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Differentiation in International Environmental Law: Has Pragmatism Displaced Considerations of Justice?

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2.1. Introduction

The Third World Approaches to International Law (TWAIL) scholarly movement seeks to assess and to advance the 'promise of international law to transform itself into a system based, not on power, but justice',[1] by considering how global norms impair or advance the interests of states in the Global South.[2] This chapter seeks to contribute to the TWAIL scholarly project by examining whether international environmental law (IEL)'s norms and mechanisms have been a source of international legal innovation by challenging entrenched global socio-economic and power imbalances, making this field of law more supportive of the interests of the South.

This chapter uses a TWAIL approach to understand evolution and innovation in IEL in the context of the growing South-South divide, as some emerging economies' significant contributions to global environmental problems and their financial and technological capabilities to protect the global comment environment set them apart from other developing countries. It considers whether IEL has incorporated innovative norms and mechanisms in this changing geopolitical context that allow it to promote environmental justice at the global level.

The enduring academic interest in the normative bases and in the actual performance of the principle of differentiation in IEL is reflected in the significant number of publications over the last twenty-five years dedicated to its analysis.[3]

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[1] Antony Anghie, 'What is TWAIL: Comment,' ASIL Proceedings of the 94th Annual Meeting (5-8 April 2000), 39-40, 40.

[2] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, vol. 37 (New York: Cambridge University Press, 2007); Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003); Bhupinder S Chimni, 'Third World Approaches to International Law: a Manifesto' (2006) 8 *International Community Law Review* 3-27.

[3] See, for example, Daniel Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms' (1990) 1 *Colorado Journal of International Environmental Law & Policy* 69-99; Anita Halvorssen, *Equality Among Unequals in International Environmental Law: Differential Treatment for Developing Countries* (Boulder: Westview Press, 1999); Duncan French,

Differentiation refers to the allocation of burdens and costs of environmental action among countries according to their economic and other capabilities. The interest in the manifestation of differential treatment in the climate regime has been particularly pronounced in recent scholarship.[4] However, much of this scholarship reveals ongoing ambiguity as to the normative underpinnings and the legal and political implications of the differentiation principle in IEL. An important segment of the existing literature argues that the principle of differentiation in IEL has been able to serve a dual purpose: an instrumental role of incentivizing the broad participation of developed and developing countries in multilateral environmental agreements (MEA), and a value-based role in promoting the just allocation of environmental burdens and costs between states with varying levels of capacity.

'Developing States and International Environmental Law: the Importance of Differentiated Responsibilities' (2000) 49 *International & Comparative Law Quarterly* 135-60; Yoshiro Matsui, 'Some Aspects of the Principle of 'Common but Differentiated Responsibilities' (2002) 2:2 *International Environmental Agreements: Politics, Law and Economics* 151-170; Philip Cullet, *Differential Treatment in International Environmental Law* (Aldershot: Ashgate, 2003); Ruchi Annand, *International Environmental Justice: A North South Dimension* (Aldershot: Ashgate, 2004); Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006); Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Austin: Kluwer Law International, 2009), Vol. V; Pieter Pauw et al, 'Different Perspectives on Differentiated Responsibilities: A State-of-the-art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations', (2014) *DIE Discussion Paper 6*. See also articles of the special 5th Anniversary edition of the Transnational Environmental Law Journal dedicated to the principle of differentiation in global environmental governance, online at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A1ADD34F30D624400DC36E5B5FEE22D7/S2047102516000315a.pdf/celebration_of_the_fifth_anniversary_of_transnational_environmental_law.pdf.

[4] Anil Agarwal and Sunita Narain, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (New Delhi: Center for Science and Environment, 1991); Joyeeta Gupta, *The Climate Change Convention and Developing Countries: From Conflict to Consensus?*, Vol. 8. (Dordrecht: Kluwer Academic Publishers, 1997); Eric A Posner and Cass R. Sunstein, 'Climate Change Justice,' (2008) 96 Georgetown Law Journal 1565-1612; Eric A Posner and David Weisbach, *Climate Change Justice* (Princeton: Princeton University Press, 2010); Benjamin J. Richardson, et al. (eds.), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Cheltenham/Northampton: Edward Elgar Publishing, 2010); Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford: Oxford University Press, 2014); Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65:2 *International & Comparative Law Quarterly* 493-514; Christina Voigt and Felipe Ferreira 'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5:2 *Transnational Environmental Law* 285-303; Patricia G. Ferreira, 'From Justice to Participation: The Paris Agreement's Pragmatic Approach to Differentiation', in Randall S. Abate, *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Washington DC: ELI, 2016); Sandrine Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25:2 RECIEL 151-160.

Most of the recent scholarship on differentiation considers the evolution of, and the debate around, the manifestation of this principle in the climate regime, particularly the new model enshrined in the 2015 Paris Agreement.[5] The existing literature also considers differentiation primarily from the perspective of a North-South divide. This chapter re-embeds the analysis of the principle of differentiation in the climate regime, both in the broader context of differentiation in MEAs and beyond the North-South dichotomy. It examines the evolution of the principle of differentiation in IEL from the 1972 Stockholm Declaration[6] to the 2015 Paris Climate Agreement from the perspective of environmental justice, considering the position of emerging economies with respect to the principle of differentiation over time.

The chapter considers whether the normative proposition that the principle of differentiation in IEL has promoted equitable treatment and environmental justice between unequal states at the global level is in fact confirmed in state practice. It challenges two arguments that have been recurrently used as indications of a justice-based state practice of differentiation in IEL. The first argument is the language in various provisions of international environmental declarations and MEAs related to differentiation have explicitly embraced a justice perspective, and that state practice following these instruments shows acceptance of this normative basis for the principle in IEL. The second argument points to the model of differentiation incorporated in the United Nations climate regime as indicating states' acceptance of a justice-based approach to differential treatment.

The study finds that there is little evidence of value-based state practice in conformity with the principle of differentiation in IEL that reflects the pursuit of a substantive notion of environmental justice. To be clear, this chapter does not purport to offer a normative claim in relation to whether the principle of differentiation should or should not advance the goal of achieving justice and fairness. Rather, the main purpose of this chapter is to increase our understanding of the limitations of the principle of differentiation in advancing international environmental justice by examining how it has operated in practice.

The chapter proceeds in four sections. Section two briefly states the working definitions of environmental justice and the principle of differentiation in IEL used in the paper. Section three unpacks the normative bases for differentiation in IEL. Section four challenges existing assertions in the literature that states have embraced the concept of justice-based differentiation in IEL. Section five presents concluding observations.

[5] United Nations Framework Convention on Climate Change, Paris Agreement (Paris Agreement), 12 December 2015, FCCC/CP/2015/10/Add.1, in force 4 November 2016.
[6] UN Conference on the Human Environment, 'Stockholm Declaration on the Human Environment', 16 June 1972, UN Doc.A/Conf.48/14.

2.2. Environmental Justice and the Principle of Differentiation

There is no single definition of 'environmental justice'. The expression has been used both to refer to a fundamental moral source from which legal rules emerge, and to the 'ultimate goal or outcome to be achieved by legal norms'.[7] For analytical purposes, one can categorize the most commonly used conceptualizations of environmental justice along the classic distinctions between procedural, corrective and distributive justice.[8]

Procedural environmental justice refers to the full participation of those affected by environmental risks or harms in environmental lawmaking and policymaking. Procedural environmental justice has limited relevance to debates around the principle of differentiation, although it can be argued that states in the Global South often lack the capacity to participate fully in the negotiation and operation of environmental treaties because of financial and other capacity restraints, and this can carry important substantive outcomes in terms of the development and implementation of international law.

Corrective environmental justice refers to a system of legal institutions and procedures designed to provide remedies and to facilitate dispute settlement related to environmental harms and conflicts. This aspect of *ex post* corrective environmental justice is also of less relevance to the differentiation principle. However it should be noted that, corrective environmental justice does invite questions as to how to make those state or non-state actors currently responsible for environmental harms and risks bear burdens and costs of restorative and preventive environmental action proportionate to their contributions.

The third conception of environmental justice, distributive environmental justice, is most relevant to differentiation. It refers to fair and equitable distribution or allocation of the burdens and the costs to address collective environmental risks or harms among State and non-State actors. It involves the assessment of these burdens and costs according to their diverse financial and technical capabilities, and having regard to their respective needs or priorities.

The principle of differentiation, or differential treatment in IEL, seeks to guide the allocation of the burdens and costs of global environmental action among countries according to: (a) their respective contributions to global environmental problems; (b) their capabilities to undertake and to finance environmental action; (c) and their development needs.[9] The principle of differentiation has been characterized as an innovative tool to incorporate corrective justice considerations in IEL in advance in order to avoid environmental harm.[10] The principle of differentiation has also been said to incorporate distributive environmental justice considerations in MEAs, as it seeks to provide support for those states without financial or technical capacity to comply with environmental standards. The

[7] Dinah Shelton, 'Using Law and Equity for Poor and the Environment', in Yves Le Bouthillier, et al (eds), *Poverty Alleviation and Environmental Law* (Cheltenham: Edward Elgar Publishing, 2012), 15.

[8] This categorization draws from Shelton, above note 7.

[9] Rajamani, above note 3, 150.

[10] Honkonen, above note 3.

following section discusses the normative bases of the principle of differentiation in IEL.

2.3. Unpacking the Normative Bases for Differentiation in IEL

Forty-five years after the 1972 'Stockholm Declaration on Human Environment'[11] first introduced a reference to differentiated responsibilities in IEL, and thirty-five years after the 1992 Rio Declaration on Environment and Development ('Rio Declaration')[12] expressly incorporated the principle of common but differentiated responsibilities and capabilities into IEL, there is still much debate as to the legal basis of this principle, as well as to which normative underpinnings best explain state practice on differentiation.[13] Based on the extensive literature on differentiation in IEL, the normative bases of the principle of differentiation can be systematized according to two distinct objectives or approaches: a value-driven approach (promoting justice among unequal states), and a pragmatic or instrumental approach (promoting broad participation).

When one analyses state practice, it becomes clear that the value-driven and the instrumental approaches to differentiation are not mutually exclusive.[14] States certainly respond to both value-driven and instrumental motivations when negotiating and implementing international agreements.[15] States may be motivated by distinctive objectives which depend on the issue at stake and on contingent national politics and foreign policy strategies. It is worth noting that the understanding of the principle of differentiation by individual states and groups of states may also evolve over time, and are not permanently tied to the interpretation of the principle as originally conceived at the time of signature or ratification of the MEA.[16]

[11] 'Stockholm Declaration,' above note 6.
[12] UN Conference on Environment and Development, 'Rio Declaration on Environment and Development', 3-14 June 1992, UN Doc.A/CONF.151/26.
[13] For a detailed discussion on the disputed conceptual basis of the principle of differentiation in IEL see Duncan French, above note 2, and Rajamani, above note 3.
[14] Cullet, above note 3.
[15] Kenneth W. Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) 31:1 *The Journal of Legal Studies*, 141-177; Walter Mattli, and Ngaire Woods, *The Politics of Global Regulation* (Princeton: Princeton University Press, 2009).
[16] Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6:1 *European Journal of Legal Studies* 127-148.

It may be difficult to affirm with certainty, for example, to what extent different countries in the European Union accepted longer compliance periods for developing countries in the Montreal Protocol[17] out of pragmatic reasons to secure their participation in the MEA, or due to some type of consideration of environmental justice.[18] Yet the point of this chapter is to argue that it is not only possible, but also valuable, to identify how the intentions of a certain state party or a group of states parties as to their preferred objectives for the principle of differentiation in individual MEAs evolve over time. Identifying trends in how states conceive differentiation in MEAs may illuminate the potential and the limitations of this principle.

One way to investigate the prevailing approach to the principle of differentiation in MEAs over time is to consider states' positions in relation to the markers usually associated with each normative basis of differentiation, and the types of differential treatment that they have promoted in MEAs over the years.

We can identify three separate markers associated with differential treatment in IEL to help understand the distinctions between the value-driven approach and the pragmatic approach. These are: contributions to global environmental problems, financial and technological capabilities, and development needs.[19] For example, countries are responsible for different shares of contribution to global environmental problems such as marine pollution, greenhouse gas (GHG) emissions or biodiversity loss. While developed countries are responsible for 76 per cent of cumulative CO2 emissions (from 1850-2002),[20] five developing countries (China, Indonesia, the Philippines, Thailand and Vietnam) accounted for 55 to 60 per cent of plastic waste entering the oceans in 2015.[21]

Financial and technological capabilities that determine the ability of countries to address global environmental problems also vary significantly among states.[22] While in 2015 'high-income economies' had an average GNI per capita of US$12,476 or more, 'upper middle-income economies' presented a GNI per capita between US$4,036 and $12,475.[23] At the bottom half of GNI per capita, 'lower middle-income economies' had an average of only between US$1,026 and $4,035, while 'low income economies' lingered further behind, with a GNI per capita of

[17] Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), 16 September 1987, 1522 UNTS 3, in force 1 January 1989.
[18] Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law,' (2004) 98:2 *American Journal of International Law*, 276-301, 285.
[19] Dinah Shelton, 'Equity' in *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2012), 639-662; and Rajamani, above note 3.
[20] Kevin A. Baumert, Timothy Herzog, and Jonathan Pershing. *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy,* (World Resources Institute, 2005), 32.
[21] 'Stemming the Tide: Land-based strategies for a plastic-free ocean', (2015) *Ocean Conservancy*.
[22] Shelton, above note 19.
[23] World Bank, calculated using the World Bank Atlas method, online: https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups.

US$1,025 or less.[24] Technological capabilities tend to be positively correlated to GNI levels. Indeed, GNI per capita is often used as a proxy of capabilities.

If developing countries need to invest their already scarce resources in actions to tackle global environmental challenges, they may jeopardize their ability to address other pressing problems such as poverty, lack of adequate health care, high unemployment and gender inequality.[25] The UNDP Human Development Index (HDI), which integrates three dimensions of human development (ability to lead a long and healthy life, ability to acquire knowledge and ability to achieve a decent standard of living), shows significant differences among the group of countries classified as 'very high human development', 'high human development', 'medium human development', and the group of countries classified as 'low human development'[26] in these three dimensions the HDI is used as a proxy to describe a state's development needs.

In addition to assessing whether differential treatment provisions incorporate three core elements (contributions, capabilities and development needs), another way to distinguish whether the primary objective of differentiation in a regime is value-driven or instrumental is to compare it with the various types of differentiated norms in IEL. In this respect, Rajamani organizes differential treatment in MEAs into three distinct categories:

1. Provisions that differentiate among parties with respect to implementation of treaty obligations, including delayed compliance schedules, adoption of subsequent base years, delayed reporting frameworks and facilitative (rather than punitive) approaches to non-compliance;
2. Provisions that grant financial and technological assistance or that provide capacity building to help certain parties (normally developing countries, or least developed countries) comply with treaty obligations; and
3. Provisions that differentiate among parties with respect to central, substantive obligations of the treaty (like obligations establishing GHG emissions targets only for developed countries).[27]

Parties take these stark variations in contributions, capabilities and development needs into consideration when defining the types of differential treatment in a treaty. But what motivates countries to consider these markers and types of differentiation? According to the value-driven approach to differentiation, equal treatment to unequal states would impose unfair or impracticable burdens on those parties to MEAs that are least able to bear them, thus exacerbating existing global inequalities.[28] In this case, differential treatment represents an

[24] Ibid.
[25] UNDP, Human Development Report 2016: Development for Everyone (2016).
[26] Ibid.
[27] Rajamani, above note 3, 93.
[28] Shelton, above note 19, especially 640; Philip Sands and Jacqueline Peel, *Principles of International Environmental Law* (New York: Cambridge University Press, 2012), especially 235; Sumudu Atapattu, *Emerging Principles of International Environmental Law* (New York: Brill, 2007), 384; Pauw, et al, above note 3, 6; Cullet, above note 3, 21.

application of the principle of distributive justice in international law, and takes into consideration capabilities and development needs.[29]

The value-based approach to the principle of differentiation also includes a second, distinguishable proposition: when some states have disproportionately contributed to a collective problem, allocating burdens and costs equally among all states would be unjust to those less responsible.[30] Consequently, those states responsible for a larger share of contribution to the collective problem – both historic and current – should be allocated a larger share of the burdens and costs to address it.[31] This idea has parallels with the polluter pays principle in environmental law, which is the notion that polluters should bear the cost of their polluting activities.[32] In this case, differential treatment is an application of the principle of corrective justice in international law.[33] Because the value-driven approach is rooted in justice considerations, advocates of this approach to differentiation tend to argue for legal provisions that will clearly enshrine the differentiated responsibilities in legal norms.[34]

The instrumental approach to differentiation, on the other hand, proposes differential treatment as a means to achieve the objective of multilateral agreements. Differentiation can be a way of expressly recognizing unequal conditions as a pragmatic and political gesture to foster international cooperation to solve common global problems.[35] In this case, considerations of the overall efficacy of a multilateral treaty, rather than purely justice considerations, would justify differential treatment. Providing different compliance regimes, financial support, technology transfer and capacity building to those countries with insufficient capabilities, or with proportionally lower capabilities, would both

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[29] Shelton, above note 19; Philip Cullet, 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps' (2016) 5:2 *Transnational Environmental Law* 305-328, 306, 308.

[30] Dinah Shelton, 'Describing the Elephant: International Justice and Environmental Law,' in Jonas Ebbesson, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009).

[31] Cheng Zheng-Kang, 'Equity, Special Considerations, and the Third World' (1990) 1:1 Colorado Journal of International Environmental Law & Policy 57-68; Philippe Sands, 'The 'Greening' of International Law: Emerging Principles and Rules' (1994) 1:2 *Indiana Journal of Global Legal Studies* 293-323, 311; Subrata Roy Chowdhury, '*Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)'*, in Konrad Ginther, Erik Denters and P. J. I. M. de Waart, *Sustainable Development and Good Governance* (Boston: M. Nijhoff, 1995).

[32] Simon Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change' (2005) 18:4 *Leiden Journal of International Law* 747-775. Caney discusses the pros and cons of the application of the polluter pays principle in the climate regime, including retrospectively addressing past emissions (a proposition that remains controversial). He argues that the polluter pays principle needs to be supplemented by the 'ability to pay principle'. See also Rajamani, above note 3, 137.

[33] Shelton, above note 30.

[34] Sands and Peel, above note 28.

[35] Plurilateral (or minilateral) governance or regulatory initiatives can be defined as those involving sub-groups of actors involved in multilateral initiatives. See German Development Institute, 'Between Minilateralism and Multilateralism: Opportunities and Risks of Pioneer Alliances in International Trade and Climate Politics' (2015) *DIE* Briefing Paper 16.

attract broad participation and promote effective implementation of global environmental standards. [36]

Scott Barrett argues that international agreements perceived as fair in their allocation of burdens and costs among unequal states induce broader participation and favour treaty compliance.[37] By offering certain forms of preferential treatment in trade agreements, for example, developed countries can enlist the participation and cooperation of developing countries in their preferred goal of global commerce liberalization.[38] By granting some forms of differential treatment to developing countries in the climate regime, developed countries would ensure that the United Nations Framework Convention on Climate Change (UNFCCC)[39] covered a comprehensive share of the global GHG emissions.[40] The instrumental approach to differentiation also tends to favour facilitated compliance regimes for certain parties based on capabilities, with all parties subject to the same, universal, standards rather than differentiated core legal obligations based on contributions or development needs.

Differentiated implementation timetables and provisions to grant support for a group of countries to implement universal standards can be associated with both the value-driven and the instrumental approaches. Differentiation in core obligations, on the other hand, tend to be associated primarily with the value-driven approach based on corrective justice. Table 1 (below) organizes the various normative bases, markers and types of differential treatment.

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[36] Halvorssen, above note 3; Günther Handl. 'Environmental Security and Global Change: the Challenge to International Law' (1991) 1 *Yearbook of International Environmental Law* 3-33; Posner and Weisbach, above note 4; Stone, above note 18.

[37] Scott Barrett, *Environment and Statecraft: the Strategy of Environmental Treaty-making* (Oxford: Oxford University Press, 2005); Scott Barrett and Robert Stavins, 'Increasing Participation and Compliance in International Climate Change Agreements' (2002) 3:4 *International Environmental Agreements* 349-376; see also Philippe Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' 10:3 *European Journal of International Law* 549-582.

[38] Nicolas Lamp, 'How Some Countries Became 'Special: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' 18:4 Journal of International Economic Law 743-771.

[39] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, in force 21 March 1994.

[40] IPCC 2014, Fifth Assessment Report, especially Chapter 13, online: https://www.ipcc.ch/report/ar5/.

Table 1			
	Normative bases or justification	***Markers***	***Types of provisions***
1)	**Justice (value-based)**	- **Contributions to environmental problems (corrective justice linked to polluter pays principle)** - **Capabilities (distributive justice)**	- **Unequal substantive obligations** - **Facilitated implementation** - **Financial and technological assistance**
2)	**Broad cooperation (instrumental)**	- **Capabilities** - **Development needs**	- **Facilitated implementation of substantive obligations** - **Financial and technological assistance**

The next section examines whether there are grounds to conclude that state practice reflects a justice-based approach to differentiation.

2.4. Examining state practice on differentiation in IEL

The literature usually advances two arguments to justify why states accept a value-driven approach to the principle of differentiation in IEL. The first argument points to the existence of explicit references to asymmetrical contributions to environmental problems and diverse capabilities to undertake environmental action in key environmental declarations and in various MEAS.[41] Those references would prove that the principle of differentiation seeks to advance corrective justice or distributive justice in IEL. The second argument points to the manifestation of differentiation in the climate regime, which was directly linked to asymmetrical contributions to GHG emissions and capabilities, as proof that IEL has embraced a justice-based approach to differentiation along a North/South divide. [42]

[41] Cullet, above note 29, especially 310-314; Sands and Peel, above note 28, 234; Honkonen, above note 3, 410.

[42] Sumudu Atapattu, 'Climate Change, Equity and Differentiated Responsibilities: Does the Present Climate Regime Favor Developing Countries?' (2008) Conference Proceedings on "Climate Law in Developing Countries post-2012: North and South Perspectives" organized by *IUCN Law Academy*,

With the advantage of hindsight, it is now possible to challenge those two arguments. The primary reason for this is because there has been a significant disparity between treaty texts (which do embrace a justice-approach to differentiation) and the actual practice of states over the last twenty years in implementing their treaty obligations. A second reason is that the model of differentiation in the UNFCCC climate regime, which was for a time clearly linked to contributions, has been significantly modified towards a pragmatic approach by the 2015 Paris Agreement, with developed states and emerging economies now treated in an increasingly similar way.

2.4.1. Disparities between treaty text and state practice

The 1972 Stockholm Conference on the Human Environment marked an important global recognition of the planetary scale of environmental degradation and that collective international norms and mechanisms were needed in response.[43] Principle 21 of the Stockholm Declaration established the responsibility of states 'to ensure that the activities within their jurisdiction and control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction'.[44] The Stockholm Declaration recognized states' common responsibility to protect the environment, while also highlighting the need for differentiation based on capabilities, by prompting the international community to consider

> the systems of values prevailing in each country and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries, and the need for financial and technical assistance.[45]

It is important to note that the 1972 Stockholm Declaration did not clearly address responsibilities for historic environmental contributions to environmental harm. A series of important MEAs became associated with the Stockholm Conference, including the 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matters,[46] the 1972 Convention for the Protection of World Cultural and Natural Heritage,[47] and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora

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3; Tomilola Akanle Eni-Ibukun, *International Environmental Law and Distributive Justice: the Equitable Distribution of CDM Projects Under the Kyoto Protocol* (New York: Routledge, 2014), 20.

[43] Oscar Schachter, 'The Emergence of International Environmental Law' (1991) 44:2 *Journal of International Affairs,* 457-493.

[44] Stockholm Declaration, above note 6.

[45] Ibid. See Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 Georgetown Law Journal 675-710, 703.

[46] Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), 29 December 1972, 1046 UNTS 120, in force 30 August 1975.

[47] Convention Concerning Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 15511, in force 17 December 1975 (World Heritage Convention).

(CITES).[48] These conventions include flexible timeframes for implementation and delayed compliance schedules for developing countries, but no differentiation in substantive obligations which are linked to differing contributions to the extent of the problem targeted by the relevant treaty regime.

In fact, global discussions on differentiated standards based on historic responsibilities for global environmental problems would gain momentum only a few years later, in the context of global discussions over a New International Economic Order (NIEO). The NIEO was a transnational governance reform initiative led by developing countries in the early 1970s, with the fundamental objective 'to transform the governance of the global economy to redirect more of the benefits of transnational integration toward "the developing nations"'.[49] It involved reforms in global economic institutions such as the IMF and the World Bank, as well as in the global trade regime. Although developing countries won a nominal victory with the United Nations General Assembly adopting the NIEO declaration by consensus in 1974, actual reforms in global economic institutions failed to materialize.[50]

Rajamani argues that 'the rhetoric of the NIEO … [found] expression in the field of IEL where notions of culpability (of industrial countries), entitlement (of developing countries) and non-reciprocal obligations are aired and offered guarded support'.[51] In the lead up to the 1992 Rio Conference, several MEAs were being negotiated in parallel, including the UNFCCC. It was in this context that most of the explicit references to disproportional contributions to environmental problems would appear in MEAs such as the UNFCCC and the Convention on Biological Diversity (CBD).[52]

The preamble to the United Nations General Assembly Resolution that convened the Rio Conference expressed concern that 'the major cause of the continuing deterioration of the global environment is the unsustainable pattern of production and consumption, particularly in industrialized countries'.[53] The Resolution affirmed 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'.[54] The Resolution further stated that 'the largest part of the current emission of pollutants into the environment, including toxic and hazardous wastes, originates in developed countries', and that therefore, developed countries 'have the main responsibility for combating such pollution'.[55]

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[48] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 993 UNTS 243, in force 1 July 1975.
[49] Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6:1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 1-16.
[50] Ibid.
[51] Rajamani, above note 3, 49.
[52] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, in force 29 December 1993.
[53] UN Conference on Environment and Development, GA Resolution 44/228 (1989).
[54] Ibid.
[55] Ibid.

This resolution was the first time that the 'contributions' marker was explicitly used in the context of differentiation in IEL. The Rio Summit therefore marked an important moment for the justice-based approach to the principle of differentiation. The 1992 Rio Declaration also established the concept of sustainable development as the centerpiece of IEL, linking together environmental protection and economic development.[56] This linkage reinforced the idea that developing countries could legitimately seek international support to address environmental challenges while at the same time reducing poverty and promoting socio-economic development.

Principle 7 of the Rio Declaration reads as follows:

> 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.[57]

Principle 7 therefore officially incorporates the 'contributions' notion in the lexicon of differentiation in IEL. Yet, the declaration maintains reference to the 'capabilities' idea as well. Principle 6 gives 'special priority' to the 'special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable.'[58]

The inclusion of this reference to contributions in the Rio Declaration was met with resistance by some developed countries, particularly the United States. The United States delegation issued an interpretative statement to Principle 7 of the Rio Declaration to make clear that it was rejecting the idea of a corrective justice differentiation linked to contributions:

> The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.[59]

Most MEAs at the time did not include different central obligations related to asymmetrical contributions. They relied primarily on differentiation related to

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[56] Rio Declaration on Environment and Development, above note 12.
[57] Ibid.
[58] Ibid.
[59] State Department, U.S. interpretive statement on World Summit on Sustainable Development Declaration, online: https://www.state.gov/s/l/38717.htm

implementation, or on financial support and technology transfer as a means to support compliance by developing states, concepts that are associated with the instrumental approach to differentiation. This shows a disconnect between the few explicit instances of recognition of justice-based differentiation related to contributions and the politics of treaty lawmaking and treaty implementation. The exception was the UNFCCC. The UNFCCC established differentiated core obligations, albeit temporarily in principle, between developed and developing countries.

The specific references to historic contributions to environmental damage in the Rio Declaration and its associated MEAs reflect the geopolitical and ideological context in which these texts were negotiated.[60] And despite the explicit references to these ideas in these foundational legal instruments of IEL, actual differentiated legal obligations reflecting these respective contributions have remained exceedingly rare in substantive provisions. Differentiated obligations expressed in more favorable compliance regimes for developing countries (for example extended timeframes for compliance and provisions of support through delivery of technical assistance, capacity building or financial transfers) are significantly more common.

Most instances of differential treatment in IEL are arguably more compatible with considerations of enlisting broad participation (instrumental) than promoting corrective or distributive justice (value-based). One notable exception is the manifestation differentiation in the climate regime, which has often been pointed to as evidence of state practice in justice-based differentiation.

2.4.2. Confounding Exception: Climate Justice Differentiation

In this section it is argued that the justice-based model of differentiation in the UNFCCC and in the Kyoto Protocol[61] was a deviation from the general pattern of instrumental differentiation across IEL. The model of differentiation enshrined in the 2015 Paris Agreement[62] has brought the climate differentiation closer to the pragmatic paradigm that prevails in other MEAs.

Unlike other MEAs, the UNFCCC, and the subsequent Kyoto Protocol, established a regime of differentiation between developed and developing countries with respect to central obligations, particularly the obligation to reduce GHG emissions. This differentiation in core obligations had clear links to contributions to GHG emissions associated with global warming.[63] The UNFCCC is distinctive in expressly stating that 'developed countries should take the lead'[64] in

[60] Jeffrey McGee and Jens Steffek, 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' (2016) 28:1 *Journal of Environmental Law* , 37-63.
[61] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, 2303 UNTS 148, in force 16 February 2005, arts. 2, 3.
[62] Paris Agreement, above note 5.
[63] Rajamani, above note 3, 129-33.
[64] UNFCCC, above note 39, Art. 3.1, Art. 4.2 (a).

meeting the objective of the Convention due to their historic responsibilities and greater capabilities. The concept of leadership was understood as requiring the industrialized countries to 'go first' in reducing GHG emissions, while developing countries should only later begin to limit or to reduce their GHG emissions.

In practice, developed countries listed in Annex I were required to adopt national mitigation policies to modify long-term trends in GHG emissions.[65] Meanwhile, non-Annex I countries (all developing countries) would voluntarily adopt national mitigation programs, with support from developed countries under the UNFCCC regime (financial support, capacity building and technology transfer).[66] The Kyoto Protocol reinforced this binary model of differentiation by only establishing mitigation obligations for Annex I countries, at least for the first commitment period.

In other words, developing countries were not simply given flexibility and support towards the implementation of core universal obligations, as was the instrumental approach adopted in other MEAs. This stark model of North-South differentiation, based on asymmetrical obligations linked to historic contributions to global emissions and capabilities, was the closest to the concept of corrective justice and distributive justice which was favoured by developing countries.[67] Despite being an exception, linking differing contributions to differentiated obligations came to be considered as part of the menu of 'widely accepted [differential treatment] in treaty and other practices of States.'[68]

Writing in 1994, in the aftermath of the Rio Declaration and the creation of the UNFCCC, Phillipe Sands argued that differentiated responsibilities comprised two aspects: it responded to the special needs of developing countries, while also accounting for 'each state's contribution to the creation of a particular environmental problem and its ability to respond to, and limit and prevent, the threat.'[69] Sands went on to say that in practical terms the principle of differentiation in IEL is 'likely to lead increasingly to the development and application of differing environmental standards between and among different states […].'[70] Sands contended that the practice of translating differentiation into different legal obligations 'seems likely to develop further.'[71]

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[65] Ibid, Art. 4.1, Art. 4.2.
[66] Rajamani emphasizes this unique feature of differentiation under the UNFCCC: see Rajamani, above note 3, 89.
[67] Rajamani, above note 3, 194.
[68] Sands and Peel, above note 28, 309. Developed countries have however always expressed strong resistance for the concept of linking historic contributions to differentiation. Therefore what was accepted was the linkage between current contributions and differential treatment. Rajamani, above note 3, at 194.
[69] Ibid, 308.
[70] Ibid.
[71] Ibid, 310.

This view illustrates a common assumption among commentators at the time that the principle of differentiation in IEL had a progressive nature and would move from provisions to support the implementation of universal standards in developing countries based on needs (a pragmatic approach) to differentiated core legal obligations based on contributions and capabilities (a justice-based approach). Edith Brown Weiss, however, cautioned that considerations of equity and fairness related to the principle of differentiation in IEL were the object of pointed conflict in both the negotiation and the implementation of MEAs following the 1992 Rio Declaration.[72] The conflicts were especially salient in the climate regime under the UNFCCC.

The conflict over the manifestation of differentiation in the UNFCCC and in the Kyoto Protocol, with its emphasis on justice considerations, is said to have compromised universal participation in emissions reductions in the climate regime.[73] The United States, expressly rejecting the idea of granting emerging economies exemptions from common climate mitigation obligations, refused to participate in the climate regime under the Kyoto Protocol terms. [74] Other developed countries including Canada, Japan and Australia would also come to express opposition to the idea of exempting emerging economies with significant emissions from fulfilling legal obligations under the Kyoto Protocol.[75] Emerging economies continued to resist assuming any future obligations, despite significant and growing emissions. [76] The negotiations for a new climate agreement to replace the Kyoto Protocol were tasked at finding a new balance in this challenging context. [77]

The negotiations included proposals to establish a spectrum of obligations, based on countries' different contributions, capabilities and development needs.[78] Developed countries would have the most stringent obligations, based on their

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[72] Weiss, above note 45.

[73] Jutta Brunee and Charlotte Streck, 'The UNFCCC as a Negotiation Forum: Towards Commom but More Differentiated Responsibilities' (2013) 13 *Climate Policy* 589-607, 594.

[74] Kathryn Hochstetler, 'Climate Rights and Obligations for Emerging States: The Cases of Brazil and South Africa' (2012) 79 *Social Research* 957-982, 958.

[75] Thomas Deleuil and Tuula Honkonen, 'Vertical, Horizontal, Concentric: The Mechanisms of Differential Treatment in the Climate Regime' (2015) 5 *Climate Law* 82-93. For a detailed political science account of the changing negotiating group dynamics in climate negotiations, with an emphasis on emerging economies, see Kathlyn Hochstetler and Manjana Milkoreit, 'Responsibilities in Transition: Emerging Powers in the Climate Change Negotiations' (2015) 21:2 *Global Governance* 205-235. Brunnee and Streck, above note 73.

[76] Andrew Hurrell and Sandeep Sengupta, (May 2012) 88:3 *International Affairs* 463-484, 467.

[77] Henry Shue,'Face reality? After you! A call for leadership on climate change.' (2011) 25:01 *Ethics & International Affairs* 17-26.

[78] On the many proposals for intermediary levels of obligations for emerging economies, see Michael Weisslitz, 'Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' (2002) 13:2 *Colorado Journal of International Law & Policy* 473-509; Edward A. Page, 'Distributing the Burdens of Climate Change' (2008) 17:4 *Environmental Politics* 556-575; Alina Averchenkova, Nicholas Stern, and Dimitri Zenghelis, 'Taming the Beasts of 'Burden-sharing': an Analysis of Equitable Mitigation Actions and Approaches to 2030 Mitigation Pledges, (2014) Policy Paper *Grantham Research Institute on Climate Change and the Environment*.

greater historic contributions and per capita emissions, and having regard to their greater capabilities. Emerging economies with significant absolute GHG emissions would have intermediary obligations, based on their lower contributions per capita, their lower capabilities compared to developed countries, and their development needs. Other developing countries with marginal contributions and low capabilities would receive support for voluntary climate action. A model with scaled obligations linked to contributions, capabilities and needs would have maintained the justice-based approach to differentiation in the climate regime.

However, the many attempts to arrive at a formula of differentiation based on a combination of the three markers failed.[79] Developed countries and emerging economies maintained their entrenched positions, refusing to let emerging economies evade significant climate commitments and relinquishing the idea of a corrective and distributive based approach to differentiation linked to historic and per capita contributions and capabilities respectively.[80] Only in 2007, during the negotiations that led to the Bali Action Plan, [81] did the position of emerging economies in defence of the stark binary approach to differentiation start to soften.[82]

In the Bali Action Plan, states pledged universal climate action, with all parties agreeing to do their share. Yet, states reiterated that climate action would follow the principles of the Convention, and 'in particular the principle of common but differentiated responsibilities and respective capabilities.'[83] It was unclear how exactly this principle was to be manifested in the new climate agreement. This overture by emerging economies to accept undertaking climate action led to renewed momentum in the multilateral regime. States held intense negotiations during the two years leading up to COP15 in Copenhagen. In 2009, the year of the 15th Conference, Barack Obama was elected President of the United States under a political platform that included support for global climate action. President Obama's election reinforced hopes among many stakeholders that states would be able to arrive at a new agreement in Copenhagen.[84]

For those advocating for a justice-based approach to differentiation, the United States and other developed countries should take the lead by embracing climate obligations that are more stringent and immediate than emerging economies and other developing countries. Emerging economies should also accept their measure of climate action, commensurate with their contributions, capabilities, and development needs. As is well known, parties did not arrive at a binding agreement Copenhagen, signing instead a nonbinding accord.[85] This accord presented a very different model for differentiation, where the link

[79] Ferreira, From Justice, above note 4.
[80] Brunnee and Streck, above note 73, 594.
[81] Bali Action Plan, FCCC/CP/2007/6 (March 2008).
[82] Brunnee and Streck, above note 73.
[83] Bali Action Plan.
[84] Álvaro de Vasconcelos and Marcin Zaborowski (eds), *The Obama Moment: European and American Perspectives*, (Paris: European Union Inst. for Security Studies, 2009).
[85] UNFCCC, Copenhagen Accord, 18 December 2009, FCCP/CP/2009/L.7.

between contribution and capabilities with differential legal obligations was significantly more diluted than in the Kyoto Protocol.

In Copenhagen, the United States and a key group of emerging economies – China, Brazil, India and South Africa – agreed behind closed doors on a new compromise to move multilateral negotiations forward: the Copenhagen Accord.[86] The 2009 conference of parties in Copenhagen was marked by noticeable divergences in the positions of emerging economies and other developing countries in the climate regime.[87] Without a broader consensus, states only 'took notice' of the Copenhagen Accord.

The dominant view[88] in the aftermath of COP15 in Copenhagen was that the Conference illustrated the incapacity of multilateral negotiations to address climate change, primarily due to the lingering North-South tension regarding differentiation. Yet, developed countries and emerging countries did agree on a new paradigm for differentiation in the climate regime in Copenhagen, one where states would be self-defining their pledges based on their own understanding of their share of contributions, capabilities and development needs. Looking beyond the North-South divide, this was a crucial change in the climate regime. If initially other countries resisted the new paradigm, because it had been decided in a non-inclusive process, virtually all countries would come to accept this new paradigm of differentiation in the climate regime in the years to come.

In hindsight, Copenhagen firmly planted the seeds for the seminal change in the model of differentiation in the climate regime.[89] This change has brought the climate differentiation closer to the instrumental model adopted in other MEAs, with some variations. In 2014, China and the United States announced their intention to cooperate bilaterally on climate change, reinforcing their support for a new concept for differentiation which includes other markers other than contributions, capabilities and needs. In their proposal, they referred to to: 'common but differentiated responsibilities and capabilities, *in light of different national circumstances*' (emphasis added).[90] The expression 'in light of different

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[86] Karl Hallding et al, 'Together Alone? Brazil, South Africa, India, China (BASIC) and the Climate Change Conundrum', (2010) Report by the *Stockholm Environment Institute*.

[87] Ibid.

[88] Navroz K. Dubash, 'Copenhagen: Climate of Mistrust' (2009) 44:52 *Economic & Political Weekly* 8-11; Lavanya Rajamani, 'Copenhagen Accord: Neither Fish nor Fowl,' (2010) *Centre for Policy Research Seminar Paper* 606, online at http://www.india-seminar.com/2010/606/606_lavanya_rajamani.htm, 26.

[89] Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104:2 *American Journal of International Law* 230-240.

[90] The White House Press Release, 'U.S.-China Joint Announcement on Climate Change' (Nov. 11, 2014), para. 2, (committing to reach an ambitious agreement in 2015 in COP21 in Paris that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances), online at https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change; see also Daniel Bodansky, 'Building Flexibility and Ambition Into a 2015 Climate Agreement' (2014) *Center for Climate and Energy Solutions (C2ES),* online at http://www.c2es.org/docUploads/int-flexibility-06-14.pdf; Daniel Bodansky & Lavanya Rajamani, 'Key Legal Issues in the 2015 Climate Negotiations' (2015*) Center for Climate and Energy Solutions (C2ES)*, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652001.

national circumstances' allows Parties to consider criteria such as stages of development, geographic size, and natural resources endowments when presenting their pledges for climate action.

With the addition of this expression, the earlier strong correlation between responsibilities for GHG emissions and capabilities and corresponding climate burdens and costs in the climate differentiation has been officially attenuated by a broadening of the markers for differentiation.[91] If the position is taken that differentiation should reflect a country's contribution and capabilities in significant ways, this model of differentiation departs from a just arrangement. It moves towards a more pragmatic approach that seeks to promote voluntary ambition while facilitating climate action, assessed according to national circumstances which now go beyond contributions, capabilities and development needs.

This pragmatic approach to differentiation was incorporated into the 2015 Paris Agreement.[92] There is broad recognition that the 2015 Paris Agreement represents a fundamental shift away from the categorical binary approach of the Kyoto Protocol based on contributions and capabilities and towards a more diffused form of differentiation that takes into account other markers or parameters.[93] In this sense the Paris Agreement represents an innovative turn in international environmental law in response to changing needs, the most important being the imperative to respond to rapidly worsening climate change. However, to conclude that the Paris Agreement is therefore innovative is not to say that it is necessarily fair or just. In any event, the Paris Agreement still builds on the normative legacy of the UNFCCC, and therefore it retains some elements of North-South differentiation based on contributions and capabilities.[94] For example, the Paris Agreement calls for developed countries to continue taking the lead in climate action.[95] This leadership, however, seems restricted to the expectation that developed countries will (voluntarily) adopt nationwide emissions reduction targets, while (mandatorily) providing financial resources for climate action in developing countries.[96] On the other hand, the common nature of the responsibilities was strengthened, with all Parties to the Paris Agreement

[91] Voigt and Ferreira, above note 4, 66.
[92] For analyses of the Paris Agreement, see a *Compendium of Commentary on the Paris Agreement/COP21*, organized by Wil Burns, online at http://teachingclimatelaw.org/compendium-of-commentary-on-the-paris-agreementcop21/.
[93] Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 *Climate Law* 1-20, 2; Daniel Bodansky, 'The Paris Climate Agreement: A New Hope?' (2016) 110:2 *American Journal of International Law*, 288-319; Rajamani, above note 4.
[94] Voigt & Ferreira, above note 4.
[95] Paris Agreement, Art.4.4, Art. 9.3.
[96] Paris Agreement, Art 9. In 2009 developed countries committed to provide $US100 billion a year to developing countries, as a group. This quantitative target was included in the Decision that accompanied the Paris Agreement, above note 5. See Joost Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons From the Trade and Climate Change Regimes' (2013) 22:1 *RECIEL* 29-41.

mandated to formulate, communicate, and update their nationally determined contributions (NDCs).[97]

Christina Voigt and Felipe Ferreira argue that while the Paris Agreement differentiation builds on the categories of 'developed' and 'developing,' countries, it could eventually, over time, lead to common types of mitigation efforts as emerging economies with high emissions move towards economy-wide reduction targets.[98] There is, however, no timeline for emerging economies to conclude this 'graduation' under the Paris Agreement, and whether emerging economies truly agreed to this idea of convergence is debatable.[99]

Linking climate pledges to contributions and capabilities has become largely a political exercise at the national level. The Paris Agreement seeks to restrain the possibility of states using this autonomy to evade their responsibilities by creating a system of oversight that leverages peer pressure for strong climate action. This system is composed of an enhanced transparency framework (article 13) and review processes (including article 14 on global stocktake and article 15 on compliance mechanisms). Whether or not a country's pledge will reflect its contributions and capabilities will therefore depend on these provisions and in the country's national processes.

To sum up, to ensure a high uptake among states, particularly developed countries and emerging economies, the differentiation model in the Paris Agreement has departed from the strong focus on climate justice which associated climate burdens and costs with responsibilities for contributions and capabilities to act on climate. According to Rajamani, the Paris model of differentiation has transitioned "from an ideological to a pragmatic basis.[100] The Copenhagen model of bottom-up pragmatic differentiation, embraced by the Paris Agreement, marks the end of the exceptional nature of differentiation in the climate regime, bringing it closer to the model of pragmatic differentiation that has prevailed in most other MEAs.

[97] Obligations of conduct relating to preparing and submitting nationally determined contributions are now universal, and do not follow a North-South divide. Paris Agreement, above note 5.

[98] Voigt & Ferreira, above note 4, 67.

[99] Rajamani, above note 4.

[100] Rajamani, above note 4, 509.

2.5. Conclusion

Jeffrey McGee and Jens Steffek argue that the Paris Agreement model of bottom-up voluntary pledges is an outcome of the United States' opposition to 'redistributive multilateralism' and signals a 'weakening' of differentiation in international environmental law.[101]An examination of the move towards the Paris Agreement model of differentiation, in the context of differentiation in other MEAs, illuminates other elements of this incomplete story.

First, the move towards a bottom-up system of voluntary pledge and review in Copenhagen and the Paris Agreement, a system dissociated from notions of contribution to environmental harm and the capability to address it, enjoyed the support not only of the United States, but also China and other emerging economies. It is more accurate, therefore, to suggest that states supporting a move away from 'redistributive multilateralism' now include key emerging economies with growing capacity to address global problems. TWAIL scholarship, concerned with the role of international law in challenging or reinforcing global socio-economic and political imbalances, will need to take the growing South-South differences in interests and values into consideration in its future analyses of international law. The rapid pace of climate change is generating normative innovation which cuts across established political divides and legal categories.

Second, the differentiation in the Paris Agreement is not necessarily 'weaker' than in other MEAs. Instead, the Paris differentiation model reflects the end of the exceptional climate model of differentiation that prevailed, at least until the Kyoto Protocol aligned closely with corrective and distributive justice considerations related to contributions and capabilities along a North and South divide. The pragmatic new climate model of differentiation is more closely aligned with other manifestations of differentiation in IEL, taking into account development needs and low capabilities of Parties in order to facilitate and to promote compliance.

As it stands today, the principle of differentiation in IEL does not fulfill the function of promoting a just global socio-economic and political order, as advocated by TWAIL scholars. For those concerned with promoting a justice-based approach to differentiation in IEL, there is a need for concerted efforts to change state practice on differentiation in IEL, both by developed countries and emerging economies. Alternatively, legal tools and policy techniques of IEL other than the principle of differentiation may be used to advance distributive and corrective justice in IEL. Future research can illuminate the role of environmental litigation, mechanisms to address loss and damage, enhanced transparency frameworks and the like in promoting equity and justice in IEL.

[101] McGee and Steffek, above note 60, 62 and 63.