2002

Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance

Mark A. Drumbl
Washington and Lee University School of Law, drumblm@wlu.edu

Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance

Mark A. Drumbl*

I. INTRODUCTION

International environmental law involves more than just the global environment. It also concerns economic development and invokes the geopolitics of global wealth distribution. Consequently, a major fault-line in international environmental lawmaking separates the North (the developed world) from the South (the developing world). Accordingly, conflicts that emerge in this lawmaking process can be deconstructed as conflicts over economic and development issues as well as environmental issues. The interdependence of development, environment, regulation and trade in public and political discourse is more pronounced today than at the adoption of the Stockholm Declaration in 1972, which many view as the initiation of the "modern" era of international

* Assistant Professor, School of Law, University of Arkansas-Little Rock; Assistant Professor, School of Law, Washington & Lee University (effective Summer 2002); Adjunct Professor, School of Law, Columbia University. For a more detailed exposition of the themes raised in this Article, *see* Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. (forthcoming 2002).

environmental law.[1] Moreover, it appears that this interdependence will be heightened and on prominent display in Johannesburg at Rio +10.

II. ECONOMIC DEVELOPMENT AND GLOBAL ENVIRONMENTAL PROTECTION

All nations are concerned with the environment. To be sure, the depth, focus, magnitude, and amplitude of this concern all vary from nation to nation and fluctuate depending upon the specific issue at hand. Nonetheless, many observers of international environmental law note that developed nations[2] tend to be more demonstrative than developing nations about proposing multilateral environmental agreements.[3] Rather than stemming from disregard or apathy for the global environment, developing nation reticence stems from prioritization. Developing nations often are preoccupied with immediate local environmental concerns such as safe drinking water, providing arable land, indoor air quality, and accommodating surging populations.[4]

1. Stockholm Declaration of the United Nations Conference on the Human Environment (June 16, 1972), 11 I.L.M. 1416 (1972); *see, e.g.*, Peter M. Haas, *UN Conferences and Constructivist Governance of the Environment*, 8 GLOBAL GOVERNANCE 73 (2001).

2. There is considerable heterogeneity among developing nations when it comes to positions taken on global environmental issues. By way of example, those developing nations that are members of the Organization of the Petroleum Exporting Countries (OPEC) are reluctant to impose cutbacks on the emission of greenhouse gases whereas developing nations that have much low-lying coastline or are small island states are particularly adamant about the need for these cutbacks.

3. D. Robertson, *The Global Environment: Are International Treaties a Distraction?*, 13 THE WORLD ECONOMY 111, 124 (1990); *see also* Kathryn Hochstetler, et al., *Sovereignty in the Balance: Claims and Bargains at the UN Conferences on the Environment, Human Rights, and Women*, 44 INTERNATIONAL STUDIES QUARTERLY 591, 610-11 (2000); ANITA MARGRETHE HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 29-30, 42, 48 (1999); Gary C. Bryner, *Implementing Global Environmental Agreements in the Developing World*, 1997 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1997); Michael J. Kelly, *Overcoming Obstacles to the Effective Implementation of International Environmental Agreements*, 9 GEO. INT'L ENVTL. L. REV. 447, 450 n.19 (1997). To be sure, these authors refer to a general trend. As with any trend, there are exceptions. Developing nations, for example, took a very active role in proposing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, U.N. Doc. UNEP/WG.190/4 (March 22, 1989) [hereinafter Basel Convention] (creating a regime of international notification and consent for the transboundary shipment of hazardous wastes and, as amended, banning certain types of transboundary movements of waste from the developed to developing world).

4. *See* Oran R. Young, *The Effectiveness of International Governance Systems*, *in* GLOBAL

Developing nation reticence to address topics of transnational environmental concern also derives from the direct costs associated with attaining the abatement standards central to many multilateral agreements. Direct costs involve the disbursements necessary to enact, administer, and enforce the domestic laws required to give force to any international agreement. Direct costs also include the technology and products required to mitigate polluting activity in accordance with the requirements of the international agreement. Many developing nations simply do not have access to the resources necessary to practice environmentally-friendly economic growth. For example, although projections are speculative, it appears that the direct implementation costs of stabilizing, let alone reducing, greenhouse gas emissions will be tremendous.[5] If these costs intimidate the wealthy United States, how large must they loom in Thailand, Bolivia, or Nigeria?

There are also opportunity costs. Developing nations fear that deceleration, deferral, or even foregoing of industrial development will be the result of increased environmental regulation.[6] To be sure, this fear of economic deceleration animates developed nation responses to international environmental governance (and has, at times, influenced developed nation withdrawal from such governance—for example U.S. abandonment of the Kyoto Protocol on global warming).[7] Nevertheless, the proposition remains

ENVIRONMENTAL CHANGE INTERNATIONAL GOVERNANCE 6 (Oran R. Young et al. eds., 1996); *see also* Kilaparti Ramakrishna, *Interest Articulation and Lawmaking in Global Warming Negotiations: Perspectives from Developing Countries*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 153, 168 (1992).

5. It is estimated that by the middle of the 21st century, the costs of containing carbon emissions to 1990 levels would constitute one to two percent of national income. *See* William E. Colglazier, *Scientific Uncertainties, Public Policy, and Global Warming: How Sure is Sure Enough?*, 19:2 POL'Y STUDIES J. 61, 65 (1991).

6. *See generally* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 368 (1997); Cheng Zheng-Kang, *Equity, Special Considerations and the Third World*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 57 (1990). But many developing nations are in a pernicious situation insofar as doing nothing to stop global warming could trigger population displacement, weaken infrastructure, and change land-use patterns. *See* Konrad von Moltke & Atiq Rahman, *External Perspectives on Climate Change*, *in* POLITICS OF CLIMATE CHANGE 338 (Timothy O'Riordan & Jill Jager eds., 1996) ("[I]mpacts of global climate change are going to have disastrous effects on the development pathways of several developing countries [whose] people and ecosystems are the victims of a global phenomenon to which their contribution is insignificant.").

7. Kyoto Protocol to the United Nations Framework Convention on Climate Change (Dec. 11, 1997), U.N. Doc. FCCC/CP/7/Add.1, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol]; CNN, *Bush Firm Over Kyoto Stance*, (March 29, 2001), *at*

that developing nations generally are more hesitant about committing to international environmental regulation than is the developed world.

Industrialized nations have attained their current level of development largely by imposing externalized costs on the global environment.[8] Now that a consensus has emerged that the planet no longer can withstand many of these externalities or has hit some sort of tipping-point, considerable Southern skepticism attaches to Northern suggestions that everyone must mitigate these externalities, including those not responsible for creating the problem in the first place. There is thus an element of moral coherence to the developing world's skepticism. Assuredly, the North's externalization upon the environment of its wealth creation is not just historical. It is ongoing.[9] The realpolitik is that one way to safeguard ongoing polluting behavior in developed countries is to prevent

http://www.cnn.com/2001/US/03/29/schroeder.bush/index.html. The U.S. recently has re-engaged itself on the issue of climate change, although it has not done so multilaterally, eschewing the climate change agreements agreed to by other nations in Bonn and Marrakesh in 2001. President Bush's February 2002 plan relies largely on incentives encouraging voluntary reduction commitments, with a goal of reducing greenhouse gas intensity by eighteen percent in ten years. *See* Andrew C. Revkin, *Bush Offers Plan for Voluntary Measures to Limit Gas Emissions*, N.Y. TIMES, Feb. 14, 2002, at A6. This plan will neither attain the reductions to which the U.S. had committed itself to prior to its abandonment of the Kyoto Protocol, nor involve power plants' output of carbon dioxide, the most prevalent of the greenhouse gases. *Id.*

8. *See* Kelly, *supra* note 3, at 455-56 ("It has been understandably difficult for developing nations to justify prioritizing restrictive environmental policies, especially international ones, over domestic economic development policies. Industrialized nations tend to engender resentment in the developing world when they, having already attained a high standard of living through exploitation of natural resources, call on the Third World to refrain from exploiting their own natural resource . . . ."). Ronald J. Herring & Erach Bharucha, *Embedded Capacities: India's Compliance with International Environmental Accords*, *in* ENGAGING COUNTRIES 395, 426 (Edith Brown Weiss & Harold K. Jacobson eds., 1998) ("It is not difficult to deduce hypocrisy from the North's admonition to 'do as we say, not as we did.'"). *But see* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 151 (1999) (suggesting that the arguments that the West's economic development emerged in part through oppressive labor practices and that the West's liberal democracy emerged from genocide do not support the further argument that the developing world must "have its chance, as it were" at unfair labor practices or "its fair opportunity to try out genocide").

9. "The 20% of the earth's population which resides in the industrialized countries generates more than 80% of global man-made pollution because of the industrial nations' higher production and consumption." FRANCK, *supra* note 6, at 364. *See also* RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 15 (1999) (citing a source that the industrialized North contains 24% of the world's population but consumes 80% of the world's energy and mineral resources; about 33% of these resources are being used by the United States, which has only about 5% of the world's population).

new polluting behavior from emerging in the industrializing world.

III. THE SHARED COMPACT

Developing nations have transformed their initial, instinctive skepticism toward global environmental governance into a negotiation strategy, by which they are acquiring commitments from developed nations to provide: (1) financial resources for the additional implementation costs that treaty ratification would trigger; and (2) technology transfer. The provision of financial resources involves the transfer of funds from developed nations to developing nations through multilateral funds (for example, the Multilateral Fund of the Montreal Protocol on Substances that Deplete the Ozone Layer,[10] special trust funds, or international financial organizations such as the Global Environmental Facility (GEF)). Technology transfer involves the dissemination of environmentally sound technologies (EST) that "protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they are substitutes."[11]

Developing nations are demanding that, before they make abatement and reduction commitments pursuant to multilateral environmental treaties, developed nations must commit to the provision of financial resources and technical transfer.[12] Devel-

10. Montreal Protocol on Substances that Deplete the Ozone Layer, as amended and adjusted by the London Amendment (June 29, 1990), 30 I.L.M. 537 [hereinafter Montreal Protocol]; *see also* Jason M. Patlis, *The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment*, 25 CORNELL INT'L L.J. 181,182, 222 (1992).

11. United Nations Conference on Environment and Development, Agenda 21: Programme of Action for Sustainable Development, ch. 34.1, U.N. Doc. A/CONF.151/26 (Vols. I, II & III) (June 13, 1992). Endogenous human resource capacity building is as important as the direct transfer of the materials and hardware. *See id.*, ch. 34.3; Rio de Janeiro Declaration on Environment and Development, prin. 9, U.N. Doc. A/CONF.151.5, (June 16, 1992) ("States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge.").

12. *See* Gaëtan Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies*, 11 GEO. INT'L ENVTL. L. REV. 49, 49 (1998); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 24, 198-200 (1995) (unpacking the notion of capacity-building, which is presented as an important strategy or mechanism in the collaborative process of international environmental governance).

oped nations are responding to this call. In fact, developing nation skepticism has prompted developed nation action, leading to an innovation in global environmental governance. In recent years, developed nation commitments to provide financial and technological support to facilitate developing nation participation in and compliance with environmental regimes have achieved textual status within a number of the leading, most broadly ratified, and truly multilateral agreements. But instead of merely taking the form of pledges or commitments to provide resources or technology, these promises are evolving into conditions upon which the involvement of developing countries in combating global environmental threats is predicated. What were once essentially vague, hortatory gestures have been transformed into contingent arrangements[13] that convey a sense of obligation, quite possibly of a binding or even legal nature.

One example is Article 5(5) of the amended Montreal Protocol, which provides that developing the capacity to fulfill the obligations of the developing nation parties to comply with and implement the control measures specified in the Montreal Protocol will depend upon the effective implementation by developed nations of financial co-operation and transfer of technology as set out in the Montreal Protocol.[14] Article 4(7) of the United Nations Framework Convention on Climate Change (FCCC) is somewhat more ambitious.[15] Its text, which is replicated in Article 20(4) of the Convention on Biological Diversity,[16] states 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* and will take fully into account that economic and social development

13. CHAYES & CHAYES, *supra* note 12, at 200. *See also* John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 45-46 (1998) ("For global environmental problems, little doubt appears to exist that the responsibilities of developing countries are contingent upon the receipt of outside assistance. [T]he Biodiversity Convention and the Framework Convention on Climate Change even make the substantive obligations of developing countries expressly contingent upon the receipt of financial and technical assistance.").

14. Montreal Protocol, *supra* note 10, art. 5(5).

15. United Nations Framework Convention on Climate Change, 31 I.L.M. 849 (May 2, 1992) [hereinafter FCCC]. The Kyoto Protocol, when it comes into effect, will operate under the aegis of the FCCC.

16. *See* United Nations Conference on Environment and Development, Convention on Biological Diversity, art. 20(4), 31 I.L.M. 818 (June 5, 1992) [hereinafter CBD].

and poverty eradication are the first and overriding priorities of the developing country Parties.[17]

These provisions link developed world distributive transfers with developing world substantive environmental commitments while recognizing Southern developmental imperatives. This linkage gives rise to and reflects a newly emerging relationship of interdependency between North and South. This relationship transcends the status quo ante in which developed nations simply pledged to provide funds or technology to developing nations.[18] In practical terms, it is one thing to say that A should (or, even, shall) provide X to B; it is quite another thing to say that should A not effectively provide X to B, then B's promises to A cease to be binding. Developing nations are providing as consideration for this bargain the forbearance of their sovereign right to choose the manner and method of industrialization they deem best for themselves.[19] Developed nations are assured that they are not simply writing a "blank check," insofar as the resources and technologies that are transferred are to be used for the stipulated environmental compliance purposes.

This Article suggests that this swap of resources and technology for participation represents a dynamic and nascent relationship between the North and South that can best be described as a "shared compact."[20] Moreover, this Article seeks to fill a lacuna in

17. FCCC, *supra* note 15, art. 4(7) (emphasis added).

18. For a reflection of the generally hortatory status quo ante in the area of technology transfer, *see* Stockholm Declaration, *supra* note 1, prin. 20 ("Environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.").

19. A detailed review of the conferences that gave rise to the climate change and biodiversity agreements reveals the extent to which Southern nations framed the debate in terms of bargaining away their sovereignty. *See* Hochstetler et al., *supra* note 3, at 598 (reporting on statements made by countries as diverse as Gabon, Cuba, Saint Kitts/Nevis, Azerbaijan, Iran, Colombia, Pakistan, and Malaysia), *citing* Report of the United Nations Conference on the Environment and Development, Vol. 3, 19-20, 38-39, 40-41, 58, 82-83, 109, 153-54, 231-33 (1993).

20. "Compact" refers to a deal or arrangement to come together strategically to attain a particular goal. Compact: "an interstate agreement entered into to handle a particular problem or task." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 461 (1966). Given that it is most unclear whether this distributive swap has any legal status at all, it is inappropriate to use legal terms to describe it. Thus, there is a need to go outside the language of the legal academy and the aptness of "compact." But, this process is one "shared" among all participants, thereby communicating a sense of commonality with others, responsibility, commitment and entitlement, perhaps even an ongo-

the scholarly literature, as the shared compact treaty provisions—article 5(5) of the amended Montreal Protocol, article 4(7) of the FCCC, and article 20(4) of the CBD—have attracted limited academic attention.[21] The secretariats of the various treaties in which

ing moral obligation. *See id.* at 2087 (defining "share" as "to participate in, take, possess, or undergo in common . . . <sharing a common responsibility> . . . to have, use, exercise, experience, or engage in something in common with another or others ..."). The notion of "shared compact" unpacked in this Article differs from Secretary-General Annan's "global compact," which engages the private sector and non-governmental organizations to work with the United Nations "to identify, disseminate, and promote good corporate practices based on nine universal principles." *See* John Gerard Ruggie, *global_governance.net: The Global Compact as Learning Network*, 7 GLOBAL GOVERNANCE 371, 371-72 (2001). For example, the "shared compact" operates in the traditional, positivist, inter-state nexus of international relations. Nonetheless, it does echo the spirit of partnership and solidarity found in the "global compact."

21. Although scholarly treatment of shared compact provisions has not been extensive, those scholars who have considered the subject generally conclude that the shared compact provisions do not mean much, are ambiguously formulated, just observe facts, and blandly recognize the realities of developing nation poverty and developed nation know-how and resources. Examples of this general consensus include Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 511 n.364 (1993) (who, in over 100 pages of sophisticated commentary on the FCCC, devotes a short footnoted passage to FCCC Article 4(7), which he describes as a "neutral formulation" that makes a "factual observation"); RICHARD E. BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 189, 196 (1991) (writing about the ozone regime, although dong so before the important 1992 Copenhagen Amendments to that regime); Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10 E.J.I.L. 549, 579 (1999) (disputing that these provisions embody customary international law); Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development*, *supra* note 12, at 61-66. *But see* Susan H. Bragdon, *The Evolution and Future of the Law of Sustainable Development: Lessons from the Convention on Biological Diversity*, 8 GEO. INT'L ENVTL. L. REV. 423, 433 (1996) (noting that "the obligations of developing country Parties under the convention depend upon the satisfaction of certain obligations by developed country Parties"). *See also id.* at 435 ("The Convention distinguishes between developed and developing country Parties and makes the fulfillment of the conservation obligations of the latter dependent upon the fulfillment of the technology transfer and financial resource obligations of the former. Together the two elements of responsibility provide the beginnings of a legal and philosophical basis for international cooperation in the field of environmental development."); FIONA MCCONNELL, THE BIODIVERSITY CONVENTION, A NEGOTIATING HISTORY 94 (1996) ("[T]he G77 members exacted a counter clause which implied that developing countries would only be expected to implement the convention if they received the necessary finance and technology."); FRANK BIERMANN, SAVING THE ATMOSPHERE: INTERNATIONAL LAW, DEVELOPING COUNTRIES AND AIR POLLUTION 117-18 (European University Studies, 1995) ("[I]ndustrialized States have bound themselves by treaties to provide financial assistance to such an extent that they have explicitly accepted to link the fulfillment of all obligations of developing countries with the condition of the actual provision of that assistance, therefore creating a regime of mutual obligations unlike earlier treaties on development aid for which the element of unilaterality was typical."); Patlis, *supra* note 10, at 196 (viewing the link between the financial and technological distribution measures and the control measures of the Montreal Protocol as a "causal one").

these provisions are found have scant information about the provisions and are reticent about how they are to be interpreted.[22] According to the FCCC and Montreal Protocol secretariats, the provisions appeared somewhat abruptly, even mysteriously, in the final treaty documents.[23] As for the CBD, there was debate on propositions that more strongly[24] and more weakly[25] linked developing nation participation with developed nation obligations, from which Article 20(4) of the final document emerged late in the negotiation process.[26]

IV NORM-CREATION IN SHARED COMPACT GOVERNANCE

The shared compact only emerges in some contexts. The more immediate, specific, and direct the global environmental harm is to the developed world, the more the developed world is willing to share technology and redistribute wealth. There is thus an im-

22. *See, e.g.*, email communication from Seth Osafo of the FCCC Secretariat (Bonn, Germany) to Melanie Bell, Research Assistant, UALR Law School (Oct. 12, 1999) (on file with the author) ("Unfortunately there are no transcripts of the debate and as far as we are aware there is very little by way of background material on [Article 4(7)]. This provision was accepted by the negotiators as essential without much debate."); e-mail communication from Michael Graber, Deputy Executive Secretary of the Ozone Secretariat (Nairobi, Kenya) to Melanie Bell, Research Assistant, UALR Law School (Sept. 28, 1999) (on file with the author) ("Unfortunately we do not have prior drafts of [Article 5(5) of the Montreal Protocol].").

23. GRABER, *supra* note 22. However, one observer reports that Article 4(7) was adopted after an alternate formulation was rejected. *See* Bodansky, *supra* note 21, at 511. This alternate formulation reads "the extent of developing countries' commitment would have depended on (or corresponded to) the extent to which developed countries implemented the Convention's provisions on financial resources and technology transfer." *Id.* at n.364. Although this language differs somewhat from the language that ultimately was adopted, these differences do not appear to be substantive.

24. HALVORSSEN, *supra* note 3, at 96 (noting that treaty language that expressly conditioned the fulfillment of developing nation obligations on receiving financial assistance from developed countries was rejected).

25. *See, e.g., Fourth Revised Draft Convention on Biological Diversity, Intergovernmental Negotiating Committee for a Convention on Biological Diversity*, at ¶ 2, art. 18, UNEP/Bio.Div/N6-INC.4/2 (1991) ("The extent to which developing countries are able to [meet the objectives] ... [fulfill the obligations under Articles . . .] ... of this Convention will be subject to the availability of [such] resources [to meet agreed incremental costs]."); *Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, Revised Draft Convention on Biological Diversity*, 3rd Sess., at art. 21(4), UNEP/Bio.Div/WG.2/3/3 (1991) ("The Contracting Parties, taking into consideration special needs of developing countries, shall co-operate with the aim to ensure the capability of developing countries to implement the provisions of the present Convention through national institutions and legislation.").

26. Article 20(4) did not appear in earlier treaty drafts.

portant bargained-for, selfish, and self-interest maximization component to the shared compact. This explains why the issue-areas in which the shared compact has arisen tend to be ones in which environmental externalities are imposed on the developed world, and not issue-areas with local impact upon developing nations alone, regardless of the severity of that impact. For this reason, the shared compact arises in some matters of "common concern to humanity."[27]

However, although this selfishness is a necessary determinant of the shared compact, it may not be a sufficient explanation of why or where the shared compact has emerged. There are also important justice and solidarity aspects to the emergence of the shared compact. For instance, Henry Shue posits that, were the North only to have acted out of narrow self-interest, negotiations such as climate change would not have been international, or even multilateral, in focus.[28] Given the heterogeneity of environmentally destructive capacity among the nations of the South, Shue suggests that pure self-interest would have motivated the nations of the North to bargain bilaterally with a small group of developing nations (for example India, Indonesia, and China), that are large incipient industrializers. The scale of industrialization currently taking place in these countries means that they have the potential to inflict massive harm to the global environment. As such, these nations hold an important bargaining chip—namely the capacity to inflict global environmental destruction—particularly when it comes to climate change and ozone depletion.[29] In the area of biodiversity, nations such as Costa Rica, Brazil, and Malaysia (which shelter a disproportionately large percentage of the world's biodiversity) would have been the chosen discussants. Instead, the North negotiated with the developing world as a whole, including nations such as Haiti, Ethiopia, Laos, Chad, and Mali, whose contribution to global environmental degradation is minimal and who, therefore, lack this bargaining chip.

Shue's analysis is insightful, although not without gaps. For example, it may have been easy for the North to have these smaller

27. "Common concerns of humanity" are resources or activities that fall within the legal jurisdiction of a state but that affect the well-being of all states.

28. Henry Shue, *The Unavoidability of Justice, in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS AND INSTITUTIONS 381-85 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

29. *Id.*

countries at the negotiation table insofar as they would not receive much in the way of financial transfers. Thus, little importance can be ascribed to choosing to negotiate with them. However, Shue is correct that, in the aggregate, this process involves some additional costs, not only in the short-term but particularly in the mid-term, when some of these countries would begin industrializing. When analyzed from a macro, instead of an individualized micro, perspective, the North did agree to provide more aggregate financial and technological resources than it would likely have had to provide as a result of independent bilateral negotiations with China, India and Brazil.

Justice motivations also can be ascribed to the South. China, India, and Brazil did not choose to negotiate individually with the North. Instead, these nations deliberately decided to include their voices within vast international negotiations in which some of the weakest participants, such as states with low-lying delta regions, are the most vulnerable to the environmental hazards but, owing to their extreme poverty, the most unable to adapt to the effects of the hazards. China, India, and Brazil consciously chose to accept less favorable terms than they may have been able to achieve through independent bilateral bargaining and opted to negotiate with and on behalf of developing nations who ordinarily would have had little influence at (or may not even have been invited to) the negotiation table. By electing to speak for all of these nations, the largest of the developing nations demonstrated a similar commitment to something beyond national self-interest and wealth-maximizing positional bargaining. On the other hand, by ensuring that the discussions were completely multilateral, the largest nations of the South also ensured that there would be no free-riders, such that no nation (no matter how small) would be exempted from whatever environmental control measures may have been agreed upon in the treaty. Moreover, it also may be insightful to contrast, as do two environmental activists, "the coincidence of national interest [in the developing countries] with international equity in the climate negotiations [with] their resistance to environmental considerations in the trade negotiations."[30] As trade, development and environmental concerns become revisited at Rio +10, it will be interesting to observe whether

30. Tom Athanasiou & Paul Baer, *What New World?* (draft manuscript, on file with the author).

this putative coincidence/resistance dialectic persists or dissipates.

In the end, although it would be imprudent to ascribe too generous a role to justice motivations, there is some force to the argument that both North and South approached biodiversity, climate change, and ozone depletion negotiations "not as rational bargaining in the narrow sense, but as a process constrained all along by some consideration of justice."[31] In addition to justice, the inclusive nature of these negotiation strategies also demonstrates a sense of solidarity and cooperation.

V. DISTRIBUTIVE TRANSFERS AND EFFECTIVE GLOBAL ENVIRONMENTAL GOVERNANCE

The emergence of the shared compact provisions triggers important legal questions. For example, does the shared compact allow developing countries to argue that the extent to which they will comply with multilateral treaties will depend on the extent to which the developed nations subsidize that compliance? If developed nations fail to provide these resources, are developing nations released from their treaty obligations? Does the shared compact permit treaty avoidance by the South in the event the North fails to fulfill its distributive obligations? Do these obligations therefore constitute a condition precedent? How will developed nations' effective implementation of their treaty obligations be measured? These questions relate to the broader issue of whether the shared compact is imbued with legal content or a sense of obligation, perhaps analogous to that which would arise in a contractual arrangement undertaken between nations.

However, the major effects of the shared compact may not be as legal precedent, but as normative prescription. In this regard, the shared compact may attract the attention of constructivist international relations scholars, who, as noted by John Ruggie, "hold the view that the building blocks of international reality are ideational as well as material."[32] Constructivists "focus on such distinctive processes as socialization, education, persuasion, discourse, and norm inculcation to understand the ways in which international

31. Shue, *supra* note 28, at 381.

32. John G. Ruggie, *The Social Constructivist Challenge*, 53 INT'L ORG. 856, 879 (1978).

governance develops."[33] Although one of the primary tasks of international lawyers is to ascertain whether a rule, practice or principle has legal status, one of the primary realities of international relations is that behavioral norms and aspirational goals—whether per se legal or not—have significant prescriptive and constructivist status. This Article suggests that, whereas the legality of the shared compact may be attenuated at best, the normative and precedential value of the shared compact in international environmental governance is much more readily apparent. Although the provenance of the shared compact leads to the prediction that it is unlikely to appear in areas outside those that involve common concerns of humanity,[34] within these common concern areas the shared compact is forming an expected baseline of negotiations or behavioral norm.

At first blush, the shared compact appears to hold much promise. It recognizes that it will not be possible to advance on many areas of global environmental policy without some sort of financial redistribution or cost-sharing. In this sense, it affords developing states the leverage to have their voices heard and permits issues of inequalities among states to be addressed. The shared compact may extricate the international community from the cul-de-sac that would arise were Southern adhesion to and compliance with global environmental protection to be left unattained. It creates incentives for developing nations to ratify global environmental treaties and to comply with them in the future. The shared compact melds the question of what to do about the global environment with the reality that someone must pay for what we decide to do. The shared compact creates a mutually understood language, thereby circumventing the apparent incommensurability of the developing world's focus on economics and the developed world's focus on the environment.

But will the innovative shared compact actually promote compliance with international environmental agreements? This Article suggests six research areas—involving efficiency and equity concerns—that need to be explored more thoroughly (perhaps as part of Rio +10?) before any informed predictions can be made

33. Haas, *supra* note 1, at 74.

34. As such, it is unlikely that the shared compact may arise outside of global environmental governance, for example in the areas of international trade law or international economic law.

about the shared compact's success or failure. These research areas are as follows:

(1) Are international environmental institutions properly equipped to supervise the distributive transfers integral to the shared compact and determine whether or not these are effective, satisfactory, and consistent with the object and purpose of the treaty? If these institutions are neither strong enough nor capable enough, there may be limited use in arrogating them this tremendous responsibility.

(2) Among the three policy devices commonly used to achieve compliance with international agreements—sunshine (transparency of information), carrots (incentives), and sticks (sanctions)[35]—does the shared compact rely too heavily on carrots? Might the shared compact, by basing participation in international environmental regimes on the provision of financial and technical carrots, have the perverse effect of incentivizing environmentally-unfriendly behavior among recipient treaty parties so that they receive more carrots? Could environmentally harmful activity then become rational for countries otherwise indifferent to the environment or who have not yet developed an industrial policy? Howard Chang is one of a number of scholars who posits that "carrots only" regimes may in fact create these sorts of perverse incentives.[36]

(3) There is some empirical research substantiating the notion that reliance on distributive transfers stifles environmental movements in the developing world. Writing within the context of negotiation theory, Paul Steinberg remarks that "if negotiators

35. Sunshine methods include monitoring, reporting, transparency, on-site inspections, public access, and NGO participation—all with a view to inducing compliance by threatening to expose non-compliance, thereby tarnishing a country's reputation. Sanctions are coercive measures such as trade penalties, embargoes, legal reprimand, withdrawal of benefits, and other punitive devices. Incentives can take the form of technical and financial assistance, technology transfer, capacity-building, differentiated responsibilities, and preferential treatment. Although the three strategies are often employed in combination, international environmental law has seen infrequent use of sanctions, some use of sunshine, and, increasingly, considerable use of incentives.

36. Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 309 (1997) (responding principally to the GATT Secretariat's recommendation that "countries rely on 'carrots' rather than 'sticks' to induce the participation of other countries in multilateral environmental agreements"); Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995); Michael J. Trebilcock & Robert Howse, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 INT'L REV. L. & ECON. 61 (1996).

from developing countries underscore the growing demand for environmental protection on the part of their citizenry, they weaken their position. Why should donors provide financial incentives to countries that already consider environmental protection a priority?"[37] If the shared compact crystallizes this disjuncture between treaty negotiators and grassroots communities in certain developing countries, then the growth of an environmentally aware and preoccupied civil society may be dampened.

(4) The fourth area of research is closely related to the incipient civil society that is emerging in some developing nations. Providing "carrots" such as financial and technological transfers, although perhaps a necessary condition to building up the capacity to comply with international environmental agreements, may not be a sufficient condition.[38] Pinning hopes on these carrots then may be misplaced. In fact, important research concludes that effective environmental capacity actually requires a reconfiguration of political, economic, and social institutions that includes the creation of domestic bureaucracies, an independent judiciary, a free press, property rights, citizen participation, as well as autonomous relationships between government, business, and civil society.[39] If this is the case, the effective implementation of international environmental agreements may become a task of building democracy. How onerous are these economic costs to developed societies? How palatable? What about political costs to illiberal developing nations?

(5) The shared compact and the "officialization" of North-South distributive capacity-building may distract attention from the need for developed nations to undertake their own substantive environmental control measures.[40] The Kyoto Protocol presents

37. PAUL F. STEINBERG, ENVIRONMENTAL LEADERSHIP IN DEVELOPING COUNTRIES 30 (2001) (discussing the GEF, and observing that as the "GEF funds only those initiatives that are thought unlikely to attract domestic support in developing countries, [this gives] these countries a powerful incentive to downplay their enthusiasm for conservation").

38. For a more detailed explication of this argument, *see* Mark A. Drumbl, *Does Sharing Know its Limits? Thoughts on Implementing International Environmental Agreements*, 18 VA. ENVTL. L.J. 281 (1999).

39. *See generally* NATIONAL ENVIRONMENTAL POLICIES: A COMPARATIVE STUDY OF CAPACITY-BUILDING (Martin Jänicke & Helmut Weidner eds., 1997) (documenting the varying experiences a series of developed and developing nations have had in fostering compliance with environmental obligations); Drumbl, *supra* note 38, at 288.

40. "[T]he need for capacity-building in environmental protection is by no means restricted to the developing world, as the debate up to now has seemed to suggest." Jänicke

an example. The Kyoto implementation process encountered serious difficulties in November 2000, when COP-6 negotiations in the Hague broke down. Even though it was predicted that "[m]uch of the [COP-6] debate hangs on [. . .] how much money [the industrialized world] would be willing to spend to help cash-strapped countries replace outmoded technology,"[41] COP-6 ultimately collapsed because of the inability of the United States, Canada, and Australia, on the one hand, and the European Union, on the other, to agree to methods to curb greenhouse gas emissions, particularly the use of forest sinks to absorb carbon dioxide emissions and whether these absorbed emissions should count toward national emission reduction requirements.[42] Subsequently, in March 2001, the U.S. abandoned the Kyoto Protocol.[43] These debates persisted at the July 2001 Bonn negotiations (COP-6bis) and November 2001 Marrakesh negotiations (COP-7), at which the Kyoto process was salvaged. Although agreement (without the U.S.) now has been achieved regarding emission reduction commitments, generous use of sinks was necessary to secure that agreement, thereby watering down what initially had been agreed upon in the Kyoto Protocol.[44] As such, implementa-

& Weidner, *supra* note 39, at 300. As an important aside, not all environmental problems require a high capacity for environmental protection. *Id.* at 150. As such, might the shared compact also distract from the ability of the South to attack certain problems out of a belief that nothing can be done without a priori transfers? *See* Drumbl, *supra* note 38, at 303. ("[T]he fact that developing nations will not have to implement any of their commitments until there is effective implementation of financial and technical transfer by developed nations ought not to be a license for stagnation and procrastination.") Nor should focus on North-South environmental dynamics distract attention from the fact that there are many important South-South environmental issues as well.

41. *See UN Conference aims at defining greenhouse goals*, THE GLOBE & MAIL, Nov. 10, 2000.

42. *See* Andrew C. Revkin, *Treaty Talks Fail to Find Consensus in Global Warming*, N.Y. TIMES, Nov. 26, 2000, at A1; *see also* Reuters, *Climate Talks Fail Amid Deadlock* (Nov. 25, 2000) (citing a spokesman from Nigeria as blaming the breakdown on the "selfishness and lack of political will among rich nations").

43. *See Bush Firm Over Kyoto Stance*, *supra* note 7.

44. Andrew C. Revkin, *178 Nations Reach a Climate Accord; U.S. Only Looks On*, N.Y. TIMES, July 24, 2001, at A1 (reporting that the Bonn agreement cuts global greenhouse gas emissions by only about a third of the Kyoto goal). The Bonn agreement "allows countries to offset their obligations to reduce industrial pollution by counting the proper management of forests and farmlands that absorb carbon dioxide." Jeff Gray, *Bonn deal will be ratified next year, PM says*, THE GLOBE & MAIL, July 23, 2001. At COP-7 in Marrakesh, Morocco, in November 2001, the FCCC parties agreed on important operational details for the implementation of the Kyoto Protocol. On the issue of "sinks," the parties agreed to discount the use of forestry credits and limit the banking of credits for future commitment periods. COP-7 may have assuaged the fears of some that too active a use of sinks would empty the

tion difficulties in the developed world prompted a renegotiation of the Kyoto commitments and their attenuation, not only through the use of credits for sinks but also through vigorous institutionalization of flexibility measures, such as markets for emission credits, joint implementation, and the Clean Development Mechanism. And, notwithstanding these abatement attenuations, the ratification process in the developed world remains very slow, such that there is at best an outside chance that the Kyoto Protocol will enter into force by Rio +10.[45] Nor have the events of September 11, 2001—which tragically exposed the mutual vulnerability of individuals in a globalized world—prompted a renewed multilateralism on the part of the U.S. regarding issues of global environmental concern, in particular global warming, that also are characterized by a deep-rooted interdependence.[46]

(6) By basing the level of transfers on the amount of biodiversity, greenhouse gas emissions or ozone depleting capacity of developing nations, those nations that do not threaten the common concern of humanity in these areas may fall further behind in terms of economic development. Although all shared compact transfers are to be additional to extant foreign aid,[47] if the shared compact addresses only global harms, this means that the most

Protocol of much of its substantive content. However, on the other hand, COP-7 saw the Russian Federation nearly double its ceiling for forest management credits. Japan is expected to purchase these credits. Although this may be an inducement for Japan to commit to the Protocol, excessive use of credits and the ability of nations to purchase these means that purchasing nations do not have to reduce as many of their own emissions. In this regard, the effectiveness of the regime depends on the baseline that is used to determine the number of credits for sinks (as well as the baseline used to determine number of permissible emissions).

45. *See, e.g.*, *Anderson Welcomes Bush Global Warming Intiative*, THE GLOBE & MAIL, Feb. 14, 2002 (reporting that Canada is wavering on its promise to ratify the Kyoto Protocol by the end of 2002).

46. Pekka Haavisto, *September 11th and Johannesburg 2002: Are there implications of the new U.S. foreign policy for the global environmental politics?* (draft manuscript, on file with the author). Official U.S. policy towards Kyoto shows no sign of détente. *See also* Haas, *supra* note 1, at 87 (concluding that the U.S. "appears to be developing a new global diplomatic posture of skeptical multilateralism" and citing the abandonment of the Kyoto Protocol as an example).

47. *See, e.g.*, FCCC, *supra* note 15, art. 4(3); Montreal Protocol, *supra* note 10, art. 10(1); CBD, *supra* note 16, art. 20(2) (providing for "agreed" full incremental costs); *see also* Philippe Cullet & Annie Patricia Kameri-Mbote, *Activities Implemented Jointly in the Forestry Sector: Conceptual and Operational Fallacies*, 10 GEO. INT'L ENVTL L. REV. 97, 102, 105-106 (1997) (finding that funding for joint implementation activities under the FCCC should be additional to pre-existing developed nation commitments under the FCCC as well as current flows of official development assistance).

severe local harms may lie unaddressed. Since these generally occur most harshly in the poorest countries with the least infrastructure, the development gap among developing countries might increase, with the poorest falling further behind in terms of relative deprivation. The development gap also may increase through the tendency among donors to favor those developing nations with the best developed regulatory and market institutions, as the transaction costs of financing in those countries are lower than in countries where such institutions are poorly developed.[48]

VI. CONCLUSION: TOWARD A NEW IMPASSE?

This Article postulates the emergence of the shared compact—an innovation in international environmental governance. The shared compact provisions draw from self-interested as well as principled motivations, and may represent a codification, normalization, or even legalization of the provision of incentives as a condition precedent to ratification, compliance, and the adoption of substantive environmental abatement commitments by developing nations. As such, the shared compact may well represent a "moment" in international environmental governance. The North has recognized that implementing major environmental treaties will impose economic, social, intergenerational, and political burdens on many developing countries. Recognition of this reality has stimulated the emergence of a dynamic between North and South in which these burdens are presumptively to be shouldered by the North, although the exact extent of the shouldering awaits definition. Developing nations have successfully employed their negative power—the power to deny the regime its objectives—to extract distributive concessions from the North. This has prompted international environmental governance to progress along a continuum: going from voluntary, discretionary assistance to help implement, to commitments to provide assistance, to an obligation to provide assistance, to an obligation to provide assistance of which a material breach might release developing nations from treaty compliance or participation. The shared compact is the latest point on this continuum. Although the selfish justice ra-

48. *See* Kal Raustiala & David G. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 675 (David G. Victor et al. eds., 1998).

tionale that creates the shared compact likely means it will remain geographically limited to common concern issues, within these issues it will have an important role.

There is a need for additional research regarding the changes that may be wrought by the shared compact and how these can promote equity as well as efficiency. There is some cause for concern insofar as the shared compact actually may not promote treaty compliance. But the problems with shared compact governance may go beyond treaty compliance. The shared compact and its institutionalization also may affect treaty formation. The present costs of implementing the shared compact, namely financing developing nation commitment to the shared compact treaties, are very high. As the amplitude of these costs becomes better appreciated, the political will to make distributive transfers in the developed world, especially in the United States (where this will already is tenuous), may erode.[49] Accordingly, if the shared compact is the only way to secure developing nation participation in global environmental treaties and becomes a norm of international environmental law-making as such, but there is little political will domestically in the developed world to implement the treaties that have been hectored out of a shared compact bargain, is the global community then headed to a new impasse? What, then, can be said of the success of this new innovation of international environmental governance?

As the distributive ante increases, the political willingness to address global environmental problems may wane. Should the costs of developed nation participation in international environmental agreements become perceived as too onerous, then the shared compact may create a new impasse whereby the developed world becomes reluctant to sign international environmental treaties or these treaties, even if signed, lack the political will to become ratified domestically in developed nations. This could lead to the adoption of fewer or weaker international environ-

49. *See, e.g.*, Sander M. Levin, *Why Fast Track Failed*, WASHINGTON POST, Nov. 24, 1997 ("The proposed global warming treaty . . . would require industrialized, but not developing, nations to reduce carbon dioxide and other 'greenhouse' gases. The U.S. business community and others have argued correctly that this would give developing countries an unfair competitive advantage."); Letter from the President, George W. Bush, to Senators Hagel, Helms, Craig, and Roberts, *reprinted in* 31:2 ENVTL. POL'Y & LAW 122 (2001) ("[I] oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance . . . .").

mental treaties, or continued stagnation in those treaty regimes that already exist. By linking issues such as climate change with financial redistribution, a situation may arise in which the costs of compliance to present generations in the North will outweigh any value attributed to the negative environmental externalities of present and future developing nation industrialization. It would only be in cases where the present costs to present generations were so high (i.e. impending catastrophe substantiated by uncontroverted scientific evidence) that the North might agree to such governance regimes. In the end, the global community's embrace of multilateral solutions to transnational environmental harm, and the successful coupling by developing nations of this governance to financial redistribution, may be but short-lived. This might presage the demise of the post-Cold War era's flurry of precautionary environmental multilateralism that embedded norms of cost-sharing into the structure of negotiations. Discussions at Rio +10 could provide a bellwether for these longer-term developments.