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ANNIVERSARY ISSUE ARTICLE

Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime

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Abstract
The Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC) signifies a shift in how the principle of common but differentiated responsibilities (CBDR) manifests in the international climate change regime. Unlike the UNFCCC and its Kyoto Protocol, the Paris Agreement does not enshrine differentiated substantive mitigation obligations for developed and developing countries. However, an increasingly proceduralized variant of the CBDR principle, which facilitates regard for the interests of developing countries with respect to treaty implementation yet does not guarantee favourable substantive outcomes for these states, is evident in the emerging regime. The experience of the International Maritime Organization's climate change regime provides a cautionary tale with respect to procedurally oriented differentiation that is not reinforced by effective processes to ensure that developed states honour their finance and technology transfer commitments. Accordingly, this article posits that strong accountability mechanisms are required to transform opportunities for procedural differentiation in the Paris Agreement into a robust framework for procedural regard for the interests of developing states.

Keywords: Paris Agreement, United Nations Framework Convention on Climate Change (UNFCCC), Common but differentiated responsibilities principle (CBDR), Procedural regard, International Maritime Organization (IMO)

1. INTRODUCTION

While the meaning of the principle of common but differentiated responsibilities (CBDR) in the international climate change regime was relatively clear-cut under the United Nations Framework Convention on Climate Change (UNFCCC)[1] and its

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1 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, Art. 1, available at: http://unfccc.int. The UNFCCC enjoins parties 'to protect the climate system for the benefit of present and future

Kyoto Protocol,[2] its significance under the Paris Agreement[3] to the UNFCCC is more nuanced, flexible and inchoate. According to the CBDR principle, all states have common environmental responsibilities,[4] but the manner in which each state meets its responsibilities should vary according to country-specific economic, historical, social and ecological variables.[5] Whereas the UNFCCC and its Kyoto Protocol codified this principle in the form of differential treatment in their central treaty obligations, including those pertaining to mitigation,[6] the Paris Agreement replaces top-down differentiation with regard to mitigation obligations with a new paradigm of bottom-up 'self-differentiation',[7] as parties select their own mitigation targets.[8] Despite the diminished role for the CBDR principle in relation to prescriptive substantive mitigation commitments under the Paris Agreement, this article posits that there is increasing scope for the CBDR principle to shape procedurally oriented implementation and support mechanisms under the Paris Agreement. In particular, CBDR will continue to play a pivotal role in the context of adaptation, finance and technology transfer, capacity building and compliance. However, the increasingly salient avenues for procedural differentiation will need to be buttressed by robust accountability mechanisms, including consequences for deficient performance,[9] to be effective. Currently, such accountability mechanisms are underdeveloped in this nascent phase of the Paris Agreement.

Insights from global administrative law (GAL) scholarship[10] valuably inform this analysis. GAL scholarship highlights the desirability of global administrative action

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generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities': ibid., Art. 3(1).

2 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

3 Paris Agreement, Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC Secretariat, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016).

4 This is consistent with the principle of *pacta sunt servanda* enshrined in Art. 26 Vienna Convention on the Law of Treaties (VCLT), Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf. This was confirmed in the 2011 Seabed Mining Advisory Opinion, in which the Seabed Dispute Chamber acknowledged the provisions promoting preferential treatment for developing states, yet noted that a sponsoring state's responsibilities and liabilities 'apply equally to all sponsoring States, whether developing or developed': International Tribunal of the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber, Case No. 17, 1 Feb. 2011, para. 158.

5 D. Hunter, J. Salzman & D. Zaelke, *International Environmental Law and Policy*, 4th edn (Foundation Press, 2011), p. 464.

6 UNFCCC, n. 1 above, Art. 4(2), and Kyoto Protocol, n. 2 above, Art. 3.

7 L. Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations' (2015) 78(5) *The Modern Law Review*, pp. 826–53, at 852.

8 J. Brunnée & C. Streck, 'The UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities' (2013) 13(5) *Climate Policy*, pp. 589–607, at 591.

9 R.B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law*, pp. 211–70, at 253.

10 GAL can be defined as 'comprising the mechanisms, principles and practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make': B. Kingsbury,

being circumscribed by mechanisms for accountability, transparency, participation, reason giving and review.[11] Stewart extends this argument by positing that 'procedural regard' for the interests of weaker actors can be promoted by these principles and practices.[12] Procedural regard is facilitated by an administrative framework in which relevant decision makers take into account the interests of affected actors in decision-making processes[13] – in this case, developing countries' interests and needs with respect to treaty implementation. In contrast, substantive regard implies securing certain outcomes that are favourable to developing countries.[14] Building on this distinction, this article contends that the diminished influence of the CBDR principle in terms of substantive regard, which was previously guaranteed through top-down differentiation in central treaty obligations, is counterbalanced by an increasing – if as yet underdeveloped – scope for the CBDR principle to foster procedural regard for developing countries' interests under the Paris Agreement. In this context, the experience of the procedurally differentiated regime of the International Maritime Organization (IMO) for reducing greenhouse gas (GHG) emissions from marine bunker fuels yields valuable lessons. The IMO's approach has proved to be ineffective in promoting the interests of developing countries largely because it does not incorporate adequate accountability mechanisms. Such mechanisms are necessary to transform mere procedural opportunities for differentiation into a robust framework for procedural regard.

This article proceeds as follows. Section 2 provides a conceptual framework for substantive and procedural regard, and charts the demise of CBDR as a principle that prescriptively shapes substantive mitigation obligations in the international climate change regime. Section 3 analyzes the text of the Paris Agreement and identifies the ways in which it paves the way for a more proceduralized manifestation of the CBDR principle. Section 4 explores the similar trajectory of the CBDR principle in the IMO's climate change mitigation regime, and draws lessons from this comparison. Concluding remarks are offered in Section 5.

2. SUBSTANTIVE AND PROCEDURAL REGARD IN THE UNFCCC AND ITS KYOTO PROTOCOL

The reconceptualization of the role of the CBDR principle in terms of substantive and procedural regard illustrates the value of insights from GAL as

N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3&4) *Law and Contemporary Problems*, pp. 15–61, at 17. See also N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *European Journal of International Law,* pp. 1–13, and the other articles in this Symposium issue of the *European Journal of International Law*, at pp. 1–278.

11 Kingsbury, Krisch & Stewart, ibid., p. 28.

12 Stewart argues that regard can be enhanced by, inter alia, accountability and other 'responsiveness-promoting measures' such as transparency, non-decisional participation and reason giving: Stewart, n. 9 above, pp. 233, 266.

13 Ibid., p. 224.

14 Ibid.

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'essential' components[15] of the developing field of transnational environmental law. GAL is an innovative branch of legal scholarship which argues that much of contemporary global governance can be conceptualized and analyzed as global administrative action.[16] GAL highlights the importance of new administrative law mechanisms in global regulatory governance,[17] in particular principles and practices that promote accountability, transparency, participation, reasoned decision making and review.[18] This article contends that these administrative mechanisms have significant potential to promote procedural regard for developing states' interests under the Paris Agreement. However, their efficacy could be undermined by partial and uneven adoption.

According to Stewart, there is a 'problem of disregard' with respect to the interests of less powerful states and other marginalized actors in global regulatory bodies.[19] The problem of disregard describes the strong risk of bias in global regulatory regimes towards promoting the interests of the powerful and well resourced, while overlooking the interests and concerns of weaker groups and individuals.[20] Stewart proposes that administrative mechanisms have significant potential to *redress* this risk by being responsive to the interests of affected stakeholders.[21] He explains how regard can provide an antidote to the problem of disregard as follows:

> As an ideal, regard requires that the decision-maker review available information about the effects of proposed decisions on the various groups, individuals, interests, and concerns entitled to consideration; weighs the benefits for and burdens on them of alternatives; and determines that decisions that impose disadvantage or harm on some affected groups and individuals are justified by relevant decisional norms.[22]

This type of procedural regard can be contrasted with both procedural disregard, in which decision makers fail or refuse to have regard for affected actors' interests,[23]

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15 P.H. Sand, 'The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective' (2012) 1(1) *Transnational Environmental Law*, pp. 183–98, at 185.

16 Kingsbury, Krisch & Stewart, n. 10 above, p. 17.

17 The other primary strand of inquiry concerns attempts by domestic administrative systems to constrain intergovernmental regulatory decisions that have national implications: ibid., pp. 16, 18.

18 Ibid., p. 28.

19 For an overview, see Stewart, n. 9 above.

20 Ibid., p. 211.

21 Ibid., pp. 244–68. Cf. the critiques of the GAL project which argue that the adoption of administrative procedures in global regulatory bodies may serve to entrench the dominance of the powerful and well-resourced: see, e.g., B.S. Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law' (2005) 37(4) *New York University Journal of International Law and Politics,* pp. 799–827, at 826; B.S. Chimni, 'Global Administrative Law: Winners and Losers', paper presented at the NYU Law School Global Administrative Law Conference, New York, NY (US), 22–23 Apr. 2005, p. 11, available at: http://www.iilj.org/gal/documents/ChimniPaper.pdf; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law*, pp. 187–214, at 187; C. Harlow, 'Accountability as a Value for Global Governance and Global Administrative Law', in G. Anthony et al. (eds), *Values in Global Administrative Law* (Hart, 2011), pp. 207–14. However, there is little evidence of administrative mechanisms being co-opted by powerful states in the compliance systems of three major global multilateral environmental agreements: A. Huggins, 'The Desirability of Administrative Proceduralisation: Compliance Rules and Decisions in Multilateral Environmental Agreements', Ph.D. thesis, University of New South Wales (Australia), Oct. 2015.

22 Stewart, n. 9 above, pp. 224–5.

23 Ibid., p. 224.

and substantive regard, which implies outcomes that are favourable to weaker or vulnerable actors.[24] This latter distinction is central to the argument in this article, although it is acknowledged that in practice substantive regard can reinforce procedural regard, and vice versa.[25]

There are a number of administrative mechanisms that can enhance procedural regard, only some of which are thus far evident in the Paris Agreement.[26] Stewart groups such mechanisms into three categories: 'decision rules', 'accountability mechanisms', and 'other responsiveness-promoting measures'.[27] Decision rules govern which actors have the authority to vote or are otherwise vested with authoritative power in the decision-making process. Other responsiveness-promoting measures include, inter alia, measures for transparency, non-decisional participation and reason giving, which can be buttressed by review.[28] The regard-enhancing tool which is most pertinent to the argument in this article is accountability. Stewart favours a narrow definition of accountability, characterized by three structural elements:

> (1) a specified accounter, who is subject to being called to provide account for his conduct; (2) a specified account holder who can require the accounter to render account; and (3) the ability and authority of the account holder to impose sanctions or other remedies for deficient performance.[29]

This definition sees accountability as a discrete procedural tool, and can be contrasted with broader understandings which conceive of accountability as a conceptual umbrella.[30] The narrow approach to accountability, which is adopted in this article, can apply to states acting as administrative 'agents' responsible for implementing their commitments under the international climate change regime, and which are ultimately accountable to the state parties for compliance with their treaty obligations.[31] It is argued that the development of accountability mechanisms for states with respect to their mitigation and support commitments is vital for the success of the emerging framework for procedural regard under the Paris Agreement, but is at risk of being undermined by a paucity of remedies for deficient performance.[32]

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24 Ibid.

25 See, e.g., N. Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008), pp. 273–4.

26 See further Section 3.

27 Stewart, n. 9 above, p. 233.

28 Ibid., p. 266.

29 Ibid., p. 253.

30 See, e.g., R.W. Grant & R.O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review*, pp. 29–43, at 36 (identifying hierarchical, supervisory, fiscal, legal, market, peer reputational, and public reputational accountability mechanisms); and J.L. Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' (2005) 5(1) *Issues in Legal Scholarship*, pp. 1–38, at 27 (identifying political, administrative, legal, product market, labour market, financial market, family, professional, and team accountability).

31 Kingsbury, Krisch & Stewart, n. 10 above, p. 36. See also J. Waldron, 'The Rule of International Law' (2006) 30(1) *Harvard Journal of Law and Public Policy*, pp. 15–30, at 23; J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) *European Journal of International Law*, pp. 315–43, at 327–37.

32 See the third point in Stewart's definition of accountability at text accompanying n. 29 above.

Stewart's discussion of disregard for marginalized individuals and groups explicitly excludes the potential for global regulatory bodies to 'disregard the interests and concerns of weaker states, especially developing-country states'.[33] This article expands upon Stewart's analysis by contending that, in the international climate change regime, the CBDR principle has the potential to shape both substantive and procedural regard for the interests of developing states. The potential for procedural regard is most clearly evident in the Paris Agreement. Of course, developing states' interests and capacities in the international climate change regime are not homogeneous; the interests of vulnerable least developed countries and small island countries diverge significantly from those of large developing economies such as China, India and Brazil, and from comparatively wealthy developing countries such as Kuwait, Saudi Arabia, Singapore and South Korea.[34] Thus, when this article refers to developing states' interests in relation to procedural regard, the focus is on those developing states that face genuine capacity constraints with respect to implementing their substantive obligations, albeit to varying degrees. These capacity constraints reflect ongoing economic and political disparities between developed and developing states which have origins in colonialism.[35] As Chayes and Handler Chayes note, developing countries' implementation and compliance issues are generally attributable to 'a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems'.[36] The present analysis of procedural regard focuses on decision making that relates to the genuine capacity limitations of developing states.

Understanding differentiation in international environmental agreements in terms of its potential for fostering procedural and substantive regard creates an alternative categorization of differential treatment to those deployed in earlier writing. Rajamani, for example, outlines three primary ways in which to categorize differential treatment in international environmental law:

- provisions that differentiate between industrial and developing countries with respect to the *central obligations* contained in the treaty, such as emissions reduction targets;

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33 Stewart, n. 9 above, p. 220.

34 D. Bodansky & L. Rajamani, 'Evolution and Governance Architecture of the Climate Change Regime', in D. Sprinz & U. Luterbacher (eds), *International Relations and Global Climate Change: New Perspectives*, 2nd edn (The MIT Press, 2016 forthcoming). Indeed, it is claimed that the lines between the global North and South in the international climate change regime have 'become increasingly blurred, as nations have formed various blocs and alliances and several Southern countries have become major emitters': R. Maguire & X. Jiang, 'Emerging Powerful Southern Voices: Role of BASIC Nations in Shaping Climate Change Mitigation Commitments', in S. Alam et al., *International Environmental Law and the Global South* (Cambridge University Press, 2015), pp. 214–36, at 236; J. Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) *Review of European Community & International Environmental Law*, pp. 29–41. Nonetheless, as is discussed in Section 3 below, the division between developing and developed countries is still a salient factor in negotiating the architecture of the Paris Agreement.

35 See, generally, A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

36 A. Chayes & A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998), p. 14.

- provisions that differentiate between industrial and developing countries with respect to *implementation*, such as delayed compliance schedules, permission to adopt subsequent base years, delayed reporting schedules, and soft approaches to non-compliance; and
- provisions that grant *assistance,* inter alia, financial and technological.[37]

This article extends and complements Rajamani's categorization by analyzing the changing prominence of these categories in terms of the shifting traction of opportunities for substantive and procedural regard in the Paris Agreement.[38]

In tracing this shifting trajectory, it is logical to begin with an evaluation of substantive and procedural regard in the UNFCCC and its Kyoto Protocol. Against the backdrop of the North–South divide,[39] and reflecting the growing prominence of the CBDR principle before and after the Rio Earth Summit in 1992,[40] differential treatment for developing countries is enshrined in the central treaty obligations of the UNFCCC and its Kyoto Protocol, which is unique among global multilateral environmental agreements (MEAs).[41] In the 1992 UNFCCC, all parties have

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37 L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006), p. 93. For a similar yet alternative categorization, see Cullet's analysis of the ways in which differentiation manifests in international environmental law. Cullet asserts that '[t]he first type of differentiation refers to situations where treaties provide different obligations for different groups of states. Secondly, differential treatment also takes the form of measures to facilitate implementation in states which do not have capacity to implement specific commitments. … Thirdly, while differential treatment is primarily a concept applying to interstate relations, it is also relevant to the issue of broadening of the range of actors in international law and the role of non-state actors in addressing problems like climate change': P. Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003), p. 28. Maguire argues that 'the principle of CBDR is implemented in more of a true sense under the implementation model of differentiation, as this is an instance in which all nations play a role in implementing the agreement and as such creates "common" responsibilities for all states': R. Maguire, 'The Role of Common but Differentiated Responsibilities in the 2020 Climate Regime' (2013) 7(4) *Carbon and Climate Law Review*, pp. 260–9, at 261.

38 Such a shift may be seen as part of a broader trend towards proceduralization in international law and global governance: see, e.g., M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006), pp. 148–57; Craik, n. 25 above, pp. 271–4.

39 North–South political dynamics in this regime occur against a complex background characterized by the industrialized North's primary responsibility for historical emissions, national variations in historical and contemporary wealth and emissions use, and the disproportionate vulnerability of the poorest populations within developing countries to adverse climate change impacts: L. Rajamani, J. Brunnée & M. Doelle, 'Introduction: The Role of Compliance in an Evolving Climate Regime', in J. Brunnée, M. Doelle & L. Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012), pp. 1–14, at 1–2.

40 Principle 7 of the Rio Declaration enshrines the CBDR principle: '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 the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command': Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. 1), 14 Jun. 1992, available at: http://www.un.org/documents/ga/conf151/aconf15126-1.htm. Rajamani argues that the influence of the CBDR principle in international environmental law reached its zenith in the decade between the Rio Earth Summit in 1992 and the World Summit on Sustainable Development in 2002: L. Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88(3) *International Affairs*, pp. 605–23, at 606.

41 Brunnée, Doelle & Rajamani, n. 39 above, p. 3.

procedural obligations to publish national emissions inventories and to formulate, publish and regularly update national and regional programmes containing mitigation measures.[42] However, only Annex I industrialized countries[43] are required to adopt national mitigation policies to limit GHG emissions and protect and enhance sinks and reservoirs, with the aim of reducing overall GHG emissions to 1990 levels.[44] Thus, the primary mitigation burden under the UNFCCC falls upon industrialized countries. Accordingly, this Convention evidences obligations that are favourable to developing states and hence reflect substantive regard.

The Kyoto Protocol was adopted at the third Conference of the Parties (COP) in 1997 to strengthen the relatively broad and vague commitments in the original Framework Convention. The Kyoto Protocol mirrors the UNFCCC's asymmetric approach to developed and developing state parties. The Protocol committed industrialized countries to achieve differentiated, legally binding overall emissions targets of at least 5% below 1990 levels in the first commitment period from 2008 to 2012. In contrast, developing countries were required only to meet certain procedural obligations, such as reporting. The Kyoto Protocol thus perpetuated and further entrenched the UNFCCC's substantive regard for the interests of developing states. Indeed, as Rajamani notes, the Kyoto Protocol represents 'the high-water mark of differential treatment' in international environmental law.[45]

The starkly differentiated substantive mitigation obligations in the Kyoto Protocol are complemented by a well-developed framework for procedural regard which allows developing states' interests to be factored into decision-making processes within the regime. For example, the Kyoto Protocol's Compliance Committee was established as the body responsible for resolving compliance issues and determining the consequences of non-compliance.[46] The Committee comprises two branches – the Enforcement Branch and the Facilitative Branch – which reflect a unique dual focus on enforcing and promoting compliance.[47] The Enforcement Branch has a mandate to take relatively strong measures[48] in response to questions of implementation involving industrialized state parties' emissions reduction commitments and related reporting and eligibility requirements, 'taking into account the cause, type, degree and frequency of the non-compliance of that Party'.[49] In contrast, the Facilitative Branch is tasked with advising and facilitating implementation

42 UNFCCC, n. 1 above, Art. 4(1)(a), (b).

43 I.e., developed countries and countries in transition.

44 UNFCCC, n. 1 above, Art. 4(2)(a) and (b).

45 Rajamani, n. 40 above, p. 606.

46 Decision 27/CMP.1, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, UN Doc. FCCC/KP/CMP/2005/8/Add.3Annex, 30 Mar. 2006, s. II.

47 S. Oberthür & R. Lefeber, 'Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience' (2010) 1(1) *Climate Law*, pp. 133–58, at 134.

48 As discussed further below, the consequences of a finding of non-compliance available to the Enforcement Branch include suspension of states from participating in the Protocol's flexibility mechanisms if the non-compliance issue concerns the eligibility requirements, and deductions from future emissions allocations if a party's emissions target is exceeded: Decision 27/CMP.1, n. 46 above, s. XV, paras 5(b) and (c).

49 Ibid., s. XV, para. 1.

for all parties,[50] taking into account the principle of 'common but differentiated responsibilities and respective capacities'.[51] Only the Facilitative Branch of the Compliance Committee was intended to apply to developing countries[52] and, to date, this branch has had limited practical relevance for all countries.[53]

Significantly, both the Enforcement and Facilitative Branches represent decision-making forums that are constrained by extensive due process guarantees.[54] Once a non-compliance issue has been referred to either branch, the rights afforded to the relevant party include:[55]

- making information available to the party concerned and requiring notifications to be sent to the party at the different stages of the process;[56]
- allowing the party the opportunity to comment in writing on all information considered by the relevant branch, as well as on any decisions;[57]
- permitting the party to designate persons to represent it during the consideration of the question of implementation by the relevant branch;[58]
- allowing written submissions, including rebuttal, from the party;[59] and
- providing the party with a hearing, to be held in public unless otherwise decided, where it may present its views, and expert testimony or opinion.[60]

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50 Stated differently, the mandate of the Facilitative Branch is to address questions of implementation that are not within the purview of the Enforcement Branch: G. Ulfstein & J. Werksman, 'The Kyoto Compliance System: Towards Hard Enforcement', in O.S. Stokke, J. Hovi & G. Ulfstein (eds), *Implementing the Climate Regime: International Compliance* (Earthscan, 2005), pp. 39–62, at 45.

51 Decision 27/CMP.1, n. 46 above, s. IV, para. 4.

52 As Rajamani notes, 'This is evident from the provisions relating to the mandate of the enforcement branch which cover Annex I commitments alone (i.e. compliance with Articles 3.1, 5.1 and 5.2, 7.1, and 7.4, and eligibility requirements under Articles 6, 12, and 17)': L. Rajamani, 'Developing Countries and Compliance in the Climate Regime', in Brunnée, Doelle & Rajamani (eds), n. 39 above, pp. 367–94, at 391.

53 Oberthür & Lefeber, n. 47 above, p. 155. The Facilitative Branch has limited practical impact because most developing country obligations are currently reflected in the UNFCCC rather than the Kyoto Protocol: see Rajamani, ibid., p. 388. There are, of course, clear differences in financial and technical capacity, and bargaining power, even amongst Annex I countries, with many countries with economies in transition facing significant capacity constraints compared with their developed country counterparts.

54 This point is informed by the work of Dubash and Morgan, who propose that the general concept of a '*procedurally constrained* space for political negotiation' is a 'core and inevitable dimension' of domestic regulatory governance in the global South: N. Dubash & B. Morgan, 'The Embedded Regulatory State: Between Rules and Deals', in N. Dubash & B. Morgan (eds), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013), pp. 279–95, at 289 (emphasis in original).

55 This list is adapted from the list of procedural requirements in UNFCCC Secretariat, 'Procedural Requirements and the Scope and Content of Applicable Law for the Consideration of Appeals under Decision 27/CMP.1 and Other Relevant Decisions of the COP Serving as the Meeting of the Parties to the Kyoto Protocol, as well as the Approach Taken by Other Relevant International Bodies Relating to Denial of Due Process', Technical Paper, UN Doc. FCCC/TP/2011/6, 15 Sept. 2011, p. 7.

56 Decision 27/CMP.1, n. 46 above, Annex, s. VII, paras 4 and 5; s. VIII, para. 7; and s. IX, para. 6.

57 Ibid., Annex, s. VII, para. 7; and s. VIII, paras 6 and 8; and Decision 4/CMP.2, Compliance Committee, UN Doc. FCCC/KP/CMP/2006/10/Add.1, 4 Mar. 2007, Rules 17 and 18.

58 Decision 27/CMP.1, n. 46 above, Annex, s. VIII, para. 2; and Decision 4/CMP.2, ibid., Rule 25(3).

59 Decision 27/CMP.1, n. 46 above, Annex, s. IX, paras 1, 7; and Decision 4/CMP.2, n. 57 above, Rule 17.

60 Decision 27/CMP.1, n. 46 above, Annex, s. IX, para. 2; and Decision 4/CMP.2, n. 57 above, Rule 9(1).

Compared with other MEA compliance systems, this represents an extensive range of procedural safeguards for parties called to account for their performance under the Kyoto Protocol.[61]

The due process guarantees in the Facilitative and Enforcement Branches are consonant with procedural regard in a number of ways. Firstly, these forums promote accountability by requiring states to account for their compliance with their multilateral environmental commitments, and for consequences to be considered and imposed in the event of non-compliance.[62] In the Facilitative Branch, such consequences are relatively 'soft' and include the provision of advice regarding implementation, financial and technical assistance, and the formulation of recommendations.[63] The remedies available to the Enforcement Branch are significantly more intrusive and include the requirement of a 'compliance action plan' for remedying non-compliance with methodological and reporting requirements,[64] state suspension from participating in the Protocol's flexibility mechanisms[65] if the non-compliance issue concerns the eligibility requirements,[66] and deductions from future emissions allocations if a party's emissions target is exceeded.[67] Thus, the accountability requirements of a forum in which states are answerable for their conduct, with potential sanctions for deficient performance, are satisfied.[68] Secondly, such guarantees promote participation by and dialogue with[69] affected parties, and the transparency of the compliance process. These measures correspond with the non-decisional participation and transparency measures Stewart categorizes under 'other responsiveness-promoting measures'.[70] Thirdly, a party may appeal to the COP serving as the Meeting of the Parties against a decision of the Enforcement Branch if it believes it has been denied due process and the decision 'relates to' Article 3(1) of the Kyoto Protocol regarding national emissions targets,[71] which provides a limited avenue for review. Thus, both branches of the Compliance Committee provide forums for holding states to account for their commitments,

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61 On the relative strength of the due process guarantees of the Kyoto compliance system compared with those of other global MEAs, see, e.g., M. Montini, 'Procedural Guarantees in Non-Compliance Mechanisms', in T. Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, 2009), pp. 389–405.

62 This aligns with a narrow understanding of accountability as discussed in Section 2 above: see n. 29 above and accompanying text.

63 Decision 27/CMP.1, n. 46 above, s. XIV.

64 Ibid., s. XV, para. 5(b).

65 Joint implementation, the clean development mechanism, and emissions trading: see Kyoto Protocol, n. 2 above, Arts. 6, 12 and 17, respectively.

66 Decision 27/CMP.1, n. 46 above, s. XV, para. 5(c).

67 Specifically, a 'deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions': ibid., s. XV, para. 5(a).

68 See n. 29 above and accompanying text.

69 Hovell argues that the 'essence of due process is not to provide access to a court, but to provide access to "dialogue"': D. Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press, 2016), p. 5.

70 Stewart, n. 9 above, p. 233.

71 Decision 27/CMP.1, n. 46 above, s. XI, para. 1.

which are constrained by numerous administrative mechanisms, evidencing procedural regard.[72]

Despite, or perhaps because of, the Kyoto Protocol's innovations in terms of differentiation in central mitigation obligations and the creation of procedurally constrained Enforcement and Facilitative Branches in the Compliance Committee, little of the Kyoto Protocol's architecture is evident in the Paris Agreement.[73] These changes are at least in part attributable to ongoing debates and contestation about the appropriate role for the CBDR principle in the international climate change regime.[74] For developing and developed countries alike, achieving deep GHG emissions cuts poses financial, regulatory and technical capacity challenges,[75] and key players such as the United States (US) have continued to resist accepting binding mitigation commitments unless developing countries 'meaningfully participate' in climate mitigation efforts.[76] This is perhaps not surprising given that large developing countries such as Brazil, China and India rank among the world's top ten contributors to cumulative global emissions.[77] Against this backdrop, there was diminishing support among some states for the Kyoto Protocol and its top-down 'prescriptive, quantitative, time-bound, compliance-backed approach' to mitigation for industrialized countries only.[78] The Kyoto Protocol's demise coincided with a renewed enthusiasm for forging a new agreement under the UNFCCC that would have universal coverage and prioritize decentralized, bottom-up selection of national mitigation targets and actions, reinforced by rigorous reporting frameworks.[79] This paradigm shift is reflected in the Paris Agreement, which is premised on nationally determined contributions (NDCs) rather than centrally imposed targets that differentiate between developed and developing state parties.

3. PROCEDURALLY ORIENTED DIFFERENTIATION IN THE PARIS AGREEMENT

An analysis of the Paris Agreement shows a relative dearth of provisions that guarantee substantive regard for developing states' mitigation, adaptation, and loss

72 Oberthür and Lefeber argue that the Kyoto compliance system 'provides for an unprecedented administrative review, by an independent international body, of state action to implement the Protocol': Oberthür & Lefeber, n. 47 above, p. 134.

73 Rajamani, n. 7 above, p. 844.

74 J. Brunnée, 'Promoting Compliance with Multilateral Environmental Agreements', in Brunnée, Doelle & Rajamani (eds), n. 39 above, pp. 48–49; Rajamani, n. 52 above, p. 367.

75 Brunnée, ibid., p. 48.

76 D. Abreu Mejia, 'The Evolution of the Climate Change Regime: Beyond a North-South Divide?', Working Paper 2010/06, Institute Catala Internacional per la, June 2010, p. 23, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884192.

77 Rajamani, Brunnée & Doelle, n. 39 above, p. 4. At Copenhagen, a new bloc comprising the large developing countries of Brazil, South Africa, India and China (known as BASIC) emerged as a powerful geopolitical force: N. K. Dubash & L. Rajamani, 'Beyond Copenhagen: Next Steps' (2010) 10(6) *Climate Policy*, pp. 593–9, at 594.

78 Rajamani, Brunnée & Doelle, n. 39 above, p. 7.

79 L. Rajamani, 'The Cancun Climate Agreement: Reading the Text, Subtext and Tea Leaves' (2011) 60(2) *International and Comparative Law Quarterly*, pp. 499–519; A. Huggins, 'The Desirability of Depoliticization: Compliance in the International Climate Regime' (2015) 4(1) *Transnational Environmental Law*, pp. 101–24, at 121.

and damage interests. However, a variety of provisions lay the foundation for a framework for procedural regard to support the implementation by developing states of their substantive commitments. Yet, this procedurally oriented differentiation risks being ultimately unsuccessful in achieving common mitigation and adaptation goals if it is not supported by finance, technology transfer and capacity-building commitments from developed states that are robust, quantifiable, and for which they will be held to account.

The binary distinction between developed and developing countries' mitigation obligations under the Kyoto Protocol has not been replicated under the Paris Agreement. While developing state parties did not have legally binding emissions targets under the Kyoto Protocol, the Paris Agreement imposes a collective general obligation on all state parties to hold 'the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.[80] This commitment is to be achieved through successive and progressively strengthened NDCs of state parties.[81] In this context, developed countries should continue to take the lead through economy-wide absolute emissions reduction targets.[82] Developing countries should also make mitigation efforts and are encouraged to adopt economy-wide emissions reduction targets in the future in the light of national circumstances.[83] States' obligations are binding with respect to fulfilling procedural requirements to prepare, communicate, maintain and periodically report national contributions and pursue domestic mitigation measures,[84] rather than in relation to the substantive achievement of mitigation targets.[85] Thus, the Kyoto Protocol's rigid, top-down bifurcation between the mitigation targets of industrialized and developing countries has been replaced by bottom-up self-differentiation[86] and procedurally oriented obligations for implementing the Paris Agreement.

The move towards self-differentiation is highly questionable to the extent that it is premised on the understanding that the 1992 UNFCCC division between industrialized and developing countries is no longer justifiable because the 'material circumstances have changed, sometimes dramatically, in the intervening years and will keep changing in the years ahead'.[87] As the Paris Agreement is an instrument

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80 Paris Agreement, n. 3 above, Art. 2.

81 Ibid., Art. 4.

82 Ibid.

83 Ibid., Art. 4(4). The Agreement clearly specifies that this target should be achieved in the context of sustainable development, poverty eradication, equity, the CBDR principle, support provided to developing and least developed countries and the special circumstances of the least developed and small island countries: ibid., Arts. 2, 3 and 4, and the Preamble.

84 Ibid., Art. 4(2) and (3). Under Art. 4(3), parties are required to communicate their contributions every five years.

85 L. Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) *International and Comparative Law Quarterly*, pp. 493–514, at 497.

86 Brunnée & Streck, n. 8 above, p. 591.

87 See, e.g., T.D. Stern, 'The Shape of a New International Climate Agreement', US Department of State, 22 Oct. 2013, available at: http://www.state.gov/e/oes/rls/remarks/2013/215720.htm.

under the UNFCCC, which enshrines the CBDR principle in Article 3(1), the Paris Agreement should be interpreted consistently with this and other principles in the UNFCCC. However, there is a view that as 'economic and political realities have evolved' since the negotiation of the UNFCCC in 1992, the CBDR principle should be interpreted flexibly in the light of these changing circumstances.[88] Despite the significant economic growth of 'emerging economies' such as Brazil, Chile, China, India, Mexico and South Korea, it is important not to overstate the extent of these changes as 'these economies are not in the same position as countries whose economies were industrialized much earlier'.[89] Moreover, the ongoing and extensive challenges of extreme poverty and hunger that continue to affect millions of people in so-called leading developing countries like China and India should not be underestimated.[90] Expecting greater parallelism between states with unequal capacities may ultimately frustrate the mitigation aims of the new international climate change agreement.[91]

As with mitigation, the Paris Agreement does not substantively differentiate between developed and developing countries' commitments with respect to adaptation, or loss and damage. The Agreement characterizes adaptation as a 'global challenge faced by all', although the urgent needs of developing countries that are particularly vulnerable to climate change are acknowledged.[92] It establishes a global goal for adaptation of 'enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change'.[93] All parties are obliged to engage in adaptation planning and implementation of adaptation actions,[94] which are again obligations with respect to the procedural steps required, rather than the outcomes of these measures. Thus, there is no substantive differentiation between the obligations imposed on developed and developing states, yet the Agreement does provide for continuous and enhanced support for developing countries for the development and implementation of adaptation plans, and the preparation of adaptation communications.[95]

Although industrialized developed countries are predominantly responsible for loss and damage arising from climate change, Article 8 of the Paris Agreement imposes no specific, binding obligations on these countries.[96] Rather, the Agreement recognizes the importance of enhancing understanding, action and support for addressing loss and damage as a result of climate change on a cooperative and

88 Rajamani, n. 7 above, pp. 837–8.

89 H. Winkler & L. Rajamani, 'CBDR&RC in a Regime Applicable to All' (2014) 14(1) *Climate Policy*, pp. 102–21, at 109.

90 As noted by Winkler and Rajamani in 2014, 'US citizens' income ($49,000) is still 13 times that of India, almost six times that of China, and more than four times those of "average" Brazilians or South Africans': ibid., p. 109.

91 See further Section 4.

92 Paris Agreement, n. 3 above, Art. 7(2).

93 Ibid., Art. 7(1).

94 Ibid., Art. 7(9).

95 Ibid., Art. 7(13).

96 The imperative 'shall' is not used at all in Art. 8 on loss and damage: ibid., Art. 8.

facilitative basis, including through the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, as appropriate.[97] The parties have agreed that the inclusion of these provisions in the Agreement 'does not involve or provide a basis for any liability or compensation' for loss and damage as a result of climate change.[98] In relation to loss and damage, therefore, the absence of binding, quantifiable obligations effectively forecloses opportunities for guaranteeing substantive regard for the interests of developing states.

Developed states are urged to demonstrate leadership in supporting developing states to meet their largely procedurally oriented implementation commitments through finance, technology and capacity-building support. The Agreement obligates developed countries to provide financial resources to developing countries,[99] and to take the lead in mobilizing and progressively increasing funds for climate finance.[100] The COP decision accompanying the Paris Agreement specifies that a quantified, collective goal for climate finance, scaled-up from a floor of US$100 billion per year, is to be agreed before 2025.[101] Prior to this, developed countries intend to continue to work towards their existing collective goal of mobilizing the US$100 billion per year agreed at Cancun in 2010.[102] Developed countries are required to submit biennial communications indicating quantitative and qualitative information regarding climate finance, including the 'projected level of public financial resources provided to developing country parties'.[103] These funds will be managed and disbursed by the Financial Mechanism of the UNFCCC.[104] Moreover, the Agreement provides for financial support for developing countries for technology development and transfer through the UNFCCC Technology Mechanism,[105] and urges developed country parties to enhance support for capacity building in developing countries[106] – the institutional arrangements for capacity building will be decided at the first COP serving as the meeting of the parties to the Paris Agreement.[107] Thus, developing countries may apply for financial, technology and capacity-building support from the relevant institutional body serving the Paris Agreement.

The above-mentioned avenues for developing states to apply for assistance provide opportunities for country-specific circumstances to be taken into account in decisions about treaty implementation, which is prima facie consonant with procedural regard. To maximize opportunities for procedural regard, the procedures shaping and constraining

97 Ibid., Art. 8(1) and (2).

98 Draft Decision -/CP.21, 'Adoption of the Paris Agreement', Report of the COP on its Twenty-First Session, Paris (France), 30 Nov.–11 Dec. 2015, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 Dec. 2015, para. 52.

99 Paris Agreement, n. 3 above, Art. 9(1).

100 Ibid., Art. 9(3).

101 Draft Decision -/CP.21, n. 98 above, para. 54.

102 Ibid.

103 Paris Agreement, n. 3 above, Art. 9(5).

104 Ibid., Art. 9(8).

105 Ibid., Art. 10(6).

106 Ibid., Art. 11(3).

107 Ibid., Art. 11(5).

these decision-making processes need to hold states to account for their commitments, be transparent, encourage participation by affected state actors, and be accompanied by written reasons and review mechanisms.[108] The 'transparency framework for action and support' specified in Article 13 of the Paris Agreement goes some way towards achieving this by recognizing the need for greater transparency in relation to information on both mitigation action and support, which will be subject to technical expert review[109] to build trust and confidence between parties.[110] The provisions in Article 13 facilitate procedural differentiation by taking into account the national capabilities and circumstances of developing country parties in implementing the transparency framework.[111]

Three key oversight mechanisms provided for in the Paris Agreement are 'multilateral consideration of progress',[112] 'global stocktakes',[113] and non-compliance processes.[114] Each party is expected to participate in a 'facilitative, multilateral consideration of progress' with respect to the implementation and achievement of its mitigation contributions and, for developed country parties, their efforts in providing financial resources to assist developing countries.[115] The purpose of the global stocktake held every five years is to 'assess the collective progress towards achieving the purpose of this Agreement and its long term goals'.[116] It is as yet unclear how the 'facilitative, multilateral consideration of progress' will be conducted, what its outcomes will be, and how it will feed into the global stocktake.[117] The emphasis on collective progress in the global stocktake suggests that states will not individually be held to account for their actions.[118]

The oversight mechanisms provided for in the Paris Agreement partially contribute to creating a procedurally constrained space for administrative action under the regime; however, there is a notable lacuna in relation to consequences for failing to comply with obligations, which is an important element of accountability.[119] While binding procedural requirements are specified in the Paris Agreement, there are no prescriptive mitigation, adaptation, or loss and damage targets, and there are no quantified and time-bound goals in relation to finance, technology and capacity-building support. Although the Paris Agreement highlights the need for developed states to assist developing, least developed and small island countries, and signals that scaled-up financial commitments beyond previous efforts are mandatory,[120] the lack

108 Stewart, n. 9 above, pp. 225, 235–6.
109 Paris Agreement, n. 3 above, Art. 13(11).
110 Ibid., Art. 13(1) and (7).
111 Ibid., Art. 13(12), (14) and (15).
112 Ibid., Art. 13(11).
113 Ibid., Art. 14.
114 Ibid., Art. 15.
115 Ibid., Art. 13(11).
116 Ibid., Art. 14(1).
117 Rajamani, n. 85 above, p. 503.
118 Ibid., p. 504.
119 Stewart, n. 9 above, p. 253.
120 Paris Agreement, n. 3 above, Art. 9(1) and (3). Art. 9(1) states: 'Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and

of precision in these obligations limits the extent to which developed states can be held to account for honouring their commitments. As will be shown in the following section, soft and vague commitments in relation to financial and technology transfer that are not buttressed by strong accountability mechanisms are at high risk of being ineffective.

Similar issues arise in relation to the Compliance Mechanism, which will be established to provide a forum for facilitating improved performance by states if they do not comply with provisions under the Agreement. The Paris Agreement's Compliance Mechanism appears likely to operate in a similar way to the Facilitative Branch under the Kyoto Protocol[121] – as previously noted, the Enforcement Branch model has not been replicated in this new agreement. The modalities and procedures for this mechanism will be adopted by the COP serving as the meeting of the parties to the Paris Agreement in 2016.[122] However, the Paris Agreement specifies that the compliance committee will be 'expert-based and facilitative in nature', and is required to 'pay particular attention to the respective national capabilities and circumstances of Parties'.[123] Accordingly, the Paris Agreement's compliance framework appears likely to represent a new procedurally constrained forum for enhancing procedural regard for the interests of developing states in regime decision-making processes, without guaranteeing favourable substantive outcomes.

An important aspect of accountability is the imposition of 'sanctions or other remedies for deficient performance',[124] drawing into question the efficacy of a purely 'facilitative', 'non-adversarial' and 'non-punitive' approach to compliance.[125] Apart from public 'naming and shaming', non-compliant state parties are likely to face limited concrete consequences.[126] In the absence of intrusive consequences for non-compliance, such as trade suspensions and the deprivation of other rights and privileges under the treaty,[127] questions can be raised about the adequacy of this

adaptation in continuation of their existing obligations under the Convention'. Art. 9(3) specifies that '[a]s part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts'. These provisions should be read in the light of Art. 4(7) UNFCCC, which states that '[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties'.

121 Ibid., Art. 15(1).

122 Ibid., Art. 15(3).

123 Ibid., Art. 15(2).

124 Stewart, n. 9 above, p. 253.

125 Paris Agreement, n. 3 above, Art. 15(2).

126 S. Oberthür, 'Options for a Compliance Mechanism in a 2015 Climate Agreement' (2014) 4(1–2) *Climate Law*, pp. 30–49, at 43.

127 The compliance committees under the Kyoto Protocol, Montreal Protocol and CITES have recourse to potential sanctions with economic consequences that may apply to parties found to be in non-compliance with their treaty obligations: Huggins, n. 21 above, p. 10. See Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, QC (Canada), 16 Sept. 1987, in force

compliance system to effect significant behavioural changes,[128] and thus to provide a strong accountability mechanism as part of a robust framework for procedural regard. For optimal utility, the nascent opportunities for procedurally oriented differentiation in the Paris Agreement need to be reinforced by a comprehensive suite of administrative mechanisms, including consequences for non-compliance, to hold states to account for their mitigation and support commitments.

4. LESSONS TO BE LEARNED FROM THE IMO REGIME FOR REDUCTION OF GHG EMISSIONS FROM SHIPS

As the Paris Agreement is in its infancy and has not yet legally entered into force, it is too early to holistically evaluate the emergent procedurally oriented framework for differentiation between developed and developing countries. This section turns to the IMO regime for the reduction of GHG emissions from ships in order to explore insights and transferable lessons for the Paris Agreement. Like the Paris Agreement, the IMO regime emphasizes procedural, rather than substantive, avenues for promoting developing countries' interests. It is argued that, despite some important differences between the two regimes, there are lessons for the development of the administrative apparatus operationalizing the Paris Agreement that can be learned from the IMO's failure to effectively embed procedural regard through the development of robust accountability mechanisms.

The UNFCCC and Paris Agreement share both similarities and differences with the IMO regime. The UNFCCC and the IMO have parallel membership – all 171 current members of the IMO[129] have ratified the UNFCCC,[130] and there is consensus among UNFCCC members on the adoption of the Paris Agreement. Protection of the environment falls within the remit of both regimes;[131] however, the IMO's mandate is significantly broader and encompasses responsibilities for setting standards for the prevention of pollution and ensuring the safety and security of international maritime transportation systems.[132] The emphasis on the CBDR principle in the UNFCCC and the Kyoto Protocol contrasts starkly with the IMO principles of non-discrimination and no more-favourable treatment with respect to the universal application of

1 Jan. 1989, available at: http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: https://www.cites.org/eng/disc/text.php.

128 See, e.g., G.W. Downs, D.M. Rocke & P.N. Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50(3) *International Organization*, pp. 379–406; R. Byrnes & P. Lawrence, 'Can "Soft Law" Solve "Hard Problems"? Justice, Legal Form and the Durban-Mandated Climate Negotiations' (2015) 34(1) *University of Tasmania Law Review*, pp. 34–67, at 48.

129 IMO, 'Member States', available at: http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx.

130 UNFCCC, 'List of Annex I Parties to the Convention', available at: http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php, and UNFCCC, 'List of Non-Annex I Parties to the Convention', available at: http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php.

131 S. Kopela, 'Climate Change, Regime Interaction, and the Principle of Common but Differentiated Responsibility: The Experience of the International Maritime Organization' (2014) 24 *Yearbook of International Environmental Law* pp. 70–101, at 73.

132 IMO, 'Introduction to IMO', available at: http://www.imo.org/en/About/Pages/Default.aspx.

adopted measures. This means that, irrespective of the flag or ownership of the ship, IMO measures are binding upon all parties.[133] The Paris Agreement's approach to self-differentiated mitigation targets bears more similarities to the IMO approach than the Kyoto Protocol's stance on differential treatment. Yet, unlike the IMO, the Paris Agreement does not impose equal mitigation targets upon all parties. Thus, despite overlapping memberships and environmental protection remits, the approach to differential treatment in the IMO and climate change regimes diverges significantly.

The two regimes are strongly linked as Article 2(2) of the Kyoto Protocol obligates developed countries to work through the IMO to reduce GHG emissions from shipping.[134] According to a study conducted by the IMO, which considered data between 2007 and 2012, the maritime transport sector is responsible for more than 3% of annual global CO_2 emissions.[135] Further, emissions from shipping are anticipated to grow by 50% to 250% by 2050.[136] Almost 14 years after the adoption of the Kyoto Protocol, in 2011 the Marine Environment Protection Committee (MEPC) of the IMO adopted an amendment to Annex VI of the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL),[137] which introduced an Energy Efficiency Design Index (EEDI) for new ships and a Ship Energy Efficiency Management Plan (SEEMP) for new and existing ships.[138] These technical measures are not, by themselves, sufficient to significantly reduce emissions from ships, and the IMO is currently considering further technical and market-based measures to achieve this goal.[139]

As with the negotiations for the Paris Agreement, the appropriate role for the CBDR principle has been highly contentious in the IMO negotiations on reducing GHG emissions from the maritime sector.[140] As noted above, the IMO adheres to the principle of non-discrimination between states, and accordingly IMO technical regulations apply to ships flying the flag of all state parties.[141] However, as Article 2(2) of the Kyoto Protocol entrusts the IMO with the task of pursuing emissions reduction from marine bunker fuels, some developing countries have argued strenuously that

133 Kopela, n. 131 above, p. 78.

134 Kyoto Protocol, n. 2 above, Art. 2(2).

135 IMO, *Third IMO GHG Study 2014* (IMO, 2015), p. 1.

136 Ibid, p. 4. See also A. Bows-Larkin et al., 'Shipping Charts a High Carbon Course' (2015) 5(4) *Nature Climate Change*, pp. 293–5.

137 London (UK), 2 Nov. 1973, in force 2 Oct. 1983, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201340/volume-1340-I-22484-English.pdf.

138 M.S. Karim, 'IMO Mandatory Energy Efficiency Measures for International Shipping: The First Mandatory Global Greenhouse Gas Reduction Instrument for an International Industry' (2011) 7(1) *Macquarie Journal of International and Comparative Environmental Law*, pp. 111–3.

139 Y. Shi, 'Reducing Greenhouse Gas Emissions from International Shipping: Is It Time to Consider Market-Based Measures?' (2016) 64(C) *Marine Policy*, pp. 123–34; M.S. Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation* (Springer, 2015), pp. 107–26.

140 S.N. Palassis, 'The IMO's Climate Change Challenge: Application of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' (2014) 6(1) *Washington and Lee Journal of Energy, Climate, and the Environment*, pp. 160–95.

141 M.S. Karim & S. Alam, 'Climate Change and Reduction of Emissions of Greenhouse Gases from Ships: An Appraisal' (2011) 1(1) *Asian Journal of International Law*, pp. 131–48.

the measures adopted by the IMO should be congruent with the principles established by the UNFCCC and Kyoto Protocol, especially the CBDR principle, to 'ensure coherence and consistency with the climate change regime'.[142] Despite strong objections from some developing countries – including Brazil, China, India and Saudi Arabia – IMO member states decided to make the EEDI and SEEMP emissions reduction measures applicable to all ships irrespective of their nationality. This is a significant departure from the CBDR principle as reflected in the UNFCCC and its Kyoto Protocol.[143]

The understanding ultimately reached in the IMO negotiations was that the CBDR principle would be implemented through procedural mechanisms to support implementation rather than through imposing differentiated substantive obligations.[144] Accordingly, the amended MARPOL provides that '[a]dministrations shall, in co-operation with the Organization and other international bodies, promote and provide, as appropriate, support directly or through the Organization to States, especially developing States, that request technical assistance'.[145] This regulation does not impose a direct obligation for the transfer of technology and assistance from developed to developing states, but rather creates a framework whereby developing states may request such assistance. Requests from developing states for technology and funding assistance, in order to facilitate compliance with new technical and operational guidelines, are taken into account in the administration of the regime, which prima facie provides an opportunity for procedural regard.

Despite this potential, this approach has led to a deadlock in the IMO negotiations because of non-cooperation on the part of developed countries in providing funds and transfer of technology to developing states.[146] After the adoption of the 2011 amendment to MARPOL, developing countries expressed their reservations about further negotiations for market-based measures until a consensus on proper arrangements for technical assistance for implementation of existing measures became evident.[147] After fraught debates, state parties finally agreed to adopt a resolution on the promotion of technical cooperation and transfer of technology in 2013.[148] However, this new resolution does not establish a legally binding arrangement in which developed countries are obliged to provide financial and technical assistance in return for acceptance by developing countries of similar substantive climate change mitigation commitments.[149]

142 Kopela, n. 131 above, p. 78.

143 Y. Shi, 'The Challenge of Reducing Greenhouse Gas Emissions from International Shipping: Assessing the International Maritime Organization's Regulatory Response' (2012) 23 *Yearbook of International Environmental Law*, pp. 131–67.

144 Karim, n. 139 above.

145 MARPOL, n. 137 above, Annex VI, Reg. 23(1).

146 Ibid.

147 'Further Work on GHG Emissions from Ships, submitted by Brazil, China, India, Peru, Saudi Arabia and South Africa', IMO Doc. MEPC 64/5/9, 27 Jul. 2012, p. 3.

148 'Promotion of Technical Co-operation and Transfer of Technology Relating to the Improvement of Energy Efficiency of Ships', IMO Res. MEPC 229(65), Annex 4, IMO Doc. MEPC 65/22, 17 May 2013 (IMO Res. MEPC 229(65)).

149 Karim, n. 139 above, p. 122.

Thus, in the IMO's climate change regime, developed countries have shown reluctance to frame and implement an adequate system to support developing countries in achieving their equal mitigation obligations. The 2013 resolution on technical assistance was adopted only after some leading developing countries took the position that no further discussion on market-based or additional technical measures for mitigation would continue without a resolution on technical assistance and technology transfer to support existing measures. Despite these efforts, the IMO resolution on technical assistance in fact failed to materially change the previous ineffective arrangements. The resolution urges or requests those member states that are able to provide technical assistance, yet the non-mandatory technology transfer commitments contain many caveats. These qualifications include that the transfer of technology 'needs to respect property rights, including intellectual property rights, and to be on mutually agreed terms and conditions',[150] and is subject to the national laws, regulations and policies of the country providing assistance.[151] The end result is that both developing and developed countries have the same substantive mitigation obligations, but the administrative apparatus for the implementation of the CBDR principle is being undermined by unsatisfactory levels of financial and technical assistance provided by developed states.

Inadequate accountability mechanisms appear to have contributed to the failure of the IMO's procedurally differentiated processes. During the negotiations regarding the 2013 resolution on technical assistance, the developing countries of Angola, China, Jamaica, Nigeria, South Africa and Venezuela stated that 'the effective implementation by developed country Parties of their commitments on transfer of technology is inherently linked to the extent to which developing country Parties are required to implement their own commitments', and stressed the need for the creation of a clear accountability framework with a robust reporting and evaluation procedure for facilitating technology transfer and assistance.[152] Similarly, India raised serious concerns that the 2013 resolution would not be successful without an effective mechanism for monitoring implementation:

> We are still apprehensive of the extent to which the spirit of this resolution is going to be transformed to reality. Hence, India strongly requests the Organization to put in place effective mechanisms to continuously assess and monitor the effectiveness of implementation of this resolution, so that the support materially reaches the entitled developing nations.[153]

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150 As in the IMO, intellectual property rights have long posed challenges for technology transfer under the UNFCCC, and despite the inclusion of text on technology development and transfer, the Paris Agreement is reticent on the topic of intellectual property and climate change: see, e.g., M. Rimmer, 'Intellectual Property and Global Warming: Fossil Fuels and Climate Justice', in M. David & D. Halbert, *The Sage Handbook of Intellectual Property* (Sage Publications, 2015), pp. 727–53.

151 IMO Res. MEPC 229(65), n. 148 above.

152 'Promotion of Technical Cooperation and Transfer of Technology Relating to the Improvement of Energy Efficiency of Ships (Submitted by Angola, China, Jamaica, Nigeria, South Africa and Venezuela)', IMO Doc. MEPC 64/4/24, 27 July 2012, p. 4.

153 'Report of the Marine Environment Protection Committee on its Sixty-Fifth Session', IMO Doc. MEPC 65/22, 24 May 2013, Annex 5, p. 6.

These developing country perspectives indicate a view that the implementation challenges associated with both the 2011 amendment to MARPOL and the 2013 resolution on technical assistance are attributable to a dearth of effective accountability mechanisms. Conceptually, this point is reinforced by Stewart's argument regarding the importance of accountability as a key regard-enhancing mechanism.[154] Thus, both developing country perspectives expressed during the IMO negotiations and the elements of procedural regard support the desirability of robust accountability arrangements.

In developing the implementation and compliance framework for the Paris Agreement, much can be learned from the IMO experience regarding the importance of strong mechanisms for holding developed states to account for their support obligations, which will significantly bolster emerging opportunities for procedural regard. This is significant as in the current absence of precise, binding commitments, the implementation of the general obligations for climate change mitigation and adaptation imposed upon all state parties under the Paris Agreement primarily relies upon the goodwill of developed states in providing financial, technical and capacity-building support to developing states. The provisions relating to the enhanced transparency framework for action and support discussed in Section 3 go some way towards providing mechanisms to promote the implementation of developed states' financial and technical assistance commitments, in addition to all parties' mitigation commitments. In the light of the foregoing analysis, serious questions arise as to whether a framework predicated on transparency, expert review, collective oversight and facilitative non-compliance processes will be sufficiently robust to achieve the Agreement's mitigation and support aims in the absence of strong consequences for non-compliance with states' commitments.

The stakes for failure are significantly higher in the Paris Agreement than the IMO climate change regime. In the latter regime, the reluctance of developed countries to provide financial and technical assistance to developing states after achieving their goal of common mitigation obligations has not had a direct deleterious impact on the global economy. This is because the IMO's technical and operational measures are relatively modest and do not increase the cost of operating ships exponentially as EEDI and SEEMP also create energy-saving opportunities.[155] However, the context of the Paris Agreement differs markedly. The substantive mitigation obligations shared by all countries are likely to significantly impact on economic progress and sustainable development in developing countries, in particular, because of their existing capacity constraints. If developed countries do not fulfil their financial, technology transfer and capacity-building commitments in good faith, this will have far-reaching and negative consequences for developing countries and lead to widespread non-compliance, as has been evident in the IMO.[156] Moreover, in

154 Stewart, n. 9 above, p. 233.

155 IMO, 'The Impact of IMO's New Energy Efficiency Measures and the EEDI', 14 Nov. 2011, available at: http://gcaptain.com/2011/11/14/impact-imos-energy-efficiency/#.VpI6EesdKlI.

156 M.S. Karim, 'Environmental Pollution from Shipbreaking Industry: International Law and National Legal Response' (2010) 22(2) *Georgetown International Environmental Law Review*, pp. 185–240.

addition to mitigation, the Paris Agreement is dealing with important issues of adaptation and loss and damage, which also require support from developed countries. Accordingly, the IMO's experience stemming from inadequate accountability mechanisms for developed states' financial and technical assistance commitments provides a valuable cautionary tale for the development of the administrative apparatus for the Paris Agreement.

5. CONCLUSION

The Paris Agreement is a symbol of the evolving influence of the CBDR principle in international environmental legal instruments. In particular, it exemplifies the increasing scope for this principle to shape procedurally oriented mechanisms for facilitating support for the implementation by developing countries of their substantive obligations. In relation to both mitigation action and support, the Paris Agreement evidences latent, but as yet unrealized, potential for developing a comprehensive framework for procedural regard. As the IMO experience highlights, the emergence of a proceduralized framework for taking into account the interests of developing states in the administration of the regime creates a high risk of non-implementation of climate change mitigation obligations if there is a lack of financial, technical and capacity-building support for these states. Thus, in order to prevent a hastened demise of the utility of the CBDR principle in the international climate change regime, procedural avenues for implementation support for developing countries need to be reinforced by strong accountability mechanisms for all states' mitigation commitments and developed states' support commitments. In this way, the potential for the proceduralization of differential treatment to develop into a robust framework for procedural regard for the interests of developing states may be realized.