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ANNIVERSARY ISSUE ARTICLE

'Common But Differentiated Responsibilities' in the National Courts: Lessons from Urgenda *v.* The Netherlands

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Abstract
The landmark 2015 decision by the Hague District Court in *Urgenda* v. *The Netherlands* represents the first time a national court has expressly used the international environmental law (IEL) principle of common but differentiated responsibilities and capabilities (CBDRs) of the climate regime as a complementary tool to interpret the scope of a state's climate obligations under domestic law. This article highlights that despite the marked engagement of national courts with IEL in recent decades (including engaging with principles such as sustainable development, polluter pays, intergenerational equity, and precaution), until this decision CBDRs had remained outside the purview of environmental law jurisprudence at the national level. The article examines how the Hague Court used CBDRs to help address two common barriers to climate liability: causation and the 'political question' doctrine. The article argues that the Court was able to find normative content in a core element of the climate-related CBDRs: the 'leadership' role of developed countries in climate action. This core element has remained remarkably consensual throughout the contested history of CBDRs in the climate regime – a history that has gained a new chapter with the signature of the Paris Agreement in December 2015. The article concludes that *Urgenda* v. *The Netherlands* may serve as a starting point for a more productive and extensive use of CBDRs in climate litigation, provided litigants make more explicit use of the persuasive authority of the principle.

Keywords: Climate change litigation, International environmental law, Common but differentiated responsibilities (CBDRs), International climate policy, National courts and international law

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1. INTRODUCTION

> [T]he state should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this.[1]

On 24 June 2015, the Hague District Court (the Court) gave its decision in the case of *Urgenda* v. *Government of the Netherlands* (*Ministry of Infrastructure and the Environment*) (*Urgenda*).[2] The Court's decision established that, in order to meet its standard duty of care towards the plaintiffs (the Urgenda Foundation,[3] representing current and future generations of Dutch citizens threatened by the risks of climate change), the Dutch government was ordered to 'limit the joint volume of Dutch annual greenhouse gas [GHG] emissions, or have them limited, so that this volume will have reduced by at least 25%–40% at the end of 2020 compared to the level of year 1990'.[4]

Urgenda's target and timeline are based on the 2007 projections by the Intergovernmental Panel on Climate Change (IPCC) of required mitigation action by the group of Annex I developed countries that ratified the 1992 United Nations Framework Convention on Climate Change (UNFCCC).[5] State parties to the UNFCCC have agreed to negotiate the allocation of responsibilities and costs for global climate action according to the principle of common but differentiated responsibilities (CBDRs) and capabilities. Developed countries have agreed to 'take the lead' in climate mitigation in order to limit temperature increase to 2 degrees Celsius (°C) above pre-industrial levels (and well below 2°C, with efforts to keep it under a 1.5°C increase since the December 2015 Paris Agreement)[6] by taking urgent and more stringent action than that required of developing countries.[7]

The *Urgenda* decision has already received a fair amount of scholarly attention, despite it being only one year old.[8] The judgment has been lauded as historic for

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1 *Stichting Urgenda* v. *Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (*Urgenda*), p. i, Summary.

2 Ibid.

3 For an explanation of the nature and history of the Urgenda Foundation, the petitioner in this emblematic case, see J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57.

4 *Urgenda*, n. 1 above, para. 5.1.

5 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: http://unfccc.int.

6 Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC Secretariat, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016).

7 B. Metz et al. (eds), *Climate Change 2007: Mitigation of Climate Change – Contribution of Working Group III to the Fourth Assessment Report of the IPCC* (Cambridge University Press, 2007).

8 Van Zeben, n. 3 above; K. Graaf & J. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27(3) *Journal of Environmental Law*, pp. 517–7; R. Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands', *Centre for International Governance Innovation (CIGI) Papers Series*, No. 79, Nov. 2015, available at: https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf; J. Lin, 'The First Successful Climate

representing the first time a court has issued a mandatory order for a government to adopt nationwide mitigation targets, outside a statutory mandate;[9] the first time a court has successfully used tort law (state negligence towards a required standard duty of care) in a climate-related action;[10] and the first time a court has determined a mandatory minimum emissions-reduction target for a developed state.[11] Scholars have critically analyzed the Court's position and reasoning on issues such as standing,[12] the 'political question' doctrine,[13] its innovative use of the tort of negligence,[14] and its promising example for citizen suits in climate litigation.[15]

The *Urgenda* decision introduced another ground-breaking development in environmental liability, which so far has received no scholarly attention: the judgment marks the first occasion on which a national court expressly used the international environmental law (IEL) principle of CBDRs as a complementary tool to interpret the scope of a state's climate obligations under domestic law. This article argues that the Court was able to find normative content in a core element of the climate-related CBDRs: that is, the 'leadership' role of developed countries in climate action. This core element has remained remarkably consensual throughout the contested history of CBDRs in the climate regime, history which gained a new chapter with the signature of the Paris Agreement in December 2015.

The remainder of the article is structured as follows. Section 2 sets the context and highlights the fact that, despite the marked engagement of national courts with IEL in recent decades (including engaging with principles such as sustainable development, polluter pays, intergenerational equity, and precaution), until this decision CBDRs had remained outside the purview of environmental law jurisprudence at the national level. Section 3 clarifies that the case is not one of direct application of CBDRs by a national court, but rather a case where the Court used the CBDRs principle as an interpretive aid to help in determining the scope of national obligations. Section 4 describes the Court's use of CBDRs in the landmark decision to help address two common barriers to climate liability: causation, and the 'political question' doctrine. Section 5 briefly revisits the contested and dynamic evolution of CBDRs in the climate regime, arguing that the concept of 'leadership' of

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Change Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)' (2015) 5(1) *Climate Law*, pp. 65–81. The ruling also generated blog commentaries such as J. Verschuuren, 'Spectacular Judgment by Dutch Court in Climate Change Case', *Tilburg University Blog*, 25 June 2015, available at: https://blog.uvt.nl/environmentallaw/?p=109), and C. Warnock, 'The *Urgenda* Decision: Balanced Constitutionalism in the Face of Climate Change?', *Oxford University Press blog*, 22 July 2015, available at: http://blog.oup.com/2015/07/urgenda-netherlands-climate-change.

9 Lin, ibid.

10 Lin, n. 8 above; Cox, n. 8 above; Van Zeben, n. 3 above.

11 Graaf & Jans, n. 8 above; Cox, n. 8 above.

12 Lin, n. 8 above; Cox, n. 8 above.

13 Lin, n. 8 above; Graaf & Jans, n. 8 above.

14 Ibid.

15 D. Estrin, 'Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts – Despite the Paris Agreement', *CIGI Papers Series*, No. 101, May 2016, available at: https://www.cigionline.org/sites/default/files/paper_no.101.pdf.

developed countries in global climate action has remained constant, and it is this core concept that informed the Court's decision in *Urgenda*.

2. CBDRs AS A LATE ENTRANT IN CLIMATE LITIGATION IN NATIONAL COURTS

Much has been written about the potential role of national courts in promoting the implementation of international treaties and in contributing to the evolution of international norms.[16] The literature recognizes that, in practice, the direct engagement of national courts with international law has traditionally been less forthcoming than its promised potential for at least three interrelated reasons:

- the responsibility for creating, implementing and enforcing international law rests primarily with the legislative and executive branches;[17]
- generally, national courts tend to favour the application and interpretation of domestic law, including law that implements international treaties;[18]
- for a long time, many national courts used avoidance techniques to evade interfering with what they consider to be international political questions (rather than legal disputes), which are better addressed through interstate negotiations.[19]

Since the 1990s, however, an increasing number of national courts in an expanding number of jurisdictions have engaged with international law,[20] either by interpreting national law in conformity with international norms or,[21] to a lesser extent, by directly applying international law in domestic legal cases.[22] The significance of this

16 See, e.g., R.A. Falk, 'The Role of Domestic Courts in the International Legal Order' (1964) 39(3) *Indiana Law Journal*, pp. 429–45; R.A. Falk & C.E. Black, *The Interplay of Westphalia and Charter Conceptions of the International Legal Order* (Princeton University Press, 1969); R.B. Lillich, 'The Proper Role of Domestic Courts in the International Legal Order' (1970) 11(9) *Virginia Journal of International Law*, pp. 9–50; J.A. Frowein, 'The Implementation and Promotion of International Law through National Courts' (1995) United Nations (UN) Congress on Public International Law, UN Doc. A/CONF.176/1 (1995); K. Knop, 'Here and There: International Law in Domestic Courts' (2000) 32(2) *New York University Journal of International Law and Politics*, pp. 501–35.

17 C. Bruch, 'Is International Environmental Law Really "Law"? An Analysis of Application in Domestic Courts' (2006) 23(2) *Pace Environmental Law Review*, pp. 423–64.

18 Ibid.

19 A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(2) *International and Comparative Law Quarterly*, pp. 57–92; E. Benvenisti, 'Judicial Misgivings regarding the Application of International Law: An Analysis of the Attitudes of National Courts' (1993) 4(2) *European Journal of International Law*, pp. 159–83, at 161.

20 Roberts, ibid; E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102(2) *American Journal of International Law*, pp. 241–74; E. Benvenisti & G. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20(1) *European Journal of International Law*, pp. 59–72.

21 For analyses of the use by national courts of international law as a guide in the interpretation of domestic legal norms see, e.g., H.P. Glenu, 'Persuasive Authority' (1987) 32(2) *McGill Law Journal*, pp. 261–98; A.M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review*, pp. 99–137; R. Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34(3) *George Washington International Law Review*, pp. 555–603.

22 This practice varies significantly according to jurisdiction. In states that adopt a monist system, national courts may directly apply international norms after the process of ratification. In states that

trend is reflected in the number of prominent academic initiatives to identify and analyze leading cases that involve the engagement of national courts with international law,[23] and to investigate the patterns of this evolving engagement.[24] However, this trend may vary in different areas of international law. While it seems clear that national courts increasingly engage with international human rights law,[25] there is still some debate as to the extent to which this engagement with IEL follows a similar upward trend.

A comparative analysis, in 2002, of whether and how national courts in 12 jurisdictions had engaged with IEL, commissioned by the American Society of International Law (ASIL), concluded that at least until the late 1990s national courts had directly applied IEL in only a few isolated cases.[26] The use by national courts of IEL as an interpretive tool of national legal instruments had also been limited, especially when compared with other international law areas such as human rights. In contrast, the fourth volume of the 2005 edition of the *International Environmental Law Reports*, edited by Alice Palmer and Cairo Robb, identified 50 leading decisions of national courts from 26 different jurisdictions, all of which broadly engaged with IEL.[27] Most of these decisions were delivered during the 1990s and early 2000s.

Palmer and Robb observe that the national court decisions could be characterized 'as having made a positive contribution to the development of international [environmental] law', although they do recognize that IEL was often only one of

adopt the dualist system, international law has legal force at the domestic level only after being implemented by national statutes. In these cases, national courts tend to apply national law: see I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford University Press, 2003), pp. 31–48; M.N. Shaw, *International Law*, 5th edn (Cambridge University Press, 2003), pp. 120–62.

23 One such prominent initiative is the *Oxford Reports on International Law in Domestic Courts* (ILDC), a collection of leading cases of international law in national courts, available at: http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts. By 2016, the ILDC project had collected 1,425 relevant cases of national courts' engagement with international law in 70 jurisdictions.

24 The International Law Association (ILA) has created a Study Group on the Principles on the Engagement of Domestic Courts with International Law, to explore the 'reasons behind the choices of domestic courts with regard to their strategies and techniques of engagement with international law'. The reports of the Study Group are available at: http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1039.

25 B. Conforti & F. Francioni, *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997); N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002); M.A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107(3) *Columbia Law Review*, pp. 628–705; Y. Shany, 'How Supreme Is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31(2) *Brooklyn Journal of International Law*, pp. 341–404.

26 The study was commissioned by ASIL to investigate whether national courts could fill the gaps when the executive and legislative branches failed to implement MEAs. The first part of the study was published in 1998 as D. Bodansky & J. Brunnée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7(1) *Review of European, Comparative & International Environmental Law*, pp. 11–20. The second part of the study was published in 2002 as an edited volume: M. Anderson & P. Galizzi (eds), *International Environmental Law in National Courts* (British Institute of International and Comparative Law, 2002).

27 The findings of this study were published in A. Palmer & C.A.R. Robb (eds), *International Environmental Law Reports, Volume 4: International Environmental Law in National Courts* (Cambridge University Press, 2005).

the factors considered by national courts in their legal reasoning.[28] Carl Bruch also argues that the 1990s and 2000s marked a 'dramatic increase in the number of cases [where national courts] interpret and apply [IEL]', noting that national courts currently use IEL 'for a wide range of purposes and in various contexts'.[29]

Although the receptiveness of national courts with IEL would still benefit from further analysis, the studies already show that in a considerable number of instances national courts have considered that key principles of IEL (such as the precautionary principle, the principle of sustainable development, the polluter pays principle and the principle of intergenerational equity) had a material role to play in the interpretation of national norms related to environmental protection or environmental disputes.[30] From the perspective of the evolution of IEL this engagement is relevant because national courts contribute to clarifying (or sometimes to complicating) what are often still vague concepts, while also helping to illuminate their potential evolution into customary norms of general application. National court decisions engaging with IEL principles can also help to establish a more significant role for these principles in the protection of environmental resources and in the resolution of environmental law disputes in other national legal orders.[31]

The studies show that despite national courts' noteworthy engagement with most of the main principles of IEL, they have yet to recognize certain principles as having a material role to play in the protection of environmental resources or the resolution of environmental disputes at the national level. One such overlooked principle is that of CBDRs. The ASIL, Palmer & Robb, and Bruch studies show no record of a national court interpreting national legal instruments in conformity with CBDRs, or using CBDRs to help in determining the scope of domestic obligations, or employing CBDRs as part of their reasoning when adjudicating environmental law disputes. The *Urgenda* decision, therefore, has broken new ground by expanding the number of IEL principles on which national courts have relied as persuasive authority. The next section describes how, prompted by the plaintiffs, the Hague Court expressly engaged with CBDRs.

3. CBDRs AS A TOOL TO INTERPRET NATIONAL LAW OBLIGATIONS

On 20 November 2013, the Urgenda Foundation (the plaintiffs) sued the Government of the Netherlands before the District Court of the Hague, arguing that the state had breached its duty of care towards Dutch citizens by not pursuing a

28 Palmer & Robb, ibid., p. xv.

29 Bruch, n. 17 above, p. 461.

30 E.g., the ASIL project reports that in a number of cases national courts had engaged with the precautionary principle and the principles of sustainable development, intergenerational equity, and polluter pays: see Bodansky & Brunnée, n. 26 above; Anderson & Galizzi, n. 26 above; Palmer & Robb, n. 27 above.

31 With one national court serving as disseminator of the persuasive authority of international law to other national courts, which reflects Anne-Marie Slaughter's idea of transjudicialism: Slaughter, n. 21 above; see also P. Sands & J. Peel, *Principles of International Environmental Law*, 3rd edn (Cambridge University Press, 2012), p. 153.

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minimum GHG reduction target of 25% to 40% from 1990 levels by the year 2020.[32] The *Urgenda* summons is possibly the first before a national court to clearly articulate the CBDRs principle, among other international law principles, as part of the applicable law in a domestic climate lawsuit. The plaintiffs argued that the state could be held liable for the volume of Dutch GHG emissions based on both national legal principles and provisions and on general principles of international law and European Union (EU) law.[33]

The plaintiffs emphasized the monist approach to international law in the Netherlands, where international norms that are 'binding on all persons by virtue of their contents' are directly applicable in the national legal system.[34] By failing to take adequate and timely mitigation measures, the state should be declared liable for breaching the 'no harm' principle of IEL, and Articles 2 (right to life) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR).[35] The plaintiffs based their claim on national law as well, arguing that the state breached the Dutch standard duty of care to prevent 'significant' harm to its citizens, thereby incurring liability in tort for negligence.[36] The plaintiffs further argued that Dutch courts may rely on non-binding treaty provisions as authoritative sources of interpretation to support findings of breaches of both international and national law.[37]

CBDRs were explicitly included in the summons, along with other relevant principles and commitments of the UNFCCC, as the plaintiffs' 'proceedings against the State, in essence, build upon [the authoritative force of those principles and commitments]'.[38] The plaintiffs argued that state parties to the UNFCCC, including the Netherlands, had agreed 'that developed and developing countries have "common but differentiated responsibilities in combating climate change"'[39] based on their different historical and current levels of emissions and capabilities. At several points the summons expressly articulated that developed countries (including the Netherlands) had agreed to 'take the lead' in combating climate change and its

32 *Urgenda Foundation* v. *Kingdom of the Netherlands*, Translation of Summons, 25 June 2014, p. 15, para. 28, available at: http://www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf.

33 Ibid.

34 Ibid., p. 55, para. 150. Based on Art. 93 of the Constitution of the Kingdom of the Netherlands, available at: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008. See also A. Nollkaemper, 'The Netherlands', in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009), pp. 326–69; A. Nollkaemper, 'International Environmental Law in the Courts of the Netherlands', in Anderson & Galizzi, n. 26 above, pp. 183–93.

35 *Urgenda*, Translation of Summons, n. 32 above, p. 55, para. 150. The Netherlands became a founding EU Member State in 1958; therefore Dutch courts are also bound by supranational EU law, in addition to international law: see G. Betlem & A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14(3) *European Journal of International Law*, pp. 569–89.

36 Van Zeben, n. 3 above.

37 *Urgenda*, Translation of Summons, n. 32 above, p. 55, para. 151.

38 Ibid., p. 61, para. 177.

39 Ibid., p. 62, para. 181.

negative effects.[40] More specifically, the plaintiffs argued that the Netherlands and other parties of the UNFCCC had agreed in the form of various decisions 'that rich countries with a long history of [GHG] emissions that have caused the problem, and those with high per capita emissions, have an obligation to take the lead and be the first to realise their necessary emissions by 2020'.[41]

The Court's legal reasoning in *Urgenda* begins with the establishment of the substantive issues on which the plaintiffs and the Dutch government (the defendant) concur. Parties agree that anthropogenic GHG emissions cause climate change, that 'a highly hazardous situation for man and the environment [globally and locally] will occur with a temperature rise of over 2°C compared to pre-industrial levels', and that significant mitigation action is needed to avoid dangerous climate change.[42] The core dispute, according to the Court, revolves around the level (or stringency) and the pace (or urgency) of emissions reductions that the Dutch state is legally required to adopt. The plaintiffs argued that in order to meet its duty of care the state must reduce its GHG emissions by at least 25% to 40% by the end of 2020, compared with 1990 levels. The state argued that it had the discretionary power to decide on the stringency and urgency of emissions cuts.

In deciding this core dispute, the Court expressly declined to derive a legal obligation directly from the principles and provisions of the UNFCCC or from EU climate law. *Urgenda* is not a case of direct application of IEL or EU law by a national court. However, the Court decided that the global nature of climate change, and the collective nature of the 'shared risk management' needed to address this hazard, required the consideration of the objectives and principles laid down in the UNFCCC and EU climate law.[43] According to the Court, the objectives and principles found in international law and policy were relevant in order to determine the 'scope of the State's duty of care (based on national law) and the discretionary power it is entitled to'.[44] A large part of the *Urgenda* ruling offers an account of relevant international and EU[45] climate law and policy.[46]

The Court reproduced the relevant provisions of the UNFCCC and its Kyoto Protocol,[47] as well as various decisions by the Conference of Parties (COP) to the UNFCCC. The Court expressly referred to CBDRs when it highlighted that the UNFCCC Preamble calls for the 'widest possible cooperation by all countries … in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions'.[48] The judgment also

40 Ibid., p. 63, paras 187, 190; p. 64, para. 191; p. 111, para. 389.

41 Ibid., p. 71, para. 217c.

42 *Urgenda*, n. 1 above.

43 Ibid., para. 4.55.

44 Ibid., para. 4.52.

45 *Urgenda* also raises important questions regarding the role of a regional climate regulatory regime, such as that of the EU, in the national implementation of multilateral climate law and policies. However, these are beyond the remit of this article.

46 Lin, n. 8 above.

47 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

48 *Urgenda*, n. 1 above, para. 2.36.

reproduced Article 3 UNFCCC, which includes the principle of CBDRs in an operational provision.[49]

The Court expressly included differentiated responsibilities among a list of other relevant principles such as 'protection of the climate system, for the benefit of current and future generations, based on fairness, "the precautionary principle", and "the sustainability principle"'.[50] The Court included both the principle of intergenerational equity (the protection of the interests of present and future generations) and the principle of intragenerational equity, which normally correlates with CBDRs, in its broad definition of the 'fairness principle'. For the purposes of this article, I concentrate on how the Court articulated the intragenerational aspect of the fairness principle.

The Court explicitly established that 'the principle of fairness … expresses that industrialized countries have to take the lead in combating climate change and its negative impacts'.[51] It went on to analyze what this leadership could represent in practice. The Court decided that since the disagreement involves difficult climate-related substantive issues which are outside the Court's expertise, it should base its legal assessment of the State's obligations on the findings of the IPCC, international climate policy agreements, and Dutch climate policy documents which both the plaintiffs and defendant recognize as correct. More specifically, the Court described how, under the terms of the UNFCCC and its Kyoto Protocol and subsequent COP decisions, developed countries have agreed to take the lead by committing to more stringent emissions reduction targets, and also to provide financial resources, technology transfer and capacity building to enable mitigation in non-Annex I (developing) countries.

Differentiation also appears in the decision when the Court analyzed the specific Dutch reduction targets. The Court referred to the IPCC Fourth Assessment Report,[52] in which the scientific body concluded that the total emissions of Annex I countries will have to be '25 to 40% lower in 2020 compared to 1990 – *with due regard for a fair distribution*', while non-Annex I countries would also have to reduce emissions substantially below business as usual, in order to keep safe concentration levels of GHG.[53] The Court stated that the Ad Hoc Working Group of Annex I countries expressly acknowledged in the 2010 Cancun Agreements[54] that they would have to limit their emissions by the levels specified by the IPCC in order to reach the stabilization goal established by the UNFCCC.[55]

In sum, the Court partially relied on CBDRs, as part of the body of international climate law and policy, to find that the projected Dutch climate policy for 2020 was

49 Ibid., para. 2.38.

50 Ibid., para. 4.56.

51 Ibid., para. 4.57.

52 N. 7 above.

53 Ibid., para. 4.23 (emphasis added).

54 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011.

55 Urgenda, n. 1 above, para. 4.23.

insufficient to meet its standard duty of care, in light of its commitment to take the lead in climate action together with other developed countries. The Court also engaged with CBDRs when dealing with two common barriers to climate liability at the national level, which I discuss next.

4. CBDRs AND TWO COMMON BARRIERS TO CLIMATE LIABILITY

As climate lawsuits before national courts in various jurisdictions increased in number and sophistication in the mid-2000s,[56] a range of significant barriers to climate liability came to the forefront of legal discussion.[57] Causation and the 'political question' doctrine are two of the most discussed barriers in the climate litigation literature. The Court explicitly engaged with the CBDRs principle in dealing with these questions in *Urgenda*. To be clear, the Court did not rely on CBDRs as the sole or even the primary foundation for its decisions on causation and the 'political question' doctrine; yet, CBDRs did feature as a significant complementary interpretive tool.

4.1. *CBDRs and the Challenge of Causation*

Many legal doctrines require proof of causation, which broadly speaking means 'the link between an actor's behavior and subsequent harm to another', in order to establish liability.[58] Proving causation may represent the most significant challenge for climate change liability because of the multi-scale nature of the problem, with its

[56] On climate litigation see W.C.G. Burns & H.M. Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (Cambridge University Press, 2009); R. Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012); J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); M. Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation', *Sabin Center for Climate Change Law White Papers*, 2015, available at: http://academiccommons.columbia.edu/catalog/ac%3A187211; E. Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35(3) *Law & Policy*, pp. 236–60; L. Butti, 'The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America (2011) 11(2) *Sustainable Development Law & Policy*, pp. 32–6, pp. 82–84 endnotes; D. Grossman, 'Warming Up to a Not so Radical Idea: Tort-Based Climate Change Litigation' (2003) 28(1) *Columbia Journal of Environmental Law*, pp. 1–61; M. Faure & M. Peeters (eds), *Climate Change Liability* (Edward Elgar, 2011).

[57] In 2007, Michael Faure and Andre Nollkaemper discussed fundamental questions related to causation and harm arising from climate lawsuits: see M.G. Faure & A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change (2007) 26A *Stanford Journal of International Law*, pp. 123–79. Douglas Kysar, looking more specifically at United States (US) tort law, also discussed some key liability challenges, arguing that since the causes of climate change are diffused between states and private actors worldwide, and climate change impacts are pervasive and temporally deferred, GHG emissions represent the 'paradigmatic anti-tort'. According to Kysar, conventional tort law is unlikely to play a significant role in addressing the climate problem, since tort law doctrines related to duty, causation, breach and harm are fundamentally ill-equipped to respond to the complexity of climate change. Climate litigation could, however, force tort law judges and scholars to rethink the doctrines: D.A. Kysar, 'What Climate Change Can Do About Tort Law (2011) 41(1) *Environmental Law*, pp. 1–71.

[58] This section presents a simplified account of the complex legal concept of causation in liability law. For more detailed discussions of various aspects of liability related to climate change see Faure & Nollkaemper, ibid; and Kysar, ibid. See also 'Note – Causation in Environmental Law: Lessons from Toxic Torts' (2015) 128 *Harvard Law Review*, available at: http://harvardlawreview.org/2015/06/causation-in-environmental-law.

large number of concurrent tortfeasors.[59] Even excluding the problem of deferred impacts of past emissions, a multitude of states and private actors currently emit GHGs and are collectively responsible for climate change.[60] Some of these actors, including large emitters such as the United States (US) and China, and fossil fuel companies like Chevron, Exxon Mobil or BP, may be individually responsible for materially significant volumes of emissions. With a population of around 16 million and a relatively small territory, the Netherlands is definitely not among the largest sources of GHG emissions in absolute terms. The emissions of actors such as the Netherlands, however, become relevant when added to the emissions of others.

The existence of multiple tortfeasors, with relatively insignificant emissions when taken individually, represents a challenge to traditional liability conceptions of causation. In *Urgenda*, the Court followed recent tort law developments to address the question of causation, but it also innovated by invoking the concept of developed countries' leadership in climate action, based on CBDRs, as complementary persuasive authority to dismiss traditional defences against causal liability in climate litigation.

In determining liability, courts usually assess specific (or proximate) causation, which refers to the extent to which the plaintiff's particular harm or risk results from the conduct of the specific defendant or group of defendants. The general test in tort law for proximate causation is the 'but for' test, 'which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant'.[61] Courts in many jurisdictions have declined to apply the 'but for' test in cases of cumulative environmental harm, since it is practically impossible for the plaintiff to prove that the injury would not have occurred but for the conduct of the particular defendant. Establishing specific causation is especially difficult in climate change cases because of the multitude of sources of GHG emissions responsible for climate change across time and across space.[62]

In several jurisdictions courts use the test of substantiality, or material contribution, to establish proximate causation in environmental cases.[63] This test evaluates whether the defendant's conduct 'materially contributed', or substantially contributed, to the injury.[64] In the emblematic US Supreme Court decision in *Massachusetts* v. *Environmental Protection Agency* (EPA), the defendant argued that the level of unregulated GHG emissions from motor vehicles contributed

59 Kysar, n. 57 above, p. 29.

60 Faure & Nollkaemper, n. 57 above.

61 *Athey* v. *Leonati* (1996) 140 DLR (4th) 235, para. 32; [1996] 3 SCR 458; [1997] 1 WWR 97; cited in D. Hillel, W.P. McCague & P.F. Yaniszewski, 'Proving Causation Where the But For Test is Unworkable' (2005) 30(2) *The Advocates Quarterly*, pp. 217–38, at 218.

62 Various climate change litigation cases against private actors have failed as a result of difficulties in finding a causal link between a corporate defendant's actions and the alleged harm to plaintiff: see B. Preston, 'Climate Change Litigation (Parts 1 and 2)': Part 1 in (2011) 5(1) *Carbon and Climate Law Review*, pp. 3–14; Part 2 in (2011) 5(2) *Carbon and Climate Law Review*, pp. 244–85; J. Peel, 'Issues in Climate Change Litigation' (2011) 5(1) *Carbon and Climate Law Review*, pp. 15–24.

63 D.A. Grossman, 'Tort-Based Climate Litigation', in Burns & Osofsky, n. 56 above, pp. 193–229, at 219.

64 'Note – Causation in Environmental Law', n. 58 above, p. 221.

'insignificantly' to the plaintiffs' harm, and should therefore generate no liability.[65] The majority of the US Supreme Court found that the emissions 'made a meaningful contribution to [GHG] concentrations', and hence to global warming.[66]

In *Massachusetts* v. *EPA*, the US Supreme Court also addressed the defendant's argument that the relief sought by the petitioners would not be an efficient remedy for the injury or risk of injury from climate change. The defendant US EPA argued that growing emissions from 'developing nations, particularly China and India, are likely to offset any marginal domestic decrease'.[67] The Supreme Court found for the petitioners, affirming that increases in emissions abroad did not diminish the fact that '[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere'.[68]

In *Urgenda*, the Hague Court had to confront similar legal questions related to (i) the multi-scale nature of emissions and the fact that a state's unilateral regulatory action cannot realistically represent an effective remedy; and (ii) the fact that the Dutch absolute GHG emissions are insubstantial compared with certain other sources of emissions. Many courts will need to address similarly difficult legal questions in future climate change cases. Although the Hague Court relied on the concept of material contribution, which had already been employed by the US Supreme Court, it innovated by invoking CBDRs to address the question of international cooperation and the concurrent contributions of other countries to climate change.

The Dutch state argued that adopting the 25% to 40% emissions reduction by 2020, as requested by the plaintiffs, would still result in a 'very minor, if not negligible, reduction in [GHG] emissions', since this would represent only 0.04% to 0.09% of the global total.[69] The state emphasized that, according to science, the level of emissions reduction necessary to avoid dangerous climate change depended mainly on the actions of other countries, especially those with high emissions levels. As the US Supreme Court did in *Massachusetts* v. *EPA*, the Hague Court rejected this defence and reasoned that, since it had been established that any level of anthropogenic GHG emissions contributes to hazardous climate change, the Netherlands still had the responsibility to take measures, no matter how small the size of its emissions compared with others, in order to fulfil domestic obligations to exercise care.[70]

To support its finding of liability, the Court also relied on the global and cooperative nature of the solution to climate change, expressly addressing the question of differentiation in helping to define the scope of the Dutch obligations.

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65 *Massachusetts* v. *EPA* 549 US 497 127 S.Ct 1438.

66 Ibid., p. 22.

67 Ibid., p. 21.

68 Ibid., p. 23. In the Australian case of *Avill Hill*, the New South Wales Court had to address a similar legal challenge related to material contribution. The Court relied on the joint liability concept to find a sufficient 'proximate link' between the potential contributions of GHG emissions from the mine and the impacts on global warming, including effects on the Australian environment: *Anvil Hill Project Watch Association* v. *Minister for the Environment and Water Resources* (2007) 159 LGERA 8.

69 *Urgenda*, n. 1 above, para. 4.78.

70 Ibid., para. 4.79.

The Court found that all countries, including the Netherlands, will need to 'implement the reduction measures to the fullest extent'.[71] The Court added: '[H]ere too, the court takes into account that in view of a fair distribution the Netherlands, like other developed countries, has taken the lead in adopting mitigation measures and has therefore committed to a more than proportionate contribution to reduction'.[72] It went on to say that 'it is beyond dispute that the Dutch per capita emissions are one of the highest in the world', which is another argument related to global discussions on CBDRs.[73]

Hence, the Court partially relied on international law and policies to conclude that, as a developed country and party to the UNFCCC, the Netherlands had endorsed the specific IPCC targets of 25% to 40% below 1990 levels by 2020, independently of the actions of developing countries.

4.2. *CBDRs and the 'Political Question' Barrier*

Many climate change cases, especially in the US, have been declared 'non-justiciable' because of the wide discretion conferred on legislators and politicians in establishing national and foreign policies to address climate change – a problem which involves significant national and international political economy considerations.[74] Even when a climate action is admitted as justiciable, defendants often argue that, on the merits, the question belongs to the realm of the executive or the legislative branches.

In the *Urgenda* case, the Dutch state advanced two lines of defence related to the 'political question' doctrine. Firstly, it argued that a judicial decision to mandate a more stringent climate policy would 'interfere with the system of separation of powers and could damage the Netherland's bargaining position in international climate negotiations'.[75] Secondly, it argued that a judicial decision would be 'contrary to the State's discretionary power' to define appropriate climate action. The Court partially relied on UNFCCC climate provisions and policies, including CBDRs, in addressing the second line of defence.

In relation to the first line of defence, the Court held that the separation of powers was not absolute under Dutch law.[76] The Court established that the judiciary has the mandate to apply the law when asked to do so, even in complex legal questions involving political consequences.[77] On the interference with global climate negotiations, the Court held that when a legal obligation is established by the courts, the state does not have the authority to disregard this obligation in the context of international negotiations.[78] The Court conceded that the complex climate change

71 Ibid., para. 4.9.

72 Ibid., para. 4.79.

73 Ibid.

74 J.R. May, 'Climate Change, Constitutional Consignment, and the Political Question Doctrine' (2008) 85(4) *Denver University Law Review*, pp. 919–59; Lord et al., n. 56 above.

75 *Urgenda*, n. 1 above, para. 3.3.

76 Cox, n. 8 above.

77 *Urgenda*, n. 1 above, para. 4.98.

78 Ibid., para. 4.99.

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problem justifies the widest possible discretionary policy space for the government to implement the obligation. According to the Court, this discretionary space, however, has limits set by the duty of care owed to Dutch citizens.

The Court invoked a key element of CBDRs – namely, the leadership of developed countries in combating global climate change – when discussing the second line of defence. In considering the scope of the discretionary power of the Dutch government in fulfilling its standard duty of care,[79] the Court found that, although Article 21 of the Dutch Constitution gives the state, in principle, wide discretion to define appropriate national environmental policies, this discretionary power is not unlimited.[80] The Court revisited the idea that the nature of the problem (a global phenomenon) and the required response (shared risk management of a global hazard) justifies taking into consideration the objectives and principles of the UNFCCC and EU climate law in deciding the discretionary limits.[81]

The Court decided that the government cannot ignore climate science and global climate politics in fulfilling its obligation to adopt effective national climate policies to address the climate threat to Dutch citizens. It judged that the state cannot, for example, focus primarily on adaptation when establishing national policies, after IPCC studies (not disputed by the defendant) showed that adaptation will offer only limited protection if significant mitigation action is not urgently undertaken.[82] On this point, the Court decided that 'from the viewpoint of efficient measures available the State has limited options: mitigation is vital for preventing dangerous climate change'.[83] It then proceeded to the question of the state's discretionary power to decide which levels of mitigation to adopt.

The Court concluded that the discretionary power of the government to decide national levels of mitigation was limited by the state's required engagement in the international cooperative regime to address climate change. Under the UNFCCC, as an Annex I (developed) country, the Netherlands has agreed *to take the lead* in adopting mitigation measures 'and has therefore committed to a more than proportional contribution to reduction, in the view of a fair distribution between industrialized and developing countries'.[84] Based on IPCC calculations and UNFCCC policies for developed countries, the Court decided that the state should limit the joint volume of Dutch GHG emissions by at least 25% to 40% by the end of 2020, compared with the levels in the year 1990.

Urgenda marks the first occasion on which a national court has used CBDRs as an interpretive aid, in parallel with other IEL and EU law principles, in helping to establish the scope of a country's environmental obligations at the national level. It must be acknowledged that the weight the Court accorded to CBDRs in the

79 The standard duty of care is established under Book 6, s. 162 Dutch Civil Code. Urgenda, n. 1 above, para. 4.52.

80 Ibid., para. 4.74.

81 Ibid., para. 4.55.

82 Ibid., para. 4.75.

83 Ibid.

84 Ibid., para. 4.76.

decision is unclear. Nevertheless, by expressly invoking the concept of differentiation as a general interpretive principle in helping to establish the scope of obligations, and as a complementary tool to reject the defence arguments, the Court indicated that CBDRs do have 'legal gravitas',[85] or persuasive authority. The Court relied on one core element of CBDRs that has remained consensual throughout the contested history of this principle in the climate regime, which is what I examine next.[86]

5. 'TAKING THE LEAD' AS A CORE ELEMENT OF CBDRs

The Hague Court's use of CBDRs in *Urgenda* has illuminated a core content of the climate-based CBDRs that has remained constant and consensual throughout the contested and dynamic history of this principle in the climate regime. Parties to the UNFCCC strongly disagree on the philosophical or ideological premises that justify differentiation, and on how exactly differentiation should be expressed in the provisions of the legal instruments of the climate regime. In this section I argue that, despite these disagreements, there has been a sustained consensus that developed countries will take the lead by shouldering a heavier burden (acting early and more significantly) in reducing emissions.[87] This consensus was present in the otherwise disputed top-down model of the 1997 Kyoto Protocol, which established exclusive mitigation obligations for developed countries, and persists in the bottom-up and more nuanced differentiation model of the 2015 Paris Agreement.

The Court in *Urgenda* relied on this core consensual element of CBDRs to mandate the Netherlands, as a developed country, to take urgent and significant action to contribute to the collective solution of the global climate change problem.

5.1. *Contestation and Discontinuities in the Climate CBDRs*

The literature on CBDRs highlights the deeply contested nature of this principle in the climate regime. In contrast, differentiation in other multilateral environmental agreements (MEAs) has been significantly less controversial. Lavanya Rajamani explains this with reference to the marked differences between climate CBDRs and differentiation in other MEAs, both in terms of the extent of the differentiation and

85 L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006), p. 160.

86 Rajamani offers a detailed discussion of the core content and the deeply contested nature of CBDRs in the climate regime: ibid, pp. 176–250. See also P. Pauw et al., 'Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations', Deutsches Institut für Entwicklungspolitik (DIE) Discussion Paper No. 6/2014, 2014, available at: https://www.die-gdi.de/uploads/media/DP_6.2014..pdf. On the debate related to the legal status of CBDRs, see Sands & Peel, n. 31 above, p. 119; E.B. Weiss, 'The Rise and Fall of International Law' (2000) 69(2) *Fordham Law Review*, pp. 345–72; P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, 2nd edn (Oxford University Press, 2002); C. Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) *American Journal of International Law*, pp. 276–91; D. Bodansky, 'Customary (and Not So Customary) International Environmental Law' (1995) 3(1) *Global Legal Studies Journal*, pp. 105–16; P.P. Cullet, *Differential Treatment in International Environmental* Law (Routledge, 2003).

87 J. Brunnée & C. Streck, 'The UNFCCC as a Negotiation Forum: Towards Common But More Differentiated Responsibilities' (2013) 13(5) *Climate Policy*, pp. 589–607, at 590. The authors present a full account of the evolution of CBDRs from the 1992 UNFCCC to Copenhagen in 2009.

the very nature of the differential provisions.[88] In the UNFCCC, the principle of CBDRs serves as the 'anchor provision'[89] of the whole legal framework and appears in the Preamble as well as in several substantive and operational provisions.[90] No other MEA adopts such a strong and articulated form of preferential treatment for developing countries.

Rajamani also argues that the UNFCCC and its Kyoto Protocol were the only two MEAs that differentiated between parties with respect to the central obligations of a regime.[91] Central obligations are designed to directly fulfil the object of the treaty. In the case of the climate regime, the primary objective, although not the only one,[92] is to stabilize GHG concentrations in the atmosphere 'at a level that would prevent dangerous anthropogenic interference with the climate system'.[93] Under the Kyoto Protocol, only developed countries were required to meet quantitative emissions reduction targets.[94] No MEA other than the Kyoto Protocol has imposed exclusive obligations on developed countries relating to the core objective of the agreement.

Moreover, no other MEA expressly allows developing countries to meet the core objective of the agreement on a voluntary basis. In the Kyoto Protocol, developing countries (including emerging economies) were not simply given flexibility in the implementation of core obligations (in the form of, for example, deferred base years or assisted compliance). Instead, they were made completely exempt from binding obligations towards a central objective of the climate regime: to reduce anthropogenic GHG emissions, concentration of which provokes hazardous climate change.[95]

The CBDRs in the Kyoto Protocol have been a major object of contention among the parties to the climate change regime.[96] The US has been especially vocal in rejecting the idea of differentiation as granting emerging economies exemptions from

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88 L. Rajamani, n. 85 above, p. 213; L. Rajamani, 'The Nature, Promise, and Limits of Differential Treatment in the Climate Regime' (2005) 16(1) *Yearbook of International Environmental Law*, pp. 81–118; L. Rajamani, 'Differentiation in a 2015 Climate Agreement', *Center for Climate and Energy Solutions (C2ES) Papers*, June 2015, available at: http://www.c2es.org/docUploads/differentiation-brief-06-2015.pdf.

89 Brunnée & Streck, n. 87 above, p. 590.

90 See Rajamani, n. 85 above, p. 191.

91 Ibid., p. 191.

92 Other objectives of the climate regime are climate adaptation and sustainable development: Rajamani, n. 85 above.

93 UNFCCC, n. 5 above, Art. 2. If there is express recognition of positive differentiation in the core substantive provisions of MEAs, it is subtle and directed at a group of particularly vulnerable countries – such as the Desertification Convention which asks 'full consideration (for) the special needs and circumstances of affected developing country Parties, particularly the least developed among them': UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), Paris (France), 14 Oct. 1994, in force 26 Dec. 1996, available at: http://www.unccd.int.

94 Kyoto Protocol, n. 47 above, Art. 3.

95 T. Deleuil, 'The Common But Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' (2012) 21(3) *Review of European Community & International Environmental Law*, pp. 271–81.

96 T. Honkonen, 'Vertical, Horizontal, Concentric: The Mechanics of Differential Treatment in the Climate Regime' (2015) 5(1) *Climate Law*, pp. 82–93.

climate mitigation obligations.[97] The US Congress arguably refused to ratify the Kyoto Protocol for that reason.[98] Over time, other developed countries, too, became more forceful in calling for reconsideration of their exclusive mitigation obligations, especially after the emission levels of countries such as China, India and Brazil grew significantly.[99]

With the Kyoto Protocol largely considered a failure, parties have tried to find a new balance that could accommodate their conflicting views in a new model for differentiation. Until the 2009 UNFCCC COP in Copenhagen (Denmark), a new compromise seemed elusive, as parties could not agree on an allocation formula that reflected their preferences.[100] Emerging economies rejected the idea of moving towards a more equal allocation of burdens if it did not reflect their development needs and developed countries' greater historic responsibilities and capabilities to act on climate change.[101] Developed countries strongly rejected the idea of continuing to exempt developing countries, especially emerging economies with high emissions, from assuming their share of the burdens and costs of climate action.[102] The parties famously failed to reach agreement for a new legally binding instrument at Copenhagen, primarily as a result of the disputes over fairly differentiated burdens.[103]

With hindsight, Copenhagen can be said to have marked the end of the paradigm of a top-down, rigid, binary differentiation of CBDRs. Emerging economies came to accept the idea that they would not be totally exempt from mitigation action.[104] The new paradigm first proposed in Copenhagen is a bottom-up, more horizontal system, in which each country defines its own intended nationally determined contributions

97 K. Hochstetler, 'Climate Rights and Obligations for Emerging States: The Cases of Brazil and South Africa' (2012) 79(4) *Social Research*, pp. 957–82; K. Hochstetler & M. Milkoreit, 'Responsibilities in Transition: Emerging Powers in the Climate Change Negotiations' (2015) 21(2) *Global Governance: A Review of Multilateralism and International Organizations*, pp. 205–26.

98 Hochstetler, ibid.

99 On several occasions, developed countries expressed the view that the division between Annex I and non-Annex I countries did not reflect current realities relating to GHG emissions, capabilities and development needs: see Deleuil, n. 95 above; and Honkonen, n. 96 above. For a detailed political science account of the changing negotiating group dynamics in climate negotiations, with special focus on emerging economies, see Hochstetler, n. 97 above; Hochstetler & Milkoreit, n. 97 above; Brunnée & Streck, n. 87 above.

100 Brunnée & Streck, n. 87 above.

101 The literature on the attempts to arrive at a more 'fair and equitable' form of differentiation in the climate regime is extensive. The IPCC Fifth Assessment Report offers a good review of this literature: D.G. Victor & D. Zhou, 'Introductory Chapter', in O. Edenhofer et al. (eds), *Climate Change 2014: Mitigation of Climate Change – Contribution of Working Group III to the Fifth Assessment Report of the IPCC* (Cambridge University Press, 2014), pp. 111–50; A. Harloverssen, *Equality among Unequals in International Environmental Law: Differential Treatment in Developing Countries* (Westview Press, 1999).

102 D. Shelton, 'Equity', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 639–62; Brunnée & Streck, n. 87 above; Lord et al., n. 56 above.

103 N.K. Dubash, 'Copenhagen: Climate of Mistrust' (2009) XLIV(52) *Economic and Political Weekly*, pp. 8–11; L. Rajamani, 'Differentiation in the Emerging Climate Regime' (2013) 14(1) *Theoretical Inquiries of Law*, pp. 151–71.

104 D. Bodanksky, 'Is the Paris Agreement Historic?', *Opinio Juris blogpost*, 13 Dec. 2015, available at: http://opiniojuris.org/2015/12/13/it-the-paris-agreement-historic.

(NDCs) according to national circumstances.[105] This bottom-up approach was the model officially incorporated in the 2015 Paris Agreement.[106]

There is broad recognition that the Paris Agreement represents a 'fundamental shift away from the categorical binary approach of the Kyoto Protocol toward more nuanced forms of differentiation'.[107] To begin with, the common nature of climate responsibilities was strengthened, with all parties to the Agreement mandated to formulate, to communicate and to update their climate action pledges. The mitigation and adaptation commitments became non-binding on all parties, although developed countries have the normative expectation to maintain absolute emissions reduction targets, while developing countries are encouraged to move towards absolute emissions cuts in the future.[108]

There is a common system of reporting and review, with flexibility mechanisms which do not follow the developed *versus* developing divide, but rather take into account various national capacities and circumstances.[109] The exemption of developing countries from mitigation action is of the past, as are the exclusive mandatory mitigation targets for developed countries. In fact, the principle of CBDRs gained a new addendum: 'in the light of different national circumstances'. This expression allows parties to take into account criteria such as geographic size and natural resources endowments when proposing their NDCs.

If widespread participation in an MEA is a sign of support for its core elements, there is arguably a compelling international consensus on the core provisions of the Paris Agreement, including its new differentiation arrangement. During the 'Opening for Signature' ceremony of the Agreement, held at the United Nations (UN) Headquarters in New York (US) on 22 April 2016, 175 parties (174 states and the EU) signed the Agreement, and 15 states deposited instruments of ratification.[110] It was the largest collective signing of an international agreement on a single day in the history of treaty making.[111]

This popular signing ceremony contrasts sharply with 16 March 1998, the date on which the UN held an equivalent ceremony to open the period for the official signing

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105 C2ES, 'Outcomes of the UN Climate Change Conference in Paris', 30 Nov.–12 Dec. 2015, available at: http://www.c2es.org/international/negotiations/cop21-paris/summary; see also D. Bodansky & E. Diringer, 'Building Flexibility and Ambition into a 2015 Climate Agreement', *C2ES Papers*, June 2014, available at: http://www.c2es.org/docUploads/int-flexibility-06-14.pdf; D. Bodansky & L. Rajamani, 'Key Legal Issues in the 2015 Climate Negotiations', *C2ES Policy Brief*, 1 June 2015, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652001.

106 N. 6 above. For analyses of the Paris Agreement, see W. Burns, 'Compendium of Commentaries and Articles', 16 Dec. 2015, available at: http://teachingclimatelaw.org/compendium-of-commentary-on-the-paris-agreementcop21.

107 C2ES, n. 105 above, p. 2.

108 M. Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment? (2016) 6(1–2) *Climate Law*, pp. 1–20.

109 Doelle, ibid.

110 International Institute for Sustainable Development (IISD) Reporting Service, '175 Parties Sign Paris Agreement, 15 Ratify Agreement on Earth Day', 22 Apr. 2016, available at: http://climate-l.iisd.org/news/175-parties-sign-paris-agreement-15-ratify-agreement-on-earth-day.

111 UN News Release, 'Today is a Historic Day', 22 Apr. 2016, available at: http://www.un.org/sustainabledevelopment/blog/2016/04/today-is-an-historic-day-says-ban-as-175-countries-sign-paris-climate-accord.

of the Kyoto Protocol. On that occasion, only six countries signed the agreement: with one exception (Switzerland), no developed country signed the Protocol during the ceremony; nor did China, India, or other emerging economies. Seven long years would elapse before the Kyoto Protocol entered into force, showing a high level of dispute over the differentiation model it represented.

Time will tell whether the strong disputes over the early manifestation of CBDRs in the climate regime will reappear during the negotiations on how to operationalize the Paris Agreement provisions, or during the implementation of the legal instrument. Yet, the history of the climate CBDRs also includes areas of consensus and continuity.

5.2. *Continuity in the Climate CBDRs: Leadership by Developed Countries*

Copenhagen arguably marked the beginning of a paradigm shift in the manifestation of CBDRs in the climate regime, and yet this narrative tells only part of the history. The focus on the end of the stark differentiation model that exempted developing countries from any obligation, and imposed mitigation targets exclusively on developed countries, hides some important continuities in the climate CBDRs – from the 1992 UNFCCC, through the 1997 Kyoto Protocol and the 2009 Copenhagen COP, to the 2015 Paris Agreement.

The continuity that is relevant to the argument of this article is the persistent consensus that developed countries will 'take the lead' in climate action, although the exact meaning of this leadership has been kept vague. The paradigm shift is perhaps less that the Paris Agreement marked the end of a binary differentiation between developed and developing countries in the climate regime, and more that the concept of a 'leadership role' for developed countries has ceased to be equated with exclusive obligations towards the core objective of climate mitigation.

The explicit mention of a leadership role arising from differentiated responsibilities and capabilities is unique to the climate-related CBDRs. No other MEA has included provisions stating that developed countries should 'take the lead' in meeting the objective of the legal agreement.[112] Since its inception, CBDRs in the climate regime have included the concept of a leadership role for developed countries in action for climate change. The UNFCCC explicitly notes, immediately following its statement on differentiated responsibilities and capabilities in Article 3, that 'accordingly, the developed country Parties should *take the lead* in combating climate change and the adverse effects thereof'.[113] The reasons justifying both differentiation and the consequent leadership role are disputed. Developed countries favour the notion of capabilities and development needs, while developing countries favour the notion of

[112] The Preamble to the Stockholm Convention on Persistent Organic Pollutants also refers to Principle 7 of the Rio Declaration 'noting the respective capabilities of developed and developing countries, as well as the common but differentiated responsibilities of States as set forth in … the Rio Declaration': Stockholm Convention on Persistent Organic Pollutants (POPs Convention), Stockholm (Sweden), 22 May 2001, in force 17 May 2004, available at: http://www.pops.int; Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) (14 June 1992), available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[113] Emphasis added. See Rajamani (2015), n. 88 above.

historic contributions.[114] Either way, differentiation within the UNFCCC initially meant that developed countries would adopt national mitigation policies to demonstrate that they are taking the lead in modifying long-term trends in climate change.[115]

Under the UNFCCC, parties agreed that, as part of this leadership role, developed countries should adopt mitigation actions to return their GHG emissions levels – individually or jointly – to 1990s levels by the year 2000.[116] There was, therefore, agreement on two points: firstly, that developed countries would assume a leadership role in meeting the central obligations of the treaty; secondly, that this leadership role entailed urgent mitigation action. The Kyoto Protocol made no mention of developed countries taking the lead on climate action. Yet, it understood the UNFCCC leadership role as granting exemption to developing countries and setting exclusive mitigation commitments to developed countries, at least for the foreseeable future.

This translation of the content of the leadership role of developed countries from the UNFCCC to the Kyoto Protocol has been fiercely disputed. The contention centred primarily on the fact that under the UNFCCC regime no meaningful participation was required from key developing countries, not even from emerging economies, on the issue of mitigation.[117] The notion of developed countries taking the lead was never at the heart of the dispute.

Although the stark binary division of the UNFCCC and Kyoto Protocol model of CBDRs has softened, the differentiation in the climate regime as reflected in the Paris Agreement still remains significantly stronger than it is in other MEAs. It is true that the Paris Agreement makes no reference to the early divide between Annex I and non-Annex I parties. The static nature of differentiation in the UNFCCC and Kyoto Protocol has given way to a dynamic differentiation with at least an expectation of future convergence over time. Yet, the Agreement still includes various explicit references to CBDRs, indicating that the principle is maintained as the 'anchor provision'[118] of the climate agreement and serves as a guide to evaluate its implementation.[119] CBDRs appear in the Preamble to the Paris Agreement and in Article 2 (goal of the Agreement), Article 3 (communication), and Article 4 (mitigation).

The concept that developed countries should 'take the lead' in climate action is also still markedly present. Under the Paris Agreement, while developed countries

114 Rajamani (2005), n. 88 above.

115 UNFCCC, n. 5 above, Art. 4(1) and (2).

116 Ibid.

117 E.g., the US refused to sign the Kyoto Protocol or participate in any new agreement that did not include some form of meaningful mandatory participation from key developing countries in climate action: see Rajamani (2005), n. 88 above, p. 84.

118 Brunnée & Streck, n. 87 above, p. 590.

119 A new reference to differentiation was included in Art. 2(2) Paris Agreement, n. 6 above. Until the very last minute, there was a fierce dispute over whether the language should be 'this agreement reflects common but differentiated responsibility' or 'this agreement will be implemented to reflect "common but differentiated responsibility"'. Developing countries, who wanted the second model, won this battle: L. Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics' (2016) 65(2) *International Comparative Law Quarterly*, pp. 493–514, at 506.

should expressly 'continue taking the lead' by immediately undertaking economy-wide absolute emissions reductions, developing countries should 'continue enhancing their mitigation efforts' and are 'encouraged' to move towards economy-wide reductions over time.[120] Developed countries are still the only parties legally required to provide funding for climate action in developing countries, although, for the first time in the history of MEAs, language was introduced to encourage those developing countries 'able to do so' to also provide funding and assistance for less developed countries.[121]

The compromise in the Paris Agreement is to combine universal responsibility, a leadership role for developed countries, and self-differentiation. The requirement that developed countries will still lead the efforts to address climate change indicates that, although there is some room to self-define the extent of this leadership, it is not unlimited. Developing countries still have normative grounds to press for more significant climate action from developed countries. The concept of 'leadership' is undoubtedly vague. However, is it so vague as to have no practical application? As the *Urgenda* decision shows, despite the vague nature of the concept 'to take the lead' in the climate regime, this core aspect of differentiation may have sufficient persuasive force to be used as a complementary tool in the interpretation of national obligations.

6. CONCLUSION AND FUTURE PROSPECTS

This article discussed how a national court in the Netherlands broke new ground by using the IEL principle of CBDRs to help in determining the scope of the Dutch government's duty of care to protect its citizens against climate-related risks. It highlighted how the Court pushed the boundaries of legal thinking by using CBDRs as an interpretive aid to overcome common barriers to liability related to the multi-scalar nature of the climate change problem, such as the difficulty of proving 'but for' causation, and the 'political question' doctrine. It argued that the Court relied on one element of the principle of CBDRs – the leadership role of developed countries – which has remained fairly consensual, if vaguely circumscribed, throughout the contested history of the global climate regime.

The Dutch government has appealed against the decision. Time will tell if the Court of Appeal will uphold *Urgenda*, and whether it will also engage with CBDRs in its reasoning. Can other national courts follow the *Urgenda* lead and use CBDRs as an interpretive tool in concrete cases, or will the *Urgenda* decision remain an exceptional, isolated case? Dutch courts have a strong record of interpreting national law in conformity with EU law, including environmental law, and are therefore more

120 Paris Agreement, n. 4 above, Art. 4(4).

121 Joost Pauwelyn argues that the long-term trend is to move away from the differential treatment of developing countries as a broad group towards more individualized differentiation according to specific criteria and tailored to each negotiation or regime; the Paris Agreement would thus be a clear step in this direction: J. Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) *Review of European, Comparative and International Environmental Law*, pp. 29–41.

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inclined to engage with IEL.[122] Dutch courts have a history of liberally engaging with indeterminate MEA norms, including non-binding provisions.[123] They also have a strong record of using international law to review the exercise of discretionary power by the executive.[124] All these characteristics may indicate that *Urgenda* could remain an exceptional example of a progressive court engaging with CBDRs.

Yet, some recent developments in climate litigation indicate otherwise. In 2015, a civil suit inspired by *Urgenda* was presented against the Belgian federal government by the Belgian non-governmental organization (NGO) Klimaatzaak.[125] As with Urgenda, Klimaatzaak relies on negligence to petition the court to order the Belgian government to increase its efforts on climate mitigation. The plaintiffs argue that industrialized countries, including Belgium, have assumed a leading role in the mitigation of GHG emissions, and their climate action should be fast and significant.[126] As in the *Urgenda* case, the *Klimaatzaak* litigation argues that Belgium has recognized that the target reduction of 25% to 40% by 2020 represents its fair share of mitigation. Although Klimaatzaak, unlike Urgenda, did not expressly mention CBDRs in its summons, the Belgian court will need to address arguments which are intrinsically linked to CBDRs. The case is expected to be decided by the end of 2016. Another case based on *Urgenda* has been initiated in Norway.[127]

It is possible that only national courts in European countries, which are used to engaging with supranational EU law, will be receptive to using CBDRs as an interpretive tool for national obligations. Yet, even in the US, which has a weak record of judicial engagement with IEL, a national court has been clearly inspired by *Urgenda*. In *Juliana* v. *United States*, initiated on 12 August 2015 before the US District Court for Oregon, 21 young American citizens asked the Court to order the government to protect their constitutional rights by adopting a recovery plan to significantly reduce the nation's carbon dioxide (CO_2) emissions.[128] The US government asked the Court to declare the case non-justiciable, citing among other reasons the 'political question' doctrine, and argued that action in the US alone would not redress the plaintiffs' problem. Responding to this line of defence, Magistrate Judge Thomas Coffin rejected the 'political question' doctrine in this case, referring to *Urgenda*, quoting the following passage:

> [T]he state should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts. Any reduction of emissions contributes to the prevention of dangerous climate change and as a developed country the Netherlands should take the lead in this.[129]

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122 Nollkaemper, 'International Environmental Law in the Courts of the Netherlands', n. 34 above; Betlem & Nollkaemper, n. 35 above.

123 Nollkaemper, ibid., p. 190.

124 Ibid., p. 191.

125 Estrin, n. 15 above.

126 *VZW Klimaatzaak* v. *Kingdom of Belgium et al.* (2015), Plaintiffs' Petition, available at: http://klimaatzaak.eu/wp-content/uploads/2015/12/Citation.pdf (in French).

127 See a reference to this lawsuit on the Urgenda website, available at: http://www.urgenda.nl/en/climate-case.

128 For a discussion of this case see Estrin, n. 15 above.

129 *Urgenda*, n. 1 above.

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Judge Coffin concluded that combined reductions in the US and other countries were able to redress the harm alleged in the petition and recommended that the suit proceed to argumentation on the merits. Admittedly, the question of the US leadership role was not directly addressed in this decision. Yet, by expressly quoting *Urgenda*, an American judge has shown that the Dutch decision does offer persuasive normative arguments that may be used by other national courts when dealing with the multi-scalar problem of climate change, even in countries less prone to engage with IEL. Whether other national courts will follow *Urgenda*'s example and explicitly engage with CBDRs will depend in great measure on whether future litigants will expressly articulate the principle before national courts. This has not happened thus far. If litigants do embrace CBDRs as a persuasive normative argument, we could well see a more productive and extensive use of CBDRs in climate litigation in the future.