# Differentiation in the Emerging Climate Regime

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*The climate regime, comprising the Framework Convention on Climate Change of 1992 and the Kyoto Protocol of 1997, contains elements of prescription for and leadership of developed countries and differentiation in favor of developing countries. The nature and extent of differentiation in favor of developing countries in the climate regime, however, has remained contentious through the years. While there is a shared understanding among states that they have common but differentiated responsibilities in addressing climate change, there is little agreement on the formulae for differentiating between states in doing so. This Article argues that the outcomes of international climate negotiations in recent years, in particular the Copenhagen Accord of 2009 and the Cancun Agreements of 2010, offer a distinctive vision of differential treatment. Through these instruments, the international community appears to be moving from differentiation in favor of developing countries towards differentiation or flexibility for all countries, as well as towards increasing parallelism between developed and developing countries. The Durban Platform of 2011, which launches a new process to negotiate a post-2020 agreement, confirms this trend, setting the scene for the erosion of differential treatment in the future/post-2020 climate regime. This Article explores the nature of differentiation, as it is evolving, in the emerging climate regime, in particular as it relates to mitigation obligations, and the impact this is likely to have on the design, ambition, reach and rigor of the emerging climate regime.*

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## Introduction

One of the fundamental premises of the United Nations Framework Convention on Climate Change (UNFCCC) of 1992,[1] and of its Kyoto Protocol of 1997,[2] is that leadership from developed countries in combination with differential treatment in favor of developing countries is the equitable basis on which the international response to climate change must be structured. This stems from a shared understanding that the bulk of the historical greenhouse gases (GHGs) in the atmosphere can be traced to industrialized countries, and that, in any case, developing countries face resource and capacity constraints, besides having pressing development needs, that limit the nature and extent of their participation in the climate regime. The tone, intent and design of the UNFCCC and the Kyoto Protocol, therefore, contain elements of prescription (for developed countries), leadership (of developed countries), and differentiation (in favor of developing countries). The nature and extent of differential treatment in the climate regime, however, has remained contentious through the years. While there is a shared understanding among states that a global climate regime is necessary, and that they have common but differentiated responsibilities in addressing climate change, there is little agreement on the formulae for differentiating between states in doing so.

The Copenhagen Accord of 2009[3] and the Cancun Agreements of 2010[4] offer a distinctive vision of differential treatment. Through these instruments, the international community appears to be moving from differential treatment

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1 United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

2 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

3 Report of the Conference of the Parties on Its Fifteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session, *Decision 2/CP.15: Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) [hereinafter *Copenhagen Accord*].

4 Report of the Conference of the Parties on Its Sixteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session, *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*, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter *Cancun Agreements LCA*]; Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Sixth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Sixth Session, *Decision 1/CMP.6 The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol at Its*

for developing countries towards differentiation or flexibility for all countries, as well as towards increasing parallelism between developed and developing countries in some respects. The Durban Platform of 2011,[5] which launches a new process to negotiate a post-2020 agreement, confirms this trend, setting the scene for the erosion of differential treatment in the future/post-2020 climate regime. This Article explores the nature of differential treatment as it is evolving in the emerging climate regime, in particular as it relates to mitigation obligations, and the impact this is likely to have on the design, ambition, reach and rigor of the emerging climate regime.

This Article begins with a brief overview of the nature and extent of differentiation in the UNFCCC and its Kyoto Protocol, and then proceeds in Parts II-V to discuss the gradual erosion of differentiation through various milestones in the recent years of the climate change negotiations, including in particular the Bali Action Plan of 2007, the Copenhagen Accord of 2009, the Cancun Agreements of 2010, and the Durban Platform of 2011. Part VI then seeks to address the gradual disenchantment with the Kyoto Protocol of 1997, which complements the overarching narrative tracing a decline in the fortunes of differential treatment. Part VII explores the implications of such erosion in differentiation for the emerging climate regime, and the last Part concludes.

## I. Differentiation in the UNFCCC and Kyoto Protocol

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) has, from the inception of the climate dialogue, underpinned the efforts of the international community to address climate change. At the Second World Climate Conference in 1990, countries recognized that the "principle of equity and common but differentiated responsibility of countries should be the basis of any global response to climate change."[6] This principle finds reflection in the

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*Fifteenth Session*, U.N. Doc. FCCC/KP/CMP/2010/12/Add.1 (Mar. 15, 2011) [hereinafter *Cancun Agreements KP*].

5 Report of the Conference of the Parties on Its Seventeenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session, *Decision 1/CP.17: Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2011) [hereinafter *Durban Platform*].

6 Ministerial Declaration of the Second World Climate Conference, Geneva ¶ 5 (Nov. 6-7, 1990); *see also* Noordwijk Declaration on Atmospheric Pollution and Climatic Change (Nov. 7, 1989), *reprinted in* 5 Am. U. J. Int'l L. & Pol'y

UNFCCC,[7] and is the basis of the burden-sharing arrangements crafted under the UNFCCC and its Kyoto Protocol.[8] The CBDRRC principle is also highlighted in numerous UNFCCC Conference of Parties (COP) decisions,[9] including the Bali Action Plan of 2007[10] and the Cancun Agreements of 2010.[11] It also features in the controversial Copenhagen Accord of 2009.[12]

The principle of CBDRRC is reflected in norms of differential treatment that can be categorized into the following. First, provisions that differentiate between developed and developing countries with respect to the central obligations contained in the treaty, such as emissions reduction targets and timetables.[13] Second, provisions that differentiate between developed and developing countries with respect to implementation,[14] such as delayed compliance schedules,[15] permission to adopt subsequent base years,[16] delayed reporting schedules,[17] and softer approaches to noncompliance.[18] Third, provisions that grant assistance to developing countries, *inter alia*, financial[19] and technological.[20]

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592 (1990); Hague Declaration on the Environment, 28 I.L.M. 1308 (Mar. 11, 1989).

7 UNFCCC, *supra* note 1.

8 Kyoto Protocol, *supra* note 2.

9 *See, e.g.*, Report of the Conference of Parties on Its First Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its First Session, *Decision 1/CP.1: The 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*, U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995) [hereinafter *Berlin Mandate*].

10 Report of the Conference of the Parties on Its Thirteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session, *Decision 1/CP.13: Bali Action Plan*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter *Bali Action Plan*].

11 *Cancun Agreements LCA*, *supra* note 4; *Cancun Agreements KP*, *supra* note 4.

12 *Copenhagen Accord*, *supra* note 3.

13 *See, e.g.*, Kyoto Protocol, *supra* note 2, art. 3.

14 *See, e.g.*, UNFCCC, *supra* note 1 (Preambular Provisions).

15 *See, e.g.*, Kyoto Protocol, *supra* note 2, art. 3(5).

16 *See, e.g.*, *id.*

17 *See, e.g.*, UNFCCC, *supra* note 1, art. 2(5).

18 *See, e.g.*, 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, *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, U.N. Doc. FCCC/CP/2001/13/Add.3, vol. III (Jan. 21, 2002).

19 *See, e.g.*, UNFCCC, *supra* note 1, art. 4(3).

20 *See, e.g.*, *id.* art. 4(5).

Of these, the provisions that differentiate between developed and developing countries with respect to central obligations — such that developed countries have targets and timetables for GHG mitigation, while developing countries do not[21] — are the most disputed. The Kyoto Protocol that endorses such differentiation in favor of developing countries, thereby capturing a unique model of developed country leadership, yet to be seen elsewhere in international law, has proven deeply contentious as a result. The United States' rejection of the Kyoto Protocol in 2001 can be sourced, in part, to such differentiation in the Kyoto Protocol.[22]

Although the Kyoto model of differentiation has always been contentious, it is only in the recent past, as Parties have begun to negotiate the future climate regime, that a serious erosion in differential treatment is in evidence. The trajectory that the negotiations have taken, from the conferences in Bali in 2007 to Durban in 2011, is of particular interest.

## II. The Bali Action Plan, 2007: Early Signs of Parallelism

The Bali Action Plan of 2007,[23] which launched a process to reach an "agreed outcome" on long-term cooperative action, contained the early signs of erosion to come. In a bid to bring the United States back into the fold, the Bali Action Plan permits developed countries to take measurable, reportable and verifiable commitments *or* actions, which may or may not include quantified emission limitation and reduction objectives.[24] It also permits an assessment of developed countries' actions benchmarked against efforts rather than results.[25]

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21 Kyoto Protocol, *supra* note 2, art. 3.

22 Letter from George W. Bush, President of the United States, to Senators Hagel, Helms, Craig, and Roberts, The White House, Office of the Press Secretary (Mar. 13, 2001):

> As you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.

23 *Bali Action Plan*, *supra* note 10.

24 *Id.* ¶ 1(b)(i) ("Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances").

25 *Id.*

These are significant departures from the premises underlying the Kyoto Protocol. The Kyoto Protocol contains obligatory (not discretionary or voluntary) emission reduction targets for developed country Parties, and hence it endorses commitments (and not just actions).[26] It favors internationally negotiated (rather than nationally determined) commitments, albeit implemented nationally and regionally. It gives pride of place to quantified emission limitation and reduction objectives (over policies and measures). It assesses performance against targets and timetables (rather than efforts) and provides international measurement, reporting, verification, and compliance procedures.

The Bali Action Plan required developing countries, for their part, to take measurable, reportable and verifiable nationally appropriate mitigation actions, albeit in the context of sustainable development, supported and enabled by technology, financing and capacity-building — also in a measurable, reportable and verifiable manner.[27]

The Bali Action Plan was carefully drafted to erode differentiation as well as enhance symmetry or parallelism between developed and developing countries. It permits the United States and India, for instance, to subject themselves or be subject in the future climate regime to the same requirements, that is, to "nationally appropriate mitigation actions." Actions in both these countries will be voluntary, nationally determined and tailored.[28] Both these sets of actions will be measurable, reportable and verifiable.[29] In the case of India, the nationally appropriate mitigation actions will need to be in the context of sustainable development, and will be supported and enabled by technology, financing and capacity-building — also in a measurable, reportable and verifiable manner — but such support could be from national, bilateral, multilateral or other sources. This is a far cry from the differential treatment between developed and developing countries contained in the Kyoto Protocol.

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26 *See, e.g.*, Kyoto Protocol, *supra* note 2, art. 3.

27 *Id.* ¶ 1(b)(ii) (prescribing the actions required of developing countries: "Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner").

28 Views Regarding the Work Programme of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Submission by the United States of America 85, 87, U.N. Doc. FCCC/AWGLCA/2008/MISC.1 (Mar. 3, 2008) (noting that "we see discussions on mitigation focusing on nationally appropriate *actions* that are measurable, reportable, and verifiable") (emphasis added).

29 *Id.* at 85 (noting that "environmental effectiveness requires *national* undertakings and review mechanisms") (emphasis added).

In the two years leading to the Copenhagen Conference of 2009, the scheduled end of the Bali process, there were numerous attempts by developed countries to achieve parallelism between developed and (large) developing country actions, and therefore differentiation among developing countries. The balance of power, it was argued, has changed dramatically since the UNFCCC and Kyoto Protocol were negotiated. Emerging powers like China, India, Brazil, and South Africa did no longer merit the extent of differential treatment they are entitled to under the regime. Future agreements, therefore, it was argued, should contain greater parity or "parallelism" in commitments between developed and developing countries.

The United States has long sought to differentiate between those developing countries that are major economies/emitters and those that are not. The multilateral initiatives the United States has launched, which include major economies/emitters alone (rather than all developing countries), are evidence of this stance.[30] The European Union has also argued that differences between developing countries must be taken into account, and that the economically advanced developing countries must make "fair and effective contributions" to the climate effort.[31] Japan has suggested categorizing developing countries into groups based on their stage of economic development, and encouraging mitigation actions tailored to their common but differentiated responsibilities.[32] Australia has argued that if the GDP per capita of UNFCCC Parties is taken into account, there are "more non-Annex-I Parties [developing countries] that are advanced economies than existing Annex-I Parties [developed countries]."[33]

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30 For further information, see MAJOR ECONOMIES FORUM ON ENERGY AND CLIMATE, http://www.majoreconomiesforum.org/ (last visited June 12, 2012).

31 *See* Europa, Press Release, Climate Change: Bali Conference Must Launch Negotiations and Fix "Roadmap" for New UN Agreement (Nov. 27, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1773&format=HTML&aged=1&language=EN&guiLanguage=en; *see also* Council of the European Union, Press Release, 2826th Council meeting, Climate Change — Council Conclusions 12 (Oct. 30, 2007); Submission by France on Behalf of the European Community and Its Member States 4, 5-6, U.N. Doc. FCCC/AWGLCA/2008/MISC.2 (Aug. 14, 2008).

32 *See* Submission by Japan 4, 11, U.N. Doc. FCCC/AWGLCA/2008/MISC.1/Add.1 (Mar. 12, 2008).

33 *See* Submission by Australia 2, 5, U.N. Doc. FCCC/ KP/AWG/2008/MISC.1/Add.2 (Mar. 20, 2008); *see also* Submission by Australia 5, 8, U.N. Doc. FCCC/AWGLCA/2008/MISC.1/Add.2 (Mar. 20, 2008) (noting that of the top fifteen emitters, seven are in Annex I (United States, European Union, Russia, Japan, Canada, Australia, and Ukraine), six (Brazil, China, Iran, Korea, Mexico, and South Africa) are countries with a higher per capita GDP than Ukraine, which

Australia recommended, therefore, that there should be an objective basis for the graduation of non-Annex I Parties to Annex I, "with a view to all advanced economies adopting a comparable effort towards the mitigation of greenhouse gas emissions."[34]

In their submissions, various developed countries suggested indicative "objective" criterion. Australia, Japan, Turkey, and others suggested categorizing countries on the basis of GDP per capita.[35] Canada recommended using the criteria of relative rates of economic and population growth, stage of economic development, structuring of economies' emissions, recognition of regional realities and interdependencies, relative mitigation potential and costs over time for the purpose of categorizing countries.[36] Japan suggested categorizing countries based on their OECD membership, stage of economic development, capacity to respond, and emission share in the world.[37] And, the United States suggested global emissions and economic development as relevant criteria.[38] Most developed country submissions on differentiation carved out an exception for Least Developed Countries (LDCs) and in some cases Small Island Developing States (SIDS) who, in their view, cannot be expected to contribute significantly to the mitigation effort.

These proposals proved controversial. Many developing countries are opposed to efforts to differentiate between them, as they perceive such differentiation as threatening their unity and the leveraging power that flows from such unity. The G-77/China[39] has expressed its "firm rejection" of "any

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is an Annex I Party, and two (India and Indonesia) have a lower per capita GDP than Ukraine; and arguing that since together these fifteen are responsible for three-quarters of global GHG emissions, they will have to act as part of a 2012 agreement for any goal to be met); Submission by Australia 73, U.N. Doc. FCCC/AWGLCA/2008/MISC.5/Add.2, pt. I (Dec. 10, 2008). The term "Annex I Parties" refers to Parties listed in Annex I of the UNFCCC, *supra* note 1. This list contains most of the countries considered to be developed. The term "non-Annex I Parties" refers to Parties that are not listed in Annex I to the UNFCCC. This list contains most of the countries considered to be developing.

34 Submission by Australia 2, 5, U.N. Doc. FCCC/KP/AWG/2008/MISC.1/Add.2 (Mar. 20, 2008).

35 Submissions by Japan 3, 11, U.N. Doc. FCCC/AWGLCA/2008/MISC.1/Add.1 (Mar. 12, 2008); Submissions by Turkey 101, 102, U.N. Doc. FCCC/AWGLCA/2008/MISC.5 (Oct. 27, 2008).

36 Submissions by Canada 9, 10, U.N. Doc. FCCC/AWGLCA/2008/MISC.1/Add.2 (Mar. 20, 2008).

37 Submissions by Japan, *supra* note 35.

38 Submissions by the United States, *supra* note 28.

39 The G-77 is a group of 131 developing countries that often negotiate with China

proposal directed towards differentiating between non-Annex I parties."[40] In their view, the differentiation sanctioned by the UNFCCC and Kyoto Protocol stems not (at least not solely) from differences in material conditions, but from differences in historical and moral responsibility for causing climate change. Any erosion of differentiation would blur the lines of responsibility, shift a disproportionate (to their contribution) burden of mitigation on to developing countries, and thereby limit their development prospects. They argue, moreover, that any attempt to differentiate between developing countries in terms of mitigation obligations would entail a renegotiation of the UNFCCC and the Kyoto Protocol, which Parties have the sovereign right to attempt, but in the appropriate forum. The Bali Action Plan, in the G-77's view, launched a process to close the implementation gap, not to discuss amendments to the Convention or Protocol.

## III. The Copenhagen Accord of 2009: Parallelism and Flexible Approaches Gain Ground

COP-15 at Copenhagen in 2009, the scheduled deadline for arriving at the Bali "agreed outcome" on long-term cooperative action on climate change, attracted 125 heads of states and governments, the largest such gathering in the history of the United Nations, and 40,000 participants. No collective challenge facing humanity — let alone an environmental one — has ever before attracted such attention, participation and political capital. Yet, Parties could not arrive at an "agreed outcome" under the UNFCCC process. A subset of Parties to the UNFCCC at the head-of-state level hammered out a deal, titled the Copenhagen Accord.[41] However, since it was rejected by the Bolivarian Alliance, Sudan, and Tuvalu, the Copenhagen Accord has no formal legal standing in the UNFCCC process.[42]

The non-binding yet influential Accord requires Annex I Parties to commit to targets, and non-Annex I Parties to undertake mitigation actions. It is silent on the issue of comparability across targets or actions. The Accord requires

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to form the G-77/China. For further details on the G-77, see *About the Group of 77*, The Group of 77 at the United Nations, http://www.g77.org/doc/ (last visited Aug. 13, 2012).

40 *See* Submission by Philippines on Behalf of the G-77/China 48, U.N. Doc. FCCC/AWGLCA/2008/MISC.5/Add.2, pt. II (Dec. 10, 2008).

41 *Copenhagen Accord*, *supra* note 3.

42 FCCC Secretariat, Notification to Parties, Clarification Relating to the Notification of 18 January 2010 (Jan. 25, 2010), *available at* http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf.

these targets or actions to be inscribed in its Appendix I and II respectively, as well as compiled in information documents.[43] Thus far, 141 countries have associated with the Accord, and countries accounting for eighty-seven percent of global GHG emissions have submitted pledges under it. It is worth noting, however, that pledges made thus far fall well short of that which is considered necessary to achieve stabilization at 2°C.[44] On the related issue of transparency of mitigation actions, the Accord requires non-Annex I Parties to submit national communications every two years;[45] ensure domestic measurement, reporting and verification (MRV) of mitigation actions; report these through national communications; and provide for "international consultation and analysis."[46] For mitigation actions seeking support from the international community, the Accord provides for a registry to record actions and the associated support provided to these actions as well as for international MRV.[47]

By allowing Parties, developed and developing alike, to self-select and list mitigation commitments and actions, the Accord effectively substitutes a regime of differentiation in favor of developing countries with a regime of differentiation for all countries, providing flexibility for all. This, through architectural sleight of hand, recasts the contours of the CBDRRC principle — rendering the issue of differentiation for developing countries increasingly irrelevant.[48]

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43 *Copenhagen Accord*, *supra* note 3, ¶¶ 4-5.

44 *See* UNEP, The Emissions Gap Report (2010), *available at* http://www.unep.org/publications/ebooks/emissionsgapreport/pdfs/GAP_REPORT_SUNDAY_SINGLES_LOWRES.pdf.

45 UNFCCC, *supra* note 1, art. 12, read with relevant COP decisions, including Report of the Conference of the Parties on Its Thirteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session, *Decision 10/CP.13: Compilation and Synthesis of Fourth National Communications* 44, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) (requiring the fifth Annex I national communication to be submitted on January 1, 2010, with the view to submitting the sixth communication four years later).

46 *Copenhagen Accord*, *supra* note 3, ¶ 5.

47 *Id.*

48 For a full analysis, see Lavanya Rajamani, *The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime*, *in* Handbook of Climate Change and India: Development, Politics and Governance 118 (Navroz K. Dubash ed., 2011).

## IV. The Cancun Agreements of 2010: Parallelism and Flexible Approaches Take Hold

At COP-16 in Cancun in 2010, Parties arrived at the Cancun Agreements that translated the core political compromises at the heart of the Copenhagen Accord into a COP decision text, thereby anchoring the Accord in the UNFCCC process. The Cancun Agreements follow the blueprint of the Copenhagen Accord in that they, too, permit self-selection of mitigation targets and actions and auto-listing by Parties, thereby endorsing differentiation for all rather than differentiation for developing countries. They also seek to achieve parallelism between mitigation targets and actions for developed and developing countries in various ways, including through identical framing and tone and by leveling the requirements placed on developed and developing countries.

The Cancun Agreements capture mitigation targets and actions in separate paragraphs for developed and developing countries, but with near-identical framing. The texts "take[s] note of" Annex I "emission reduction targets," and non-Annex I "mitigation actions," "to be implemented" "as communicated by them" and contained in information documents "(to be issued)."[49] The texts are accompanied by identical footnotes, noting that "Parties' communications to the Secretariat that are included in the INF document are considered communications under the Convention."[50] The use of near-identical framing language, or "parallelism," in the text relating to developing countries and developed countries is the culmination of efforts launched in the Bali Action Plan by the United States, among other developed countries. These countries sought to ensure that the look and feel of obligations across developed and developing countries (at least the "major emitters and emerging economies"), even if not their stringency, is similar.[51] To the United States, for example, there is "no rationale for legal asymmetry, in the Convention or otherwise."[52]

The gradual shift towards parallelism is accompanied by a shift towards a less prescriptive and more predictive tone in relation to mitigation. In the Copenhagen Accord, the language used to frame commitments and actions is

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49 *Cancun Agreements LCA*, *supra* note 4, ¶¶ 36, 49.

50 *Id.* ¶ 36 n.4, ¶ 49 n.5.

51 *See, e.g.*, Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan, Submission by the United States of America 71, U.N. Doc. FCCC/AWGLCA/2008/MISC.5/Add.2, pt. II (Dec. 10, 2008) (noting that "at least some developing countries (such as major emitters and emerging economies) should be taking the same kinds of mitigation actions as developed countries").

52 *See* Additional Views on Which the Chair May Draw in Preparing Text to Facilitate Negotiations Among Parties, Submission by the United States of America 79, U.N. Doc. FCCC/AWGLCA/2010/MISC.2 (Apr. 30, 2010).

prescriptive for developed countries[53] and predictive for developing countries.[54] In the Cancun Agreements, the language used is predictive for both.[55]

In addition, in the Cancun Agreements the language of obligations that has thus far attached to developed countries' mitigation gave way to the language of aspiration. The argument runs thus. The Kyoto Protocol characterizes the mitigation obligations of developed countries as "quantified emission *limitation and reduction* commitments."[56] The Bali Action Plan characterizes them as "commitments or actions" (with ambiguous language on whether or not these need to encompass "quantified emission limitation and reduction objectives"). The Copenhagen Accord characterizes them as "emissions targets." It is apparent that the language of commitments, arguably signifying an obligatory undertaking, has given way to the aspirational language of targets.

Mitigation in relation to developing countries has also evolved through the years. There is an increasing quantification or concretization of mitigation actions required from developing countries, and a gradual shift in emphasis from supporting mitigation actions to requiring unsupported mitigation actions. The UNFCCC imposes qualitative commitments in relation to mitigation policies and measures on developing countries.[57] The Berlin Mandate that launched the process that led to the Kyoto Protocol expressly forbade imposition of new commitments on non-Annex I countries.[58] The Kyoto Protocol, accordingly, contained none. The Bali Action Plan suggested the adoption of "nationally appropriate mitigation actions" (NAMAs) for developing countries, but tied this to the provision of measurable, reportable and verifiable technology, finance and capacity-building.[59]

Since Bali there have been at least two distinct developments. First, although the Copenhagen Accord required developing countries to submit and implement mitigation actions, it did not prescribe a cumulative quantitative mitigation goal.[60] The Cancun Agreements take a tentative step in this direction by requiring developing countries to aim at achieving a "deviation in emissions relative to business as usual" by 2020.[61] Second, the Copenhagen Accord disturbed

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53 *Copenhagen Accord*, *supra* note 3, ¶ 4 ("Annex I Parties commit to implement . . . ").

54 *Id.* ¶ 5 ("Non-Annex I Parties will implement . . . ").

55 *Cancun Agreements LCA*, *supra* note 4, ¶¶ 36, 49 (" . . . to be implemented"); *Cancun Agreements KP*, *supra* note 4, ¶ 3 (" . . . to be implemented").

56 Kyoto Protocol, *supra* note 2, art. 3 (emphasis added).

57 UNFCCC, *supra* note 1, art. 4(1).

58 *Berlin Mandate*, *supra* note 9.

59 *Bali Action Plan*, *supra* note 10, ¶ 1(b)(ii).

60 *Copenhagen Accord*, *supra* note 3, ¶ 5.

61 *Cancun Agreements LCA*, *supra* note 4, ¶ 48.

the direct link between MRV of financing and MRV of mitigation actions by placing these in separate paragraphs, and contriving to nullify interpretations that make the former a precondition for the latter.[62] This trend — to delink support from actions — has been taken forward in the Cancun Agreements.[63]

## V. Durban Platform on Enhanced Action, 2011: The Final Blow — the Missing Reference to CBDRRC and Equity

The final blow to differentiation in the climate regime, at least insofar as it relates to the post-2020 regime, was dealt by the Durban Platform on Enhanced Action, arrived at in the early hours of December 11, 2011, thirty-six hours after the scheduled end of COP-17 in Durban.

In the lead-up to Durban, many countries, including the BASIC[64] host, South Africa, had coalesced in favor of a legally binding instrument to crystallize mitigation and other commitments that will chart the world through to a 2°C or even 1.5°C world, with current instruments and commitments having been deemed inadequate. The Alliance of Small Island States (AOSIS) and other vulnerable countries, on the frontlines of climate impacts, believed anything short of a legally binding instrument to be an affront to their grave existentialist crisis. The European Union had indicated that they would offer the Kyoto Protocol a lifeline to ensure its survival for a transitional commitment period, conditional on the adoption at Durban of a deadline-driven roadmap towards a "global and comprehensive legally binding agreement" under the UNFCCC.[65] This agreement applicable to all is intended to take effect post-2020. Brazil, China and India argued that extending Kyoto is a legal obligation and not a bargaining tool to wrench further concessions from developing countries. These countries were if at all, only willing to consider a mandate for a new legally binding instrument after the completion of the review of the long-term global goal of 2°C slated for 2015. The United States, nervous about the gathering momentum in favor of a Durban mandate, had indicated that any new legally binding instrument, if and when it becomes necessary, must

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62 *Copenhagen Accord*, *supra* note 3, ¶¶ 4, 5.

63 *Cancun Agreements LCA*, *supra* note 4, ¶ 52.

64 BASIC stands for Brazil, South Africa, India and China.

65 Council of the European Union, Preparations for the Seventeenth Session of the Conference of the Parties (COP 17) to the United Nations Framework Convention on Climate Change (UNFCCC) and the Seventh Session of the Meeting of the Parties to the Kyoto Protocol (CMP 7) (Nov. 28-Dec. 9, 2011); Council Conclusions, 3118th Environment Council Meeting 7 (Oct. 10, 2011).

incorporate symmetrical mitigation commitments, at least in form, for all significant emitters.

In Durban, much of the developing country resistance to a new legal instrument dissipated in the face of concerted efforts by the European Union and AOSIS, and the real prospect of losing the Kyoto Protocol, should a roadmap for a new agreement not be arrived at. India, alone, held out until the final hours of the conference, insisting that agreeing to a legally binding instrument was a red line that it could not cross. It could agree at best to launch a process towards a "legal outcome" — which would leave the precise legal form of the instrument open. A "legal outcome" could encompass legally binding instruments as well as Conference of Parties decisions, which, although operationally significant, are not, save in the exception, legally binding. This formulation lacked the clarity and ambition that the European Union, the AOSIS, the Least Developed Countries, many Latin American countries, and even India's BASIC allies, Brazil and South Africa, were seeking.

Critically, this was not sufficient for the European Union to endorse a Kyoto second commitment period. After a fast and furious "huddle" in the final hours of the conference, India agreed to substitute the term "legal outcome" with a marginally less ambiguous term, "agreed outcome with legal force," thus triggering the acceptance of a Kyoto second commitment period by the European Union and its allies. Unlike the terms "Protocol" and "another legal instrument," the term "agreed outcome with legal force" does not reflexively signal a legally binding instrument. Nevertheless, given the momentum that had built up towards a legally binding instrument in the lead-up to Durban, the legal form of the outcome of this process will likely be a legally binding instrument. India, for its part, agreed to the term "an agreed outcome with legal force," as this leaves open the possibility of an outcome that derives its legal force from domestic law in different jurisdictions rather than international law.

More importantly, the nature and extent of differentiation the future regime will contain is likely to represent a fundamental departure from that in the current regime. The Durban Platform decision does not contain a reference to "equity" or "common but differentiated responsibilities." This is no benign oversight. Through the two weeks of the conference, developed countries were unanimous in their insistence that any reference to "common but differentiated responsibilities" must be qualified with a statement that this principle must be interpreted in the light of "contemporary economic realities." They were also insistent that the future regime must be "applicable to all." India, among other developing countries, argued in response that this would be tantamount to amending the UNFCCC.

The only way out of this impasse was to draft the text in such a way that it was rooted in the Convention — "under the Convention"[66] — thereby implicitly engaging its principles, including the principle of common but differentiated responsibilities. This, it was believed, would hold efforts to reinterpret and qualify this principle at bay. Nevertheless, the fact that the divisions over the application of this principle are such as to preclude even a rote invocation of it signals a likely recasting of differentiation in the future climate regime. Given the opposition of many developed countries to the perceived rigid Annex I / non-Annex I differentiation in the climate regime, the future regime is likely to countenance a more nuanced vision of differentiation between countries.

The use of the term "applicable to all" further substantiates this point. Admittedly, merely because this instrument applies to all Parties does not necessarily imply that it applies symmetrically to all Parties. However, given the insistence by developed countries that the future regime have mitigation obligations for all, and the conspicuous absence of the usual markers for differentiation — equity and common but differentiated responsibilities — it appears that the goalposts on differentiation are likely to shift post-2020.

It is also significant that it was deemed necessary to launch a new process. The Bali Action Plan of 2007, which launched a process to reach an "agreed outcome" on long-term cooperative action on climate change, could have offered the basis for a new climate regime. However, the Bali Action Plan was interpreted by some developing countries as creating a firewall between developed country commitments and developing country actions.[67] In other words, some developing countries believed that the language of the Bali Action Plan, in keeping with patterns established in the UNFCCC and the Kyoto Protocol, created a firm divide between the nature of mitigation obligations imposed on developed and developing countries, respectively. In a bid to move away from the Bali "firewall," the United States, among others, insisted on a new process, and on terminating the Bali process in 2012. Durban delivered

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66 *Durban Platform*, *supra* note 5, preambular para. 3.

67 Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan, Submission of Algeria on Behalf of the African Group, 11 U.N. Doc. FCCC/AWGLCA/2009/MISC.4, pt. I (May 19, 2009); *see also* Statement of Common Position, African Group, Group of Least Developed Countries and ALBA Group (Oct. 7, 2011), *available at* http://climate-justice.info/wp-content/uploads/2011/11/Statement-of-Common-Positions-Afr-LDC-ALBA-FINAL.pdf. It is worth noting that although this distinction between commitments and actions came to be characterized as a "firewall" after Bali, many developing countries source such a firewall to the UNFCCC. Conversation with J.M. Mauskar, Special Secretary, Ministry of Environment and Forests, India, and lead climate negotiator, in New Delhi, India (Feb. 24, 2012).

the new process and with it a clean slate on differentiation. The mandate will be negotiated in 2012. It remains to be seen how, if at all, CBDRRC and equity will be rehabilitated in the mandate discussions, and indeed in the post-2020 climate agreement.

## VI. Meanwhile: The Waning Fortunes of the Kyoto Protocol

The Kyoto Protocol represents a model of environmental regulation that privileges clear, precise, prescriptive and deadline-driven obligations backed by a compliance system with enforcement powers. It also symbolizes, by encapsulating a unique form of differential treatment in favor of developing countries, a particular model of differentiation for developing countries and leadership from developed countries. All these models — of prescription, differentiation and leadership — have been contested in the climate negotiations that followed the Protocol.

The Kyoto Protocol's first commitment period is scheduled to come to an end in 2012.[68] Negotiations to adopt targets for a second commitment period were launched in 2005, but are yet to conclude.[69] Russia, Canada, and Japan have expressed their intention not to participate in a second commitment period of the Kyoto Protocol.[70] Canada has expressly withdrawn from the Kyoto Protocol, in part because it will cost $14,000,000,000 to bring itself back into compliance, and because in its view, the Kyoto Protocol, which does not cover the United States and Chinese emissions, will prove ineffective in addressing climate change.[71] Although Durban gave Kyoto a new lease on life, it only extended the Protocol for a second commitment period — either for

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68 Kyoto Protocol, *supra* note 2, art. 3.

69 Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Decision 1/CMP.1: Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention Under Article 3, Paragraph 9, of the Kyoto Protocol*, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006).

70 *See* Suzanne Goldenberg, *Cancun Climate Change Conference: Russia Will not Renew Kyoto Protocol*, The Guardian, Dec. 10, 2010, http://www.guardian.co.uk/environment/2010/dec/10/cancun-climate-change-conference-kyoto; John Vidal, *Cancun Climate Change Summit: Japan Refuses to Extend Kyoto Protocol*, The Guardian, Dec. 1, 2010, http://www.guardian.co.uk/environment/2010/dec/01/cancun-climate-change-summit-japan-kyoto.

71 Bill Curry & Shawn McCarthy, *Canada Formally Abandons Kyoto Protocol on Climate Change*, The Globe and Mail, Dec. 12, 2011, http://www.theglobeandmail.

five or eight years — not indefinitely.[72] The political understanding between the European Union, the principal adherents to a Kyoto second commitment period, and many developing countries is that the second commitment period will be Kyoto's last, and the new climate agreement that will come into effect in 2020 will replace Kyoto.

Most developed countries, and increasingly a large number of vulnerable developing countries,[73] have chosen to repose their faith not in the Kyoto Protocol — which they believe is of symbolic value alone, since it will likely cover only about eleven to fifteen percent of GHG emissions going forward — but in the new climate agreement. They believe this new agreement will ensure greater participation in and effectiveness of climate controls. In particular, they hope it will bring the United States and large developing countries into the circle of states with mitigation obligations.

The United States, responsible for twenty percent of the world's annual emissions and thirty percent of historical emissions (1900-2000),[74] has long considered the Kyoto Protocol to be "ineffective and unfair," in part because it does not include mitigation commitments for major "population centers" such as China and India.[75] It has also in the recent negotiations proven resistant to the charm of Kyoto's accounting and compliance rules. The United States was unlikely to ratify the Kyoto Protocol, even if comprehensively amended. Since most other developed countries considered it essential that they are in the same legal instrument as the United States — subject to the same flexibility and constraints (or lack thereof) and standards — a new instrument was deemed essential. Many developed countries believe that if they were to

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com/news/politics/canada-formally-abandons-kyoto-protocol-on-climate-change/article4180809/.

72 Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Seventh Session, Addendum, Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Seventh Session, *Decision 1/CMP.7: Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol at Its Sixteenth Session*, U.N. Doc. FCCC/KP/CMP/2011/10/Add.1 (Mar. 12, 2012).

73 *See, e.g.*, Legal Options Paper, Fifth Meeting of the Cartagena Dialogue (July 26-27, 2011) (on file with the author).

74 *Contributions to Global Warming: Historic Carbon Dioxide Emissions from Fossil Fuel Combustion, 1900-1999*, Earth Trends, Environmental Information, World Resources Institute, http://earthtrends.wri.org/ (last visited Apr. 13, 2012).

75 Letter from George W. Bush, *supra* note 22; *see also* Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997) (enacted).

transition to a new legally binding instrument which captures market-friendly elements of the Kyoto Protocol, permitted flexible approaches tailored to national circumstances, and deferred to domestic political constraints, the United States would participate in it.

Six agreements — Protocols from Japan,[76] Australia,[77] Tuvalu,[78] Costa Rica[79] and Grenada,[80] and an Implementing Agreement from the United States[81] — have thus far been communicated to Parties. Although these agreements contain a range of architectural models — some Kyoto-style and others Copenhagen-style — any instrument that emerges from the negotiations is likely, given the blueprints offered by the Copenhagen Accord of 2009 and the Cancun Agreements of 2010, to have a fundamentally different character to that of the Kyoto Protocol. It is likely to reflect a regulatory approach based on self-selection of mitigation commitments and actions (rather than prescription), enhanced parity between the obligations placed on developed and developing countries (rather than differentiation), and enhanced information flow relating to commitments/actions (rather than a compliance system).[82] In the process, this new agreement will fundamentally alter the balance of responsibilities in the climate regime and privilege a different, some would argue more sensible,[83] regulatory model.

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76 Draft Protocol to the Convention Prepared by the Government of Japan for Adoption at the Fifteenth Session of the Conference of the Parties, U.N. Doc. FCCC/CP/2009/3 (May 13, 2009).

77 Draft Protocol to the Convention Prepared by the Government of Australia for Adoption at the Fifteenth Session of the Conference of the Parties, U.N. Doc. FCCC/CP/2009/5 (June 6, 2009).

78 Draft Protocol to the Convention Presented by the Government of Tuvalu Under Article 17 of the Convention, U.N. Doc. FCCC/CP/2009/4 (June 5, 2009).

79 Draft Protocol to the Convention Prepared by the Government of Costa Rica for Adoption at the Fifteenth Session of the Conference of the Parties, U.N. Doc. FCCC/CP/2009/6 (June 8, 2009).

80 Proposed Protocol to the Convention Submitted by Grenada for Adoption at the Sixteenth Session of the Conference of the Parties, U.N. Doc. FCCC/CP/2010/3 (June 2, 2010).

81 Draft Implementing Agreement Under the Convention Prepared by the Government of the United States of America for Adoption at the Fifteenth Session of the Conference of the Parties, U.N. Doc. FCCC/CP/2009/7 (June 6, 2009).

82 See, for further analysis, Lavanya Rajamani, *The Cancun Climate Change Agreements: Reading the Text, Subtext and Tealeaves*, 60 Int'l & Comp. L.Q. 499 (2011).

83 *See generally* Post-Kyoto International Climate Policy: Implementing Architectures for Agreement (Joseph E. Aldy & Robert N. Stavins eds., 2010);

## VII. Erosion of Differentiation in the Emerging Climate Regime: Implications

This erosion of differentiation since 2007 has come at considerable cost. Given the strength of the American demand for parallelism between the mitigation commitments and actions taken by developed and (some) developing countries,[84] and the absence of political conditions for strengthening the overall mitigation effort, symmetry has been achieved at the cost of ambition, and by leveling down the mitigation efforts required of developed countries. Taking note of documents containing mitigation pledges that will not meet the stated 2°C goal, as the Cancun Agreements do, is a far cry from Kyoto-style quantitative targets and timetables.

The Durban Platform does not offer any clues as to the preferred architecture of the future climate regime. However, given that the political context that led to the Copenhagen and Cancun outcomes — capturing a "bottom-up approach" — has not changed and is unlikely to, it is likely that the post-2020 regime will also contain self-selected targets and actions, albeit of the same legal character for all Parties. The political context includes domestic political constraints in the United States fueled by the fossil fuel lobbies and a fear of being overtaken by China, competitive concerns in other developed countries, an abiding concern amongst the large developing countries that the emerging climate regime will limit their development prospects, and a worsening global economic downturn.

The parallelism between developed and developing countries has been achieved, therefore, at the cost of ambition as well as prescription – if developed and developing countries are to have symmetrical commitments, it is more likely than not that these commitments will be flexible and tailored to national circumstances. It is perhaps to counter this that the Ad Hoc Working Group on the Durban Platform is mandated to raise the level of ambition, with a view to closing the ambition gap by ensuring the highest possible mitigation efforts by all Parties.[85]

It is worth noting that since prescriptive commitments/actions have proven to be a casualty of parallelism, so has the possibility of a future compliance system. Neither the Copenhagen Accord nor the Cancun Agreements contain any reference to a future compliance system. The Durban AWG-LCA Outcome

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Steve Rayner, *How to Eat an Elephant: A Bottom Up Approach to Climate Policy*, 10 Climate Pol'y 615 (2010).

84 To the United States, there is "no rationale for legal asymmetry, in the Convention or otherwise," *see* Submission by the United States of America, *supra* note 52.

85 *Durban Platform*, *supra* note 5, ¶¶ 6, 7.

decision contains a sole and controversial reference in the context of the international assessment and review process for developed countries to "any future agreement on a compliance regime for mitigation targets under the Convention."[86]

The erosion of differentiation in evidence since Bali, in combination with the trend towards less prescriptive and more flexible mitigation obligations, may have the beneficial effect of (potential) universal coverage. The United States, long on the outskirts of international climate controls, is perhaps, with the Durban Platform decision, back in the fray for the post-2020 regime.[87] The flexibility promised in the Copenhagen/Cancun Agreements, should it come to pass in the post-2020 regime, will also prove attractive to many developing countries.

Although the nature and extent of differentiation in favor of developing countries will shift post-2020, and the more controversial forms of it — as seen in the Kyoto Protocol — will come to an end, some less controversial forms of differentiation will survive. Provisions of differential treatment that offer support, financial and technological, to developing countries in need will likely survive. So will provisions that differentiate between countries in terms of content and stringency of obligations rather than their legal form. Even the United States has only sought parity primarily in legal form across developed and developing countries. It acknowledges that in terms of content and stringency, obligations will be differentiated based on respective capabilities. It does, however, expect "meaningful contributions from countries with a significant emissions profile,"[88] and for "major emitters" and "emerging economies" to take on similar commitments.[89] Australia and Norway suggest that "while all countries should quantify their expected emissions outcomes, developed countries will be held accountable to the emissions outcome of their targets; whereas, developing countries would only be bound to implement their actions, not the specific emissions outcome."[90] A host of other forms of

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86 Report of the Conference of the Parties on Its Seventeenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session, *Decision 2/CP.17: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2011).

87 *See, e.g.*, John M. Broder, *U.S. Envoy Relieved by Climate Talks Outcome*, N.Y. Times, Dec. 14, 2011, http://green.blogs.nytimes.com/2011/12/14/u-s-envoy-relieved-by-climate-talks-outcome/.

88 *Id.*

89 *See* Submission by the United States of America, *supra* note 52.

90 *See* Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan, Submission by Australia and Norway 4, 7, U.N. Doc. FCCC/

differentiation between countries tailored to national circumstances may well be explored and fleshed out in the future climate regime.

## Conclusion

The last five years — from the Bali Action Plan to the Durban Platform — have borne witness to tremendous shifts in the politics, economics and underlying premises of the climate regime, and therefore to a steady erosion of differential treatment in favor of developing countries, in particular of the kind in evidence in the Kyoto Protocol. The heightened symmetry sought and achieved to some extent between mitigation actions taken by developed and developing countries has come at the cost of ambition and prescription in the regime. As obligations placed on developed and developing countries have become increasingly symmetrical, less prescriptive and softer norms, more acceptable (and perhaps even suitable) to developing countries, and more attractive, for domestic political reasons, to some developed countries, have gained ground.

This has opened up the possibility of having an instrument that will cover, unlike the Kyoto Protocol, the majority of global GHG emissions, in particular those of the United States and China. It may also lead to a more nuanced and thereby perhaps more effective vision of differentiation in the future climate regime. However, these shifts may serve to marginalize countries that believe that this rapid erosion in differentiation unfairly limits their legitimate development aspirations. It may also alienate small islands and other vulnerable nations to whom an ambitious prescriptive regime (for all) appears to be the only solution adequately tailored to the existential threat they face.

Therefore, the trend towards greater symmetry in mitigation actions between developed and developing countries, which has come at the cost of an ambitious prescriptive regime (for some), will pull both in favor of and against the chances of achieving international cooperation on climate change. Some countries will believe such a regime to be fair since it is universally applied, while others will consider it unfair precisely because it is universally applied. Perceptions of fairness will fundamentally influence the attractiveness of the regime to countries, as well as their ability to sell the future climate agreement to domestic constituencies. The nature, extent and design of differential treatment — and its links with the overall ambition of the regime, its legal form as well as its architecture — therefore will be critical to arriving at an acceptable, fair and effective future climate agreement.

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AWGLCA/2011/MISC.9 (Sept. 23, 2011).