At the dawn of the new millennium this, if nothing else, is clear, the earth’s inhabitants have heavily overdrawn on limited natural resources and continue to do so at a steady rate. The legacy and continuing practice of environmental exploitation has unleashed forces of destruction, any impact on which will have, of necessity, to be driven by fundamental changes in global resource use, development patterns, and lifestyle options. It is critical that the community of sovereign states arrives at a common environmental goal and participates effectively in its achievement. Yet the community of sovereign states, confronted as it is with the increasing disparities between and within nations and a worsening of poverty, faces significant hurdles in crafting a common platform for environmental action. Different actors in the community of sovereign states derive their priorities and compulsions from divergent historical, economic, and political realities. The integration of countries from these divergent spaces into international environmental regimes is the central challenge in the modern era of international environmental dialogue.

Of the techniques available to integrate countries from divergent spaces into international environmental regimes, differential treatment is the most effective as well as the most controversial. Differential treatment refers to the use of norms that provide different, presumably more advantageous, treatment to some states. Real differences exist between states: historic, economic, political, and others. Norms of differential treatment recognize and respond to these real differences between states by instituting different standards for different states or groups of states. This book explores the value of differential treatment in integrating developing countries into international environmental regimes. It analyses the anatomy of differential treatment in environmental treaties, the doctrinal basis

4 Various techniques exist. For instance, some treaties encourage participation by creating disincentives for non-participation. They contain provisions prohibiting or limiting trade with non-parties.
for and boundaries of differential treatment in international environmental law, and the application of differential treatment in the climate regime.

I. Sovereign Equality in a World of Unequal States

Differential treatment, in tailoring treaty obligations to differences, might appear to be a derogation of the doctrine of sovereign equality of states, a constitutive element of the international legal discipline. However, it is the exercise of equal sovereignties in a world of unequal states that results in unequal rights and duties.

The traditional account of sovereign equality of states disregards the manifest practical and political inequality between states. In the words of Emerich de Vattel, ‘[a] dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom’,\(^5\) and therefore, ‘[a]ll States, whether great or small, have equal rights and duties in matters of international law.’\(^6\) It follows logically from the notion of sovereign equality that consent reigns supreme in international law.\(^7\) It is for each state to determine, first, what will in future be the content of international law by which it is bound, and, second, what the content of international law is in a given case.\(^8\) As the Permanent Court of Justice observed:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.\(^9\)

A state can, by treaty, therefore agree to be bound by rules that deny it treatment on par with other states or that grant special treatment to other states. The politics of international relations might dictate that some states accept less than equal treatment or that some states grant special treatment to others. The result is the existence in international law of a wide array of differing treaty rights and duties of


\(^6\) Article 2(1) UN Charter 1945 declares the UN to be based on the principle of sovereign equality. Article 78 reiterates that the relationship among Members of the United Nations shall be based on the respect for the principle of sovereign equality. For a commentary on these articles, see generally The Charter of the United Nations: A Commentary (Bruno Simma ed. 2nd edn. 2002).

\(^7\) The Friendly Relations Declaration, GA Res. 2625 (1970), elaborates on this principle and posits that all states have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political, or other nature.

\(^8\) Pitt Cobbett, Cases and Opinions on International Law (1909–13), Pt I, 50.

\(^9\) Georg Schwarzenberger, Power Politics (1964), 92.


\(^9\) The Case of the S.S. ‘Lotus’ (France v Turkey), 1927 PCIJ Rep, Series A, No. 9, at 18.
states. As Colin Warbrick observes, ‘[i]t is as clearly wrong to speak of the “equal rights and duties” of states as it is to speak of their material equality. It is the exercise of their equal sovereignties which has resulted in their unequal rights and duties.’\textsuperscript{10} The exercise of equal sovereignties (resulting in unequal rights and duties) is fashioned by a series of historical, political, economic, and ideological factors, which serve to contextualize differential treatment in international law.

(A) The Legacy of the Colonial Encounter and the Dynamics of Difference

The political dynamic in international society is shaped by the history and disempowering impact of the colonial encounter, as well as the existence of manifest and increasing inequalities between states. Notwithstanding liberal attempts to relegate colonialism and the imperial project to apologetic footnotes in the history of international law, they have a profound impact on the present. The existence of manifest and seemingly enduring inequalities between states is at least in part a product of the colonial encounter. Not just because the central mission of colonialism—the conquest of non-European people—was designed to establish and maintain political and economic superiority, but because it resulted in stripping the governed of legal personality and excluding them from playing a creative role in the development of international law in the colonial period.\textsuperscript{11} This exclusion, and indeed the complicity of international law in the colonial enterprise, led to rules crafted to facilitate and further economic exploitation, not limit it. Decolonization and the extension of sovereign status to the formerly colonized did not obliterate all vestiges of international law’s historical complicity with imperialism. Rather, as Antony Anghie so persuasively argues, the colonial origins of international law are re-enacted whenever the discipline attempts to renew or reform itself.\textsuperscript{12} The sceptical reception and eventual rejection of the New International Economic Order on the grounds that it was without legal status, as tested against benchmarks the developing world played little role in formulating, serves to illustrate the participation of international law in the neo-colonial project.\textsuperscript{13}

At the turn of the twentieth century there were 34 recognized states,\textsuperscript{14} today there are over 192. Membership grew from a small group of European nations


\textsuperscript{11} See R. P. Anand, New States and International Law (1972), 21 (noting that the new states were excluded, having lost their legal personality, from playing a role in the development of international law at the most creative period of its history).

\textsuperscript{12} See Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005), 313.


with a common Christian ethos to encompass all humanity, a humanity comprising peoples of different religious, ethical, and political persuasions, and uneven material conditions. Membership grew to encompass both the colonizers and the formerly colonized, and, the ‘civilized’ and the ‘uncivilized’. These categories translated into new ones in the process of decolonization. The newly liberated sovereign states of Latin America, Asia, and Africa emerging from the shadow of colonialism took on as their central and defining preoccupation the mission of development, a mission they could only achieve by changing those rules (and/or premises) of international law which permitted and perpetuated imperialism. The gap between the colonizers and the formerly colonized thus came to be located in economic distinctions between the developed and developing, and the economic distinctions between the developed and developing world are stark and growing. South African President Thabo Mbeki, calling for an end to what he termed ‘global apartheid’, characterized humanity as comprising of ‘islands of wealth, surrounded by a sea of poverty’. These disparities in living conditions, set against the backdrop of (and at least in part due to) the colonial encounter, have given rise to rents in the social, economic, and political fabric of the international community, and therefore to different groupings of states and regional systems of international law, negotiating blocs, and interest-based coalitions. Norms of differential treatment, and indeed, negotiations for differential status occur in this context and between these divergent interest-based groups.

(B) The Challenge of Globalization

The political dynamic in the international society is also influenced by a series of recent shifts in the economic and political landscape. The collapse of the socialist regimes, the end of the Cold War, the increased incidence of terrorism and counter-terrorism, the growing enchantment with conservatism, and the rise of unilateralism, to name but a few, have given rise to an international society

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16 See supra note 12 at 203–4. 17 ibid 204.
19 See infra note 27.
21 See supra note 15. Friedmann refers to the European Community as furnishing a model of integration, but other examples, albeit of a different character include the Non-Aligned Movement (NAM), the G-77 and the G-8.
24 From arms control law to environmental and human rights law, few areas of international law remain unaffected by unilateralism, in particular by the United States. Significant international
torn apart by conflicting ideologies and impulses. These shifts have occurred in tandem with critical changes in the world’s economic governance architecture. The formation of the World Trade Organization (WTO), the ascendancy of trade liberalization, the increasing currency of corporate-led globalization, and the spread of communication technology have altered the nature and scope of human endeavour, its impact on the planet and consequent social evolution. Indeed, Hardt and Negri believe that the changes wrought by globalization have united a series of national and supranational organisms under a single logic of rule and resulted in a ‘new global form of sovereignty’ they term ‘empire’. As the contradictions, negative by-products and inequities arguably inherent in these policies and trends have become increasingly evident, the involvement and influence of non-state actors has escalated. Organizations with varied interests, from human rights to the environment, have gained visibility in the interstate dialogue, and have emerged as a formidable force for political change. Initially non-state actors sought to challenge the evolution of an international governance architecture driven primarily by state and private interests. But, over time the non-state movement has grown to encompass a ‘rich and diverse array of civil society demands/proposals for economic justice and social inclusion.’ Their central concern is with globalization in its current form, and their primary goal is the democratization of globalizing processes and institutions.


29 The advent of the internet has made coalitions between geographically disparate groups, both in terms of knowledge-sharing as well as coordinated action, possible. The combined influence of the world’s civil society groups is remarkable.


30 From the anti-globalization protests in Seattle, November 1999 (WTO) to those in Genoa, July 2001 (G-8), and more recently in Washington DC, September, 2002 (IMF/World Bank). For more information visit: <http://www.wikipedia.org/wiki/Anti-globalization_movement>.

31 Summary Report of the Meeting of NGO and Civil Society Focal Points from the UN System and International Organizations, UN NGLS, 6–7 March 2003 (on file with the author).
The full breadth of global political actors today goes far beyond the traditional categories of state and society of states, and captures not only those global corporate organisms that form part of Michael Hardt and Antonio Negri’s ‘empire’ but also those non-state actors that have emerged to counterbalance the ‘empire’. Attempts to structure responses to global problems, environmental or otherwise, must factor in the various processes that are loosely strung together by the term globalization. They must also include the broad range of international actors that both influence the setting of standards and exert pressure for their compliance, and be accountable to the international society at large.

Although the onset of economic globalization in the 1980s put paid to the New International Economic Order, it may not have rung the death knell for differential treatment more generally. Differential treatment, in so far as it furthers equality rather than entrenches inequality, has the potential to counterbalance some of the inequities inherent in globalization, and since decisions of the community of sovereign states are increasingly tested against the touchstone of civil society opinion, those decisions based on differential treatment may well be more equitable and therefore defensible in certain situations.

(C) The Imperatives of an Interdependent World

The political dynamic in the international society is tied to the evolving realization of economic and ecological interdependence. There is growing scientific certainty as to the lack of boundaries in ecological causal networks and a consequent understanding of the concept of environmental externalities that can result in one nation facing the consequences, in part or in whole, of the environmental choices of another. Ecological interdependence is complemented by economic interdependence attributable to increasing globalization and characterized by mutual reliance between states with differing resources, income levels, and social choices. Interdependence and its perception creates a strong pull towards common action and results in a diffusion of power amongst the various actors in the system. Developing countries may have the power to deny the industrialized states their environmental objectives, or particular industrial countries may have the power to wreck beneficial environmental outcomes. Differential treatment in favour of some may well be the pragmatic outcome of a negotiation process that seeks to achieve common environmental objectives in the face of divergent short-term interests and ecological and economic interdependence.

In addition to these historical, political, economic, and pragmatic factors, the community of sovereign states is also influenced, to varying degrees at varying


points in time, by the goal-oriented values of cooperation and solidarity enshrined in the UN Charter.\(^{34}\) The influence of these values is evidenced, \textit{inter alia}, in the rise of international organizations aimed at ‘social progress and better standards of life’,\(^ {35}\) the increasing emphasis on the internationalization of basic human values and core concerns,\(^ {36}\) the growing range and breadth of ‘common concern’ environmental treaties,\(^ {37}\) and the escalating role of individual and other non-state actors in international law.\(^ {38}\) Differential treatment in so far as it is premised on commonalities of interest in the face of divergent material conditions is a reflection of solidarity in the international field.\(^ {39}\)

The international system mirrors the complex international society it governs. The system is subject to contradictory pulls: inequality between states on the one side and ecological and economic interdependence on the other. States within this system driven by practical, political, and ethical compulsions exercise their equal sovereignties to accept unequal rights and duties, i.e. to countenance differential treatment. Differential treatment is the legitimate outcome of the democratic dialectic process that sets the fact of inequality against the fiction of equality.

## II. Exploring Differential Treatment

### (A) Differential Treatment—a Prologue

Norms of differential treatment in treaty law can be activated through unilateral or multilateral means. The unilateral means of activating differentiation is through Party reservations to treaties. States choose the extent of their obligations under a treaty through reservations,\(^ {40}\) and the original treaty obligations are accordingly modified. The multilateral means of activating differentiation is through negotiated agreement preceding the adoption of the treaty or its implementing instrument.

Norms of differential treatment can be soft or hard law: they can be couched in discretionary and guiding language within the context, \textit{inter alia}, of resolutions, declarations, and conclusions and therefore constitute soft obligations;\(^ {41}\)

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\(^{34}\) The UN Charter identifies the aim of the international community to ‘achieve international peace’ and ‘save succeeding generations from the scourge of war’. Preamble, UN Charter 1945.

\(^{35}\) ibid. Examples include the International Labour Organization, the UN High Commission for Refugees, and the UN Commission on Human Rights.


\(^{37}\) See Chapter 5, section II.A.


or they can be cast in prescriptive terms within the framework of binding agreements and thus constitute hard obligations. Differential norms can be explicit or implicit. Implicit in that while the norms themselves provide identical treatment to all states affected by the norm, their application requires (or permits) consideration of characteristics that might vary from country to country.42

Norms of differential treatment in some instances recognize inequality and reflect it. In others they recognize inequality and seek to correct it. An example of the former is the legal recognition accorded to the political hegemony of certain powers in the composition of the UN Security Council. An example of the latter is the special and preferential trading status accorded to Least Developed Countries under the WTO. One reflects, and possibly furthers, inequality; the other seeks to limit it.

Differential treatment can have inherent and/or instrumental value. If differential treatment is instituted either as recompense to some states for past injustices or to reflect enhanced responsibility of other states for past wrongs it has value in itself. If it is instituted in order to further equality between states it has instrumental value. An example of the former is the enhanced responsibility of industrial countries in the international climate regime. Their enhanced responsibility is a reflection of their greater contribution to the problem of climate change. Differential treatment herein has inherent value. An example of the latter is the provision of trade-related technical assistance to Least Developed Countries under the WTO Integrated Framework for Trade-Related Technical Assistance.43

(B) Differential Treatment in International Environmental Law

The many facets of differential treatment are showcased in international environmental agreements. Two central factors influence the environmental regime-building process: the ecological imperative and the existence of manifest inequalities between states.44 The history of international environmental dialogue, as a result, is a history of conflict between developing and industrial countries. The conflict encompasses the framework, nature, and agenda of international environmental law, but is focused on who should take responsibility, in what measure, and under what conditions to contain global environmental degradation. In the face of inequality in resources and contributions to global environmental degradation, and in the interests of environmental protection, sovereign states have crafted a burden-sharing arrangement rooted in

44 As South African President, Thabo Mbeki phrased it at his opening speech at the World Summit on Sustainable Development 2002, ‘a global human society based on poverty for many and prosperity for a few’, supra note 20.
differential treatment. This is in evidence in recent environmental treaties, all of which contain norms of differential treatment in favour of developing countries.

Differential treatment in international environmental law is unique in that it has both inherent and instrumental value. Differential treatment is instituted as recompense to some states for the excessive use of the ecological space by others. It is also instituted in recognition of the differences in the ability of nations to participate in the global effort to protect the environment. The essence of differential treatment in international environmental law is captured by the principle of common but differentiated responsibility, which posits that states have common but differentiated responsibilities based on their differing ‘contributions to global environmental degradation’ and ‘technologies and financial resources’.

(C) The Research Agenda, a Few Caveats and a Road Map

This book seeks to determine to what extent differential treatment is a valuable tool in engaging countries in environmental treaties, and, if differential treatment is indeed a valuable tool, whether certain boundaries exist, or should exist, in the use of differential treatment in environmental treaties. This book explores these questions with particular reference to the climate regime which, in recent times, has been controversial for the differential treatment it embodies.

A few caveats are necessary. This book focuses primarily on differential treatment in favour of developing countries. It uses the terms ‘developing countries’ and ‘industrial countries’ in full recognition of the dangers of over-generalization and reductionism inherent in such usage. It does so in the absence of appropriate alternatives, and in the interest of representing the existing divide between negotiating blocs which identify themselves broadly as developing or industrial.

This book confines its inquiry to treaty law, and focuses on new generation international environmental agreements. The term ‘new generation international environmental agreements’ refers to treaties concluded between the UN Conference on the Human Environment 1972 and the World Summit on Sustainable Development 2002. Agreements in this period are of critical importance. The participation of developing countries in international processes, and therefore the spectrum of differences in the international community, increased dramatically after the UN Conference on the Human Environment in 1972. This Conference also catalysed the interest of a wider range of industrial

46 The treaty law in this area is of vast and enduring interest. Moreover, since several key treaties embodying differential treatment have near-universal participation, the value of studying customary international environmental law norms with respect to differential treatment is limited.
countries. The Ramsar Convention on Wetlands,48 for instance, concluded in 1971 was negotiated by five developing and thirteen industrial countries,49 while the World Heritage Convention concluded in 1972 was negotiated by twenty-seven industrial and ninety developing countries.50

A discussion on the anatomy of differential treatment in international environmental agreements would be incomplete if divorced from the historical, political, and ideological context of differential treatment in international law more generally. This book begins with an exploration of differential treatment across international law. Chapter 2 surveys the instances of differential treatment across the entire gamut of international law, and analyses the practical and political basis for differentiation in different regimes. Chapter 3 traces the evolution of dissonance in international environmental dialogue and fleshes out the contradictory ideological premises that developing and industrial countries operate from. The dissonance between developing and industrial countries in the evolution and structuring of international environmental dialogue translates into differentiation between developing and industrial countries in international environmental agreements.

Chapter 4 explores the legal character of and variety in norms embodying differential treatment. It separates provisions of differential treatment in environmental treaties into numerous logically divisible categories. In doing so, it seeks to demonstrate first that differential treatment, broadly conceived, is deeply embedded in the fabric of the new generation international environmental agreements, and second that while some categories of differential treatment have broad support, others are disputed terrain.

The essence of differential treatment in international environmental law is captured by the principle of common but differentiated responsibility. Chapter 5 establishes the common but differentiated responsibility principle as the doctrinal basis for differential treatment and investigates its contours. In so doing it analyses the philosophical and practical basis as well as the legal status of this principle in international environmental law. It also explores the boundaries of the common but differentiated responsibility principle and identifies certain limits on the application of this principle (and the use of differential treatment) in international environmental law.

The common but differentiated responsibility principle is best reflected in the climate regime, i.e. the UN Framework Convention on Climate Change 199251

The climate regime, in particular the Kyoto Protocol, is widely considered to be the ‘clearest attempt to transform common but differentiated responsibility from a legal concept into a policy instrument.’ The climate regime contains every known category of differential treatment. While some norms of differential treatment have integrated seamlessly into the fabric of the agreement, others have generated considerable controversy, at times threatening to destabilize the regime. Chapters 6 and 7 examine and analyse the evolution of the climate regime, the nature and extent of differential treatment it contains, the controversy generated over the issue of ‘meaningful participation’ for developing countries, and the competing legitimacies presented in the debate. Chapter 7 applies the common but differentiated responsibility principle, which offers a critical angle of vision in determining where the balance is to be struck between competing claims and interpretations, to the climate regime. It offers an interpretation of the current balance of commitments between industrial and developing countries, as well as guidelines for the future development of the climate regime.

In tying various threads together, Chapter 8 reviews the main findings of the study within the framework of the research agenda and suggests possible avenues for further inquiry.

(D) The Whys and Wherefores

The precise terms of integration of countries from divergent realities into international environmental regimes is, as noted before, a site of conflict between industrial and developing countries. Although there is no scarcity of rhetoric on both sides of the debate, there is a dearth of research on the precise terms of integration across different environmental treaties, and an analysis of the conceptual framework within which the integration should take place. This book seeks to step into the breach. It systematically categorizes and analyses the terms of integration, i.e. differential treatment, across new generation environmental treaties. It ferrets out the philosophical and practical bases for differential treatment in environmental treaties, and creates a framework within which differential treatment can be assessed.

This book builds on earlier work in this area. It investigates and suggests principled limits on the application of differential treatment in environmental

54 The studies currently available, although thoughtful, do not break differential treatment down into its constituent elements, and analyse them across treaties; they place an overwhelming emphasis
treaties. It illustrates the application of these limits in the climate regime which, in recent times, has been subject to intense scrutiny over the differential treatment it embodies. In March 2001, United States President George W. Bush rejected the Kyoto Protocol in part because it ‘exempts 80 percent of the world, including major population centers such as China and India, from compliance.’\(^5\)

The exit of the United States, responsible for 23.1% of global greenhouse gas emissions, is a significant hurdle to the effectiveness of the climate regime and the feasibility of achieving the Kyoto targets. This study examines the debate on participation of developing countries, analyses the divergent positions on it, and applies the notion of common but differentiated responsibility in a bid to resolve, on a principled basis, the outstanding issues.

The conflict between industrial and developing countries has thus far significantly impaired the ambition of the international environmental agenda and the pace of the dialogue in support of the agenda. The relevance of this book lies in its ability to provide a principled framework within which the industrial versus developing countries conflict in the international environmental realm can be examined and resolved.


\(^5\) Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts, The White House, Office of the Press Secretary, 13 March 2001: President Bush writes, ‘[a]s you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate’s vote, 95–0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.’