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Foreword to the *TEL* Fifth Anniversary Issue

Re-evaluating the Principle of Common But Differentiated Responsibilities in Transnational Climate Change Law

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The principles of equity and common but differentiated responsibilities must remain the bedrock of our collective enterprise across all areas: mitigation, adaptation and means of implementation. Anything else would be morally wrong.

Narendra Modi, Prime Minister of India
COP-21 Leaders Meeting, November 2015

If we keep our eye on this core objective [that we must act to avoid dangerous climate change], the imperative of bringing all major emitters into a regime of climate commitments is clear. There is simply no other way to head off the coming crisis. As I have said before – just do the math.

Todd Stern, US lead negotiator,
Comments to the Center for American Progress, February 2010

1. INTRODUCTION

In December 2015, parties to the United Nations Framework Convention on Climate Change (UNFCCC)[1] adopted the Paris Agreement, committing all nations to undertake ambitious efforts as part of the global response to climate change.[2] This 'historic' moment in the long-running international climate change negotiations[3] provides an opportunity to consider and re-evaluate the role of one of the most important, but also enduringly controversial, principles of transnational climate change law and broader international environmental law – the principle of common

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

2 Paris Agreement, Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016), Arts 2 and 3.

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

but differentiated responsibilities (CDBRs). This principle – as the quotes above indicate – is one that has 'continued to simultaneously evoke contrasting iterations … in deeply contentious debates over the future of climate action'.[4] In turn, the international climate change regime has served as a laboratory for testing different and evolving understandings of the principle, and its consequences for transnational efforts to address climate change. In honour of the fifth anniversary of *Transnational Environmental Law* (*TEL*), this special issue brings together a collection of articles reflecting on the place and role of the CBDRs principle, with a particular focus on its development and application in the international climate regime from the 1992 UNFCCC to the 2015 Paris Agreement.

In preparing this foreword to the Anniversary Issue it has been my privilege and pleasure to read all articles included and to select from among them the winner of the *TEL* Fifth Anniversary Issue Scholarship Prize, with the authors also invited to give the *TEL* Fifth Anniversary Public Lecture in Cambridge (United Kingdom) in February 2017. While in such competitions there can only be one winner, each of the eight articles in this Anniversary Issue makes a distinctive and significant contribution to evolving understandings of CBDRs in the context of international climate change law, and to scholarship on the relationship between transnational environmental governance and differentiation more generally. The articles consider the principle of CBDRs in a wide variety of climate change contexts, from deforestation to corporate emissions, and from national courts to hybrid governance arrangements. Consistent with *TEL's* mission of fostering comparative and cutting edge interdisciplinary analysis, they also adopt a range of methodological approaches, including socio-legal analysis, assessment of empirical data, detailed textual treaty analysis, and comparative evaluation based on the examination of regional approaches.

In these introductory comments I highlight the particular contribution made by each article to developing notions of CBDRs, as well as the reasons why I selected the article by Sébastien Jodoin and Sarah Mason-Case, 'What Difference Does CBDR Make? A Socio-Legal Analysis of the Role of Differentiation in the Transnational Legal Process for REDD+',[5] as the winning entry. To put those comments in context, I begin with a brief overview of the principle of CBDRs and a discussion of why – with the conclusion of the Paris Agreement – understanding of the principle's vital element of 'differentiation' is seen to have undergone a distinct change. This emerging new conception of differentiation will have important consequences for the implementation of the Paris Agreement, and potentially for other areas of transnational environmental law.

2. THE PRINCIPLE OF CBDRs

While the principle of CBDRs has become closely associated with transnational climate change law – and particularly the treaty regime under the UNFCCC – its

[4] S. Jodoin & S. Mason-Case, 'What Difference Does CBDR Make? A Socio-Legal Analysis of the Role of Differentiation in the Transnational Legal Process for REDD+' (2016) 5(2) *Transnational Environmental Law,* pp. 255–84, at 283.

[5] Ibid.

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reach extends more broadly across the field of international environmental law.[6] As articulated in Principle 7 of the 1992 Rio Declaration, the principle provides:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[7]

This formulation of the principle emphasizes the varying contributions by states to global environmental problems, as well as their differing capacities – technological and financial – to respond to environmental degradation.[8] In the UNFCCC, the principle also stresses parties' 'differentiated responsibilities and respective capabilities' and links CBDRs to the broader notion of equity.[9] As Philippe Cullet explains, the development of CBDRs in international environmental law and particular treaty regimes such as the UNFCCC reflected twin prerogatives: (i) equity considerations associated with an acknowledgement of the deep inequalities in states' wealth, power and historical contribution to environmental problems; and (ii) the necessity for developed countries to offer suitable conditions to developing countries to encourage broad participation in global environmental regimes.[10]

The question of how to implement the element of 'differentiation' called for by the CBDRs principle is one that has generated a number of different responses in international environmental law. The most basic approach is what Cullet calls 'contextualization', where obligations are qualified by phrases that recognize the unequal capacities of states to address a given environmental problem.[11] Another common approach involves techniques that provide special accommodation for parties with fewer resources or less capacity to implement treaty requirements,[12] such as 'grace periods' allowing developing countries to delay implementation.[13]

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6 P. Cullet, 'Principle 7: Common but Differentiated Responsibilities', in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015), pp. 229–44.

7 Rio Declaration on Environment and Development, adopted by the United Nations 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, Principle 7, available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

8 P. Sands & J. Peel, *Principles of International Environmental Law*, 3rd edn (Cambridge University Press, 2012), p. 233.

9 UNFCCC, n. 1 above, Art. 3(1).

10 P. Cullet, 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps' (2016) 5(2) *Transnational Environmental Law*, pp. 305–28, at 307.

11 Ibid., p. 311.

12 Commission on Sustainable Development, 'Rio Declaration on Environment and Development: Application and Implementation, Report of the Secretary-General', UN Doc. E/CN.17/1997/8, 10 Feb. 1997, para. 46.

13 A leading example is the Montreal Protocol on Substances that Deplete the Ozone Layer, Vienna (Austria), 16 Sept. 1987, in force 1 Jan. 1989, available at: http://ozone.unep.org/en/treaties-and-decisions/montreal-protocol-substances-deplete-ozone-layer (Montreal Protocol), which provided delayed implementation periods for the phase out of ozone depleting substances by developing

A third and widely used mechanism is the provision of implementation aid by developed to developing countries, including technology transfer, financial resources and other capacity-building efforts.[14] Less commonly, but more controversially, differentiation may involve states taking on different commitments. The Kyoto Protocol to the UNFCCC represents the most extreme version of this approach: under the Protocol only developed countries have binding obligations to reduce greenhouse gas (GHG) emissions.[15]

The 'binary distinction' between developed and developing countries' emissions reduction obligations under the Kyoto Protocol was originally conceptualized as a first-stage measure, with broader, more stringent obligations for emissions reduction to be introduced in subsequent commitment periods under the Protocol.[16] However, as the international climate negotiations dragged on and global emissions reduction efforts faltered, this view gave way to the idea of the Kyoto Protocol 'firewall' between developed and developing country commitments.[17] Developing countries invoking the principle of CBDRs argued that they would not accept binding emissions reduction commitments unless and until developed countries demonstrated that they were 'taking the lead' on climate change mitigation as required under the UNFCCC.[18] The resulting impasse paralyzed efforts to agree on new GHG emissions reduction measures extending beyond the life of the Kyoto Protocol.[19]

3. DIFFERENTIATION IN THE PARIS AGREEMENT

For many, the 2015 Paris Agreement endorses a markedly different notion of differentiation under the CBDRs principle from that of previous understandings. The rigid separation of developed and developing country obligations which characterized the Kyoto Protocol has been replaced with a commitment by all countries to develop and implement 'nationally determined contributions' (NDCs) to the global climate change response.[20] Reference to 'common but differentiated responsibilities and respective capabilities' remains, but is qualified by the phrase 'in the light of different national circumstances'.[21] Paula Castro and Maria Antonia

countries: see B.A. Green, 'Lessons from the Montreal Protocol: Guidance for the Next International Climate Change Agreement' (2009) 39(1) *Environmental Law*, pp. 253–83.

14 Again, the Montreal Protocol provides a leading example: ibid., Arts 10 and 10A.

15 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, Art. 3 and Annex B, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

16 F. Yamin, 'The Kyoto Protocol: Origins, Assessment and Future Challenges' (1998) 7(2) *Review of European Community and International Environmental Law*, pp. 113–27. See also C. Voigt & F. Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) *Transnational Environmental Law*, pp. 285–303.

17 L. Rajamani, 'Differentiation in the Emerging Climate Regime' (2013) 14(1) *Theoretical Inquiries in Law*, pp. 151–71, at 165.

18 UNFCCC, n. 1 above, Art. 4(2)(a).

19 G. Nagtzaam, 'What Rough Beast? Copenhagen and Creating a Successor Agreement to the Kyoto Protocol' (2010) 36(1) *Monash University Law Review*, pp. 215–37.

20 Paris Agreement, n. 2 above, Arts 3 and 4(2).

21 Ibid., Preamble and Arts 2(2), 4(3) and 4(19).

Tigre describe this as amounting to a new approach of 'self-differentiation'.[22] Anna Huggins and Saiful Karim see the 'shift' as being from differentiation in the substantive mitigation obligations of developed and developing countries to a 'proceduralized variant' that takes account of developing country interests in treaty implementation.[23] Christina Voigt and Felipe Ferreira stress that differentiation in the Paris Agreement remains connected to the normative legacy of the UNFCCC but contains new elements regarding progression over time and highest possible ambition, which give the concept a more 'dynamic' orientation.[24]

Most authors contributing to this Anniversary Issue see the evolution of the CBDRs principle in the Paris Agreement as a positive development, at least as a way of overcoming negotiating deadlock to foster agreement on global climate change action. Indeed, Christina Voigt and Felipe Ferreira go further, arguing that a new notion of 'dynamic differentiation' has emerged in the Paris Agreement, which 'has the potential to function as a catalyst for a race to the top on climate action, rather than merely a burden-sharing concept'.[25] By contrast, Philippe Cullet characterizes the agreement on differentiation at Paris as merely 'victory … in the face of the no-agreement option', which is nonetheless a failure in terms of the adoption of a framework 'led by the individual self-interest of states rather than by international ambition'.[26] He argues that there is a continuing need for 'new thinking in terms of criteria that could become the basis for differentiation that avoids the pitfalls of the current framework'.[27]

4. CONTRIBUTION OF THE ANNIVERSARY ISSUE TO THE EVOLVING UNDERSTANDING OF CBDRs

In advancing 'new thinking' on CBDRs, either in the context of the international climate change regime or transnational environmental governance more generally, the articles included in this Anniversary Issue offer a variety of suggested pathways.

Focusing on the international climate change regime, Christina Voigt and Felipe Ferreira see significant potential for a concept of 'dynamic differentiation' in the Paris Agreement to build momentum for effective global climate change action.[28] In their article, 'Dynamic Differentiation', which builds on and expands their earlier analysis

22 P. Castro, 'Common But Differentiated Responsibilities Beyond the Nation State: How Is Differential Treatment Addressed in Transnational Climate Governance Initiatives?' (2016) 5(2) *Transnational Environmental Law*, pp. 379–400; and M.A. Tigre, 'Cooperation for Climate Mitigation in Amazonia: Brazil's Emerging Role as a Regional Leader' (2016) 5(2) *Transnational Environmental Law*, pp. 401–25.

23 A. Huggins & M.S. Karim, 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' (2016) 5(2) *Transnational Environmental Law*, pp. 427–48.

24 Voigt & Ferreira, n. 16 above.

25 Ibid., p. 303.

26 Cullet, n. 10 above, p. 318.

27 Ibid.

28 Voigt & Ferreira, n. 16 above.

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in a piece published in *Climate Law*,[29] Voigt and Ferreira contend that the requirements for each party's successive NDCs to represent 'a progression' beyond previous versions and to 'reflect its highest possible ambition'[30] imply the existence of an evolving 'duty of care' that states now need to exercise. This duty will only be met, they argue, through the application of a 'due diligence' standard whereby governments act in proportion to the risk at stake and take all appropriate and adequate climate measures according to their respective responsibilities and best capabilities.

Philippe Cullet, in his article, 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps', sees a need for efforts to broaden the existing framework for differentiation that extend beyond the sphere of the international climate change regime.[31] Responding to critiques of differentiation – many of which have arisen in the climate change context – he argues strongly for the continued application of differentiation in a still very unequal world. In respect of the understanding of differentiation under CBDRs, he argues this requires (i) identification of the beneficiaries of differentiation on the basis of environmental and social indicators rather than the economic development criterion implied by the developed/developing country categorization; and (ii) treating the environment as common heritage and addressing environmental problems at the global level in order to devise equity measures that transcend the nation state. He further calls for a broader application of differentiation beyond the conventional environmental law context to all sectors of sustainable development and within nation states to ensure that differential measures benefit not just a country in general but also the most disadvantaged individuals.

In tune with Cullet's call for a broader approach to differentiation, a common theme of several of the articles in this Anniversary Issue is the emphasis they place on opportunities for development of the principle of CBDRs beyond the confines of the international climate change treaties. Several of the articles identify promising new arenas for developing the principle both within and beyond the state. Focusing on what she labels the element of developed country 'leadership' in the principle of CBDRs, Patrícia Galvão Ferreira sees particular opportunities for development of the principle through its use and application by national courts.[32] Ferreira's article, '"Common But Differentiated Responsibilities" in the National Courts', focuses on the landmark 2015 decision of the Hague District Court in *Urgenda* v. *The Netherlands*,[33] which found that the Dutch government's 2020 emissions reduction target was inadequate in light of international climate science and policy requirements. She argues that the Court applied the core leadership concept of

29 C. Voigt & F. Ferreira, 'Differentiation in the Paris Agreement' (2016) 6(1–2) *Climate Law*, pp. 58–74.

30 Paris Agreement, n. 2 above, Art. 4(3).

31 Cullet, n. 10 above.

32 P. Galvão Ferreira, '"Common But Differentiated Responsibilities" in the National Courts: Lessons from *Urgenda* v. *The Netherlands*' (2016) 5(2) *Transnational Environmental Law*, pp. 329–51.

33 *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*).

CBDRs to address two common barriers to domestic climate change liability: causation, and the 'political question' (or separation of powers) issue. Ferreira opines that this decision – the first of its kind – may represent a starting point for more extensive and explicit use of the CBDRs principle in domestic climate change litigation.

Lisa Benjamin's article 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?'[34] offers another, starkly different, 'internal' context for examining the role of CBDRs in transnational climate change law and looks at the reporting behaviour of the largest polluting companies or 'carbon majors'.[35] Benjamin's focus is on the arena of domestic company law and the constraints that those legal frameworks and associated commercial norms, such as shareholder wealth maximization, place on efforts to curb corporate emissions. The link to CBDRs here lies in conceptualizing carbon major entities – the emissions from which exceed those of many states[36] – as bearing a special responsibility to contribute to emissions reduction given the greater burdens that their activities place on the climate system. In this framing, a new range of tools drawn from domestic corporate and financial law becomes a potential vehicle for advancing (or hindering) the realization of CBDRs in transnational climate change governance.

Looking beyond the state to emerging private and hybrid governance initiatives in the climate change space, Paula Castro's article examines the extent to which the CBDRs principle is reflected in a sample of 40 transnational climate governance (TCG) initiatives, including the C40 Cities Network, the Biocarbon Fund, and the Carbon Disclosure Project (CDP).[37] These initiatives have often been 'a response to the apparent incapacity of the multilateral climate change regime to address the growing urgency of climate change and to adapt to the changing circumstances of the world', as well as 'a means of supporting and diffusing the implementation of climate-related policies and practices at different governance levels and by non-state actors'.[38] Recognizing that TCG initiatives face similar challenges to the UNFCCC in addressing differing levels of capacity and responsibility among their members, Castro empirically assesses whether and how selected TCG initiatives address CBDRs. She finds some evidence of special accommodation and implementation aid to developing countries under some initiatives undertaken as part of a 'pragmatic view' of differentiation. This approach, she contends, can be seen as an opportunity for CBDRs to avoid the politicization of the principle that plagued the UNFCCC and its Kyoto Protocol, but also as a risk if it fails to encourage sufficiently the participation of developing countries most in need of support for implementing climate change-related goals.

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34 L. Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5(2) *Transnational Environmental Law*, pp. 353–78.

35 R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1) *Climatic Change*, pp. 229–41.

36 Ibid., p. 234.

37 Castro, n. 22 above.

38 Ibid., p. 383.

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For Maria Antonia Tigre, the regional level offers significant promise for new ways of ensuring differentiation, particularly in terms of better engaging the responsibilities of emerging economies like Brazil.[39] Emissions growth in these countries since 1992 was one of the factors that precipitated concern about the binary developed/developing country approach of the Kyoto Protocol. Tigre's article, 'Cooperation for Climate Mitigation in Amazonia', sees leadership by emerging economies as part of cooperative regional efforts on climate change-related issues, such as the protection of the Amazonian rainforest, as a potentially effective way to promote the implementation of differentiated responsibilities for climate change mitigation. She examines a case study of the little known Amazon Cooperation Treaty Organization as an avenue for enhanced regional cooperation and Brazilian leadership in strategies for emissions reduction in this region.

Lessons for the implementation of CBDRs may also come from treaty regimes in the multilateral system the primary focus of which is not climate change. For instance, Anna Huggins and Saiful Karim look to the International Maritime Organization's (IMO) rules for controlling shipping emissions as a source of experience that could inform development of the 'proceduralized' approach to differentiation that has emerged under the Paris Agreement.[40] As recounted in their article 'Shifting Traction', the IMO rules on energy efficient maritime transportation – like the Paris Agreement – contain no substantive differentiation of obligations between developed and developing countries but rely instead on procedural mechanisms that allow developing countries to request technical and funding assistance to ensure compliance. The non-cooperation of developed countries in providing funds and transfer of technology to developing states has led to a deadlock in IMO negotiations for further development of its rules for shipping emissions – a situation which, Huggins and Karim argue, offers a 'cautionary tale' for implementation of CBDRs in the Paris Agreement. They stress the importance of robust accountability mechanisms for holding developed states to account for their supportive obligations towards developing countries.

5. THE WINNING ARTICLE: 'WHAT DIFFERENCE DOES CBDR MAKE?'

The winner of the *TEL* Fifth Anniversary Issue Scholarship Prize is 'What Difference Does CBDR Make? A Socio-Legal Analysis of the Role of Differentiation in the Transnational Legal Process for REDD+', by Sébastien Jodoin and Sarah Mason-Case.[41] The article focuses on the particular conception and application of CBDRs that has emerged in the context of REDD+ (Reduction of Emissions from Deforestation and Forest Degradation in Developing Countries), and explores how this understanding of the principle has fostered the construction and diffusion of legal norms for REDD+. Prior to the conclusion of the Paris Agreement, REDD+ offered one of the few bright spots of consensus in the contentious climate change

39 Tigre, n. 22 above.

40 Huggins & Karim, n. 23 above.

41 Jodoin & Mason-Case, n. 4 above.

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negotiations and has enjoyed widespread (although by no means unproblematic) uptake by developing countries. As Jodoin and Mason-Case argue, an examination of the role of differentiation in the transnational legal process for REDD+ thus offers 'a valuable opportunity to explore whether, how and to what extent CBDR may influence the emergence and effectiveness of transnational climate law'.[42]

In selecting this article as the competition winner I applied two key criteria: (i) the coherence with *TEL*'s mission to develop novel ideas on the contribution of law to environmental governance in a global context; and (ii) the new contribution made to evolving understanding of CBDRs in the context of international climate change law and/or on the relation between transnational governance and differentiation generally.

As regards the first criterion, 'What Difference Does CBDR Make?' admirably encapsulates *TEL*'s aim of fostering the study of environmental law and governance beyond the state. The article explicitly frames REDD + as a 'transnational legal process' which involves 'the construction and transmission of legal norms across borders'.[43] This perspective, as Jodoin and Mason-Case note, is one that 'embraces the broad variety of sites and levels of authority in which legal norms for REDD+ have been developed and implemented, and recognizes the key role played by multiple public and private actors … in their production and migration'.[44] The article thus speaks clearly to the interest of *TEL* readers in the contribution of non-state actors, and the multi-level governance context in which contemporary environmental law unfolds. This aspect is enhanced by the interdisciplinary methodological approach of the article. The authors use socio-legal analytical techniques to explore 'the causal mechanisms through which CBDR may directly and indirectly influence the interests, ideas, and identities of the wide array of public and private actors engaged in the transnational legal process for REDD+'.[45]

In terms of the novel scholarly contribution made by the article, the conclusions drawn from the analysis point to the potential for the principle of CBDRs to develop in unique ways in different contexts and also emphasize its dynamic nature. Jodoin and Mason-Case track how the emergence of REDD+ within the international climate change regime provided the vehicle for the generation of shared understandings of differentiation in the context of emissions reduction from deforestation, demonstrating how developing countries could take on responsibilities for climate change mitigation, subject to their national circumstances and adequate support from developed countries. This flexible and targeted understanding of CBDRs helped to drive the diffusion of legal norms for REDD+ and its acceptance by developing country governments.

The parallels with the NDCs approach of the Paris Agreement are clear. The REDD + experience discussed by Jodoin and Mason-Case suggests that mitigation obligations tailored to the national circumstances of developing countries can provide a pathway for more inclusive, global climate action, although, as the authors

42 Ibid., p. 258.
43 Ibid., p. 259.
44 Ibid.
45 Ibid., p. 260.

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stress, this is closely tied to developed countries adequately fulfilling finance obligations to support full and effective implementation in developing countries. Where, as in REDD+ implementation, these commitments have not been met, there may be the need to shift attention to novel solutions to 'redistribute accountability for climate change mitigation', including greater private sector engagement in financing and more attention to the underlying drivers of emissions generating processes. Overall, these 'lessons' from the analysis reinforce a critical conclusion from all the articles included in this Anniversary Issue: 'the importance of developing broader conceptions of CBDR that can account for the contemporary reality that a spectrum of actors and practices influence GHG emissions'.[46]

[46] Ibid., p. 284.

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