“Venues for Contestation” within the United Nations Framework Convention on Climate Change: Subsidiary Bodies and Working Groups

Michael Clarke

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Abstract

This paper examines the role of subsidiary bodies and working groups within the United Nations Framework Convention on Climate Change (UNFCCC) in providing arenas for norm contestation. The UNFCCC acknowledged concern about and a determination to protect the climate system. However, it did not commit states to undertake any action involving the reduction of greenhouse gases. The Kyoto Protocol of 1997 changed this and committed targeted reductions by participating states. It might then be argued that the Kyoto protocol institutionalised a normative consensus on an appropriate response to possible climate change. From this perspective norms are perceived as quasi-causally affective rendered with interpretative stability. However, this paper is based upon the precept that norms remain contested by default. Due to the weakness and decentralisation of UNFCCC norm contestation should remain prevalent. Yet it is argued here with reference to the structures of UNFCCC subsidiary bodies and working groups that arenas for contestation exist which facilitate consensus and implementation of decisions within domestic contexts. Notable amongst these is both the access to participation which is open to all and the availability to information which is unrestricted. This availability of access and information facilitates the informal dialogue that reduces contestation during domestic implementation. This paper argues that such an approach would be beneficial to numerous inter-national and transnational situations as a means to reduce norm contestation.

Introduction

Environmental issues and specifically climate change have received increased attention during recent years. The result has been the ‘Earth Summit’ or more specifically the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, the United Nations Framework Convention on Climate Change (UNFCCC) of 1994 and the Kyoto protocol to the UNFCCC in 1997.

The focus within this paper is the UNFCCC and the Kyoto protocol which can be characterised as a system of deliberative intergovernmentalism. This is based on the precept that ‘[i]n the absence of a rigid and unambiguous legal framework, effective decision-making essentially relies on the generation of self-commitment to common

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rules and guidelines on [the] part of national governments. Due to the weakness of compliance enforcement mechanisms within the convention as compared to aspects of the European Union, consensus formation is critical. However, there remains the problem during international negotiations whereby it is possible to agree to a rule or norm in principle yet contest its meaning during implementation and practice. To overcome this Pueter argues for the creation of venues for contestation during international negotiations. This dialogical process allows for the differing meanings of norms based upon cultural conditioning to be expressed with the aim of reducing ambiguity and increasing coherence in implementation. This paper examines the UNFCCC and the Kyoto protocol from the basis that access to contestation has been incorporated into its institutional design. It should therefore be the case within this framework that we should observe increased convergence in norm meaning across contexts as well as increased implementation and compliance.

This short paper firstly briefly examines norms in international politics. This is followed by an examination of the architecture of the UNFCCC and the Kyoto protocol in which it is argued that access to participation, contestation and dialogue should facilitate the salience and convergence in norm meaning. Finally the conclusion will summarise the paper and point towards future empirical research objectives.

**Norms in International Politics**

Norms have often been viewed as stable quasi-causative intersubjective conceptions of acceptable or unacceptable behaviour. For Kazenstein norms are ‘collective expectations for the proper behaviour of actors with a given identity’ evolving from social practice, strategies of interest promotion or as a means to

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2 Ibid, p 19.
4 Pueter, Uwe, op cit.
manage conflict. From this perspective international environmental agreements create collective expectations or normative frameworks in which actors (primarily states) interact. These normative frameworks are both the product of and a means of reinforcing a sense of shared identity and interest. The identity aspect of these agreements is highly dependent upon the ‘fit’ between international environmental norms and domestic norms and social practice. Bernstein argues this point by stating that

‘the compatibility, and interaction, of domestic policy norms and norms promoted in the international institution are significant determinants of compliance, potentially overriding or redefining domestic interests. Since international institutions, especially in the environmental issue area, ultimately are designed to promote change in domestic policies or behaviours of government, sub-state and corporate actors, and even individuals, the fitness with domestic policy norms is especially important.’

In a similar vain Ogley argues for five ‘factors’ in relation to environmental norm generation, these are participation, external legitimacy, internal legitimacy, flexibility and specificity. With the idea being that those subject to a norm should be involved in its articulation (participation), that it should conform to some general ‘internationally accepted principle such as ‘the common heritage of mankind” (external legitimacy), that it conform to domestic opinion (domestic legitimacy), that it be adjustable to changing circumstances (flexibility) and that actors understand and know their obligations (specificity).

There is an inherent tension between the idea of ‘specificity’ and ‘flexibility.’ This tension can be highlighted by an elaboration of a few concepts on the theory of norms. It has been common to equate norms with rules in which ‘the prescription (or proscription) is the part of the norm informing actors within an identity what to do (or what not to do)…The parameters of a norm indicate under what situations the norm’s prescription applies.’ This corresponds to the conception by Bernstein in which

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11 Ibid
the institutionalisation of norms has causal effect because it increase the likelihood of the behaviour they prescribe and decreases the likelihood of the behaviour they proscribe, transferring the burden of effort onto those who oppose the norm. Whilst this may not guarantee that all behaviour will conform to the norm, it shifts the burden of effort and proof onto those actors who contest their validity, and empowers actors in conformity with the norm.\textsuperscript{13}

This atomistic\textsuperscript{14} rather than compound conception of a norm in which it is a basic unit with a defined meaning, implies that its application is universally applicable to a given set of situations. The result being that if norms are rules and ‘the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.’\textsuperscript{15}

However, as norms are not mechanistically applied it is often the case that there exists competing norms in a given situation in which discretion must be used to determine applicability.

It is also the case that norms entail a dual quality in which they are both structuring of and constructed by practice.\textsuperscript{16} This is to say that the meaning of a norm is both an exogenous structuring variable as well as an endogenous product of practice. This (re)construction of meaning which is associated with the idea of meaning in use\textsuperscript{17} is central to the idea of norm flexibility. The flexibility of norm meaning implies that a norm can provide the foundation of international agreements and be commonly agreed upon, yet its meaning can differ between contexts and in practice. Finally norms are not all the same, they range from fundamental norms such as human rights to organising principles such as voting procedures.\textsuperscript{18} The level of contestation and flexibility is then on a sliding scale with fundamental norms at the top. Many norms associated with environmental policy are highly contested and flexible and do not function as rules but as moral principles.\textsuperscript{19} Norms from this

\textsuperscript{13} P206 Bernstein, international institutions and the framing of domestic policies.

\textsuperscript{14} Schwellnus Guido, ‘Dynamics of Norm-Construction and Norm-Resonance in the Context of EU-Enlargement: Minority Rights in Poland. Queens University Belfast: PhD, 2006, p 35.

\textsuperscript{15} Dworkin, Ronald, \textit{Taking Rights Seriously}, Cambridge: Cambridge University Press, 1977 p. 4

\textsuperscript{16} Wiener, Antje, The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to ‘Interaction’


\textsuperscript{18} Wiener, Antje, The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to ‘Interaction’

\textsuperscript{19} Fundamental norm are akin to moral principles and are both flexible and highly contested. Organising principles or standardised procedures on the other hand function closer to rules.
perspective ‘fall into the category of *reasons for actions* which are not the same as *causes of actions*.’ The idea of norm specificity commonly equates to the concept of norms as rules rather than reasons. The tension between specificity and flexibility is further enhanced when we bring in Ogley’s idea of internal and external legitimacy. The meaning of a norm is highly dependent upon historical contingency which relates to the constitutive practices within a society that provide reference frames for meaning, the internal legitimacy of a norm ultimately relates to its social facticity and legal and cultural validity. For Habermas facts are positive enacted law that is also enforced. This creates a tension between the facticity of the law and its validity. Legal validity is the perceived legitimacy which depends upon our understanding of fairness and justice. Finally cultural validity refers to individual connotation whereby it would expected that those that have a shared social context would produce shared interpretations of norm meaning. This not only creates a problem with the idea of external legitimacy where there is no common cultural basis for norm meaning. It also infers that as the meaning of a norm is dependent upon social facticity and legal/cultural validity, global specificity would remain a problem. To overcome the problem of norm contestation and lack of universal specificity we need to focus on a dialogical communicative process in which access to contestation forms the central basis of international environmental agreements.

**Architecture of the UNFCCC and Kyoto protocol**

It is not possible here to give a full account of the UNFCCC architecture, instead a brief overview of its objectives and its accompanying Kyoto protocol will be outlined. The objective is to show that the UNFCCC as an institutionalised means of addressing climate change has incorporated access to contestation. As such further

23 Puetter, Uwe and Antje Wiener, op cit, p 1072.
research should be undertaken in order to facilitate a lessons learned understanding that could be beneficial to future international agreements.

The UNFCCC has near universal ratification the objective of which is to achieve, in accordance with the relevant provisions of the Convention, stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change.

In order to do this the article 3 of convention stipulates that the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

Two important aspects can be seen from this article. Firstly is the ‘should’ which does not create a legal requirement for reduction of emissions. However, article 3 of the convention provides the basic normative basis for the later Kyoto protocol by providing the norm or ‘should’ of climate system protection. The second important aspect is the idea of differential responsibility for climate emissions reduction. The idea being that developed countries should take the lead and incur higher costs than developing countries. This uneven distribution of the financial costs of implementing emissions reductions has been one of the major reasons for non US ratification. It has also been argued to be a threat to the future success of climate change agreements.

The Kyoto protocol which was agreed in 1997 and entered into force in 2005 states that ‘the parties included…shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in…the Annex] do not exceed their assigned amounts.’ The importance here is ‘shall’ and ‘do not’ which differs from the ‘should’ of the convention by requiring

27 Ibid, Article 3
action rather than simply desiring it. The Kyoto protocol like the UNFCCC has been ratified by a large majority of states, although this does include the US. Yet contestation during the implementation of the protocol still exists with Greece being the first ratifying state to be held in non-compliance.\footnote{United Nations Convention on Climate Change, ‘Informal Information Note by the Secretariat on Recent and Current Compliance Cases,’ available at http://unfccc.int/files/kyoto_protocol/compliance/background/application/pdf/informal_information_note_on_recent_and_current_cases_.pdf, (accessed 29th May 2008)}

For international environmental agreements to be successful they require the ability to adapt to the changing situation and advances in scientific understanding. They must also provide venues for contestation in which the agreement and often disputed scientific advances can be discussed. Previous models of institutional design such as the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere provides no annual review mechanism.\footnote{Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, available at http://sedac.ciesin.org/entri/texts/wildlife.western.hemisphere.1940.html, (accessed 29th May 2008)} The result being that its protection priorities are outdated and it is largely ignored. The UNFCCC on the other hand is a differing model which is a process of ongoing (re)design. This process rather than ‘one stop shop’ agreement creates adaptability and interaction between contracting parties.

Other institutional innovations relate to access to information and participation. These include webcasts and transcripts of compliance and enforcement meetings. Increased participation comes in the form of allowing NGO’s and IGO’s attendance to meetings. The result is that ‘this appears to be an effective overall approach to institutional design, leaving a great deal of flexibility to develop each regime’s institutions, rules and procedures differently according to its particular situation and tasks.’\footnote{Green, Owen, ‘Environmental Regimes: Effectiveness and Implementation Review,’ in in Vogler, John and Mark F. Imber, (eds) The Environment and International Relations, London: Routledge, 1996, p. 209.}

The current 29th meeting of the subsidiary bodies are currently underway in Bonn\footnote{The 29th meeting runs from the 2-13th June} with the important tasks of the working groups and subsidiary bodies to reach agreement on means to achieve reductions in greenhouse emissions and enhance sustainable development. It would be hypothesised here that the design of the UNFCCC in providing for participation, information and access to contestation increases compliance by facilitating convergence in norm meaning. The success of the
UNFCCC has led some academics to claim that ‘[v]ariants on this approach [UNFCCC] could also be useful for the development of other environmental regimes dealing with great complexity.’

## Conclusion

It has been common within International Relations literature to view norms as stable structuring rules whereby contestation exists between which norms to choose. For example issues relating to human rights and sovereignty. It was argued here that norms should not be seen as stable but rather as flexible (re)constructed concepts that both shape and are shaped by practice. The result is that norms are contested depending upon context, the meaning of a norm is not universally accepted but depends upon historical contingency in which meaning will differ from country to country. A state may therefore agree in principle to an international norm which is constitutionalised into an international agreement, yet differing interpretations will exist during implementation and practice. To overcome these differing meanings arguments have been made to enhance access to contestation. Numerous research projects are currently being undertaken to assess the differing meanings of norms within a number of international organisations, the objective being to assess convergence or divergence in meaning. However, we must also question if access to contestation will increase convergence. If the idea of access to contestation argued by Puetter implies increased participation and informal dialogue then the UNFCCC provides an interesting framework in which it would be possible to assess this concept.

It has not been possible in this very short paper to examine in any full measure the theoretical foundations of this approach to norm flexibility or the institutional design of the UNFCCC and Kyoto protocol. Further empirical research would be needed to assess norm convergence or divergence within this framework and within domestic state contexts. Yet the success of the UNFCCC should not be underestimated. It is easy to criticise numerous failings by the international community to curtail environmental degradation and climate change. Yet in a short period of time an institutional framework has been established that puts server limitations on state

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34 Green, Owen, op cit, p 212.
activity. Both a top down (inter-state agreements) and a bottom up (NGO’s and civil society) are responsible for its success. The UNFCCC is a broadly success institutional architecture that brings these groups together to share information, adapt and develop future arrangements.
References


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