CHAPTER 18 – DIFFERENTIATION

Philippe Cullet

Forthcoming *in* Lavanya Rajamani & Jacqueline Peel, *Oxford Handbook of International Environmental Law* (Oxford University Press)

I. INTRODUCTION

Differential treatment between different groups of countries constitutes one of the bases of international environmental law. Such differentiation between the Global South (South) and the Global North (North) is firmly anchored in the structure of international environmental law that cannot be understood without reference to the various measures taken to reflect the situation of developing and least developed countries.

Differential treatment is one of the main instruments that exist in international environmental law to foster equity. It builds on ideas of global distributive justice and helps to rebalance some of the most visible inequalities arising between formally equal states of very different size, power and natural resource endowments.[1] The principle that reflects differential treatment in international environmental law is that of common but differentiated responsibilities (CBDR). CBDR has been repeatedly endorsed since the 1990s, including recently, in the UN summit for the adoption of the post-2015 development agenda.[2] This confirms the central position of differentiation and the intrinsic link between equity and existing international environmental law. This is not surprising in a context where more than thirty years after the release of the Brundtland Commission report,[3] states have neither tackled inequality nor poverty. In such a situation, differentiation is and will remain necessary for the majority of countries of the South for decades to come.

The chapter begins with a discussion of the conceptual bases for and development of differential treatment. This confirms the significance of the break proposed to the traditional international legal framework and explains the continuing opposition to differential treatment by some countries. This chapter then highlights the different manifestations of differential treatment in international environmental law and shows that differential treatment pervades the whole field. While debates tend to focus specifically on the presence or absence of CBDR, this section shows that the reality is much more complex, and that differentiation arises in many forms and places. The section that follows examines some of the critiques of differentiation and the forms of differential treatment that have evolved over the past couple of decades. The final section moves on to consider the need for differentiation in the context of ongoing

1 See references in the bibliography.

2 United Nations General Assembly (UNGA) Res 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1 (2015), Declaration, para 12.

3 Report of the World Commission on Environment and Development, Our Common Future, UN Doc A/42/427 (1987).

inequalities, and for a broader conceptual framework that better reflects the complexity of international society.

II. CONCEPTUAL BASES AND DEVELOPMENT OF DIFFERENTIATION

A. Conceptual bases

Differentiation is a relatively novel phenomenon in international law. Its development is directly linked to the rapid increase in the number of states following decolonization that fundamentally changed the nature of the 'international community'.[4] Indeed, countries newly recognized as states often shared a common past of colonial exploitation and a relatively similar socio-economic profile, very different from other countries having been recognized as states for much longer.

The development of differentiation can be explained from two different perspectives. First, differential treatment is based on a recognition that deep inequalities must be addressed to legitimise the international legal order. Equity is at the root of measures that seek to foster substantive equality in a world structured around formal equality.[5] Second, differentiation is the product of the convergence of different interests in international negotiations that offer a basis for diverging from the usual reciprocity of obligations.[6] In international environmental law, differential treatment reflects equity considerations, as well as the necessity for the North to offer suitable conditions to countries of the South to entice them to join environmental regimes on issues of global importance.[7]

Structurally, differential treatment constitutes a recognition of the limits of a system based on the fiction of legal equality between states, which are not otherwise equal in practice. This fiction is at the root of the traditional structure of international law based on reciprocity of commitments by all state parties to a given treaty.[8] Differentiation thus implies rethinking the structure of these rules and moving away from the idea of strict reciprocity.[9] The rationale for introducing non-reciprocal norms is to foster a reduction in inequality, prevent an increase in inequality and more generally ensure results that are more just than without differentiation.

Differential treatment seeks to foster substantive equality where formal equality does not lead to adequate results. Different conceptions of justice can provide a justification for differential treatment in international environmental law. The first is corrective justice that leads to a focus on the differential historical contributions of states to environmental degradation. The most debated case in this context is climate change since there is a direct correlation between greenhouse gas emissions over the past couple of centuries and present levels of per capita

4 eg Dino Kritsiotis, 'Imagining the International Community' *European Journal of International Law,* 13/4 (2002): 961.

5 On equity, see Scholtz in this Handbook.

6 eg Philippe Cullet, 'Differential Treatment in International Law: Towards a new Paradigm of Inter-State Relations' *European Journal of International Law,* 10 (1999): 549, 551.

7 eg Anne Gallagher, 'The "New" Montreal Protocol and the Future of International Law for the Protection of the Global Environment' *Houston Journal of International Law,* 14 (1992): 267, 311.

8 Daniel Barstow Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms' *Colorado Journal of International Environmental Law & Policy*, 1 (1990): 69.

9 eg Emmanuel Decaux, *La réciprocité en droit international* (Librairie générale de droit et de jurisprudence 1980).

economic development.[10] Yet, while differential treatment may be given strong roots in corrective justice, the North has rejected an understanding of the principle of CBDR that includes a historical dimension.[11]

The second conception of justice at the root of differentiation is distributive justice. This focuses on the need to address existing inequalities in human development. In a context where the legal framework equates justice with formal equality, distributive justice reminds us that equality of opportunities is not sufficient, and that equality of results matters.[12] Consequently, like cases should be treated alike and dissimilarly situated people should be treated dissimilarly.[13] In the Aristotelian formulation, dissimilar situations need to be addressed in ways that take into account existing differences,[14] something that has been accepted for decades in international law.[15] Internationally, in view of prevailing inequalities, it is imperative to take measures to address such inequalities. Yet, measures taken to address them, such as economic redistribution of resources has remained contentious in the North that has been shying away from recognizing any entitlement linked to justice claims for such redistribution.[16] Indeed, even Rawls whose theory of justice had given a more humane touch to liberal philosophy,[17] finds that once the duty of assistance at the international level is satisfied and all people have working liberal or decent governments, 'there is again no reason to narrow the gap between the average wealth of different peoples'.[18] Stone argues in a similar manner when he queries in the context of an environmental discussion why redistribution should be based on 'exempting the Poor from efficient environmental and resource standards – giving them a 'right to pollute' – rather than through a more straightforward step-up in aid and development assistance?[19]

The points made by Rawls and Stone do not address the need for the international legal framework to retain or gain legitimacy in the eyes of the majority of the world's countries and people. Asserting that inequalities need no further attention once a framework of formal legal equality has been established is an inappropriate way to address the world's reality. Success should be measured by the way in which desired environmental and social outcomes are reached.[20] In this context, differential treatment offers a basis to reach fair outcomes in the context of significant inequalities among states. This must be expressed first of all through measures of intra-generational equity. At the same time, the needs of future generations must also be taken into account through measures of inter-generational equity.[21]

---

10 Concerning corrective justice, eg Eric A Posner & Cass R Sunstein, 'Climate Change Justice' *Georgetown Law Journal,* 96 (2008): 1565.

11 Kristin Bartenstein, 'De Stockholm à Copenhague – Genèse et évolution des responsabilités communes mais différenciées dans le droit international de l'environnement' *McGill Law Journal*, 56/1 (2010): 177, 187.

12 eg Francis Fukuyama, *The Origins of Political Order – From Prehuman Times to the French Revolution* (Profile Books 2012).

13 HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1994), 159.

14 Aristotle, *The Nicomachean Ethics* (trans. David Ross, revised by JL Ackrill and JO Urmson, OUP 1991).

15 *South West Africa, Second Phase* (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 6, 306.

16 eg Duncan French, 'Global Justice and the (Ir)relevance of Indeterminacy' *Chinese Journal of International Law,* 8/3 (2009): 593, 608.

17 John Rawls, *A Theory of Justice* (Clarendon 1972).

18 John Rawls, *The Law of Peoples* (Harvard University Press 1999), 114.

19 Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' *American Journal International Law*, 98 (2004): 276, 293-4.

20 Daniel M Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' *American Journal International Law*, 93 (1999): 596, 611.

21 eg Halina Ward, 'Beyond the Short Term: Legal and Institutional Space for Future Generations in Global Governance' *Yearbook of International Environmental Law*, 22/1 (2011): 3.

B. Development

The first step in the development of differential treatment in international law came through the consideration of equity as a relevant factor in the application of reciprocal rules by international tribunals. This gave judges some flexibility in the interpretation of rules to ensure a just and fair result.[22] Judicial equity is premised on the need to ensure that legally correct decisions are not regarded as unjust.[23] It provides an important tool to address individual cases but does not offer a solution where structural inequalities among formally equal states imply that the application of reciprocal norms is likely to lead to results considered generally illegitimate by a majority of states.

It is such concerns about the legitimacy of reciprocal rules that led to the introduction of preferential treatment in the years following decolonization. The lack of adequacy between legal and economic equality led to calls for special measures to assist developing countries to allow them to overcome their difficult colonial legacy.[24] Measures were, for instance, taken in the context of the General Agreement on Tariffs and Trade.[25] The high point of the push for preferential treatment was attained in the call for a New International Economic Order (NIEO) in the 1970s.[26] This ebbed rapidly and by the time the World Trade Organization (WTO) was set up in 1995, trade rules were largely premised on abandoning preferential treatment in favour of a return to reciprocity.[27]

The decline of preferences in international economic law was largely parallel to the development of differential treatment in international environmental law. Both preferential and differential treatment are based on the idea that reciprocity of obligations is not necessarily the best way to structure legal obligations among very different states. At the same time, differential treatment is distinct insofar as it relies less on unilateral claims of the South to redistribution than preferential treatment.

Differential treatment in international environmental law grew in part around the distinct interests of the South and North that were brought together by a combination of factors. On the one hand, the South showed limited interest in some proposed global environmental regimes in a context where these did not coincide with their own domestic environmental or development priorities. On the other hand, the North found itself in the position of seeking to adopt measures to address global problems that had been mostly caused by industrial development in the North. The South reacted by articulating equity claims that were relatively similar to the ones made relatively unsuccessfully in international economic law.[28] Yet, in this case, they found themselves in a stronger bargaining position, as confirmed in the case of the

---

22 eg Anastasios Gourgourinis, 'Delineating the Normativity of Equity in International Law' *International Community Law Review,* 11 (2009): 327.

23 eg Michael Akehurst, 'Equity and General Principles of Law' *International & Comparative Law Quarterly*, 25/4 (1976): 801.

24 Ahmed Mahiou, 'Le droit au développement', in International Law Commission (ed), *International Law on the Eve of the 21st Century* (United Nations 1997) 217.

25 eg General Agreement on Tariffs and Trade, Geneva, 31 October 1947, 55 UNTS 187 (1950), art XXXVI.3 & 8.

26 UNGA Res 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974, UN Doc A/RES/3201 (S-VI).

27 eg Anastasios Gourgourinis, 'Common but Differentiated Responsibilities in Transnational Climate Change Governance and the WTO' in Panagiotis Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 31, 40.

28 eg Jerzy Makarczyk, *Principles of a New International Economic Order* (Nijhoff 1988).

Montreal Protocol where India and China managed to premise their ratification on additional funds.[29] This explains in part the rapid development of the various forms of differential treatment that exist today in international environmental law.

III. MANIFESTATIONS OF DIFFERENTIATION IN INTERNATIONAL ENVIRONMENTAL LAW

A. Differentiation and the principle of common but differentiated responsibilities (CBDR)

Equity concerns have been reflected in international environmental law since the 1970s. The Stockholm Declaration included references to equity, including a recognition of the importance of inter-generational equity, linking 'under-development' and the necessity to provide financial and technical aid, and calling on the North to ensure that environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the South.[30]

By the Earth Summit in 1992, references to differentiation had become much more specific. The Rio Declaration linked the realization of the right to development to equitably meeting the needs of present and future generations, and recognized the necessity to give special priority to least developed countries and the most environmentally vulnerable countries.[31] Crucially, it included principle 7 that has become the central principle reflecting the need for differentiation in international environmental law.[32] It has since then been integrated directly and indirectly in a variety of legal instruments. This includes restatements in preambles, including in the Stockholm and Minamata conventions,[33] as well as in programmatic instruments.[34] It has also been integrated in treaty provisions, notably in the FCCC under a formulation that links CBDR and 'respective capabilities'.[35] In some other cases, there may be no restatement of the principle verbatim but some provisions directly reflect it, as exemplified in situations where developing countries' implementation of their commitments is made conditional on developed countries' effective implementation of their own financial and technology transfer commitments.[36] In some instances, the principle of CBDR has also been used to guide judicial reasoning, as was the case in the WTO shrimp turtle dispute.[37]

---

29 Gallagher, 'Montreal Protocol' (n 7) 301.

30 Declaration of the UN Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc A/CONF.48/14/Rev.1, principles 2, 9, 20.

31 Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc A/CONF.151/26/Rev. 1 (Vol. I), Annex II, principles 2 & 6.

32 ibid, principle 7.

33 Stockholm Convention on Persistent Organic Pollutants, Stockholm, 23 May 2001, 2256 UNTS 119 (Stockholm Convention) and Minamata Convention on Mercury, Kumamoto, 10 October 2013 (Minamata Convention).

34 UNGA Res 70/1 (n 2) Declaration, para 12.

35 UN Framework Convention on Climate Change, New York, 9 May 1992, 1771 UNTS 107, art 3.

36 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79 (CBD), art 20(4); Stockholm Convention (n 33) art 13(4).

37 *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* (Report of the Panel) WTO Doc WT/DS58/RW (2001), para 7(2).

On the whole, CBDR is well enshrined in the structure of international environmental law. There is, however, no specific reference to a necessity to differentiate at the level of legal commitments in the basic principles of international environmental law. Thus, while principle 7 recognizes differences between the North and the South, such as in terms of contributions to environmental degradation, it does not go as far as imposing legal obligations of redistribution on the North. Indeed, the United States specifically indicated that it did not believe principle 7 could be interpreted as creating any obligation or liability for the North.[38] Commentators often take a similar line and argue against the existence of binding commitments of differentiation to be borne by the North.[39]

B. Differential norms

Differentiation has been introduced in different ways in international environmental treaties to reflect the different situation of countries of the South and North. At the level of treaty norms, the most frequent form of differentiation is contextualization. In this case, a typical binding reciprocal obligation may be qualified by a clause, such as 'in accordance with its particular conditions and capabilities'.[40] This reflects a desire to highlight the seriousness of the commitment and a recognition that member states do not have the same capacity to implement their obligations. This contextualization is a recurring feature in environmental agreements.

Differentiation is also enshrined in the obligations themselves, such as in the case where different groups of states take on different commitments. The Kyoto Protocol where only the North took on greenhouse gas emission reduction commitments is an example.[41] In the case of the Desertification Convention differentiation is implemented in such a way that some commitments are only borne by the North.[42]

Overall, differentiation has been organized around groups of states, mostly developed and developing countries. This has been a compromise from the start since two large groups of states cannot effectively capture the diversity of situations within each of them. At the same time, it made negotiations slightly easier by structuring obligations around a well-known categorization, albeit one that is built around an economic development classification rather than an environmental one. In this context, the Paris Agreement breaks new ground insofar as it introduces individual differentiation in an international environmental legal instrument. Here, Nationally Determined Contributions (NDCs) introduce self-differentiation whereby each country determines its own level of ambition.[43] In addition, differentiation emerges from individual commitments rather than through collective bargaining. This can be seen as

---

38 Report of the UN Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), UN Doc A/CONF.151/26 (Vol. IV) (1992).

39 eg Jean-Maurice Arbour, 'La normativité du principe des responsabilités communes mais différenciées' *Cahiers de Droit*, 55/1 (2014): 33, 37; Thomas Deleuil, 'The Common but Differentiated Responsibilities Principle' *Review of European Community & International Environmental Law*, 21/3 (2012): 271; Stone, 'Common but Differentiated' (n 19) 299.

40 CBD (n 36) art 6.

41 Kyoto Protocol to the UN Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 148, art 3.

42 Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 17 June 1994, 1954 UNTS 3, art 6.

43 Paris Agreement, Paris, 13 December 2015, UN Doc. FCCC/CP/2015/10/Add.1, art 4(2). See also Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' *International & Comparative Law Quarterly,* 65/2 (2016): 493; Christina Voigt and Felipe Ferreira, 'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' *Transnational Environmental Law,* 5/2 (2016) 285.

responding to the long-standing call for more granular differentiation that is able to distinguish, for instance, the situation of a landlocked least developed country with that of a BASIC country. At the same time, it can be criticized for restricting the ambition of the international community in tackling crucial environmental issues, since self-differentiation essentially reflects the inability to agree on binding targets at the international level.

Differential commitments introduced above are among the most significant ways in which traditional international law is challenged by the principle of CBDR. At the same time, in a number of treaties, alternative ways of reflecting CBDR have been found. Delayed implementation of certain commitments by developing countries is one of the techniques used in this context. For instance, the Montreal Protocol offered developing countries with a sufficiently low level of consumption of the controlled substances a ten-year grace period.[44] Delayed implementation ensures that the same environmental standards apply to all countries but reflects the fact that some countries need a longer adaptation period. This is also linked directly to financial and technology transfer commitments highlighted in the next section.

C. Differentiation at the implementation level

Differential norms reflect the need to give provide developing countries leeway in terms of their commitments in environmental agreements, whether because of their diminished responsibility in causing the problem or limited capacity to address it. This led to the development of new forms of differentiation wherein all countries take similar commitments but developing countries have their compliance subsidized through implementation aid and technology transfer.

This has in fact become one of the most visible forms of differentiation.[45] Most treaties adopted since the early 1990s include provisions concerning implementation aid and technology transfer.[46] This was linked to the progressive recognition that a growing number of treaties with an increasing number of Parties did not necessarily translate into effective implementation, in part because many states did not have the necessary financial, technological or administrative capacity. The response was to include an aid component to environmental treaties.

IV. CRITICISMS OF DIFFERENTIATION AND PROGRESSIVE EVOLUTION

A. Critiques

Differential treatment has been subjected to various forms of criticism, ranging from conceptual to practical aspects. The first criticism has been that differentiation affects the very structure of international law because it threatens the binding character of legal norms.[47] This is particularly targeted at contextual norms that are said to dilute the certainty offered by

---

44 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 29, art 5. See also Stockholm Convention (n 33) art 4(7).

45 eg Sophie Lavallée, 'Responsabilités communes mais différenciées et protection internationale de l'environnement: une assistance financière en quête de solidarité?' *Cahiers de Droit*, 55/1 (2014): 139.

46 eg CBD (n 36) art 20 and Minamata Convention (n 33) art 14.

47 cf Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' *Yearbook of International Environmental Law*, 1 (1990): 3, 9.

reciprocal rules. Indeed, contextualization is specifically meant to provide a degree of flexibility in the implementation of international commitments. This criticism is, however, not necessarily specific to differential norms, as international environmental agreements are regularly accused of being soft because the provisions they contain are drafted in relatively open-ended terms. While stricter environmental norms would be advantageous for the environment, the reality of international environmental law where enforcement options are limited and implementation depends in large part on states' willingness to comply makes the usefulness of the comparison with other branches of international law, such as trade law, unhelpful.

Differential treatment has also been criticized for weakening the environmental content of international agreements because it allows the South to do less than the North on internationally agreed commitments. More specifically, it has been suggested that differential treatment does not necessarily provide the basis for agreements favourable to sustainable development.[48] In this way, it is the presence of differentiation that is seen as the root cause of the dilution of environmental measures. Differentiation thus appears to be a factor limiting the potential ideal environmental outcome or a factor that needs to be constrained to ensure it does not affect the environmental goals of a treaty.

In fact, differentiation is an intrinsic part of the concept of sustainable development, as reflected, for instance, in the Rio Declaration. In other words, there cannot be sustainable development at the international level without differentiation, something that international environmental treaties have confirmed over the past few decades. An (environmentally) successful treaty is one whose environmental obligations are differentiated. In fact, differentiation is at the root of the consensus position that is reflected in the final negotiated text. As a result, it does not affect the environmental content of a treaty but is an intrinsic part of its development. Indeed, none of the main international treaties adopted since the 1980s would have been widely ratified if they did not include a differential component.[49] In other words, differential treatment needs to be seen against the baseline of the absence of agreement rather than against the ideal treaty that would do all that could be expected in environmental terms. There is in any case no ideal treaty since all environmental treaties are based on a compromise between conservation and use.

B. Evolving differential techniques

Differentiation has been strongly linked with measures benefitting the South as a single category of 'developing' countries. This remains the central modus operandi of environmental agreements. At the same time, the limitation of this division has been addressed to a certain extent in some contexts.

Firstly, a limited number of environmental factors have been taken into account in framing contextual norms. This includes vulnerability in the Climate Change Convention, which acts as a subsidiary category within the broader group of developing countries.[50] The Convention uses this categorization to single out 'particularly vulnerable' developing countries in terms of the obligation put on developed countries to assist in meeting the costs of adaptation to the

48 cf Yves Le Bouthillier, 'Des constats et des questions sur le principe des responsabilités communes mais différenciées' *Cahiers de Droit*, 55/1 (2014): 315, 317-8.

49 eg Gallagher, 'Montreal Protocol' (n 7) 356.

50 FCCC (n 35) art 3(2).

adverse effects of climate change.[51] In addition, the Convention also recognizes that certain groups of developing countries have special needs and singles out, for instance, the needs and concerns of small-island countries, countries with low-lying coastal areas, countries with areas prone to natural disasters or areas prone to desertification.[52] At the same time, the climate change example confirms that introducing environmental factors as a basis for differential measures does not guarantee fair results. Indeed, one of the few provisions of the FCCC specifically mentioning vulnerability singles out developing countries 'with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change' and further specifies that this applies in particular to countries highly dependent on production, processing and export, and/or consumption of fossil fuels.[53] This seems to give OPEC countries that are quite economically resilient a similar claim to vulnerability as low-lying and other small island countries directly affected by sea-level and is thus suspect in terms of fairness.

Secondly, environmental factors have been used in setting up voting mechanisms, as in the case of the International Tropical Timber Agreement where countries are grouped according to their importance in the production and the use of timber, with exporters and importers each holding 1000 votes.[54] Among the producers, 40 per cent of the votes are distributed equally among Africa, Asia-Pacific and Latin America, and then redistributed equally among each producing member in the region. Thirty per cent of the votes are distributed in accordance with the respective shares of the total tropical forest resources of all producing members. Finally, the remaining 30 per cent is allocated in proportion to the producing members' respective shares in tropical timber trade.[55] This arrangement is significant not only because it gives equal power to producing and consuming nations but also because it specifically allocates part of the voting power in accordance with producing countries' respective shares of forest resources.

Another example is the decision-making structure of the regime for the exploitation of deep seabed minerals put in place under the Law of the Sea Convention. The composition of the Council, which is the executive organ of the Authority, reflects partly the share of exploitable minerals consumed by each country, the importance of investments made for the conduct of activities in the Area, the importance of these minerals as export products, the necessity to take into account the situation of developing countries and partly the principle of equitable geographical representation.[56]

Thirdly, it is possible to consider doing away with categories altogether and differentiate on an individual basis since there is a relatively small number of states overall. This is what the UN has been doing for many years in assessing member states' contributions to the organization according to a scale of assessment where each state is classified mainly according to its capacity to pay.[57] This has not been implemented in environmental agreements but self-differentiation under the Paris Agreement could be seen as a step towards a new type of differential norms. In fact, some commentators have positively assessed the weak form of differentiation enshrined in the NDCs as a move ahead of a 'bipolar, rigid and static type of differentiation' in the Kyoto

51 ibid art 4(4).

52 ibid art 4(8).

53 ibid art 4(10).

54 International Tropical Timber Agreement, Geneva, 27 January 2006, UN Doc TD/TIMBER.3/12, art 10.

55 ibid.

56 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994, 1836 UNTS 3, art 3.15.

57 UNGA Res 73/271, Scale of Assessments for the Apportionment of the Expenses of the United Nations, 22 December 2018, UN Doc A/RES/73/271.

Protocol.[58] This is certainly the first time that a major environmental agreement does this and it reflects a lack of ambition by negotiating states rather than a step forward in terms of the measures proposed. It may be that the same will be repeated in a context where there seems to be limited appetite at the international level for strong environmental measures and where any agreement ends up being identified as successful in the face of the no-agreement option. At the same time, ambition-less environmental regulation is not an option in a world facing an environmental crisis that may end up destroying the very bases of human civilisation. Negotiated differentiation thus remains a central part of any future answers to this mounting challenge.

Overall, the past decade has witnessed a weakening of the willingness of states negotiating multilateral environmental agreements to grant the South the kind of preferential measures granted in earlier decades. This is no doubt linked in part to the fast rising economic and political clout of a limited number of large developing countries. This is in particular the case of China that is still classified as a developing country but is at the same time the world's worst contributor to greenhouse gas emissions and one of the largest economies. This explains the growing unwillingness of the North to grant concessions to all developing countries indiscriminately and is reflected, for instance, in self-differentiation in the Paris Agreement. At the same time, while the situation of large and economically successful countries grabs the headlines, this does not reflect the reality of the majority of developing countries whose relative position has not significantly improved over the past few decades. In addition, fast economic growth does not necessarily translate in significant human development gains for the majority of poor people in those countries. As a result, it remains and will remain extremely difficult for the North to reject the principle of CBDR for many years. This is reflected in the re-assertion of the principle in various soft law instruments, as well as new conventions like the Minamata Convention.

V. ONGOING NEED FOR DIFFERENTIATION

A. Need to maintain some form of differentiation

Differential treatment has often been seen as an acceptable mechanism to redress inequalities, but only for a limited period of time since the aim is to ensure the swift return to a legal order based on legal equality and reciprocal obligations.[59] The rapid economic growth of BASIC countries since the beginning of the century has unsurprisingly led to calls for restricting or abolishing differential treatment based on the argument that these countries are now resilient enough and must bear the burden of their fast increasing contribution to environmental degradation.[60]

Yet, the majority of countries of the South, in particular least developed countries, are comparatively no better off than they were at the beginning of the 1990s. A longer term comparison confirms this point. Thus, the share of world GDP of sub-Saharan Africa may have grown from barely 1 percent in the early 1970s to nearly 2 percent in 2017 but this remains

---

58 Sandrine Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' *Review of European Comparative & International Environmental Law*, 25/2 (2016): 151, 154.

59 eg Yoshiro Matsui, 'Some Aspects of the Principle of "Common but Differentiated Responsibilities"' *International Environmental Agreements: Politics, Law and Economics,* 2/2 (2002): 151.

60 cf John Copeland Nagle, 'How Much Should China Pollute?' *Vermont Journal of Environmental Law*, 12 (2011): 591.

abysmally low.[61] In terms of the Human Development Index (HDI), there has thankfully been a faster progression of the HDI in countries at the bottom of the scale. Yet, while countries with low human development saw their HDI increase from 0.345 in 1980 to 0.504 in 2017, countries with very high human development also saw their HDI increase significantly from 0.757 to 0.894 during the same period.[62]

There is thus neither reason to celebrate the progression witnessed in the South over the past few decades nor reason to be concerned by a situation where inequalities between the North and the South would be so reduced that the basis for differential treatment would be redundant. The idea that differentiation must be dynamically interpreted is a valid proposition,[63] but this must take place in a context where structural inequalities show signs of decreasing significantly. At present, the moral imperative for differential treatment remains as strong as it was a couple of decades ago. In fact, the need to 'combat inequalities' is one of the specific commitments taken by the UN summit for the adoption of the post-2015 development agenda.[64] Overall, inequalities in levels of human development between the North and South have only diminished to a limited extent over the past couple of decades, particularly between the North and small developing and least developing countries. This clearly confirms the relevance of differentiation.

Beyond the principled justification for differentiation, there are also strong pragmatic reasons that confirm the continued relevance of differential treatment. International environmental law is different from, for instance, international trade law in that its effectiveness depends not on the extent of enforcement against defaulting states but rather on the extent to which states willingly comply with the norms they adopt. The introduction of non-compliance procedures is a testament to this approach that prods states into compliance rather than punishes them for non-compliance. Differential treatment is part of this culture of incentives that seeks to ensure participation of all states regardless of their contribution to environmental harm and to provide a framework that facilitates implementation of commitments taken by all states, including those with limited administrative, financial or technical capacity.

B. Broadening the bases for and forms of differentiation

Differentiation has been based primarily on a simple categorization framed around economic factors. Initially, the developed and developing country dichotomy was used for convenience's sake and because in some cases there was a strong correlation between levels of economic development and contribution to environmental damage. This was, for instance, the case in relation to generation of hazardous wastes and contribution to greenhouse gas emissions. Yet, this is problematic because economic development tends to overshadow environmental debates. This has been confirmed in the case of the evolving understanding of sustainable development meant to provide a balance between environmental, social and economic elements where economic growth has progressively become more important, as reflected in the introduction of the concept of green economy at the Rio+20 summit. As long as differentiation

61 Economic Commission for Africa, Africa in the Global Economy: Issues of Trade and Development for Africa (2000) and World Bank, World Development Indicators, 2017 figures <http://wdi.worldbank.org/table/WV.1>.

62 UNDP, Human Development Report 2014 (UNDP, 2014) 167; UNDP, Human Development Indices and Indicators – 2018 Statistical Update (UNDP, 2018) 29.

63 cf Sandrine Maljean-Dubois & Pilar Moraga Sariego, 'Le principe des responsabilités communes mais différenciées dans le régime international du climat' *Cahiers de Droit*, 55/1 (2014): 83, 104.

64 UNGA Res 70/1 (n 2) Declaration, para 3.

is structured around economic categories, this will contribute to undermining the environmental content of the measures taken. It is thus crucial to rethink the categories in environmental terms. Even if the ranking may not be significantly different, it will make a qualitative difference by giving more weight to environmental factors.

There is thus a need to move towards differentiation based primarily on an environmental and social assessment that will identify countries' vulnerability and resilience to environmental problems. This will have several advantages. First, it will help bring back the environmental agenda to the centre of environmental treaties. This is, for instance, a concern in the climate change regime where debates have focused on the extent to which countries should be allowed to pollute the atmosphere. This is inappropriate and climate change legal instruments should rather use the precautionary principle as a basis for differentiated obligations to take precautionary measures to mitigate and adapt to climate change. This would have the advantage of building obligations around each country reducing its impact on the global environment rather than on a grandfathering basis.

Second, using social and environmental indicators as the basis for differentiation will provide a much better basis for differentiating between countries. There is, for instance, little in common between China and Malawi in terms of their respective responsibilities to causing global environmental harm, their resilience to harm and their capacity to address the consequences of environmental harm. Similarly, while Fiji is, like China, a country with high human development,[65] its contribution and needs in the face of climate change and sea-level rise as a small-island state is not at all comparable to China's.

Differential treatment also needs to be adapted to the nature of the environmental challenges we face. At present, it is organized around a territorial understanding of the world that reflects the structure of international law around sovereign legal entities. A complete rethinking is needed that will take us beyond the idea of ownership of environmental resources by individual states to an understanding of certain resources being in the custody of the whole of humankind.[66] Under 'common heritage' status,[67] resources must be managed jointly and the benefits of their conservation and use must also be enjoyed jointly, in a manner that transcends national self-interest. The principle of common heritage is an appropriate basis for addressing global environmental issues from a redistributive perspective. Starting points could be made with resources that are already under some form of joint management, such as Antarctic water resources.[68]

VI. CONCLUSION

Differential treatment is a central conceptual pillar of international environmental law. This is reflected in the fact that all multilateral environmental agreements have a strong South-North dimension structured around the different situations, responsibilities and capabilities of the two groups of states. The principle of CBDR may not have become a principle of customary

65 UNDP, 'Human Development Indices' (n 62) 27.

66 Thomas M Franck, 'Fairness in the International Legal and Institutional System' *Collected Courses of the Hague Academy of International Law,* 240 (1993): 9, 92.

67 eg Stephen Stec, 'Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment' *International Community Law Review*, 12/3 (2010) 361.

68 eg Jochen Sohnle, 'Le principe des responsabilités communes mais différenciées dans les instruments conventionnels relatifs aux eaux douces internationales – Cherchez l'intrus!' *Cahiers de Droit*, 55/1 (2014): 221, 251.

international law in itself but the equity dimension of international environmental law constitutes an intrinsic part of this branch of international law. This is why debates concerning the impacts of differential treatment on the certainty of the legal order are not helpful insofar as they distract us from the centrality of equity in international environmental law. The question is not whether international law is threatened by non-reciprocity but rather whether international environmental law would have ever acquired its breadth and depth without differentiation. The answer is clearly negative since it is an inseparable part of the deals made by negotiators when adopting new legal instruments and central to implementation and compliance, for instance.

At the same time, there has been increasing resistance to differentiation, particularly in view of the fact that some countries still classified as developing countries in environmental agreements are now among the main contributors to the environmental problems that multilateral agreements address. This explains the weakening of differentiation in the Paris Agreement.[69] At the same time, the Paris Agreement also confirms that differentiation cannot be set aside, even if a distinct version of the principle has to be introduced.[70] Indeed, in this case, differentiation remains central, for instance, at the level of implementation.

Overall, the continuing inequalities among countries that have structured international relations since decolonization still constitute the basis for any further law making because the structural gap between the majority of developing countries and developed countries remains immense. The socio-economic gaps will not be bridged for another few decades at least. As a result, even if equity measures are assumed to be temporary until such time as inequalities have disappeared, they will remain a central part of international environmental law for the foreseeable future.[71] This is in fact called for by the broader principle of solidarity among states that requires states to take measures to address inequalities, including through differentiation.[72] This was confirmed in 2015 in the context of the adoption of the development agenda that calls for a global partnership for sustainable development 'based on a spirit of strengthened global solidarity'.[73] It is within this context that differentiation constitutes one of important tools for addressing the shortcomings of a system based on formal equality and to bring about substantive equality.

VII. BIBLIOGRAPHY

Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate 2003).

Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon 1995).

Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements* (Kluwer Law International 2009).

Lavanya Rajamani, *Differential Treatment in International Environmental Law* (OUP 2006).

69 Maljean-Dubois, 'The Paris Agreement' (n 58).

70 Rajamani, 'Ambition and Differentiation' (n 43) 509.

71 cf Kristin Bartenstein, 'L'opérationnalisation du principe des responsabilités communes mais différenciées repensée: plaidoyer pour une démarche ancrée dans l'équité' *Cahiers de Droit*, 55/1 (2014): 113, 127.

72 cf Ronald St John McDonald, 'The Principle of Solidarity in Public International Law' in Christian Dominicé *et al* (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing 1993) 275.

73 UNGA Res 70/1 (n 2) section 'Partnership'.