DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW

WORKSHOP ON SCOPE, STRUCTURE AND DESIGN OF THE 2015 AGREEMENT
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Rationale for Differentiation
- Principled Bases
- Practical Basis

Forms of Differentiation (with examples)

Constituent Elements of Differentiation
- Categories of Parties
- Categories of Commitments

Design Options for Differentiation

Limits to Differentiation
Rationale for Differentiation

- Principled Bases
  - Principle of CBDR & RC (explicitly or implicitly)
    - Contribution (Rio Principle 7)
    - Capacity
  - ‘Equality for equals, inequality for unequals’ – justice requires that the ‘factual matrix’ be taken into account in determining States’ commitments

- Practical Basis
  - Universal participation in an instrument enhances its effectiveness - tailoring commitments to capacities and national circumstances advances the goal of universal participation
  - However differentiation in favor of some can create disenchantment among those not so favored, so differentiation can also hamper universal participation
Forms of Differentiation

Legal Form
• Obligations that are binding for some and voluntary or non-existent for others

Central Obligations
• Targets and Timetables for some and lack thereof for others

Implementation
• Stringency
• Context/Language
• Subsequent Base Years
• Soft Approaches to Non-compliance
• Timing
• Delayed Compliance Schedules
• Delayed Reporting Schedules

Assistance
• Financial Assistance
• Technology Transfer
• Capacity Building
• Technical Assistance
Constituent Elements of Differentiation

Categories of Commitments
- Central Obligations
- Obligations of Effort (Eg: Policies and Measures)
- Obligations of Result (Eg: Targets and Timetables)
- Assistance Obligations
- Reporting Obligations
- Others

Categories of Parties
- Definition Method (objective criteria)
- Listing Method (self-identification, external factors/membership etc)
- Combination

Differentiation ➔ Matching Commitments to Parties
Design Options for Differentiation

<table>
<thead>
<tr>
<th>Categories of Parties</th>
<th>Categories of Commitments (in relation to central obligations)</th>
<th>No Categories of Commitments (in relation to central obligations)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Categories of Parties</td>
<td>Categories of Parties are matched to Categories of Commitments (Prescriptive)</td>
<td>Categories of Parties select their own commitments</td>
</tr>
<tr>
<td>No Categories of Parties</td>
<td>Parties select the category of commitments they believe suits their situation</td>
<td>Parties choose their own commitments (Facilitative)</td>
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</tbody>
</table>
Limits to Differentiation

- Differentiation is not an end in itself, but a means to an end, hence differentiation should cease when it begins to detract from the object and purpose of the treaty
  - However the object and purpose of the treaty can be interpreted ‘expansively’ or ‘conservatively’

- Differentiation is based on relevant differences between Parties, logically it should cease when relevant differences cease to exist
  - However, how you identify ‘relevant’ differences, and determine that they have ceased to exist is a value-laden and subjective exercise