Differential Treatment in International Law

International law contains numerous instances of differential treatment, whether explicit or implicit, and of the soft or hard variety. In an attempt to traverse the historical, political, and ideological landscape of differential treatment, this chapter surveys the various faces of and calls for differential treatment in international law. In doing so it paints a backdrop for the study of differential treatment in international environmental agreements.

This survey is illustrative rather than exhaustive, and is intended to speak to the following points: instances of and calls for differential treatment exist across the whole gamut of international law; differential treatment favours different countries or groups of countries in different international regimes; and, differential treatment frequently engenders controversy and occasionally contradiction (at times, states that oppose differential treatment in one agreement, advocate or benefit from it in another). This survey showcases the various arguments made in support of or in opposition to differential treatment, and teases out the factors based on which differential treatment is instituted.

In considering differential treatment in differing international regimes, an initial distinction is drawn between differential treatment favouring developing countries and differential treatment favouring industrial countries. Such a distinction will highlight the particular characteristics of and factors responsible for differential treatment favouring each group of countries. International development law, human rights law, economic law, and law of the sea are considered under the first category, and international arms control and disarmament law, and institutional law under the second. Each regime is explored from within, placing particular emphasis on the controversy differential treatment engenders.

I. Differential Treatment Favouring Developing Countries

(A) International Development Law (Droit International du développement)

Of all the calls for and instances of differential treatment in international law, it was perhaps the developing countries’ demand for a New International Economic Order (NIEO) based on the rationale of the Droit International du développement that left resounding echoes in international law. Not within the
terms of the NIEO which died a natural death, but in terms of its intuitively attractive and surprisingly adaptable rhetoric that survived the death of the NIEO and found expression in succeeding generations of international dialogue on various issues including international environmental law. The arguments offered and the theory developed to support the call for the NIEO are examined in some detail here as it is one of the most ambitious and well-constructed projects launched by developing countries for differential treatment in their favour.

(i) The Theory: A New Approach to International Law

The term Droit International du développement was coined in the mid 1960s by a group of French academic lawyers in L’Annuaire Francaise de Droit International. These academics drew inspiration for this concept from the increasing profile and demands of the group of developing countries who came together in 1964 under the auspices of the UN Conference on Trade and Development (UNCTAD) to form the G-77, a united front in dealing with industrial countries on international economic matters. Maurice Flory translated the term Droit International du développement as the ‘international law for development.’ This law could only be defined on the basis of its objective, which was the shaping of principles, rules, and institutions of public international law for the promotion of harmonious development of international society. Droit International du développement was conceived of not as a branch of international law, but rather as a new approach to the whole body of law.

It was a new approach for it challenged through its premises and methods classic conceptions of sovereignty and equality of states and advocated a departure from the principle of substantive reciprocity. As one of the academics writing in the intellectual tradition of international development law characterized it: while classic international law is based on the principle of sovereign equality, ‘international development law proceeds from the premise that equality in conditions of economic inequality is tantamount to the legalization of

1 International environmental law encompasses several principles put forward in the context of the NIEO. See Andrew Jordan and Jacob Werksman, ‘Incrementality and Additionality: A New Dimension to North-South Resource Transfers?’, 6 World Resource Rec. 178 (1994) (noting that the demand for additional capital on concessional terms in the context of global environmental agreements is also part of the developing countries’ long running demand for an NIEO). See also Kamal Hossain, ‘Sustainable Development: A Normative Framework for Evolving a More Just and Human International Economic Order’, in The Right to Development in International Law (Subrata Roy Choudhary et al. eds., 1992), 259; and Antonio Cassesse, International Law in a Divided World (1986), 351.


3 See generally <http://www.g77.org>. Also referred to as G-77/China.


5 ibid 16.

6 ibid.

7 See supra note 2 at 54 (noting that, ‘[t]he most distinguishing feature of international development law . . . is its pointed departure from the principle of substantive reciprocity’).
inequality.’”8 Milan Bulajic argued that a ‘state cannot be economically unequal and legally sovereign.’ Sovereignty in other words, ‘is no longer a bulwark of passive defence but is instead becoming a principle for action to achieve the right of equality and, above all, opportunities for economic development.’9 Addressing himself to the notion of equality of states, Mohammed Bedjaoui argued that, [t]he phenomenon of domination has always flourished under the cover of fictions. One becomes aware that the effect of international development law is not in the end to set to rights a principle, that of the equality of States, since this has never really existed. The task assigned to it amounts to a modification of the respective rights and duties of States according to their level of development. The fact of inequality is henceforth set against the fiction of equality.10

The new approach to international law was founded on the belief that need was a sufficient basis for entitlement11 and that effective equality made necessary differential and special treatment for developing countries. Maurice Flory envisaged that most multilateral treaties dealing with economic matters would distinguish between developed and developing countries, in order to settle different rules of treatment for each of them. Instead of one single set of regulations for all kinds of states and instead of a single body of rules, there would be a multiplicity of rules.12 This is in essence what has come to be known as differential treatment and in providing a theoretical framework to house this concept, Flory and others make an argument that has been transferred to other areas of international law as well.

At the root of this new approach to international law lies a set of interrelated notions (sometimes termed ‘principles’): cooperation, solidarity, and mutual aid. Some scholars argue that cooperation, constructive and proactive give and take between nations, is the basis for a viable international legal order,13 in particular the law of development.14 They highlight the relevant provisions of the UN Charter,15 the Friendly Relations Declaration,16 and the Final Act of the First Session of UNCTAD17 all of which profile a duty of cooperation in

9 ibid 50.
12 See *supra* note 4 at 16.
15 Preamble, Articles 1(3), 9, 17, and 55–6, UN Charter 1945.
international relations. A related notion, solidarity, is also considered to be an ideological source for the law of development. Solidarity is an aspect of cooperation ‘which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states’ and ‘creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states.’ Solidarity has been characterized as the ‘[t]rue justification for the right to development’ and ‘its very foundation’. In fact, in proposing the Charter of Economic Rights and Duties of States in 1972, then President of UNCTAD, Luis Echeverría, highlighted its objective as ‘removing economic cooperation from the sphere of goodwill and rooting it in the field of law by transferring consecrated principles of solidarity among men to the sphere of relations among nations.’ The final notion in the set, mutual aid is intrinsically linked both to cooperation and solidarity. In the context of mutual aid between nations, Jenks had this to say:

None of these notions are new or indeed a product merely of the post Second World War world. Emerich de Vattel, in 1758, recognized a duty of cooperation, solidarity, and mutual aid. In his vision, since nations like individuals were subject to the laws of nature, the duties which a person owes to another, a nation owes to another. He characterizes these duties, or ‘offices of humanity’, as ‘doing all in our power for the welfare and happiness of others, as far as is

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18 See supra note 14.
20 Keba M'Baye, ‘Le Droit au développement comme un droit de l’homme’, 5 Revue Des Droits De L’Homme 505, 524 (1972) (arguing that ‘[a]s participants in a common humanity, it is incumbent upon us all to try and conquer the egoism of peoples by an aspiration to the universal’).
21 Verbatim Record of the 2315th Plenary Meeting, A/PV 2315 (1972) at 67.
consistent with our duties towards ourselves.’24 Vattel however regards this duty of mutual assistance between states as an imperfect obligation which gives ‘but the right to request’.25 In other words, mutual assistance occupied the realm of morality not legality. It is precisely this that the opponents of the Droit International du développement argued: ‘we are not talking here about legal duties at all but merely some no doubt laudable moral imperatives.’26 They believed that Droit International du développement blurred the distinction between lex lata and lex ferenda,27 and in doing so created uncertainty which threatened ‘the integrity of the international legal system’ and encouraged ‘confusion between law, morality and ideology’.28 They characterized the definitional feature of Droit International du développement, the fact that it is goal-oriented29 as ‘anathema to those who see the essential value of the international legal system as the provision of a set of rules to be impartially and indifferently applied without regard to the policy imperatives or consequences.’30

(ii) The Praxis: The Rise and Decline of the New International Economic Order

The physical manifestation of the Droit International du développement in the international arena was the developing world clarion call in the late 1960s and the 1970s for the NIEO, a legal regime of positive discrimination in favour of developing countries. The NIEO consisted of a set of three instruments passed in 1974 by the UN General Assembly (GA): the Declaration on the Establishment of a NIEO;31 the Programme of Action on the Establishment of a NIEO;32 and the Charter of Economic Rights and Duties of States.33

The germ of the NIEO idea developed in the 1950s and 1960s when newly independent states began to discover that their economic underdevelopment was not merely the product of colonization, for even as colonization was dismantled, their economic conditions despite aid from the former colonizers, continued to flounder.34 A gradual realization arose that their poor performance was in large measure due to the prevailing rules of international trading and investment,

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24 ibid § 3.
27 Supra note 2 at 54 and supra note 26.
29 See text accompanying supra notes 4 and 5.
30 Supra note 28 at 32.
rules they had no part in shaping. This realization found a voice in the First Ministerial Meeting of the G-77 in October 1967 which resulted in the adoption of the Charter of Algiers documenting the economic problems of the developing world and seeking a revision of commodity, trade, and development financing policies. In 1972 the scene shifted to the UNCTAD where then President Luis Echeverria proposed the Charter of Economic Rights and Duties of States. The 1973 Arab oil-exporting countries boycott of industrial states and consequent oil crisis, ‘emboldened’ developing countries to put forward more ‘audacious plans and far-reaching demands concerning the reshaping of international economic relations.’ The battle moved on to the GA where developing countries had a majority. The GA met in a Special Session in 1974 and adopted the Declaration and the Programme of Action on the NIEO. The Resolution setting forth the Declaration was accepted by consensus; but industrial states entered significant reservations to it. The GA also met in a regular session later that year to adopt the Charter of Economic Rights and Duties of States. Together these three instruments put forward the case that the industrial countries’ dominance of the international economic system, its institutions, its laws, and its unequal exchange relationships prevented developing countries from moving forward. They sought to remedy the inequality of the existing relationship through a fundamental restructuring of the institutional and legal order governing economic interaction by: solidarity among developing countries; introduction of pervasive unilateral and non-reciprocal preferences for the developing countries; and claims by developing countries of industrial countries for financial, technology, institutional, political, and trade-related concessions.

35 The NIEO was deeply influenced by the insights of the ‘structuralist’, ‘dependency’, or ‘neo-Marxist’ theories produced by early post-colonial development scholars, such as Samir Amin, Andre Gunder Frank, and Raul Prebisch. According to their analyses, colonialism organized economic relations between the colonizing states (the North) and colonized societies (the South) by transforming the Southern economies into satellites of the Northern economies. This led to a large-scale transfer of resources from the South to the North. Under this view, the colonial international economy not only failed to develop the South but also ‘underdeveloped’ it by extracting indigenous resources and by transforming the South from a self-reliant (albeit subsistence) economy to one dependent on both imports from and exports to Northern markets. Political independence, post-colonial critics pointed out, did little to alter this organization and therefore perpetuated existing economic relations characterized by the ‘neocolonial’ dominance of Northern economic actors. See generally Samir Amin, Neo-Colonialism in West Africa (1973); Andre Gunder Frank, The Development of Underdevelopment (1966); and Raul Prebisch, Towards a New Trade Policy for Development (1964).


37 ibid.

38 Antonio Cassesse, International Law in a Divided World (1986), 364.

39 See supra note 31 and 32.

40 Text of these reservations reprinted in 13(3) ILM at 744, 749, 753, 759, and 762 (1974).

41 See supra note 33.

These unilateral claims were to be matched by non-reciprocal obligations on the part of the industrial countries and necessitated interventionist or dirigiste policies.

Industrial countries were not prepared to take on these non-reciprocal obligations and locate these issues in the realm of law. The GA resolutions left a significant mark on international relations, not only in their impact on the nature and direction of the cooperative work undertaken for the next decade, but also in the manner in which they shaped and continue to shape the dynamic of the dialogue between developing and industrial countries. However, the principles they enshrined and the programme they advocated never came to be. Only a fraction of the trade preferences they sought were reflected in the General Agreement on Tariffs and Trade (GATT). The Draft Code on Technology Transfer, central to the NIEO mission, was not adopted even as a non-binding instrument, and little progress was made on the integrated programme for commodities. While developing countries with their numerical majority in the GA managed to draw attention to their cause, they could not persuade the industrial countries to take on the corresponding legal obligations. In fact the institution that they had used to promote the NIEO, the GA, came under increasingly scathing attack. The status of GA resolutions, a perennial subject of debate in international legal circles, was challenged as never before. These resolutions came to be characterized as ‘informal prescriptions’ and ‘vanguard’ resolutions which were ‘not very appropriate as foundations for building up legal practice.’ These ‘informal prescriptions’ were not in any sense law in themselves, they could merely have a ‘contingent and catalytic effect’ on international law-making. Unfortunately for the NIEO supporters these resolutions did not have such contingent and catalytic effect. Despite their numerical majority, developing countries found they were unable to change international law as their proposed changes did not find favour with industrial countries. And of course, such opposition was inevitable given that the old rules had in effect been created by the industrial countries to further their own interests.

The NIEO was in part also a casualty of history. The onset of the debt crisis and the waxing of the economic globalization mantra in the early 1980s,

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43 See infra note 94.
48 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005), 222 (criticizing the Texaco-Libya arbitral award which explored the legal significance of these resolutions and concluded that they were not binding on capital exporting states as many industrialized states had opposed them).
followed by the collapse of the socialist regimes and a shift away from state-controlled economies (and interventionist policies) to laissez faire in the late 1980s marked the beginning of the end for the powerful rhetoric of the NIEO. Indeed the Declaration of International Economic Cooperation\textsuperscript{49} agreed to in 1990 contains no reference to the term NIEO and references human rights and the environment instead. In the relevant paragraph, the Declaration perceives environmental threats as concerning everyone and to be remedied and avoided by all according to their means.\textsuperscript{50} Into the 1990s the NIEO rhetoric had faded away and given way to a new understanding of cooperation which emphasized the mutual responsibility of both industrial and developing countries on issues of international concern.\textsuperscript{51}

The issue of development, central to the NIEO, had moved away from the economic sphere and seamlessly into the arena of human rights,\textsuperscript{52} where the notion of mutual responsibility albeit with a special status for developing countries was explored. For instance, the UN Declaration on the Right to Development (UNDRD)\textsuperscript{53} does not differentiate among states based on level of development. Although several provisions emphasize the special status of developing countries, all states are subjects of the right, and duty-holders under it.\textsuperscript{54} This is in keeping with the shape differential treatment assumed within the framework of human rights agreements: differential treatment does not detract from the obligations that all states are subject to; it merely permits a ‘reasonable restriction’ on the right.

(B) International Human Rights Law

The human rights arena, where the notion of universality\textsuperscript{55} holds sway, is in theory hostile to differential treatment. If the notion of universality implies that the existence and protection of human rights transcends cultural, social, religious, economic, and political contexts, then there is indeed limited scope for differential treatment. Yet even the realm of human rights law is rife with norms


\textsuperscript{50} ibid paragraph 29.

\textsuperscript{51} See Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, 250 Recueil Des Cours—Academie de Droit International 217 (1994).


\textsuperscript{53} Declaration on the Right to Development, GA Res. 128 (1986). See Chapter 3 for a discussion on the right to development.


of differentiation, albeit unique context-specific variants of them. The rhetoric of
universality in human rights treaties, which seemingly wrests power and control
away from individual states, is balanced by a lack of prohibitions on reserva-
tions,\textsuperscript{56} which presents states with apparently unlimited power to tailor the
relevant treaty to their own conditions, and therefore achieve unilateral differ-
entiation. As Upendra Baxi notes, ‘[a]ny international human rights lawyer
worth her or his calling knows the riot of reservations, understandings, and
declarations that parody the texts of universalistic declarations. The “fine print”
of reservations usually cancels the “capital font” of universality.’\textsuperscript{57} This is cer-
tainly true of the Convention on Elimination of All Forms of Discrimination
Against Women (CEDAW) 1979,\textsuperscript{58} where nearly 40% of the 180 Parties have
entered reservations, many of which are general reservations transcending spe-
cific provisions, or reservations to core obligations.\textsuperscript{59}

It is not just through reservations, however, that differentiation is achieved in
the human rights realm. Implicit norms of differential treatment have, in
however guarded a manner, been incorporated into certain human rights treaties,
in particular with respect to economic, social, and cultural rights. For instance,
Article 2(1) of the International Covenant on Economic Social and Cultural
Rights (ICESCR) 1966\textsuperscript{60} requires each state to take steps, ‘individually and
through international assistance and co-operation, especially economic and
technical, to the maximum of its available resources’, with a view to ‘progressive
realization’ of the rights recognized in the Covenant. Article 2(1), by its terms,
introduces flexibility in implementing the obligations contained in the treaty.
First, it recognizes that differences in resource capacities may result in differing
levels of implementation across states. Second, by its use of the phrase
‘progressive realization’ it recognizes ‘the realities of the real world, and the
difficulties involved for any country in ensuring full realization of economic,
social and cultural rights.’\textsuperscript{61} In doing so, it accommodates diversity and
embodies differential treatment. In deference to the values of universality,
interdependence, and indivisibility, however, this provision has been interpreted

\textsuperscript{56} See Catherine Redgwell, ‘The Law of Reservation in Respect of Multilateral Conventions’, in
\textit{Human Rights Norms as General Norms and a State’s Right to Opt Out} (J. P. Gardner et al. eds.,
1997), 3, 13 (noting that very few human rights treaties prohibit reservations altogether, and
presenting the ‘rare example’ of Article 9 of the Supplementary Convention on the Abolition of
Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, which does so).
\textsuperscript{57} Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’, 8 Transnt’L &
\textsuperscript{58} Convention on the Elimination of All Forms of Discrimination Against Women, 18
\textsuperscript{59} For a full list of the reservations and declarations to CEDAW, 1979, see <http://www.
un.org/womenwatch/daw/cedaw/reservations.htm>.
\textsuperscript{60} See 6 ILM 368 (1967). See also Article 4, Convention on the Rights of the Child (CRC),
20 November 1989, reprinted in 28 ILM 1448 (1989) (specifying that with regard to economic, social,
and cultural rights, states shall take measures ‘to the maximum extent of their available resources’).
\textsuperscript{61} The Nature of State Parties Obligations (Article 2, paragraph 1), CESCR General Comment
to carefully circumscribe the extent of differential treatment available to states. Article 2(1) is read to constitute a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’, and further that ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.’ There is, in addition, notwithstanding divergent interpretations of the term ‘progressive realization’, an obligation to move as ‘expeditiously and effectively as possible’ towards the goal of full realization of the rights identified in the ICESCR. Differential treatment in the ICESCR 1966 thus, to the extent it is countenanced, is carefully hemmed in.

In most human rights treaties (even in those such as the International Covenant on Civil and Political Rights (ICCPR) 1966 where state obligations are not qualified by phrases such as ‘progressive realization’ and ‘available resources’), there are mechanisms to consider and accommodate, in however limited and transitional a manner, differences between states at the level of implementation. For instance under the ICESCR, ICCPR, CEDAW, and the Convention on the Rights of the Child (CRC) states are given an opportunity to indicate in their reports to the relevant treaty bodies the ‘factors and difficulties’ affecting implementation. Among the ‘factors and difficulties’ most often deployed are economic difficulties, political transition and instability, and traditional practices and customs. The relevant committees recognize and acknowledge certain difficulties, in particular economic ones, but urge states to do everything in their power to overcome them.

The European Court of Human Rights has fashioned and developed yet another technique for the recognition and accommodation of differences between states in implementation of human rights norms—the doctrine of ‘margin of appreciation’. This doctrine is based on the recognition that each

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62 The Nature of States Parties Obligations (Article 2, paragraph 1), CESCR General Comment 3, E/1991/23 (1990) (noting, inter alia, that at a minimum, states are required to provide for the basic needs of the population).

63 The role of treaty bodies in issuing General Comments which flesh out treaty obligations is not uncontroversial. See supra note 57 at 140 (noting that the manner in which treaty bodies formulate, ‘through the distinctive device of the “General Comment”’, unanticipated treaty obligations upon states is beginning to emerge as a contested process).


65 Article 2 ICCPR, supra note 55.

66 Article 17(2).

67 Articles 40(2).

68 Article 18(2).

69 Article 44(2) supra note 60.


71 ibid 349 (noting that in the majority of cases the committee ‘notes’ the factors and difficulties asserted, in some cases it ‘recognizes’ or ‘acknowledges’ them, and in others it refers to the difficulties ‘as asserted by the state’ indicating disagreement).

society is entitled to ‘certain latitude in resolving the inherent conflicts between individual rights and national interests or between different moral convictions.’

As such, the European Court of Human Rights permits states a ‘margin of appreciation’ in interpreting and applying human rights obligations stemming from the European Convention on Human Rights. This doctrine has given rise to rich outpourings of scholarly work, and it is beyond the scope of this book to review them. Suffice it to say, that while some commentators have argued that the doctrine of margin of appreciation, with its ‘principled recognition of relativism’, is at odds with the universality of human rights, others have characterized it as a ‘promising general approach to the problem of mediating between universality and diversity at the international level.’ In any case, the European Court, in keeping with the carefully circumscribed nature of differential treatment in the field of human rights, keeps a watchful eye on states who seek to avail the benefit of this doctrine. And, it has developed a rich and nuanced jurisprudence to help it temper the discretion offered to national governments, as for instance, where a European consensus exists on the issue, or the importance of the right demands it.

In sum, notwithstanding the rhetoric of universality in the human rights realm, states recognize and accommodate, in however guarded a manner, and even if only transitonally, diversity at the level of implementation of human rights norms. Differential treatment, a carefully circumscribed and unique contextual variant, exists across the board in human rights treaties. Differential norms in this field are a reflection of the fact that ‘[w]hat is universal about human rights is the logic of aspiration, not the reality of attainment.’ Even the Vienna Declaration and Programme of Action which underscores the universality of human rights with the emphatic words, ‘the universal nature of these

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International Law by the European Court of Human Rights (1993), 19 (noting cases before the Human Rights Committee that have been decided based on the rationale underlying the doctrine of margin of appreciation).


76 Supra note 74 at 844.


78 See Yourow supra note 73 at 10, 20, 47, 70–1 (noting that under the Court’s jurisprudence the margin of appreciation is limited by the concept of ‘European supervision’, which positis the ECtHR as the final arbiter of European Convention rights).

79 ibid 193–6 (noting that the Court offers a wide margin of state discretion over issues involving morality for which no clear European consensus exists (see e.g. Handside, 1 EHR 737, 753–5 (1979–80)) and a limited margin of discretion for issues over which consensus exists (see e.g. Dudgeon v United Kingdom 4 EHR 149 (1982)).

80 Yourow supra note 73 at 188–91 (noting that the cases demonstrate a wide margin for national security and socio-economic policy issues, a certain margin for most personal liberties and a narrow margin for restrictions on rights such as political speech).

81 Supra note 57 at 150.
rights and freedoms is beyond question’,\textsuperscript{82} notes that the ‘significance of national and regional particularities and various historical, cultural and religious back-grounds must be borne in mind.’\textsuperscript{83}

(C) International Economic Law

In contrast to the field of human rights law, differential treatment has a long, albeit checkered, history in the field of international economic law. Although quite pervasive in the early years, the discrediting of the NIEO rhetoric has been accompanied by a growing reluctance to provide differential treatment to developing countries, in particular in trade agreements.\textsuperscript{84} As this section demonstrates, the provisions of GATT\textsuperscript{85} and World Trade Organization (WTO) have evolved over the years toward fewer and more circumscribed preferences for developing countries. The preferences under the Lomé Conventions, after repeated GATT/WTO challenges and EU versus US trade wars have also been refashioned to suit the current economic and ideological landscape.

(i) International Trade Law: The Changing Fortunes of Special and Differential Treatment under GATT and the WTO

The concept of differential treatment, as in the case of international development law, is no stranger to the field of international trade law. There are 145 provisions embodying special and differential treatment for developing countries spread across the different Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and various Ministerial Decisions.\textsuperscript{86} These provisions can be broadly classified into six categories: increasing the trade opportunities of developing country members;\textsuperscript{87} requiring WTO members to safeguard the interests of developing country members;\textsuperscript{88} incorporating flexibility of commitments, of action, and use of policy instruments;\textsuperscript{89} providing transitional time periods;\textsuperscript{90} granting technical assistance;\textsuperscript{91} and relating to least-developed country members.\textsuperscript{92}

While there are an impressive number of provisions embodying special and differential treatment today, it is both unclear what the legal consequences of

\textsuperscript{82} Paragraph 1. \textsuperscript{83} Paragraph 5. \textsuperscript{84} See supra note 45 at 69.  
\textsuperscript{85} See infra note 94.  
\textsuperscript{86} Note by Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WTO, Committee on Trade and Development, WT/COMTD/ W/77 (2000), at 3. For all relevant documents, summary of provisions, and status of implementation of special and differential treatment for developing countries see <http://www.wto.org/English/tratop_e/devel_e/d2legl_e.htm>.  
\textsuperscript{87} There are 12 such provisions, ibid at 4–6.  
\textsuperscript{88} There are 49 such provisions, ibid.  
\textsuperscript{89} There are 30 such provisions, ibid.  
\textsuperscript{90} There are 18 such provisions, ibid.  
\textsuperscript{91} There are 14 such provisions, ibid.  
\textsuperscript{92} There are 22 such provisions, ibid.
these numerous provisions are and how many of these constitute effective preferences for developing countries. A brief overview of the history of differential treatment in international trade law may cast some light on our inquiry.

GATT, drawn up by twenty-three countries in 1948, is the legal framework within which a large portion of the international trade between developing and industrial countries took place in the last five decades. GATT was originally part of a draft charter, the Havana Charter, for an International Trade Organization, the third leg of the Bretton-Woods post-war order along with the IMF and the World Bank. The Havana Charter included several provisions reflecting the special interests of developing countries, embodying special treatment for them, and permitting a release for underdeveloped countries from certain trade commitments to the extent necessary to allow them to establish new industries. Unfortunately for the developing countries, the Havana Charter did not survive a vote in the US Congress. GATT, a simplified trade agreement based on the principle of nondiscrimination and ‘most favoured nation’ in trade between Parties and devoid of any special provisions for developing countries, emerged from the ruins of the Havana Charter.

From its inception developing countries had voiced their concern with the GATT world view. After years of discussion in 1965, Part IV was added to GATT and in 1971, the Generalized System of Preferences (GSP) was adopted in favour of all developing countries. Part IV of GATT, titled Trade and Development, includes Articles XXXVI, XXXVII, and XXXVIII that recognized for the first time the principle of non-reciprocity which established differential treatment in favour of developing countries in tariff negotiations or renegotiations by eliminating the mutuality of concessions principle enshrined in the most favoured nation standard. The GSP permitted developed countries to grant duty-free treatment or other non-reciprocal tariff preferences to products from developing countries for a trial period of ten years. While both Part IV and the

93 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 187. The current version of GATT is reprinted in 33 ILM 1125 (1994).
94 Charter for an International Trade Organization, E/CONF.2/78 (1948) (frequently referred to as and hereinafter the ‘Havana Charter 1948’).
95 See Articles 8–15. Article 10(3) of the Havana Charter required the international trade organization to cooperate with the UN and other appropriate international organizations on all phases of industrial and general development ‘especially of those countries that are still relatively underdeveloped’. See generally Bartram S. Brown, ‘Developing Countries in the International Trade Order’, 14 N. Ill. U. L. Rev. 347, 358 (1994).
96 The Charter contained provisions concerning special treatment for two traditional concerns of developing countries: primary commodities: Articles 55–65; and economic cooperation among developing countries: Articles 15 and 16(3).
97 Articles 13–14.
98 See supra note 93.
99 See <http://www.unctad.org> for details of the GSP.
100 See Article XXXVI(8) GATT.
101 The waiver setting up the GSP was not a novel departure from the GATT MFN principle of equality of treatment and nondiscrimination. Ndina Kofele-Kale notes that requests for waivers from the provisions of Article 1(1) GATT were routinely accommodated. The first application for such a waiver with respect to the preferential treatment of imports from an individual country was
GSP were significant gains for the developing countries, as Ndiva Kofele-Kale observes, the GSP, as it was then structured, fell short of the developing countries’ goal of having the principle of preferential treatment grounded as a basic right within GATT rather than as an ‘ex gratia favor from industrial countries’. In part to remedy this, in 1979 at the insistence of the developing countries at the conclusion of the Tokyo Round of multilateral trade negotiations, the Contracting Parties agreed to set up a permanent legal basis for preferential treatment in the GATT system. The Contracting Parties adopted a ‘Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’, commonly termed the Enabling Clause. This clause provides a legal basis for industrial countries to provide differential and more favourable treatment to developing countries. It might have been logically extended to create a species of right, however ethereal, in developing countries to be accorded special treatment. As the conclusions of the Special Committee on Preferences leading up to the Enabling Clause had however made clear, any tariff preferences granted were to be temporary in nature, their grant did not constitute a binding commitment, and in particular, it did not in any way prevent subsequent withdrawal or reduction of tariffs. The Enabling Clause therefore was clearly conceived of as a non-binding instrument sans portée juridique. This does not however imply that it carries no legal consequences. At the very least the instrument constituted reliable evidence of the positions taken by these states and consequently of the fact that these states had recognized the principles, rules, status, and rights acknowledged, and intended to take on a moral and political commitment to be fulfilled in good faith. In practice, the grant of special treatment under the Enabling Clause is discretionary, revocable, and often conditioned on the fulfilment of non-trade related goals such as labour and environmental standards.


102 ibid 298.
104 See Agreed Conclusions of the Special Committee on Preferences, TD/B/330 (1970) at 6.
105 ibid. See also supra note 101 at 303–4.
108 See supra note 101 at 332.
109 See e.g. Trade Act of 1974, 19 USC § 2462(c) (7) (2000), at section 502(c) (7) (noting that ‘in determining whether to designate any country a beneficiary developing country under this...
In the late 1980s and early 1990s the increasing interdependence of national economies and the growth in trade and services placed the GATT system under stress and brought its institutional shortcomings to the forefront. As a result, at the Uruguay Round of multilateral trade negotiations, 124 states and the EU signed the WTO Charter to bring the WTO into existence.\textsuperscript{110} Apart from providing an institutional context for GATT, the WTO also sought to ‘fundamentally change the GATT’... to accommodate the vast new terrain of trade competence.’\textsuperscript{111} Developing countries were widely regarded as having suffered a setback in this process of fundamental alteration. One of the guiding principles of the Uruguay Round was that of a ‘single undertaking’.\textsuperscript{112} Under the concept of ‘single undertaking’ states agreed to accept all the negotiated agreements and bring them into force as a single undertaking (thus underlining the fact that all WTO members accept the full range of rights and obligations administered by it). While the distinction between developed and developing members was preserved with respect to specific commitments and undertakings, this distinction no longer coloured participation in the trade regime as a whole. Indeed, in a departure from previous GATT negotiations, developing countries undertook a wide range of specific commitments in their trade policies. They also accepted the norm of full participation, even if some members were not yet ready to accept the full range of obligations.\textsuperscript{113} As Michael Rom phrases it, one ‘detects a change of heart and attitude’ and a return ‘to the basic rules of the original GATT, favoring non-discrimination and liberalization as the fundamental tenets

\textsection{Favouring Developing Countries}

section, the President shall take into account whether that country has taken or is taking steps to afford internationally recognized worker rights to workers in that country.’

See also Council Regulation (EC) 2501/2001 [2001] 03 L346/1 at Title III and IV (including ‘special incentive arrangements’ for the protection of labour rights and the environment, and to combat drug production and trafficking). India challenged the EC’s ‘special incentive arrangements’ as it distinguished between developing countries on impermissible criteria. See Constitution of the Panel Established at the Request of India, Note by the Secretariat, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries WT/DS246/5 (2003). The Dispute Settlement Panel and the Appellate Body ruled in India’s favour in ‘European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries’ WT/DS246/AB/R (2004), WTOAB 2, 7 April 2004.


\textsuperscript{112} Hesham Youssef, South Centre Working Paper, Special and Differential Treatment: Background and Policy Issues at Stake (1999).

\textsuperscript{113} Jayashree Watal, ‘Developing Countries’ Interests in a Development Rounds’, in The WTO After Seattle (Jeffrey J. Schott ed., 2000), 71 (arguing that Uruguay was a watershed in the participation of developing nations in the trading system, as for the first time, developing country participants chose to strike bargains on the basis of reciprocity).
of the international trading system for all to be generally applicable with the minimum number of exceptions possible.\textsuperscript{114} To complement the ‘single undertaking’ concept, there were few, if any, explicit references to the Enabling Clause, leading some to conclude that special and differential treatment is ‘no longer an explicit right of developing countries (other than the least developed countries) and that it is open to the discretion of the developed countries, if they so desire, to exert pressure to obtain more commitments and concessions than are actually justified.’\textsuperscript{115} In the same vein, there are those who believe that the only outcome of the Uruguay Round developing countries can count as an achievement is the incorporation of provisions that buy time for developing countries to fulfil their commitments.\textsuperscript{116} The trend away from special treatment is best reflected in the EU Trade Commissioner, Pascal Lamy’s words:

\textit{[t]he Uruguay Round was perhaps the last time when we could write a new set of trade rules the way we, the Northern countries, wanted them, and then granting developing countries ‘special and differential treatment’ to relieve them of the burden of the rules. This time, developing countries must be at the table, north and south negotiating on the future of rules together.}\textsuperscript{117}

The Doha Ministerial Declaration highlighted the interests of developing countries and the need to review special and differential treatment for them.\textsuperscript{118} It notes that:

The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. . . . In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.\textsuperscript{119}

Elsewhere it promises that, ‘[a]ll special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.’\textsuperscript{120} There are widely differing views on the outcome of the Doha Ministerial. While some believe the Doha Agreements

\begin{itemize}
  \item \textsuperscript{114} Michael Rom, ‘Some Early Reflections on the Uruguay Round as Seen from the Viewpoint of a Developing Country’, 28 J. World Trade 5, 7 (1994).
  \item \textsuperscript{115} ibid 8.
  \item \textsuperscript{116} Raj Bhala, ‘Book Review: Assessing the Modern Era of International Trade’, 21 Fordham Int’l L. J. 1647, 1658–9 (1998). See also Frank J. Garcia, ‘Beyond Special and Differential Treatment’, 27 B.C. Int’l & Comp. L. Rev 291, 298 (2004) (noting that many of the WTO’s 145 special and differential provisions were drafted in a ‘best efforts’ style, and the results have been disappointing as wealthier states have not delivered, and such provisions are not enforceable).
  \item \textsuperscript{118} The Doha Ministerial Meeting was held shortly after the Seattle Ministerial which failed to launch a new round of trade negotiations, an incident considered without a parallel in the history of the postwar global trading system. See Jeffrey J. Schott, ‘The WTO After Seattle’, in The WTO After Seattle (Jeffrey J. Schott ed., 2000), 5.
  \item \textsuperscript{119} WTO, Fourth Ministerial Declaration, WT/MIN (01)/DEC/1 (2001) at paragraph 2.
  \item \textsuperscript{120} ibid paragraph 44.
\end{itemize}
indicate that the WTO is turning into a ‘distributive organization’, others argue that the Doha Agreements are a disaster for developing countries as the agenda for future trade talks reflects the interests of industrial countries alone. It remains to be seen which of these predictions will come true.

There is in general an increased recognition that developing countries need to increase their capacity to benefit from the multilateral trading system. Under the Integrated Framework for Trade-Related Technical Assistance, the WTO provides Least Developed Countries (LDCs) with ‘trade-related technical assistance, including human and institutional capacity-building, for supporting trade and trade-related activities of the least-developed countries.’ The creation of the Doha Development Agenda Global Trust Fund at the WTO Ministerial Conference in Doha, November 2001, ensures the adequacy and predictability of funding for such assistance.

(ii) A Special Partnership: The Road from the Lomé Conventions 1975–2000 to the Cotonou Agreement 2000—The Waning of Preferential Treatment

The rhetoric of the NIEO that the industrial world ‘owed’ and therefore had ‘unilateral obligations’ toward the developing world had few takers among the industrial world. Of these few takers perhaps for a time the European Community (EC) was one. In his comprehensive study on the principle of solidarity in international economic law, Raimund Schutz cites as one of the few instances of unilateral obligations the grant of unhindered EC market access to the African–Caribbean–Pacific (ACP) states in the Lomé Convention. And indeed, the negotiation for the first Lomé Convention was conducted against the backdrop of the NIEO. The signing of the first Lomé Convention in 1975 was welcomed by the ACP states as ‘a landmark achievement, a breakthrough and a vindication for the [lesser-developed countries] call for a New International Economic Order.’

121 Peter M. Gerhart, ‘Slow Transformations: The WTO as a Distributive Organization’, 17 Am. U. Int’l L. Rev. 1045 (2002) (arguing that at Doha the WTO began transforming itself from an organization whose central value is efficiency to one that also considers global distributive issues).
124 See generally <http://www.wto.org/English/tratop_e/devel_e/teccop_e/tct_e.htm>.
126 The Yaouandé Conventions (Yaouandé I 1963–9 and Yaouandé II 1969–75) preceded the Lomé Conventions and laid the ground for an association agreement between the former French colonies and the then EEC.
responsibility for the colonial past’ and intended to aid the evolution of these former dependent territories into the world economy. Since 1975, the Lomé Convention has been renegotiated and updated to Lomé II 1979, Lomé III 1984, Lomé IV 1990, and the Cotonou Agreement 2000.

At the centre of the Lomé Conventions I–IV was a special partnership between the EC and the ACP which manifests itself in financial assistance and non-reciprocal trade preferences (including unlimited entry to the EC market for 99% of ACP industrial goods and other products). Three key principles are at the root of the Lomé trade preferences: stability—preferences granted for extended periods; contractuality—preferences agreed to jointly; and non-reciprocity (the ACP countries are not obligated to extend reciprocal preferences to EU exports). Based on these principles commodity protocols have been concluded for beef and veal, banana, rum, and sugar.

This system of non-reciprocal trade preferences, however, has been consistently challenged by affected Parties. The EC’s Banana Protocol which provided preferential trade access to ACP banana producers has, over an eight-year period resulted in three disputes at GATT, and challenges at the WTO as well as the European Court of Justice. All the GATT/WTO disputes resulted in unfavourable rulings for the EC. Although the final WTO Appellate Body Report did not raise a principled objection to the Lomé Convention or the EC’s right to continue its preferential trade arrangement until 2000, it did hold the EC Import Regime for Bananas discriminatory and incompatible with WTO rules.

When Lomé IV came to an end, the EC and the ACP countries negotiated the Cotonou Agreement to replace it. The negotiation of the Cotonou

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133 The EC had obtained a waiver in 1995.
136 Under the Cotonou Agreement, the current all-ACP non-reciprocal tariff preferences will be maintained until 31 December 2007. Starting from 2008, a set of reciprocal Economic Partnership Agreements, negotiated over a period of five years from September 2002–07 will replace them. Not all ACP countries will have to open their markets to EU products after 2008. The LDCs are entitled to keep Lomé, or even a slightly improved version of it, without having to reciprocate. By contrast, non-LDCs could be transferred into the EU’s GSP, a non-reciprocal set of preferences less generous than Lomé, or they could benefit from alternative WTO-compatible arrangements. See generally European Centre for Development Policy Management, Cotonou Infokit: Innovations in the Cotonou Agreement (2001).
Agreement, unlike the first Lomé Convention, was set against the backdrop, not of a call for the NIEO, but of protracted and expensive challenges to the EC Banana Import Regime and numerous international rulings proclaiming its WTO-incompatibility. Many commentators noted that the WTO-inconsistency of Lomé provisions is a deus ex machina for the EC which wished to end the colonial system of trade preferences which from its perspective had outlived its utility. Some perceived the system of trade preferences as a ‘post-colonial relic’ while others argued that the colonial era had ended and with it the golden handshakes that were once expected, proffered, and accepted all around. 136

The Cotonou Agreement reaffirmed the EC ‘attachment’ to ‘ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP Least Developed Countries’, 137 but specified that this would only be done in a WTO-compatible manner. 138 Since the WTO is moving toward fewer and less effective preferences for developing countries it would be safe to assert that the EC’s non-reciprocal preferential treatment of the ACP states is being and will continue to be whittled away.

This overview of international and regional trade law reveals that differential treatment, ‘special and differential treatment’ in GATT/WTO language, is contentious terrain and has been so ever since the inception of international trade talks. It also reveals that differential treatment in favour of developing countries is on the wane. Another area of international economic law that is no stranger to disagreements and which reflects a similar whittling away of differential treatment for developing countries is the law of the sea.

(D) International Resource Allocation: The Law of the Sea

The UN Convention on the Law of the Sea (UNCLOS) 1982 139 adopted after nine years of tedious negotiations, 140 sought to establish a comprehensive legal regime governing activities related to the world’s oceans. At the time of its adoption however, several industrial countries in particular the United States, refused to support the Convention in its entirety as it contained provisions related to the use of deep sea bed resources beyond national jurisdiction 141 that they considered unacceptable. Developing countries in sharp contrast, viewed the same provisions in a favourable light and indeed as part vindication of their efforts to establish the NIEO. 142 As a result several developing

136 See supra note 128.
137 Article 35(3) (Principles).
138 Article 34(4) (Objectives).
139 UN Convention on the Law of the Sea, 10 December 1982, reprinted in 21 ILM 1261
(1982) (hereinafter ‘UNCLOS’).
140 The Conference voted 130 in favour and 4 (Israel, Turkey, US, and Venezuela) against, with 17 abstentions, to adopt the Convention.
141 Articles 133–191 UNCLOS.
countries signed and ratified the Convention while few industrial countries signed or ratified the Convention. The impasse continued until 1994 when, in an effort to gain universal participation, then UN Secretary-General, Javier Perez de Cuellar, initiated consultations that resulted in an agreement revising or amending those parts of the Convention the industrial countries viewed as unacceptable.143

(i) Deep sea bed mining

The key provisions that divided industrial and developing countries until the 1994 Agreement ‘repaired the damage’ contained differential treatment in favour of developing countries with respect to deep sea bed mining.145 The relevant provisions dealt with: the mandatory transfer of technology and finances to developing countries; and the decision-making structure of the International Sea Bed Authority, which in providing that decision-making would be carried out by a one-nation, one-vote assembly would in effect give a de facto majority to developing countries.146

The 1994 Agreement held the provisions on mandatory technology transfer inapplicable. In its place it imposed a general duty of cooperation, ‘consistent with the effective protection of intellectual property rights’, if the Enterprise (the operating arm of the Sea Bed Authority) or developing countries are unable to obtain such technology on the open market or through joint-venture arrangements.147 The Agreement also eliminated any requirement that states contribute funds to finance the Enterprise or provide economic adjustment assistance to developing countries.148

On the decision-making structure of the International Sea Bed Authority, the 1994 Agreement qualified the general policy-making powers of the Assembly by requiring the collaboration of the limited membership Council, which would have a seat for ‘the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product’, i.e. the United States.


144 ibid.

145 See supra note 141.


147 Annex, section 5(1)(b).

148 Annex, sections 2(3) and 7(1)(a) and Article 173 UNCLOS.

149 The International Sea Bed Authority contains an Assembly with universal membership, a Council of limited membership, and specialized elected organs also of limited membership. In the 1982 text while all specific regulatory powers with regard to deep seabed mining are reposed exclusively or concurrently in the Council, Article 160 gives the Assembly ‘the power to establish general policies.’ See generally Oxman, supra note 146.

150 Annex, section 3(1) and (4).

151 Annex, section 3(15)(a).
The consensus on these issues that had eluded countries in 1982 proved feasible in 1994 as the global political landscape had changed dramatically with the demise of the Soviet Union, the decline in the G-77/China call for the NIEO (and its corresponding ‘blocking force’\(^{152}\)) and the rise in capitalist ideologies.\(^{153}\)

As one writer expressed it, the Convention had been ‘caught in the crossfire of ideological wars that are now behind us.’\(^{154}\)

In the law of the sea, differential treatment favouring developing countries proved controversial, and even a hindrance to universal participation. Eventually in the interests of universal participation differential treatment was limited in some cases and excised in others from the text of UNCLOS.

(ii) Other provisions

Among the provisions of differential treatment favouring developing countries that survived the 1994 Agreement are those that refer to the special needs of developing countries and provide developing countries with assistance.

UNCLOS recognizes the special needs of developing countries in numerous provisions. The Preamble calls for the ‘realization of a just and equitable international economic order’, ‘taking into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.’ Article 207(4) provides that states, in endeavouring to establish approaches to prevent, reduce, and control pollution of the marine environment from land-based sources, shall ‘take into account characteristic regional features, the economic capacity of developing States and their need for economic development.’ In one instance, developing states in recognition of their special economic situation are permitted preferential access to the surplus catch of coastal states.\(^{155}\)

UNCLOS provisions also grant assistance to developing countries. Article 202 obliges states to provide scientific, educational, technical, and other assistance for the protection and preservation of the marine environment to ‘provide appropriate assistance, especially to developing States’, to minimize the effects of major incidents, and in the preparation of environmental assessments. Article 203 further provides that developing states should be granted preference by international organizations in allocating funds and technical assistance and utilizing specialized services. UNCLOS also contains a series of provisions relating to technology transfer and financial assistance to developing countries.\(^{156}\)

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\(^{155}\) Article 62.

\(^{156}\) For instance, Articles 266, 267, and 268; and sections 5 and 7 of the Annex to the 1994 Agreement deal with transfer of technology and economic assistance, supra note 143.
Numerous provisions, structures, and arrangements elsewhere in international law also recognize the less than equal status of developing countries and seek to provide financial, infrastructural, and other support to redress such status. Obvious examples of financial support include debt relief and aid provided by industrial to developing countries. At successive G-7/G-8 summits, industrial countries promise to cancel debts owed to them by the world’s poorest and increase aid, if governance and accountability concerns are met. Recent promises include those made as part of the Millennium Declaration 2000 and the Monterrey Consensus on Financing for Development 2001. Countries have pledged, inter alia, to halve by the year 2015 the proportion of the world’s people whose income is less than $1 a day and aim at a 0.7% of GNP target for ODA. Other examples of support include the creation of trust funds for the participation of developing countries’ delegates in the intergovernmental negotiations, and the provision of negotiation training to level the playing field in international negotiations. The UN Institute for Training and Research (UNITAR) provides training in the field of international diplomacy that focuses on general, specific, and at times technical aspects of international political and economic relations.

II. Differential Treatment Favouring Industrial Countries

The treaties examined so far have institutionalized preferences—in whatever form and to whatever extent—in favour of developing countries. Treaties with institutionalized preferences in favour of industrial countries are found, inter alia, in the fields of international arms control and disarmament law and international institutional law.

158 The G-8 consists of Canada, France, Germany, Italy, Japan, Russia, the UK, and the US. Together they account for 48% of the global economy, 80% of the economic activity of developed economies, and 49% of global trade. See generally <http://www.g8.gc.ca/>.
163 See supra note 161 at 5.
164 See supra note 162 at 10.
165 See e.g. Protection of Global Climate for Present and Future Generations of Mankind, GA Res. 45/212 (1990); and Establishment of an Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa, GA Res. 47/1888 (1992).
In 1885 James Lorimer pointed out that the ‘human problem is not to supplant power by reason but to discover it by reason; to distinguish between the powers that be and powers than only seem to be.’\textsuperscript{167} In his vision of equality among states, ‘[a]ll States are equally entitled to be recognized as States, on the simple ground that they are States; but all States are not entitled to be recognized as equal States, simply because they are not equal States.’\textsuperscript{168} Although much has come to pass in the century since James Lorimer made this statement, his words contain an insight into the nature of power politics in international relations that is of continuing relevance. Differential treatment favouring industrial countries stems essentially from his vision. Some states are incontrovertibly more equal than others and therefore consider themselves entitled to be treated as such. And since they are more equal than others they possess the means to accord themselves preferential status and have it recognized by others.

\textbf{(A) International Arms Control and Disarmament Law}

At the centre of international efforts at arms control and disarmament are the Non-Proliferation of Nuclear Weapons Treaty 1968 (NPT)\textsuperscript{169} and the Comprehensive Nuclear Test Ban Treaty 1996 (CTBT).\textsuperscript{170} They are both controversial for the differential treatment they are said to embody.

The NPT divides Parties into two categories—nuclear-weapon and non-nuclear-weapon states—and assigns differential obligations to them.\textsuperscript{171} Non-nuclear-weapon states are obliged not to receive, manufacture, or acquire nuclear weapons or other nuclear explosive devices. They are also obliged not to seek or receive any assistance in such manufacture.\textsuperscript{172} Nuclear-weapon states are obliged not to transfer or assist non-nuclear weapon states in the manufacture of nuclear weapons or other nuclear explosive devices.\textsuperscript{173} There are 187 states party to this treaty. India, Israel, and Pakistan are however conspicuous by their absence.

The CTBT 1996 obliges states not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control. While the CTBT does not create different categories of parties with differential obligations, it is still perceived by some states as embodying differential treatment because it prevents some states from acquiring technology that others possess.

\textsuperscript{167} James Lorimer, \textit{I The Institutes of the Law of Nations} (1885), 178.
\textsuperscript{168} James Lorimer, \textit{II The Institutes of the Law of Nations} (1885), 260 at footnote 1 (emphasis added) (noting that, ‘[a]ny attempt to depart from this principle, whatever be the sphere of jurisprudence with which we are occupied, leads not to the vindication but to the violation of equality before the law’).
\textsuperscript{169} Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, reprinted in 7 ILM 811 (1968).
\textsuperscript{171} See Article I, II and III. \textsuperscript{172} Article II. \textsuperscript{173} Article I.
The CTBT in Annex II includes a list of countries which must ratify the treaty for it to come into force.\textsuperscript{174} Three Annex II states have withheld their consent from the treaty: India, Pakistan, and the Democratic People’s Republic of Korea.\textsuperscript{175}

Of the nations that have withheld their consent from the NPT and CTBT, some, as for instance Israel, have done so mainly due to regional security concerns,\textsuperscript{176} others have done so for a combination of reasons including regional security concerns and the perceived unfairness inherent in the differential treatment these treaties embody. India, for instance, refuses to be a party to the NPT and the CTBT because it considers these treaties to embody unfair differential treatment. In a speech before the third UN Special Session on Disarmament in 1988, Rajiv Gandhi, erstwhile Prime Minister of India, said:

We cannot accept the logic that a few nations have the right to pursue their security by threatening the survival of mankind ... nor is it acceptable that those who possess nuclear weapons are freed of all controls while those without nuclear weapons are policed against their production. History is full of such prejudices paraded as iron laws: that men are superior to women; that white races are superior to the coloured; that colonialism is a civilizing mission; (and) that those who possess nuclear weapons are responsible powers and those who do not are not.\textsuperscript{177}

In justifying India’s objection to the CTBT at the GA on 29 September 1995, India’s External Affairs Minister argued that, ‘...[n]uclear weapon states have agreed to a CTBT only after acquiring the know-how to develop and refine their arsenals without the need for tests.’ He said, ‘[t]he CTBT must be an integral step in the process of nuclear disarmament. Developing new warheads or refining existing ones after a CTBT is in place, using innovative technologies, would be as contrary to the spirit of CTBT as the NPT is to the spirit of non-proliferation.’\textsuperscript{178}

In 1996, India voted against the GA resolution proposing the adoption of the CTBT. The Indian representative called for, ‘[a] genuine commitment by the nuclear weapon States to eliminate their nuclear weapons in a reasonable

\textsuperscript{174} Article XIV and Annex II; Annex II contains forty-four states. These forty-four states all formally participated in the 1996 session of the Conference on Disarmament, and possess either nuclear power or research reactors.

\textsuperscript{175} Of the forty-four states in Annex II, forty-one have signed it. The exceptions are the Democratic People’s Republic of Korea, India, and Pakistan. Thirty-three states have ratified the CTBT: the exceptions are China, Colombia, Democratic People’s Republic of Korea, Egypt, India, Indonesia, Iran, Israel, Pakistan, US, and Vietnam.

\textsuperscript{176} Israel’s non-ratification of the NPT is attributed to the security threats posed by its neighbours. For an overview of Israel’s position on international disarmament efforts see <http://www.israel-un.org>.

Pakistan’s non-ratification of the NPT and CTBT is also attributed to regional security concerns. For an overview of Pakistan’s foreign policy motivations see the website of the Pakistani Ministry of Foreign Affairs <http://www.pakistan.gov.pk/foreignaffairs-ministry/index.jsp>.

\textsuperscript{177} cf. Nuclear Non-Proliferation, A Note by the Embassy of India. Available at: <http://www.indianembassy.org/policy/CTBT/embassy_non_proliferation.htm>.

\textsuperscript{178} ibid.
and negotiated finite span of time.’ She explained the Indian vote by arguing that since such a commitment did not exist, ‘the treaty becomes an unequal treaty which retains the present discriminatory nuclear regime—sanctioning, in effect, the possession of nuclear weapons by some countries for their security and that of their allies, while ignoring the security concerns of other States.’ 179

Even though China is a party to the NPT and has signed the CTBT, it has concerns with the potentially discriminatory aspects of the treaty as well. The official Chinese policy highlights this concern: ‘[a]ll countries, regardless of their size, strength and wealth, should have an equal right to security. Disarmament should not become a tool for stronger nations to control weaker ones, still less should it be an instrument for a handful of countries to optimize their armament in order to seek unilateral security superiority.’ 180

International arms control and disarmament law, in incorporating differential treatment, encompasses what has come to be the signature feature of differential treatment, controversy. However commendable the goal of the arms control treaties—and they are commendable—the hypocrisy inherent in the system is undeniable. It restricts arms to those who already possess them and permits certain countries to use the power deriving, in part, from those arms to restrict others. Differential treatment here is a reflection of power, and it is used to further rather than limit inequality.

(B) International Institutional Law

The international institutional arena contains a vast array of deeply ingrained instances of preferential treatment in international law. Indeed some scholars believe that the principle of sovereign equality is entirely misplaced in the context of international institutional law. Athena Debbie Efraim, for instance, argues that, ‘Article 2(1) of the UN Charter is a misstatement of the customary international law principle of sovereign equality’ for ‘the principle emerged with the genesis of modern international law and was intended to be employed within the then current structure of the world community’ alone. As ‘international organizations did not exist in the 16th, 17th and 18th centuries they were never engaged vis-à-vis the doctrine of sovereign equality.’ 181 She proceeds to make the case that when states decide to join an international institution, ‘in pursuit of the common benefit of all member states and of the function of the intergovernmental organization, and in the areas which fall under the intergovernmental


organizations’ mandate, the state ‘relinquishes or shares its sovereignty and, therefore, cannot claim the right to sovereign equality within this organized structure.’

Efraim’s argument is questionable for although the doctrine of sovereign equality did not have to engage in any significant manner with international organizations in the sixteenth, seventeenth, and eighteenth century, the founders of the doctrine as well as those who expanded and refined it had not only envisaged international institutions but also an international civil society, a *civitas maxima*. While Christian Wolff and Immanuel Kant believed that in entering into such an international civil society, states would cede a portion of their sovereignty, Emerich de Vattel argued that state sovereignty and a world of sovereign states was the proper and fitting condition for humanity. While the international society has not yet evolved into an international civil society, it would be accurate to describe the world as one of sovereign states that cooperate on most matters of international concern. Differences, and their recognition as characterized in differential treatment, have long existed in uneasy but continuous existence with the doctrine of sovereign equality.

The following are illustrative instances from the arena of international institutional law where despite the rhetoric of formal equality differential treatment is instituted to respond to the recognition of differences between states, whether in: capacity to pay, political power, industrial strength, or other.

Differential treatment in international institutional law can be classified into: differential membership (differential eligibility to membership); differential decision-making (differential value of membership); differential contributions (differential costs of membership); and differential enforcement.

(i) Differential membership

(a) The UN Security Council

The UN Charter underscores the principle of sovereign equality yet endorses a ‘highly differentiated international society.’ Indeed, some have even claimed that the UN Charter ‘represents an example of the power asymmetries, marginalization, and subordination that plague the international system.’ The limited membership of the Security Council, one of the principal organs of the UN, with responsibility for the maintenance of international peace and security,
bears testimony to these assertions. The Security Council was initially composed of
eleven members of which five were permanent and six were non-permanent. It
consists today of fifteen members, of which five are permanent and ten are
non-permanent members. The non-permanent members are to be elected by the
General Assembly based on their contribution to the maintenance of international
peace and security and equitable geographical distribution.\(^\text{188}\) While some degree
of parity, at least in terms of equal opportunity, is evident in the treatment of non-
permanent seats, there is no parity or even a semblance of parity, between nations
in the selection of permanent seats. The selection of the permanent members
was based on post-world war victors’ justice. The permanent composition of the
Security Council is largely a reflection of the balance of power that existed in 1945.

The distinction between permanent and non-permanent members was also
made in the League of Nations, the predecessor to the UN. In the League, as in
the UN, legal recognition is given to the political hegemony of certain powers.
However in the UN, legal hegemony is not reserved just to those who possess
political hegemony: China is an example,\(^\text{189}\) and in the League of Nations veto
power was accorded to all the members of the security body. It ran on unanimity.

(b) Other international bodies
The governing body of the International Labour Organization (ILO)\(^\text{190}\) is
the Executive Council which takes decisions on ILO’s policy, establishes the
programme, presents the budget, and elects the Director-General. Like the
remaining organs of the ILO, this organ encompasses a tripartite structure:
government, employers, and workers. Differential treatment in terms of pref-
ferential membership is evident in the constitution of the governing body. The
governing body consists of fifty-six persons: twenty-eight representing govern-
ments; fourteen representing the employers; and fourteen representing the
workers.\(^\text{191}\) Of the twenty-eight persons representing governments, ten are
appointed by the ‘members of chief industrial importance’, and eighteen by other
government delegates to the conference.\(^\text{192}\) An overwhelming majority of states
are excluded from membership to the governing body, and a preference is created
for ‘members of chief industrial importance’, such that industrial states are
guaranteed ten out of twenty-eight government seats within this restrictive body.

The executive organ of the International Monetary Fund (IMF)\(^\text{193}\) is a non-
plenary decision-making body, within which five out of the twenty are reserved

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\(^{188}\) Article 23(1).


\(^{190}\) Article 2 of the Constitution of the International Labour Organization, 28 June 1919, 15 UNTS 35 (hereinafter ‘ILO Constitution’). The ILO, a specialized UN agency, consists of three organs: the international labour conference; the governing body; and the international labour office: ibid.

\(^{191}\) Article 7(1) ILO Constitution.

\(^{192}\) Article 7(2).

\(^{193}\) Article XII, section 1, Articles of Agreement of the International Monetary Fund, 22 July 1944, 2 UNTS 39, as amended in 1992 available at: <www.imf.org>. The International Monetary
for members with the largest quota (expressed as special drawing rights). Here, as in the ILO governing body, an overwhelming majority of states are excluded from membership, and a preference is created for the largest contributors.

In a similar vein, the International Civil Aviation Organization and the Intergovernmental Maritime Consultative Organization both in their constitutions, specifically reserve for certain categories of states, aviation and maritime powers respectively, seats in their limited-membership organs (‘the Councils’).

Preferential membership for the more than equal, whether for members of ‘chief industrial importance’, largest contributors, or aviation powers, in the limited membership policy-making bodies of various international organizations is both widely practiced and commonly justified on grounds of efficiency and even equity.

(ii) Differential decision-making

Preferential membership for the powerful in policy-making and enforcement bodies is often accompanied by particular decision-making arrangements which further consolidate their special status. As with preferential membership such decision-making arrangements could be argued to be a derogation of the principle of sovereign equality. The principle of sovereign equality would require unanimity in decision-making as no sovereign state could be bound by a decision without its consent. Lassa Oppenheim noted that ‘whenever a question arises which has to be settled by the consent of the family of nations, every State has a right to a vote but to one vote only’ and, ‘legally the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful’. However of the numerous international organizations which exist today unanimity finds de jure application only in a few global organizations: as a
general rule in the North Atlantic Treaty Organisation (NATO);\(^{201}\) and as an exceptional rule in the Organisation of Economic Co-operation and Development (OECD), IMF, and ILO.\(^{202}\)

Instances of differential decision-making will be noted in the following categories of bodies: deliberative bodies such as the GA; enforcement bodies such as the UN Security Council; funding bodies such as the World Bank, IMF, and Restructured Global Environment Facility; and special interest bodies such as the International Energy Agency.

(a) Deliberative bodies
Deliberative bodies, in most cases, use the principle of majority rule in decision-making. Although it could be argued that the majority rule, in contrast to the unanimity rule, is a \textit{de facto} breach of the principle of sovereign equality, the majority rule at least ensures a more democratic process.\(^{203}\) Decision-making in the GA, the deliberative organ of the UN, is governed by the principle of majority rule.\(^{204}\) The decisions of the GA are non-binding,\(^{205}\) although the precise legal nature of GA resolutions is a subject of perennial debate.\(^{206}\) The majoritarian character of the GA, as well as the legal character of its resolutions, came under severe attack during the years the NIEO was in the ascendancy.\(^{207}\)

The UNCTAD like the GA uses the majority rule.

(b) Executive and enforcement bodies
Special decision-making arrangements to provide preferential deference to the views of some over others are particularly evident in the working of enforcement bodies. A classic example is the decision-making pattern in the Security Council. It follows the basic principle of one state one vote, but unanimity is required between the five permanent members for decisions on substantive matters.\(^{208}\) This operates as a veto power—an exclusive and unequal voting right—in the

\(^{201}\) When decisions have to be made in the NATO Council, action is agreed upon on the basis of ‘unanimity and common accord’. There is no voting or decision by majority. Each nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions, NATO Handbook, available at: \texttt{<http://www.nato.int/structur/struc-cos.htm>}.\(^{202}\) Of the regional organizations the following use unanimity as one of the principles governing certain decision-making processes: EU, European Space Agency, European Free Trade Association, Council of Europe, Benelux, and Organization of Petroleum Exporting Countries. See \textit{supra} note 199 at 535.\(^{203}\) \textit{Supra} note 181 at 116. Note, however, that the UN Charter does not contain any references to the principle of democracy.\(^{204}\) Article 18(2) and (3) UN Charter 1945.\(^{205}\) Except for internal decisions.\(^{206}\) See \textit{supra} note 47. See also Richard Falk, ‘On the Quasi-Legislative Competence of the General Assembly’, 60 Am. J. Intl L. 782 (1966). D.H.N. Johnson, ‘The Effect of Resolutions of the General Assembly of the United Nations’, 32 Brit. Y.B. Intl L. 97 (1955–6).\(^{207}\) R. P. Anand, \textit{Confrontation or Cooperation? International Law and Developing Countries} (1987), 129–49 (documenting the conflict over the developing countries’ use of the GA).\(^{208}\) Article 27 UN Charter 1945.
hands of each of the five permanent members. In the five decades of the Security Council’s existence, the veto power has frequently been abused and during the years of the Cold War it resulted in the paralysis of the Security Council. This inequity is compounded by the fact that the decisions of the Security Council, unlike the decisions of the GA, have the power to be legally enforceable. The veto power represents a serious challenge to the traditional theory of national sovereignty and sovereign equality for it not only ‘subordinates the will of each and all ten permanent members (i.e. collective) to the will of any one of the five permanent members’, but also the will of the majority of the world’s nations to the will of each one of the five permanent members.

The reason for this blatantly iniquitous position is founded in power politics. During the negotiations in the run up to the adoption of the UN Charter, the ‘Big Three’, United Kingdom, United States, and the Soviet Union, cited the ‘special burden of the Great Powers to maintain international order’ as the reason for their special voting privilege. Soviet Ambassador, Andrei Gromyko, argued that, ‘[n]ations possessing the necessary power to keep the peace had the chief responsibility to preserve it.’ British Under-Secretary, Sir Alexander Cadogan, added that, ‘the new organization must be composed of great and small states, but the role each had to play depended on its power.’ Quite simply, the superpowers assigned to themselves elitist and exclusive voting rights because they could. It is interesting in this context to refer to the voting powers in the NATO Council which uses the principle of unanimity (and therefore respects complete sovereignty): clearly anything less would have been unacceptable between relative political equals.

The ILO governing body is another example of an executive body with a special decision-making arrangement. It has already been noted that the ILO governing body encompasses preferential membership for members of ‘chief industrial importance’. In general, it uses the majority rule to make its decisions: a special majority i.e. three-fifths majority is required for urgent and special cases; but unanimity is sought when there is a motion to place an item on the General Conference’s agenda. Majorityism arguably represents in general a de facto violation of the principle of sovereign equality, however in the

209 Jack C. Plano and Roy Olton, *The International Relations Dictionary* (1988), 338 (noting that ‘[t]he power of veto is elitist and abusive for it recognizes that great power politics renders some states de facto more equal than others’).


211 See supra note 181 at 133.


213 ibid. 214 See supra notes 191–2 and accompanying text.

particular context of the ILO’s decision-making, majoritarianism constitutes a further violation of the principle as the ILO’s majoritarianism process applies to the total number of delegates and not merely to the total number of government delegates.\textsuperscript{216} Therefore on particular issues of common interest employers and union workers can defeat the will of the majority government delegates.\textsuperscript{217}

Yet another executive body with a special decision-making arrangement is the Enforcement Branch of the Kyoto Protocol Compliance Committee. This branch consists of countries included in Annex I (industrial countries) and countries not so included (developing countries). Decision-making requires both a three-fourths majority from all members present and voting, as well as a majority of Annex I and non-Annex I countries.\textsuperscript{218} The Executive Committee of the Multilateral Fund for the Implementation of the Montreal Protocol also follows a similar pattern. Decisions at the Fund are adopted by a two-thirds majority vote of the Parties present and voting, representing a majority of the Parties operating under paragraph 1 of Article 5 (developing countries) and a majority of the Parties not so operating (industrial countries).\textsuperscript{219}

\textbf{(c) Funding Bodies}

Most funding bodies treat states differently in that they tailor voting power to the financial contributions made by the state to the institution. The voting formula in the World Bank follows the principle of weighting the vote of each member state in proportion to the financial contribution made to the organization, i.e. every member state has one additional vote for each share of stock held.\textsuperscript{220} The IMF’s voting formula follows a similar pattern. Each state receives a basic number of votes (i.e. 250). Irrespective, \textit{inter alia}, of size and population it then receives additional votes on the basis of its contribution to the IMF (i.e. one vote per 100,000 special drawing rights of its quota).\textsuperscript{221} The Multilateral Investment Guarantee Agency, the newest member of the World Bank group incorporates voting arrangements that are structured to reflect the equal interest in the Agency of two categories of states, developed and developing, as well as the importance of each member’s financial participation. Each member has 177

\textsuperscript{216} Article 1(4) and (6) ILO Constitution.

\textsuperscript{217} Droit International Public (Quoc Dinh et al. eds., 5th. edn., 1994), 172; cf. supra note 181 at 174.


\textsuperscript{219} Article 10(9) of the Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, reprinted in 26 ILM 1550 (1987).


\textsuperscript{221} Article XII, section 5(a), of the Articles of Agreement of the International Monetary Fund, 22 July 1944, 2 UNTS 39, as amended in 1992 available at: <www.imf.org>. See supra note 199 at 540.
membership votes plus one subscription vote for each share of stock held by that member.\(^{222}\)

Decision-making in the Council of the Restructured Global Environment Facility\(^{223}\) follows a slightly different formula. Decisions are normally taken by consensus, but if no consensus appears attainable, any member of the Council may require a formal vote. Decisions requiring a formal vote are taken by a double weighted majority, i.e. ‘both a 60% majority of the total number of participants and a 60% majority of the total contributions.’\(^{224}\) In practice this operates as an industrial country veto.

(d) Special interest bodies

Differential voting arrangements based on special interest are also evident in international institutional law. For instance, in the International Energy Agency, an autonomous body established by the OECD, every member state has three votes plus one to forty-eight votes proportional to their interest in oil consumption.\(^{225}\)

The weighted voting formula in international institutions is unpopular with developing countries since in effect it reinforces and compounds in different fora inequalities, political and economic, between countries. In fora that developing countries have equal votes in, they have sought to express this dissatisfaction. Thus in UNCTAD and the GA developing countries pioneered resolutions proposing reform in the decision-making procedures in international economic and financial institutions.\(^{226}\) Further, a vast and growing array of literature exists on the ‘democratization of the UN’.\(^{227}\) Weighted voting does however have its admirers. There are those who perceive unequal voting as a ‘practical solution to a very real problem’.\(^{228}\) Henry Schermers and Niels Blokker in their comprehensive work on international institutional law argue that ‘equality of voting power for all member states is a poor basis for decision-making, unless it is supported by an equality of judgment or a parity of interest.’\(^{229}\) They believe equality of judgment might exist where all states base their decisions on the same factors, however parity of interests is rare in international organizations.\(^{230}\) Equality of voting power in such circumstances may mean that ‘member states


\(^{223}\) See generally <www.gefweb.org>.


\(^{226}\) See e.g. Charter of Economic Rights and Duties of States, GA Res. 3281 (1975).

\(^{227}\) See generally Lavanya Rajamani, ‘Democratisation of the UN’, *Economic and Political Weekly* 3140 (December 9, 1995) and references contained therein.


\(^{229}\) See supra note 199 at 537.

\(^{230}\) ibid.
that pay the bill may be unable to prevent the organization from taking on new obligations or that members with vital interest in a particular field can be outvoted by members with virtually no interest at all.231 Arguing in the same vein, Bartram Brown sympathizes with major contributors in the concern they have about how the funds they contribute are used.232 In the case of the World Bank, he says, contributors are also concerned about potential liability should the Bank ever face losses due to defaulting borrowers. Weighted voting answers these concerns and thereby assures the participation of donor countries. This system recognizes the economic inequality between member states, something which, he contends, cannot realistically be ignored.233

(iii) Differential contributions

Another area in which differences between states are taken into account is in assessing fiscal contributions to various international organizations. International organizations have adopted different schemes to take into account the dissimilar capacities of states to pay. Most organizations assess their members according to some scale reflecting the size and importance of their economies.234 The contributions to the UN are assessed on ‘capacity to pay’. Assessments vary from 0.0001% to 25% (capped at 25%).235 The factors used to determine capacity to pay include: comparative estimates of national income; comparative income per head of population; and ability of members to secure foreign currency.236 Several specialized agencies237 apportion their expenses according to the principles of the UN scale.238 NATO collects contributions representative of each country’s ‘ability to pay’.239 According to the NATO Handbook however, ‘the basis for the formulae applied is as much political as it is economic.’ The formulae today reflect new membership and differing degrees of participation in the integrated command arrangements. The relationship of the cost sharing formula to current economic capacity such as Gross Domestic Product (GDP) or purchasing power parities is therefore imprecise.240 The Restructured Global Environment Facility (GEF) uses a burden sharing arrangement that is also guided by ‘ability to pay’. Contributions are measured against a reference point known as ‘basic shares’. If there are changes in donor budgetary circumstances, basic shares can be enhanced by additional and supplementary

contributions. At the World Bank, members contribute according to a scale that roughly corresponds to ‘economic, financial and political importance on the world stage’.

In a new age formula tailored to the specificities of the agreement in question, both capacity to pay and historical responsibility are incorporated in assessing contributions to the Montreal Protocol Fund which are based on financial capacity and per capita consumption of the controlled substances.

(iv) Differential enforcement

The enforcement power that various organizations possess is not always exercised in a symmetrical way: not every country is equally policed by the various international organizations, leading to differential enforcement. The World Bank and the IMF, for example, impose ‘conditionality’ only on developing countries. The United States, sometimes described as the world’s largest debtor country, is not required to follow an IMF austerity programme. The decision-making structure within the IMF and the World Bank reinforces this problem of differential enforcement.

III. Pulling the Threads Together

(A) Common Threads

This chapter documents the existence and pervasive nature of differential treatment in international law. It testifies to the controversial nature of such differential treatment. From the ideological turf wars fought on the NIEO and the multi-year hiatus on UNCLOS to the ongoing battles over arms control and disarmament, and representation at the Security Council, differential treatment across the board and without exception engenders controversy and dissonance. Such dissonance is characteristic of the international environmental dialogue as well.

Differential treatment, although pervasive, and conflicted, differs from regime to regime based on context and application. In each instance the law is tailored to respond to specific economic, political, and/or ideological realities. In human

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244 See Brown, supra note 96 at 354.
245 See also supra note 48 at 269 (arguing that ‘[w]estern states are immune from the operations of IFIs [international financial institutions] although they engage in forms of protectionism, for example, that have been targeted by the IFIs when present in third world societies.’)
246 See ‘Well Would you Debit It’, The Economist, 1 August 1987, at 73 (observing that ‘[e]conomic reporters love to refer to America as the world’s biggest debtor’).
247 See supra note 228 at 354.
248 ibid.
249 See generally Chapter 3.
rights law, for instance, where ‘universality’ is central, differential treatment is grudgingly permitted, carefully circumscribed and clearly transitional. In economic law, where universality is less of a virtue, differential treatment is explicit and frequent. Notwithstanding differences stemming from context and application, there are a few common threads—in terms of purpose, form and content of norms—running through the regimes that offer differential treatment in favour of developing countries on the one hand and regimes that offer differential treatment in favour of industrial countries on the other.

(i) Rationale, form, and content of differential norms in favour of developing countries

Norms of differential treatment in favour of developing countries are designed to limit rather than further inequality. They recognize the vast economic differences between states, and in the service of some notion of fairness, however elemental, they seek to redress the balance. A range of explanations animate the debate: some claim differential treatment is based on ‘need as a basis for entitlement’;250 others argue that it is designed to achieve wealth redistribution in the face of debilitating inequalities;251 yet others insist that differential treatment is merely an ‘ex gratia favor from industrial countries’.252 Underlying all these explanations however is the fact that differential treatment recognizes manifest inequalities between states and seeks to address it.

Norms of differential treatment in favour of developing countries defy easy classification. The claim that particular norms of this ilk are legally obligatory, i.e. that they are ‘law’ properly so called, is sceptically received and frequently rejected. The founding documents of the NIEO, for instance, were discredited on the grounds that they could never be anything but soft law. James Thuo Gathii describes this ‘bifurcation of legal claims (representing the status quo) on the one hand, and moral claims or soft law (deviations from the status quo or challenges to it) on the other hand’, as a ‘liberal strategy for perpetrating an unjust status quo’.253 Mohamed Bedjaoui refers to this phenomenon as ‘legal paganism’.254 In this reading change is wrought, if ever, with great turmoil and at tremendous cost. A more optimistic view is that particular norms of differential treatment in favour of developing countries are in the early stages of evolution, and although they begin their journey as political principles they may one day become legal principles, then rights, and eventually jus cogens.255 This is a

250 See supra note 11.
251 See generally Frank J. Garcia, Trade Inequality and Justice (2003) (advocating a redistributive orientation to trade law).
252 See supra note 107.
255 See e.g. the common but differentiated responsibilities principle discussed in Chapters 3 and 5 (a principle in favour of developing countries whose legal character and status is deeply disputed).
trajectory other norms of international law have taken,\footnote{256} and it may be that particular norms of differential treatment in favour of developing countries will eventually acquire the necessary gravitas to be characterized as ‘law’. To the extent that norms of differential treatment assume a form that can be characterized as ‘law’, such as operational provisions in treaties, the content of the law is couched in aspirational rather than justiciable language,\footnote{257} and the grant of differential treatment is usually qualified, always discretionary, and at times transitional and revocable. The Enabling Clause and implicit norms of differential treatment in human rights treaties present useful illustrations.

The future of differential treatment favouring developing countries, since it is subject to acceptance from industrial countries who are more than equal in their relationship with developing countries, is limited by such as is non-negotiable as far as industrial countries are concerned. From the demise of the NIEO and the gradual reduction of preferential treatment for developing countries in the GATT/ WTO to the 1994 Agreement on the Law of the Sea diluting the once-mandatory transfer of technology to developing countries and the dramatic reduction in ODA to developing countries, there is little doubt that differential treatment for developing countries in the areas covered is on the wane and has been since the early 1990s. In contrast however, as the succeeding chapters demonstrate, differential treatment favouring developing countries has been on the rise in international environmental agreements in the same period, and there is an arguable continuity in rhetoric between international economic and environmental law.

(ii) Rationale, form, and content of differential norms in favour of industrial countries

Norms of differential treatment in favour of industrial countries reflect, if not actively further, inequality. Differential treatment favouring industrial countries as seen in both international institutional law and arms control law, is based on a combination of economic, political, and military power—the existence of as far as industrial countries are concerned, and the lack thereof as far as developing countries are concerned. Ideological conflicts, to the extent they exist are swept under the carpet. Industrial countries abrogate to themselves special powers because they can. Any other explanation is a fig leaf, and few in good conscience offer them. The composition of the Security Council is the classic case in point.

Norms of differential treatment in favour of industrial countries are rarely characterized as anything but law. The UN Charter, for instance, is

\footnote{256} See Dominick McGoldrick, ‘Sustainable Development and Human Rights: An Integrated Conception’, 45 Int'l & Comp. L.Q. 796, 801 (1996) (noting that self determination began as a political principle, was translated into a legal principle, then on into a legal right and then, arguably into the status of \textit{jus cogens}).

\footnote{257} See Garcia, supra note 116 at 293 (arguing that the WTO contains many loopholes in existing special and differential provisions and, they must be plugged by substituting justiciable language for aspirational language).
unambiguous in its terms with respect to the composition of and voting arrangements in the Security Council. Articles 23 and 27 of the UN Charter have such a firm foothold in international law that these provisions have, five decades and many stimuli later, proven resistant to change. 258 The status quo is always represented as ‘neutral, natural and objective’ and as legitimate for it derives from the ‘the will of states.’ 259 Further, the grant of differential treatment is couched in mandatory and justiciable rather than aspirational language, and is typically accompanied by unapologetic justifications for differentiation based on greater power, responsibility, and financial outlay.

(B) Overlapping Terrain: International Economic Law, Environmental Law, and Human Rights Law

Although differential treatment, and indeed the precise contours of international obligation, differs in context and application from discipline to discipline, there are three spheres of overlapping ideological terrain—international development/economic law, environmental law, and human rights law. The overlap between these three disciplines testifies to an increasingly integrated conception and evolution of environmental protection. 260 The rhetoric of the NIEO, given short shrift in the field of international development and economic law, finds expression in the field of international environmental law where notions of culpability (of industrial countries), entitlement (of developing countries), and non-reciprocal obligations are aired and offered guarded support. 261 The link between environmental protection and economic development, explored in the 1970s and 1980s, finds explicit support in the Rio Declaration on Environment and Development 1992 which notes that ‘environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it,’ and in GA Resolution 55/199 which emphasizes the need for ‘a balance between economic development, social development and environmental protection as these are interdependent and mutually reinforcing components of sustainable development.’ 266

258 See A More Secure World: Our Shared Responsibility: Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change (2004), 244–260 (noting that despite changes to the distribution of power, and the nature of threats to the peace, the Security Council has been slow to change).
259 See supra note 253 at 207.
260 See generally supra note 256.
261 See Chapter 3.
262 The link between environment and development is recognized in Principles 8, 9, 10, 11, and 12 of the Stockholm Declaration on the Human Environment, 1972, reprinted in 11 ILM 1416 (1972).
265 ibid, Principle 4.
The integration of development/economic law with environmental law, given the gathering consensus on global ecological and economic interconnectedness, is but natural. Increasingly, however, human rights law is also being pressed into the service of environmental protection. The multilateral environmental dialogue, in its anthropocentricity, has always held the human being firmly at its centre, but it is only in the last few decades that environmental protection has been articulated in the language of human rights. More than sixty national constitutions, several international soft law instruments and numerous treaties, recognize and protect environmental rights, whether procedural, derivative, or stand alone ones. Indeed, the Ksentini Report, commissioned by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, records ‘universal acceptance’ of environmental rights at the national, regional, and international level. Notwithstanding this ‘universal acceptance’, only a handful of international treaties recognize an explicit human right in relation to the environment. The practice of international judicial fora, in particular human rights ones, however, suggests an increasing recognition that environmental harms could lead to human rights violations. The International Court of Justice (ICJ) in the Gabcíkovo Nagymaros case recognized the protection of the environment as a ‘sine qua non for numerous human rights such as right to health and the right to life itself.’ The ECtHR in a series of cases starting with its landmark judgment in Lopez

267 See Alexander Gillespie, International Environmental Law, Policy and Ethics (1997), 15–18 (arguing that anthropocentrism, despite a few recent developments that buck the trend, remains central to contemporary international environmental policy).


269 See e.g. GA Res. 2398 (XXII) (1968); Stockholm Declaration 1972, Preamble, supra note 262; the Hague Declaration on the Environment 1989, reprinted in 28 ILM 1308 (1989); and, GA Res. 45/94 (1990).


271 See e.g. Article 6 ICCPR, supra note 55; Article 2, ECHR Article 4 of the American Convention on Human Rights 1969, reprinted in 9 ILM 673 (1970) (where an environmental right might be said to flow from the right to life); and, see Article 8 ECHR (where an environmental right might be said to flow from the right to private and family life). See generally Robin Churchill, ‘Environmental Rights in Existing Human Rights Treaties’, in Human Rights Approaches to Environmental Protection (Alan Boyle and Michael Anderson eds., 1996), 89.


274 ibid 59.

Ostra\textsuperscript{276} held that ‘severe environmental pollution may affect individuals’ wellbeing and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.\textsuperscript{277} The ECtHR in Lopez Ostra did not consider the absence of a specific right to a safe and environmentally-sound environment\textsuperscript{278} a bar to considering environmental cases.\textsuperscript{279} The Human Rights Committee and the Inter-American Court on Human Rights also consider cases based on environmental harms in the absence of specific environmental rights.\textsuperscript{280}

Notwithstanding this seemingly widespread endorsement of a human right to the environment, the scope, content, and justiciability of environmental rights, as well as the wisdom of pursuing a human rights path to environmental protection,\textsuperscript{281} remain controversial.\textsuperscript{282} The scope and content of a human right in relation to the environment is by its very nature indeterminate. It raises more questions than it answers. First, to what qualitative level should the environment be protected—clean, safe, healthy, decent, or satisfactory?\textsuperscript{283} Second, against which of the numerous existing standards or benchmarks should the qualitative level of protection be assessed? Third, even if determinable, to what extent, if at all, should the level of protection be uniform across states (should it, instead, be tailored to the specificities of economic resources and priorities)? Fourth, who should bear the burden of the correlative duties—states (by themselves or collectively), multinational corporations, private actors, and/or individuals? Fifth, to what extent should these rights be justiciable? These queries are yet to be authoritatively discussed and resolved at the inter-governmental level. In addition to these pragmatic difficulties in conceptualizing a workable human right in relation to the environment, is the ethical concern that a human rights focus to environmental protection may be excessively anthropocentric, and not accord due consideration to the intrinsic value of the environment?\textsuperscript{284}

\textsuperscript{275} Lopez Ostra v Spain 20 EHRR 277 (1995); See also Guerra v. Italy 26 EHRR 357 (1998); Hatton v United Kingdom 34 EHRR 1 (2002); Taskin v Turkey (Application No. 46117/99), ECtHR, 10 November 2004; Moreno Gómez v Spain (Application No. 4143/02), ECtHR, 16 November 2004. 
\textsuperscript{277} At 295.

\textsuperscript{278} No such right exists in the European Convention on Human Rights 1950.


\textsuperscript{280} See Dinah Shelton, ‘Background Paper 2: Human Rights and the Environment: Jurisprudence of Human Rights Bodies,’ UNEP-OHCHR Expert Seminar on Human Rights and the Environment 2002 (noting that nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights; the complaints brought have been based upon rights to life, property, health, information, family and home life, but underlying the complaints are instances of pollution, deforestation, water pollution, and other types of environmental harm).

\textsuperscript{281} See Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’, in Human Rights Approaches to Environmental Protection (Alan Boyle and Michael Anderson eds., 1996), 43

\textsuperscript{282} See supra note 256 at 811.

\textsuperscript{283} ibid.

\textsuperscript{284} See Catherine Redgwell, Life, the Universe and Everything: A Critique of Anthropocentric Rights, in Boyle and Anderson, supra note 281 at 71–87 (discussing such critiques, and arguing that,
A few consequences flow from the fact that development law and human rights law encroach on the realm of environmental law in this fashion. The integration of development/economic law with environmental law, given their shared rhetoric, ideological roots, and emphasis on inequalities between countries, fits neatly into the overarching framework of differential treatment in favour of developing countries. The encroachment of human rights law on the environmental realm, with its emphasis on universality and a ‘common standard of achievement’, however, strikes a jarring note.

Differential treatment in the human rights field is fundamentally limited. In contrast, differential treatment in the environmental realm, free from the constraints of an ideological commitment to universality, is a growth arena. If environmental protection, however defined and limited, is articulated as a human right, it might appear logical to infer that the resulting environmental human right, subject to the same ideological commitment to universality, would limit both the nature and extent of differential treatment in environmental agreements. Not necessarily so. Differential treatment in international environmental agreements is a burden-sharing arrangement between states to protect the global environment. This burden-sharing arrangement, as subsequent chapters demonstrate, is tailored both to the contribution of states to the environmental harm in question and to their capacity to take response measures. If human rights arise, and are appropriate for protection in this context, the correlative duty would arguably devolve on the international community collectively, or on different states to the extent of their responsibility under the burden-sharing arrangement. If a particular state fails to carry its share of the burden, resulting thereby in environmental protection at less than the multilaterally agreed and desired level, which level would presumably ensure adequate protection of environmental human rights, claims may be brought against that state. Where states comply with standards, whether differential or otherwise, set by international environmental treaties, it will constitute, by extension from the ECtHR jurisprudence, ‘a strong evidential indication that there is no unlawful interference’ with the relevant human right.

given the increasing awareness of the interconnectedness of human beings and the environment and of the intrinsic value of the latter, it is unlikely that the recognition of a human right to a clean, healthy or decent environment will have as its necessary corollary the denial of non-human rights).

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285 See generally Chapter 4.
286 See e.g. Paul Brown, ‘Global Warming is Killing Us too, say Inuit’, The Guardian, 11 December 2003; and Andrew C. Revkin, ‘To Eskimos, Warming is a Rights Issue’, The New York Times, 16 December 2004 (reporting that the Inuit People have declared their intention to file a human rights claim before the Inter-American Court of Human Rights against the US for its rejection of the Kyoto Protocol and refusal to reduce its GHG emissions).
287 Kate Cook, ‘Environmental Rights as Human Rights’, 2 EHRLR 196, 214 (2002) (noting also that compliance, however, will not, in principle, preclude claims particularly where the environmental burden borne by certain individuals is disproportionate and uncompensated).
It is against this backdrop—of pervasive, if context specific, differential treatment across international law and overlapping terrain between environmental law, economics/development law, and human rights law—that differential treatment in international environmental law and in particular in the international climate regime will be explored in subsequent chapters.