GLOBAL ENVIRONMENTAL REGIMES: GOVERNANCE WITHOUT GOVERNMENT

An Introduction:

In recent years, environmental problems on a global scale that seriously affect the very existence of humankind - global warming, the depletion of the ozone layer, the diminution of tropical forests, and so on - have increased in magnitude. It is generally recognized that the problems are such that mankind must tackle these problems with all its wisdom.

Global environmental disruptions are set apart from conventional ones in that in a global case, a country that generates pollution is not always the country that suffers from the pollution; pollution can cross borders inflicting damage on a wide area. Environmental damage progresses so gradually over a long period of time that it may be too late to take action by the time the damage becomes apparent. Such being the case, effective preventive measures should be devised.

Such are the characteristics of the global environmental problem that its solution requires the efforts of all countries of the world, and international arrangements to address the issue have been launched in recent years. Global environmental regimes (GERs) have emerged as a consequence of these efforts and arrangements.

Generally Regimes can be defined “social institutions that consist of agreed upon norms, rules, decision-making procedures, and programs that govern the interaction of actors in specific issue areas”\(^1\) These are also defined as possessing norms, decision rules, and procedures which facilitate a convergence of expectations”.\(^2\) It assumes that cooperation is possible in the anarchic system of states, as regimes are by

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\(^1\) Young, Oran [ed.]: Global governance: drawing insights from the environmental experience, p 5-6 Cambridge, Mass, MIT Press, 1997.

definition, instances of international cooperation.³ It is also said to be a concept used to compare international politics across issues areas.⁴ Thus, the concept of international regime has been defined in two very different ways. According to the first definition, it is a set of norms, rules, or decision making procedures, whether implicit or explicit, that produces some convergence in the actors' expectations in a particular issue area. In this broad definition, it may be applied to a wide range of international arrangements, from the coordination of monetary relations to superpower security relations. This way of conceiving regimes has been strongly criticized for including arrangements that are merely agreements to disagree and have no predictability or stability. Although a set of norms or rules governing international behaviour may exist in some issue areas in the absence of a formal international agreement, it is difficult to identify norms or rules in the global environmental area that are not defined by an explicit agreement.

The second definition of regime is a system of norms and rules that are specified by a multilateral agreement among the relevant states to regulate national actions on a specific issue or set of interrelated issues. Most regimes take the form of a binding agreement or legal instrument. On global environmental problems, the most common kind of legal instrument is the convention, which may contain all the binding obligations expected to be negotiated or may be followed by a more detailed legal instrument elaborating on its norms and rules.

If a convention is negotiated in anticipation of one or more later elaborating texts, it is called a framework convention. It is intended to establish a set of principles, norms, and goals and formal mechanisms for cooperation on the issue (including a regular conference of the parties [COP] to make policy and implementation decisions), rather than to impose major binding obligations on the parties. A framework convention is followed by the negotiation of one or more protocols, which spell out more specific obligations on the parties on the overall issue in question or on a narrower sub issue.⁵

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³ Retrieved from en.wikipedia.org/wiki/Regime theory accessed on 15/01/2015
⁵ Ibid.p.18
A nonbinding agreement could also be viewed as a regime to the extent that it establishes norms that influence state behavior. In global environmental politics, nonbinding codes of conduct and guidelines for global environmental problems such as pesticide trade and hazardous waste trade (prior to the Basel Convention), which are referred to as soft law, could be considered as regimes with varying degrees of effectiveness. And the Agenda 21 plan of action adopted at the 1992 United Nations Conference on Environment and Development also could be considered an "umbrella regime" for worldwide sustainable development, defining norms of behavior on a wide range of environment and development issues. Although such nonbinding agreements do influence state behavior to some extent, regimes based on legal instruments are usually far more effective. That is why some countries become dissatisfied with a given nonbinding code of conduct or other soft-law agreement and insist that it should be turned into a legally binding agreement.6

**Evolution of Global Environmental Regimes:**

More than half a century has passed since the modern ecology movement started to take hold and make environmental protection a political cause at the domestic and international level. This movement owes its first impulse to many people. However, it is fitting to underscore that at its origin there is the work of scientists and concerned individuals. The ground breaking work of Rachel Carson (1962) on the devastating impact of industrial toxic waste on the environment,7 the pioneering research of the biologist Barry Commoner documenting the harmful effects on children of radiological fall-out8, Aurelio Peccei’s Club of Rome, a precursor of the concept of sustainable development, 9 they all contributed to the nascent and powerful movement of modern ecology. The efforts of these early pioneers did not display their effect only in academia and the closed circle of concerned scientists. They delivered policies that have had long-lasting effects at a normative and institutional level. The Partial Nuclear Test Ban Treaty saw the light in 1963, triggering the process of gradual phasing out of atomic weapon

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6 Ibid , p16-17
7 Rachel Carson and the legacy of Silent Spring , https://www.theguardian.com/science/2012/may/27/rachel-carson-silent-spring-anniversary
8 https://en.wikipedia.org/wiki/Barry_Commoner
tests in the atmosphere, in outer space and under water (Treaties 1963). In 1970, the United States established the first Environmental Protection Agency, a model later followed by Europe at both a national level and the European Union (EU) level. In April of the same year, the United States inaugurated the first Earth Day.\(^\text{10}\)

In Europe, despite the absence of specific environmental provisions in the European Economic Community (EEC) Treaty, the European Court of Justice (ECJ) began to develop in the 1970s a jurisprudence recognizing the importance of environmental protection in the process of interpreting and applying provisions on the functioning of the common market\(^\text{11}\). It was in this context that in 1972 the first United Nations (UN) conference dedicated to the environment was convened in Stockholm and the Stockholm Declaration on the Human Environment was adopted, a seminal document from which a vast law-making movement in the field of environmental protection has since evolved.

While the Stockholm Declaration can be seen as the act of birth of modern international law on the environment, there is no denying that even before the Declaration international law had played a role with regard to the protection of nature and natural resources. As early as the beginning of the 20th century we can find treaties for the protection of migratory birds and on the conservation of seals (Treaties 1902 and 1911)\(^\text{12}\). Later, the arbitral award in the Trail Smelter dispute between the United States and Canada set a precedent in the matter of cross-border air pollution which is still widely cited in international practice and still relevant to the adjudication of claim for damage in trans-boundary environmental disputes (Trail Smelter case 1941)\(^\text{13}\). This notwithstanding, the Stockholm Declaration remains a watershed in the evolution of the system of global environmental governance at least for two reasons. First, the Declaration introduces in the lexicon of international law the term “environment”, which does away with the expression “nature conservation”, which was previously used. This is not only a


\(^{11}\) ibid

\(^{12}\) Treaties List, laws.fws.gov/lawsdigest/treaty.htm

\(^{13}\) Trail Smelter dispute, https://en.wikipedia.org/wiki/Trail_Smelter_dispute
terminological change: it reflects a transformative step in normative perspective.

By shifting the focus from nature to “environment”, international law somehow abandons a normative perspective in which nature and its components are themselves the worthy object of protection and focuses instead on the “environment” as space of human life and activities. In this way protection of nature ceases to be an end in itself and becomes instead the instrument at the service of human needs. This is confirmed by the official title of the Stockholm Declaration, which adopts the expression “human environment” and opens up with the solemn proclamation: “Man is both the creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth”\(^\text{14}\). (See Annexure 1 for full details) This “instrumental” vision of nature was bound to persist in the subsequent evolution of the system of environmental governance. Actually, twenty years later, the Rio Declaration on Environment and Development\(^\text{15}\), marked a turn toward an even narrower instrumental conception of the natural environment, in the sense of nature being at the service of economic growth and economic development. (See Annexure 2 for details)

Second, and most importantly, the Stockholm Declaration emancipates environmental law from the original limits of “private law” and elevates it to the rank of public international law. With the Stockholm Declaration the protection of the environment is recognized as part of the public interest of the international community as a whole, independently of the specific reciprocal relations and interests of individual states. This is confirmed by the expressed reference in Principle 21 to the responsibility of states to ensure that activities within their jurisdiction and under their control do not cause damage to “the environment [...] of areas beyond the limits of national jurisdiction”\(^\text{16}\).

Thus the year 1972 was historic, because for the first time countries across the world came together to identify and address environmental problems. The United Nations Conference on the Human Environment, held in Stockholm in 1972, was the first

\(^{16}\) Supra note 33
international intergovernmental conference to focus on environmental problems. The preparations for the Conference, and the period immediately following the Conference had lasting consequences for the course of international environmental law. Perhaps the most central issue that arose in the preparations for the Stockholm Conference was the need to address the potential conflict between economic development and environmental protection. Developing countries were especially concerned that an international effort to protect the environment would come at the expense of their own development. Shortly before the Conference, a group of experts from governments, academia, and nongovernmental organizations met in Founex, Switzerland, to discuss the conflicts and develop a conceptual framework for reconciling environmental protection and economic development. The Founex report recognized that environmental protection and economic development could and should proceed in tandem. It laid a foundation for later acceptance of the concept of sustainable development, which governments confirmed as an overarching policy twenty years later at the Rio Conference Environment and Development.

The Stockholm Conference also resulted in the adoption by governments the U.N. Stockholm Declaration on the Human Environment. This document set the stage for the further development of principles of international environmental law. In particular, Principle 21, which provides that "States have [...] the sovereign right to exploit their own resources pursuant to their own environmental policies, and responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of States or of areas beyond the limits of national jurisdiction," sets forth a basic obligation, which the International Court of Justice subsequently recognized as part of international law.17

As a result of the Stockholm Conference, countries established the first international intergovernmental organization focused on environment section: The United Nations Environment Programme (UNEP) in Nairobi, Kenya. The organization was not established as a United Nations specialized agency, however, and thus lacks

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17 Legality of the threat or use of nuclear weapons, advisory opinion, I.C.J. Reports 1996,p.226
the status of other United Nations organizations such as the United Nations Food and Agricultural Organization (FAO) or the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The decision to locate UNEP in Kenya was especially significant, because the specialized United Nations agencies were all located in developed countries. UNEP’s location sent a signal that environmental problems were endemic to all countries.

The Stockholm Conference also heralded the emergence of nongovernmental organizations, and to a lesser extent other elements of the private sector, concerned participants in the discussion of international environmental issues and in the development of international environmental law. Several important multilateral agreements are associated with the Stockholm Conference, namely the 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1972 Convention for the Protection of World Cultural and Natural Heritage, and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). These agreements have been early pillars of international environmental law. Most countries are parties to CITES and to the World Heritage Convention, and many to the one on marine pollution by dumping. In every field of international law, one can point to catalytic events for the growth of the field. The developments highlighted above, together with the UN Conference itself, set the stage for the rapid expansion in international environmental law during the next two decades.

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18 All member countries belong to the governing body of the specialized agencies, while UNEP’s governing council includes only some of the member countries. The specialized agencies are established by international agreement and by article 57 and 63 of the United Nations Charter and are linked to U.N. ECOSOC. UNEP was established by U.N. General Assembly Resolution 2997 of December 15, 1972.

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In every field of international law, one can point to catalytic events for the growth of the field. The developments highlighted above, together with the UN Conference itself, set the stage for the rapid expansion in international environmental law during the next two decades. In the two decades that followed the Stockholm Conference, international environmental agreements proliferated. By the end of the period, there were more than 1100 international legal instruments that were either fully concerned with the environment or had important provisions relating to the environment. This number includes both binding agreements and nonbinding legal instruments, such as the U.N. Stockholm Declaration on the Human Environment.

In this period, countries became adept at negotiating new agreements in a relatively short time frame, often less than two years. Even the intergovernmental negotiations for the U.N. Framework Convention on Climate Change took only 16 months to reach agreement. Generally, it took longer for the agreements to come into effect than to negotiate.

In June 1992, countries met in Rio de Janeiro, Brazil, to commemorate the twentieth anniversary of the 1972 Stockholm Conference on the Human Environment. The location of the conference in Brazil sent an regardless of their stage of economic development. The Rio Conference became an important milestone in the development of international environmental law and policy. The World Commission on Environment and Development (also called the Brundtland Commission), created by the United Nations General Assembly, prepared a report for the Rio Conference, Our Common Future, which made the concept of sustainable development the leitmotif of international environmental policy. States confirmed that the guiding paradigm was unsustainable

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development and thus officially ratified the process of reconciling environment and
development that had been begun twenty years previously in Founex, Switzerland.

The Rio Conference produced four important documents for international environmental
law: the Rio Declaration on Environment and Development\(^{22}\) which laid the basis for the
rapid development of new principles and rules of international environmental law; the
U.N. framework convention on climate change, the Convention on Biodiversity\(^{4}\); and the
very detailed Agenda 21, which set forth comprehensive list of action that States were to
take. The Conference also adopted a "Non-legally Binding Authoritative Statement of
Principles for a Global Consensus on Management, and Sustainable Development of all
types of Forests," \(^{6}\) and led to the subsequent negotiation of a Convention
on Desertification.\(^{37}\) It resulted in the establishment of a new institution at the United
Nations, the Commission on Sustainable Development, to review progress in
implementing Agenda 21.

The years since Rio have witnessed major developments in international environmental
law and policy. The field has become more robust and more comprehensive. International
intergovernmental organizations, civil society, and industry associations, as well as other
groups have become important participants. International environmental has developed
close links to trade, human rights, and national security. New principles and rules have
emerged and been refined. The focus has shifted from a near exclusive concern with
negotiating new legal instruments to one concerned with implementing and complying
with international agreements.

**Working of the Global Environmental Regimes: Governance without
Government:**

As it is evident from above discussion that so far governance at the international level is
mainly run by a set of rules, regulations and guidelines which are themselves subordinate
to the whims and caprices of nation-states who are again being driven by their own
national interests. As is true about other international mechanisms, applies to

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\(^{22}\) Rio Declaration on Environment and Development, Report of the U.N. Conference on
environment too. There is no institutional mechanism comparable to national government for enforcement of laws, rules and regulations. There is “Governance without Government”.

A common observation among those people concerned with solving environmental problems and more generally, promoting sustainability in human–environment relations is that governance systems work relatively well but poorly and not at all in efforts to solve international, transnational, and specially, global problems. Although state is a positive force in managing natural resources and regulating pollution in domestic setting, the anarchic character of international society treated as a society of sovereign states constitute a barrier to successful governance at the international level. Failures to tackle environmental problems effectively, much less to achieve sustainability in human–environment relations are common not only in societies facing severe problem of poverty and hunger or saddled with the curse of natural resources but also in advanced industrial societies.

Although efforts to address the grand challenge of global environmental catastrophe leave a great, deal to be desired, international environmental governance does not present a uniform picture of failure. Some regimes are successful in the sense that they contribute to solving international environmental problems. Arrangements widely regarded as effective in these terms included the regime created to protect the ozone layer, the governance system applicable to Antarctica besides others. The lack of efficacy or relative failure of other regimes is equally evident. Besides others prominent examples include the climate regime and arrangements created to combat desertification. Many regimes fall between these two polar categories although it is often hard to place them precisely along a continuum ranging from total failure to clear-cut success. For example regime dealing with pollution in the North Sea.

24 Collier P, The bottom billion : why the poorest countries are falling and what can be done about it,, Oxford University Press, 2004, p 249-50
The above discussion show that various factors influence the functioning of environmental regimes which lead them to success, failure or average performance. Anarchic character of international society, regime design, dynamism in the sense that they change continually after their initial formation, and other contextual factors matters as a determinant of the effectiveness of the regime. An arrangement that works perfectly well in one setting may fall flat in other setting.

Negotiating positions usually reflect domestic socio-political balances and may change dramatically because of a shift in those balances. Although the structure of an issue in terms of economic interests may indicate which states are most likely to join a regime, it is often domestic political pressures that tip the balance toward regime creation. A theoretical explanation for global environmental regime formation or change, therefore, must incorporate the variable of state actors' domestic politics.

A theoretical explanation for the formation of global environmental regimes must also leave room for the importance of the rules of the negotiating forum and the linkages between the negotiations on regimes and the wider relationships among the negotiating parties. The legal structure of the negotiating forum-the "rules of the game" regarding who may participate and how authoritative decisions are to be made—are particularly important when the negotiations take place within an already established threat or organization. The cases of whaling and Antarctica both illustrate how these rules can be crucial determinants to the outcomes of the negotiations.

Economic and political ties among key state actors can also sway a regime to compromise or defect. Particularly when the global environmental regime under negotiation does not involve issues that are central to the economy of the states who could block agreement, the formation or strengthening of a regime is sometimes made possible by the potential hegemon state's concern about how a veto would affect relations with states that is important for economic or political reasons.

Building a theoretical approach that account for actual historical patterns of regime formation and regime functioning and can predict most outcomes will require advancing a series of testable hypotheses encompassing multiple variables rather than relying on a
single variable approach. Until such explicit hypotheses are generated and tested, the study of working regime will focus primarily on identifying some common patterns through case studies.26

Conclusion:

Today, it is generally recognized that the environment is a “concern of humankind as a whole”. More than forty years after the adoption of the Stockholm Declaration, this concern persists and has become one of the main issues on the international agenda. Significant results have been achieved at the normative level, with the adoption of a large number of legally binding instruments, including international treaties and various declarations and other soft-law instruments. However, important gaps still exist, both at the normative and at the institutional level. In particular, the lack or deficiency of enforcement mechanisms is a major weakness of the current system of environmental law. There is a long way to go before achieving a global system of environmental regime which can effectively address the challenges of protecting and preserving the environment as a public global good, and providing redress to victims when internationally agreed norms are violated. As practice has shown, important differences of views persist among states on the policies and measures to adopt, on the type of commitments to take, and on how to share responsibilities, especially between the industrialized countries on the one hand and the developing countries on the other. However, also among the industrialized states attitudes and policies differ significantly.

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