

DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW

WORKSHOP ON SCOPE, STRUCTURE AND DESIGN
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Outline



- 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

	Categories of Commitments (in relation to central obligations)	No Categories of Commitments (in relation to central obligations)
Categories of Parties	Categories of Parties are matched to Categories of Commitments (Prescriptive)	Categories of Parties select their own commitments
No Categories of Parties	Parties select the category of commitments they believe suits their situation	Parties choose their own commitments (Facilitative)

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

References



- L. Rajamani, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (Oxford University Press, Oxford, 2006)
- L. Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, 88(3) *INTERNATIONAL AFFAIRS* 605 (2012)