Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations

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Abstract

International law has traditionally been based on the principle of sovereign equality of states. As a consequence, treaties have normally provided for similar obligations for all states. In recent decades, the expansion of the international community and the globalization of environmental and economic issues have led to the search for new legal tools to take into account existing disparities and inequalities among states and to foster a better implementation of international agreements. Differential treatment, which refers to instances where the principle of sovereign equality is sidelined to accommodate extraneous factors, such as divergences in levels of economic development or unequal capacities to tackle a given problem, constitutes one possible avenue to make international law more responsive to these new challenges and to foster substantive equality among states. This article first examines the conceptual issues underlying the development of differentiation among states. It further surveys the development of differential treatment and examines its current status in international law, especially with regard to recent developments in international environmental law.

Introduction

Traditionally, international law was only concerned with the coexistence of sovereign entities. In the words of Allott, '[i]nternational law has been the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other'.[1] In recent decades, the emergence of issues of global concern has had a profound impact on inter-state relations. The fact that global respect for human rights, sustainable use of the environment or a solution to the economic development problems of developing countries cannot be brought about

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[1] P. Allott, *Eunomia — New Order for a New World* (1990), at 324.

only through bilateral arrangements has deeply influenced the nature of international law.[2]

Common interests have been given increasing prominence in recent decades with the progressive internationalization of the world economy and the realization that there exist environmental problems of global reach. In turn, globalization in all its forms has meant that states have become more interdependent. In recent years, this has been most clearly marked by the consolidation of a unified 'world economy' and by technological developments such as the information technology revolution.[3]

For the time being, the tension between the recognition of interdependence and the current organizational structure of the international society which remains based on the principle of decentralization through reliance on separate sovereign entities has not been resolved.[4] While the phenomenon of sovereignty is blocking the emergence of stronger relations of solidarity, there is little doubt that most states understand more and more clearly the necessity to cooperate at the international level to put an end to an array of problems whose solution cannot be found domestically.[5] The existence of issues that must be solved collectively in an international society organized on principles which favour egocentric attitudes has tended to create tensions among states negotiating on any particular issue and has, for instance, favoured the emergence of country groupings with entrenched opposing views.[6]

The internationalization of problems, especially in the environmental field, necessitates the development of new legal tools to foster more effective action at the international level. This should be achieved both at the level of norms and at the level of their implementation. This article analyses the concept of differential treatment which has been developing rapidly in recent years in the context of international environmental law instruments in particular. It first examines the conceptual issues underlying the development of differentiation among states. It shows that differentiation can bring about substantive equality among states, can foster cooperation and partnership and, finally, can facilitate the effective implementation of international norms. The following section highlights the salient points of the development of differential treatment in international law. The last part of the article assesses the contribution of differentiation to the development of international law. While this article purports to give a broad view of differential treatment in international law, it focuses specifically on international environmental law because of its special relevance in the recent development of differentiation.

[2] See, e.g., Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 217.

[3] See, e.g., H. G. Gelber, *Sovereignty through Interdependence* (1997).

[4] Carrillo-Salcedo, 'Droit international et souveraineté des Etats', 257 *RdC* (1996) 35.

[5] Cf. Keohane *et al.*, 'The Effectiveness of International Environmental Institutions', in P. M. Haas *et al.* (eds), *Institutions for the Earth — Sources of Effective International Environmental Protection* (1993) 3.

[6] See, e.g., R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (1986) and Carrillo-Salcedo, *supra* note 4.

1 Differential Treatment: General Remarks

Differential treatment refers to instances where the principle of sovereign equality is sidelined to accommodate extraneous factors, such as divergences in levels of economic development or unequal capacities to tackle a given problem. Differential treatment has strong affinities with preferential treatment as conceived in the international law of development era, and in practice, preferential or differential treatment lead to broadly similar results. Differential treatment, however, is predicated on different conceptual bases which emphasize solidarity and partnership. It does not require the establishment of a 'new' legal order but seeks to achieve more equitable and effective results within the existing system.

Differential treatment does not encompass every deviation from the principle of sovereign equality. It refers to non-reciprocal arrangements which seek to foster substantive equality in the international community. In practice, this mainly includes deviations which seek to favour least favoured states. The latter can often be equated with developing and least developed countries. This categorization, which is based mainly on a measure of economic development, is relevant in a number of cases because economic development is of prime importance in a range of fields, such as trade, that are covered by international cooperation and because it is often correlated with levels of political or military power. However, the level of economic development is not the only means of categorizing states for purposes of differentiation and this has been acknowledged in the practice of international institutions. In the case of commodity agreements, for instance, the International Tropical Timber Agreement first allocates a similar number of votes to the group of consumer and to the group of producer member states. Further, it allocates votes among the producer countries partly according to their respective shares of the total tropical forest resources.[7] Environmental agreements have also gone beyond the simple division between developed and developing countries in some instances. Thus, the Climate Change Convention gives special attention to the situation and needs of countries with low-lying coastal areas and small island countries.[8]

Differential treatment does not include non-reciprocal arrangements which tend to increase disparities and inequalities. One example of this is found in the current set-up of the UN Security Council, which is heavily biased in favour of a handful of the most powerful states. It is also noteworthy that a given non-reciprocal technique may be seen as differential or not depending on the context. Granting different groups of countries different implementation timetables to put their commitments into practice constitutes one such case. Longer implementation periods in the case of environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, definitely favour the group of countries for which compliance with the

[7] See International Tropical Timber Agreement, Geneva, 26 Jan. 1994, reprinted in 33 *ILM* (1994) 1014.

[8] See Article 4.8 of the Framework Convention on Climate Change, New York, 9 May 1992, reprinted in 31 *ILM* (1992) 849.

instrument is relatively more cumbersome.[9] In the case of delayed implementation in the context of the GATT 1994 Agreement, however, it is much less clear whether it participates of differential treatment. Indeed, GATT 1994 tends toward the elimination of existing differentiation and only retains some of the previous exceptions to reciprocity, mostly on a temporary basis. In other words, one may distinguish between procedural and substantive differentiation, where the former is not necessarily geared towards the realization of substantive equality.

The most obvious application of differential treatment is in treaties which provide different commitments for different categories of member states. In recent years, differentiation at the implementation level has become another very significant application of differential treatment. This includes, for instance, technology transfer or aid mechanisms which are meant to foster the implementation of the treaty by countries with comparatively lesser ability to implement it. Further, differentiation can also constitute one of the guiding principles of a treaty, such as in the case of the regime for the exploitation of deep seabed resources.

Differential treatment has often been granted in favour of a group of countries, most often developing or least developed countries. While these categorizations have the advantage of highlighting the existence of significant differences between states in these different groups of countries, they tend to be reductionist. Disparities and inequalities within the developing country group are immense and it is hardly feasible to amalgamate all these countries together even when the least developed ones are separated. Given the relatively manageable number of states in the international community, an alternative differential framework would be to take into account the situation of each and every state to determine their actual capacity to respond to a given problem. This would not be feasible in the case of individuals in domestic law but does not present significant difficulties in a community comprising about 200 members. This has already been experimented with in practice and the UN has, for instance, since inception sought contributions from Member States according to a scale of assessment where each state is classified mainly according to its capacity to pay.[10]

2 Conceptual Issues for Differential Treatment

Differential treatment can be seen as having three main objectives. It is first and foremost concerned with bringing about substantive equality in a framework still based on the idea that formal equality can be equated with justice. Secondly, in a world where more and more issues cannot be solved at the domestic or bilateral levels, differentiation has a definite role to play in fostering cooperation among states.

[9] See Article 5.1 of the Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 Sept. 1987, reprinted in Ozone Secretariat–UNEP, *Handbook for the International Treaties for the Protection of the Ozone Layer* (4th ed., 1996).

[10] See, e.g., GA Res. 52/215, Scale of Assessments for the Apportionment of the Expenses of the United Nations, 22 Dec. 1997, UN Doc. A/RES/52/215.

Thirdly, it has important benefits at the level of implementation of international instruments, mainly through incentives provided to some states for better implementation of their obligations.

A *Differential Treatment and Substantive Equality*

Differential treatment constitutes first an instrument to bring about substantive equality in an international community made up of unequal states but organized according to the principle of sovereign equality.

1 Formal Equality

Most theories of justice pursue the achievement of some form of equality as their ultimate goal. However, equality is an elusive concept since different versions of equality yield extremely different substantive outcomes. Formal equality posits that all subjects of the law should be treated in a similar fashion. Rules are usually deemed to be just if they apply to all without discrimination. No attempt is made to correct, for instance, existing economic or other inequalities in the society. The entitlement theory is representative of a strict application of this principle.[11] Its proponents submit that a right is justly acquired as long as it was acquired according to the rules in force at the time of acquisition. The distribution of wealth is thus deemed to be fair as long as everyone is entitled to the holding they possess under this scheme.[12] It has been contended that even by utilitarian standards such inequalities are counterproductive because they give the few who own wealth too high a reward to encourage productivity, while at the same time denying essential commodities to the majority.[13] The Rawlsian theory is also broadly based on formal equality but in a much milder form. While it accepts the inevitability of inequalities in the basic structure of any society,[14] it provides that inequalities in access or distribution must have advantages for the beneficiaries and for everyone else as well. Further, while it does not seek to guarantee the realization of minimum basic needs to all,[15] it provides that the poorest must not become relatively poorer.[16]

At the international level, the principle of formal equality has been translated into the notion of sovereign equality of states, which constitutes a cornerstone of international law.[17] Historically, the neutrality of the law has been premised on the legal equality of all states, with the consequence that treaties were traditionally

[11] See, e.g., R. Nozick, *Anarchy, State and Utopia* (1974).

[12] *Ibid.*

[13] See, e.g., T. M. Franck, *Fairness in International Law and Institutions* (1995).

[14] J. Rawls, *A Theory of Justice* (1972) states that inequalities are inevitable in the basic structure of any society.

[15] See H. Shue, *Basic Rights — Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed., 1996).

[16] Rawls, *supra* note 14.

[17] See, e.g., GA Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 24 Oct. 1970, reprinted in 9 *ILM* (1970) 1292, stating that all states enjoy sovereign equality. See also I. A. Shearer, *Starke's International Law* (11th ed., 1994).

deemed to be 'just' if they provided for reciprocity of obligations among contracting states.

2 Substantive Equality

The provision of formal equality as an ultimate policy goal may, under favourable conditions, produce an optimal aggregate outcome but does not take into account the welfare of disadvantaged members of the community. Accordingly, even if the international community adopts an international system built on the rule of law, in which the weak and strong are treated equally, and where all have a chance to benefit from an open, market-based, global economy, the least favoured will continue to be relatively disadvantaged. More generally, equality of rights or opportunities will not necessarily bring about equality of outcomes, especially in a world characterized by disparities in resources and capabilities.[18]

Legal systems are premised on the need to bring stability, coherence and predictability to human relations. One of the instruments used to regulate social conduct in large groups is the enactment of rules and standards. As noted by Hart, 'the law must predominantly . . . refer to *classes* of person, and to *classes* of acts, things, and circumstances'.[19] It does not however follow that all rules should apply uniformly to all individuals. Different factors militate against a strict reliance on the principle of fixed rules applying uniformly to all. Firstly, the changing nature of society and human needs calls for progressive change in the legal system. There is thus a conflict between the desire for certainty in legal results and the desire for modification and improvement.[20] The fulfilment of unmet basic needs may, for instance, push people to seek changes in the existing legal order.[21] Secondly, the application of a general rule to a particular case may often necessitate the consideration of special factors and the balancing of the various interests at stake. There is thus a border area where enforcement agencies need to supplement gaps in existing rules.[22] Thirdly, the fact that rules emanate from competent organs and have been taken in regular forms does not guarantee that the rule is equitable. Even though law is usually based on the premise of a coincidence with justice, this is not necessarily the case in practice.[23]

The search for an alternative basis to the principle of fixed rules leads to the old principle that like cases be treated alike and that dissimilarly situated people should be treated dissimilarly.[24] In Aristotle's own words,

> if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints — when either equals have and are awarded unequal shares, or unequals equal

[18] See, e.g., O. Schachter, *Sharing the World's Resources* (1977).

[19] H. L. A. Hart, *The Concept of Law* (2nd ed., 1994), at 124.

[20] See, e.g., Snyder, 'Natural Law and Equity', in R. A. Newman (ed.), *Equity in the World's Legal Systems* (1973), at 34.

[21] See, e.g., Franck, *supra* note 13, at 7, noting that the different expectations of people may cause a tension between the search for change (for instance, meeting basic needs) and the search for stability in the legal order.

[22] See, e.g., Hart, *supra* note 19.

[23] See, e.g., Dupuy, *supra* note 6.

[24] See, e.g., Hart, *supra* note 19.

> shares. Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense.[25]

While stressing the importance of foreseeability, this principle of distributive justice implies that relevant dissimilarities between subjects of the law warrant special attention or special treatment.[26] Judge Tanaka in his dissenting opinion in the *South West Africa* case adopts a similar conception of justice. He states that formal equality must remain the basic principle by which to abide and that proponents of differential treatment bear the onus of substantiating their claims. He further asserts that once the case for differential treatment is established, it is then not only permissible but compulsory as a matter of justice to take remedial action: 'To treat unequal matters differently according to their inequality is not only permitted but required.'[27] This conception of distributive justice has, however, never been embraced by the International Court of Justice (ICJ).[28]

Asserting that like cases must be treated alike does not yet tell us which differences should be taken into account, since individuals in a given society will often have several common and several distinct characteristics. It is therefore important to determine whether height, gender, age, wealth or income constitute relevant factors. Thus, while discrimination on the basis of gender is banned in a number of countries, it is not uncommon for tax systems to tax more heavily people in higher income brackets.[29] This constitutes an acknowledgement that a strict reliance on formal equality may yield results which may not be 'just' if the existence of inequalities in society is not taken into account.[30] In other words, the fulfilment of formal equality may not bring about substantive equality. The realization of substantive equality can only be brought about if existing inequalities, such as inequalities in wealth or natural endowments, are acknowledged and taken into account.

At the state level, a number of factors are relevant in assessing a given state's claim to benefiting from differentiation. The level of per capita GNP constitutes one of the important factors. This is because the level of economic development is in many cases correlated with the political and military clout of states in the international community. Further, economic development constitutes one of the factors constraining the capacity of a state to effectively implement international commitments requiring domestic action. While the predominance of economic development in today's world may foster a temptation to see everything through the lens of per capita GNP, other factors are also relevant. These may include, depending on the matter

[25] Aristotle, *The Nicomachean Ethics* (trans. D. Ross, revised by J. L. Ackrill and J. O. Urmson, 1991).

[26] Cf. Principle 10 of the Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, in International Law Association, *Report of the Sixty-Second Conference* (1987), at 2.

[27] *South West Africa* (Diss. Op. Tanaka), Second Phase, Judgment, ICJ Reports (1966) 6, at 306.

[28] Cf. C. R. Rossi, *Equity and International Law — A Legal Realist Approach to the Legal Process of International Decisionmaking* (1993).

[29] See, e.g., J. Slemrod (ed.), *Tax Progressivity and Income Inequality* (1994).

[30] *Contra* Akehurst, 'Equity and General Principles of Law', 25 *Int'l & Comp. L.Q.* (1976) 801, stating that it is more important to have certain rules than just rules.

under consideration, the share of a given country in the trade of a specific commodity, the share of a given resource under the sovereignty of a given state, the importance of an industry for a state or the geographical situation of certain states, such as landlocked states, in the context of the law of the sea. These factors must normally be analysed in context. Indeed, the situation of an African least developed landlocked country in the context of the law of the sea can, for instance, not be equated with that of landlocked Western European countries. This explains why these factors should not be analysed in isolation. It is noteworthy that a comprehensive analysis is likely to include the factor of economic development.

In international law, exceptions to the rule of strict reciprocity can take two forms. Traditionally, departures from reciprocity signalled an 'unequal' treaty or more precisely a treaty imposed on a given state, such as a peace treaty.[31] The absence of reciprocity can also herald the passage from reliance on formal equality to a compensatory inequality taking into account that powerful states are favoured by a legal system focusing on the formal validity of legal rules.[32] As opposed to preferential treatment put forward in the context of the international law of development which relied on claims made by developing countries against developed countries, differential treatment is mostly based on mutually accepted non-reciprocity.[33]

3 Towards Differential Treatment: The Case of Judicial Equity

In a judicial sense, equity appears as a form of individualization of justice and serves to temper the significant unfairness which sometimes results from the strict application of the law.[34] It represents the liberty offered to the judge to achieve material justice that a formal application of the norm at stake may not provide.[35] It can serve to fill gaps in the law, to provide a basis for a most just interpretation, to provide a moral basis for making an exception to the normal application of a rule of international law or to provide the basis for deciding a case in a way that disregards existing law.[36]

Reliance on the principles of equity has been particularly important in the various cases submitted to the International Court of Justice concerning the delimitation of continental shelves.[37] The Court has thus acknowledged that '[e]quity as a legal concept is a direct emanation of the idea of justice' and that it is bound to apply it as part of the process of administering justice.[38] It has even pointed out that it is more concerned with striking an equitable solution than with equitable principles as such because it considers the result to be of overwhelming importance.[39] It has, for

[31] E. Decaux, *La réciprocité en droit international* (1980).
[32] *Ibid.*
[33] See further, *infra* Section 2.B.2.
[34] See, e.g., Franck, *supra* note 13.
[35] See, e.g., Janis, 'The Ambiguity of Equity in International Law', 9 *Brooklyn J. Int'l L.* (1983) 7 and I. Brownlie, *Principles of Public International Law* (4th ed., 1990).
[36] See, e.g., Brown Weiss, 'Environmental Equity and International Law', in S. Lin (ed.), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1995), at 7.
[37] See, e.g., Franck, *supra* note 13.
[38] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports (1982) 18.
[39] *Ibid,* at para. 70.

instance, been willing to consider geographical factors as relevant indices in the application of the rule of law at stake. However, the Court has refused to take into consideration economic factors stating, for instance, that economic matters are extraneous to the delimitation of continental shelf areas, because of the cyclical and changing nature of economic development.[40] In this view, the law must thus remain detached from the vagaries of development to favour solutions of a permanent character.

Judicial equity has an important role to play in bringing about substantive equality. However, the role of courts in this regard is limited. Judges operate at the level of the enforcement of legal rules and the creation of distributive rules or regimes does not usually pertain to courts.[41] Even though both types of instruments work towards the same broad goal of fostering the realization of a material conception of justice, the application of equity at the level of rule-making and implementation is of much broader application than judicial equity. This broader conception of equity constitutes a more direct challenge to the standard legal framework than the now well-established judicial equity.[42]

4 Differential Treatment for Equity

As traditionally conceived, equity seeks to influence results, brought about by the application of a given rule of law, which are deemed undesirable according to broader justice, moral or social concerns. This approach thus excludes 'permanent' exceptions, but tends to provide for remedial measures to the harshness of the application of a rule of law applying to all in a similar way.

Rules which treat all partners in the same way and only allow for divergence from the established pattern in special circumstances are suitable as long as the partners have the same capacity to benefit from the standards in place. In practice, it appears that in many cases, inequalities among partners or countries do influence their capacity to benefit from a given regime. Since inequalities witnessed in the real world are in large part independent of people's or states' actions, the necessity arises to devise exceptions which take into account some existing inequalities so as to bring about substantively equal results. As Sen recalls, this is a difficult task since '[t]he demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter'.[43] The rationale is not to create permanent exceptions but a temporary legal inequality to wipe out an inequality in fact.[44]

This implies that certain classes of actors need to be singled out on account of

[40] See, e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen,* ICJ Reports (1993) 38 at para. 80.

[41] Cf. Sir H. Lauterpacht, *The Development of International Law by the International Court* (1958) on *ex aequo et bono* adjudication.

[42] Cf. Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)', 162 *RdC* (1979) 245.

[43] A. Sen, *Inequality Reexamined* (1992), at 1.

[44] See, e.g., Decaux, *supra* note 31.

differences which affect their capacity to enjoy the rights established by the rules in force. Thus, while identical rules of access to a given market constitute the fairest allocation among equal partners, this is not necessarily the case when people do not have the same economic capacity to enter the market. This constitutes the rationale for the establishment of rules which give disadvantaged members of the community the capacity to compete. In international law, this implies that political independence and legal equality do not suffice to explain the realities of the different members of the international community. Gaps in economic development among different countries influence significantly, for instance, the capacity of states to realize their independence and constitute relevant factors in the search for substantive equality. It is important to stress that differential treatment seeks to adapt the legal system to social and economic realities and is not akin to charity. While aid is motivated (at least in part) by charity and is based on discretionary motives of the donor, differential treatment seeks to find firmer bases for redistributive measures whose eventual aim is the empowerment of weaker actors.[45]

B *Differential Treatment and Cooperation*

Differentiation in international law not only fosters substantive equality among unequal actors but also provides a framework for less confrontational relations among states. The link between differential treatment and inter-state cooperation can be analysed at different levels. First, from a broad perspective, differentiation can be linked to the general principle of solidarity. Second, the development of differentiation can be linked to the convergence of interests that states can find on certain issues. Third, in the specific case of international environmental issues, differentiation can be based on the different responsibilities in causing a given problem and different capacities to respond. These elements will be examined in turn.

1 Solidarity and Differential Treatment

Solidarity and differentiation are closely related. Solidarity is an expression by members of a community that they have common interests and that they should contribute to their realization and furtherance. It implies a sense of partnership among all actors in solving issues which are of interest or concern to the community at large. These may include problems whose solutions require common action on the part of all members, such as environmental problems caused in varying degree by all, or problems faced by some members whose resolution would constitute a gain to the community as a whole, such as poverty.

The principle of solidarity or partnership constitutes one of the ethical bases of inter-state relations. It is often seen as an essential element of the existence of the community of states and a basic unalterable feature of international law. In this sense, solidarity is an unenforceable, yet compulsory basic moral standard of peaceful

[45] See, e.g., Khurshid, 'Justice and the New International Economic Order', in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980) 108.

relations among states.[46] The principle of solidarity reflects the interdependence of states, but also their responsibility to ensure that their economic, environmental or other policies do not harm other states and a prohibition to interfere with the interests of other states.[47] Today, the existence of a principle of solidarity at the international level is widely accepted. However, divergent views exist concerning the nature of the principle. While some commentators argue that solidarity implies no extra legal obligations beyond conventional obligations, others opine that it implies extra legal obligations on the part of developed countries to assist developing countries.[48]

Differential treatment builds upon these ideas of solidarity. The broad link with solidarity implies, for instance, that differential treatment acknowledges the possible necessity of positive duties on the part of the better off. It thus rejects Hardin's metaphor of the tragedy of the commons. Hardin posits the world as a sea on which a small number of well-equipped ships are surrounded by a multitude of shabby boats whose passengers all want to board the better-equipped ones. Since this will cause the well-equipped ships to sink with all their passengers, he argues against sharing.[49] While solidarity is in large part a fundamental moral standard, differential treatment is a practical application of the notion of solidarity whose direct impacts are more easily measurable.

The principle of solidarity finds its expression, for instance, in Article 55 of the UN Charter which recognizes the need for cooperation among nations to achieve the goals of economic and social development.[50] This conception of international law goes beyond the recognition of the factual existence of states and seeks to promote substantive cooperation, thereby acknowledging the transformation to a legal structure based upon the interdependence of all states.[51] The cooperation envisaged calls for the recognition of the need for positive discrimination in a world of politically and economically unequal states. More recent instruments have reiterated and given content to these principles. Thus, the preamble to the instrument establishing the WTO states that one of the objectives of the organization is to ensure that least developed countries secure a share in the growth of international trade that is commensurate with their economic development needs.[52]

2 Self-interest of Developed Countries

Differential treatment is often put into practice through redistributive policies in a world of finite resources. In the context of international relations where there is no

[46] See, e.g., McDonald, 'The Principle of Solidarity in Public International Law', in C. Dominicé *et al.* (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (1993), at 275.

[47] See, e.g., J. Makarczyk, *Principles of a New International Economic Order* (1988).

[48] McDonald, 'Solidarity in the Practice and Discourse of Public International Law', 8 *Pace Int'l L. Rev.* (1996) 259.

[49] See Hardin, 'Living on a Lifeboat', 24 *Bioscience* (1974) 561.

[50] Article 55 of the UN Charter.

[51] See, e.g., O'Manique, 'Development, Human Rights and Law', 14 *Hum. Rts. Q.* (1992) 383.

[52] Agreement Establishing the World Trade Organization, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 Apr. 1994, reprinted in 33 *ILM* (1994) 1125.

authority superior to states, the consent of states from which something is to be subtracted is usually necessary. There are different levels at which interests of the North can contribute to the realization of differential treatment. Economic and financial integration at the global level constitutes a first example. The debt crisis of the early 1980s, the financial crisis in Mexico or the crisis of confidence in Asian markets all seem to show that developed countries cannot afford bankrupted developing countries.[53] The packages put together by the IMF and some developed countries in response to the financial collapse in some East Asian countries may imply a duty of solidarity but can largely be explained by the need to stem the crisis before it spreads further.[54] In economic terms, developed countries gain from a secure access to primary resources situated to a large extent in developing countries. Besides, they will also eventually gain from developing countries becoming richer and being more amenable to absorb part of the production of developed countries, be it in the form of manufactured goods or services. Some of the more successful developing countries in economic terms now constitute significant export markets for the North and these cannot easily be abandoned.

In the environmental field, it is apparent that among the numerous issues of international significance, issues of greater concern to developed countries, such as ozone depletion, have been addressed more thoroughly and rapidly than issues of lesser importance to them, such as desertification. Developed countries have specific interests that push them to provide more favourable treatment to the South to ensure that their current priorities are acted upon throughout the world.[55] Thus, in the case of the depletion of the ozone layer, it is a combination of economic and environmental interests which ensured the success of the Montreal Protocol. Developed countries went as far as enticing developing countries into ratifying the Protocol through the provision of financial incentives and technology transfer.[56] This was done to ensure that, even though the current per capita consumption and production of ozone-depleting substances in developing countries was still comparatively very low, a projected surge in both production and consumption in those countries would not thwart the aims of the Protocol. There were also specific commercial interests to the accession of developing countries to this agreement because all the alternative, environmentally-friendly technologies have originated in developed countries.

The predominance of developed countries' views in the granting of differential treatment is also apparent in the way that global environmental and local priorities are apportioned. In most cases, differential treatment granted to address global

[53] On the debt crisis of the 1980s, see, e.g., Bedjaoui, 'Some Unorthodox Reflections on the "Right to Development" ', in F. Snyder and P. Slinn (eds), *International Law of Development: Comparative Approaches* (1987), at 87.

[54] See, e.g., IMF, 'IMF Approves Stand-by Credit for Thailand', *Press Release* No. 97/37, 20 Aug. 1997 and IMF, 'IMF Approves SDR 15.5 Billion Stand-by Credit for Korea', *Press Release* No. 97/55, 4 Dec. 1997.

[55] See, e.g., Jordan and Werksman, 'Incrementality and Additionality: A New Dimension to North-South Resource Transfers?', 6 *World Resource Rev.* (1994) 178.

[56] Cf. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *Yb Int'l Envtl. L.* (1990) 3.

environmental problems does not seek to directly benefit developing countries but to achieve global benefits.[57] This is reflected in the newly developed but already key concept of incremental costs that is present in most global environmental agreements. The Global Environment Facility (GEF) was, for instance, specifically set up to meet the costs of measures that benefit the global environment and would not be undertaken otherwise because they entail an extra financial burden for developing countries that the latter have no incentive to shoulder.[58] Thus, the additional finance that is being provided to developing countries has in a sense strictly limited aims, even though it is hoped that it does offer benefits for recipient countries too.

3 Contribution to Problems and Capacity to Respond

When states do not have the same responsibility in the creation of a common problem or the same capacity to solve it, reciprocity must also give way to differentiation.[59] This can be clearly illustrated in the case of some global environmental problems. The emergence of issues of 'common concern' requiring common action, such as global warming, is fostering the development of new forms of inter-state cooperation linked partly to the different contributions of states to the creation of the problem and their different capacity to tackle it. The importance of global environmental problems in the context of differential treatment stems in part from their relationship with economic development. Human-induced climate change has, for instance, primarily been caused by industrialization. There is thus a good correlation between current levels of development and emissions of greenhouse gases. A temporal dimension must however be added since greenhouse gases remain in the atmosphere for significant periods of time. Looking back, countries which industrialized early have produced an overwhelming share of total emissions over the last 200 years. However, it is expected that the share of developed nations' emissions will substantially decrease over the coming decades as developing countries rapidly develop fossil-fuel-based industries.[60]

Since the effects of climate change will probably be experienced the world over, the necessity for cooperation is acutely felt. While developed countries who still account for the largest share of emissions can take action to reduce their own emissions, this will probably not be sufficient in the long run. Whether the underlying motive is compensation for past action, solidarity in solving a global problem or the search for cheap solutions, special measures for developing countries are necessary if the development of substantial fossil-fuel-based industries is to be averted. It would not be morally, legally or economically feasible to expect developing countries to pay the

[57] See, e.g., Jordan & Werksman, *supra* note 55.

[58] See, e.g., GEF/K. King, *The Incremental Costs of Global Environmental Benefits* (1993).

[59] Cf. Abi-Saab, 'Whither the International Community?', 9 *EJIL* (1998) 248.

[60] See, e.g., Banuri *et al.*, 'Equity and Social Considerations', in J. P. Bruce *et al.* (eds), *Climate Change 1995 — Economic and Social Dimensions of Climate Change — Contributions of Working Group III to the Second Assessment Report of the IPCC* (1996).

supplemental costs associated with leapfrogging the fossil-fuel stage of industrialization through which all developed countries have gone.[61]

A compelling argument for differentiated measures can also be made on the basis of past, current and expected future per capita emissions. In this case, developed countries are far ahead of other countries even in the medium-term future. This is mostly because, if the overall share of developing countries' emissions is to rise substantially, their per capita emissions will remain far below those of developed countries for the foreseeable future. The increased share of developing countries' emissions will therefore not notably alter current disparities in standards of living. Transfers of technologies and other redistributive measures are also called for because inaction may threaten not only the process of development in developing countries but also current standards of living in the North. It is indeed probable that equalizing levels of development in developed and developing countries while following the development path pursued by the former would not be environmentally sustainable.[62]

Further, inequality with regard to resources and capacities constitutes another important factor influencing the capacity of states to take effective action to address specific environmental problems.[63] This constitutes another important rationale for differential treatment.[64] This has been acknowledged in some international instruments such as the FAO Code of Conduct for Responsible Fisheries, which states that '[t]he capacity of developing countries to implement the recommendations of this Code should be duly taken into account'.[65]

C *Differential Treatment and the Implementation of International Law*

A third category of benefits that are derived from differentiation in the current international legal order is the better and more effective implementation of standards agreed upon at the international level. This is in some way a consequence of better inter-state cooperation. In practice, measures taken include, for instance, longer implementation periods for some countries or mechanisms to ensure that the necessary technologies are effectively transferred.

Indeed, one of the main contributions of differential treatment in practice has been to ensure a revival of the significance of implementation aid and technology transfer through the recognition that financial and technological capacities constitute significant constraints on the ability of states to implement international environmental agreements. Differential treatment thus implies that law cannot be planned in a

[61] Cf. Paolillo, 'Final Report', 67/1 *Yb. Inst. Int'l L.* (1997) 437, stating that the extent to which states have contributed to environmental degradation in a particular field constitutes one criterion on which differential treatment can be based.

[62] See, e.g., Kymlicka, 'Concepts of Community and Social Justice', in F. O. Hampson and J. Reppy (eds), *Earthly Goods — Environmental Change and Social Justice* (1996) 30.

[63] See, e.g., Gündling, 'Compliance Assistance in International Environmental Law: Capacity-Building through Financial and Technology Transfer', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) 796.

[64] See, e.g., Paolillo, *supra* note 61.

[65] Article 5 of the *Code of Conduct for Responsible Fisheries*, Report of the Conference of FAO, 28th Sess., Rome 20–31 Oct. 1995, Doc. C 95/REP, Annex I.

vacuum or in a context which assumes that all states have equal capacities to address environmental problems. This is especially true in situations where the full implementation of an international treaty requires costly measures. In international environmental law, two of the most visible differential implementation mechanisms are implementation aid, such as that dispensed by the Global Environment Facility, and technology transfer.

Differentiation at the implementation level constitutes, in other words, an avenue to make international law more responsive to local (or at least national) circumstances. This is exemplified by the fact that technology transfer is offered in priority to countries which do not have the capacity to tackle the environmental problems addressed in international regimes.

3 Differential Treatment in International Law

Modern international law developed in parallel to the rise of national sovereignties in a Eurocentric world.[66] It was predicated on the common consent of states acting as sovereign and equal entities.[67] Even though states have never been perfectly equal in power, the idea that international law was a law among nations and not above them necessitated the fiction of equality.[68] The existence of great and smaller powers was acknowledged,[69] but this was within a predominantly European context where countries had a shared political, historical and cultural background. This commonality of interests was reinforced by the reliance on the notion of civilized nations to exclude many non-European nations from the international community.[70] In other words, the international legal system was based on juridical equality coupled with political independence.[71]

One of the corollaries of legal equality was that international legal obligations were traditionally framed as strictly reciprocal commitments binding all signatories in exactly the same way.[72] The most favoured nation clause in the General Agreement on Tariffs and Trade (GATT) is one example of a rule whereby each state can demand

[66] See, e.g., Brownlie, *supra* note 35 at 287.

[67] See, e.g., A. Cassese, *International Law in a Divided World* (1986), at 351, stating that '[t]raditional law was geared to States' freedom and formal equality and no attention whatsoever was paid to factual inequalities'.

[68] See, e.g., L. Oppenheim, *International Law — A Treatise* (R. F. Roxburgh (ed.), Vol. 1, 3rd ed., 1920).

[69] *Ibid.* See also Cassese, *supra* note 67.

[70] See, e.g., J. Lorimer, *The Institutes of the Law of Nations* (1883), distinguishing clearly between civilized men and savages, and J. Westlake, *Chapters on the Principles of International Law* (1894). See also Singh, 'The Distinguishable Characteristics of the Concept of Law as it Developed in Ancient India', in M. Bos and I. Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (1987) 91.

[71] See, e.g., S. P. Sinha, *Legal Polycentricity and International Law* (1996).

[72] See, e.g., Decaux, *supra* note 31 and Cassese, *supra* note 67.

the fulfilment of the same obligations from all other member states.[73] Reciprocity was thus a central element of the basis of obligations.[74]

Absolute reciprocity was however not upheld in all circumstances. The possibility to make reservations to multilateral treaties constitutes one example of differentiation.[75] As codified in the Vienna Convention on the Law of Treaties, states can make reservations unless they are prohibited by the treaty or are incompatible with the object and purpose of the treaty.[76] The fact that treaty law provides for a form of differential treatment indicates that differentiation has been a long-standing concern of the international community.[77]

Further developments did not occur until the end of the Second World War and the ensuing rapid enlargement of the international community. After decolonization, international law became for the first time truly universal in scope and came to encompass in particular a new group of 'developing' states, which made the international community much more heterogeneous than before.[78] Differences in levels of economic development among the members of the international community became much more pronounced than they had been among the group of countries which had previously been full subjects of international law. These changes came to test the legal foundations of international law. It became, for instance, clear that the strict reliance on the concept of legal equality could less and less be upheld in all circumstances in a growing community whose members had different economic, political and military capacities.

In the post-Second World War era, economic agreements dealing with developmental problems were among the first instruments to include differential treatment provisions. The internationalization of environmental problems and the link between development and environmental problems have led to the growth of a new wave of differential treatment provisions reflecting in part the increasing interdependence of all states.

A *Differential Treatment as Unilateral Claims from Developing Countries*

1 Decolonization and Demands for Economic Development

Decolonization fundamentally altered the landscape of international relations. In the two decades following the inception of the UN, the number of its member states more than doubled and has continued to increase to the present day. Given that many new states were born from the demise of colonial empires, a profound destabilization of the

[73] General Agreement on Tariffs and Trade, Geneva, 31 Oct. 1947, 55 UNTS (1950) 187 [hereinafter GATT Agreement]. See also, Franck, *supra* note 13 and Decaux, *supra* note 31.

[74] See R. Higgins, *Problems and Process — International Law and How we Use It* (1994).

[75] Cf. Paolillo, *supra* note 61 at 471.

[76] Article 19 of the Convention on the Law of Treaties, Vienna, 23 May 1969, reprinted in 8 *ILM* (1969) 679.

[77] Cf. Paolillo, *supra* note 61.

[78] On the new universalist scope of international law, see M. N. Shaw, *International Law* (4th ed., 1997).

international legal order could have resulted. In the event, various factors, such as the reliance of new rulers on the *uti possidetis* principle to consolidate their nascent 'nation-states', whose existing borders had often been drawn under colonial rule, ensured that developing countries broadly embraced the existing international legal framework.[79]

Despite the broad acceptance of existing international law, developing countries soon came to voice concerns that political independence could not be equated with economic independence. In particular, claims were made concerning the control of economic resources situated in the territories of newly independent countries. Demands were thus made for special measures to remedy decades of economic stagnation under colonial rule and an international economic system which appeared to favour too strongly vested interests and positions acquired in the course of the colonization process.[80]

A whole body of instruments focusing on economic development in an international perspective came into being in the ensuing decades. What came to be known as the International Law of Development was thus, from the outset, based upon the recognition that real independence requires more than political independence and that special measures should be taken to assist less economically developed countries in realizing economic independence.[81] In other words, it was based on principles of equity among nations which required new legal arrangements to allow developing countries to overcome the difficult situation they had inherited from their past.[82] Different instruments were used to foster the aims of the international law of development. These ranged from the affirmation of redistributive principles, such as the recognition of a 'permanent sovereignty over natural resources',[83] to special measures in instruments concerned with economic development.

International trade law constituted one of the most hotly contested areas. This was a consequence of colonization when colonial and metropolitan economies were integrated in such a way that colonial economies would be geared towards meeting the needs of the metropole. In many instances, especially for a number of small and least developed countries, one of the major economic impacts of colonialism was the high degree of specialization that these countries achieved.[84] Differential treatment in trade agreements thus constituted the first focal point for newly independent

[79] See, e.g., Anand, 'Attitude of the Asian-African States toward Certain Problems of International Law', 15 *ICLQ* (1966) 55. On the principle of *uti possidetis*, see, e.g., Ratner, 'Drawing a Better Line*: Uti Possidetis* and the Borders of new States', 90 *AJIL* (1996) 590.

[80] Even though not all developing countries were subjected to colonial rule, a number of countries that remained independent were in the sphere of influence of one or the other Western power. See, e.g., P. J. Cain and A. G. Hopkins, *British Imperialism — Crisis and Deconstruction 1914–1990* (1993).

[81] See, e.g., G. Feuer and H. Cassan, *Droit international du développement* (1991).

[82] See, e.g., Mahiou, 'Le droit au développement', in *International Law on the Eve of the 21st Century — Views from the International Law Commission* (1997) 217.

[83] See GA Res. 1803 (XVII), *Permanent Sovereignty over Natural Resources*, 14 Dec. 1962, reprinted in 2 *ILM* (1963) 223.

[84] Even today, in Africa, the share of primary products in total exports is still at 83%, while it is at 69% for all least developed countries. See UNCTAD, *State of South-South Cooperation* (1995).

countries. One of the earliest instances can be found in the revision of Article XVIII of the GATT in the mid-1950s, which granted developing countries with low standards of living permission to derogate from some of the obligations taken under GATT by all other members.[85] A decade later, following UNCTAD I, a new Part granting developing countries more specific exemptions was added to the GATT.[86] Article XXXVI(3) thus states that '[t]here is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development'.[87] A further paragraph continues by asserting that '[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'.[88]

2 The New International Economic Order Era

Despite some improvements in the preceding decades, it was often felt in developing countries at the beginning of the 1970s that traditional international economic law put too much emphasis on the protection of alien property against nationalization.[89] Though these countries still maintained their willingness to uphold international law on the whole, they now demanded the creation of new rules allowing them to better benefit from the international system.[90] Their arguments centred on the denunciation of injustice in economic relations among developed and developing countries.[91] Their claims focused on the protection of their economic interests, positive discrimination and non-reciprocity.[92] Though controversies covered to a certain degree the protection and utilization of global commons, the main points at issue were international trade, international monetary issues and the financing of development through aid, loans and foreign direct investment.[93] The New International Economic Order (NIEO) marked a turning point in North-South relations insofar as developing countries drifted away from full cooperation with the North towards trying to impose on developed countries a new set of principles and rules of international law.[94] The

[85] Article XVIII of the GATT Agreement, *supra* note 73. On preferential treatment in GATT, see generally Verwey, 'The Principles of a New International Economic Order and the Law of the General Agreement on Tariffs and Trade (GATT)', 3 *Leiden J. Int'l L.* (1990) 117.

[86] See, e.g., Flory, 'Mondialisation et droit international du développement', 101 *Revue générale de droit international public* (1997) 609.

[87] Article XXXVI para. 3 of the GATT Agreement, *supra* note 73.

[88] Article XXXVI para. 8 of the GATT Agreement, *supra* note 73.

[89] See, e.g., Wälde, 'A Requiem for the "New International Economic Order" — The Rise and Fall of Paradigms in International Law', in N. Al-Nauimi and R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (1995) 1301.

[90] See, e.g., Sinha, *supra* note 71.

[91] See, e.g., Dupuy, *supra* note 6 and M. Bedjaoui, *Towards a New International Economic Order* (1979).

[92] See, e.g., Verwey, *supra* note 85.

[93] See, e.g., Fatouros, 'The International Law of the New International Economic Order: Emerging Patterns of Norms', XII *Thesaurus Acroasium* (1981) 445.

[94] See, e.g., Flory, *supra* note 86.

NIEO was thus marked by unilateral calls by developing countries for changes in the international economic and legal system.[95]

A series of factors allowed developing countries to voice these concerns at the level of the UN General Assembly. The global energy crisis of the early 1970s, which highlighted the dependence of developed countries on natural resources, and the fact that developing countries had by then a majority of votes in the General Assembly constituted important elements in the development of these issues in international fora.[96] The most visible results were a series of non-binding instruments seeking to establish the NIEO. These General Assembly resolutions aimed at creating rules of international law meeting the specific needs of developing countries on the basis of their different levels of economic development.

The NIEO called in essence for a form of distributive justice aimed at meeting the needs of developing countries.[97] It was based on a series of principles emphasizing the need for developing countries to gain effective control over their natural resources and economic development. This explains the central importance of the principle of permanent sovereignty over natural resources. One of the main thrusts of NIEO proposed measures was thus to strengthen the position of states as economic actors against private foreign investors. This implied a heavier state involvement in the management of the economy.[98]

The series of General Assembly resolutions had a significant political impact but the principles put forward were never fully implemented.[99] One of the major projects that the international community embarked upon to realize the NIEO principles was the promotion of an Integrated Programme for Commodities. Its central funding mechanism was to be a Common Fund for Commodities whose rationale was to limit fluctuations in the prices of commodities.[100] The negotiations eventually led to the conclusion of a diminutive agreement establishing a common fund for commodities in 1980 that only came into force in 1989.[101] The most significant sign of the failure of the NIEO movement to bring about significant changes in the field of commodities was the absence of progress on these issues at UNCTAD IV and the following two sessions.[102]

[95] See, e.g., McDonald, *supra* note 48.

[96] See, e.g., Feuer and Cassan, *supra* note 81.

[97] See, e.g., Janis, *supra* note 35.

[98] See, e.g., S. K. Sell, *Power and Ideas — North-South Politics of Intellectual Property and Antitrust* (1998).

[99] Makarczyk, *supra* note 47.

[100] See UNCTAD Res. 93 (IV), 'Integrated Programme for Commodities', 30 May 1976, Proceedings of the United Nations Conference on Trade and Development, Fourth Session, Nairobi, 5–31 May 1976, Vol. I — Report and Annexes, UN Doc. TD/218 (Vol. I). See also K. Griffin, *International Inequality and National Poverty* (1978).

[101] Agreement Establishing the Common Fund for Commodities, reprinted in 19 *ILM* (1980) 896. See also G. Corea, *Taming Commodity Markets — The Integrated Programme and the Common Fund in UNCTAD* (1992).

[102] See, e.g., Feuer and Cassan, *supra* note 81.

B *Differentiation in an Interdependent World*

1 The Demise of the New International Economic Order

The NIEO movement was based on solidarity claims by developing countries. These unilateral demands which were to be matched by unilateral obligations of developed countries to compensate for the wrongs of the colonial period were eventually unsuccessful both at the level of principles and in practice.[103] The eventual demise of the NIEO was linked to several factors. While the onset of the debt crisis in 1982 constituted a turning point in the NIEO debate, broader forces were at play during the 1980s. For instance, economic globalization constituted one of the main trends during the 1980s. This received a tremendous boost with the collapse of the socialist regimes of Eastern Europe as this allowed the world economy to become unified to a much larger extent.

While the NIEO had emphasized the possibility of an alternative economic development path based largely on state intervention, the new policy and economic environments were becoming less and less conducive to their realization.[104] By 1990, following what came to be known as the lost development decade for many developing countries, the NIEO rhetoric had faded away and had given way to a new understanding of solidarity emphasizing the mutual responsibility of both developed and developing countries concerning the various international issues which necessitated cooperation.[105] This was, for instance, reflected in the Declaration on International Economic Cooperation adopted in 1990 by the UN General Assembly, which assigns proportionally greater responsibility to the North for the economic problems of the 1980s and for meeting the challenges of the 1990s, while providing at the same time that the South will assume the main burden of macroeconomic policy reform at the national level.[106]

The waning of the NIEO rhetoric has been matched by a greater reluctance to provide differential treatment in particular in trade agreements. The GATT 1994 agreement has, for instance, maintained the principle of differential treatment but with much stronger qualifications than before and stipulates that such measures are temporary in nature.[107] As confirmed by the 1997 decision concerning the regime for the importation, sale and distribution of bananas in the EU, trade preferences such as those provided in the context of the Lomé agreements will be considered more and

[103] See, e.g., Simma, *supra* note 2.

[104] See, e.g., Flory, *supra* note 86.

[105] See, e.g., Simma, *supra* note 2.

[106] GA Res. S-18/3, *Declaration on International Economic Cooperation, in particular the Revitalization of Economic Growth and Development of the Developing Countries*, 1 May 1990, GAOR 18th Special Session, Sup.2, A/S-18/15 (1990). See also, Barsh, 'A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States', 85 *AJIL* (1991) 192.

[107] See, e.g., Benedek, 'Implications of the Principle of Sustainable Development, Human Rights and Good Governance for the GATT/WTO', in K. Ginther *et al.* (eds), *Sustainable Development and Good Governance* (1995) 274.

more severely in coming years.[108] Indeed, while the Lomé IV Convention between the EU and African, Caribbean and Pacific (ACP) countries is still premised on the granting of trade preferences to ACP countries, and retains a stabilization mechanism to remedy the 'harmful effects of the instability of export earnings' for ACP countries,[109] its renegotiation in its current form does not appear likely as unilateral trade preferences would require an exception under GATT rules.[110]

2 New Bases for Differential Treatment

While the emergence of the new economic paradigm heralded the decline of differential treatment in the economic field, other factors have ensured a revival under a different guise. Firstly, the progressive internationalization of environmental concerns and the realization that some problems are global in scope have led to a profound change in international environmental policy-making and to the search for new ways to ensure the participation of all countries in relevant agreements.[111] Issues such as the allocation of natural resources, responsibility for conserving and controlling pollution, and the distribution of costs arising from pollution prevention and environmental damage have brought the issue of equity to the fore.[112] Secondly, globalization in the economic and financial sectors and the end of the Cold War have led many developing and other countries to be much more integrated in the world economy. This is fostering new relations of interdependence among all countries. Thirdly, globalization has been proceeding at the same time in the economic, technological and environmental fields and strong linkages between them have become apparent.[113] This is, for instance, the case with regard to the economic impact of measures to stem climate change or the economic potential of biological resources.

The new dimension of environmental problems, the shift away from state-controlled economies and events such as the end of the Cold War have contributed to making the NIEO obsolete in international fora.[114] Private foreign investment in developing countries has become comparatively much more important and the existence of unified markets is forcing all countries to compete on a par. Granting differential treatment in the economic sphere is thus becoming more and more difficult to justify, but it is other factors bearing on the economy which have allowed the development of a new wave of differential provisions and instruments. The importance of global environmental problems has become such that nearly all recent international environmental agreements include provisions and/or specific mechanisms destined to take into account certain characteristics of a given group of countries.

[108] See European Communities — Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, 22 Aug. 1997, WTO Doc. WT/DS27/AB/R.

[109] Article 186 of the Fourth ACP-EC Convention of Lomé as Revised by the Agreement Signed in Mauritius, 4 Nov. 1995, 155 *Courier ACP-EU* (1996).

[110] See, e.g., Maerten, 'Future ACP-EU Trade Relations', 167 *Courier ACP-EU* 18 (1998).

[111] See, e.g., The South Commission, *The Challenge to the South* (1990).

[112] See, e.g., Brown Weiss, *supra* note 36.

[113] See, e.g., Anand, 'A New International Economic Order for Sustainable Development?', in Al-Nauimi and Meese, *supra* note 89, at 1209.

[114] See, e.g., Wälde, *supra* note 89.

Even though the NIEO rhetoric has almost completely subsided, some of the substantive elements which formed the core of the debate in the 1970s are still present. A case in point is the importance of technology transfer which remains central to current differential treatment debates, even though its modalities may be different.[115] What has changed is more the rationale for granting differential treatment, which now focuses on global environmental needs rather than on development priorities of individual countries. A certain measure of continuity is indeed discernible. In some cases, recent agreements still refer to NIEO-era instruments. Thus, Article 34 of the International Timber Trade Agreement states that the Council must consider taking appropriate differential and remedial measures in accordance with the UNCTAD Integrated Programme for Commodities adopted in 1976.[116] More significantly, while some of the NIEO demands were never met when they were formulated as unilateral demands of developing countries, their realization has sometimes been enhanced in recent years. The voting structure adopted in the Montreal Protocol Fund constitutes an example of this trend.[117] Among the factors explaining this resurgence of differential treatment is the fact that it is no longer linked to the call for an overhaul of the economic and legal system.[118] Global environmental problems are thus allowing for a second wave of differential treatment devoid of negative ideological undertones.[119]

Interdependence in solving global environmental problems has been a key factor in the revival of differentiated measures. Differential measures must, for instance, be seen in light of the fact that relatively less industrialized countries hold most of the remaining biodiversity. This is partly due to non-industrialization and partly to the fact that the tropics happen to be more gene-rich than temperate zones. Industrialization in developing countries is likely to wipe out part of this heritage. Another element which is allowing for the rapid development of differential measures is the fact that current environmental problems identified as global are all of current major concern in developed countries, while they may only be of future concern in developing countries. Thus, the supply of fresh water is of much greater present concern to numerous developing countries than climate change. These elements and a host of others, such as the fact that the overwhelming majority of environmentally-sound technologies are produced in the North, create a situation in which developed countries will agree to differential treatment measures in favour of other countries.

The rationales for differentiation may be diverse, ranging from concern for the global environment to the search for the cheapest options to solve a given problem or

[115] Cf. Dolzer, 'The Global Environment Facility — Towards a New Concept of the Common Heritage of Mankind', in G. Alfredsson and P. McAlister-Smith (eds), *The Living Law of Nations — Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups* (1996).

[116] International Tropical Timber Agreement, *supra* note 7 and UNCTAD Res. 93 (IV), *supra* note 100.

[117] See, e.g., Biermann, 'Financing Environmental Policies in the South — Experiences from the Multilateral Ozone Fund', 9 *Int'l Envtl. Aff.* (1997) 179.

[118] See, e.g., Dolzer, *supra* note 115 at 338.

[119] See, e.g., Mercure, 'Le choix du concept de développement durable plutôt que celui du patrimoine commun de l'humanité afin d'assurer la protection de l'atmosphère', 41 *McGill L.J.* (1996) 595.

the opening of new markets for environmentally-sound technologies. The Clean Development Mechanism defined by Article 12 of the Kyoto Protocol to the Climate Change Convention illustrates this well.[120] It seeks to facilitate joint emission reduction projects between parties with commitments and developing countries. In this sense, it constitutes a form of partnership among developed and developing countries to solve a global problem on the basis of the different commitments that countries assume under the Protocol, and is thus a direct emanation of the principle of common but differentiated responsibility. At the same time, it constitutes an avenue for parties with commitments to lower the cost of compliance.

The main result of differentiation linked to interdependence is that countries which often lack resources to meet the most basic needs of their populations can avoid diverting necessary resources from these essential tasks while contributing to solving global environmental problems.[121] In practice, differential treatment has thus become in some cases the price to be paid to ensure universal participation in environmental agreements concerned with global problems.[122]

C *Forms of Differential Treatment*

1 Positive Discrimination

Given that the standard rule of law applies to all subjects without distinction, differential treatment is in essence about creating distinctions to achieve a goal which formal equality can in many cases not reach. From the starting point of a 'universal' rule, differential treatment thus calls for positive discrimination in favour of a given class or classes of subjects. Positive discrimination does not usually seek to bring about the complete elimination of inequality, but rather attempts to make sure that inequalities are only the result of individual differences, uncomplicated and unburdened by historical handicaps.

At the domestic level, policies seeking to redress existing inequalities have been used in different countries, for instance, under the heading of affirmative action[123] or reservation policies.[124] Affirmative action has been controversial in all the countries where it has been used, but in general even its opponents accept that there is a need for

[120] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 Dec. 1997, Decision 1/CP.3/Annex, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Third Session*, Kyoto, 1–11 Dec. 1997, UN Doc. FCCC/CP/1997/7/Add.1 [hereafter Kyoto Protocol].

[121] Cf. Bekhechi, 'Une nouvelle étape dans le développement du droit international de l'environnement: La Convention sur la désertification', 101 *Revue générale de droit international public* (1997) 5.

[122] See, e.g., Boyle, 'Comment on the Paper by Diana Ponce-Nava', in W. Lang (ed.), *Sustainable Development and International Law* (1995) 137.

[123] For instance in the United States. See, e.g., Killian, 'Redressive Action and Ethnic Relations in the USA', in S. K. Mitra (ed.), *Politics of Positive Discrimination — A Cross National Perspective* (1990) 9.

[124] Reservation policies of India are particularly noteworthy because India is one of the few countries to have embodied such principles in its constitution. See, e.g., Parekh and Mitra, 'The Logic of Anti-Reservation Discourse in India', in S. K. Mitra (ed.), *Politics of Positive Discrimination — A Cross National Perspective* (1990) 91. See generally M. Galanter, *Competing Equalities — Law and the Backward Classes in India* (1984).

measures targeting the poorest and enhancing the status of disfavoured communities.[125] In most cases, affirmative action has been proposed to remedy current inequalities, but such measures also constitute a way to redress past injustices.[126] Despite the controversies and critiques, positive discrimination, wherever it has been used, has been successful in highlighting the extent of existing deprivation, in promoting specific schemes which benefit some, usually economically deprived sections of the society, and in redressing inequalities in general.[127]

Positive discrimination provisions have, for instance, been widely used in international human rights instruments. Thus, while the main aim of the Convention on the Elimination of All Forms of Discrimination against Women is to promote equality of treatment between men and women, the Convention recognizes that differential measures may be pursued to bring about de facto equality and that such measures cannot be held to be discriminatory in nature.[128] At the inter-state level, differential treatment includes the numerous provisions granting special treatment to a specific group of countries. The Agreement on the Global System of Trade Preferences among Developing Countries is, for instance, based on the principle that least developed countries are not required to make concessions on a reciprocal basis.[129] Similarly, the special provisions regarding developing countries in the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works allow developing countries not to implement some of the provisions of the Convention and grant them, for instance, the right to substitute the exclusive right of reproduction by a system of non-exclusive and non-transferable licences.[130]

2 Redistribution of Resources

Redistributive policies imply an allotment of burdens and benefits among the various actors in the society. This stems from the fact that it is usually only when goods are available in limited quantities that the need for allocation and the enactment of rules for this purpose are necessary.[131] Any mandated re-allocation of a given stream of benefits must therefore benefit some people and deprive others. As noted by Hart, it is often the case that '[p]rovision for the poor can be made only out of the goods of others'.[132] In practice, differential treatment thus often involves the redistribution of goods available in finite quantities, and is thereby a measure of direct or indirect

[125] See, e.g., J. Faundez, *Affirmative Action — International Perspectives* (1994), and Anaya, 'On Justifying Special Ethnic Group Rights', in W. Kymlicka and I. Shapiro (eds), *Ethnicity and Group Rights — Nomos XXXIX* (1997) at 222. Cf. T. Sowell, *Preferential Policies — An International Perspective* (1990), who takes a very negative view of preferential treatment.

[126] See, e.g., *Brown v. Board of Education*, 347 U.S. (1953) 483.

[127] See, e.g., Faundez, *supra* note 125.

[128] See Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 Dec. 1979, reprinted in 19 *ILM* (1980) 33.

[129] See Article 3.f of the Agreement on the Global System of Trade Preferences among Developing Countries, Belgrade, 13 Apr. 1988, reprinted in 27 *ILM* (1988) 1204.

[130] See Article 3 of the Appendix to the Berne Convention for the Protection of Literary and Artistic Works — Paris Act, 24 July 1971 (as amended on 28 Sept. 1979), WIPO Doc. 287(E).

[131] Cf. Hart, *supra* note 19, at 163.

[132] Hart, *supra* note 19, at 166.

wealth or income redistribution. At the global level, it is clear that humanity has only access to a limited quantity of resources at any one point, due to climatic, technical and other constraints. Since basic needs have to be met immediately, part of the redistribution envisaged thus involves a static transfer of resources from the North to the South.[133]

3 Instruments of Differential Treatment

At the level of legal norms, differential treatment includes various situations where the principle of reciprocity is not upheld. The distinction between 'absolute' and differential norms is not watertight. In many cases, rules which formally apply to all in the same way will provide for some type of flexibility, for instance, by stating that the special situation of a group of states should be taken into account.[134] Differential treatment specifically refers to situations where norms providing for different obligations for different groups of actors are adopted. These differential norms were coined as 'dual norms' in the context of the international law of development to emphasize the distinction between the North and the South and the clash between classical international law and recent legal developments.[135]

Further, differential treatment also refers to various situations where equity, justice or moral considerations lead to the adoption of solutions which constitute a departure from normal legal arrangements. The setting up of a regime for the exploitation of deep seabed resources which provides for the compensation of states affected by the exploitation of these common resources constitutes one such example. In international environmental law, one of the most visible differential techniques is 'implementation aid'. These environmental funding mechanisms, such as the Global Environment Facility, seek to attract widespread membership, to subsidize compliance with treaties for some countries and to foster the implementation of the objectives of the conventions in countries which lack the technical, financial or institutional capacity to effectively implement their commitments. In several cases, the establishment of financial mechanisms is linked to the fact that developing countries will only be able to contribute to solving environmental problems if their access to cleaner technologies, usually developed in the North, is facilitated. Since private parties usually own these technologies, their diffusion in developing countries is often hampered by difficulties with access to finance.[136]

[133] See, e.g., Barry, 'Humanity and Justice in Global Perspective', in J. R. Pennock and J. W. Chapman (eds), *Ethics, Economics and the Law — Nomos XXIV* (1982) 219.

[134] Note that flexibility or preciseness is not a characteristic of either absolute or differential norms. Both types of norms can be qualified by 'contextual' elements. See, e.g., Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms', 1 *Colorado J. Int'l Envtl. L. & Pol'y* (1990) 69.

[135] See, e.g., Benedek, 'The Lomé Convention and the International Law of Development: A Concretisation of the New International Economic Order?', 26 *J. African L.* (1982) 74.

[136] See, e.g., S. Schmidheiny *et al.*, *Financing Change: The Financial Community, Eco-Efficiency, and Sustainable Development* (1996).

4 Differential Treatment: A General Assessment

Though international law is still primarily based on the principle of reciprocity, numerous differential provisions can be identified. This reflects a widespread recognition of the limits of the principle of formal equality in an international community conjoining states of varying sizes and population, with widely different economic and political clout and unequal stocks of natural resources and biodiversity. Differentiation is important in all cases where burdens and benefits have to be allocated.[137] In the environmental field, this is a frequent occurrence and partly explains the rapid development of a second wave of differential treatment since the mid-1980s.

Differential treatment is not limited to provisions granting a given group of countries such privileges as different obligations or a delay to implement obligations which are similar for all signatories. It can also constitute the basis of a regime of exploitation of natural resources. As noted earlier, it is thus fundamentally linked to principles of equity and fairness, but in legal terms differential treatment goes much further than judicial equity by applying fairness to rules.

Economic inequalities still provide the backbone of differentiation. However, environmental factors have become more important following the realization that environmental goods are also unequally distributed across the world and that environmental endowments are often in direct relation to the level of economic development. Thus, the Climate Change Convention singles out, among others, the situation and needs of countries with low-lying coastal areas and small island countries.[138]

While differential treatment can theoretically be given various foundations, two main motives seem to prevail in practice. Firstly, 'weaker' states have been able to push through differential regimes where their bargaining power is stronger than usual due to favourable conditions. Secondly, and much more consistently, differential treatment has developed where it has been in the 'stronger' states' interests to do so. Global environmental problems provide an interesting test case since these are problems usually identified by developed countries which require the cooperation of, often unwilling, developing countries. Overall, unlike the postulation of a new international economic order in the 1970s, presently proposed strategies to counter the threat to global environmental security may lead to the empowerment of developing countries.[139]

[137] Cf. Franck, *supra* note 13.

[138] See Article 4.8 of the Framework Convention on Climate Change, New York, 9 May 1992, reprinted in 31 *ILM* (1992) 849 [hereinafter Climate Change Convention].

[139] See, e.g., Handl, *supra* note 56.

A *Impact of Differentiation on the Development of International Law*

1 Legal Status of Differential Provisions

The widespread utilization of differential instruments in international law does not prejudge of their legal status in international law. At the outset, it may be recalled that judicial equity developed over several centuries and that its 'validity' was questioned until relatively recently. While judicial equity is now widely accepted even at the international level, the legal status of differential treatment is still the object of significant debate. It has, for instance, been questioned whether differential provisions constitute hard law. This is linked to the broader debate on the existence of soft law provisions in binding international agreements.[140] Unlike General Assembly resolutions whose status as soft law is easily established through a formal legal analysis, the soft law content of a binding provision is more difficult to ascertain. In some cases, a provision will be seen as reflecting a 'soft obligation' if the language of the treaty does not specify clearly states' obligations and is couched in any language other than 'shall'. In other cases, the nature of the obligation itself is 'soft'. The commitments clause in the Climate Change Convention thus reads as follows: 'All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall . . .' This introductory paragraph is then followed by specific commitments, one of which states that the parties shall

> [t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions ... with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.[141]

Here, the actual content of the obligation undertaken by states parties is so weak that it may eventually be compared to a non-binding commitment made in the context of a resolution or declaration.

These soft binding obligations constitute a defining trait of some recent international environmental conventions but do not define differential treatment. This 'contextualization' may affect both absolute and differential treatment.[142] Differential treatment is neither limited to 'contextual clauses' nor primarily concerned with contextual clauses. Entirely different 'hard' obligations are a much more significant example of differential treatment. A significant example of such differential treatment is given by the Montreal Protocol, which grants countries with low per capita emissions of ozone-depleting substances a 10-year window to implement commitments which apply similarly to all countries. In the field of human rights, Article 2.1 of the Covenant on Economic, Social and Cultural Rights, which grants member states the possibility to implement the rights progressively in accordance with their

[140] See, e.g., Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan J. Int'l L.* (1991) 420.

[141] Article 4.1 and 4.1 (f) of the Climate Change Convention, *supra* note 138.

[142] See, e.g., Magraw, *supra* note 134.

respective capabilities, illustrates that differentiation does not diminish the binding nature of a given obligation.[143] In this case, differentiation does not make obligations to respect economic and social human rights less binding for all states, but constitutes at most a temporary derogation.[144] This is confirmed by the now near universal acknowledgement that there is no substantive difference between so-called first- and second-generation human rights.[145]

2 Towards the Development of New Principles of International Law?

Differential treatment has become a common feature of international law, but it is still disputed whether granting differential treatment has become compulsory and, if so, in which situations. Differentiation has been used extensively in agreements pertaining to international trade and economic development, as well as environmental conservation and management agreements. By the early 1980s, one comprehensive study of differential treatment exposed the extent of its application. Verwey, however, carefully avoided any suggestion that there may be a customary duty to grant differential treatment in the economic field and stated that it should be 'left to the United Nations Member Governments to decide what legal significance they would attach to the evidence presented in the present report'.[146]

It is useful to assess developments over the past 20 years in the various fields where differentiation has developed in order to determine the present status of differential treatment in international law.

First, it is apparent that differentiation to enhance the economic situation of poorer countries has been upheld until today. It is striking that the international law of sustainable development encompasses several principles put forward in the context of the NIEO or the international law of development (ILD). Thus, despite the fact that both the ILD and the NIEO have been largely discarded, some of their underlying principles have survived in a different form.[147] The specific case of aid is noteworthy since it has historically been one of the main instruments through which differentiation has been put into practice. The significance of aid provisions is such that donors have usually refused to make indefinite aid commitments.[148] However, aid has been a common feature of many international treaties and it has been contended that a right to aid, and thus by extension to differential treatment, would be slowly

[143] Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, reprinted in 6 *ILM* (1967) 360.

[144] Cf. Anderson, 'Human Rights Approaches to Environmental Protection', in A. E. Boyle and M. R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 1.

[145] See, e.g., M. C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights — A Perspective on Its Development* (1995).

[146] Verwey, 'The Principle of Preferential Treatment for Developing Countries', 23 *Indian J. Int'l L.* (1983) 343, at 359.

[147] See, e.g., Hossain, 'Sustainable Development: A Normative Framework for Evolving a More Just and Humane International Economic Order', in S. R. Chowdhury *et al.* (eds), *The Right to Development in International Law* (1992) 259. See also, Cassese, *supra* note 67.

[148] See, e.g., F. Biermann, *Saving the Atmosphere — International Law, Developing Countries and Air Pollution* (1995) 117.

emerging.[149] It is noteworthy that in the last 10 years, allocation structures in aid mechanisms have been strengthened in favour of recipient countries. While official development assistance (ODA) has clearly been declining in recent years,[150] this represents a significant departure from previous practice and seems to give aid further standing internationally. This is exemplified by developments in environmental trust funds. In the Montreal Protocol Fund, the North agreed to an innovative decision-making structure which gives recipients a say in the main decision-making body. This was supposed to be a one-off occurrence and the United States in particular was adamant that this should not be repeated elsewhere.[151] As it turned out, within a couple of years a similar decision-making structure was adopted in the GEF.

Second, as highlighted above, even though economic differentiation is less frequently granted than before, differential treatment has developed rapidly in international environmental law in recent years. This can be explained in part by the much greater convergence of interests among all countries in environmental law than in the field of economic development. This is linked to historical, geographical and economic reasons which make developing, tropical and populous countries necessary participants in the fight against a number of global problems which are currently of concern mostly in developed countries. It is remarkable that there has been a consistent practice of granting differential treatment in global environmental agreements since the adoption of the Montreal Protocol in 1987. Further, there has been a marked diversification of differentiation techniques and a definite strengthening of their 'differential' content. This is, for instance, the case of provisions making the implementation of developing countries' obligations dependent upon developed countries first fulfilling their own pledges.[152]

The principle which captures most closely the essence of differential treatment in international environmental law is the principle of common but differentiated responsibility (CBDR).[153] In substance, it posits that states should be held accountable in different measure according to their respective historical and current contributions to the creation of global environmental problems and their respective capacities to address these problems. At the same time, it seeks to bring all states together to

[149] See, e.g., M. Flory, *Droit international du développement* (1977), stating that the international community is progressively recognizing a right to aid, and Johnston, 'Financial Aid, Biodiversity and International Law', in M. Bowman and C. Redgwell (eds), *International Law and the Conservation of Biological Diversity* (1996) 271.

[150] See, e.g., Eurostep and ICVA, *The Reality of Aid — An Independent Review of Development Cooperation* (J. Randel & T. German (eds), 1997).

[151] This is reflected in the Decision of the Second Meeting of the Parties establishing the Interim Financial Mechanism which states that '[t]he Financial Mechanism set out in this decision is without prejudice to any future arrangements that may be developed with respect to other environmental issues'. See Dec. II/8, *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, London, 27–29 June 1990, UN Doc. UNEP/OzL.Pro.2/3.

[152] See, e.g., Article 20.4 of the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, reprinted in 31 *ILM* (1992) 818.

[153] See, e.g., Article 3 of the Climate Change Convention, *supra* note 138.

cooperate in solving international environmental problems.[154] The essence of the principle of CBDR is thus its twin emphasis on partnership and differential treatment.[155] The principle of differentiated responsibilities constitutes, for instance, one of the basic principles of the Climate Change Convention, which states that

> Parties should protect the climate system ... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[156]

The principle of CBDR is in large part an economic principle, as illustrated by the emphasis on the temporal dimension of each nation's responsibility in the creation of international environmental problems. As noted, there is, for instance, a clear relationship between industrialization and climate change. Since industrialization has not proceeded at a similar pace in all parts of the world, some countries have contributed a higher overall share of greenhouse gases, while others may increasingly contribute in the future. In the Climate Change Convention, for instance, the principle of CBDR is applied through developed countries' pledges of financing the full incremental costs of measures to be taken by developing countries to alleviate the greenhouse effect on the basis of their higher past and present contributions to the problem.[157] The economic dimension of the principle of CBDR is extremely important since it highlights a continuity with differential treatment in economic instruments. It is therefore possible to assert that differential treatment in environmental agreements does have roots in development-based differential treatment and that the two strands are not totally unconnected, even though circumstances surrounding their respective development are notably different.[158] The consistent practice in recent environmental agreements and the fact that CBDR is specifically linked to other strands of differential treatment may lead to the recognition of CBDR as a general principle of international environmental law.[159] Despite a rather discontinued history, the practice of granting differential treatment may thus be given more concrete recognition in the specific context of international environmental law. It is moreover noteworthy that while the founding instruments of the NIEO were in most cases cast in the form of non-binding instruments, such as General Assembly resolutions, 'new' differential treatment

[154] See, e.g., P. Sands, *Principles of International Environmental Law I — Frameworks, Standards and Implementation* (1995). The eighth session of the UNCTAD recognized, for instance, that all countries have a common but differentiated responsibility for the main environmental problems. See Proceedings of the United Nations Conference on Trade and Development, Eighth Session, Cartagena de Indias, Colombia (8–25 February 1992) — Report and Annexes, UN Doc. TD/364/Rev.1.

[155] On the notion that the concept of common but differentiated responsibility is promoting a sense of partnership, see, e.g., International Committee on Legal Aspects of Sustainable Development, 'Second Report', in International Law Association, *Report of the Sixty-Seventh Conference* (1996).

[156] Article 3.1 of the Climate Change Convention, *supra* note 138. See also Article 10 of the Kyoto Protocol, *supra* note 120.

[157] See, e.g., Parikh, 'North-South Cooperation for Joint Implementation', in J. K. Parikh *et al.* (eds), *Climate Change and North-South Cooperation — Indo-Canadian Cooperation in Joint Implementation* (1997) 192.

[158] See, e.g., Patlis, 'The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment', 25 *Cornell Int'l L.J.* (1992) 181.

[159] See, e.g., Dupuy, 'Où en est le droit international de l'environnement à la fin du siècle?', 101 *Revue générale de droit international public* (1997) 873.

provisions are usually contained in treaties, and a fairly consistent state practice in this regard can be observed over the last few years.[160] The new importance of differential treatment in international environmental law has been reflected in a resolution of the Institute of International Law, which states that multilateral environmental treaties shall

> on the basis of the differences in the financial and technological capabilities of States and their different contribution to the environmental problem, provide for economic incentives, technical assistance, transfer of technologies and differentiated treatment where appropriate.[161]

Developments in environmental law seem to show that granting differential treatment is more and more firmly established in international law.[162] However, even if a principle of differentiation is emerging, it is probably rather limited. Thus, in the case of economic development instruments, despite some advances, it is doubtful whether state practice is more conclusive than at the time of Verwey's study.[163] Rather, the 'old' type differential provisions have become partly obsolete in the current international framework and the development of customary norms in this sphere has been all but halted as exemplified by the GATT 1994 provisions discussed above. In environmental law, even if a generic principle of differentiation is emerging, it may be difficult to ascertain the existence of specific customary norms. Thus, if developed countries have accepted in several environmental treaties that the provision of aid should be made a condition for the implementation of their obligations by developing countries, this is unlikely to constitute a rule of customary law at present.[164]

B *Differentiation and the Transition from Reciprocity to Partnership*

As noted, sovereignty constitutes a keystone principle of international law. It defines the boundaries between the domestic and international spheres and implies that states have a duty to refrain from intervening in matters which are essentially within the domestic jurisdiction of another state.[165] Sovereignty further entails indepen-

[160] See, e.g., Biermann, '"Common Concern of Humankind": The Emergence of a New Concept of International Environmental Law', 34 *Archiv des Völkerrechts* (1996) 426.

[161] Article 4 of the Procedures for the Adoption and Implementation of Rules in the Field of Environment, 67/2 *Yb. Institute Int'l L.* (1997) 515.

[162] See, e.g., Biermann, 'Justice in the Greenhouse: Perspectives from International Law', in F. Toth (ed.), *Fair Weather? Equity Concerns in Climate Change* (1999) 160.

[163] See also, H. Beck, *Die Differenzierung von Rechtspflichten in den Beziehungen zwischen Industrie- und Entwicklungsländern — Eine völkerrechtliche Untersuchung für die Bereiche des internationalen Wirtschafts-, Arbeits- und Umweltrechts* (1994). Cf. Magraw, *supra* note 134, at 79, stating that there may be 'a "soft law" principle or an emerging customary norm that international conventional regimes — environmental and other — should, as a general matter, take the interests of developing countries in achieving sustainable development into account'.

[164] See, e.g., Biermann, *supra* note 160 and Beck, *supra* note 163. Cf. N. Schrijver, *Sovereignty over Natural Resources — Balancing Rights and Duties* (1997).

[165] Article 2.7 of the UN Charter.

dence.[166] The scope of sovereignty is however not fixed since states can of their own accord choose to restrict it.[167] Further, developments in international law can lead to changes in the ambit of the principle. Thus, the development of human rights in the UN era has had as a consequence that sovereignty is today no bar to international consideration of internal human rights situations.[168]

In environmental law, sovereignty has been subjected to contradictory trends. The principle of permanent sovereignty over natural resources which emerged after decolonization was principally asserted as a way to promote a redistribution of global wealth so that developing countries could be in a better position to realize their development plans and included, for instance, a right to nationalize foreign-owned resources.[169] It has since been repeatedly reaffirmed in international treaties. Traditional international environmental law was thus based primarily on a simple balancing of competing sovereign interests which fostered confrontation between independent and competing entities rather than cooperation.[170]

Despite this emphasis on sovereignty, exceptions qualifying the principle have progressively developed in both treaty and customary rules.[171] Thus, one of the central customary principles in modern international environmental law is that states have the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other states.[172] The internationalization of environmental problems has further led the international community to acknowledge that some global environmental problems are a common concern of humankind.[173] The principle of common concern expresses the common environmental interest and responsibility of states in solving international environmental problems.[174] Different issues illustrate this point. The recognition of the global significance of climate change is, for instance, meant to foster further cooperation to alleviate its consequences. Another example is the internationalization of some environmental resources situated under national sovereignty which is having a profound impact on traditional notions of sovereignty. A number of conservation treaties have already introduced the notion that the international community has an interest in the sustainable

[166] See, e.g., *Island of Palmas* Case (*Netherlands v. USA*), The Hague, April 1928, 2 *Rep. Int'l Arbitral Awards* (1949) 829.

[167] See, e.g., Lee, 'A Puzzle of Sovereignty', 27 *California Western Int'l L.J.* (1997) 241.

[168] See, e.g., Shaw, *supra* note 78.

[169] See, e.g., Schrijver, *supra* note 164.

[170] See, e.g., Brunnée and Nollkaemper, 'Between the Forests and the Trees — An Emerging International Forest Law', 23 *Envtl. Conservation* (1996) 307.

[171] See, e.g., P. W. Birnie and A. E. Boyle, *International Law and the Environment* (1992) and Handl, *supra* note 56.

[172] See, e.g., Principle 2 of the Rio Declaration on Environment and Development, reprinted in 31 *ILM* (1992) 874.

[173] Cf. Grossman and Bradlow, 'Are We Being Propelled towards a People-Centered Transnational Legal Order?', 9 *American University J. Int'l L. & Pol'y* 1 (1993). See also, Moomaw, 'International Environmental Policy and the Softening of Sovereignty', 21 *Fletcher Forum World Affairs* (1997) 7.

[174] Brunnée and Nollkaemper, *supra* note 170.

management of wildlife.[175] This implies that states may have a responsibility towards other states or the international community to conserve or sustainably manage wildlife stocks. While conservation has been relatively uncontentious, recent attempts to have some natural resources under state jurisdiction, such as forests, recognized as common concern of humankind have met with stiff opposition.[176] This is partly linked to the significant impact of setting forested land aside on behalf of the international community on the economic development of developing countries. The fact that the exploitation of forests by developing countries cannot be dissociated from economic development in these countries and from global environmental issues only increases the pressure to 'internationalize' the problem of deforestation.[177] Despite this strong opposition, the Desertification Convention illustrates the diminishing support for traditional concepts of sovereignty excluding all international supervision in the field of natural resources.[178]

Apart from various qualifications to the traditional concept of sovereignty, other elements show that international environmental law has been moving towards new forms of cooperation which may signal the end of the 'confrontational' conception of international law. In areas beyond sovereignty, such as the high seas which used to be devoid of international management, states have found ways to set up a regime for the exploitation of deep seabed which, after revision, will probably become operational and effective.[179] The fact that there have been moves towards both the strengthening and weakening of sovereignty shows that a broader dynamic is at play. This broader trend is linked to the globalization which has been occurring at different levels and is bringing new relations of interdependence among all states. While economic globalization may not bring about any change in international power relations, the peculiarity of international environmental problems has been in a number of cases that they favour states which are in most cases among the economically less developed. This has in effect brought about new relations based on cooperation and partnership. Differential treatment in international environmental law may thus constitute the external representation of the concept of partnership. Indeed, it seeks to provide a framework where all states can work on a common platform which has not been brought about by the reliance on sovereign equality. New developments in the notion of sovereignty may thus partly lead to the establishment of more substantively

[175] See, e.g., Convention on the Conservation of European Wildlife and Natural Habitats, Berne, 19 Sept. 1979, *European Treaty Series* No 104 and Convention for the Protection of the World Cultural and Natural Heritage, Paris, 23 Nov. 1972, reprinted in 11 *ILM* (1972) 1358.

[176] Progress on the negotiation of an international forest convention has, for instance, been extremely slow. See, e.g., Report of the Ad Hoc Intergovernmental Panel on Forests on its fourth session (New York, 11–21 February 1997), Commission on Sustainable Development, Fifth session, 7–25 April 1997, UN Doc. E/CN.17/1997/12.

[177] See, e.g., Brunnée & Nollkaemper, *supra* note 170.

[178] See, e.g., Iles, 'The Desertification Convention: A Deeper Focus on Social Aspects of Environmental Degradation', 36 *Harvard Int'l L.J.* (1995) 207.

[179] See, e.g., Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, International Seabed Authority, 4th Sess., 16–27 Mar. 1998, Doc. ISBA/4/C/4.

equal relations. The UN Watercourse Convention accepts, for instance, that cooperation cannot be based only on the principle of sovereign equality. Article 8 thus states that watercourse states must not only cooperate on the basis of sovereign equality but also on the basis of 'mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse'.[180]

Overall, differentiation appears as an extremely convenient tool to foster new dynamics in international law, while keeping the principle of sovereignty as the basic organizational principle. It is thus permitting the development of legal relations which focus less rigidly on the principle of sovereign equality while keeping this notion enshrined in the UN Charter as the fundamental principle against which departures are to be measured. This closely corresponds to the definition of solidarity given by McDonald who stresses that solidarity is 'an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and maintenance of common goals or interests'.[181]

Conclusion

Differential treatment is a new notion which builds upon vast strands of theory and practice, such as the international law of development. It focuses on the enhancement of substantive equality and new forms of cooperation at the international level. In other words, it seeks both to enhance the position of disadvantaged states, while building on the converging interests of all states in some areas. Differential treatment has been applied quite effectively in international environmental law because effective ways to reconcile the often diverging interests of different countries have been devised.

The development of differentiation in international law has important implications. First, it constitutes a very effective tool to overcome the deficiencies of the principle of sovereign equality, particularly in the context of problems of common concern which can only be solved cooperatively. Second, it constitutes a tool to remedy existing inequalities among states that cannot be achieved through reliance on the principle of sovereign equality which assumes actual equality. Thirdly, improved cooperation among states is fostering better and more effective implementation of internationally agreed upon standards, as illustrated by the development of implementation aid mechanisms in international environmental law.

The significance of differentiation in international law is increasing rapidly and the growing number of issues of common concern at the international level will probably lead states to recognize the need to grant differential treatment in more areas in the future. One must, however, keep in mind that in some areas, such as trade, differentiation seems to be less and less acceptable.

[180] Convention on the Law of the Non-navigational Uses of International Watercourses, 12 May 1997, reprinted in 36 *ILM* (1997) 700.

[181] McDonald, *supra* note 48 at 290.