

The Amazon fires show why we need global governance in the Anthropocene

Dominic Lenzi,

A-id: Agenda for International Development

MercatorResearch Institute

This series of policy briefs provides an independent commentary on current themes associated with the debate on international development.

***Agenda for International
Development***

*is an independent non-profit policy
research institute focused on
development and humanitarian
issues.*

Several months ago, as fires engulfed large parts of the Amazon, world leaders led by French President Emmanuel Macron declared an international emergency and pledged support to help Brazil. Brazil's President Jair Bolsonaro responded with accusations of colonialism and foreign interference, asserting that the Amazon is Brazilian territory and no business of outsiders. One should of course take political rhetoric with a large grain of salt, especially in our current 'post-truth' era. For instance, roughly 60% of the Amazon is within Brazilian territory, while Peru controls 13%, Colombia around 10%, with the rest shared by Venezuela, Ecuador, Bolivia, Guyana, Suriname and French Guiana. But even if the Amazon isn't entirely Brazil's, these claims do reflect genuine conflicts between state sovereignty and global governance, which continue to hamper responses to environmental crisis. Addressing these conflicts is especially urgent in the Anthropocene – the new geological epoch in which human activity has produced interconnected ecological problems of planetary scale.

Previous international efforts to halt rainforest destruction have often floundered on sovereignty concerns – whether real or merely perceived. One high-profile example is the Indonesian Palm Oil Pledge, adopted with great expectations at the UN Climate Change Festival in New York in 2014. This initiative failed due to lobbying from large palm oil producers, and the perception that the IPOP infringed Indonesia's sovereignty.¹

¹ <https://www.greenpeace.org/international/press-release/22030/indonesian-government-actively-blocking-efforts-to-reform-palm-oil-industry/>
<https://news.mongabay.com/2019/05/indonesia-calls-on-palm-oil-industry-observed-by-secrecy-to-remain-opaque/>

The jury is still out on whether the failure of the IPOP was bad news for forest conservation, or merely the demise of a failed policy mechanism. But what is clear is that sovereignty concerns played a significant role in this failure.

Sovereignty concerns continue to hamper efforts to improve global environmental governance. For example, the carbon stored in the Amazon, like other rainforests, has also long been envisaged to become part of a global emissions trading scheme under the UNFCCC's REDD+ Programme. However, sovereignty has again loomed large, given the implication that foreign agents, potentially including foreign governments, would end up owning carbon assets within the jurisdiction of states. At the most recent COP in Madrid, President Bolsonaro claimed that carbon stored by Brazil's forests should count in Brazil's national emissions quota since they belong to Brazil, while also being traded on an international carbon market. While critics have pointed out that this would amount to double-counting, the attempt to enclose elements of a global environmental good within the boundaries of the nation-state reflects a paradox in the standard logic of the nation-state: annex territory and be free to exploit its resources. The problem, of course, is that for any global environmental resource 'annexation' is impossible without an effective global regime – which is precisely what resource sovereigntists do not want to see.

Previous attempts to classify something as a global common good continue to provoke controversy. From a biophysical perspective, there is no doubt that rainforests are essential components of the global carbon cycle. There is so much carbon stored in rainforests that their destruction would doom all efforts to halt climate change, tipping the planet into a new and dangerous equilibrium such as a nightmare 'Hothouse Earth' scenario (Steffen et al. 2018). However, countries with areas of rainforest

within their borders complain that recognising rainforests as common goods in any jurisdictional sense would be both unfair and an arbitrary loss of territorial authority. There is some truth to these complaints. For instance, any attempt to classify rainforests as the Common Heritage of Mankind would require ceding territorial jurisdiction. This principle was developed following Maltese Ambassador Arvid Pardo's proposal to the United Nations to equitably share the mineral resources of the deep sea bed. The Common Heritage of Mankind was subsequently enshrined in the *United Nations Law of the Sea Convention* (UNCLOS), and the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (or 'the Moon treaty'). But because the Common Heritage requires ceding territorial control over whatever it governs, the principle remains controversial and its extension has often been blocked by states wary of any infringement of their resource rights. Moreover, the current formulation of the Common Heritage merely concerns resource exploitation, and implies nothing for environmental sustainability beyond standard protections against transboundary harm.

The loss of sovereignty implied by the Common Heritage principle encouraged the development of the Common Concern of Mankind, a principle which registers a need for cooperation to govern transboundary goods, but is non-binding and implies nothing about territorial sovereignty. Thus, the *UN Convention on Biological Diversity* (1992), the *UN Framework Convention on Climate Change* (1992), and the *Paris Agreement* (2015) affirm biodiversity and climate change to be of common concern, but this does not require anything from states. Thus, even if some good can be described as a global commons in descriptive terms, in legal terms it has proved difficult to articulate this notion without triggering sovereignty concerns or without becoming merely advisory.

The fundamental problem seems to be the governance structure inherited from the post-World-War II global order, which was established to ensure state security against foreign aggression. Of course, the architects of this global order were ignorant about most, if not all of the global environmental challenges we now face. But as the existence of these challenges reveals, the common benefits of environmental goods are not properly acknowledged by the international order. Instead, free-riding upon many global common goods continues, reflecting the previous order of autonomous states. Moreover, political rhetoric appealing to isolationism and national sovereignty risks dangerous ecological brinkmanship. It has proved far too easy for critics of multilateralism to wrap themselves in a border-bounded nationalism, where the interests of the state always trump those of distant outsiders.

But while this global order does not facilitate effective global environmental governance, it is untrue that there is little more than anarchy at the global level. The assertions of Bolsonaro and others overstate their case: states do not enjoy complete autonomy to use resources as they wish, and all states are accountable if their decisions impose harm or risks upon others. While the international legal principle of 'Permanent sovereignty over natural resources' does indeed establish sovereign states' unrestricted rights to make use of resources within their territorial boundaries, since the Rio Declaration of 1992 states are also obliged to consider transboundary harms that might arise from activities within their territories, or in common spaces. Moreover, states also have duties to cooperate to address any transboundary emergencies or risks that emerge. These obligations and expectations are secured through a mix of 'hard' treaty law and 'soft' customary law, which along with informal regimes constitute existing global environmental governance. While enjoying

sovereign resource rights, states are *already* obliged to consider the interests of other states, to avoid creating or exacerbating environmental risks, and to assist other states should an environmental problem emerge.

One might ask: if this is so, why has it proved so difficult to address our global environmental problems? The short answer is that while these regimes have laid the groundwork for future global environmental governance, their spirit has yet to become the letter of international law. Thus, climate change and biodiversity loss have yet to be brought under effective global governance, despite (or according to its critics, because of) the signing of the Paris Agreement. Further, many requirements under international environmental law remain advisory, and agreements are voluntarily entered into. States that do not wish to play along with such governance regimes can check out, or can obstruct by refusing to comply with the spirit of the law. A cautionary example may be the International Convention for the Regulation of Whaling. Signed in 1946 by 15 nations, it has now been ratified by 89 states. Yet this convention only arose when whaling ceased to be commercially viable, and not when the existence of a problem was first discovered. Moreover, traditional whaling states such as Norway have withdrawn and re-entered the Convention several times, and have never accepted the moratorium on whaling signed into action in 1986 under paragraph 10e. Japan, by contrast, pulled out officially in 2019, after maintaining a whaling fleet since 1986 under the clearly false pretence of conducting scientific research. While Japan never produced any credible evidence that they were conducting scientific research, or that this research required killing whales, it took nearly four decades for pressure from other signatories to encourage Japan to withdraw. And by withdrawing, Japan intends to continue commercial whaling, now without any false pretence of conducting

research. The Trump administration's withdrawal of the US from the Paris Agreement on climate change is another case of non-compliance, following decades of obstructing climate governance under the binding Kyoto agreement (Cléménçon 2016).

One way to strengthen existing environmental governance is for cases to be brought holding some states or agents responsible for climate-related harms. To date, there has been a conspicuous absence of such cases concerning activities affecting climate change or biodiversity, such as building fossil fuel infrastructure or clearing ecosystems. For climate change, one key stumbling block seems to be the law's difficulty in considering causally uncertain effects based upon probability estimates (Pfrommer et al. 2019). Different climate models produce widely varying estimates of the effect of actions upon the global climate, and cannot always be aggregated into compatible findings. Moreover, the standard model in law is for actions with clear causes, attributable to actors who can be held responsible. Yet uncertainty is unavoidable in estimating the sensitivity of the planet's climate system to atmospheric greenhouse gas concentrations, or in attributing harmful effects of climate change to particular agents, given the problem of multiple causation. Part of addressing this challenge requires clarity on admissible scientific evidence. Recent research on attribution has proposed a modification of the standard criteria for determining risk attribution to capture the incentives of actors who might select climate models favourable to themselves, and to establish clear rules for determining admissible research as evidence that a climate risk has been exacerbated. Research on 'carbon-majors', i.e. the corporations who have emitted the most CO₂ up until now, could also provide the basis for such claims (Ganguly, Setzer, and Heyvaert 2018; Benjamin 2016). Short of international cases, there may be more immediate success in citizen-led cases against national

governments, such as the successful case brought against the Dutch government.² However, the Dutch constitution explicitly invites such litigation through a constitutional requirement upon the government to secure a healthy environment, a provision which many constitutions lack. Nonetheless, as the climate crisis worsens, it is far from impossible for such cases to emerge. Obviously, such a development would be vigorously opposed by states worried about becoming newly liable. Although the spirit of existing laws against transboundary harm and against actions affecting commons seem to apply to these issues equally strongly (if not more so), such an extension requires cases being brought to establish new precedents and interpretations.

At a deeper level, it has been claimed for some time that more far-reaching changes to the international order of states are required. While calls for the establishment of a 'world state' are rare, a more promising proposal may be to extend the common heritage and common concern principles to recognise the entire planet as the 'intangible common heritage of mankind' (ref). This proposal is based upon an analogy of nested jurisdiction and overlapping ownership on the model of the condominium: states would enjoy ownership of their territories just as individuals own their apartments, yet aspects such as windows or gardens can be owned collectively.³ In this way, it is claimed that effective global governance requires recognising the Earth system as a legal entity in its own right, but in a way that does not require nullifying existing state sovereignty. Of course, such proposals raise profound moral and political questions. Yet from a moral perspective it is hard to find

² <https://www.theguardian.com/environment/2018/oct/09/dutch-appeals-court-upholds-landmark-climate-change-ruling>

³ <https://globalchallenges.org/planetary-condominium-a-legal-framework-for-earth-system-stewardship/>

convincing moral reasons for states' complete sovereignty over natural resources, whether one looks at securing the wellbeing of citizens, warding off threats, or even a historical relationship between people and places (Armstrong 2015). The distribution of goods of global environmental significance imposes costs and benefits upon providers of a resource and beneficiaries. Yet the distribution of rainforests, like the distribution of coral reefs or deserts, depends on very specific biological and geological conditions, while the world map was determined by human occupations, migrations and conquests, with little regard for ecological borders. As a result, from the perspective of any state the presence of a rainforest within its borders is simply random chance. But states without rainforests have often cut down their forests, and were never asked to consider global consequences. For example, Great Britain today has little more than 2% of its original forests intact.⁴ Yet nations with rainforests are being asked to preserve far more than 2%, and to do this because of global consequences. These double standards are at the heart of debates about sovereignty and the global commons. Perhaps until the Global North ramps up mitigation, rainforest countries are under no obligation to listen to their hypocritical demands. Yet if all countries think this way, we ensure a world of runaway climate change and mass extinction, likely far beyond the ability of even the richest countries to adapt. While Ecuador's bid for funding to offset the lost revenue from oil extraction in its Yasuni Amazonian national park failed amid accusations of environmental blackmailing, it is far from clear that the principle at stake tells against Ecuador. Fairness was an additional reason for the failure of the Indonesian Palm Oil Pledge: Indonesian policymakers considered it unfair for Indonesia to submit to stringent

⁴ <https://policy.friendsoftheearth.uk/insight/why-uk-should-double-forest-area-curb-climate-change>

deforestation conditions, when other states are free to do as they please.⁵ So if Ecuador is to forego the same kind of fossil fuel extraction that countries in the Global North have long availed themselves of (and continue to do so despite current warnings of a climate emergency), fair compensation and development aid for non-carbon projects would seem to be the only just outcome. It is morally intolerable that a single nation could endanger all of humanity by using natural resources in ways that are still legally within their power. At least in theory, Brazil could decide to cut down all of the trees in its territory. The architects of such a plan would likely not survive long, but the mere possibility that one rogue country could decide to act in ways that endanger all is an affront to the post-war order that the permanent sovereignty principle was supposed to protect. However, research suggests that much less than this would be enough for a global catastrophe: if the Amazon lost between 20-25% of its trees the entire ecosystem would pass an irreversible 'tipping point' leading to its collapse (Lovejoy and Nobre 2018). Humanity simply cannot afford another decade of complacency on international rule making. Addressing global environmental challenges requires finding a way around sovereignty concerns, whether real or imagined, while ensuring the protection of the global environmental commons.

References

Armstrong, Chris. 2015. 'Against "permanent Sovereignty" over Natural Resources'. *Politics, Philosophy & Economics* 14 (2): 129–51.

Benjamin, Lisa. 2016. 'The Responsibilities of Carbon Major Companies: Are They (and Is

the Law) Doing Enough?' *Transnational Environmental Law* 5 (2): 353–78.

Cléménçon, Raymond. 2016. 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?' *The Journal of Environment & Development* 25 (1): 3–24.

Ganguly, Geetanjali, Joana Setzer, and Veerle Heyvaert. 2018. 'If at First You Don't Succeed: Suing Corporations for Climate Change'. *Oxford Journal of Legal Studies* 38 (4): 841–68.

Lovejoy, Thomas E., and Carlos Nobre. 2018. 'Amazon Tipping Point'. *Science Advances* 4 (2): 23-40.

Pfrommer, Tobias, Timo Goeschl, Alexander Proelss, Martin Carrier, Johannes Lenhard, Henrike Martin, Ulrike Niemeier, and Hauke Schmidt. 2019. 'Establishing Causation in Climate Litigation: Admissibility and Reliability'. *Climatic Change* 152 (1): 67–84.

Steffen, Will, Johan Rockström, Katherine Richardson, Timothy M. Lenton, Carl Folke, Diana Liverman, Colin P. Summerhayes, et al. 2018. 'Trajectories of the Earth System in the Anthropocene'. *Proceedings of the National Academy of Sciences* 115 (33): 8252–59.

⁵ <https://www.greenpeace.org/international/press-release/22030/indonesian-government-actively-blocking-efforts-to-reform-palm-oil-industry/>
<https://news.mongabay.com/2019/05/indonesia-calls-on-palm-oil-industry-obscured-by-secrecy-to-remain-opaque/>