

The Applicability of the UNFCCC Annexes to the Paris Agreement

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*This advice is provided in response to **Query 04/20***

Query:

Clarify to what extent, if at all, do the annexes to the UNFCCC apply to the Paris Agreement.

Summary:

In order to respond to this question, I have undertaken a classic treaty interpretation analysis. My conclusion is that, while some of the context to the terms "developing country Parties" and "developed country Parties" suggests an interpretation consistent with the Annexes, this does not meet the high standard of proof necessary for concluding that Parties agreed to assign a special meaning to the terms under Article 31(1)(4) VCLT. Moreover, the travaux préparatoires show that Parties could not agree on giving an Annex-based meaning to "developing" and "developed". Therefore, while the Annexes to the UNFCCC may provide a point of reference, ultimately the categories of "developing" and "developed" country Parties are evolving and are not set in stone.

Advice:

I. Introduction

The United Nations Framework Convention on Climate Change ("the Convention") contains two annexes. These annexes are the chief means by which the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) is operationalised in the Convention.

While all Parties hold certain responsibilities under the Convention [see e.g. Article 4(1)], others are differentiated according to the Annexes. For instance, Annex I Parties are obliged to adopt policies and take measures on mitigation [Art 4(2)(a)], periodically communicate information on such policies and measures [Art 4(2)(b)], and include certain elements of information in such communication [Article 12(2)]. Parties included in Annex II, for example, are obliged to 'provide new and additional financial resources' to meet the costs incurred by developing country Parties in meeting their obligations and implementing measures under the Convention [Article 4(3)], to assist developing country Parties in meeting the costs of adaptation [Article 4(4)], and to take all practicable steps to promote, facilitate and finance technology transfer [Article 4(5)].

In the absence of an explicit provision in the Paris Agreement ("the Agreement") that the annexes to the Convention are to apply to it, the question of to what extent, if at all, the annexes to the Convention apply to the Paris Agreement ("the Agreement") is a question of the interpretation of the Agreement, specifically the terms "developing country Parties" and "developed country Parties". To this writer's eye, these words represent the primary avenue for arguing that the Annexes to the Convention apply to the Paris Agreement.

This memo will first set out the rules of the interpretation of treaties, through which this question must be examined (II), before turning to apply these rules to the terms "developing country Parties" and "developed country Parties" in the Paris Agreement (III).

At the outset, let us first remind ourselves of where and how the Agreement distinguishes between developed and developing country Parties.

The terms "developing country Parties" or "developed country Parties" occur in two preambular recitals of the Paris Agreement and 34 of its operative paragraphs.

Preamble

In the fifth recital Parties recognise 'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention'.

In the 16th recital Parties recognize that 'sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change'.

Operative paragraphs

The second sentence of Article 3 states: "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'. Therefore while developing country Parties are, like developed country Parties, expected to progress their efforts over time, their need for support is also recognized.

Mitigation

Article 4(1) provides, inter alia, in order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, 'recognizing that peaking will take longer for developing country Parties'.

Article 4(4) states that '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.'

This provision represents a development from the Convention, where the type of mitigation effort expected of developing countries was not prescribed¹.

However, this provision was not intended to create any new obligations for Parties², although they certainly set strong normative expectations and evoke the Convention's burden-sharing system.

Article 4(5) provides that '[s]upport shall be provided to developing country Parties' for the implementation of Article 4, in accordance with Articles 9-11, 'recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions'.

Article 4(15) provides that Parties 'shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties'.

REDD+

Article 5(2) encourages Parties to take action to 'implement and support' the existing framework 'policy approaches and positive incentives for activities related to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks [i.e. REDD+] in developing countries' as well as alternative policy approaches.

Article 6

Article 6(6) provides that the CMA 'shall ensure that a share of the proceeds from activities under the [Article 6(4) mechanism] is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.'

Adaptation

Article 7(3) provides that developing country Parties' adaptation efforts 'shall be recognized', while under Article 7(6) Parties recognize the importance of support for and international cooperation on adaptation efforts 'and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change'. Article 7(7)(d) provides that Parties should strengthen their cooperation on enhancing action on adaptation, including with regard to '[a]ssisting developing country Parties' in, inter alia, identifying effective adaptation practices. Under Article 7(1), Parties should, as appropriate, submit and update periodically an adaptation communication 'without creating any additional burden for developing country Parties'. Article 7(13) provides that '[c]ontinuous and enhanced international support shall be provided to developing country Parties' for their implementation of Article 7(7), (9), (10) and (11), while Article 7(14)(a) provides that the global stocktake shall recognise adaptation efforts of developing country Parties.

Finance

¹ Christina Voigt and Felipe Ferreira, 'Dynamic Differentiation': The principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 58, 68.

² Rajamani n x 510

Article 9 contains perhaps the clearest differentiation between developing and developed country Parties. Paragraph 1 provides that developed country Parties 'shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention', while the donor base is expanded by Paragraph 2 under which '[o]ther Parties [i.e. developing country Parties] are encouraged to provide or continue to provide such support voluntarily'.

Article 9(3) provides that developed country Parties 'should continue to take the lead' in mobilizing climate finance, 'taking into account the needs and priorities of developing country Parties' (see also decision 1/CP.21 [53]).

Article 9(4) provides that the provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, 'taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States...'

Under Article 9(5) developed countries are obliged to biennially communicate indicative quantitative and qualitative information related to Article 9(1) and (3), as applicable, including as available projected levels of public financial resources to be provided to developing country Parties, while other [read: developing country] Parties providing resources are 'encouraged' to do so 'on a voluntary' basis'.

Under Article 9(6) the global stocktake 'shall take into account the relevant information provided by developed country Parties' on climate finance.

Article 9(7) states that developed country Parties 'shall provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially', while other Parties are 'encouraged' to do so.

Article 9(9) provides that the institutions serving the Agreement, 'including the operating entities of the Financial Mechanism of the Convention, shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced readiness support for developing country Parties, in particular for the least developed countries and small island developing States, in the context of their national climate strategies and plans.'

Technology

On technology development and transfer, Article 10(5) provides that efforts to accelerate, encouraging and enabling innovation shall be supported by the Technology Mechanism and the Financial Mechanism, inter alia for facilitating access to technology to developing country Parties.

Article 10(6) provides that support, including financial support, 'shall be provided to developing country Parties for the implementation of' Article 10, and the global stocktake 'shall take into account available information related to support on technology development and transfer for developing country Parties'.

Capacity building

Article 11(1) provides that capacity building under the Paris Agreement 'should enhance the capacity and ability of developing country Parties' in particular those with least capacity and those that are particularly vulnerable to the adverse effects of climate change such as SIDS, 'to take effective

climate change action'. Article 11(2) provides that capacity-building should, among other matters, 'foster country ownership of Parties, in particular, for developing country Parties'. Under Article 11(3), all Parties 'should cooperate to enhance the capacity of developing country Parties to implement this Agreement', while '[d]eveloped country Parties should enhance support for capacity-building actions in developing country Parties. Article 11(4) provides that '[a]ll Parties enhancing the capacity of developing country Parties to implement [the Paris Agreement]...shall regularly communicate on these actions or measures on capacity-building', and '[d]eveloping country Parties should regularly communicate progress made on implementing capacity-building plans, policies, actions or measures to implement this Agreement'.

Transparency

The transparency provisions contained in Article 13, in general, grant flexibility to 'those developing country Parties that need it in the light of their capacities'. Under paragraph 2 of Article 13, the transparency framework 'shall provide flexibility in the implementation of the provisions of [Article 13] to those developing country Parties that need it in the light of their capacities'.

Under Article 13(9), developed country parties 'shall', while other Parties that provide support 'should', provide information on financial, technology transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11.

Article 13(10) provides that developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received under Articles 9, 10 and 11.

The first sentence of Article 13(11) provides that the technical expert review of information submitted under Article 13(7) and (9) will, for 'those developing country Parties that need it in the light of their capacities', include assistance in identifying capacity-building needs. Article 13(12) provides that the technical expert review will, inter alia, 'pay particular attention to the respective national capabilities and circumstances of developing country Parties'.

Under Article 13(14), support 'shall be provided' to developing countries for the implementation of this Article, and under Article 13(15) support 'shall also be provided for the building of transparency-related capacity of developing country Parties on a continuous basis'.

In summary, the Paris Agreement reflects a degree of differentiation between developed and developing country Parties, particularly with regard to support (including finance, technology transfer and capacity-building) as well as flexibility in the application of the transparency framework (at least for those developing country Parties that need it in the light of their capacities).

II. Treaty interpretation

When interpreting the meaning of provisions of the Paris Agreement the starting point is Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)³. Although not all parties to the Paris Agreement have signed and/or ratified the VCLT, these articles represent customary international law:

Article 31 General rule of interpretation

³ adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Regarding Article 31(1), good faith is 'one of the basic principles governing the creation and performance of legal obligations'⁴. The principle of good faith grounds the presumption that the terms of a treaty were intended to mean something, rather than nothing⁵. The ordinary meaning is the current and usual meaning⁶. The object and purpose of a treaty include its aims, nature and end, and a treaty may have many objects and purposes⁷.

Under Article 31(2), the context may include, in addition to the text itself including preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the

⁴ Nuclear Tests Cases [1974] ICJ Rep 268 [46].

⁵ Iran-US Claims Arbitration (1982) 62 ILR 603, minority opinion.

⁶ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 426.

⁷ *Ibid* 427.

conclusion of the treaty, as well as any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. These are forms of authentic interpretation, whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are external to the treaty itself. Under 31(2)(b), relevant instruments will include agreements *inter se* between certain parties or unilateral statements such as interpretative declarations upon ratification or accession⁸.

Article 31(3)(a) means that subsequent agreements between the Parties are authentic means of treaty interpretation. The International Law Commission expanded on the role of subsequent agreements as well as subsequent practice under Article 31(3)(b) in its 2018 *Draft conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties*⁹. The weight to be given to a subsequent agreement or subsequent practice depends on its clarity and specificity [Draft conclusion 9 and commentary thereto]: a specific and clear understanding between Parties on a treaty provision will overrule unilateral state practice that might point to a different interpretation. Subsequent agreements need not be legally binding in order to be taken into account [Draft conclusion 10] and can include decisions adopted by a Conference of Parties [Draft conclusion 11] insofar as such decisions express agreement in substance between the parties regarding the interpretation of a treaty¹⁰.

To be relevant under Article 31(3)(b), a subsequent practice must establish the agreement of the parties regarding the interpretation of the treaty: that is, it will have been acquiesced in by the other parties, and no other party will have raised an objection¹¹.

Under Article 31(3)(c), a treaty must be interpreted against the entire background of international law; the meaning of a term will correspond with any relevant rules of international law applicable in the relations between the Parties¹². It is assumed that in entering treaty obligations, the parties did not intend to act inconsistently with other previous obligations¹³. As the ICJ put it in the *Namibia Advisory Opinion*¹⁴:

"Mindful as the Court is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."

Related to this, there is also a general legal imperative to interpret agreements harmoniously in relation to legal instruments covering the same subject matter¹⁵.

A special meaning, i.e. a meaning going beyond the ordinary meaning, can be given to a particular term if it is established that the Parties so intended (Article 31(4)). However, the standard of proof is

⁸ Villiger n x 429-430.

⁹ UN Doc A/73/10.

¹⁰ see also *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226 [83].

¹¹ Villiger n x 431.

¹² Villiger n x 432.

¹³ Villiger n x 433.

¹⁴ [[1971] ICJ Rep 31.

¹⁵ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (13 April 2006) UN Doc A/CN.4/L.682

high: it is not enough that only one party uses the term in a particular way¹⁶. Evidence of the shared intention may be found in one of the other means of interpretation under Article 31(2) or (3).

These various factors do not operate in a hierarchy; they are all of equal value and must be applied in a single combined process¹⁷.

The Paris Agreement thus must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, in their context and in the light of its object and purpose. The relevant context includes the immediate sentence, paragraph and article surrounding a contested provision, the remainder of the Agreement, its preamble, as well as decision 1/CP.21 (under Article 31(2)(a) VCLT) and any instrument made by one or more parties in connection with the conclusion of the Paris Agreement and accepted by the other Parties as an instrument related to the treaty (e.g. interpretative declarations upon ratification or signature, explanatory reports prepared by governmental experts). We also need to take into account any subsequent agreement, subsequent practice, and relevant rules of international law. Regarding the former, the Paris Rulebook is likely to be relevant¹⁸. This is all one combined analysis in which no single factor carries more weight than others.

If upon completing the Article 31 exercise the meaning remains ambiguous or obscure, the result is manifestly absurd or unreasonable, or if we simply wish to confirm the meaning, recourse may be had to supplementary means of interpretation, including the *travaux préparatoires* of the treaty and the circumstances of its conclusion. The supplementary means listed in Article 32 are not an exhaustive list, indicated by the word "including"; hence, other supplementary means of interpretation may be considered.

The preparatory work referred to in Article 32 includes all documents relevant to and generated by the parties during the preparation of the treaty until its conclusion, including Parties' submissions and other statements and transmitted to each other or to the Secretariat; diplomatic exchanges; treaty drafts; negotiation records; and minutes of proceedings¹⁹.

The circumstances of a treaty's conclusion include the political, social and cultural factors surrounding the treaty's conclusion²⁰.

III. The meaning of “developed” and “developing”

A. Introduction

In the Convention, the terms "developed country Parties" and "developing country Parties" were treated as synonymous with Annex I/II and non-Annex I/II Parties, depending on the context (e.g. Annex II for finance, Annex I for mitigation).

¹⁶ Shaw 2014 680.

¹⁷ ILC Report 1966, YBILC 166 II. 219 [8] and 220 [9].

¹⁸ see Petra Minnerop, 'The Legal Effect of the 'Paris Rulebook' under the Doctrine of Treaty Interpretation' (2020, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3491775); International Law Commission, 'Draft conclusions on subsequent agreement and subsequent practice in relation to the interpretation of treaties' (UN Doc A/73/10) [51].

¹⁹ Villiger n x 445.

²⁰ Villiger n x 445.

By contrast, as many have noted, these terms are not defined in the Agreement itself²¹.

Scholars are divided on the extent to which the Annexes apply through the terms "developing" and "developed" in the Paris Agreement. While Maljean-Dubois argues that although the Annexes have been implicitly abandoned, she says 'one can assume that they can provide an important - but not sacrosanct and intangible - point of reference when necessary'²². On the other hand, Voigt and Ferreira argue that the absence of annexes and definitions means there is no 'static placement of countries'; rather, this 'allows countries to move towards greater mitigation ambition over time without the need to "graduate" from one category to the other'²³.

We will assume that the terms "developed" and "developing" country Parties each carry a singular meaning throughout the Paris Agreement. That is, their meaning does not change on a provision-by-provision basis. To assume otherwise would introduce considerable ambiguity, difficulty and absurdity into the Paris Agreement. It would be bizarre, for instance, if "developing country Parties" in Article 9 (finance) carried a different meaning to "developing country Parties" in Article 4 (mitigation) or Article 7 (adaptation).

B. Ordinary meaning

Under Article 31(1) VCLT, the ordinary meaning of a treaty provision is one factor to be taken into account in its interpretation. In treaty interpretation exercises it is common to see dictionary definitions. So, let us refer to some dictionaries.

The Oxford English Dictionary²⁴ defines "developing" as: *"Designating a country, region, etc., which has not yet advanced economically and socially (but is seeking to do so), and which typically has lower living standards and less investment in education, industry, new technologies, etc., than the developed world"* and "developed" as: *"Designating a country, region, etc., which is economically and socially advanced, and typically has high living standards, widespread literacy, and investment in the development of industries, new technologies, etc."*

The Cambridge Dictionary²⁵ defines "developing country" as: *"a country with little industrial and economic activity and where people generally have low incomes"*, and "developed country" as *"a country with a lot of industrial activity and where people generally have high incomes"*.

The Merriam-Webster Dictionary²⁶ defines "developing country" as "having a relatively low economic level of industrial production and standard of living (as from lack of capital)" and "developed country" as "having a relatively high level of industrialization and standard of living".

The ordinary meaning, then, appears to focus on industrialisation, economic activity, "social advancement", technological development, income level and standard of living as key factors that define whether a country is developed or developing.

²¹ See e.g. Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 ICLQ 493, 513; Sandrine Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25 RECIEL 151, 156.

²² Maljean-Dubois n x at 156.

²³ Voigt and Ferreira n x 67.

²⁴ online version, <http://oed.com>

²⁵ online version, <http://dictionary.cambridge.org>

²⁶ online version, <http://merriam-webster.com/dictionary>

Self-evidently, the dictionary does not refer to Annexes I and II of the Convention in defining "developed" and "developing". If the Annexes were to apply to the Agreement, in other words, this would not be the ordinary meaning. Under Article 31(4) VCLT, this would be a 'special meaning' which we could ascribe to the 36 paragraphs listed in section I above if we can establish that the parties so intended--but the standard of proof required is high.

The "ordinary meaning" exercise would be made easier if there was one common understanding amongst the international community of the meaning of "developing" and "developed". However, these are disputed terms.

It may be that the UN WESP represents a common understanding²⁷. This document classifies all countries of the world into one of three broad categories: developed economies, economies in transition, and developing economies.

In 2019, the developed economies listed in the WESP were: Austria, Australia, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States.

Economies in transition were listed as: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Montenegro, Russia, Serbia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

There is considerable, though not complete, overlap with Annexes I and II of the Convention. One might argue that the UN WESP would be a good reference document for the sort of evolutionary interpretation which some argue should be attached to the words "developing" and "developed": updated every year, it can provide a basis for the objective categorisation of countries into "developed" and "developing". However, this notion is complicated by the fact that the WESP includes an "economies in transition" category, which does not appear in the Paris Agreement.

Another possible basis for "developed" and "developing" is the World Bank's categorisation into low income, lower-middle income, higher-middle income, and high income countries. Although now the World Bank has abandoned the terms "developed" and "developing", in 2015 it still referred to high income countries as "developed" and low and middle-income countries as "developing". An examination of the World Bank's categorisation reveals that it departs from the Annexes more than the WESP does. For instance, in 2015 it listed Qatar, Saudi Arabia, Oman, Panama, Singapore, the Republic of Korea, Kuwait, Chile, Brunei, Bahrain, Uruguay, the United Arab Emirates, Nauru, and Israel as high-income (and therefore "developed")²⁸.

C. Context

a. Durban Platform

²⁷ *World Economic Situation and Prospects (WESP) 2019* (United Nations 2019).

²⁸ <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>

As an instrument adopted in connection with the conclusion of the Agreement, the Durban Platform²⁹ is a relevant piece of context.

Under Paragraph 2 of the Durban Platform, Parties launched the process to develop the Paris Agreement, there described as 'a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'.

The phrase "under the Convention" means that the principles of the Convention, as well as its Annexes (see discussion below under "References to the Convention") are implicitly engaged.

The phrase "applicable to all Parties" reflects Parties' wishes that the outcome not reflect a binary differentiation of the kind seen in the Kyoto Protocol, but rather contain obligations (in particular mitigation obligations) applicable to all.

b. References to the Convention in the Paris Agreement

Article 16(1) of the Convention provides:

1. Annexes to the Convention shall form an integral part thereof and, unless otherwise expressly provided, a reference to the Convention constitutes at the same time a reference to any annexes thereto. ...

It is clear that the annexes form 'an integral part' of the Convention, and any reference to the Convention is thus a reference to the annexes. This will be kept in mind when examining the context.

c. Preamble

The preamble forms part of the context to be taken into account in the interpretation process.

The first and second preambular recitals situate the Agreement in the context of the Convention (*Being Parties to the...Convention...*) and the Durban Platform (*Pursuant to the Durban Platform...*).

The third recital states: "*In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,*"

The phrase "the objective of the Convention" is to be read as "the objective of the Convention, including its Annexes".

The objective of the Convention is found in its Article 2: "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

²⁹ Decision 1/CP.17 on the establishment of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (15 March 2012) Doc FCCC/CP/2011/9/Add.1.

The principles of the Convention are found in its Article 3, and include in paragraph 1 the principle that "Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."

As noted in section I above, in the fifth recital of the Agreement Parties recognise 'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention'. This harks back to Article 3(2) of the Convention, which contains the principle that inter alia the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, should be given full consideration.

The eighth recital emphasizes the 'intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty' - a matter which concerns developing countries more than developed ones.

In the 16th recital Parties recognize that 'sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change'. The language of developed country Parties "taking the lead" harks back to the Convention, Article 3(1), second sentence (above).

d. Equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances

The Agreement refers in five places (in addition to the preamble, as noted above) to equity and/or the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 2(2) provides that the Agreement 'will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

Article 4(1) refers to 'on the basis of equity' in peaking and reducing greenhouse gas emissions to achieve the long-term temperature goal.

Article 4(3) provides that each Party's successive NDC 'will represent a progression beyond the Party's then current [NDC] and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

Article 4(19) provides that all Parties 'should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

Article 14(1) provides that the global stocktake shall proceed "in the light of equity" amongst others.

The implications of these provisions are two-fold. Firstly, Article 2(2) provides a strong steer that the Agreement, including the provisions that refer to "developed" and "developing" country Parties, should be interpreted to reflect equity and the principle of CBDR-RC, in the light of different national circumstances. Equity is central to the implementation of the Agreement. Second, it is likely that the

qualifier of 'in the light of different national circumstances', as Rajamani puts it, 'introduces a dynamic element to the interpretation of the principle, whereby the common but differentiated responsibilities of States will evolve as national circumstances evolve'³⁰. This dynamic element marks a break from the version of the principle contained in and operationalised under the Convention - i.e. indicates that the Annex-based dichotomy no longer applies. While equity is still central, its meaning has changed.

e. National capabilities and circumstances

References to national capabilities and/or circumstances appear in a few places in the Agreement:

Article 4(3) (NDC progression)(above) and Article 4(19) (LEDs) (above) refer to 'in the light of different national circumstances'.

Article 13(1) establishes the enhanced transparency framework 'with built-in flexibility which takes into account Parties' different capacities'.

Article 15(2), concerning the compliance committee, states that the committee 'shall pay particular attention to the respective national capabilities and circumstances of Parties'.

These provisions indicate that the "developing"/"developed" distinction is not the only one relevant for the purposes of equity and CBDR-RC in the light of different national circumstances. This is further evidence to suggest that the Annexes do not apply to the terms "developing" and "developed".

f. Other forms of differentiation in the Agreement

Similarly, there are several places in the Agreement where differentiation between countries appears on a different basis than the developed/developing dichotomy. For instance, reference to the least developed countries and/or small island developing States, which are subsets of the category of "developing country Parties", is made in preambular recital 6, Article 4(6), Article 9(9), Article 11(1), and 13(3). In a similar vein, some Articles refer to developing country Parties 'especially those that are particularly vulnerable' to climate impacts (e.g. preambular recital 5, Article 7(6)). Another *sui generis* form of differentiation is found in Article 4(15) which refers to 'Parties with economies most affected by the impacts of response measures, particularly developing country Parties'. While some developing Parties will fall into this category, others will not; it may also include some developed country Parties.

This is further evidence to suggest that the Annex-based differentiation is given less importance in the Paris Agreement than under the Convention.

g. The text of the provisions

Further context can be found in the rest of the sentences, paragraphs and articles in which the terms "developing" and "developed" are found.

Under Article 4(4), developed country Parties 'should continue taking the lead' while developing country Parties 'should continue enhancing their mitigation efforts'.

³⁰ Rajamani n x 508.

The word "continue" implies a reference to the Convention - both to the principle in Convention Article 3(1) (above), and on the existing mitigation obligation to take the lead found in Article 4(2)(a) of the Convention:

"Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention..."

This Article concerns Annex I Parties specifically. This is evidence to suggest that the word "developed" in Article 4(4) is intended to refer to Annex I Parties.

Article 4(14) states that in the context of their NDCs, 'when recognizing and implementing mitigation actions with respect to anthropogenic emissions and removals, Parties should take into account, as appropriate, existing methods and guidance under the Convention, in the light of the provisions of paragraph 13 of this Article.' Paragraph 13 relates to accounting for NDCs. While the reference to "the Convention" incorporates the Annexes, this is only relevant to the extent that the Annexes have a bearing on existing methods and guidance for accounting for NDCs.

Similarly, in Article 5 (conservation of sinks, including REDD+), "the existing framework as set out in related guidance and decisions already agreed under the Convention" is referred to - again implicitly referring to the Annexes. This is relevant to the extent that Annexes are relevant to existing REDD+ guidance and decisions.

Article 9(1) reads:

"Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.

Finance-related obligations under the Convention are, as seen above, highly differentiated with respect to both mitigation and adaptation, according to Annex II. Article 4 of the Convention relevantly provides:

"3. The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.

"4. The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

"5. The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or

access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.

"7. The 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.

The phrase "in continuance of their existing obligations" suggests that the word "developed" in Article 9(1) refers to Parties included in Annex II. No other Parties have existing finance-related obligations under the Convention.

Similarly, under Article 9(3), developed country Parties should 'continue to take the lead' in mobilising climate finance. It is Article 4 of the Convention, paragraphs 3, 4, 5 and 7, read in the light of Article 3(1) of the Convention, that in the first place instils the notion that developed country Parties should take the lead on finance. This is also evidence to suggest that the word "developed" in Article 9(3) refers to Parties included in Annex II.

The other Articles of the Agreement regarding support to be provided to developing country parties (e.g. Articles 4(5), 6(6), 7(6), 7(13), 10(5), 10(6), and 11(3)) should be read in the light of Article 9, meaning that the Annex II interpretation of "developing country Parties" is relevant to those articles as well.

The transparency framework, under Article 13(3), 'shall build on and enhance the transparency arrangements under the Convention'. The transparency arrangements under the Convention were differentiated by Annex. Under Article 12(2) of the Convention, Parties included in Annex I 'shall' incorporate in their communications certain elements of information in relation to its mitigation commitments under Article 4(2)(a) and (b) of the Convention, while under Article 12(3) Annex II Parties 'shall' incorporate details of measures taken in accordance with Article 4(2)(a) of the Convention.

This is also evidence to suggest that 'developed' and 'developing' in Article 13 of the Agreement, as well as in Articles 9(5), 9(7) and 11(4) of the Agreement which concern information to be provided in relation to finance and capacity building, should be given an Annex-based interpretation.

h. Financial mechanism

Related to the point about finance in Article 9, above, of interest is Article 9(8) which states that the Convention's Financial Mechanism, including its operating entities, shall serve as the financial mechanism of the Paris Agreement. [see Article 11 of the Convention; also see Article 9(9) of the Agreement providing that the operating entities of the Financial Mechanism shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced readiness support for developing country Parties.]

The operating entities of the Financial Mechanism of the Convention are the Green Climate Fund, the Global Environment Facility, and the Adaptation Fund. [see decision 9/CP.1 [1].]

The Green Climate Fund's Governing Instrument states that developing country Parties to the UNFCCC are eligible for GCF support, while leaving the category undefined. However, the GCF's website makes it clear who the GCF considers eligible: "non-Annex I countries"³¹. The website notes that 147 out of 154 non-Annex I countries have designated a National Designated Authority or Focal Point, a key requirement for unlocking GCF resources.

i. Decision 1/CP.21

As the COP decision through which the Paris Agreement was adopted, decision 1/CP.21 is undeniably relevant context for the purpose of interpreting the Agreement.

Decision 1/CP.21 also includes the terms "developing country Parties" and "developed country Parties" in several places throughout its text³². It would be absurd if, in the absence of express indications from parties, these terms were given different meanings in each instrument. Yet there are no indications that parties intended the words "developed" and "developing" to be interpreted differently in the Agreement compared with the Decision.

Certain paragraphs are especially relevant in the light of the points made above regarding the Agreement's provisions on finance.

The COP calls for developed country Parties and the operating entities of the Financial Mechanism, among others, to provide support for the preparation and communication of INDCs for Parties that may need it. [15] It requests the GCF to expedite support for LDCs and other developing country Parties for the formulation of national adaptation plans [46], and urges the GCF and others to 'enhance the coordination and delivery of resources to support country-driven strategies through...continued readiness support to developing country Parties'. [64] It urges and requests the GEF to make arrangements to support the establishment and operation of the Capacity-building Initiative for Transparency, including 'through voluntary contributions to support developing country Parties in the sixth replenishment of the Global Environment Facility'. [86]

The significance of these provisions is that they add further weight to the points made above regarding the Financial Mechanism and the finance provisions of the Agreement.

D. Object and purpose

The aims of the Paris Agreement are expressed in its Article 2:

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

³¹ <https://greenclimate.fund/countries/>.

³² see e.g. paragraphs 15, 18, 42(b), 45(a), 46, 52, 53, 64, 71, 84, 86, 89, 90, 92(b), 93, 94(a), 102, 105(d), 114.

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emission development, in a manner that does not threaten food production; and

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

The chapeau to Article 2(1) states that the Agreement, 'in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty...'

This Article thus incorporates the objective of the Convention (Article 2, discussed above) as well as arguably its principles (Article 3, discussed above) and can be read as meaning that the Agreement will enhance the implementation of the Convention necessarily including its Annex-based differentiation.

This provision must be read in the context of the preamble, including those recitals quoted above.

The objective of the Convention referred to in Article 2 of the Paris Agreement is found in its Article 2:

1. "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

The phrase "in enhancing the implementation of the Convention, including its objective", also incorporates by necessary implication relevant provisions of Article 3 of the Convention (principles).

E. Subsequent agreements and subsequent practice

There is a good argument to be made that the Paris Rulebook decisions are an authentic means of interpreting the Paris Agreement³³, under the criteria proposed by the ILC [see above]. The CMA was expressly required to adopt the decisions under the Paris Agreement and Decision 1/CP.21, and certain decisions definitely embody an agreement on Parties' preferences³⁴.

³³ see Minnerop n x.

³⁴ Minnerop argues that, for instance, Decision 4/CMA.1, Annex I, embodies the agreement of Parties concerning the interpretation of Article 4(8) of the Agreement, Decision 19/CMA.1 constitutes agreement of Parties in substance concerning the operation of the global stocktake mechanism, and decision 20/CMA.1 has expressed the common understanding of Parties on the Article 15 mechanism.

The Paris Rulebook decisions, however, are not necessarily of help in deciphering the terms at issue here, although the decisions contain numerous references to "developed country Parties" and "developing country Parties"³⁵.

One thing of interest is the COP's welcoming with appreciation of the 2018 Biennial Assessment and Overview of Climate Finance Flows of the Standing Committee on Finance, 'in particular its key findings and recommendations highlighting the increase in climate finance flows from developed country Parties to developing country Parties'.

The Standing Committee on Finance report (seen in the Annex to decision 3/CP.24) explicitly maintains an Annex-based distinction in assessing climate finance flows from developed to developing country Parties.³⁶

Several provisions of the Paris Rulebook decisions also refer back to the goal for developed country Parties to jointly mobilize USD 100 billion annually by 2020. [see e.g. decision 3/CP.24 [2], [3]].

Further, several provisions refer to the existing mandates of the GEF and GCF [see e.g. Decision 9/CMA.1 [10] and [21]; decision 11/CMA.1 [25]; decision 18/CMA.1 [8];], for instance, to channel support to developing country Parties for the preparation and submission of their adaptation communications. As argued above, the existing mandates of the GEF and GCF are founded upon the Annex-based dichotomy.

F. Any relevant rules of international law applicable in the relations among the Parties

Under Article 31(3)(c), one factor to be taken into account in the interpretative exercise is any other relevant rules of international law applicable in the relations between the Parties.

It is worth noting, in this connection, that the terms "developed" and "developing" are used without definition in other United Nations international legal instruments on similar topics: for instance the Addis Ababa Action Agenda, the Sendai Framework, The Future We Want, and the SAMOA Pathway. None of these other instruments provides us with assistance in terms of the meaning of these words.

G. The Article 31 analysis

Taking into account all of the factors so far outlined, what is the result under Article 31?

The evidence is contradictory. On the one hand, the provisions on finance and support lend themselves to a reading of "developing" and "developed" that corresponds to the Annexes.

On the other hand, the context of the Durban Platform, the evolution in the meaning of equity and the principle of CBDR-RC in the light of national circumstances, and the shifted emphasis away from solely developed/developing distinction as the basis of differentiation and rather the inclusion of

³⁵ see e.g. decision 1/CP.24, paragraphs [9], [13], [15], [20]; decision 3/CP.24, Long-term climate finance [1], [2], [3], [4], [5]; decision 9/CMA.1 (adaptation communication) [1] (b), [2] (b), [19], [10], [21]; decision 11/CMA.1 [7], [9], [10], [11], [12], [20], [21], [23], [25], [29], [30]; decision 12/CMA.1 [2] and Annex (a), (e), (j), (l), (m), (n), (o); Decision 13/CMA.1 (Adaptation Fund) [1] and [4]; decision 15/CMA.1 (technology framework) [6]; decision 18/CMA.1 (transparency framework) [1], [3], [4], [7], [8], [15(a)], Annex; decision 19/CMA.1 (global stocktake) [11], [12]; decision 20/CMA.1 (Article 15 committee) [27].

³⁶ see [25] of that report read in conjunction with [51] (a), (b), (d), (f), (g), (k) and (l).

other forms of differentiation, all suggest that "developing" and "developed" are not meant to be read as meaning non-Annex I and Annex I.

Given the high burden of proof required to establish a special meaning under Article 31(4), it is not sufficiently clear that the Parties intended to give an Annex-based meaning to "developing" and "developed" in the Agreement.

We should therefore look at supplementary means of interpretation to see if they shed any light on the matter.

H. Supplementary means of interpretation

Travaux préparatoires

Draft versions of the Paris Agreement show that at several stages of its preparation, a differentiation based on Annexes (either Annexes to the Paris Agreement itself, or the existing Annexes to the Convention) was contemplated by the Parties as one option.

For instance, in the negotiating text of 25 February 2015³⁷, references to Annexes are found in many places throughout the text³⁸.

The non-paper of 5 October 2015 then contains no reference to annexes.

In the draft agreement produced by the ADP of 3 December 2015 at 08:00, Article 1 includes proposed definitions of "developing country Party" and "developed country Party":

9. ["Developed country Party"] means a developed country Party [under the Convention][within the meaning of this Agreement][in the United Nations system].]

10. ["Developing country Party"] means a developing country Party [under the Convention][within the meaning of this Agreement][in the United Nations system].]

Furthermore, the 3 December draft contains references to Annexes in several Articles (Article 3 (mitigation - see paragraphs 3 option 1, and 17 option 1), Article 6 (finance - see paragraphs 2 options 1 & 2, 3 option 2, 10 option 2, 11 options 1 & 2, 13, and 14), Article 7 (technology - see paragraphs 6 option 2 and 7 option 1), and Article 9 (transparency - see paragraph 5bis)) as well as in the accompanying decision ([47], [87], [88], [100], [100bis].)

By 5 December, the proposed definitions of "developed" and "developing" were removed, reflecting that Parties were unable to decide on assigning them an Annex-based definition. However, the Draft Paris Agreement of 5 December 2015³⁹ still contained several references to Annex II of the Convention in its Article 3 (mitigation - see paragraph 5, option 1), Article 6 (finance - see paragraphs 1 option 2, 2 options 1 & 2, 4 option 2, 10 option 2, 12, 16 options 1 & 2, and 18), Article 7

³⁷ Doc FCCC/ADP/2015/1.

³⁸ see the Preamble, para C.3. option 1, para 6, para 8, para 9 option 2, para D.17.1 option 3, para 17,2 option a, para 19 option 2, para 21 option 3, para 21.1 option 3. para 21.8 option 2, para 21.6 options 2&4, para 27 option 2, para E.50 options 1 & 3, para 51.2, para 51.6, para 51.7, para 54.3, para 57 option 3, and para 65.

³⁹ Doc FCCC/ADP/2015/L.6.

(technology - see paragraphs 6 option 2, and 7), and in the accompanying Draft Decision (at [62], [69], [72], [81], [102(0)], [103] and [104]).

The draft of 9 December 2015 at 15:00 contained substantially fewer references to Annex I and II - see Article 3 (mitigation - paragraphs 3 option 1, and 5 option 2), Article 6 (finance - paragraphs 2 option 2, 4 option 2, and 7 options 1 & 2), and Article 7 (technology - paragraph 7), as well as in the draft decision at [57], [69], [80] and [103].

In the draft outcome of 10 December 2015 at 21:00, all references to Annex I and Annex II are removed.

This is an incomplete analysis of the preparatory work of the Paris Agreement. A more extensive analysis would involve examining Parties' submissions and records of the meeting. However, the above analysis is sufficient to demonstrate that the Parties could not agree on proposals to define "developing" and "developed" in accordance with the annexes to the Convention. Nor could they agree to include express references to Annex I or Annex II in the Agreement.

Circumstances of conclusion

The Paris Agreement was concluded in the circumstances of a strict Annex-based dichotomy approach to differentiation, as seen in the Kyoto Protocol, having been widely viewed to have failed. Further, it was concluded in the context of debates over Annex-based differentiation being seen to be a key factor in why the Copenhagen talks could not result in agreement. The Paris Agreement was seen by many as a change to move away from the Annexes towards a new operationalisation of equity and CBDR-RC.

IV. Conclusion

The treaty interpretation exercise under Article 31 of the VCLT resulted in considerable ambiguity. Looking at the supplementary means of interpretation under Article 32 VCLT, it is clear that the Parties to the Agreement did not intend to apply the Annexes to the Convention to the definition of the terms "developing country Parties" and "developed country Parties". Such a definition was proposed in an early draft along with other potential definitions, but Parties could not agree on it. Moreover, the circumstances surrounding the conclusion of the Agreement further suggest that the Annexes were not intended to apply to the Agreement in this way.

The evidence suggest that Parties intended that "developed" and "developing" carry a more evolutionary and dynamic meaning.

In this light, however, substantial uncertainty remains as to what "developing" and "developed" mean in the Paris Agreement. It may be that the Annexes could constitute a starting point or one factor in whether a country is considered "developing" or "developed", but it is clear that other factors must additionally be taken into account. Such factors could include a country's categorisation under the UN WESP or by the World Bank in its annual income classifications. This will ultimately be a political question.