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Abstract

It is nothing new that governments advance self interested policies during international policy negotiations and that the knowledge of policy experts reflects frameworks which are weaved into international policies. But it is unclear though if policy makers take deliberate steps to eliminate potential ineffective models when crafting international regulatory instruments. Using the Convention on Biological Diversity (CBD) as a focus, this paper examines how an environmental regime's policies can build on sustainable institutional systems, enhance sustainable policy frameworks, save scarce resources, promote informed & effective community participation, and legitimise policy objectives. By examining whether multidisciplinary approach and knowledge can enhance the achievement of policy goals, as well as expose possible setbacks to achieving effective regime policies, this paper espouses multidisciplinary tools for understanding regime policy. It highlights potential health rights topics suitable for contemporary policy debates and themes for further research in the field of policy making. It is argued that debates about policy discourses in the 21st century ought to concern the degree of policy effectiveness: not policy ineffectiveness per se.

Keywords: policy regulation, multidisciplinary approach to policy making, policy effectiveness, sustainable policy making, informed community participation, policy debate.

Introduction

In our contemporary world, policy regulation is the fulcrum on which globalisation sits. On one end of the scale is a regime – the CBD, and a State on the opposite end. In regards to environmental regulation under the CBD, policy targets as conceived by Parties are so vague that the fact in itself almost ridicules theories of international law. States convene to address issues of common environmental concern by negotiating an agreement – designed tactfully in order to realise primary goals of the convention. But the advanced ‘chess game’ germane in the negotiation process usually eliminates the quests of the weak and then the product of the union often celebrated as democratically instituted codes of policy. An end – product traditionally characterised by superior political and economic dictations: running short of genuine desire to promote collective policy interest.

The best way to describe policy regulation as understood by States when acting under an international regime is that the common goals are easily determinable. Parties can make reference to specific provisions in relevant instrument where their clear objectives are eruditely articulated. It is equally uncomplicated to observe that in their capacity as international organisation, Parties know exactly what their domestic obligations mean in terms of harmonizing domestic arrangements with collective agreements.

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Common perception about State Parties' understanding concerning their domestic environmental obligations and hence would respect regime obligations may be extremely misguided. This is because within domestic domains States' assumed collective policy perception usually reveals tacit yet abstract policy images – regarding environmental policy priorities – among same members of a regime. Often, it suddenly becomes vivid that the gap between a regimes' understanding of its policy goals on one hand and the understanding of its individual Parties for same policy goals on the other hand: is like a chasm. This qualification of reality within a regime may notwithstanding its blunt but true character; not garner considerable popularity among mainstream ideology – concerning the relevance of the CBD.

But so does a regime emerge: a convention of States transforms into established institution building legitimacy all across the board. Based on just this factor, the CBD; can be correctly declared as a successful international environmental system – at least from an institutional point of view. Zucker has the following to say about institutions, '...once institutions are established, they may persist even though they are collectively suboptimal.'¹ When societies reach a form of ideological consensus in terms of their perceptions about political institutions, the institutions which emerge gain legitimacy. So, ideological consensus about the significance of an institution represents a suitable match for formal rule.²

Therefore, the CBD remains important, relevant, legitimate, and even appears effective. At domestic levels many State Parties meet face to face with unfriendly political and economic pressures and consequently they succumb to social, political and economic priorities entirely different from environmental policy targets which they had pledged in their capacity as parts of the CBD regime. Above all, it can yet be averred from a political science perspective that States always uphold their social, political and economic targets. States are crucial and relevant for policy regulation. So in as much as State's changing interest remains a constant phenomenon, the discipline of political science sees this form of erratic characterisation as nothing surprising; and more so the fact that the normative nature of State policies tends to be misconstrued by erroneous attempts of other academic disciplines to use cognitive approaches while attempting to understand State decisions. States may indeed deserve to claim legitimacy in terms of facilitating international environmental accords or merely, as genuine instruments of policy effectiveness.

In regards to exploiting bioresources States do not hesitate to assert their right and authority through claims based on sovereignty. Nevertheless, a critical actor remains deeply buried in the heart of this policy regulation discourse. What about local communities/indigenous peoples? International environmental regulations ceremoniously highlight legitimate concerns of local communities – with mere lip service. This is no nasty surprise to most researchers because researchers understand the process of international policy negotiation and they know that stakeholders like States, multinational corporations and intergovernmental organisations walk into policy negotiating table with policy experts and other scientists who ensure that the interests of these 'alpha stakeholders' are not jettisoned by all other interests –

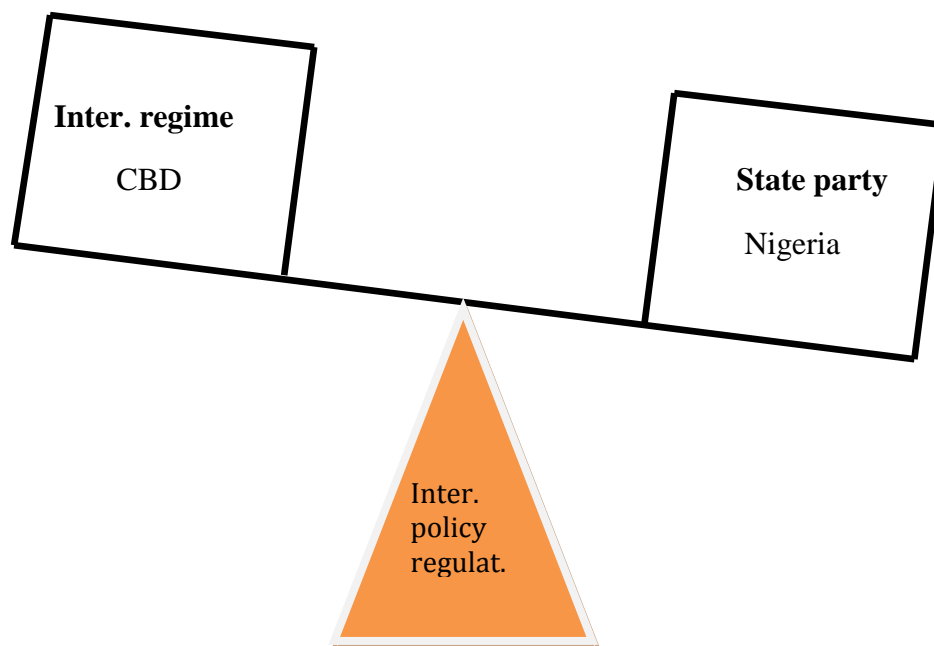
¹ Lynne Zucker, 'Production of Trust: Institutional Sources of Economic Structure 1840 – 1920' in B M Staw and L L Cummings (eds) *Research in Organisational Behaviour* 8:53 – 111 (Greenwich Connecticut JAI Press 1986)

² Walter W Powell and Paul J DiMaggio (eds) *The New Institutionalism in Organisational Analysis* (The University of Chicago Press 1991)

whether collective in the sense of common goals of the regime or individual in the sense of other influential and powerful stakeholders.

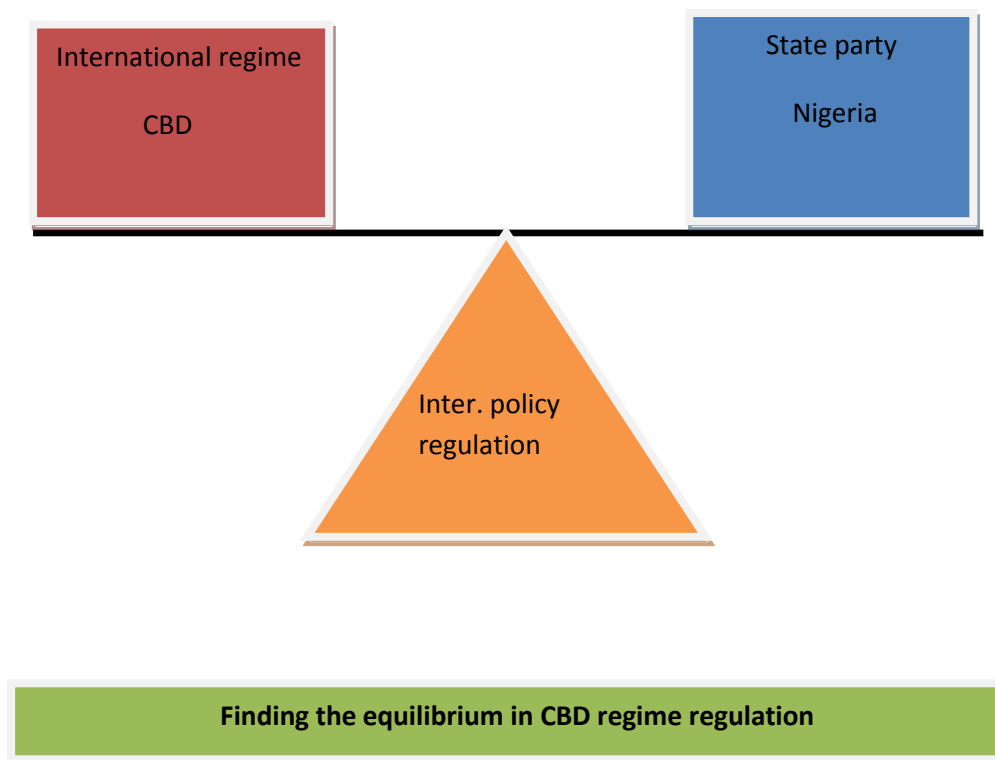
NGOs do their best during international environmental negotiations and they push hard to keep alive, policy debates concerning weak stakeholders – local communities and other vulnerable groups. Under the CBD, socio – environmental quests of local communities were achieved by incorporating these concerns into the international accord. But at domestic levels, local communities are unjustly compensated with environmental injustice (especially in developing countries), probably due to the fact that NGOs who possess technical expertise relevant for policy negotiations cannot be everywhere. The outcome of such absence is that on matters regarding exploitation of bioresources from lands belonging traditionally to local communities, these communities engage in the so called ‘participation’ by embarking on policy & project negotiations with other parties who possess overarching expertise in the field of resource exploitation and management. What happens as a result of this factor? Local communities normally loose in such negotiations. But not just loosing; they often loose badly: very fundamental health and environmental rights – a portrait of inequality existing in our current international environmental regime under the CBD. For illustration, see figures 1.0 and 1.1 below.

Figure 1.0



Imbalance in power equation within the CBD in regards to socio – environmental concerns of local communities

Figure 1.1



Multidisciplinary approach to understanding policy regulation

This paper reviews policy commitments by actors towards indigenous people/local communities and whether such commitments are indeed sustainable in character. It explores these questions by assessing frameworks for environmental policy regulation under the CBD. To be precise, this paper examines whether international environmental policy negotiations based on the Convention genuinely take health & environmental rights of local communities into proper account or contribute instead to the violation of these health & environmental rights. It further explores this question with multidisciplinary spectacles. The question treated herein tiers into flaws in negotiating power parity of indigenous peoples when they are pitched against actors like States or multinational corporations – on issues concerning exploitation of bioresources. Hence it reveals how CBD regime regulations operate perfectly at the ‘top’ but never carries its sustainability goals to indigenous people/local communities – who are always located at the ‘bottom’. Analysis in this paper draws inspiration from theoretical perspectives in the fields of sociology, political science, international relations, economics and law.

Sociologists view the introduction and establishment of the CBD mechanism as rooted in the concept of institutionalism and they have widely developed theories for explaining the *raison d'être* for using institutional structures in achieving or satisfying societal needs. Neo institutional theories³ can be used to demonstrate how modern institutions – CBD, can

³ Powell and DiMaggio (eds) (n 2)

facilitate sustainable institutional frameworks by improving the tenor of participation for local communities in negotiation processes.

Across the social sciences and particularly within the field of sociology, scholars reach out for terms like institution or institutionalisation as a term which connotes the presence of authoritative rules or binding organisation, and explaining why institutions are organised, have established characters and possess systematic procedures. In fact, some sociologists suggest that the theory of institutions is the sociological replica of ‘...the theory of competition in economics’.⁴ ‘Both the rational – actor and more sociological approaches to international institutions are better developed theoretically than empirically: there is little research on why regimes develop in some issue areas rather than others; nor do we know what factors explain regime persistence. What is apparent is that international regimes are durable institutions that shape and constrain the relations among states, and that understanding how such institutions develop, persist and expire is an important task.’⁵

There are both rational and sociological reasons why international institutions emerge and evolve. Rational reason why the CBD emerged is quite obvious; but a more sociological line of thinking recognises that ‘institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power.’⁶

According to Meyer J W and Rowan B, ‘...organisations are driven to incorporate the practices and procedures defined by prevailing rationalized concepts of organisational work and institutionalised in society. Organisations that do so increase their legitimacy and their survival prospects, independent of the immediate efficacy of the acquired practices and procedures... Institutionalised products, services, techniques, policies, and programmes function as powerful myths, and many organisations adopt them ceremonially.’⁷ So sociologists acknowledge equally that if a new norm is internalised within an institution; enterprises and other stakeholders would eventually adopt this new norm in order to maintain legitimacy – irrespective of controversies surrounding its immediate, short term or long term values.

As Meyer and Rowan pointed out, sticking with institutionalised rules often clash with efficiency criteria. At the same time, coordinating and controlling activities in order to promote efficiency undermines an organisation’s ceremonial conformity and compromises its support and legitimacy.⁸ The CBD regime operates effectively when exclusively assessed on a global platform but the reverse is the case if compared to its effectiveness at domestic levels. In particular, it lags in effectiveness with respect to how its mechanisms affect health & environmental rights of vulnerable local communities in many developing countries. Thus, the pursuit of unsustainable economic targets tends to be one of several factors that impede the achievement of CBD goals at local levels.

⁴ Ludwig Lachmann, *The Legacy of Max Weber* (The Glendessary Press 1971) 68

⁵ Powell and DiMaggio (eds) (n 2) 7

⁶ Robert O Keohane ‘International Institutions: Two Approaches’ (1988) 32 *International Studies Quarterly* 379, 382; Friedrich Kratochwil and John Gerald Ruggie ‘International Organization: A State on the Art of the State’ (1986) 40 *International Organisation* (4) 753 – 75; Stephen D. Krasner (ed) *International Regimes* (Cornell University Press 1983)

⁷ John W Meyer and Brian Rowan, ‘Institutionalised Organisation: Formal Structures as Myth and Ceremony’ in Powell and DiMaggio (eds) (n 2)

⁸ Powell and DiMaggio (eds) (n 2)

According to institutional economics, ‘institutions arise and persist when they confer benefits greater than the transaction costs (that is the costs of negotiation, execution and enforcement) incurred in creating and sustaining them.’⁹ The role of institutions as suggested by organisational economists is to reduce uncertainties by providing dependable and efficient frameworks for economic exchange.¹⁰ North defines transaction costs quite broadly, by viewing them as the general overhead cost of maintaining a system of property rights, under conditions of growing specialisation and a complex division of labour.¹¹

Institutional sociologists on the contrary offer more normative perspectives to factors that contribute to the optimality of international institutions. Sociologists define ‘optimistic functionalism as a mode of explanation whereby outcomes are attributed to their beneficial consequence.’ They claim that when ideological consensus is high, opportunistic behaviour is curbed. But when ideological consensus is low, contracting costs are higher and more energy goes to efforts towards institutional change. Thus, as previously asserted in the introduction, ideological consensus normally represents an efficient substitute for formal rules. Is there so far high ideological consensus on the goals of CBD at the international level and municipal levels? How do we explain this gap (if there is any) and do we properly evaluate the CBD regime – with institutional systems within it?¹²

‘...organisational success depends on factors other than efficient coordination and control of productive activities. Independent of their productive efficiency, organisations which exist in highly elaborated institutional environments and succeed in becoming isomorphic with these environments gain the legitimacy and resources needed to survive.’¹³

Hirsch argued that this success is primarily based on environmental processes peculiar to the organisation in question, together with the organisational leadership’s conscious efforts to transform these processes.¹⁴ ‘All organisations, to one degree or another, are embedded in both relational and institutionalised contexts and are therefore concerned both with coordinating and controlling their activities and with prudently accounting for them.’¹⁵ It may therefore be true as many sociologists postulate that power and interests shape the evolution of organisational fields.¹⁶

Regimes are understood as international structures comprising policies, norms and systems of decision making with implied and/or explicit speculations of what actors want out of such

⁹ (n 2) 3 – 4.

¹⁰ *ibid* 4

¹¹ Douglas C North ‘Government and the Cost of Exchange in History’ (1984) 44 *Journal of Economic History* 255 – 64

¹² The CBD may appear as efficient environmental regime due to its milestone – from a global standpoint; but it is also an unsustainable and inefficient environmental system from a local perspective – due to its negative and unintended effects on socio – environmental rights of local communities in developing countries. Under its operational system the obligation to enact local environmental policies is delegated to State Parties but at the same time not subjugated to international environmental standards which navigates a fast route to achieving the supreme goals of the regime itself. ‘...the delegation of activities to the appropriate occupations is socially expected and often legally obligatory over and above any calculations of its efficiency.’ (n 2) 44

¹³ Powell and DiMaggio (eds) (n 2)

¹⁴ Paul M Hirsh ‘Organisational Effectiveness and the Institutional Environment’ (1975) 20 *Administrative Science Quarterly* (3) 327 – 44

¹⁵ Powell and DiMaggio (eds) (n 2) 54

¹⁶ *ibid* 31

social partnership.¹⁷ The distinction between researches on neo – institutionalism; namely a sociological dimension to the dictates of collective behaviour, and a rational – choice approach is that the latter has more cognitive emphasis concerning the politics of international regimes. The contemporary approach to the nature of regimes is suitably normative in character and hence highlights non – cognitive factors that shape modern regimes. The CBD itself can make or break the relevance of informed voice of local communities as well as their legitimate health & environmental concerns. So a bleak exemplification of the impact of the Convention in many developing countries is so to speak both a regime and State failure to promote sustainable international environmental policies. This kind of flaw in CBD regime framework stems from compliance and implementation dilemma that is generated by mechanisms of the Convention.¹⁸

Many scholars content that the Convention is broad in its focus and as a result covers too many issues. Thus, it has become a convergent point for a multi – dimensional, complex, trade related and controversial environmental topics.¹⁹ One way of reconciling divergent perspectives about regimes is to chart the independent variables and disaggregates of co – operation and which can mean: i) agreements on norms; ii) procedural rules/systems of compliance; iii) outcomes from co – operative process; iv) or promoting the degree of acceptance of a regime. This includes the harmonisation of existing rules, sharing the economic burden for rule – making, rule – enforcement within the regime or increasing the scope of acceptability, for these norms. Although there may be initial agreement on a range of norms, rules and procedures, it would be misleading to assume that other forms of co – operation will follow. Compliance theorists and lawyers typically focus on the first order co – operation (i), liberal institutionalists on the three others (ii, iii, iv) and constructivists on the last (iv).²⁰ Further analysis hereunder tersely explores ways in which the effectiveness of the CBD regime can be measured.

Effectiveness as problem – solving: by many measures, this is the most fancied and yet most problematic aspect of effectiveness in regimes. ‘A regime is effective when it contributes importantly to the solution of the problems that it was ostensibly created to address. In this conception, effectiveness is generally thought to proceed from implementation and compliance.’²¹ The CBD will be effective if after a minimum time lag, one notices a fair improvement in the state of biodiversity conservation around the world. Two dimensions were identified by Underdal²² in this regard: the degree to which the regime has contributed to the improvement, and the distance between that improvement and the social (collective) optimum.

¹⁷ Krasner (eds) (n 6) 2

¹⁸ See U Orazulike, ‘Revisiting the Elusive Nature of Indigenous Peoples’ Rights under International Environmental Law’ in Vasilka Sancin (ed) *International Environmental Law: Contemporary Concerns and Challenges* (GV Publishing Ljubljana 2012) pp 242 – 46

¹⁹ Philippe G Le Prestre (ed) ‘Governing Global Biodiversity: The evolution and implementation of Convention on Biological Diversity’ (Ashgate 2002) ‘Conceived initially as a means of putting some order into disparate agreements regarding the protection of wildlife, the CBD quickly moved beyond this narrow concern. It addresses issues that range from ecosystems protection to the exploitation of genetic resources, from conservation to justice, from commerce to scientific knowledge, from the allocation of rights to the imposition of responsibilities.’

²⁰ (n 19) 59

²¹ *ibid*

²² Arild Underdal, ‘The Concept of Regime Effectiveness’ (1992) 27 (3) *Co – operation and Conflict* 227 – 40

Effectiveness through goal attainment: this model is different from the preceding one in that the explicit yardstick for measuring effectiveness is whether, a regime's goals (express or implied) are achieved during a given period.

Implementation: is favoured as an indicator of effectiveness by policy – oriented scholars. Implementation can weaken, strengthen or completely modify the purpose and effectiveness of policy. Implementation failures, that is, failure to adopt measures needed to carry out national obligations, may be wilful (eg economically unaffordable), stem from ignorance of the legal and policy implications of the covenant, be rooted in a lack of technical resources, or be the consequence of the agreement and measures planned having become overridden by other international rules. But implementation failure can equally be rooted in technical flaws in the policy instrument.²³

Compliance: is a popular measure of effectiveness in regimes. It is widely supported by scholars who promote an international order based on international law equating effectiveness with compliance.²⁴ Thus, a regime is considered to be effective to the extent that parties comply with the commitments that were undertaken under the environmental instrument in question. Under its rules, compliance can be i) procedural ii) substantive or iii) normative. Procedural compliance refers to adhering to the legislative procedures laid out in a treaty, such as in the case of CBD regime, an obligation to report.²⁵ Substantive compliance refers to substantive requirements set out in institutional frameworks associated with an environmental treaty, such as controlling an activity.²⁶ And normative compliance represents adhering to the spirit of the treaty with regards to the broad normative principles as elicited in the Preamble or initial articles of the Convention.²⁷

Behavioural change: 'In light of difficulties of assessing outcomes, and eager to encompass the range of situations and problems that environmental agreements tackle, many political scientists have opted for a conception of effectiveness centred on behavioural change. According to this perspective, a regime is effective "when its implementation leads to patterned behaviour that furthers the goals of the accord"²⁸ behaviour that would not have taken place in the absence of the regime.'²⁹

Behavioural change engenders: reinforcing pre – existing behaviour, enabling entirely new behaviour, or changing old behaviour. Behavioural effectiveness is not limited to States that are parties to the regime. It makes sense that it also includes other parties, targets, and

²³ Orazulike (n 18)

²⁴ Karen J Alter, 'Regime Design Matters: Designing International Legal Systems for Maximum or Minimum Effectiveness' 2000 International Studies Annual Meeting

²⁵ Convention on Biological Diversity Rio De Janeiro 1992 article 26

²⁶ Articles 8 and 14 (n 25)

²⁷ Harold K Jacobson and Edith B Weiss 'Assessing the Record and Designing Strategies to Engage Countries' in Harold K Jacobson and Edith B Weiss (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998)

²⁸ Oran R Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in James N Rosenau and Erns – Otto Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (Cambridge University Press 1992) 161

²⁹ Le Prestre (n 19) 72; Andreas Hasenclever Peter Mayer and Volker Rittberger, *Theories of International Regimes* (Cambridge University Press 1997) 86

stakeholders.³⁰ Most importantly, researchers generally acknowledge that while measurement of effectiveness as compliance or implementation can easily be made, it is more difficult to measure ‘behavioural change’.

Co – operation: concerns whether the regime has had a positive impact on co – operation and on stakeholders’ commitments in favour of its objectives and whether it has led actors to re-evaluate and redefine their interests in terms of collective goals. International regimes are effective in the sense that States follow cooperative policies which, in the absence of a regime, they would most likely not pursue.³¹ This concept of effectiveness in regimes centres around process in contrast with differing focus on outcomes or outputs. ‘Success then depends on the extent to which the regime has facilitated ‘processes of learning’, capacity building and support building in order to address policy problems in a decentralized way consistent with the interests of the actors involved.’³² A regime is effective if it leads to a redefinition – successful socialization process; strong if the content of the redefinition is extensive; stable if the norms, rules and procedures evolve only slowly and if the nature of the Parties also remains constant or robust. Young and Levy lucubrates it succinctly:

‘...institutions that goad members to undertake measures that go beyond what is required for compliance are considered more effective than those that only elicit the minimum behavioural change required.’³³

Does this mean moral obligations to foster the goals of a regime, beyond explicit obligations of Parties to the regime – in question?³⁴ Further on – in this sense, business enterprises which adopt sustainable biodiversity policies due to its prominence in the CBD regime commit to corporate behavioural change. Hence a vivid example of ‘co – operation channel’ though through non – binding or non – regulatory route to achieving policy goals enshrined in the Convention.³⁵

Normative Justice: ‘Finally, effectiveness can have a heavy normative meaning and refer to particular desirable outcome that may not be directly related to the proximate goals of the regime (such as biodiversity conservation) but are socially desirable or to a process that promotes desirable social goals (such as empowerment and participation).’³⁶ According to Young, ‘It is also possible to think about effectiveness in terms of normative principles, such as fairness and justice, stewardship, participation... Each profession is likely to favour a particular notion of effectiveness.’³⁷ Factors that give more weight to regimes are: i) defining the legitimacy of contemporary norms that (over time) transforms progressively into internalised and routinized forms of behaviour; ii) facilitating awareness about environmental concerns (policy debates, public campaigns, changes in knowledge, discourses, and values);

³⁰ David G Victor Kal Raustiala and Eugene S Skolnikoff (eds) *The Implementation and Effectiveness of International Commitments: Theory and Practice* (MIT Press/IIASA 1998)

³¹ Peter H Sand (ed) *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (Grotius 1992)

³² Christopher Knill and Andrea Lenschow, ‘New Concepts – Old Problems? The Institutional Constraints for the Effective Implementation of EU Environmental Policy’ 2000 International Studies Annual Meeting 6

³³ Oran R Young, (ed) *The Effectiveness of International Environmental Regimes: Casual Connections and Behavioural Mechanisms* (MIT Press 1999) 6

³⁴ See an illustrative example in article 1 (3) EU Council Directive 89/391

³⁵ Sustainability Report Royal Dutch Shell PLC Sustainability Report 2010, 5

³⁶ Hirsh (n 14) 74

³⁷ Young and Levy (n 33)

iii) definition of roles (stakeholder or interest); iv) acting as agents of internal reforms through their impact on involving all local interests that affect governance at domestic levels.

Young and Demko³⁸ explain why certain regimes are more effective or successful than others: the nature of the problem as set by the Parties to the regime acting collectively; the involvement of key actors in the negotiating process... Again, the CBD framework can only pass this form of evaluation if the regime – exclusively promotes sound, effective and sustainable environmental policies. A regime cannot pass this test if mechanisms within – for example, the CBD lack a system for informed participation by local communities or if these mechanisms accommodate the application of divergent domestic environmental policies – stemming from ‘compliance & implementation dilemma’.³⁹

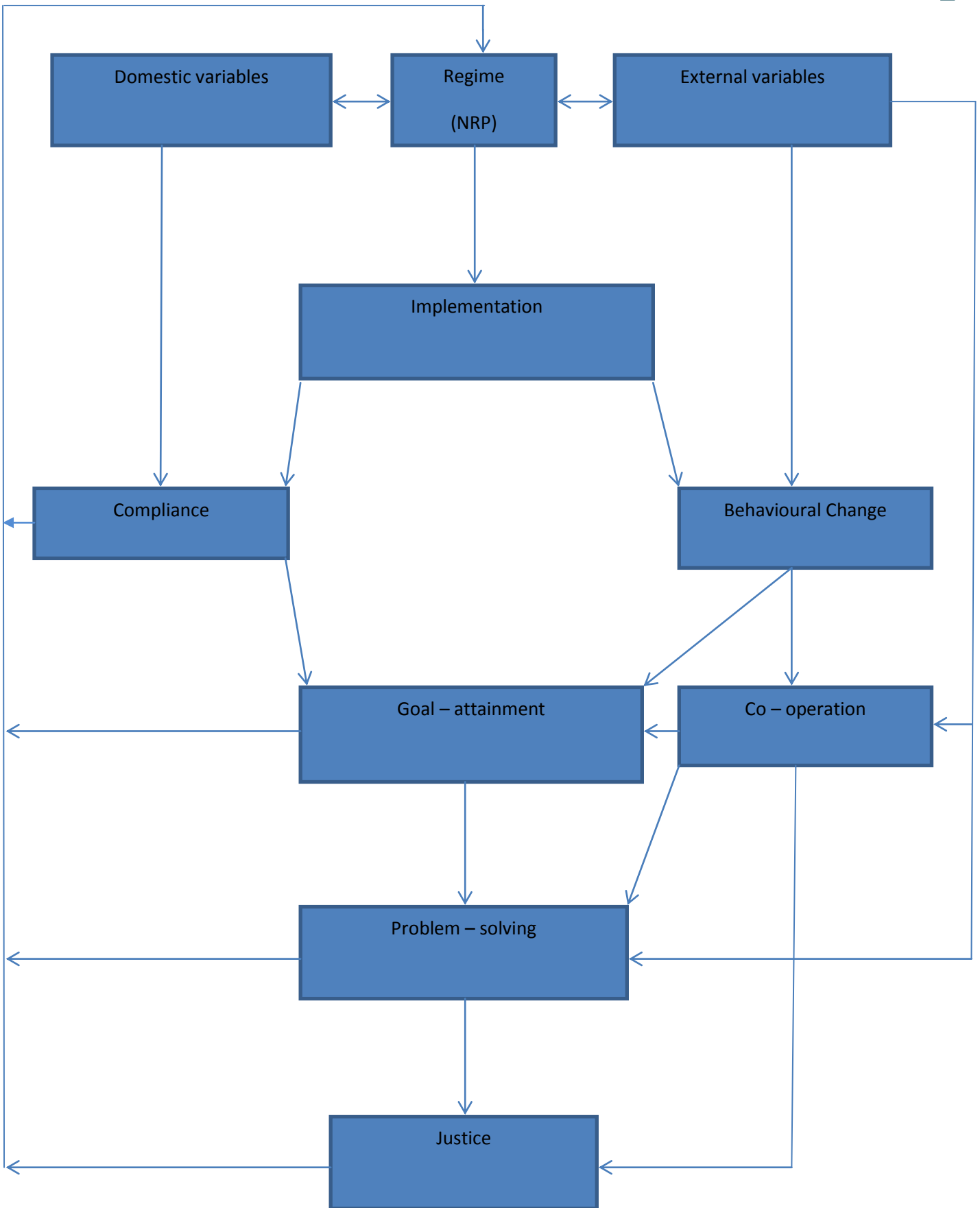
Levy, Keohane and Haas⁴⁰ have argued that regimes matter because they make it more advantageous for States to: co – operate – by boosting concerns about a specific issue (that is boosting governments’ and stakeholders’ interests in preserving biodiversity); contractual environment – resolving distributional, informational, and enforcement issues; capacity building – devising and implementing technical, scientific and political solutions; all of which can often transform into critical causes of ineffectiveness. Le Prestre’s diagram⁴¹ (below) charts factors that are related to effectiveness in regimes.

³⁸ Oran R Young, ‘Introduction: The Effective of International Governance’ in Oran R Young, George J Demko and Kilaparti Ramakrishna (eds) *Global Environmental Change and International Governance* (University Press of New England 1996) 231 – 36

³⁹ Orazulike (n 18)

⁴⁰ Robert O Keohane, Peter M Haas and Marc A Levy, ‘The Effectiveness of International Environmental Institutions’ in Robert O Keohane, Peter M Haas and Marc A Levy (eds) *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press 1993) 405 – 6

⁴¹ Le Prestre (ed) (n 19) 76



Relationship among various types of effectiveness

Why must community participation be informed?

Informed community participation: Informed community participation is an institutional approach to dealing with legitimate stakeholder concerns through the provision of technical supports to vulnerable participants in the policy negotiation process or through the provision of expert support to weaker stakeholders on issues concerning the promotion of a regime's sustainable goals. The problem concerning policy ineffectiveness relates in part to the fact that international regimes do not provide technical support units for vulnerable stakeholders – within institutions. The function of this form of unit would be to provide informed community participation. When local communities negotiate agreements over projects related to bioresource exploitation – with governments or multinational corporations, they usually lack the expertise and resources to understand technical implications of their consent and agreement with these forms of actors. They may equally lack policy expertise necessary for understanding the full stretch – point scenarios under which domestic or international regulatory policies could impede guaranteeing their health & environmental rights. They usually do not possess the technical expertise to examine whether environmental impact assessments have adequately taken their socio – environmental concerns into consideration. This is an area where technical units within international regimes can strategically fill in the gaps often intertwined with mechanisms that exist in environmental regimes. Such unit would advise on the policy implications of community decisions concerning bioresource exploitation activities and as well provide more effective options. Governments and multinational organisations deploy best available professional expertise when they push their policy interests at international forums: an undisputable fact which exposes imbalance in the whole equation.

To otherwise perpetuate the inequality within current environmental system in the CBD regime would be tantamount to promoting an unsustainable environmental system. The relationship between local communities and corporations or States – in existing model for participatory approach can be satirically explained by say, a policy which promotes contractual agreements which minors or handicaps undertake with well-informed adult entities. The only explanation why the socio – environmental situations of local communities never change substantially over time must be that they make the wrong demands or they are disadvantaged in terms of technical know – how necessary for making the right bargain during participation processes. In the context of policy negotiation, informed community participation can be examined from economic, socio – political and ethical/legal dimensions. As a primary interest group, the impact of unsustainable environmental policies affects indigenous peoples/local communities firstly, before its negative consequences hit the general/secondary interest group (for instance, the rest of the population in a State or humanity as a whole).⁴²

Resource/economic dimension to policy regulation: Regimes may indeed save valuable time and resources by ensuring that the 'a to z' of policy frameworks are geared towards effectiveness. Even though it is naïve to presume that politics will somehow evaporate when nations convene to negotiate environmental policies, global financial shocks may have taught governments to think through their addictions of postponing the evil days. At least, to demonstrate that the current CBD mechanism is flawed from sustainability, economic, environmental and socio – cultural perspectives; may persuade governments to pay attention

⁴² Orazulike (n 18)

to material and immaterial benefits of transforming current CBD system. Let us look at a classical example even though it is a hypothetical scenario. In the year 2036, continuous deforestation through illegal wood logging, reckless grazing, poorly planned urbanisation projects etc say in the Amazonia Rain Forest regions, soars and governments & other actors ignore warnings concerning their environmental consequences. The topic dominates headlines in the media for a while but suddenly a deep global financial crisis overshadows the environmental challenge as well as priorities of governments. Officials in some western countries dismiss appropriate environmental measures as reckless liberalism which is expensive, slows growth and simply unjustifiable or unscientific as to enter top government priorities. Then in 2056, heavy hurricane, wind, flood and tornadoes sweep across South America destroying large farmlands, houses, roads, bridges and hospitals – killing over 7 500 000 people. Panic and confusion fuelled by total breakdown of domestic institutions ensue across countries crippling emergency response systems, and simultaneously making rescue operation impossible. It takes a while to re coordinate and institute rebuilding frameworks but in the end, governments from across the world including World Bank, IMF & Inter – American Development Bank (IDB) cough out over £500 000 000 000 000 in international aids, health care support and so on... So which option is more economically & environmentally effective – both in the short and long term, a measure of economic sacrifice today or paying a heavier price – 100 times the cost, in 44 years' time? '...some scientists blame deforestation for causing the enormous 1988 floods in Bangladesh that left 25 million people, out of a total population of 110 million homeless...' ⁴³ Economics experts almost never take account of indirect costs of environmental policies. The truth is that even if the international community ignores reckless use of resources within countries in the South, they may never evade incurring heavier future costs through aids and rescue supports when the natural environment counteracts with fury.

Socio – political dimension to policy regulation: Policy negotiations in the 2012 Rio+20 Convention confirms research postulations in this paper in terms of the dynamics of power imbalance within CBD institutional system. A general assessment of reactions from different actors on the outcomes policy paints a more vivid picture about the state of affairs with the negotiation process. The Secretary General of United Nations (UN) made the following statement in regards to the overview & outcomes document of the convention. 'Achieving sustainable energy for all is not only possible, but necessary – it is the golden thread that connects development, social inclusion and environmental protection.' ⁴⁴ Through his press release, Ban emphasised the need to achieve greener energy future, universal access to modern energy service, State commitment to green energy technology, need for commitment by wider energy industry to promote renewable energy sources and facilitating what he termed 'advanced social equity'. These targets were put in place by the so called Sustainable Energy for All initiative which was launched in 2011.

Similarly, the UN Human Rights Chief Navi Pillay was positive but at the same time ambivalent about policy outcome of the Rio+20 Convention. While commending the

⁴³ Gerald T. Gardner & Paul C. Stern, *Environmental Problems and Human Behaviour* (Pearson Custom Pub 2nd edition 2002) chap 1 pp 8 – 11. cf Stephen M Gardner, 'Ethics of Climate Change' (2004) 14 *Ethics* (3) 555 – 600; James Garvey, *The Ethics of Climate Change: Right and Wrong in a Warming World* (Continuum London 2008)

⁴⁴ UN News Service, Rio+20: Ban announces more than 100 commitments on sustainable energy Friday, June 21, 2012 http://www.hrea.org/lists2/display.php?language_id=1&id=24162 accessed 2012 – 07 – 17

inclusion of specific human rights provisions in the outcomes document, Pillay further applauded the inclusion of, ‘key elements of human rights based approach, including *the principle of participation*, accountability, non – discrimination, and empowerment as well as the rule of law and democracy.’⁴⁵ Pillay pointedly noted her disappointment with failure to include the ‘imperative of human rights impact assessment...due diligence by public & private entities and stronger accountability mechanisms for government & business enterprises’ – in the outcomes policy document.⁴⁶ Civil society organisations received the outcomes policy document with more scathing response, expressing dismay at the lack of opportunities for their meaningful participation in the Rio process.⁴⁷

Assessing international environmental policy negotiations from the spectacles of these actors, it becomes easier to understand how and why policy power equation under the CBD regime, extremely disfavours local communities/indigenous peoples. Just as civil society groups lamented, ‘while international, regional and national courts and human rights bodies have increasingly recognised environmental damage as a cause of human rights violations, and have firmly established state responsibility with respect to environmental protection, the Rio+20 process ignored the right to a healthy environment.’⁴⁸

Legal & ethical dimension to policy regulation: Civil society groups express their disappointment for not participating meaningfully in the development of Rio+20 outcomes policy. Their frustration is perfectly explained by traditional norms which govern the *modus operandi* of international institutions. Institutional systems within regimes are traditionally dominated by States and intergovernmental organisations. For their parts, powerful multinational business enterprises are widely believed to owe a bunch of responsibility in facilitating policy effectiveness and hence possess ‘a power stool’ at international policy negotiation tables. They permeate institutional rules through economic influences, commercial partnerships with States and veiled representations – commonly known as lobbyists. That is why failure to examine existing inequality in the CBD regime from ethical or legal & ethical perspective; will certainly not showcase an understanding of imbalance in power equation within the regime itself. Just as Ban ki Moon emphasised, cooperation or collaborative efforts is the only pathway to finding the solutions that expand equity in the long journey towards more ecologically friendly and sustainable world.⁴⁹ A legitimate institutional system ought to entrench procedures that encourage ‘informed community participation’. This factor would not only legitimise such regime but is also a yardstick for measuring genuine institutional commitment to promoting sustainable environmental

⁴⁵ United Nations Press Release, Rio+20: Human Rights emerge as new pillar of sustainable development June 25 2012 http://www.hrea.org/index.php?base_id=2&language_id=1&msg_id=24179

⁴⁶ Pillay equally suggested that a new paradigm is already emerging: sustainable development goals (SDGs) framework *ibid*

⁴⁷ Amnesty International Press release, The global summit’s final document falls short on corporate accountability and reproductive rights 22 June 2012

http://www.hrea.org/wv/index.php?base_id=116&list_id=1&language_id=1&msg_id=24169

⁴⁸ *ibid*

⁴⁹ (n 44); For more in dept understanding concerning Rio+20, see Rio+20 Corporate Sustainability Forum – Overview and Outcomes: Innovation & Collaboration Public Policy Recommendations, Commitments to Action Rio De Janeiro 21 June 2012

policies, human rights and modern democratic style participation (informed community participation).⁵⁰

Conclusion

Throughout this paper, analysis of topics explored both the milestones and progress opportunities of CBD policy systems. It is undisputable that our collective effort to bring ourselves back on track, from centuries of serious environmental recklessness and perhaps ignorance of sophisticated ecological order upon which all lives depend on – is laudable. Nevertheless, human achievement concerning sustainable ecological system is so far marred with contradictory principles, unfair utilization of proceeds from bioresources, and lack of discipline in complying with collaborative systems for promoting a ‘green future’. There is nothing sustainable about an environmental policy system which takes so much from natural endowments of indigenous communities and yet keeps aloof about how economic obsessed policies subjugate their fundamental rights: causing them in many cases, to suffer all sorts of health problems. A sustainable international environmental regime ought to guarantee the right to health for local communities, at least when such health problems emanate from anthropogenic effects of exploiting bioresources. This proposition is open to academic debates because the jurisprudence of socio – economic human rights is so far built around non justiciability – in developing countries. The right to health is not completely a legal right in many developing countries due to the theory that such economic based human rights should be realised progressively and more so subject to available economic resources within the disposal of a State. In a direct and express language, the principle of socio – economic human rights postulates that it would not be morally, logically and practically tenable to mandate a State that possesses ‘little resources’ to fully guarantee a right that requires financial resources. That is to say, enforceability of socio – economic human rights depends on whether a State possesses requisite resources to secure both its other pressing political/economic priorities and pure pecuniary inclined human rights. Moreover, it is controversial and unpopular in international law to regulate through international mechanisms – how a sovereign State should budget or utilise its sovereign resources.

So how can the equation involving relevant stakeholders be balanced in a sustainable manner – within the threshold of international environmental regulation concerning CBD? In order to offer possible solutions to this question, it is important to highlight flashpoints necessary to capturing the true picture of our current institutional system. Let us begin with the graphics earlier displayed under introduction. On the right side of the fulcrum is a State – with local communities (within it) pressing for proper guarantee of their fundamental health rights in CBD policies. On the other side is the international community piloting on a pointed journey to a sustainable planet. Subsumed in an illusion of well – constructed trip to a green future, the international community continuously relegates the message from the grassroots base. The system presumes a water tight framework that grants local communities a say. The so called community consent and participation.

Because current institutional system merely promotes community participation, local communities possess by far, low bargaining power when they negotiate policies with

⁵⁰ Although unclear, the Rio+20 Overview and Outcomes Policy seems to suggest a productive form of community participation in modern sustainable urbanization plans. See ‘Partnership with local people’ Rio+20 (n 49) p 35. ‘...it means that local people are involved in a way that goes beyond intermittent consultation.’

powerful actors like multinational corporations or States. These powerful stakeholders possess far better expertise which they naturally use to their advantage during policy debates/negotiations or domestic project negotiations. It is no surprise therefore that health & environmental concerns of local communities have hitherto never improved considerably. Imbalance in technical resources necessary for advancing fundamental concerns eliminate the chance of making fundamental socio – environmental demands that ought to be the bedrock of any domestic policy geared towards exploitation of bioresources. Assuming that international law encourages mandatory allocation of a chunk of proceeds from bioresources to cater for health related problems caused by exploiting such bioresources, the right to health for local communities would be systematically enshrined into domestic laws: at least to the extent that alleged health rights stem from the activities involving exploitation of bioresources from lands originally belonging to these communities. As a result understanding this discourse would require a review of two dimensional angles to CBD regime obligations. The first angle requires an introduction of an international institutional system which provides framework for raising the bargaining cards for local communities/indigenous peoples. This part involves establishment of a technical resource unit – within the CBD, which would be endowed with the responsibility of facilitating ‘informed community participation’. It should on request by local communities provide scientific guidance in regards to community consent or options which are available to local communities – when these communities negotiate with more powerful actors.

The second angle to the discourse concerns fundamental socio – environmental interests of local communities the guarantee of which defines a true sustainable international environmental regime. And as stated earlier, the right to health for indigenous peoples/local communities ought to be *contextually* enforceable legal rights in developing countries. This category of socio – environmental right is clearly just and equitable to the extent that alleged health rights emanate from harms caused in the business of exploiting bioresources. Our current mechanism under the CBD should be transformed in a way that though States have sovereign rights to exploit and judge how to distribute or utilise proceeds coming from bioresources, they are nonetheless duty bound to guarantee sustainable environmental policies which promote the goals of the Convention. A percentage of profit from bioresources should be used to ensuring that indigenous people do not suffer ill health or exposed to other harmful dangers that may cause diseases, sicknesses or death.

When our current CBD regime is transformed up to such point, environmental policy debates will definitely begin to take a different shape. And environmentalists can proudly walk into the policy negotiating table with a different mood: craving for arguments from traditional enemy stakeholders; be it government, business enterprises or lobbyists. Policy debates may probably shift to a different direction if we ever attain that point in the nearest future. Environmental regulatory policies may probably begin to deal with debates concerning how we can use science & innovation to avert environmental disasters or how to use our knowledge of impending environmental crisis to mitigate the supremacy of natural forces over human science.



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