

Global Environmental Governance: The Post-Johannesburg Agenda

***October 23-25, 2003
Yale University
New Haven, CT, USA***

On October 23-25, 2003, forty individuals from over fifteen countries convened at Yale University to discuss the state of global environmental governance. The meeting represented the sixth dialogue on this topic sponsored by the Global Environmental Governance Project of the Yale Center for Environmental Law and Policy. The meeting was convened a year after the World Summit on Sustainable Development took place in Johannesburg and represented an effort by experts from around the globe to assess the state of the debate following the WSSD.

Why Do We Have the Current Global Environmental System? Learning from History

The conference opened with an animated discussion, which assessed participants' perspectives on the existing mechanisms of global environmental governance and prospects for achieving progress. The session was structured to glean instantaneous responses from participants using instant polling technology. Each individual received a voting "wand" to electronically submit responses to a series of questions. Responses were instantaneously displayed on screen and discussed by the group.

The introductory question asked: "Did the Johannesburg Summit advance or inhibit efforts to improve global environmental governance?" Participants selected the following responses:

- Significantly advanced 8%
- Slightly advanced 38%
- Neutral 26%
- Slightly inhibited 13%
- Significantly inhibited 15%

Participants expressed disappointment that their high expectations for the Summit had not been met. WSSD exposed the difficulty of implementing a governance agenda and the collapse of international financial markets limited the funding available for environmental efforts. However, several positive aspects of the Summit were noted, including the significant number of governments in attendance, the increased number of national contributions to UNEP, the development of Type II partnerships, the notable rise in civil society participation, and the streamlining of key issues such as climate change and biodiversity into the sustainable development framework. Participants remarked on the prominence at WSSD of "sustainable development governance" (as opposed to "environmental governance") and questioned the implications of this concept.

The second question asked: "How effective has UNEP been as the central authority in global environmental governance?" Participants selected the following responses:

- Very effective 0%
- Effective 33%
- Neutral 23%
- Not effective 33%
- Detrimental 10%

Proponents of UNEP's effectiveness noted its critical role in the development of multilateral environmental agreements. However, they acknowledged that its perceived ineffectiveness provides a setback to the achievement of consensus on the need for environmental governance. The respondents

who identified UNEP as ineffective stated that its dominance in the policy space impedes future progress. It is essential to determine whether UNEP may serve as the building block for future governance efforts or whether it needs to be replaced by another structure. Several participants noted the necessity of including a broader set of “non-environmental” interests in the discussion of institutions for environmental governance and considering broadening the institutional conversation beyond the confines of the UN system.

The third question asked respondents to assess the statement: “Global environmental governance reform should center on strengthening and upgrading UNEP.” Participants selected the following responses:

- Strongly agree 30%
- Agree 19%
- Neutral 22%
- Disagree 14%
- Strongly disagree 16%

Participants largely agreed that UNEP must be the basis for building effective institutions, given its status as the current central institution in international environmental policy. However, significant disagreement centered on whether incremental or radical change is preferable. Additional concerns focused on ensuring that the selected institutional structure is not isolated and its goals are translated to the national and local levels.

The fourth question asked respondents to assess the statement: “The world needs a Global Environmental Organization.” Participants selected the following responses:

- Strongly agree 24%
- Agree 18%
- Neutral 21%
- Disagree 13%
- Strongly disagree 24%

The conversation reflected the prior discussion of whether or not UNEP should serve as the basis for a new or upgraded institutional structure. Many participants critiqued the focus on institutional structure as opposed to goals or functions. In addition, many comments were raised in support of combining environmental and development goals and maximizing the flexibility of institutional structures.

The fifth question asked: “What is the effect of UNEP’s location on its effectiveness?” Although responses were not recorded, the conversation was decidedly split between those who consider location to be an important characteristic in determining effectiveness and those who do not. Those who viewed the location as an impediment cited its distance from the “centers” of the UN system and noted the associated technological and human resource capacity problems. They argued that the “symbolic” location of UNEP detracts from its effectiveness. However, others contended this characterization by noting the weaknesses of other UN institutions that are centrally located. These participants emphasized the range of other factors—such as focus, content, and organization—which may contribute more directly to effectiveness.

Central Functions of Global Environmental Governance and Obstacles to Reform

The participants were divided into four breakout groups to address the central functions of global environmental governance: legislative, administrative, judicial, and financial. The groups were given two tasks: 1) to consider issues and ideas broadly in order to determine necessary goals and structures and 2) to identify obstacles that prevent the attainment of those goals and structures. At the conclusion of the breakout sessions, each group presented its findings and recommendations in plenary.

Legislative session

The legislative breakout group defined the legislative function as encompassing not only legislation and other rule making, but also policy guidance, oversight, budgetary control, and public legitimacy. The group identified four levels of activity to be performed under this broadly defined legislative function:

1) Agenda setting

The group noted that rule-making and policy guidance should continue to be initiated by many diverse sources. Parliaments and the executive are the classical actors, but many players in civil society (e.g. the private sector, NGOs, academia) as well as formal and informal policy networks also provide valuable contributions. Despite this broad set of actors, the authority to make a formal decision to implement a legislative or rule-making process must rest with sovereign states.

2) Decision-making

The group identified two stages of decision-making: 1) decisions to adopt international legislation, rules or policy guidance, which are the prerogative of sovereign states and 2) ratification of international legal instruments, which is the prerogative of national legislators.

3) Implementation and enforcement

At the national level, implementation and enforcement fall within the confines of the executive function. However, at the international level, the mandate of the “international executive” (e.g. secretariats) does not include these critical activities; implementation and enforcement are the tasks of state actors. Therefore, the states are required to perform both legislative and executive functions. In recent years, other actors such as local authorities, private sector entities, and NGOs have been granted increased responsibility for implementation. The group supports this expansion through partnerships, which provide a mechanism to retain transparency and legitimacy in the implementation process.

4) Oversight of implementation

At the national level, oversight or auditing of implementation is generally the responsibility of the legislature. However, this function is not performed at the international level. The group identified improvement of this oversight activity as a critical component of any improved governance system.

The legislative group recognized ongoing efforts to improve global environmental governance, but participants cited an absence of political will to undertake decisive action to change the existing structure of the system. Participants noted the fragmentation (substantive and institutional) in policy guidance and rule-making as a primary obstacle to achieving system coherence and broad participation.

The group then identified several options for improving the legislative function of global environmental governance:

1) Create a single institution to address global environmental issues

The group recommended building on UNEP to create a single institution with a stronger coordinating mandate and a strengthened executive function. The creation of the Global Ministerial Environment Forum (GMEF) and the Environmental Management Group (EMG) were identified as helpful first steps.

2) Strengthen the role of parliaments and parliamentarians

At the national level, parliaments and legislatures should intensify their involvement in international environmental decision-making by holding the executive accountable. National parliamentarians and legislators also should participate more actively in international processes, through topical legislator assemblies, greater participation in national delegations, and improved observer status.

3) Create a “single space” for the international environment

Since it appears politically unfeasible to co-locate the wide set of international environmental institutions, it may be beneficial to establish a single campus for conducting different negotiating processes. This would enable all actors to more efficiently share expertise and coordinate their activities, which would promote coherence in the governance system.

4) Increase efficiency

Reduce the frequency of meetings by delegating some functions to smaller but more representative structures (e.g. executive bodies).

5) Create new frameworks for cooperation

Provide frameworks for extended cooperation and coalitions between state and non-state actors with regard to agenda setting and implementation.

6) Establish an international environmental college

Establish an international “environmental staff college” (modeled on military staff colleges), where participants from international and national institutions, governments, parliamentarians, local authorities, the private sector, and civil society would meet as fellows to freely incubate ideas and exchange experiences. A MGA (Master of Global Administration) may be considered as desirable in this century as the MBA was in the last.

Executive session

The executive breakout group noted the difficulty of considering the executive function in the international context, because member states possess executive powers within the UN system. Therefore, the group chose to associate the executive function with leadership and administrative powers. Participants also noted that the delineation between legislative and executive powers in the context of global governance is often ambiguous.

In order to consider the executive function as largely a leadership responsibility, the group established a definition of leadership for use in the discussion. Leadership at the international level was characterized as accountable, flexible, legitimate, authoritative (not authoritarian), transparent, opportunistic, and confident. In addition, leadership was associated with the power to convene and to make deals. The group identified four connected dimensions of leadership, which must be exercised to bring coherence to the governance system:

1) Scientific

To be effective, international organs need to drive science and help identify a science and research agenda. They should develop the capacity to evaluate and assess progress and to fill data and information gaps. There is also a need to integrate knowledge across disciplines and help scientific communities interact with policy-makers.

2) Moral/ethical

International leadership must speak for the public good and help formulate a common vision for the environment. This role entails raising consciousness among governments and stakeholders, but it also suggests a focus on individual citizens.

3) Political

There has been an absence of political leadership within individual governments and also within the international system at large. Governments need a place where agendas and priorities are set.

4) Programmatic

Individuals and organizations must have the ability to identify successes, address gaps in compliance, question poor performers, comprehend the role of capacity development, and influence national and local decision making.

The group identified a set of obstacles, which have limited the development of leadership within and across these four critical areas.

- Dispersion of leadership
- Failure to clearly define functions
- Absence of incubation period for ideas
- Absence of “safe havens” for idea development
- Absence of self-confidence within the environmental community
- Absence of accountability
- Abundance of priorities limits ability to establish focus
- Aversion to risk taking
- Mistrust of multilateralism as limiting state sovereignty

The group suggested several prospects for action to overcome these obstacles and improve leadership within the global environmental governance system:

1) Engage universities in educating environmental leaders

Environmental leaders should systematically engage universities in developing the next generation of leaders. A key dimension environmental education should be the teaching of ethics.

2) Evaluate other models for application to environmental governance

Consider applying lessons learned from approaches to global governance in other topic areas, e.g. AIDS Fund funding structure, CDM Executive Board function, and private sector consciousness-raising.

3) Consider issue-based approaches to governance

Coalitions, networks, and other informal structures may coalesce around significant global issues (e.g. oceans, climate change) and dominate the governance structure.

4) Base future steps on existing structures and consensus

The most effective approach to environmental governance will build on the momentum of existing priorities and processes and resist the temptation to start from scratch. For example, the Millennium Development Goals have been critical to building confidence and credibility within the international system; these should serve as a basis for future efforts.

5) Evaluate a continuum of reform options and build consensus

Options for reform should be considered throughout the spectrum of ad-hoc (e.g. networks, minimal oversight, safe havens for idea development) to full-scale reform (e.g. World Environmental Organization).

Judicial session

The judicial breakout group identified several considerations that governed its discussion of the judicial function in global environmental governance. First, the role of judiciary is necessary linked to the role of the rule of law. By implication, strengthening the judiciary will require strengthening the rule of law. Second, the role of the judiciary in the international context may be broader than in the national context. Third, the national and international legal systems are not always harmonized and often may conflict with one another. Fourth, it may not be possible to distinguish the role of the judiciary in environmental issues from its role in other topical issues. Dispute settlement mechanisms in the environmental realm typically involve other issues, notably trade and development. Finally, an effective judiciary must provide legal standing to communities and NGOs.

Given these considerations, the group identified thirteen functions of the judiciary in global environmental governance:

- 1) Strengthening the rule of law
- 2) Interpreting rules and provisions
- 3) Creating formal law by acknowledging customary law

- 4) Moving from written principles to applied principles to law
- 5) Defining public interest by interpreting and applying law
- 6) Providing arbitration and dispute settlement
- 7) Acting as state attorney/public prosecutor
- 8) Strengthening compliance with law through the strengthening of the system of liabilities
- 9) Strengthening compliance through building trust and incentives
- 10) Ensuring compliance and the translation of international agreements into domestic law
- 11) Providing access to justice
- 12) Ensuring environmental justice
- 13) Defining pre-existing rights (e.g. indigenous rights)

The group identified the entities that currently perform this set of functions and the mechanisms they utilize. There are no specific dispute settlement mechanisms in the Multilateral Environment Agreements, although the Montreal Protocol and the Kyoto Protocol (among others) include compliance mechanisms. In fact, most “judicial” decisions with environmental implications have been established in the context of settlement procedures for economic cooperation, bilateral investment treaties, or trade violations. Specific functions are performed by the International Court of Justice, the Permanent Court of Arbitration, the dispute settlement mechanisms of the WTO and regional trade agreements, and the Inspection Panel of the World Bank. Other “judicial” functions often are fulfilled by the media, NGOs, and international organizations.

Despite this broad set of entities and activities, the group noted several obstacles to the comprehensive performance of the judicial function in global environmental governance:

- Lack of knowledge, capacity, training, and expertise in the systems that interpret environmental rules
- Institutional gaps, both internationally and nationally
- Fragmentation and limitations of environmental law
- Nascent nature of environmental law (principles need to be operationalized)
- Insufficient and/or poorly defined compliance mechanisms
- Absence of effective systems of enforcement
- Absence of the “pure” environmental
- Lack of affordable access to judicial mechanisms
- Insufficient access to justice for affected stakeholders
- Lack of clear responsibilities and harmony among different courts and decisions
- Lack of harmonization among domestic, regional, and international courts

The group suggested several recommendations for reforming the existing judicial function within the global environmental governance system:

1) Create and disseminate knowledge

There is a need for increased knowledge in order to ensure 1) an effective translation of international agreements into domestic law, 2) compliance with national, supranational, and international law, 3) adoption of effective and efficient decisions, and 4) fair process.

2) Define and create a body of law

One of the most important functions of a judiciary is to foster the creation of a body of environmental law. This includes the definition of the implications of the Rio Principles and their integration into the larger body of environmental law. The judiciary can help to strengthen the system of environmental liabilities and to incorporate the environmental dimension into decision-making.

3) Allocate rights and broaden the notion of standing in court

- 4) **Create and support a unified and efficient dispute settlement mechanism**
- 5) **Link national courts to the international system**
- 6) **Include other mechanisms to hold entities accountable (e.g. media, NGOs)**
- 7) **Create an environmental appeals body**

This could take two forms: 1) an entity that is called upon if “principles of universal applicability” are affected or 2) an entity that reviews the decisions of other dispute settlement mechanisms.

- 8) **Create a consultative body on environmental law**

This body would be open for requests from all courts and decision making bodies. It would possess only an advisory function, but it would necessarily enhance knowledge and harmonize decision making

Financial session

The role of the financial sector in global environmental governance is significantly less established and formalized than that of the other three sectors. Steven Lovink’s concept of Eco-Insurance served as the basis for the group’s discussion and generated broad conversation about the roles of the public and private sector in motivating and implementing environmental protection. The group largely agreed that norms have been developed broadly, and the current focus of environmental governance should be implementation, which requires the active involvement of the private sector. The group emphasized the need for the public sector to establish property rights as well as regulatory frameworks that encourage investment in environmental initiatives. The group discussed the role of UNEP in structuring public-private partnerships that might facilitate this cooperation between governments and the private sector.

The group produced a series of summary statements based on the views of participants:

1. One element of governance must be financing techniques in support of internationally agreed-upon goals
2. We need to move from the world of norm-setting into the world of implementation. We need to consider new government structures, including taxes.
3. The new global environmental governance system should use finance to connect entities to give feedback on their positive and negative impacts.
4. The under-investment in the environment is due to a lack of leadership. Environmental damage is going to be costly, and we’re not insured. We need an international corporation to develop an investment scheme.
5. A flexible, collaborative approach is required to develop financial mechanisms for more projects.
6. We need to move from norm-setting to implementation. We need to increase public-private investment in natural capital. We need to apply market principles to level the playing field (and eliminate subsidies). We need innovative international taxation mechanisms.

Turning Obstacles into Opportunities – plenary discussion

Following the conclusion of the breakout groups, a plenary session provided the full set of participants with an opportunity to discuss the observations and recommendations of the groups. Comments have been grouped into broad categories to capture the principal areas of conversation.

Sovereignty

The evolving role of the state in international relations serves as a principal challenge to defining and improving the functions of global environmental governance. Sovereignty remains the foundational principle of the international system, but states are increasingly influenced and even challenged by major powers, as well as actors from the private and non-profit sectors and networks. Governments are no longer equal and exclusive players in the international system.

This provides a particular challenge to the executive function of governance, since executive powers are associated with individual states. Under this assumption, activities at the international level are inherently reflections of decisions made at the domestic level. However, the Executive Breakout Group defined the executive function more broadly by equating it with leadership. In this context, the UN has a broader executive function, as does the larger set of actors now involved in the international system. Participants concluded that a framework is required to define core government functions and identify the roles and intervention points for other actors. It was suggested that state governments make final decisions, but the stages of initiation, agenda setting, drafting, and even implementation should be open to a broad spectrum of actors.

The suggestion was raised that sovereignty is not absolute, but rather granted contingent upon a set of responsibilities. One participant noted the need for established concepts of appropriate intervention, particularly when a single state cannot be identified as responsible for violation of accepted environmental norms or practices.

Great powers

Participants noted the role of powerful countries (notably the US) in influencing the outcome of environmental negotiations. International relations was depicted as a game of “power politics” in which powerful countries are capable of dictating the terms of agreements and even the nature of other countries’ participation.

Accountability

The broad set of actors involved in the international system places new demands on structures of transparency and accountability. Participants raised the need for clear administrative law and rules of procedure related to the environment, which will define both procedural and substantive fairness. In addition, the increased role of NGOs has increased demands for methods of establishing accountability for the roles and actions undertaken by these groups. Others noted the role of special interests such as fossil fuel companies, the “buying” of scientific opinion, and the impact of think tanks and intelligence agencies.

Translating measures from the international to national level

It is critical to link the global discussion with processes at the national, bilateral, and regional levels in order to assure coherence and reduce fragmentation in the international system. In addition, the international governance system must deliberately build capacity within individual countries. Participants stressed the need to address development pressures in developing countries as well as the production and consumption processes in developed countries.

Additional functions of governance

Participants noted that a series of common principles (democracy, transparency, participation, and equity) underlie the functions of global governance. On a more functional level, it was also noted that data and information are required to adequately perform all the functions and sub-functions presented by the breakout groups. Specific sub-functions of global governance raised by participants included agenda setting, capacity development, policy advice, and data dissemination.

Strategy for Action and Next Steps

The following six conclusions were presented from the previous discussion of functions and roles.

- 1) The framework for partnerships should include modalities for increasing natural resources capital and influencing investment flows, through innovative financing that is based on the services provided by ecosystems, insurance schemes; possibilities for international taxation should be explored.
- 2) There is an important role to be played by mixed governance structures that establish coalitions between state and non-state actors – civil society, business, local governments, parliamentarians and the judiciary. These frameworks could support agenda setting, implementation and reviewing how resources are utilized.
- 3) Development of norms for procedural “fairness” is important to ensure legitimacy, transparency and accountability, and conflict resolution, especially regarding the roles of non-state actors through ad-hoc courts.
- 4) It is important to recognize that implementation will be at different levels – global, regional and local – depending on the type of issue and political will.
- 5) In determining policy priorities, the analytical function was considered important, in terms of comparable data, information, scientific advice, and technological input. This should take into account cross-sectoral aspects of policies, integration of policies and modalities for interaction between various actors.
- 6) The institutional design should include development of a leadership role that has space to discuss innovation, supported by opportunities for informal discussions, training, etc. to build a common understanding of issues. Enforcement was linked to capacity building.

These conclusions provided the basis for a broad-ranging conversation on the state of the existing global environmental governance system and strategies for moving forward. The principal considerations involved the role of UNEP, the key players in the governance framework, the creation of linkages between the environment and other issues, the validity of sustainable development as a governing concept, and the role of data and information in informing and improving the mechanisms of governance. This section concludes with a proposal from one of the participants on a new functional division of the global governance system.

UNEP

The role of UNEP continued to be a focal point of discussion, and a clear break emerged between those who supported incremental reform and upgrading of UNEP and those that preferred a more dramatic, systemic change. Several points merit particular mention:

- Simply renaming UNEP and upgrading to a specialized agency is not compatible with the governance functions discussed in the course of this dialogue. In order to expand the policy space, observers cannot be excluded from the formal decision-making processes. Actors representing business and civil society must be included in the dialogue in a more substantial and meaningful fashion.
- A system that is based on inter-governmental interactions will continue to place strong emphasis on immediate national interests. It is necessary to consider how to encourage governments to bring a broader perspective to environmental issues, particularly by integrating a focus on future generations.
- It is essential to establish a clear and predictable funding mechanism for UNEP. This funding will be instrumental for the new structures of partnerships and technology transfer mechanisms.

Key players

Discussion of new, critical players centered on the role of civil society and business. Participants noted the need to engage in capacity building exercises with the private sector, as it will be necessary to create institutionalized forums to engage and educate the business community. Participants also suggested creating similar “safe havens” for idea development among former environment ministers who understand the politics of environmental governance. Universities also were identified as critical participants, the resources of which may be used to address critical theoretical and practical questions.

Integration of environment and other issues

Many participants identified the environment as an ideal field for issue linkage. Participants stressed the need to expand the group of people who discuss these issues; experts on trade, finance, health, and security issues should be involved in these conversations. The environmental regime must be able to project its concerns into other issue areas and link environmental issues with health, security, and poverty in the eyes of the public, the media, and governments. Environmental issues need to be perceived as directly relevant to individuals who elect their governmental representatives; one participant noted that environmental concerns need to pass the “family test.” Participants commented on the need to pursue a complex strategy that addresses these linkages rather than a simple strategy based solely on the traditional merits of environmental protection.

Challenges of integrating environment and development

Many participants critiqued the existing linkage of environment and development under the “sustainable development” mantra. They expressed concerns that this linkage results in the consideration of environmental issues as a second, “soft” subject in relation to development. Some participants expressed their belief that the linkage may dissolve because investment and growth have not achieved environmental benefits in developing countries. These individuals specifically recommended distancing the environment from the WTO agenda. However, others firmly believed that sustainable development will maintain its stance as the dominant paradigm of environmentalism. Therefore, it is essential to recognize the linkage and ensure that environment and development priorities are mutually supportive. It is also important, however, to keep developed countries involved, which may require a focus different than poverty. A strong international voice for the environment will benefit both developing and developed nations in identifying issue linkages, setting priorities, and implementing agreements.

Data and information

In order to make informed decisions about policies and priorities, we must establish a strong, authoritative data gathering mechanism. Reliable and comparable information will allow the environmental community to develop indicators and link those to other critical issues such as health and poverty.

Proposal for new environmental regime

Toward the end of the session, a proposal for a new environmental regime was presented, which would provide four distinct functions:

- 1) Norm-setting (legislative, judiciary, executive branches)
- 2) Science
- 3) Business
- 4) Leadership (executive branch: empowerment of weak national environmental ministries)