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EXISTING LEGAL TREATMENT OF DEVELOPING COUNTRIES:
DIFFERENTIAL, CONTEXTUAL, AND ABSOLUTE NORMS

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I. INTRODUCTION

A. Analytic Framework: Types of Norms

The treatment and role of developing countries¹ arise in virtually every discussion of international environmental protection and resource management. These serious and difficult issues must be confronted successfully in order to realize effective international solutions. This paper analyzes the existing international legal regime regarding those issues.

For purposes of this paper, there are, generally speaking, three types of treatment that international law can provide developing countries. The first is what I refer to as "differential" treatment, by which I mean treatment according to a norm that on its face provides different, presumably more advantageous, standards for developing countries than for developed countries. An example of a differential norm is that contained in the 1985 Montreal Protocol on Substances that Deplete the Ozone Layer, which allows developed countries 5 years to decrease pollution to a specified level, but developing countries 10 years to reach that same level.²

The second type of treatment is what I refer to as "contextual" treatment, by which I mean treatment according to a norm that on its face provides identical treatment to developing and developed countries but the application of which requires (or at least permits) consideration of factors that might vary from country to country and that correspond typically, but not unvaryingly, to the development level of a country. An example of a contextual norm is the World Heritage Convention's requirement that a country, in protecting natural and cultural heritage, "do all it can to this end, to the utmost of its resources."³

The third type of treatment is what I refer to as "absolute" treatment, by which I mean treatment according to a norm that provides identical treatment to developed and developing countries and which does not require or permit consideration of factors that vary between countries. An example of an absolute norm is the 1987 Nuclear Accident Notification Convention's requirement of immediate notification of pending transboundary harm.

This paper examines existing international norms with respect to the extent to which they require or otherwise provide a basis for according these different types of treatment to developing countries.

B. Non-legal Considerations

Before addressing those questions, it is useful to mention some related approaches that one can take to thinking about the

treatment of developing countries with respect to environmental norms.

From a political perspective, there are two points to note. First, at the international level, developing countries comprise more than a majority of the world's approximately 165 countries, and they contain more than three-quarters of the world's population. Developing countries are significant to developed countries such as the United States in many arenas not expressly involving the environment. I will not dwell on this aspect, but will only note the obvious: developing countries' claims can not be ignored.

The second point to make about political considerations concerns the domestic level. Political leaders in developing countries face tremendous pressures to accomplish short-term economic development, even if that involves sacrificing the environment. The importance of "sustainable development," as that term is used in the Report of the Brundtland Commission,⁴ and the dependence of long-term economic development on environmental protection are increasingly accepted by developing-country leaders. But that recognition has not yet spread to the masses. Until it does (and perhaps even thereafter), impatience and resultant political pressure will be the rule. In the absence of special incentives, expecting that developing-country political leaders will surmount that pressure in the interests of the global environment, or even their own country's sustainable development, is probably naive.

From a practical (non-political) perspective, developing countries are the source of much of the world's pollution and contain much of the world's population and natural resources. International environmental measures thus must involve the continued participation of developing countries in order to be effective. Equally significant, but with different implications, is the reality that developing countries face greater difficulties than do developed countries with respect to managing environmental problems. Developing countries may not have sufficient information to predict the potential for transboundary harm created by activities within its territory of foreign or foreign-owned entities because the country may not receive full information from such an entity. A developing country may not have sufficient technical expertise to evaluate complex technological proposals or to monitor on-going performance, especially (as is often the case) where control of the day-to-day operations is effectively in the hands of foreigners. A developing country may lack regulatory and administrative skills necessary to effectuate pollution-control laws, or may not have the legislative-drafting skills and experience necessary to draft adequate laws. Moreover, developing countries may face an unusually high risk of suffering transboundary harm from ill-planned or hazardous activities of neighbors, because the neighboring countries are typically developing countries and because the governments or people of the affected developing country are typically not as aware of the potential harm, or as able to detect, monitor, or remedy such harm.

From a moral perspective, an urgent and undeniable imperative exists that the standard of living of the world's poorest people be improved. Roughly one billion people live in what Robert McNamara has described as "absolute poverty," that is, in a form of existence so characterized by malnutrition, exposure to the elements, disease, and illiteracy, that it is below any reasonable standard of human decency.⁵ The moral imperative to alleviate absolute poverty has profound implications for international environmental law. On the one hand, it means that the situation international law must deal with is more complicated and threatening: improving the absolute poor's standard of living will inevitably require increased energy use and greater demands on natural resources. On the other hand, the moral imperative places a constraint on the means international law can use to deal with that worsening situation: environmental norms must be structured so as to minimize interference with the effort to lift people from absolute poverty.

Moral philosophy may also have other implications regarding the extent to which developing and developed countries should be subject to the same international environmental standards. One might make an argument based on the philosophy of John Locke (1632-1704) that developing countries are not entitled to any differential treatment. The Lockean principle of acquisition from a commons permits one to appropriate or use a resource provided that one does not take more than one can use without waste and that after one's acquisition there is "enough, and as

good left in common for others."⁶ How much it is permissible to take will depend on how many others want to use the resource and on how much they are likely to need or want. Presumably the Lockean principle covers using an area like the sea as a disposal site. If there are only a few other polluters around, say, the Mediterranean, and if they are only likely to want to put small amounts of pollutants into the sea, then country A may be able to put in a large amount of pollutant (call this amount N) without violating the Lockean condition. Later, when there are many more countries putting pollutants into the Mediterranean, another country B may not be able to dispose of an amount as large as N without running afoul of the Lockean proviso. Country B then has no complaint that A used to be able to dispose the greater amount N, or that A was able to dispose a greater aggregate amount over time by having an earlier need for disposal.

The Lockean proviso, however, cuts in the other direction as well. Suppose that A continues to dispose of amount N every year even while new polluters in order to avoid violating the Lockean proviso have to dispose of less than N per year. Here the newer polluters have grounds to complain that there is no longer any basis for A's claim that it is entitled to dispose of amount N. A, like the other polluters, is only entitled to contribute an amount that takes into account the number of parties wanting to make use of the commons.

Consider this problem in a real case. Many scientists think that uncontrolled forest burning in the Western part of Brazil contributes a significant amount to global warming. Countries

that industrialized earlier than Brazil and whose fossil fuel use contributes much of the rest of the problem, might complain that Brazil cannot make this large deposition of carbon dioxide into the atmosphere without violating the Lockean proviso. Surely this would be correct. But Brazil would also be correct in responding that other countries can no longer put as much carbon dioxide into the atmosphere as they were once free to do. Brazil would be correct, that is, in appealing to the Lockean proviso in demanding that cuts be multilateral rather than limited to Brazil alone.

But might Brazil be able to use Locke to argue further that developed countries should cut back more than Brazil, on the grounds that the need to develop economically (or to benefit Brazil's absolute poor) should be considered in determining what is "enough"? Such an argument would be buttressed by moral conclusions drawn from the imperative to improve the standard of living of those living in absolute poverty, from a philosophical approach that generally favors access to resources based on need (Brazil's needs are greater than those of developed countries), from a philosophical approach centered on ability (developed countries generally have more resources and technical capacity to combat international environmental degradation than Brazil has), or from a philosophical approach that emphasizes who caused the problem in question (anthropogenic activities in developed countries have historically contributed more to global warming than have anthropogenic activities in Brazil).

This article is not the appropriate place for a full exploration of the problems of fairness between developing and developed countries in distributing the burdens of dealing with transboundary environmental problems. But it is appropriate to assert that these fairness issues will have to be taken seriously, and that it will not be plausible for developed countries to insist that they should be allowed to continue contributing as much pollution as they did just because they started doing it first.

C. Organization of This Article

One hopes, of course, for a consonance between the international legal regime -- as it presently exists and as it evolves in the future -- and the political, practical, and moral considerations just mentioned. The remainder of this article examines the existing international legal regime with respect to the two types of treatment mentioned above -- differential treatment and contextual treatment. The discussion is organized as follows. Part II examines the efforts to promote economic development and to protect international human rights. Part III examines four customary international environmental law principles: reasonable and equitable use of a shared natural resource; state responsibility for causing significant injury to another state's environment or to global commons; the duty to cooperate; and the duty to compensate for transboundary harm even when the activity causing the harm is permitted to continue by international law. Part IV examines six conventional regimes

dealing with transboundary environmental problems. Part V contains the Conclusion.

II. THE NEW INTERNATIONAL ECONOMIC ORDER AND INTERNATIONAL HUMAN RIGHTS

The major post-World War II efforts to promote economic development, to protect the environment, and to foster international human rights are related on many levels. At a substantive level, all three share a concern for health and safety, and all three are primarily directed at benefiting individuals, rather than states. The following discussion explores whether the economic-development and human-rights efforts also share a common concern for developing countries in the context of environmental protection and, if so, how that concern is expressed normatively.

A. Efforts to Promote Economic Development

Efforts to promote economic development began in earnest immediately after World War II, with references to improved standards of living in the United Nation's Charter and the formation of the International Bank for Reconstruction and Development. These efforts were followed, in 1974, by the formal call for a New International Economic Order (NIEO). The call for NIEO was contained in three United Nations General Assembly resolutions: the Declaration on the Establishment of a New International Economic Order;⁷ the Programme of Action on the Establishment of a New International Economic Order;⁸ and the

Charter of Economic Rights and Duties of States (CERDS).⁹ The thrust of NIEO is that the Third World must develop, that the gap between the developed and the developing countries must narrow, and that there should be a transfer of resources from the developed countries to the developing countries to accomplish those ends.¹⁰ NIEO is thus firmly based on the notion of differential treatment of developing countries. Moreover, each of the three basic documents expressly states that developing countries should be treated in a beneficial manner.¹¹ Most significantly, article 30 of CERDS expressly requires differential treatment in the context of state responsibility for protecting the environment:¹²

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.

NIEO also contains elements of contextual treatment. Each of the three basic NIEO resolutions repeatedly refers to "equity" and "equitable."¹³ As is evident from many opinions of the International Court of Justice, including the North Sea Continental Shelf cases¹⁴ and the Tunisia-Libya continental shelf case,¹⁵ these concepts require consideration of the facts and circumstances of the particular situation under examination. As

Judge Jiménez de Aréchaga stated in an individual opinion in the Tunisia-Libya case:¹⁶

To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case.... In other words, the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant "factual matrix" of that case. Equity is here nothing other than the taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.

...
All the relevant circumstances are to be considered and balanced; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case.

The concepts of "equity" and "equitable" thus mandate that the individual characteristics of developing countries to be taken into account. At least one of the references in CERDS refers to sharing benefits derived from natural resources, indicating that contextual treatment is relevant both to environmental and non-environmental issues.¹⁷

As is well-known, the NIEO resolutions contained several controversial elements, and the resolutions were not adopted unanimously. CERDS, for example, was approved by a vote of 120 in favor, 6 opposed (including the United States), and 10 abstaining.¹⁸ Considerable literature exists about whether NIEO constitutes international law and, phrased differently, whether there exists an international right to development.¹⁹ I will not attempt to resolve that debate in this article.

Rather, I would point out that the dialogue about the importance and goals of the economic development effort now is phrased in terms of "sustainable development," as that term is used in the Report of the Brundtland Commission, and that, regardless of whether NIEO constitutes international law in a strict or "hard" sense, the vast majority of multilateral treaties since 1974 -- environmental and non-environmental -- have expressly referred to the needs of developing countries and frequently have made some specific provision for them.²⁰ Time has not permitted either a complete perusal of all such conventions or of the accompanying opinio juris. It nevertheless seems possible to assert an existing or emerging customary international norm that international conventional regimes -- environmental and other -- should, as a general matter, take the interests of developing countries into account, even if the details of that consideration may be no more definable than by a reference to the obligation to take those interests into account in good faith -- the obligation of good faith being itself a contextual norm.²¹

Such "soft" obligations raise several questions and have raised some objections. Indeed, soft law has been called the "Trojan horse of environmental law." Two issues should be distinguished: whether there is any legal obligation and whether a legal obligation is defined in hard-edged terms.²² It seems to me that the obligation mentioned earlier in this paragraph is a legal obligation, not just a moral one, but that its content is

not hard-edged in its clarity and ease of application. In the latter sense only, therefore, can it be said to be soft law.

If NIEO has crystallized into customary law, for example in the express terms of CERDS, the obligation to provide either differential treatment or contextual treatment (the choice would depend on the issue) would be clear. CERDS article 30's requirement, quoted above, that environmental policies not adversely affect developing countries' development potential, would be especially pertinent.

B. International Human Rights

The post-World War II movement to establish and protect international human rights encompasses several rights directly related to environmental concerns. Article 1(3) of the United Nations Charter states as a purpose of the United Nations "To achieve international co-operation . . . in promoting and encouraging respect for human rights . . ."; Article 55 states that "the United Nations shall promote . . . higher standards of living . . ., solutions of international . . . health, and related problems; and international cultural . . . cooperation"; and Article 56 pledges United Nations members to cooperate to achieve the goals of Article 55.²³ The Universal Declaration of Human Rights provides that everyone: "is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his

personality" (art. 22); has the right to "just and favourable conditions of work" (art. 23); has the right to "a standard of living adequate for the health and well-being of himself and his family" (art. 25); and has the right "freely to participate in the cultural life of the community" (art. 27).²⁴ The International Covenant on Economic, Social and Cultural Rights (the "Covenant") provides: that the members to the Covenant "recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular . . . Safe and healthy working conditions" (art. 7); the right to "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (art. 11(1)); the obligation to improve methods of production, conservation and distribution of food . . . by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources" (art. 11(2)(a)); and that members "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (art. 12(1)) and the obligation, in attempting to achieve that right, to take steps for "[t]he improvement of all aspects of environmental and industrial hygiene [and] [t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12(2)(a),(b)).²⁵

It thus is evident that there exist human rights to just and favourable conditions of work, an adequate standard of living, health, and participation in and enjoyment of the fruits of

culture. The human rights just enumerated clearly are related to the natural and cultural environment and have most probably passed beyond the stage of being only conventional norms to become customary international law.²⁶ Some authors have even argued that there has evolved a human right to a clean and healthy environment.²⁷

As a general matter, countries are required to work towards providing the rights enumerated in the three documents described above to their own nationals and to participate in international efforts to provide these rights to persons everywhere.²⁸ This process is referred to as "progressive realization." However, the statement of countries' obligations contained in Article 2 of the Covenant -- which is the latest and most precise of the three documents -- is more exact. Each member is required to take steps "to the maximum of its available resources" (art. 2(1)). This is an example of contextual treatment. Article 2 continues to state: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."²⁹ This is an example of differential treatment to developing countries, albeit differential treatment that does not place any obligation on developed countries. The Covenant thus supports both types of distinction examined in this paper.

In addition, if the rights described above are part of customary international law and if every country -- including developed countries -- has the obligation to participate

internationally to achieve those rights for all people, including those in developing countries, there may be an obligation that developed countries assist developing countries in meeting international environmental norms. If so, this is another example of differential treatment for developing countries: the differential treatment would be the obligation to provide financial, material, or technological aid to developing countries to help them satisfy international environmental standards.

III. CUSTOMARY INTERNATIONAL LAW PRINCIPLES SPECIFICALLY RELATING TO THE ENVIRONMENT

Substantial dispute exists regarding whether there exist general customary norms relating to the environment and regarding the precise content of those norms, assuming they exist. For example, Professor Johan Lammers has compiled a partial list of principles or concepts that have been invoked to attack or defend the alleged legality under international law of instances of transboundary pollution; this partial list has 25 entries.³⁰ Nevertheless, there are some formulations of international environmental norms that would receive widespread, though not universal, approval. Four of those formulations are discussed below.

A. Reasonable and Equitable Use of a Shared Natural Resource

Under this principle, states are entitled, in their own territory, to "a reasonable and equitable share of the beneficial

uses of a transboundary natural resource."³¹ This principle does not provide differential treatment to developing countries. But the determination of whether a particular use is "reasonable" takes into account all relevant facts and circumstances, including the social and economic needs and conditions of the states concerned.³² This principle, which is an example of contextual treatment, thus could result in different rights for use to two countries that are sharing a resource and that are similar in all ways except their development status.

B. State Responsibility for Causing Significant Injury to Another State's Environment or to Global Commons

Many authorities agree that a state is responsible under international law if activities within its jurisdiction or control cause significant injury in or to the territory of another state. That principle was stated clearly by the international arbitral tribunal in the oft-cited Trail Smelter case:

[U]nder the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.³³

An aspect of this principle may also be found in the Corfu Channel case: the International Court of Justice (ICJ) stated as a "general and well-recognized principle," "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States."³⁴ In the Lake Lanoux case, the ICJ discussed the general obligation to negotiate in

good faith and stated the requirement that a potential source (upstream) state take "into consideration in a reasonable manner the interests of the downstream State."³⁵ The Trail Smelter principle was reaffirmed by implication in the Nuclear Tests case, but there was no express statement of the rule.³⁶

By their terms, none of these four cases require differential treatment of developing countries. The only apparent way in which the Trail Smelter case requires contextual treatment is the requirement that the "case [be of] serious consequence" -- a determination that presumably would vary according to the injured country's particular situation. The Lake Lanoux case, with its reference to "reasonable," clearly requires a contextual analysis.

Principle 21 of the 1972 Stockholm Declaration on the Human Environment contains a more generalized (i.e., not fume-specific) version of the Trail Smelter principle, but it expresses that principle in tandem with the principle that states have the right to exploit their own natural resources:³⁷

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

It is arguable that Principle 21 states a balancing test that would weigh a state's right to exploit its resources against its obligation not to cause transboundary harm and which thus would necessitate a contextual analysis that presumably would consider the importance of the right to the source (upstream) state and

the significance of the injury to the affected (downstream) state. That appears to be the position of the United States:³⁸

. . . Principle 21 . . . maintains a careful balance between the sovereign right of a State to exploit its resources and its responsibility to avoid serious transboundary pollution. The principle does not purport to resolve (or even address) the issue of the extent to which the State's rights are circumscribed by its responsibility. As such, there must be a balancing between a State's right to act and another State's right not to be affected, on which there is no clear cut answer. This is consistent with a State's responsibility to exercise due diligence to avoid deleterious transboundary impacts on another. . . .

While that interpretation is not implausible, substantial evidence exists that the better interpretation is that the prohibition on causing transboundary harm is a limitation on a state's right to exploit its resources. For example, the U.N. General Assembly stated in December 1972 in the Resolution on Cooperation between States in the Field of the Environment "That, in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction."³⁹ Further support for this interpretation is provided by the International Law Association's 1986 Seoul Declaration, which does not juxtapose the state's right to exploit its resources:⁴⁰

The protection, preservation and enhancement of the natural environment for the present and future generations is the responsibility of all States. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field.

Article 30 of CERDS, quoted above,⁴¹ provides additional support, as does the Helsinki Final Act: " . . . each of the participating States, in accordance with the principles of

international law, ought to ensure . . . that activities carried out on its territory do not cause degradation of the environment in another State or in areas lying beyond the limits of national jurisdiction."⁴²

Under this interpretation of Principle 21, which I believe to be correct, one contextual analysis would concern whether a particular harmful effect would be "significant" -- similar to the discussion above about the requirement of seriousness in the Trail Smelter principle. Other contextual aspects may also be present, depending on how closely the rule in Principle 21 is akin to a due care (or due diligence) standard, and on whether a state is responsible only if the harm is reasonably foreseeable.⁴³ The latter inquiry would be contextual because of the reasonableness element. A due care (or due diligence) standard would be contextual because accountability would arise only if the source state acted or refrained from acting intentionally or negligently -- the determination of which requires a contextual analysis examining factors such as the nature of the activity, the potential harm, and the costs of preventing that harm (including benefits that would be foregone, for example if the activity were to cease altogether).⁴⁴

Principle 21 does not mention developing countries, and does thus not provide differential treatment. Principle 23 of the Stockholm Declaration, however, does provide for such treatment, as well as providing individualized (contextual) treatment:⁴⁵

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in

each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Principle 23 thus is another example of state practice providing differential treatment to developing countries and contextual treatment.

The recent Restatement (Third) of Foreign Relations Law of the United States contains contextual norms as its primary international environmental rule:⁴⁶

§ 601. State Obligations with Respect to Environment of Other States and the Common Environment

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and

(b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

(2) A state is responsible to all other states

(a) for any violation of its obligations under Subsection (1)(a), and

(b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.

(3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state's territory or under its jurisdiction or control.

The phrase in paragraph (1) "to the extent practicable under the circumstances" clearly calls for a contextual analysis. The requirement of "significant" injury in paragraphs (1)(b) and (2)b) also necessitates a contextual analysis, as described

above.⁴⁷ Moreover, the Comments state that "In all cases [a defense is available if the] injury was due to the failure of the injured state to exercise reasonable care to avoid the threatened harm."⁴⁸ Such a reasonableness standard calls for a contextual analysis. Section 601 and the accompanying Comments and Reporters' Notes do not provide any indication that differential treatment of developing countries is called for.

C. Obligation to Cooperate

Much authority exists for the proposition that states are obligated to cooperate in managing transboundary pollution. Professor Pierre-Marie Dupuy has formulated this principle in the following terms:⁴⁹

1. States have the obligation to co-operate, in a spirit of solidarity, with one another as well as with competent international organizations with a view to preventing, diminishing and eliminating transfrontier pollution.

2. To discharge this obligation, States inform and consult one another, in all good faith, on their activities or measures, undertaken or projected, that are likely to cause transfrontier pollution.

3. Without prejudice to paragraph 2 above, States inform one another on their respective pollution prevention policies, consult with one another about all questions likely to arise between them in connection with the management of their environments and take concerted action aimed at harmonizing their environmental policies.

No formulation of the obligation to cooperate with which I am familiar requires, by its terms, differential treatment of developing countries; but it seems to me that the exact form cooperation takes in a particular situation must necessarily be contextual, i.e., that what is appropriate and required will depend on the facts and circumstances of each transboundary

situation. For example, the kind of information or technical assistance the United States might be obligated to give to Canada regarding a particular transboundary threat might vary from that required to be provided to Mexico in an otherwise similar situation because of differences in language, technical expertise, regulatory experience, cultural patterns, agricultural practices and products, ecosystem susceptibilities, climate patterns, etc.

D. The Duty to Compensate for Transboundary Harm Even When the Activity Causing the Harm Is Permitted to Continue by International Law

Situations requiring compensation but in which the harmful activity is permitted to continue, are the subject of controversy regarding whether they are covered by the principle of state responsibility discussed in part III.B, above, or whether they are governed by a different form of state accountability, usually referred to as "international liability."⁵⁰ That dispute is, by and large, irrelevant to this paper because proponents of both positions agree that there are some situations in which states are accountable to compensate another state for transboundary environmental harm even though the harmful activity is allowed by international law to continue.⁵¹ Indeed, the Trail Smelter case is an example of exactly that situation: the tribunal held that Canada must compensate the United States for any future damage that occurred even after the smelter was brought into compliance with the minimum operating standards set by the tribunal.⁵²

One element of the forementioned dispute that is relevant is the question of what standard should be applied in determining whether a situation exists requiring compensation but allowing the harmful activity to continue. Some argue that the appropriate standard is one of strict (or absolute) liability for ultrahazardous activities.⁵³ On its face, that standard requires neither differential treatment nor contextual treatment. On closer analysis, however, it seems to me that a contextual analysis is called for, because otherwise how can it be determined either that an activity is or is not ultrahazardous (presumably, activities' dangers vary according to realistic appraisals of factors such as operating conditions and operator skills) or that its social worth justifies its continuance in spite of the harm it is causing.⁵⁴

Others argue that accountability for injury from acts that are nevertheless permitted to continue by international law is (or should be) based on a contextual analysis taking into account a wide variety of factors, and encompasses (or should encompass) activities that are not ultrahazardous. An example of this view is the approach of the U.N. International Law Commission (ILC) with respect to "international liability for injurious consequences arising out of acts not prohibited by international law." According to the work of the first Special Rapporteur, Robert Quentin Quentin-Baxter, if transboundary harm with a physical consequence occurs and if no governing conventional regime has been agreed to, the states involved must negotiate in good faith to determine their rights and obligations, and

reparations are required unless that would be inconsistent with the states' shared expectations. The amount of reparations (if required) is to be determined by balance-of-interests tests, possibly taking into account the states' previous behavior, their shared expectations, and several specified "principles," "factors," and "matters."⁵⁵ A contextual analysis clearly was required. In addition, though Professor Quentin-Baxter did not expressly call for differential treatment for developing countries, some of the variables to be considered were most probably directed at ensuring that particular characteristics of developing countries be considered. For example, "standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability [and] should take into account the means at the disposal of the acting State" ⁵⁶

The ILC's approach to the international liability topic has shifted under the current (second) Special Rapporteur, Julio Barboza. Ambassador Barboza proposed ten draft articles in 1988 that do not concur precisely with Professor Quentin-Baxter's approach. They do appear to contain contextual elements and to be directed at protecting developing countries. The draft articles apply only to activities that create an "appreciable risk of causing transboundary injury," and "risk" is to be determined with reference to whether the relevant substance's physical properties, "considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury" ⁵⁷

The explanation and examples of this determination do not suggest a broad contextual analysis, nor do they contain aspects that relate characteristically to developing countries, but neither do they expressly exclude consideration of such factors.⁵⁸ That such factors might be relevant is suggested by other parts of the draft and the accompanying commentary. Article 3, for example, states that the draft's obligations apply to a state only if "it knew or had means of knowing" of a potentially injurious act.⁵⁹ In explaining this article, Ambassador Barboza states that "its primary aim is to protect developing countries, which sometimes lack the means to be aware of everything that goes on within their territory" ⁶⁰ Other draft provisions requiring a contextual analysis but whose terms do not provide differential treatment, are those regarding the obligations to cooperate in good faith, to prevent injury, and to make reparations.⁶¹

IV. CONVENTIONAL REGIMES DEALING WITH TRANSBOUNDARY ENVIRONMENTAL PROBLEMS

As indicated above, it has become common for multilateral conventions of all types at least to mention the need to take into account the needs of developing countries, and many conventions have gone further to provide either differential treatment or contextual treatment. In this part, I describe several multilateral environmental conventions with respect to whether they provide differential or contextual treatment. Time has not permitted a full examination of all multilateral environmental treaties, but I believe that the selection herein

is representative of such treaties. At the least, it provides examples of some of the most important normative responses to the Third World's situation. The conventions are examined chronologically.

A. 1972 Convention on the International Liability for
Damage Caused by Space Objects

This Convention does not specifically mention developing countries or provide differential treatment to them; indeed article 2 specifies a standard of absolute liability on the part of the launching state.⁶² Two norms, however, are contextual. Article 10 deals with time limits on making claims; it allows an extension of up to one year after the date the injured state "could reasonably be expected to have learned of the facts." Perhaps more significantly, article 12 states that the amount of compensation that is due "shall be determined in accordance with international law and the principles of justice and equity." The reference to "justice and equity" presumably calls for a contextual analysis.⁶³ But that analysis may be limited by the further statement in article 12 that the compensation should "restore [the injured person] to the condition which would have existed if the damage had not occurred."

The Space Object Liability Convention thus contains both contextual and absolute norms. The contextual norms -- "reasonably be expected" and "justice and equity" -- are objective rather than subjective, i.e., they depend on the perspective not of the acting State or of the injured State, but

rather on a perspective external to those States. On the other hand, it seems highly probable that the individual characteristics, knowledge, and motives of the States involved would be taken into account in making that external analysis. The norms thus effectively take into account relevant differences between developed and developing countries. The absence of differential norms, which would be another way of considering those differences, is notable; this Convention antedated by two years the formal call for NIEO.

B. The World Heritage Convention

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage does not mention developing countries per se, but it states in its Preamble that national protection of natural and cultural heritage "often remains incomplete because of . . . the insufficient economic, scientific and technical resources of the country where the property [is]" and that it is "incumbent on the international community . . . to grant[] collective assistance" ⁶⁴ That obligation to provide assistance is elaborated in the Convention's normative provisions. Article 6 "recognize[s] the duty of the international community to cooperate" and, more specifically, that each member state "undertakes to give help" if requested to by the state in which the heritage is located. (As indicated in the following paragraph, article 4 is unusual in that it imposes a reciprocal duty to utilize any assistance which the state in which the heritage is located "may be able to obtain.") Article

7 states the understanding that international protection of natural and cultural heritage includes establishing "a system of international cooperation and assistance." Article 13(4) provides that the World Heritage Committee established by the Convention shall determine its priorities with reference to, inter alia, the resources and capabilities of the states in which threatened heritage is located. And Article 21 provides that the World Heritage Committee should evaluate requests for assistance from the Fund established by Convention with respect, inter alia, to the "reasons why the resources of the State requesting assistance do not allow it to meet all the expenses." Although the obligations do not by their terms benefit only developing countries, the Preamble indicates a sensitivity to the need to assist developing countries in protecting heritage (together with dealing with the fact that many situations such as protecting natural heritage shared by more than one country, require international efforts).

The Convention also contains many examples of contextual norms that are fairly obviously directed at taking account of countries' differing capabilities and resources. For example, some provisions contain contextual norms that turn specifically on the state's capabilities and resources. Article 4, which contains the Convention's general duty to identify, protect, conserve, present, and transmit heritage to future generations, provides that each state "will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation . . . it may be able to

obtain." Article 5, which elaborates on that general duty, obligates each state to endeavor to reach specified goals "in so far as possible, and as appropriate for each country." Similarly, the obligation in Article 11 to provide a heritage inventory only extends "in so far as possible."

The World Heritage Convention thus effectively takes the situation of developing countries into account by providing a duty to assist -- apparently balanced by a duty to seek assistance -- and by invoking contextual norms taking into account factors characteristically of concern to developing countries, such as the amount of available resources and protective capabilities more generally.

C. 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is an attempt to protect endangered species by regulating international trade in those species -- primarily via prohibiting trade in certain endangered species except under specified circumstances, requiring any export, re-export, or import of those species to occur only pursuant to a permit system, requiring any trade to occur under conditions designed to ensure the survival of the specimen, and returning specimens traded in violation of the Convention.⁶⁵ CITES neither specifically refers to developing countries nor provides differential treatment to them in any other fashion.

Almost all obligations in CITES are stated in absolute terms. The only expressly contextual norms are found in articles

8 and 13. Paragraph 1 of Article 8, which is critical to CITES because it contains the parties' basic obligation, provides that parties "shall take appropriate measures" to enforce the Convention and to prohibit trade in violation thereof. Paragraph 3 of article 8 states that parties shall process specimens with a minimum of delay "[a]s far as possible." Article 13(2) provides that parties should respond to inquiries from the Secretariat established by CITES "as soon as possible." The references to "possible" indicate a contextual norm that takes into account resources and regulatory and other capabilities. The meaning of the term "appropriate" in article 8(1) is less clear. Time has not permitted examining the travaux preparatoire. On its face, "appropriate" seems to require a contextual analysis: how else would one determine whether a particular action fit a particular situation. Whether that term would allow a less effective action to be taken because of the characteristics of or resources available to the actor (as would be allowed by the World Heritage Convention), is less obvious.

Unless "appropriate" does allow a contextual analysis sensitive to the conditions in developing countries, CITES is somewhat unusual in stating its major obligations virtually entirely in absolute terms. This situation may have arisen because the official actions required (e.g., export and import control) were thought to be well within the competence of developing and developed countries alike, or because the interests sought to be protected by CITES were viewed as being of very high priority (perhaps especially to some developing

countries, such as Kenya, Tanzania, India, China). The travaux preparatoire may contain answers to these questions. It must also be recalled that CITES, like the World Heritage Convention, was drafted before 1974, when NIEO first was officially and formally recognized.

D. 1979 Convention on Long-Range Transboundary Air Pollution, and the Accompanying Resolution and Declaration

This Convention was drafted and adopted within the framework of the U.N. Economic Commission for Europe (ECE).⁶⁶ Also adopted were a Resolution on Long-Range Transboundary Air Pollution⁶⁷ and a Declaration on Low- and Non-Waste Technology and Re-Utilization and Recycling of Wastes.⁶⁸ Although the ECE has only 34 members, the Convention is of general interest because it was the first major multilateral effort to combat transboundary air pollution.

The Convention and Resolution do not specifically mention developing countries or provide them differential treatment. The preamble to the Convention refers to "the pertinent provisions" of the 1972 Stockholm Declaration. The only principle specifically mentioned is Principle 21; but the Stockholm Conference was so permeated by the question of how developing countries should be treated that a reference to that issue probably should be inferred. Even such an inference falls short of differential treatment, of course. The 1979 Waste Declaration, however, recommends in paragraph 5(b) that international cooperative activities occur within the framework

of ECE to exchange scientific and technical information "taking into account the interests of ECE countries that are developing from an economic point of view."

The Convention contains numerous contextual norms that are either implicitly or explicitly sensitive to economic development. Article 2 states that the parties are determined to protect man and the environment against air pollution and "shall endeavor to limit and, as far as possible, gradually reduce and prevent air pollution" Article 4 also includes an obligation (regarding information exchange and policy review) modified by the words "as far as possible." Article 6 commits parties "to develop the best policies and strategies [and] control measures compatible with balanced development, in particular by using the best available technology which is economically feasible" (emphasis supplied). Article 7 requires parties to initiate and cooperate in research or development regarding six areas "as appropriate to [the party's] needs."

The Resolution includes contextual elements in paragraph 1 to implement the Convention even before it is in force "to the maximum extent possible" and in paragraph 4 to limit air pollution "as far as possible." The Declaration contains one such provision in paragraph 5(d), stating that certain educational programs be self-supporting "as far as possible."

The Convention, as well as its accompanying Resolution and Declaration, thus contain a variety of contextual rules, most probably demonstrating sensitivity to the condition of developing countries and to the practical realities facing air-pollution-

control efforts generally. The Declaration also calls for differential treatment of developing countries in one area.

E. 1982 United Nations Convention on the Law of the Sea
(UNCLOS)

UNCLOS⁶⁹ was the product of years of negotiations that continuously considered the claims, interests, and political significance of developing countries.⁷⁰ The Preamble speaks not only of the "equitable and efficient utilization of the resources" of the seas and the "realization of a just and equitable international economic order," but also to "tak[ing] into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked" (emphasis supplied).

UNCLOS provides a series of environmental norms specific to particular aspects or areas covered by the Convention. Most make no mention of developing countries. Article 192 provides the general obligation: "States have the obligation to protect and preserve the marine environment." Articles 194 (Measures to prevent, reduce and control pollution of the marine environment), 195 (Duty not to transfer damage or hazards or transform one type of pollution into another), 196 (Use of technologies or introduction of alien or new species), 197 (Co-operation on a global or regional basis), 198 (Notification of imminent or actual damage), 199 (Contingency plans against pollution), 200 (Studies, research programmes and exchange of information and data), 201 (Scientific criteria for regulations), 204 (Monitoring

of the risks or effects of pollution), 205 (Publication of reports), 206 (Assessment of potential effects of activities), 213-222 (the enforcement provisions), 223-233 (Safeguards), 234 (ice-covered areas), and 235 (Responsibility and liability), deal with other aspects of environmental protection but make no mention of developing countries.

Most of the articles that cover specific sources of pollution also do not provide differential treatment, including article 208 (Pollution from sea-bed activities subject to national jurisdiction), 209 (Pollution from activities in the deep seabed -- see also article 145), 210 (Pollution by dumping), 211 (Pollution from vessels), and 212 (Pollution from or through the atmosphere). However, article 207 (Pollution from land-based sources) provides that states, in endeavoring to establish regional and global approaches, shall "tak[e] into account characteristic regional features, the economic capacity of developing States and their need for economic development." (Some of these articles provide that policies are to be harmonized on a regional basis (articles 207(3) and 208(4)), which is related to claims by developed countries.⁷¹)

There is another aspect of marine environmental protection regarding which UNCLOS provides differential treatment: assistance in meeting environmental norms. Article 202 obligates states to provide scientific, educational, technical and other assistance for the protection and preservation of the marine environment, to "provide appropriate assistance, especially to developing States," to minimize the effects of major incidents,

and to "provide appropriate assistance, especially to developing States," concerning preparation of environmental assessments (emphasis supplied). Article 203 further provides that developing countries be granted preference by international organizations in allocating funds and technical assistance and utilizing specialized services. The general scheme is thus that UNCLOS's environmental standards do not provide differential treatment to developing countries except (1) with respect to one aspect of land-based pollution and (2) that they require developed countries and, to a lesser extent, international organizations to assist developing countries in meeting those standards.

Many of the foregoing provisions involve contextual norms. Most significantly, article 194, which specifies measures to prevent, reduce and control marine pollution, provides that:⁷²

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.

(Emphasis supplied.) Article 207(4) expressly directs that the economic capacity of developing countries and their need to develop be considered, as indicated above.

UNCLOS thus requires differential treatment and contextual treatment. The predominant approach, however, is to eschew differential treatment in favor of contextual treatment, except in the provisions regarding pollution from land-based sources and

assistance to developing countries from other states and from international organizations.

F. 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer

The Montreal Protocol⁷³ gives specific substance to the more general provisions of the Vienna Convention.⁷⁴ The Vienna Convention Preamble refers to "the circumstances and particular requirements of developing countries." Article 2, which contains the Convention's general obligations, provides that parties "shall, in accordance with the means at their disposal and their capabilities," undertake certain measures. Article 4, which elaborates regarding legal, scientific, and technical cooperation, provides that states shall cooperate in promoting the development and transfer of technology, "taking into account in particular the needs of the developing countries." The Convention thus contains differential treatment and contextual treatment.

The Montreal Protocol follows the Vienna Convention in those respects. The Preamble "[a]cknowledg[es] that special provision is required to meet the needs of developing countries for [substances that cause depletion of the ozone layer]," and it speaks of the need "to control equitably total global emissions of [such substances]." Article 10 provides a duty to cooperate in promoting technical assistance that is to "tak[e] into account in particular the needs of developing countries," and it states that workplans "shall pay special attention to the needs and

circumstances of the developing countries." Article 2 provides the basic obligations of the Protocol to control consumption and production of specified ozone-depleting substances, referred to as "controlled substances." Article 2, by reference to article 5, distinguishes between developing countries whose annual consumption of controlled substances is less than 0.3 kilograms (two-thirds of a pound) per capita -- which includes virtually all developing countries -- and all other countries.

Countries not meeting the developing country/0.3 kg. test are required by article 2 to freeze their consumption of chlorofluorocarbons (CFCs) for each 12-month period at 1986 levels; production of CFCs must be frozen at 1986 levels except a 10 percent increase is permitted to satisfy needs of states meeting the developing country/0.3 kg. test or for industrial rationalization (which involves transfer of production from one party to another and thus no net increase in production); consumption must be reduced 20 percent by 1994, and a further 30 percent by 1999 (a total of 50 percent); and production must be decreased by similar amounts, with a possible upward variation of 10 percent allowed on the same grounds mentioned above. The consumption and production of halons (the other major group of ozone-depleting substances covered by the Protocol) are to be frozen at 1986 levels, again with an increase of 10 percent allowed for the reasons mentioned above. These countries thus must freeze and, for CFCs, reduce their consumption and production, with a net increase in production possible only to meet needs of developing countries.

Countries that do meet the developing country/0.3 kg. test are treated quite differently, and at least ostensibly more favorably. Article 5 allows such countries to delay compliance with the standards in article 2 by 10 years, as long as it does so to meet domestic needs and as long as it does not exceed the 0.3 kg. threshold. Flexible measurement methods are also allowed.

Article 5 thus provides differential treatment in that it allows developing/0.3 kg. countries to avoid reductions and freezes required of all other parties. But there is another perspective: developing/0.3 kg. countries cannot exceed a per capita annual consumption of 0.3 kg., whereas many developed countries are so high above that level now that they will exceed it many times over even after reducing their consumption by 50 percent. The benefits available from CFC and halon use will thus not be available to developing countries to the same extent they have been and will be available to such developed countries.

There is another instance in which developing countries may be seen to be disadvantaged by the Protocol. Article 2(b) allows a country not meeting the developing country/0.3 kg. test to add to 1986 production any facilities that are under construction or contracted for by Sept. 16, 1987 (the date the Protocol was signed) and that were provided for in national legislation (e.g., a five-year plan), as long as they are completed by December 31, 1990 and the production does not raise the party's per capita consumption above 0.5 kg. The principal beneficiary of this

provision appears to be the U.S.S.R.;⁷⁵ it might also have been beneficial to some developing countries.

V. CONCLUSION

Powerful political, practical, and moral reasons exist to involve developing countries in the effort to protect the biosphere and to fashion policies and legal norms that will promote, or at least avoid hampering, the effort to improve the standard of living of present and future generations of individuals living in those countries.

Such legal norms can take three general forms. One form is to provide what I refer to as differential treatment to developing countries per se, i.e., the norm by its terms can provide different treatment to developing countries. The second form is what I call contextual treatment, i.e., the norm, without specifically mentioning developing countries, requires or allows consideration of factors that typically vary according to the economic-development situation in a country. The third general form of norm is what I refer to as absolute norms, i.e., norms that do not differentiate between developing and developed countries and that do not require or allow contextual treatment.

Norms providing differential treatment or contextual treatment can be directed at, or have the effect of, benefiting developing countries in a variety of ways. For example, they can: impose additional burdens on developed countries or international organizations vis-a-vis developing countries; require that future conventional regimes take developing

countries' interests into account; provide lower standards of care for developing countries than are required for developed countries; or require developing countries to pay less in compensation (or other forms of reparation) than would be required of otherwise similarly situated developed countries. Such norms -- particularly those providing differential treatment -- may also have the perhaps unintended effect of disadvantaging developing countries. Absolute norms might conceivably be constructed so as to benefit developing countries, but my preliminary research has not revealed any examples of that.

Although absolute norms predominate, the contemporary international legal system is replete with differential norms and contextual norms. Instances of each type occur in the evolving and interconnected areas of economic-development, human-rights, and environmental law. Indeed, there probably is an existing general customary obligation, stemming primarily from state practice in those three areas, to take the effect on economic development in developing countries into account -- in order to foster, or at least avoid interfering with, such development -- when fashioning international environmental norms. If such a norm is not already de lata, it is de ferenda (in the process of coming into existence).

The most important customary international environmental principles already contain a contextual element, although this is not always expressed. The conventional environmental regimes examined in this paper reflect widely differing resolutions of the desirability of providing standards sensitive to disparities

in economic development and contain various mixtures of absolute, differential, and contextual norms. Those differences presumably reflect the different types of behavior and threats with which the regimes were concerned, and thus are not to be deplored. Indeed, such a rich menu of possible approaches should be welcomed, as long as the underlying concern for the social and economic well-being of present and future generations of individuals throughout the world is the predominant factor in choosing which approach is most appropriate for a particular situation.

ENDNOTES

- * The author wishes to express his appreciation to the University of Colorado Faculty Fellowship program for supporting research leading to this article, to Lewis Kornhauser for stimulating various ideas leading to this article and to Debra Donahue, Mary Scherschel, and Rebecca Rains for research assistance.
- ¹ The terms "development," "developed," and "developing" are used throughout this paper in a descriptive and value-neutral sense. The term refers to economic development; more precisely, to the level of per capita income.
- ² Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, arts. 5, 10, reprinted in 26 I.L.M. 1541 (1987).
- ³ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 4, 27 U.S.T. 37, T.I.A.S. No. 8226, 1037 U.N.T.S. 15511; see also id. at arts. 5, 11.
- ⁴ The World Commission on Environment and Development, Our Common Future 43 (1987) [the Report of the Brundtland Commission] ("Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."). With respect to the question of what qualifies as "development," the Report states that sustainable development includes "the concept of 'needs,' in particular the essential

needs of the world's poor, to which overriding priority should be given." Id.

⁵ McNamara, Time Bomb or Myth: The Population Problem, 62 Foreign Aff. 1107, 1118-19 (1984).

⁶ J. Locke, The Second Treatise of Government, ch. 5, § 27 (1690). The accompanying text was adopted from Magraw & Nickel, Can Today's International System Handle Transboundary Environmental Problems? in D. Scherer, ed., Upstream/Downstream: Issues in Environmental Ethics (Temple University Press, forthcoming).

⁷ G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9556 (1974).

⁸ G.A. Res. 3202 (S-VI), 6 (Special) U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9556 (1974).

⁹ G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 51, U.N. Doc. A/9946 (1974) [hereinafter CERDS].

¹⁰ See, e.g., id. at Preamble, arts. 15, 18, 19, 21, 22, 23. See generally R. Meagher, An International Redistribution of Wealth and Power (1979).

¹¹ See, e.g., CERDS, supra note 9, Preamble, art. 5, 6, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25 (special attention to needs and problems of the least-developed countries), 27, 29 (exploitation of resources on seabed and ocean floor and subsoil thereof), 30.

- 12 Id. at art. 30 (emphasis supplied).
- 13 See, e.g., id. at Preamble, Ch. I, arts. 6, 8, 10, 14, 26, 27, 28, 29. Cf. id. at art. 25 (referring to "particular difficulties" of the least-developed countries).
- 14 North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 50 (Judgment of Feb. 20).
- 15 Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 60, reprinted in 21 I.L.M. 225 (1982).
- 16 Id. at 106, 109. According to Professor Louis Sohn, The role of equity in the jurisprudence of the International Court of Justice in Mélanges Georges Perrin 303, 311, (Université de Lausanne 1984), this statement is "[p]erhaps the best official statement of the present position of equity in international jurisprudence." Judge Jiménez de Aréchaga also stated:

For the notion of justice is not divorced from or opposed to that of equity. Its having authority to apply equitable principles does not entitle a court to reach a capricious decision in each particular case, but to reach that decision which, in the light of the individual circumstances, is just and right for that case. Equity is thus achieved, not merely by a singular decision of justice, but by the justice of that singular decision.

This conception of equity, not as a correction or moderation of a non-existent rule of law, but as a "lead rule" well adapted to the shape of the situation to be measured, is the one which solves the fundamental dilemma arising in all cases of continental shelf delimitation: the need to maintain consistency and uniformity in the legal principles and rules applicable to a series of situations which are characterized by their multiple diversity.

1982 I.C.J. 18, 106, 109.

- ¹⁷ CERDS, supra note 9, art. 29 (dealing with seabed, ocean floor, and the subsoil thereof). See also art. 3 (each country "must cooperate [in exploiting shared natural resources] to achieve optimum use of such resources without causing damage to the legitimate interests of others").
- ¹⁸ Charter of Economic Rights and Duties of States, 1974 U.N.Y.B. 381, 402-03, U.N. Doc. ST/DPI(OS)/Y3/1974.
- ¹⁹ See, e.g., M. Bulajic, Principles of International Development Law (1986).
- ²⁰ See, e.g., sources cited in Part IV, infra.
- ²¹ See generally Hassan, Good Faith in Treaty Formation, 21 Va. J. Int'l L. 443, 476 (1981).
- ²² See generally 1988 Proc. Am. J. Int'l L. _____ (forthcoming).
- ²³ U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, arts. 1(3), 55, 56.
- ²⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 at 71, arts. 22, 23, 25, 27, (1948).
- ²⁵ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, arts. 7, 11, 12, U.N. Doc. A/6316 (1966) [hereinafter Economic Rights Covenant].

- 26 Restatement (Third) of Foreign Relations Law of the United States § 701 Reporters' Note 6 (1987) [hereinafter Restatement (Third)].
- 27 See, e.g., Alain Pellet, The Functions of the Right to Development -- A Right to Self-Realization, in Human Rights and Development 129 (1984).
- 28 [David M.] Trubek, Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs 205, 207, in _____.
- 29 Economic Rights, Covenant, supra note 25, art. 2.
- 30 Lammers, "Balancing the Equities" in International Law, in The Future of the International Law of the Environment 153, 154 (Hague Academy of International Law, R.-J. Dupuy ed. 1985). An example is the controversy surrounding the U.N. International Law Commission's study of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law," mentioned infra at text accompanying note 50.
- 31 Lammers, The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research, in Transfrontier Pollution and International Law 89, 91 (Hague Academy of International Law, 1985). Accord Weiss, A Resource Management Approach to Carbon Dioxide During the Century of Transition, 10 Den. J. Int'l L. & Pol'y 487, 491 (1981) ("equitable use").

32 Accord Lammers, supra note 31, at 91 (emphasis added).

Professor Lammers writes that the factors to be considered include, inter alia:

geographic, hydrologic, climatic, biologic or ecological conditions, the existing use made of the natural resource, the economic and social needs of each of the State concerned, the feasibility of alternative means -- including the availability of other resources -- to satisfy these needs and the possibility of compensation . . . as a means of adjusting conflicts among uses.

The precise content of reasonableness standards in international law is not clear; I am currently studying that question.

33 Trail Smelter (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905, 1965 (1938 & 1941).

34 Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of Apr. 9).

35 Lake Lanoux (Fr. v. Spain), 24 I.L.R. 101, 140 (1957) (English), 12 R. Int'l Arb. Awards 281 (1957) (French).

36 Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. Rep. 99 (Interim Protection Order of 22 June).

37 Declaration of the United Nations Conference on the Human Environment, Stockholm, U.N. Doc. A/CONF.48/14 & Corr. 1, principle 21, reprinted in 11 I.L.M. 1416 (1972) [hereinafter 1972 Stockholm Declaration].

38 Address by Scott A. Hajost, Deputy Associate Administrator, U.S. Environmental Protection Agency, Legal Implications of

- U.S. Policy on Acid Deposition (Aug. 7, 1988) (unpublished manuscript).
- 39 G.A. Res. 2995, U.N. GAOR Supp. (No. 30) at 42, U.N. Doc. A/8730 (1972). For additional support, see Lammers, supra note 29, at 96-98, and A. Kiss, Survey of Current Developments in International Environmental Law 41-42 (IUCN Env't & Law Paper No. 10 1976).
- 40 International Law Association, Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order § 7.5, in The Report of the Sixty-Second Conference, Seoul (1986) (emphasis supplied).
- 41 Supra text accompanying note 12.
- 42 Conference on Security and Cooperation in Europe: Final Act (Aug. 1, 1975), reprinted in 14 I.L.M. 1292, 1307 (1975).
- 43 See, e.g., Lammers, supra note 31, at 98.
- 44 See, e.g., Lammers, supra note 30, at 157-163.
- 45 1972 Stockholm Declaration, supra note 37, principle 23.
- 46 Restatement (Third), supra note 26, § 601.
- 47 See supra text following notes 36 & 42.
- 48 Restatement (Third), supra note 26, § 601 at Comment d.
- 49 Dupuy, Overview of the Existing Legal Regime Regarding International Pollution (forthcoming).

- 50 Compare, e.g., Akehurst, *International liability for injurious consequences arising out of acts not prohibited by international law*, 16 Neth. Y.B. Int'l L. 3 (1985), with Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 Am. J. Int'l L. 305 (1986).
- 51 See, e.g., Akehurst, *supra* note 50, at 10-14; Magraw, *supra* note 50, at 318.
- 52 Trail Smelter, *supra* note 33, at 1980 (indemnification must occur if damage occurs "notwithstanding the maintenance of the regime [prescribed by the tribunal]).
- 53 See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* 50 (1983) (quoting I. Brownlie, *Principles of Public International Law* 285 (3d. ed. 1979)); *see also id.* at 436, 443-45; Lammers, *supra* note 31, at 100-103 (describing "ultrahazardous hazardous" activities as activities that involve "a risk of causing extraterritorial harm of a possibly exceptionally serious dimension," and documenting the increasing acceptance of strict liability for such activities as evidence of an emerging principle of law recognized by civilized nations, within the meaning of article 38(1)(c) of the ICJ Statute).
- 54 See Lammers, *supra* note 31, at 99. Although Professor Lammers does not speak in terms of contextual analysis and does not specify what factors should be considered, he does call for

determining whether there exists "a high disproportion between . . . the technical and socio-economic cost or loss of benefits involved in preventing or abating the (significant risk of) substantial harm, and . . . the (significant risk of) substantial harm caused [in another state]."

55 Quentin-Baxter, Third Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, U.N. Doc. A/CN.4/360 & Corr. 1 at 24-30, § 4, arts. 1,2,3, (1982) (hereinafter Schematic Outline). See also id. at §§ 5, 6, 7.

56 Id. at § 5, arts. 2 & 3. For a further discussion of the Schematic Outline's treatment of developing countries, see Magraw, The International Law Commission's Study of International Liability for Nonprohibited Acts As It Relates to Developing States, 61 Wash. L. Rev. 1041 (1986).

57 Barboza, Fourth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, U.N. Doc. A/CN.4/413 at 6 (English) (1988).

58 See id. at 11.

59 Id. at 7.

60 Id. at 25.

61 Id. at 8, 9 (arts. 7, 9, 10). See also id. at 36.

- ⁶² Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, art. 5, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187. The Convention went into force Sept. 1, 1972. As of 1987, 81 states (including the United States) were parties.
- ⁶³ See supra note 14.
- ⁶⁴ Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226 [hereinafter World Heritage Convention]. The Convention went into effect in 1975. As of 1987, 83 states (including the United States) were parties to it. U.S. Dep't of State, Treaties in Force 325 (1987).
- ⁶⁵ CITES, art. III, IV, V, VIII, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243. CITES went into force July 1, 1975. As of 1987, 97 states (including the United States) were parties. U.S. Dep't of State, Treaties in Force 230 (1987).
- ⁶⁶ Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, U.N. Doc. ECE/HLM.1/R.1 (1979), T.I.A.S. No. 10541, reprinted in 18 I.L.M. 1442 (1979). The Convention went into force March 16, 1983. As of 1987, 31 states (including the United States) were parties.
- ⁶⁷ Resolution on Long-Range Transboundary Air Pollution, reprinted in 18 I.L.M. 1450 (1979).

- 68 Declaration on Low- and Non-Waste Technology and Re-Utilization and Recycling of Wastes, reprinted in 18 I.L.M. 1451 (1979).
- 69 United Nations Convention on the Law of the Sea, Oct. 21, 1982, U.N. Doc. A/CONF.62/121, reprinted in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS]. This Convention is not yet in force, but many of its provisions are commonly viewed as embodying customary international law. As is well known, the United States has not signed the Convention; but the vast majority of states have.
- 70 For a description of these negotiations, see Wertenbaker, A Reporter at Large: Law of the Sea (pts. 1 & 2), New Yorker, Aug. 1, 1983, at 38, New Yorker, Aug. 8, 1983, at 56.
- 71 See Kindt, The Effect of Claims by Developing Countries on LOS International Marine Pollution Negotiations, 20 Va. J. Int'l L. 313, 328-32 (1980).
- 72 UNCLOS, supra note 69, art. 194(1) (emphasis supplied).
- 73 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, reprinted in 26 I.L.M. 1550 (1987).
- 74 Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, reprinted in 26 I.L.M. 1516 (1987).
- 75 See N.Y. Times, Sept. 16, 1987, at A11, col. 1; Van Dusen, Fresh Hope in the Sky, Macleans, 56 Sept. 18, 1987, at 56.