

Equity in the 2015 Climate Agreement

Lessons From Differential Treatment in Multilateral Environmental Agreements

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Abstract

The success of the negotiations under the ADP will depend, among other things, on a common understanding of equitable sharing of efforts and benefits. An equitable climate regime needs to be based on differentiation that is flexible and dynamic and only granted on a temporary basis. Finding reliable yet flexible and dynamic ways for allocating rights and responsibilities accordingly may be the main and toughest task in multilateral environmental treaty-making. This article analyses differentiation in various multilateral environmental agreements and identifies ways for differentiating between states that could be helpful in a climate context.

Keywords

common but differentiated responsibility – equity – multilateral environmental agreements (MEAs) – ADP

1 Introduction

The Conference of the Parties to the UN Framework Convention on Climate Change decided in 2011 to launch the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) with a mandate ‘to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.’¹ This negotiating process, which began in

¹ Decision 1/CP.17, 2011.

May 2012, is scheduled to end by 2015. The outcome should come into effect and be implemented from 2020 onwards. The door is now open for formal discussion of the architecture of the new agreement. One aspect, which will be defining for the new agreement, is the reflection of equity in its design.

The success of the negotiations under the ADP will depend, among other things, on a common understanding of equitable sharing of efforts and benefits. Article 3(1) of the UN Framework Convention on Climate Change sets out the principle of equity, with common but differentiated responsibility and respective capability (CBDR) as its major expression. The article does not define equity, either generally or in its application to climate change. Its meaning and scope remain contentious. In general terms, equity refers to the quality of being impartial, fair, and just. In the international climate discourse, equity and fairness are used interchangeably. A broad understanding is that the new agreement must take account of states' different 'circumstances', whether these concern the stage of development, economic means, risk (exposure and vulnerability) of climate impacts, contribution to increasing greenhouse gas concentrations in the atmosphere—historical, current, and future trends—financial and technological capacity, etc. These differences must be reflected in the definition of rights and responsibilities in the new agreement, as well as in its architecture.

Traditionally, international law is defined by the sovereign equality of states which guarantees that all states have equal rights and obligations. Since the 1972 Stockholm Conference, international environmental treaty-making has changed from providing identical treatment to all contracting states to providing differential (and preferential) treatment for developing countries, based on concepts of cooperation and solidarity. The aim is to bring about effective—rather than formal—equality among *de facto* unequal states and to ensure the participation of all countries in international environmental agreements.

With the 1992 Rio Declaration, a specific form of differential treatment has found its way into international environmental law-making. The Declaration's Principle 7 reads:

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

Differentiation has so far meant 'developed' versus 'developing' states, premised on the historical contributions of developed countries to environmental degradation; and developed countries' capability to engage in cost-intensive environmental mitigation action. These factors have led to substantively stronger obligations for developed countries, with developing countries having lighter or no obligations. They have also led to a right of developing countries to receive finance, technology, and know-how from developed countries. In this way, 'positive discrimination' in favour of developing countries has led to highly asymmetric environmental obligations, coupled with mechanisms for capacity-building, transfer of financial resources and technology, and compliance assistance.

This binary understanding of differentiation has proven to be a stumbling block for the current climate negotiations. The immense current global challenges that all states commonly face can only be tackled by taking cooperative large-scale remedial action. The factual preconditions under which states must act still differ considerably. Yet the 'landscape of similarities and differences' has changed in the last forty years. Today, the world is characterized by disparities in resources and capabilities in different ways. The antagonistic dividing line between developed and developing countries is not only becoming increasingly blurred, but in effect an obstacle to meaningful mitigation action. The two groups, if they even can be identified,² are no longer homogenous but are marked by stark internal differences. Any attempt at categorization will be insufficient to capture such dynamism. For this reason, an equitable climate regime needs to be based on differentiation that is flexible, more diverse, and dynamic and only granted on a temporary basis.

Finding reliable yet flexible and dynamic ways to define groups and allocate rights and responsibilities accordingly, may thus be the main and toughest task in multilateral environmental treaty-making.

2 Forms of Differentiation

Differentiation, or differential treatment, manifests itself in different ways:

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- 2 See, for example, the classification by the International Monetary Fund in 'advanced economies' and 'emerging market and developing economies': International Monetary Fund, *World Economic Outlook*, October 2012, p. 179. The IMF notes: 'This classification is not based on strict criteria, economic or otherwise, and it has evolved over time' (p. 177). According to the UN Statistics Division, 'There is no established convention for the designation of 'developed' and 'developing' countries or areas in the United Nations system.' See UNSD, *Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings*, revised 11 October 2012.

1. *Explicit principled references*: There can be explicit references to, for example, the principle of common but differentiated responsibility³ or more generally to the 'Rio Principles'.⁴ A more straightforward, yet principled, approach refers to 'special needs of developing countries' (and countries with economies in transition).⁵
2. *Implicit principled references*: Differentiation can also be made by including references to parties' 'particular conditions',⁶ 'national circumstances',⁷ 'capabilities',⁸ or 'means', or by including qualifiers such as 'as far as possible and as appropriate'.⁹ Such references differentiate implicitly and allow for taking into account factual differences among parties to a multilateral environmental agreement (MEA) in defining the content of obligations.
3. *Differentiation in substance*: A treaty can impose lesser substantive obligations on some countries or totally exempt them from such obligations.¹⁰ Such treaties either operate with a list of countries or refer to 'developing' and 'developed' country parties.
4. *Differentiation in form*: A treaty can impose identical substantive obligations on all of parties, but make formal or procedural/administrative requirements less stringent for some parties, e.g. grant longer timeframes for implementation (so-called 'grace periods') or less-stringent reporting requirements. Another form is to impose stronger or exclusive obligations

3 Art. 3(1) of the UNFCCC, Preamble to the Stockholm Convention on Persistent Organic Pollutants.

4 This was suggested by some developing countries during the negotiations of the Nagoya Protocol.

5 See, for example, Art. 12 of the CBD, Art. 22 of the Nagoya Protocol, Art. 16 of the Rotterdam Convention, and Art. 12 of the Stockholm Convention. For preambular reference, see: UNCLOS and Vienna Convention on for the Protection of the Ozone Layer.

6 Art. 6(a) of the CBD.

7 For an example see REDD.

8 Art. 2 of the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972. Another example is article 4 of the 1984 Convention for Co-operation in the Protection and Development of the Marine and Coastal environment of the West and Central African Region (Abidjan Convention) which states that all contracting parties shall take appropriate measures 'in accordance with their capabilities'. UNCLOS notes the 'need to take account of states' economic capacity' (Art. 207) and the 'need for economic development' (Art. 202). The Vienna Convention on the protection of the Ozone Layer refers to 'means at their disposal' (Art. 2(2)).

9 Arts. 6(b), 7, 8, 9, 10, 11 of the CBD.

10 There are very few examples of treaties with asymmetric (substantive) environmental obligations, the most striking example being the UNFCCC (Art. 3(1) and Annex I) and Kyoto Protocol (Arts. 3 and 10).

on developed countries for financial, technology, or know-how transfers to developing countries (and countries with economies in transition).¹¹

5. *Differentiation in form and substance*: A treaty can combine less substantive obligations with less-stringent procedural obligations.
6. *'Differentiation by conditionality'*: Here we see a link of substantive (or formal) requirements of one group of parties (developing countries) to certain substantive, formal, or financial conditions to be fulfilled by another group of parties (e.g. developed countries). Usually, this is the case with provisions that make the implementation of the obligations resting upon developing states *conditional* on the transfer of funds, know-how, or technology from developed states.

While these various types of differentiation can be identified, it is not uncommon to see the combination of two or more elements in one and the same treaty.

3 Differing Norms

In terms of substantive obligations, differential treatment can be designed by using two distinct categories of norms: differential norms and contextual norms.¹² Differential norms provide explicitly different, more favourable, treatment to developing countries. Contextual norms, on the other hand, are norms that *prima facie* provide equal and identical treatment to all states, but require or allow for 'considerations of factors that might vary from country to country'.¹³ It is possible, and practised, to combine both types of norms in one and the same agreement.

Differential norms have the advantage of defining the content of the norm, thereby rendering the norm 'reviewable'. Cases of non-compliance can be identified, and appropriate measures to address non-compliance taken.

Contextual differentiation is the more flexible choice and might be appropriate in situations where classical differentiation based on certain criteria is impossible or inopportune. Examples include the formulation 'Each Contracting Party shall, in accordance with its particular conditions and capability', or 'as far as possible and as appropriate'.

11 See fn. 5. See also Art. 13(1.5) of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Protocol).

12 See D. B. Magraw, Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms (1990) 1 *Colorado Journal of International Environmental Law and Policy* 69.

13 Ibid, at 73.

The downside of ‘differentiation in context’ is that it allows for taking into account a wide range of factors based on states’ own discretionary (sovereign) decisions. Such decisions may not be judicially reviewable, rendering it difficult, if not impossible, to establish the exact content of the norm and, respectively, its breach.

4 Approaches to Equity and Differentiation Under the UNFCCC

The language in Article 3(1) of the UNFCCC (‘accordingly’) suggests that an application of the notion of equity would require developed countries to take the lead in combating climate change and its adverse effects. This is followed through by the differentiated commitments of developed and developing countries seen in Article 4.

Equity is also the underlying notion of the architecture of the Kyoto Protocol, which contains quantified emission-reduction commitments for developed states only. It is also referred to in the 2009 Copenhagen Accord, where states noted that long-term cooperative action to combat climate change had to be ‘on the basis of equity and in the context of sustainable development’.¹⁴ Since 2009, states have frequently invoked equity in their submissions. However, its constituent elements and application modalities are rarely articulated.¹⁵

In the 2010 Cancun Agreements, parties expressed a shared vision ‘for long-term cooperative action in order to achieve the objective of the Convention under its Article 2, including through the achievement of a global goal, on the basis of equity and in accordance with common but differentiated responsibilities and respective capabilities’.¹⁶ Further, they agreed to take urgent action to meet the long-term goal of reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C above preindustrial levels, ‘consistent with science and on the basis of equity’.¹⁷ However, they also agreed to cooperatively work towards identifying a timeframe for global peaking of greenhouse gases based on ‘equitable access to sustainable development’.¹⁸ As the ILA committee on legal principles relating to climate change rightly notes: “The term “equitable access to sustainable development”,

14 Decision 2/CP.15, FCCC/CP/2009/11/Add.1 (30 March 2010), para. 1.

15 International Law Association, Washington conference (2014), *Legal principles relating to climate change*, Draft report, page 10.

16 Decision 1/CP.16, FCCC/CP/2010/7/Add.1 (15 March 2011), para. 1.

17 Ibid, para. 3.

18 Ibid, para. 6.

is an unwieldy compromise between the more controversial “equitable access to atmospheric space” that may be interpreted as a right to emit, and “sustainable development” that signals restraint.¹⁹

In an attempt to provide their understanding of this notion, experts from the BASIC group of countries (Brazil, South Africa, India, and China) wrote in 2011 that equitable access to sustainable development must be based on access to (atmospheric) carbon space and ‘carbon budgets’, which differ for developing and developed countries.²⁰ Carbon budgets must take into account emissions since 1850. They must also be based on states’ per capita ‘entitlements’ to atmospheric space. Both elements strongly favour developing countries and have therefore been rejected by the developed group. The continuation of the strict developed/developing country divide in BASIC’s outlook has proven to be an obstacle to designing an effective 2015 framework.

A slightly more flexible approach is advocated by the Africa Group as an equity-based reference framework to operationalize the notion of ‘equitable access to sustainable development’.²¹ This principle-based, voluntary reference framework is designed to assess the adequacy and fairness of the mitigation targets and actions that states select and commit to.²² Still, this approach maintains the antagonistic distinction between developing and developed countries.

As long as there is no flexible, more diversifying approach to differentiation, an effective solution to the climate challenge might be out of reach. In the next part, I will discuss how other international environmental agreements deal with differentiation and whether there are lessons to be learned for the 2015 climate regime.

5 Multilateral Environmental Agreements with Differentiated Approaches

5.1 *Montreal Protocol on Substances that Deplete the Ozone Layer*

Parties to the 1987 Montreal Protocol on Ozone Depleting Substances opted for formal (temporal) differentiation. In accordance with Article 2 of the 1985

19 International Law Association, Washington conference (2014), Legal principles relating to climate change, Draft report, p. 10.

20 *Equitable access to sustainable development: Contribution to the body of scientific knowledge*, BASIC expert group: Beijing, Brasilia, Cape Town, and Mumbai.

21 Submission by Swaziland on behalf of the Africa Group In respect of Workstream I: 2015 Agreement under the ADP (30 April 2013), available at: <http://unfccc.int/files/bodies/awg/application/pdf/adp_2_african_group_29042013.pdf>.

22 ILA, 2014, page 11.

Vienna Convention for the Protection of the Ozone Layer, which provides that parties shall take appropriate measures ‘in accordance with the means at their disposal and their capabilities’ (no reference to historic contributions!), the Montreal Protocol in its Article 2(A-H) imposes on all parties identical substantive obligations, but allows in its Article 5 certain developing countries²³ to postpone for up to ten years their compliance with their obligations to reduce or phase out the consumption and production of ozone-depleting substances. During this period, developing countries were allowed to increase their use of ODS. Such a grace period for implementation was granted in order to meet the developing countries’ basic domestic needs (Montreal Protocol, Article 5.1).

This obligation, which discriminates in favour of developing countries, is accompanied by the obligation of industrialized parties under Article 10 of the Montreal Protocol to create a financial mechanism, including a Multilateral Fund. The Fund is to provide ‘financial and technical co-operation, including transfer of chlorofluorocarbon-free technology to developing countries ... to enable ... compliance ... with control measures.’²⁴ The mechanism is to meet all agreed incremental costs of such parties in order to enable their compliance with the control measures of the Protocol.²⁵ The Fund was one of the first operating financial mechanisms designed to enable compliance with international environmental treaty obligations, and its successful management has facilitated the transfer of technology to make this possible for developing-country parties. Importantly, the financial obligations of developed countries under Article 10 condition developing countries’ action on the effective implementation of developed countries’ financial commitments.²⁶

An important dynamic element of the Montreal Protocol is a unique adjustment provision which enables parties to respond quickly to new scientific, environmental, technical, or economic information and allows them to adjust reduction targets on chemicals. Moreover, reporting requirements are coupled with the non-compliance procedure and trade sanctions.

In sum, the combination of the following has proven to be effective: Flexible and dynamic design (adjustments), which has enabled the parties to respond to improvements in the scientific understanding of ozone-layer depletion; establishment of assessment panels—operating on a voluntary basis with the

23 These developing countries include those with an annual consumption of substances controlled by the protocol of less than 0.3 kg per capita. Currently, 147 of the 196 Parties to the Montreal Protocol meet these criteria.

24 Montreal Protocol, Art. 10.

25 Montreal Protocol, Art. 10(1).

26 Montreal Protocol, Article 5.5.

participation of industry, governments, and academia—has given parties access to the best available information on which to make decisions; longer implementation periods for developing countries; financial incentive structure; the comparatively well-equipped Multilateral Fund (a key success factor); and attention to compliance, through the establishment of a model non-compliance mechanism.

5.2 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*

The Rotterdam (PIC) Convention sets up two international mechanisms for promoting shared responsibility and cooperative efforts among parties in the international trade of certain hazardous chemicals and pesticides. These mechanisms are the prior informed consent procedure and information exchange. The content of the PIC Convention thus is of a procedural nature.

As a starting point, the obligations under the PIC Convention apply symmetrically to all parties. However, the preamble takes ‘into account the circumstances and particular requirements of developing countries and countries with economies in transition, in particular the need to strengthen national capabilities and capacities for the management of chemicals, including transfer of technology, providing financial and technical assistance and promoting cooperation among the Parties’.

A special provision for developing countries is found in Article 6, which helps them to use the infrastructure of the PIC Convention to report problems with hazardous pesticide formulations. The developing country party may then draw upon technical expertise from any relevant source.

In addition, Article 16 recognizes the needs of developing countries and countries with economies in transition, and sets up obligations of all parties to cooperate in promoting technical assistance for the development of the infrastructure and the necessary capacity. For this purpose the Convention has developed a technical-assistance programme which has provided a range of activities tailored to the specific needs of individual countries.

5.3 *Stockholm Convention on Persistent Organic Pollutants*

Here, again, the obligation to take measures to reduce or eliminate releases of persistent organic pollutants (POPs) applies equally on all parties. There is no differentiation in substance. However, the preamble to the POP Convention takes ‘into account the circumstances and particular requirements of developing countries, in particular the least developed among them, and countries with economies in transition, especially the need to strengthen their national

capabilities for the management of chemicals, including through the transfer of technology, the provision of financial and technical assistance and the promotion of cooperation among the Parties', and notes 'the respective capabilities of developed and developing countries, as well as the common but differentiated responsibilities of States'.

Accordingly, Article 12 recognizes that technical assistance to developing-country parties and parties with economies in transition is essential to the successful implementation of the POP Convention. Parties are to 'cooperate to provide timely and appropriate technical assistance to developing country Parties and Parties with economies in transition, to assist them, taking into account their particular needs, to develop and strengthen their capacity to implement their obligations under this Convention.'²⁷

Article 13 of the POP Convention states that *each* party undertakes to provide, within its capabilities, financial support and incentives in respect of those national activities that are intended to achieve the objective of the Convention in accordance with its national plans, priorities, and programmes. Article 13(2) states that developed-country parties are to provide new and additional financial resources to enable developing countries and parties with economies in transition to meet the agreed full incremental costs of implementing measures that fulfill their obligations under the Convention. The implementation of these commitments is to take into account the need for adequacy, predictability, the timely flow of funds, and the importance of burden-sharing among the contributing parties. Article 13(3) states that 'Developed country Parties, and other Parties in accordance with their capabilities and in accordance with their national plans, priorities and programmes, may also provide and developing country Parties and Parties with economies in transition avail themselves of financial resources to assist in their implementation of this Convention through other bilateral, regional and multilateral sources or channels.'

Article 13(6) defines a mechanism for the provision of adequate and sustainable financial resources to developing-country parties and parties with economies in transition on a grant or concessional basis to assist in their implementation of the Convention. Article 14 establishes the interim financial arrangements. The Global Environment Facility is to function, on an interim basis, as the principal entity entrusted with the operations of the financial mechanism referred to in article 13.

²⁷ Stockholm Convention, Art. 12(2).

5.4 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*

The obligations under the Basel Convention also show no substantial differentiation. All obligations apply symmetrically to all parties. According to Article 4(1), each party is entitled to prohibit the import of hazardous wastes or other waste for disposal. Further, each party is responsible to ensure that the generation of hazardous wastes and other wastes, as well as the transboundary movement of hazardous wastes within its territory, is reduced to a minimum. The Basel Convention sets forth detailed conditions for the international regulation of transboundary movements of hazardous and other wastes between parties based upon a system of 'prior informed consent'. The exporting state must notify the importing state and provide information on the substance exported. The importing state must give its consent as a condition of import.

The Basel Convention was a response to cases of dramatic hazardous waste dumping, mainly in developing countries. Given, again, the main direction of transboundary movement of hazardous wastes from developed to developing countries, the Basel Convention, like the PIC Convention, aims in essence to protect the interests of developing countries against (uninformed and impermissible) waste dumping.

The Convention only partially bans the transboundary movement of waste. This led to the negotiation of the 'Basel Ban', which by the third COP was formally incorporated into the Convention by amendment. The Basel Ban Amendment does not refer to OECD and non-OECD countries, but bans hazardous waste exports for final disposal and recycling from Annex VII Parties (EU, Lichtenstein, and OECD) to non-Annex-VII parties. The amendment is still not in force due to an insufficient number of ratifications.

The Basel Convention also contains provisions for financial support of different regions and subregions according to their specific needs; no reference is made to developing countries.²⁸ The establishment of the funding mechanism—the Technical Cooperation Trust Fund—is of a voluntary nature. It was established to assist developing countries and other countries in need of technical assistance in the implementation of the Basel Convention. In addition, a Trust Fund for the Convention was established to provide financial support for the expenditures of the Secretariat. In both cases, there are significant gaps between pledges and receipts from parties.

²⁸ Basel Convention, Art. 14 (1).

5.5 *Convention on Biological Diversity*

The CBD stipulates that the ‘conservation of biological diversity is a common concern of humankind’. The parties of the CBD have formally symmetrical legal obligations that have de facto different effects. While the conservation of biological diversity and the sustainable use of its components (objective 1 and 2 of the CBD) apply to all parties, the obligation to facilitate access to genetic resources is incumbent on the host states, which predominantly are developing states with rich genetic diversity.²⁹

Under the Convention, all parties must co-operate for the conservation and sustainable use of biological diversity, while more detailed rules exist for in-situ and ex-situ conservation. Most of the obligations pertaining to conservation and sustainable use are qualified by terms such as ‘in accordance with its particular conditions and capabilities’³⁰ or ‘as far as possible and as appropriate’.³¹ As mentioned above, these provisions are examples of contextual differentiation, which leaves it up to the discretion of each party to define its obligations in accordance with its particular circumstances. Specific needs of developing countries are explicitly recognized in article 12 with regard to scientific and technical education, research, and training.

The CBD requires of developed-country parties³² to provide new and additional financial resources to enable developing parties to meet their agreed full incremental costs when implementing the Convention.³³ The implementation by developing parties of their commitments is conditioned (‘will depend on’) on the effective fulfillment by developed countries of their financial commitments and commitments to technology transfer.³⁴ The provision of financial resources is channeled through a financial mechanism, which under the CBD is the Global Environment Facility.

The two protocols to the CBD, the Nagoya Protocol and the Cartagena Protocol, both ‘institutionalize’ the Convention’s approach to equity and differentiation.

²⁹ See for further detail Nagoya Protocol below.

³⁰ Art. 6 (a) of the CBD.

³¹ Arts. 6 (b), 7, 8, 9, 10, 11, 14 of the CBD.

³² For the List of developed-country parties and other parties which voluntarily assume the obligations of developed country parties, see COP 1 Decision I/2, Financial Resources and Mechanism, Annex II.

³³ Art. 20 (2) of the CBD.

³⁴ Art. 20 (4) of the CBD.

5.5.1 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS)

The Nagoya Protocol applies to genetic resources within the scope of Article 15 of the CBD and restates and elaborates some of the principles reflected in that article. According to Article 15 of the CBD, each party is to endeavour to facilitate access to genetic resources for environmentally friendly uses. Although equally applicable to all parties, the obligation is incumbent on provider states of genetic resources, which often, but not always,³⁵ are developing countries rich in genetic diversity. Access to genetic resources is subject to prior informed consent of the provider country.³⁶ In return for access to genetic resources, all contracting parties (mainly industrialized) must take measures for sharing the results of research and the benefits arising from commercial and other utilization. The sharing of benefits is to happen on mutually agreed terms and, where necessary, through the financial mechanism,³⁷ which is the GEF.³⁸ In addition to financial assistance, the benefitting state (user country) must provide technological³⁹ and scientific⁴⁰ assistance to the provider developing country.

The Protocol, in Article 22, contains detailed provisions on capacity-building in developing countries, which include a list of key areas and measures. Article 25(3–5) links the financial mechanism to capacity-building in developing countries, taking into account the needs of developing countries.

5.5.2 Cartagena Protocol on Biosafety

The Biosafety Protocol applies to the transboundary movement, transit, handling, and use of all living modified organisms (LMOs) that may cause adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health.⁴¹ The central regulatory mechanism established by the Protocol is the advance informed agreement (AIA) procedure, which applies to the first transboundary movement of an LMO into an importing party for introduction into the environment of that party.

35 One exception being Australia which accounts for about 10 per cent of global biodiversity. Norway also has significant marine biodiversity.

36 Art. 15 (5) of the CBD.

37 Art. 15 (7) of the CBD.

38 Nagoya Protocol, Art. 25.

39 Art. 16 of the CBD.

40 Art. 18 of the CBD.

41 Cartagena Protocol, Art. 4.

As part of the clearing-house mechanism envisaged under Article 18(3) of the CBD, the Cartagena Protocol establishes a Biosafety Clearing-House to facilitate the exchange of scientific, technical, environmental, and legal information on LMOs, as well as to 'assist Parties to implement the protocol, taking into account the special need of developing country Parties, in particular the least developed and small island States among them, and countries with economies in transition as well as countries that are centres of origin and centres of genetic diversity'.⁴²

The relatively low capacity of developing countries with respect to known and potential risks associated with LMOs was an important factor in the adoption of the Protocol.⁴³ Article 22 of the Protocol therefore requires parties to cooperate in the development or strengthening of human resources and institutional capacities in biosafety, including biotechnology to the extent that it is required for biosafety, for the purpose of ensuring the effective implementation of the Protocol in developing countries, in particular the least developed and small island states as well as parties with economies in transition.⁴⁴ In doing so, they are required to take fully into account the needs of these countries for financial resources and access to and transfer of technology and know-how.

Article 28 provides for financial assistance to be provided to developing parties, and to some extent to parties with economies in transition. The rationale for this provision is that parties with limited capacity need assistance if they are to comply with their obligations under the Protocol. Article 28 addresses two basic issues: the provision of financial assistance through a multilateral financial mechanism established under the CBD; and the provision of financial assistance by developed countries through other bilateral, regional, and multilateral channels.

Article 28(2) provides for the GEF to be the financial mechanism for the Protocol. Under the provisions of Article 28, for both sources of financial assistance, the developed parties assume the role of donors, and the developing parties are designated as recipients. Parties with economies in transition have a somewhat ambiguous role: they can be recipients of bilateral assistance, but they are not mentioned as beneficiaries of the financial mechanism, although they do in practice receive assistance from the GEF. They can also assume the role of donors on a voluntary basis, both through the financial mechanism and on a bilateral basis. The category of 'developed countries' has been defined for

42 Cartagena Protocol, Art. 20 (2b).

43 Sands, 2012, 471.

44 Cartagena Protocol, Art. 22 (2.1) and (2.3).

the purposes of financial resources and mechanisms in the context of the CBD—and by implication its protocols—through a list adopted by the CBD COP at its first meeting.⁴⁵ There is no corresponding list of ‘developing countries’. One important issue to note is that the Protocol does not contain a provision equivalent to Article 20(4) of the CBD, which links implementation of the CBD by developing countries to the financial assistance they receive for this purpose.

Article 28(1) provides that the parties must ‘take into account’ the provisions of Article 20 of the CBD in ‘considering’ financial resources for the implementation of the Protocol. This means that Article 20 of the CBD does not directly apply to the provision of financial resources under the Protocol, but is merely to be ‘taken into account’ in this context, if, for example, a specific issue is not addressed by Article 28.⁴⁶ This wording is the result of a compromise between those countries that wanted to include a strong obligation to provide financial resources, and those that were reluctant to include a provision of this type. The wording softens the obligation of potential donor countries in two respects. First, they are not obliged to provide financial resources, but merely to consider the issue of financial resources, and second, the provisions of Article 20 of the CBD are not said to be directly applicable to the Protocol, but are only to be taken into account.⁴⁷

Article 28(3) links the financial mechanism to the provisions on capacity-building set out in Article 22 of the Protocol. It specifies that in setting out the guidelines for the role of the financial mechanism, as it relates to the Protocol, the CBD COP, must take account of the needs regarding capacity-building as set out in Article 22. In carrying out its role, the GEF must thus aim to meet the specific capacity-building needs that are enumerated in Article 22(2). As specified in Article 22, the different situations in potential recipient countries must be taken into account. This is important given the great diversity of situations and needs in the different categories of countries that are potential recipients of assistance.⁴⁸

45 See fn. 30.

46 IUCN Environmental Law Center, *An Explanatory Guide to the Cartagena Protocol*, IUCN Environmental Law and Policy Paper No. 46, 2003, 174.

47 Ibid.

48 Following the adoption of the Protocol in 2000, the GEF Council approved in November 2000 an Initial strategy for assisting countries to prepare for the entry into force of the Cartagena Protocol on Biosafety together with a global UNEP-GEF project to assist all eligible countries to develop national biosafety frameworks (NBFS). The project was launched in June 2001, and has so far assisted 123 countries. For more information, see <www.cbd.org>.

5.6 *Convention on Long-Range Transboundary Air Pollution*

As the first regional environmental convention, LRTAP has been instrumental in the reduction of harmful pollutants in both Europe and North America. The Convention establishes a regional framework to ‘endeavor to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution’.⁴⁹ The framework treaty contains no specific commitments with targets and timetables but the parties must develop the best policies and strategies, including air quality management and control measures, using best available technology that is economically feasible.⁵⁰ The Convention establishes consultation and information-exchange duties as well as a ‘Co-operative Programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe’ to monitor sulphur dioxide and related substances and to develop and use standardized monitoring procedures.

The Convention is supplemented by eight protocols, which establish more detailed commitments.⁵¹ The protocols illustrate the extent to which LRTAP has evolved and gained sophistication over time. While early LRTAP protocols focused on single pollutants and single problems, have later protocols had a broader and more holistic focus. For example, since the 1994 Sulphur Protocol, the ‘critical loads’ approach has been adopted which allows for the (upwards) adjustment of emission-reduction targets in accordance with the ecological vulnerability of different regions and in response to new scientific insights.

Two of the protocols, the 1991 Volatile Organic Compounds Protocol and the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication, and Ground-level Ozone, deserve further attention.

5.6.1 Volatile Organic Compounds Protocol

Interesting from the perspective of differentiation is the 1991 Volatile Organic Compounds Protocol to LRTAP. The VOC Protocol establishes specific targets and timetables which commit parties to control and reduce their emissions of VOCs. In order to reflect the need for differentiation based on a party’s emissions and particular geographic and demographic circumstances, the VOC Protocol offers parties three ways to meet the emission-reduction requirement. Upon signature or ratification, a party must choose one of these options. While the first option is open to all parties, the availability of the other two options depends on particular criteria and circumstances.

⁴⁹ LRTAP, Art. 2.

⁵⁰ LRTAP, Art. 6.

⁵¹ See <http://www.unece.org/env/lrtap/status/lrtap_s.html>.

The first option to achieve emission reductions is for (any) party to 'take effective measures to reduce its national annual emissions of VOCs by at least thirty per cent by the year 1999, using 1988 levels as a basis or any other annual level during the period 1984 to 1990, which it may specify upon signature of or accession to the present Protocol.'⁵²

The second option is only available to a party whose annual emissions contribute to tropospheric ozone concentrations in areas under the jurisdiction of one or more other parties, and where such emissions originate only from an area under its jurisdiction that is specified as a tropospheric ozone management area (TOMA) under Annex I to the Protocol.⁵³ A party that chooses this option must 'as soon as possible and as a first step, take effective measures to: (i) Reduce its annual emissions of VOCs from the areas so specified by at least 30 per cent by the year 1999, using 1988 levels as a basis or any other annual level during the period 1984–1990, which it may specify upon signature of or accession to the present Protocol; and (ii) ensure that its total national annual emissions of VOCs by the year 1999 do not exceed the 1988 levels.'⁵⁴

The third way is only available to parties whose national annual emissions of VOCs were in 1988 lower than 500,000 tonnes and 20 kg/inhabitant and 5 tonnes/km². Such a party 'shall, as soon as possible and as a first step, take effective measures to ensure at least that at the latest by the year 1999 its national annual emissions of VOCs do not exceed the 1988 levels.'⁵⁵

Futhermore, no later than two years after the protocol entered into force each party was required to apply 'appropriate' national or international emission standards to new stationary and new mobile sources based on 'best available technologies which are economically feasible'. No later than five years after the entry into force of the Protocol, in those areas in which national or international tropospheric ozone standards are exceeded or where trans-boundary fluxes originate or are expected to originate, each party must apply

52 VOC Protocol, Art. 2(2)(a). This option has been chosen by Austria, Belgium, Estonia, Finland, France, Germany, Netherlands, Portugal, Spain, Sweden, and the United Kingdom with 1988 as base year, by Denmark with 1985 as base year, by Liechtenstein, Switzerland, and the United States with 1984 as base year, and by the Czech Republic, Italy, Luxembourg, Monaco, and Slovakia with 1990 as base year.

53 Art. 2(2)(b) of the VOC Protocol. Annex I specifies TOMAs in Norway (base year 1989) and Canada (base year 1988). The total Norwegian mainland as well as the exclusive economic zone south of 62°N latitude in the region of the Economic Commission for Europe (ECE), covering an area of 466,000 km², is a TOMA.

54 Art. 2(2)(b) of the VOC Protocol. This has been chosen by Bulgaria, Greece, and Hungary.

55 Art. 2(2)(c) of the VOC Protocol.

‘best available technologies which are economically feasible’ to existing stationary sources in major categories.⁵⁶

The success of the LRTAR is partly due to its restricted regional scope and its comparatively small and homogenous group of parties. It has nevertheless served as a model for the UNFCCC and the Vienna Convention on the Protection of the Ozone Layer. Other reasons for its success are: the dynamic evolution through more and more sophisticated protocols; flexibility in ways to achieve VOC reductions by meeting parties’ differentiated circumstances; successive and progressive steps to implement ‘best available technologies which are economically feasible’ in relation to various sources; continuation of negotiation of further steps to reduce annual emissions of VOCs; obligation to co-operates; and verification of implementation through the Implementation Committee.

5.6.2 Gothenburg Protocol to Abate Acidification, Eutrophication, and Ground-Level Ozone

The Protocol, amended in 2012, sets emission ceilings for 2020 for a number of pollutants: sulphur, NO_x, VOCs, ammonia, and fine particulate matter, all based on scientific assessments of pollution effects and abatement options. There is a certain degree of differentiation: parties whose emissions have a more severe environmental or health impact and whose emissions are relatively cheap to reduce are to make the biggest cuts. Also, some of the obligations of the protocol only apply to countries of a certain size (two million square kilometers) whose annual emissions originate predominantly from within an area under its jurisdiction that is listed as a pollutant emissions management area (PEMA) in annex III. This allows for taking into account specific circumstances of parties and is an example of substantive differentiation.

One of the LRTAP Convention’s priorities is to provide assistance to countries in southern and eastern Europe, the Caucasus, and central Asia in ratifying and implementing various protocols under the Convention. The revised 2012 Gothenburg Protocol includes specific provisions on flexibility to implement emission standards for these countries in order to facilitate the ratifications and implementation of the Protocol’s flexible transitional arrangements. For example, according to Article 4, a Party to the Convention that is a newcomer to the Protocol may declare upon ratification of the amended Protocol that it will extend any or all of the specified timescales for application of the emission-limit values. Depending on the emission source or pollutant, this so called grace period may be extended by up to 5–15 years after

⁵⁶ Art. 3 of the VOC Protocol.

the date of entry into force of the Protocol for the party in question. For new stationary sources, the application timescale is to be one year.

6 Way Forward to 'Optioning' and 'Self-Differentiation'

The overview shows that there are various options available (and practised) for procedural and substantive differentiation between parties to MEAs. Certain conclusions can be drawn from this overview which might be useful in the context of the ADP discussions. As a starting point, the question of how to treat countries differentially is different from the question of how to 'group' parties. As we have seen above, traditionally, differentiation has been made along the fault line of 'developed' and 'developing' countries in most of the MEAs. This antagonistic dividing line is becoming increasingly blurred and particularly difficult to maintain. Differentiation should thus avoid being of strictly binary in nature. Further, it should be more flexible and dynamic and only be granted on a temporary basis.

The VOC and Gothenburg Protocols to the LRTAP Convention stand out as interesting approaches. By giving parties the choice of options, the parties can find their own 'group' in a kind of 'self-differentiation'. As option three of the VOC Protocol illustrates, certain emission-intensity criteria (e.g. t/capita or t/km²), overall emission amounts, or other economic, demographic, or geographic criteria can be included in the design of options. This could be helpful in the context of the UNFCCC, where a list of parameters could come into play. Such parameters could, for example, include a state's geography (e.g. small island developing states) and demography, historical, current, and future contributions to climate change, technological, financial, and infrastructural capabilities, as well as economic-development status and potential.

In addition, the options could differ either in substance (higher baselines or different base years or reference levels, higher emission caps or less stringent targets), in form (flexibility of implementation, supplementarity, timeframe for implementation, grace periods), or in both. For example, some options might be equal in substance, but differ in the timeframe for implementation (grace periods, as in the Montreal Protocol). Moreover, some options could be linked to either providing or receiving financial, technological, or scientific support. This could be fine-tuned with the particular design of the various options. One example could be the choice between two particular options, where one includes stronger emission-reduction targets but weaker obligations to provide financial support, whereas the other option contains the opposite: more moderate emission-reduction targets coupled with significant

financial transfer obligations. Such an 'optioning' approach coupled with objective criteria for the availability of particular options by otherwise free choice could open up much-needed flexibility in the design of new international environmental agreements. It would allow for a self-selection of commitments within the constraints of certain parameters. As such, this approach could provide a welcome middle ground between an 'everything goes' bottom-up approach and a too restrictive top-down approach.

While the optioning-approach could be a feasible way forward, it is important to maintain the architectural dynamic. Dynamic elements in terms of, for example, technological responses are the requirement of using 'best available technologies' or 'best practices'. Dynamism in terms of substance can also be maintained by adopting a 'critical loads' approach which allows for upward adjustments (see the Sulphur Protocol), regular review of the appropriateness of the targets in the light of new scientific findings, automatic strengthening of commitments at given intervals or adjustments on the basis of available scientific, environmental, technical, and economic information (article 6 of the Montreal Protocol), or by review of the level of ambition by an expert assessment panel.

This is not to say that such an optioning approach is simple. Much care needs to be taken in setting up the right (and right number of) parameters upon which 'self-differentiation' should be possible. This is not an easy task, and negotiations might be difficult. Too many parameters could lead to too much, unmanageable, and in the end meaningless differentiation. Too few, however, may not be politically feasible. A careful balance needs to be struck between meaningful and politically acceptable parameters and maintaining practicality of implementation, a functional simplicity, as well as avoiding of a situation of 'anything goes'.

The point is that there will not be one type of differentiation that 'fits all' and covers all the very different circumstances and situations of parties. It will be the right combination or 'mix' of substantive commitments, incentive structures, entitlements, procedural requirements, etc., which will be crucial for the success of a new agreement. A well designed and fine-tuned 'catalogue' of options (with differing commitments or entitlements) which parties can choose from upon signature or ratification might be a feasible way forward, reflecting the diversities of a globalized and interconnected world in the sophisticated design of a comprehensive agreement. The VOC and Gothenburg Protocols have shown that such an approach is possible. It now remains for the UNFCCC process to benefit from this experience.