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The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?

Sandrine Maljean-Dubois*

Among international environmental agreements, the early climate regime gave the best illustration of the principle of common but differentiated responsibilities. The principle has been frequently invoked in the delicate negotiations on the future climate regime, and its role has gradually evolved. The 2010 Cancún Agreements promoted a type of self-differentiation which tended to blur the distinction between developing and developed countries. In the post-2020 negotiations, the notion of intended nationally determined contributions to be communicated by each party took this approach further. However, differentiation was still at the core of discussions. The Paris Agreement represents a fine balance between the requirements of differentiation and ambition. Differentiation has grown both in flexibility and adaptability. The agreement marks a decisive step forward in the gradual blurring of country categories, and better takes into account diverse national circumstances, capabilities and vulnerabilities, all of which are by their very nature changing over time.

INTRODUCTION

Traditionally, international law is based on the sovereign equality of States. Being equally sovereign, all States have equal rights and obligations. That is why in most cases ‘uniform terms remain the rule’.¹ However, following decolonization, international economic law and international environmental law have applied differential treatment to different categories of States. Differential treatment ‘seeks to foster a form of substantive equality which cannot be achieved through reliance on sovereign equality in a world where states are unequal in many respects’.² The 1992 Rio Declaration recognized in its Principle 7 the common but differentiated responsibilities (CBDR) of States. This principle has since been given increasing recognition in the domain of international environmental law,³ with the early climate regime giving the best illustration of the principle.

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) is strongly embedded in the climate regime. It plays a structural role in the 1992 United Nations Framework Convention on Climate Change (UNFCCC)⁴ as well as in the 1997 Kyoto Protocol.⁵ These two treaties differentiate between ‘developed’ and ‘developing’ countries because of the historical contributions of developed countries to climate change and their greater capacity to implement strong mitigation policies. Accordingly, in the Convention, developed countries (listed in Annex I) have stronger obligations than

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¹ C.D. Stone, ‘Common but Differentiated Responsibilities in International Law’, 98:2 *American Journal of International Law* (2004), 276.

² R. Maguire, ‘The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments’, 7:4 *Carbon and Climate Law Review* (2013), 260.

³ Rio Declaration on Environment and Development, found in: Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992), Annex, Principle 7.

⁴ United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994) (‘UNFCCC’).

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997; in force 16 February 2005).

developing countries (non-Annex I countries). Developed countries and other parties included in Annex II also should provide new and additional financial resources to developing countries, and promote, facilitate and finance the transfer of, or access to, environmentally sound technologies and skills to developing country parties. Developing countries also benefit from a softer compliance regime. The implementation of the Convention by developing countries will depend on the effective implementation by developed countries of their commitments related to financial resources and transfer of technology, considering that ‘economic and social development and poverty eradication are the first and overriding priorities of the developing country and Parties’.⁶ The Kyoto Protocol cements this binary understanding of differentiation. It imposes quantified emission limitation and reduction commitments only on developed countries listed in its Annex B. One of the major reasons provided by the United States for not joining the Kyoto Protocol was exactly this bifurcation between Annex I (developed) countries and non-Annex I (developing) countries.⁷

These dividing lines have proven to be no longer suitable to account for the widespread diversity among States in a rapidly changing world, as characterized by the rise of emerging economies that are still listed under the official banner of developing countries. Under the heading of developing countries, we find countries at varying stages of development, and with different levels of vulnerability to climate change, different historical and current responsibilities for greenhouse gas concentrations in the atmosphere, and different capacities to mitigate and adapt to climate change.

A rigid and static dichotomy was always difficult to maintain. But seeking formal equality would have been a mistake too. In the context of international climate law, differentiation is a matter of both fairness and effectiveness. However, differentiation also requires flexibility and dynamism. During the post-2012 and post-2020 negotiations in the climate regime, the issue has been deeply contentious and has posed a serious hurdle to reaching agreement. As Rajamani argues, ‘[i]n part, the failures of states to reach a legal solution in Copenhagen can be attributed to deep disquiet over the nature and extent of differentiation in the climate regime’.⁸

Differentiation has been frequently invoked in these difficult negotiations, and its role has gradually evolved. Following the voluntary pledges of the Copenhagen Accord,⁹ the 2010 Cancún Agreements¹⁰ promoted a type of self-differentiation that tended to blur the distinction between developing and developed countries. In the negotiations in the context of the Ad Hoc Working Group on the Durban Platform on Enhanced Action (ADP), the notion of intended nationally determined contributions (INDCs) to be communicated by each party took this approach further. The 19th Conference of the Parties (COP19) in Warsaw¹¹ decided to put these INDCs at the heart of the future agreement. This did not end the debate, however.

⁶ UNFCCC, n. 4 above, Article 4.7.

⁷ J. Viñuales, ‘Balancing Effectiveness and Fairness in the Redesign of the Climate Change Regime’, 24:1 *Leiden Journal of International Law* (2011), 225.

⁸ L. Rajamani, ‘The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law’, 88:3 *International Affairs* (2012), 615.

⁹ UNFCCC, Decision 2/CP.15, Copenhagen Accord (UN Doc. FCCC/CP/2009/11/Add.1, 30 March 2010).

¹⁰ UNFCCC, 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 March 2011).

¹¹ UNFCCC, Decision 1/CP.19, Further Advancing the Durban Platform (UN Doc. FCCC/CP/2013/10/Add.1, 31 January 2014).

Differentiation (between who, how, until when and with what legal consequences) remained at the very core of the climate negotiations. Justice, equity and common but differentiated responsibilities were emphasized and promoted, with diametrically opposed views and goals. In the run-up to COP20 in Lima, many countries sought to renew what had become a somewhat circular and never-ending discussion. Several interesting submissions on the issue were made by parties, like the one of the Independent Association of Latin America and the Caribbean.¹² One can further mention the proposals from Brazil, which put forward the idea of progressive ‘concentric differentiation’,¹³ from Bolivia on a compound index of countries’ participation in the global emissions budget,¹⁴ and from South Africa, proposing the idea of an ‘equity reference framework’.¹⁵

Just before COP21 in Paris, the draft agreement reflected the divergent positions, with many different and often antagonistic options remaining in the draft text until the very end.¹⁶ The success of the negotiations under the ADP was to ‘depend, among other things, on a common understanding of equitable sharing of efforts and benefits’.¹⁷ This related not only to parties’ INDCs, but also to issues such as adaptation, finance, technology transfer, capacity building, loss and damage, and transparency and compliance.

Ultimately, the controversial issue of differentiation was dealt with in a subtle, creative and more dynamic manner, paving the way for the adoption of the Paris Agreement. The agreement restates the principle of differentiation, but renders it a more dynamic meaning. In its operational provisions, it moves from self-differentiation with respect to the central obligations to a more classical form of differential treatment – between categories of countries – with respect to the means of implementation. The Paris Agreement thus approaches differentiation in various ways in different parts of the agreement, carefully balancing what will be differentiated and what will be common in the post-2020 period. By doing so, parties have sought to find the right balance between bottom-up and top-down approaches in international climate cooperation.¹⁸

A MORE DYNAMIC APPROACH TO DIFFERENTIATION

¹² S. Maljean-Dubois and P. Moraga, ‘Le Principe des Responsabilités Communes mais Différenciées dans le Régime International du Climat’, 55:1-2 *Les Cahiers de droit* (2014), 83.

¹³ ‘Views of Brazil on the Elements of the New Agreement under the Convention Applicable to All Parties’ (6 November 2014), found at: <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf>.

¹⁴ ‘Proposal on the Compound Index of Countries’ Participation in the Global Emission Budget under the Convention Applicable to All Parties’ (20 November 2014), found at: <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/106_99_130617739555048267-submission%20bolivia%20ADP%20GLOBAL%20EMISSION%20BUDGET.pdf>.

¹⁵ ‘South African Submission on Mitigation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action’ (30 September 2013), found at: <https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_mitigation_20130930.pdf>.

¹⁶ Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action Work of the ADP Contact Group (23 October 2015), found at: <http://unfccc.int/meetings/bonn_oct_2015/session/9195.php>.

¹⁷ C. Voigt, ‘Equity in the 2015 Climate Agreement’, 4:1-2 *Climate Law* (2014), 50.

¹⁸ See also N. Dubash and L. Rajamani, ‘Beyond Copenhagen: Next Steps’, 10:2 *Climate Policy* (2010), 593.

The Durban mandate called for the adoption of ‘a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.¹⁹ However, as the Durban decision did not mention ‘differentiated responsibilities’ or ‘equity’, it was unclear what the meaning was of the phrase ‘applicable to all Parties’. To some, it signalled a shift towards a regime without differentiation. In any case, the formulation seemed to indicate the need to increase the collective level of ambition and to ensure the highest possible mitigation efforts by all parties. However, for many countries, the phrase ‘under the Convention’ meant implicitly engaging its principles, including the principle of CDRRC. The Doha COP decision confirmed this understanding, acknowledging ‘that the work of the Ad-Hoc Working Group on the Durban Platform for Enhanced Action shall be guided by the principles of the Convention’.²⁰ Moreover, in contrast to the Doha and Warsaw decisions, the 2014 Lima Call for Climate Action, adopted one year before the Paris conference, for the first time in an ADP outcome included an explicit reference to the CDRRC principle.²¹

Throughout the negotiations in 2015 and until the very end of the Paris COP, the draft agreement included many incompatible options. The final text of the Paris Agreement contains repeated and strategically located references to equity and the CDRRC principle. For instance, they are mentioned in the preamble, following a reference to the UNFCCC and its principles: ‘In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’.²² It is worth noting that it is the only principle of the Convention reaffirmed in this preambular provision. The principle is also mentioned in Article 2.2, just after having stated the objective of the Agreement: ‘This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’. These two provisions do not create new obligations for States. However, taken together, they will guide the interpretation of the whole agreement. From this perspective, the implications of their inclusion are potentially significant.

In addition, there are also several partial references to equity, CDRRC and different national circumstances or different national capacities. These references can be found in every core element of the agreement. For instance, decarbonization will occur ‘on the basis of equity’.²³ National contributions are to be based on CDRRC, as are long-term low greenhouse gas emission development strategies.²⁴ The transparency framework will take into account parties’ different capacities.²⁵ And the global stocktake will be carried out in the light of equity.²⁶ The implementation and compliance mechanism ‘shall pay particular attention to respective national capabilities and circumstances of Parties’.²⁷ As such, the references are at the very heart of the agreement.

¹⁹ UNFCCC, Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012), at paragraph 7; see also *ibid.*, at preamble and paragraph 2.

²⁰ UNFCCC, Decision 2/CP.18, Advancing the Durban Platform (UN Doc. FCCC/CP/2012/8/Add.1, 28 February 2013).

²¹ UNFCCC, Decision 1/CP.20, Lima Call for Climate Action (UN Doc. FCCC/CP/2014/10/Add.1, 2 February 2015), at paragraph 3.

²² Paris Agreement (Paris, 12 December 2015; not yet in force), at preamble.

²³ *Ibid.*, Article 4.1.

²⁴ *Ibid.*, Article 4.3-4.4 and 4.19..

²⁵ *Ibid.*, Article 13.1.

²⁶ *Ibid.*, Article 14.1.

²⁷ *Ibid.*, Article 15.2.

However, even though equity and CDBRRC are strongly reaffirmed throughout the agreement, they also take on a new meaning. Indeed, the Paris Agreement wording is different from the UNFCCC formula. In the preamble and in Article 2.2, we find the full expression of the ‘principle of equity and common but differentiated responsibilities and respective capabilities’, but compared to the previous climate treaties, there is the addition of ‘in the light of different national circumstances’. This qualification appeared for the first time in the US-China Joint Announcement on Climate Change,²⁸ adopted in November 2014 just before the COP in Lima. Unsurprisingly, this formula inspired Decision 1/CP.20, in which the COP ‘[u]nderscores its commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances’.²⁹ This new formula could increase the range of factors that may serve as a basis for determining differentiation.³⁰ This clarification is particularly meaningful for developed countries, which consider that it opens the door for a flexible and evolutionary interpretation of the CDBRRC, as national (political, social and economic) circumstances are themselves, by definition, evolving. The new formulation represents a compromise between Northern and Southern countries: it reaffirms the original principle but specifies that it is evolutionary in nature.

Regarding the enhancement of developing countries’ mitigation efforts, ‘in the light of different national circumstances’ is simply mentioned, without the CDBRRC principle preceding it. Once again, it marks the compromise between developed and developing countries. Their obligations are differentiated: ‘Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances’.³¹ In other provisions, parties put forward equity without mentioning CDBRRC (Articles 4 and 14). In other parts, the agreement refers to CDBRRC without equity (Article 4.3) or even only to ‘different capacities’ (Article 13) or ‘respective national capabilities and circumstances of Parties’ (Article 15).

Thus, compared to the previous climate agreements, there is a more flexible differentiation in expressions of the CDBRRC principle, depending on the place where it is mentioned and the subject matter. The Paris Agreement establishes a sliding scale, which is evolutionary in nature. Thus, the more dynamic phrasing of CDBRRC is operationalized by the shift from a binary to a more subtle and differentiation between parties and categories of parties, evolving over time.

A MORE SUBTLE AND EVOLUTIONARY DIFFERENTIATION BETWEEN CATEGORIES OF STATES

²⁸ White House, ‘U.S.-China Joint Announcement on Climate Change’ (11 November 2014), found at: <<https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>>, at paragraph 2.

²⁹ Decision 1/CP.20, n. 21 above, at paragraph 3.

³⁰ M. Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’, 5:1 *Climate Law* (2016, forthcoming).

³¹ Paris Agreement, n. 22 above, Article 4.4.

With respect to its central obligations, on mitigation and adaptation, the Paris Agreement is largely based on self-differentiation. Self-differentiation can be considered the ultimate form of differential treatment, because there are as many different situations as there are parties. But differentiation in the Paris Agreement is not completely limited to self-differentiation. The treaty also differentiates between categories of States, although old categories are being blurred. Both self-differentiation and the mentioning of categories of States give rise not to less but more differentiation. This signals a shift in our understanding of ‘differentiation’ in international environmental law.

NATIONALLY DETERMINED CONTRIBUTIONS: THE REALM OF SELF-DIFFERENTIATION

The distinction between Annex I countries and non-Annex I countries for the purposes of defining obligations was not sufficiently sensitive to variations in the level of emissions, human development, financial and technological capabilities, population and other criteria potentially relevant for a fair distribution of the benefits and costs of addressing climate change.³² This model was no longer suitable for the wide diversity of prevailing national situations and circumstances in a more heterogeneous world, signified particularly by the rise of emerging economies such as China, Brazil or South Africa. It also had the disadvantage of not being sufficiently evolutionary to reflect the rapidly changing world. But shortly after COP13 in Bali, the definition of new annexes appeared to be both unachievable and, in part, undesirable.

On the road to Copenhagen, the challenge was determining how to move beyond the UNFCCC’s annexes, which reflected a bipolar, rigid and static type of differentiation. To leave behind what became a stale debate, the Copenhagen Accord and the Cancún Agreements creatively opted for a self-differentiated climate regime for the pre-2020 period, at least for national pledges on mitigation. Self-differentiation is the result of a fully bottom-up (and voluntary) process of self-determination of national pledges. The international regime does not prescribe the nature, type and stringency of mitigation commitments or actions to be taken by countries.³³ Ultimately, self-determination means no more differentiation for developing countries as a single group. But it results in more not less differentiation, as it allows for each country to be treated differently. The same shift can also be identified in the field of international trade law.³⁴

After COP19 in Warsaw, it became increasingly clear that the post-2020 regime would adopt the same key features. COP19 agreed to invite ‘all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions’.³⁵ From this point of view, there was no difference between countries from the global North or South. The decision in Warsaw went beyond the Copenhagen Accord/Cancún Agreements, in which the distinction between developed and developing countries was already softened (as all were invited to mitigate their emissions). but nevertheless still existed. In Copenhagen/Cancún,

³² See J. Viñuales, n. 7 above, at 225.

³³ D. Bodansky and L. Rajamani, ‘The Evolution and Governance Architecture of the Climate Change Regime’, in: D. Sprinz and U. Luterbacher (eds.), *International Relations and Global Climate Change: New Perspectives*, 2nd edn (MIT Press, 2016, forthcoming).

³⁴ J. Pauwelyn, ‘The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes’, 22:1 *Review of European, Comparative and International Environmental Law* (2013), 29.

³⁵ Decision 1/CP.19, n. 11 above, at paragraph 2.

countries were invited to communicate a ‘quantified economy-wide emission reduction targets’, whereas developing countries were merely encouraged to submit ‘nationally appropriate mitigation actions’. According to Rajamani, these instruments rendered ‘the issue of differentiation for developing countries increasingly irrelevant’.³⁶

Moving away from the original binary distinction is a major step forward. The decision adopted at COP19 was strongly related to the mandate of the ADP, insisting several times on the necessity of ‘ensuring the highest possible mitigation efforts by all Parties’, and calling for the adoption for ‘a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.³⁷ Read in conjunction with the phrase ‘under the Convention’, this meant that all parties were required to undertake mitigation efforts. But it did not mean that their content or the level would be the same.

In the run-up to Paris, the challenge was to design an agreement that would move beyond the binary distinction of the UNFCCC, which had become blurred by the Cancún Agreements, but nonetheless still existed. The Paris Agreement had to provide sufficient space for differentiation if it was to be agreed by developing countries. As suggested by Rajamani, ‘a wholesale rejection of differential treatment, and of the “equity” concerns that animate it, would destabilize the normative core of the regime as well as render the climate regime unattractive to key players like India’.³⁸

Unsurprisingly, the Paris Agreement is based on self-differentiation and uses the tool of the INDCs conceived in Warsaw, losing the ‘I’ of ‘intended’ in the process, and moving towards ‘nationally determined contributions’ (NDCs). The NDCs are the central piece of the treaty even if they are not formally part of it. They will be recorded in a public registry maintained by the UNFCCC Secretariat. However, each party has the obligation to ‘prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions’.³⁹ NDCs are by definition respectful of national sovereignty. That is the key to its success: 188 contributions were communicated to the UNFCCC Secretariat in the run-up or just after the COP 21, covering more than 98% of world emissions.⁴⁰ They cover far more than the countries that had made commitments under the second period of the Kyoto Protocol (38 industrialized countries), and also much more than those ‘committed’ to take mitigation action under the Cancún Agreements (43 industrialized countries and 48 developed countries). This approach thus succeeded in attracting broader participation.

For the time being, parties have a lot of flexibility in the design of their NDC. COP20 failed in disciplining and circumscribing parties in this exercise (with respect to INDCs), and the Paris Agreement does not offer more detailed guidance for NDCs. Parties to the Paris Agreement will have to provide more guidance, at least in order to ensure the clarity and comparability of NDCs.⁴¹ Meanwhile, each party’s NDC will have to ‘reflect its highest

³⁶ See L. Rajamani, n. 8 above, at 617.

³⁷ Decision 1/CP.17, n. 19 above, at paragraph 7; see also *ibid.*, at preamble and paragraph 2.

³⁸ See L. Rajamani, n. 8 above, at 605.

³⁹ Paris Agreement, n. 22 above, Article 4.2. See also D. Bodansky, ‘The Legal Character of the Paris Agreement’, 25:2 *Review of European, Comparative and International Environmental Law* (2016).

⁴⁰ See <<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>>.

⁴¹ UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement (UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016), at paragraphs 26-28.

possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.⁴² Developing countries can argue for an equitable burden-sharing in the determination of their national contributions, and can claim that the parties should take equity and justice concerns into consideration in adopting further guidance in the future.⁴³ That is to say that self-differentiation has to be interpreted in light of the principle of common but differentiated responsibilities. Developed countries overcame the initial static interpretation of CDRRC through a political compromise introducing a dynamic element, i.e. the phrase 'in the light of different national circumstances'. But there is no agreement on objective or evidence-based criteria, and there are no operational indicators or a common burden-sharing formula. Leaving aside a lot of concrete and interesting parties' contributions to a never-ending debate,⁴⁴ the agreement does not clarify what is equitable at a given time, nor what the CDRRC principle means in a given situation. Neither has it specified common procedures to achieve this end. Countries have to self-assess the fairness of their self-determined contribution, which is undoubtedly a subjective exercise. However, that will not stop nongovernmental organizations, academics and more broadly civil society to fuel the debate, even at the domestic level, by carrying out such an assessment of both the ambition and fairness of national contributions.⁴⁵

One should add that the Agreement contains quite a few contextual norms, for instance using the words 'to the extent possible', 'as appropriate', 'where appropriate', or 'as soon as possible'. Such terms are also a way of allowing parties a large amount discretion, and thus a certain flexibility in their implementation.

DIFFERENTIATING BETWEEN CATEGORIES OF STATES: THE BLURRING EFFECT OF THE PARIS AGREEMENT

The Paris Agreement is not just about self-differentiation. The Paris Agreement still provides for distinct categories of countries. Developing countries are mentioned 36 times as such in the treaty in order to legitimate, allow or organize special treatment compared to developed countries.⁴⁶ But while these categories may still be relevant, they are nowhere defined. These categories are no longer based on Annexes I or II of the UNFCCC, which have been implicitly abandoned, allowing for both full self-determination and flexibility. From this point of view, the Agreement extends the approach followed by the 2007 Bali Action Plan and the 2009 Copenhagen Accord, going beyond the initial rigid annex-based dichotomy. The Paris Agreement, in a similar way to the Bali Action Plan and the Copenhagen Accord, and in accordance with the UNFCCC,⁴⁷ reserves a special place for 'developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change', as well as the 'least developed countries and small island developing States',⁴⁸ or 'countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States'.⁴⁹

⁴² Paris Agreement, n. 22 above, Article 4.3.

⁴³ Decision 1/CP.21, n. 41 above, at paragraph 26.

⁴⁴ See n. 13-15 above.

⁴⁵ See, for instance, the 'CAIT Equity Explorer' developed by the World Resources Institute, found at: <<http://cait.wri.org/equity/>>; and ActionAid *et al.*, CSO Equity Review (2015), found at: <http://civilsocietyreview.org/wp-content/uploads/2015/11/CSO_FullReport.pdf>.

⁴⁶ Paris Agreement, n. 22 above, at preamble, Articles 3, 4.1, 4.4-4.6, 4.15, 5.2, 6.6, 7.2-7.3, 7.6-7.7, 7.10, 7.13-7.14, 9.1, 9.3-9.5, 9.7, 9.9, 10.5-10.6, 11.1-11.4, 13.2-13.3, 13.9-13.12, 13.14-13.15.

⁴⁷ See in particular *ibid.*, Articles 3.2 and 4.8.

⁴⁸ Paris Agreement, n. 22 above, Articles 4, 9.9 and 13.

⁴⁹ *Ibid.*, Article 11.

In practice, even if there is no reference to the UNFCCC annexes, one can assume that they can provide when necessary an important – but not sacrosanct and intangible – point of reference.

What is new and more interesting is the blurring of these categories of which we can identify at least two indications. First, regarding finance, the dichotomy between developing countries and developed countries is replaced by a trichotomy, including also ‘other parties’.⁵⁰ It indicates the birth of a new group in between developing and developed countries. This category may relate to emerging countries. However, there is not a single and clear criterion to define emerging countries, let alone an official list. In the Paris Agreement, belonging to ‘other countries’ is a matter of self-determination. Parties in a ‘position’ or ‘with capacity’ to do so were other options explored in the negotiations, but these options were strongly rejected by developing countries fearing assessments of who is in a ‘position’ or who has the ‘capacity’ to do so. In the end, this inclusive formula captures countries well beyond emerging countries and as different as Mexico, Peru, Colombia, Indonesia, Vietnam or Mongolia, which all have pledged money to the Green Climate Fund.⁵¹

These ‘other countries’ do not have obligations. They are simply and gently ‘encouraged to provide or continue to provide such support voluntarily’.⁵² It is worth noting that the UNFCCC provisions were aimed at ‘developed country parties and other developed parties included in Annex I’, or ‘developed country parties and other developed parties included in Annex II’. In both cases, the categories extended beyond developing countries, but their content was collectively agreed in the form of a list, which is no longer the case.

Second, a breach has been opened by Article 13 on transparency. Indeed this provision refers to ‘those developing country Parties that need it in the light of their capacities’.⁵³ This is to say that there will be a differential treatment within the category of developing countries: not all of them need, in principle, such preferential treatment. It will depend on their capacities, which are themselves evolutionary. This provision could probably benefit the least developed countries and small island developing States.⁵⁴ But once more the formula leaves the door open for a distinction within developing countries, between for instance emerging countries and others.

NUANCED DIFFERENTIATION ACCORDING TO TOPICS AND ELEMENTS OF THE PARIS AGREEMENT

The Paris Agreement must be understood and interpreted in the light of equity and the CBDRRC, cutting across all of its elements. Furthermore, most of its provisions open the door to fine-grained differentiation. From this perspective, like the UNFCCC and, in some cases, the Kyoto Protocol, the Paris Agreement uses the whole range of differentiation measures: softer, delayed and conditional central obligations, softer approaches to transparency and compliance with softer and delayed reporting, compliance schedules,

⁵⁰ Ibid., Article 9.2. It is noteworthy that the last sentence of paragraph 4 of Decision 1/CP.20, n. 21 above, already recognized ‘complementary support by other Parties’, indicating for the first time that developing countries could also play a role in the provision of support.

⁵¹ See <<http://www.greenclimate.fund/contributions/pledge-tracker#states>>.

⁵² Paris Agreement, n. 22 above, Article 9.2.

⁵³ Ibid., Article 13.2, 13.11; and Decision 1/CP.21, n. 41 above, at paragraph 93(b).

⁵⁴ See in particular Paris Agreement, n. 22 above, Article 13.3.

financial and technical assistance.⁵⁵ But what is new is that the degree of differentiation varies according to the various elements and topics of the Agreement, being more or less implicit, more or less stringent. The balance between what is common and what is differentiated has been carefully addressed, resulting in a much more nuanced picture than in the previous regime. As a result, each section of the Paris Agreement takes a different approach to differentiation.

MITIGATION

Regarding mitigation, the Agreement adopts a nuanced approach. On the one hand, it sets general provisions common to developed and developing countries: obligations are mostly the same for all parties. On the other hand, it complements them by giving flexibilities to developing countries, and specifically to least-developed countries, in their implementation. The Agreement includes a global mitigation trajectory that is applicable to all parties, but the peaking of emissions ‘will take longer for developing country Parties’; moreover, the emissions trajectory will be determined ‘on the basis of equity’.⁵⁶ The central obligation of the Agreement, the obligation to prepare, communicate and maintain successive nationally determined contributions, applies to all parties. However, the obligation to increase efforts over time is conditional upon support provided by developed countries.⁵⁷ Further, each party’s NDC will ‘reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’.⁵⁸ Even if the provision creates no new obligation, developed country parties ‘should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances’.⁵⁹ Even though this will only materialize over time, this provision represents a real shift compared to the UNFCCC or the Kyoto Protocol, which did not prescribe mitigation efforts for developing countries. Indeed, the provision has to be read in conjunction with the requirement of the ‘highest possible ambition’ of Article 4.3. Read together, these two provisions result in a nuanced and subtle differentiation, combining a common obligation to contribute to the long-term temperature goal of the Agreement, with the highest possible ambition of each party, taking into account their common but differentiated responsibilities, capabilities and national circumstances. Measures have to be proportionate to each individual case and thus may change over time and space. This flexibility is reminiscent of the 2011 Advisory Opinion of the International Tribunal for the Law of the Sea, in which it considered, further to the Rio Declaration, that the precautionary approach, within the standard of due diligence, shall be widely applied by States according to their capabilities.⁶⁰ In addition, support shall be provided to developing

⁵⁵ L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006), Chapters 2 and 6.

⁵⁶ Paris Agreement, n. 22 above, Article 4.1.

⁵⁷ Ibid., Article 3; see also *ibid.*, Article 4.5.

⁵⁸ Ibid., Article 4.3.

⁵⁹ Ibid., Article 4.4.

⁶⁰ International Tribunal for the Law of the Sea, 1 February 2011, *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, found at: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>, at paragraphs 151-163. According to the Tribunal, ‘[f]urthermore, the reference to “capabilities” is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields’. *Ibid.*, at paragraph 162.

countries for implementing the provision.⁶¹ Lastly, '[t]he least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances'.⁶²

ADAPTATION

The provisions on adaptation are more uniform. They concern 'parties' in general or 'each party', with no specific obligations for developed countries including with respect to 'loss and damage' (Article 8). However, they do give preferential treatment to developing countries or to 'developing country Parties that are particularly vulnerable to the adverse effects of climate change'.⁶³ In the same way, '[c]ontinuous and enhanced international support shall be provided to developing country Parties for' adaptation.⁶⁴ Emphasis is put on the different vulnerabilities and capacities of countries in adapting to climate impacts. However, there is no official list of the most vulnerable countries and the assessment of vulnerability to climate change is much debated.⁶⁵ One may suppose that, at the very least, LDCs and SIDS fall within this category.

FINANCE AND SUPPORT

Regarding finance, Article 9 is constructed in a way that resembles Article 4. The differentiation is very clearly expressed. Developed countries have strong obligations: 'Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation'; and '[a]s part of a global effort, developed country Parties should continue to take the lead'.⁶⁶ 'Other Parties' are merely 'encouraged to provide or continue to provide such support voluntarily'.⁶⁷ 'Other parties' could further benefit from delayed reporting schedules and obligations.⁶⁸

Article 3 also recognizes 'the need to support developing country Parties for the effective implementation of this Agreement'.⁶⁹ However, compared to the UNFCCC, the agreement at no point states that developing countries' measures and actions depend on international support.⁷⁰ Instead, the Agreement specifies that 'enhanced support for developing country Parties will allow for higher ambition in their actions'.⁷¹

TRANSPARENCY AND REVIEW

⁶¹ Paris Agreement, n. 22 above, Article 4.5.

⁶² Ibid., 4.6.

⁶³ Ibid., Article 7.2 and 7.6.

⁶⁴ Ibid., Article 7.13.

⁶⁵ See, for example, CLIMAPS, 'Who Deserves To Be Funded?', found at: <<http://climaps.eu/#!/narrative/who-deserves-to-be-funded>>.

⁶⁶ Paris Agreement, n. 22 above, Article 9.1 and 9.3.

⁶⁷ Ibid., Article 9.2.

⁶⁸ Ibid., Article 9.7.

⁶⁹ Ibid., Article 3.

⁷⁰ UNFCCC, n. 4 above, Article 4.7 states: 'The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.'

⁷¹ Paris Agreement, n. 22 above, Article 4.5.

For the transparency framework, a bifurcated system was rejected. It is the part of the agreement where the obligations of developed and developing countries are converging the most, even if developing countries, and in particular the most vulnerable among them, can rest assured that their special needs and circumstances will be considered. All ‘Parties shall account for their nationally determined contributions’,⁷² even if the transparency framework takes into account parties’ different capacities. It recognizes ‘the special circumstances of the least developed countries and small island developing States’, and suggest to ‘avoid placing undue burden on Parties’.⁷³ The transparency requirements vary throughout the text.⁷⁴ But the meeting of the parties will adopt ‘common’ modalities, procedures and guidelines for the transparency of action and support.⁷⁵ In addition, ‘[f]or those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs’.⁷⁶ As another sign of flexibility, the Agreement states that ‘[t]he review shall pay particular attention to the respective national capabilities and circumstances of developing country Parties’.⁷⁷ Moreover, support for the implementation of the transparency framework and the building of capacity is to be provided to developing countries.⁷⁸

Although the global stocktake assessing the collective progress towards achieving the purpose of the agreement will cover all parties, it will be done in the light of equity.⁷⁹ And in the provision on the new implementation and compliance mechanism, the agreement notes that the future compliance committee ‘shall pay particular attention to the respective national capabilities and circumstances of Parties’.⁸⁰ Here it is worth noting that the Paris Agreement puts in place only the general principles. The transparency requirements will have to be specified by subsequent decisions, and the devil – also with respect to differentiation – is as always in the details.

The Paris Agreement could be compared from this point of view to the very convoluted formula according to which the Sustainable Development Goals and targets are ‘global in nature and universally applicable, taking into account different national realities, capacities and levels of development and respecting national policies and priorities’.⁸¹ A balance between the requirements of universality and differentiation and specificity are similarly sought in this context.

THE NEED TO COUNTERBALANCE THE FLEXIBILITY BY A ROBUST COMMON FRAMEWORK

The flexibility of the approach adopted by the Paris Agreement is a precious asset. But, once aggregated, national pledges have little chance to put the world on the right track. The Copenhagen Accord mentions the objective to hold the increase in global temperature below

⁷² Ibid., Article 4.13.

⁷³ Ibid., Article 13.3.

⁷⁴ See for instance, *ibid.*, Article 9.

⁷⁵ Ibid., Article 13.13.

⁷⁶ Ibid., Article 13.11.

⁷⁷ Ibid., Article 13.12.

⁷⁸ Ibid., Article 13.14-15.

⁷⁹ Ibid., Article 14.1.

⁸⁰ Ibid., Article 15.2.

⁸¹ Transforming Our World: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1, 25 September 2015).

2 °C.⁸² But the 2020 emission levels that would result from national pledges are far from what science tells us would keep average temperature increases on track to stay below 2 °C by the end of the century.⁸³ For the post-2020 period, the INDCs submitted in 2015 as part of the preparation for COP21 demonstrate a significant increase in ambition. However, this would still put long-term temperatures on track for a significant rise in temperatures that would lead to serious climate impacts.⁸⁴ We definitely needed to set up a more legally robust regime for the post-2020 era, encouraging countries to gradually increase the level of ambition of their contributions, in line with the ambitious objectives of the Paris Agreement.

The main issue in Paris was to counterbalance the flexibility given to parties by its subtle but extremely differentiated approach with a robust common framework. It was the only way to reintroduce some top-down elements in a bottom-up regime, and to offer adequate guarantees for the implementation of the agreement: to follow-up parties' implementation, to ensure that we are collectively on track and to build confidence between parties. Because of the centrality of NDCs, the design of this framework (transparency, global stocktake, compliance) was the real key point of the COP21.⁸⁵ Top-down and bottom-up approaches needed to converge in the Paris Agreement.

From this point of view, Paris can be seen as a success because, as Rajamani puts it, 'the agreement puts in place strong top-down elements that are expected to discipline self-determination and enhance ambition'.⁸⁶ Indeed, even if the Paris Agreement is based on self-differentiation, like the Copenhagen Accord and Cancún Agreements, it goes further than the pre-2020 regime. First, the post-2020 regime is rooted in a treaty, which makes a difference from a strict legal point of view. Whether the Paris Agreement will live up to its potential will depend on the substance of future decisions by the parties. A major step to a more ambitious framework for national contributions is called for. All parties accept the global mitigation and adaptation goals and the direction of travel towards decarbonization. All parties also agree to make (and implement) successive and increasingly ambitious contributions, following the same five-yearly schedule. All parties are further subject to the transparency framework and the implementation and compliance mechanism, as well as the dispute settlement provision. This common framework, constituted by common principles and common provisions, can help to ensure that within a very flexible framework, 'similar countries undertake similar responsibilities'.⁸⁷

CONCLUSION

The provisions of the Paris Agreement allow for differentiation between countries in several ways, but at the same time differentiation has grown in flexibility. The Paris Agreement marks a decisive step forward in the gradual process of blurring the categories of countries. This shift renders the UNFCCC annexes irrelevant. Moving beyond the UNFCCC's bifurcated differentiation, the agreement better takes into account diverse national circumstances, capabilities and vulnerabilities, resulting not in less but in more

⁸² Decision 2/CP.15, n. 9 above, Annex, at paragraph 2.

⁸³ United Nations Environment Programme (UNEP), *Emissions Gap Report 2015* (UNEP, 2015), at xv.

⁸⁴ UNFCCC, Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions, Note by the secretariat (UN Doc. FCCC/CP/2015/7, 30 October 2015).

⁸⁵ See also C. Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement', *25:2 Review of European, Comparative and International Environmental Law* (2016).

⁸⁶ See L. Rajamani, 'Paris Triumph', *The Indian Express* (16 December 2015).

⁸⁷ IDDRI, 'What to Look out for in the Paris Agreement: 10 Key Points' (17 November 2015), found at: <<http://www.blog-iddri.org/2015/11/17/what-to-look-out-for-in-the-paris-agreement-10-key-points/>>.

differentiation. Furthermore, this approach does not herald the end of categories of States. They are sustained, which is important for developing countries to continue to act as a group and preserve their bargaining power. Equity requires also an even more favourable treatment of least-developing and vulnerable countries. Emerging countries are now taken into account, even if they are not explicitly recognized as a new category. And in those cases in which the Paris Agreement uses country categories, the reference is a flexible and dynamic one, not constrained by structured annexes that are part of a treaty and as such difficult to amend. This basic structure, supplemented by the principles of progression and of the highest possible ambition for NDCs, raises hopes that the level of ambition of collective action will further improve over time.

This is all the more so, as the flexibilities given to parties are counterbalanced by a relatively robust common framework, and did not go at the cost of ambition, which was a genuine risk.⁸⁸ Parties are encouraged to increase the level of ambition of their contributions in various ways. As Rajamani has argued, ‘[t]he relationship between ambition, differentiation and support was clear from the start – the greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries as well as for financial resources to support ambitious efforts’.⁸⁹ From this perspective, with its sophisticated design, the Paris Agreement has found a good balance between ambition, differentiation and support. It breaks down the barrier represented by endless discussions on a new burden-sharing arrangement, and offers a new vision of fairness as a matter of effectiveness.⁹⁰ Based on multiple and moving categories, self-identification and self-determination, it also introduces some uncertainties. But this pragmatic approach has been the price to be paid to avoid a race to the bottom.

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⁸⁸ See L. Rajamani, n. 8 above, at 616-617.

⁸⁹ See L. Rajamani, n. 55 above. See also L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’, *International and Comparative Law Quarterly* (2016, forthcoming).

⁹⁰ P. Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003), at 172.