Valuing Natural Capital: Reconciling a Right to Development with a Right to a Healthy Environment in the Context of the Climate Crisis

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ABSTRACT

This article proposes that developed countries bearing the highest historical contribution to global emissions must be held accountable for financing the sustainable development of less economically advanced nations. Drawing upon the international legal concept of Common But Differentiated Responsibility (CBDR), the article argues that developed states have a duty to support developing states. Fundamentally, 'Valuing Natural Capital' aims to fairly compensate developing countries for the natural resources they were unable to exploit due to colonialism and historical economic structures. The article proposes an economic framework, grounded in the assumption of historic responsibility by developed nations for their carbon emissions, which would allow developing nations to seek economic redress under international law. By integrating legal, economic, and environmental considerations, this article will take an interdisciplinary approach, aiming to promote a more equitable global response to climate change which prioritises both ecological sustainability and social justice in international climate policies.

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I. **Introduction**

Among the myriad complexities of the climate crisis, one thing can be asserted as of near-absolute necessity to tackle such an existential issue: a globalised, cooperative response. However, it is clear that in working towards this common aim, States cannot be expected to assume equal burdens. This can be attributed to two key factors: a given State's capacity to enact climate-related measures (due to economic, technological, and population-size disparities), and the historic responsibility borne by States who have contributed to climate change in the past. Of the two, the latter is by far the most contentious. It can be argued that the States that contributed to historic emissions did so unknowingly and it would thus be inequitable to punish this ignorance, rather than those States that continue to emit in full knowledge of the consequences. However, this article will assert that historic responsibility is of fundamental importance in establishing the common but differentiated responsibility which each State must bear. In balancing the competing rights of States, and the individuals within those States, international law must prevent developed States from leveraging their ill-borne strength against the rights of developing States in the name of global

climate action. Instead, economic and legal solutions must be found to value natural capital in order to reconcile the competing rights to development on the one hand, and a healthy environment on the other.

This piece argues that climate change solutions to climate change must be approached from an interdisciplinary perspective, integrating ecological, social, historical, legal, and economic dimensions to analyse the complex climate relationship between developed and developing nations. To do justice to all of these vast considerations being somewhat beyond the scope of this article, the focus is placed on the tension between a right to a healthy environment and a right to economic development—a challenge that many States, if not all, must wrestle with.

II. **A Right to a Healthy Environment**

A right to a healthy environment is becoming increasingly enshrined at international law, and has become a point of significant academic and judicial contention. With climate litigation trends on the rise, international courts including the European Court of Human Rights have increasingly found a right to a healthy environment and a duty to combat climate change as falling under the positive international law obligations of States, such as in the landmark decision of *KlimaSeniorinnen v Switzerland*.[1]

Here, it is important to draw a distinction between those obligations which correspond to rights held by humans (i.e., human rights owed to individuals by States), and obligations which are owed, and rights held, as between States (e.g., as State parties to multinational or international treaties).

There is a wealth of emerging case law concerned with the former: human rights courts, such as the African Commission on Human and Peoples' Rights in *SERAC v Nigeria*,[2] have found States to bear both positive and negative duties in relation to human rights, to protect, preserve, and maintain a healthy environment, from as early as the year 2000. Two decades later, in *Lhaka Honhat Association v Argentina*, the Inter-American Court of Human Rights held that Argentina violated an autonomous right to a healthy environment, and ordered the State to take restitutionary measures for the recovery of the natural resources of the indigenous communities affected.[3] In *La Oroya v Peru*,[4] the autonomous right found in *Lhaka Honhat* was once again engaged, and a new precedent set by the IACHR: an obligation on State parties to "regulate, control and remediate the effects of environmental pollution".[5] Thus, there is an increasingly rich history of global jurisprudence for the right to a healthy environment as it relates to humans or individuals. As of 2021, over 155 States had recognised 'some form' of a right to a healthy environment at a domestic or international level per a Resolution adopted by the Human Rights Council.[6]

In considering obligations owed between States, apart from human rights or the obligations of States to their own people, the development of a global right to a healthy environment is found primarily in international multilateral treaties and conventions. Since the 1990s, international treaties have been signed between hundreds of States acknowledging the climate crisis as a "common concern of humankind"[7] and seeking to implement strategies, mechanisms, and

[1] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, 53600/20, Judgment of the Grand Chamber of the ECtHR, 9 Apr. 2024.
[2] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60.
[3] "Inter-American Court Recognizes Right to a Healthy Environment in Indigenous Peoples' First Contentious Case." *IUCN World Commission on Environmental Law*, May 2020.
[4] *Community of La Oroya v Peru*, Judgment of the IACtHR, 22 Mar. 2024, Series C 511.
[5] "Inter-American Court Ruling on La Oroya Case Sets Key Precedent for the Protection of a Healthy Environment." *Interamerican Association for Environmental Defense*, 22 Mar. 2024.
[6] "The Human Right to a Clean, Healthy and Sustainable Environment." UNHRC Res. 48/13, 8 Oct. 2021, UN Doc. A/HRC/RES/48/13.
[7] The Paris Agreement of 12 Dec. 2015, 3156 UNTS 79.

mandates to promote the protection of the environment.

Despite the essential nature of a collective acknowledgement of the importance of the environment, and the preservation of its health, this right must be a tempered one. The Paris Agreement contextualises its environmental objective alongside the concepts of "sustainable development and efforts to eradicate poverty",[8] thus demonstrating that rights and duties borne towards the environment do not surpass the rights of developing States to seek to alleviate poverty among their own population. This distinction is crucial, and it is not simple to reconcile the rights of such States with the right to a healthy environment held by all States, both in the present moment and in looking to the future. It is at this point that the right to development must be examined.

III. **A Right to Development**

The 'right to development' is enshrined at international law under the 1986 UNGA Declaration on the Right to Development.[9] The Declaration conceptualises the right as one owed by States to their citizens and peoples, stating that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development".[10] This centres the human right as the core realisation of the right to development, with obligations being conferred primarily on individuals rather than between States. The Declaration also makes no explicit reference to 'sustainable development', which was first recognised at the 1972 Stockholm Conference, but not popularised until the Brundtland Report in 1987.[11]

The Brundtland Report defined sustainable development as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs",[12] recognising the need for an intersectional approach to the rights to development and a healthy environment. While it is crucial that States prioritise their own development in order to benefit their own citizens, it is also crucial that they do so in a way that is sustainable, and will not threaten the human rights of future citizens.

The Paris Agreement recognises succinctly the "intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty",[13] focusing on setting targets to provide a framework for realising the sustainable development goals. Furthermore, the treaty takes 'full account' of the unique situation of developing country parties in achieving this aim. The tension which often arises between the right to a healthy environment for all, and the right to development of developing States can thus be recognised by the principle of sustainable development. What must be further considered is how sustainable development can address, and ultimately rectify, this tension.

IV. **Historic Responsibility**

Analysis by CarbonBrief of the percentage of emissions released between 1850 and 2021 attributable to the "national responsibility" of different States for C02 emitted on their territory found that the US was found to have produced 20% of total global emissions in this period.[14] This staggering figure was followed by China at 11% and Russia at 7%; while at 4% and 3%, Germany and the UK have also produced emissions at a highly population-disproportionate rate. These statistics demonstrate the disproportionate share of historic emissions produced by developed States, who now seek to regulate the

[8] ibid, Art. 2(1).
[9] "Declaration on the Right to Development." UNGA, 4 Dec. 1986, A/RES/41/128.
[10] ibid, Art. 2(1).
[11] "History of Sustainable Development." *Sustainable Development Commission*, 1992.
[12] *Our Common Future*. World Commission on Environment and Development, 1987, at Chapter 2, [1].
[13] The Paris Agreement (n 7) *supra*, preamble.
[14] Evans, Simon. "Analysis: Which Countries Are Historically Responsible for Climate Change?" *CarbonBrief*, 2021.

emissions of developing States to prevent the continual rise of global temperatures. As a result of their own emission 'spending' and the destruction of their own natural resources, developed States are seeking to implement climate-positive restrictions internationally. The EU Deforestation Regulation, for example, seeks to restrict the trade of products resulting from deforestation, and consequently to target those areas of biodiversity loss such as in the Amazon Rainforest in Brazil.[15]

The Amazon Rainforest is the quintessential example of the valuable natural capital possessed by Global South countries: while Global North countries have exploited their own resources, perhaps past the point of no return, and reaped the economic and developmental rewards as a result, they now seek to limit those same actions in other countries as natural capital generally continues to decline.[16] This hypocrisy is clear even without reference to, perhaps even more pertinently, the massive exploitation that those same States enacted on the natural capital of others through the course of colonisation. In imposing trade restrictions on products originating from developing countries, developed States use a 'stick' rather than 'carrot' approach. Instead of facilitating economic and environmental growth, they sanction economic activity, thus restricting the development of such States further and perpetuating the paternalistic cycles of colonialism. This approach is legally moralistic, and may go as far as to contravene the principle found in Article 3(5) of the UNFCCC (1992) which prohibits the use of unilateral (or otherwise) measures from restricting international trade under the guise of combating climate change.[17]

Moreover, it is proposed that, in light of the historic culpability of developed States, the common but differentiated responsibility should be that the developed States facilitate developing States to develop in a manner consistent with the international aims of climate preservation and restoration. Article 3(5) of the UNFCCC supports such a view, promoting party cooperation towards an "open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them to better address the problems of climate change".[18] This construction envisages a 'carrot'-based approach, allowing for developing countries to do so sustainably, both in terms of their own economic development and in the interests of environmental protection.

V. **Economic Solutions to Natural Capital**

At the simplest level, in order to value natural capital the externalities of pollution and biodiversity loss must be internalised into the cost of production. The 'polluter-pays' principle is a mechanism to hold consumers from developed States to account financially for their carbon spending, recognised at international law under Principle 16 of the Rio Declaration (1992), which instructs national authorities to internalise environmental costs "without distorting international trade and investment".[19] This principle reflects the need for economic solutions to place a burden on the consuming States, as well as those involved in the production process, in order to fairly distribute the environmental costs.

However, cost internalisation and pricing policy is only one factor in correctly valuing natural assets. In internalising costs, the depletion of resources continues to occur, just at a higher price point—which should have the effect of limiting overconsumption to a degree. This is, however, an insufficient measure in the face of the existential threat

[15] Regulation (EU) 2023/1115.
[16] Managi, Shunsuke, and Pushpam Kumar. *Inclusive Wealth Report 2018*. United Nations Environment Programme / Kyushu University, 2018.
[17] The United Nations Framework Convention on Climate Change, 1771 UNTS 107
[18] ibid, Art. 3(5).
[19] "The Rio Declaration on Environment and Development." UNGA Res. 47/190, 14 Jun. 1992, at Principle 16.

climate change poses. Cost internalisation serves to correctly distribute the environmental costs found in creating a given product, but fails to treat the issue at the core. It is clear that instead, developing countries must, in exchange for the protection and non-exploitation of their own naturally occurring resources, be in some way compensated by those countries who have already 'grown' and now seek to 'clean up later'.[20] This could take the form of (i) classical compensation in the form of financial contributions, (ii) economic carrots, and indeed sticks, to incentivise climate positive trade and investment, and (iii) technological support and the reduction of the cost of capital in climate positive investment.

A. *Classical Compensation Model*

Classical compensation, while the simplest mechanism to quantify, is difficult to administer. A classical compensation model would seek to provide reparations to developing States, paid by developed States, proportionate to their share of historic responsibility. Though this is in principle an equitable solution, it is inefficient, easily susceptible to corruption, and would be incredibly difficult to enforce at international law.

The systems of international law being predicated on State consent, it is highly unlikely that developed nations would be willing to sign themselves up to make bare reparations without seeking some return on investment for their own economic gain. Without the involvement of all the major emitters, including China and the USA, this system would not yield sufficient investment, and is fundamentally unattractive to the developed countries whose economic burden would be highest. Furthermore, even in a system where it would be possible to require such financial contributions from these wealthier nations, it is inefficient to grant each individual developing State a lump sum to compensate them for the bare cost of their natural resources that they will in turn not exploit. The classical model fails to account for the historic investment into the technology required for the green transition that the developing countries will also benefit from, unlike the climate positive investment approach explored below.

Finally, a fund dedicated to financial reparation for losses suffered, or an inability to exploit a State's own natural resources, necessarily pays out monetary sums without specific direction to those States on how that money must be spent. As the State would have been free to exercise their own total discretion as to the purpose of money generated from the exploitation of their own natural capital, the compensatory value would therefore also be theirs to direct. While this may yield an equitable result, it is extremely difficult to ensure that the restitutionary sum be used efficiently and in a way which ensures sustainable development—with the contributions from developed States likely being conditional on the latter. The administrative difficulties render this model aspirational, but overly complex, and highly unlikely to ever operate in practice. This essay argues that instead, many of these issues may be resolved through a combination of the following two approaches.

B. *Economic Carrot (and Stick) Approach*

The economic carrot and stick approach targets corporations, rather than States, in attempting to incentivise climate positive trade and investment. There are many mechanisms by which economic carrots and sticks can be utilised to facilitate climate positive trade, such as through specific legislation which gives lower carbon products tax benefits (for example Carbon Border Adjustment Mechanisms) and disincentivises the trade of products with higher emissions ratings. However, while this approach can contribute to the lowering of emissions by a given State in line with their emissions

[20] Ekins, Paul, and Dimitri Zhengelis. "The Costs and Benefits of Environmental Sustainability." *The Productivity Institute*, 2021.

reductions goals, this does little to facilitate the green transition of developing countries.

Such an approach may include carbon pricing, such as implementing specific carbon taxes, or cap and trade systems such as the European Emissions Trading Scheme (ETS). The EU ETS is based on the polluter-pays principle, requiring companies to report and monitor their carbon emissions, and pay for a carbon allowance in line with what they emit: failing to do so results in heavy fines.[21] The 'cap' (i.e., the total number of emissions which may be produced and given corresponding allowances for) is reduced every year, with the goal of reducing the EU's total emissions in line with their climate commitments, as well as incentivising companies to reduce their own emissions to escape the carbon price, which affects their profits.

Carbon pricing can thus be effective in reducing emissions and encouraging companies to act in a climate positive way. However, the ETS in this form is only targeting the first part of the dual problem: the right to a healthy environment. In order for an ETS to target the second issue - the right to development - the revenue generated by such a scheme must not benefit the development of renewable energy, energy efficiency improvements and low-carbon technologies only in the home States to which the ETS applies. Therefore, in order to take into account the historic responsibility of the developed States, and the right to development which they should thus be facilitating, a link should be drawn between profits generated from climate positive trade, and economically supporting those developing countries whose own trade will be disadvantaged by such a system. This link could take the form of the classical compensation model described above, with profits going towards simple reparations, but the disadvantages of this have already been laid out. More effective would be to use such profits to fund the development of technologies that facilitate the green transition in these countries.

C. *Technological Support / Reduction of Costs to Facilitate a Green Transition*

In implementing economic tools for the sustainable development of States while valuing natural capital, it will thus be necessary for developed States to support developing States to bypass the infrastructure which has historically been the method of industrialisation at the expense of the environment. The natural cost decline of new technologies such as renewable energy and storage systems is not yet sufficiently low as to incentivise developing countries to choose these systems on the basis of economic cost alone. This choice must therefore be facilitated by developed States, in supporting the large-scale upfront investment required to put in place infrastructure which will have a lesser negative impact on the environment. While cheaper forms of energy production exist, it cannot be the sole responsibility of developing States to finance their development to align with the green transition. Thus, those States which have a capacity to do so should bear a legal duty to facilitate the introduction of such infrastructure.

The support of developed economies, both in technological development and upfront investment, will reduce the cost of capital globally and align with the sustainable development goals. The assurance of investment and financial backing by developed States can also provide private investors with the necessary confidence to invest in developing States deemed to be less stable. This is relevant as it is the transitional costs which will be fundamental in allowing for a green transition to occur across the global stage. Bhattacharya et al.[22] found that investment and spending requirements by emerging and developing economies will

[21] *Report on the Review of The European Union Emissions Trading System (EU ETS)*. European Commission, 2021.

[22] Bhattacharya, Anshuk, et al. "Financing a Big Investment Push in Emerging Markets and Developing Economies for Sustainable, Resilient and Inclusive Recovery and Growth." *Grantham Research Institute on Climate Change and the Environment*, 2022.

require $1500 billion a year on the energy transition alone. This vast and continuing investment through the transitional period demonstrates the requirement for a global, cooperative response. Bhattacharya et al. also found that a further $300bn investment on the same metric would be required to deal with natural capital and sustainable agriculture; a valuation that reflects the significant role played by natural capital in the economics of the climate transition. The Paris Agreement of 2015 sought to strengthen the global response to climate change through ensuring "finance flows consistent with a pathway towards low greenhouse gas emissions".[23] In light of these economic commitments (however vague) it is clear that developed countries have a duty to support developing countries through their economic means if agreements are to be effectively implemented,[24] through direct and indirect investment, as well as technological and trade support.

Ekins and Zhengelis[25] consider the significant structural shift in developing countries under the low-carbon transition as a potential blockade to traditional industrial development routes. They go on to cite evidence that multilateral funding and technological diffusion may allow countries to leverage global finance in the implementation of new, green technologies. This reflects the necessity of economic investment, but also the responsibility of richer countries to support the development of green technologies and trade diffusion beyond their own spheres.

With developing countries less able to rely on public borrowing, high-income countries will be vital in providing access to the finance and technologies necessary to secure sustainable growth,[26] and could be delivered by either new or existing institutions of international law and cooperation.[27]

VI. **Incorporating CBDR**

The principle of common but differentiated responsibility provides the international legal underpinning for the different treatment of States with regard to environmental treaties. Under Art. 3(2) of the UNFCCC, full consideration should be given to "the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change" when analysing State obligations under the Convention. This is essentially negative in effect ('excusing' developing States of obligations): in order for the principle to have tangible impact, it is necessary that CBDR takes positive effect.

In applying positively, CBDR would apply to actively require developed States to support developing States. A positive incorporation of the principle would thus give a legal basis to the proposed economic framework, wherein those States that are determined to bear historic responsibility for climate emissions are required at international law to contribute to the facilitation of the green transition, through investment and technological support, of developing countries.

CBDR already being an accepted principle of international law, the rule would form a solid legal basis to support the valuation of natural capital and its subsequent reparation, and legitimises the theoretical imposition of such a framework.

VII. **Conclusion**

In considering the unequal opportunities afforded to States throughout history (in particular, those opportunities having been

[23] The Paris Agreement (n 7) *supra*, Art. 2(1)(c).
[24] ibid, Art. 3.
[25] Hidalgo, César, et al. "Climate Change 2007: Synthesis Report." *Science*, vol. 318, no. 5850, 2007, pp. 1-16.
[26] Ekins and Zhengelis (n 20) *supra*.
[27] *see* the World Bank's current approach to concessional financing, that models a similar (but somewhat limited) approach. Although sometimes including grants to facilitate transitional costs associated with global challenges such as climate-associated risks, concessional financing includes low-rate loans and equity investments (all coming from private or non-State investors) and is thus inherently limited under the historic-responsibility and social justice analysis delivered prior. For more information, *see* Duarte, Mafalda. "What You Need to Know About Concessional Finance for Climate Action." *World Bank*, 16 Sept. 2021.

robbed from one State-class by another), it is clear that developing States have neither the capacity, nor the same responsibility, to enact climate measures at the same level as developed States who have already been afforded the opportunity to develop through the exploitation of the globe's natural resources. However, there exists a collective need to prevent the continuing devastation of the rich natural resources the Global South possesses. As a result, while developing States do have a share of the duty under the common aspect of differentiated responsibility, it is equitable that the Global North and developed States contribute economically and technologically to the necessary climate measures outside of their own direct territory, in order to fairly compensate developing countries for the non-exploitation of their natural capital. If such facilitation of the Global South is practically supported, there may be room for optimism that both the right to development and a right to a healthy environment may coexist in the coming decades. This optimism is conditional[28] on a fast, cooperative response as the clock continues to tick on our environmental time bomb.

[28] Stern, Nicholas. "Growth with Decarbonization Is Not an Oxymoron." *Institute for New Economic Thinking*, 3 Mar. 2021.