

Preventing the Undermining of Equity in the Implementation of the Paris Agreement

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1. INTRODUCTION

SINCE the ratification of the Paris Agreement (PA) in 2016, efforts have been underway under the United Nations Framework Convention on Climate Change (UNFCCC) to negotiate the guidelines and procedures for the implementation of the Agreement under what is known as the PA Work Programme (PAWP). These guidelines are expected to be adopted in December this year at the 24th meeting of the Conference of Parties to the UNFCCC (COP 24) in Katowice, Poland.

The PA was the outcome of major battles on a multitude of issues, especially between developed and developing countries. The developing countries wanted to:

- (a) defend the Convention and not let it be changed or subverted;
- (b) ensure that the Agreement is non-mitigation-centric with all issues (including adaptation, loss and damage, finance and technology, besides mitigation) addressed and in a balanced manner;
- (c) ensure that differentiation in all aspects be reflected, with the principles of equity and common but differentiated responsibilities and respective capabilities (CBDRRC);
- (d) ensure that developed countries enhance the provision of finance and technology transfer;
- (e) ensure that 'loss and damage' is recognised as a separate pillar apart from adaptation;
- (f) have legally binding provisions, especially on the developed countries in relation to emission reductions and the provision of the means of implementation to developing countries.

A number of developing countries also wanted the temperature goal to be limited to below 1.5°C from pre-industrial levels, as the 2°C level was viewed as being insufficient.

Developed countries led by the United States (US) and its allies (especially those under the Umbrella Group) wanted the opposite of what developing countries wanted. They mounted an onslaught on the Convention, seeking to:

- weaken the provisions and their obligations;
- redefine differentiation so as to blur the different obligations of developed and developing countries.

The US also did not want legally binding provisions due to a hostile Congress.

The European Union, the Umbrella Group and its allies, apart from weakening differentiation also wanted a more mitigation-centric approach by:

- wanting the nationally determined contributions (NDCs) to reflect only mitigation obligations and they were very opposed to Article 3 of the PA (which was what the Like-minded Developing Countries [LMDC] wanted on the full scope of NDCs);
- having a focus mainly on the ex-ante information for clarity, transparency and understanding of the mitigation actions of countries; and
- having a focus on the transparency framework in relation to mainly mitigation actions.

In the final hours of the negotiations on the PA, the LMDC in particular presented its ‘super-redlines’ to the COP 21 Presidency¹. They included:

- that the purpose of the Agreement is to enhance the implementation of the Convention in accordance with the principles and provisions of the Convention;
- reflection and operationalisation of equity and CBDR across all elements;
- clear differentiation between developed and developing countries on the mitigation efforts;
- commitment by developed countries on provision of finance, technology transfer and capacity-building with no transfer or extension of obligations to developing countries to provide finance.

In the final outcome, some of the important points gained by developing countries were that:

- The PA is not mitigation-centric as desired by developed countries, although in some aspects mitigation does get pride of place.
- In particular, Article 3 of the PA reflects that NDCs are not only about mitigation but cover adaptation as well as the means of implementation.
- The developing countries to a significant extent successfully defended the Convention and stopped the plans of developed countries to drastically rewrite the Convention.
- Differentiation between developed and developing countries was retained in the main, although weakened in some areas.
- The principles of equity and CBDR were mentioned in a specific clause in the important Article 2 on purpose of the Agreement, and operationalised in some key areas of the Agreement.
- Sustainable development and poverty eradication as important objectives of developing countries were referred to as the context of actions by developing countries in some key areas.
- Developed countries should take the lead in mitigation and finance is referred to in the Agreement.
- Although the temperature goal is to limit temperature rise to well below 2°C from pre-industrial levels, the reference to pursuing efforts to limit the rise to below 1.5°C is significant.

2. THE BATTLE OF INTERPRETATION OF THE PA CONTINUES

Since the commencement of negotiations on the implementation of the PA under the PAWP in 2016², it has been clear that developed countries are still pushing their way in interpreting the PA the way they want and are hell-bent on securing their way, despite their failure to get what they wanted in Paris as described above. They read the PA in a skewed way, that is intended to bolster their interpretation and approach.

Several developing country groupings such as the LMDC, the African Group and the Arab Group, in particular, have been putting forward their positions and submissions consistent with their understanding and interpretation of the PA.

¹ For more details, see <https://www.twn.my/title2/climate/doc/Meenabriefingpaper.pdf>

² See http://www.twn.my/title2/climate/news/Bonn18/TWN_update5.pdf

So the battle of interpretation continues and the divergences are clear as seen from the documents (referred to as ‘tools’) that have most recently been produced from the climate talks held in Bangkok from 4 to 9 September, as Parties make efforts to produce a negotiating text for COP 24³.

Having secured some gains on the major issues above, developing countries must ensure that in the battle of interpretation of the PA, and through the PA Work Programme, these gains are not lost.

Close attention must be paid to the details of the modalities, procedures and guidelines (MPGs) being drawn up, for the ‘devil is in the detail’ and it must be ensured that the MPGs are consistent with the PA as well as the Convention.

There are several ways on how the gains that have been made can be lost if developing countries are not careful and how equity and the CBDR principle under the PA can be seriously undermined, although Article 2(2) provides that the PA is to be implemented to reflect equity as well as the CBDRRC principle.

The challenge for developing countries is in ensuring the operationalisation of Article 2(2) of the PA in the MPGs.

Once the CBDR principle is undermined and further weakened, developing countries would be losing the one hook they have in operationalising equity in the implementation of the PA.

The result will be in developing countries having to take more climate actions with very little or no means of implementation, while developed countries get away from meeting their commitments under the PA, including in doing their fair share in emission reductions in order to limit the temperature rise as agreed to under the PA.

3. HOW EQUITY IS BEING UNDERMINED AND IS AT STAKE

The key ways on how developing country positions will be undermined is set out below, which is already prevalent in the positions of developed countries in the ongoing negotiations under the PAWP, which would be advanced further not only in the negotiations but also through the public discourse via developed country think-tanks, consultants and civil society.

Some of the key ways on how equity and CBDR will be undermined are as follows:

(a) From the principle of CBDR to a CRRC approach

In the negotiations that are ongoing under the PAWP, developed countries have been opposing the reflection of differentiation among developed-developing countries (which is the CBDR principle and is referred to as the ‘bifurcated’ system by the United States). In place of the CBDR principle, the notion of ‘**common responsibility according to respective capabilities**’ (CRRC) is being advanced.

Although the CRRC notion is not explicitly mentioned, entrenching this notion is the underlying intent of developed countries, and this can be seen in the negotiations through the introduction of notions such as ‘common MPGs’, ‘common approaches’, ‘common time-frames’ etc. with ‘some flexibilities for developing countries according to their respective capabilities’ and through other methods such as ‘all countries’ having the collective responsibility to address the emissions gap **as if everyone had the same starting point, without addressing the historical emissions or the historical responsibility of developed countries.**

³ See TWN Bangkok Climate News Update 5 – <https://twnetwork.org/climate-change/developing-countries-oppose-renegotiation-paris-agreement>

The attempt by developed countries here is to not have differentiation between developed and developing countries, and instead promote the notion of sharing the responsibility for addressing climate change without differentiating the responsibility between developed and developing countries, especially in relation to emission reductions and the provision of finance, among all countries, and to have the responsibilities shared according to the ‘respective capabilities’ of countries.

The effect is that the CBDR principle is undermined, by promoting the idea of ‘common responsibility’ which is **not differentiated between developed and developing countries but is differentiated according to respective capabilities of all countries.**

The ‘**but**’ in the principle of ‘common **but** differentiated responsibility and respective capabilities’ is dropped – which makes a significant difference in the understanding of the principle which differentiates developed and developing countries first, **before** looking at the respective capabilities of countries.

The notion of ‘common responsibility’

The notion of ‘common responsibility’, which is not differentiated between developed and developing countries, is premised on looking at current and future emissions without addressing historical or cumulative emissions among countries.

- The ‘common responsibility’ idea stems from the notion that some major developing countries are responsible **equally** for the ‘current emissions’ rather than looking at ‘historical emissions’ together with ‘current emissions’ which amounts to ‘cumulative emissions’, as well as looking at per capita emissions. This is especially the case in relation to references by developed countries to the ‘major emitters’, which target China and India in particular.
- The ‘common responsibility’ (without looking at historical responsibility of developed countries) approach ignores the notion of equitable access to atmospheric space or the ‘fair shares approach’ and its intent is to wipe out historical responsibility, and treat all countries as if they all had the same starting point in terms of responsibility for current and future emissions.

This appears to be the underlying reason why developed countries, in the run-up to the PA, were fighting at all costs to have a completely new treaty which is not linked to the Convention, as they wanted to wipe out any association to their historical emissions or responsibility and to start anew.

The 1992 Convention in its preamble notes ‘that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs’.

At the insistence of developing countries, the PA sets out in Article 2(1) that the Agreement is about ‘enhancing the implementation of the Convention’. **The Convention provides the legal basis for not ignoring the historical emissions of developed countries** which, until then, had allowed developed countries to accumulate their wealth and capabilities and acquire their developed status with no restraint on carbon emissions since the Industrial Revolution.

In the process leading up to the PA, and especially under the Bali Action Plan process, there existed the notion of ‘equitable access to atmospheric space’, which later became ‘equitable access to sustainable development’ at COP 16 in Cancun in 2010. These were notions advanced by developing countries in an effort to have some references to how the remaining carbon budget is to be shared between developed and developing countries⁴.

⁴ See Martin Khor on ‘Equitable Sharing of atmospheric and development space’; https://www.southcentre.int/wp-content/uploads/2013/05/RP33_Equitable-Sharing-of-Atmospheric-and-Development-Space_EN.pdf.

In the run-up to the PA, these notions disappeared and gave way to the concept of ‘nationally determined contributions’ or ‘NDCs’, which are nationally determined, with no reference to the notion of ‘equitable access to atmospheric space’ or to ‘equitable access to sustainable development’, which would have meant a top-down approach in determining what countries must do at the international level, as was the case under the Kyoto Protocol for the second commitment period.⁵

However, if the PA is to be implemented to reflect equity and the principle of CBDRRC, in the light of national circumstances (as contained in Article 2(2)), then equity must remain central to the operationalisation and implementation of the PA, including in the drawing up of the MPGs.

In a bottom-up process, where countries determine how much they will do by themselves, **any collective aggregation or quantification of countries’ targets without any reference to the cumulative emissions of Parties, puts all Parties at the same starting point** – meaning that the emissions gap (the gap between the NDC targets and what is needed to limit temperature rise in terms of the global goal) is inequitable, as this means that the remaining carbon budget has to be shared among all equally, regardless of how much developed countries have already used of that carbon space. This approach is highly inequitable, and developing countries must express this explicitly.

To stress this point further, with the attempt by developed countries at wiping out historical responsibility/ their historical emissions, and by focusing on the remaining carbon budget or the emissions gap, developed countries are let off the hook for their historical emissions, and all countries are treated as if everyone is at the same starting point in assuming common responsibility for reducing emissions and in meeting the emissions gap. This is contrary to the notion of equity and fair shares, and results in inequity.

Hence, in any process, whether it is the Talanoa Dialogue (TD)⁶ or the global stocktake⁷, there is a need to address equity up-front and centre, by focusing on the equitable access to atmospheric space concept, the notion of cumulative emissions and the historical responsibilities of developed countries and not just allow the focus to be on the ‘emissions gap’ as if all countries had common and undifferentiated responsibility.

Indeed, the need is to focus on the ‘but’ of the CBDR principle – where the responsibility is differentiated between developed and developing countries and not allow its erosion, which leads to the negation of historical emissions and responsibilities in the negotiation of the MPGs, or when Parties engage in the Talanoa Dialogue. (See more on this below).

The notion of ‘respective capabilities’ in the CRRC approach

Under the CRRC approach, on the issue of ‘respective capabilities’, some developing countries are viewed as being more capable than other developing countries and indeed even compared with some developed countries too, and therefore, flexibilities in the implementation of the MPGs may be provided to only those countries that are viewed as needing them.

The common refrain in the run-up to the PA from developed countries was that the ‘world has changed’, meaning that many developing countries are not poor anymore, and must be differentiated according to the World Bank income categories of low-income, middle-income or high-income. Underlying this refrain is that those with higher incomes have more capabilities and therefore they should not be given flexibilities, and they should also contribute to providing climate finance and should not be receiving finance or technology transfer. These arguments were strongly resisted by developing countries in the negotiations, who countered that this was contrary to the UNFCCC’s principles and provisions. The LMDC in particular, which includes China and India, in its interventions stresses that two-thirds of the world’s poor live in its member countries.⁸

⁵ http://www.twn.my/title2/climate/news/doha01/TWN_update20.pdf

⁶ The 2018 facilitative dialogue to inform the preparations of NDCs under para 20 of decision 1/CP.21.

⁷ Under Article 14 of the PA to take stock of the collective progress of Parties in achieving the purpose of the Agreement.

⁸ See TWN Paris News Update 10; http://twn.my/title2/climate/news/paris01/TWN_update10.pdf

In this approach, emerging developing countries will be viewed as needing to also do much more in emission reductions, including by taking on absolute emission reductions similar to that of developed countries and in contributing to financial resources over time, and they would not be given grants or concessional finance by developed countries or affordable technologies.

Those viewed as needing flexibilities from the perspective of developed countries may include Least Developed Countries (LDCs) and Small Island Developing States (SIDS) and that too until their 'capabilities' or 'capacities' are built up; after which everyone is treated in the same way in the application of the MPGs.

Such a CRRC approach is not tenable as:

- There is absolutely no legal basis for the CRRC notion in the PA or the parent Convention;
- Differentiation among developing countries is not recognised in the Convention or the PA, except the special circumstances of the LDCs;
- The special case of 'LDCs, SIDS and Africa' was recognised in the Green Climate Fund (GCF) in a decision by the Board in relation to the allocation of the Fund's resources for adaptation, where 'the urgent and immediate needs of vulnerable countries, in particular LDCs, SIDS and African states' is to be taken into account, including in ensuring that 50% of the adaptation allocation be for 'particularly vulnerable countries, **including** LDCs, SIDS and African States'. This cannot be taken to mean that only these groupings of developing countries have 'less capabilities' in the real world.

In any event, what capabilities a developing country has must be decided by the country itself and is its national circumstance and not for any international process to define. This national determination of a developing country's capability or capacity must be respected.

Hence, the slippery slope of moving from CBDRRC to CRRC must be prevented and resisted by all developing countries as this is contrary to the Convention and the PA.

(b) Scope of NDCs – a mitigation-centric approach

Under the discussion on NDCs, its features, information and accounting (agenda item 3 of the Ad Hoc Working Group on the PA), the approach of developed countries is to ignore the importance of Article 3 of the PA and to interpret NDCs as only referring to mitigation, and in using the heading of agenda item 3 – 'Further guidance in relation to the mitigation section of decision 1/CP.21, on.....' to suggest that the discussion should only be about mitigation when:

- The heading was not negotiated in Paris and cannot circumscribe what should be the substance and content of NDCs as defined by Article 3 and when the term NDCs is used in Article 4, it must have the meaning ascribed to it under Article 3.⁹
- The understanding contained in Article 3 must be operationalised through the relevant articles of the PA and when the discussion is about features, the scope of the NDC is a vital consideration, as well as in relation to information to be provided ex ante or ex post, including in the transparency framework.

Article 3 of the PA provides that 'As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.'

Article 3 symbolises the 'battle' over the nature of the agreement to ensure that the NDCs are not viewed only as being 'mitigation-centric' (Article 4 refers to the element of 'mitigation', Article 7 to 'adaptation',

⁹ See http://www.twm.my/title2/climate/news/Bonn18/TWN_update5.pdf

Article 9 to ‘finance’, Article 10 to ‘technology development and transfer’, Article 11 to ‘capacity-building’ and Article 13 to a ‘transparency framework for action and support’.)

One problem is that even among some developing countries, there is no shared understanding about the importance of Article 3 and how NDCs cannot be viewed without the linkages between mitigation and the means of implementation and adaptation and the means of implementation and the link between mitigation and adaptation for developing countries in reality.

Insisting on the full scope of the NDCs is not being against ambition. On the contrary, only through adopting a comprehensive approach is equity ensured through developing countries being able to achieve ambition in the real world. Linking climate actions to the availability of resources at both domestic and international levels is critical to operationalising equity between developed and developing countries. Critical for developing countries too is the mitigation-adaptation link, the mitigation co-benefits derived from adaptation efforts.

(c) Efforts to focus only on ‘ambition’ but not on ‘equity’ in the process

In the discussions under the Talanoa Dialogue and in the negotiations on the global stocktake, there is strong resistance by developed countries to address equity and what this means for developing countries.

For instance, in the Talanoa Dialogue session held in May this year, the questions posed did not include the very key question of ‘how did we get here’ in relation to the climate problem. The focus by the Fijian COP 23 Presidency was only on ‘where are we; where do we want to go and how do we get there’.

Developing country groupings including the LMDC and the Arab Group stressed that the ‘how did we get here’ question was an important one that reflects the historical responsibility of developed countries for climate change and was a vital matter to address.¹⁰

Clearly, not posing this vital question in relation to the historical responsibility of developed countries is an effort at further undermining equity in the negotiations.

In relation to discussions on the global stocktake at the Bangkok talks held in early September 2018 to assess the collective progress of Parties in achieving the purpose of the PA, developed countries attempted to side-line the consideration of equity as a substantive element in the design of the stocktake. Developing countries of course resisted such moves.

In addition, it has become common practice for many quarters including the European Union and their think-tanks to cite the United Nations Environment Programme’s Emissions Gap reports in the negotiations, or even the reports of the Intergovernmental Panel on Climate Change (IPCC) to expose the emissions gap that exists between what countries are doing and what is needed in limiting the temperature rise and to ask all countries to do more, without looking at who is not doing their fair shares consistent with their historical/cumulative and current emissions (which are mainly the developed countries). This is not consistent with equity, as has been pointed out above, as everyone is treated as having the same starting point in terms of responsibilities for the current and future emissions.

Thus, it is imperative for developing countries to push the ‘equity’ narrative, and articulate better how equity is the gateway and the only way to more ambition. This reflects the reality of how developing countries also have to cope with numerous sustainable development challenges.

Developing countries can only do so much with their own domestic resources, and their priority will naturally be to respond first to adaptation and address loss and damage arising from climate-related disasters, as these require urgent attention and cannot wait, given the suffering and effects faced by their people.

¹⁰ TWN Bonn News Update 4, May 3, 2018

Hence, operationalising equity in this regard means the provision of climate finance which takes into account the needs and priorities of developing countries as provided for under Article 9 of the PA and to also enable the transfer of climate-friendly technologies as recognised under Article 10.

Further, developed countries must be exposed to show that they are doing far too little in terms of their fair shares as this is also not consistent with equity.¹¹

Also critical for developing countries is to keep the focus on developed countries meeting their pre-2020 commitments so that the emissions gap is not shifted to developing countries in the post-2020 timeframe. This is especially important in view of the urgency for climate action to start now rather than postponing actions till after 2020 under the NDCs.

(d) No meeting of commitments on finance under the PA

Developed countries, led by the United States in particular but not limited to it alone, are resisting decisions to advance the provision of finance to developing countries under the PAWP.

Since COP 23 in Bonn in 2017 and in Bangkok most recently (in September 2018), it has been clear that developed countries as a whole are not interested in advancing and implementing the decisions taken on finance in Paris such as whether to agree on a modality to communicate biennially ‘indicative quantitative and qualitative information’ on the ‘projected levels of public financial resources to be provided to developing country Parties’ (under Article 9.5), or to begin a process to discuss the new collective goal on post-2020 finance based on the needs and priorities of developing countries¹²; or in relation to the Green Climate Fund¹³, to talk and agree on a target for replenishment of the Fund¹⁴, or to have the existing Adaptation Fund (in its current form) to serve the PA.

These finance issues have become among the most highly contentious negotiations under the PAWP, with developed countries stalling and weakening their existing commitments under the PA and also asserting that these issues are not needed to be agreed to for the first meeting of the Conference of Parties meeting as the Parties to the PA (CMA1) in Poland end of this year.

In the best-case scenario, the underlying agenda of developed countries seems to be in limiting any financial resources to ‘LDCs and SIDS’ and to get the major developing countries to provide more financial resources to others, even if it is only voluntary; as well as in shifting much of the focus to mobilising finance from the private sector and for developing countries to mobilise their own domestic resources.

Clearly, such efforts by developed countries gravely threaten the implementation by developing countries of climate actions under the PA and undermine equity very fundamentally in not providing the means of implementation for achieving such actions.

¹¹ CSO Equity Review (2017) *Equity and the Ambition Ratchet: Towards a Meaningful 2018 Facilitative Dialogue*. Manila, London, Cape Town, Washington, et al.: CSO Equity Review Coalition. http://civilsocietyreview.org/wp-content/uploads/2017/11/CSO_Report_COP23_Equity_and_the_Ambition_Ratchet_SCREEN.pdf

¹² <https://twnetwork.org/climate-change/no-hurry-set-new-collective-goal-finance-say-developed-countries>

¹³ See <http://www.twn.my/title2/climate/info.service/2018/cc180702.htm>

¹⁴ <http://www.twn.my/title2/climate/info.service/2018/cc180702.htm>

4. THE U.S. ROLE AND OTHERS HIDING BEHIND IT

A key elephant in the negotiation rooms is the role of the US in the process, which has indicated that it does not intend to be a Party to the PA when it made the announcement on 1 June 2017. It however remains a Party until November 2020, given the provisions in the PA as to when a Party can withdraw from the Agreement.¹⁵

Despite its intention to withdraw, the US continues to negotiate as a key Party, calling the shots as was visible at COP 23, and in leading its allies in the developed world to accommodate its concerns.

Questions abound in the corridors of the negotiations as to whether the US is negotiating in good faith or if it is undermining the PA to accommodate the interests of the Trump Administration so that the US can once again be a Party to the PA, which in itself is indeed doubtful, given Mr Trump's view that climate change is a 'hoax' concocted by the Chinese.

The US in the negotiations of the PAWP has strongly and firmly opposed issues such as differentiation between developed and developing countries in the MPGs and any proposal by the G77 and China or other developing country groups on issues of finance such as that under Article 9.5 or in the setting of a new collective goal on finance.

Hence, developing countries must recognise the US inflexibility and if more concessions are to be given to accommodate it, it will be counter to the interests of developing countries and will negate the gains made and the delicate balance struck in the PA.

5. CONCLUSION

Given the above, the stakes are rather high with the potential for the erosion of the gains made in Paris, as well as the further undermining of equity in the implementation of the PA, which will be highly disadvantageous to developing countries.

With an inflexible US and a willingness among its allies to accommodate US interests further as they have similar positions, the climate talks in Poland will continue to be very divisive and contentious between developed and developing countries.

If the gains made in Paris for developing countries are to be protected, then developing countries must spare no effort in defending them and in ensuring that equity is not eroded any further in how the PA is to be implemented, either through the MPGs or through the various processes and decisions that will be adopted in Poland at COP 24.

¹⁵ The PA entered into force for the United States on 4 November 2016, which means that, under Article 28.1 of the PA, the US can withdraw from the PA only after 3 November 2019 (three years after the PA entered into force for the US) and according to Article 28.2, 'such withdrawal shall take effect upon expiry of one year from the date of receipt ...of the notification of withdrawal,...'. The earliest that the US pull-out from the PA can take effect is four years from 4 November 2016, i.e. on 3 November 2020.