Research Articles

Equity Norms in Global Environmental Governance

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> In these negotiations, the principle of equity should be the touchstone for judging proposals. Those responsible for environmental degradation should also be responsible for taking corrective measures.[1]

Introduction

Among the most prominent evidence of the quest to create global environmental arrangements that reflect widely shared ethical standards of responsibility is contestation over North-South equity and justice[2] in environmental regimes. But despite a wide acknowledgment of the need for justice in the design of institutions for global environmental governance, the various attempts to introduce equity-based norms in these institutions have yielded only very limited results.[3]

Drawing critically from the burgeoning constructivist literature on norm creation and diffusion, this essay discusses the factors that influence the adoption and viability of equity norms in global environmental regimes. This task is undertaken through the examination of "the degree of institutionalization"[4] and the legitimacy of two key equity norms—the common heritage of mankind (CHM) and common but differentiated responsibility (CDR) principles. The degree of institutionalization, according to Bernstein, "can be inferred primarily from norms frequency or 'density' in social structure, that is, the amount and range of instruments, statements and so on that invoke them."[5] Legitimacy is understood, following Thomas Franck, in terms of the "the capacity of rules to affect state conduct."[6] Legitimacy is obviously the ultimate test of the "success"

1. Indian proposal at the United Nations climate change negotiations (cited in Dasgupta 1994, 133).
2. Technically, justice and equity are different terms but are used synonymously in this essay.
3. See among others Dobson 1998; Okereke 2008; and Shue 1992.
4. Bernstein 2001, 30.
5. Ibid, 30.
6. Franck 1988, 705.

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of equity norms in international politics since there is ample evidence that states could be quite willing to admit equity principles in regime texts but not as committed in observing the responsibilities generated by such principles. As noted by Thompson, international norms are only useful insofar as they affect the behavior of states.[7]

The main influencing factors identified here include the source of the norms and the force of articulation, the nature of the issue-area, and what I call the "moral temper" of the international community. Critically, I argue that the most important determinant of the "success" of equity norms in environmental regimes is the extent to which they "fit" with dominant neoliberal economic ideas and structures. In other words, whilst each of the other factors have their non-negligible independent weights, the degree to which an equity norm is institutionalized and/or influences states' behavior is, I claim, ultimately dependent on how much its requirements could be met within the limits set by a prior commitment to the neoliberal economic order.

Theoretically, the analysis implies serious limitations for constructivist accounts that tend to overemphasize the independent role of norms in the global arena. Although the essay makes no pretension of providing a complete account of an alternative theoretical framework, it does grant primacy to explanations that focus on "ideational hegemony within particular world orders,"[8] especially the hegemony of neoliberal economic ideas and structures.

I begin, in the next section, by providing the theoretical context for the analysis, and subsequently give an account of the evolution of the two equity norms in global environmental governance system. The bulk of the paper discusses the four factors that shape the uptake and influence of these two norms. This is followed by a short argument that the "responsibility deficit" that currently characterizes the global environmental governance system is mainly due to the co-optation of equity norms by neoliberalism. The paper ends with brief concluding remarks.

Constructivism and Equity Norms in International Politics

Over the last decade or so, scholars working under the label of constructivism have produced a substantial literature on the role of norms—"collective expectations for the proper behavior of actors"[9]—in international cooperation.[10] Originally, the main focus of this scholarship was to show that norms have "independent causal effect in international politics;"[11] that is, to indicate, contrary to the assumptions of rational choice approaches, that the outcomes of international cooperation are *not* explicable *only* on the basis of the material powers

7. Thompson 1993, 81.
8. Bernstein 2001, 13.
9. Katzenstein 1996, 5.
10. See Finnemore and Sikkink 2001 for an excellent review of this literature.
11. Finnemore and Sikkink 2001, 396.

and self-interested calculus of state actors. Subsequently, constructivist writers have expanded their research agenda into identifying the mechanisms of norm diffusion, the role of different types of "norm entrepreneurs" in this process, and the factors that facilitate the "internalization" of norms in the international arena.[12]

Curiously, however, the constructivist literature has hardly addressed "issues of justice" and equity-based norms in international politics.[13] This neglect is significant because justice, defined by Aristotle as "giving to each his own,"[14] is widely recognized by political philosophers as the "principal virtue of social institutions"[15] and "incomparably the most binding part of all morality."[16] If justice is therefore a major component of social structure, conventional wisdom from constructivist assumptions is that equity-based norms would have exceedingly strong impact in international cooperation for the environment. But this has not been the case. Indeed, North-South equity norms present very interesting case studies because as well as important aspects of the social structure, ideas of justice are also explicit objects of construction by states that, as Legro observes, have to "weigh the desirability of adherence versus violation."[17] Hence, contestations for justice present us with scenarios that allow us to observe, first hand, the trade-offs between a widely shared value and other (including material) interests of state actors and, in turn, to judge the potency of intersubjective beliefs in international politics. It seems odd, therefore, that contestations of justice are not more frequently used as cases for testing the assumptions of constructivism. It is fair to suggest that constructivist scholarship has generally tended to neglect deontic norms (norms that have moral character) in its explanatory arguments.

Perhaps this failing has to do with the much-observed bias of the constructivist literature towards "success stories" while tending to ignore partially successful or failed cases.[18] Many scholars have noted that constructivism does not generally cope well with instances where "norms are violated or where norms that should have been institutionalized fail to get strong recognition."[19] The approach, as Checkel notes, exhibits a tendency to avoid the "dog that didn't bark."[20] Furthermore, the constructivist perspective cannot explain why some norms matter more than the others or how much norms matter relative to other factors. Central in explaining this limitation is that much constructivist scholarship is preoccupied with showing that social facts are important aspects of inter-

12. See among others Bernstein 2000, 2001; Checkel 1998; and Litfin 1994.
13. Björkdahl 2002, 14.
14. Aristotle 1847/1998.
15. Barry and Matravers 1997,141.
16. Mill 1893/1973, 465.
17. Legro 1997, 32. Legro makes this point with respect to prohibitory norms but it is equally applicable to equity norms.
18. Bernstein 2000, 464; Florini 1996, 363; and Legro 1997, 32.
19. Björkdahl 2002,
20. Checkel 1998, 4.

national life whilst giving little or no attention to mapping who the relevant actors are, what such actors want and, crucially, whose interests particular social structures promote.[21] Hence, in seeking to assess the success of equity norms in international politics or to open the critical space for a more in-depth understanding of the underlying logic of international environmental cooperation, one needs to look to theoretical frameworks that highlight the interplay between ideas and structure, especially the role of hegemonic political economic ideas within particular world orders. Here Gramscian ideas offer very important insights.

Towards a Critical Approach for Understanding the Promise and Limit of Equity Norms in Regimes

A neo-Gramscian account offers space for a richer understanding of the factors that affect the uptake of equity norms and also, critically, for explaining the impact and limits of such norms in environmental regimes. One of the main advantages of this approach is its emphasis on the dialectical and complex relationship between the historic bloc (the ruling alliance in the form of states, classes or transnational actors) and the subordinate classes—characterized in terms of series of coalitions, contestation and compromises. This characterization is significantly different from classical international political economy accounts where this relationship is described in terms of domination and resistance.[22] Moreover, while recognizing the critical importance of the material realm, neo-Gramscian accounts are acutely sensitive to the role of ideas and ideational factors in politics. Indeed, for Gramsci, the disagreements, concessions and alliances that define politics are generally negotiated against the background of a broad-based consent and commitment to hegemonic sociopolitical ideas.[23] An idea is said to be hegemonic if it has won legitimacy over alternative ways of looking at the world and more or less sets the limits on what constitutes the right and wrong ways of responding to political and socioeconomic challenges faced by society.[24] This means that domination is less reliant on coercion; rather, political control is rooted in the institutions of civil society (schools, churches media, the academy, etc.) which "play a central role in ideological reproduction."[25] These agencies perform this function mainly by "providing legitimacy through the assertion of moral and intellectual leadership and the projection of a particular set of interests as the general interest."[26] In other words, hegemony is successfully established when a dominant class is

21. See Finnemore and Sikkink 2001. There are a few critical constructivist writings to which this criticism would not apply.
22. Paterson 2000.
23. Cox 1983, 1992; see also Ford 2003; and Paterson et al. 2003.
24. Gramsci 1975.
25. Levy and Egan 2003, 805.
26. Ibid, 805–6.

able to link its interests with those of the subordinate classes in the pursuit of a social order that reproduces its own dominant position.[27]

On this view, there is no need to assert that everything derives from economic structural factors or that ideational superstructures are "mere reflection of the economic base" as is the case in classical Marxism. Rather, the realm of culture and ideology are both perceived to be autonomous. Both exert independent forces and constitute a filed of renewal "apt for negotiation with technology, other identities and for political change itself."[28] As Gramsci himself acknowledges, popular beliefs and similar ideas are themselves material forces which alter and are altered by discursive practices. Moreover, although "the economic and ideational realms evolve in dialectical tension,"[29] generating fissures and opportunities for challenge, change nonetheless remains mostly incremental and marginal with core structures always emerging more or less preserved.

With this framework one can appreciate the fact that while notions of justice, equity, responsibility and accountability all represent aspects of the intersubjective beliefs of state agents, these ideas are not taken as given by states. Rather, their precise meanings are objects of political construction and contestations. Perhaps more importantly, one sees that there is a degree to which existing social facts and power relations privilege some ideas over others and, in so doing, set boundaries as to what is achievable within a particular social order.

However, a problem with the neo-Gramscian framework is that since cultural, economic and ideational evolution is contextualized and premised upon *interest awareness* or consciousness, there is little or no room in this approach to account for the independent role of morality in (inter)national politics.

To overcome this problem, Bernstein has proposed a "socio-evolutionary" approach which seeks to combine insights from constructivism, agent-based theories and neo-Gramscian approaches. This integrative model allows us, he claims, to recognize the independent role of ideas while noting that the legitimacy of these norms is contingent on the "promotion and maintenance of a liberal economic order."[30] However, while the move towards integration is commendable, much work is still required to specify the key assumptions and limits of this approach. I will not pursue this issue further here, firstly because this essay is more of a theoretically informed narrative than an exercise in theory building and, secondly, because the emphasis here is on accounting for the factors that affect the success of equity norms rather than trying to ascertain the influence of moral norms in regimes.

Before giving an account of the factors that influence the success of the two equity norms, a short description of these norms is first provided.

27. Cox 1983; and Gramsci 1971, 181.
28. Levy and Egan 2003.
29. Levy and Newell 2005, 50.
30. Bernstein 2001, 4.

The Common Heritage of Mankind (CHM)

CHM is the principle that seeks to ensure that natural resources beyond the jurisdiction of states are exploited under international governance systems informed by the idea of international distributional equity. CHM is the first principle through which developing countries sought to accomplish their aspiration for distributional justice within institutions of global environmental governance, even if the emphasis was more on resource exploitation than environmental protection. A significant moment in this regard was 1 November 1967, when the Permanent Representative of Malta to the UN, on the floor of the General Assembly, rendered a long but moving speech about the resources in the seabed and ocean floor beyond the jurisdiction of states. In his speech, Ambassador Pardo noted that the seabed and ocean floor beyond the jurisdiction of states contained an immense amount of extractable polymetallic nodules—the monetary value of which, he envisioned, could be used to offset the economic disparity between developed and the developing countries. He therefore *inter alia* urged the UN to consider "the creation of a special agency with adequate powers to administer" the oceans and the ocean floor beyond national jurisdiction in the interest of all mankind and "with particular regard to the needs of poor countries."[31] Following Pardo's speech, the UN established an *ad hoc* committee charged with studying "the elaboration *of the legal principles and norms* [my emphasis] which would promote international cooperation in the exploration and uses of the seabed . . . for the benefit of mankind, and . . . in order to meet the interests of humanity as a whole."[32] Upon receiving the recommendations of the committee, the UN General Assembly—by means of Resolution 2749 (XXV) of 17 December 1970—adopted Pardo's suggestion by declaring "that the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources in the area are the common heritage of mankind." The UN affirmed in the same document that any international regime designed to regulate this area must "seek to implement effectively this principle" and in particular "ensure the equitable sharing by States in the benefits derived from the area taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal."[33]

The *Third United Nations Conference on the Law of the Sea* (UNCLOS III), negotiated between 1973 and 1982, established the treaty framework for the international governance of the seabed and implementation of the CHM principle. Indeed for many commentators, the entire nine-year official process of negotiating UNCLOS III more or less revolved around finding how best to operationalize the common heritage concept.[34] The process was long and too complicated to be detailed here but, in the end, states agreed a very delicate regime (Part IX of UNCLOS III) which many agree constitutes a significant attempt to

31. UN General Assembly 1967.
32. UN General Assembly 1968.
33. UN General Assembly 1970.
34. Friedheim 1993; Kiss 1985; and Pontecorvo 1988.

establish global justice at the heart of international environmental cooperation.[35] The regime established an "Enterprise"—a legal entity which would do business on behalf of the international community—and an International "Authority" which would be democratically run on the basis of the equality of states. State parties also put in place an elaborate formula for the distribution of the proceeds of seabed mining together with other clauses designed to protect developing countries whose income was dependent on land-base mining.

UNCLOS III has since entered into force, but many developed countries rejected the treaty, at least in its original form. In so doing, the main complaint was what a former special assistant to President Reagan termed "the redistributionist bent"[36] of the seabed regime. However the US, which had been in the forefront of opposition to the seabed regime, has since (1994) secured massive free market oriented amendments to the treaty. And only on this basis has it recently begun making moves to ratify the convention. Nonetheless, since commercial-scale seabed mining is yet to take place, it remains difficult to predict how the potential conflicts between the developing and the developed countries in relation to the seabed regime might be resolved. This also implies some difficulty in measuring the practical influence of the CHM principle.

Other than the Law of the Sea, CHM is also adopted in the 1979 *Agreement Covering the Activities of States on the Moon and Other Celestial Bodies.* Article 11 (1 and 2) declares "The area is the common heritage of mankind and not subject to national appropriation by any claim of sovereignty." Article 11 (7d) further declares that the benefits derived from these resources should be shared equitably among states with "special consideration given to the interest and needs of the developing countries."[37] But again, these provisions have not really been politically tested since there is as yet no significant exploration in these areas.

Developing countries have subsequently made attempts to incorporate CHM in the Antarctic Treaty System, the *Convention on Biological Diversity* and the *UN Framework Convention on Climate Change* (UNFCCC). However the developed countries have rebuffed these efforts. In all of these issue-areas, the principle of common interest of mankind has instead been adopted. It is on this basis that many commentators suggest that whilst the CHM still constitutes a significant stride towards global (environmental) justice, the principle has not been particularly successful.[38]

The Common but Differentiated Responsibility (CDR) Principle

CDR has a somewhat less defined history than CHM but its effects are much wider and more verifiable. To date, the only issue-specific environmental treaty where the term "common and differentiated responsibility" is used verbatim is the UNFCCC and the related Kyoto Protocol. However, there are an innumera-

35. Duff 2004; Friedheim 1993; and Vogler 2000.
36. Bandow 2004, cited in Duff 2004, 205.
37. United Nations 1979.
38. Duff 2004; Kiss 1985; and Vogler 2000.

ble number of what Stone terms "veiled or encoded variants"[39] of the principle in nearly all global environmental treaties negotiated since the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil (1992).

It has been suggested, however, that the first "veiled" appearance of CDR in environmental governance circles was in 1972 during the UN Conference on the Human Environment (UNCHE). Here, two of the 24 declarative principles agreed in Stockholm are often cited. The first is Principle 12 of the *Stockholm Declaration*, where it is stated that in formulating policies in future environmental regimes, the international community would need to devote extra resources to assist the economically disadvantaged states taking "into account the circumstances and particular requirements of developing countries and any cost which may emanate from their incorporating environmental safeguards into their development planning." The other is Principle 23, which recognizes that national environmental standards adopted by advanced countries may be "inappropriate, of unwarranted social cost and therefore inapplicable for developing countries." Generally, CDR can be regarded as arising "from the application of equity in general international law"[40] although it is of interest that Stone has recently advanced a sophisticated argument to show that some of its aspects could be grounded on the basis of rational bargaining.[41] Stone nonetheless admits that the advent of the norm is rooted in "the force of good citizenship in international politics."[42]

As an equity concept, CDR "has dual grounding."[43] The first is culpability. On this dimension, the historical "pressures developed countries placed on the global environment"[44] and the subsequent need for them to take responsibility in dealing with the problems caused is emphasized. The second dimension is capability, stressing the superior technological and financial and resources commanded by the developed countries and their strong leverage to act in support of ecological protection. The developing countries tend to favor the first grounding while the developed countries incline to the second.

There are at least three notable ways in which the norm of CDR has been given expression in global environmental regimes. The first is through what Stone calls "differential substantive requirements."[45] An example is the *Basel Convention on the Control Transboundary Movements of Hazardous Wastes and their Disposal* where OECD countries are banned from shipping hazardous wastes to developing countries. The second is through agreeing a more favorable compliance timetable for developing member countries: a notable instance here is the *Montreal Protocol on Substances that Deplete the Ozone Layer* where developing

39. Stone 2004, 276.
40. Sands 1995, 217.
41. Stone 2004.
42. Ibid, 282.
43. Matsui 2002, 151; and Harris 1999.
44. Matsui 2002, 151.
45. Stone 2004, 278.

countries are given a 10-year "grace" period to comply with the provisions restricting the use of ozone depleting substances. Thirdly, CDR is expressed in the form of support to some state parties in order to enable them comply or absorb the costs of compliance. Many environmental treaties contain (if not hinge on) provisions for technical assistance, technology and financial transfers from developed to developing countries.

It has been suggested, though, that by far the most significant presence of CDR in global environmental regimes so far is in the Kyoto Protocol to the UNFCCC[46] which not only differentiates among different developed countries but exempts the developing countries from undertaking quantified emissions reduction targets. Further, developed countries are required to transfer technology and financial resources to the developing countries in addition to those agreed through other multilateral agreements. Moreover, it is also clearly stated that "The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology."[47]

All of the above suggests that CDR has been relatively more successful than CHM. It has obviously more "density" in terms of usage and has seemingly secured more in terms of practical actions from states than CHM. However, going by the wrangling that continues to characterize climate change negotiations and the extremely low level of support that many developing countries receive in the context of the regimes which purport to be based on CDR, the success of CDR as an equity norm is still moderate.

Factors that Determine the Adoption and Viability of Equity Norms in Regimes

In this section, I briefly discuss four factors that affect the degree of internalization and the legitimacy of these two norms in global environmental regimes. I start my discussion with the source and force of articulation because this is the factor that has received the most attention in the literature on the evolution and diffusion of norms. Next, I discuss the role of issue-area before introducing the relatively less discussed factor that I call the moral temper of the international community. The last factor discussed is the impact of the prevailing neoliberal economic order.

The Source and Force of Articulation

The view that the prospect of norms gaining adherence in international politics is affected by their sources and the ways they are framed is widely argued in the constructivist literature.[48] "Source" refers principally to the person or group of

46. Stone 2004, 281; and Matsui 2002.
47. UNFCCC Art. 4 (7).
48. Finnemore and Sikkink 1998; Franck 1988; Legro 1997; and Wendt 1999.

persons that are advocating a particular norm as well as those that are supporting the idea(s) being canvassed. "Norm entrepreneurs" is the term now commonly used to describe these agents. Here, I suggest that the success of international equity norms in environmental governance is, like most other norms discussed in the constructivist literature, determined in part by the stature of the norm advocates and the force or style with which the norms are presented. However, there are also notable peculiarities in the specific ways in which this aspect matters with respect to equity norms in international regimes.

In one of the early inquiries into the mechanisms of norm institutionalization in the international arena, Inis Claude noted that the effectiveness of the UN as an "agent of legitimation and norm transmission"[49] correlates strongly with the perception of its political authority and impartiality.[50] Similarly, Thomas Franck, in what has come to be a standard reference text, also discusses the role of the status of norm advocates in enhancing the viability of norms in international settings.[51] He notes that the legitimacy of a norm ("rule" in Franck's terminology) is enhanced not only by the content but also "by the authority of the originator."[52] He also stresses the importance of effective communication and articulation in securing legitimacy and increasing compliance.

Barnett underscores the role of both the source and the force of articulation in enhancing the success of norms in international settings. Drawing upon Franck's work, he distinguishes between substantive and procedural legitimacy. Substantive legitimacy refers to the content of the norm in terms of what it pre/proscribes—why the rule ought to be obeyed and how the rules might be implemented. Procedural legitimacy, on the other hand, refers to who created the norm, the stature of those advocating the norm as well as where the authority for interpreting the norm ultimately lies.[53] Florini, using an evolutionary analogy, similarly highlights the role of the perception of the source of norms in international institutions. She notes that the prominence of a norm depends in part "on where the mutant norm first arose" and whether the advocates "appear to be particularly conspicuous."[54]

This logic partially applies to equity norms in international environmental governance systems. Here, as in other contexts, there is a correlation between the perceived legitimacy of norms entrepreneurs and the degree to which those ideas advocated are received. Similarly, there is evidence that framing, presentation and style of argumentation do impact the chances for the internalization of equity norms. However, in the case of equity norms, the popular wisdom that the more defined and specific a principle, the more its chances of getting legitimized does not necessarily apply. Rather, it seems that a preferred route is often

49. Barnett 1997, 548.
50. Claude 1966, 370–4.
51. Franck 1988.
52. Ibid, 713.
53. Barnett 1997.
54. Florini 1996, 374.

to build a robust case for articulating the principle without necessarily specifying in great detail how the norm might be operationalized.

There is not a great variety in the stature of the advocates that seek to introduce equity norms in international environmental regimes. In the majority of the cases, it is the group of developing countries acting under the aegis of G77 and China. But even so, it still appears that the actor (country and person) that gets to introduce a norm and the manner in which this is done nonetheless remain important factors. At the least, these factors seem to have played a role in the journey of CHM into the norm-complex of international environmental management.

Arvid Pardo, the key early proponent of the CHM principle, was in many respects a pivotal character for CHM uptake. He was vastly experienced, widely travelled and well connected within the diplomatic circles in both developed and the developing countries.[55] Moreover the fact that he represented Malta—a small newly independent state that is completely surrounded by the sea—afforded him the opportunity to make his appeal somewhat personal. Pardo repeatedly drew attention to this fact in an obvious attempt to evoke emotion and establish some form of *ius standi* in advocating the adoption of CHM as the basis for the global governance of the world's oceans. He described Malta as a nation that lives and breathes through the sea,[56] and he talked of the "truly incalculable dangers" that Malta and "mankind as a whole" could face if the ocean was not governed in line with the common heritage concept.

At the same time, Pardo's style was also widely acknowledged by contemporaries to be persuasive. In a speech described by *The New York Times* as "electrifying,"[57] Pardo deployed metaphor very effectively and cited from numerous journal articles, books and conference papers to argue that ocean mining was not only possible but likely soon to be achieved. He also successfully linked the CHM with world peace and nuclear safety and, in so doing, exploited the prevalent fear of nuclear annihilation:

> The dark oceans were the womb of life: from protecting oceans life emerged. We still bear in our bodies—in our blood, in the salty bitterness of our tears—the marks of the remote past. Retracing his past, man, the present dominator of the emerged earth, is now returning to the ocean depths. His penetration of the deep could mark the beginning of the end of man, and indeed for life as we know it on this earth. It could also be a unique opportunity to lay a solid foundation for peaceful and increasingly prosperous future for all peoples.[58]

In general, one sees in Pardo's speech a classic illustration of the point highlighted by Finnemore and Sikkink that language which "names, interprets and

55. See Korbonski et al. 1999.
56. UN General Assembly 1967, 1.
57. *The New York Times,* 10 December 1969, 5.
58. UN General Assembly 1967, 2.

dramatizes" has a particularly good chance of evoking positive response among states.[59] It is not therefore unreasonable to suggest that Pardo's stature and presentation style played some role in the eventual adoption of the CHM as the principal norm that should govern the exploitation of the mineral resources in the ocean floor and seabed.

It is not possible to produce a similar analysis with respect to CDR given, as already noted, its indefinite origin. McCormick,[60] Bernstein[61] and Ramakrishina[62] among others have all identified the important role of the Founex Report (published in the run up to the Stockholm conference) in the evolution of the CDR principle. However, since this term was not explicitly mentioned in the UNCHE documents, it remains difficult to establish the veracity of these claims. On the other hand, although the imprecise nature of CDR has meant that there is no lack of disagreement over how it should apply, this lack of specificity may also have played some part in establishing its popularity in the arena of global environmental governance. After all, the need to be seen to be making the right kind of noises without necessarily committing to any specific obligation is by no means an insignificant tool in the trade of national and international politics.

The Nature of the Issue-Area

The nature of the issue-area is ostensibly an obvious candidate for the factors that would be expected to influence the chances of equity norms being adopted in international regimes. This is quite simply because the whole idea of justice is based on interactions, relationships and perceptions of cause and effect.[63] Many analysts have indeed suggested that environmental issues as a whole have provided "the most fertile field"[64] for the articulation of global equity aspirations, mainly because they highlight aspects of spatial and temporal relationships among humankind that societies have previously been inclined to ignore.[65] Essentially, environmental issues reveal a high degree of global ecological interdependence and demonstrate the ease with which the negative effects of a number of socio-economic activities (such as air pollution and hazardous wastes) are transmitted across the world. Both, in turn, reinforce the idea of a collective fate for humankind and raise awareness about the artificiality of politically constructed territorial boundaries in this context.[66] Accordingly, environmental issues have provided a solid base for the articulation of what Hedley Bull[67] de-

59. Finnemore and Sikkink 1998, 897.
60. McCormick 1989, 95.
61. Bernstein 2001, 40–42.
62. Ramakrishna 1990.
63. See Rawls 1971; and Shue 1992.
64. Stone 2004, 279.
65. Dyer 2007, 22–4; and Stone 2004, 279.
66. Birnie and Boyle 2002, 503; and Dyer 2007, 23.
67. Bull 1983.

scribes as "a solidarist conception" of the international community. Sachs captures these sentiments well when (in reference to NASA satellite pictures of the earth) he avers that "the condition of earth's limits and finiteness . . . intimates the social unity of all its inhabitants and serves to entrench the idea of 'one people and one world,'" adding that "The unity of the earth has effectively globalized the notion of political community [and] stands for the aspiration of creating a world citizenship."[68]

It is observable that on the issue-level scale, there is a strong relationship between the "success" of moral norms and the specific features of the environmental challenge being addressed through international cooperation. In this regard, a number of "micro" factors play important roles. One of such micro factor is the extent to which it is possible to establish causality or responsibility. The role of this factor is evident in the Basel Convention, as well as in the agreements on climate change and ozone layer depletion. In the case of toxic wastes, the relative ease in tracing lines of responsibility clearly enhanced arguments for accountability and differentiated responsibility.[69] This subsequently helped in securing the eventual ban of movements of hazardous wastes from OECD to non-OECD countries against the wishes of the developed countries. The relatively clear lines of causality and responsibility also enhanced the strength of the proposals for the establishment of a liability and compensation regime based on cosmopolitan individual (as opposed to state-based) rights.[70] Similarly, although it has been far more difficult to attribute climate change related burden or harm along country-specific lines, the notion that developed countries account for the bulk of global greenhouse gas emissions was critical in securing the adoption of differentiated responsibility in the Kyoto Protocol. Conversely, the ability to measure emissions across countries and to forecast future trajectories has been a potent tool in the developed countries' argument that countries like China and India should take on quantified emission targets in future climate regimes.[71]

Another "micro" factor is the extent to which the environmental problem under consideration allows more vulnerable groups (usually within the global South) to exert leverage in bargaining circles. This relates, among others things, to the specific characteristic of the environmental resource or issue being negotiated. The relative success of the CDR principle in the ozone regime—evident in the 10-year "grace" period and the substantial transfer of technology and financial resources to some developing countries—has a lot to do with the peculiar features of the problem. Of particular importance is the fact that a few developing countries, namely China and India, had enormous leverage in respect of this issue. The fact that these populous countries had a clear ability to exacerbate the problem while remaining relatively less threatened by the dangers asso-

68. Sachs 1999,ix.
69. Kummer 1995.
70. See Kummer 1995; Basel Convention Art. 4 (1), 4 (6): Art. 5.
71. See Harris 1999.

ciated with ozone layer depletion afforded them the unique opportunity to make a strong case for these equity provisions to be included in the regime.[72]

Similarly, the uptake of CHM, to the extent described in the outer space and the seabed regimes, has a lot to do with the inherent characteristics of these resources. The fact that these areas are clearly outside the jurisdiction of states, coupled with the extreme difficulty in enclosing the resources, was critical in the argument that they should be considered as the common heritage of mankind.[73] On the other hand, the invocation of the CHM principle by the developing countries in relation to the global climate was rejected by the developed countries on the basis of the argument that the nature of the atmosphere makes it difficult to accord it the same legal status as the high sea and deep seabed.[74] Birnie and Boyle make clear that in discarding CHM, states were eager to stress that although the atmosphere "cannot be equated with airspace which, above land, is simply a spatial dimension subject to the sovereignty of the subadjacent states,"[75] there is nonetheless a condition of constant overlap with territorial sovereignty which means that the atmosphere cannot be treated as common property resource. Such reasoning played an important role in the successful efforts of the developed countries to set aside the CHM principle and adopt instead the resolution that the climate (and also Antarctica) is the "common concern of mankind." The concept of common concern is morally weaker than that of CHM because although it invokes "global unity" and "the common legal interest of all states in protecting the global atmosphere,"[76] it does not, as with CHM, link this legal interest with the notion of global distributional justice.

At the same time, developing countries have also relied on a similar logic to frustrate attempts by the developed countries to declare tropical rainforests to be the common heritage of mankind. The developed countries, in arguing that tropical rainforests should be designated as CHM, tend to highlight the global-scale importance of these resources and the seeming inability of national governments to accord them effective protection. But developing countries argue that despite having global value, tropical rainforests are unequivocally national resources and thus should entirely be subject to the well-established norm of sovereignty over natural resources.[77]

Lastly, a similar but more complex situation obtains with respect to global biodiversity and various treaties seeking to regulate it. The complexity resides in the fact that both the gene-rich countries of the South and the technologically advanced but gene-poor countries of the North are unsure about the implications of designating global biodiversity as the common heritage of mankind. Southern countries are concerned that under CHM they might lose the rights to

72. See Benedick 1991.
73. Vogler 2000, 3–10.
74. Bodansky 2001, 52; and Birnie and Boyle 2002, 502–3.
75. Birnie and Boyle 2002, 502–3.
76. Birnie and Boyle 2002, 503.
77. See Herber 1991.

prevent access to their genetic resources, whilst Northern countries worry that the principle might theoretically prevent them "from restricting access to laboratory bred genetic resources through the application of patents or other forms of intellectual property rights."[78]

Moral Temper of the International Community

A critical, albeit less recognized factor that influences the success of equity norms in global environmental governance is the "moral temper" of the international community. By moral temper, I mean the disposition of, or extent to which the international community, as a society, is attuned to moral propositions within a particular socio-political time frame. This is, in other words, the international approximate of Emile Durkheim's state of "common or collective consciousness."[79] Michael Walzer in *Just and Unjust Wars*[80] alludes to this state of public feeling, referring to it as the "moral posture" of a society, while Mansbach and Ferguson[81] call it "the normative temper of an era." Each phrase denotes an attempt to capture the sense of value or the degree of moral sentiment that abides in a given society within a specified period.

There is a rich tradition of philosophical investigation that suggests that individuals do not operate at that same level of moral attunement at all times. A particular individual may on the average be considered more altruistic or empathic than another. However, the specific level of altruism or empathy of such individual will vary from time to time depending on a number of physiological and social factors.[82] What is less discussed in the literature is the notion that societies also have a collective moral sense which, like those of individuals, varies from time. Whilst the intuition behind this assertion is fairly straightforward, the influence of this "social fact" on national and international conduct and policy-making has not been widely articulated. A notable exception is the work of Mansbach and Ferguson which attempts to explain paradigmatic shifts in international political discourses on the basis of periodic changes in the "normative emphases" prevalent in the international arena. They outline a host of factors that could work together to affect or define the specific moral temper of the international community. These include *inter alia:* (i) the level of economic prosperity within an era; (ii) the growth or decline of military problems, (iii) the activities of social movements; (iii) incidence of large scale natural disasters; (iv) scientific breakthroughs; (v) spiritual or religious revivals; (vi) qualitative technological changes; and (vii) the emergence of relatively novel challenges. Mansbach and Ferguson argue that the incidence, scale and variations in the alignments of these factors determine the specific normative temper of

78. Jerome 1998, 7–8.
79. Durkheim 1895; 1912.
80. Walzer 1977, 11.
81. Mansbach and Ferguson 1986.
82. See Durkheim and Giddens 1972.

the international community, which is then reflected in alterations in political dialogue and vocabularies, changes in the value hierarchy, as well as the reconceptualization of notions of rights, responsibilities and obligations. The impact of any value or idea in international politics is thus determined, at least in part, by the state of common consciousness or moral posture of the international community.

Likewise one can assert that if an equity norm is introduced in the cause of environmental bargaining at a time that the international moral temper is favorable, the chances that it will be internalized are correspondingly high. The converse is also true. Here, I suggest that the warm reception and moderate impact that CHM had on the UN Law of the Sea was, among other factors, dependent on the fairly high moral temper of the international community during the period that the idea was introduced by Ambassador Pardo. Conversely, the wane in the impact of this equity norm both during the last years of the negotiation of UNCLOS III as well as in subsequent environmental regimes reflects, among other factors, successive changes in the normative temper of the international community.

There are at least three factors that might be said to have interacted to set a high moral tone in the international community at the beginning of the negotiation of UNCLOS III. The first and most obvious was the wave of decolonization that was sweeping across the world during this period (late 1950s and early 1960s). This wave carried alongside it a euphoric sense of idealism which found expression in the aspiration for international distributional justice. Second, and related, is fact that despite the UN having already been through some growing pains in the Korean and Congo conflicts, the 1960s was still a period of relatively high hopes for this world body. Rightly or wrongly, expectations at this period were relatively high that the UN would provide the means through which global peace and justice might be achieved. Moreover, UNCLOS III was essentially the first UN-sponsored environmental negotiation where a majority of the newly independent states had the opportunity to participate in a global-level environmental decision-making process. Accordingly, the sense of mission and self-importance of these newly independent states were substantial. This supports Mansbach and Ferguson's position that a key factor influencing the normative temper of an era is the perception of a "shift in global status hierarchy" especially "when the enfeeblement of high-status actors encourages challenges to an existing distribution of stakes and the energizing of low-status actors spurs their ambition."[83] The third factor was the "Cold War Effect." The balance of power between the US and Russia, the struggle to gain developing country allies, and Russia's support for "socialist" policies at the international level all worked in the favor of the adoption of the CHM principle.

A look at the record of the negotiation and the pre-Convention meetings reveals an abundance of highly motivated speeches from delegates from all parts of the world—each drawing upon and reflecting more or less explicitly this

83. Mansbach and Ferguson 1986, 563.

euphoric sense that international politics was at a turning point and that the world was about to witness a sea change in the relations among states.[84] One example is the speech by the representative of the then German Democratic Republic who expressed the hope that the redistributive provisions of the seabed regime "would help to overcome to a certain extent, the economic, scientific and technological differences between countries, which was one of the most regrettable legacies of colonialism."[85]

It is not surprising that, in the end, these sentiments found their way into the official text of the treaty and greatly influenced both the language of the substantive provisions of the convention. For example there were over seven mentions of the need for equity and justice in a very short preambular chapter comprising eight simple paragraphs, including an expression of belief that the Convention will conform "with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations."[86]

It would be relevant to ask to what extent the quest for international justice by the newly independent states was motivated by material as opposed to moral considerations. Of course, a moral discourse is not one necessarily devoid of self-interest, so the mix of material and ideational motivations in the advocacy of justice norms by states requires investigation. However, while material interests were certainly a factor, there can also be little doubt that the high level of solidarity among these countries and the exuberant drive for reform of the international economic infrastructure within the same period reflected something of the global normative temper of that era.

Moving on briefly to the CDR principle, one notes again that despite its imprecise origin the moral temper of the international community was at a relatively high level during the Stockholm Conference. Not only were some of the factors discussed above still in force at this period, there was also the added "social shock" relating to new understandings of the finiteness of natural resources, the common fate of humankind, and the novelty of wide-scale environmental problems. Having said all this, it is important to admit that identifying the precise effect of these forces and their causal relationship remains a difficult task. Moreover, regardless of the level of moral temper of an era, the content and framing of a norm would still have to be sufficiently persuasive to secure internalization.

The Fit with the Extant Neoliberal Economic Order

The notion that the influence of equity norms is affected by prevailing global economic structure and ideas does not, I think, require much justification. For this reason, my focus in this section will be instead to establish the more

84. See for example UNCLOS III Official Records 1979.
85. UNCLOS III Official Records 1979, 5.
86. UNCLOS III, 1982, Preambular paragraph 4.

significant claim that this factor is the one that "trumps" all the other factors and ultimately shapes the extent to which aspirations for North-South distributive justice could be accomplished within institutions for global environmental governance. Or, in other words, that the viability of moral norms in global environmental circles rest, in the end, on the extent to which the obligations or responsibilities that such norms purport to generate could be achieved within the boundaries permissible by the dominant neoliberal economic order.

I start by noting that it is difficult to find any argument against CHM that aims to challenge its basis or moral content. Rather, much of the attack against CHM (both during and after the negotiation of UNCLOS III) was couched in arguments designed to show that it would be economically more efficient if the minerals in the oceans were exploited purely on the basis of free market principles.[87] Critically, many analysts have observed that the mining of the polymetallic nodules in the seabed would not have constituted a core aspect of the economy of many of the developed countries.[88] It has also been observed, despite Pardo's eloquent speech, that no amount of redistributive gestures based on the proceeds of seabed mining would have led to economic parity between the developed and the developing countries.[89] The real problem, as Friedheim notes, was that CHM was seen more than anything else as a challenge to the "general structure of the world economic system."[90] The norm, he elaborates, did not imply "merely a change in the particular or specific rules describing permissible activities or the means of managing them, but, rather, a new set of rules for an entirely different political, economic and moral framework for managing human affairs."[91] Friedheim insists that the developed countries were determined to curtail the influence of CHM essentially for the reason of "ideological purity"[92] given that they saw the principle as tantamount to the promotion of pluralistic or socialist management approaches to global natural resources. In other words, the crux of the opposition was simply because the North, in the words of Boczek,[93] "did not want to set a bad precedent."

It was hardly surprising, therefore, that after the distributional arrangements implied by CHM had been successful adopted by in UNCLOS III, the US subsequently mounted an aggressive diplomatic campaign designed to dissuade other developed countries from ratifying the convention. In doing so, the US aimed to kill the treaty or, failing that, drastically to alter the relevant equity provisions and bring them in line with the dictates of the free market doctrine. This intensive lobbying has since resulted in the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (July 1994),

87. See for example Friedheim 1993.
88. See Boczek 1984; and Herber 1991.
89. Friedheim 1993.
90. Friedheim 1993, 220.
91. Ibid, 220.
92. Ibid, 290.
93. Boczek 1984, 80.

otherwise known as the Boat Paper Agreement, which retained the concept of CHM but saw to it that the principle was thoroughly emptied of its content.[94]

The Boat Paper Agreement is significant because it not only secured far-reaching alterations to the seabed regime, but did so with a clear admission that the principal reason for the alterations was to make the regime consistent with free market ideology. The Agreement notes "the political and economic changes, including market-oriented approaches, affecting the implementation of Part XI"[95] and expresses the desire of parties to ensure that the development of the resources in the deep seabed takes "place in accordance with sound commercial principles."[96] It then proceeded to sanction the scrapping of the provisions in the original convention text that secured State funding for the Enterprise and instead mandated that "all the provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to [production] activities in the Area."[97] The Boat Paper Agreement also guaranteed the US a permanent seat on the Council of the International Seabed Authority and proceeded to void all the articles mandating the transfer of technology to the South. Instead, the document declares that "developing States wishing to obtain deep seabed mining technology shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market."[98] Such process, it states, must be "consistent with the effective protection of intellectual property rights."[99]

The impact of prevailing neoliberal ideas on the law of sea is also mirrored in the activities on the moon and other celestial bodies even if political events in these resource-areas have been less dramatic. Although it has been officially declared that these areas are the common heritage of the mankind and that any exploitation would have to be done on the basis of global distributive equity, the developed countries have continued to enjoy the benefits of launching satellites at optimal positions without transferring the profits accruing from these activities to the international body.[100] This condition has led Chemillier-Gendreau to suggest that despite the proclamations designating these resources as common heritage, "the technological inequality between states renders the principle of equal access derisory."[101]

As with CHM, the overall impact of CDR in global environmental governance has also been more or less shaped by the prevailing neoliberal economic order. In insisting that CDR should constitute the foundation for North-South environmental cooperation during the Stockholm Conference, developing countries had hoped that this principle would result in significant economic

94. United Nations 1994.
95. Ibid, Preambular paragraph 5.
96. Ibid, Annex. Section 2, The Enterprise, Art. 2.
97. Ibid, Annex. Section 6, Production Policy. Art 1(b).
98. Ibid, Annex Section 5, Transfer of Technology.
99. Ibid.
100. Chemillier-Gendreau 2002.
101. Ibid, 382.

empowerment if not the complete closure of the economic gap between the North and the South. The hopes were for *substantial quantities of financial and technological assistance, the free flow of up-to-date scientific information,* and the *ready transfer of technical experience* across the various countries of the world in the spirit of a new mode of international cooperation.[102] These hopes were also loudly echoed in the World Commission for Environment and Development (WCED) (Brundtland) Report which asserts that "inequality is the planet's main environmental problem" and that "it is futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international inequality."[103] However, by the time of the Rio Conference in 1992, and even more clearly during (and beyond) the Johannesburg Conference in 2002, it had become increasingly apparent that radical North-South redistributive mechanisms that are ostensibly inconsistent with free market ideals could hardly be a prominent part of global environmental rule-based regimes.

Neoliberalism and the Global Governance Responsibility Deficit

The foregoing analysis suggests that the limited impact of CDR and CHM norms—and, indeed, the general responsibility deficit that characterizes the current global environmental governance system—are fundamentally due to the co-option of global equity norms by neoliberalism. The analysis supports the works of many other scholars who have rigorously argued that in the years leading up to Rio, and thereafter, there has been a general global shift towards the neoliberal order with what Mansfield calls the predominant "focus on markets as the central form of governance."[104] As a result of the hegemony of neoliberalism, even the Southern states, according to these scholars, have also begun to endorse market-based approaches as the best route to global environmental management.

In his account of the dynamics of norm uptake in global environmental governance, Bernstein is emphatic that it is the "new realities of the international political economy" as expressed in the neoliberal order that have "made the success of the more radical redistributional proposals of the WCED unlikely."[105] Similarly, Paterson, in one of the first comprehensive accounts of global climate politics, notes that "the effect of neoliberalism has been to narrow available options" and to weaken the capabilities of states to respond effectively to issues of responsibility and North-South distributive justice notably implicated in global climate change. It is instructive, for example, that despite the unambiguous mention of CDR in the UNFCCC and its Kyoto Protocol, significant portions of these documents nevertheless read as though they are an

102. See for example Principles 9 and 20 of the Stockholm Declaration.
103. WCED 1987, 3.
104. Mansfield 2004, 314. See also Chatterjee and Finger 1994; and Sachs 1999.
105. Bernstein 2001, 71.

appendix to a World Trade Organization (WTO) agreement. One such paragraph is Article 3 (5) of the UNFCCC where Parties affirms the need to promote an "open international economic system that would lead to sustainable economic growth," insisting that "measures taken to combat climate change, including unilateral ones, should not constitute a means of . . . restriction on international trade."[106]

In general, it is safe to assert that the relative success of CDR in global environmental governance is for the most part due to its resilience and particularly because it generates less specific, and somewhat more localized obligations than CHM. Crucially, whatever the duties and responsibilities that are generated by CDR, the unspoken *ultimate imperative* is that such obligations must not amount to a fundamental challenge to the prevailing rules of international commerce and global economic power structures. Accordingly much of the early hope that CDR would lead to globally responsible environmental policies has been abandoned for minimalist and voluntaristic (often free market based) gestures which benefit a very limited number of developing countries (mostly China and India). The new order is reflected in the Montreal Protocol where China and India are the main beneficiaries of an essentially localized Ozone Fund. This effect is also manifest in the Climate Change Convention where, in the words of Paterson, "the advantages of 'market mechanisms' over 'command and control' regulation [are] often regurgitated, rather in the form of a mantra."[107] Bodansky[108] echoes this sentiment, aptly observing that whilst a commitment for OECD transfer exists, neither the UNFCCC nor the Kyoto Protocol actually requires "any particular country to contribute any particular amount." Even the much acclaimed equity policy in the UNFCC—the Clean Development Mechanism—has apparently only succeeded because it is (rightly or wrongly) perceived as an innovative construct which allows justice to be dispensed by the market and without violating the sacred canons of the neoliberal order.

Conclusions

The essay has argued that there are at least four key factors that determine the uptake and practical impact of equity/responsibility norms in environmental regimes—source of norms, issue area, the moral temper of the era, and prevailing economic values. It has been argued that the most important of these factors is the prevailing global economic order, as expressed in both ideational and structural terms.

The analysis indicates, on the positive side, that whilst the international arena might not be a haven for moral discourses, it is nevertheless not com-

106. UNFCCC, Art. 3 (5).
107. Paterson 1996, 169.
108. Bodansky 2001, 212.

pletely insensitive to moral argumentation. This implies that the assertion by the realists and neoliberal institutionalists that "the reason of state" has weakened international morality "to the point of ineffectiveness"[109] is an overstatement. On the other hand, however, the analysis also suggests that whilst (moral) norms exact some influence in regime development, they do not matter in the ways or to the extent that proponents of sociological accounts of regime development would claim. There is of course little doubt that in recent years, the conduct of states, as Björkdahl observes, tends to rely "less on distribution of power and more on soft powers of ideas, values and norms."[110] But the values and ideas that ultimately shape international conduct are not those that arise from "intersubjective beliefs" as constructivists are inclined to emphasise. Instead, the most powerful ideas are those that generate, and are generated from, the wider commitment to hegemonic neoliberal economic philosophy. In present-day international politics, powerful states rarely have the need to threaten weaker ones with military invasion in order to get them to toe a preferred line in international decision making circles. Instead, the handier and arguably more effective weapon is quite simply to show that the preferred policy is the most economically efficient and, conversely, that alternative propositions are inconsistent with free-market principles.

However, drawing from the analysis above, as well as Gramscian ideas, one sees that there is nevertheless some room for making the demands of North-South equity more efficacious by nurturing some of the other conditions that promote the influence of justice norms in regimes. Strategy is important because despite the dominant role of prevailing economic ideas and structures, there remains ample room for counter hegemonic struggle and well articulated moves that challenge the policies and values that privilege groups with superior resources. Notwithstanding the wide commitment to neoliberalism and its resilience, there is much doubt over its ability to support the more radical distributional aspirations often expressed by the developing countries. There is thus the need for (especially developing) states to consider seriously the extent to which global equity and related aspirations for responsibility in institutions of global environmental governance can be achieved whilst simultaneously consenting to neoliberalism.

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109. Morgenthau 1978, 257
110. Björkdahl 2002, 9.

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