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DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW, by Philippe Cullet. Brookfield, VT: Ashgate Publishing Co., 2003. 224pp. Hardback. $99.95. £55.00. ISBN 0-7546-2314-9.

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DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW is supposedly a study of "situations where the principle of reciprocity of obligations gives way to differentiated commitments, for the purpose of fostering substantively more equal results than what is achieved through the principle of formal equality, in situations where actors are not equal" (p.1). More straightforwardly stated, Philippe Cullet seeks to undertake an exploration of the extent to which the emerging field of international environmental law takes special account of differences in resource endowments and capacities in the distribution of burdens among the actors. The study is conducted in six chapters.

Chapter 1 lays out basic premises and attempts to provide conceptual definitions of core terms. At the outset, the reader is told that "[i]nternational law is fundamentally premised on the principle of sovereign equality and the concomitant principle of legal equality of all states," an assertion made with little further explication, but which repeatedly appears as a foundational precursor for arguments presented in the book. The phrase "International Environmental Law" is given a wide sweep to embrace not only the regulation of traditional issues involving transboundary pollution and the climate, but the entire field of "sustainable development." "Differential treatment"—or "differentiation"—the author says, "is closely related to the notions of partnership and solidarity," which presumably puts it in tension, if not outright conflict, with the legal concept of sovereignty. Differential Treatment appears in several guises, including "common but differentiated responsibilities," technology transfers, lengthening (or softening) of periods for compliance, and financial aid. Whether all of these forms of "Differential Treatment" uniformly pose challenges to the notion of state sovereignty is never addressed. But the author leaves the reader in no doubt that the concerns of the international environment which cannot be adequately resolved within territorial boundaries, and which in fact may best be addressed through the concept of "common heritage of mankind," renders the resort to differential treatment highly instrumental, if not philosophically mandated. Differential Treatment, adds the author, is the application in the legislative and implementation spheres of a legal regime of the judicial maxim "do equity." To apply Differential Treatment is to acknowledge that "formal equality may lead in some cases to results which are undesirable according to broader conceptions of justice" (p.14). [*332]

The practice of Differential Treatment, the first chapter properly points out, is neither unique to International Environmental Law, nor to our contemporary legal order. Its analogs may be found in the domestic law doctrines of "affirmative action," or "positive discrimination," and in the Generalized System of preferences in International Trade Law. Indeed, according to the author, the regime of a "New International Economic Order," which "developing countries" sought to create in the 1970s, and the related espousal of an "International Law of Development" were essentially claims by these countries for the institutionalization of Differential Treatment writ large in International Law. Yet, Cullet asserts, Differential Treatment in International Environmental Law is fundamentally different from these other instances because it is anchored in principles of cooperation, solidarity and partnership rather than in the unilateral assertion by the less privileged of rights and entitlements that the more privileged are bound to bestow on the former. And its aspirations correspondingly are much more limited; for, differentiation here does not seek to overthrow the regime, but to function within it.

The second chapter is advertised as an overview of "some general theoretical issues" implicated in the concept of Differential Treatment. This begins with an attempted explanation of the justification in International Law for Differential Treatment. This justification is said to lie in a preference for "substantive" over "formal" equality. It is articulated more or less in the following syllogism: International Law, like all law, strives for neutrality in the regulation of its subjects. The subjects of International Law are states. International Law maintains its stance of neutrality among states by presuming, through the concept of sovereignty, that all states are formally equal. A necessary corollary of this presumption is that states' interactions in International Law must be reciprocal. But since, as a factual reality, states are demonstrably unequal in their endowments and capabilities, substantive justice requires that the burdens they are asked to assume under International Law be adjusted to take account of these real differences. Hence, the need for differential treatment.

This argument is buttressed by invocation of the debates in some liberal societies like the United States as to the moral and political nature of contractarian rights. In a rather superficial treatment of the issue, Cullet canvases the contending positions of minimalists like Robert Nozick, who believe that the state has no role whatsoever in the apportionment and distribution of endowments, and somewhat more welfare oriented philosophers like John Rawls who believe that to the extent it promotes overall welfare and meets basic needs, the state may interfere no more than is absolutely necessary with the assignments of rights to satisfy these limited criteria. Presumably, the latter approach, which respects entitlements while at the same time guaranteeing the basic needs of all, is to be preferred over the former which represents a strict application of the concept of formal equality. Similarly, the role of "judicial equity" in tempering the formalism of rules is deployed to support Differential Treatment as a departure from the rule of strict [*333] formalism in law. Again, Differential Treatment operates within and not outside the existing legal regime, and, there is of course state practice as evidenced by numerous treaties that have in fact incorporated it. And these are to be found in a wide variety of regional multilateral agreements, such as Protocol 12 to the European Convention on Human Rights, as well as unrestricted international treaties like the Convention on the Elimination of Discrimination Against Women, and indeed the Uruguay Round agreements formalized in the World Trade Organization.

Other grounds for Differential Treatment (perfunctorily put forward by the writer, but not necessarily endorsed) include: (i) "States should have a right to an equitable share of what belongs to all because common goods should be used for the benefit of humankind as a whole without consideration of territorial borders" (p.38); (ii) as compensation (or reparation) for historical wrongs, e.g., colonization; (iii) as compensation (under the contemporary doctrine of state responsibility) for continuing wrongs; (iv) as a show of solidarity or demonstration of fairness by strong states towards the weak. This last ground for differential treatment may be induced not simply by moral but practical considerations as well. Thus, the idea of debt-reduction/forgiveness is posited as one form of differential treatment that is necessitated by the fact that it would not be in the economic interest of wealthy states to have developing states default extra-legally on the payment of their debt obligations. Similarly, the benefits to developed states of having as many countries as possible sign environmental agreements, and the need for maintaining the integrity and institutional cohesion of these agreements go quite some way in explaining the voluntary willingness of wealthy states to entertain non-reciprocal arrangements within environmental treaties. And it may be that Differential Treatment yields long-run economic returns for wealthy states, such as creating a market in the poor countries for pollution-control devices.

Finally, the author traces the difficulties inherent in determining who ought to be the beneficiary of Differential Treatment. Here, Cullet contends that, while the standard yardstick in International Law has been the level of poverty as measured by per capita income, International Environmental Law has frequently departed from this gauge of entitlement, and instead has often experimented with several other contextual indicators of the need for differentiation. These include, as in the case of the Law of the Sea Convention, the absence of a coastline, or, in the context of the Climate Change Convention, countries with "low-lying coastal areas," and "small island countries" (pp.51-52). Cullet applauds a multifactor approach to establishing a claim for differential treatment, arguing that this approach is not only fairer than the use of any one gross factor, but that it would permit applying differential treatment to subnational entities and units, including nongovernmental organizations. The extension of differential treatment to these groups, he asserts, would further the object of international law as being ultimately intended for the benefit of individuals, and as promoting decentralization and democratic development.

Chapter 3 ranges far and wide to [*334] expose the broad sweep of differential treatment in International Law. Ostensibly, it focuses on "differentiation as an exception to reciprocity." Cullet develops this theme by elaborating on

the claim in the introductory chapter that current approaches to Differential Treatment in International Environmental Law represent a fundamental shift from earlier efforts inasmuch as current Environmental Law approaches are anchored in cooperation and solidarity; while earlier efforts constituted the unilateral demands of weak states. Further, Cullet posits as instances of Differential Treatment in International Law, such measures as the use of graduated contributions in the funding of international organizations, and weighted voting in international financial institutions.

The flow of the material in this chapter is at best choppy. Unifying ideas are difficult to grasp. For example, Cullet initially confidently asserts that the unilateral demands of developing countries for Differential Treatment in the 1970s was "largely a failure" (p.64), while at the same time conceding that "technology transfer," a central feature of Differential Treatment in International Environmental Law, is a direct outgrowth of the 1970s movement (p.68). Similarly, his contention that the post-Uruguay Round trading system has been "reluctant" to extend Differential Treatment, and that this trend will likely continue (p.66) is undercut – if not contradicted outright – by his assertion only a page later that "an increasing number of events point to a possible revival of differentiation in the WTO context" (p.67). It appears to this reader that the author, having started out with the presupposition that Differential Treatment in International Environmental Law represents a distinctly different approach from that employed in the 1970s, tries too hard – and in my view unsuccessfully – to distinguish the two.

The fourth Chapter is a workmanlike description of the use of differential treatment in the implementation of environmental treaties, notably the Climate Change Convention, the Convention to Combat Desertification, and the Kyoto Protocol. These descriptions amply show that recent Environmental Agreements quite frequently incorporate provisions relating to the transfer of technology and/or the provision of financial assistance by the developed states to their poorer cousins. It is equally clear that such transfers of know-how and finance are neither mandatory, nor have they proved to be completely satisfactory in meeting the aspirations and objectives of the treaties. It may be that the new Differential Treatment regime is motivated by a different sense of "solidarity" from the old, but its efficacy is yet to be proven; and its implementation appears no less aspirational than the old – and in the author's view defunct – approaches of the 1970s.

Chapter 5 is at once a departure from the main concern of the book and its fullest realized piece of coherent writing. Entitled "Differential Treatment in Practice: The Case of Plant Variety Protection," the Chapter focuses on a relatively narrow subject, and actually attempts to demonstrate how Differential Treatment operates within a defined subject area. And in truth – and contrary to the book's billing – the classification [*335] of the subject matter as falling within the realm of "International Environmental Law" requires some stretching of the label. In any event, what the author presents here is a quite illuminating exploration of the change over time of the international regimes for conferring exploitable monopoly rights in inventions and discoveries, and how those changes have influenced or been mirrored in national legislation, specifically that of India. We learn that in the 1970s, India – and indeed much of the world – prohibited the patenting of biological organisms, including plant life. We also come to appreciate at the same time the highly nuanced regulatory approaches both internationally and in India, notwithstanding the prohibition, that were employed to encourage discoveries and inventions in the Biological fields by granting limited exploitation rights to plant breeders and by granting process – as opposed to specific product or substance – patents. By the 1990s, however, the political and economic environment had changed, and the TRIPS Agreements substantially altered the existing framework in the International arena. All members of the WTO were now required to extend property rights protection to products of the intellect, including plant varieties. Rather than insisting on a uniform approach, however, the TRIPS arrangement left a "margin of appreciation" for each country (considered by Cullet to constitute "Differential Treatment") as to how best to satisfy the obligation. And we get to learn how India's post-Uruguay round (2001) legislation sought to harmonize domestic law with its international obligations. Thus, one encounters in this chapter, as one does nowhere else in the book, the rich tapestry that surely is present whenever in the name of justice, the doctrine of differential treatment is invoked as the basis for departure from established rules: the interaction of the moral and philosophical with the practical, the murky politics of seeking to reconcile conflicting claims of justice by diverse interest groups, the muddled results that typically flow from conscientious and not-so-conscientious efforts at weighing and balancing costs and benefits.

The last chapter is no more than a restatement of some of the ideas advanced in the first chapter; and as a restatement, it goes on for far too long.

Descriptions overwhelm analysis, and the latter tends to be at best inconclusive, and more often than not quite unpersuasively presented. A glaring example is the frequent assertion that the active involvement of non-state actors in the International Environmental Law regime has beneficially influenced the reception of Differential Treatment within the regime. And yet, this fascinating (and, if demonstrably true, surely significant) claim is never developed in any meaningful way anywhere in the book.

I came to this book with a lot of interest. As anyone in the U.S. academy over the last quarter-century knows all-too-well, determining when two persons are "similarly situated" so that a law of general applicability should treat them identically has been a vexing issue. When should the law treat the disadvantaged differently from the mainstream? And what constitutes a "disadvantage?" More recently, the debate over the moral and philosophical justifications for "affirmative action" has [*336] gone truly global. From Western Europe to South Africa, Australia, India, Canada, Malaysia, and Nigeria, academics and politicians have joined the debate. Does the history of past discrimination against a group entitle surviving members to preferential treatment? Are contemporary inequalities in access to social capital such a debilitating disadvantage in a democracy that society must take affirmative steps to remove them, even where such steps would entail giving disadvantaged members preferential treatment? And, more recently on the international stage, the ravages of HIV/AIDS and the particular difficulty of poor countries in paying for medicines that can effectively ameliorate the condition have renewed and galvanized seemingly forgotten debates about the need for preferential treatment in International Trade. International Environmental Law has emerged as a genuinely new development in international law during the last decade. I thus believed that a study of Differential Treatment in International Environmental Law, in addition to being educational in its own right, might provide fresh insights into some of these thorny issues. This book does not do so. Both the concept of Differential Treatment and the field of International Environmental Law are too diffusely and superficially defined and canvassed to engage a serious intellectual discussion, although these are purportedly the subject matters of the book. The footnotes and bibliography indicate that the author has read widely. Those who are looking for research aid might find these useful.

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Back To LPBR Home