



# Climate justice and the international regime

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Contestations over justice and equity in the climate regime provide the most striking evidence of the quest by relevant actors to ensure that institutions for global environmental governance are based on widely shared ethical standards of responsibility and fairness. This review article examines recent policy debates and literature on distributive justice and the climate regime and highlights some areas of key research. The review indicates that while discussions on climate justice have gained ascendancy within the international regime circle with noticeable impacts, a lot remains to be clarified about the status of justice concepts and how to best design policies that reconcile moral ideals and power politics. Hence, although the current regime performs well in terms of recognizing the need for and incorporating concepts of distributive justice between the rich and poor countries, it has not provided a basis to sufficiently upset the underlying forces and abiding structures of global inequality. © 2010 John Wiley & Sons, Ltd. *WIREs Climate Change* 2010, 1, 462–474

Climate change has thrown up questions about the nature and ethical basis of international political institutions 'in ways that have never been faced'.<sup>1</sup> Contestations over justice have been one of the most prominent features of the international climate regime. Similarly, competing claims over how policies may be designed to realize these ideals constitute some of the principal challenges facing global climate governance.<sup>2,3</sup> Climate justice has also provided the impetus for the most recent intense and widespread academic engagement with the ethical issues associated with interstate relations and the international regime.<sup>4,5</sup> However, while demands for scholarship on climate justice represent significant aspects of the global climate governance landscape, much still remains to be done to clarify the status, implications, and best approaches for climate justice within the context of the international regime.

This review article examines recent policy debates and literature on justice and the climate regime and highlights some areas of key research. The review touches on various kinds of justice issues (distributive, procedural, retributive, and systemic) in both inter- and intra-generational perspectives. However, the term distributive (or distributional)

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sake space turns on intragenerational equity which speaks to justice between nations in the here and now.

## (IN) APPLICABILITY OF JUSTICE IN INTERNATIONAL REGIMES: AN ANACHRONISTIC DEBATE?

Traditional approaches to the study of regimes reject the notion that distributive justice is applicable in institutions for international cooperation.<sup>9,10</sup> Scholars have defined regimes as a 'set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge'.<sup>11</sup> However, they caution that norms as used here must not be understood as capable of 'generating obligations that are morally binding regardless of considerations of narrowly defined interests'.<sup>12</sup> Instead, norms and principles, on this frame, are to be understood strictly in the deontological sense, that is, as referring to minimal rules of reciprocity, coexistence, and standards of behavior defined in terms of rights and obligations. On this 'formalistic'<sup>13</sup> and 'contractual'<sup>14</sup> perspective, regimes are construed simply as intervening variables that provide the means for rational or interest-maximizing state actors to stabilize expectations, decrease transaction costs, and seek Pareto-optimal solutions to collective action problems.<sup>15</sup>

Realists and several neoliberal functionalists insist that 'justice in international politics' is 'an oxymoronic expression'<sup>16</sup> since states are basically egoists always seeking to maximize their individual utilities in an essentially self-help environment. They tend to deny any such thing as the international society understood in the 'deeper sense of a society in which members share values about the ends that communities ought to try and achieve'.<sup>17</sup> Moreover, the notion of international justice is dismissed as the woolly and 'a meaningless concept',<sup>18</sup> which merely serves as a cover for self-interested bargaining. Now, rational choice theorists are clear that they are neither against caring for the marginalized nor against strong environmental protection. Instead, they maintain that their approach is guided by how things *actually* work rather than how they *ought* to work.<sup>19</sup> Some even suggest that questions of justice and equity in regimes are potential distractions that can delay or derail effective climate change agreements.<sup>20</sup> Others claim that rational choice approaches can actually benefit weaker states and social groups. Ridely and Low,<sup>21</sup> for example, argue that moral exhortation designed to get states to sacrifice for the sake of humanity and the environment is 'utterly at odds with conventional wisdom and incapable of saving the environment'. They suggest that to avert the disaster of global

warming states would need to 'tap from the boundless and renewable resource: the human propensity for thinking mainly of short-term interest'.

Recently, however, the 'realists and neoliberal institutionalists' assumptions have been vigorously challenged by a body of works from 'globalists' and constructivist scholars who have been clearly motivated by policy debates within the regime development arena.<sup>22–24</sup> These scholars argue that although international institutions 'continue to constitute a deformed political order', they are, nevertheless, arenas where 'various conceptions of what the good life entails can be brought together and reconciled'.<sup>25</sup> Constructivists argue, contrary to the rational choice hypothesis, that norms have independent causal effects in international politics. They also assert that the outcomes of climate negotiations cannot be explained based on power and material interests alone.<sup>26,27</sup> Regimes are therefore conceived, on this frame, as intersubjective phenomena which shape and reflect underlying social expectations of the international community. Here, it is also emphasized that global environmental diplomacy is by no means the exclusive preserve of state entities but rather a process which is heavily influenced by a host of nonstate actors such as businesses and civil organizations. Moreover, statesmen and these other autonomous actors are not 'abstractions or fictitious personalities'<sup>28</sup> but individuals who are making choices on behalf of their constituencies; it implies that both actors and regimes are ultimately circumscribed by and subject to the influence of the broader normative context within which negotiations occur. In other words, ethics and questions of justice are not intrinsically 'outside' of the international realm but rather intrinsic to existing political practices. And if so, then questions of justice are 'a theoretical priority that can only be discounted by taking unreasonably strong positions in longstanding debates of philosophy and social science'.<sup>29</sup>

On the charge that justice is a woolly concept and a mere cover for self-interested bargaining, globalists often reply that men have never needed an elegant definition of justice in order to appeal for a just treatment. They also point out that appeals for justice do not immediately dissolve into pure rationalism if part or the whole of it is identified as serving the interest of the appellant. Rather, what is required is an assessment of the merits of the argument, which in turn must be based on shared social values and the overarching, normative structure of the society. The point here is quite simple that although moral concepts might be particularly notorious for their 'malleability', they do not necessarily translate to words of 'inconstant signification' for otherwise, the

entire notion of morality would collapse.<sup>30</sup> Indeed, as Walker and Bulkeley<sup>31</sup> point out, notions of environmental justice have been deployed at both national and international levels more as an instinctive gut reaction to 'perceived injustice, as judged through observations of unreasonable inequality in outcome and lack of "fair treatment" than as closely argued concept.

In one of the earliest contributions entitled *Who bears the burden: equity and allocation in greenhouse gas abatement*, Grubb et al.<sup>32</sup> clearly recognize the dual character of equity arguments in international climate institutions. They argued that while equity arguments may well be 'important as tactical instruments in negotiations, they also have an intrinsic role and impact on the structure of agreements'.<sup>33</sup> Shue<sup>33</sup> in a seminal contribution appropriately entitled *The unavailability of justice* argues that questions of justice are not external to the international negotiation on climate change on three grounds. First is that the negotiations necessarily involve state parties that coexist under prevailing conditions of 'background injustice'. Second is that the 'rich nations have caused, albeit unintentionally, the impending harm that cooperation attempts to prevent'. And third is that avoiding questions of justice would ultimately result in the poor nations having to sacrifice their vital interests—survival interests in order for the rich nations to avoid sacrificing their trivial interests.

Many other scholars have, on the basis of similar arguments and by pointing to incontrovertible examples from policy debates, dismissed the argument that justice does not apply in regimes as stale and anachronistic.<sup>34,35</sup> These authors argue that in so far as climate negotiations do not occur in a social vacuum, the idea that justice issues can be divorced from the process is a crass absurdity mooted by the perpetrators and beneficiaries of the existing inequitable international system. Many observers would indeed agree that the debate has since moved on to identifying the various dimensions of climate (in) justice in regimes and the best means of addressing such inequities. That said, the need for more in-depth understanding of the moral limits and possibility of international institutions<sup>36</sup> remains a very vital area of academic inquiry.

## DIMENSIONS OF JUSTICE IN THE CLIMATE REGIME

In the climate debate, justice concern is rooted in the immense differences in countries' historical and projected contributions to global greenhouse gas emissions, their vulnerability to climate change, and their ability to bear the costs of mitigating or adapting to climate change. These concerns are exacerbated

by the fundamental difference in the balance of power between the developed and the developing countries which raises the distinct possibility that 'the more powerful countries can, in principle, use their greater influence to define international positions convenient to them'.<sup>5</sup> Generally, while the majority of the accumulated global stock of greenhouse gases has arisen from the industrialized world, it is the developing countries that are likely to suffer the most from the negative impacts of climate change. Climate change thus effectively implies the rich imposing costs on the poor. Complex ethical questions over intergenerational equity (generally sidestepped in this article) also arise because the future generations that will be the most affected by climate change are not able to participate in present-day decision-making processes. On the other hand, the time-lag between emitting Green House Gas (GHGs) and the experience of their ultimate effects means that today's generation is being asked to make sacrifices in order principally to benefit future generations.

In the literature, there is a wide range of different classifications of the 'domains' or 'dimensions' of justice implicated in the climate regime. In early debates, the question was formulated basically in terms of burden sharing—how to allocate responsibility and resources for greenhouse gas emission abatement costs. Till date, majority of the economist contributions continue to adopt this narrow approach, the favored formulation of majority of the economic contributions to the debate.<sup>37</sup> For some scholars,<sup>38,39</sup> questions of justice in the climate debate resolve along three elements: compensation for past harm (*compensatory justice*), distribution of future and present responsibilities (*distributive justice*), and adoption of fair procedures and inclusive framework in the process of reaching decision making (*procedural justice*). Yet, the list of dimensions of climate justice has since expanded with Parks and Roberts<sup>40</sup> identifying '10 layers of climate injustice' in which the international regime ought to address. Nevertheless, the most popular classification in the literature and policy debates draws from the works of Henry Shue.<sup>33,41</sup> Here, the composite climate justice concerns in the climate regime is distilled into the following four distinct dimensions.

### Mitigation and Burden Sharing

To stand a realistic chance of avoiding dangerous climate change, scientists suggest that global emissions would 'need to peak before 2015 and be reduced by 50–85% of 2000 levels by 2050'.<sup>42</sup> Such a level of stabilization requires enormous sacrifices from states

especially given the intimate link between carbon emissions and economic growth. The question is how the climate regime should seek to distribute the risks, cost, and benefits of this burden among individual countries—both immediately and on the long run—especially given the significantly different degrees of responsibilities in terms of both current and historical carbon emissions. Overall 'the richest 20% of the world population is responsible for over 60% of its current emissions of greenhouse gases and over 80% if past contributions are added'.<sup>40</sup> Developing countries are adamant that the rich countries should take the lead in cutting emissions since they are mostly responsible for the historical stock of CO<sub>2</sub> that is causing climate change. They insist that their priority is how to provide the basic needs of life for their teeming populations that are currently living in abject poverty. The rich countries on their own part regularly argue that since the climate change implications and harmful effects of carbon emissions were not widely known during the industrial revolution, it would be unfair to hold the present generations responsible for the 'sins' of their forefathers. They suggest that it would be much fairer to allocate responsibilities based on current emissions in which case rapidly developing and populous countries like China and India would be expected to undertake deep emission cuts. A great deal of scholarship and policy debates has focused on the ethics of both positions and the burden sharing criteria that might provide a basis for the equitable sharing of carbon reduction commitments between countries within the climate regime. To this effect, one or a combination of the following has been mooted: equal entitlement for each country; polluter pays principle, historic responsibility, land mass, population/per capita, Gross Domestic Product (GDP), willingness to pay, basic needs, comparable burdens, and 'grand fathering' or status quo.<sup>32</sup>

### Impact and Adaptation

Regardless of the stabilization efforts of states, the world is already committed to some unavoidable consequences of climate change. Indeed, the evidence suggests that millions of people all over the world, especially those in developing countries are already suffering severe consequences of climate change.<sup>43</sup> Some of the most significant effects include droughts, failing crop yields, flooding, diseases, and death. The United Nations Convention on Climate Change (UNFCCC) estimates that between \$50 billion and \$170 billion per annum (in current values) will be needed by the year 2030 to help developing countries adapt to climate change. Policy makers have agreed

that international deal for climate change should give serious attention to adaptation but deciding how to deal with the social justice aspects of adaptation to climate change remains a very major issue in the climate debate. Developing countries argue that funding for adaptation should not be about handouts but a form of compensatory finance owed by the richest and highest-polluting nations to the most vulnerable communities and countries that are bearing the brunt of impacts of climate change—now. As the argument goes, the rich countries have a moral obligation to pick up the bill for adaptation in accordance with the polluter pays principle—an ethical basis for environmental policy making widely applied in developed countries. But while developed countries have generally tended to recognize the vulnerability of poor countries to climate change, they have been very reluctant to accept culpability or commit the required amounts to fund adaptation. They insist that the ground for compensatory justice is extremely weak given the difficulty, perhaps the improbability of establishing clear lines between cause and effect. Moreover, the rich countries also keen to ensure that proper distinction is made between the small climate vulnerable developing countries and big rapidly industrializing developing countries in the disbursement of the Adaptation Fund. This is fuelled by a growing suspicion that in contrast to some smaller countries that have a genuine urgency to enhancing adaptive capacity, some of the more technologically advanced developing countries could be attempting to use adaptation as a route to the compensation debate.<sup>44</sup>

### Procedural Justice

It is a popular belief that there is a close connection between fairness of an outcome and the legitimacy of the process by which it is determined. Hence, if distribution of the costs and benefits of climate change is to be fair, it must proceed from a process that is agreed by all parties. Specifically, those who are affected by key decisions should have some say in how such decisions are made. Despite the elevation of certain 'methods and prescriptions in our epistemologies'<sup>45</sup> and the increasingly 'scientized veneer'<sup>46</sup> of modern climate debate, it is well known that decisions on targets, metrics, emission counting methodologies, and reporting systems all involve both technical and political considerations. Hence, figuring out how to ensure broad and effective participation of all countries in the decision-making process represents another important dimension of justice in the climate regime. Incidentally, this topic has not received adequate attention in the literature. While the issue of stakeholder involvement in environmental decision making

has been widely studied in the developed countries, very little exists in articulate form on the subject of quality participation or the impact of procedures and rules of negotiation on regime outcomes.

### Systemic Injustice

There is a perception, especially among developing countries, that there is an abiding systemic bias in the international system (in terms of rules, access rights, terms of trade, etc.), which reflects historical patterns of inequity between the political North and South.<sup>47</sup> For a long time, the clamor from developing countries for a just international system took the form of calls for better terms of trade and a New International Economic Order (NIEO). Now, questions are being asked as to what extent background injustice causes vulnerability to climate change and what options there are for addressing these issues through or in conjunction with the climate regime. Since the inception of climate negotiation in late 1980s and early 1990s developing countries has long seen the link between climate change and broader issues of sustainable development and has always insisted that these have to be negotiated as a package.<sup>48,49</sup> But few in the developed countries wish to bring in terms of trade and issues of debt cancellation into the climate debate. The question of what should be the appropriate ambition and objective of the convention remains a very contentious one till date with some arguing that a narrower focus or a small number of countries are a necessary precondition for getting an effective climate deal. Others are, however, pressing for a much broader convention with clear links to other issues like trade, biodiversity, and international property rights regimes.<sup>50</sup>

### PRINCIPLES OF JUSTICE IN THE CLIMATE REGIME

Following the widespread concern for justice in the climate regime and the articulation of the various domains in which such concerns apply, significant literature has focused on possible rules or justice principles for distributing costs and benefits within the climate regime. Climate justice literature presents several typologies of justice conceptualization that figure in the regime development debates and parity proposals. To further complicate issues, the majority of these typologies are organized differently and operate at different levels of generality,<sup>51</sup> thus giving rise to conceptual pluralism. For example, while some are broad 'pure' conceptions of justice (e.g., liberal egalitarianism), others are simple burden sharing criteria (e.g., comparable burden), which in theory

could be underwritten by a number of different justice theories.<sup>52</sup> Another result is that the list of justice ideas and conceptions range from 2 'basic rules'<sup>53</sup> to 13 'acceptable', allocation rules'.<sup>54</sup>

Noting that scholarship had been dominated by concern with mitigation and emission allocation sharing, a number of scholars<sup>55</sup> highlight the social justice dilemma in the context of adaptation. They give prominence to the justice of funding adaptation activities in developing countries and how the burden may be distributed among developed countries. Here, the principle of compensatory justice which, in essence, is a form of polluter pays is suggested. The second is the justice of distributing funds for adaptation among poor countries in which case the criterion of social vulnerability is mooted. Finally, they emphasize questions of procedural justice in terms of decision making at the international, national, and local levels. While not denying the importance of procedure and compensation, some have argued that the central focus of justice is always the end distribution and that the both compensation and procedure are relevant only as a means of achieving desired outcomes. Following this line of thought, I have not included transparency and inclusiveness as independent or distinctive equity principles in the table below.

Indeed, in my view, there are probably eight distinct (yet overlapping) positions that figure regularly in literature and policy debates. These (and their short interpretations) are presented in Table 1.

The first thing to observe from the table above is that discussions on justice principles in regimes have focused more on narrow burden sharing rules and not rooted in broader traditions of justice. This bias, in the view of Matthew Paterson,<sup>52</sup> has much to do with an 'overriding concern for an effective regime rather than a primary concern with justice for its own sake'. In other words, while many scholars start with the assumption that climate regime needs to be just in order to be effective, much of the analysis going forward concentrates on 'questions of short-term practical politics rather than justice'. Following Paterson, many commentators have developed broader theories of climate justice with an eye to how they relate the more technical rules put forward regarding justice and global warming.<sup>56,57</sup> However, much these offerings continue to be framed in terms of 'ameliorating and overcoming—rather than contesting and problematizing—the parameters of anarchy and sovereignty'.<sup>58</sup>

Second, it is interesting to point out that a number of scholars have observed that states actually seldom make any mention of specific justice principle in their proposals and policy debates. Nor do they

**TABLE 1** | Equity principles and their interpretations.

Equity Principle	Interpretation and Burden Sharing Rule
Equal per capita entitlements/egalitarianism	Emission entitlement divided equally among world population
Sovereign equality	Equal entitlement and burden for each country
Status quo/ grandfathering	Share emissions and burden in reference to relative emission levels between countries. Historical or current emissions constitute 'squatter rights'
Basic need/max=mini/subsistence emissions	Allocate rights to survival emissions and share remaining burden to benefit the least well off
Property rights/market justice	Create tradable permits to achieve lowest net world cost for abatement
Polluter pays/historic responsibility	Allocate abatement burden corresponding to current (and historic) emissions
Mutual advantage	Allocate benefits and burden in terms of agreements that have positive net benefit for all
Kantian allocation rule	Countries chose abatement levels at least as large as the level they would like countries under comparable situations to undertake

Source: adapted from several of the references cited in this article.

explicitly seek to ground their demand for justice in scholarly theoretical frameworks. The polluter pays principle, common but differentiated responsibility, historic responsibility, and per capita emissions get mentioned quite frequently but no government has yet bothered to provide a detailed definition of these terms or tie them to broader conceptions of justice. Indeed, recent works<sup>59</sup> have shown that in many cases, states' positions and proposals often contain an allusion to a number of different, even conflicting principles of justice. One notable effect of this is that despite the growing clamor for justice in the international regime, the normative landscape remains very messy and unwieldy.

One key insight that has emerged from all this though is that many commentators now accept that only a pluralist framework could provide the basis for parties to seek a just solution to climate change at the international level and that no single principle can meet the full range of requirements. It is suggested that

in order to be acceptable to a critical mass of parties a burden sharing scheme will have to combine two or more principles of fairness. Critically, Ringuis et al.<sup>60</sup> argue that widely acceptable approaches are those that combine responsibility, capacity, and need in one form or the other. If this observation is correct, it would lead to the extremely important conclusion that *responsibility, capability, and need* constitute the normative core of the international community. However, a number of critical works<sup>61,62</sup> have argued that there is a deep abiding tension between the normative essence of global sustainable development and the international climate governance system. They argue that while the notion of global sustainability implicates the ethics of need, care, and community, the current global climate system remains rooted in property right and market ideas of justice which favor the powerful players. It is suggested that this hegemonic order is what ultimately 'trumps' or at least severely dilutes the radical visions of climate justice within the existing regime. This criticism will appear fair when one examines more closely how the existing climate change regime has so far handled issues of distributional justice.

### HOW DOES THE EXISTING CLIMATE REGIME HANDLE QUESTIONS OF JUSTICE?

The climate regime has attracted both lofty praise and severe criticism from all sides over how it handles questions of justice both in the UNFCCC and the Kyoto Protocol. Many in the developed countries, especially the United States say the regime is unfair because it panders too much to the demands of the G77 and China. Some specific points are that: (1) division into Annex A and Annex B countries in the Kyoto Protocol is arbitrary; (2) big developing countries like China and India have no reduction commitments; (3) the regime fails to deal with the issue of tropical deforestation; (4) the regime imposes disproportionate blame and cost on developed countries.<sup>63</sup>

Developing countries have also criticized the regime for how it deals with the issue of justice although it is probably fair to suggest that they have been the happier of the two political regions. Perhaps the clearest indication of this is that in the run up to the Copenhagen conference the developed countries fought hard for the Kyoto regime to be 'killed' and replaced with another regime while the developing countries insisted that future global climate regime must build on and recognize the key elements of the Kyoto accord. That said, the criticisms of the developing countries often relate to the regime's:

(1) over reliance on market instruments; (2) poor funding; (3) avoidance of the issue of compensation; (4) inattention to historic responsibility; (5) complex methodology for accessing funds; (6) lack of attention to adaptation; (7) lack of transparency in decision-making procedure, (8) lack of inclusiveness and opportunity for participation; (9) lack of attention to the need of developing countries for capacity building.<sup>64</sup>

In the literature, there is a broad consensus, that as far as the primary texts or stated norms are concerned, equity is at the heart of the climate regime. Scholars mostly observe that Parties agree in the text 'to protect the climate system for the present and future generations on the basis of equity' (Article 3.1). The developed countries are directed to 'consider the needs and specific circumstances of developing countries'. Cooperation is premised on the basis on the common but differentiated responsibility principle. References are made to per capita emission and historic emissions [Preamble, Article 3 (1 and 2); Article 2 (4 and 8)]. Developed country parties are expected to take the lead in modifying their long-term emission trends and to provide financial assistance to the developing country parties [Article 4 (1–10) (5c) (7b)]. The industrialized countries are required to 'take all practical steps to promote, facilitate, and finance the transfer of environmentally sound technology and other resources to the developing countries' (Article 2.5). And, 'the extent to which developing country parties will effectively implement their commitment under the Convention will depend on the effective implementation of the developed country parties of their commitment under the Convention related to financial resources and transfer of technology' (Article 2.7). Indeed, some commentators have gone as far as suggesting that all provisions of the convention and decisions made under it have justice implications'.<sup>65</sup>

However, while the centrality of equity in the texts of the climate regime is recognized, it has also been widely noted that there is a big disjoint between the emphasis given to equity in the climate regime documents and how the climate change actually handles issues of justice in practice. Ashton and Wang<sup>66</sup> express the sentiment well saying that while equity is regularly invoked in the climate regime, 'outcomes in the real world reflect the practical choices of governments, politicians and others who shape their opinion'. However, for critical scholars,<sup>67–69</sup> it is not so much about the practical choices of governments but more about the overriding commitment to the neoliberal philosophy with its emphasis on market liberalization. The hegemony of neoliberalism, it is said, limits the policy space and

makes the pursuit of justice conceived in radical terms practically impossible. For example, the prevailing thinking during the early days of its development was that the international climate regime would sanction large scale North–South financial transfers as a precondition for justice and the cooperation of developing countries. The developing countries had made it clear that any financial commitment from the South would have to be written off by the North and that such 'cheques' would have to be different and 'additional' to any transfers that currently took place under existing agreements. And, many of the forward-looking industrialized states had consented that 'all signatories should accept binding commitments, while acknowledging their need to 'assist' developing countries to fulfill their commitments'.

Following this sentiment, a number of scholars provided calculations and estimates of the amounts that might be needed to secure and maintain international climate cooperation. Grubb et al.<sup>70</sup> suggested that at the price of US\$20/tonne of carbon, North–South transfer would equal about 0.42% of Gross National Product (GNP) for the United States and around 0.16% of GNP for the rest of the Organization for Economic Co-operation and Development (OECD) countries up from up until about 2025. Hayes<sup>71</sup> calculated that under high abatement cost scenario, developed countries owe the developing countries a natural debt of about US\$529 billion, payable by an annuity of about US\$34 billion over a 30-year period. Grubb<sup>72</sup> estimated that an annual North-to-South transfer of about US\$100 billion is required as just compensation for the burden imposed on them as a result of climate change. However, only little if any of the stated ambition regarding North–South financial and technology transfers has been given expression in real life in the over 20 years that the regime has so far existed. This is probably due to the fact that while the regime incorporates provisions for technology and financial transfer, it is mute on the ethical basis on which such transfers are grounded—whether based on reification of justice, the right to development, historic responsibility, or aid and charity. It is not, therefore, surprising that as the negotiation of the post-Kyoto agreement gets under way, the big questions have been about how to translate the lofty intentions continued in the regime texts into practice—in ways that broadly satisfy the demands of both the developed and the developing parties. One way of doing this, is through the use of innovative concepts and policies. In the next section, I will examine the key concepts and policies that have characterized the debate and the 'battle' around their interpretation and application.

## MOBILIZATION OF JUSTICE AROUND KEY CONCEPTS AND POLICIES IN THE CLIMATE REGIME

As stated, the climate regime does incorporate quite a lot of justice-inspired provisions, policies, and institutions. The common but differentiated responsibility principle is clearly the most important equity concept in the climate regime.<sup>73</sup> Other key concepts include the notion of per capita and historic emissions. In terms of policies, some of the most significant include the differentiation among countries and the exemption of the developing countries from quantified emission reduction obligations, provisions for technology transfer, capacity building and adaptation funding, and the clean development mechanism (CDM).

In the literature and policy debate, a lot of attention has focused on the ways in which principles of justice have been mobilized around these concepts and policies, their moral grounding, practical impact as well as the factors that affect their institutionalization. More recently, in the run up to a post-Kyoto conference, a lot of commentaries have emerged on the possible options for their reforms. Three different views can be detected among commentators on the practical impact equity concepts and policies in the climate regime.

The first are those that tend to reject these concepts as meaningless with a call that they should be abandoned, if not expunged from the regime texts. One example is Binaz<sup>74</sup> who argues that the Common but Differentiated Responsibility (CDR) is 'neither necessary nor helpful' but only serves to 'breed laziness in the negotiation process'. The second are those that insist these concepts are fit for purpose and as such provide a solid basis for equitable cooperation between the rich and poor countries.<sup>75</sup> These scholars tend to criticize the west for trying undermine the uniqueness of these concepts (and the policies they generate) as a means avoiding their responsibilities in the climate regime. The third are those who tend to tow the middle ground—adopting a posture of cautious optimism.<sup>76</sup> They argue that while these concepts represent unique products of the previous climate bargaining, greater effort is now required to clarify what these terms mean and the specific responsibilities they generate. Stone,<sup>77</sup> for example, argues that while the CDR and its close cognates might be helpful in securing an agreement, its meaning and moral grounding are vague and problematic. Matui<sup>78</sup> emphasizes the dual grounding of CDR, the one which emphasizes culpability and the other which stresses assistance based on the superior technical and financial resources of developed countries and their stronger leverage to act. He says the CDR is therefore an ambiguous term

which lends itself to different interpretations of justice and as such allows both the developed and developing countries to claim allegiance to the principle with enormous variations in form and effect. Critically, a major outcome of this ambiguity is that the CDR has been more or less emptied of its more radical content and now serves as a platform for voluntary actions based on self-defined national capacity. One source puts it well, saying that 'in sum, CDR has been operationalized more in line with capacity than historical responsibility, rationalized with the rhetoric of aid, voluntary action, and market efficiency, rather than in line with responsibility, liability, guilt, or debt'.<sup>8</sup>

The other two concepts—per capita and historic emissions—are equally beset with ambiguities and controversies. The concept of per capita carries enormous intuitive appeal as it recognizes the equality of all human lives which sits at the heart of many theories of justice. It also provides moral grounding for subsistence emission rights, meeting needs, and contraction and convergence. But it has been considered a political nonstarter since it will generate massive obligation for the industrialized countries. The per capita also implicates highly emotive issues especially around population growth. Like the per capita, historical emission was mentioned only once (the preamble) in the UNFCCC but has continued to figure strongly in literature and policy debates. But despite the effort of Brazil and the technical body of the UNFCCC issues around methodology for calculating historical contributions has continued to diminish its potency as a tool for elaborating burden sharing rules under the regime. It is probably fair to say therefore that one of the greatest challenge facing commentators and policy makers relates to how best to provide conceptual clarity to equity concepts in regimes terms and how to translate the concepts into practical policies that bridge the gap between moral ideals and political realities.<sup>79</sup>

It has generally been assumed that the division of countries into Annex 1 and non-Annex 1 countries in the UNFCCC is based on the CDR but as the discussion above has suggested such an assumption is technically very problematic because while the division generated differential obligations the specific justice criterion/principle upon which this is based remains unclear. For example, some have argued that rather than reflecting culpability and historical responsibilities the division was partly arbitrary and partly based on grandfathered emission reduction levels.<sup>80</sup> There is now a growing sense that the current division into two blocs of countries does not provide a fair basis for a just future international climate regime. It is frequently observed that the G77/China

comprises states with massive differences in wealth, socioeconomic conditions, and emission profile. Following, a number of scholars have suggested combining different criteria such as total national emissions, per capita emissions, and per capita GDP in deciding how countries might be divided in the post-Kyoto climate treaty.<sup>81</sup> But until a clear and robust set of justice principles is agreed, such a move might well introduce greater complexity in negotiations.

Debate on technology transfer focuses on the remit and mandate of existing enabling institutions, especially the Expert Group for Technology Transfer (EGTT), the funding mechanism, and their method of operation. Developing countries are of the view that the relevant institutions and policies have had a very minimal impact in helping them gain access to climate friendly technologies. They recommend a serious overhaul including the establishment of a Multilateral Technology Acquisition Fund (MTAF) to sponsor joint research and the development of environmentally friendly technologies and the development of clear indicators that would aid the monitoring and assessment of the implementation of the technology transfer framework. Such a fund which is said to be more consistent with distributive equity and compliance based on historical responsibilities. However, developed countries now appear to be backtracking in their commitment on technology transfer claiming that the protection of Intellectual Property Rights (IPR) is crucial to encourage sustainable enterprise and innovation. They, however, claim a willingness to facilitate the transfer of technology by encouraging private investments and public-private partnerships in ways that are align with market competition and justice as property rights.<sup>82</sup>

After many years of neglect, adaptation has now probably gained its deserved place in the international regime agenda but, as always, controversy and doubt hang over relevant policies and institutions. The key questions have centered on who will hold the purse, what is the money to be spent on, and who is going to pay how much.<sup>6</sup> It was recently agreed that the Fund will be replenished through a 2% levy on the Kyoto Protocol CDM but the voluntary nature of the CDM projects implies that the Adaption Fund is not strictly speaking based on polluter pays or historical responsibility. Even so, a number of conservative Northern countries have expressed concerns over the possibility that the Southern countries could be seeking to get their national development bankrolled by the North under the guise of an adaption fund. They continue to favor financial aid based as closely as possible on the CDM model and channelled through

established agencies like the World Bank under competitive market conditionality rules.

But the CDM itself as an equity policy has been a subject of intense controversy—perhaps attracting more commentary than the other equity policies. On the positive side, CDM is defended firstly because it represents an efficient way of dealing with the climate challenge by allowing emissions to be reduced in a cost effective way. Second, it is argued that the mechanism promotes both specialization and the North–South financial and technology transfer much needed by the South for sustainable development. Third, the CDM is said to promote multilevel and multi-stakeholder engagement in climate governance by creating roles for local communities and the private sector in line with non state-centric principles of justice. Finally, the CDM is said to enhance local capabilities and aid the improvement of the livelihood of many in the developing countries.

However, on the negative side the CDM has been criticized for (1) providing a cheap way for the rich West to avoid taking serious action on climate change; (2) representing a perverse way of managing the global common by allocating private property rights to nature, and realizing its value through the market; (3) reinforcing hierarchies, patterns of domination, and power dynamics between the poor and rich countries; (4) impoverishing the local community by alienating them from decisions making over commonly owned natural resources; (5) serving the interest of the rapidly developing countries like China and India while alienating the most vulnerable countries in Africa and Asia.<sup>83,84</sup> Needless to say that all of the above positions reflect and draw upon various and in some cases incommensurable conceptualization of equity and justice. Discussion on how the CDM may be improved in a post-Kyoto agreement has since begun with a range of offerings again reflecting allegiance to differing notions of justice.

Exactly what amount of North–South transfer is just and to what extent can the adaption fund, CDM, capacity building, and similar equity-based climate regime policies secure such an outcome? Shue<sup>85</sup> view is that no amount of transfer can be deemed as either just or unjust without a prior debate on the justice of the current holdings—which includes historical responsibilities. He argues that the basis upon which financial and technology transfers are secured have remarkable effects on the terms of transfer (who transfers what and who gets what) as well as the level of commitment and the means of administration. Paterson<sup>86</sup> makes a similar point when he observes that the argument for the transfer of resources, although significant in its

own right, could not be concluded without a clear discussion on what notion of justice underwrites such transfers. He points out that there are other ways—including long-term loans, help, and strategic welfare-oriented foreign investments—through which resource transfer may be secured without addressing the question of justice. The point quite simply is that more explicit debates are required to build a stronger international consensus regarding the notion of global distributinal justice and how this applies specifically to international climate policies.

## CONCLUSION

If the proliferation of environmental regimes demonstrates increase in global governance in the 20th century, the contentions over justice in the climate regime provides the most striking evidence of the quest to ensure that these global environmental governance arrangements are based on widely shared ethical standards of responsibility and fairness. Justice is at the heart of the international climate regime because climate change principally involves the rich imposing risks on the poor. The massive impacts of climate change on the poor, the unique leverage held by some big developing countries (e.g., China, India, and Brazil) on the issue, and the increasing ability for social movements to organize at the global level altogether imply that questions of justice will continue to remain cogent in the international climate regime development process. The essay has attempted to review the recent literature and policy debates on climate justice and the international regime. It is demonstrated that the age-long question about the (in) applicability of distributinal justice in international regimes is more not external to the international climate governance but rather intrinsic to existing political practices. The question is not whether distributinal justice applies in the international regime but the forms they take and how they are handled by the existing and emerging climate governance agreement.

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