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Global Legislators Organization
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World Summit for Sustainable Development
International Eminent Persons Meeting on

Inter-linkages

Strategies for bridging problems and solutions to work
towards sustainable development

BACKGROUND NOTE
for
WORKING GROUP ONE

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INTRODUCTION

While prior to the 1972 Stockholm Conference on the Human Environment there was very limited international activity in the field of the environment, the past thirty years have seen a great deal of international action, including the negotiation of many global and regional conventions. The end result is that there are presently over 500 international treaties and other agreements related to the environment, with 60 percent dating from 1972. Over the same period, there has been an accelerated increase in Multilateral Environment Agreements (MEAs); over 300 agreements have been negotiated. Today, national governments find themselves facing as many as 65 global and regional environmental conventions and agreements.¹

There have been a number of landmark events.² An important outcome of the Stockholm Conference was the creation by the UN General Assembly of the UN Environment Programme (UNEP) with its headquarters in Nairobi. With environment clearly on the global agenda, the General Assembly established the World Commission on Environment and Development in 1983 to address the relationship between environment and development.³ In 1987 it made comprehensive proposals for institutional and legal change with the objective of promoting sustainable development. The principal challenge was summarised as follows: "The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions - on the same agendas and in the same national and international institutions."⁴

Twenty years after the Stockholm conference, the UN Conference on Environment and Development (UNCED) - the 'Earth Summit' – was convened in Rio de Janeiro in 1992. The extensive Agenda 21 plan of action was adopted further marking the objective of integrating environment considerations into national and international economic and development policy making. Subsequent discussions resulted in the creation of the Commission on Sustainable Development (CSD) in 1992 as a high-level forum for discussion of environmental, developmental, social and economic issues. Its role was to ensure an effective follow up to the Conference, and to rationalize the inter-governmental decision making capacity when it comes to the integration of environment and development issues into policy. The CSD was created as a functional commission of the UN Economic and Social Council (ECOSOC).

Five years after the Rio Conference, in 1997, General Assembly undertook a five-year review of the outcome of the Earth Summit and adopted the Programme for the Further Implementation of Agenda 21. The Program underscored that given the increasing number of decision-making bodies concerned with various aspects of

¹ These statistics come from UNEP (2001), International Environmental Governance: Multilateral Environmental Agreements, UNEP/IGM/2/INF/3, 10 July 2001. The specific country examples given are the countries of the European Union.

² The progression of institutional developments is spelled out in more detail in the Annex.

³ Its 1987 report, Our Common Future, launched the concept of sustainable development on the international stage.

⁴ See UNEP, International Environmental Governance, Report of the Executive Director, to the first meeting of the Open Ended Intergovernmental Group of Ministers in New York, 18 April 2001 (UNEP/IGM/1/2, 4 April 2001).

sustainable development, including international conventions, there is an ever greater need for better policy coordination at the intergovernmental level, as well as for continued and more concerted efforts to enhance collaboration among the secretariats of those decision-making bodies.⁵

The Global Environment Facility (GEF) was created in 1991 to promote international cooperation and foster actions to protect the global environment. The Earth Summit in 1992, in Agenda 21, recognized GEF as a means to achieve sustainable development by providing funding to developing countries and countries with economies in transition for project activities targeting global benefits in selected areas.⁶ The three implementing agencies are the World Bank, UNDP and UNEP.

With the increasing number of treaties, conventions and institutional arrangements the UN Secretary-General, Kofi Annan, officially placed the question of international environmental governance reform on the international political agenda with the release of his 1998 programme for reform entitled "Renewing the United Nations." Within this programme, the Secretary-General appointed a Task Force on Environment and Human Settlements that was to examine, *inter alia*, the structures and actors involved in efforts to manage and protect the global environment.⁷

One of the recommendations of the Task Force was the establishment of an Environmental Management Group (EMG). Another was the establishment of a Global Ministerial Environment Forum (GMEF) to meet at the same time as each annual meeting of the UNEP Governing Council.⁸ The forum is to serve as the focal point for discussions relating to the identification of global environmental policy priorities.

The implementation of the outcome of UNCED is to be reviewed at the 'Rio plus Ten' conference – the World Summit on Sustainable Development (WSSD) – scheduled for September 2002 in Johannesburg, and priorities are emerging for action at that conference. At the first meeting of the GMEF in Sweden in May 2000, ministers adopted the *Malmö Declaration*, in which they noted that despite some progress since the Stockholm conference, the environment and the natural resource base that supports life on Earth continues to deteriorate at an alarming rate. They noted an alarming discrepancy between commitments and action. According to the Ministers, the WSSD should review the requirements for a greatly strengthened institutional structure for international environmental governance based on an assessment of

⁵ See UNEP, International Environmental Governance, op. cit.

⁶ The areas are: biodiversity, climate change, international waters and ozone layer protection. Land degradation, particularly deforestation and desertification activities, as they relate to the four focal areas are also eligible for funding.

⁷ See United Nations, The Report of the United Nations Task Force on Environment and Human Settlements to the Secretary-General, 15 June 1998, contained in the Report of the Secretary-General: United Nations Reform- Measures and Proposals - Environment and Human Settlements (A/53/463, 6 October 1998).

⁸ The UN General Assembly supported this recommendation through a resolution passed on 10 August 1999.

future needs for an institutional architecture that has the capacity to effectively address wide-ranging environmental threats in a globalizing world.⁹

This declaration was supported by the UNEP Governing Council and, later, by the UN General Assembly. At its first organisational session in May 2001, the CSD, acting as the preparatory committee for the WSSD, agreed to include issues relating to international environmental governance within discussions of the summit agenda. The GMEF established an Intergovernmental Working Group (IWG) which will report to the next GMEF meeting in the first half of 2002. The results should be fed into preparations for the review of the outcome of UNCED at the World Summit on Sustainable Development.

The extent of international activity relating to the environment over the past three decades has been impressive. The outcome in terms of the negotiation of conventions and protocols marks a considerable achievement in a relatively short period of time. However, it has resulted in a proliferation of structures, agreements and conferences that now raise the need for continuing policy coherence among the various instrumentalities that exist in this area, at both the inter-agency and intergovernmental levels. These institutional mechanisms have, however, "often been created without due consideration of how they might interact with the overall system, and questions have increasingly arisen concerning the coordination of this multifaceted institutional architecture. A new model of international environmental governance must be predicated on the need for sustainable development that meets the interrelated social, economic and environmental requirements."¹⁰

Against this backdrop, the upcoming WSSD provides the opportunity for an overall evaluation of the functioning of the international environmental governance structure in order to assess its adequacy to meet the needs of today. More importantly, based on the numerous assessments and recommendations relating to improving the environmental governance structure that are presently on the table, the WSSD presents an opportunity to contribute positively to the international governance of the environment by taking decisions that will lead to its significant improvement. This can be done by agreeing to, and setting in place, those reforms that will give substance to the political and other declarations calling for meaningful institutional reform to reverse the pattern of environmental degradation that we are witnessing today.

The objective of this paper is present material that may be useful for discussions relating to the reform of the structure of international environmental governance. The first section addresses the need for greater coherence in the formulation of policies that bear on the structure of environmental governance. As there have been a number of proposals for reform based on the premise that this can best be done through the creation of a World Environment Organization, there is a brief review of the status of these proposals in the next section. As the view has been expressed that useful conclusions would perhaps be drawn by comparing the manner in which

⁹ Malmö Ministerial Declaration, Adopted by the Global Ministerial Environment Forum - Sixth Special Session of the Governing Council of the United Nations Environment Programme, Fifth plenary meeting, Malmö, Sweden, 31 May 2000.

¹⁰ See UNEP, International Environmental Governance, Report of the Executive Director, to the first meeting of the Open Ended Intergovernmental Group of Ministers in New York, 18 April 2001 (UNEP/IGM/1/2, 4 April 2001).

multilateral trade agreements and multilateral environment agreements are dealt with at the global level, there is then a description of some of the characteristics of the World Trade Organization. There is then an overview of the principal proposals that have been advanced for improving the coherence of instruments dealing with environmental governance. The paper closes with some suggestions of how to move the process forward.

NEED FOR COHERENCE

In the words of the Secretary General of the United Nations, “no crisis in history has so clearly demonstrated the interdependence of nations as the environmental crisis. The pressures wielded by the forces of economic globalization and technological change are transforming the global environment as never before. A number of trends that characterized the last decade of the 20th century are coming to a head. They include the increasingly transboundary nature of environmental problems; the recognition of interlinkages between various environmental issues; the challenge of implementing the increasing number of multilateral environmental agreements”

Meeting these challenges requires a coherent approach and institutional structure. At the global level, this means the existence of institutions that determine the substantive policies and public processes with a delineation of the responsibilities of the various actors involved. The goals of the institutions should be to facilitate the attainment of policy objectives through co-operation, while providing for the avoidance and resolution of any disputes that may arise in the pursuance of these objectives. Good governance requires a set of such institutions which are coherent, mutually-consistent, and supportive, and which operate in an effective, accountable and legitimate manner. At the international level, these are the characteristics of an effective global environmental governance structure.

The need for such a structure is well accepted. At the G8 Communiqué from the Environment Ministers Meeting in Trieste this year, for example, the Ministers stated that “the strengthening of international environmental governance is important to meet the challenges of the twenty-first century and to implement multilateral environmental agreements. Effective, accountable governance not only helps to strengthen democracy and human rights, promote economic prosperity and social cohesion and reduce poverty, but is critical to enhance environmental protection and the sustainable use of natural resources, and deepen confidence in government and public administration.”¹¹

While a general recognition of the importance of effective global environmental governance is important, the obvious question is whether or not the current institutional infrastructure constitutes an adequate system of governance. Here there would appear to be little disagreement either. According to the Executive Secretary of UNEP, the international institutional mechanisms to deal the environment have often been created without due consideration of how they might interact with the overall system, and questions have increasingly arisen concerning the coordination of the resulting multifaceted institutional architecture. He points to the fact that the

¹¹ See G8 Communiqué, G8 Environment Ministers' Meeting in Trieste, Italy (2-4 March 2001)

continued destruction of the natural resource base, declining financial resources and the realization that environmental problems are of such magnitude that the continued sustainability of the planet must be addressed in a more coordinated and coherent manner. The policy prescription is that the international institutional architecture dealing with environmental issues must be strengthened.¹²

At the very operational level, there have also been proposals as to how to disentangle the various structural elements of global environmental governance. Four layers of the structure have been identified in recent UNEP report.¹³ The top layer is the international decision-making process. An improvement in the co-ordination of decisions taken at this level is important to ensure that there is no contradiction between the objectives of various multilateral environmental agreements are trying to achieve. The second layer is the international institutional architecture. When policy decisions are taken, they must be implemented through an institutional structure. Actual implementation at the international level is the third layer where the actual management and putting into practice the various policies and decisions is important. Finally, the fourth layer relates to the coordination of the implementation of international environmental governance decisions at the national level.

A series of intergovernmental decisions relating to all four layers have addressed issues of environmental governance, and a number of initiatives have been launched to develop proposals on how the structure could be reformed to function better. The United Nations, its specialized agencies and the secretariats of numerous multilateral environmental agreements are already engaged in initiatives to enhance their coordination in a number of areas. These range from joint meetings of convention secretariats under the aegis of the United Nations Environment Programme (UNEP) to efforts to harmonize national reporting and the implementation of joint work programmes under memoranda of understanding signed between convention secretariats. A recent UNEP Report notes, however, that the implementation of these initiatives has been piecemeal rather than the result of a deliberate, overarching strategic choice. A strategic vision for collaboration and coordination amongst multilateral environmental agreements not only has to take into account lessons learned but must also marshal limited resources - human and financial - to leverage change.¹⁴ One view is that this can best be done through the creation of a World Environment Organisation.

A WORLD ENVIRONMENT ORGANISATION?

If there is an lack of coherence from an institutional and legal perspective in creating the appropriate institutional structure, it is not surprising that the discussion for institutional reform has frequently focused on the creation of a World Environment

¹² See UNEP, International Environmental Governance, op. cit.

¹³ UNEP (2001), International Environmental Governance: Multilateral Environmental Agreements, UNEP/IGM/2/INF/3, 10 July 2001.

1. ¹⁴ The problems faced by the multilateral environmental agreements in enhancing coordination have been delineated in the report entitled UNEP, International environmental governance: multilateral environmental agreements, op. cit.

Organisation (WEO). This may have been prompted in some measure by the recent creation of the World Trade Organisation (WTO), the next section addresses the possible relevance of the WTO for some form of a WEO.

There are numerous and very different views as to what would constitute a World Environment Organisation. Nevertheless, a number of similar questions are addressed in most proposals: what functions would it have; would it act as an umbrella for the various multilateral environmental agreements; what financial resources and legal authority would it be endowed with. These proposals have usefully been grouped into three different models by Frank Biermann: the cooperation, the centralization, and the hierarchization models.¹⁵

In the cooperation model, UNEP would be given new legal and political powers of a specialized UN agency that would exceed its current mandate. It would be upgraded to a specialized UN agency, such as the World Health Organization or the International Labour Organization, and no other agencies or regimes would be disbanded. Supporters of a model expect that such a world environment organization would approve by qualified majority vote certain regulations which then become binding on all members. The WEO general assembly could also adopt draft treaties that have been negotiated by sub-committees under its auspices. This goes much beyond the powers of the existing UNEP Governing Council, which can initiate intergovernmental negotiations, but cannot adopt legal instruments on its own. Advocates of the centralization model would integrate various existing agencies, programs and regimes into a world environment organization, which they advocate on the basis of resulting efficiency gains and improved environmental policy coordination. The advocates of this model sometimes point to the WTO, which has integrated various multilateral trade agreements under its umbrella. Finally, the hierarchization model calls for a quasi-supranational agency on environmental issues that would have decision-making and enforcement powers vis-à-vis a minority of non-consenting states if the global commons are at stake. However, in the view of the author, a world environmental organization with sanctioning powers has little support.

These various proposals are seen to have shortcomings by a number of observers. In particular, it is argued that they have suffered from a significant lack of detail and a failure to explain why the creation of a new global environmental organisation would make any difference to the underlying problems of a lack of resources, a lack of political will and inadequate policy integration.¹⁶ The end result is that some see a World Environment Organisation as an intellectually attractive option for the longer term, but point to an emerging consensus that progress will be easier on the basis of an evolutionary, step-by-step approach rather than through an institutional "big-bang". This means that, in the short to medium term, the main priority for some governments at least will be to reinforce UNEP both politically and financially by building upon

¹⁵ See Frank Biermann, "The Emerging Debate on the Need for a World Environment Organisation: A Commentary", Environmental Politics 1:1, February 2001. The following description of each of the models is a summary drawn from the article by Biermann.

¹⁶ Joy Hyvarinen and Duncan Brack (2000), Global Environmental Institutions: Analysis and Options for Change, Report prepared for Department of the Environment, Transport and the Regions (UK) by the Royal Institute of International Affairs, September, London.

recent reforms.¹⁷ Thus, “the strengthening of international environmental governance should be based on existing structures, in particular UNEP, should aim gradually to adapt them to the new requirements and could ultimately lead to a World Environment Organization, respecting existing headquarters; it should try to respond to current challenges, particularly as regards the implementation of environmental agreements.”¹⁸

WORLD TRADE ORGANISATION AS A MODEL?

There has been some discussion of what lessons could be learned – both positive and negative – by looking at the WTO in terms of the functions and responsibilities of a World Environment Organisation. For example, when global environmental governance was discussed by EU Environment Ministers in July 2000 the “main issue” was whether to copy the WTO model in the environmental field. The French Presidency favoured the creation of a World Environment Organisation (WEO) as the central body managing all MEAs, as well as a centralised dispute settlement mechanism.¹⁹

One event that may have sparked some additional interest in the WTO as a possible model could have been a remark by the (then) Director General of the WTO when he expressed his view that environmentalists should “put their house in order”. He also made clear that in his view, a World Environment Organization could be considered as a means to bring this order. He also spoke of a “framework” within which environment agreements could be dealt with coherently, effectively and efficiently.²⁰ The Director General may well have had the WTO framework that deals with the multilateral trade agreements in mind when making this comment.

As a World Trade Organization already exists – albeit only five years old – comparisons between the framework which encompasses the multilateral trade agreements and multilateral environment agreements may be insightful. The purpose of this section is not to promote one model in preference to another, but to point to similarities and differences in the governance implications of a set of multilateral agreements that are not administered by a world organization and those that are.

The WTO is located in Geneva, Switzerland and was established on 1 January 1995. It is the result of the Uruguay Round negotiations (1986-94) and currently has 142 member countries. It has a Director-General. Its functions involve administering WTO multilateral trade agreements; acting as a forum for trade negotiations; handling trade disputes; monitoring national trade policies; providing technical assistance and training for developing countries; and cooperating with other international

¹⁷ European Commission, An EU Contribution to Better Governance Beyond our Borders, White Paper on Governance, Report of Working Group 5, May 2001.

¹⁸ European Union, Global Environmental Governance - Conclusions, 2321st Council meeting (Brussels, 18-19 December 2000).

¹⁹ European Commission, An EU Contribution to Better Governance Beyond our Borders, White Paper on Governance, Report of Working Group 5, May 2001.

²⁰ See remarks by Renato Ruggerio to the WTO High Level Symposium on Trade and Development, Geneva, 17–18 March 1999.

organizations. Its resources are extremely limited when compared to a number of other multilateral institutions. Its budget is 75 million dollars (about the same as the travel budget of the IMF) for the year 2000 and it has a secretariat of 500 staff members.

As with multilateral environment agreements, there are a large number of intergovernmental multilateral trade agreements. In the case of the trade agreements, these are found attached to the Agreement Establishing the WTO. This agreement has four annexes in all. The first contains all the multilateral trade agreements administered by the WTO; that is, the updated GATT of 1947 (i.e., GATT 1994)²¹ plus twelve other agreements. These agreements differ greatly in nature and subject-matter covered. Some relate to sectors (agriculture, textiles), some to government measures (subsidies, safeguards) or private actions (dumping) and some to processes (import licensing, and rules of origin). The annex also contains the General Agreement on Trade in Services (covering all services such as financial, telecommunications, professional and transport services), and the agreement on Trade Related Aspects of Intellectual Property Rights (patents, copyrights, trademarks, industrial designs, geographical indications etc.).²²

In at least one sense, there is a great deal of similarity between the trade and the environment agreements; namely, the diversity of the subject-matter. Protecting endangered species is very different from protecting the ozone layer, maintaining a stable climate, preserving wetlands or inhibiting the encroachment of deserts. So it is with trade agreements; quarantine measures, patents, financial services, dumping and agricultural price-supports are all very different, but nevertheless they too are all covered by multilateral trade agreements.

Another similarity with the trade agreements is that the secretariats that service the environment agreements – with some exceptions – are very small, and in many cases 5-6 people. This is also the case in the WTO with secretariats (i.e., the WTO divisions servicing the agreements) of about the same size (or sometimes less) servicing the trade agreements.

There is, however, a parting of the ways. Most notably perhaps, is that the trade agreements are dealt with in the same geographical location under the "same roof" in Geneva – or literally in the same "house". The environment agreements are dealt with by geographically dispersed secretariats located in Geneva, Montreal, Nairobi, Bonn and elsewhere. This presumably has implications for the coherence of the diverse environment agreements and the effectiveness with which they can be managed.

The seventy plus councils, committees, working parties and other bodies that meet regularly in the WTO building to deal with the trade agreements are frequently serviced by the same people both from national delegations and the WTO secretariat. They too, of course, meet under the same roof. In this manner a high degree of

²¹ The 1994 GATT consists of the 1947 GATT plus six Understandings that emerged from the Uruguay Round that one way or another refine the original GATT text without changing it.

²² The second annex sets the rules and procedures for dispute settlement and the third provides for regular reviews of developments in national and international trade policy. The fourth annex relates to four plurilateral trade agreements, only two of which are now in force.

expertise is built up all around and there is a minimum of travel in servicing the various trade agreements; particularly for local delegations stationed in Geneva.

The WTO is a "member driven" intergovernmental organization. Unlike some other organisations (e.g. the Bretton Woods institutions), the Director General has very limited powers. He can not, for example, formulate policy for the organisation nor is he expected to comment on the policies of the member governments. He can certainly not interpret rules, rights and obligations in the various trade agreement as this could be cited in Panel or Appellate Body reports and prejudice the outcome of disputes. The power to create, interpret and enforce rules lies solely in the hands of governments; in this respect, the supreme body of the WTO – the Ministerial Conference – is all important. It has full authority to take decisions on all matters under any of the multilateral trade agreements. As Ministers meet relatively infrequently (every two years is formally provided for) the functions of the Ministerial Conference are exercised by the General Council, which like the Conference, is made up of the full membership of the WTO.

In practical terms, the General Council is responsible for the continuing management of the WTO and supervises all aspects of its activities. In this respect, the organisation of the work relating to the various multilateral trade agreements differs substantially from that of the multilateral environment agreements. There is no such council dealing with the totality of multilateral environment agreements. Another marked difference between the two sets of agreements is that the multilateral trade agreements and the WTO have only one chief executive officer – the WTO Director General. This contrasts with the secretariats of the multilateral environment agreements that do not have a common head of all the various secretariats.

That governments act collectively with respect to all the WTO agreements provides considerable flexibility for a number of aspects of the work of the WTO – most notably, those relating to one of its principal roles, that of a negotiating body. While not all proposals, initiatives, and even agreements are popular with all members, the collective nature in which they are dealt with permits governments to strive for not only a balance of rights and obligations across members, but also a balance of interests. There can be trade-offs between the different agreements. While one government may not find a proposal attractive in one area, it can be "paid off" with something it sees as attractive in another area or agreement. It is not at all clear that this model could be replicated for environment agreements.

There are at least two very important features of the frameworks within which trade agreements operate that provide the glue that holds them together. First, is the dispute settlement process. This lies at the heart of the WTO. In all of the diverse multilateral trade agreements, breaking the rules means being taken to court; if the offending measures applied by the country found to be in error are not brought into conformity with WTO rules, then compensation and retaliation – with the approval of the General Council – are provided for. And in this context, the inter-relationship between the trade agreements is critical. Compensation can be sought in the form of improved market access in any of the areas covered by the multilateral trade agreements; not necessarily with respect to the agreement where the breach of obligations was committed. Similarly, retaliation can take place in any of the areas

covered by the agreements – not necessarily with respect to the one where there was a breach of obligations.

However, building up what many consider an effective dispute settlement process is the culmination of 55 years of experience. In the same vein it is important to be realistic about the WTO model being applied to the multilateral environment agreements if that were thought desirable.

This leads to the second important feature of the trade agreements. They are built on the same very simple theoretical and commercial foundations – namely those of the benefits of international trade.²³ The virtue of progressive liberalization in trade in goods and services is well accepted – at least by trade officials – as is the 200 year old principle of comparative advantage. The belief that a liberal trading system should operate in a predictable and stable manner is enshrined in the belief that the system should be rules based. Regulations affecting trade (e.g. tariffs) should be transparent and there should be an effective compliance mechanism. In an operational sense, non-discrimination appears as a cornerstone of almost all the trade agreements, and as noted above, they have a common compliance mechanism. While protection of the environment is certainly a common objective of multilateral environment agreements, it may be that there is not the same scope to apply the similar concepts, principles and rules – based on the notion of non-discrimination for example – across the different agreements as is the case with most of the trade agreements.

At the process level, it would appear that there is a fundamental difference between trade and environment policy formulation. In particular, the transparency with which the policies themselves are formulated. The environment community appears to favour openness and transparency in policy formulation, but this has not been the GATT practice in the past.²⁴ The closed nature of GATT negotiations can arguably be traced to the realities of the political economy of protection. The vast literature on this topic makes clear that distributional coalitions form to resist policy change that is not in the specific interest of their members. As interest groups can be adversely affected through a process of trade liberalization, they naturally use their influence to resist such change. WTO members – and GATT contracting parties before them – are familiar with taking decisions that are not in the interest of all groups in society but are nevertheless thought to be in the interests of the constituencies that the governments represent when elected democratically. This has very practical

²³ There are exceptions to the principals of liberal trade in the WTO agreements. These include the Multi-fibre Arrangement and the long-term exclusion of agriculture from the normal disciplines of GATT.

²⁴ According to Principle 10 of the Rio Declaration : Environmental issues are best handled “with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

implications for governments that spill over to transparency considerations.²⁵ After reviewing the evidence before it – preferably by holding transparent national public enquiries – the government would be expected to take decisions at the multilateral level that were in the interests of the community at large.

A democratically elected government advancing community-wide interests through trade liberalization when individual interest groups may be adversely affected may well wish to proceed in a non-transparent manner. Thus, many GATT documents have traditionally been kept far from the eyes of the public. National proposals for tariff reductions, for example, continue to be among the most highly restricted documents during rounds of trade negotiations. As a result, GATT contracting parties in the past have built up a tradition of jealously guarding the intergovernmental character of GATT without the active participation of interested (industry) groups. The WTO, however, has seen a radical change in some areas in response to public pressure. Nevertheless, the transparency that characterizes environment negotiations is strongly resisted by WTO members.²⁶

Yet another fundamental difference stems from what has been described as a different approach to trade and environment rule-making and enforcement. Experience has shown that changes to GATT rules were rare.²⁷ Since the establishment of GATT in 1948, there were only two amendments—one in 1955 and another in 1964.²⁸ GATT and WTO rules, in contrast, have proven to be very flexible instruments where “changes” have been possible through techniques that have ranged from simple non-enforcement of certain rules to a variety of relatively informal actions agreeing to allow some deviations from rules. It has been argued, for example, that the inexact status of the final actions taken by WTO members represents a practical answer to policy issues on which it is not possible to reach total agreement. The reasoning is that trade ministries have a certain degree of mutual trust allowing them to leave long-term answers open while short-term pragmatic solutions are found. They are confident that there is enough common interest among members to make it likely that something will be worked out in the long run.²⁹ Another possibility is that given the contractual nature of WTO agreements, members will only agree to a rule change if the outcome is clear and without risk. Unlike many environmental agreements, the dispute settlement process with the threat of retaliation and compensation is the Damocles’ sword hanging over those that have to live with the interpretation of the new rules.

²⁵ If, for example, saving an efficient domestic motor vehicle manufacturing industry requires removing tariff protection for a highly protected and inefficient local steel industry, it is most unlikely that the government concerned would invite steel and car manufacturers to the multilateral negotiating table.

²⁶ A corollary of this is that the GATT has historically paid a great deal more attention to defending itself in terms of the conventional political economy of protection than in dealing with interest groups concerned with the environment. It could be added that while environmental concerns in the trade arena are not new, the intensity of the concern is relatively recent. For example, trade and environment was not an issue in the formulation of the agenda for the Uruguay Round.

²⁷ See Jackson (1998), *The World Trade Organization Constitution and Jurisprudence*, The Royal Institute of International Affairs, London..

²⁸ There were, however, understandings negotiated in the Uruguay Round relating to some of the principal GATT articles.

²⁹ This thinking is developed in an excellent article on this and related topics by Robert E. Hudec, “The GATT/WTO Dispute Settlement Process: Can it Reconcile Trade Rules and Environment Needs,” in Rudiger Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means*, (Berlin: Springer-Verlag, 1996).

PROPOSALS FOR REFORM

Due to the expanding environmental agenda and the recognition of the fragmented approach to international action, there has been a plethora of proposals from various parts of the international community as to how to change the existing international institutional machinery to better confront the challenges of the twenty-first century. In all these proposals, the basic premise for charting a new course for institutional strengthening is that existing institutions do not (or will not) adequately address current and future needs.

The purpose of this section is not to present in a comprehensive manner all the numerous options that have been advanced in this respect. The objective is to provide an overview of the proposals that have been made in order to indicate their nature, breadth and variety. The following brief overview is based on a categorization in a recent UNEP documents where there is a division between proposals relating to organizational matters and those dealing with MEAs.³⁰

With respect to proposals relating to organizational matters, four areas of concern can be identified. The first relates to what some see as conflicting goals of various multilateral instruments. A good example of the potential importance of this problem can be seen from the potential conflict between WTO agreements and some MEAs. In the discussions in the Committee on Trade and Environment of the WTO, the view has been expressed by some WTO Members that the Trade Related Intellectual Property Rights (TRIPS) Agreement may interfere with the attainment of the objectives of the Convention on Biodiversity (CBD). The CBD, in its Preamble recognises that it is desirable that the "...benefits arising from the use of traditional knowledge, innovations and practices..." of indigenous and local communities should be shared equitably. Doubts have been expressed that the current system of intellectual property rights – with TRIPS at the center – does not facilitate this task. Similarly, the Biosafety Protocol establishes the conditions according to which trade in genetically modified organisms can take place as well as products derived from them. The observation has been made by a number of governments that the negotiations surrounding the Bio-safety Protocol proved to be difficult, for example, "precisely because of the lack of clarity with regard to the relationship of the Protocol to the WTO".³¹ It has also been argued that there may well be an important inconsistency in the manner in which precaution is dealt with in the Protocol and WTO Agreements such as the Sanitary and Phytosanitary Agreement.³²

³⁰ These have been usefully described in a recent UNEP report. The approach in the document is to create and an analytical framework for classifying various initiatives and then to briefly describe them. This section of this paper draws heavily on UNEP, International Environmental Governance, Report of the Executive Director, to the first meeting of the Open Ended Intergovernmental Group of Ministers in New York, 18 April 2001 (UNEP/IGM/1/2, 4 April 2001).

³¹ See, WTO, Submission by Switzerland to the CTE (19 October 2000). This view is also expressed in WTO, Submission by the European Community to the CTE (19 October 2000).

³² See Barbara Eggers and Ruth Mackenzie, "The Cartagena Protocol on Biosafety", Journal of International Environmental Law, 2000.

In more general terms, although the importance of protecting the environment is clearly acknowledged in the preamble and various agreements that established the WTO, it was not a main focus of the negotiations.³³ Nor does it appear in any of the substantive WTO Agreements. In fact, the CTE has been accused of failing, among other things, in its task of recommending modifications of the provisions of the multilateral trading system “to enhance a positive interaction between trade and environmental measures and for the promotion of sustainable development.”³⁴ Similarly, there have been calls for “mainstreaming” sustainable development in WTO agreements to make them a core feature of WTO activities. This has not met with approval on the part of WTO members.

Second, there are organizational proposals for a stronger agency for governing the global environment. It is clear that the future of UNEP is central to any proposal relating to organisational reform. At the recent G8 meeting of environment ministers, it was underlined that there was a need to improve and reform UNEP's coordinating role in international environmental management and the need to foster voluntary exchanges of information between all international environmental institutions and bodies with a largely environmental remit. UNEP's role was seen to be one of providing coherence, in particular on a thematic basis, among schedules, assessments, reporting strategies and actions. Its role was also to improve existing structures of cooperation between conventions and between their secretariats.³⁵

However, there are differing views on what shape any reform of UNEP should take if these objectives are to be met. A common proposal relates to removing the limits placed on UNEP as a ‘program’ rather than a decision-making organization, as well as its current focus on a specific set of tasks in the environmental area. Most proposals look to reinforcing UNEP within the existing structure. One view however, is that establishing UNEP as a specialized agency as a result of decisions taken at the WSSD, would be premature; even in the long run this may be neither practical nor desirable.³⁶

³³ The Preamble to the Agreement Establishing the World Trade Organization (WTO) states that members recognize “that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living...while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.” The texts of the WTO agreements referred to in this paper can be found in WTO, The Results of the Uruguay Round Negotiations: the Legal Texts (Geneva: 1995).

³⁴ See, for example, Steve Charnovitz, “A Critical Guide to the WTO's Report on Trade and the Environment,” Arizona Journal of International and Comparative Law, vol. 14, no. 2 (1997).

³⁵ See G8, Communiqué: G8 Environment Ministers' Meeting in Trieste, Italy, 2-4 March 2001.

³⁶ This view is reported in: Expert Consultations on International Environmental Governance, Cambridge, 28-29 May, 2001. Expert Consultations on International Environmental Governance took place in Cambridge, United Kingdom, from 28-29 May 2001. The United Nations Environment Programme (UNEP) organized the expert consultations pursuant to decision 21/21 of the UNEP Governing Council. Decision 21/21 established an Open-ended Intergovernmental Group of Ministers to undertake a comprehensive policy-oriented assessment of weaknesses in existing international environmental institutions and examine options for strengthened international environmental governance, and indicated that the process should benefit from expert input. Twenty-seven participants, including academics, policy specialists from non-governmental organizations, and experienced international environmental negotiating processes attended the consultations. See the report on the meeting prepared by the International Institute for Sustainable Development on www.iisd.org.

Other organizational proposals include: broadening the mandate of the Global Environment Facility (GEF) to make it the financial mechanism of all global environmental agreements and link it more closely with UNEP to ensure coherence between policy and financing; greater coordination with the GEF, possibly even integration of the GEF in UNEP;³⁷ raising the profile of the Commission on Sustainable Development to integrate – environmental, social and economic considerations – with greater involvement alongside GEF and other programmes and the United Nations Development Group, and involving ministries other than environment ministries; and the establishment of a new environmental court.

The third area addresses the proposals that highlight the need for tools and mechanisms to improve the coordination between the various entities involved in environmental governance. These include; agreement on a structure to provide direction and coherence among agreements within the same category; improved coordination between trade and environment agreements; establishment of a dispute settlement scheme for trade-related environmental issues, with the dispute settlement process independent of the rule-making and negotiating functions of WTO; utilization of UNEP's recently established GMEF for setting broad policy guidelines for international action on the environment; creation within EMG of a coordination mechanism to cover all institutions with a largely environmental remit, UNEP and the secretariats of the multilateral environmental agreements; inclusion of UNEP in the United Nations Development Group; establishment of a United Nations Environment Group, on the model of the United Nations Development Group, and based on strengthening of EMG.

As far as multilateral environmental agreements are concerned, the overriding issue addressed in most of the proposals is to strengthen the manner in which they operate and co-ordinate. There have been a number of initiatives in this respect.

For example, in 1999 the United Nations University, in collaboration with over fifteen different UN organizations and agencies, MEAs, and specialized agencies, hosted an international conference to examine the issue of synergy and co-ordination within international efforts to protect the environment. The *Inter-linkages* conference generated a number of practical recommendations in terms of how international environmental institutions could be reformed to make more effective use of the natural synergies that exist in the environment. The conference also produced a number of recommendations for further research.³⁸

Among the proposals it is generally agreed that MEAs will, and should continue to, play a pivotal role in any future global environment governance system, however, more and better co-ordination is needed, particularly among MEAs addressing the same policy area. This would make the system more coherent, rationalise the international agenda and avoid duplication of efforts. It seems generally agreed that

³⁷ European Commission, An EU Contribution to Better Governance Beyond our Borders, White Paper on Governance, Report of Working Group 5, May 2001.

³⁸ Inter-linkages: Synergies and Co-ordination between Multilateral Environmental Agreements, Report, Tokyo: UNU, 1999.

UNEP play a leading role in this endeavor.³⁹ Four areas of policy concern and therefore proposals have been identified:

First, a number of proposals see the dispersed location of secretariats and inadequate coordination in the timings of conferences as complicating effective coordination between MEAS. This is added to by the fact that the various conventions have different focal points at the national level. Ideas put forward to deal with this situation include: co-location of secretariats of agreements; development of umbrella conventions; utilization of one scientific body to address the scientific or thematic assessment needs of agreements functioning on demand-driven basis; and the use of UNEP's recently established GMEF to clarify the main principles to be incorporated into the various agreements with a view to harmonizing their implementation.

Second, there are proposals addressing shortcomings in the monitoring of compliance of states with multilateral environmental agreements. The concern is that while the current processes call for national reports to each agreement as a means of monitoring levels of implementation and compliance with conventions, some countries do not submit reports, and others only do so belatedly. Further, convention secretariats and their budgets are small. Suggestions include: the establishment of an authoritative body that has the capacity to verify the information that governments are to supply; reviewing the status of implementation on a country-by-country basis as opposed to an agreement-by-agreement basis; and reinforcement of surveillance mechanisms to monitor the implementation of agreements.

Third, concern has been raised that multilateral environmental agreements are not being effectively implemented and that the lack of financial measures and incentives is the primary cause of this problem. Incentives and measures to improve compliance include: additional financing; adoption of a centralized reporting process for the different agreements; efforts by Conferences of Parties to do more to encourage countries that have not yet ratified agreements to do so; action to make some agreements enforceable for non-signatories; identification of the precise role of technology transfer as an incentive; drafting of a legal instrument on economic instruments which, while being common to the various agreements, would be specific for each issue; and drafting of a framework convention on economic instruments to promote the implementation of all multilateral environmental agreements.

The fourth group of proposals deals with the establishment of a complaints system with defined roles for the secretariats of environmental agreements in processing such complaints, the powers of Conferences of Parties to rule on them and the range of measures that could be taken (ranging from assistance measures to economic sanctions). Proposals include the establishment of a dispute settlement mechanism; a non-compliance system which would allow non-governmental actors to log complaints; the establishment of an independent body to manage the system; and the availability of a wide range of different measures, ranging from positive measures

³⁹ European Commission, An EU Contribution to Better Governance Beyond our Borders, White Paper on Governance, Report of Working Group 5, May 2001.

to sanctions, when a case of non-compliance has been established.⁴⁰ It has also been proposed that there be the creation of a post for an environmental ombudsman or a centre for amicable settlement of disputes, possibly under the auspices of UNEP; and the implementation of common regulations on the subject of environmental liability as an instrument prompting Parties to respect their obligations.

THE WAY FORWARD

In the words of the Secretary General, “ ***There is no shortage of ideas on what should be done.*** We need only look at some of the proposals put forward in this Millennium year — in the Malmö Declaration of Environment Ministers at the First Global Environment Forum, in my Report to the Millennium Summit and in the Millennium Declaration. Nor is there a shortage of specific programmes of action, such as the Global Compact — an initiative for partnership between the UN and the private sector to encourage and promote good corporate practices and learning experiences in the areas of the environment, human rights and labour. ***What we need is a better understanding of how to translate our values into practice, and how to make new instruments and institutions work more effectively.***”⁴¹ (emphasis added)

A number of conclusions can be drawn from the forgoing discussion. The past thirty years have seen a great deal of international activity generated by concern over the environment. This concern has been expressed at the highest political levels and by public interest groups from all quarters of the globe. There has been an impressive response in terms of the creation of various instruments that has resulted in a network of agreements and institutions to deal with the specific environmental concern. Notwithstanding a great deal of hard work, the problems many of the instruments address still remain, or in some cases have worsened. It seems fair to say that a consensus has now emerged about the pressing need to review the instruments to render the system of global environmental governance more effective.

What is important in this respect is that: “ ***There is no shortage of ideas on what should be done.***” The problems have been identified and a vast array of proposals as to how to deal with these problems have emerged in recent months and years. ***“What we need is a better understanding of how to translate our values into practice, and how to make new instruments and institutions work more effectively.”*** It seems that this is the critical question to address at this point in time – just one year prior to the WWSD.

And while there are differing views on the priorities of the issues that have been identified, as well as the specifics of the proposals to deal with them, it seems that it should not be beyond the capacities of governments to define at an early stage those reforms could be operationalised at the WWSD. A package of reforms which collectively would considerably improve the functioning of global environmental governance.

⁴⁰ European Commission, An EU Contribution to Better Governance Beyond our Borders, White Paper on Governance, Report of Working Group 5, May 2001.

⁴¹ Preface by the Secretary General to the Annual Report of UNEP, 2000.

In this respect, while discussions of whether the world needs a World Environment Organization are instructive and serve to focus the thinking of academics, policy makers and others on problems and their solutions, it seems it will not be an outcome of the WSSD. So too for discussions surrounding the movement of an environmental governance model closer to that of the WTO. This too constitutes an instructive discussion, but will not lead to a definitive policy result in itself. Certainly not at the WSSD.

What would appear to be the preferred means to move the process forward would be to decide on an initial set of ambitious but realistic steps, that may or may not end with the creation of a new World Environment Organisation, but would be worth pursuing in their own right. Some packages have been put forward with this approach in mind. If governments can not decide on a package of such measures at an early stage to ensure their adoption and implementation at the WSSD, then it would throw into serious doubt the political will of governments to address problems to which their constituencies attach the highest priorities.

ANNEX⁴²

The United Nations Conference on the Human Environment in Stockholm in 1972 Conference constituted the first attempt by the international community to address the relationships between environment and development at the global level. The Conference succeeded in putting environment on the global agenda, with the adoption of the Stockholm Action Plan, a first global action plan for the environment, which provided the basis for a standard agenda and a common policy framework to deal with the first generation of environmental action. A declaration of principles was adopted which provided the foundation for the development of international environmental law during the 1970s and 1980s. An important outcome of the Conference was the subsequent establishment of the United Nations Environment Programme (UNEP). A search began for a new, more rounded concept of development related to the limits of the natural resource base, in which environmental considerations play a central role while still allowing opportunities for human activities. The Conference created an important impetus in countries and in the United Nations and other organizations in recognizing and addressing emerging environmental problems. As part of such international efforts, UNEP, from the mid-1970s onwards, embarked upon the establishment of regional seas programmes, under which conventions and action plans were drawn up as a framework for regional cooperation.

To mark the tenth anniversary of the Stockholm Conference, a session of a special character of the UNEP Governing Council was held in Nairobi in May 1982. It provided a unique opportunity to bring together the new generation of environmental decision makers from around the world to reinvigorate the standard environmental agenda, policies and institutions in the light of the experience of the 1970s and the emerging challenges of the time. At the end of the session of a special character, the Governing Council adopted a resolution citing the achievements of the United Nations in implementing the Stockholm Action Plan and the challenges that faced the international community. At the tenth session of the Governing Council, held immediately after the session of a special character, the Montevideo Programme for the Development and Periodic Review of Environmental Law was adopted to serve as strategic guidance for UNEP in catalysing the development of international treaties and other agreements in the field of the environment.

By resolution 38/161 of 19 December 1983, the General Assembly set up a World Commission on Environment and Development to propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond. The Commission was requested to consider ways and means by which the international community could deal more effectively with environment and development concerns. In 1987, after three years' work, it made comprehensive proposals and recommendations to promote sustainable development, including proposals for institutional and legal change. It summed up the chief institutional challenge of the

⁴² The material contained in this annex comes from: United Nations, Report of the United Nations Task Force on Environment and Human Settlements, A/53/463, 15 June 1998, and UNEP, International Environmental Governance, Report of the Executive Director, to the first meeting of the Open Ended Intergovernmental Group of Ministers in New York, 18 April 2001 (UNEP/IGM/1/2, 4 April 2001).

1990s as follows: "The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions – on the same agendas and in the same national and international institutions."

In June 1992, exactly 20 years after the Stockholm Conference, world leaders met in Rio de Janeiro at the United Nations Conference on Environment and Development, the Earth Summit. The Conference was a significant turning point in redirecting national and international policies towards the integration of environmental dimensions into economic and developmental objectives. The outcome of the Conference, in particular Agenda 21 and the Rio Principles, became instrumental in promoting the development and strengthening of institutional architecture for environmental protection and sustainable development at the national and international levels. Chapter 38 of Agenda 21 outlines international institutional arrangements, and specifies tasks to be carried out by UNEP. Subsequently, in resolution 47/191 of 22 December 1992, the General Assembly adopted new international institutional arrangements, including the establishment of the Commission on Sustainable Development.

The concept of sustainable development links economic, social and environmental concerns, and has been adopted by the world community. Agenda 21 assigns a broad range of responsibilities for action to United Nations organizations and bodies, national Governments and many other international and national groups. Environmental issues have appeared increasingly on the agendas of development-oriented institutions including the United Nations Development Programme (UNDP), the World Bank, the regional multilateral development banks, and such specialized agencies as the World Health Organization (WHO), the World Meteorological Organization (WMO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Industrial Development Organization (UNIDO), as well as the United Nations regional commissions.

The development of international regimes to address complex global environmental issues, such as climate change, biological diversity and desertification, was accelerated. In addition to Governments, civil society organizations, the private sector and other major groups of society have been increasingly recognized as essential in achieving the goals of sustainable development.

In 1997, at its nineteenth special session, the General Assembly undertook a five-year review of the outcome of the Earth Summit and adopted the Programme for the Further Implementation of Agenda 21. The Programme recognized the progress made since the Rio Summit and the challenges that face the world community in pursuit of sustainable development, acknowledging a variety of governmental and non-governmental actors active in the field of the environment and sustainable development, and underscored the role of UNEP as the leading global environmental authority. The heads of State and government at the special session were of the view that a number of positive results had been achieved, but were deeply concerned that overall trends with respect to sustainable development were worse than in 1992. They emphasized that the implementation of Agenda 21 in a comprehensive manner remained vitally important and was more urgent than ever.

The 1997 Nairobi Declaration, adopted by the Governing Council of the United Nations Environment Programme (UNEP) and endorsed by the United Nations General Assembly, clearly establishes UNEP as “the principal United Nations body in the field of the environment” and clarifies its role as the “leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of sustainable development and that serves as an authoritative advocate for the global environment”.

During 1998 within the overall reform effort of “Renewing the United Nations”, the Secretary-General appointed a Task Force on Environment and Human Settlements, which finalized its work in 1999 with the adoption of the “Report of the Secretary-General on environment and human settlements”. The work of the Task Force focused on a number of aspects, including inter-agency linkages, intergovernmental forums and the involvement of major groups, information, monitoring, assessment and early warning and the revitalization of UNEP and the United Nations Centre for Human Settlements (UNCHS) (Habitat). Its recommendations were considered by the Governing Council and adopted by the General Assembly in its resolution 53/242. One of these recommendations dealt with the establishment of an Environmental Management Group to address the issue of improving coordination between agencies and also between environmental conventions. The Group held its first meeting in January 2001. A second recommendation dealt with the creation of a Global Ministerial Environment Forum, to meet annually on the occasion of the Governing Council.

The first meeting of the Global Ministerial Forum, held in Sweden in May 2000, adopted the Malmö Declaration which focused on crucial areas such as major environmental challenges of the twenty-first century, the relationship between the private sector and the environment, civil society and the environment and the 10-year review of the implementation of the outcome of the United Nations Conference on Environment and Development. As all these areas impact on the role of the environment in an increasingly global policy outlook, Governments agreed that the 2002 World Summit on Sustainable Development should “review the requirements for a greatly strengthened institutional structure for international environmental governance based on an assessment of future needs for an institutional architecture that has the capacity to effectively address wide-ranging environmental threats in a globalizing world. UNEP’s role in this regard should be strengthened and its financial base broadened and made more predictable.”

This conclusion was based, in part, on the present proliferation of structures, agreements and conferences, which has resulted in a heavy burden on developing countries in particular, many of which simply do not have the necessary resources either to participate in an adequate and meaningful manner, or to comply with the complex and myriad reporting requirements associated therewith. It is also becoming apparent that weak policy coordination is resulting in missed opportunities to enhance coherence and synergy among the various instruments. The number of legal agreements dealing with environment and sustainable development is increasing while the average time taken to negotiate each treaty is decreasing. At the same time, the scale of problems to be addressed has widened – from the regional through the hemispheric to the global – while the number of sovereign

States that have to participate in the negotiation of such legal arrangements has gradually burgeoned. Whereas the creation of the various legally binding conventions and protocols on the environment constitutes an outstanding achievement on the part of the international community, it also raises the need for continuing policy coherence among the various instrumentalities that exist in this area, at both the inter-agency and intergovernmental levels.

It is against this background that, at the twenty-first session of the Governing Council, in February 2001, Governments expressed increasing concern that the current governance structures do not meet the needs of the environmental agenda, and addressed the issue of international environmental governance. In decision 21/20 the Council provided for the further strengthening of UNEP, while decision 21/21, on international environmental governance, built on such elements as the Nairobi Declaration and the Secretary-General's report on environment and human settlements, but also called for a comprehensive policy-oriented assessment of existing institutional weaknesses, as well as future needs and options for strengthened international environmental governance, including the financing of UNEP.

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