DEVELOPING STATES AND INTERNATIONAL ENVIRONMENTAL LAW: THE IMPORTANCE OF DIFFERENTIATED RESPONSIBILITIES

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I. INTRODUCTION

THE protection of the global environment has become one of the central objectives of the international community in recent decades. Issues such as climate change, the depletion of the ozone layer, and the loss of the biological diversity has resulted in a growing international awareness of the problems facing the planet. Moreover, there is also recognition that States will need to act more collaboratively at the international level if effective solutions are to be found to these problems. However, concurrently there is also recognition that many States have pressing socio-economic concerns of their own, and that they have neither the resources nor the capabilities with which to devote to such global issues—so called "developing" States. This article examines the response of international environmental law to these two, potentially opposing, trends, viz., the need for universalism, on the one hand, and sensitivity to the needs of developing States, on the other. In particular, the article will examine the emerging legal principle of "common but differentiated responsibilities", as well as discussing the various means of operationalising it. Nevertheless, as will be discussed below, there is still much debate as to the conceptual basis of this principle—leading one to question its real aim. Is it to contribute to a fairer world system in which developed States recognise their historical responsibility for past environmental damage, or is it simply an expedient means of ensuring the participation of developing States in what are primarily Northern concerns?

II. DIFFERENTIATED RESPONSIBILITY—THE 1992 RIO DECLARATION

One of the most conspicuous aspects of the 1992 United Nations Conference on Environment and Development was the international community's endorsement of differentiated responsibilities between developed and developing States as a means of achieving both global

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environmental protection and sustainable development.[1] Such differentiation could be seen in the texts of all of the documents agreed at Rio; the two treaties, the U.N. Framework Convention on Climate Change,[2] and the Convention on Biological Diversity,[3] and the three non-binding documents, Agenda 21, the Rio Declaration of Principles and the Statement on Forests.[4] Of particular importance, are Principles 6 and 7 of the Rio Declaration.

> *Principle 6*: "The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority ...."
> *Principle 7*: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystems. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The 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."

Principle 7 was particularly controversial, with the text satisfying neither developed nor developing States. Whilst developed States disliked the idea of being held legally responsible for their past acts of environmental degradation, many developing States felt the final text failed to specifically blame the North for its past and current behaviour. The G77 Group of developing States was particularly disappointed as its own proposal for Principle 7 had been rejected. As originally formulated, it read,

> "... The major cause of the continuing deterioration of the global environment is the unsustainable patterns of production and consumption, particularly in developed countries. ... In view of their main historical and current responsibility for global environmental degradation and their capability to address this common concern, developed countries shall provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development".[5]

1. "Sustainable Development" is the notion that economic development, social progress and environmental protection can be made compatible. As the 1987 Report of the World Commission on Environment and Development, *Our Common Future* noted, "[it is] development that meets the needs of the present without compromising the ability of future generations to meet their own needs", p.43.

2. 1992 Framework Convention on Climate Change (31 I.L.M. (1992) 849).

3. 1992 Convention on Biological Diversity (31 I.L.M. (1992) 822).

4. See UN Doc. A/CONF.151/26/REV.1 (Vol.I), p.3: Declaration of the United Nations Conference on Environment and Development; p.9: Agenda 21; and p.480: Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.

5. UN Doc. A/CONF.151/PC/WG.III/L.20/REV.1 (1992): (Proposal submitted on behalf of the Group of 77).

The differences between this text and Principle 7 are all too apparent. Whereas Principle 7 assigns "responsibility" to developed States because of "the technological and financial resources they command" as much as for any reason of past environmental damage caused by the "pressures their societies place on the global environment", the G77 proposal was much more direct on the point of responsibility. It stated that the North should accept the "main historic and current responsibility" for the present environmental situation because of its "unsustainable patterns of production and consumption" which has resulted in "global environmental damage". Of particular significance is what developed States are responsible for; whereas in Principle 7, developed States acknowledge responsibility "that they bear in the international pursuit of sustainable development", in the G77 proposal, developed States have the "main ... responsibility for global environmental degradation". This difference is not just semantics. Whereas in the G77 proposal, developed States are held responsible under international law for past and current acts of environmental degradation, in Principle 7, developed States tried to eliminate notions of legal responsibility, and replace them with the idea of future responsibility in achieving global sustainable development—largely based on their increased financial and technological resource base. Nevertheless, many developed States disliked also the third sentence of Principle 7. The text itself was taken from a 1991 OECD Policy Statement agreed by the developed countries themselves.[6] The South had therefore managed to use one of the North's own phrases to impose differential responsibilities. The US was particularly concerned with Principle 7 and issued an interpretative statement emphasising the fact that it felt the principle merely acknowledged "the special leadership role of developed countries" due to their "wealth, technical expertise and capabilities". It also included the belief of the US that Principle 7 does not "imply a recognition ... of any international obligations ... or any diminution in the responsibility of developing countries".[7] The US interpretative statement is difficult to reconcile with the actual text of Principle 7 as it is quite clear that if the reference to "common but differentiated responsibilities" in the text is to mean anything, it must imply that developing countries have different, and to that extent, diminished obligations. As was clear from the Framework Convention on Climate Change to which the US is a Party, the obligations of developing States were significantly less comprehensive than those of developed States. It therefore seems somewhat strange that the US would object to a principle that it itself endorsed in the Climate Change Convention.

6. OECD SC/Press (91) 71 (3 Dec. 1991), 3: Policy Statement of Meeting of OECD Ministers on Environment and Development.

7. UN Doc. A/CONF.151/26 (Vol.IV) (1992), 20.

The text of Principle 7 was also disliked by developing States. As was noted above, the final version had substantially removed any notion of legal responsibility of developed countries for past and current environmental degradation. It would now be much more difficult for the South to argue for the imposition of liability upon the North for past environmental harm upon the basis of Principle 7. Moreover, unlike the G77 proposal, where the provision of financial and technological resources from developed States to developing States was to be seen as compensation for environmental degradation, Principle 7 lacked any mention of such transfers.[8] And despite the fact that Principle 9 of the Rio Declaration contains a broad commitment to the transfer of technology,[9] by being phrased in terms of "States should cooperate" instead of the G77 proposal which talked in terms of "developed countries shall provide", developed States were largely able to prevent Principle 9 providing any future basis for the development of a new customary obligation requiring the transfer of environmentally sound technology outside the framework of multilateral environmental agreements.

However, despite such criticisms of the Rio Declaration, on both sides of the debate, there is little doubt that Principle 7 is a major new contribution to international environmental law. In particular, Principle 7 seems to recognise the notion of common but differentiated responsibilities as having significant legal implications, though whether it is a legal principle or just a political guideline is still open to debate.[10] And despite the fact that Principle 7, in its final form, was ambivalent, at best, on the issue as to whether developed States were currently in breach of international law for the present state of the environment, there is little question that one of the central justifications for the imposition of differentiated responsibilities is because of the differing contributions of States to global environmental problems.[11]

3. TYPES OF DIFFERENTIATION

Before discussing the various legal and theoretical justifications for the concept of differentiated responsibility, it is necessary at this stage to

8. J. Kovar, "A Short Guide to the Rio Declaration" (1993) 4 CJIELP, 128–129: "The absence of these elements from the Rio Declaration made it very difficult for China and some delegations from the G–77 to accept the final text."

9. Principle 9 Rio Declaration reads "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies".

10. A. Kiss, "The Rio Declaration on Environment and Development" in L. Campiglio *et al.* (Eds), *The Environment after Rio: International Law and Economics* (1994), 61.

11. P. Malanczuk, "Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference" in K. Ginther *et al.* (Eds), *Sustainable Development and Good Governance* (1995), 32–33.

outline the various types of differentiated obligation. Some of the most important as regards international environmental law include the setting of differential standards, permitting grace periods in implementation, requiring flexibility in approach, and the provision of international assistance. However, whatever type of obligation, differentiation can be achieved in one of two ways. The obligation can either be drafted in such a way so that it is obvious from reading the text that it is advantageous for one particular group of States—what Magraw terms a "differential norm",[12] or the obligation can appear universally applicable to all States, but in reality requires, or permits, the consideration of other factors in its implementation—a "contextual norm". In Magraw's analysis, both contextual and differential norms allow for preferential treatment for developing States. Contextual norms, in particular, require some further explanation. They are norms that allow States to take into account considerations, often socio-economic, in the application of international commitments. As Magraw notes, terms such as "reasonable" and "equitable" are classic examples of contextual norms as they provide States with "wide latitude for arguing compliance or non-compliance".[13] However, the indeterminancy, or flexibility, of contextual norms need not be infinite. Treaties themselves can try to limit the freedom a contextual norm gives to State Parties. For example, the 1992 Convention on Biological Diversity imposes numerous obligations on States that they must implement "as far as possible and as appropriate".[14] And despite the fact that the phrase as a whole is extremely ambiguous, the insertion of "as far as possible" is an attempt to prevent developing State Parties relying too heavily upon "as appropriate" for a justification for inaction. Moreover, as will be seen below, contextual norms can play a vital role in international law through the flexibility that they inherently possess.

It is the aim of the next few paragraphs to take each form of differentiated obligation in turn and to discuss briefly its current role in international environmental law. First, the use of differential standards. As Agenda 21 notes, States should, when devising international standards "take into account the different situations and capabilities of countries".[15] Such standards can be seen in, *inter alia*, the 1992 Climate Change

12. D. Magraw, "Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms" (1990) 1 CJIELP, 69–99.

13. Magraw, *loc. cit. supra* nn.12, 74.

14. See, for example, Arts.5, 7, 8, 9, 10, 11 and 14 1992 Convention on Biological Diversity.

15. Para.39.3(d) Agenda 21.

Convention, the 1994 Desertification Convention,[16] the 1994 International Tropical Timber Agreement (ITTA),[17] the 1994 Sulphur Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution,[18] the 1996 Protocol to the London Dumping Convention,[19] and the 1997 Kyoto Protocol on Climate Change. However, the nature of these differential standards largely depends upon the purpose of the agreement. For example, as the Climate Change Convention is a framework treaty, differentiation is not being used to formulate specific individual emission reduction commitments for each Party (as it is in the 1994 Sulphur Protocol and the 1997 Kyoto Protocol), but rather to ensure that the broad reporting and policy development obligations imposed on all States are more comprehensive for developed States than developing States. In particular, only developed States are under an obligation to "aim" to return their greenhouse gas emission levels to 1990 levels by 2000.[20] Similarly, under the Desertification Convention, developed State Parties have accepted obligations not imposed upon developing State Parties. However, what is also apparent from several of the texts is that differentiated standards are not just a tool to encourage the participation of developing countries in international environmental law. Differentiated standards are also utilised between developed States. For example, in both the 1994 Sulphur Protocol and the 1997 Kyoto Protocol, where the States involved were either virtually all developed countries, or where only the developed countries undertook substantive commitments, differentiation was an essential component in negotiating a successful treaty. In both instances, each State Party agreed to an individual emission reduction target.[21]

As well as differentiated standards, a large number of texts since UNCED have also included explicit references to the situation, needs and concerns of developing States. Some of these references have already been mentioned, such as those in the Convention on Biological Diversity.

16. See, for example, Art.5 (obligations of affected country Parties) and Art.6 (obligations of developed country Parties) 1994 Desertification Convention (33 I.L.M. (1994) 1328).

17. See Art.34 1994 ITTA (33 I.L.M. (1994) 1016) on special measures for developing countries. In particular, Art.34.1: "Developing importing members whose interests are adversely affected by measures taken under this Agreement may apply to the Council for appropriate differential and remedial measures".

18. See Annexes I and II 1994 Sulphur Protocol (33 I.L.M. (1994) 1540).

19. Art.26 1996 Dumping Protocol allows State Parties to adhere to an adjusted compliance time schedule for specific provisions (36 I.L.M. (1997) 1).

20. See Arts.4.1 and 4.2 1992 Climate Change Convention.

21. On a related issue, both the Climate Change Convention (Art.4.3) and the Kyoto Protocol (Art.11.2) (37 I.L.M. (1998) 22) utilise the notion of "appropriate burden sharing" to guide the future negotiation of financial commitments between developed country Parties. As with the use of the notion of equity in international environmental law, "burden sharing" presumably requires all relevant considerations to be taken into account before a conclusion is reached.

However, what is becoming increasingly apparent is that international environmental law is adopting a much more flexible approach to global environmental issues to take account of the economic and social reality. Recent texts that have included such references include, *inter alia*, the 1992 Climate Change Convention, Agenda 21,[22] the 1992 Forest Principles,[23] the 1994 Desertification Convention,[24] and the 1997 Kyoto Protocol.[25]Of particular interest is the repetition of a number of very similar phrases, such as recognising the "special needs and circumstances of ... developing country Parties",[26] and taking into account such countries' "special requirements".[27] Such preferential language allows State Parties to take a more integrated and holistic approach to environmental issues. Moreover, such statements provide additional guidance to State Parties on the relevant factors that must be taken into account in the implementation of such agreements and the development of subsequent standards. The clearest example of this is article 3 of the Climate Change Convention which sets down those principles to guide future behaviour.

> "In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following: [1] The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities ... [2] The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change ...."

Article 3 is an excellent example of how a treaty can not only guide the future implementation of its own provisions, but also the subsequent development of future protocols. In effect, the principles contained within article 3 provide a written constitution, which the Conference of the Parties is duty bound to apply when fulfilling its obligations under the

22. Both the Climate Change Convention and Agenda 21 make constant references to the needs and circumstances of developing countries. In fact, it might be suggested that such references are overused and therefore arguably lose some of their influence.

23. Art.9(a) Forest Principles.

24. The 1994 Desertification Convention includes references to the needs of developing States throughout its text, but particularly in the preamble, and Arts.3(d), 5 and 6.

25. See Art.10 1997 Kyoto Protocol: "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances ...".

26. Art.3.2 1992 Climate Change Convention. See also Art.4.9 1992 Climate Change Convention: "The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology".

27. Art.24.1 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ("Straddling Fish Stocks Convention") (34 I.L.M. (1995) 1542).

Convention. Of particular interest, is the reference in Article 3 to those developing country Parties "that are particularly vulnerable to the adverse effects of climate change". This principle is supported by Article 4.8 which requires developed country Parties when considering the impact of their responses to climate change to take particularly into account the needs of such developing countries as small island countries, those "prone to natural disasters" or those "liable to drought and desertification". This requirement to take into account the needs of certain categories of States, particularly developing States, can also be seen in such texts as the 1995 Washington Declaration on Protection of the Marine Environment from Land-based Activities,[28] the 1996 Dumping Protocol,[29] and the 1994 Report of the UN Conference on Small Island Developing States.[30] One particularly good example of such preferential treatment is the emphasis that the Desertification Convention gives to the issue of desertification in Africa; as article 7 states,

> "... Parties shall give priority to affected African country parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country Parties in other regions."

There is of course the danger that explicit incorporation within multilateral environmental agreements of the concerns of developing States, or the needs of a sub-category thereof, will undermine attempts to unite the international community in common action. Nevertheless, environmental protection will ultimately be self-defeating if it fails to take into account the socio-economic realities, particularly of countries in the South.

The third type of differentiated obligation which has become much more noticeable in international environmental law since the adoption of the 1990 amendments to the Montreal Protocol is the increasing reliance by the international community on the provision of financial and technological assistance to developing States. One of the principal means of achieving such assistance is through the establishment of an international environment fund. Whilst of great importance, the Multilateral Fund under the Montreal Protocol was not the first example of such a fund. Earlier examples included the UNEP Environment Fund[31] and the World Heritage Fund.[32] The UNEP Fund was established in 1972 in order to enable the UNEP Governing Council to fulfil its mandate of promoting

28. Adopted on 1 Nov. 1995 at the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (A/51/116, Annex I, App.II). It can be found in (1996) 26 E.P.L. 1, (1996) 37.

29. Seventh preambular paragraph: "the interests and capacities of ... in particular small island developing States".

30. UN Doc. A/CONF.167/9. In particular, see Annex I: Declaration of Barbados.

31. UNGA Res.2997 (XXVII) (1972).

32. See Arts.15–18 1972 World Heritage Convention (1037 U.N.T.S. 151).

environmental initiatives within the United Nations and beyond. The whole fund is made up of voluntary contributions. The World Heritage Fund, on the other hand, receives both voluntary and compulsory contributions. The fund allows the World Heritage Committee to support technical cooperation and training, as well as subsidiary functions such as emergency assistance and the provision of general advice. In a similar way, the 1990 Wetland Conservation Fund—a fund created by the Conference of the Parties to the 1971 Ramsar Wetlands Convention,[33] allows the Standing Committee with responsibility for the fund, to support the activities of developing countries as regards wetland conservation and management. This trend was further strengthened by the creation of the Global Environment Facility (GEF) in 1990, which was restructured in 1994 to take account of the obligations contained within the Climate Change and Biodiversity Conventions.[34] The establishment of the GEF through the collaboration of the World Bank, UNEP and UNDP was a major step forward in the scope and nature of such funds. The purpose of the GEF was to provide financial grants to enable developing countries implement environmentally sound projects, seek technical assistance and undertake research, as well as purchase environmentally sound technology. The GEF focused on four main areas: global warming, loss of biological diversity, pollution of international watercourses, and depletion of the ozone layer. Other international environmental funds include the Technical Cooperation Trust Fund under the Basel Convention,[35] the IMO Technical Cooperation Programme, and the Financial Mechanisms under the Climate Change and Biodiversity Conventions.[36] Most post-UNCED treaties also include provisions on financial resources including the Desertification Convention,[37] and the Straddling Fish Stocks Convention, which requires States to cooperate to establish "special funds to assist developing States in the implementation

33. Conference Res. C.4.3. 1971 Ramsar Wetlands Convention (996 U.N.T.S. 245).

34. For a brief introduction to the GEF, see P. Sands, *Principles of International Environmental Law (Vol.I: Frameworks, Standards and Implementation)* (1995), 736–741.

35. Decision of 1/7 of the First Conference of the Parties (1992) to the 1989 Basel Convention created two trust funds. The first was an ordinary trust fund to provide financial support for the secretariat; the second fund was the Technical Cooperation Trust Fund designed to "assist developing countries and other countries in need of technical assistance in the implementation of the Basel Convention" (Annex II: Terms of Reference, para.1) (28 I.L.M. (1989) 657).

36. Arts.11 and 21.3 1992 Climate Change Convention, and Arts.21 and 39 1992 Biodiversity Convention.

37. Art.21 1994 Desertification Convention. The Financial Mechanisms under the Climate Change, Biodiversity and Desertification Conventions are all partly administered by the restructured GEF.

of this Agreement".[38] One of the central benefits of such funds is that it allows developed States to insist upon more stringent standards for developing States, thereby ensuring a higher standard of environmental protection. However, despite those funds already mentioned, the international community as a whole was not prepared to establish one to assist developing States in the implementation of the broader objectives of Agenda 21. Despite the fact that chapter 33 of Agenda 21 noted that for developing countries, particularly the least developed countries, "substantial new and additional funding ... will be required" (sic),[39] the primary means of mobilising such resources would be through the private sector and the extension of official development assistance. Though some developing States had wanted the international community to establish a new fund for sustainable development,[40] Agenda 21 makes it very clear that whilst innovative solutions to financing should be explored, a global "sustainability" fund was not one of them.

The establishment of environmental trust funds, however, is not the only means of providing assistance to developing States. As many treaties acknowledge, international cooperation can take many forms. As the Straddling Fish Stocks Convention notes,

> "[c]ooperation ... shall include ... assistance relating to human resources development, technical assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services".[41]

Such a broad view of international assistance is also found in the texts of other environmental treaties. The 1996 Dumping Protocol, for example, requires technical cooperation and assistance, including the "training of scientific and technical personnel ... with a view to strengthening national capabilities".[42] In fact, following the Brundtland Report, this notion of national capacity building has become one of the central objectives of international assistance.[43] Capacity building was defined in the 1994 Desertification Convention to include, "institution building, training and

38. Art.26.2 1995 Straddling Fish Stocks Convention. Funding is also available at the regional level; Art.IX.3 1996 Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (36 I.L.M. (1997) 777) sets up a supplementary conservation fund for the purposes of "monitoring, research, training and projects relating to the conservation of cetaceans".

39. Para.33.13 Agenda 21.

40. See, for example, para.15(1) UNGA Res. 44/228: "to examine the possibility of a special international fund".

41. Art.25.2 1995 Straddling Fish Stocks Convention.

42. Art.13.1(1) 1996 London Protocol.

43. See for example, Art.6 1992 Climate Change Convention (education, training and public awareness); Arts.12 (research and training) and 13 (public education and awareness) 1992 Biodiversity Convention; and ss.2 and 3 1994 Desertification Convention.

development of relevant local and national capacities"[44] Moreover, in relation to climate change, capacity building is likely to play an ever-increasing role following the adoption of the Kyoto Protocol. Article 12 of the Protocol creates a Clean Development Mechanism, the purpose of which is to allow developed States take action in developing States to reduce greenhouse gases, and thereby comply with their international commitments. Nevertheless, it seems quite clear that one of the preconditions for the involvement of the Mechanism in such projects will be appropriate capacity building.

4. "COMMON RESPONSIBILITIES"

Before analysing the various conceptual justifications for differentiation in international environmental law, it is first necessary to discuss briefly the "common" responsibilities that are binding on all States. As Principle 7 of the Rio Declaration notes, "States have common but differentiated responsibilities".[45] Such a notion of commonality is inevitably based on the customary obligation that all States are responsible for ensuring "activities within their jurisdiction or control" do not damage the environment beyond their own territory. As codified in Principle 21 of the 1972 Stockholm Declaration on the Human Environment and Principle 2 of the Rio Declaration, the text of the "no harm" obligation makes no reference to the socio-economic situation of States. In fact, the "no harm" principle is seemingly applicable to both North and South alike.[46] Moreover, this customary obligation has, more recently, been supplemented by the environmental principles of " 'common good', 'common interest' ... [and] 'common concern of humankind' ".[47] Such principles are having a significant effect on both the nature and scope of international environmental law. Not only is the international community becoming much more involved in what were previously considered issues of domestic concern, but also States are beginning to accept that they are under an international obligation to protect and preserve their own "internal" environment. And despite the fact that such principles as "common concern" and "common interest" do not yet enjoy a "common

44. Art.19.1 1994 Desertification Convention.

45. Emphasis added.

46. Nevertheless, the International Law Commission in a 1997 paper noted, "[i]t is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to discharge a State from its obligation under the present articles" (UN Doc. A/CN.4/L.554 and Corr.1–2, Add.1 and Add.1/Corr.1–2, and Add.2 and Add.2/Corr.1, Art.3 commentary para.14).

47. A. Timoshenko, "From Stockholm to Rio: The Institutionalization of Sustainable Development" in W. Lang (ed.), *Sustainable Development and International Law* (1995), 154.

interpretation",[48] both North and South have recognised a common responsibility for solving global environmental issues. As a recent UNEP report notes, it is the responsibility of all States, "individually and jointly", to "protect ... the environment and promot[e] ... sustainable development".[49] However, common responsibilities need not result in common obligations. As Sands makes very clear, whilst it is the commonality of obligations which ensures the participation of all States in international environmental law, it is the differentiation within such obligations which makes international environmental law politically acceptable.[50] Common responsibility may provide the basis for international action, but it is the concept of differentiation which will hopefully promote the efficacy of such action.

5. JUSTIFICATIONS FOR DIFFERENTIATED RESPONSIBILITY

It is a basic premise of this article that there are a number of distinct but mutually related grounds for the existence of differentiated obligations in international environmental law. Previously, it has been argued by academics and States alike that there are two main reasons for the existence of such differentiation, viz. the historical responsibility of the North for current environmental degradation, and its present capability to remedy such problems. However, despite the veracity of this argument, it disguises the fact that there are a number of other possible grounds for the existence of differential responsibilities. These include, first, recognition within the international community that international obligations must take into account the specific needs and circumstances of developing countries; second, the emerging principle on States to assist each other in international relations to achieve sustainable development—the idea of a "global partnership"; and third, as an inducement to hesitant States to sign and then implement multilateral environmental agreements.

The traditional approach to differentiation in international environmental law that there were only two main reasons for the existence of differing responsibilities between States can be clearly seen in the texts of some of the most important post-Brundtland documents. The UN General Assembly resolution that convened UNCED, for instance, made a very clear statement on this issue. It affirmed that,

> "the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must

48. *Ibid.*

49. 1996 UNEP Final Report of the Expert Group Workshop on International Environmental Law aiming at Sustainable Development, para.43(a).

50. P. Sands, "International Law in the Field of Sustainable Development" (1994) LXV BYIL, 344.

> be in relation to the damage caused and must be in accordance with their respective capabilities and responsibilities".[51]

Such phrases set the tone for the Conference itself, where Principle 7 of the Rio Declaration contained very similar ideas. It talked in terms of States having differing responsibilities "[i]n view of the different contribution to global environmental degradation". Moreover, the third sentence of Principle 7 expands upon this initial justification for responsibility by noting that,

> "[t]he 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".

Developed countries, though denying legal responsibility for environmental damage, by agreeing to the wording of Principle 7 were clearly "acknowledg[ing]" responsibility for the role they play in both causing environmental damage, and finding solutions thereto. Before going on to discuss other justifications for differentiation in international environmental law, it is important to discuss the nature of these two traditional approaches to the issue. Arguably, the most obvious reason for the existence of differential obligations is the different contributions States make to the present state of environmental degradation. As Chowdhury notes,

> "contribution to global degradation being unequal, responsibility ... has to be unequal and commensurate with the differential contribution to such degradation".[52]

The responsibility for environmental deterioration is most clearly visible as regards environmental pollution. Problems such as ozone depletion, climate change, acid rain and the transboundary movement of hazardous waste are still primarily problems created by the North. However, as Hurrell and Kingsbury point out, there is also a "striking asymmetry" between developed and developing countries as regards resource use.[53] The benefits and profits acquired through the exploitation of renewable and non-renewable resources are usually reserved for the North. Global environmental degradation as mentioned in Principle 7 is as applicable to

51. Sixteenth preambular paragraph, UNGA Res. 44/228.

52. S. Chowdhury, "Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)" in K. Ginther *et al.* (Eds), *op. cit. supra* nn.11, 333.

53. A. Hurrell and B. Kingsbury, "An Introduction" in A. Hurrell and B. Kingsbury (Eds), *The International Politics of the Environment* (1992), 39.

protection of plant species as it is to the build up of greenhouse gases.[54] It is therefore not surprising that both the Climate Change and Biodiversity Conventions rely upon the notion of differentiation to achieve their environmental goals. However, merely by stating that the North is responsible for environmental damage blurs a number of other issues. First, despite saying that a country's responsibility should correlate with its contribution to the damage caused, this is not an easy principle to translate into practice. How can an international agreement truly reflect the contribution of an individual State, or group of States, to an environmental problem? Or, in other words, how can a legal document be made to reflect scientific reality? Is it actually realistic to try to expect any degree of accuracy in creating obligations on the basis of a State's contribution to environmental damage? Moreover, should this approach just be utilized for the adoption of differential standards, or could it also be used to determine contributions to environmental funds? In fact, the majority of agreements that have differentiated on the basis of contribution to the problem, have not tried to follow such a literal approach; technical and political difficulties having prevented this.[55] What State practice seems to suggest is that differentiation on the basis of contribution to environmental damage has largely been used as a way of requiring leadership from developed States in international environmental law, as well as a means of treating them as a single category as regards certain treaty obligations. As Hurrell and Kingsbury note, developing countries have consistently required the "rich countries [to] take the first steps in tackling global environmental threats".[56] Such a principle can be seen in article 3.1 of the 1992 Climate Change Convention stipulates that "developed country Parties should take the lead in combating climate change ...".

The second issue concerning differentiation based on a State's contribution to environmental damage is that many developing countries believe that the responsibility of developed countries goes beyond the negative impact their activities have had upon the environment. There is also the argument that developed States have, over the decades, benefitted significantly in economic terms from the exploitation and

54. Of course, it would be completely wrong to neglect the fact that much of the present degradation of biological resources is taking place within developing States. The destruction of the Amazonian rainforest is a good example. Nevertheless, despite the fact that such destruction is being sanctioned by the governments of developing States, it is not at all clear where responsibility should lie? Developing States for allowing it to occur? Multinational corporations for actively seeking the timber contracts? Or the international economic system which forces developing States to clear forests so as to provide arable land to grow cash crops to service their international debt?

55. Cf. the 1994 Sulphur Protocol has tried to differentiate not only on each State's contribution to the problem, but also the assimilative capacity of the receiving environment.

56. Hurrell and Kingsbury, *op. cit. supra* nn.53, 39.

degradation of the environment, and should therefore be obliged to pay the larger sum for its amelioration. In other words,

> "as principal beneficiaries of past emissions, [the North should] bear a disproportionate share of the costs".[57]

This is not the same argument as saying that as developed States are financially more able to ameliorate environmental damage, they are under a greater responsibility (the notion of "respective capabilities" discussed next), but is rather a variant of the present discussion on responsibility for historical damage. It is, however, a controversial argument and one that many developed States would reject outright. It has close similarities with an argument put forward by the South during the negotiations for a New International Economic Order (NIEO), that one of the reasons for imposing additional burdens on the North was because they were under an obligation to make historical reparations for colonialism. As Vasciannie notes,

> "[a]nother argument used to justify preferential treatment for developing countries is that former colonial powers and some other industrialized States which benefitted from colonial activities have a moral, if not a legal, duty to make reparations for past exploitation".[58]

Whilst there may be some truth in the statement that colonial powers are under a moral obligation to make such reparations, many States in the North would distance themselves from any suggestion that they are under any legal obligation to compensate for past economic gains.[59]

The third issue relating to differentiation based upon a State's contribution to environmental damage is that it should not be presumed that primary responsibility will inevitably always fall upon developed States. In fact, a distinction should be made between current responsibility and conceptual responsibility. Current responsibility refers to the present state of affairs, that at the moment—at the end of the twentieth century—developed States are the largest contributors to global environmental degradation. However, current responsibility is not the same as conceptual responsibility, which sets out the general principle that responsibility is dependent upon a State's contribution to environmental problems. This general principle is unqualified by the present situation

57. *Ibid.*

58. S. Vasciannie, *Land-locked and Geographically Disadvantaged States in the International Law of the Sea* (1990), 26.

59. Cf. *Certain Phosphate Lands in Nauru* I.C.J. Report (1992) 240. The case before the International Court of Justice involved the liability of trustee States (and, by analogy, colonial powers), for environmental damage to territories which they administered. However, the court never discussed the substance of the case as Australia paid $107 million in full and final settlement.

and leaves open the possibility that it will not necessarily always be the case that it is developed States which are responsible for the greater part of global environmental damage. In fact, with developing States having around four-fifths of the population, greater land mass, and large areas still not industrialised, the potential of the South to cause damage to the environment is immense. It is therefore apparent that differentiation cannot simply impose additional obligations on developed States *ad infinitum*. Environmental situations change—as do those States which cause them. Principle 7 of the Rio Declaration recognises this distinction between conceptual and current responsibility. Whilst in the third sentence it recognises the current situation for which developed States have acknowledged responsibility, the second sentence sets out what the international community considers to be the basic conceptual justification for differentiation, viz. "[i]n view of the different contributions to global environmental degradation" (sic). The second sentence of the Principle is unqualified and therefore hypothetically unrelated to the North-South dichotomy. It leaves open the possibility that developing States will be required to accept greater responsibility for environmental degradation as their contribution to the problems increase. Of course, any requirement on such States to accept further obligations in the future may well conflict with other justifications for differentiation, in particular, that differentiated obligations are a way of ensuring preferential treatment for developing countries, regardless of their contribution to environmental degradation. Such a possible conflict is discussed in more detail below.

The second justification for differentiation is that some States have greater current capability with which to tackle the causes of global environmental problems, and where negative environmental impacts are inevitable, to try to ameliorate the consequences. Principle 7 of the Rio Declaration talks in terms of "technologies and financial resources". The Climate Change Convention, following the wording of UNGA Res. 44/228, uses the term "respective capabilities".[60] Both, however, refer to the same issue—that of obligations being differentiated on the basis that those States with greater access to technology and resources are required to assist other States in the implementation of their international commitments. As a recent UNEP report notes, this emphasis on respective capabilities is explicitly related to countries' "different levels of development".[61] First, it is often the most developed countries that will have the technological and financial capability with which to resolve environmental problems. Second, the most devastating human and

60. See Art.3.1 1992 Climate Change Convention, and sixteenth preambular paragraph, UNGA Res.44/228.

61. 1996 UNEP Final Report of the Expert Group Workshop on International Environmental Law aiming at Sustainable Development, para.43(a).

ecological effects of environmental problems will be felt in developing States, where they have less capacity to adapt and prepare for change.[62] Therefore, there is an obvious relationship, which multilateral environmental agreements have utilised, between those States which have the capacity to respond and those which most need it. Of course, as with differentiation based on a State's contribution to environmental damage, differentiation based on capabilities can either be interpreted literally requiring individual States in the North to meet individually set targets dependent upon their capabilities, or it can be interpreted more widely, so as merely to impose vague additional obligations on all developed States (or alternatively, any State Party, developed or developing, that can offer assistance). As might be imagined, some developed States have been unwilling to accept individually set targets. The United Kingdom, for instance, issued a declarative statement to its signature of the Biodiversity Convention noting that it was of the view that nothing in articles 20 and 21 (on financial resources)

> "... authorizes the Conference of the Parties to take decisions concerning the amount, nature, frequency or size of the contributions of the Parties under the Convention."[63]

However, whether the UK's interpretation on these articles is correct or not, it is quite clear that developed States, as a group, are subject to more onerous obligations due to their perceived enhanced capabilities. Moreover, both the Climate Change and Biodiversity Conventions include the statement that the successful implementation by developing country Parties of their commitments "will depend on the effective implementation by developed country Parties" of their financial resources and technology transfer commitments.[64] Of particular note is the argument of many developing States that as such assistance is contained within binding multilateral environmental agreements, it should not be treated as charitable. Consequently, the institutional structures created to manage such assistance should not be dominated by the donor countries, but rather more equitable representation between North and South. However, whilst "respective capabilities" is a useful justification for

62. See Art.4.4 1992 Climate Change Convention: obligation on developed country Parties to help those "particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects".

63. P. Sands *et al.* (Eds), *Documents in International Environmental Law (Vol.IIA)* (1994), 873.

64. Art.4.7 1992 Climate Change Convention; Art.20(4) 1992 Biodiversity Convention. Sands, *loc. cit. supra* nn.50, 376–377: "This language, reflecting the essence of the interdependence between North and South which transcends all aspects of UNCED, was carefully drafted. In the event that developed countries fail effectively to fulfil their financial obligations, the developing countries' legal commitments will continue to exist, but they will not be called upon to implement them effectively".

differentiation in international environmental law, it should not be used to deny the right of developing States to be involved in the decision-making process. "Respective capabilities" imposes burdens upon developed States, it does not necessarily also bestow upon them additional rights. In fact, differentiation based upon capability is a rather vague justification for differentiated responsibility. It is neither based upon historical responsibility for past environmental damage,[65] nor, as yet, can it be said to form part of a wider nexus of rights and responsibilities which arguably the concept of a "global partnership", discussed below, does. "Respective capabilities" is therefore simply a means of utilising the resources of the North, for the benefit of the South. Nevertheless, the capability of the North to provide assistance to the South may well prove to be a central feature of ensuring greater economic justice between States—the notion of intragenerational equity.[66]

There are, however, other conceptual justifications for differentiation. The first is the notion that the international community is under an obligation to take into account the special needs and circumstances of developing countries when adopting and implementing international law. The idea that the South should receive preferential treatment was originally discussed in the context of the establishment of the NIEO. It has, however, also been adopted as a relevant concept for the future development of international environmental law. As Principle 6 of the Rio Declaration notes, "[t]he special situation and needs of developing countries ... should be given special priority ...". Moreover, particular attention should be given to those developing States that are the least developed or most environmentally vulnerable. This approach to differentiation is clearly distinct from the two previous approaches. Whereas differentiation based on a State's contribution to the environmental damage caused revolves around issues of responsibility, and differentiation based on respective capabilities focuses upon the advanced financial and technological resources of the North, differentiation based on the needs of the South is quite clearly based on recognition of the fact that tackling global environmental protection, or adapting to the consequences thereof, is not a priority for many developing countries. As the preamble to the Climate Change Convention states, the attainment of

65. Interestingly, the States of Nauru, Tuvalu and Kiribati issued identical statements to the 1992 Climate Change Convention declaring that it was their "understanding that signature of the convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the convention can be interpreted as derogating from the principles of general international law"; see Sands, *op. cit. supra* nn.206, 275.

66. See E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989): "[i]n the intragenerational context, conservation of access implies that all people should have a minimum level of access to the common patrimony".

"sustainable economic growth and the eradication of poverty" are the "legitimate priority needs" of developing countries Parties.[67] It is therefore not surprising that obligations contained within multilateral environmental agreements are differentiated on the basis of the differing socio-economic circumstances of different groups of States. In fact, it is quite clear that many commentators consider Principle 7 (on differentiated responsibilities) to be a direct consequence of Principle 6 (on the special needs of developing States). As a recent UN report notes,

> "[t]he principle of the special treatment of developing countries finds its elaboration in ... the recognition of differentiated responsibilities among countries".[68]

There is a close relationship between these two principles; a connexion that is visible in most post-Brundtland environmental agreements. Moreover, the need to take into account the needs of developing States provides further support for the creation of environmental funds, and obligations to transfer environmentally sound technology. Differentiated obligations are, therefore, seemingly as much the result of the incorporation of socio-economic circumstances into international law, as they are the result of a State's responsibility for environmental harm. In fact, it appears from the writings of some commentators, that this "obligation" to take into account the special needs of developing states is an overriding consideration. As another recent UN report notes on the adoption of the 1992 Climate Change Convention,

> "[t]he Convention recognizes the special circumstances and needs of developing countries, and then structures the duties and obligations to be undertaken by the States Parties accordingly.[69]

There is, however, a potential conflict here between differentiation based on historical responsibility and differentiation based on the need to give preferential treatment. It is, for instance, extremely likely that the contribution of some developing States to global environmental degradation will, over the next few decades, increase significantly, but that such

67. Twenty-first preambular paragraph, 1992 Climate Change Convention. Hurrell and Kingsbury, *op. cit. supra* nn.53, 39: "rich countries [must] ... provide assistance to the South to cover costs of specific measures to tackle global environmental threats so that resources are not diverted from development".

68. UN Doc. E/CN.17/1997/8: Report of the Secretary-General: Rio Declaration on Environment and Development: Application and Implementation (10 Feb. 1997), para.40. See also Principle 11 of the Rio Declaration: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".

69. 1997 Report of the Secretary-General: Overall progress achieved since the United Nations Conference on Environment and Development: International Legal Instruments and Mechanism, Box 5.

countries will remain in a poorer socio-economic situation than developed States. In such a case, a literal interpretation of differentiation based on responsibility for damage caused would suggest that such developing States would be obliged to undertake some of those obligations previously only imposed upon developed countries. However, differentiation based on the special circumstances of developing States would not look at the greater environmental impact of such countries, but rather whether such States still require preferential treatment because of their socio-economic status. In such a situation as this, there is an obvious conceptual conflict between the imposition of differential obligations based on contribution to environmental damage, and differential obligations based on the requirement to give preferential treatment for developing States. The International Law Association's International Committee on Legal Aspects of Sustainable Development was quite clear in its view on this issue.

> "The rationale for [the notion of common but differentiated responsibilities] lies in 'the different contributions to global environmental degradation' and not in different levels of development"[70]

However, the view of the committee—a view shared by a number of developed States—fails to take into account the reality of the situation in the South. As the preamble to the Climate Change Convention makes clear as regards global warming, the emissions of greenhouse gases in developing States "are still relatively low" and therefore their "share of global emissions" will have to rise to meet "their social and developmental needs"[71] The leadership role of the North in tackling global environmental issues seems, to some extent, to be independent of the future trends in environmental degradation.[72]

In fact, the only way to prevent such a conflict between these reasons for differentiation arising is to increase the amounts of international assistance from the North, as it will only be through a substantial increase in the transfer of financial and technological resources from North to South that will allow developing States to both improve their socio-economic situation and reduce their future negative impact upon the environment. Differentiation based upon giving preferential treatment to developing States is an important justification for the existence of

70. International Law Association (ILA), Report of the Sixty-Sixth Conference (held at Buenos Aires, Argentina) (London: ILA) (1995), 116.

71. Third preambular paragraph, 1992 Climate Change Convention.

72. Interestingly, a number of State Parties at the third Conference of the Parties to the Climate Change Convention (1997), which concluded negotiations on the Kyoto Protocol, were adamant that the most polluting developing State Parties should accept greater responsibility for climate change. Such a view did not however prevail, primarily because the Berlin Mandate that began the negotiation process clearly stated developing State Parties were not to be subject to any new obligations at that point in time.

differentiated responsibilities. However, as was said above during the discussion on the NIEO, the problem with such an approach is that many developed States would argue that they are not under any customary obligation to take into account the interests of the South. Consequently, differentiation based on this ground is limited to obligations contained within multilateral environmental agreements, and promises of assistance in Agenda 21 are simply that—non-binding promises.

A more recent justification for the use of differentiated obligations within international environmental law is that the international community has entered a new stage of international cooperation, one that obliges those more developed States to take on additional responsibilities. The basis for such an argument can be found in the Rio Declaration itself; in fact, such cooperation is arguably the very purpose of the whole document. As the preamble to the text says,

> "[w]ith the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people".[73]

Moreover, Principle 7 requires States "in a spirit of global partnership" to protect and restore the Earth's ecological balance. It is therefore quite clear that such a partnership is the central means by which the international community hopes to achieve sustainable development. In fact, without such "new and equitable" forms of cooperation, it is extremely unlikely that sustainable development will be attainable. As the section below on equity notes, such a global partnership has as much to say on socio-economic and developmental issues as it does on environmental issues. But whatever the substantive content of this notion of a global partnership, it is very clear that differentiated responsibilities have an important role to play in its achievement. As a recent report published for the Commission on Sustainable Development notes,

> "[a] number of international agreements provide for a duty of (sic) industrialized countries to contribute to developing countries' efforts to pursue sustainable development and to assist developing countries in protecting the global environment. Such assistance may entail, apart from consultation and negotiation, financial aid, transfer of environmentally-sound technology and cooperation through international organizations".[74]

The same report makes the point that this obligation to cooperate is the very "cornerstone" of both Agenda 21 and the concept of sustainable development.[75] In an interdependent international society, much

73. Third preambular paragraph, Rio Declaration.

74. 1995 Report of the Expert Group on Identification of Principles of International Law for Sustainable Development, para.78.

75. 1995 Report of the Expert Group on Identification of Principles of International Law for Sustainable Development, para.77.

depends upon the relationship between richer and poorer States. International assistance and differentiated standards are both ways in which international law can achieve the mutually dependent goals of environmental protection and intragenerational equity.[76] In fact, it is arguable that the concept of differentiated responsibilities is a "fundamental principle" in international environmental law and one that is "necessary if sustainable development is to be achieved"[77] However, this argument that cooperation is an essential aspect in improving international relations is not a new idea. It is a central tenet of the UN Charter and figured prominently during the NIEO debate, and the negotiations leading up to UNCLOS in 1982.[78] Nevertheless, despite the general consensus between developed and developing States as regards the creation of this "new and equitable" global partnership, there is very little agreement on what it entails. Whereas developing States view it as a means of achieving intragenerational equity, developed States emphasise its role in achieving sustainable environmental protection. Arguably, such disagreements will continue until the international community comes to a consensus on what it means by the term "sustainable development". Consequently, it may well be a mistake to tie the notion of differentiated responsibility too closely with the concept of a global partnership as the latter's status in international environmental law and policy is still not yet secure. Moreover, as with the notion that differentiation is based on the requirement to take into account the special needs of developing States, developed States would reject any argument that the concept of a global partnership has any status in customary international law. In conclusion, therefore, whilst differentiation based on a global partnership between North and South may well, in the future, prove to be an important justification for differentiated responsibilities, at the present time, the concept has not yet sufficiently codified to provide a firm basis for differentiation in international environmental law.

A final justification for the existence of differentiated responsibilities is that it provides an inducement to hesitant States, particularly those in the South, to participate in multilateral environmental agreements. In many cases, developing States see little benefit to themselves in agreeing to

76. Vasciannie, *op. cit. supra* nn.58, 25: "the interdependence of States in the international community has generated strong pressures on developed countries to assume responsibility for their developing counterparts".

77. G. de Berdt Romilly, "Comment on P. Sand's Paper on Institutionalizing Sustainable Development" in W. Lang (ed.), *op. cit. supra* nn.47, 188.

78. R. Anand, *Confrontation or Cooperation? International Law and Developing Countries* (1987), 45: "Proclaiming the 1970s as the Second UN Development Decade the General Assembly added that 'economic and social progress is the common and shared responsibility of the entire international community' ".

environmental obligations that may prove both costly and a further hurdle to their economic development. Moreover, they argue that environmental obligations should largely be imposed upon those States that have caused the problem, viz. the developed North. Developed States, on the other hand, acknowledge that as such issues as climate change, ozone depletion and loss of genetic diversity are of global concern, the international response must have broad North-South support. In addition, as many environmental problems will continue to worsen as developing States industrialise, it is vitally important that such States are encouraged to participate in environmental agreements as early as possible. As one commentator puts it,

> "[i]n order to inveigle the South into signing global conventions, the North is now realising that it may have to offer sweeteners or side payments".[79]

These "sweeteners or side payments" may take the form of transfers of financial resources and environmentally sound technology, as well as lower standards for developing States—particularly during the early stage of the regime. The extent of such differentiation will, however, depend upon numerous factors, including the nature and scale of the environmental problem, the economic implications for developing States of participating in environmental agreements, and whether the contribution of developing States to the environmental problem is likely to increase in the future.

With developed States recognising the necessity of the involvement of developing States in preventing global environmental degradation, it is arguable that the South has discovered a "new, albeit small, point of political leverage over the North".[80] Unlike in the negotiations for the NIEO, where the South had very little to offer the North, in the era of sustainable development, the active involvement of the South in international environmental law may well prove to be the difference between global survival and global destruction.[81] Not only does the South hold much of the world's remaining biological diversity, it has the potential to exceed irreparably the Earth's assimilative capacity. And whilst the influence of the South should not be overstated, it is true that it has, in

79. A. Jordan, *The International Organisational Machinery for Sustainable Development* (1993), 7. Arguably, the effect of such "sweeteners" can be seen in the fact that many more developing States acceded to the Montreal Protocol after 1990, than other environmental conventions, such as the 1979 Bonn Convention, which contain little or no differentiation.

80. *Ibid.*

81. A. Boyle, "Comment on D. Pone-Nava's Paper on Capacity-Building" in W. Lang (ed.), *op. cit. supra* nn.47, 138: "the arguments for linking ... [financial and technology transfer] provisions to environmental protection measures are different from the focus on economic self-determination that prevailed in the resource conflicts of the 1970s. Now the problem is to persuade developing states to participate in treaty regimes that they may perceive as offering little benefit or as hindering their freedom to develop".

more recent years, played a much more proactive role in the negotiations preceding a multilateral environmental agreement. As Boyle notes,

> "[f]or developing states, the threat of non-participation gives them the necessary leverage to insist on adequate benefits from regimes of 'common but differentiated responsibility' ".[82]

However, it is not only the developing States that benefit from differentiated obligations. By agreeing to support international assistance and differential standards, developed States hope to generate international consensus on an environmental issue so as to prevent future environmental harm to their own societies. Moreover, such "broad state acceptance of a regulatory regime" that includes provisions on assistance and differentiation should also beat what Handl terms the "lowest common denominator problem", viz. finding uniform standards that are acceptable to both North and South.[83] Such standards would be woefully inadequate, both in terms of their substantive content, and in the likelihood of their being implemented effectively in developing States. Thus,

> "[t]he usefulness, indeed indispensability of selective incentives, is, of course, a reflection of the fact that expected benefits and costs of any regime will vary from state to state".[84]

The political benefits of differential standards and assistance obligations are clearly obvious for both North and South. However, there is a real danger that negotiations preceding a multilateral environmental agreement can become fixated on these issues to the detriment of the wider issue of environmental protection. This was certainly the case with the 1992 Biodiversity Convention, where such issues as transfer of technology and protection of intellectual property rights threatened the very agreement. Moreover, there is a danger that negotiating such inducements will result in Parties falling back onto traditional North-South arguments, making the negotiations even more acrimonious. Such disputes will not only occur in the negotiations preceding a treaty's adoption. They are likely also to continue throughout the lifetime of the treaty, particularly when the Parties come to reassess the nature and extent of such inducements. As was noted above, such a reassessment will often reveal the underlying conceptual justifications behind differentiated obligations. In fact, differentiation based on the notion of inducement may well prove decisive in North-South disagreements. Such

82. *Ibid.*

83. G. Handl, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 Y.I.E.L. 9. In fact, trying to beat the "lowest common denominator" problem may actually be considered a further justification for differentiation.

84. *Ibid.*

a justification reflects the self-interest of all States, and this may ultimately be found to be the most important reason for the international community's continued reliance on differential standards and international assistance in international environmental law.

6. DIFFERENTIATED RESPONSIBILITIES: A CONCLUDING COMMENT

Whatever the actual justification of the notion of differentiated responsibilities, it is abundantly clear that it plays a very significant part in many international environmental regimes. And this significance is likely to increase as developing States continue to take an active role in environmental policy and law-making. However, the international community's reliance on differential obligations is not without its critics who note that it jeopardises the very purpose of international environmental law. Handl, for instance, argues,

> "[a] dilution of the normative demands on developing countries is likely to impede progress by those countries towards an adequate level of local environmental protection, the acquisition of technological know-how and managerial ability on which 'sustainable development' locally will depend".[85]

In a similar vein, Boyle notes that there are "two contradictory trends in international environmental law-making"; on the one hand, the international community is seeking a precautionary approach to environmental issues, whilst on the other, the obligations it adopts are "qualified" by "reference to the capabilities of the states concerned".[86] However, whilst it is true that these are tensions inherent within international environmental law, in a decentralised international community where numerous interests must be taken into consideration to arrive at an agreement acceptable to the majority, it is difficult to see how it could be any other way. Moreover, as Vice-President Weeramantry recognised in *The Gacikovo-Nagymaros Project* (*Hungary* v. *Slovakia*), the integration of environmental and developmental issues is now a fundamental issue both for the International Court of Justice, and the international community, more generally.[87] Differentiated responsibilities are therefore inevitable. They allow the international community to act as a true society of States where all recognize their contribution to global environmental degradation, but where their responses thereto are differentiated so as to take into account such factors as historical responsibility, technical capability,

85. Handl, *loc. cit. supra* nn.83, 10. However, Handl does go on to say that "retaining uniformity with regard to core obligations while taking into account states' socio-economic conditions, are entirely compatible objectives for multilateral regulatory regimes". The question must therefore be what he considers "core obligations", and what effect should socio-economic conditions have upon them?

86. Boyle, *op. cit. supra* nn.81, 139.

87. I.C.J. Report (1997) 88.

future environmental trends, and the need of all States to develop sustainably. The use of differentiated responsibilities, however at present imperfect,[88] is therefore a sign of an international community that is beginning to know itself as a community.[89] Of particular interest is the way the international community uses a combination of differential standards, international assistance and universal norms to achieve its many goals. As Magraw notes, "such a rich menu of possible approaches should be welcomed".[90]

88. Jordan, *op. cit. supra* nn.79, 7: "the North's offer of extra resources and appropriate access to environmentally friendly technologies, was [at UNCED] both narrow (i.e. it was mainly for global environmental protection) and limited (i.e. it still left open the question of patents and intellectual property rights), but it proved to be sufficiently large to garner the necessary level of developing country support".

89. P. Allott, *Eunomia: A New World Order for a New World* (1990), 298: "International society will create an appropriate legal system for itself in conceiving of itself at last as society".

90. Magraw, *loc. cit. supra* nn.12, 99.