

DIFFERENTIATION IN A 2015 CLIMATE AGREEMENT



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A central issue in the ongoing negotiations towards a new international climate change agreement this year in Paris is how the agreement will differentiate obligations among developed and developing countries. Differentiation among parties to the United Nations Framework Convention on Climate Change, based on their “common but differentiated responsibilities and respective capabilities,” is a defining feature of the international climate change regime. This policy brief outlines the basis for and forms of differentiation in the climate regime, and the key areas where differentiation has arisen in the negotiations for a 2015 agreement. The brief then presents a range of design options, drawn from the climate regime as well as other multilateral environmental agreements, for differentiation in the 2015 agreement. It concludes that the most feasible approach is likely to be a hybrid one that tailors the manner of differentiation to the specific elements of the agreement.

BASIS FOR DIFFERENTIATION IN THE CLIMATE REGIME

The U.N. Framework Convention on Climate Change (UNFCCC) establishes a principled basis for differential treatment of countries in the global climate regime with its core principle of “common but differentiated responsibilities and respective capabilities” (CBDRRC).² In recognizing that parties vary both in their levels of responsibility for climate change and in their capacities to address it, the CBDRRC principle provides a basis for differentiating among them. The UNFCCC explicitly notes, immediately following its statement of the CBDRRC principle, that “[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”³

As a universally accepted principle, CBDRRC offers authoritative guidance in certain respects—it requires efforts from all states in service of the convention’s ultimate objective, and it countenances differentiation among parties. Arguably, current obligations must be interpreted and future obligations structured in accordance with these basic tenets of the CBDRRC principle.

Beyond this, the precise contours of the principle are a work in progress, with a range of views among parties on its core content, its legal status, and how it should be reflected in a new climate agreement.⁴

CBDRRC is reflected in the core commitments of the UNFCCC—some of which are common to all parties while others are differentiated among parties. The specific applications of this principle have evolved through the provisions of the Kyoto Protocol and subsequent decisions by the parties, and in the design of UNFCCC procedures and mechanisms. For instance, certain obligations apply to specific categories of countries (e.g., Annex I and Annex II), special consideration is granted in some respects to other categories of countries (e.g., least developed countries, small island states, and economies in transition), transparency procedures are differentiated among parties, and contextualized provisions allow parties to take into account their individual circumstances.

Although previous negotiating mandates invoke CBDRRC,⁵ the Durban Platform decision⁶ that launched the negotiating process towards the 2015 agreement contains no reference to the principle, in large part because of divergences over its interpretation. The subsequent

Doha⁷ and Warsaw decisions⁸ make general reference to the “principles” of the convention, but contain no specific reference to CBDRRC. The Lima Call to Climate Action underscores parties’ commitments to reaching an ambitious agreement in 2015 agreement that reflects the principle of CBDRRC, qualified, however, by the clause “in light of different national circumstances.”⁹ This qualification could be interpreted as introducing a dynamic element to the interpretation of the CBDRRC principle—as national circumstances evolve, so too will parties’ common but differentiated responsibilities. It could also, however, be interpreted as adding little to the existing requirement to take into account parties’ “respective capabilities,” which will in any case be linked to different national circumstances.

In addition to the principled basis for differentiation, expressed in CBDRRC, there is also a pragmatic rationale for introducing differentiation in treaties—to achieve broader participation. Universal participation in an agreement enhances its effectiveness. Allowing commitments to be tailored to parties’ varied capacities and national circumstances can help to advance the goal of universal participation. However, if, by favoring some, differentiation leads to the disenchantment of others, it can also hamper broad participation.

FORMS OF DIFFERENTIATION IN THE CLIMATE REGIME

Although many multilateral environmental agreements (MEAs) provide for some form of differential treatment, the extent of differentiation in the climate regime is unusual. Numerous provisions of the UNFCCC and the Kyoto Protocol contain provisions that differentiate among parties, including:

- provisions that differentiate between Annex I and non-Annex I countries with respect to the core obligations (e.g. mitigation) most directly related to the convention’s ultimate objective;
- provisions that differentiate among parties with respect to implementation, in particular in relation to stringency or timing, such as permission to adopt subsequent base years,¹⁰ delayed reporting schedules,¹¹ and softer approaches to non-compliance;¹² and
- provisions that differentiate among parties in relation to commitments to provide, and eligibility to receive, financial¹³ and technological¹⁴ assistance.

The nature and extent of differentiation among parties has evolved over time. The Kyoto Protocol contains binding absolute emissions targets set to deadlines for developed countries alone—a stark form of differentiation in core obligations that is unique among MEAs. The Cancún Agreements provide for self-defined mitigation pledges from both developed and developing countries, but of differentiated types (“quantified economy-wide emission reduction targets” for developed, and “nationally appropriate mitigation actions” for developing).¹⁵ The Cancún model retains a bifurcated structure but permits self-differentiation in both the level and (in the case of developing countries) the form of parties’ individual mitigation commitments.

Like many other MEAs, including some with no explicit differentiation between categories of countries, the climate regime also provides for implicit differentiation through norms whose application permits consideration of characteristics that vary from country to country. This is effectuated through language permitting flexibility and discretion in implementation, such as “in so far as practicable,” “where appropriate,” “all it can to the utmost of its resources,” and “to the extent feasible.”¹⁶

Decisions taken by the parties to advance the current round of negotiations offer insights into how differentiation may be reflected in the 2015 agreement. The 19th Conference of the Parties (COP 19), in 2013 in Warsaw, invited parties to prepare and submit “intended nationally determined contributions” (INDCs) to the new agreement well ahead of the Paris conference,¹⁷ as they have now begun to do.¹⁸ COP 20 in Lima provided guidance on the information to be provided by parties with their INDCs.¹⁹ With their emphasis on “nationally determined” contributions, the Warsaw and Lima decisions appear to favor a self-differentiated approach.

DIFFERENTIATION IN THE DURBAN PLATFORM NEGOTIATIONS

As a crosscutting issue, differentiation is relevant to varying degrees in relation to each of the core elements of the Durban Platform negotiations (mitigation, adaptation, finance, technology, capacity building and transparency of action and support). The following are some of the principal areas where questions of differentiation arise, and some of the options for addressing them reflected in the Geneva Negotiating Text:²⁰

Mitigation: A long-term global goal on mitigation could apply uniformly to all parties or differently to different categories of countries. Examples of the latter include differentiated peaking years, or peaking years only for certain categories of parties,²¹ or differentiated emission budgets based on historical responsibilities, ecological footprints, capabilities and/or stage of development.²²

Similarly, mitigation obligations could apply uniformly to all parties or differently to different categories of countries. Examples of the latter include: commitments/contributions differentiated in type, scope, scale, coverage, timing and/or legal character; unconditional commitments/contributions for some and conditional ones for others;²³ and/or commitments/contributions inscribed in a range of instruments anchored differently to the core agreement.²⁴ Alternatively, parties' mitigation commitments/contributions could fully or to some degree be self-differentiated.²⁵

Adaptation: Obligations to support adaptation in vulnerable countries could extend to all parties or only to some parties, such as Annex II parties, developed country parties and/or parties in a position to do so.²⁶ Commitments/contributions on adaptation could be different for different groups of parties or uniform for all parties. For instance, developed countries could be required to report on support provided, and developing countries on the level of support needed, or all parties could be required to report on their experience with adaptation planning.²⁷

Finance: Obligations to provide or mobilize finance could extend to all parties or only to some parties, such as Annex II parties, developed country parties and/or parties "in a position to do so."²⁸ And, eligibility for or entitlement to funding could be differentiated across categories of parties—for instance, special consideration could be provided to particularly vulnerable countries.²⁹

Technology and Capacity Building: Technology development and transfer as well as capacity building could be addressed in the 2015 agreement through strengthened cooperative action among all parties or through differentiated obligations, with enhanced responsibilities for developed countries.³⁰

Transparency/Accountability: Transparency and/or accountability could be addressed in the 2015 agreement through, for example, a common framework applying the same procedures to all parties; a common framework with different procedures for different categories of

countries; parallel frameworks applying different procedures to different categories of countries; or procedures that are differentiated initially but evolve into a single, common framework over time.³¹

DESIGN OPTIONS FOR DIFFERENTIATION

The modes of differentiation reflected in the 2015 climate agreement will be inextricably linked to the agreement's overall architectural design. A "top-down" design more readily lends itself to explicit categorization of countries, for example, while a "bottom-up" agreement favors self-differentiation. A "hybrid" agreement—one that seeks to achieve both broad participation and strong ambition by blending top-down and bottom-up elements—could entail other forms of differentiation falling somewhere between a strict categorization of countries and full self-differentiation.

It is possible to distill from existing models of differentiation, and from parties' proposals in the ongoing negotiations, at least four generic design options for differentiation that could be applied to one or more elements of the 2015 agreement. The agreement could, in fact, employ different approaches to differentiation for different elements. These four generic design options run from more to less prescriptive with correspondingly less to more autonomy for states. They include:

- The agreement establishes (or adopts existing) categories of countries and prescribes different commitments for each category.
- The agreement establishes (or adopts existing) categories of countries and parties are given the flexibility to choose from different menus of commitment types, depending on their category.
- The agreement establishes a menu of commitment types and parties can choose among them.
- The agreement allows parties the flexibility to define their own commitments.

With any of these generic approaches, the agreement also could employ "hybrid" design features to set normative expectations or to enhance or constrain parties' flexibility.

CATEGORIZING COUNTRIES

Parties can be categorized in several ways, including:

- Based on objective criteria, such as historic or current emissions, per capita emissions, or per capita

GDP. The categorization could be evolving—i.e., countries could choose to move from one category to another as their circumstances change; or there could be a formal process of graduation once certain criteria are met.

- Through agreed lists, such as the existing UNFCCC Annexes. Listing can permit self-identification by parties into particular categories, or external factors such as membership in other clubs (e.g. the Organization for Economic Cooperation and Development, the European Union, etc.) to play a role. Whether employing the existing annexes or establishing new lists, the agreement could include provisions permitting simpler movement between categories of parties.

CATEGORIZING COMMITMENTS

Commitments can be categorized in several ways, including based on whether they constitute:

- obligations of effort (e.g. policies and measures) or obligations of result (e.g. targets and timetables).
- procedural obligations (e.g. reporting) or substantive obligations (e.g. GHG targets, assistance).

Substantive mitigation obligations (of effort or result) could be further categorized based on their type, scope, scale, coverage, legal character, etc. Categorization by type and scope, for instance, could include economy-wide absolute emission targets, economy-wide emissions intensity targets, sectoral emission targets, renewable energy or energy efficiency goals and other policies and measures.

As reflected in the generic design options listed above, an explicit categorization of commitment types could be expressly linked to an explicit categorization of countries, or parties could be free to choose from among an explicit set of commitment types.

SELF-DIFFERENTIATION

An alternative to any explicit categorization of countries or commitment types is to allow parties to self-differentiate by defining their own commitments and tailoring them to national circumstances, capacities and constraints. The decisions in Warsaw calling on parties to put forward “intended nationally determined contributions,” and in Lima implicitly leaving the scope of such contributions to national determination, appear to favor such an approach.

By providing greater flexibility and privileging sovereign autonomy, self-differentiation may help to encourage broader participation. However, the absence of a prescribed differentiated structure may provide less assurance that countries’ contributions will accord with their responsibilities and capabilities as viewed by other parties. An agreement relying exclusively on self-differentiation may therefore be less acceptable to some countries.

HYBRID OPTIONS

Each of these generic design options—categorization of countries, categorization of commitments and self-differentiation—could include supplemental features that enhance or constrain parties’ flexibility. In a self-differentiation model, for instance, the agreement could seek to set expectations, or set boundaries on the flexibility afforded by self-differentiation, and thereby provide greater assurance that countries will undertake commitments commensurate with their circumstances.

Options include:

- **Assessment**—The agreement could include provisions facilitating the assessment by parties, individually or collectively, of the fairness and ambition of countries’ intended contributions. Such an assessment could be on the basis of, for instance, a principle-based reference framework employing a basket of objective indicators.³² It also could be on the basis of criteria identified by individual parties to justify the fairness and ambition of their own commitments and the commitments of others. The assessment would inform, but not necessarily override, a party’s national determination of its contribution.
- **Providing directionality**—The Lima decision encourages each party to put forward a contribution that represents a “progression beyond the current undertaking of that Party.”³³ This provision reflects an expectation that parties’ contributions to the 2015 agreement will be no less rigorous in form, scope or ambition than their present Kyoto targets or Cancún pledges. For developed countries, for instance, this implies an expectation that contributions be at least in the form of their Cancun pledges (“quantified economy-wide emission reduction targets”) and be more stringent. The 2015 agreement could set an explicit expectation that each party’s

contribution will gradually progress towards a higher level of effort through a more ambitious type and/or scale of commitment. In a self-differentiation model, this would ensure continuing differentiation in the near term, building on the different starting points reflected in the current balance of commitments, while setting an expectation that countries would strengthen their contributions as their responsibilities and capabilities evolved.

- **Recognizing special circumstances**—The agreement could continue the well-established practice of recognizing the special needs and circumstances of certain groups such as least developed and small island countries. It could provide some groups of countries with flexibility or discretion in the implementation of certain obligations. It also could strengthen provisions targeting assistance to some groups of countries.
- **Self-applied criteria**—The agreement could set expectations that would apply to parties that identify themselves as being “in a position to do so” or “willing to do so.” This would allow willing and able parties to contribute as they deem fit, and for the agreement to recognize their contributions.
- **Optionality**—The agreement could give some or all parties discretion in choosing which of the regime’s rules they accept. Currently, for instance, the climate regime’s reporting framework employs tiered methodologies of varying rigor, with parties free to choose among them. Similarly, parties could be allowed to “opt-in” or “opt-out” of certain requirements.
- **Conditionality**—The agreement could give parties discretion in taking on particular commitments as and when certain conditions, such as provision of assistance, are met.

Although the four generic design options and the additional “hybrid” options have been described primarily in the context of mitigation, most could apply to other elements of the agreement. For instance, in relation to finance, a defined category of parties could commit to provide or mobilize finance, or parties could be allowed to self-select their financial commitments. In relation to adaptation, a defined category of parties could commit to provide or mobilize finance at the scale required to support another category of parties in adapting to the adverse effects of climate change. In relation to transparency, parties could be subject to different reporting

obligations based on categories of countries, or based on the type of nationally determined contribution they have chosen to put forward.

CONCLUSION

There can be little doubt that differentiation, albeit a more nuanced version than has thus far been seen in the climate regime, will be a central defining feature of the 2015 agreement. This paper identified several generic design options that can be used to operationalize or reflect the core principle of CBDRRC in the new agreement. Each approach has its merits and demerits and accordingly fans and followers. Yet there is likely no single approach that can adequately address differentiation across all areas of the agreement—mitigation, adaptation, finance, technology, and transparency. The most feasible solution to differentiation in the 2015 agreement is likely to be a hybrid approach that tailors the manner of differentiation and the use of particular design features to the specific elements of the agreement.

ENDNOTES

1 The author is grateful to Elliot Diringer and Daniel Bodansky for excellent constructive feedback on earlier versions of this paper.

2 United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107 [hereinafter ‘UNFCCC’], Art. 3.

3 UNFCCC, Art. 3.

4 For a detailed examination of these issues see Lavanya Rajamani, ‘The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime,’ in Navroz K. Dubash (ed.), *Handbook of climate change and India: Development, politics and governance* (New Delhi: Oxford University Press, 2011) 118–29.

5 See e.g. Decision 1/CP.1, ‘Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, sub-paragraph (a) and (b) of the Convention, including proposals related to a Protocol and decisions on follow-up,’ FCCC/CP/1995/7/Add.1 (6 June 1995).

6 Decision 1/CP.17, ‘Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action,

2011,' FCCC/CP/2011/9/Add.1 (15 March 2012) [hereinafter 'Durban Platform'].

7 Decision 1/CP.18, 'Agreed outcome pursuant to the Bali Action Plan,' FCCC/CP/2012/8/Add.1 (28 February 2013), recital to Part I and recital to Part II.E.

8 Decision 1/CP.19, 'Further Advancing the Durban Platform,' FCCC/CP/2013/10/Add.1 (31 January 2014) [hereinafter 'Warsaw ADP Decision'], preambular recital 9.

9 Decision 1/CP.20, 'Lima Call for Climate Action,' FCCC/CP/2014/10/Add.1 (2 February 2015) [hereinafter 'Lima Call for Climate Action'], para 3.

10 E.g. UNFCCC, Art. 4(6). See also for an example in another MEA, Montreal Protocol 1987, 1522 UNTS 3 [hereinafter 'Montreal Protocol'], Art. 5(3)(a).

11 E.g. UNFCCC, Art. 2(5).

12 E.g. Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, in 'Report of the Conference of the Parties on its Seventh session, Addendum. Part two: Action taken by the Conference of the Parties at its Seventh Session,' Volume III, FCCC/CP/2001/13/Add.3 (21 January 2002).

13 E.g. UNFCCC, Art. 4 (3), See also for examples in other MEAs, Stockholm Convention on Persistent Organic Pollutants 2001, 2256 UNTS 119, Art. 13(2); Convention to Combat Desertification 1994, 1954 UNTS 3 [hereinafter 'Convention to Combat Desertification'], Art. 20(2); and Convention on Biological Diversity 1992, 1760 UNTS 79 [hereinafter 'CBD'], Art. 20.

14 E.g. UNFCCC, Art. 4(5), See also for examples in other MEAs, CBD, Art. 16; Convention to Combat Desertification, Art. 18; International Tropical Timber Agreement 1994, 1955 UNTS 81, Art. 27(2); Vienna Convention for the Protection of the Ozone Layer 1985, 1513 UNTS 293, Art. 4(2); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, 1673 UNTS 57, Art. 10(3); and, Montreal Protocol, Art. 10A.

15 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,' FCCC/CP/2010/7/Add.1 (15 March 2011);

16 See e.g. UNFCCC Art. 4(3) and 4 (5).

17 Warsaw ADP Decision, n 7, para 2(b).

18 See the INDC Submission Portal at http://unfccc.int/focus/indc_portal/items/8766.php (last accessed 8 April 2015).

19 Lima Call for Climate Action, n 8, para 14.

20 Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (8–13 February 2015), Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text, FCCC/ADP/2015/1 (25 February 2015) [hereinafter "Geneva Negotiating Text"].

21 See e.g. Geneva Negotiating Text, para 5 and 17.

22 See e.g. *ibid*, para 7 and 17.

23 See e.g. *ibid*, para 21.

24 See e.g. *ibid*, para 27.

25 See e.g. *ibid*, para 21.

26 See e.g. *ibid*, para 51.

27 See e.g. *ibid*, para 54.

28 See e.g. *ibid*, para 79 and 103.

29 See e.g. *ibid*, para 82.

30 See e.g. *ibid*, paras 130 and 132, and 138.

31 See e.g. *ibid*, para 141

32 See e.g. Submission by Swaziland on behalf of the African Group Under Workstream I of the ADP (8 October 2013), at: http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf (last accessed 13 April 2015).

33 *Ibid*, para 10.



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