International Environmental
Law Research Centre

ENVIRONMENT AND DEVELOPMENT

THE MISSING LINK

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Published in: in Julio Faundez & Celine Tan eds, *International Law, Economic Globalization and Developing Countries* (Cheltenham: Edward Elgar, 2010), p. 354-78.

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16. Environment and development – the missing link

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1. INTRODUCTION

International environmental law has grown at a rapid pace over the past few decades and now covers a range of issues of relevance to developed and developing countries (see generally Birnie et al., 2008). Further, a number of environmental problems addressed in environmental treaties are of global relevance; in other words, not amenable to solution at the national or regional level.

There are at least three ways to approach the link between environmental law and development at the international level. First, international environmental law has developed in the space of relatively few years into an area of law that is now fundamentally based on attempting to put conservation and economic development side by side and, ideally, reconcile the two objectives. The legally unclear umbrella notion of sustainable development provides the general framework within which all environmental issues are conceived today.

Second, the link between environment and development in international law is in large part underpinned by considerations of equity that have come to dominate the engagement of the South in a variety of environmental regimes. This is reflected in legal terms in the concept of differential treatment that provides, in its most evolved form, a new basis for commitments that are not based on reciprocity of obligations. This manifestation of equity or justice concerns in international environmental law is premised for the most part on different levels of economic development in the North and South. It is also the reflection of a political compromise and, thus, not entirely a principle-based response to the moral concerns raised by current environmental challenges. Indeed, differential treatment constitutes the middle ground where the North and South meet: between devel-

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oping countries having sought 'preferential' treatment since independence, and developed countries seeking the engagement of the South in tackling global environmental problems caused mostly by the North, as in the case of global warming and the ozone layer depletion.

Third, international environmental law has had an ambiguous relationship with the growth of environmental law in developing countries. It has, without doubt, contributed to the transmission of what are now basic principles of environmental law in many countries of the world and in this way may have sped up certain aspects of environmental protection in certain countries.[1] At the same time, the priorities set at the international level, which have not necessarily been dictated by developing countries, have often de facto become core concerns of environmental law and policy at the national level, regardless of the actual environmental situation of particular countries.

The relationship between environmental law and development needs to be understood through its varied and partly contradictory trends. This chapter highlights some of the main issues that define this relationship. The following section considers the link between environment and development through the lens of the notion of sustainable development, examining the general issues that arise in this regard. The third section considers some of the difficulties that have arisen in the development of international environmental law with regard to developing countries; in particular, the impact of economic development issues on environmental law. The fourth section then examines the notion of differential treatment, one of the ways in which the concerns of developing countries have been taken into account in recent environmental law. Finally, the fifth section considers ways in which economic globalization has affected international environmental law.

2. SUSTAINABLE DEVELOPMENT: ENVIRONMENTAL LAW'S CONCEPTUAL FRAMEWORK FOR THE 21ST CENTURY

International environmental law has developed remarkably fast since its formal beginning in the early 1970s (see, for example, UNGA, 1972). Apart from the great number of legal instruments adopted, environmental law is also noteworthy for the development of a corpus of notions and principles

[1] See, for example, the integration of the precautionary principle by the Indian Supreme Court in *Vellore Citizens' Welfare Forum v. Union of India*.

that have come to define not only the way in which environmental issues are addressed but also how they have impacted other areas of law.

One of the most remarkable developments that have taken place over the past few decades is the changing premises on which environmental regulation is conceived. Indeed, while an understanding of the links between environmental protection and development issues is already clearly articulated in the Stockholm Declaration,[2] early environmental treaties tended to be influenced more by a conservationist perspective (see, for example, Okereke, 2008: 14). This changed significantly over time and since the publication of the World Commission on Environment and Development (WCED) report in 1987, environmental issues have in principle not been considered in international law in isolation from their development component (World Commission on Environment and Development, 1987). Thus the 1992 Rio Conference was tasked by the UN General Assembly to address 'environmental issues in the developmental context'.[3]

The link between the use and conservation of the environment provided the bedrock for the changes that have led environmental law to be an area of international law that covers a huge spectrum: it includes not only environmental issues strictly speaking, but many other issues related to the core environmental issues addressed, such as human rights, health, trade, economic development, intellectual property protection and agriculture. The expansion of the scope of environmental law was due in large part to developing country concerns that conservation did not provide an appropriate angle to approach issues that were directly linked to livelihoods. In that sense, poverty has been an integral part of environmental law for the past couple of decades. Yet, at the same time as it was the poverty of developing countries that provided the trigger for broadening the scope of environmental law, the actual poverty of the majority of poor people in developing countries has not become the core concern of environmental law.

The acknowledgment of the intrinsic links between environmental issues and economic development from the local to the global levels has had a dramatic effect on the growth of environmental law. Indeed, if it was not for the fact that global warming is intrinsically linked to the basic economic development framework of most countries, it is doubtful that it would have acquired the prominence that it has been given over the past

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[2] *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 16 June 1972 (UNGA, 1972).

[3] *United Nations Conference on Environment and Development*, Resolution 44/228 (UNGA, 1989: para. 15).

few years. Even a key conservation treaty like the Biodiversity Convention owes its prominence at least as much to the links between conservation and use as to concerns for nature protection. These examples are symptomatic of a broader trend whereby most major environmental issues over the past couple of decades have become issues that are also major economic development concerns, from access to biological resources to trade in genetically modified organisms.

At a conceptual level, the notion of sustainable development encompasses the links between environment and development. Sustainable development is extremely useful as a catchphrase because it provided in the first place the background for understanding that environmental issues cannot be considered in isolation from their development impacts. While it is the economic dimension that still dominates the sustainable development discourse today, its relative flexibility has allowed social issues also to be considered a key component of sustainability. The open nature of the notion of sustainable development has also meant that it has progressively become over time one of the key defining elements of the international legal order. This is, for instance, illustrated by the fact that even an organisation like the World Trade Organization (WTO) that has no specific environmental mandate sees the fostering of 'the objective of sustainable development' as an overarching goal of the organisation.[4]

The widening acceptance of sustainable development as a key element of international law in general is a significant step forward because it provides a recognition that the links between, for example, trade and environmental protection cannot be ignored. Yet, at the same time, its widespread acceptability is also the cause of its irrelevance at a more specific level. There have been debates for a long time as to whether sustainable development can be deemed to be a principle of international (environmental) law. While there are strong arguments in favour of such recognition, this only shifts the tasks at hand. Indeed, the very reason why those involved in social movements, NGOs, the United Nations Environment Programme (UNEP), the WTO and the World Bank agree on the goal of sustainable development is because it is a malleable notion that can be given a multiplicity of definitions (on the different understandings of sustainable development, see Blewitt, 2008). Since the present international legal order does not provide a single specific definition, sustainable development remains at present an umbrella term that serves a useful purpose in drawing attention to the broad scope of the challenges at hand but does not point towards any specific policy direction.

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[4] See Preamble to the Agreement Establishing the World Trade Organization (GATT, 1994*a*).

One of the clearest cases in favour of recognising sustainable development as a binding principle of international law was made by Judge Weeramantry more than a decade ago. He argued that sustainable development 'offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected' (*Gabčíkovo-Nagymaros Project*, 1997: 95). Judge Weeramantry sees sustainable development as the mechanism that provides an avenue to solve tensions between the two rights. To people who believe in the existence of a right to development and a right to a clean environment, this may be a simple extension of the right. This is not, however, the position of all states (see generally Bosselmann, 2008: ch. 2). While a majority of states have, in some way, integrated the right to a clean environment in their legal framework,[5] its recognition at the international level remains a distant prospect (see, for example, Shelton, 2007). With regard to the right to development, its explicit recognition in the 1986 Declaration has proved insufficient to build a consensus over its status and its content.[6] In other words, the definition that Judge Weeramantry proposed is a well-argued position, but one that would be disputed by a number of developed states.

This highlights the underlying North–South tension that can be found in a number of documents. Yet, the noteworthy aspect of 'sustainable development' is that it has transcended what could be seen as its original North–South context that sought to bridge the different perspectives of the North and South on environmental regulation. Sustainable development can today alternatively be conceived as the linchpin of an international organisation promoting free trade around the world like the WTO and an organisation seeking to foster stronger environmental regulation like UNEP. Similarly, it can provide the conceptual basis for an NGO advocating free flows of genetic resources across borders that may be used to develop genetically modified seeds, and for organic farmers seeking to protect their lands from the threat of genetically modified organism (GMO) contamination. This is what explains its wide appeal rather than its focus on the development concerns of developing countries or its focus on the situation of the most marginalised and the poorest.

The limitations of the umbrella notion of sustainable development –

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[5] According to the list of constitutional provisions compiled by Earthjustice, 119 countries have a right to a clean environment (Earthjustice, 2008).

[6] *Declaration on the Right to Development*, 4 December 1986 (UNGA, 1986).

notwithstanding a number of legal principles that are well established – can be argued as constituting a more specific understanding of what sustainability implies. These include, for instance, the principle of integration of environment and development concerns; the prevention and precautionary principles; and participation, in particular that of women, and intra- and inter-generational equity.[7] The precautionary principle has, for instance, been integrated as a core element of the Biosafety Protocol.[8] This is significant for several reasons in the context of this chapter. First, the precautionary principle is one of the important novel conceptual developments that have taken place in international environmental law. Its inclusion in a treaty seeking to regulate a new technology where economic and commercial stakes are extremely high is a significant achievement. Second, given that the Protocol provides, in effect, safeguards for importing state parties, the use of the precautionary principle in this context provides a shield for developing countries that are in practice the main beneficiaries of the measures adopted. Third, while the Protocol is clearly an environmental law treaty, it is in no way a classical conservation treaty. In fact, the Biosafety Protocol is an instrument that regulates transboundary trade in GMOs. In other words, it is one of the environmental law treaties that focus on trade as the point of entry for introducing environmental safeguards. Overall, the Biosafety Protocol uses the precautionary principle to foster objectives that fall directly under the broader umbrella of sustainability in a context that is centred on conservation through the regulation of trade.

Sustainable development has on the whole become so important that it has come to define the relationship between environment and development. This is helpful in bringing out the links between the environment and the overall process of development. At the same time it can have unwanted side-effects insofar as it may affect the core environmental values of environmental law in favour of approaches that may eventually not be environmentally sound. Since there is no exact legal standard by which to judge 'sustainability', it pushes back the debate to the level of broader questions of environmental values. Thus, whereas it can be argued that the Clean Development Mechanism (CDM) fosters sustainability because it contributes to the global goal of climate change mitigation, the CDM can also be seen as a simple economic mechanism that redistributes the cost

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[7] *Rio Declaration on Environment and Development*, adopted at the UN Conference on Environment and Development, Rio de Janeiro, 14 June 1992 (UNGA 1992: Annex 1).

[8] See the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Secretariat of the Convention on Biological Diversity, 2000).

of mitigation and uses up the cheapest emission reduction opportunities in developing countries that will not be able to benefit from them the day they have to cap or reduce their emissions (see Section 5 below).

3. ENVIRONMENTAL LAW AND DEVELOPING COUNTRIES: FOCUS AND PRIORITIES

The shift from what could be seen as a more conservationist agenda to the broader agenda of sustainable development is in principle a testimony to the fact that the position of the South has had an important influence on the development of environmental law. This also seems to be borne out by the fact that some of the basic principles of international environmental law directly refer to the development dimension of environmental regulation, such as the principle of integration of environment and development. Similarly, the rapid growth of differential treatment examined in the next section is a reflection of the importance of the South in shaping up environmental law.

Yet, international environmental law cannot be qualified as a developing-country-focused area of international law. In fact, there exist a number of areas of tension or conflict that have surfaced over time.

International environmental law has now addressed a number of issues, some of a relatively specific nature like wetland protection, some of an immense complexity like global warming. Yet, there is a lack of unity overall. This is due, in part, to the fact that there is no set of principles that apply by definition to all international environmental treaties. While it is hoped that a number of the Stockholm and Rio Declaration principles may have or will attain the status of customary law, this is only partly helpful because individual treaty regimes can have their own understanding of a given principle. The sort of unity that can be identified in contexts such as those of the WTO or the International Labour Organization (ILO) is largely absent in environmental law. Indeed, the 'cement' that binds environmental law are those soft law instruments, in particular the conference declarations, that provide the most evolved statements on the structure of international environmental law.

The fragmented nature of international environmental law is reinforced by the fact that UNEP has never had as strong a mandate as specialised agencies of the UN in their own fields or institutions like the WTO. Additionally, for a combination of reasons, the multiplicity of negotiating forums and the multiplicity of institutional setups – in particular, the different secretariats found in different regions of the world – have combined to ensure any progress in one area may have little impact in another area.

Further, while the setting up of UNEP as the only major UN programme in the South was a huge step forward, the last three decades have seen at least another three strong centres of environmental governance emerge in Europe and North America – Geneva, Bonn and Montreal – that have diluted the leadership role that Nairobi should have ideally played.

The absence of either a specialised agency dealing with environmental issues within which all environmental negotiations would take place and that would administer all treaties or an international covenant on environmental law has had negative impacts on the overall development of international environmental law from the point of view of the South and of the integration of the concerns and rights of the poorest and most marginalised.[9] Indeed, the development of international environmental law has taken place, in part, according to the priorities of the states identifying a new issue of concern and, in part, according to the availability of resources to implement new treaties. In both cases, the priority given to 'global environmental issues' is revealing in terms of the choice of issues addressed. The case of the ozone layer regime reflects, for instance, the push by developed countries having nearly exclusively contributed to an environmental problem with global consequences to develop a legal regime that would bind polluters and non-polluters alike (see, for example, Benedick, 1998). What is at stake is not the reality of the environmental issue but the fact that the same priority was not – and has not been – given to the impacts of economic development (in particular in the phase of economic globalization) on the poor (in particular the majority of the poor people in the South). The ozone layer also reflects the importance of financial issues in the development of the environmental law regime since universal membership was only achieved after the cost of compliance for the South was made insignificant through implementation aid and technology transfer.[10]

The issue is not the extent to which developing countries were able to extract concessions in the negotiations of environmental treaties that did not constitute immediate priorities at the national level (such as in the case of the ozone regime or climate change) at the time of the adoption of the treaties. What matters is the way in which priorities were defined. A telling example is that of land degradation and desertification. In terms of the legal regime, its development only happened as an afterthought of

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[9] On the debates concerning the need for an international environment organisation, see Biermann and Bauer (eds) (2005). With regard to the proposal for an international covenant, see IUCN (2004).

[10] See, for example, Gallagher (1992). The Montreal Protocol is the first international environmental treaty to have achieved universal participation in 2009.

the Rio process, with developing countries extracting the concession for their participation in the biodiversity and climate change negotiations (see Cullet, 2007). Even more difficult was the inclusion of land degradation as a 'focal area' in the Global Environment Facility. While this has nothing to do directly with environmental law priorities, the importance that implementation aid has acquired in making environmental treaties effective in individual countries implies that the sidelining of land degradation until 2002 reflected its lower priority for the global community of states despite its critical importance in a number of developing and least developed countries (see GEF, 2002).

The politics of the legal agenda is not an innocuous concern because addressing environmental issues cannot be separated from the development concerns of the majority of the South. There are thus two sets of issues that need to be addressed concurrently. First, international environmental law is tasked with addressing transboundary environmental issues. Most people would probably identify global warming as an issue that is intrinsically global in scope and perceive the need for cooperation on issues such as migratory species. The same level of agreement may not be apparent concerning an issue like biodiversity conservation or land degradation since most of the direct negative impacts are suffered within the country under whose jurisdiction the problem is taking place. Yet, today biodiversity conservation and land degradation are overwhelmingly understood as being issues that have important international aspects. In fact, there are a growing number of problems that may not be apparently transboundary but have an international dimension. Additionally, it is artificial to make a distinction between local air pollution and global warming since it is the same harmful emissions that are the subject matter of both. This, together with the fact that environmental law is concerned with the various links with related fields, makes it difficult to fix with precision the boundaries of the field.

Second, there is no institution which has been tasked with prioritising environmental issues at the international level. Given the multiplicity and variety of issues that qualify as international environmental issues, and given the absence of any framework treaty allocating priorities, this has happened largely in an ad hoc fashion. In practice, this has meant that law making is related to a specific policy proposal in one forum or another by a determined group of countries. The skewed priority list of international environmental law has arisen from this inchoate policy process that benefits countries taking the initiative. This would not necessarily be problematic if environmental issues had no links to the development process because this sectoral approach would simply imply that the international community is slowly covering issues one after the other. The links with

development make the choice of issues more significant. Indeed, in the case of land degradation, not only was it a subsidiary priority at the time of the Rio Conference and a subsidiary issue for the GEF, but the Desertification Convention has remained a poor cousin of the other conventions addressing 'global' issues such as biodiversity and climate change.[11]

Further, the relative weakness of UNEP in the UN system cannot be ascribed only to its 'decentralised' location and the emergence of other centres of international environmental governance. Indeed, the power that has never been given to UNEP has not necessarily been left to an institutional vacuum. This is illustrated by the following two examples. First, while funding for the implementation of environmental treaties has played a key role in the success of environmental regimes, this funding has routinely been channelled through institutions that are, at least in principle, more responsive to donor concerns than UNEP. This is reflected even in the case of the GEF, which is credited with being more responsive to developing country concerns than its parent institution the World Bank. Second, the case of climate change illustrates the lack of commitment of the donor community to the global regime. On the one hand, attempts by developing countries to have adaptation given more importance led to the setting-up of the Adaptation Fund but its full operationalisation has proved to be difficult.[12] On the other hand, several special funding mechanisms have been established directly under the authority of the World Bank, from the early Prototype Carbon Fund to the recent Climate Investment Funds: the Clean Technology Fund and the Strategic Climate Fund. The latter include a sunset clause to avoid prejudicing ongoing climate change negotiations but at the same time propose that they may continue operation if the outcome of the negotiations so indicates (World Bank, 2008*c*: paras 53, 55, 2008*d*: paras 56, 58). There is thus an important degree of independence for these funds.

The policy preferences of developed countries, reflected in their push for certain regimes in preference to others, have resulted in a legal landscape that gives much more prominence to certain issues than others. Typically, over the past few years, climate change has become the environmental issue subsuming everything else. Interestingly, climate change was one of those global issues that bore no direct relationship to the environmental priorities of most developing countries when the United Nations Framework

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[11] See Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 17 June 1994.

[12] See, for example, Decision 1/CMP.4, Adaptation Fund (UNFCCC, 2009*b*).

Convention on Climate Change was being negotiated, with the obvious exception of countries facing, for instance, the threat of submergence. In the meantime, adaptation concerns have become widespread in most countries. Yet, while global warming is a major challenge for each and every country, an overwhelming majority of developing countries have much more pressing environmental and development concerns to address. This is not to say that developing countries are not concerned by global warming. There is, however, a significant difference in approach where the need to reduce air pollution at the local level for health and environmental reasons is addressed with a local rationale in mind from where it is done in the context of a global issue.

Another issue that significantly affects environmental law is the fact that it largely reflects the main concerns of states. As a result, while international environmental law fails to prioritise environmental concerns of the South, it is even less responsive to the concerns of the majority of the poor in the South. Thus, the only existing international treaty on water only addresses transboundary watercourse issues.[13] Similarly, when the first treaty specifically addressing food security was negotiated, and despite a specific mandate to define farmers' rights more precisely, negotiating states did everything apart from provide an effective farmers' rights regime.[14] These two examples are symptomatic because water and food are two of the most fundamental needs that are not fulfilled for hundreds of millions of people. There are good international law reasons explaining the failure of states to negotiate on issues that actually matter to people, such as sovereignty concerns with regard to water, yet the result is that international environmental law is not particularly responsive to the concerns of the poorest and most marginalised.

4. ADDRESSING THE NORTH–SOUTH GAP: THE DIFFERENTIAL TREATMENT ANSWER

As analysed in the previous section, international environmental law has, in certain respects, failed to respond to the development needs of the South. At the same time, international environmental law has been one of the most dynamic and responsive areas of international law in

[13] Convention on the Law of the Non-navigational Uses of International Watercourses, Resolution 51/229, 21 May 1997 (UNGA, 1997).

[14] International Treaty on Plant Genetic Resources for Food and Agriculture, approved by the Food and Agriculture Organization (FAO) Conference, 31st Session, Resolution 3/2001, 3 November 2001.

recent decades with regard to its engagement with the South. This can, for the most part, be explained by the fact that while law making has often been driven by concerns of the North, the issues addressed could only be solved with the active participation and engagement of the South. This pragmatic realisation that cooperation was required, and that the South had often no particular interest in collaborating, has led to the development of a series of new bases for international environmental law.[15]

At the broadest level, developed countries have appealed to the basic principle of solidarity to enlist the cooperation and participation of a majority of developing countries in legal regimes that did not necessarily reflect their own priorities (McDonald, 1996). This could be the case of climate change, where they had made only a minor contribution to the problem at hand and were not much affected at the time of the negotiations in the early 1990s; or GMOs, where one of the primary concerns was to avoid losing out on export markets for conventional or organic crops.

The principle of solidarity may be widely accepted, but it is not necessarily enough to make countries effectively engage on a specific issue. As a result, more specific mechanisms have been needed to ensure full and effective cooperation of all countries on issues that could not be solved by the actions of the North alone. The concept of differential treatment, which recognises that all international law measures need not be strictly based on the principle of formal legal equality, has been one of the main conceptual vehicles for ensuring developing country participation.

Differential treatment offers, in its most developed form, an avenue to adopt international measures that do not impose the same obligations on all states. This is, for instance, the case of the Kyoto Protocol.[16] A number of other mechanisms that are differently differential have also been introduced in environmental treaties. These include varying implementation time periods, where all states take on the same commitments but at different dates,[17] implementation aid, where certain states are only legally bound to implement their commitments upon receipt of financial

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[15] *Cf* Okereke (2008) arguing that 'from the perspective of North–South relations . . . distributive bargaining rather than environmental protection is the defining feature of international regime efforts'.

[16] See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto 10 December 1997 (UNFCCC, 1998*b*: 7).

[17] Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol to the Vienna Convention for the Protection of the Ozone Layer), Montreal, 16 September 1987.

or technological aid;[18] and legally less clear contextual provisions, where states are allowed to interpret the commitments they take according to their development situation.[19]

Differential treatment remains controversial and it has, for instance, been argued by a leading environmental lawyer that even if redistribution is necessary, it should not be undertaken by exempting the poor from 'efficient environmental and resource standards – giving them a "right to pollute" – rather than through a more straightforward step-up in aid and development assistance' (see, for example, Stone, 2004: 294). Indeed, in international trade and economic law, a massive backlash against the granting of 'differential' or 'preferential' treatment has been visible since the 1980s. The pervasive inclusion of differentiation in international environmental treaties is thus doubly noteworthy.[20] First, differential treatment has been one of the most effective ways that states negotiating global environmental regimes have found to address the persistent inequalities among states forming the UN. Second, this has happened more or less at the same time as the scope for granting preferences in international trade law diminished to the point where the Uruguay Round was largely premised on returning to the principle of legal equality as a more effective basis for lifting developing countries out of poverty (*cf* Michalopoulos, 2000).

The concept of differentiation has several noteworthy features. Firstly, at a conceptual level it is a manifestation of equity. In fact, it constitutes an acknowledgment at the international law level of the principle that formal equality does not necessarily lead to substantive equality (see generally Cullet, 2003). While this should not have been a major discovery, because of the vast gap in economic development between the North and the South, it took more than three centuries and the process of decolonisation for the limits of formal legal equality to become obvious to most. More specifically, differential treatment is a reflection of a notion of distributive justice that was clarified a number of decades ago by Justice Tanaka, who asserted that '[t]o treat unequal matters differently according to their inequality is not only permitted but required'.[21] While this is not the conception of justice that is generally accepted today (for instance,

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[18] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992: Art. 20(4).

[19] See, for example, ibid: Art. 6.

[20] More generally, Okereke (2008: 29) notes that almost all global environmental agreements since 1972 contain at least one reference to international justice and equity.

[21] South West Africa (*Ethiopia v. South Africa*; *Liberia v. South Africa*) (1966: 306).

by the International Court of Justice), Justice Tanaka's statement reflects the fact that the need for a progressive evolution of the understanding of equality and equity has been felt at various levels in the decades following decolonisation.

Second, differential treatment turns out to be one of the legal mechanisms that provide a space to development concerns in international law. The fact that the most successful differential measures over the past couple of decades have been adopted in environmental law is, in some way, a reflection of the increasingly strong links between development and environmental concerns. This is reflected, for instance, in two principles of the Rio Declaration. Principle 6 first recognises, in general, the fact that there is a need for UN member states to give special attention to economic and environmental vulnerability, singling out the position of least developed countries. Principle 7 is more specific and addresses the different contributions that developed and developing countries have made to environmental degradation and their different capacity to address these problems. While this is not necessarily always linked to levels of economic development, in the case of some of the most important global problems such as global warming there is an intrinsic link between levels of economic development and contribution to the global problem. The acknowledgment of the link between the environment and development is thus direct, even though the legal consequences that flow from this statement are not made explicit.

Third, differential treatment offers results that can be compared with the 'preferential' treatment that was found earlier in international trade and economic law. Yet, the path is different. In the era of preferential treatment between the 1950s and 1970s, the driving force behind preferences was the attempt by newly decolonised countries to reorganise the structure of international law. As a result, in that era, developing countries were often pitted against developed countries. This yielded some results, in particular in political terms in the context of the call for a New International Economic Order; however, in strict legal terms, relatively little of substance was achieved.[22] As opposed to the relatively confrontationist path of the post-decolonisation years, international environmental law has developed in a much more consensual way. This is due to the fact that, while the relative power equations have not necessarily evolved significantly since the 1970s, negotiations around international environmental issues brought to the fore a new 'strength' of developing countries. The

[22] *Declaration on the Establishment of a New International Economic Order*, Resolution 3201 (S-VI), 1 May 1974 (UNGA, 1974).

necessity for the North to include them in the regimes negotiated implies that the South was in a much better position to extract concessions. These concessions can be analysed in conceptual terms as a manifestation of equity, but their genesis owes at least as much to hard practical realities as to lofty concepts.

The development of differential treatment in international environmental law reflects to a large extent the development concerns of developing countries. Yet, unlike in the era of preferential treatment, the South is not trying to engage the North in restructuring the international legal order. The South is here benefiting from the fact that environmental issues are so structured that its participation is often a precondition for addressing certain issues in an effective way. This has translated into 'different' commitments in several treaties, implementation aid has become a nearly necessary part of any treaty, and most treaties include a variety of contextual provisions which meet the concerns of countries that are unsure about their capacity to implement the commitments they take.

While the development of differential treatment is, on the whole, beneficial to the South, this is not necessarily the case in all its aspects. The case of capacity building under the Biosafety Protocol illustrates this point. From a differential treatment perspective, the biosafety regime provides procedural safeguards for an importing country and thus strengthens developing countries' position in negotiations with GMO exporters.[23] At the same time, one of the impacts of the Protocol is to ensure that all member states have a legal regime in place that regulates – but does not prohibit – the transboundary movement of GMOs. This restricts the options that developing countries have with regard to banning GMOs. In addition, significant capacity building was undertaken in the context of a relatively large UNEP/GEF project whose main intent was to ensure that developing countries that had ratified the Protocol had the actual capacity to deal with import requests (see, for example, GEF Council, 2000). In this case, capacity building ends up indirectly limiting the range of options that developing countries consider in adopting biosafety laws. This is, for instance, illustrated by the fact that while the African Model Law on Safety in Biotechnology had a strong liability and redress provision – something that is clearly positive for an importing country – some countries, like Cameroon, having drafted their laws in the context of the UNEP/GEF project, ended up with very weak liability and redress frame-

[23] See Articles 7–10 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Secretariat of the Convention on Biological Diversity, 2000).

works.[24] In other words, even an instrument that is very progressive from an environmental point of view – since it uses the precautionary principle as its main operative principle – and an instrument that, in substance, builds up procedural safeguards in favour of developing countries does not necessarily lead to results that are unequivocally positive for developing countries.

5. ENVIRONMENTAL LAW AND RECENT ECONOMIC REFORMS

Environmental law entered a phase of consolidation after a period of rapid development in the 1980s and 1990s. This is partly due to the realisation that the constant addition of new instruments was doing little to ensure their effective implementation and thus to improve environmental standards overall. It is in this context that implementation aid has become one of the key elements of most environmental regimes as technology and finance were identified as key stumbling blocks in the process of implementing international commitments in the South. The end of the 'growth' can also be ascribed to an increasing disenchantment with the way environmental policy had been conceived in the 1970s and 1980s, linked in large part to the changing economic policy environment. This section examines some of the main impacts of the neoliberal reforms on international environmental law.

I. Economic Instruments and the Climate Change Regime

One of the important trends that can be noticed from the 1990s is the increased visibility of economic instruments in international environmental law. The Kyoto Protocol marks some sort of a watershed in this context. Indeed, the introduction of economic instruments became one of the key points that United States negotiators insisted upon in the Kyoto Protocol negotiations. This led to the inclusion of what we now know as flexibility. Flexibility refers to two new phenomena in international environmental law. The first is the flexibility which is given to countries with commitments to reduce their greenhouse gas emissions to implement part of their international obligations through projects in a different member

[24] See Organisation of African Unity (2002: Art. 14); Law to Lay down Safety Regulations Governing Modern Biotechnology in Cameroon, Law No 2003/006, 21 April 2003: s. 11.

state. This is unprecedented because it provides a form of extra-territorial implementation of international commitments. The environmental justification for this new mechanism is linked to the global nature of the environmental issue that is addressed. Indeed, it matters neither where a given ton of greenhouse gas is emitted nor where emissions are reduced or avoided. As a result, where the frame of reference is the global environment good that is climate change mitigation, there is no need to differentiate between action taken in the United Kingdom or in Malawi.

Secondly, flexibility refers to the desire to ensure that environmental aims are reached in the most economically efficient way. This translates into the search for the cheapest emission reduction opportunities anywhere on the planet, regardless of the origin of the pollution. This has led to the development of what we now know as carbon markets. While this was not necessarily directly stated at the outset, one of the implications of the search for efficiency has been that the private sector plays an important and direct role in the implementation of the climate change regime. This is also novel in international environmental law.

Of the two different market mechanisms that have been set up under the Kyoto Protocol, the more important in a North–South context is the Clean Development Mechanism (CDM).[25] The CDM is, in effect, a project-based market mechanism that seeks to redistribute the cost of compliance with Kyoto commitments by providing a framework for undertaking emission reduction activities where they are cheaper than in the country with the commitment.[26] In other words, extra-territorial implementation of commitments is directly linked to an economic rationale – reducing the cost of compliance for countries with commitments – even though an environmental cloak has been put around the issue, as indicated in the previous paragraph. Additionally, the CDM includes a sustainable development veil that is meant to counterbalance the economic rationale for flexibility. In practice, however, while the international legal framework makes pious admonition for sustainability, where developing country governments fail to take action to ensure that benefits of the CDM are ploughed back into climate change mitigation or adaptation measures it turns into another commercial instrument for businesses in the North and the South.

The introduction of economic instruments was crucial for the participa-

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[25] The CDM is defined in the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997 (UNFCCC, 1998*b*: 11, Art. 12).

[26] See generally Decision 3/CMP.1 'Modalities and Procedures for a Clean Development Mechanism, as Defined in Article 12 of the Kyoto Protocol' (UNFCCC, 2006: 6).

tion of the United States in the Kyoto Protocol in the mid-1990s. In the meantime, economic instruments have been adopted by many countries as a key element of any climate change deal. In fact, they have come to play such a central role that they can be described as the linchpin of any global agreement on climate change mitigation. The CDM, joint implementation and emissions trading have thus turned out to be much more than a new supplemental way to implement an international treaty. They have led to a completely new outlook on the way international environmental treaties are shaped.

II. Limited Overall Progress in Environmental Law

Since the 1992 Rio Conference, the conceptual development of international environmental law seems to have tapered off. The 2002 World Summit on Sustainable Development (WSSD) failed, for instance, to take international environmental law beyond what had been achieved in 1992 (see, for example, Galizzi, 2006). Further, it has been increasingly difficult to conclude negotiations on issues that could not be finalised at the time of the adoption of the main treaty, as in the case of the liability and redress regime of the Biosafety Protocol.[27] Similarly, where liability and redress regimes have been adopted, states have been increasingly slow in ratifying these instruments.[28]

In international environmental law per se, there has been no significant weakening of standards adopted earlier. The same cannot be said, however, of the overall environmental dimension of international law. This is true, in particular, with regard to the international trade regime. In the context of a fast-evolving jurisprudence on trade and the environment, WTO panels have taken positions that at least indirectly affect environmental instruments. This is partly related to the way in which environmental treaties are considered by WTO panels, making them at best a relevant consideration in a decision that does not apply norms of international environmental law. It is also partly due to the often more specific nature of trade obligations, which may lead to an assessment of

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[27] For the most recent version of the text under negotiation, see, for example, Group of the Friends of the Co-Chairs on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (2009).

[28] This is, for instance, the case of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Fifth Conference of Parties, Basel, 10 December 1999, UNEP/CHW.5/29, Annex III, which has not yet entered into force.

norms that implicitly privileges trade rules over environmental norms with a frequent in-built potential for a broader interpretation.

Additionally, it is symptomatic that some of the most important environmental instruments, such as environmental impact assessments, are for all practical purposes not covered in international law as far as the South is concerned. This is due to the fact that the Espoo Convention remains, despite the opening-up of its membership to all states, a regional convention and one that was negotiated without the South.[29] Further, even if the Espoo Convention was widely ratified in the South, it would not cover some of the most important issues of relevance to the South, in particular aid and foreign investment.

The result is that one of the key impact assessment frameworks at the international level ends up being the World Bank's operational policy applicable to its lending activities. This is positive because it ensures that at least some projects get assessed. The major shortcoming is that this is not a framework that has ever been debated and negotiated in the form of an international treaty. Additionally, while it reflects the greening of the World Bank, this remains necessarily limited because protecting the environment is not, and maybe can never be, the core mandate of the Bank. There are also concerns that the Bank may be instrumental in certain cases in fostering the weakening of existing frameworks for impact assessment, as identified in the case of India by the independent people's tribunal on the World Bank (Independent People's Tribunal on the World Bank in India, 2007).

III. Sustainable Development and Neoliberal Reforms

The progressive shift from 'environment' to 'environment and development' and eventually 'sustainable development' has had two different consequences. On the one hand, enshrining sustainable development at the heart of international law reinforces on a superficial level the idea that environment and development have effectively been integrated. On the other hand, the vagueness of the concept of sustainable development has had the unfortunate effect of making it easier for the language of neoliberal economic reforms to enter the domain of environmental law without necessarily being in open conflict with the basic tenets of the international-level orthodoxy. Thus, whereas environmental law was viewed for some time as a relatively new and innovative branch of international law that

[29] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991.

had the potential to challenge some of the orthodoxy prevalent in other branches of international law, the past decade seems to indicate that this is not the case any more. This can be partly related to the linking of environment and development that has, over time, provided the basis for a weakening of the environmental part in favour of an economic development discourse. It can also be linked to the neoliberal discourse that is generally averse to governmental intervention.

The preceding remarks may appear out of place in a context where global warming has been given a central place in all areas of policy-making over the past couple of years. In fact, what seems to be progressively happening is that the environmental discourse is used as a tool to reconfigure economic policies under the guise of a broader environmental aim such as global warming mitigation. Thus, the shift in international environmental policy is, for instance, illustrated by the WSSD Plan of Action's frequent call for private sector participation and public–private partnerships in a variety of areas, including a reliance on the private sector to deliver integrated water management and water efficiency that 'give priority to the needs of the poor' (World Summit on Sustainable Development, 2002: 22, para. 26(g)). In other words, whether it is flexibility mechanisms that give the private sector what is probably its most direct role in the implementation of an international environmental treaty yet, or the reconfiguration of basic development goals such as access to drinking water as requiring the private sector for their fulfilment, the language of neoliberalism has increasingly infiltrated international environmental law.

IV. Increasing Role of International Institutions in Shaping Environmental Law in the South

The link between environmental law and development is increasingly shaped by international actors. Thus, over the past decade, the World Bank has, for instance, taken a very pro-active view of law making in the South. This is illustrated in the context of water where the Bank has imposed on several Indian states the adoption of specific pieces of legislation as part of a water sector loan. The resurgence of conditionality in the context of economic globalization is in itself very important and a worrying development. More specifically, recent water-law-related conditionality reinforces the view that economic reforms prevail over the environment, as well as, for instance, the realisation of human rights. In the case of water, the main premise for law reform is that water must be seen as an economic good. The prescriptions of the Bank include the setting up of new 'independent water regulatory authorities' modelled on the framework used for

electricity earlier.[30] The significance of the interventions of the Bank is manifold. In the context of this chapter, the following can be highlighted:

- First, the water law interventions of the Bank do not have a strong environmental component. This is surprising in general and more so in the Indian context where a general environmental perspective to water law is missing despite a piece of legislation focusing on water pollution.[31]
- Second, water is a multi-faceted issue that includes a major environmental dimension. This is entirely sidelined by the focus on issues of 'management' in the water sector and on the conception of water as an economic good.
- Third, from a legal perspective, the single-minded focus on water as an economic good as a premise for law making in India is at best inappropriate. This is due to the fact that there is no basis in law to affirm that water is a tradable economic good.[32] On the contrary, various Supreme Court judgments affirm that there is a human right to water and that water is a public trust.[33]

V. Deregulation in the Name of Stronger Regulation

Where international environmental law has been strengthened in recent years, the additional 'regulation' often comes in the form of indirect or hidden deregulation. This is, for instance, illustrated by the case of benefit sharing. Access and benefit sharing has become one of the main mechanisms to address the inequities of the international flow of genetic resources. This has been taken up in the context of several regimes but the only binding regime at present is that of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture. In furtherance of the Treaty provisions, the Governing Body adopted a standard material transfer agreement (SMTA) (see FAO, 2006*a*: app. G).

Benefit sharing, as conceived under the Treaty and the SMTA, is a form

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[30] See, for example, World Bank (2001*b*) and Uttar Pradesh Water Management and Regulatory Commission Act 2008.

[31] India, Water (Prevention and Control of Pollution) Act 1974.

[32] The main basis for affirming that water is an economic good in India is policy documents. While there has been a tendency to conflate water policies and water laws, this is inappropriate because the two are completely different instruments (see, for example, Cullet, 2009).

[33] See, for example, *Subhash Kumar v. State of Bihar and others* (on the human right to water) and *MC Mehta v. Kamal Nath* (public trust).

of compensation that is conceived in the context of bilateral transactions. The recognition of the need for benefit sharing and the adoption of the SMTA constitute important additions to regulation since, in the absence of legal rights, farmers did not get any benefit when their varieties were used.

At the same time, the framing of access and benefit sharing in the form of a contract mechanism that involves only the two parties signing the contract reflects the absence of any public power in this context. This is particularly surprising and unwelcome in the context of benefit sharing because the actors signing the contract can, as a matter of principle, be – with exceptions – expected not to be on a level playing field. Problems arise, for instance, from the fact that it is in most cases the weaker party to the contract – such as a farmer or a group of farmers – that offers to transfer something under their control to another party – such as a university or private company – that will be largely free to use, modify and commercially exploit the seed and knowledge related thereto in any way they see fit. In other words, the party that benefits most from the contract – usually a legal entity – is also the one who most often proposes the transaction and has better resources to ensure that the contract fulfils all their interests. Some countries like South Africa have recognised the dangers posed by purely private transactions and propose at least a form of monitoring by a public authority.[34]

VI. Unresolved Conflicts between the Economic and Environmental Regimes

Environmental law has also been indirectly and directly affected by the fact that potential or actual conflicts between the economic and environmental regimes are not given concrete solutions in the environmental law regime. This is damaging, for instance, in the context of any dispute that has a trade angle, as is the case of many issues that may arise at the international level. In a context where there is little by way of binding dispute settlement provisions in international environmental law, this leads to the dispute being brought nearly by default to the WTO, rather than, say, the International Court of Justice. This is not the place where a neutral resolution to any trade and environment conflict can be expected.

The identified problem in terms of dispute settlement is made worse by the fact that the international economic and trade law regime to a

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[34] See, for example, South Africa, National Environment Management: Biodiversity Act 2004: s. 82.

large extent does not even consider the possibility of a conflict with other international law regimes. There is thus very little to work from. This is illustrated, for instance, by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), whose single mention of the environment is in a narrowly construed exception to the principle that patents must be available in all fields of technology (GATT, 1994*b*: Art. 27(2)).

On the environmental law front, some attempts have been made to consider the links that exist and the problems that can arise. The primary link is in terms of technology transfer, which has been a key demand of the South in most international environmental law treaties since the 1970s. In most cases, the link between the fulfilment of environmental commitments and technology transfer is made but no specific mention is made of intellectual property rights as being of central importance to technology transfer. In a few cases, the link has been acknowledged.[35] This, however, only confirms that there is a link; it does not discuss the potential impediments to technology transfer that intellectual property rights foster (for instance, where importing countries cannot afford the royalty demanded). The most direct acknowledgment in a general provision that there is a potential conflict between the environment and intellectual property rights is found in Article 16(5) of the Biodiversity Convention.[36] Article 16(5) is an important provision because it does what no trade treaty does. It does not, however, provide a specific answer, because the broad commitments of the Biodiversity Convention do not lend themselves easily to identifying the point at which a conflict of norms would arise in a concrete situation.

Environmental treaties include other provisions confirming the presence of a conflict. This is, for instance, the case of the so-called 'savings clauses'. These clauses typically found in preambles tend to sidestep the real issue by emphasising the need for mutual supportiveness or harmonisation, then stating that the environmental law instrument does not affect other existing treaties and finally asserting that the present treaty is not subordinate to any other treaty.[37] The end result is that such clauses do not actually give any new guidance since they only restate things that are derived from existing principles of international law. Further, by empha-

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[35] See, for example, 'Decision VII/22, Review of the Financial Mechanism (Annex V, Action 21)' (Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 1995).

[36] See Convention on Biological Diversity, Rio de Janeiro, 5 June 1992: Art. 16(5).

[37] See, for example, Preamble to Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Secretariat of the Convention on Biological Diversity, 2000).

sising mutual supportiveness, as stated above, they tend to favour the trade/economic regime because environmental law provisions are usually more amenable to a broader array of different interpretations than trade/economic treaties.

Overall, existing international law tends to disregard the very possibility of a conflict between development law and environmental law (for instance, in the case of the TRIPS Agreement). Where links, overlaps and conflicts are acknowledged, no practical and specific solutions are proposed, as is the case in environmental law treaties. This is problematic because a treaty like the TRIPS Agreement has significant consequences for developing countries beyond the strict intellectual property rights regime. Thus, in the case of benefit sharing mentioned above, the TRIPS Agreement recognises neither farmer/healer knowledge nor what is now known in policy circles as traditional knowledge as forms of knowledge that can be protected by legal rights. This implies that all this knowledge is part of the public domain that can be freely used by any- and everyone because it is knowledge that does not meet the criteria for protection under existing intellectual property rights frameworks. Since intellectual property rights protect knowledge only in the context of its commercial exploitation, this leaves out all other rationales for protection, including any social, cultural, religious or environmental grounds for the protection of certain forms of knowledge. The end result is that in a context where knowledge can only be protected through what are recognised forms of intellectual property rights, all other knowledge is seen as hierarchically inferior, in practical and in legal terms.

6. CONCLUSION

Environment and development are today inseparable as far as international law and policy making is concerned. This is, for instance, reflected in the central role played by the notion of sustainable development. The understanding that the two are linked is most welcome and has, for instance, ensured that environmental law has evolved beyond a conservationist agenda and has started to consider a number of links going beyond the environment *stricto sensu*.

Yet, the central problem is that no specific legal meaning can be ascribed to sustainable development at the international level today. It can be used alternatively to justify neoliberal economic policies, welfare state measures and conservationist agendas. While some of the different perspectives can be reconciled, there exist also a number of areas of conflict. This is made more complex by the fact that, today, environmental law is much more

than nature protection. Conversely, the environment is a major aspect of many other fields of international law. In a decentralised system there is thus no scope for imposing a definition of sustainable development that would apply in international environmental law as well as in all other fields. In fact, the only reason why people working on such diverse issues as the environment, human rights, economic development, trade and financial issues can agree on a single umbrella concept is because each can ascribe their own understanding of the term. As a result, the seemingly all-pervasive link between environment and development is in fact, at least in part, a front that lacks in depth.

This is not to say that the links between environment and development have not been made in various contexts. However, where the links are made, it has often been in a context which privileges an understanding of development as focusing on economic development. In other words, despite very significant developments in conceptual terms over the past couple of decades, the practice of international law, as well as the practice of international institutions directly involved in 'development' (such as the World Bank), still indicates a significant bias in favour of growth and economic development as the core measure of development. This has in fact been reinforced over the past two decades with the sweeping neoliberal economic reforms that most countries of the world have witnessed.

Overall, much work remains to be done to ensure that the 'development' discourse does not use environmental arguments as a fig leaf to foster further economic development activities that are either environmentally unsustainable or socially regressive. At the international level, the development over the past two decades of the concept of differential treatment reflects a broad realisation of the need to take into account 'development' as a factor in environmental law making and implementation. Yet, much more needs to be done. Indeed, differential treatment per se does no more than address some of the basic inequalities that are in-built in the structure of international law. It does not necessarily lead to norms that intrinsically integrate environmental and human rights principles as core issues in environmental law and development. A much broader effort must be made to ensure that differential treatment is effectively coupled with a large-scale application of basic principles of environmental law such as the precautionary principle. It is only once such a broader framework is adopted that environmental protection will stop being in some cases an excuse for the promotion of certain economic agendas, as is the case with the development of carbon markets in the climate change regime.