

World Resources Institute (WRI) ADP Submission – Track 1:

In this submission, we briefly summarize experience under the UNFCCC and other international arrangements for the application of equity and CBDR-RC and experience in the design and architecture of these multilateral regimes.

The World Resources Institute and the Mary Robinson Foundation for Climate Justice have launched The [Climate Justice Dialogue](#), in collaboration with partners from across the globe to provide a platform to surface current assumptions on equity and a global forum for new and existing ideas on how to operationalize equity in a way that is perceived as fair, that safeguards environmental integrity, protects populations most vulnerable to climate change, and creates the basis for the widest possible cooperation amongst countries and spurs ambition. With respect to the Principles of the Convention, we therefore offer preliminary observations based on ongoing research and convenings with a focus on provisions of the Convention and COP decisions as well as brief examples from other regimes. Highlights include the following:

- Certain basic aspects of equity and CBDR-RC have been recognized across the Convention including, protection of the vulnerable, equitable access to sustainable development, the tiered approach to MRV, and differentiation in finance.
- CBDR-RC is an approach widely employed in other multilateral agreements.
- Experience from other regimes affords lessons for the climate regime. For example, understandings regarding what some developing countries consider disappointing results in trade and other economic negotiations may color understandings of fairness in the climate negotiations. On the other hand, strong differences between developed and developing countries in the early phases of the ozone negotiations were overcome in concluding the Montreal Protocol.

The views expressed in the second part of this submission on the scope and design of the climate regime, as well as ways to reflect and convey enhanced actions¹, are mainly based on WRI published materials: Moncel et al., *Building the Climate Regime: Survey and Analysis of Approaches*,² and Bell et al., *Building International Climate Cooperation – Lessons from the weapons and trade regimes for achieving international climate goals*.³ In this section, we make the case for an agreement whose functions and structure could:

- Allow Parties who wish to go further and faster the flexibility to move ahead – the concept of variable geometry.
- Provide for a process in which countries can take new responsibilities, commitments, and roles at a dynamic pace – the concept of graduation.
- Ensure that the regime has the agility to press forward with parts of the puzzle while other discussions are stalled – the process of decoupling issues and outsourcing elements of the regime
- Build trust, convey and reflect enhanced actions – through enhanced transparency, verification and compliance.
- Provide for a legal and institutional architecture that preserves environmental integrity and accountability.

¹ FCCC/ADP/2012/3, para 29.

² <http://www.wri.org/publication/building-the-climate-change-regime>

³ <http://www.wri.org/publication/building-international-climate-cooperation>

1. APPLICATION OF THE PRINCIPLES OF THE CONVENTION

1.1 Equity and CBDR-RC under the Convention

There are a number of Convention articles and decisions where the principles of equity and CBDR-RC are present.

Article 3 of the Convention states that the Parties should protect the climate “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities” and that “developed country Parties should take the lead. . . .”⁴

At the 2011 Conference of the Parties, the COP concluded the “Durban Platform” where it “decide[d] to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform of Enhanced Action.”⁵ The COP also decided to “complete its work as early as possible, but no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.”⁶

The Durban Platform does not mention equity but does state that action will be “under the Convention,” which, as noted above, includes equity and CBDR-RC. In the outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action at Durban, the COP agreed to work towards “identifying a time frame for the global peaking of greenhouse gas emissions based on the best available scientific knowledge and equitable access to sustainable development. . . .”⁷ It requested the Ad Hoc Working Group on the LCA “to consider the issue of equitable access to sustainable development, as contained in decision 1/CP.16, through a workshop.”⁸ The COP also said the Parties should take urgent action to meet the 2 degree long term temperature goal “consistent with science and on the basis of equity.”⁹ Finally, the COP provided that the review of the adequacy of the long-term global goal “should be guided by the principles of equity and common but differentiated responsibilities and respective capabilities. . . .”¹⁰

In addition to the indirect and direct references to equity and CBDR-RC in the Durban decisions, there are various other Convention provisions and decisions of recent COPs that establish differentiation or call for equitable treatment. Examples follow:

Vulnerability: The Convention provides that “The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a

⁴ United Nations Framework Convention on Climate Change (UNFCCC)

⁵ FCCC/CP/2011/9/Add.1, 1/CP.17 para 2.

⁶ FCCC/CP/2011/9/Add.1, 1/CP.17 para 4.

⁷ FCCC/CP/2011/9/Add.1, 2/CP.17 para 2.

⁸ FCCC/CP/2011/9/Add.12/CP.17 para 4.

⁹ FCCC/CP/2011/9/Add.1, 2/CP.17 section II. B.

¹⁰ FCCC/CP/2011/9/Add.1, 2/CP.17 para 160.

disproportionate or abnormal burden under the Convention, should be given full consideration.”¹¹ The Convention also provides that “The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”¹²

Equitable access to sustainable development: The Cancun outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action stated that the COP, “Further recognizes that deep cuts in global greenhouse gas emissions are required. . . .”¹³ The COP said it, “Also agrees that Parties should cooperate in achieving the peaking of global and national greenhouse gas emissions as soon as possible, recognizing that the time frame for peaking will be longer in developing countries, and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-carbon development strategy is indispensable to sustainable development. In this context, further agrees to work towards identifying a timeframe for global peaking of greenhouse gas emissions based on the best available scientific knowledge and equitable access to sustainable development. . . .”¹⁴

A workshop on Equitable Access to Sustainable Development (EASD) was held under the guidance of the Chair of the Ad Hoc Working Group on Long-term Cooperative Action in Bonn, Germany on May 16, 2012. Great diversity of views was expressed, including, for example, a quantitative approach and a qualitative approach.¹⁵ Divergence on a key aspect was stated as follows: “For some, historical responsibility was central to the discussion on a formulaic approach, and this issue has to be resolved in terms of responsibility for current impacts before discussing the responsibility of non-Annex I Parties. For others, it was not seen as an adequate measure of equity because it is complex, static and includes a large number of variables. Furthermore, the world has changed and a Party’s contributions are dynamic, not fixed as assumed by historical responsibility.”¹⁶ “Some presentations focused on defining equity.”¹⁷ “Other presenters were of the view that we should not seek to agree on a definition of equity but rather agree on how to apply this political concept to specific circumstances.”¹⁸

All Parties should take action: As noted above, the Durban Platform is based on the decision to develop an outcome “applicable to all Parties.”¹⁹ How the outcome might apply to different Parties remains a significant issue under discussion.

Tiered approach on Measurement Reporting and Verification (MRV) framework: The use of hierarchical tiers of methods for the estimation of greenhouse gas emissions and removal that range from default data and simple equations to the use of country specific data and models to accommodate national circumstances is an example of the application of CBDR-RC.²⁰ These tiers correspond to a progression

¹¹ UNFCCC Article 3.2.

¹² UNFCCC Article 4.4.

¹³ FCCC/CP/2010/7/Add.1/1/CP.16, para 4.

¹⁴ FCCC/CP/2010/7/Add.1/1/CP.16, para 6. -- See also, Durban decision FCCC/CP/2011/9Add.1./ 2/CP.17, II.B.

¹⁵ FCCC/AWGLCA/2012/INF.3/Rev.1, para 63.

¹⁶ FCCC/AWGLCA/2012/INF.3/Rev.1., para 64.

¹⁷ FCCC/AWGLCA/2012/INF.3/Rev.1. para 59.

¹⁸ FCCC/AWGLCA/2012/INF.3/Rev.1. para 66.

¹⁹ FCCC/CP/2011/9/Add.1/1/CP.17, para 2.

²⁰ IPCC, Chapter 3 “Good Practice Guidance for the LULUCF”

<http://www.ipcc.ch/meetings/session21/doc5to8/chapter31.pdf>

from least to greatest levels of certainty and accuracy over time.²¹ Regardless of tier level, countries should document what tiers were used as well as assumptions (in this case the emission factors, and activity data used) to prepare the estimate. This process acknowledges Parties' different capabilities and the fact that moving from lower to higher tiers will usually require increased resources, and institutional and technical capacity. In accordance with Article 10 and the Marrakesh Accords, Parties to the Kyoto Protocol used this principle to record progress on the tracking of performance and improve the quality of data over time by taking into account the recommendations of experts during the thorough technical, facilitative UNFCCC review process. It took Parties approximately a decade to achieve the level of accuracy we know from the most recent national reports. Such a tiered approach provides developing countries the ability to participate in the MRV regime with a degree of credibility, while improving over time.

Differentiation in finance: Under the Convention, the “developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources” to developing countries to comply with their reporting obligations. Developed countries are also called upon to assist in “meeting the costs of adaptation” and to “facilitate and finance, as appropriate, the transfer of” technologies.²² Finance modalities to support mitigation, including REDD, as well as adaptation, vary and their adequacy remains a significant issue for discussion. Most of the current mechanisms have taken into account the potential impact (e.g. greenhouse gas emissions reduction, poverty reduction, and economic development) in order to determine the level of funding but prioritize these different impacts in different ways. Some, such as the Global Environment Fund (GEF), aim to maximize the environmental benefits and reduction potential when considering funding for mitigation actions. Other mechanisms consider criteria to determine the need of countries receiving the funds. For example, priority could be given to those countries that are low income with the most severe disease burden.²³ Other criteria (e.g. Overseas Development Assistance) could include: high exposure to climate change hazards or vulnerability risk that will increase if investment is delayed, gross national income per capita or population size. The Adaptation Fund uses another method for determining how to allocate climate funds, placing a cap on the amount of funding for which a country is eligible.²⁴ The funding ceiling could be in the form of an exact dollar amount (e.g. \$10 million per country for the Adaptation Fund) or it could alternatively be a set percentage of total funds (e.g., 11 percent of total GEF funds for climate change).²⁵ This latter example illustrates the complexity of the task when it comes to apply equity across the board: On the one hand, this decision could be perceived as helpful to ensure that one country does not receive all of the funding to the detriment of its neighbors. On the other hand, this system risks treating countries that have diverse economic circumstances as the same despite having different needs and capabilities.

Another example of the diverse approaches offered at the Equal Access to Sustainable Development (EASD) workshop in Bonn last year relates to how equity should apply: “Several views were expressed with regard to the aspects of the new agreement that should be specifically targeted in the context of the equity discussions. One view was that equity should apply to all aspects of the new agreement.

²¹ IPCC, 2006 Guidelines for Greenhouse Gas Inventories, Chapter 3 http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/0_Overview/V0_1_Overview.pdf

²² UNFCCC, Article 4

²³ The Global Fund to Fight AIDS, Tuberculosis, and Malaria <http://www.theglobalfund.org/en/activities/fundingmodel/eligibility/>

²⁴ AFB/B.13/6, Decision B.13/23.

²⁵ GEF (Sept 21 2012) System for Transparent Allocation of Resources; PL/RA/01, Annex 1.

Another view was that it should be applied to specific aspects, such as convergence by combining top-down and bottom-up perspectives that address CBDR-RC and engaging in a low-emission society. Yet another view was that equity should apply to the whole package and not to each individual component.”²⁶

In view of the examples above, which highlight different approaches to equity and CBDR-RC (e.g. finance of mitigation and adaptation, MRV), one can argue that consideration of such principles across the various elements would be useful and help identify trade-offs for a balanced agreement.

Although this submission by WRI outlines that aspects of equity and CBDR-RC have been recognized under the Convention and in COP decisions, significant issues remain²⁷ that impact the negotiating process. Over the next two years, WRI and MRFCJ will work with partners under the Climate Justice Dialogue to develop options and narratives that promote both equity and CBDR-RC in a way that spurs ambition.

1.2 Equity and CBDR-RC under other regimes and arrangements

In light of the significant issues unresolved regarding equity and CBDR-RC, review of other regimes may be useful. We offer here brief examples as an initial step toward further research and discussion.

The principle of CBDR-RC can be traced to similar concepts in Principle 23 of the Stockholm Declaration of 1972 and Principle 7 of the 1992 Rio Declaration.²⁸ It can be found across a wide range of multilateral arrangements dealing with many different subjects.²⁹

There are many types of differentiation, including differential standards, grace periods for implementation, various kinds of flexibility, including variable geometry and graduation, and provision of aid.³⁰ The differentiation may be explicit in the text or may occur because an ostensibly universal norm is subject to other factors in implementation.³¹

The Montreal Protocol, dealing with the phase-out of chemicals contributing to ozone depletion, contained key elements of differentiation. Developing countries were provided a delay of ten years to comply with industrial country limits. Also, developing countries were funded for the incremental costs of participation, with funding apportioned according to the United Nations assessment scale. East European countries were initially ineligible for funding from the special fund of the Protocol, but when they experienced economic shocks in the wake of changing political and economic conditions, compliance assistance was provided by the Global Environmental Facility (GEF).³²

²⁶ FCCC/AWGLCA/2012/INF.3/Rev.1. para 68.

²⁷ The Bonn workshop also included various proposals for further discussion. FCCC/AWGLCA/2012/INF.3/Rev.1. para 72-76.

²⁸ World Bank (2011) *Human Rights and Climate Change*. World Bank: Washington, DC, p. 50.

²⁹ French, D. (2000) “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities” *International Comparative Law Quarterly* (49), pp.35-60.

³⁰ *Id.* at p. 39; Bell, R., et al. (2012) *Building International Climate Cooperation: Lessons from the weapons and trade regimes for achieving international climate goals* WRI: Washington, DC., pp. 5, 6.

³¹ French, D. (2000) “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities” *International Comparative Law Quarterly* (49), p. 39.

³² Barrett, S. (2003) “The Strategy of Environmental Treaty-Making,” *Environment and Statecraft*, pp. 346-49.

Over the decades of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), there have been extensive provisions for differential treatment of developing countries.³³ Whether and to what extent developing countries actually benefit from the trade regime, and this differential treatment, is a matter that is actively debated. Many representatives and proponents of developing countries maintain that the larger picture is one that tends to disfavor their development strategies and the products in which they wish to expand while developed countries press to enter their markets with agricultural and other products, often subsidized.³⁴ Others argue that trade and globalization are beneficial to developing countries and help alleviate poverty, although it is suggested that transitional adjustment assistance and other safeguards are warranted.³⁵

Lessons regarding equity can be drawn from the experience of other regimes and this is a topic that deserves more thorough examination. The regimes just mentioned may indicate examples of some lessons. For instance, one commentary suggests that the perception by developing countries of disappointment in areas like finance and trade makes it more difficult to build trust in the climate negotiations, a reality that proponents of climate action need to recognize and address.³⁶ In the context of climate change, there is a diversity of views regarding equity among both developed and developing countries.³⁷ Also, solutions have been found in other regimes even where there were initially strong differences regarding fairness. In the case of the Montreal Protocol, developed and developing countries started with strong differences over what would be fair, but negotiated a solution.³⁸ One illustration is that in providing for contributions to the Montreal Protocol Multilateral Fund, each industrialized country paid for incremental costs of developing countries in proportion to its share of UN assessments.³⁹

2. Scope, structure and design of 2015 Agreement

Based on the lessons learned from multilateral processes, in particular from the trade, weapons and climate regimes as articulated in *Building International Climate Cooperation*,⁴⁰ and *Building the Climate Change Regime, Survey and Analysis of Approaches*,⁴¹ there are five functions that should be considered when designing the new agreement:

³³ Jackson, J. (1997) *The World Trading System*, 2nd Ed., Ch.13.2.

³⁴ Tandon, Y. "A Forward-Looking Agenda for Global Trade Governance and Sustainable Development from a Southern Perspective" in Birkbeck, C. and Melendez-Ortiz, R. (2009) *Rebuilding Global Trade*, pp. 72-4; Cheng, F. "Tariff Escalation in World Agricultural Trade" in Pinstrup-Andersen, P. and Cheng, F., eds. (2007) *Food Policy for Developing Countries*; Khor, M. (Aug 16 2008) "Behind the July Failure of the WTO Talks on Doha."

³⁵ Bhagwati, J. (2007) *In Defense of Globalization*, 2nd Ed., Oxford UP. For a brief discussion of the arguments pro and con, and references to other authorities, regarding the fairness to developing countries of the trade regime, see Jackson, J. (1997) *The World Trading System*, 2nd Ed., pp. 319-25.

³⁶ Examples suggested include less finance provided by developed countries than agreed at Rio in 1992 and rejection of developing country positions on trade and investment in 1997. Parks, B., and Roberts, J. (2008) "Inequality and the Global Climate Regime: Breaking the North-South Impasse" *Cambridge Review of International Affairs*, pp. 621-44.

³⁷ 24 May 2012 Bonn Workshop on equitable access to sustainable development, FCCC/AWGLCA/2012/INF.3/Rev.1.

³⁸ Parks, B., and Roberts, J. (Dec 2008) "Inequality and the Global Climate Regime: Breaking the North-South Impasse" *Cambridge Review of International Affairs*, pp. 635-36.

³⁹ Barrett, S., (2007) *Why Cooperate? The Incentive to Supply Global Public Goods* Oxford UP, p. 81.

⁴⁰ Bell, R., et al.

⁴¹ Moncel, R., et al. (2011) *Building the Climate Change Regime: Survey and Analysis of Approaches* UNEP & WRI: Nairobi and Washington, DC.

- Allow Parties who wish to go further and faster the flexibility to move ahead –this is the concept of variable geometry.
- Provide for a process in which countries can take new responsibilities, commitments, and roles at a graduated and dynamic pace – this is the concept of graduation.
- Ensure that the regime has the agility to press forward with pieces of the puzzle while other discussions are stalled – the process of decoupling issues and outsourcing elements of the regime.
- Build trust and convey and reflect enhanced actions through enhanced transparency, verification and compliance.
- Provide for a legal and institutional architecture that preserves environmental integrity and accountability and protects the most vulnerable.

2.1 Careful approach to variable geometry

The agreement could allow Parties who wish to go further and faster the flexibility to move ahead, dilute the power of those who wish to move slower, and incentivize those who wish to lead.⁴² While these clubs would not necessarily form under the new agreement, there are several way sin which clubs and the new agreement could interact in order to capture the additional ambition generated by the clubs.

Rather than creating new institutions, one could argue that existing non-negotiating fora could be leveraged to explore and generate ideas that could then be brought into an agreement. In a recent article in *RECIEL*, by Weischer et al., “Climate Clubs: Can Small Groups of Countries Make a Big Difference in Addressing Climate Change?,”⁴³ we provide a detailed review of existing clubs, their topic areas, activities, functions and membership as well as of proposals for new clubs, with a view to complementing the multilateral climate negotiations :

- Dialogue fora and Implementation clubs:⁴⁴ Distinct from other mechanisms and bodies of the Convention given their cooperative nature and structure, partnerships (e.g. REDD, LEDS, Mitigation & MRV partnerships) can be used to address complex and emerging climate issues by creating a forum under which a range of decision-makers are committed to providing technically viable options and suggesting policy solutions. Partnerships can offer a mechanism for enhancing dialogue, bringing together experts and policy makers, and tapping expertise and knowledge from a broader set of stakeholders to develop guidance and guidelines.⁴⁵ Despite the potential benefits of these clubs, including faster resolution of contentious issues, more innovative capacity and more ambitious policy goals, Weischer et al.⁴⁶ also point out that none of them are catalyzing ambitious action at the scale required to reach the agreed goal of

⁴² See Weischer, L., Morgan, J., & Patel, M. (2012) “Climate Clubs: Can Small Groups of Countries Make a Big Difference in Addressing Climate Change?” *Review of European Community and International Environmental Law* 21 (3). Blackwell Publishing Ltd.: Malden, MA, pp. 178-179; Biermann, F., et al. (2009) *The Fragmentation of Global Governance Architectures: A Framework for Analysis* *Global Environmental Politics* 9 (1), p. 25; Bell, R., et al.; and Bell, R. & Blechman, B. (Dec 20 2012) “Global Warming Experts Should Think More About the Cold War” Bloomberg, <http://www.bloomberg.com/news/2012-12-20/global-warming-experts-should-think-more-about-the-cold-war.html> for a review of the literature on this theme.

⁴³Weischer et al.

⁴⁴ Id.

⁴⁵ Such benefits are highlighted in the Basel Convention, <http://archive.basel.int/industry/index.html>.

⁴⁶ Weischer et al.

keeping the global average temperature increase below 2°C in comparison with pre-industrial levels. At the same time, such initiatives are often too weak to turn the more ambitious ideas contained in declarations and action plans into real action.⁴⁷ Therefore, a new kind of transformational climate club could help build momentum to close the emissions gap⁴⁸ to avoid dangerous climate change.

- Transformational clubs could provide a proof of concept that encourages low-emissions development, accelerates technology development and diffusion, and catalyzes other initiatives to lead to the necessary emissions reductions. These clubs would require a level of ambition as a membership criterion, so that potential members would be required to demonstrate a certain track record, show that they have national policies and strategies in place and/or agree to specific commitments regarding emissions reductions, energy efficiency, renewable energy deployment, etc. as a condition for admittance into the club. Weischer et al.⁴⁹ shows that different proposals for new kinds of climate clubs all call for further incentives for action to underpin greater ambition. These incentives would be predominantly economic benefits, related to trade, investment, labor mobility, technology sharing or access to finance. For example, the European Union and the World Trade Organization provide significant economic or security benefits to members. The benefits could be significant in order to outweigh perceived costs of ambitious mitigation action, exclusive to the club members, accrue to all members of the club and be generated in a way that respects existing international law.

On the other hand, a variable geometry approach also carries risks. Existing initiatives have been criticized for privileging the voices of those within clubs at the expense of those outside, reproducing existing international hierarchies.⁵⁰ Bell et al. also warn that the gap between those committed and those uncommitted may increase as the latter group of countries is not forced to undertake appropriate adjustment of structures and is therefore likely to fall behind compared to countries that would have been under such pressures from international commitments.⁵¹

As is often argued in the trade context, bilateral or regional agreements risk weakening the multilateral regime; they need to be carefully designed in a way “that *complement[s] the multilateral trading system, help[s] to build and strengthen it.*”⁵² There is a risk that new clubs might draw attention and resources away from the UNFCCC. Ensuring that club agreements with smaller membership are a useful complement to the multilateral regime may mean that they should provide for equal or higher standards or expectations from their members.⁵³ This must spur a race to the top. In doing so, care must be given to prevent the risks of inconsistencies in the rules and procedures among such agreements themselves, and between these agreements and the multilateral framework. Otherwise, as highlighted

⁴⁷ Weischer et al., p. 184.

⁴⁸ There is currently a gap between Parties’ pledged emission pathways and global emissions levels that would keep warming below 2°C. United Nations Environment Programme (2010) *The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2° C or 1.5° C? A Preliminary Assessment* UNEP: Nairobi, Kenya.

⁴⁹ Weischer et al., p. 184.

⁵⁰ Id.

⁵¹ Bell et al., p. 129

⁵² World Trade Organization (n.d.) Regional Trade Agreements: Scope of RTAs http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm.

⁵³ Id.

in WTO's regional trade agreement website,⁵⁴ this is likely to give rise to loopholes, regulatory confusion, and implementation problems. These worries resonate with the concerns expressed by a number of Parties on the fragmentations of the carbon market.

Explicitly linking the activities happening in various clubs with the UNFCCC process could help mitigate some of these risks. Questions that negotiators might consider in this context include: Can countries report informally, but regularly on the activities they are undertaking in various clubs and in which forum under the Convention should these reports take place? Could clubs activities be captured in the existing formal reporting process in a transparent and harmonized way? Could there be reporting relationships between the more formal complementary international agreements, addressing issues such as HFCs, aviation and maritime emissions and the UNFCCC? Under which conditions can finance and investment that flows within a club be counted towards climate finance commitments and how can this be measured, reported and verified? Could the commitments under the new agreement capture the activities countries are undertaking in clubs?

2.2 Graduation recognizing that over time the capacities and resources of regime participants can change

Any agreement that seeks to endure over decades should consider how to respond to changes among participants. 'Graduation' is discussed as a way to manage fundamental changes within the WTO membership. Indeed, as Bell et al.⁵⁵ write, graduation provides for a continuous but assured process in which countries can take new responsibilities, commitments, and roles at a graduated and dynamic pace. Rules or criteria would have to be set in advance. If countries can agree on what these rules might be, "differentiated countries could take on new responsibilities and roles at a predefined gradual place." The predefined criteria for such a graduation process would, however, need to strike a balance between equity and environmental integrity, taking into account participants' differing capabilities, needs and stage of development.

Bell et al. also point out that "countries might be more accepting of graduation if the rules are established earlier in negotiating relationships, before consideration of new obligations becomes a defense of the status quo for some negotiating parties."⁵⁶ An example is the way the WTO is struggling to accommodate the inevitable changes in the capabilities and economic power of its member countries: the acknowledgement of diverse national circumstances is reflected through individual schedules for tariff and services bindings. The levels of commitment negotiated would be commensurate with the needs of countries and levels of social and economic development.⁵⁷

Idea for Consideration:

A tiered approach for mitigation actions could help frame an equitable race to the top that would lead countries to increase their ambition in accordance with their capabilities and help the community of practice (negotiators, practitioners, policy makers) to engage more positively and confidently with the leadership agenda by providing a pathway to do so. This concept was first introduced through the national greenhouse gas inventories, where methodologies, including the tiered approach, were developed to address CBDR-RC. The tiered approach for MRV of mitigation actions was also flagged in

⁵⁴ Id.

⁵⁵ Bell et al.

⁵⁶ Id.

⁵⁷ Id.

Ellis and Moarif⁵⁸ as a way to appraise the diversity of NAMAs. This can bring some flexibility while acknowledging the complexity of the sources of support and the technical difficulties (e.g. metrics, sources of data), especially when integrating non-GHG targeted initiatives that support wider sustainable development goals.

This approach could potentially provide for middle ground between Annex I and non-Annex I countries' responsibilities. This tiered approach could be combined into one that allows graduation from voluntary agreements to mandatory packages, and subsequently allows the regime to take up new challenges and produce new legal instruments.⁵⁹ This could be applied not only in the mitigation arena, but also with regards to means of implementations and adaptation.

2.3 Decoupling issues and outsourcing elements of the regime to specialized bodies at the national and international level can increase progress

As suggested in Bell et al.,⁶⁰ in complex negotiations, it is inevitable that blockages will occur as countries assess their fundamental interests which may vary widely. Ensuring that the regime has the agility to press forward with parts of the puzzle while other discussions are stalled is vital to meeting the overall objective. Moreover, outsourcing contentious and often technical issues to specialized agencies or to different venues can lead to breakthroughs that are more difficult within a single, centralized process.

- One could envisage one or more fora to be smaller testing grounds of tools that might be applied later to a larger number of countries.
- A variety of existing fora and partnerships (e.g. MEF, and partnerships such as LEDS, Mitigation/MRV, NAMAs partnerships) could allow for the development of negotiating relationships for key actors to interact and trade-off. These fora allow a form of flexibility and relationship building not found in formal approaches to complex threats, which “can be laborious and politically difficult and take a very long time to complete.”⁶¹
- Stalled negotiating issues could be exported for management to other existing or specifically created parts of an existing institution because these parts might deal with these issues more effectively. This could take place in separate and independent multilateral agencies carrying out narrower mandates on which there is general agreement to depoliticize the issues. Comparability, accounting, verification, and compliance could be dealt with by a depoliticized compliance and implementation committee or body. The Montreal protocol is likely to be the best positioned to adopt and implement a phase-out of HFCs, since it has the technical, scientific and financial institutions in place, as well as successful experience in phasing out HFCs precursors. The 38th Assembly Session of the ICAO could potentially be the moment, to provide for a more effective way to deal with greenhouse gas emissions and associated market based mechanisms. Cooperation between climate, ozone and aviation experts and negotiators would need to be intensified this year to make this happen.

2.4 Importance of transparency verification and compliance to build trust, reflect and convey enhanced actions:

⁵⁸ Ellis, J., & Moarif, S. (2009) *GHG Mitigation Actions: MRV Issues and Options*. Paris: Organisation for Economic Cooperation and Development and International Energy Agency.

⁵⁹ Bell et al.

⁶⁰ Id.

⁶¹ Id.

As conveyed by Bell et al.,⁶² lessons from the climate, weapons and trade regimes demonstrate that trust is developed not only through actual reporting and verification of what each Party does, but also from the level of confidence that can be developed out of extended and positive interactions, including piloting, with growing levels of agreement and concessions. Where trust has developed, countries have often agreed to be held to account in ways that might historically have been seen to impinge national sovereignty.

- These verification processes could become more stringent over time and evolve toward greater scrutiny and deeper engagement with a series of incremental steps over the years. The period pre-2020 could be used to pilot and test the newly agreed verification regime for both developed (International Assessment & Review) and developing countries (International Consultation and Analysis) to see how this could be strengthened to improve countries' reporting, enhance the effectiveness of their actions regime, and implementation of their commitments. Both processes provide for interactive sessions that would be conducive to trust.
- Formal complaint procedures and sanctions could play an important role in motivating countries to meet their commitments. As highlighted by Bell et al.,⁶³ the existence of a formal complaint procedure and dispute settlement body in the trade regime has encouraged some processes toward more informal and amicable resolution of international disagreements.
- However, such a verification process is made more effective when coupled with clear benefits or incentives, which would encourage countries to make concessions as they see the pros and cons of the participation in such a regime. For instance, governments in the trade regime found benefits that aligned with their national interests by collecting economic data to meet their international verification obligations. Other broader and longer-term benefits included nuclear safety and economic prosperity. In the weapons regime, under-resourced countries were persuaded to collect data for compliance with biological weapons obligations when it enhanced their ability to track domestic diseases. In both cases, dual use of information was the trigger to agree to international provisions. The same could apply to climate change actions, which would not be seen as a concession but rather a benefit.

From the point of view of adequacy, performance tracking rules under the UNFCCC carry important benefits.⁶⁴ Drawing from experience in other international regimes, note that systematic and comparable global reporting and verification standards are an important part of efforts to tackle transboundary challenges. By creating consistent transparency and accountability rules around country actions and commitments, Chayes and Chayes argue these standards can give Parties the certainty that their counterparts are living up to their obligations. These standards may also incentivize them to increase their level of ambition within the regime. Consistent, complete, comparable, transparent, and accurate rules to account for country emissions of greenhouse gases are essential to get an accurate picture of emissions of individual countries, regional groups and all Parties in aggregate. Such standardized accounting rules can be agreed under the UNFCCC, building from experience with the first period of the Kyoto Protocol, in order to assess emissions in key sectors, including forestry, and accurately track the use of offsets. By contrast, disharmonized accounting rules can result in reporting and review standards that do not capture the full scope of gases or sectors in major economies, or double count emission reductions when offsets are issued or used.

⁶² Id.

⁶³ Id.

⁶⁴ Chayes, A., and Chayes, A. (1998) *The New Sovereignty: Compliance with International Regulatory Agreements* Cambridge: Harvard UP; Blechman, B., & Finlay, B. (2012) *Managing Across Boundaries: Promoting Private Solutions to the Nonproliferation Threat*.

2.5 Legal and Institutional Architecture, Environmental Integrity, Accountability and Protection of the Most Vulnerable

In Moncel et al.⁶⁵, we note the work of Werksman⁶⁶ that it is possible to identify four components of legal character: the legal form of the agreement (whether legally-binding or not); the mandatory or discretionary nature of the commitments (whether the commitments are expressed in obligatory language); the specific and prescriptive nature of the commitments; and the institutions, procedures, and mechanisms designed to hold Parties accountable for these commitments. Collectively, these components give each Party confidence that other Parties will act in accordance with the bargain struck.⁶⁷

If a comprehensive legally-binding agreement is the long-term goal, nevertheless in the near term, incremental steps may be required that accommodate targets and timetables that are not yet legally binding, until the political will can be generated behind specific and mandatory legally-binding commitments. Ultimately legally-binding form, specific content, and strong institutions and procedures are linked to environmental integrity, accountability and the stability and predictability needed for the carbon market⁶⁸ and potentially other means to reduce greenhouse gas emissions. To move as rapidly as possible towards the goal, effort could be invested in those components of legal character that can be strengthened through means that are not yet legally-binding, e.g. improving the institutions and procedures of the Convention, measurement, reporting, verification, and accounting in a way that provides flexibility without incurring the risks of a highly fragmented system.

The UNFCCC MRV framework provides an important means for learning and sharing experiences for both developed and developing countries. It promotes implementation by providing facilitative assistance to help Parties improve their performance. The reporting and verification framework agreed in Durban provides an opportunity for all Parties to engage in facilitative exercises and information exchanges so that government officials can learn from their peers' experiences, replicate successes, support each other (financially or otherwise), and enhance the institutions and rules that would lead to a legally binding regime.

⁶⁵ Moncel et al.

⁶⁶ Werksman, J. (2010) "Legal Symmetry and Legal Differentiation under a Future Deal on Climate Change" *Climate Policy*, Vol. 10 (6): 672-677.

⁶⁷ Moncel et al.

⁶⁸ Werksman, J., and Herberston, K. (2010) "The Aftermath of Copenhagen: Does International Law have a Role to Play in a Global Response to Climate Change?" *Maryland Journal of International Law* Vol 25.