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I BEG TO DIFFER:

Taking Account of National Circumstances under the Paris Agreement, the ICAO Market-Based Measure, and the Montreal Protocol's HFC Amendment

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The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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1. INTRODUCTION

Within less than a year, States reached agreement on three major climate change-related instruments: the Paris Agreement,[1] the International Civil Aviation Organization (ICAO) Resolution on a global market-based measure to address international aviation emissions,[2] and the Kigali Amendment to the Montreal Protocol to phase down production and consumption of hydrofluorocarbons (HFCs).[3] What is remarkable about these three instruments is not only the short period of time in which they were all completed (and, in the case of the Paris Agreement, entered into force), but the variety of methods by which negotiators took account of different national circumstances in formulating commitments and other aspects of cooperation.

The issue of "differentiation," or the extent to which an instrument makes distinctions among States in setting out commitments and other features, has been a particularly salient and controversial one in the climate change arena. The foundational UN Framework Convention on Climate Change set forth a general principle regarding "common but differentiated responsibilities and respective capabilities" and established several categories of countries, including those that are or are not listed in Annexes I and II.[4] However, all Parties had commitments and, except with respect to finance, the distinctions among such commitments were relatively minor. The Kyoto Protocol radically changed the differentiation narrative by placing legally binding emissions commitments on "Annex I" Parties and essentially excluding all other Parties from any new commitments.[5] Kyoto's stark divide between the two categories of Annex I and non-Annex I Parties (also referred to, somewhat less accurately, as "developed" and

[1] See http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.
[2] See http://www.icao.int/Meetings/a39/Documents/WP/wp_530_en.pdf.
[3] See https://treaties.un.org/doc/Publication/CN/2016/CN.872.2016-Eng.pdf.
[4] See Preamble, Article 3 ("Principles"), and Article 4 ("Commitments"), of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.
[5] See https://unfccc.int/resource/docs/convkp/kpeng.pdf.

"developing" countries) was a major reason why the United States did not join the Protocol and led to many years of diplomatic wrangling. Even the word "differentiation" was a source of contention; some used it as shorthand for the proposition that "developed countries must take on binding commitments, while developing countries may engage in voluntary actions," which irritated others.

Nearly twenty years later, the Paris, ICAO, and HFC instruments all fall far from the Kyoto tree. They reflect a wealth of approaches to addressing various national circumstances, including in relation to participation in the regime per se, the nature of commitments, the timing of commitments, the need for assistance, and other features.

There is substantial variety in approaches to differentiation both within each of the three instruments and among them. What all of them have in common is how they pragmatically answered the need for accommodation, whether demanded by logic, fairness, limited capacity, or simple negotiating leverage. Further, they have significantly expanded the arsenal of differentiation tools available to negotiators in the future, in the climate world and other spheres where appropriate.

2. PARTICIPATION

2.1 Voluntary Self-Selection

ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), adopted at the ICAO Assembly on October 6th, 2016, provides for the aviation sector to offset its international CO_2 emissions above 2020 levels by buying credits from outside the aviation sector. The scheme had its origins in widespread opposition to the EU's inclusion in its emission trading scheme of flights to and from EU territory. The U.S.-brokered compromise reached in 2013 was, on the one hand, that the EU would suspend its law and, on the other, that ICAO Member States would develop a global market-based measure for international aviation, for decision at ICAO's 2016 Assembly. The 2013 ICAO Resolution called for a scheme that took into account "special circumstances and

respective capabilities." [6] Recognizing ICAO's time-honored principle of non-discrimination, the new scheme was also to minimize market distortion.[7]

Negotiations did not begin in earnest until the Paris Agreement was concluded. Before that point, States had been either too busy with the Paris negotiations or concerned about prejudicing those negotiations indirectly through ICAO positions and outcomes. Once negotiations were re-invigorated, the main issues roughly divided into "who," "what," and "when."

The "when" issues were the least controversial. It was broadly agreed at the outset that the scheme would operate, at a minimum, for fifteen years, from 2021 to 2035, before States considered an extension. The most divisive issues related to the proposal for a "pilot" phase, including how long such a phase would last. It was ultimately agreed to divide the fifteen years into three time periods:

- an initial three-year "pilot" phase;
- a subsequent three-year "first phase;" and
- a nine-year "second phase."[8]

In contrast, the "who" and "what" were hotly debated. In terms of "who," it was widely accepted that there should be some kind of differentiation among States when it came to participation in the early phase(s) of the scheme. However, there was no agreement on which criteria should apply to determine which States would go first:

- Many States considered that the level of aviation activity of a State's carriers (expressed in terms of "Revenue Tonne Kilometers," or RTK) should be the deciding criterion. Others agreed that such activity was relevant but thought that it needed to be combined with another criterion based on a State's level of development.

[6] See paragraphs 19 and 20 of the 2013 ICAO Assembly Resolution, http://www.icao.int/Meetings/GLADs-2015/Documents/A38-18.pdf.
[7] See paragraph 20 of the 2013 ICAO Resolution.
[8] See paragraph 9 of the 2016 ICAO Resolution.

- A proposal to couple aviation activity with gross national income (GNI) per capita was opposed, largely out of concern that the use of such a criterion in ICAO would create a precedent for other international fora.
- A proposal to combine aviation activity with the ICAO's scale of assessment was also opposed, in part because the scale already factors in aviation activity and would end up counting that criterion twice.
- A proposal that "developed" countries should go first was opposed on the grounds that several developing countries have high aviation activity and/or that the Paris Agreement had moved beyond differentiating commitments on the basis of a developed/developing country divide.

Given the difficulty of agreeing on the applicable criteria, a criteria-free alternative was considered. Early participation would be based on a quasi-negotiated voluntary list. The list could be attached to the Resolution or somehow otherwise reflected in the outcome of the Assembly. While background factors would likely inform the list – and the key States would, *de facto*, need to be on it -- the list itself would not reflect any criteria; that way, no precedents would be created, and each State could explain its inclusion/exclusion, and the inclusion/exclusion of others, as it saw fit.

This approach gained some traction, but was ultimately not successful. It was difficult to discuss who would be on the list without looking at a notional list. At the same time, various attempts to create such a list proved to be too politically sensitive. Although it was clear that notional lists were just that – notional – and drawn up simply for purposes of discussion, several States that found themselves on such lists were not comfortable continuing the exercise.

Quite apart from who would ultimately be on the list, some States also had a concern about the existence of *any* list. However devoid of criteria, a list might give the appearance of creating a new climate-relevant category of States.

In the end, the solution was a purely voluntary opt-in approach. The Resolution strongly encouraged all ICAO Member States to "voluntarily participate" in the pilot phase and first phase.[9] The decision whether or not to participate could be made on whatever basis a State chose. Several aspects of the "volunteering" approach are worth noting:

- The Secretariat is to maintain "information" on volunteering States (rather than a "list") on the ICAO website.[10]
- Due to the insistence of a few States, a State may "un-volunteer" (i.e., discontinue its participation) at certain intervals.[11] There was initial criticism of the inclusion of this option. However, it is possible that it will result in greater participation, given the reluctance of some States to volunteer if they do not have the option to back out.
- It is important to emphasize that it is a State's participation that is voluntary, rather than its implementation; once a State has volunteered, it is expected to implement the offsetting requirements as set forth in the Resolution and further elaborated by ICAO.

There was some initial skepticism that a voluntary approach would result in sufficient participation. In order for the scheme to be viable, the pilot and first phases needed to cover enough emissions to be environmentally meaningful, as well as attract the right States from both political and competitiveness points of view. For China and others, it was important to have "developed countries" volunteer; for the United States and others, it was important to have on board the countries with high aviation emissions, whatever their development status. However, various early announcements of States' intention to participate provided an important catalyst, including the North American

[9] See paragraph 9(c) of the 2016 ICAO Resolution.
[10] See paragraph 9(d) of the 2016 ICAO Resolution.
[11] See paragraph 9(f) of the 2016 ICAO Resolution.

Climate, Clean Energy, and Environment Partnership Action Plan,[12] a joint U.S.-China announcement,[13] and a declaration by European and Central Asian States (ECAC).[14] [15] As of October 12th, 2016, sixty-six States (representing 86.5% of international aviation activity) had volunteered to participate in the scheme from its outset (i.e., the pilot phase).[16]

2.2 Everyone In – Minus

Reaching agreement on which States would participate in the second phase of ICAO's market-based scheme was also controversial. There was broad agreement in principle that, after the pilot phase and first phase, all States would be expected to participate except those explicitly carved out. The question was *which* States would be exempted.

Negotiators were readily able to agree to exempt the categories of least developed countries (LDCs) and landlocked developing countries (LLDCs). Both of these are established categories.[17] After some consideration, negotiators also agreed to exempt the established category of small island developing States.[18]

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[12] See https://www.whitehouse.gov/the-press-office/2016/06/29/north-american-climate-clean-energy-and-environment-partnership-action.

[13] See http://beijing.usembassy-china.org.cn/us-china-climate-change-cooperation-outcomes-2016.html.

[14] See the Bratislava Declaration, http://www.icao.int/environmental-protection/Documents/2016-BRATISLAVA_DECLARATION.pdf.

[15] The many announcements made before the ICAO Assembly's adoption of the Resolution enabled the United States and China to reach pragmatic agreement on a sentence for inclusion in the Resolution. Paragraph 9(c) provides: "All States are strongly encouraged to voluntarily participate in the pilot phase and the first phase, noting that developed States, which have already volunteered, are taking the lead, and that several other States have also volunteered." The sentence satisfied China's need for some kind of reference to "developed" countries "taking the lead." At the same time, it satisfied the U.S. need to avoid a bifurcated approach (i.e., all States are encouraged to volunteer, not developed countries in particular); to have any reference be factually descriptive, rather than prescriptive; and to note that developing countries had volunteered along with developed countries.

[16] See ICAO website, http://www.icao.int/environmental-protection/Pages/market-based-measures.aspx.

[17] See http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf and http://unctad.org/en/pages/aldc/Landlocked%20Developing%20Countries/List-of-land-locked-developing-countries.aspx.

[18] See https://sustainabledevelopment.un.org/topics/sids/list.

It was also widely accepted that the remaining exemption should be based on international aviation activity. However, the exact threshold was the subject of intense debate for at least two reasons. The cut-off for participation would affect the overall environmental effectiveness of the scheme. It would also end up including or excluding particular countries, which in turn raised competitiveness issues in various regions.

Ultimately, there was agreement on an aviation activity-based threshold for participation in the second phase, in addition to the three categories above.[19] It is interesting to note that, while negotiators were not able to agree on an aviation activity-based threshold as an affirmative basis for participation in the pilot and first phases (see above), such a threshold was acceptable as the basis for an exemption from participation in the second phase.[20]

3. NATURE OF COMMITMENT

3.1 One Formula / Different Impacts

The ICAO scheme, in addition to reflecting differentiation in terms of "who" participates when, also differentiates in terms of "what." It was widely agreed upfront that the scheme would involve offsetting growth in CO_2 emissions from international aviation from 2020 levels, but the controversial question was how to allocate the requirement to offset such growth among various States/airlines.

There were at least four schools of thought:

[19] See paragraph 9(e) of the 2016 ICAO Resolution, which provides that, with the exception of LDCs, LLDCs, and SIDS, the second phase applies to "all States that have an individual share of international aviation activities in RTKs in year 2018 above 0.5 per cent of total RTKs or whose cumulative share in the list of States from the highest to the lowest amount of RTKs reaches 90 per cent of total RTKs…."

[20] Note that, per paragraph 9(e), exempted States are free to volunteer to participate, and some (e.g., the Marshall Islands and Papua New Guinea) have volunteered to participate in the scheme from its outset. See http://www.icao.int/environmental-protection/Pages/market-based-measures.aspx.

- A few States considered that each State (or possibly airline) should decide for itself how much to offset. Such an approach, it was argued, would be most consistent with the Paris Agreement's "nationally determined" approach to mitigation efforts (discussed below).
- Most States considered that, in light of the Chicago Convention's principle of non-discrimination, as well as competitiveness concerns within the sector, the offset requirements should be internationally determined. However, they disagreed about how.
    - Some thought each airline should offset its own individual CO_2 emissions growth post-2020.
    - Others considered that airlines should share in offsetting the sector's global growth in emissions, because an individual approach would unfairly disadvantage fast-growing airlines and, correspondingly, unfairly advantage established airlines that had emitted significant CO_2 emissions pre-2020.
- A few States argued that offset requirements applicable beyond the pilot phase should be decided only after, and on the basis of, a post-pilot phase review.

Negotiators eventually split the difference and agreed on a "dynamic" approach that initially allocates offsetting requirements based 100% on a global growth factor and moves over time to a more and more individual approach:

- During the pilot phase, first phase, and first three years of the second phase, participating airlines will be required to offset covered emissions based on global growth in emissions.
- During the next three years, "at least 20%" of the offsetting requirements of participating airlines will be based on their individual growth (i.e., at most 80% of their requirement will be based on global growth).

- During the last three years, "at least 70%" of the offsetting requirements of participating airlines will be based on their individual growth (i.e., at most 30% of their requirement will be based on global growth).[21]

The formulae apply equally on their face, but will have different impacts on airlines depending upon their respective growth patterns post-2020. The approach here is also noteworthy because the offsetting requirements relate to airlines, rather than States. Thus, in addition to creating (indirect) differentiation among States, it may create certain intra-State differentiation, i.e., airlines within a single State will have at least slightly different growth rates and therefore different offset requirements.

3.2 Five Groupings

The Kigali Amendment, adopted on October 15th, 2016, adds HFCs to the substances controlled under the Montreal Protocol on Substances That Deplete the Ozone Layer. HFCs are factory-made chemicals used primarily in air conditioning, refrigeration, and foam insulation; they are also potent greenhouse gases. The Montreal Protocol was considered the appropriate vehicle for addressing HFCs because, among other things, the rise in the usage of HFCs – a substitute for ozone-depleting substances -- was a direct result of the phase-out of chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs) under that Protocol.

The Montreal Protocol regime took account of different national circumstances decades before the adoption of the HFC amendment. The original 1987 Protocol provided a grace period for so-called "Article 5" Parties. In order to qualify for this flexibility, Article 5 requires a Party to meet a double requirement:

- It must be a "developing country."[22]
- Its per capita consumption of CFCs must be under a specified threshold.[23]

[21] See paragraph 11 of the 2016 ICAO Resolution.

[22] The Montreal Protocol Parties have adopted a list of "developing countries" for purposes of the Protocol. See http://www.ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1398.

The original Protocol, as well as subsequent amendments adding new controlled substances, all differentiated between the commitments of non-Article 5 Parties (i.e., all Parties other than those eligible for a grace period) and Article 5 Parties.

Negotiators of the HFC amendment intended to follow this pre-existing structure. However, as negotiations on the HFC schedules and baselines proceeded, it became clear that different national circumstances within both the Article 5 and non-Article 5 groups would make it difficult, if not impossible, to reach a sufficiently ambitious common baseline/schedule for each group. In other words, while it was theoretically possible for each group to have a common baseline/schedule for all the States within that group, it would have reflected a least common denominator that was environmentally inadequate. The alternative was to maintain, for most Parties, a higher level of ambition but to permit certain deviations within each group.

The resulting amendment provides as follows:

- For non-Article 5 Parties (i.e., all Parties other than Article 5 Parties), the commitments are generally, relative to a 2011-2013 baseline: to reduce production and consumption of HFCs by 10% by 2019; and, following a series of interim steps, to reduce production and consumption by 85% by 2036.[24]
- For Article 5 Parties, the commitments are generally, relative to a 2020-2022 baseline, to freeze production and consumption by 2024; and, following a series of interims steps, to reduce production and consumption by 80% by 2045.[25]

Within the category of non-Article 5 Parties, there is additional time, as well as increased baselines, for certain specified Parties. These Parties asserted during the negotiations that they would be unable to meet the otherwise applicable schedule and baseline. The grouping of Parties entitled to increased flexibility (which includes Belarus,

[23] See Article 5.1 of the Montreal Protocol, http://ozone.unep.org/Publications/MP_Handbook/Section_1.1_The_Montreal_Protocol/index.shtml.
[24] See Article 1 of the Kigali Amendment, amendments to Article 2 of the Montreal Protocol.
[25] See Article 1 of the Kigali Amendment, amendments to Article 5 of the Montreal Protocol.

the Russian Federation, Kazakhstan, Tajikistan, and Uzbekistan) is not based on criteria. Rather, it is ad hoc, based on a combination of self-selection and agreement of the Meeting of the Parties to the inclusion of those Parties in the grouping.[26]

Within the category of Article 5 Parties, there are two different forms of additional differentiation:

- Akin to the internal grouping within non-Article 5 Parties, there is a more relaxed schedule (freeze in 2028, 85% reduction in 2047) for certain Parties that asserted they could not meet the otherwise applicable schedule and baseline. Again, the grouping (which includes Bahrain, India, Iran, Iraq, Kuwait, Oman, Pakistan, Qatar, Saudi Arabia, and the United Arab Emirates) is not based on criteria. Rather, the Meeting of the Parties endorsed the inclusion of the self-selected countries on an ad hoc basis.[27]
- In addition, Parties with "high ambient temperature" (that therefore have a greater need for refrigerants) can opt into a four-year exemption for certain sectors where suitable alternatives do not exist. Unlike the other form of flexibility, qualifying for this one is based on factual criteria that must be met.[28] This group, which includes thirty-four Parties, partially overlaps with the one directly above.

It will be interesting to see, when the Montreal Protocol addresses its next new substance, whether the use of multiple groupings in the HFC context represented a general Montreal shift toward more forms of differentiation (perhaps driven by the Paris

[26] See Article 1 of the Kigali Amendment, amendments to Article 2 of the Montreal Protocol, and paragraph 1 of Decision XXVIII/2, http://conf.montreal-protocol.org/meeting/mop/mop-28/final-report/English/MOP-28-12E.pdf.

[27] See Article 1 of the Kigali Amendment, amendments to Article 5 of the Montreal Protocol, and paragraph 2 of Decision XXVIII/2.

[28] See Article 1 of the Kigali Amendment, amendments to Article 5 of the Montreal Protocol, and paragraph 29 and Appendix II of Decision XXVIII/2.

Agreement's rejection of binary categories) or was a specific response to the particulars of the HFC negotiation.

3.3 Self-Differentiation

The Paris Agreement, adopted under the Framework Convention, sets out a long-term framework for addressing both mitigation of climate change and adaptation to climate impacts. Key features include a goal of limiting the global temperature increase to "well below" 2° C, as well as various mechanisms for achieving it, e.g., submission by all Parties of emission "contributions," regular updating of such contributions following "global stocktakes," and a robust reporting and review regime.

In general, the Paris Agreement is a highly differentiated agreement, but not in the sense in which the Kyoto Protocol was differentiated.

As noted above, Kyoto set forth legally binding emissions targets for Annex I Parties (those Parties listed in Annex I to the Framework Convention), while exempting non-Annex I Parties from any new commitments (i.e., commitments beyond those in the Framework Convention). Before and after Kyoto, many developing countries asserted that the Framework Convention's principle of "common but differentiated responsibilities and respective capabilities" (CBDR/RC) mandated such a lopsided approach.

In contrast, the Paris Agreement moved well beyond Kyoto's rigid categorical approach. It includes an updated formulation of the CBDR/RC principle, tacking on language ("in the light of different national circumstances") that recognizes a continuum of national situations.[29] It has no references to Annex I or non-Annex I Parties. Commitments other than those related to financial and other forms of assistance apply to all Parties.

Each aspect of the Agreement addresses differentiation in a distinct manner. Regarding the core issue of mitigation, the Agreement provides for Parties' mitigation

[29] See, e.g., Article 2.2 of the Paris Agreement.

efforts to be "nationally determined."[30] This approach, by permitting each Party to design its contribution based on its own circumstances, was intended to be attractive to a wide range of countries. It allowed States to agree to move beyond a Kyoto-style, bifurcated regime by providing a broadly acceptable alternative.[31]

To date, over 190 States (representing roughly 99% of global emissions) have submitted their plans to reduce or limit their emissions.[32]

3.4 Flexibility for a Sub-Group

The Paris Agreement's transparency provisions, which address, *inter alia*, reporting and review of progress toward meeting mitigation targets, provide for flexibility for "*those* developing countries that need it in the light of their capacities" (emphasis added).[33] The double requirement for flexibility (i.e., a Party must both be a "developing" country and need the flexibility in light of its capacity) is analogous to the Montreal Protocol's double requirement for Article 5 status, noted above, which also accords flexibility to a sub-set of developing countries.

Unlike the Montreal Protocol, however, neither Paris prong is defined:

- While the Montreal Protocol Parties have agreed on a list of "developing countries" for purposes of Article 5 flexibility, it is highly unlikely that the Parties to the Paris Agreement would ever be able to agree on the scope of that term – or would even attempt to do so. Dating all the way back to the negotiation of the Framework Convention, there has been no agreed meaning or

[30] See Article 4.2 of the Paris Agreement.
[31] It was important to a few States to honor the Paris Agreement's "nationally determined" approach in the ICAO scheme in some way. It was agreed that, during the pilot phase, each State may choose between two different variables in applying the formula for the offsetting requirement. See paragraph 11(e)(i).
[32] See NDC registry at http://www4.unfccc.int/ndcregistry/Pages/Home.aspx; those States not yet Party to the Paris Agreement have submitted intended NDCs at http://unfccc.int/focus/indc_portal/items/8766.php.
[33] See Article 13.2 of the Paris Agreement.

listing of "developed" and "developing" countries.[34] A proposal during the negotiation of the Paris Agreement to define such terms as equivalent to "Annex I" and "non-Annex I" Parties failed.

- The Paris Agreement's second prong ("…that need it in light of their capacities") is also distinguishable from the Montreal Protocol. While Montreal's requirement (annual per capita consumption of CFCs below 0.3 kg) is quantitative and therefore extremely precise, the Paris Agreement's "capacity" requirement is not.

As such, the Parties will need to decide whether to base eligibility for one or more types of flexibility on self-selection, applicable criteria, or some creative combination of these or other factors. For example, a self-selection approach might be coupled with a requirement that a Party include a justification for flexibility and/or an indication of how and when it considers it will be able to meet the common standard in the future.

The Paris Agreement includes other interesting, flexibility-related features. As one example, the mitigation article allows the least developed countries and small island developing States to "prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances."[35] While such countries could have sought, and likely would have achieved, a full-blown exemption from mitigation-related requirements (akin to that under the ICAO Resolution), they did not seek such an exemption. On the contrary, many wanted to be among the Parties expected to make a contribution; they simply sought more flexibility than the article would have otherwise permitted.

[34] See Section 2 of Biniaz, Comma But Differentiated Responsibilities, at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/biniaz_2016_june_comma_diff_responsibilities.pdf.
[35] See Article 4.6 of the Paris Agreement.

4. SPECIAL CONSIDERATION

In addition to providing various forms of flexibility for LDCs, SIDS, and, in relation to transparency, a sub-set of developing countries with limited capacity, the Paris Agreement refers to other, unspecified forms of special consideration that do not relate to commitments per se.

The Agreement contains several references to developing country Parties "that are particularly vulnerable to the adverse effects of climate change" and the importance of taking into account their needs. Such references appear in the preamble, as well as in provisions related to adaptation and assistance.[36]

Consistent with the Framework Convention,[37] the concerns of Parties with "economies most affected by the impacts of response measures," e.g., oil-producing countries, are also to be taken into consideration.[38]

The Agreement's article on a mechanism to facilitate implementation of, and promote compliance with, the Agreement calls for the committee established thereunder to "pay particular attention to the respective national capabilities and circumstances of Parties."[39] This language, borrowed from the analogous article in the Minamata Convention on Mercury,[40] does not refer to any particular groupings or types of Parties but will need to be taken into account as the Paris Parties elaborate the committee's remit.

[36] See, e.g., preambular paragraph 5 and Articles 7.2, 7.6, 9.4, and 11.1 of the Paris Agreement.
[37] See Articles 4.8 and 4.10 of the Framework Convention.
[38] See preambular paragraph 7 and Article 4.15 of the Paris Agreement.
[39] See Article 15 of the Paris Agreement.
[40] See Article 15.1 of the Minamata Convention, http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf.

5. ASSISTANCE

Another way in which all three instruments take account of national circumstances is by providing for various forms of assistance related to implementation. They do so in somewhat different ways.

The HFC amendment, from a differentiation point of view, does not affect the existing financial arrangements under the Montreal Protocol (which follow the Article 5/non-Article 5 distinction). As noted above, these categories are defined.

The ICAO Resolution provides for ICAO and its Member States to assist with capacity-building and assistance related to the implementation of CORSIA, including with respect to the establishment of registries and the "MRV" system (i.e., measurement, reporting, and verification).[41] The Resolution does not call upon any particular States to assist or to receive assistance. Modalities will need to be developed.

The Paris Agreement's commitments related to assistance (and corresponding commitments to report on such assistance) are the only ones in that Agreement to reflect differentiation based on "developed" and "developing" country status. With respect to finance in particular, developed country Parties have a collective commitment to provide resources in continuation of their existing obligations under the Framework Convention;[42] other Parties are encouraged to provide such support,[43] and developing country Parties are the recipients of support.[44]

While the Framework Convention's finance obligations apply to Parties "included in Annex II," an unambiguous listing,[45] the Paris negotiations involved a deliberate, overarching move away from an approach based on the Convention's Annexes. Thus, the

[41] See paragraph 22 of the 2016 ICAO Resolution.
[42] See Article 9.1 of the Paris Agreement.
[43] See Article 9.2 of the Paris Agreement.
[44] See Article 9.1 of the Paris Agreement.
[45] See, e.g., Article 4.3 of the Framework Convention.

Paris Agreement's financial and other assistance provisions refer to the less clear category of "developed country Parties."[46]

6. OTHER PROVISIONS OF NOTE

As noted above, with the exception of the provision of assistance and reporting thereon, the Paris Agreement takes a non-bifurcated approach to commitments. In this regard, two mitigation provisions are noteworthy. Neither changes the non-bifurcated nature of mitigation commitments per se (which apply to all Parties, with flexibility for LDCs and SIDS), but both were important to one or more developing countries to reach closure on the Agreement.

In addition to including a global temperature goal in the Agreement,[47] many countries sought a long-term emissions goal and a shorter-term goal of peaking global emissions. With respect to the latter, it was possible to reach agreement on an "aim" to reach global peaking "as soon as possible" by adding the proviso "recognizing that peaking will take longer for developing country Parties…."[48]

Some developing countries also expressed a concern that developed country Parties, which had previously taken on economy-wide absolute emission reduction targets, might use the "nationally determined" aspect of the mitigation article to walk backwards, or "backslide," from this type of target. They sought assurance that this would not be the case. The United States and others were amenable to such an assurance, provided it was hortatory, it made clear that the phrase "developed countries…taking the lead" referred to a continuation of previous efforts (rather than constituted a new prescription), it was specific to the issue of form of targets (not climate action more

[46] See, e.g., Articles 9.1 of the Paris Agreement.
[47] See Article 2.1 of the Paris Agreement.
[48] See Article 4.1 of the Paris Agreement.

broadly), and it included an exhortation for developing countries to move in that direction.[49]

7. CONCLUSION

The Paris Agreement, and the ICAO and HFC instruments that followed shortly thereafter, provide a wide range of methods for addressing different national circumstances. Some reflect differentiation explicitly, while others do so implicitly. Some rely on existing categories of States, both defined and undefined, while others create new criteria and groupings for a particular purpose. Some allow States to create their own differentiation (whether through determining their own participation or defining their own commitments), while others take an approach based on agreed criteria.

While these approaches unquestionably helped enable negotiators to reach agreement on the three instruments and may serve as inspiration for future negotiations, it is of course a different question whether they will be effective in tackling the environmental issues in question. There may be a point where the accommodation of national circumstances goes too far, and the environmental objective of an agreement would be better served with less accommodation, even if it means sacrificing the participation of some States. Time will tell whether the proper balance was achieved in each of the three instruments.

[49] See Article 4.4 of the Paris Agreement, which provides: "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."