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Differentiation In the Post-2012 Climate Regime

Introduction[1]

Since the dawn of the intergovernmental dialogue on climate change, countries have bickered over who should take responsibility, in what measure and under what conditions to avert climate change. At the heart of these questions in the ongoing negotiations on the post-2012 climate regime is the notion of "differentiation." The Framework Convention on Climate Change, 1992 (FCCC) and the Kyoto Protocol, 1997, differentiate between developing and industrialized countries, and assign a leadership role in mitigation to industrialized countries. Should the post-2012 climate regime differentiate between developing countries, based on "objective criterion," in determining who, amongst them, should take greater responsibility, perhaps even akin to the responsibility that industrialized countries have currently assumed?

The Great Divide[2]

The Bali Action Plan, December 2007, that launched the process to negotiate a post-2012 climate agreement, uses the terms "developing country parties" and "developed country parties," rather than the FCCC categories of "Annex-I" and "non-Annex I" Parties indicating that at least some countries hoped thereby to open up the categories of developing and developed countries for discussion. As Japan notes in its submission to the *Ad Hoc* Working Group on Long term Cooperative Action, Parties will need to "clarify the definition of 'developed country Parties' and 'developing country Parties,'" and "identify the scope and criteria of those 'developing country Parties' required to take actions."

Most industrialized countries are in favour of a more flexible and evolving categorisation of Parties which will permit differences within and between developed and developing countries to be taken into account in fashioning obligations under the future climate regime. The US has long sought to differentiate between those developing countries that are major economies/emitters and those that are not. The recent multilateral initiatives the US has launched which include major economies/emitters alone (rather than all developing countries) stand testimony to this stance. Canada is similarly insistent that binding commitments be extended to all "major emitting economies." The EU also believes 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.

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The rationale is simple and apparently neutral. As Australia points out, if the GDP per capita of FCCC Parties is taken as the benchmark there are "more non-Annex-I Parties that are advanced economies than existing Annex-I Parties." They argue that the top 15 emitters are responsible for 3/4 of global greenhouse gases (GHGs) and they will have to act as part of a 2012 agreement. There should, therefore, they argue, be an "objective" basis for 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." In recent submissions various industrial countries have suggested indicative "objective" criteria including:

- GDP per capita (Australia, Japan, Turkey and others)
- 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 (Canada)
- OECD membership, stages of economic development, capacity to respond, and emission share in the world (Japan)
- primary energy consumption per capita, R & D expendi-ture, emissions per capita, population growth, Human Development Index, historical responsibility and energy intensity (Turkey), and
- global emissions and economic development (US).

Industrialized country submissions on differentiation carve out an exception for Least Developed Countries (LDCs) who, in their view, cannot be expected to contribute significantly to the mitigation effort. It is worth noting in this context that the LDC, like the developing country, stamp is not an accurate descriptor for current social and economic ranking. Maldives, for instance, currently classified as an LDC has a higher per capita income and Human Development Index ranking than India, classified as a developing country. Several countries classified by the World Bank as low-income countries are not considered LDCs, and several LDCs are on the World Bank's list of middle-income countries.

Most developing countries, for their part, are opposed to any efforts to differentiate between them – both because such differentiation would threaten their leveraging power as well as destabilize the burden sharing architecture of the climate regime. Notwithstanding material differences, the 130 developing countries that form the G-77 share a common ideological vision and approach to international law, and they perceive efforts to differentiate between them as threatening their identity and leveraging power. In the climate negotiations, the differences between members of the G-77, encompassing as it does both the oil exporting countries and the small island states, run deep. However the G-77 has thus far, but for a few notable occasions, exhibited a tenuous yet tenacious togetherness.

In the Accra negotiations in August 2008 the EU raised the issue of differentiation between developing countries, which the EU noted was important to its political constituencies. The EU's call for differentiation was supported by Australia, Japan, New Zealand, Turkey, and the US. The G-77 responded that such differentiation between developing countries would entail a renegotiation of the Convention and the Kyoto Protocol, which Parties had 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.

It is questionable if competitiveness fears in the industrialized world are legitimate concerns within the climate regime, and indeed if differentiation between developing countries should be used to address such fears.

Dealing with Chindia: Levelling the playing field through Differentiation?

Of the objective criteria industrial countries have suggested for differentiation between countries, GDP per capita and emissions profiles figure in many submissions. If these criteria are taken however, as Australia acknowledges, India and Indonesia do not figure in the mix. Yet India, in particular, is very much at the centre of the international full court press on climate change. India has low per capita (1.2 metric tons) and cumulative emissions (4.6% of global emissions), is 128th on the Human Development Index, 44% of its population lives without access to electricity, and an estimated 80% of its population lives on less than US$2 a day. By most objective criteria India would not be required to prioritise mitigation commitments. It is nevertheless a country that is at the top of the industrialized world's list of "advanced developing countries," "emerging economies," "major economies" etc. This is presumably due to its healthy economic growth rate, attendant competitiveness concerns in developed countries, and its projected emissions growth trajectory. India's projected emissions growth rate is certainly a relevant factor, but it is unclear to what extent, given the fickle nature of economic growth on which it is dependent (ever more evident in the ongoing financial crisis), and the impact that climate change is likely to have on India's monsoons to which its economy is anchored. India's projected emissions growth rate may not therefore be sufficient to make the case for it to be treated as an "advanced developing country" in the regime today. So why then is India clubbed together with China, to form *Chindia*, the intended target of the call for differentiation?

The answer at least in part lies in the competitiveness concerns that appear to implicitly drive negotiating positions in the climate regime. A draft version of the EU's third-phase emissions trading scheme contained in Article 29 a border carbon adjustment measure titled Future Allowance Import Requirement (FAIR). While the FAIR provision has been dropped for now, the EU appears ready to keep an open mind on measures to obtain a "level playing field" for its industries. The US is also considering a similar carbon equalization measure in the proposed American Climate Security Act, 2007 and the Bingaman-Specter Low Carbon Economy Act. Needless to say, there is little sympathy for such concerns in countries like India. India's ambassador to the World Trade Organization (WTO) has warned the EU of retaliation and litigation if it implements such trade restrictive measures. The WTO Appellate Body in the Shrimp-Turtle case made it clear that however legitimate the policy goal "unilateral and non-consensual procedures" will be viewed with suspicion. It is questionable if competitiveness fears in the industrialized world are legitimate concerns within the climate regime, and indeed if differentiation between developing countries should be used to address such fears.

Given that most industrialized countries have had limited success in meeting their Kyoto commitments, their grasp on the high ground in pressing developing countries to take such action is tenuous.

Applying Objective Criteria Objectively

Notwithstanding their espousal of it, it is intriguing that differentiation on objective criteria is not a method that industrialized countries followed, or are likely to follow, to differentiate between themselves or their GHG mitigation targets in the climate regime. Both the Intergovernmental Negotiating Committee in the run-up to the FCCC, and the *Ad Hoc* Group on the Berlin Mandate in the run-up to Kyoto, discussed criteria for inclusion into the annexes, but these discussions proved bootless. The rough rule of thumb followed was that members of the OECD and those countries with economies in transition were included in Annex I of the FCCC and OECD members were included in Annex II. The emphasis was on auto-election (either directly or through membership in a political/economic organization) not on differentiation based on objective criteria. The targets chosen were also nationally determined and internationally negotiated. They were not listed according to objective criteria. If they had been the US would have had a far more onerous commitment.

The only method industrial countries countenance is one that respects their sovereign choice and autonomy, albeit within a negotiated context, not one based on objective criteria, which would in effect limit the scope for deal-seeking. The current negotiations in the *Ad Hoc* open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP) and the Bali Action Plan are focused on actions/commitments that are nationally determined and tailored and then internationally negotiated. If a departure from this approach and differentiation on objective criteria is to be explored, perhaps differentiation between *all* countries *and* targets could be implemented based on internationally negotiated objective criteria? Needless to say, most developing countries would emphasize historical responsibility and per capita emissions use, as their preferred objective criteria and the negotiations would grind to a halt.

A Way Forward: Differentiation in Actions

To be clear, differentiation between countries, developed and developing, is in principle, desirable. Ambiguity in the classification of countries creates a legitimacy deficit in the system. It can hamper efficient distribution of scarce resources. And, it can prevent identification of those countries that bear greater responsibility for contributing to climate change. This is true between developing countries as well as between developed and developing countries. It is also desirable that there are limits to differential treatment in the climate regime, a theme I have explored at length elsewhere. What is not acceptable is first, that differentiation on seemingly objective criteria is used to address competitiveness concerns, and second, that standards for differentiation prescribed for developing countries are not countenanced for industrialized ones. The use of such criteria reduces the space for negotiation, for political jostling and deal-seeking, and either it should be effected across the board to level the playing field or not at all.

A preferred alternative to differentiation between developing countries based on objective criteria would be differentiation in actions, in combination with auto election. In theory at least, three methods exist to categorize parties to international treaties: the definition, list, and auto-election methods. In the definition method, the treaty provides criteria based on which categories of parties are identified (and across the gamut of new generation multilateral environmental negotiations, not a single definition of "developing countries" exists). In the list method, the treaty creates lists that include relevant parties, and, in the auto-election method, parties elect themselves to a particular category. The list and the auto-election method are not mutually exclusive. Parties can elect themselves to particular lists created by the treaty. These lists could be of Parties or actions. And, countries could elect themselves to perform actions which appear in a particular list.

South Africa in a recent submission suggested the creation of a register of mitigation actions by developing countries which combines the list and auto-election methods, and is a useful model to pursue. A register would be created by a COP decision and maintained by the Secretariat. It would list actions rather than countries. And, it would permit developing countries to elect to implement certain actions conditional on the provision of appropriate international support. The register would allow actions currently being undertaken in developing countries to be recognized, and it would enable the implementation of proposed actions which require support. The registry would permit an accurate evaluation not just of each country's climate performance, but also of emission trends across developing countries. Should such a voluntary approach not catalyze a trend towards the requisite deviation (15-30% below baseline) for developing countries, Parties could review and reassess the level of effort required.

It is worth referring in passing to countries like Mexico and the Republic of Korea, that are members of OECD, Singapore, which is ranked 25th in the Human Development Index, and Cyprus and Malta, which are now EU member states. These countries are currently non-Annex I countries. Differentiation in actions may be inappropriate for these countries, given their relative wealth and capacity, and their membership in organizations signifying such wealth and capacity. These countries could in the context of their membership in the OECD or EU be requested to elect themselves to FCCC Annex I. The process of amending the Annexes, whilst tedious and time consuming, is not impossible.

Conclusion: The Key to Developing Country Engagement

If developing countries are to participate proactively in the climate challenge, persuasion not coercion is key. As a first step, the global regime must reinforce the confidence-building architecture of the climate treaties, not destabilize them, which implies both that industrialized countries must lead by example (thus far only in patchy evidence), and that they must operationalize and go beyond, in real, concrete and credible ways the financing and technology provisions of the climate treaties. Given that most industrialized countries have had limited success in meeting their Kyoto commitments, their grasp on the high ground in pressing developing countries to take such action is tenuous. Financing will need to be the centrepiece of the deal in Copenhagen. The FCCC Secretariat estimates that mitigation measures needed to return global GHG emissions to current levels require additional investment and funding of between 200 and 210 billion USD in 2030, and adaptation measures will require several tens of billions of USD. Although seemingly large, this sum is small in relation to estimated world GDP (0.3 to 0.5%) and global investment (1.1 to 1.7%) in 2030, and insignificant compared to the damage that uncontrolled climate change will wreak. The current levels of funding by industrialized countries are limited and will need to be stepped up significantly.

In addition the global regime must offer developing countries attractive opportunities to engage. It must recognize and reward actions that are currently being taken, and create the conditions necessary to tempt them to take further commitments. The emphasis in this context must be on auto-election by countries, not forcible differentiation (on debatable indicators) and binding targets. This is not just because differentiation in its current avatar is politically controversial, questionably motivated, and inconsistently applied but also because a well designed system with built-in incentives and disincentives will achieve, without friction, effective differentiation in actions.

1 This article builds on an existing pool of work where a full list of references may be found. This includes, Rajamani, L. (2006) Differential Treatment in International Environmental Law, Oxford: Oxford University Press; (2007) 'Differential Treatment in the International Climate Regime,' 2005 Yearbook of International Environmental Law, 16, p. 81; and (2008) 'From Berlin to Bali and Beyond: Killing Kyoto Softly' International and Comparative Law Quarterly, 57(3), pp. 909-939.

2 All submissions of Parties to the Ad Hoc Working Group on Long term Cooperative Action are available on <http://unfccc.int/meetings/items/4381.php>