

EFFECTIVE NATIONAL ENVIRONMENTAL GOVERNANCE – A KEY TO SUSTAINABLE DEVELOPMENT¹

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SUMMARY

With her seminal 1962 work, “A Silent Spring,” Rachel Carson ushered in the environmental movement and presented a critical question for generations to come: How can the practices and needs of modern society be managed in a manner that prevents damaging pollution, biodiversity loss, and other environmental harms? Or, in contemporary vernacular, how can global development proceed in a manner that is environmentally sustainable?

In the years since Ms. Carson’s prescient work, countries around the world, with different legal systems and different levels of development, have engaged in the effort to answer this question, and much progress has been made. With last year’s 40th anniversary celebration of the U.S. Environmental Protection Agency’s creation immediately behind us, and next year’s U.N. Conference on Sustainable Development in Brazil, which marks the 20th anniversary of the 1992 Earth Summit, and the 40th anniversary of the Stockholm Conference on the Human Environment immediately before us, it is a propitious moment to take stock. What are the ingredients that have made for the successes realized in the past several decades and how can we project these same ingredients into a future that will include dramatic development and change in many parts of the world?

This paper discusses the importance of national environmental governance³ and suggests that a common set of seven core precepts have emerged that forms a basis for effective environmental governance. These include that: (1) Environmental laws should be clear, even-handed, implementable and enforceable; (2) Environmental information should be shared with the public; (3) Affected stakeholders should be afforded opportunities to participate in environmental decision-making; (4) Environmental decision-makers, both public and private, should be accountable for their decisions; (5) Roles and lines of authority for environmental protection should be clear, coordinated, and designed to produce efficient and non-duplicative program delivery; (6) Affected stakeholders should have access to fair and responsive dispute resolution procedures; and (7) Graft and corruption in environmental program delivery can obstruct environmental protection and mask results and must be actively prevented. These precepts apply both to efforts to protect human health and to protect and conserve natural resources. The identification and reinforcement of these core precepts can assist countries seeking to strengthen their environmental governance systems so that they are better able to address their environmental problems by making and implementing sound, science-based decisions. Effective national environmental governance can also be critical to ensuring a level playing field for commerce and preventing emergence of pollution havens. Improved international coordination and systematic collaboration to strengthen national environmental governance will help forge a path towards global sustainable development.

1 INTRODUCTION

Next year’s U.N. Conference on Sustainable Development, also commonly referred to as Rio+20, has as its central organizing themes: (a) a green economy in the context of sustainable development and poverty eradication, and (b) the institutional framework for sustainable development. While much of the institutional framework discussion has centered on

“Good governance . . . is essential for sustainable development. At the domestic level, sound environmental, social, and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, . . . and an enabling environment for investment are the basis for sustainable development All countries should strengthen governmental institutions, including by providing necessary infrastructure and promoting transparency, accountability, and fair administrative and judicial institutions.”

2002 World Summit on Sustainable Development
Plan of Implementation, paragraph 163.

international modalities and structures, effective environmental governance *at the country level* will be key to fulfilling international and national sustainability aspirations. Green economy discussions have focused on a range of issues including renewable energy, efficiency, ecosystems services, oceans, and mainstreaming of environment in agriculture, infrastructure, and tourism policies, among others. Yet, effective national environmental governance will be critical to support implementation of such policies. In short, without effective environmental governance at the national level, none of our sustainability aspirations – international or domestic – can be realized.

This essay explores the importance of environmental

governance at the country level and suggests that a common set of core precepts have emerged that forms a basis for effective environmental governance. The identification and reinforcement of these core precepts can, we believe, assist countries interested in strengthening their environmental governance systems so that they are better able to address their environmental problems. Ultimately, we believe that improved international coordination and systematic collaboration to strengthen national environmental governance will help forge a path towards global sustainable development.

*Environmental Governance =
Environmental laws +
Implementation mechanisms +
Accountability regimes +
Institutional Arrangements*

2 EFFECTIVE NATIONAL GOVERNANCE IS CRITICAL FOR SUSTAINABLE DEVELOPMENT

There have been many efforts to address individual features of environmental governance, for example, by training environmental inspectors, prosecutors or training judges. These efforts, while they can be quite valuable, are often isolated and can miss the importance of addressing environmental governance as a system comprised of a number of inter-related and reinforcing parts. This system includes environmental laws, implementation mechanisms, accountability regimes, and institutional arrangements. Together, these elements provide the foundation for effective environmental protection and conservation of natural resources, and help chart a course towards an environmentally responsible future. They are key to emergence of the rule of law in the environmental arena – a state of being in which there is the presence of, respect for, and observance of environmental norms and expectations. Indeed, the ingredients of environmental rule of law and effective environmental governance are virtually coterminous.

Effective national environmental governance complements efforts to improve international mechanisms for environmental protection. For example, international treaty commitments cannot be implemented without corresponding national laws and institutions. Effective national environmental governance helps ensure that parties to international environmental agreements actually reap the benefits those agreements are designed to provide⁴ and also produces mechanisms for addressing national and sub-national problems that are not the subject of international attention to the same degree. Effective national environmental governance also helps advance environmental justice⁵, because protection of vulnerable communities requires strong legal institutions and open forms of governance that foster public participation. Finally, it contributes to a level playing field for businesses operating globally and helps avoid the emergence of pollution havens in places lacking effective environmental governance.

3 CORE PRECEPTS OF EFFECTIVE ENVIRONMENTAL GOVERNANCE

As environmental laws and regulatory frameworks around the world continue to evolve and adapt in response to changing conditions, and though countries differ on the precise nature of the environmental challenges they face and on the best ways to address them, this global diversity in circumstances and the lessons derived therefrom point to a core of common governance precepts. We have tried below to identify what we regard as the key common precepts that have emerged to date. As always, the extent to which these elements can be found, and their shape, in particular country settings varies across the diversity in legal systems, cultures, and priorities. Nevertheless, environmental challenges in different countries tend to share fundamental similarities, and thus it is not surprising to see a convergence of legal and institutional tools in response to these common challenges.

Precepts of Effective National Environmental Governance

- *Environmental laws should be clear, even-handed, implementable and enforceable*
- *Environmental information should be shared with the public*
- *Affected stakeholders should be afforded opportunities to participate in environmental decision-making*
- *Environmental decision-makers, both public and private, should be accountable for their decisions*
- *Roles and lines of authority for environmental protection should be clear, coordinated, and designed to produce efficient and non-duplicative program delivery*
- *Affected stakeholders should have access to fair and responsive dispute resolution procedures.*
- *Graft and corruption in environmental program delivery can obstruct environmental protection and mask results and must be actively prevented*

3.1 Environmental laws should be clear, even-handed, implementable and enforceable

For environmental governance systems to be effective, the underlying laws and regulations should be clear, even-handed, implementable, and enforceable. For example, environmental laws should provide a clear roadmap for translating general legal mandates to facility-specific requirements through such tools as implementing regulations and facility-specific permits. Another critical feature is the use of clear and enforceable language, often with reference to identifiable norms and reference points that take science as a key predicate. The result is that the regulated community obtains clarity on requirements and reporting protocols and thus can more readily achieve compliance.

Laws and regulations should also be even-handed in their design and application, ensuring that the vital interests and views of all stakeholders in the environment are considered. This may be achieved in part through public participation processes that allow for stakeholder input into regulatory processes before final decisions are made.

A central premise of many environmental laws is that prevention in the first instance is far superior to remediation because some harm is irreparable, and cleanup is virtually always more costly than prevention. Both technology and ambient norms are used in many systems to achieve such goals. Where capacity is limited, technology-based requirements can serve as a relatively straight-forward first step with ease of application by regulators and proven effectiveness in reducing pollution.⁶ Implementation of technology-based requirements can be facilitated by availability of clearinghouses to match available technologies with facility operations. In imposing technology requirements, caution should be exercised to consider possible unintended consequences, including path dependency that can inhibit innovation, as well as cost effectiveness and efficiency. To allow for program advancement and maturation, environmental laws should allow ultimately for identification of ambient environmental goals, with individual interventions geared towards aligning incentives to achieve and maintain those goals. Environmental laws should further point to scientific information (such as monitoring data) as a critical reference point for sound decision-making.

Environmental laws often provide for review and renewal of standards, to provide a means of updating requirements based on new knowledge. Anti-backsliding mechanisms may be included to promote continual improvement or at least guard against regression. Environmental laws also commonly make use of measures that make accountability mechanisms more efficient, including requiring polluters to monitor and report their pollution, limiting defenses that can be raised in enforcement cases, and curbing opportunities to challenge regulatory agency decisions beyond a set timeframe. The laws must also be designed to resonate with and advance the other core environmental governance precepts discussed below. Thus, environmental laws should include clear articulation of processes and mechanisms for inter-governmental accountability and coordination, reporting and information disclosure requirements, procedures for stakeholder involvement, institutional structures for program implementation, mechanisms to reduce the possibility of corruption, and provisions for judicial review.

3.2 Environmental information should be shared with the public

Routinely making environmental information public enables civil society to take an active role in ensuring accountability, reinforcing and expanding upon government efforts to ensure accountability. This provides a basis for community engagement, and fosters development of an environmental ethic throughout civil society, industry, and government.

Basic scientific research as well as robust monitoring and assessment of pollution and resource threats are important pillars of effective environmental governance. Our dependence on the services which ecosystems provide is increasingly being given consideration in designing policies and laws. Systematic collection and assessment of environmental information can form the basis of reviewing environmental programs and policies to evaluate effectiveness and make adjustments.

In recent years, the idea of Pollutant Release and Transfer Registry has emerged as one of the most important developments in modern environmental protection, especially as means for creating pressure to lower pollutant release levels. This Registry system requires public disclosure of pollutant release information, often via the internet. The result is to attract the attention of high level company managers who have the power to prioritize actions to reduce pollution. Accounting for pollutant releases also exposes waste in production processes, encouraging adjustments towards more efficient materials management.

Public access to environmental compliance data reported by the regulated community or amassed by government serves many of same goals. Generally, reported information can inform public debate and consumer behavior, and leverage the “power of shame” and competitive pressure as compliance motivators.

3.3 Affected stakeholders should be afforded an opportunity to participate in environmental decision-making

Effective public participation has several key features, including access to information (discussed above), the opportunity to offer views at a pre-decisional stage, and the opportunity for post-decision challenge before a neutral tribunal. Regulated entities and civil society should have an opportunity to engage regulators regarding regulations that affect them and the opportunity to challenge government decision-making that is erroneous or unprincipled, i.e. that is not grounded in science and law.

Communication and education efforts can enhance public awareness and understanding needed for effective public participation, and can inform the development of an environmental ethic.

Direct citizen legal action against polluters has proven a powerfully important element in some countries. Such citizen actions can complement government enforcement efforts and reinforce the backbone of government enforcers. Provision for direct citizen legal action can also enhance the system of checks and balances on government behavior not grounded in science and law.

An empowered citizenry feels in control of its fate and is more apt to channel its concerns through legal mechanisms rather than through civil disobedience or other extra-legal means. An involved and informed community is also more likely to understand and be accepting of outcomes, while noninvolvement breeds suspicion and disaffection.

3.4 Environmental decision-makers, both public and private, should be accountable for their decisions

Effective environmental governance systems hold government accountable for making principled decisions, grounded in science and law, to ensure confidence in the impartiality and public purpose of their actions. Effective environmental governance systems also hold polluters accountable for compliance with environmental requirements and for remediating any environmental damage caused by them. Where government is itself a polluter it should lead by

example and, at a minimum, commit to the same standard of conduct it expects from the private sector.

The ability of citizens to seek legal recourse against polluters and against the government, discussed under public participation above, can be an important part of the overall system of accountability.

Governmental enforcement usually makes up a critical part of an effective accountability regime. Compliance assistance, reporting requirements, inspections, monitoring, and administrative, civil, and criminal enforcement authorities can all play important roles in an effective enforcement system. As an initial priority, enforcement remedies should require halting the violation, through injunctive relief or related tools. Penalties or fines assessed must be sufficient to deter noncompliant behaviors. To do so, they typically must at a minimum disgorge from the violator the economic benefit of noncompliance. The costs of environmental remediation should ordinarily be borne by the entity that produced those costs rather than the public at large (“polluter pays”). Enforcement actions should endeavor to treat like violations in like fashion, providing a level playing field of expectation and response.

Further, accountability regimes should provide equivalent and non-discriminatory treatment to national and foreign actors, and should ensure transparency of government decision-making, exposing improper influences or purposes to public scrutiny. If corruption, capacity limits, or other factors are allowed to interfere with the objective of robust, even-handed enforcement, the law can be flouted and the Rule of Law undermined, forestalling sustainable development.

3.5 Roles and lines of authority for environmental protection should be clear and coordinated

Regulatory roles should be defined in a manner that provides means of coordination to foster efficiency and prevent conflicting expectations of regulated entities. Rules and protocols are often needed to “direct traffic,” i.e. ensure that tasks and responsibilities are assigned appropriately, so as to achieve coherence in the division of labor between different government institutions. This is the case whether the system for delivery of environmental protection operates via a centralized governance structure or a decentralized governance structure.

At the national level, laws should define whether environmental protection programs are to be administered by an independent agency or associated with other governmental programs. In some instances, the independence of regulatory functions can be compromised if they are housed together with business enabling functions. It can thus be important to structure environmental agencies in such a way as to avoid industry “capture” of the environmental protection function, i.e. to ensure that the private business interests of the regulated industries do not inappropriately influence or predominate over the public interest mission of the program.

Relationships between national-level agencies involved in environmental protection can advance environmental objectives more effectively if they are formally structured rather than worked through on an ad hoc basis. To minimize competition, prevent conflict, and clarify roles and rules of engagement, roles can be set out in laws, regulations, or inter-agency Memoranda of Understanding. For example, in many systems, environment ministries establish close links with prosecutors to promote enforcement cooperation.

When multiple levels of government are involved, effective governance necessitates a clear division of labor between the national, provincial and local levels. This includes, for example, specifying clearly which level of government has implementation primacy – for

example, which level will issue pollution permits – as well as creating mechanisms that address contingencies such as implementation failures by provincial or local government authorities.

3.6 Affected stakeholders should have access to environmental dispute resolution mechanisms that are fair and responsive

The judiciary (and, in some countries, administrative courts) plays a vital role as the guarantor of the protective benefits of environmental law. What judges treat as important, a society comes to judge as important. And thus the response of the courts to environmental problems can have a powerful transforming effect for a society at large. The seriousness of judicial attention and response can project to the regulated community and to the public at large the importance of environmental quality and the unacceptability of behaviors that jeopardize the environment. The judicial response can serve as a powerful catalyst toward the solidification of the environmental rule of law and the development of an environmental ethic – an ethic that, once it takes hold, can engender a sense of responsibility in all sectors of society, inspire citizens to think green and buy green, and encourage businesses to respond to green consumer demand and to their own emergent corporate environmental conscience.

Fair and responsive resolution of disputes requires impartiality of the reviewing tribunal as well as timely review. After all, justice delayed can frequently be justice denied, especially in light of the irreversibility of some health impacts and environmental harms.

Publication of judgments is desirable both as a means of calling the attention of the regulated community to the compliance imperative and of promoting more general awareness of the importance of environmental protection.

Courts in different countries have utilized a variety of special mechanisms for dealing with the complexity of environmental cases, including the use of special masters and other court appointed experts, strict liability standards, shifting the burden of proof to the polluter on some issues, and development of environmental specialty courts. Nevertheless, traditional judicial authorities, such as invocation of the coercive power of the courts to ensure that judgments are carried out and the ability to maintain jurisdiction to effectuate a remedy, remain of central importance in the environmental context.

The principled and even-handed administration of justice includes producing consistent, predictable results in like cases and a penalty baseline that recaptures the economic benefit of noncompliance. Doing so promotes cost internalization and eliminates market disparities between compliers and non-compliers.

3.7 Graft and corruption in environmental program delivery can obstruct environmental protection and mask results and must be actively prevented

Environmental governance does not operate in a vacuum but is linked to and complementary with other aspects of good governance, including the need to ensure independence and prevent corruption within the various elements of the environmental governance system. Corrupt and unprincipled decision-making frustrates program implementation, masks environmental results, and erodes public confidence in the environmental rule of law.

Because the cost of compliance with environmental requirements can be significant to individual actors,⁷ it is vital to reduce the potential for graft and bribery of environmental officials, such as inspectors and permitting officers, through anti-corruption measures. Standards of ethical conduct for government officials and strong and independent internal review

mechanisms to ferret out corruption are essential. Moreover, “whistleblower” protections can encourage employees of polluting companies and government agencies to report, i.e. “blow the whistle,” on misdeeds of superiors by creating protection from acts of reprisal.

Similarly, judicial professionalism and independence can be enhanced by developing a code of conduct for judges, including provisions for financial disclosures and recusal or disqualification when there is an appearance of conflict of interest. Providing financial security and protection from political retaliation can help as well.

4 CONCLUSION: ENHANCING INTERNATIONAL COLLABORATION ON NATIONAL ENVIRONMENTAL GOVERNANCE

That effective governance is key to success in addressing environmental challenges – or for that matter any important societal objective – is beyond reasonable dispute. Indeed, many governments and inter-governmental organizations have worked for years on building capacity to promote particular elements of effective environmental governance. For example, there have been laudable efforts to provide training on legal tools for environmental protection, environmental enforcement, public participation in environmental law, the role of science in environmental law, as well as training for judges on handling environmental cases, each of which addresses a discrete aspect of environmental governance. But what has been missing has been the stitching together of these elements into a coherent whole. Moreover, what constitutes effective environmental governance has not to date been reduced to a commonly accepted set of ideas.

A basic tenet of the environmental movement is that everything is connected to everything else. Twenty years after the Rio Earth Summit and more than 40 years since the creation of the U.S. EPA, we see this tenet extending beyond eco-systems to *government* systems. Perhaps recognition of the common precepts of an effective, integrated system of governmental intervention built on the rule of law and geared towards producing a sustainable future would represent a meaningful step forward, as countries endeavor to manage their development in a sustainable and environmentally protective manner. With the benefit of decades of lessons learned, identification of such precepts is now within our means, and we offer our list as grist for further discussion. Perhaps next year’s United Nations Conference on Sustainable Development provides a moment to reflect on the critical foundation national environmental governance provides, identify its core elements, and to consider modalities for more effective and systematic efforts to build national environmental governance capacity.

5 REFERENCES

¹ This working draft should be viewed as provisional. Any comments on this draft can be sent to Steve Wolfson of the U.S. Environmental Protection Agency’s Office of General Counsel at wolfson.steve@epa.gov

² Scott Fulton serves as the General Counsel of the United States Environmental Protection Agency, and Antonio Benjamin serves as a Justice to the Supreme Court of Brazil. In their current and prior capacities, Benjamin and Fulton have over the past two decades been key discussants in the international dialogue concerning environmental governance. The views expressed in this essay are those of the authors and do not necessarily reflect the views of the United States or Brazilian governments.

³ For ease of reference, we use the label “national” to offer differentiation from “international.” We view “national” as including within it actions that happen at the country-level, whether those actions are implemented by national, provincial or local authorities. In our view, the ideas expressed apply with equal force to the different levels of government within a given country.

⁴ Some countries often need new legislation to implement treaties while in others courts may enforce treaties directly.

⁵ “Environmental justice” is the fair treatment and meaningful involvement of all people regardless of race, color, religion, national origin, or income with respects to the development, implementation, and enforcement of environmental laws and policies.

⁶ At this point in the evolution of environmental protection, there are readily available technology reference points for most types of polluting activities.

⁷ Based on the experience of many countries, the public health and other dividends of environmental protection far exceed in value the private costs of compliance.