Conclusion

The existence of pervasive inequalities between states on the one side and ecological and economic interdependence on the other has given rise to a host of challenges in international cooperative efforts. In the realm of international environmental cooperation, the challenge is one of integrating diverse states into environmental treaty regimes. Writing in 1971, Richard Falk feared that ‘a world of states each with its own self-serving rendering of historical experience and bolstered by deeply ingrained traditions of sovereignty, varying material circumstances, and wildly uneven perceptions of the character and seriousness of different types of environmental harm, was structurally incapable of meeting the ecological challenge’.\(^1\) Three decades on, the world has proved Richard Falk wrong. Although the state of the global environment is far from satisfactory, the community of sovereign states has, as a result of three decades of environmental dialogue, created a conceptual legal framework, arrived at a range of different burden-sharing arrangements, and deployed a host of techniques to integrate different states into international environmental regimes. Of the techniques used, differential treatment has proven to be the most effective as well as the most controversial.

Differential treatment in international environmental agreements finds its roots in the ideological battles fought over the New International Economic Order. As Susan Marks has observed, ‘[w]hen ideals begin to seem like illusions, we can jettison and replace them. Or we can reassert and reclaim them.’\(^2\) When the ideals of the New International Economic Order began to attain an illusory character, developing countries reasserted and reclaimed them, albeit in a different forum and under a different guise. In the environmental field, unlike in the economic, the evidence of industrial country complicity in the exploitative processes in question is incontrovertible, and therefore developing countries have had greater success in obtaining differential treatment in their favour in environmental treaties than elsewhere.

\(^1\) See Richard Falk, ‘Environmental Protection in an Era of Globalization’, 6 Y’bk of Int’l Env. L. 3, 10 (1995) (referring to his earlier work The Endangered Planet (1971)).

\(^2\) Susan Marks, The Riddle of All Constitutions (2000), 119.
I. Differential Treatment as a Valuable Tool in Engaging Countries in Environmental Treaties

Differential treatment, broadly conceived, is deeply embedded in the fabric of the new generation international environmental agreements, and is indeed the essence of the compact between industrial and developing countries with respect to international environmental protection. Differential treatment is found in varying degrees in all the new generation environmental treaties. In particular it is a central element of five core environmental treaties which have near-universal participation, the Vienna Convention for Protection of the Ozone Layer 1985, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987, the Convention on Biological Diversity 1992, the FCCC 1992, and the Convention to Combat Desertification 1994. All these treaties contain provisions of differential treatment in favour of developing countries, in particular with respect to implementation and assistance. These provisions are complemented by others conditioning the effective participation of developing countries to the implementation of industrial countries’ commitments.

The doctrinal basis of differential treatment in international environmental law is the principle of common but differentiated responsibility which identifies contribution to environmental degradation and capacity as the twin markers for differentiation between countries. This principle takes within its fold, at varying levels, historical, current, and future contributions to environmental degradation. It relies on environmentally degrading activity occurring across different temporal spaces for it will lead in time to the most equitable and environmentally sound result. Equitable for it privileges neither those who committed transgressions in the past (regardless of whether the transgressions were recognized as such) and reaped the benefits thereof nor those who commit transgressions today (when transgressions are recognized as such) without regard for the future, and environmentally sound for it imposes responsibility across temporal spaces and emphasizes both curative and preventive action.

The principle of common but differentiated responsibility is based on three inter-related notions. First, the notion of ‘equality for equals and inequality for unequals’, which requires that the characteristics of developing countries, the inequalities in the international community, divergences in levels of economic development and unequal capacities to tackle a given problem be taken into account in fashioning commitments under environmental treaty regimes. Second, the notion of intra-generational equity, traced to the widely accepted principle of sustainable development, which would entail prioritizing the development needs of the developing countries, providing adequate environmental space for their development, and helping them secure the necessary resources, technology, and access to markets. And finally, the notion of ‘restoring equality’, which would require that developing countries, to date victims of
the western industrialization process, receive preferential treatment, and industrial countries, to date beneficiaries of the process that led to the creation of the problem, bear an unequal burden for addressing environmental degradation.

The legal status of the principle of common but differentiated responsibilities is the subject of intense legal debate. Given, however, that both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its core content\(^3\) and the nature of legal obligation it entails,\(^4\) it will prove difficult—nay, impossible—to establish the existence of the necessary *opinio juris* the orthodox account of custom would demand. Even though against the tested touchstone of the orthodox account of custom the principle has not achieved the status of customary international law, it possesses a ‘species of normativity’ implying a certain legal gravitas. It is the context within which a particular subspecies of international law, here international environmental law, functions, such that this principle, *inter alia*, forms the bedrock of the burden-sharing arrangements crafted in different environmental treaties. It is also part of the conceptual apparatus of particular regimes such that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the regime in question. The principle of common but differentiated responsibilities is more authoritative than ‘soft law’ but less authoritative than custom. It is at a particular stage in the process of its evolution. It is more than a political principle or an aspirational goal but as yet far too inchoate and disputed to be properly characterized as custom.

Differential treatment has both equitable and practical bases, and as such it functions as an effective tool in instilling confidence and engaging developing countries in international environmental regimes. Yet aspects of differential treatment are intensely controversial. Differential treatment with respect to central obligations, such as is contained in the Kyoto Protocol, where industrial countries have mitigation commitments and developing countries do not, has been challenged repeatedly by key industrial countries. This cannot but raise the question of whether differential treatment in environmental treaties should be subject to boundaries.

**II. The Boundaries of Differential Treatment**

This book identifies three boundaries to differential treatment. First, differential treatment should not detract from the overall object and purpose of the treaty. Second, it should recognize and respond to differences across pre-determined

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\(^3\) One, that the CBDR principle ‘is based on the differences that exist with regard to the level of economic development’, and the other that the CBDR principle is based on ‘differing contributions to global environmental degradation and not in different levels of development’.

\(^4\) While some argue that it is obligatory others contend that it can be nothing but discretionary.
political and other categories. And, third, it should cease to exist when the relevant differences cease to exist.

The principle of common but differentiated responsibility recognizes the existence of a common environmental goal and the need to differentiate between countries in the actions required to achieve the common goal. It follows logically that the tasks countries undertake, however these are divided between the parties, should in their totality further the common environmental goal. If the actions detract from the common environmental goal then differential treatment has gone too far. Since the common environmental goal is captured in the object and purpose of the treaty, the extent of differential treatment in a treaty may be limited in the service of the object and purpose of the treaty.

The principle of common but differentiated responsibility is based, *inter alia*, in the Aristotelian conception that justice requires the dissimilar to be treated dissimilarly. It follows logically that the significant differences within the category of ‘developing countries’ constitute relevant differences to be taken into account in fashioning commitments under environmental treaty regimes. In practice this would serve environmental integrity and ensure that the categories of ‘developing’ and ‘industrial’ countries are broken down in favour of a more differentiated set of categories that takes into account significant differences within vast fuzzy categories.

Differential treatment exists where relevant differences exist. It follows logically that when the relevant differences vanish, differentiation should cease, or at least that the lack of differences should be taken into account in fashioning future obligations under the regime. Since differential treatment is a reflection of differences, if differential treatment persists after the differences have ceased to exist, differentiation perpetuates rather than addresses inequality. This suggests that differential treatment should be subject to review and therefore time-bound.

### III. The Boundaries as Applied to the Climate Regime

The climate regime, subject to continuing dissonance over the issue of ‘meaningful participation’ of developing countries, is an ideal test case for the application of the identified boundaries. The FCCC contains the following balance of commitments: the mitigation of climate change is the primary (but not exclusive) responsibility of the industrial countries, and sustainable development coupled with adaptation to the adverse effects of climate change is the primary (but not exclusive) responsibility of developing countries. The Kyoto Protocol, a product of the Berlin Mandate directed at strengthening the commitments of industrial countries through the adoption of a Protocol, requires industrial countries to undertake mitigation commitments and developing countries, to the extent possible given their respective capabilities and developmental priorities, to cooperate with industrial countries in helping them reach their commitments.
The balance of commitments under the climate regime is in keeping, for now, with the objects and purposes of the regime. The objects of the climate regime are two fold, the stabilization of anthropogenic emissions in the atmosphere and the redistribution of the ecological space. The FCCC recognizes the need for developing countries to industrialize, a process which will leave ecological footprints. It also recognizes that stabilization of the GHG emissions in the atmosphere is an ecological imperative. The FCCC chooses the equitable way out of the impasse. It provides developing countries an opportunity to increase their ecological space, with due sustainable development controls in place, at the expense of industrial countries, which it recognizes have contributed disproportionately to the climate change problem and occupy an inordinate amount of the ecological space.

If the need arises to do more to avert climate change, certain guidelines, based on common but differentiated responsibility, need to be kept in mind in crafting new legal obligations. First, developing countries should be permitted to take on mitigation commitments different in nature and stringency from those taken on by industrial countries. Second, developing countries should be given latitude in time before they are required to take on mitigation commitments, and the obligation of particular developing countries to adopt commitments or graduate from a certain commitment to a more stringent one should be tied to their achievement of a specified level of per capita emissions, per capita GDP, and historic and current contribution. Finally the re-evaluation of differential treatment should be a multilateral process channelled through in-built review procedures.

A wise man once said ‘[t]he secret of being a bore is to tell everything’. In an attempt to avoid being a bore, and in the interests of coherence, this study leaves some avenues unexplored, and some stories untold. Possible avenues for further exploration include the application of specific criteria so as to identify countries entitled to differential treatment, as well as determine their graduation out of differential treatment. Stories that merit telling include a story on the impact of differential treatment in international environmental law on the theories of justice and equality in international law jurisprudence, and a story on the potential relevance of differential treatment to arguments relating to the move from coexistence to cooperation in international law.

The existence of manifest inequalities between states and groups on the one side and ecological and economic interdependence on the other is the complex reality of contemporary international society. As long as inequalities persist, the dialogue on ways of integrating diverse countries into international cooperative efforts will continue. This book makes a modest effort to contribute to this dialogue.

5 Voltaire, 1694–1778.