Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?

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Introduction

The failure of the Copenhagen, Cancún and Durban conferences to produce a new, legally binding climate treaty (as distinct from a promise to negotiate a treaty) has generated increasing concern over the capacity of the multilateral climate negotiations to respond to the challenge of climate change in a timely and effective manner. Critics of the United Nations Framework Convention on Climate Change (UNFCCC) negotiation process have argued that it has become fatally cumbersome because it requires the impossible: consensus decision-making by 194 parties on every line of a complex and lengthy treaty. The negotiations have produced diminishing returns over time as a result of the development of deeply entrenched positions by increasingly defensive negotiating blocs.[1] The sixteenth Conference of the Parties (COP16) at Cancún put the negotiations back on track after the derailment at Copenhagen, but the Cancún agreement was secured by determined chairing by the Mexican host, which included departing from a strict adherence to the consensus rule in the final session to avoid a repetition of Copenhagen. COP17 at Durban has been celebrated for starting a fresh round of negotiations for a new legal agreement that will include all major emitters, and for throwing another lifeline to the Kyoto Protocol. Yet Durban was also a case of déjà vu, since the Bali conference in 2007 had launched a roadmap for a legally binding treaty including all major emitters to be signed at Copenhagen in 2009. The so-called Durban platform, agreed after a record negotiating marathon, represents a non-binding agreement to negotiate a legally binding treaty by 2015, to come into effect by 2020. There was no effort made by the major emitters to raise the level of ambition on mitigation to levels that would keep warming below the politically agreed threshold

1. See, for example, Depledge 2006.

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of 2°C. It is widely acknowledged that each year of delay will require greater ambition if and when agreement is finally reached if the risks of dangerous climate change are to be reduced.

This frustration over the slow progress of the climate negotiations relative to the narrow window of opportunity for effective action has generated a range of alternative proposals to the current UNFCCC architecture and negotiation process, as well as many spirited defenses of the existing system. This article focuses on the debate over the respective strengths and weaknesses of multilateralism with large numbers versus small numbers, which I shall call "inclusive multilateralism" versus "exclusive minilateralism." The key question asked is under what circumstances, if any, might minilateralism advance the climate negotiations by serving as a stepping-stone towards a more comprehensive treaty?

The debate over inclusive multilateralism versus exclusive minilateralism raises some challenging tensions for cosmopolitan political theorists and climate justice activists interested in both procedural justice and substantive climate justice. Proponents of exclusive minilateralism appear ready to sacrifice procedural justice at the altar of an efficient and best-practical outcome that ensures the buy-in of the major emitters. They measure progress in the climate negotiations against the counterfactual of no agreement or an ineffective agreement. Proponents of more inclusive multilateralism maintain that procedural justice is essential to the legitimacy of any climate treaty. They measure progress in terms of movement towards an ideal of communicative justice, which they understand as necessary for the achievement of substantive climate justice.

These two positions appear, at first blush, to be irreconcilable. Even modest proposals to improve the decision-making practices of the climate negotiations to enhance the participation of the smaller and more vulnerable states, not to mention nonstate actors, are likely to try the patience of, and increase the risk of defection by, the major emitters, whose participation is crucial to the success of the climate regime. Conversely, any move towards a less formal, minilateral agreement among the major emitters will further exacerbate the existing procedural injustices of the climate negotiations without necessarily producing an agreement that will significantly lower the risks of dangerous climate change.

This article explores and negotiates these tensions, and offers a modest proposal for *inclusive* minilateralism as a means of reconciling, or at least closing the gap between, these competing positions, and moving the negotiations forward. The proposal is necessarily modest because it arises from an exercise in "non-ideal political theory" that seeks to grapple with, rather than bracket, real-world tensions and constraints, including the role of great powers in multilateral negotiations. To this end, I draw on critical theory's method of praxeology (with some modifications) in order to push critical theory in a more applied direction.[2] Praxeology entails working with the existing principles and practices of the UNFCCC (rather than ideal cosmopolitan theory), identifying their

2. Linklater 1998, 5.

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unfulfilled promise in delivering procedural and substantive justice and suggesting practical ways in which the promise may be better, if not perfectly, fulfilled.

I begin by explaining the normative, sociological and praxeological research tasks of critical theory and suggest how the tensions between communicative justice and substantive justice might be addressed. I then situate climate multilateralism in the context of the broader evolution of multilateralism as an institutional form and show that the climate negotiations represent a three-way struggle between exclusive minilateralism, traditional multilateralism and a new, more heroic form that I call "affirmative multilateralism," which discriminates in favor of developing countries according to the principles of equity and common but differentiated responsibilities and capabilities. Against this background, I evaluate exclusive minilateralism and argue that it is elitist, procedurally unjust, self-serving and likely to thwart the justice principles of the UNFCCC. If minilateralism is to be more inclusive and "fit for purpose," then I argue that it should be based on "common but differentiated representation," that is, representation by the most capable, the most responsible and the most vulnerable. I defend "inclusive minilateralism" based on these representation principles as one possible means of reconciling the tensions between inclusive multilateralism and exclusive minilateralism. I propose a Climate Council, constituted on the basis of common but differentiated representation, to address the core issues of long and medium term mitigation targets. Such a Council would be small and manageable enough to enhance the prospects of meaningful dialogue and creative compromise and diverse enough to avoid the representation deficits of exclusive minilateralsm. I also offer some practical suggestions as to how the Council might be embedded in the UNFCCC negotiations.

Critical Theory and Praxeology

Andrew Linklater has laid out the research program of Habermasian inspired critical International Relations theory in terms of three, interrelated tasks: the normative, the sociological and the praxeological.[3] The overriding normative task of critical theory is to promote human emancipation by exposing unjust systems of exclusion and exploring how more inclusive and culturally sensitive dialogic communities may be fostered that give voice and representation to excluded groups. The sociological task is concerned with mapping and understanding the character and evolution of political community, focusing in particular on the evolution of states and the society of states, and identifying the potential of this community to develop in more inclusive ways. The praxeological task is to explore how this potential might be practically realized by identifying the particular moral resources embedded within existing institutions that might be harnessed for emancipatory purposes.

3. Linklater 1998, 6–7.

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Critical theory's well-known standard of normative validity is based on the regulative ideal of communicative justice. A norm or agreement is valid when it has received the unforced consent of all those affected after full and free deliberation.[4] This is a demanding standard that can never be reached in the real world and should not be treated as a blueprint for policy-makers. Rather, it operates as a counterfactual ideal or critical yardstick by which particular communicative contexts and any resulting agreements can be judged as either more or less free or distorted, more or less inclusive or exclusive and, therefore, more or less legitimate. Clearly, seven billion people cannot meet to negotiate a treaty to protect the world's climate and there are other constituencies affected by climate change that literally cannot be present in such negotiations, such as future generations. Global climate policy must necessarily be negotiated by political representatives, who must "make present" the concerns and interests of those who are absent.[5] In the case of treaty negotiations, critical theorists must grapple with the fact that those representatives are confined to states, so the praxeological task is to explore how the international climate negotiations might move towards rather than away from the ideal of communicative justice.

However, the tensions between inclusive multilateralism versus exclusive minilateralism force critical theory to confront two challenges. The first is that the idea of communicative justice does not provide a theory of representation since *all* those affected should, ideally, be present. All it can do, in relation to any particular regime, is argue that wider and more diverse representation is always better because it will enable a greater range of standpoints and discourses to be aired, provide a better chance of producing decisions that promote generalizable rather than self-serving interests and therefore ensure the autonomy of the many rather than the few. While critical theorists may be quick to recognize practical arguments in favor of restricting the number of parties to a dialogue, the regulative ideal of communicative justice provides no obvious basis for providing any restrictions. The only option is to acknowledge that there are degrees of affectedness and that if the number of parties has to be restricted to ensure a manageable dialogue, then those most affected should certainly not be excluded. However, it still remains to work through what "most affected" might mean in different contexts.

The second challenge is that critical theory's standard of normative validity is essentially procedural rather than substantive. While critical theorists are able to offer judgments about the degree to which communicative contexts may be more or less inclusive, they do not typically make judgments about the merits of the particular decisions reached by parties to negotiations. As Linklater has explained, "discourse ethics sets out the procedures to be followed" but it "does not offer putative solutions to substantive moral debates, envisage historical endpoints or circulate political blueprints."[6] However, this leaves critical theo-

4. Habermas 1993.
5. Pitkin 1967, 8–9.
6. Linklater 1998, 92.

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rists with no basis for critically reflecting on, and calibrating, the relationship between what Fritz Scharpf has called "input legitimacy" and "output legitimacy" in real-world settings.[7] A dialogue may be inclusive and procedurally fair, but it may produce an ineffective agreement, or no agreement at all. This could produce perverse results from the standpoint of cosmopolitan justice if it meant that substantive justice could not be done, or serious injustices could not be prevented. If the ultimate normative purpose of critical theory is the removal of constraints on human autonomy, then it ought not to be assumed *a priori* that unconstrained dialogue is necessarily always the best or only means of furthering this ultimate purpose.[8] This is clearly not the case in situations where time is of the essence, such as in emergencies where swift action may be required to prevent human suffering, or when present or potential future victims of serious human rights abuses are in no position to enter into a dialogue. Unconstrained dialogue also encounters its own moral limits in situations where there is only a narrow window of time available for effective action even though harm may not be imminent. This is the problem presented by climate change, which threatens to pose increasingly significant constraints on the already compromised autonomy of many people living at the margins of existence in developing countries. It will also impose significant constraints on future generations. If there are more expeditious ways of reducing the unelected risks of climate change for the most vulnerable constituencies, now and in the future, than more inclusive dialogue then they ought to be carefully considered in the name of promoting substantive justice.

Once we dig underneath the ideals of communicative justice to the substantive and pre-discursive normative core of critical theory—the promotion of human autonomy—we have a normative basis from which to make practical judgments as to the circumstances when the demands of communicative justice might need to be relaxed in order to further substantive justice or avoid the creation of injustices. Such judgments should be part of the praxeological task, informed by a sociological understanding of the evolution of particular international regimes, and existing political and practical constraints. In the case of the climate regime, it requires recognizing that ever more inclusive dialogue might sometimes be counter-productive to reaching an international agreement given the limited window of time (less than a decade) in which to tackle the problem that the regime is designed to address. This should not, however, be seen as a crude utilitarian calculation whereby the ends of substantive climate justice can be used to justifying any means whatsoever, including the abandonment of communicative justice. Rather, it entails ensuring that communicative justice is calibrated in ways that promote rather than impede the achievement of substantive justice, or prevent or reduce the infliction of foreseeable harm. There will always be significant limits associated with sacrificing too much communicative

7. Scharpf 1999.
8. Eckersley 2008.

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justice by narrowing the range of participants in the dialogue because of the important connections between diverse representation and the epistemic quality, range of alternative standpoints considered and social acceptability and durability of any resulting agreement.

From a praxeological standpoint, these tensions require critical theorists to develop guidelines for formal representation in decision making bodies in ways that encompass not only those "most affected" by decisions, but also those most capable of producing effective decisions that promote substantive justice or prevent substantive injustices according to the norms and goals of particular regimes. I now turn to the sociological task of mapping the evolution of the climate regime in the context of the evolving institution of multilateralism, and identifying the moral resources that might be creatively harnessed to promote critical theory's larger moral purpose.

Multilateralism: From Hierarchy to Reverse Discrimination

Multilateralism, according to John Ruggie's ideal type, is "an institutional form which coordinates relations among three or more states on the basis of "generalized" principles of conduct."[9] As an institution, multilateralism rests on recognized principles of sovereign equality, indivisibility and diffuse reciprocity.[10] That is, treatment accorded to one party must be extended to all parties, and agreement is expected to provide a rough equivalence of benefits over time.[11] Since no state can be forced into signing a treaty, and states are free to withdraw from treaties at any time, Ruggie concedes that multilateralism is a highly demanding institutional form and its incidence is likely to be less frequent than a self-help order.[12]

The constitutive principles of multilateralism presuppose the formal equality of states and are therefore especially demanding and constraining for great powers. Not surprisingly, great powers often prefer unilateral or bilateral agreements or soft law instruments, which place them in a better position to call the shots.[13] Even where great powers have played an active role in building multilateral institutions, they typically do not conform to Ruggie's ideal type. Many multilateral regimes forsake reciprocity for asymmetric principles of conduct that confer special responsibilities and/or privileges on states with greater capabilities.[14] While these multilateral regimes clearly infringe the principles of sovereign equality, reciprocity and rough equivalence of benefits over time specified in Ruggie's ideal type, other states have sometimes accepted such asymmetry as necessary and appropriate in those circumstances where the states in ques-

9. Ruggie 1992, 571.
10. Ruggie 1992, 572–573.
11. Caporaso 1992, 600–601.
12. Ruggie 1992, 572.
13. See, for example, Krisch 2005.
14. For an extended treatment of special responsibilities, see Bukovansky et al. 2012.

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tion have unique or greater capabilities and moral responsibilities to secure valued collective goods.

Of course, some regimes appear to embody the constitutive principles of multilateralism. The international trading regime, which was founded on the fundamental principles of non-discrimination and reciprocity, is usually offered as a textbook case. However, these principles have now been qualified by the new principle of "special and differential treatment" for developing countries. This variation suggests that it might be more fruitful to think of multilateralism not as a modern, generic institution with one set of constitutive principles, against which there are many exceptions, but rather as a much more flexible institution, with different principles and decision making practices in different domains of governance.[15] These principles and practices may be mapped along a continuum from hierarchy (which favors the powerful) to formal equality (based on diffuse reciprocity) to reverse discrimination designed to achieve substantive equality (which favors the weak). In the environmental domain, multilateralism has moved much more in the direction of equality in a substantive rather than merely formal sense to provide a form of reverse discrimination. Instead of imposing generalized principles of conduct and providing reciprocal benefits over time for all parties, many environmental regimes impose asymmetric obligations on the more developed states in order to redress inequalities suffered by the less developed states.

The elements of this new form of environmental multilateralism emerged at the Stockholm Conference on the Human Environment in 1972, which recognized the development needs of developing countries and called for financial and technological assistance to developing countries. However, it was not until the Montreal Protocol 1987 that the regulative ideals of differentiated responsibilities began to take a clearer and more practical shape. As Matthew Hoffmann explains, the negotiations for the London amendment to the Montreal Protocol were based on a "grand bargain"—Southern participation in return for Northern assistance—which "enshrined the common but differentiated responsibility principle and solidified an altered set of expectations about the appropriate way to address global environmental problems."[16] This principle was consolidated at the 1992 Earth Summit in Principle 7 of the Rio Declaration, and Article 3(1) of the UNFCCC, which imposes an obligation on developed countries to "take the lead in combating climate change and the adverse effects thereof" (Article 3(1)). This obligation is derived from their significant historical and current emissions, their high per capita emission and their greater capabilities (technological, economic and administrative) to pursue mitigation and assist developing countries with mitigation and adaptation.[17] The UNFCCC also recognizes that the parties who are the least responsible for climate change are also the most exposed to the risks of climate change, and the least capable of adapt-

15. This is a key claim of Bukovansky et al. 2012.
16. Hoffmann 2005, 120.
17. UNFCCC, Article 3(1). See also the preamble and Articles 3(2), and 4(2)(a).

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ing.[18] Requiring reciprocity in the form of tit-for-tat emissions reductions by all parties was never an option—it would have exacerbated rather than alleviated injustices. In effect, the UNFCCC consolidated the practice of *affirmative multilateralism,* which provides a form of reverse discrimination in favor of developing countries in order to reduce asymmetries in power, wealth, income, risk and opportunity between the developed and developing world.[19] Its emergence and subsequent entrenchment may be attributed not only to the growing political strength of China and the G77, but also the general support given by UN members to the mutually reinforcing principles of sustainable development and human security.

However, if traditional multilateralism is demanding and constraining for great powers, then affirmative multilateralism is even more demanding and constraining. This problem is particularly acute for the US, which is one of the "most responsible" developed states in terms of historical emissions, per capita emissions and capabilities. While the European Union (EU) has embraced common but differentiated responsibilities, as reflected in the mitigation obligations of developed countries under the Kyoto Protocol, the US has always had an uneasy relationship with these principles.

When set against the longer history of multilateralism, both the content and political form of the Copenhagen Accord, along with the process by which it was produced, may be seen as a partial return to "minilateral great power collaboration disguised by multilateral institutions."[20] Although the Accord helped to rescue the meeting from total failure, it also reflected serious fractures within the developed and developing world. The sidelining of the EU, which has historically played a major leadership role in the negotiations, has exacerbated trans-Atlantic tensions over the climate negotiations, while the privileged negotiating role of the BASIC group (Brazil, South Africa , India, and China) undermined the unity of the G77, creating a split between the major emitters and the rest. The Accord was merely noted rather than formally endorsed by COP15 due to formal objections by a small group of countries (led by Sudan, Venezuela and Bolivia) that the document was illegitimate because the usual procedures for consultation, plenary debate and discussion were not followed.[21] However, the Accord was subsequently acknowledged a year later at Cancún through a formal COP decision to recognize the basic mitigation and financial pledges of the Accord. Bolivia was the only party that attempted to veto the proposed decision in the closing session on grounds of lack of ambition, but the Chair gaveled through the decision, declaring that one country cannot impose a veto.[22] The Cancún meeting signaled a new mood of pragmatic accommodation of geo-

18. UNFCCC, Article 3(2), 4(3) and 4(5).
19. Cullet (1999: 555–58) describes and defends common but differentiated responsibilities as a version of "international affirmative action" for developing countries.
20. Kahler 1992, 707.
21. For a full account, see Dimitrov 2010.
22. ICTSD 2010, 1.

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political realities. This creates a major challenge for those wishing to rescue the principles of affirmative multilateralism while maintaining the support of the major emitters.

The Case for Exclusive Minilateralism

Proposals for an exclusive minilateralist forum among the major emitters may be seen, in part, as an effort to formalize a negotiation practice that has already taken place among key emitters. We have already noted that the role of the major emitters has assumed increasing importance over time by virtue of their sheer collective capacity to realize collective goals. Defenders of minilateralism claim that paring down the negotiations to the critical players acknowledges this reality and will produce more effective agreements.[23] Just as critics of the Doha Development round of trade negotiations have criticized the so-called Single Undertaking of the World Trade Organization (WTO) as dysfunctional, critics of the climate negotiations have criticized consensus-based decision-making as too demanding for complex treaties like the proposed LCA treaty.[24] From this more pragmatic perspective, consensus decision-making can enable a small number of "insignificant parties" to block decisions and stifle progress.

In the case of the multilateral trading regime, the Warwick Commission has recommended a critical mass approach as a means of relaxing the demanding requirements of the Single Undertaking, whereby nothing is agreed until everything is agreed by consensus by all members.[25] A critical mass is represented by those states whose support is essential to an effective agreement. This approach has also been defended by Moisés Naim, who had argued that the solution to the growing challenges facing multilateral negotiations with large numbers (hereafter 'large-n multilateralism') in the post-Cold War era "is to bring to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem. Think of this as minilateralism's magic number."[26] He suggests that this number will vary according to the nature of the collective action problem but in the case of climate change the magic number is twenty because the world's top twenty carbon polluters account for around 75 per cent of global emissions. Naim argues that confining the climate negotiations to this smaller group will "break the untenable gridlock" by enabling an agreement among the crucial players.[27] While he concedes that minilateralism is undemocratic and exclusionary he suggests that its defects pale in comparison to those of large-n multilateralism, and that in any event, it could form the basis for more inclusive agreements.

This defense of exclusive minilateralism enjoys strong support in the US.

23. Naim 2009.
24. Low and Murina 2010.
25. Warwick Commission 2007, 3.
26. Naim 2009, 135.
27. Naim 2009, 135.

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Even before he became the US Special Climate Envoy, Todd Stern had proposed in 2007 a new "E8," made up of major emitters from the developed and developing world.[28] Anticipating the disappointments of Copenhagen, David Victor argued that "more progress will come from small groups of pivotal nations rather than global forums" and he suggested the 17 member Major Economies Forum on Energy and Climate (MEF) as the best candidate.[29] Prior to Cancún, Andrew Light, from the Center for American Progress, had argued that the G20 and the Major Economies Forum on Energy and Climate had produced more multilateral and bilateral success stories than the UNFCCC process.[30] Such meetings also break down the hard distinction between developed and developing countries that the US, in particular, has never accepted.[31]

However, there are three important objections to exclusive minilateralism. First, many of the obstacles to agreement lie within the group of major emitters, particularly disagreement between the US and China.[32] Excluding states with lower emissions from the negotiations will therefore disenfranchise many states without necessarily resolving disagreement.

Second, even if we accept that small-n negotiations may be more likely than large-n negotiations to increase the prospect of an agreement (a point I accept and develop below), minilateralism among the major emitters is likely to produce a self-serving agreement. From the standpoint of critical theory, it offends the basic principles of communicative justice to restrict the negotiations of any anti-pollution treaty to the biggest polluters and to exclude victims of pollution simply because their pollution contribution is negligible. Excluding the most vulnerable from the climate negotiations will remove an important source of information and advocacy for strong action on mitigation, and therefore reduce the quality of the dialogue and eliminate the answerability of the major emitters to the most vulnerable parties during the crucial negotiation phase. The Alliance of Small Island States (AOSIS) has played an important role in improving the ambition of the climate regime. It was responsible for ensuring that 1.5°C was included in the Copenhagen Accord, and that a review would take place in 2015.[33] Here critical theorists would side with those who argue that the most vulnerable states must be at the negotiating table and that inclusive multilateralism is preferable to exclusive minilateralism even though it also brings with it the disadvantages of delaying tactics by vested interest groups like the Organization of the Petroleum Exporting Countries (OPEC).[34]

Finally, a self-serving deal struck among the major emitters is likely to lack legitimacy in the eyes of excluded states. We have already noted that one of the

28. Franke-Ruta 2009.
29. Victor 2009.
30. Light 2009.
31. Andrew Light has since declared the Cancún agreements as a critical step towards a more comprehensive legal treaty (Podesta and Light, 2010).
32. Depledge and Yamin 2009.
33. Hare et al. 2010, 605.
34. Hare et al. 2010, 605.

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reasons why certain states refused to endorse the Copenhagen Accord in 2009 was because it was forged in a back-room deal by the US, China, India, Brazil and South Africa, which departed from the normal negotiating processes. A minilateral agreement is less likely to serve as a stepping-stone to a more comprehensive agreement if it lacks procedural legitimacy *and* there is no compensatory "output legitimacy."

Inclusive Minilateralism: Differentiated Representation Fit for Purpose

So far, I have argued that inclusive multilateralism is clearly preferable to exclusive minilateralism from the standpoint of critical theory. Inclusive multilateralism provides a better approximation of the ideal of communicative justice than exclusive minilateralism, and it is likely to produce a more ambitious agreement. However, this brings us back to the dilemma presented at the outset of this discussion. The current UN negotiations are more inclusive but they are also cumbersome, painstakingly slow and may not deliver an agreement within the narrow window of time that is left to prevent dangerous climate change.

How might critical theory respond to this dilemma? Is it possible to design a different kind of minilateral forum that could avoid the elitism and procedural injustices of exclusive minilateralism and stand a better chance of producing a more timely agreement than the current UN process? Recall that the praxeological task is to draw on the moral resources embedded in the UNFCCC and to extend their unfulfilled promise in ways that minimize the tensions between communicative justice and substantive climate justice.

We can begin this task by noting that the normative purpose of affirmative multilateralism has never been adequately reflected in the practices of political representation and decision-making in the UNFCCC negotiation process. As one commentator has wryly observed, while the principles of common but differentiated responsibilities are now universally recognized "there remains no guidance for 'common but differentiated representation.'"[35] Instead, affirmative multilateralism has followed the same procedural norms of formal equality as traditional multilateralism, which presupposes sovereign equality, indivisibility and diffuse reciprocity. Decisions of the COP are made by a consensus of the parties, which is interpreted in practice to mean the absence of any formal objection. While Article 7 of the UNFCCC enables rules of procedure to be adopted by the COP, the infamous Draft Rule 42 which provides two different options for majority voting, has never been formally adopted because there has been no consensus to adopt either. Majority voting is resisted by powerful states because they would be outnumbered. Consensus decision making also gives the smaller, less powerful states from the developing world the right to object to COP decisions, which is often the only power they can exercise given the

35. Hultman 2010, 2.

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significant disadvantages they face during the negotiation process (although the high political cost of exercising this power usually induces restraint). They typically have much smaller delegations and therefore cannot keep abreast of the myriad issues, meetings and side-events at the COPs. They often lack sufficient technical support and are typically excluded from the most crucial back-room meetings among the major powers. Yet the major emitters also have a strong incentive to by-pass the complexities of the formal negotiating process and either cut deals with other major players or simply defect.

Under what circumstances, then, might minilateralism avoid the disadvantages of inclusive multilateralism and exclusive minilateralism? My proposal is "inclusive minilateralism," which combines the idea of critical mass with inclusive representation. It would take the form of a Climate Council that is embedded in the UN negotiation process and given the remit of working through the most crucial agenda items that were left in the 'too hard' basket at Cancún and Durban but must be resolved within the next few years if dangerous climate change is to be averted. This would include the long-term mitigation goal, the timetable for the peaking of global emissions and the near-term emission reduction commitments of the major emitters. The rest of the agenda would be dealt with in the normal way. Agreements negotiated by the Council would be based on consensus, and then presented in the form of a recommendation to the entire COP for approval.

The composition of the Council should be guided by the established justice principles of the UNFCCC: equity and common but differentiated responsibilities and capabilities.[36] "Common but differentiated representation" would therefore be based on the most capable, the most responsible and the most vulnerable. The most capable are the leading developed economies (using GDP as a proxy for capacity), which have the greatest capacity to reduce emissions through technological innovation, and the greatest capacity to assist developing countries with mitigation and adaption. The most responsible are the parties with the biggest historical, aggregate and forecasted emissions, and therefore the biggest scope to reduce emissions, with appropriate acknowledgment of differences in per capita emissions and development need. The most vulnerable are the parties that are expected to suffer the harshest impacts of climate change, and have the least capacity to adapt. The most vulnerable are represented by three key negotiating blocs: the Alliance of Small Island States (AOSIS), the African Group (AG) and the Least Developed Countries (LDC).

There is, of course, a robust political and philosophical debate about the meaning of the most capable, the most responsible and the most vulnerable. However, such disagreement does not need to be resolved here if the size of the Council is kept relatively small, since whatever criteria are employed to judge capacity and responsibility, the major emitters tend to emerge at the top of the

36. This differs from Huang's proposal of a L20 (Hang 2009), which is simply based on the top twenty emitters with equal representation from developed and developing countries.

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list.[37] Likewise, whatever criteria are employed to judge vulnerability, the least developed states, and small island and low-lying coastal countries, tend to emerge at the top of the list. Moreover, the arguments of the most vulnerable on emissions targets are likely to encapsulate the interests of all other vulnerable states.[38]

Differentiated representation according to capability, responsibility and vulnerability would also incorporate the parties that will be "most affected" in two significant senses from the standpoint of communicative justice and the moral purpose of the climate regime (i.e., those most vulnerable to the impacts of climate change) and those most obligated in terms of responsibility for emissions and/or capacity to make a difference. While the leading and primary mitigation burden lies with the major emitters in the developed world, the major emitters in the developing world must also stem projected future growth in emissions if the UNFCCC's basic objectives are to be met and substantive climate injustices are to be prevented.

Since many parties wear more than one hat in terms of the criteria of "most capable" and "most responsible," the size of the Climate Council could be as small as eight (the USA, China, EU, Russia, Japan, India and a representative from AOSIS and LDC) or as large as 23 (the G20 plus AOSIS, LCD and AG). Determining the "magic number" invariably requires a trade-off between the virtues of a relatively smaller, more intimate and efficient group and a larger, more representative group with greater collective "emissions power" and greater potential for trade-offs to facilitate agreement.[39] Yet even a Council as small as twelve, made up of the USA, the EU, Japan, the Russian Federation, China, India, Brazil, Korea, Mexico, AOSIS, AG and LDCs would capture the most responsible, the most capable and the most vulnerable while including around 70 percent of total emissions and around 70 percent of the world population.[40] It would also happen to include a rough balance of developed and developing countries, representation from the UN's five regional groupings, all the major

37. This point is graphically illustrated by Carin and Mehlenbacher, who argue that "the G20 is as good as it gets" whatever criteria one chooses to determine capability and responsibility (2010, 33).
38. A case might be made that nations with very high dependence on fossil fuels, such as members of OPEC, are also among the most vulnerable to policies to mitigate climate change, but this would be a distortion of the term as used in the UNFCCC and detract from the moral purpose of the climate regime. Nonetheless, OPEC states would certainly be seriously affected by tough mitigation targets so their arguments deserve attention in debates about a fair transition to a low carbon global economy.
39. Low and Murina 2010, 152.
40. The top ten economic powers based on GNP data from the International Energy Agency (IEA, 2010: 56–58) are the EU, the US, China, India, Japan, Germany, United Kingdom, France, the Russian Federation and Brazil. However, only the developed countries in this list have leadership responsibilities. The top ten aggregate CO_2 emitters are China, the US, the EU, Russia, India, Japan, Germany, Canada, United Kingdom and Korea (IEA 2010, 80–82). Since Canada largely follows the US's lead in climate policy, it was not given separate representation. The ten biggest cumulative emitters are the USA, China, Russia, India, Japan, Germany, Brazil, Canada, United Kingdom and Italy (Carin and Mehlenbacher 2010, 26).

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negotiating blocs, all the great powers, and a mix of pioneers, leaders, pushers and laggards. And a Council of around twelve would be the size of a jury, which many deliberative democrats argue is the optimal size for meaningful deliberation.

The proposal for "common but differentiated representation" in a minilateral council builds upon the negotiating coalitions, improvised procedures and informal and out-of-session meetings developed by the parties to the COP to work around the highly ritualized and staged plenary sessions. The most significant of these for present purposes is the "Friends of the Chair" groups, which are convened at the discretion of the COP President.[41] These groups vary in style, name and task, ranging from informal consultation on matters of process to end-game bargaining over key issues. There is no set procedure for the selection of members—much depends on the issues and context—but the President usually strives to achieve some form of balanced representation in terms of interests and regions. Although the purpose of such informal groups is to provide a more efficient supplement to the bilateral negotiations and shuttle diplomacy conducted by the President, they have attracted considerable criticism from excluded parties and have not always been effective.[42] If the Friends of the Chair are seen to be unrepresentative, then any deal that is brokered is likely to be rejected.[43] However, efforts to improve the representativeness and hence legitimacy of the groups by, for example, expanding representation, and providing negotiating coalitions with the opportunity to select and consult with their representative and observe proceedings, can raise transaction costs and undermine their basic appeal, which is to provide the President with a small, informal, private, candid, flexible and efficient forum to deal with key questions of process and/or substance. Friends groups also suffer from other drawbacks. The informal character of the groups means there are no equity and procedural safeguards, they often contain a mix of ministers and officials with different experiences, and they are ad hoc and highly fluid. This sometimes produces a rather chaotic process, with many smaller groups meeting concurrently, creating confusion over the development of the negotiating text.[44] At Copenhagen, the regular negotiations were suspended on the last day of the conference while a 25 member Friends of the Chair group met to craft a short compromise text to replace the 200-plus pages of text that had been negotiated over two years. Violations in normal procedures, including lack of transparency and inclusivity, were cited as some of the reasons why some states, such as Bolivia, refused to give their support to the Accord in the final plenary.

A Climate Council would help to reduce this complicated and often unruly process by providing more focus and continuity in working through the most significant and contentious agenda items. It builds on the requirement of

41. Werksman 1999; Yamin and Depledge 2004, 455–457; and Depledge 2005, 122–131.
42. See Dimitrov 2010; and Müller 2011.
43. See Kjellen 2010; and Müller 2011.
44. Kjellen 2010.

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balanced representation in terms of interests and regions, but also provides a formal and semi-permanent structure of decision-making based on the burden-sharing principles of the regime, and a fixed rather than shifting remit. It also explicitly incorporates the idea of critical mass, which is why the initial task is to reach agreement among the parties inside the Council; their support is essential for regime functionality and the prevention of the primary injustices of climate change. Securing the support of the remaining parties to the UNFCCC is, of course, the next step, but momentum for such support is likely to grow once a critical mass agreement is reached.

In any event, recommendations on long and near term mitigation targets forged within the Climate Council would be more likely to serve as a stepping-stone towards a more inclusive multilateral agreement than informal, exclusive minilateral agreements made by the major emitters. Since the inclusive representation on the Council is modeled on the burden-sharing principles of the UNFCCC it would provide more procedural legitimacy. And the inclusion of the most vulnerable states would guard against a self-serving deal by the major emitters, who would be required to answer to the vulnerable states and take on board their concerns. This would raise the prospects of a more ambitious agreement.

Three Hesitations

However, there are three significant questions or hesitations that are likely to be raised in response to the Climate Council proposal. First, what motivation would the great powers and major emitters have to commit to a Council? Second, will conflict and stalemate simply be replicated inside the Council? Third, why would excluded states cede authority to the Council and/or accept its recommendations?

As to the great powers, the proposal for a Climate Council draws lessons from the "contingent legitimacy" of the UN Security Council, which has enjoyed relative success compared to the failed League of Nations owing to the privileges accorded to the permanent five members. The great powers and major emitters would likewise enjoy privileged decision-making power that includes an effective right of veto and should, therefore, not feel threatened by it. However, the Climate Council would have much greater legitimacy than the Security Council because it provides a better reflection of the shifting balance of power since 1945 while also giving a seat to the most vulnerable states. Decisions reached in the Climate Council would have greater procedural and equity safeguards than the back-room, informal deal making that currently takes place among the major powers. Unlike the Security Council, which is not directly answerable to the UN General Assembly, the Climate Council would be ultimately answerable to the COP, which would have the final power to accept, modify or reject Council recommendations.

Of course, there is still the strong likelihood that conflicts would be repli-

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cated inside the Climate Council. This cannot be avoided. However, the small size of the Council would at least provide a more conducive forum for addressing differences than the larger conference where communication is highly staged. Size does matter. Smaller numbers reduce the complexity and transaction costs of negotiations and provide the opportunity for more intimate and fulsome discussions among the critical players. It is easier to build personal relationships and trust among a smaller group of negotiators than a larger group, especially when negotiations continue over a significant period of time. The Council could meet on an ongoing basis, at the COPs and between sessions, until its core business is resolved. Even if deep differences remain, smaller numbers provide a better opportunity for each party to deepen their understanding of the key issues, domestic concerns and constraints faced by other parties. A greater depth of understanding of reasons for disagreement can lead to an "economy of disagreement" and enable creative compromises. Such compromises rarely occur in large plenary sessions, where communication is highly ritualistic and often directed to the press gallery and domestic constituencies rather than to other parties. It is also less likely to occur in ad hoc contact groups that are provisional and shifting rather than in a forum that is stable and ongoing.

Finally, states that are not members of the Council are more likely to accept its recommendations than minilateral deals struck by the major emitters alone. States do not presently cede any formal authority to the major emitters to reach agreements like the Copenhagen Accord, so they may see advantages in ceding authority to make recommendations to a more formalized and more legitimate minilateral forum with a clear and fixed remit. They would also have notice of Council meetings, have the opportunity to make representations to Council members, add their input when the Council presents its recommendations to the full COP, and withdraw their final consent. However, any agreement reached in the Council would have enormous pulling power by virtue of its sheer capacity to make a difference and because of its composition. The Climate Council combines some of the virtues of responsive representation and what Philip Pettit has called "indicative representation."[45] Whereas responsive representatives are elected by, and directly accountable to, a particular constituency, indicative representatives serve as a proxy by enacting the concerns and interests of the represented like an actor in a theatre who resembles or portrays the represented.[46] These two different forms of representation can stand alone, but can also be mutually reinforcing. The legitimacy of a decision making body that is composed of indicative representatives is likely to be stronger the more it resembles a microcosm of the polity it seeks to represent, but the body's legitimacy is likely to be further enhanced if representatives are also responsive to the polity in the sense of answering to the polity (which the Council would have to do be-

45. Pettit 2010.
46. Pettit 2010, 427–428.

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fore the COP, which has the final say). If the COP is "the polity" for these purposes, then the Climate Council may be seen as a representative "minipublic" that is diverse enough to replicate the key climate discourses within the polity. Even if some parties objected to its proposals, the members of the Council could forge a like-minded, plurilateral treaty based on their agreement that others could join if they wished. Such a critical mass agreement would certainly be preferable to no agreement given the diminishing window of opportunity for effective action.

Conclusion

The international climate negotiations are clearly a major work in progress. This is hardly surprising, given that this is the most challenging international regime ever negotiated in terms of its complexity, the breadth and depth of change that is required, the moral and geopolitical stakes involved and the unthinkable consequences of failure. The UNFCCC is the only body that can deliver a comprehensive, legally binding international treaty. It has stood the test of time for twenty years and should not be sidelined, as some commentators have suggested. However, while the negotiations appear to be back on track after Cancún and Durban, confidence in the capacity of the UNFCCC negotiations to produce a timely treaty is waning. The proposed minilateral Climate Council provides one mechanism to move the negotiations forward on the most crucial agenda items as the window of opportunity for effective action diminishes.

Critical theorists are not known for engaging in prescriptive ethical theory or even recommending new institutional designs, since these are considered the appropriate tasks of affected political actors to determine in real-world dialogic communities. In this article, I have pushed critical theory out of the spectator's gallery and into the ring, in order to show how it might be able to make a practical and constructive contribution to one of the most pressing challenges of our time. There is plenty of scope to argue about the precise remit and composition of the Climate Council and whether it should be increased or reduced in size. Consistent with the precepts of critical theory, the proposal can only be redeemed, modified or rejected through further debate in the scholarly community, the public sphere and, of course, ultimately by those who have to decide, namely, the parties to the UNFCCC.

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