The changing fortunes of differential treatment in the evolution of international environmental law

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The past century has borne witness to unprecedented advances in science, technology and prosperity. While these advances have indubitably improved the lives of many, they have also left in their wake an ever-expanding web of patterns of natural resource use and abuse by which few in either the developed or developing world are untouched. Unless these patterns of resource use and abuse are checked, the burdens placed on generations to follow will be both incalculable and unconscionable. As these concerns began to trouble the consciences of sovereign powers, global environmental issues began to feature in the international discourse. From the 1970s, when these issues first made their appearance on the international stage, international law relating to the environment has developed in leaps and bounds. Over the past four decades there has been a rapid expansion in the use of international law in the service of the environment. In a world of unequal states that differ widely both in their contributions to global environmental degradation and in their capacities to respond to it, such widespread resort to international law has proved possible primarily owing to the tailored use in multilateral environmental agreements of differential treatment in favour of developing countries.

This article explores the evolution of international environmental law and dialogue in the four decades from the United Nations Conference on the Human Environment held in Stockholm in 1972 to Rio+20 in 2012, with a particular focus on the changing dynamics of the discourse between developed and developing countries, and the corresponding interpretational shifts in the application of differential treatment in international environmental law. The evolution of international environmental law as it relates to differential treatment can be divided into three distinct periods. The first period, spanning the two decades between the Stockholm conference and the first Rio conference in 1992 (the United Nations Conference on Environment and Development: UNCED or the 'Earth Summit'), saw the origin and emergence of international environmental law and

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the dissonance between developed and developing countries that accompanied it. Differential treatment in this period is still in its infancy. The second period, spanning the decade between the Rio conference of 1992 and the World Summit on Sustainable Development of 2002, witnessed the consolidation and expansion of international environmental law and with it the flowering of differential treatment in favour of developing countries, in particular in the climate regime. The Kyoto Protocol of 1997, representing the high-water mark of differential treatment, came into existence in this decade. The decade following the World Summit on Sustainable Development of 2002 has been one of ferment. During these years the issue of climate change rose to the pinnacle of the international political agenda, and acquired a salience hitherto unseen in international environmental law. Yet notwithstanding the heightened profile of the climate question, or perhaps because of it, differential treatment in favour of developing countries, in particular the variant of it in evidence in the Kyoto Protocol of 1997, ever a source of irritation for some, came under serious questioning. In the latter half of this decade, the tension between the developed and developing worlds escalated at the same time as traditional North–South alliances disintegrated in the face of rapid economic growth in some countries. This led to a rapid erosion of certain forms of differential treatment in the climate regime, which arguably will wield an influence over developments in other areas of international environmental law as well. This article concludes that while the international regime can survive the erosion of certain limited forms of differential treatment, a wholesale rejection of differential treatment, and of the 'equity' concerns that animate it, would destabilize the normative core of the regime as well as render the climate regime unattractive to key players such as India.

A few caveats are in order. First, this article does not attempt to provide a comprehensive overview of developments in the tools and techniques of international environmental law, of which there are many. Instead, it focuses on developments in international environmental law as they pertain to the evolution, flowering and retreat of differential treatment in favour of developing countries. Second, the latter half of the article is focused primarily on developments in the climate regime. The climate challenge dominated the international agenda in this period, and there has been a relative lull in activity in other multilateral environmental agreements. The climate regime, however, is complex and idiosyncratic, and while developments in this arena are likely to be profoundly influential, there are limits to which they can be said to apply uniformly to all areas of international environmental law.

The origins and emergence of international environmental law: 1972–1992

The origins of the modern era of environmentalism are frequently traced to the United Nations Conference on the Human Environment held at Stockholm in 1972. Prior to 1972 environmental treaties were negotiated in an ad hoc and

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sporadic manner. They were regional in scope, and parochial in the interests they covered. The Stockholm conference, which was convened pursuant to a call by the UN General Assembly in 1968,[1] was conducted against the backdrop of and driven by the discourse of a New International Economic Order and witnessed a sharp dissonance between developing and developed countries. Developing states focused on the pressing need for development in their countries,[2] while the developed states steered the debate towards the formulation of a global environmental ethic,[3] premised on an understanding of the planet as an object of national and international policy and collective management.[4]

At the time, the impasse was resolved through a tenuous compromise that recognized that environmental protection is not necessarily incompatible with economic development. This compromise became possible because of a willingness on the part of many developing countries, in particular India, led at the time by its charismatic Prime Minister Indira Gandhi, to take a 'more holistic view, blaming neither population growth nor economic affluence alone'.[5] The conflict in Indira Gandhi's view 'was between conservation and reckless exploitation, not between progress per se and ecological values'.[6] The growing salience of the developing world in global politics also contributed to a conciliatory approach among developed countries towards those demands perceived as legitimate,[7] of which the development imperative of poor countries was clearly one. The resulting Stockholm Declaration of 1972 reflected this compromise. In deference to the desire of developed countries to create a common environmental ethic, the preamble recognized that environmental protection was 'a major issue' and that it was the 'urgent desire of the peoples of the whole world and the duty of all Governments'.[8] Principle 24 crystallized this sentiment, stating that the 'environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing'.[9] The recognition of a common protection imperative, however, was qualified by several principles that recognized the special needs of developing countries, including in particular their development imperative.[10]

In the 1980s, in keeping with the burgeoning interest in addressing global environmental problems, numerous diplomatic processes were launched including those that led to the World Commission on Environment and Development Report

1 'Problems of the human environment', UN General Assembly Resolution 2398 (XXIII) (1968), initiating the Stockholm Conference.
2 See e.g. 'Statement by head of Indian delegation', in Mostafa Tolba, ed., *Evolving environmental perceptions: from Stockholm to Nairobi* (London: Butterworth, 1988), p. 151.
3 See e.g. Olaf Palme, 'Speech of welcome by the Prime Minister of Sweden', in Tolba, ed., *Evolving environmental perceptions*, p. 51.
4 James Gustave Speth, 'The global environmental agenda: origins and prospects', in James Gustave Speth and Peter M. Haas, *Global environmental governance* (Washington DC: Island Press, 2006), pp. 1–20.
5 Mahesh Rangarajan, 'Striving for a balance: nature, power, science and India's Indira Gandhi, 1917–1984', *Conservation & Society* 7: 4, 2009, pp. 299–312.
6 Rangarajan, 'Striving for a balance'.
7 See generally Jens Steffek, 'The legitimation of international governance: a discourse approach', *European Journal of International Relations* 9: 2, 2003, pp. 249–75.
8 Stockholm Declaration, 1972, Preamble.
9 Stockholm Declaration, 1972, principle 24.
10 Stockholm Declaration, 1972, principles 9, 10, 11 and 12.

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of 1987 and the Hague Declaration on the Environment of 1989. These in turn led to UN General Assembly Resolution 44/228 of 1989, convening the United Nations Conference on Environment and Development in 1992. Resolution 44/228 explicitly attributed historical responsibility for certain global environmental problems to developed countries. Pertinently, it noted that 'the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must be in relation to the damage caused and must be in accordance with their respective capabilities and responsibilities'. This was to evolve into the principle of common but differentiated responsibilities and respective capabilities (CBDR) in the Rio Declaration.

In the two decades between 1972 and 1992 several multilateral environmental agreements were negotiated and adopted. Among them were the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Convention on International Trade in Endangered Species (1973), the Convention on Migratory Species of Wild Animals (1979), the Vienna Convention on the Protection of the Ozone Layer (1985), the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) and the Basel Convention on the Transboundary Movements of Hazardous Wastes (1989).

Differential treatment 1972–1992

The Montreal Protocol of 1987, widely considered to be the most successful of all multilateral environmental treaties, is successful in part because of its unique burden-sharing arrangement, which sought to address the concerns raised by developing countries in the years after Stockholm. The Basel Convention of 1989, also negotiated in this period, contains several provisions on differential treatment in favour of developing countries.[11] These provisions can be divided into:

- provisions that differentiate between developed and developing countries with respect to implementation,[12] such as delayed compliance schedules[13] or permission to adopt subsequent base years;[14] and
- provisions that grant assistance of various types, *inter alia* financial and technological.[15]

These provisions were designed to assist developing countries in meeting their commitments under the relevant treaty, not to exclude or protect them from particular commitments. The Montreal Protocol and the Basel Convention heralded the beginnings of an era of pervasive differential treatment in multilateral environmental agreements.[16]

[11] The Basel Convention, 1989, article 14(2), decision V/32. See also decisions I/7, I/14, II/2, III/3, IV/20 and IV/22, http://www.basel.int, accessed 27 Feb. 2012.
[12] See e.g. preambular provisions of the Montreal Protocol, 1987, and the Basel Convention, 1989.
[13] See e.g. Montreal Protocol, 1987, article 5.
[14] See e.g. Montreal Protocol, 1987, article 5(3)(a).
[15] See e.g. Montreal Protocol, 1987, article 10A.
[16] There is a rich and varied history of differential treatment in other fields of international law, including in particular the field of trade law. For a full survey see Rajamani, *Differential treatment in international environmental law*.

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The consolidation and expansion of international environmental law: 1992–2002

At Rio in 1992 the old conflicts between the developing and developed countries resurfaced.[17] There was little consensus on the real environmental issues, the significance of the terms 'environment' and 'development' or indeed the nature of the interaction between environment and development. While developed countries sought progress on climate change, biodiversity, forest loss and fishery issues, developing countries pushed for market access, trade, technology transfer, development assistance and capacity-building.[18] While developed countries sought to place on the agenda global environmental issues, perceived as a consequence of affluence, developing countries sought to emphasize local issues, perceived as intimately linked to poverty.[19] The issue of culpability was also a bone of contention between developing and developed countries. While the developed world attributed global environmental degradation to population growth in the developing world, the developing world sought to attribute it to consumption levels in the developed world.[20] These divergent approaches to global environmental governance can be traced, as Guha and Martínez-Alier do, to the material differences between the 'environmentalism of the poor' (linked to iniquitous and environmentally destructive processes of development) and First World environmentalism (linked to the emergence of a post-industrial society).[21]

A fragile consensus developed at Rio around the now marginally better rticulated although still inchoate concept of 'sustainable development'.[22] This concept acquired a rhetorical power and promise that essentially had something for everyone. Developing countries could see it encompass their emphasis on development, and developed countries could see it include their desire to control transboundary pollution. The resulting Rio Declaration is a delicate balance between the claims of the developing and developed countries. This balance is reflected in two sets of key principles or considerations. They are, on the one hand, the precautionary approach and the polluter pays principle;[23] and, on the other, the right to development, poverty alleviation and the recognition of common but differentiated responsibilities.[24] Notably, principle 7 of the Rio Declaration reads: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The

[17] Tony Brenton, *The greening of Machiavelli: the evolution of international environmental politics* (London: Earthscan, 1994), p. 211.

[18] David Runnalls, 'What the North must do', in Simon S. C. Tay and Daniel C. Esty, eds, *Asian dragons and green trade* (Singapore: Times Academic Press, 1996), pp. 169, 170.

[19] José Goldemberg, 'The road to Rio', in Irving M. Mintzer and J. Amber Leonard, eds, *Negotiating climate change* (Cambridge: Cambridge University Press, 1994), pp. 175, 177.

[20] Jyoti K. Parikh and Subir Gokarn, *Consumption patterns: the driving force of environmental stress*, report for UNCED (Bombay: Indira Gandhi Institute, 1991).

[21] Ramachandra Guha and Juan Martínez-Alier, *Varieties of environmentalism: essays North and South* (London: Earthscan, 1997), p. 16.

[22] *Agenda 21: programme of action for sustainable development*, A/CONF.151/26/Rev. 1 (1992).

[23] Rio Declaration on Environment and Development, 1992, principles 15 and 16.

[24] Rio Declaration, 1992, principles 3, 5 and 7.

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developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

Though covering similar ground, in its tone and intent the Rio Declaration is qualitatively different from the Stockholm Declaration. Indeed, UNCED 1992 was heralded as representing a 'paradigm shift' from international environmental law to the international law of sustainable development,[25] and as signifying a 'new international ecological order'[26]—albeit one perceived by some as a 'mere appendage to another branch of international law: international development law tout court'.[27] Developing countries believed they were integrating rules once considered as comprising international environmental law and rules once considered as comprising international developmental law under the mantle of this new law of sustainable development.[28] This paradigm shift can be traced to the increasing currency of development rhetoric, as well as the heightened mobilization of developing country coalitions in the lead-up to UNCED. For their part, developed countries arguably accepted this shift, as it complemented their own growing faith in the 'norm complex' of liberal environmentalism that stressed sustained economic growth, free trade and market instruments as the preferred means of managing environmental problems.[29]

The Rio process provided the necessary impetus for the negotiation and adoption of several multilateral environmental agreements. These include, among others, the UN Framework Convention on Climate Change (UNFCCC) and the UN Framework Convention on Biological Diversity, both concluded in 1992 and negotiated in parallel with the Rio Declaration and Agenda 21; and later the Convention to Combat Desertification (1994), the Kyoto Protocol (1997), the Rotterdam Convention on Prior Informed Consent (1998), the Cartagena Protocol on Biosafety (2000) and the Stockholm Convention on Persistent Organic Pollutants (2001). These treaties cover areas of 'common concern', tailor commitments to capacities through provisions on differential treatment for developing countries, attract therefore near-universal participation, and create institutions for continuing regime development, implementation and review.

[25] The shift was deliberately made in Working Group III, at the fourth session of the UNCED Preparatory Committee in New York, March 1992, following a proposal by the Brazilian delegate. See Peter H. Sand, 'UNCED and the development of international environmental law', *Journal of Natural Resources and Environmental Law* 8, 1993, pp. 209, 228.

[26] Jan Pronk, 'A new international ecological order', *Internationale Spectator* 14, 1991, p. 728.

[27] Marc Pallemaerts, 'International environmental law in the age of sustainable development: a critical assessment of the UNCED process', *Journal of Law and Commerce* 15, 1996, pp. 623, 674–5.

[28] See generally Kamal Hossain, 'The Rio Conference and post-Rio: the New International Economic Order', in Najeeb Al-Nauimi and Richard Meese, eds, *International legal issues arising under the United Nations decade of international law* (The Hague: Kluwer Law International, 1995), p. 1199.

[29] Steven Bernstein, 'Ideas, social structure and the compromise of liberal environmentalism', *European Journal of International Relations* 6: 4, 2000, pp. 464, 474.

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Differential treatment 1992–2002

There are several remarkable features about the multilateral environmental agreements negotiated in this period. Distinctive among these is the growing currency of the CBDR principle and its application through differential treatment in favour of developing countries, with the increasing appearance of 'linking clauses', that is, clauses that link implementation by developing countries of their commitments to the provision of assistance by developed countries.

Although the Montreal Protocol of 1987 and the Basel Convention of 1989 contained norms of differential treatment in favour of developing countries, it is in the multilateral environmental agreements negotiated in the decade after UNCED that differential treatment came into its own. The CBDR principle made its way from the 'soft law' confines of the Rio Declaration to an operational provision in a legally binding treaty, the UNFCCC.[30] In addition, differential treatment, the application of CBDR, took the form not just, as in the previous phase, of

- provisions that differentiate between developed and developing countries with respect to implementation,[31] such as delayed compliance schedules, permission to adopt subsequent base years,[32] delayed reporting schedules,[33] and softer approaches to non-compliance,[34] and
- provisions that grant assistance, which may be financial[35] or technological,[36]

but, critically, also, of

- provisions that differentiate between developed and developing countries with respect to the central obligations contained in the treaty, such as emissions reduction targets and timetables.[37]

In this context the Kyoto Protocol of 1997, which contains such differential treatment in its central obligations, represents the high-water mark of environmental law-making during this period. The Kyoto Protocol is unique in that it is the only instrument currently in force that differentiates between developed and developing countries with respect to central obligations—such that developed countries have targets and timetables for greenhouse gas (GHG) mitigation, while developing countries do not. It proved possible for developing countries to negotiate this form of differentiation because of the clear recognition that the

30 Article 3 of the UN Framework Convention on Climate Change, however, unlike Rio principle 7, contains no reference to the enhanced contributions of industrial countries to global environmental degradation, and places both common but differentiated responsibilities and respective capabilities on the same plane.

31 See e.g. preambular provisions of the Convention to Combat Desertification, 1994; UNFCCC, 1992; and Convention on Biological Diversity, 1992.

32 See e.g. Kyoto Protocol, 1997, article 3(5).

33 See e.g. UNFCCC, 1992, article 2(5).

34 See e.g. 'Procedures and mechanisms relating to compliance under the Kyoto Protocol', FCCC/CP/2001/13/Add.3, 21 Jan. 2002.

35 See e.g. Stockholm Convention, 2001, article 13(2); Convention to Combat Desertification, 1994, article 20(2); Convention on Biological Diversity, 1992, article 20; and UNFCCC, 1992, article 4(3).

36 See e.g. Convention on Biological Diversity, 1992, article 16; UNFCCC, 1992, article 4; Convention to Combat Desertification, 1994, article 18; International Tropical Timber Agreement, 1994, article 27(2); Vienna Convention, 1985, article 4(2); Basel Convention, 1989, article 10(3); Montreal Protocol, 1987, article 10A.

37 See e.g. Kyoto Protocol, 1997, article 3.

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largest share of historical and current GHG emissions had originated in developed countries, that per capita emissions in developing countries are still low, and that the share of global emissions from developing countries will grow to meet their social and developmental needs.[38] Implicit in the Kyoto burden-sharing arrangement is the understanding that the principal polluters should take the first decisive step in the fight against climate change. Such a burden-sharing arrangement was a particular, and contested, interpretation of the principle of common but differentiated responsibilities.

To ensure that this first step by developed countries was truly decisive, the Kyoto Protocol contained clear, precise, prescriptive and deadline-driven obligations backed by a compliance system with enforcement powers. Indeed, Kyoto's compliance system provides the most highly developed example thus far of an original, complex, rigorous and arguably successful non-compliance procedure.[39] The Kyoto Protocol bears tremendous significance for developing countries as it endorses a unique form of differentiation in their favour, and captures a model of developed country leadership yet to be seen elsewhere. But it is precisely this form of differential treatment and this model of developed country leadership that have proven contentious.

Another provision common to many of the multilateral environmental agreements of the late 1980s and 1990s is the 'linking clause' that makes the implementation of commitments by developing countries conditional to some extent on the implementation of commitments by developed countries. UNFCCC article 4(7), a representative example, reads:

> The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.[40]

The Montreal Protocol of 1987, the Convention on Biological Diversity of 1992 and the Stockholm Convention of 2001 contain similar provisions.[41] These provisions were significant innovations in that, by making developing countries' participation and implementation conditional on developed countries' performance of their commitments, they underpinned and reinforced the compact between developing and developed countries with respect to international environmental protection. Needless to say, since the precise contours of this compact are unclear, these provisions have greater rhetorical power than pragmatic effect.

Differential treatment came into its own in this period as a response to the increasing voice and influence of developing countries and the perceived legitimacy

[38] Decision 1/CP.1, the Berlin Mandate, FCCC/CP/1995/7/Add.1, 6 June 1995, at p. 4.

[39] For a detailed analysis of compliance under the climate regime, see Jutta Brunnee, Meinhard Doelle and Lavanya Rajamani, eds, *Promoting compliance in an evolving climate regime* (Cambridge: Cambridge University Press, 2011).

[40] UNFCCC, 1992, article 4(7).

[41] Montreal Protocol, 1987, article 5(5); Convention on Biological Diversity, 1992, article 20(4); Stockholm Convention, 2001, article 13(4).

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of their position, as well as the pragmatic consideration of ensuring universal participation in international environmental instruments. There was a recognition that developing countries, with their limited capacities and resources, could not or would not participate if there were no provisions to facilitate their participation and limit their exposure to onerous obligations and hefty compliance costs.

The World Summit on Sustainable Development (WSSD) of 2002 was convened at the tail-end of this phase. UN General Assembly Resolution 55/199 (2000) charged the WSSD with conducting a ten-year review of Agenda 21 and 'reinvigorat[ing] the global commitment to sustainable development'. Resolution 55/199 required the WSSD to 'ensure a balance between economic development, social development and environmental protection as these are interdependent and mutually reinforcing components of sustainable development'. At the WSSD significant divergences emerged between developing and developed countries on how the balance should be struck between economic development, social development and environmental protection. A gradual but distinct shift in the sustainable development agenda emerged, however, with a tilt of the balance from environmental protection to social and economic development.

The WSSD Plan of Implementation contains numerous commitments made by the international community on the developmental and environmental fronts.[42] On the developmental front, the international community agreed to establish, among other things, a world solidarity fund to eradicate poverty,[43] and it agreed to halve by the year 2015 the proportion of people without access to basic sanitation.[44] It also reiterated numerous development goals enshrined in other multilateral processes. On the environmental protection front, the international community agreed to accelerate the shift towards sustainable consumption and production;[45] 'substantially increase' the global share of renewable energy sources;[46] 'aim' to use and produce chemicals in ways that do not lead to significant adverse effects on human health and the environment;[47] maintain or restore, where possible, by 2015 depleted fish stocks to levels that can produce the maximum sustainable yield;[48] and achieve by 2010 a significant reduction in the current rate of loss of biodiversity.[49]

To the extent that a distinction can be drawn between them, the economic and social development outcomes of the WSSD arguably outweigh the environmental protection ones. This is a reflection of the agenda and focus of the WSSD. To complement the shift in emphasis in the sustainable development dialogue from environmental protection to social and economic development, developing countries sought to consolidate Rio's principle 7, enshrining CBDR, as the basis

[42] World Summit on Sustainable Development, Plan of Implementation, 4 Sept. 2002, http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm, accessed 8 March 2012.
[43] WSSD, Plan of Implementation, para. 6(b).
[44] WSSD, Plan of Implementation, para.7.
[45] WSSD, Plan of Implementation, para. 14.
[46] WSSD, Plan of Implementation, para. 19(e).
[47] WSSD, Plan of Implementation, para. 22.
[48] WSSD, Plan of Implementation, para. 30(a).
[49] WSSD, Plan of Implementation, para. 42.

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for international action with respect to all three pillars of sustainable development; they met with only limited success, however.[50]

From Stockholm to Johannesburg, although the environment versus development debate has consistently underpinned the international environmental dialogue, the locus of action has shifted over time to encompass a larger number of developmental concerns. The Stockholm Declaration cautiously recognized the environment–development link; the Rio Declaration heralded a new international ecological order characterized by an emphasis on sustainable development; and the WSSD Plan of Implementation shifted the accent within the sustainable development dialogue from environmental protection to social and economic development. The WSSD turned the spotlight on developmental issues such as poverty, education, sanitation, health, trade and globalization. In doing so it legitimized the claim that these are issues of common concern and that the development concerns of developing countries need to be fully integrated into the sustainable development dialogue.

Unlike the Rio Declaration, the WSSD encouraged reflection on the larger developmental context within which multilateral environmental agreements were situated, and on the implementation and effectiveness of existing multilateral environmental instruments. The decade following the WSSD witnessed frenetic environmental activity at the national and international levels, but this did not translate into the large-scale adoption of new international legal instruments as it had in the previous decade. A handful of regional agreements were negotiated in this period, as were numerous amendments to existing multilateral agreements.[51] Among the few multilateral environmental agreements negotiated in this period is the Nagoya Protocol on Access and Benefit Sharing of 2010, which is yet to come into force; and negotiations are under way on a global legally binding instrument on mercury.

A decade of ferment: 2002–2012

The years since the WSSD mark the onset of a distinct and significant phase in the evolution of international environmental law. While the previous decades bore witness to the increasing currency of developmental concerns and differential treatment in favour of developing countries, in this period the trend was checked: these notions were challenged, problematized and reinterpreted, at least in the climate regime, which has been considered a pattern case for differential treatment.

In this period environmental issues, and climate change in particular, began to acquire new salience and political gravitas. It was argued that while the costs of

[50] WSSD, Plan of Implementation, para. 42. There are six references to CBDR in the Plan, in the introduction (para. 2) and in the context of changing unsustainable patterns of consumption and production (para. 13), climate change (para. 36), air pollution (para. 37) and means of implementation (para. 75). Although there are other references, most of these occur in the context of the environmental protection rather than the social and economic development pillar.

[51] Data from Ronald B. Mitchell, International Environmental Agreements Database Project (Version 2010.3), 2002–2011, http://iea.uoregon.edu/, accessed 27 Feb. 2012.

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compliance with climate controls may well be high, the costs of non-compliance would be even higher. Meanwhile countries like China and India began growing at a breathtaking pace—distinguishing themselves from their 'Third World' partners, lifting their people out of poverty and rapidly expanding their carbon footprints. As the stakes rose, however, differences between countries grew wider, beleaguered North–South lines were further eroded and differential treatment came under serious attack.

The rise and rise of the climate issue

Environmental issues, in particular the issue of climate change, have come to acquire a salience in international affairs thus far reserved for the likes of trade and warfare. Once the preserve of sleepy environmental ministries across the world, climate change has been catapulted by the ever more reliable scientific advances on its catastrophic impacts, including in particular the economic and existential threats it poses to many nations, and the media attention it has drawn, into a political priority at head-of-state level. The UN Secretary General, Ban Ki-moon, has made addressing climate change 'a cornerstone of his tenure'.[52] The United Nations Development Programme (UNDP) characterizes climate change as the 'defining human development challenge of the twenty-first century'.[53] And in perhaps the most fitting testament of all to this global significance, the 15th Conference of Parties (COP) to the UNFCCC, held at Copenhagen from 7 to 18 December 2009, attracted 125 heads of state and government and 40,000 participants. No collective challenge facing humanity—let alone an environmental one—has ever before attracted such attention, participation and political capital. Yet, in keeping with the tone of environmental diplomacy in this decade, these heads of state could not reach agreement on a legal formula to avert dangerous climate change.

The fall and fall of differential treatment?

In part, the failure of states to reach a legal solution in Copenhagen can be attributed to deep disquiet over the nature and extent of differentiation in the climate regime, in particular the differentiation in central obligations embodied in the Kyoto Protocol. The balance of power, it is argued, has changed dramatically since the UNFCCC and Kyoto Protocol were negotiated. Emerging powers like China, India, Brazil and South Africa no longer merit the extent of differential treatment they are entitled to under the regime. Future agreements, therefore, some argue, should contain greater parity or 'parallelism' in commitments between developed and (at least some) developing countries.

The United States' opposition, along with that of other developed countries, to the more extreme form of differentiation in evidence in the climate regime

[52] See http://www.un.org/wcm/content/site/climatechange/pages/gateway/secretary-general, accessed 27 Feb. 2012.

[53] UNDP, *Human Development Report, 2007–8*: *Fighting climate change: human solidarity in a divided world*, http://hdr.undp.org/en/reports/global/hdr2007-8/, accessed 1 March 2012.

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dates back to the early period of the climate negotiations, and has been consistent through the years.[54] In the more recent past the US has sought to differentiate between those developing countries that are major economies/emitters and those that are not. The European Union has also argued that differences between developing countries must be taken into account, and that the economically advanced developing countries must make 'fair and effective contributions' to the climate effort.[55] Japan has suggested categorizing developing countries on the basis of their stage of economic development, and encouraging mitigation actions tailored to their common but differentiated responsibilities.[56] Australia has argued that if the GDP per capita of UNFCCC parties is taken into account, there are 'more non-Annex-I Parties [developing countries] that are advanced economies than existing Annex-I Parties [developed countries]'.[57] Australia recommends, therefore, that there should be an objective basis for graduation of non-Annex I parties to the Annex I grouping, 'with a view to all advanced economies adopting a comparable effort towards the mitigation of greenhouse gas emissions'.[58]

These proposals have proved controversial. Many developing countries are opposed to efforts to differentiate between them, as they perceive such differentiation as threatening their identity and leveraging power. The G77 and China have expressed 'firm rejection' of 'any proposal directed towards differentiating between non-Annex I parties'.[59] In their view the differentiation sanctioned by the UNFCCC and Kyoto Protocol stems not (at least, not solely) from differences in material conditions but from differences in historical and moral responsibility for causing climate change. Any erosion of differentiation would blur the lines of responsibility, shift a disproportionate (to their contribution) burden of mitigation onto developing countries, and thereby limit their development prospects.

Despite these concerns, the climate negotiations have resulted in the past few years in a subtle yet significant erosion of certain forms of differentiation between developed and developing countries in the climate regime. The non-binding Copenhagen Accord of 2009,[60] the Cancún Agreements of 2010,[61] and the Durban Long-term Cooperative Action (LCA) decision of 2011,[62] represent a departure from certain types of differentiation hitherto in evidence in the climate instruments.

54 See Paul G. Harris, 'Common but differentiated responsibility: the Kyoto Protocol and United States policy', *New York University Environmental Law Journal* 7: 1, 1999, pp. 27, 41–2.

55 See 'Climate change: Bali conference must launch negotiations and fix "roadmap" for new UN agreement', IP/07/1773, Brussels, 27 Nov. 2007; see also submission by France on behalf of the European Community and its member states, FCCC/AWGLCA/2008/MISC.2, 14 Aug. 2008, pp. 5–6.

56 See submission by Japan, FCCC/AWGLCA/2008/MISC.1/Add.1, 12 March 2008, pp. 4, 11.

57 See submissions by Australia, FCCC/KP/AWG/2008/MISC.1/Add.2, 20 March 2008, p. 5; FCCC/AWGLCA/2008/MISC.1/Add.2, 20 March 2008, p. 8; FCCC/AWGLCA/2008/Misc.5/Add.2 (Part I), 10 Dec. 2008, pp. 73–9.

58 Submission by Australia, FCCC/KP/AWG/2008/MISC.1/Add.2, p. 5.

59 See submission by Philippines on behalf of the G77/China, FCCC/AWGLCA/2008/MISC.5/Add.2 (Part II), 10 Dec. 2008, p. 48.

60 Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1, 30 March 2010.

61 Decision 1/CP.16, 'The Cancún Agreements: outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', FCCC/CP/2010/7/Add.1, 15 March 2011.

62 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, advance unedited version', draft decision -/CP.17, http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf, accessed 27 Feb. 2012 (hereafter 'Durban LCA decision').

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As indicated before, there are several categories of differentiation in the climate instruments. Differentiation between countries, and not just broadly between developed and developing but between various groups of countries, pervades the climate treaties.[63] There is differentiation between countries in relation to the applicability of central obligations, implementation of obligations and access to proffered assistance. Of these, the perceived rigid or bipolar distinction between Annex I (developed) and non-Annex I (developing) countries in relation to central mitigation obligations has proved to be the most controversial. The Copenhagen Accord, Cancún Agreements and Durban LCA decision seek primarily to dilute this form of differentiation in the climate instruments.

These three sets of measures all contain commitments on financial assistance[64] and technology transfer,[65] as well as providing for preferential access to assistance for developing countries, in particular least developed countries, small island developing states and Africa,[66] thereby signalling a broad acceptance of differentiation in relation to proffered assistance. In relation to mitigation, however, all three follow a distinctive model. The Copenhagen Accord contains appendices, and the Cancún Agreements and Durban LCA decision refer to documents, that list self-selected mitigation commitments and actions from developed and developing countries respectively.[67] Admittedly, they require developed/Annex I countries to implement 'quantified economy-wide emission reduction targets'[68] and developing/non-Annex I countries to implement 'nationally appropriate mitigation commitments'.[69] However, since these instruments allow self-selection of commitments and actions, the distinction between commitments and actions in practice may be blurred. Therefore these instruments effectively replace a regime of differentiation in favour of developing countries with a regime of flexibility for all countries. This, through architectural sleight of hand, recasts the contours of the CBDR principle—rendering the issue of differentiation for developing countries increasingly irrelevant.[70]

In an effort to further consolidate this move away from differentiation in favour of developing countries, in particular in the future climate regime, at the 17th

[63] The various categories identified include 'developed countries', 'developing countries,' 'least-developed countries', 'small island developing States', 'countries with economies in transition', 'developing countries, whose economies are particularly dependent on fossil fuel production', 'low-lying and other small island countries', 'countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification' and 'developing countries with fragile mountainous ecosystems.' See UNFCCC, 1992, *passim*.

[64] See e.g. Copenhagen Accord, paras 8, 10, 11; Cancún Agreements, para. 95; Durban LCA decision, paras 126–32 and Draft decision -/CP.17, Green Climate Fund, report of the transitional committee, advance unedited version, http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf, accessed 27 Feb. 2012.

[65] See e.g. Copenhagen Accord, para. 11; Cancún Agreements, paras 113–29; Durban LCA Decision, section V.

[66] See e.g. Copenhagen Accord, paras 3, 8; Cancún Agreements, para. 95.

[67] See e.g. Copenhagen Accord, para. 4; Cancún Agreements, paras 36, 49.

[68] Copenhagen Accord, para. 4 and Cancún Agreements, para. 36 with marginally different language; Durban LCA decision, preambular recital 7 to section II.A.

[69] Copenhagen Accord, para. 5; Cancún Agreements, para. 49; and Durban LCA decision, preambular recital 8 to section II.B.

[70] For a full analysis, see Lavanya Rajamani, 'The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime', in Navroz K. Dubash, ed., *Handbook of climate change and India: development, politics and governance* (New Delhi: Oxford University Press, 2011), pp. 118–29.

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COP to the UNFCCC in Durban in 2011, parties launched a process titled the Durban Platform on Enhanced Action to negotiate 'a Protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all'.[71] This instrument is scheduled to be adopted in 2015 and implemented from 2020. This decision—in marked contrast to several previous COP decisions launching negotiations towards future agreements[72]—does not contain a reference to 'equity' or 'common but differentiated responsibilities'. This is no benign oversight. Developed countries were unanimous in their insistence that any reference to 'common but differentiated responsibilities' must be qualified with a statement that this principle must be interpreted in the light of 'contemporary economic realities'. They were also insistent that the future regime must be 'applicable to all'. India, among other developing countries, argued in response that this would be tantamount to amending the UNFCCC. The only way out of this impasse was to draft the text such that it was rooted in the Convention—'under the Convention'—thereby implicitly engaging its principles, including the principle of common but differentiated responsibilities. This, it was believed, would hold efforts to reinterpret and qualify this principle at bay. Nevertheless, the fact that the divisions on the application of this principle are such as to preclude even a rote invocation of it signals a likely recasting of differentiation in the future climate regime.[73]

The use of the term 'applicable to all' further substantiates this point. Admittedly, the fact that the instrument applies to all parties does not necessarily imply that it applies symmetrically to all parties. However, the political context for the inclusion of this term, particularly given the conspicuous absence of the usual markers for differentiation—equity and common but differentiated responsibilities—makes it crystal clear that differential treatment in favour of developing countries in on the wane.[74]

Such erosion of differentiation, or at least some variants of it, has come at considerable cost. Given the strength of the American demand for parallelism between the mitigation commitments and actions taken by developed and (some) developing countries,[75] and the absence of political conditions for strengthening the overall mitigation effort, symmetry has been achieved at the cost of ambition, and by levelling down the mitigation efforts required of developed countries.[76]

[71] Draft decision -/CP.17, 'Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action', 2011, advance unedited version, http://unfccc.int/2860.php, para. 2, accessed 27 Feb. 2012 (hereafter 'Durban Platform Decision').

[72] See e.g. Berlin Mandate, para. 1(a); decision 1/CP.13, Bali Action Plan, FCCC/CP/2007/6/Add.1, 14 March 2008, p. 3, para. 1(a).

[73] For a full analysis of the Durban Platform Decision, see Lavanya Rajamani, 'The Durban Platform on Enhanced Action and the future of the climate regime', *International and Comparative Law Quarterly* 61: 2 (forthcoming, 2012).

[74] Rajamani, 'The Durban Platform on Enhanced Action'.

[75] To the United States, there is 'no rationale for legal asymmetry, in the Convention or otherwise'. See submission by the United States of America, FCCC/AWGLCA/2010/MISC.2, 30 April 2010, p. 79.

[76] Although it is impossible to prove that asymmetry would have resulted in higher ambition overall, it is evident that the move away from targets and timetables, since these would be inappropriate for developing countries, and towards self-selected commitments and actions, is in itself a weakening of ambition, at least in the form of the commitments required by the international law of states.

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Taking note of documents containing mitigation pledges that will not meet the stated 2°C goal, as the Cancún Agreements do, is a far cry from Kyoto-style quantitative targets and timetables.[77]

Another casualty of this erosion of differentiation is the principle of equity. In an effort to distance themselves from the perceived bipolar developed–developing country distinctions in the UNFCCC and Kyoto Protocol, in Cancún parties endorsed instruments that provide flexibility for all, and in Durban an instrument that has no reference or grounding in equity. A future climate regime 'applicable to all' that does not distinguish between countries, and is built on principles that do not recognize and accommodate the needs of countries with serious energy poverty and developmental issues, will raise grave challenges to the legitimacy of the climate regime.

The increasing currency of the CBDR principle and differential treatment in the decade following Rio is matched in the decade following the WSSD by a march towards legal symmetry across states, at least in the climate negotiations. Although there are many reasons for this gradual erosion of certain forms of differentiation between developed and developing countries, it is at least in part a result of cracks in G77 unity. The G77 and China are at times able to project a tenacious togetherness, but the differences among the 132 members of the group run deep. The overall unity of the group has been abandoned in order to enable progress in the negotiations on several occasions in the past. Recently, more vulnerable developing countries that have little in common with large developing countries have begun to find their own voice. Bangladesh, in its final plenary statement at the Bali Climate Conference of 2007, and in subsequent written submissions, stressed the 'vast differences' between developing countries, in particular between large developing countries and the least developed countries.[78] The emergence of the Cartagena Dialogue for Progressive Action, an informal alliance of countries including some developed and many vulnerable developing countries, working towards an ambitious, legally binding regime, is also evidence of this trend. Given that a significant proportion of GHG emissions can be sourced to large developing countries, it is in the interests of the more vulnerable developing countries to spurn strict adherence to differentiation, which is likely to result in inadequate coverage of global GHGs. These countries joined the EU in the Durban Climate Conference to press India to accept the launch of negotiations towards a legally binding agreement after 2020.

For their part, the large developing countries have also begun to distinguish themselves from the rest. At Copenhagen, the BASIC group (Brazil, South Africa, India and China) emerged as a distinct negotiating entity to forge a last-minute political deal with the United States. Since Copenhagen the BASIC countries have met quarterly to formulate strategy in the lead-up to negotiating sessions. These countries, however, appear to have concurrent rather than coordinated positions.

[77] Cancún Agreements, paras 36, 49. See UNEP, *Bridging the emissions gap: a UNEP synthesis report* (Nairobi, 2011). The 2°C goal refers to the goal Parties adopted in the Cancun Agreements to hold the increase in global average temperature below 2°C above pre-industrial levels. See Cancún Agreements, para. 4.

[78] See submission by Bangladesh, FCCC/AWGLCA/2008/MISC.1, 3 March 2008, p. 8.

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Their strength and complicity stem from cumulative might and overlapping interests rather than from unified positions. While together they have the ability to stave off legally binding commitments, they do not have sufficient clout to compel developed countries to take on legally binding commitments or to prescribe differentiation. On many key issues their views have begun to diverge: for example, on equity in the climate regime, on which India and South Africa have differing interpretations, and on the need for a new legally binding agreement, on which South Africa was in favour and India was not. At the final plenary in Durban, after some initial support from China, India was isolated in its opposition to the launch of negotiations leading to a legally binding instrument.

The impending death of the Kyoto Protocol

A final influential occurrence in this decade will be the eventual termination of the controversial Kyoto Protocol, whose first commitment period is scheduled to come to an end in 2012.[79] Negotiations to adopt targets for a second commitment period were launched in 2005, but are yet to conclude.[80] Against all odds,[81] in Durban in 2011 the Kyoto Protocol was extended for another commitment period.[82] The EU had made it clear in the lead-up to Durban that it would be willing to extend the life of the Kyoto Protocol for the period necessary to make the transition to a new agreement, but not indefinitely.[83] Although the text of the Durban decision does not make this evident, the understanding on which the parties, in particular the EU, are proceeding is that the Kyoto Protocol will come to an end when the second commitment period expires.[84]

In the past few years there has been gathering momentum towards a new legally binding instrument to regulate climate change. Most developed countries, and a large number of vulnerable developing countries,[85] consider a new legally binding agreement essential to ensure greater participation in and effectiveness of climate controls. In particular they hope it will bring the United States and large developing countries into the circle of states with mitigation obligations.

[79] Kyoto Protocol, 1997, article 3.

[80] Decision 1/CMP.1, 'Consideration of commitments for subsequent periods for parties included in Annex I to the Convention under article 3, para. 9 of the Kyoto Protocol', FCCC/KP/CMP/2005/8/Add.1, 30 March 2006.

[81] In particular the categorical rejection by Canada, Japan and Russia of a second commitment period: see 'Canada to withdraw from Kyoto Protocol', BBC News, 13 Dec. 2011; 'Cancún climate change summit: Japan refuses to extend Kyoto Protocol', *Guardian*, 1 Dec. 2010; 'Cancún climate change conference: Russia will not renew Kyoto Protocol', *Guardian*, 10 Dec. 2010.

[82] Draft decision -/CMP.7, 'Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I parties under the Kyoto Protocol at its sixteenth session', advance unedited version, http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf, accessed 27 Feb. 2012 (hereafter 'Durban KP Decision').

[83] See preparations for COP-17 and CMP-7, Durban, South Africa, 28 Nov.–9 Dec. 2011, EU Council conclusions, 3118th Environment Council meeting, Luxembourg, 10 Oct. 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/125026.pdf, accessed 1 March 2012.

[84] It is yet to be determined whether the second commitment period will end on 31 Dec. 2017 or 31 Dec. 2020. See Durban KP Decision, para. 1.

[85] See e.g. Legal options paper, fifth meeting of the Cartagena Dialogue, Samoa, 26–27 July 2011 (on file with the author).

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The United States, which is responsible for 20 per cent of the world's annual emissions and 30 per cent of historical emissions (1900–2000),[86] has long considered the Kyoto Protocol to be 'ineffective and unfair', in part because it does not include mitigation commitments for major 'population centers' such as China and India.[87] It has also in recent negotiations proved resistant to the charm of Kyoto's accounting and compliance rules. The United States is unlikely to ratify the Kyoto Protocol even if it is comprehensively amended. Since most other developed countries consider it essential that they are in the same legal instrument as the United States—subject to the same flexibility and constraints (or lack thereof) and standards—a new instrument is considered essential. Many developed countries believe that if they were to make the transition to a new legally binding instrument which captures market-friendly elements of the Kyoto Protocol, permits flexible approaches tailored to national circumstances and defers to domestic political constraints, the United States will participate in it.

In response to this gathering momentum towards a new legal instrument, the Durban Platform launched negotiations towards 'a Protocol, another legal instrument or agreed outcome with legal force'.[88] Any instrument that emerges from the negotiations is likely, given the blueprints offered by other recent instruments, to have a fundamentally different character from that of the Kyoto Protocol. It is likely to reflect a regulatory approach based on self-selection of mitigation commitments and actions (rather than prescription), enhanced parity between the obligations placed on developed and developing countries (rather than differentiation), and enhanced information flow relating to commitments/actions (rather than a compliance system).[89] In consequence of these differences, this new agreement is likely to fundamentally alter the balance of responsibilities in the climate regime and privilege a different, some would argue a more sensible,[90] regulatory model.

The international climate negotiations that have dominated the international environmental agenda in the period between 2002 and 2012 offer evidence of a distinct shift in the decade leading up to Rio+20—a shift towards symmetry in the legal requirements placed on countries, and therefore limited obligations as well as flexibility in methods. This translates into greater deference than before to national circumstances, discretion, policies and priorities, a more circumscribed role for international law, and a corresponding expansion of sovereign power. It is against this backdrop of ferment that the Rio+20 meeting is being convened.

[86] World Resources Institute, Earth Trends, Environmental Information, 'Contributions to global warming: historic carbon dioxide emissions from fossil fuel combustion, 1900–1999', http://earthtrends.wri.org/text/climate-atmosphere/map-488.html, accessed 1 March 2012.

[87] Text of a letter from the President to Senators Hagel, Helms, Craig and Roberts, The White House, Office of the Press Secretary, 13 March 2001, http://www.gcrio.org/OnLnDoc/pdf/bush_letter010313.pdf, accessed 1 March 2012; see also Byrd Hagel Resolution, Senate Resolution 98, 25 July 1997, http://www.nationalcenter.org/KyotoSenate.html, accessed 1 March 2012.

[88] Durban Platform Decision, para. 2.

[89] For further analysis, see Lavanya Rajamani, 'The Cancún climate change agreements: reading the text, subtext and tealeaves', *International and Comparative Law Quarterly* 60: 2, 2011, pp. 499–519.

[90] See generally Steve Rayner, 'How to eat an elephant: a bottom up approach to climate policy', *Climate Policy* 10: 6, 2010, pp. 615–21; Joseph E. Aldy and Robert N. Stavins, eds, *Post-Kyoto international climate policy: implementing architectures for agreement* (Cambridge: Cambridge University Press, 2010).

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Conclusion

In the first three decades of environmental diplomacy, from 1972 to 2002, the international community witnessed an exponential growth in the number and range of multilateral environmental agreements, an ever-widening array of tools, techniques and practices, and a rapid expansion of differential treatment in favour of developing countries. Differential treatment in central obligations, albeit disputed from its inception, took pride of place in the Kyoto Protocol negotiated in 1997. The decade that followed, from 2002 to 2012, notwithstanding the heightened popular and political profile of climate diplomacy, in response to seemingly intractable difficulties both across the North–South divide and within the North, witnessed a retreat from such differential treatment in central obligations. The battle over the future (or lack thereof) of the Kyoto Protocol, and the developments in the climate regime, in particular the non-binding Copenhagen Accord and the subsequent Cancún Agreements, Durban LCA decision and Durban Platform decision, testify to this retreat from certain variants of differential treatment, equity and CBDR. Since the call for symmetry, at least in legal form, between the commitments of developed and developing countries could only be met by abandoning a prescriptive climate regime, such retreat is matched by an increase in investment and faith in national discretion, policies and practices.

Although the climate regime is unique in several respects, the extent to which it has monopolized investment and attention in the last decade suggests that developments in this field are likely to have impacts in other areas of international environmental law as well. If parties to the UNFCCC had limited themselves to excising differentiation in central obligations from the climate regime—since it is unique to the Kyoto Protocol—there would be fewer ripple effects. However, since developed countries have sought, in particular in the negotiations for the future climate regime, to distance themselves from all forms of differentiation, many of which form part of the conceptual apparatus of other multilateral environmental regimes, efforts to renew or extend differential treatment in other multilateral environmental agreements are also likely to be contested.

Different explanatory interpretations of this gradual erosion of differentiation over time are possible. It could be argued that international law, as reflected in the Kyoto Protocol, was an overreach or a ‘step change’, and that a more gradual evolution would have been more in keeping with practices that have been tried and tested in other multilateral environmental agreements.[91] Arguably, differential treatment in central obligations, contested from the start, is at the root of the United States’ disengagement from the Kyoto Protocol, and any regulatory tool that marginalizes a major emitter is unlikely to endure.

A wider critique is that there are intrinsic political limits to traditional international law as a form of governance, and the climate regime as currently structured has been straining unproductively against those limits. A new, more pragmatic

[91] Daniel Bodansky and Elliot Diringer, *The evolution of multilateral regimes: implications for climate change* (Arlington, VA: Pew Centre on Global Climate Change, 2010).

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regime based on flexibility for all, rather than North–South transfers, and on the gathering and dissemination of information, is in the process of taking hold. This more pragmatic decentralized regime, based on multiple modes and nodes of governance, has, some would argue, greater potential to address climate change successfully than an idealized prescriptive international climate change law regime. Whether this proves to be the case remains to be seen, but such a system, as is evident from the developments in the climate regime, leaves little room for a meaningful conversation on issues of equity between nations.

And it is this—equity between nations, the normative core of the climate regime—that could prove to be the principal casualty of this recent erosion of differentiation. Some forms of differentiation—such as that in central obligations seen in the Kyoto Protocol—have lost favour politically, and will not play a role in the future climate regime. Indeed, isolating this form of differentiation and excising it from the climate regime was arguably essential in order to end the long years of deadlock in the negotiations. In seeking to distance themselves from this form of differentiation, however, developed countries appear to have swung the pendulum too far in the other direction. Other forms of differentiation—in implementation and assistance—are important, given the diversity of parties at the table and the need for universal participation. While these still have a place in the current climate regime, it is unclear, in view of the Durban Platform decision, which contains no markers for differentiation of any kind, to what extent, if at all, these will play a role in the future climate regime.

Differentiation, equity and ambition are critical to an effective multilateral environmental regime and are inextricably linked. At the heart of differential treatment lies the notion that equity or fairness dictates special or preferential treatment for certain countries, whether on the grounds of their differing capacities or their lesser contributions to the global environmental problem. It is only when countries believe themselves to be treated fairly that they will first participate in the regime, and next consider ways of enhancing their own ambition in relation to its central goals. For developing countries with serious energy poverty and developmental challenges, a climate regime built around symmetry will impose severe limitations on their ability to lift their people out of poverty or provide universal access to energy. India, in particular, has repeatedly made this point. This will limit these countries' desire to find common cause with the regime's central objectives and to bind themselves to its requirements.

The evolution of international environmental law in the past four decades has witnessed the rise and fall of differential treatment. The rise of differential treatment paid rich dividends in terms of universal participation in prescriptive multilateral environmental agreements. It remains to be seen whether universal participation in multilateral environmental agreements will survive the waning star of differential treatment.

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