
INTERNATIONAL ENVIRONMENTAL POLICY AND THE SOFTENING OF SOVEREIGNTY

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The traditional ability of national governments to control events within their territorial boundaries is being challenged by major new transboundary forces such as transnational corporations, economic globalization and trade, international crime and the rise of global communications and other technologies. Less recognized is the assault on sovereignty by international environmental problems and the treaties designed to address them.

Traditional diplomacy deals primarily with maintaining national sovereignty over one's own territory and defending boundaries from encroachment by neighbors. Historically, the building of alliances was driven primarily by issues of war and peace or trade relationships. This is not surprising, since the rise of the nation-state was premised on the concept of territoriality: a particular piece of land was subject to the jurisdiction of a sovereign, who ruled and defended it from both physical encroachment by other states and undue outside influence in the governance of its internal affairs. The instrument for the successful defense of territorial integrity has always been a strong military, supported by a nation's resources and economic wealth. Only the commons, such as the oceans and seas, were open to all under a doctrine of freedom of the seas.

A second set of diplomatic concerns has addressed trade relations, which, since the founding of the General Agreement on Tariffs and Trade (GATT) in 1947, have become nearly global in scope. States increasingly recognize that trade agreements require the willingness to relinquish some sovereignty in order to obtain a commitment by all states to lower tariffs and other barriers to trade. Giving up the right to impose tariffs or to exclude imports is an obvious manifestation of reduced governmental power to set internal policies. At another level, the rules of free trade and those of environmental protection

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may sometimes be in conflict. So far, the opportunity to use trade as an instrument for environmental improvement has gone largely unrecognized.

Prior to 1972, only a few international agreements had been implemented to address resources shared across borders, such as water or wildlife; to set liability rules for oil spills; or to regulate fisheries and whaling. Such agreements hardly challenged traditional notions of sovereignty, and they were very much part of ordinary treaty-making. Around the time of the U.N.-sponsored Stockholm Conference on the Human Environment in 1972, recognition grew that the nature of global environmental problems differed significantly from those of trade and traditional international law and that new approaches were required.¹

Transboundary and global environmental problems challenge the traditional roles of the state, the assumptions on which state sovereignty is based and the nature of the international agreements needed to address them in several important ways:

- Most importantly, national boundaries are porous to pollution or global environmental degradation, and no amount of military force or economic power can fully insulate a country from their consequences.
- Environmental diplomacy and the negotiation process to create treaty and soft-law regimes often differ from traditional diplomatic practices. International and global environmental problems promote alliances that are often quite different from those formed to address traditional diplomatic issues.
- International environmental treaties often commit nations to an ongoing process instead of, or in addition to, the achievement of specific treaty goals.
- International environmental treaties require nations to comply by enacting domestic measures that reduce pollutants or alter their patterns of resource use.

Environmental problems can be classified into four useful categories to analyze their implications for diplomacy and national sovereignty: 1) domestic, internal issues, 2) common concern assets, 3) transboundary movements of resources, pollution and migratory species, and 4) global and commons issues.

Domestic Environmental Issues

Domestic environmental issues do not transcend state boundaries or impinge upon the commons; they are of no concern outside the nation in which they occur. Because these issues are confined within a state's territorial boundaries and are completely under the control of the government and its laws, they lie within the frame of traditional sovereign rights and practices. In principle, therefore, there is no international dimension to issues such as local air

or water pollution, or the management of territorial resources such as forests or species. In some cases, a solution to a local problem may create an international dilemma. To clean up local air conditions in the American midwest and in Europe, factories and power plants extended smokestacks higher into the air. Although local air pollution was reduced, exhaust from coal-burning power plants was vented into higher-altitude air currents, which carried the smoke across the borders into other U.S. states and countries. What had been a local problem became an international one because of the local solution.² While most domestic issues fail to attract any attention from abroad, not all actions taken within a nation's territory are restricted by national boundaries, nor are they always immune from foreign scrutiny.

Common Concern Assets

Common concern assets represent a new dimension of the international order. These assets are resources, ecosystems (especially forests) or species that lie wholly within the territory of a nation but elicit concern and efforts on the part of foreign governments, nongovernmental organizations and foreign individuals to influence their use or protection. There is little challenge to the notion that minerals and fuels that are found within the boundaries of a state belong to that state, no matter how new the state's political history or how old the geological history of the resource. Until recently, the same could be said of forests and plant and animal species. However, as recent controversies over rainforest loss and protection of the biodiversity of species demonstrate, these natural assets have become resources of common concern.

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If forests are net producers of global oxygen as "the lungs of the world," then their loss can directly and adversely affect the well-being of all humanity. If a plant species that offers significant medical benefits is threatened with extinction, is it not in the interest of all that it be protected? Examples such as the accidental discovery of the few remaining patches of the wild Mexican yam that became the basis for the oral contraceptive, or the near loss of the cancer treatment Rosy Periwinkle of Madagascar or the Pacific Yew of Northwest North America, support the idea that concern should extend beyond the boundaries of the state within whose borders these resources lie. The Convention on Biodiversity, signed in Rio de Janeiro in 1992, and now in force, makes the case that parties have stewardship responsibilities for species, ecosystems and genetic diversity, but also explicitly acknowledges that nations have sovereignty over their biological resources and may develop them in any way they wish. Current attempts to negotiate a treaty on forests similarly break with tradition by calling on forested nations to protect the integrity of forests for all, even as they legitimately use them as resources. These international

agreements provide little in the nature of enforcement and only a modest set of requirements to meet compliance.

Another step removed are "existence value" interests, for which a foreign party can receive satisfaction, rather than more tangible benefits, from the knowledge that a wilderness ecosystem or a species still exists. These less defined interests are addressed by what might be called "very soft law" instruments such as the U.N. Charter for Nature, which proclaims the inherent value of all species without requiring that any state take action to protect their value. World Heritage designation of important cultural and natural monuments by UNESCO has created controversy, in countries as diverse as Egypt and the United States. In Egypt, highway construction was halted to protect the Sphinx. In the United States, World Heritage designation for Yellowstone National Park bolstered efforts to stop construction of the New World Mine just outside the park's boundary.³

Transboundary Environmental Issues

Transboundary environmental issues involve the passage of resources, pollution or living organisms from one state to another either by natural forces or through trade. Some of the earliest international environmental treaties created agreements to protect breeding sites and migration routes for bird and animal species whose migration pathways were usually established long before nation-states were created. Rivers that form boundaries between nations, or which flow through several, are also the subject of many international agreements.⁴ These treaties are most similar to those negotiated for traditional diplomatic purposes. Specific agreements limiting pollution flows to neighboring countries may be either bilateral, as in the case of the U.S.-Canadian agreement to reduce acid rain exports, or multilateral, as in the comprehensive European agreements embodied in the Long Range Transport of Air Pollutants Treaty. The Stockholm Declaration of 1972 declares the principle that nations are obligated not to conduct actions within their own boundaries that cause harm to other countries. This, however, is a soft-law provision, and there is no obligation to abide by it.

Global and Commons Issues

Global and commons issues involve non-territorial oceans and seas, the atmosphere, the climate and the continent of Antarctica. Two traditional approaches have addressed concerns about the oceans and their use. Older treaties such as that establishing the International Whaling Commission regulated the harvest of a resource; only recently have such treaties played the role of protecting a species. Halting pollution is the goal of the bulk of ocean treaties, such as the London Dumping Convention, which restricts the dumping of waste at sea, and the myriad of anti-oil pollution agreements, many of which address issues of liability in the event of a spill as much as they set standards to prevent oil discharges in the first place.⁵

The Law of the Sea, which entered into force in 1994, takes a different tack.⁶ The negotiators gave up trying to set rules of conduct in the commons when

it came to economic resources. Instead, they extended sovereignty over those resources from 12 nautical miles to 200 nautical miles off-shore. The creation of these Exclusive Economic Zones (EEZs) was supposed to protect the resources and reduce conflicts; however, they have in many cases done just the opposite. First, coastal nations rushed to establish their sovereignty over the EEZ years before the treaty was ratified, including many large nations, such as the United States, which have yet to ratify the agreement. Second, conflict areas were created where the EEZs of two nations overlapped. For example, Greece claims many small rock outcrops just off-shore from Turkey. Several states now claim large EEZs in the South China Sea which include the Spratley Islands and other small points of land. These claims have created a whole new set of old-style territorial issues. The former conflict is over national pride, but the latter is over potential deposits of oil and gas.

The Law of the Sea Treaty designates all resources beyond the 200 mile EEZ as the "common heritage of humankind." The common heritage principle applies, among other things, to seabed mining, which was the main reason that the United States and other industrial nations have refused to become parties. Nationalizing the coastal seas unfortunately appears to have hastened the collapse of all but two of the world's fisheries.

In contrast, existing territorial claims in Antarctica by seven nations have been put on hold.⁷ Some 38 nations now "manage" Antarctica under a set of treaties that prohibit the exploitation of the continent's mineral resources for 50 years and limit the use of the land and its surrounding coastal waters for research. Such an

agreement to suspend claims of sovereignty and to restrict open-access use of a land-mass—much less a continent—is unprecedented.

The atmosphere and climate system are a commons of a different order. While some operational rules on the power of a nation to restrict over-flights of its territory exist, there is a blurred boundary as to how high sovereignty extends. While aircraft and even balloonists must obtain permission to fly over, satellites pass with impunity, even when they contain spying cameras.

The first global atmospheric issue to emerge was the potential loss of the stratospheric ozone layer that shields the earth from damaging ultraviolet rays that can alter DNA, cause cataracts and skin cancer, damage the immune system, slow plant growth and injure or kill some species of animals and bacteria. When hearings were held on this issue in 1975 by the U.S. Senate Committee on Aeronautical and Space Sciences of the 94th Congress, its Subcommittee on the Upper Atmosphere was given oversight jurisdiction for matters taking

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place above six miles to the edge of the atmosphere.⁸ At the time of the hearings, scientists had proposed that the release of chlorofluorocarbons (CFCs) from aerosol cans, refrigerators, air conditioners, foam blowing and solvents were rising more than ten miles into the stratosphere where they were broken

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down, releasing ozone-depleting chlorine. Despite the fact that this hypothesis had not been confirmed at the time (although it has now been confirmed), nor had CFCs been detected within the ozone layer, Oregon and other states enacted laws banning the use of CFCs as propellants in spray cans.

Because CFCs diffuse worldwide and contribute to the depletion of the ozone layer everywhere, it was clearly impossible for Oregon to protect its citizens through the enactment of its sovereign powers. When the United States eventually took unilateral action (as did Canada and several Scandinavian countries) to eliminate the use of CFCs in aerosol sprays, the government was unable to protect its citizens or crops within its territory from the depletion that might be

brought about by the continued release of CFCs in other countries. U.S. action did have an effect, however, because at the time of the phase-out, one-quarter of global CFC use was for the U.S. aerosol industry. Eventually, nations successfully negotiated the Vienna Treaty and the Montreal Protocol and amendments that now govern the use and trade in ozone depleting substances.⁹ Under this treaty regime, all industrial nations, with the exception of Russia, Romania, Georgia and Yugoslavia, had halted production of CFCs by the end of 1995, slowing, but not halting ozone layer destruction. The Montreal Protocol has been successful in lowering CFC releases into the atmosphere from a peak of 1,300 million tons in 1988 to only 300 million tons in 1995.¹⁰ The complete elimination of the remaining CFCs by developing countries is not scheduled to occur until 2010, and indeed, their emissions are likely to increase for the next decade. Scientists estimate that after all emissions cease, the ozone layer will require an additional 75 years to 150 years to recover.

News accounts of the devastating effects of hurricanes, typhoons, tornadoes, flooding from swollen rivers or the crop losses due to drought vividly demonstrate the incapacity of governments to protect their citizens from severe weather events. Small island nations and low-lying countries such as Bangladesh are defenseless against inundation from sea-level rise that will accompany any significant global warming. The Association of Small Island States has mounted a concerted diplomatic effort to persuade the industrial world and newly industrializing countries to slow their additions of heat-trapping gases into the atmosphere.¹¹ There are no national defenses against changes in weather patterns because the climate system is global in its scope. It depends upon a combination of solar radiation hitting the earth, the flow of

ocean currents, alterations in the climate from the release of heat-trapping greenhouse gases and local cooling arising from the creation of clouds or particulates that reflect sunlight back into space. Regardless of which nation or human activity produces climate change, all national borders are defenseless against its consequences. It is interesting that at various times, deliberate climate alteration has been discussed and even studied as a weapon of war. Each time, there have been loud complaints as to how unethical a weapon of drought or flood would be. Yet, when 10 large greenhouse-gas-releasing nations create such a potential problem for the entire world, including themselves, there is no comparable sense of concern.

Developing countries that were formerly colonies are particularly sensitive to the possibility that relinquishing any of their sovereignty would subjugate them to a new form of colonialism. Attempts to save forests in developing countries have raised the loudest protests in defense of sovereignty. Debt-for-nature swaps were thought by their creators to be a beneficial mechanism to relieve developing country debt in exchange for forest protection. While countries like Costa Rica, Ecuador and Poland embraced the concept, Brazil has refused to participate. The Brazilian government argues that agreeing to set aside forest land in return for debt forgiveness by foreign debt holders limits their domestic policy choices and infringes upon national sovereignty.¹² Similarly, when companies and governments proposed to pay to plant or to protect forests in the tropics to absorb atmospheric carbon dioxide and to lessen global climate change, Brazil again opposed such action on the grounds that it infringed upon national sovereignty.¹³ The purchase of a large tract of one of the last remaining southern hemisphere temperate forests in Chile by a North American philanthropist for preservation purposes created a national debate over infringement of sovereignty.¹⁴ Simultaneously, the Chilean government was promoting a sale of similar forest land to a North American firm for commercial harvesting. During discussions of a potential global forestry treaty during the past decade, Malaysia, a leading tropical timber producer, has led opposition on the grounds of defending its sovereign right to determine the use of its natural resources. The United States, which is also a major timber producer, has implicitly taken a similar view concerning its own forest resources by supporting *tropical* forest treaties rather than global forest protection that would subject its own forestry practices to international scrutiny.

Treaties that address commons issues and transboundary movements of pollutants or resources create a different set of issues with respect to sovereignty. In order for a nation to comply with its treaty obligations, it must

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enact domestic legislation to implement effective actions. An agreement to eliminate the production and use of ozone-depleting CFCs requires states to develop regulatory schemes that will eliminate the use of these chemicals by the agreed-upon date. Reducing greenhouse gases to slow climate change requires domestic legislation that will improve the efficiency of fossil fuel use either through setting standards or by raising the price through taxes. Reducing the export of acidic sulfur compounds to neighboring countries requires domestically mandating scrubbers on electric power plants and smelters. Needless to say, it is easier for a foreign ministry to pledge action at an international meeting than it is to negotiate the necessary changes in domestic law to

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meet its commitments. The political inability of the United States to enact meaningful energy or pollution taxes demonstrates why global carbon taxes are unlikely to be part of any future climate treaty. A government's ability to levy taxes is, of course, among the most important of its sovereign powers, and few are willing to delegate that capability to an extranational body. Yet, this is what trade agreements routinely do in their relentless drive to lower tariffs. States agree to forego the revenue from tariffs and the protection they provide domestic commerce in exchange for other states' reciprocally lowering their tariffs as well. By agreeing to these trade provisions, nations voluntarily give up their sovereign powers to tax.

Because uncertainty often surrounds the complex science of large-scale environmental issues, international environmental treaties usually have flexible goals that can be modified by the parties in light of new evidence. This has led to

a structuring of international environmental agreements that makes it relatively easy to modify goals in light of new scientific information. The Montreal Protocol, for example, permits some degree of flexibility for adjusting levels of emissions without requiring full re-ratification of the treaty. Critics argue that this dilutes national sovereignty.

In order to address global environmental and commons issues, nations must soften the rigid edges of sovereignty and cede some autonomy to achieve a common good. At the 1990 Global Forum on Environment and Development in Moscow, the vice president of the Soviet Academy of Sciences and chief scientific adviser to Soviet President Mikhail Gorbachev, Evgenij Velikhov, explicitly stated that addressing global environmental problems would require nations to relinquish some sovereignty. This was a remarkable statement coming before the end of the Cold War from a highly-placed Soviet official. Not many national leaders have rallied to this call. In fact, to the contrary, many

nations hide their environmental problems—as they hide their human rights abuses—behind a veil of sovereignty.

Notes

1. For a good description of many of the issues discussed in this article, see Gareth Porter and Janet Welsh Brown, *Global Environmental Politics*, second edition (Boulder: Westview Press, 1996).
2. Porter and Brown, 69.
3. I am grateful to Peter Stott of UNESCO for bringing the Sphinx example to my attention. For more information on the New World Mine see Jessica Maxwell, "New World Blues," *Audubon* 97 (September, 1995): 5.
4. Sandra Postel, *Last Oasis*, [W.W. Norton and Co., 1992], also Rhoda Margesson, "Reducing conflict over the Danube Waters: Equitable Utilization and Sustainable Development", *Natural Resources Forum* 21(1997): 23-38.
5. The International Whaling Commission grew out of the 1946 International Convention for the Regulation of Whaling. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil was replaced by the 1973 International Convention for the Prevention of Pollution from Ships. The London Dumping Convention of 1972 prohibited or required permits for the dumping of non-oil substances, including radioactive wastes.
6. For more on the Law of the Sea Treaty, see Sohn and Gustafson, *The Law of the Sea in a Nutshell* (St. Paul: West Publishing Co., 1984).
7. Porter and Brown, 88-92.
8. "Hearings Before the Subcommittee on the Upper Atmosphere of the Committee on Aeronautical and Space Sciences" United States Senate, 94th Congress, September 18, 19 and 23, 1975, U.S. Government Printing Office, Washington, DC.
9. The texts of these treaties are available through the world-wide web at <http://www.tufts.edu/fletcher/multilaterals.html>.
10. *Vital Signs 1996*, L.R. Brown, N. Lenssen and H. Kane eds. (W.W. Norton and Co., 1996).
11. Porter and Brown, 37.
12. Derek Asiedu-Akrofi, "Debt for Nature Swaps: Extending the Frontiers of Innovative Financing in Support of the Global Environment", *The International Lawyer*, 25, (1991): 557-586.
13. Jose Goldemberg and Eunice Ribeiro Durham, "Amazonia and National Sovereignty" *International Environmental Affairs* 2 (1990): 22-39,.
14. Kate Mahoney, "Can't See the Forest for the Trees: The Challenge of Buying the Right to Conserve Chile's Southern Forests" unpublished paper, The Fletcher School of Law and Diplomacy, Tufts University.



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