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# A New Environmental Order: Laying the Legal and Administrative Foundation for Global Environmental Governance

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**SJD DISSERTATION**

**A NEW ENVIRONMENTAL ORDER  
LAYING THE LEGAL AND ADMINISTRATIVE FOUNDATION  
FOR  
GLOBAL ENVIRONMENTAL GOVERNANCE**

**DEEPA BADRINARAYANA**

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## INTRODUCTION

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There is an urgent need to strengthen governance mechanisms to manage and address environmental problems that are increasing across the globe. In a world divided along political, economic, social, cultural, and geographical lines this requires the cooperation of discrete governmental agencies, because, regardless of their international or global effects, some problems that are primarily caused by a few countries can only be addressed in cooperation with government agencies of those countries in the absence of an overarching autonomous international governance system. As a result, efforts to improve global environmental governance mechanisms generally focus on strengthening the hub of governmental interactions—international organizations.

However, strengthening global environmental governance requires more than the performance of cosmetic surgery on international organizations. Improving global environmental governance presents an unequivocal need for closely examining the underlying challenge of ensuring justice and fairness in the distribution, use and enjoyment of natural resources regardless of political, economic, or other distinctions. Since this challenge falls within the purview of law, global environmental governance can only be improved by reinforcing the rule of law on a global scale.

The current practice of negotiating *ad hoc* multilateral environmental agreements (MEAs) contributes very little towards strengthening the rule of law, given its primary focus on addressing a specific problem.<sup>1</sup> While such a practical approach,<sup>2</sup> common to most MEAs,<sup>3</sup> provides States the flexibility to negotiate legal agreements on a case-by-case basis,<sup>4</sup> it is not adequate to strengthen global environmental governance.

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<sup>1</sup> The Oxford American Dictionary defines *ad hoc* as “for the specific purpose,” deriving from the Latin term “for this.” See, *Oxford American Dictionary*, 12 (1080).

<sup>2</sup> See generally Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L. J. 353, 354 (1997). In the context of domestic legal theory he describes the practical approach to problems as one in which “anyone who thinks about the law should be directing their attention to the immediate practical problem posed by any political occasion. The only question should be: How can we make things better? You do need to know a lot about the consequences of different decisions – and perhaps also some economics in order to gauge these consequences – in order to answer the practical question helpfully. But you do not need volumes of political philosophy.”

<sup>3</sup> In fact almost all MEAs appear to follow the same formula comprising the following steps—(1) problem identification, (2) source verification, (3) scope solutions or scientific substitutions, and (4) treaty negotiation and execution. The formulistic approach can be illustrated by case of ozone depletion as follows; (i) Problem Identification – ozone depletion resulting in unchecked penetration of ultraviolet rays through the Earth’s atmosphere that causes problems such as skin cancer, eye problems, and negative effects on animal and plant life. (ii) Source Verification – chlorofluoro carbons (CFCs) that are used in cooling devices such as air conditioners and refrigerators. (iii) Scope Solutions – substitute CFCs with other substances and eliminate CFC producing goods from all markets. (iv) Treaty Negotiations (that may be preceded by informal meetings and negotiations facilitated by international organizations) – Framework Convention on Substances that Deplete the Ozone Layer that lay out the general problem and reiterate certain tenets, such as the precautionary principle, the polluter pays principle, and common but differentiated responsibility. It is complemented by a Protocol on Substances that Deplete the Ozone Layer, which identifies the specific chemicals, the target dates for phase out, the compliance procedure requirements and financial and other arrangements, all of which is generally monitored by a Secretariat and a Conference of Parties established under the MEA. See Drusilla J. Hufford and Paul Horwitz, *Fixing the Hole in the Ozone Layer: A Success in the Making*, 19-SPG NAT. RESOURCES & ENV’T 8 (2005); CESARE P. ROMANO, THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES 34 – 42 (2000); Appendix III for the role of COPs.

<sup>4</sup> See generally Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Notice Phenomenon in International Environmental Law*, 94 AM. J. INT’L. LAW 623 (2000).

The problem of global warming illustrates the gross insufficiency of *ad hoc* treaty negotiation, where the problem reached a tipping point before any legal arrangement was concluded.<sup>5</sup> Moreover, any affected nation or group of people that approaches the World Court, or any other forum, seeking redress faces not only the daunting challenge of proving that any particular country (or particular countries), caused the harm but also of claiming a legally enforceable remedy under current international environmental law.<sup>6</sup>

Thus, a practical approach to address environmental issues through *ad hoc* MEAs does not reinforce the rule of law in addressing environmental problems. This rule of law deficit cannot be addressed solely by changing the structure of international organizations. It is crucial to simultaneously strengthen the rule of law.

Furthermore, the rule of law concern is accompanied by the challenge of globalization, which is heralding fundamental changes in the current state-centered world order. The expectations from and the demands on international organizations and States have increased exponentially at the global level. Those

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<sup>5</sup> See, e.g., Ian Sampler, *Warming hits 'tipping point'*, THE GUARDIAN, August 11, 2005, available at, <http://www.guardian.co.uk/climatechange/story/0,12374,1546824,00.html>, last visited 5/26/06. See also, Juliet Eilperin, *Debate on Climate Shifts to Issue of Irreparable Change*, WASHINGTON POST, January 29, 2006, available at, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/28/AR20060128012801021.html>, last visited 5/26/06.

<sup>6</sup> The Eskimos in Alaska and Canada wanted to initiate lawsuit against the Bush Administration for refusing to take action against global warming by not signing the Kyoto Protocol, and thereby affecting their human rights, in 2003. However, it has not advanced far since then. See Paul Brown, *Inuit begin rights case over global warming*, THE AGE, December 16, 2003, available at <http://www.theage.com.au/articles/2003/12/15/1071336885565.html>, last visited 9/14/06.

interested in addressing environmental problems no longer want to sit back and wait for States to act through international governmental organizations. Non-governmental actors across the world are seeking solutions and pushing for State action, regardless of concerns about state sovereignty. Demonstrations during the Seattle Round of Negotiations of WTO provide an early illustration of this development.<sup>7</sup> These demonstrations also indicated that a traditional international governmental organization vested with greater authority is not anticipated to be able to meet the demands for legitimate global action in managing environmental problems.

In other words, strengthening global environmental governance requires an analysis of the current world order as well.

This dissertation argues that global environmental governance can be strengthened by structuring legal and administrative mechanisms to meet the demands of the current world order. In particular, this dissertation provides a theoretical analysis of those legal and administrative mechanisms that can improve environmental governance in a globalizing world. However, since it is a theoretical analysis, this dissertation does not assert that the analysis in itself will simplify the process of strengthening the rule of law, resolve all environmental

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<sup>7</sup> See generally, L. David Brown, Sanjeev Khagram, Mark H. Moore, and Peter Frumkin, *Globalization, NGOs and Multi-sectoral Relations*, HAUSER CENTER FOR NONPROFIT ORG. WORKING PAPER NO. 1, (July 2000), available at SSRN: <http://www.ssrn.com/abstract=253110> or DOI: 10.2139/ssrn.253110.



issues, or require every single environmental problem to be addressed through an international process. Rather, the objective of the analysis is to provide a theoretical understanding of legal and administrative alternatives which, in the context of globalization, would advance ongoing efforts to strengthen global environmental governance.

The dissertation consists of four main chapters. The first chapter examines the current world order and explains the context in which global environmental governance must be strengthened. In particular, the chapter examines how globalization is shaping a global society by facilitating interactions and an exchange of ideas and viewpoints across borders. More specifically, it examines the impact of globalization on traditional views of governance.

The second chapter analyzes the importance of strengthening the rule of law in an era of increasing globalization by developing positive environmental law. The chapter draws lessons from World Trade Organization (WTO) law. Based on the analysis of WTO law it evaluates the current structure of international environmental law and its limitations from a positive law perspective. It also examines a few alternatives for strengthening the rule of law by establishing a global environmental legal system.

The third chapter discusses the problem of developing and administering a global environmental legal system. It examines several concerns that have been

expressed concerning the legitimacy of the rules that have been developed and implemented through centralized mechanisms. The chapter analyzes certain dominant theories that present alternatives to traditional methods of governance. Based on key elements of these theories, the structure of an intergovernmental organization established in 1949 —the World Conservation Union or IUCN— is examined as a model for addressing concerns of legitimacy in developing and implementing policy and law.

The fourth and concluding chapter summarizes the analysis made in the previous chapters. Based on these analyses it lays out a broad proposition to create a new environmental order.

The dissertation also includes two appendices—Appendix I describes the basic structure of IUCN and Appendix II provides a brief explanation of the structure of key international organizations that address environmental issues as part of their activities.

## CHAPTER I

### GLOBALIZATION AND THE ENVIRONMENTAL ORDER

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Global environmental governance in its current form is based on the absolute primacy of sovereign nations. Mandatory action and response to environmental problems cannot be required from multiple states without their cooperation. This form of governance is reminiscent of a world order that is fundamentally changing as a result of globalization.

Yet, ongoing efforts to restructure international environmental governance systems continue to reaffirm the centrality of governments in global environmental management, paying lip service to other important actors, and developments, in the international arena. Such an approach has not produced meaningful and significant alternatives to current governance mechanisms.

Any new global environmental governance structure, whether designed from existing models and structures, or newly created, must reflect the nuances of the emerging global order, which in turn requires an understanding of process of globalization, its implications for the world order, and its impact on environmental governance. This chapter examines and analyzes all three aspects, which are at the foundation of strengthening global environmental governance.

## UNDERSTANDING GLOBALIZATION

Globalization is a pervasive process, fostering global discussions on a range of issues such as food, fashion, pollution and politics. A few developments, notably the demise of the Cold War and technological innovations, have galvanized the process of globalization.<sup>1</sup> In fact, the foundations of globalization can be traced back to technological advances originating in the Industrial Revolution, which facilitated mass production, fostered trade and catalyzed migration of people in search of raw materials and new markets.<sup>2</sup> The Industrial Revolution also facilitated cultural exchange between countries in the East and the West/ North and South, leading to an exponential expansion in transnational relations.<sup>3</sup> This early form of globalization, however, was interrupted by the First World War.<sup>4</sup>

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<sup>1</sup> See Rex Honey, *An Introduction to the Symposium: Interrogating the Globalization Project*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 7 (2002).

<sup>2</sup> Ross Wecker, *Regulating the Global Information Society*, 4 *J. HIGH TECH. L.* 1 (2004-2005); *GLOBALIZATION OF TECHNOLOGIES: INTERNATIONAL PERSPECTIVES* (Janet H. Muroyama and H. Guyford eds., 1988).

<sup>3</sup> See generally Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 *THE JOURNAL OF FINANCE* 831 (1993). On a more contentious note conolonization related to the technological domination of some European countries led to anti-colonization movements and gave rise to nationalist feelings. These experiences continue to raise questions about the legitimacy of the traditional international system. See "Europe", *Britannica Student Encyclopedia* from Encyclopedia Britannica Premium Service. <http://www.britannica.com/ebi/article-200448>, (last visited Feb. 16, 2006). See also "Nationalism", Microsoft Encarta Online Encyclopedia 2005. [http://encarta.msn.com/text\\_761559371\\_0/Nationalism.html](http://encarta.msn.com/text_761559371_0/Nationalism.html) (last visited Feb. 16, 2006); David P. Fidler, *Agora: Third World Approach to International Law*, 2 *CHINESE J. INT'L L.* 29 (2003).

<sup>4</sup> See generally JEFFREY SACHS, *THE END OF POVERTY*, 18 (2005).

At the end of World War I, a neutral non-state entity, now termed as an intergovernmental organization, was established to resolve international conflicts without resorting to a bloody war—the League of Nations (“the League”).<sup>5</sup> The League, however, proved ineffective when shortly after its establishment countries clashed in another World War. Nevertheless, at the end of the Second World War the League was replaced by a more structured intergovernmental organization—the United Nations (“UN”)—with an affirmative mandate to maintain international peace and security.<sup>6</sup>

In addition to the creation of the UN, other significant developments in the aftermath of World War II changed the then existing world order. Under the supervision of the United Nations Trusteeship Council, many European colonists ceded their control over colonies under the pressure of “independence” movements and a major war.<sup>7</sup> Much of Eastern Europe, as well as a few countries in Asia, that came under the control or direct influence of USSR established communist regimes.<sup>8</sup> Western European countries, as well as the United States and Japan, focused on reconstructing their economy and infrastructure established

<sup>5</sup> See William E. Rappard, *The League of Nations as a Holistic Fact*, 11 INT’L CONCILIATION 278 (1926-27).

<sup>6</sup> See Preamble, Charter of the United Nations, We the Peoples of the United Nations...United for a Better World, <http://www.un.org/aboutun/charter/index.html>, (last visited Feb. 16, 2006) (stating as one of its objectives, “to unite our strength to maintain international peace and security”).

<sup>7</sup> See Terry Boswell, *Colonial Empires and the Capitalist World-Economy: A Time Series Analysis of Colonization, 1640-1960*, 54 AMERICAN SOCIOLOGICAL REVIEW, 180, 182 (1989).

<sup>8</sup> See Paul Shoup, *Communism, Nationalism and the Growth of the Communist Community of Nations after World War II*, 56 AMERICAN POLITICAL SCIENCE REVIEW, 886 (1992). The author also discusses the challenges to communism that emerged from the growth of nationalism in Eastern Europe and China.

another intergovernmental organization, the International Bank for Reconstruction and Development [“IBRD”].<sup>9</sup>

Thus, the post-WWII world order was a kaleidoscope of old and new nations, each pursuing different economic, political, and social goals, as well as intergovernmental entities organizing cooperation among these states on peace and security, as well as other issues. However, as ideological rivalry between the United States of America and the United Soviet Socialist Republic (USSR) heightened, the differences among nations deepened. Yet, instead of a full blown war, the differences resulted in a “Cold War” that divided the world into the three main political blocs—First (Democratic/Capitalist), Second (Communist) and Third (countries not aligned purely to either ideology) World countries.<sup>10</sup> During the Cold War, countries continued to engage in multilateral relations through international and regional intergovernmental organizations established for several purposes both within and without the United Nations structure. One could say that this period of intense expansion in intergovernmental organizations laid the foundation for the next phase of globalization.

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<sup>9</sup> See Barry Eichengreen & Peter B. Kenen, *Managing the World Economy under the Bretton Woods System: An Overview*, in *MANAGING THE WORLD ECONOMY*, 5 (Peter B. Kenen ed., 1994). See also G. John Ikenberry, *The Political Origins of Bretton Woods*, in *A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM* 155 (Michael D. Bordo & Barry Eichengreen, 1993).

<sup>10</sup> See *THE ENCYCLOPEDIA OF WORLD HISTORY* 1008 (6<sup>th</sup> ed. 2001). See also Paul Marer, *The Political Economy of Soviet Relations with Eastern Europe*, in *SOVIET POLICY IN EASTERN EUROPE* 159 (Sarah Meikle & John Terry eds., 1984).

Significant and definitive changes to the prevailing world order emerged with the collapse of USSR, as well as the increased availability and use of computers and the Internet in the 1990s.<sup>11</sup> The prevalence of the United States' capitalist ideology blurred the "bloc" division among nations. US and "western" policies gained momentum as many states embraced an open market economy.<sup>12</sup> Information Technology ("IT"), notably the Internet, brought radical changes to global information collection and dissemination on myriad subjects, from politics and science to culture and travel, unfettered by differences in time zones or language. Communications technologies such as fiber optics and satellite continue to expand the space for global interactions on an unprecedented scale.<sup>13</sup>

The post-Cold War period also catalyzed existing trade relations among nations. After years of failed negotiations,<sup>14</sup> nations finally agreed to new international trading relations and established a new intergovernmental organization—the World Trade Organization ("WTO"). Unlike existing intergovernmental models, notably the UN, WTO was not set up merely to

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<sup>11</sup> See MARCUS FRANDA, *Launching into Cyberspace, Internet Development and Politics*, in FIVE WORLD REGIONS 9 (2002). See also MICHAEL MANDELBAUM, THE IDEAS THAT CONQUERED THE WORLD 70 (2002); Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFFAIRS (January-February 2001).

<sup>12</sup> See Mandelbaum, *ibid*, at 35. See also Nye Jr., *infra* note 13.

<sup>13</sup> See JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER 41-76 (2002). See also ABBE MOWSHOWITZ, VIRTUAL ORGANIZATION (2002); John King Gamble, Emily A. Allen, & Nicole L. Dirling, *International Law and Globalization: Allies, Antagonists, or Irrelevance*, 30 SYRACUSE J. INT'L L. & COM. 1, 9-11 (2003).

<sup>14</sup> See L. Alan Winter, *The Road to Uruguay*, 100 THE ECONOMIC JOURNAL 1288 (December 1990), explaining the hurdles to negotiations faced before and during the Uruguay talks.

facilitate international cooperation on multilateral trade.<sup>15</sup> Rather, nations established an organization with substantially significant adjudication and enforcement power, the details of which are discussed in the next chapter.

All in all, the post-Cold War economic policies and technological developments have rejuvenated the process of globalization.<sup>16</sup> Globalization is in turn impacting the world order.<sup>17</sup> As globalization deepens, national borders shrink and interactions across borders among governments and non-state actors expand,<sup>18</sup> leading to the emergence of what Friedman refers to as a “flat world,” in which global opportunities, expectations and responses are no longer overshadowed by traditional political and economic differences that necessitate constant governmental attention.<sup>19</sup> Some scholars even argue that globalization has eroded the traditional Westphalian concept of a nation-state.<sup>20</sup>

<sup>15</sup> Marrakech Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994), 33 ILM 1144 (1994).

<sup>16</sup> Mandelbaum, *supra* note 11. Thomas Friedman explains it in this manner – “globalization is not simply a trend or a fad but is, rather an international system. It is the system that has now replaced the old Cold War system, globalization has its own rules and logic that today directly or indirectly influence the politics, environment, geopolitics and economics of virtually every country in the world.” See, THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, at vii (2000).

<sup>17</sup> Nye, *supra* note 13.

<sup>18</sup> L. David Brown, Sanjeev Khagram, Mark H. Moore, and Peter Frumkin, *Globalization, NGOs and Multi-sectoral Relations*, HAUSER CENTER FOR NONPROFIT ORG. WORKING PAPER NO. 1, (July 2000), SSRN: <http://www.ssrn.com/abstract=253110> or DOI: 10.2139/ssrn.253110. Some scholars criticize the increased participation of non-state actors as a threat to global order. See also SUTER, *supra* note 14.

<sup>19</sup> THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 5 (2005).

<sup>20</sup> KEITH SUTER, *GLOBAL ORDER AND GLOBAL DISORDER, GLOBALIZATION AND THE NATION-STATE*, 1 (2003). The Westphalian system emerged in Europe as a result of the Peace of Westphalia signed in 1648 to end 30 years of war between Catholic and Protestant states and to establish an international system that recognized the sovereign rights of States in managing their domestic affairs. International scholars generally accept this agreement as the beginning of modern international law. See generally Jan Aart Scholte, *The Globalization of World Politics*, in



At the same time, globalization is contentious, especially vis-à-vis its impact on issues such as labor rights and environmental protection. These contentions reflect on the efficacy of existing governance mechanisms to address environmental problems in a globalizing world order. Therefore, dissatisfaction with globalization can be addressed by reshaping governance mechanisms to address the contentions. However, such an undertaking necessitates an understanding of the nature of the contentions, which are discussed below.

### **THE DISCORDANCE OVER GLOBALIZATION**

The process of globalization has its fair share of supporters and detractors. The viewpoints of both are discussed in this section to demonstrate the complex nature of the process and the governance challenges it presents.

One main complaint against globalization is that it creates enormous gaps between the rich and the poor by maximizing economic benefits for a select few at substantial cost to the less privileged, who are left without even basic needs.<sup>21</sup> Critics view globalization as another facet of global free trade, fostering unfair labor conditions in poorer countries, unsustainable exploitation of natural resources and human rights violations by allowing nations to treat them as

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THE GLOBALIZATION OF WORLD POLITICS 20 (2001). *See also* Josef L. Kunz, *Pluralism of Legal and Value Systems and International Law*, 49 AJIL 371 (1955).

<sup>21</sup> *See generally* Andrew Hurrell and Ngaire Woods, *Globalisation and Inequality*, in *INEQUALITY, GLOBALIZATION AND WORLD POLITICS* (Andrew Hurrell & Ngaire Woods, eds., 1999). These findings have been substantiated by some UN Reports. *See for instance*, UN Development Programme, *Human Development Report* (1999).

comparative advantages.<sup>22</sup> These “anti-globalists”<sup>23</sup> argue that such perverse interpretation creates a dangerous global “race to the bottom” in environmental and other social standards.<sup>24</sup>

Skeptics also fear that globalization poses a threat to cultural heterogeneity by promoting homogenization, in particular Americanization, of other traditions.<sup>25</sup> For example, there is substantial apprehension about the effect of the Agreement on Trade-Related Intellectual Property Rights (TRIPs)<sup>26</sup> on indigenous knowledge and practices regarding medicinal plants, as well local art and dance forms.<sup>27</sup> Such concerns about cultural integrity have led UNESCO to adopt a treaty protecting cultural heterogeneity.<sup>28</sup>

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<sup>22</sup> David Ricardo, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (3<sup>rd</sup> Ed. 1817). In chapter 7, Ricardo explains the concept of comparative advantage. According to him, a nation could be more competitive and efficient if it produces and trade in few goods with high competence, rather become self-sufficient. Extending the theory to poor regulation indicates a perverse interpretation of the original concept, unless one can agree that human rights violations or environmental degradation are forms of efficiency.

<sup>23</sup> A term coined by Jagdish Bhagwati to describe those who oppose globalization. *Infra* note 29, at 10.

<sup>24</sup> See generally DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995).

<sup>25</sup> For instance, opposition to McDonalds in France and Italy is a notable example of cultural challenges emerging from globalization. See Rory Carrol & Andy Murdoch, *Protestors Try to Halt Rise of Fast-food Giant in Italy*, THE GUARDIAN, October 17, 2000. See also *Big Mac Invasion Forces France to Weigh Culture*, USA TODAY, April 10, 2004, [http://www.usatoday.com/money/industries/food/2004-04-10-mcdonalds\\_x.htm](http://www.usatoday.com/money/industries/food/2004-04-10-mcdonalds_x.htm), (last visited Feb. 15, 2006).

<sup>26</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Marrakech Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round Vol. 31, 33 I.L.M. 81 (1994).

<sup>27</sup> See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 44 (2004).

<sup>28</sup> See Convention on the Protection and Promotion of Diversity of Cultural Expressions, Clt-2005/Convention Diversite-Cult Rev.,

More recently, the movement of jobs overseas, or outsourcing, has given rise to concerns about the loss of jobs in some countries. Notably, in the United States, which is considered an important driver of free trade and globalization, the resistance to global free trade is on the rise.<sup>29</sup> These contentions regarding globalization, generally seen from the lens of free trade have resulted in anti-trade/anti-globalization demonstrations, such the one during the Seattle Round of Negotiations.<sup>30</sup>

Supporters, on the other hand, believe that globalization will improve general living conditions, human rights protection and environmental standards

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<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>, (last visited Feb. 16, 2006). An overwhelming majority of 148 States supported the Convention two oppositions and four abstentions. See generally [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2450&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2450&URL_DO=DO_TOPIC&URL_SECTION=201.html), (last visited Jan. 6, 2006). See also Molly Moore, *UN Body Endorses Cultural Protection, US Objections are Turned Aside*, WASHINGTON POST, October 21 (2005). But, there are also arguments that globalization promotes unity among different cultural groups. See David Brooks, *All Cultures are Not Equal*, N.Y. TIMES, August 10, 2005, available at, <http://www.globalpolicy.org/globaliz/cultural/2005/0810allcultures.htm>, (last visited Feb. 16, 2006).

<sup>29</sup> JAGDISH BHAGAWATI, IN DEFENSE OF GLOBALIZATION 8 (2003). See also Michael Schroeder and Timothy Aepfel, *Skilled Workers Mount Opposition to Free Trade, Swaying Politicians*, in WALL STREET JOURNAL ONLINE, October 10, 2003, <http://www.cwlocal4250.org/outsourcing/binarydata/0,,SB106574731540500800,00.pdf>, (last visited Feb. 17, 2006); Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 JOURNAL OF ECONOMIC PERSPECTIVES 135 (2004). See also Dani Rodrik, *HAS GLOBALIZATION GONE TOO FAR?* 11-12 (1997); Robin Toner, *A New Populism Spurs Democrats on the Economy*, N.Y. TIMES, July 16, 2007, available at <http://www.nytimes.com/2007/07/16/us/politics/16populist.html?ex=1189396800&en=c8d19e83a378545&ei=5070#> (last visited 6/19/2007).

<sup>30</sup> Brown et al, *supra* note 18, at 1-21.

globally by catalyzing economic growth and technological innovations.<sup>31</sup> In favor of their standpoints, “pro-globalists” cite examples such as economic and social empowerment of women through increased employment opportunities, comparable situations in developed countries during the early Industrial Revolution period and the prevalence of poor working conditions and lower wages in developing countries even before globalization.<sup>32</sup> They also believe that globalization has cultural benefits, because it facilitates exchange of cultural practices across borders and pushes forward positive aspects and erodes negative cultural practices.<sup>33</sup>

As such pro-globalists believe that globalization is a solution to a range of pre-globalization social problems, including poverty and numerous related concerns.<sup>34</sup> Opposition to the process is attributed to a poor understanding of its nature, scope and implications.<sup>35</sup>

Straddling the above two viewpoints is a moderate perspective that recognizes that globalization carries certain benefits, but also raises concerns

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<sup>31</sup> See Friedman, *supra* note 19.

<sup>32</sup> See e.g. Sachs, *supra* note 4, at 29.

<sup>33</sup> See for instance David Rothkop, *In Praise of Cultural Imperialism? Effects of Globalization on Culture*, Global Policy Forum, June 22, 1997, available at <http://www.globalpolicy.org/globaliz/cultural/globcult.htm> (last visited Feb. 17, 2006).

<sup>34</sup> They argue that globalization is not the cause of problems like environmental degradation, human rights violations or extreme economic gaps. But, that globalization has drawn attention to issues that prevailed before globalization. From this viewpoint emerges the argument that solutions to these problems is to work with governments in promoting better policies, rather than to oppose globalization. See e.g. Bhagawati, *supra* note 29, at 10-11.

<sup>35</sup> *Ibid*, 438-440.

about corresponding costs and equitable distribution.<sup>36</sup> Those in favor of this perspective, lets call them the moderate globalists, are more interested in canalizing and managing, rather than promoting or reversing, globalization. Thomas Friedman’s “integrationist social safety netter approach,”<sup>37</sup> which does not promote a “brutal and politically unsustainable” “pure market vision” or a generally unsustainable “pure welfare state” is an example of the moderate approach, which emphasize on sustaining globalization.<sup>38</sup>

Similarly, Jeffrey Sachs argues that if properly channeled, globalization presents an opportunity to end extreme poverty.<sup>39</sup> According to Sachs, many people in the developed world enjoy a level of prosperity comparable only to the pre-World War I wave of globalization and that their engagement can help resolve poverty and related problems, such as public health and environmental degradation.<sup>40</sup> The UN Millennium Development Goals, for instance, have been set out to ensure that globalization leads to positive social benefits.<sup>41</sup>

<sup>36</sup> See generally Joseph E. Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (2002).

<sup>37</sup> Friedman, *supra* note 19, at 444.

<sup>38</sup> Friedman argues that the United States can provide leadership in this regard by supporting institutions such as the World Bank, International Monetary Fund (IMF), and the United Nations and by bringing together people from software writers to human rights activists. Friedman, *supra* note 19, at 466.

<sup>39</sup> Sachs, *supra* note 4, at 24. According to Sachs an open market system allows the development of a country’s economy which, in combination with social policies favored by developed countries, can eradicate poverty.

<sup>40</sup> *Ibid.*

<sup>41</sup> The Millennium Goals set out eight goals, including environmental sustainability and eradication of poverty. See <http://www.un.org/millenniumgoals/> (last visited June 19, 2007).

In effect, whether one supports it or not, globalization is occurring and influencing worldviews and relations between states and peoples in economic, social, political and other spheres of life. Contentions about globalization can be best addressed through appropriate governance responses. As mentioned earlier, traditional international governance mechanisms, notably intergovernmental organizations, were established for a particular type of world order and it is important to understand the effects of globalization on these mechanisms in order to devise appropriate responses to global problems.

### GLOBALIZATION AND GLOBAL GOVERNANCE

Globalization is creating a sense of world community,<sup>42</sup> which is a significant development insofar as international governance is concerned. In effect, globalization has “altered the terrain on which global problems solving take[s] place.”<sup>43</sup> More specifically, fundamental precepts upon which

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<sup>42</sup> See Report of the UN Commission on Global Governance, *Our Global Neighborhood*: (1998). The Commission on Global Governance defines global governance as, ‘...the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.’ See also Mandelbaum, *supra* note 11; JAMES P. MULDOON, JR., *THE ARCHITECTURE OF GLOBAL GOVERNANCE*, 5 (2004). Muldoon defines global governance as “a long history of thought on and experience with various ways of ordering and organizing political, economic, and social relations”. JAMES P. MULDOON, JR., *THE ARCHITECTURE OF GLOBAL GOVERNANCE*, 5 (2004). See also MARGARET P. KARNS AND KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS, THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 4 (2004). According to the authors, governance includes international rules, norms or soft laws, international intergovernmental organizations, international regimes, *ad hoc* arrangements, global conferences, and private governance.

<sup>43</sup> *APPROACHES TO GLOBAL GOVERNANCE THEORY* 14 (Martin Hewson and Timothy J. Sinclair eds., 1999).

international governance was founded, notably the Westphalian system of nation-states and state sovereignty, as well as the state-centeredness of international organizations and institutions are inadequate to meet all the challenges of globalization, and a few are even becoming irrelevant in effect.<sup>44</sup> One can perhaps fathom understand the extent of restructuring required to address globalization challenges by understanding the effect of globalization on some of the foundations of international governance, which are discussed below.

One of the key foundations of international governance is the “nation-state,” the modern origins of which is generally traced back to the Treaty of Westphalia signed in 1684 to end thirty years of war in Europe.<sup>45</sup> Signatories agreed to respect national territorial boundaries of sovereign nations. The world order that emerged between the 17<sup>th</sup> and 19<sup>th</sup> century was based on this notion of primacy of nation-states, even though it was not extended to countries that became European colonies.<sup>46</sup> Even these colonies implicitly accepted the primacy of nation-states in international relations upon gaining independence.<sup>47</sup> The national government therefore became responsible for protecting and representing

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<sup>44</sup> See Suter, *supra* note 20.

<sup>45</sup> Fidler, *supra*, note 3.

<sup>46</sup> *Ibid*, at 37. See also MARTIN WRIGHT, INTERNATIONAL THEORY, THE THREE TRADITIONS, (1992).

<sup>47</sup> Fidler, *supra* note 3, at 38. See generally Thomas M. Franck, *Some Legal Problems of Becoming A New Nation*, 4 COLUM. J. TRANSNAT'L L. 13, 23-27 (1965 - 1966), discussing the legal complexities involved when new nations become part of the international community.

the interests of their nation and its citizens in international forums, regardless of the establishment of the United Nations.

Globalization is reshaping this notion of primacy of nation–states by increasing the global space for communication and discussions for non-state actors. According to one scholar, the increased movement of people across borders has resulted in the erosion of the nation–state and has resulted in the formation of new nation–states within nation–states.<sup>48</sup> One notable example of this phenomenon is the agreement between California and the United Kingdom on climate change, where the U.S. state differed from the federal policy via an international arrangement.<sup>49</sup> Citizens and other groups in most all parts of the world can also express their opinions on a global scale without interference from their governments.<sup>50</sup>

Globalization is also altering another cornerstone of international relations related to the notion of a “nation-state,” state sovereignty.<sup>51</sup> Sovereignty, which was traditionally central to the internal organization of a state evolved into an

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<sup>48</sup> Suter, *supra* note 20, at 28.

<sup>49</sup> See generally Erwin Chemerinsky, Brigham Daniels, Brett Hardy, Tim Profeta, Christopher H. Schroeder, and Neil S. Siegel, *California, Climate Change and the Constitution*, 37 ELR10653 (September 2007).

<sup>50</sup> Exceptions do exist to this general phenomenon. China’s imposition of limitations on Internet content of Yahoo is one such example. Even so, the debate over the validity of such action is discussed by non-state actors in China and outside. See “Race to the Bottom” Corporate Complicity in Chinese Internet Censorship, Human Rights Watch Report, Vol. 18 No.8(C), August 2006, <http://www.hrw.org/reports/2006/china0806/> (last visited Feb. 16, 2007).

<sup>51</sup> In fact the Westphalian system of nation-states is considered to represent a form of sovereignty. See STEPHEN D. KRASNER, *SOVEREIGNTY AND ORGANIZED HYPOCRISY*, 3 (1999).



“essential ingredient of formal participation in international society.”<sup>52</sup> The principle guaranteed ‘domestic jurisdiction, the sovereign equality of states, diplomatic and sovereign immunity, the doctrine of nonintervention, and the doctrine of recognition of new states and governments,’ to nations participating in the international order.<sup>53</sup> These guarantees enabled States to give primacy to and prioritize their national interests.

Even though there is no single accepted theory on the relevance of sovereignty in an era of globalization, it is hard to deny that dynamic changes are taking place in so far as the role of a sovereign nation-state is concerned.<sup>54</sup> The critical work of scholars who fear that new trading regimes, such as WTO and the North American Free Trade Agreement (“NAFTA”) undermine the classic notion of sovereignty by providing jurisdiction to international tribunals and courts to resolve cases concerning domestic law demonstrates this shift in sovereignty.<sup>55</sup> The establishment of the WTO itself indicates a more liberal approach to the concept of sovereignty among states.<sup>56</sup>

<sup>52</sup> Muldoon, *supra* note 42, at 31. Suter, *supra* note 20, at 22. See also RICHARD FALK, THIS ENDANGERED PLANET (1972).

<sup>53</sup> Suter, *ibid.*

<sup>54</sup> See e.g. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, (Book Review), 118 HARV. L. REV. 1255, 1261-1266 (2005).

<sup>55</sup> See e.g. JEREMY RABKINS, WHY SOVEREIGNTY MATTERS (1998).

<sup>56</sup> Earlier attempts to create an International Trade Organization were resisted by States because of concerns about losing their sovereign rights to shape their national economic priorities and policies. See MICHAEL J, TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 21-23 (2<sup>nd</sup> ed., 1999). See also JOHN JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (2<sup>nd</sup> ed., 1997).

Globalization is also increasing the room for non-sovereign actors to question sovereign actions and decisions at the international level. Or, as expressed by Chayes and Chayes in their seminal work on the subject, “...sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in the regimes that make up the substance of international life.”<sup>57</sup> While a “one-world, one-government view” has not emerged as result, globalization is influencing the nature of international interactions and governance.

Robert Keohane and Joseph Nye argue that the current world order comprises ‘networks of interdependence at multi-continental distances’<sup>58</sup> that influence domestic and, consequently, global governance.<sup>59</sup> Anne Marie Slaughter notes that the increasing numbers of global governmental networks have greater potential for delivering a just world order than traditional institutions, including nation-states.<sup>60</sup> As these networks grow, the legitimacy of international decisions affecting national policies taken primarily by nation-states, and the governance mechanisms supporting traditional decision-making, are being scrutinized.<sup>61</sup>

<sup>57</sup> ABRAM CHAYES AND ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995).

<sup>58</sup> Robert O. Keohane and Joseph S. Nye, Jr., *Introduction, in, GOVERNANCE IN A GLOBALIZING WORLD 2* (Joseph S. Nye and John D. Donahue eds., 2000). The authors refer to this phenomenon as globalism, which they believe is increasing globalization.

<sup>59</sup> *Ibid.*

<sup>60</sup> ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* 6-7 (2004).

<sup>61</sup> Kal Raustiala, *Sovereignty and Multilateralism*, 1 *CHI. J. INT’L. L.* 401 (2000) pointing out that “[as] the locus of political decision-making increasingly shifts upwards, away from the state and

In particular, intergovernmental organizations<sup>62</sup> through which nation-state cooperated multilaterally<sup>63</sup> have been cooperating since WWII have become central to global governance reforms. Ongoing efforts to reform the United Nations,<sup>64</sup> undertaken to “ensure that globalization becomes a positive force for all of the world’s people, instead of leaving billions of them behind in squalor,”<sup>65</sup> is a clear case in point.

Reforming international organizations such as the United Nations present substantial challenges because, as argued by some scholars, although initially conceived to provide space for inter-governmental interaction, they have by now gained significant autonomy<sup>66</sup> and they also play a key role in managing problems in a globalizing world.<sup>67</sup> The WTO, even though established relatively recently, has significant powers to administer and enforce trade treaties under

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toward the international level, rules and processes should be adjusted to permit interest groups to follow suit.”

<sup>62</sup> The term international organizations refer in this thesis primarily to intergovernmental organizations. See CLIVE ARCHER, *INTERNATIONAL ORGANIZATIONS* (1983), for a discussion on the different types of organizations.

<sup>63</sup> As Muldoon points out international organizations ‘shape the way cooperation is organized and complex interdependence is managed.’ See Muldoon, *supra* note 42, at 2.

<sup>64</sup> See generally Robert. F. Meagher, *Introduction, Symposium: The United Nations: Challenges of Law and Development*, 36 HARV. INT’L L. J. 273 (1995).

<sup>65</sup> Kofi A. Annan, ‘*We the Peoples*’, *THE ROLE OF THE UNITED NATIONS IN THE 21<sup>ST</sup> CENTURY*, 6, (2000).

<sup>66</sup> See generally, Jose E. Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, (2005); see also JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 1-16 (2002). Alvarez examines numerous international organizations in concluding that these bodies have essentially become law-makers. International relations scholars even argue that international organizations are competing with each other. See Michael N. Barnett and Martha Finnemore, *The Politics, Power and Pathologies of International Organizations*, 9/1/99 INT’L. ORG. 699 (1999).

<sup>67</sup> Paul Taylor argues that an increase in globalization has resulted in more global activities requiring more global management, which can only be provided by global international organizations. See PAUL TAYLOR, *INTERNATIONAL ORGANIZATION IN THE AGE OF GLOBALIZATION* 1 (2003).

GATT 1994,<sup>68</sup> including adjudication of trade disputes and imposition of sanctions on Member.<sup>69</sup>

The growing autonomy of international organizations in global governance adds to the concerns about their accountability and transparency, evident in the efforts to create checks and balances for international organizations through a global administrative law.<sup>70</sup>

It is in the midst of these dynamic changes in the world order and global governance structures that efforts are being made to strengthen environmental governance. However, governance systems alone are not subject to the influences of globalization. The process is also has specific connotations for environmental governance itself which have to be studied as well.

### **GLOBALIZATION AND ENVIRONMENTAL GOVERNANCE**

This section examines the impact of globalization on environmental governance from two dimensions. One, the negative impacts of trade, flowing

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<sup>68</sup> General Agreement on Tariffs and Trade, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994), 33 ILM 1144 (1994).

<sup>69</sup> Ernst-Ulrich Petersmann, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 57-62 (1997). It must be noted even ICJ does not enjoy such jurisdictional powers, although studies indicate that States do comply with ICJ decisions even though there is no mechanism for imposing sanctions. See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004).

<sup>70</sup> See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 –62 (2005). See Janet McLean, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law*, 68 JOURNAL OF LAW AND CONTEMPORARY PROBLEMS 167 (2005), the author refers to integration of nations following the end of colonization to indicate the problems of legitimacy in international decision-making. See also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999).

from conflicts between environmental and free trade regimes, particularly WTO Appellate Body decisions, and two, the positive impacts of globalization on environmental governance.

One of the early cases that brought focus to the confluence of trade and environmental protection was the *Tuna-Dolphin* decision,<sup>71</sup> in which Mexico successfully challenged US embargos on tuna harvested using a fishing method that killed dolphins in the process.<sup>72</sup> The decision of the GATT Panel sparked reactions against the perceived negative impacts of free trade on environmental standards. As a result, the negotiation of GATT 1994 and the establishment of the World Trade Organization (WTO) were considered serious threats to environmental protection.<sup>73</sup> Such skepticism escalated and elicited wide response when an embargo imposed by the United States on shrimp caught without turtle excluder devices (which resulted in turtles getting caught and killed) was challenged under the WTO dispute settlement mechanism.

<sup>71</sup> Panel Report on “United States – Restrictions on Import of Tuna”, General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents [hereinafter GATT, BISD] 39S/155, reprinted in 30 I.L.M. 1594 (1991) [Tuna Dolphin I]. See also, Panel Report on “United States – Restrictions on Imports of Tuna”, I.L.M. 839 (1994) [Tuna Dolphin II].

<sup>72</sup> In this case the United States imposed, under its Marine Mammal Protection Act, 16 U.S.C.A §1361, embargos on tuna harvested by using purse seine nets that also trapped dolphins fatally. Countries affected by the embargo challenged it before a GATT dispute resolution panel. The Panel ruled in favor of the petitioning countries, holding that GATT did not authorize the imposition of embargos on goods based on the process of their production. The United States had to lift the embargo. Although the concerned governments, Mexico and the United States eventually resolved the issue through bilateral negotiations, the decision signaled that free trade could influence domestic environmental protection decisions.

<sup>73</sup> See for instance, Steve Charnowitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENV'T L. 475 (1993).

Unlike in Tuna-Dolphin, the WTO Appellate Body reversed the Panel decision and held that the embargoes imposed were justifiable under the Article XX (9) environmental exception to GATT read with the chapeau articulating “sustainable development” as one of the objectives of the Agreement. Nevertheless, the Appellate Body ruled that the embargoes were illegal because they did not meet the prerequisite of applying the least trade restrictive measure.<sup>74</sup> Consequently, even though *Shrimp-Turtle* marked an important departure in the WTO Appellate Body’s interpretation of environmental protection under GATT, its effect on WTO jurisprudence was nullified by the final outcome of the dispute.

Similarly, multiple regimes regulating genetically modified organisms, one under WTO’s Sanitary and the other under Phytosanitary Agreement and another by the Cartagena Protocol on Biosafety adopted under the Biodiversity Convention, 1992, have given rise to conflicts stemming from the application of different standards and remedies.<sup>75</sup> The *Beef Hormone* dispute is an illustration of such conflicts between a trade regime and environmental regime.<sup>76</sup>

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<sup>74</sup> United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf).

<sup>75</sup> See generally Deepa Badrinarayana, *To Trade or Not to Trade...* in 32 ELR 10512 (2002).

<sup>76</sup> Report of the WTO Panel, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA (Aug. 18, 1997). In this case, EU imposed restrictions on hormone-fed beef imports from the US, which challenged the restriction before WTO DSB. The Appellate Body held that EU’s measures were not justified under the SPS Agreement, because there was no conclusive scientific evidence on the health risks of hormone-fed meat. When EU failed to comply with the decision, the WTO DSB found that EU was liable to pay compensation to the United

Similarly, concerns about conflicts between international trade rules and domestic environmental standards have arisen in the context of other trade agreements, notably the North American Free Trade Agreement (NAFTA), as illustrated by disputes such as the *Metalclad* arbitration.<sup>77</sup>

Another oft cited impact of globalization is its influence on lifestyles, such as the spread of consumerism and resulting increased demand for material goods that in turn puts pressure on the environment.<sup>78</sup> Notably, the influence of US lifestyle on populous countries, such as India and China, are feared to increase natural resource depletion and degradation.<sup>79</sup> Increased production at low costs in some of these countries also increases consumption in exporting countries,

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States for loss resulting from the embargo. But, in the *Asbestos* case, the Appellate Body held that health risks associated with a product could be pertinent in examining 'likeness' between domestic and non-domestic products under Article III:4 of GATT 1994. On these grounds it ruled that products containing asbestos could be treated differently from products not containing asbestos. Hence, it upheld the restrictions on the asbestos containing products. European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001.

<sup>77</sup> In the *Metalclad* case, a US company successfully sued the Mexican government before an Arbitral Tribunal established under Chapter 11 of the North American Free Trade Agreement (NAFTA), for violating its Article 1105 (fair and equitable treatment) and Article 1110 (not to expropriate an investment) obligations by not permitting it to develop a hazardous waste facility on land purchased for that purpose. See *Metalclad Corp. v. Mexico*, International Center for the Settlement of Investment Disputes, Case No. ARB (AF)/97/1, <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>, last visited Feb. 22, 2006). But see *Methanex v. United States*, in which a NAFTA Arbitral Tribunal found California's ban on methanol for reasons of environmental protection did constitute an expropriation under NAFTA. For a detailed documentation of the case and its history, see <http://www.state.gov/s/l/c5818.htm>, (last visited Feb. 22, 2006).

<sup>78</sup> See JAMES GUSTAVE SPETH, *RED SKY AT MORNING* 192-197 (2004). See *The Earth Charter, Preamble – The Global Situation*, <http://www.earthcharter.org/files/charter/charter.pdf>, (last visited Feb. 22, 2006). See also, Barbara Stark, *Sustainable Development and Postmodern International Law: Greener Globalization?*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 137 (2002).

<sup>79</sup> Peter Goldmark, *Rethinking the Global Environment*, THE GLOBALIST, December 13, 2004, <http://www.theglobalist.com/DBWeb/StoryId.aspx?StoryId=4023>, (last visited Feb. 22, 2006).

bringing profits for both exporters and importers, but not necessarily benefiting those dependent on natural resources.<sup>80</sup>

Additionally, expansive trade and migration increases the vulnerability of all people to the effects of poor environmental standards. Unchecked movement of hazardous waste may end up affecting countries that exported it.<sup>81</sup> As outbreaks such as the Avian Flu or SARS show,<sup>82</sup> the ability to contain or isolate problems is reduced because of an increase in travel and migration.<sup>83</sup> Recent problems arising from pet foods and generic medicines produced in China illustrate the extent of this vulnerability,<sup>84</sup> as do reports that some US exports do not meet the country's own consumer safety standards.<sup>85</sup>

Thus, the impact of free trade on environmental protection is generally perceived as a negative result of the process of globalization, because the principle of comparative (trading) advantage has been perversely interpreted to include poor environmental conditions that create a race to the bottom in national

<sup>80</sup> See e.g. Elizabeth C. Economy, *The Great Leap Backward?* FOREIGN AFFAIRS (September/October 2007).

<sup>81</sup> See LAKSHMAN D. GURUSWAMY, BURNS H. WESTON, SIR GEOFFREY W.R. PALMER, AND JONATHAN C. CARLSON, INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 699 (2<sup>nd</sup> ed., 1999).

<sup>82</sup> See e.g. Lawrence O. Gostin, *Pandemic Influenza: Public Health Preparedness for the Next Global Health Emergency*, 32 J. L. MED. & ETHICS 565 (2004).

<sup>83</sup> Daniel Esty points out that we live in a highly interdependent world. See Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 Yale. L. J. 1490, 1493 (2005). He argues, "[f]rom the 9/11 tragedy to the global panic engendered by the 2003 outbreak of SARS to the bird flu in 2005, the interdependence of our globalized world has become painfully evident in the recent years. National governments alone cannot address a range of critical issues, including ... worldwide environmental issues such as climate change."

<sup>84</sup> Editorial, *China, Unregulated*, THE NEW YORK TIMES, A 20 (August 15, 2007).

<sup>85</sup> See Renae Merle, *Products that Miss Safety Standards Sent Overseas by U.S. Companies*, THE WASHINGTON POST, D01 (September 1, 2007).



environmental standards.<sup>86</sup> More specifically, the determination of the validity of domestic environmental rules by an international trade tribunal or dispute settlement body applying environmental standards accepted under a trade regime has led to the broad conclusion that globalization challenges environmental protection efforts.

Globalization is also influencing environmental governance in a more general manner. Modern technology and increased mobility increase the potential for convergence on environmental issues as non-state actors cooperate globally in addressing national environmental issues.<sup>87</sup> NGOs communicate with each other internationally in addressing national environmental problems.<sup>88</sup> Multinational private enterprises are taking into account environmental concerns nationally and globally.<sup>89</sup> For example, financial institutions, including Goldman Sachs and

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<sup>86</sup> See generally DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995).

<sup>87</sup> See also Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

<sup>88</sup> For instance, a thermometer producing factory set up in India after its plants were closed down in New York for mercury pollution was sought to be closed down by E-Law advocates. E-Law is a network of environmental lawyers across the world working on international environmental law issues. In this particular instance, the E law office in the United States provided scientific support to the Indian lawyers in analyzing water samples as well as information on the protocol for clean-up. See <http://elaw.org/news/impact/text.asp?id=2529>, (last visited Feb. 22, 2006).

<sup>89</sup> See e.g. INTERVIEW WITH JONATHAN SCHMIDT, DIRECTOR, GLOBAL AGENDA, WORLD ECONOMIC FORUM, <http://www.weforum.org/site/homepublic.nsf/Content/Interview+with+Jonathan+Schmidt%2C+Director%2C+Global+Agenda%2C+World+Economic+Forum>, (last visited Feb. 23, 2006). Influential global corporate actors such as British Petroleum, Goldman Sachs, and the Citigroup are voluntarily looking into their environmental practices. For an overview of BP's environment initiatives, see

Citigroup, have adopted environmentally sustainable policies for their global operations.<sup>90</sup> In establishing the Global Compact, former UN Secretary-General Kofi Annan expressed the importance of engaging the private sectors in addressing environmental and other issues in a globalizing world.<sup>91</sup>

Surprisingly, increased trade could also promote such convergence in some instances. Countries are adopting higher environmental standards to gain competitive advantage in the global market. For example, following its entry into NAFTA, Mexico moved out of the G-77 group of countries<sup>92</sup> and at the same time its environmental policies became open to close scrutiny under the

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<http://www.bp.com/sectiongenericarticle.do?categoryId=9002325&contentId=3072033>, (last visited Feb. 22, 2006). For an overview of BP's environment initiatives, see <http://www.bp.com/sectiongenericarticle.do?categoryId=9002325&contentId=3072033>, (last visited Feb. 22, 2006). See Goldman Sachs Environmental Policy Framework, [http://www.gs.com/our\\_firm/our\\_culture/social\\_responsibility/environmental\\_policy\\_framework/docs/EnvironmentalPolicyFramework.pdf](http://www.gs.com/our_firm/our_culture/social_responsibility/environmental_policy_framework/docs/EnvironmentalPolicyFramework.pdf), (last visited Feb. 16, 2006). See *Rainforest Action Network and Citigroup Announce Enhanced Citigroup Environmental Policy*, January 22, 2004, available at <http://www.citigroup.com/citigroup/press/2004/data/040122a.htm>, (last visited Feb. 23, 2006). For a discussion of the responses of several companies and other groups, in particular to the problem of global warming, see Marc Gunther, *Strange Bedfellows, Evangelical Christians, Fortune 500 execs and Environmentalists Band Together to Curb Global Warming*, in FORTUNE, February 8, 2006, [http://money.cnn.com/2006/02/08/news/pluggedin\\_fortune/index.htm](http://money.cnn.com/2006/02/08/news/pluggedin_fortune/index.htm), (last visited Feb. 22, 2006). See also Benjamin J. Richardson, *Enlisting Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives*, 28 N.C.J.INT'L L. & COM. REG. 247( 2002).

<sup>90</sup> See Nicola Graydon, *Rainforest Action Network, The Inspiring Group Bringing Corporate America to its Senses*, *The Ecologist* (February 16, 2006), available at [http://ran.org/media\\_center/news\\_article/?uid=1849](http://ran.org/media_center/news_article/?uid=1849) (last visited February 21, 2007).

<sup>91</sup> The Global Compact is an initiative that provides corporations a forum through which they can voluntarily adhere to certain principles and bring together universal ideas to address issues such as environmental protection. See <http://www.globalcompact.org/AboutTheGC/index.html>, (last visited Feb. 23, 2006).

<sup>92</sup> The Group of 77 or G – 77 was formed within the United Nations in 1964 as a coalition of developing countries to structure and shape their specific economic goals. Presently it is comprised of 132 developing countries. See <http://www.g77.org/main/main.htm>, (last visited Feb. 27, 2006).

environmental side agreement to NAFTA, the North American Agreement on Environmental Cooperation (NAAEC).<sup>93</sup>

Similarly, China is recognizing the importance of adopting European environmental standards for expanding its trade relations with the European Union.<sup>94</sup> Eastern European countries seeking membership to the European Union adopt stringent EU environmental standards to gain access to the common European economic market.<sup>95</sup>

Consumers of imported products can also force convergence by boycotting exported products that do not meet certain environmental standards. For instance, as seen in the *Tuna-Dolphin* disputes some consumers expressed

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<sup>93</sup> Bryan W. Husted and Jeanne M. Logsdon, *The Impact of NAFTA on Mexico's Environmental Policy*, 28 GROWTH AND CHANGE 24 (1997). See also Kevin P. Gallagher, *The CEC and Environmental Quality*, in, GREENING NAFTA, THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, 2003; Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports under NAFTA*, in GREENING NAFTA, THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, 2003; Mónica Araya, *NAFTA and the Environment: Lessons for the Americas*, in, THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA (2004). At the same time it must be noted that in terms of environmental betterment, many challenges lie ahead for developing countries. See generally Kevin P. Gallagher, FREE TRADE AND THE ENVIRONMENT, 2004, in which the author argues that trade between US and Mexico has increased pollution problems that are detrimental to both countries.

<sup>94</sup> For instance, China is complying with EU environmental standards for electronic goods to improve its access to EU market, even though there is no such domestic requirement. See Greg S. Slater, *Prevention of Pollution from Production of Electronic Information Products in the People Republic of China*, ALI-ABA Course of Study, International Environmental Law, (November 20-21, 2003) (on file with author). See also Richard J. Ferris and Hongjum Zhang, *Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM & MARY BILL OF RIGHTS JOURNAL 569 (2003).

<sup>95</sup> See e.g. John F. Casalino, *Shaping Environmental Law and Policy of Central and Eastern Europe: The European Union's Critical Role*, 14 TEMP. ENVTL. L. & TECH. J. 227 (1995). See also ALEXANDRE KISS AND DINAH SHELTON, MANUAL OF EUROPEAN ENVIRONMENTAL LAW (1997).

their preference to buy tuna cans that were labeled dolphin-safe.<sup>96</sup> Thus, globalization can promote convergence in environmental standards and practices.

Further, a “sovereign” position on an environmental issue taken by a nation at the international level is not inviolable. The agreement between the State of California and the United Kingdom to reduce greenhouse gases, tangential to the international position of the US federal government, is a case in point.<sup>97</sup> Similarly, the practice of private entities claiming rights over foreign land and natural resources, whether by investors seeking profits for investment<sup>98</sup> or conservation groups aiming to preserve lands for posterity,<sup>99</sup> is quiet signal to re-think about traditional notions of sovereignty over natural resources.

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<sup>96</sup> See Nina M. Young, Wm. Robert Irvin, and Meredith L. McLean, *The Flipper Phenomenon: Perspectives on the Panama Declaration and the “Dolphin Safe” Label*, 3 OCEAN & COASTAL L. J. 57 (1997). See also Abram Chayes, *International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L. Q. 480, 483 (1994). Chayes argues that there was no justifiable scientific or legal standard to impose the ban.

<sup>97</sup> A copy of the agreement is available at [http://gov.ca.gov/pdf/press/UK\\_CA\\_Agreement.pdf](http://gov.ca.gov/pdf/press/UK_CA_Agreement.pdf) (last visited August 15, 2007). See also *California UK in Climate Pact*, BBC NEWS (August 1, 2006), available at [http://news.bbc.co.uk/2/hi/in\\_depth/5233466.stm](http://news.bbc.co.uk/2/hi/in_depth/5233466.stm), (last visited August 15, 2007). In fact, U.S. states are exercising their sovereignty in addressing the issue through a series of legislative measures and through litigation in addressing global climate change. See Laura H. Kosloff, Mark C. Trexler, and Hal Nelson, *Outcome-Oriented Leadership: How State and Local Climate Change Strategies can Most Effectively Contribute to Global Warming Mitigation*, 14 WIDENER L. J. 173 (2004). In fact many US firms want to be part of the emissions trading that is taking among Parties to the Kyoto Protocol. See generally Patrick Matschoss and Heinz Welsch, *International Emissions Trading and Induced Carbon-Saving Technical Change: Effects of Restricting the Trade in Carbon Rights*, GERMAN INSTITUTE FOR ECONOMIC REFORMS, DIW BERLIN, DISCUSSION PAPER 404, <http://www.diw.de/deutsch/produkte/publikationen/diskussionspapiere/docs/papers/dp404.pdf>, (last visited Feb. 28, 2006).

<sup>98</sup> See James May, *Mining Company Files for NAFTA Arbitration*, INDIAN COUNTRY TODAY (March 9, 2005).

<sup>99</sup> See HOW WE WORK, <http://natureconservancy.org/aboutus/howwework/> (last visited Feb. 22, 2006). The Nature Conservancy buys land globally and sells them for conservation.

The growth of a global open market is also decreasing the efficacy of the traditional North-South divide.<sup>100</sup> Whereas during the Cold War period<sup>101</sup> Third World countries focused on industrial development<sup>102</sup> and resisted global commitments to address environmental problems on the ground that they had not substantially exploited natural resources both nationally and in the global commons,<sup>103</sup> many of them are now adopting development strategies and economic policies that could potentially increase their contribution to the global pool of environmental problems.<sup>104</sup> A shift in that direction will require these

<sup>100</sup> See e.g. Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107, 2113-2115 (1993).

<sup>101</sup> As mentioned earlier, the First, Second and Third Worlds followed distinctly different policies. Western countries followed a liberal economic policy, the former USSR adopted a more centrally planned economy, and the Third World countries followed mixed policies. See generally Michael J. Hogan, *THE MARSHALL PLAN* (1987); See generally Alexander Belozertsev and Jerry W. Markham, *Commodity Exchanges and the Privatization of the Agricultural Sector in the Commonwealth of Independent States – Needed Steps in Creating a Market Economy*, 55 AUT LAW & CONTEMP. PROBS. 119, 128-130 (1992) See generally No-Hyoung Park, *The Third World as an International Legal System*, 7 B.C. THIRD WORLD L. J. 37(1987). See also Marc Williams, *The Third World and Global Environmental Negotiations: Interests, Institutions and Ideas*, GLOBAL ENVIRONMENTAL POLITICS 5:3 (2005). The author presents a clear picture of the extent to which traditionally Third World alliances on environmental issues have weakened despite the continuing relevance of certain issues to their conditions.

<sup>102</sup> See, e.g. Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 357 - 358, 377 (1994). For example, in her memorable speech at the Conference, the Prime Minister of India, Indira Gandhi expressed this skepticism to environmental protection by stating that poverty was the greatest polluter. See Statement by Mr. Kim Hak-Su, Executive Secretary, Economic and Social Commission for Asia and the Pacific, *Regional Implementation of Sustainable Development and WSSD Outcomes: Natural Resources and Sustainable Development*, World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, (Plenary Session – Regional Implementation\_ 29 August 2002).

<sup>103</sup> See generally Note, *New Perspectives on International Environmental Law*, 82 YALE L. J. 1659, 1675-1676 (1972-1973)

<sup>104</sup> See generally Rudolph Dolzer, *Global Environmental Issues: The Genuine Area of Globalization*, 7 J. TRANSNAT'L. L. & POL'Y 157 (1998). For instance, China is the second largest emitter of the greenhouse gas, carbon dioxide, but not subject to emission control limitations under the Kyoto Protocol. See *Ask EarthTrends: How Much CO2 is emitted from the Burning of Fossil Fuels? How Much is Emitted by the U.S. and China?*, December 20, 2005,

emerging economies to actively participate in global environmental governance, or at the very least that the legitimacy of their reasons for inaction will be strained.

In effect, globalization is steering the world order from a traditional state-centric world divided into nation-states to a people-centric world divided by their positions on any given issue, facilitated by communications technology and free trade.<sup>105</sup> While states and traditional intergovernmental organizations remain central to the emerging global order, they can only be effective if they can meaningfully integrate non-state actors in global decision-making processes. Further, globalization and the global trade regime are challenging fundamental tenets of international law, thereby necessitating an inquiry into the state of international environmental law.

However, thus far international focus has been concentrated on the organizational aspects of strengthening environmental governance—a direct response to the supranational trade body, WTO—even though the dissatisfaction with the space for non-state participation within WTO, particularly within its

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<http://earthtrends.wri.org/updates/node/5>, (last visited Feb. 22, 2006). However, developing countries are taking efforts to reduce their emissions and pollution. See Kevin A. Baumert and Nancy Kete, *Will Developing Countries' Carbon Emission Swamp Global Reduction Efforts?*, in, THE UNITED STATES, DEVELOPING COUNTRIES, AND CLIMATE PROTECTION: LEADERSHIP OR STALEMATE (Christian Layke and Wendy Vanasselt eds., 2002),

[http://earthtrends.wri.org/pdf\\_library/features/cli\\_fea\\_emissions.pdf](http://earthtrends.wri.org/pdf_library/features/cli_fea_emissions.pdf), (last visited Feb. 22, 2006).

<sup>105</sup> See generally Adino Addes, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1 (2004), arguing that as technology increases, the “thickness” of sovereignty decreases, leading to increased universalism while at the same time accommodating political differences.

dispute settlement mechanism remains controversial.<sup>106</sup> Thus, instead of focusing on alternative models of governance the emphasis has remained on establishing a purely state-centered supranational organization, the legitimacy of which is problematic.

Further, the legal structure underlying WTO's authority and functions, fundamental not only to its administrative powers but, also to establishing a robust and reliable free trade regime has received lesser attention. The law of WTO reinforces the rule of law not only by vesting the organization with the authority to deliver binding decisions and to enforce them by imposing sanctions, but also by ensuring that globally set trade law standards have primacy over domestically determined standards on trade and related issues such as environmental protection.

Therefore, insofar as environmental governance is concerned, we are not simply confronted with the question of creating an organization to counterbalance WTO, but the complex challenge of determining whether the rule of law on global environmental governance is comparable to that on global trade.<sup>107</sup> Even a

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<sup>106</sup> For a discussion on the problems related to accepting amicus curiae briefs, see G. Marceau and M. Stilwell, *Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies*, JOURNAL OF INTERNATIONAL ECONOMIC LAW 155-187 (2001, 4:1). See also Sungjoon Cho, *A Quest for WTO's Legitimacy*, WORLD TRADE REVIEW, 391-399 (2005).

<sup>107</sup> In an early analysis on the issue, Daniel Esty proposed the need for an institutional structure for environmental protection similar to GATT, but that focus remained on the organizational aspect. See Daniel C. Esty, *GATTing the Greens*, FOREIGN AFFAIRS, 32 (November/December 1993). See generally International Law Commission, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, available at [http://untreaty.un.org/ilc/guide/1\\_9.htm](http://untreaty.un.org/ilc/guide/1_9.htm) (last visited February 16, 2006).

cursory comparison of the WTO structure of integrated treaties and the *ad hoc* structure of multilateral environmental agreements (MEAs) would reveal that we are not talking about two equal laws governed by organizations with unequal powers and functions.

Consequently, even as globalization provides people with the ability to communicate and understand how complex issues converge from domestic to global levels, such as environmental pollution resulting in global warming, and as they also begin to understand, even if very slowly, the importance of concerted action, the potential to turn such realization into effective governance mechanisms is inhibited—by the decreasing their ability within the national sphere, to revoke international commitments on some issues, and by not providing them the benefit of balanced international legal structures so that their rights, and duties, vis-à-vis related issues that are affected as a result are substantially protected, and enforced.

Therefore, on the one hand even as globalization, supported by the global trade regime, brings more attention to the urgency and importance of environmental protection, the legal structure to address the problems is not only inadequate, but is being further undermined by a relatively effective global trade law, under which environmental protection remains an exception. Consequently, the enterprise of strengthening global environmental governance consequently entails both a close reexamination of the current international environmental law



and alternative models for an environmental organization that does not suffer from the legitimacy deficits of WTO.

Both these dimensions of strengthening environmental governance in an era of globalization are further discussed in the next two chapters.

## **CHAPTER 2**

### **RULE OF LAW, TRADE AND ENVIRONMENTAL GOVERNANCE**

This chapter focuses on the rule of law to strengthening environmental governance. More specifically, it examines the legal structure of WTO, in particular its positive law characteristics, and evaluates the existing international environmental law regime in light of these characteristics. Based on that analysis, potential challenges to reorganizing the current structure of *ad hoc* environmental treaties and “soft law” declarations are considered, from a legal theory perspective also re considered.

#### **WTO LAW: A THEORETICAL ANALYSIS OF ITS STRUCTURE AND IMPACTS**

The WTO legal structure has been described as a Hartian modern legal system of primary and secondary rules.<sup>1</sup> According to this construction,<sup>2</sup> GATT 1994 provides the secondary rules of recognition, change, and adjudication.<sup>3</sup> For

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<sup>1</sup> H.L.A. Hart provides a theoretical concept of a legal system, whereby those who are bound by a law, as well as those who are not, understand the reason for certain actions regulated by the law such as stopping at a red traffic signal. These are the internal and external viewpoints respectively. Thus, everyone is aware of why a particular law exists and has to be obeyed. Further, the legal system is made up of a complex of primary and secondary rules. Primary rules set standards comparable to social etiquette or rules of conduct – rules against theft or murder. Secondary rules, which are essential components of a modern legal system, comprise of rules of recognition, adjudication, and change. Rules of Recognition reflect the internal viewpoint and are used to measure the validity of primary rules, but their validity is treated as a “fact,” for example like the Constitution. Rules of adjudication help resolve and redress violation of rules problems and presuppose the existence of rules of recognition, because the validity of primary rules itself may be subject of judicial proceedings. Rules of change provide for amendment of primary rules, that could be otherwise cumbersome in a system of primary rules alone that are generally developed through customs. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

<sup>2</sup> *See* David N. Palmetter, THE WTO AS A LEGAL SYSTEM (2003); David Palmetter, *The WTO as a Legal System*, 24 FORDHAM INT’L L. J. 444 (2000).

<sup>3</sup> Understanding on Rules and Procedure Governing the Settlement of Disputes [hereinafter DSU], Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *in*

example, the chapeau and other provisions such as national treatment and the most favored nation (MFN) are considered secondary rules of recognition, similar to the “standard meter bar.”<sup>4</sup> Other trade related agreements such as the SPS Agreement or the Agreement on Technical Barriers on Trade are considered primary rules.

In other words, the WTO legal structure, unlike other areas of international law,<sup>5</sup> is considered as a positive law, much like a well-developed domestic legal system, whereby those bound by the law consciously obey it, and the law can be enforced through judicial mechanisms. Likewise, WTO Members also comply with certain minimum standards,<sup>6</sup> when for example, imposing tariffs on goods or services. If they fail to comply, they can be subject to judicial proceedings.<sup>7</sup>

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WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999).

<sup>4</sup> According to Hart all meter bars in the world are based on the meter bar in Paris, the meter bar in Paris cannot be tested against any other bar because it is accepted as *the* standard. *Ibid.*

<sup>5</sup> Hart considered international law to be a set of primary rules, a municipal system of rules. *Supra* note 1.

<sup>6</sup> These include non-discrimination standards such Most Favored Nation Treatment, which requires a State conferring special treatment to one Member country to all Member countries, and the National Treatment, which requires a Member country to extend all tariff/trading privileges and rights that its nationals enjoy to other Member countries, as well.

<sup>7</sup> See generally JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO (2001). See also, Editorial Comment, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109 (2004). See also Pascal Lamy, *Trade can be a friend, and not a foe, of Conservation*, WTO SYMPOSIUM ON TRADE AND SUSTAINABLE DEVELOPMENT WITHIN THE FRAMEWORK OF PARAGRAPH 51 OF THE DOHA MINISTERIAL DECLARATION, (Oct. 10 – 11, 2005), [http://www.wto.org/english/news\\_e/spp1\\_e/spp107\\_e.htm](http://www.wto.org/english/news_e/spp1_e/spp107_e.htm), (last visited Feb. 05, 2006).

A Member State can “disobey” the law or impose a non-tariff trade restriction, only if, and to the extent, permitted under WTO law.<sup>8</sup> A trade barrier on grounds of environmental protection or public health must, therefore, satisfy the requirements of Article XX.<sup>9</sup> Further, exceptions must be applied in conformity with secondary rules, such as the MFN requirement. For example, in *Shrimp-Turtle*,<sup>10</sup> the Appellate Body ruled that even though a Member could impose non-tariff trade barriers to protect endangered species, in view of the goal

<sup>8</sup> For example, developing countries were allowed transitional periods to comply with both intellectual property and anti-dumping agreement. *See e.g.* Hunter Nottage, *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment*, 6 J. INT’L. ECON. L. 23, 31-32 (2003). *See also*, WTO (1999), *Developing Countries and the Multilateral Trading System: Past and Present*, BACKGROUND NOTE BY THE SECRETARIAT, World Trade Organization, Geneva (1999), [http://www.wto.org/english/tratop\\_e/devel\\_e/bkgdev\\_e.doc](http://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc), (last visited March 16, 2006). *See also*, DEVELOPING COUNTRIES IN THE WTO SYSTEM, GUIDE TO THE URUGUAY ROUND AGREEMENTS, [http://www.wto.org/english/docs\\_e/legal\\_e/guide\\_ur\\_deving\\_country\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/guide_ur_deving_country_e.pdf), (last visited March 16, 2006). *See also* John H. Jackson, *Afterword: The Linkage Problem – Comments on Five Texts*, 96 AM. J. INT’L. L. 118 (2002).

<sup>9</sup> GATT Article XX provides,

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...

(b) necessary to protect human, animal or plant life or health....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;...

<sup>10</sup> United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf). In this dispute the United States imposed an embargo on shrimp that harvested in a method that also killed endangered sea-turtles. US domestic law required the use of ‘turtle excluder devices.’ The affected countries brought the dispute before a WTO DSB. The Panel ruled that the embargo was not justified under Article XX of GATT 1994. The Appellate Body reversed, holding instead that the US measure was justified under Article XX (9). However, the Appellate Body found that the embargoes were not WTO compliant, because the US had applied the Article XX exception in an arbitrary and discriminatory fashion by treating countries differently.

of sustainable development articulated in the chapeau,<sup>11</sup> the measure violated WTO law because it failed to satisfy the MFN and least trade restrictive trade measure requirements.

The establishment of such a comprehensive legal system is reinforcing the primacy of WTO law over national legislation, including on environmental protection or public health. For instance, in *Beef-Hormone*,<sup>12</sup> the Appellate Body found that the European Union's imposition of trade barriers on hormone-fed beef on public health grounds was illegal, because the Union could not establish a scientific basis for its action within the parameters of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

When the European Union refused to comply, not were damages imposed on it,<sup>13</sup> but also two private entities brought an action before the European Court of Justice [ECJ], claiming damages from EU for the loss of business revenue resulting from continuing embargoes on hormone-fed beef.<sup>14</sup> The entities argued

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<sup>11</sup> *Shrimp-Turtle* marks an important departure in WTO Appellate Body jurisprudence, because it moved away from earlier its earlier interpretation of Article XX—that the exception was applicable to harmful products and not to products involving harmful processes.

<sup>12</sup> Report of the WTO Panel, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA (Aug. 18, 1997). When the EU failed to lift the trade ban, it was required to pay US compensation for its loss.

<sup>13</sup> *Ibid.* In Even though some scholars argue that States do not always obey an Appellate Body ruling or suffer sanctions as a consequence, it is generally accepted that “WTO obligations are binding as a matter of law, even when they cannot be enforced.” See generally Judith Hippler Bello, *Book Review*, 95 AJIL 984, 986-87 (2001) (reviewing John H. Jackson, *The Jurisprudence of GATT & the WTO*). See also Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 261 - 262 (2004).

<sup>14</sup> *Biret International SA v. Council of the European Union*, Case C – 93/02 P. 2003 ECR I-10497, reported in 99 AM. J. INT'L L. 230 (2005), discussing other exceptions as well.

that the Appellate Body decision had “direct effect”<sup>15</sup> on European Community legislation, and therefore, was applicable without any further legislative action. While ECJ ruled that the time period for the claim had lapsed, it did not reject the Advocate-General’s position that the Appellate Body’s ruling was directly binding on the EU.<sup>16</sup>

Thus, WTO legal system is gaining primacy insofar as the 151 WTO Member States are concerned, and reinforcing the rule of law in global trade arrangements. Consequently, harmonization of trade rules and standards are catalyzed,<sup>17</sup> and could lead to more cohesive national trade rules. Such a reliable global system is critical for transnational investors and traders in a globalizing society, because it can guarantee dependability and predictability.

Applying the analogy to environmental governance, a modern legal system is essential to ensure better governance in a globalizing society. But, first we need to determine whether or not the current environmental regime constitutes a modern legal system.

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<sup>15</sup> Direct effect implies that certain EU regulations are directly applicable to a Member country and the Member has no choice. *See generally*, Frederick M. Abbott, Thomas Cottier, and Francis Gurry, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY, 29 (2007).

<sup>16</sup> The Advocate-General observed that “WTO law is directly applicable when the DSB has found an EC measure to be inconsistent with WTO law and where EC has failed to implement DSB recommendations or rulings within a reasonable time period, as specified by WTO. *Ibid*, at 232.

<sup>17</sup> For example, under the GATT system all Member countries set a uniform tariffs, or at least have a uniform minimum percentage, according to their economic status, above which tariffs would not be imposed. *See generally* UNDERSTANDING THE WTO: THE AGREEMENTS, TARIFFS: MORE BINDINGS AND CLOSER TO ZERO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm), (last visited March 16, 2006).

### INTERNATIONAL ENVIRONMENTAL LAW: AN EVALUATION

This section examines whether the current international environmental law regime, comprising international declarations<sup>18</sup> and multilateral environmental agreements<sup>19</sup> constitutes a modern legal system of secondary and primary rules.<sup>20</sup>

International resolutions and declarations on environmental issues guide, rather than mandate, state action.<sup>21</sup> Some of these instruments, or provisions thereof, have been vested with customary international law status in judicial proceedings.<sup>22</sup> However, not only is adjudication rarely resorted to resolve international environmental disputes,<sup>23</sup> but also adjudicators are cautious about ascribing legal status to principles, contrary to the original intention of States.<sup>24</sup>

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<sup>18</sup> Notable examples include the Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. Doc.A/CONF. 48/14/Rev. 1 (1972), *reprinted in*, 11 I.L.M. 1416 and the Rio Declaration on Environment and Development, I Report of the United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, U.N. Doc. A/CONF. 151/26/Rev. 1 (1993).

<sup>19</sup> *See generally* ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW (1991); PATRICIA BIRNIE AND ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (2<sup>nd</sup> ed., 2002); LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER, (2<sup>nd</sup> ed., 1999); VED P. NANDA, AND GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY (2003).

<sup>20</sup> *See* Hart, *supra* note 1.

<sup>21</sup> *See generally* David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist* 82 Am. J. Int'l. L. 1 (1988), analyzing various interpretations of the London Declaration and its implications for State action.

<sup>22</sup> *See generally* PHILLIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS, AND IMPLEMENTATION (2<sup>nd</sup> Ed., 2003). *See also* Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L. L. J. 87 (1991).

<sup>23</sup> Daniel Bodansky, *Customary (And Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 (1995). Bodansky argues that whether an environmental principle such as the precautionary principle is customary international law is only relevant for the purposes of dispute settlement and that, since this occurs infrequently in international

For instance, in *Texaco Overseas Petroleum et al. v. Libyan Arab Republic*<sup>25</sup> the Arbitrator noted that resolutions and declarations were political statements, unless recognized as customary international law.<sup>26</sup> He also observed that while the principle of permanent sovereignty over natural resources had gained customary law status, such status could not be automatically attributed to all international resolutions. More recently, the WTO Appellate Body in *Beef Hormone* rejected the argument that the precautionary principle was customary law.<sup>27</sup>

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environmental law, the focus ought to be more on how to take action based on treaties rather than on debating whether a principle has become customary international law. In fact, Bodansky argues that categorizing the norms articulated in Declarations or resolutions as customs is a “myth system,” since these norms represent the collective ideals of the international community, which at present have the quality of fictions and half-truths.”

<sup>24</sup> Schachter has pointed out that States can be bound by an international instrument if they manifest the intention to be legally bound and that discerning such intent in international law is a complex exercise. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 88 (1991). See also Oscar Schachter, *The Twilight Zone of Non-binding International Agreements*, 71 *AJIL* 296 (1997).

<sup>25</sup> International Arbitral Award, Jan. 19, 1977, reprinted in 17 *I.L.M.* 1 (1978). In the *Texaco Arbitration*, the Libyan Government passed a decree nationalizing all interests and property of Texaco. The company initiated arbitration proceedings, claiming that the government had violated the Deeds of Concessions that vested rights in Texaco. Addressing Libya claim that it had exercised its sovereignty, the Tribunal found that the statements made by States regarding the UN GA Resolution on Permanent Sovereignty over Natural Resources indicated that they were not trying to “create a custom but confirm one by formulating it and specifying its scope, thereby making it possible to determine whether or not one is confronted with a legal rule”. The Arbitrator found that such an intention was present with respect to the Resolution on Permanent Sovereignty.

<sup>26</sup> In the context of the Charter, it was observed, “...the Charter is not a first step to codification and progressive development of international law, within the meaning of Article 13, para. 1(a) of the Charter of the United Nations, that is to say an instrument purporting to formulate in writing the rules of customary law and intended to better adjust its content to the requirements of international relations”.

<sup>27</sup> Report of the WTO Panel, *EC Measure Concerning Meat and Meat Products (Hormones)* WT/DS26/R/USA (Aug. 18, 1997). In this case, EU imposed restrictions on import of hormone-fed beef from the US, which challenged the restriction before the WTO Dispute Settlement Body. The Appellate Body held that EU’s measures were not justified under the SPS Agreement, because there was no conclusive scientific evidence of the health risks of hormone-fed meat. Even



Further, customary international law may not lead to legally binding regulation, even though it may make it more effective.<sup>28</sup> For example, the International Law Commission's (ILC) efforts to codify "the duty to not cause transboundary harm," which was interpreted as a customary international law in the *Trail Smelter Arbitration*,<sup>29</sup> has come to naught. After more than three years of codification efforts, ILC recommended that liability under the principle be

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though it referred to the precautionary principle, it held that the standard applied by Europe did not satisfy the test under WTO to impose trade barriers. See WTO Appellate Body Report on EC Measure Concerning Meat and Meat Products (Hormones), Jan 16, 1998, WT/DS48/AB/R, para 123, at [http://www.wto.org/english/docs\\_e/docs\\_e.htm](http://www.wto.org/english/docs_e/docs_e.htm), (last visited June 24, 2006). See also, Lakshman D. Guruswamy, *Sustainable Agriculture: Do GMOS Imperil Biosafety?* 9 IND. J. GLOBAL LEGAL STUD. 461 (2002). Some international scholars however, opine that the principle has gained the status of customary international law. See PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS, AND IMPLEMENTATION 212 (2<sup>nd</sup> Ed., 2003). Some national courts have also held that the precautionary principle has gained the status of customary international law. See *Vellore Citizens Forum* case (1996) 5 SCC 647, in which the Supreme Court provided a broad interpretation of the precautionary principle (and the polluter pays principle) by reading it as "the law of the land" when read in conjunction with Article 21 of the Indian Constitution, which guarantees "the right to protection of life and personal liberty". See <http://www.elaw.org/resources/text.asp?id=199>, (last visited March 16, 2006). See also *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212 : JT (1996) 2 SC 196.

<sup>28</sup> In fact, Bodansky argues that one of the problems with customary international law is that their lack of determinancy or "...the degree to which they establish certainty of expectations about future action..." As he puts it, "States are told, for example, to avoid significant transboundary pollution, but what constitutes "significant"? They ought to undertake precautionary action, but in what circumstances and to what degree? As a result of this vagueness, *states may basically do what they like and argue that their actions are consistent with customary international law.*" [Emphasis added]. See Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995-1996). See also Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1004 (2002-2003). Sunstein argues that the precautionary principle does not provide sufficient guidance to governments in addressing environmental issues.

<sup>29</sup> See *Trail Smelter Arbitration* (US v. Canada), Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C.U.S. Treaty Series No. 893, signed at Ottawa, April 15, 1935, ratifications exchanged Aug. 3, 1935, <http://www.lfip.org/laws666/trailsm.htm>, (last visited Feb. 15, 2006). In this case, United States brought an action against Canada for transboundary pollution caused by smelters located in Canada. The arbitral Tribunal, which settled the dispute, found Canada liable under international law for transboundary harm caused to its neighbor from which emerged the international principle of states' duty not to cause transboundary harm to other states.

limited to legal or permissible activities that accidentally cause damage to other States or individuals, and not to accidents affecting the global commons,<sup>30</sup> and also, that it be adopted as a legally non-binding principle to encourage widest acceptance.<sup>31</sup>

Thus, in the absence of a judicial determination or codification, environmental declarations and principles are not legal rules. Further, given the limitations of the adjudication or codification processes, their value as a modern legal system is also moot. Consequently, while such international environmental instruments may serve some practical, even if contested, functions,<sup>32</sup> such as drawing media attention to critical issues,<sup>33</sup> increasing flexibility and expediency

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<sup>30</sup> See Report of the International Law Commission on the Work of Its Fifty-sixth Session (May 3 – June 4 and July 5 – August 6, 2004), UN GAOR 59<sup>th</sup> Sess., at 153-156, para. 175, UN Doc. A/59/10 (2004), <http://www.un.org/law/ilc>. See also Michael Matheson, *The Fifty-Sixth Session of the International Law Commission*, 99 AM. J. INT'L L. 211 (2005). The skepticism of applying the principle is also evident in a recent case decided by the U.S. Court of Appeals for the Ninth Circuit in which a Canadian company carrying out legal hazardous waste disposal activities in Canada was ordered by the United States Environmental Protection Authority (USEPA) to clean up accidental transboundary contamination of the Columbia River on the U.S. side under the Comprehensive Environmental Regulation of Contaminated Land Activities (CERCLA). When the company failed to comply, some citizens brought a citizens suit action under CERCLA seeking enforcement of the suit in which the District Court found the Canadian Company, over which it was exercising extraterritorial jurisdiction, liable under its domestic law since the effect or harm was in the United States. The decision does not in any way seek to reiterate the international principle of transboundary harm, thereby indicating the weak legal content of the principle. See *Pakootas v. Teck Cominco Metals Ltd.*, 452 F. 3d 1066 (2006).

<sup>31</sup> *Ibid.*

<sup>32</sup> See Jan Klabbers, *The Undesirability of Soft Law*, 67 NORD. J. INT'L. L. 381,387 (1998), arguing that complex and time consuming process take away from these practical benefits.

<sup>33</sup> Peter H. Sand, *UNCED and the Development of International Environmental Law*, C795 ALI-ABA 747, ALI-ABA Course of Study (February 11, 1993); see also David Freestone, *The Road from Rio: International Environmental Law after the Earth Summit*, 6 J. ENVTL. L. 193 (1993). The authors argue that even though media publicity boosted the Rio Conference, little or no effective result emerged in resolving environmental problems in reality.

through non-formal political negotiations, and enhancing time efficiency,<sup>34</sup> they do not provide the “rule of law” services of a modern legal system.

Furthermore, States are re-limiting the possibility of judicial interpretations, by emphasizing the legally non-binding nature of soft law instruments,<sup>35</sup> to ensure that their “verbal” exchanges are not construed as customary international law.<sup>36</sup>

Multilateral environmental agreements (MEA), unlike “soft law,” are legally binding. The evaluation of whether they constitute a modern legal system is carried out at two levels—one, all MEAs as one unit, and two, each MEA as an individual unit. In evaluating all MEAs as one unit, the following questions, based on Hart’s theory, are considered: do States ratifying treaties have an internal viewpoint; do MEAs evoke an external viewpoint; and do they comprise primary rules and secondary rules of recognition, adjudication and change.

With respect to MEAs as one unit, both ratifying and non-ratifying States can be said to share internal and external viewpoints if they understand why international environmental treaties are binding. Generally, States understand that

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<sup>34</sup> See generally RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 24 (1981).

<sup>35</sup> See generally Klabbars, *supra* note 32, citing as an example the “Non-Legally Binding Authoritative Statement of Principles for Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests,” U.N.Doc. A/CONF. 151/26 (Vol. III) (1992), *reprinted in* 31 I.L.M. 881 (1992).

<sup>36</sup> Bodansky, *supra* note 28, at 115, arguing that the Declarations reflect “how states speak to each other.”

environmental agreements are signed and “obeyed” to address environmental concerns, regardless of whether they are signatories or not. Thus, one can say that all States have either an internal or an external viewpoint with respect to MEAs.

On the question of primary rules, all MEAs comprise primary rules. Prohibitions and obligations contained in MEAs such as the prohibition on CFC emissions, regulation of trade in hazardous waste, quota limitations on whaling or carbon dioxide emissions reduction targets can be considered primary rules.

The issue of secondary rules of recognition, change and adjudication common to all MEAs as one unit is more complex. On the rule of recognition, there is no single environmental law treaty, comparable to GATT 1994 for the WTO system, based on which the validity of primary rules in all MEAs can be tested. For example, the validity of provisions contained in the Antarctic Treaty Regime,<sup>37</sup> the Convention on the International Trade in Endangered Species (CITES),<sup>38</sup> and the United Nations Convention on the Law of the Seas (UNCLOS)<sup>39</sup> cannot all be ascribed to any single treaty or secondary rule of recognition.

Similarly, MEAs as one unit are not governed by composite rules regarding adjudication and enforcement mechanism, similar to the WTO

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<sup>37</sup> 402 U.N.T.S. 71, *reprinted in* 19 I.L.M. (1980). *See also* Convention for the Conservation of Antarctic Seals, 29 U.N.T.S. 441, *reprinted in* 11 I.L.M. 251 (1972); Convention on the Conservation of Antarctic Marine Living Resources, 19 I.L.M. 841 (1980).

<sup>38</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 12 I.L.M. 1085 (1973).

<sup>39</sup> United Nations Convention for the Law of the Sea, 21 I.L.M. 1261 (1982)

system.<sup>40</sup> Each treaty provides different dispute settlement processes, such as arbitration or adjudication before the World Court. The rules governing each adjudication mechanism vary. For example, the rules for approaching the World Court are different from the rules for seeking arbitration before the Permanent Court of Arbitration.<sup>41</sup>

Equally, there are no common rules for amending MEAs. As discussed below, amendment of MEAs depend on individual treaty provisions. Therefore, even though States share external and internal viewpoints, all MEAs considered as one unit may constitute a body of primary rules, but not a modern legal system.

Regarding the second level of inquiry, considering MEAs individually, States may not share internal and external viewpoints regarding each and every MEA. For example, signatories and non-signatories to the UN Framework Convention on Substances that Deplete the Ozone Layer understand why provisions to eliminate ozone depleting CFC substances under the treaty are obeyed. However, States that are not part of the Antarctica Treaty, due to inadequate economic and technological know-how, do not understand why countries with those advantages alone should be members of the MEA, and thus,

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<sup>40</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, WTO Agreement, available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.doc](http://www.wto.org/english/docs_e/legal_e/28-dsu.doc), last visited 2/16/06, explaining dispute settlement mechanisms available to Members.

<sup>41</sup> See generally ELLEN HEY, REFLECTIONS ON AN INTERNATIONAL ENVIRONMENTAL COURT, 2000.

lack an external viewpoint.<sup>42</sup> Similarly, not all Parties have an internal viewpoint regarding the whaling quotas rules under the Convention on Whaling.<sup>43</sup>

The problem of internal and external viewpoints, in particular an internal viewpoint regarding some treaties, the absence of an internal viewpoint among countries as to why they should to “obey” global rules to manage climate change, or conserve forests, especially when they have not benefited from resource exploitation for economic development, also reflects on the effectiveness of specific MEAs.<sup>44</sup>

On the question of secondary rules, the Preamble to a specific MEA can be considered the secondary rule of recognition, from which all other rules derive their validity. For example, the precautionary principle as articulated in the Preamble to the treaty on ozone depletion<sup>45</sup> serves as the secondary rule of recognition for the primary rules contained in the MEA.

Most MEAs also contain provisions on dispute settlement, or rules of adjudication. However, with the exception of the International Tribunal on the

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<sup>42</sup> Brendan F. Brown, *International Environmental Law and the Natural Law*, 18 LOY. L. REV. 679, 681 (1971-1972); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 624 (1999).

<sup>43</sup> The issue of whaling has been an ethically difficult question to address for several years. See Alexander Gillespie, *Ethical Question in the Whaling Debate*, 9 GEO. INT’L. ENVTL. L. REV. 355 (1996-1997); see also Peter G.G. Davies, *Legality of Norwegian Commercial Whaling Under The Whaling Convention and Its Compatibility with European Community Law*, 43 INT’L & COMP. L. Q. 270 (1994).

<sup>44</sup> See generally Developments in the Law, *International Environmental Law*, 104 HARV. L. REV. 1484 (1990-1991)

<sup>45</sup> The Preamble reads, “Noting the precautionary measures for controlling emissions of certain chlorofluorocarbons that have already been taken at national and regional levels....” See Montreal Protocol on Substances That Deplete the Ozone Layer, *reprinted in*, 26 I.L.M. 1550 (1987).

Law of the Sea (ITLOS), which adjudicates disputes arising under the UN Convention on the Law of the Sea,<sup>46</sup> MEAs generally do not provide rules for dispute settlement, but provide general provisions such as resolving dispute through arbitration depending on the international organization managing the agreement.<sup>47</sup> In fact, many MEAs incorporate the non-confrontational alternative of non-compliance mechanisms.<sup>48</sup>

Most individual MEAs do not contain secondary rules of change, even though some treaties make provision for amendment. For instance, the Conference of Parties to the treaty on ozone depletion is vested with the authority to add or remove chemicals to its Annex.<sup>49</sup> Similarly, the Convention on Whaling provides for stringent rules for changing whaling quotas, as demonstrated by

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<sup>46</sup> Article 21, Statute of the International Tribunal on the Law of the Sea, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html), (last visited March 16, 2006). The Tribunal has decided a few cases since its inception including, the Southern Bluefin Tuna Dispute, see *New Zealand v. Japan*, *Australia v. Japan*, International Tribunal for the Law of the Sea, Order of August 27, 1999, Request for Provisional Measures, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html), (last visited Jan. 12, 2006).

<sup>47</sup> See CESARE P. ROMANO, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES* 39-41 (2000). Romano attributes the weak development of environmental dispute settlement mechanisms to two reasons: (1) dispute settlement mechanism is provided for within the system of Conference of Parties (COP), Secretariat, Fund and other technical bodies established for each MEA, a practice that rarely changes, and (2) in many instances the mode of dispute settlement is determined by the organization, say, United Nations Environment Program (UNEP) or the UN Food and Agricultural Organization (FAO), that facilitates the negotiation of an MEA.

<sup>48</sup> *Ibid.*

<sup>49</sup> The Montreal Protocol on Substances that Deplete the Ozone Layer sets out the details of the obligations of the Parties, the control measures that need to be taken, and the specific substances that should be eliminated. The Conference of Parties can make amendments whenever required, thus the COP acts as the legislative body. The 1990 London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer is one example of the application of the rule of change. See UNEP/Oz. L.Pro. 2/3 (Annex II).

Japan's efforts to overhaul the entire Board to change whaling quotas under the whaling treaty.<sup>50</sup>

Although all the secondary rules requirements are not satisfied, one can say that all MEAs contain primary rules. Provisions regulating emissions of a particular pollutant,<sup>51</sup> prior informed consent requirements,<sup>52</sup> or trading rules<sup>53</sup> are examples of primary rules.

Thus, MEAs regarding which States have internal and external viewpoints, and which contain primary and secondary rules form a modern legal system. However, few MEAs satisfy all the requirements— UNCLOS and the Montreal Protocol on Substances that Deplete the Ozone Layer being two possible examples.<sup>54</sup> Even so, unlike the WTO system, there are no rules regarding sanctions and enforcement that would make them effective.

In conclusion, international environmental law in its current form does not constitute a modern legal system. Declarations and resolutions, even if considered

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<sup>50</sup> See Japan and Allies Pass a Motion That Criticizes A Whaling Ban, NY TIMES, A4 (June 19 2006).

<sup>51</sup> United Nations Framework Convention on Climate Change, U.N. Doc. A/CONF. 151/26, 31 I.L.M. 849 (1992) along with Kyoto Protocol to the United Nations Framework Convention on Climate Change, reprinted in 37 I.L.M. 32 (1998).

<sup>52</sup> Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and Their Disposal, 28 I.L.M. 657 (1989).

<sup>53</sup> See generally Gary C. Bryner, *Carbon Markets: Reducing Greenhouse Gas Emissions through Emissions Trading*, 17 TUL. ENVTL. L. J. 267 (2003-2004).

<sup>54</sup> Political science scholars consider MEA self-contained regimes – where ‘principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.’ See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, INTERNATIONAL REGIMES 2 (Stephen D. Krasner ed., 1983).



customary international environmental law, have legal effect only if States agree to be bound by it, and MEAs, either considered together or individually, do not generally meet all the requirements of a modern legal system, especially that of secondary rules. Even individual MEAs, such as UNCLOS, which satisfy all the requirements of a legal system do not represent the entire international environmental regime, but constitute a legal system for a particular issue.

The effect of the international environmental law regime not constituting a modern legal system is evident in relation to primacy and harmonization of the rules. To the extent that a treaty constitutes a modern legal system, its positive effect on primacy is visible. For example, a Party to the Montreal Protocol is obligated to phase out the use and production of CFCs as required under the agreement, regardless of national policy on production of chemicals.<sup>55</sup> However, efforts to establish harmonized standards even under relatively effective treaties are problematic—be it targeted emissions reduction;<sup>56</sup> quotas on whales catch;<sup>57</sup>

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<sup>55</sup> See Vienna Convention for the Protection of the Ozone Layer, 26 I.L.M. 1529 (1987) along with the Montreal Protocol on Substances That Deplete the Ozone Layer, 26 I.L.M. 1550 (1987).

<sup>56</sup> Harmonization in the case of climate change becomes especially problematic when States do not agree on the degree to which each is responsible for the problem. See CARING FOR THE CLIMATE, A GUIDE TO THE CLIMATE CHANGE CONVENTION AND THE KYOTO PROTOCOL, UNFCCC, 2005, [http://www.unfccc.int/resources/docs/publications/caring2005\\_en.pdf](http://www.unfccc.int/resources/docs/publications/caring2005_en.pdf), (last visited March 13, 2006). See also Annex B to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, *reprinted in*, 37 I.L.M. 32 (1998).

<sup>57</sup> In the case of whaling, problems occur when each state demands claims different quotas based on cultural reasons. See generally Elizabeth M. Bakalar, *Subsistence Whaling in the Native Village of Barrow: Bringing Autonomy to Native Alaskans Outside the International Whaling*

or phasing out CFCs.<sup>58</sup> Rather, harmonization is limited to procedural rules such as those on prior informed consent provided in treaties such as CITES,<sup>59</sup> the Convention on Transboundary Movement of Hazardous Waste<sup>60</sup> and the Stockholm Convention on persistent organic pollutants (POP),<sup>61</sup> and even these are mostly voluntary in nature.<sup>62</sup>

On the question of primacy, it is worth noting that the WTO Committee on Trade and Environment has concluded that WTO dispute settlement body must

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Commission, 30 Brook J. Int'l. L. 601 (2004-2005). *See also*, International Convention for the Regulation of Whaling, 161 U.N.T.S. 361 (1946), Convention for the Conservation of Antarctic Seals, 29 U.N.T.S. 441, *reprinted in* 11 I.L.M. 251 (1972); Convention on the Conservation of Antarctic Marine Living Resources, 19 I.L.M. 841 (1980).

<sup>58</sup> For example, Article 5 contains special phase out provisions for developing countries. *Supra*, note 56.

<sup>59</sup> Under Articles III, IV, V, and VI, signatories are required to establish national management authorities to regulate trade in endangered species listed in the Convention by granting export and import permits. *See supra* note 51. For a general discussion on the importance of domestic legislation in enforcing CITES, see, Karl Jonathan Liwo, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora during the 1990's*, 15 SUFFOLK TRANSNAT'L L. J. 122 (1991).

<sup>60</sup> Articles 5 through Article 7 of the Basel Convention require the establishment of a national authority to grant permits to trade in hazardous waste, both to Parties and non- Parties. *See supra* note 53.

<sup>61</sup> For an overview of the Stockholm Convention on Persistent Organic Pollutants, see, Joel A. Mintz, *Two Cheers for Global POPs: A Summary and Assessment of the Stockholm Convention on Persistent Organic Pollutants*, 14 GEO. INTL. ENVTL. L. REV. 319 (2001).

<sup>62</sup> *See also* the Rotterdam Convention On the Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides in international trade, which came into force in 2005, <http://www.pic.int/home.php?type=t&id=49&sid=16>, (last visited Jan. 22, 2006). In fact, the increased focus on chemicals began the Pollution Release and Transfer Registers (PRTR), created in the United States in the aftermath of the Bhopal Gas Leak Disaster in India to provide information on chemicals that are released in different locations and the quantities of chemicals kept on-site or transferred to other off-site facilities. Ever since UNEP and FAO have been actively involved in creating a PIC treaty, which would however be voluntary in nature, although a PRTR Protocol may eventually be negotiated under the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, 38 I.L.M. 517, (2001) (Aarhus Convention). *See* DAVID HUNTER, JAMES SALZMAN, AND DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, 896-898 (1998). *See* Bradley C. Karkkainen, *Information as Environmental Regulations: TRI and Performance Benchmarking, Precursor of a New Paradigm?*, 89 GEO.L. J. 89 (2001).

take into account a Member's commitment under an MEA when making a determination about the validity of a MEA-based non-tariff trade barrier.<sup>63</sup> In *Shrimp-Turtle* the Appellate Body indeed took into consideration the fact that the relevant provisions of its national regulation had been enacted pursuant to the United States obligation under CITES.<sup>64</sup> However, in the absence of a comprehensive modern legal system, such balance can be hard to achieve.

The advantages of a modern legal system in strengthening the rule of law, establishing primacy of internationally agreed obligations, and catalyzing harmonization of standards as demonstrated even in the context of a few MEAs, present a case for establishing a composite modern legal system as part of the enterprise to strengthen global environmental governance.

### **THE MODERN ENVIRONMENTAL LEGAL SYSTEM PROJECT**

This section discusses the prerequisite for creating a modern environmental legal system, the challenges to establishing such system from a legal theory perspective, and potential alternative models.

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<sup>63</sup> See Environment Backgrounder: The Relationship between MEA and The WTO, [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_backgrnd\\_e/c5s1\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c5s1_e.htm), (last visited March 24, 2006).

<sup>64</sup> *Shrimp-Turtle* case, *supra* note 10.

A modern environmental legal system, as discussed earlier, would require internal and external viewpoints and, primary and secondary rules. As a prerequisite for creating such a composite structure encompassing the entire field of environmental law, the current piecemeal approach of entering into *ad hoc* MEAs<sup>65</sup> must be replaced with a more integrated approach, such as the WTO legal system.<sup>66</sup>

However, the idea of discontinuing *ad hoc* environmental treaty-making is neither novel nor simple. Indeed, key international environmental conferences starting with the Stockholm Conference on the Human Environment and declarations adopted therein, represent unsuccessful attempts to adopt an

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<sup>65</sup> Quite apart from being ineffective, *ad hoc* treaty making has also been considered counterproductive in other fields. For instance, in the context of treaties on torture Jeremy Waldron points out that prior to the Geneva Convention on Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988); 1465 U.N.T.S. 85.), the Conventions (before World War II) were vulnerable to being treated as a patchwork of rules with piecemeal coverage, encouraging Germany, for example, to argue that it could exclude from the benefit of their coverage various categories of detainees such as commandos, partisans,...and those who fought on behalf of a new kind of political entity (the Soviet Union). See Jeremy Waldron, *Torture and Positive Law: Jurisprudence For the White House*, 105 COL. L. REV. 1695 (2005).

<sup>66</sup> It may be noted that the idea of drafting such a treaty has been on the agenda of the International Law Commission for several years now. *Supra* note 23. Several scholars have also reiterated the idea of drafting an integrated treaty. For example, Romano points out in his work, “[y]et what the international community is still missing is a general treaty which could codify existing customary international environmental law and, eventually, develop it, as happened with the Vienna Conventions on the Law of the Treaties or the Vienna Convention on Diplomatic and Consular Relations. As a matter of fact, the absence of a general treaty codifying the principles of existing international law on the problem of the environment is probably the cause of the large number of METs concluded each year.” Romano, *supra* note 58, at 37; see also M.E. O’Connell, *Enforcing the New International Law of the Environment*, 35 GYIL 293-332, 299 (1992), arguing that “not having a general treaty is like having numerous safety regulations but no tort law.”

integrated treaty on environmental protection.<sup>67</sup> The Stockholm Declaration established the importance of environment to mankind, but, as commentators later noted, it failed to change the course of *ad hoc* environmental treaty making.<sup>68</sup>

Likewise, the UN Conference on Environment and Development (UNCED) is a benchmark meeting in which fundamental concepts of environmental protection were articulated,<sup>69</sup> including the nexus between environment and development.<sup>70</sup> Several key principles, such as the precautionary approach, polluter pays, common but differentiated responsibility, national sovereignty over their natural resources, and the duty to prevent transboundary harm<sup>71</sup> were reiterated and emphasized in the Rio Declaration.<sup>72</sup> The meeting also

<sup>67</sup> See generally LAKSHMAN D. GURUSWAMY, SIR GEOFFREY W.R. PALMER, BURNS H. WESTON, AND JONATHAN C. CARLSON, *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER* 347 (2<sup>nd</sup> Ed., 1999). The authors refer to all the declarations as attempts to codify international environmental law.

<sup>68</sup> Note, *New Perspectives on International Environmental Law*, 82 *YALE L. J.* 1659 (1972-1973). The author notes of the Stockholm Conference: “[a] beginning was made, but legal analyses of global environmental problems are still characterized by piecemeal, overlapping, and often contradictory classifications.” See also Brendan F. Brown, *International Environmental Law and the Natural Law*, 18 *LOY. L. REV.* 679, 681 (1971-1972). Although the author notes the significance of the Stockholm Conference as a positive development to the extent that it was convened in response to the limitations of international law. However, he argues that the Conference did not provide what was necessary to address environmental problems, namely, “a universal obligation, either voluntarily created, or as imposed by the Grotian concept of an extrinsic moral order.”

<sup>69</sup> Developments, *International Environmental Law*, 104 *HARV. L. REV.* 1485 (1990-1991). The essay written prior to UNCED provides an excellent legal analysis on international environmental protection, its limitations and the expectations for UNCED.

<sup>70</sup> Principle 4, Rio Declaration. Principle 3, however, stated that the right to development was ancillary to environmental protection.

<sup>71</sup> Principle 2, Rio Declaration. The principle was also articulated in the Stockholm Conference. Under Principle 21 States have a “responsibility to ensure that activities within their jurisdiction and control do not cause [significant] damage to the environment of other states”. Report of the UN Conference on the Human Environment, Stockholm, June 5-16, U.N.Doc.A/CONF.48/14/at 2-65, *reprinted in*, 11 *I.L.M.* 1416(1972); hereafter the Stockholm Declaration.

produced Agenda 21,<sup>73</sup> which lays out the multidimensional challenges of environmental protection and an action plan for addressing them.<sup>74</sup>

However, while both documents emphasized the importance of environmental regulation,<sup>75</sup> neither produced an integrated approach to treaty making. In fact, two treaties<sup>76</sup> that were strategically opened for signature during UNCED<sup>77</sup> and the legally non-binding statement on forests adopted at the Conference reemphasized the *ad hoc* treaty-making approach.

A more recent meeting, the World Summit on Sustainable Development followed up on the nexus between environment and development established at

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<sup>72</sup> Rio Declaration on Environment and Development, adopted by the U.N. Conference on Environment and Development (UNCED), at Rio de Janeiro, 13 June 1992, U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *reprinted in* 31 I.L.M. 874 (1992); hereinafter Rio Declaration.

<sup>73</sup> Adopted by the U.N. CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED), at Rio de Janeiro, 13 June 1992, U.N. Doc. A/CONF.151/26 (Vols. I, II, & III) (1992).

<sup>74</sup> Agenda 21 identified four broad aspects for action – social and economic dimensions, conservation and management of resources for development, strengthening the role of major groups, and means of implementation. See the four main divisions of Agenda 21, each item is the heading of four major sections of Agenda 21, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>, (last visited March 13, 2006).

<sup>75</sup> Principle 11 pointed out that it was important for States to adopt national environmental legislation that reflected “the environmental and developmental context to which they applied”.

<sup>76</sup> The United Nations Framework Convention on Climate Change U.N.Doc. A:AC237/18, *reprinted in* 31 I.L.M. 849 and the convention on Biological Diversity [CBD or Biodiversity Convention]; U.N.Doc.DPI/1307, *reprinted in* 31 I.L.M. 818.

<sup>77</sup> See e.g. RESOLUTION ON PROTECTION OF GLOBAL CLIMATE FOR PRESENT AND FUTURE GENERATION OF MANKIND, G.A.RES. 212, U.N.GAOR, 45<sup>th</sup> SESS., para. 7, <http://www.un.org/documents/ga/res/45/a45r212.htm>, (last visited March 13, 2006). The UN General Assembly proposed that the two treaties, on climate change and biodiversity conservation, be opened during UNCED to strategically reinforce the treaties as well as the Summit. The drafting of the climate change convention began in 1988 through the initiative of 30 countries with plans to adopt it at UNCED. See UNEP/WMO Panel from 30 Countries to Work Toward Global Warming Treaty, 11 Int’l Env’t Rep. (BNA) 644 (Dec. 14, 1988).

Rio. The Johannesburg Declaration<sup>78</sup> adopted at the Summit reiterated the broad and ambiguous<sup>79</sup> goal of sustainable development<sup>80</sup> and the importance of environmental protection in achieving goal,<sup>81</sup> but the Declaration was not intended to constitute the basis for a comprehensive treaty system on the environment.

Other unsuccessful such efforts include the World Charter for Nature and the Declaration of The Hague. Both documents articulate a few basic principles on environmental protection. The World Charter for Nature focuses on basic

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<sup>78</sup> JOHANNESBURG DECLARATION ON SUSTAINABLE DEVELOPMENT: REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, CH. 1, RESOLUTION 1, ANNEX, at 1-5, U.N. Doc. A/Conf. 199/20, U.N. Sales No. E. 03.II.A.1. Adopted at the World Summit on Sustainable Development held in Johannesburg in 2002.

<sup>79</sup> See e.g. Hari M. Osofsky, *Defining Sustainable Development after Earth Summit 2002*, 26 LOY. L.A. INT'L & COMP. L. REV. 111 (2003); see also David G. Victor, *Recovering Sustainable Development*, FOREIGN AFFAIRS, (January/February 2006). The concept of sustainable development (sustainable use of resource as it was then called) was first introduced by the World Conservation Union in the context of global conservation, and the need to "maintain for future generations the natural resources indispensable to their sustenance", see MARTIN HOLDGATE, THE GREEN WEB 42 (1999). But, the meaning of sustainable development has been contentious ever since the World Commission on Environment and Development articulated it in terms of the rights of the future generation or unborn generation. OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, 43 (Harlem G. Brundtland Ed., 1987), hereafter WCED Report; more popularly known after the Commission's Chair as the Brundtland Commission Report. See also EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1988); See generally SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW (Winfried Lang ed. 1994), for a collection of essays presenting different viewpoints on sustainable development.

<sup>80</sup> See generally Nicholas A. Robinson, *Befogged Vision: International Environmental Governance A Decade after Rio*: WM. MARY ENVTL. L. POL'Y REV. 299 (2002). See also Thomas L. Schmit, *Great Failures, Small Success: The 2002 Johannesburg*, 19 MO. ENVTL. L. & POL'Y REV. 57 (2002).

<sup>81</sup> JOHANNESBURG DECLARATION ON SUSTAINABLE DEVELOPMENT: REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, CH. 1, RESOLUTION 1, ANNEX, at 1-5, U.N. Doc. A/Conf. 199/20, U.N. Sales No. E. 03.II.A.1. The Johannesburg Declaration states environmental protection is one of the three "mutually reinforcing pillars of sustainable development," economic and social development being the other two. See Paragraph 5, adapted at the 17<sup>th</sup> Plenary Meeting of World Summit on Sustainable Development, 4<sup>th</sup> September 2002.

values for conserving nature<sup>82</sup> and the Declaration of The Hague emphasizes the importance of international environmental regulation as a necessary concomitant of the “right to live.”<sup>83</sup>

Therefore, even though a modern environmental legal system is critical to effective environmental governance and significant efforts have been undertaken in this direction, adopting a determinate set of rules structured in the form of an integrated system remains elusive. In overcoming this problem, it is useful to understand the special nature and needs of the subject matter of environmental regulation from a legal theory perspective.

The subject matter of regulation, the “environment,”<sup>84</sup> is generally considered a “given,” much like “free parking spots in a state of pre-regulation.”<sup>85</sup> This means that in the absence of regulations or societal limitations activities affecting the environment, be it waste disposal, clearing trees, or burning coal are

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<sup>82</sup> Adopted by the U.N. General Assembly, 28 October 1982.G.A. Res. 37/7 (Annex), U.N. Doc. A/37/51; reprinted in 22 I.L.M. 455 (1983).

<sup>83</sup> U.N. Doc. A/44/340-E/1989/120 (Annex) (1989); reprinted in 28 I.L.M. 1308 (1989).

<sup>84</sup> The Working Group of Experts on Liability and Compensation for Environmental Damage arising from Military Activities (Working Group), established by UNEP to assess environmental damages for environmental harms caused by Iraq after its occupation of Kuwait, defines the term environment broadly to include, “air, water, soil, flora, fauna and the ecosystem formed by their interaction,” as well as, “cultural heritage, features of the landscape and environmental amenity.” See UNEP, REPORT OF THE WORKING GROUP OF EXPERTS ON LIABILITY AND COMPENSATION FOR ENVIRONMENTAL DAMAGE ARISING FROM MILITARY ACTIVITIES, May 17, 1996, para. 42

<sup>85</sup> See Waldron, *supra* note 65.



considered unfettered rights.<sup>86</sup> Creating an environmental legal system that would regulate generally unfettered activities on a global scale would therefore require substantial “universal” conception about the “environment.”

However, universality cannot be derived from legal or political inquiry, but requires a hermeneutical study, or an understanding of the “complex process linking experiences to perceptions, meaning and values all of which in their turn are rooted in a particular culture.”<sup>87</sup> When perceptions are rooted in cultural dissimilarities efforts to impose the viewpoint of one culture on another as a universal standard without adequate dialogue and reasonable justification<sup>88</sup> will fail, because it requires changes in human behavior that are governed by “subjective intentions.”<sup>89</sup> For example, Mexican fishermen that incidentally catch dolphins will accept regulatory restrictions on tuna-fishing methods only when they share the underlying cultural or ethical viewpoint.<sup>90</sup>

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<sup>86</sup> Garrett Hardin, *The Tragedy of the Commons*, 196 SCIENCE (1968). The exception here would be of private property, where those who own the property are in a position to determine which activities are permitted.

<sup>87</sup> *Id.*, at 9.

<sup>88</sup> See generally Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 313-314 (1998-1999). Addressing the issue of universality of human rights, Waldron points out that “the price of legitimizing our universalist moral posturing is that we make a good faith attempt to address whatever reservations, doubts, and objections there are about our positions *out there, in the world*, no matter what society or culture or religious tradition they come from...” He goes on to argue that it could otherwise take the “form of moral imperialism if we were to swagger around trying to impose our way of life without sensitively confronting the basis of other people’s and other cultures’ resistance to it.”

<sup>89</sup> See Freeman, *infra* note 92, at 5 (citing Mill).

<sup>90</sup> Abram Chayes, *International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L. Q. 480, 483 (1994). Chayes argues that there was no justifiable scientific or legal standard to impose the ban.

Thus far, progress in creating universal opinion has been achieved by relying on objective scientific knowledge.<sup>91</sup> However, because science involves a long process of verification<sup>92</sup> changing the worldview through science can be long drawn.<sup>93</sup> The precautionary principle, which was developed to ensure that scientific uncertainty does not preclude necessary action, appears to be ineffective.<sup>94</sup> The problem of establishing legally binding regulations to address global warming and climate change is a classic example of sluggish progress awaiting scientific certainty, and the inadequacy of the precautionary principle.

To complicate matters, great emphasis is laid on developing a unified perception of environmental protection based on common economic goals and values.<sup>95</sup> As a result, developing universal viewpoints on environmental protection have become subject to achieving a universal form of global economic development, rather than an independent endeavor. The inextricable link that has

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<sup>91</sup> Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 622 (1999) (noting, "...although science cannot answer questions of value, expertise can provide a basis of decision-making with respect to issues where there is no significant disagreement over values – where people have shared goals and the issue is how to achieve those goals."

<sup>92</sup> See generally KARL POPPER, *THE POVERTY OF HISTORICISM* (1957) (extracted in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, 7 (6<sup>th</sup> ed., 1994). Popper argues that since facts in science are not generally verifiable, members of the scientific community try their best to falsify each other's theory. *But see* Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U.L. REV. 115 (2004). Esty points out that rapid change in modern technology now facilitates a faster transformation of knowledge into action.

<sup>93</sup> As Thomas Kuhn points out, "new worldviews or paradigms evolve as increasing anomalies in an existing pattern break down the resistance of the old paradigms adherents." See T.S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* 1970 (excerpted in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 40 (6<sup>th</sup> ed., 1994).

<sup>94</sup> See Sunstein, *supra* note 28.

<sup>95</sup> The goal of sustainable development as articulated in the Johannesburg Declaration reemphasizes the link between economic development and environmental protection.

been established between environmental protection and the broader goal of sustainable development is evident in judicial treatment of environmental challenges.

In both *Phosphates Dispute (Nauru v. Australia)*,<sup>96</sup> and the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*<sup>97</sup> the World Court agreed that environmental protection and sustainable development were closely linked, even though the majority in *Danube* disagreed on the legal

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<sup>96</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Pleadings, 1992 ICJ Rep. 240, International Court of Justice, June 26, 1992. In this case, the Republic of Nauru claimed that Australia had mismanaged its natural resources in its position as a Trustee of the island under the UN Trusteeship Agreement. Nauru brought an action against Australia before the ICJ in 1963 for mining phosphates on the island without regard for the complete destruction of the land, which was inhabitable and unusable for any purpose after years of indiscriminate mining for phosphates, which were sold at below-market value. Most arguments before the court revolved around the responsibility of Australia *vis-à-vis* the other two Trustees, Great Britain and New Zealand as well as Nauru's own policy of mining. However, ICJ rejected Australia's preliminary arguments and the rights of the future generation in environmental issues. However, the court did not give any explanation of the concept of sustainable development. In fact, after nearly three decades of litigation, the case was settled out of court with Australia agreeing to create a compensation fund to rehabilitate the people of Nauru once the island ran out of phosphates.

<sup>97</sup> Hereafter the Danube Dam case. 37 ILM 162 (1998). Dispute arose between Hungary and Slovakia in the Danube Dam case when Hungary stepped back from a 1977 Treaty with Czechoslovakia, which later became Slovakia and the Czech Republic. Among the various contentions Hungary refused to construct the dam under the Treaty because of environmental reasons, although it was also burdened by economic incapacity. Slovakia continued to build the dam under Variant C, an alternative provided under the 1977 Treaty, which Hungary opposed. When all efforts to negotiate failed, the countries brought the dispute before ICJ for settlement. Although the application of international environmental norms was central to this case, ICJ focused on the question of state succession to the 1977 Treaty. The Court decided that the Treaty was valid and binding on Hungary, which, however, did not justify Slovakia's implementation of Variant C. Based on these reasons, the Court ordered the Parties to enter into an Agreement to settle the matter. In effect, ICJ did not analyze or discuss any existing international environmental norms or define the scope of the environmental. However, the Court observed that only 'imminent environmental danger' justified an environmental defense

status of the concept of sustainable development.<sup>98</sup> Even the Appellate Body in *Shrimp Turtle* found that the concept of sustainable development articulated in the chapeau to GATT 1994 justified non-tariff trade barriers,<sup>99</sup> a position that has become institutionalized.<sup>100</sup>

The challenge to strengthening global environmental governance from a legal perspective, therefore, is to identify a universal conception of environmental protection that would serve as the foundation for a modern environmental legal system, or at least provide the basis for formulating secondary rules, particularly, of recognition.

The WTO system has achieved a common ground after years of negotiation,<sup>101</sup> by enshrining sustainable development as the overarching secondary rule of recognition, in addition to other rules of recognition such as national treatment and most favored nation treatment. These rules in combination with other secondary rules serve as the archetypes for a modern trade legal

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<sup>98</sup> In the *Danube* case Justice Weeramantry observed that sustainable development was concomitant to environmental protection and that it had gained the status of customary international law, but the majority disagreed that the concept could be considered a legal norm. *Id.*

<sup>99</sup> *Supra* note 10.

<sup>100</sup> See generally Pascal Lamy, *Trade can be a friend, and not a foe, of Conservation*, WTO SYMPOSIUM ON TRADE AND SUSTAINABLE DEVELOPMENT WITHIN THE FRAMEWORK OF PARAGRAPH 51 OF THE DOHA MINISTERIAL DECLARATION, Geneva, Oct. 10 – 11, 2005, [http://www.wto.org/english/news\\_e/sppl\\_e/spp107\\_e.htm](http://www.wto.org/english/news_e/sppl_e/spp107_e.htm), (last visited Feb. 05, 2006). He states, “[w]e must remember that sustainable development is itself the end goal of this institution. It is enshrined in page 1, paragraph 1, of the Agreement that establishes the WTO”.

<sup>101</sup> See generally, Jackson, *supra* note 7. See also Robert F. Hudec, *ENFORCING INTERNATIONAL TRADE LAW- THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1991).

system.<sup>102</sup> Evidently, there appears to be little support for any existing environmental principles, even the concept of sustainable development, to serve as the archetype for an integrated environmental legal system, if one takes into account the limitations of soft law instruments, discussed earlier.

Part of the quandary can be attributed to the nature of the subject, environmental protection. Unlike the subject matter of trade, the subject of environmental protection—emissions or effluents, birds, whales, or other species, forests, oceans—are inherently indivisible, especially in terms of their effect on Earth’s integrated system.<sup>103</sup> Yet, natural resources are divided among States. An

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<sup>102</sup> The definition of archetype used here is the one provided by Waldron, namely, it is something that is “shared by the participants in a given legal system, not just a feature of an individual mind.” Waldron defines the an archetype as follows: “They work in the foreground as rules or precedents, but in doing so, they sum up the spirit of the whole body of law that goes beyond what might be thought to require on their own terms. The idea of an archetype, then, is the idea of a rule of positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of the a whole structured area of doctrine, and so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise.” Waldron, *supra* note 81, at 1723.

<sup>103</sup> See e.g. NASA’s Earth Observation System project to study the oceans, atmosphere, glaciers, etc. in understanding the Earth as an integrated system. See <http://eosps0.gsfc.nasa.gov/>. The Working Group was established following Security Council Resolution 687 (1991). Even legal determination regarding environmental protection matters show that a narrow and precise definition of the environment may not be possible. See The UN Security Council Resolution 687 of April 3, 1991, UNSC Res. 687 (April 3, 1991), *ILM*, Vol. 30, 1991 at p. 846, para 16. The Working Group was established by UNEP to determine environmental damages resulting from the Iraq-Kuwait conflict. According to the Working Group definition the term environment included, “...abiotic and biotic components, including air, water, soil, flora, fauna and the ecosystem formed by their interaction... ‘environment’ also includes, cultural heritage, features of the landscape and environmental amenity.” See also Nicholas A. Robinson, *IUCN as Catalyst for Law of the Biosphere: Acting Globally and Locally*, 35 *ENVTL. L.* 249 (2005).

archetype for a modern environmental legal system will therefore require significant global consensus.

States must strive to achieve such consensus, by engaging in dialogue with different stakeholders. As such, the focus on sustainable development is not informative for an integrated treaty on environmental protection. Focusing on sustainable development may inform economic policies, but not environmental policies and law. Principles such as the precautionary principle are not sufficiently determinate.<sup>104</sup> Therefore, a different archetype needs to be identified.

A closest archetype of environmental protection that is well-recognized in all societies is conservation of natural systems and natural resources. Moreover, all environmental issues, be it pollution or waste management, or species and habitat extinction, can be basically reduced to a concern for conserving a state of environment in which human beings, and other species, can enjoy sound health and living conditions. Both the World Charter for Nature and the Declaration of The Hague provide a similar approach.<sup>105</sup> Thus, the Preamble to an integrated environmental treaty must set out its goal as conservation of nature and natural resources. Exceptions to this may be incorporated within such a treaty.

Further, if lessons from WTO are taken into account, minimum standards on non-commons, or purely national concerns, need to be based on the global treaty. This would mean that a country's clean water standards would be

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<sup>104</sup> See Sunstein, *supra* note 28.

<sup>105</sup> *Supra*, at 58-59.

determined by a global mechanism. The problem, however, is that unlike in global trade, if there is no active exchange of water for routine use, which is usually the case, establishing jurisdiction will be harder. Thus, the rules must be drafted to apply in specific contexts, say, in the case of determining whether a “process” by which a product is manufactured meets the requirements of the environmental treaty. Also, existing agreements, as has been suggested, existing MEAs can be clustered on an issue-specific basis, thereby bringing them under a single legal system.<sup>106</sup> Further, rules for adjudication must also be provided, which is closely linked to the matter of administrations.

While this chapter only focuses on the importance of establishing a modern legal system to manage environmental protection concerns in a globalizing society, the limitations to undertaking such an endeavor, and some possible direction for future action, these aspects must be simultaneously addressed, in addition to organizational concerns, discussed in the next chapter.

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<sup>106</sup> See Konrad von Moltke, *Clustering International Environmental Agreements as an Alternative to World Environment Organization*, in Frank Biermann and Bauer, *supra* note 17, at 175-204. According to this approach, MEAs on, say, atmosphere would be clustered together, their Secretariats and COPs co-located and the communication systems between them improved.

### **CHAPTER 3**

#### **ADMINISTERING A GLOBAL ENVIRONMENTAL LEGAL SYSTEM**

It has been observed that at the domestic level, “government can only be carried on by means of laws, and laws can only be effectively administered if there exists some final legal authority beyond which there is no further legal appeal. If not, no legal issue can be finally decided, and government would become impossible.”<sup>1</sup> At the international level there is no international legal system or world government. However, to the extent that there are treaties and other legal instruments, international organizations such as the United Nations serve as international administrative mechanisms.

Further, intergovernmental bodies are no longer viewed as extensions of the intentions and actions of States, but autonomous to semi-autonomous entities with their own rules, procedures, and wide sphere of influence on numerous issues. The concentration of international decision-making processes within such de facto administrative bodies has given rise to concerns about the legitimacy of these organizations and about the absence of regulatory checks and balances.<sup>2</sup>

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<sup>1</sup> W.J. REES, *THE THEORY OF SOVEREIGNTY RESTATED* 264 (1950).

<sup>2</sup> Jan Klabbbers compares international organizations to Mary Shelly’s Frankenstein monster – needing them but unable to control them. JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 1-16 (2002). See also Michael N. Barnett and Martha Finnemore, *The Politics, Power and Pathologies of International Organizations*, 9/1/99 *INT’L. ORG.* 699 (1999) (discussing early political science and sociological theories on the pathologies of international organizations). See also Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 1, 15-61 (2005).



Under these circumstances, it is unclear whether the establishment of another traditional state-centered organization or vesting an existing one with greater powers will lead to effective, legitimate and transparent decision-making.<sup>3</sup> Yet, these options have become the central pursuit of many advocates seeking better global environmental governance. Further, since globalization is changing the terrain of societal organization, we require a less hierarchical international decision-making mechanism, to ensure that the rights and obligations of people, whose national rights may be affected through international decisions, are properly considered in global discussions.

In this chapter, some emerging conceptions of efficacious and legitimate decision-making are discussed. Based on the discussions, the structure and work of the World Conservation Union, is also considered as an alternative model for an international environmental organization.

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<sup>3</sup> See Calestous Juma, *Stunting Green Progress*, FIN. TIMES 15 (July 16, 2000); Calestous Juma, *The Perils of Centralizing Global Environmental Governance*, ENVIRONMENT MATTERS 13 2000, arguing that environmental issues cannot be managed through centralized structures. *See also* Peter Newell, *A World Environmental Organization: The Wrong Solution to the Wrong Problem*, THE WORLD ECONOMY, 659-671 (Vol. 25, 2001), arguing that the costs of negotiating consensus and establishing a new organization will be substantially expensive.

**CONCEPTIONS OF EFFICACY AND LEGITIMACY OF INTERNATIONAL DECISION-  
MAKING**

In recent times, some broad conceptions have emerged with respect to international decision-making processes. They draw attention to the growing importance, and influence, of transgovernmental networks, public participation, and legitimacy-enhancing internal procedures, for effective regulation and administration in a globalizing society. Efforts to establish an effective environmental organization would benefit by taking these developments into consideration, and are therefore discussed below.

Transgovernmental networks<sup>4</sup> are networks of governmental agencies.<sup>5</sup> Emphasis on these networks stems from the significant benefits they provide—foster ‘international cooperation on international problems that have domestic

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<sup>4</sup> Considered “blueprint for the international architecture of the 21<sup>st</sup> century,” it has been argued that transgovernmental networks will lead to the disaggregation of States and sovereign authority. See Anne-Marie Slaughter, *The Real New World*, FOREIGN AFFAIRS 184 (Sept.-Oct., 1997). SLAUGHTER argues that “disaggregation of states by creating institutional networks may ultimately lead to the sovereignty getting disaggregated, whereby individuals – regulators, legislators and judges could implement decisions on the ground rather than relying on the state to do so.” See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 15-16 (2004). See also Robert Keohane and Joseph Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L. L. 1 (2002).

<sup>5</sup> Slaughter describes the phenomenon of increased transgovernmental networks as “a disaggregated world order...latticed by countless government networks...for collecting and sharing information of all kinds, for policy coordination, for enforcement cooperation, for technical assistance and training, perhaps ultimately for rule making. They would be bilateral, plurilateral, regional, and global.” See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 15-16 (2004).

roots;”<sup>6</sup> catalyze legitimate and creative solutions to problems through open discussions;<sup>7</sup> establish national networks that “can anchor broader networks of non-state actors pursuing global agendas of various types while still retaining a distinct governmental character and specific government responsibilities to their constituents;”<sup>8</sup> broaden networks of regulators who “can expand regulatory reach far beyond the capacity of any one national government...[and] bolster...adher[ance] to norms of good governance at home and abroad by building trust, cohesion, and common purpose among their members;”<sup>9</sup> and enhance “compliance with existing international agreements and deepen and broaden cooperation to create new ones.”<sup>10</sup>

On the downside, there is apprehension that such networks could create exclusive “club” situations,<sup>11</sup> which may undermine the legitimacy of the benefits they offer for international law-making, harmonization, and compliance. This brings us to the next aspect, public participation, which could correct any club-like issues in international decision-making.

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<sup>6</sup> Slaughter, *supra* note 4, at 3, 25. For example, Slaughter draws attention to the International Network for Environmental Compliance and Enforcement created by the Dutch government and the US Environment Protection Agency (EPA) as one such example.

<sup>7</sup> *Ibid*

<sup>8</sup> Slaughter, *supra* note 4, at 33. *See also* Raustiala, *supra* note 4.

<sup>9</sup> *Ibid*.

<sup>10</sup> Slaughter, *supra* note 4.

<sup>11</sup> *See generally* Raustiala, *supra* note 4, at 43.

Public participation, usually associated with non-governmental organizations, or more broadly the civil society,<sup>12</sup> has been identified as a key component of legitimate decision-making.<sup>13</sup> The term public participation encompasses a variety of actors, allowing space for a broad range of viewpoints.<sup>14</sup> The importance of such participation in environmental governance is fairly well-established.<sup>15</sup> The civil society has been the vanguard of environmental

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<sup>12</sup> The term civil society was originally coined by Adam Ferguson. See ADAM FERGUSON, AN ESSAY IN THE HISTORY OF CIVIL SOCIETY 11 (1995). The term is now used broadly to include professional associations, non-governmental organizations, and other special interest groups. For example the Wikipedia defines civil society as, ‘...the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family, market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated...Civil societies are often populated by organizations, such as registered charities, development non-governmental organizations, community groups, women’s organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups. See [http://en.wikipedia.org/wiki/Civil\\_society](http://en.wikipedia.org/wiki/Civil_society), (last visited March 16, 2006).

<sup>13</sup> See generally Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 541 (1997). Raustiala argues that increased public participation of “relevant stakeholders” in environmental decision-making “legitimizes the joint and coordinated arrogation of new state powers through the creation of new public international law.” He further argues that this strengthens, rather than weakens, states sovereignty because the procedural guarantees provided lead an increase in hard laws which reinforces State power. He also points to contrary arguments (quoting an unpublished paper by James Cameron & Ruth Mackenzie, *State Sovereignty, Non-Governmental Organizations, and Multilateral Institutions* (January 1995)). See also Steinar Andersen & Jørgen Wettestad, *The Effectiveness of International Resource Cooperation: Some Preliminary Notes on Institutional Design*, 13 INT’L CHALLENGES 61, 67 (1993), arguing that, “participation by key stakeholders, such as scientists, industry representatives and environmentalists increases legitimacy of international environmental regimes.”

<sup>14</sup> See Steinar Andersen & Jørgen Wettestad, *The Effectiveness of International Resource Cooperation: Some Preliminary Notes on Institutional Design*, 13 INT’L CHALLENGES 61, 67 (1993), arguing that, “participation by key stakeholders, such as scientists, industry representatives and environmentalists increases legitimacy of international environmental regimes.”

<sup>15</sup> Carl Bruch and John Pendergrass, *The Road from Johannesburg: Type II Partnerships, International Law, and the Commons*, 15 GEO. INT’L. ENVTL. L. REV. 855 (2003). In fact, UNCED marked the importance of public participation or participation of non-state actors in addressing environmental issues on a global scale. See Patricia Waak, *Shaping a Sustainable Planet: The Role of Nongovernmental Organizations*, 6 COLO. J. INT’L. L & POL’Y 345 (1995). The participation level, however, was no as strong at Johannesburg. See George (Rock) Pring, *The*

governance at the domestic level, by participating in decision-making through governmental mechanisms such as courts,<sup>16</sup> administrative processes<sup>17</sup> and legislative lobbying.<sup>18</sup>

The civil society is now steadily expanding its sphere of influence globally, spurred in part by technological innovations and globalization.<sup>19</sup>

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2002 *Johannesburg World Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'Burg into 'Jokeburg'*, 30 DENV. J. INT'L. L & POL'Y 410 (2002).

<sup>16</sup> In many countries, such as the United States and India, citizen's suit provisions facilitate this participation. US environmental laws provide for citizen suits to enforce environmental laws. Organizations are allowed to bring action against the USEPA or polluters under the citizen suit provisions so long as they satisfy certain standing and notice requirements. For a review of the standing requirement under US environmental laws. See David Sive, *Environmental Standing*, 10-FALL NAT. RESOURCES ENV'T 49 (1995). The article analysis the Supreme Court decision in two cases, *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Lujan v. Defenders of Wildlife*, 505 U.S. 3543, 1992, which lay out the standing requirements for bringing a citizens suit. See also *Friends of Earth, Inc. v. Laidlaw Environmental Law Services*, 528 U.S. 167, 120 S. Ct. 693, (2000). Similarly, the Supreme Court of India pioneered a unique system of Public Interest Litigation (PIL) to allow citizens to directly approach the Court, bypassing the formal procedures for bringing a suit when a fundamental right is violated. See generally Maureen Callahan Vandermay, *The Role of the Judiciary in India's Constitutional Democracy*, 20 HASTINGS INT'L & COMAT L. REV. 103 (1996).

<sup>17</sup> The notice and comment period requirement for all administrative rules proposed by governmental agencies such as EPA, the Bureau of Land Management (BLM) or the Fish and Wildlife Service (FWS) in the US, allows citizens and NGOs among others to participate in the process and to challenge any final rule both through administrative tribunals and through courts. See generally Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681 (1990).

<sup>18</sup> See e.g. Amy E. Moody, *Conditional Federal Grants: Can the Government Undercut Lobbying by Non-profits through Conditions Placed in Federal Grants*, 24 B.C. ENVTL. AFF. L. REV. 113, 158 (1996).

<sup>19</sup> For instance, the Environmental Law Alliance Worldwide facilitates exchange of information and provides scientific support for legal cases outside of the United States. See generally <http://www.elaw.org>; see also Chapter 1, note 79, at 21 Such developments are identified as "a new form of government, democratic experimentalism, in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems." See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

International organizations are also encouraging public participation<sup>20</sup> by granting some an observer status, enabling them to scrutinize ongoing inter-governmental dialogues and decisions.<sup>21</sup> Such public participation is provided in some international environmental<sup>22</sup> and trade agreements, as well.<sup>23</sup>

Moreover, the meaning of public participation is evolving, as NGO initiatives are increasingly supplemented by private initiatives of transnational companies.<sup>24</sup> Although initially motivated by NGOs,<sup>25</sup> corporate social

<sup>20</sup> See Enhanced Cooperation between the United Nations and all relevant partners, in particular the private sector, A/58/227, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/461/70/PDF/N0346170.pdf?OpenElement>, (last visited Jan. 9, 2006). See also Enhancing Civil Society Engagement in the Work of the United Nations Environment Programme: Strategy Paper, Twenty-second Session of the Governing Council, Global Ministerial Environment Forum, UNEP/GC.22/INF/13, 21 November 2002, [http://www.uneat.org/DPDL/civil\\_society/PDF\\_docs/Enhancing\\_Civil\\_Society\\_Engagement\\_In\\_UNEATpdf](http://www.uneat.org/DPDL/civil_society/PDF_docs/Enhancing_Civil_Society_Engagement_In_UNEATpdf), (last visited Feb. 15, 2006). The Global Ministerial Forum of UNEP provides room for increased participation of the civil society.

<sup>21</sup> See generally Carolyn L. Willson, *Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115, 120 (1996).

<sup>22</sup> See Raustiala, *supra* note 4, at 543 – 552. Raustiala analyses the “observer status” provisions in major treaties, including ozone depletion, climate change, and whaling. See also Convention on the Protection of the Alps, Nov. 7, 1991, 31 I.L.M. 767. The involvement of these NGOs was referred to by Mr. Wolfgang Burhenne at the Committee on International Environmental Law of the Association of the Bar of New York City (CIEL-ABCNY) where he was a guest speaker on 1 December 2005. See Wolfgang Burhenne, *The Alpine Convention – An Update*, 27 ENVTL. POL'Y & L. 407 (1997), for an analysis of the Convention.

<sup>23</sup> Under the North American Agreement on Environmental Cooperation, the side agreement to NAFTA, citizens of Member States can file a complaint against their government for non-enforcement of environmental law, which could result in a fact finding. BRINGING THE FACTS TO LIGHT, A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, [http://www.cec.org/files/PDF/SEM/BringingFacts-Jun02\\_en.pdf](http://www.cec.org/files/PDF/SEM/BringingFacts-Jun02_en.pdf), (last visited March 16, 2006).

<sup>24</sup> Campaigns to influence companies such as Home Depot, Nike, and Citi Group demonstrate the importance of the global presence of these companies and their ability to address environmental issues on a transboundary scale. See generally David M. Bigge, *Bring the Bluewash: A Social Constructivist Argument Against Using Nike v. Kasky to Attack the UN Global Compact*, 14-SPG INT'L LEGAL PERSAT 6 (2004).

<sup>25</sup> For example, The Rainforest Action Network, an environmental NGO has been noticeably at the forefront of campaigns seeking to change corporate behavior. For a discussion on the role of the

responsibility (CSR)<sup>26</sup> has now become a platform for companies to engage in international dialogue with other stakeholders on environmental protection and other issues. International organizations, notably the Global Compact, are engaging top-level executives<sup>27</sup> in international dialogues on critical concerns such as climate change, and other myriad challenges of globalization.<sup>28</sup>

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organization in influencing corporations, see, [http://ran.org/what\\_we\\_do/old\\_growth/history/](http://ran.org/what_we_do/old_growth/history/), (last visited March 16, 2006). See also Marc Gunther, *The Mosquito in the Tent, A Pesky Environmental Group Called the Rainforest Action Network is getting under the Skin of Corporate America*, FORTUNE, May 31, 2004; J.R. Geraghty, *From Trees to the Tables – How Big Timber Got Green*, 20 COLO. J. INT'L. ENVTL. L. & POL'Y 97 (2000).

<sup>26</sup> See e.g. Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465 (1997); Robert F. Blomquist, *Six Thinking Hats for the Lorax: Corporate Social Responsibility and the Environment*, 18 GEO. INT'L ENVTL. L. REV. 691 (2006). For example, certification of forest-based products is one way by which companies voluntarily participate in crucial environmental issues. The certification program under the International Tropical Timber Agreement is one such example. The mechanism certifies timber-based products that are manufactured timber harvested in a sustainable manner, which translates into practices such as not cutting old growth trees and replanting trees proportionately to those cut. For a critical analysis of forest certification under ITTO, see, Richard Eba'a Atyil and Markku Simula, *Forest Certification: Pending Challenges for Tropical Timber* (2002), [http://www.itto.or.jp/live/Live\\_Server/192/ts19e.pdf](http://www.itto.or.jp/live/Live_Server/192/ts19e.pdf), (last visited March 16, 2006). The International Tropical Timber Agreement was negotiated and signed in 1983 by both tropical timber producing and consuming countries; International Tropical Timber Agreement, Nov. 25, 1983, U.N. Doc. TD/Timber/11. The Agreement has been re-negotiated two times, in 1994 and more recently in 2006. The new agreement will come into effect in 2008. For an overview of the agreement, see, Summary of the UN Conference for the Negotiation of a Successor Agreement to the International Tropical Timber Agreement, 1994, Fourth Part, 24 Earth Negotiations Bulletin, 30 January 2006, <http://www.iisd.ca/vol24/enb2475e.html>, (last visited Feb. 12, 2006).

<sup>27</sup> The engagement of companies such as Goldman Sachs, Virgin Atlantic Airlines, Ford Motors and British Petroleum can be traced to their top-level executives – Henry Paulson Jr., Richard Branson, Ford, and Sir Brown, respectively illustrate this point. For an overview of BP's environment initiatives, see, <http://www.batcom/sectiongenericarticle.do?categoryId=9002325&contentId=3072033>, (last visited Feb 22, 2006). See Goldman Sachs Environmental Policy Framework, [http://www.gs.com/our\\_firm/our\\_culture/social\\_responsibility/environmental\\_policy\\_framework/docs/EnvironmentalPolicyFramework.pdf](http://www.gs.com/our_firm/our_culture/social_responsibility/environmental_policy_framework/docs/EnvironmentalPolicyFramework.pdf), (last visited Feb. 22, 2006). Former UN Secretary General Kofi Annan referred to this as corporate citizenship. See [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>28</sup> For example, re-insurance companies that may have to face huge claims because of increasing environmental catastrophes caused by global warming are particularly interested in addressing the problem of global warming. Swiss Re is one such example. See e.g. Interview with Jonathan Schmidt, Director, Global Agenda, World Economic Forum,

These developments indicate that an effective international environmental organization must provide widest possible room for public participation, both for traditional and non-traditional non-governmental actors.

Legitimacy-enhancing procedures of an international organization include aspects such as voting rights or experts' involvement,<sup>29</sup> that address legitimacy concerns beyond the purview of public participation.<sup>30</sup> Such procedural legitimacy of international organizations is also emphasized in the emerging dialogue on global administrative law.<sup>31</sup> An effective international environmental

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<http://www.weforum.org/site/homepublic.nsf/Content/Interview+with+Jonathan+Schmidt%2C+Director%2C+Global+Agenda%2C+World+Economic+Forum>, (last visited Feb. 23, 2006). For a discussion of the responses of several companies and other groups, in particular to the problem of global warming, see, Marc Gunther, *Strange Bedfellows, Evangelical Christians, Fortune 500 execs and Environmentalists Band Together to Curb Global Warming*, in, FORTUNE (February 8, 2006), [http://money.cnn.com/2006/02/08/news/pluggedin\\_fortune/index.htm](http://money.cnn.com/2006/02/08/news/pluggedin_fortune/index.htm), (last visited Feb. 22, 2006). See also Benjamin J. Richardson, *Enlisting Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives*, 28 N.C.J.INT'L L. & COM. REG. 247 (2002).

<sup>29</sup> See Daniel Bodansky, *The Legitimacy of International Governance*, 93 AM. J. INT'L L. 596,613 (1999). He argues that the Council of the Global Environment Facility that allows for decision-making by a voting majority of 60 donor countries is one example, which not only represents a majority, but by requiring the majority to comprise of donor countries, States' trust in the process is increased because as donors they would share common history, culture or interests.

<sup>30</sup> *Id.*, at 617. Bodansky notes that "participation can contribute to popular legitimacy by giving stakeholders a sense of ownership in the process," but at the same time argues that legitimacy of international environmental obligations as set by international institutions raises concerns that cannot be augmented by public participation. As he observes: "Unless some [] basis of legitimacy can be found, the continuing centrality of state consent (which remains, by default, the principle source of legitimacy for international environmental law) is likely to limit the possibilities of international governance."

<sup>31</sup> See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMPORARY PROBS. 15 –62 (2005). See also David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW AND CONTEMPORARY PROBLEMS 127 (2005).



organization must therefore, consider the importance of voting and other procedural aspects.

Legitimacy concerns regarding international decision-making ultimately centers on one theme that resonates the effects of globalization, the increasing shift responses from purely state-centered politics to a broad and well-informed dialogue among a range of stakeholders. This is especially important when international trade and other economic arrangements limit the ability of non-state actors to address environmental and other concerns nationally, and the applicability of national rules addressing these concerns can be subject to international procedures, within which their participation is limited.

International organizations are aware of these concerns and attempt to address them by making room for broader participation and procedural legitimacy. But, the current structure of international organizations inherently limit decision-making to governments, and in case of environmental governance, efforts to establish more centralized organizations have consistently failed, or only resulted in incremental changes.<sup>32</sup> This point can be illustrated through the

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<sup>32</sup> Bharat Desai, *Institutionalizing International Environmental Law*, 2004.

two main efforts, one, to restructure the United Nations Environment Program (UNEP) and two, to establish a world environmental organization.<sup>33</sup>

The idea of restructuring UNEP that has been floating around almost since its inception, gained momentum in the 1990s,<sup>34</sup> but has consistently failed. Efforts to increase the power and budget of UN ECOSOC<sup>35</sup> program by elevating it to the position of a specialized agency have led to the creation of parallel organizations, notably the Commission on Sustainable Development (CSD) in 1992.<sup>36</sup>

UNEP has contended with multiple shortcomings such as its mandate, budget, and as some suggest, its headquarters in Nairobi,<sup>37</sup> by undertaking

<sup>33</sup> see Frank Biermann, *The Case for a World Environmental Organization*, 42 ENVIRONMENT 22, (2000); Udo E. Simonis, *Advancing the Debate on a World Environmental Organization*, THE ENVIRONMENTALIST, (2002), pp 29-42; Frank Biermann and Udo E. Simonis, *Needed Now: A World Environment and Development Organization*, REPORT TO THE DEVELOPMENT AND PEACE FOUNDATION, (1998), available at, <http://bibliothek.wz-berlin.de/pdf/1998/ii98408.pdf>. See also Steve Charnowitz, *A World Environment Organization*, 27 COL. J. ENVT'L. L. 323, (2002).

<sup>34</sup> Efforts to reform UNEP were particularly intense during the Rio and Johannesburg conferences. See, GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, *WORLD IN TRANSITION: NEW STRUCTURES FOR GLOBAL ENVIRONMENTAL POLICY* 176-177 (2001), available at [www.wbgu.de](http://www.wbgu.de), last visited, 1/06/06. See also, Elizabeth Dowdeswell, *The Promise of Stockholm*, in 8.5 OUR PLANET, 1997 (January); Mostafa K. Tolba, *Redefining UNEP*, 8.5 OUR PLANET, 1997 (January); Maurice F. Strong, *The Way Ahead*, 8.5 OUR PLANET, 1997 (January); Mark Allan Gray, *The United Nations Environment Program: An Assessment*, 20 ENVT'L. L. 291 (1990), Bharat Desai, *Institutionalizing International Environmental Law*, 2004, MARIA H. IVANOVA, *CAN THE ANCHOR HOLD? RETHINKING THE UNITED NATIONS ENVIRONMENT PROGRAMME FOR THE 21ST CENTURY*, 2005; Richard G. Tarasofsky and Alison L. Hoare, *Implications of a UNEO for the Global Architecture of the International Governance System*, December 2004 (on file with author).

<sup>35</sup> The Economic and Social Council of the United Nations is one of the main organs of the international organization. See [www.un.org](http://www.un.org), last visited 01/22/07.

<sup>36</sup> See BHARAT H. DESAI, *INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW*, 2004, 249.

<sup>37</sup> See generally Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVT'L. L. J. 291 (1990).

incremental changes to its governing structure,<sup>38</sup> by focusing on coordination between MEAs,<sup>39</sup> the role of civil society,<sup>40</sup> and policy and law.<sup>41</sup> However, its central concern, that of power allocation among the myriad UN agencies and programs addressing environmental issues, is a matter of reforming the entire UN system<sup>42</sup> and not merely an enterprise of strengthening global environmental governance.

Similarly, the proposal to establish a new environmental organization, called either a World Environmental Organization (WEO)<sup>43</sup> or a UN

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<sup>38</sup> For instance, General Assembly Resolution led to the creation of the Global Ministerial Forum, “an annual, ministerial-level, global environmental forum, with the Governing Council of the United Nations Environment Programme constituting the forum in the years that it meets in regular sessions, and in alternate years, with the forum taking form of a special session of the Governing Council, in which participants can gather together to review important and emerging policy issues in the field of the environment, with due consideration for the need to ensure the effective and efficient functioning of governance mechanisms of the United Nations Environment Programme, as well as possible financial implications, and the need to maintain the role of the Commission on Sustainable Development as the main forum for high-level policy debate on sustainable development”. “Report of the Secretary-General on Environment and Human Settlements,” General Assembly Resolution 53/242; Doc. A/Res/53/242 of 19 August 1999. *See also* “Views of the General Council on the Report of the Secretary-General on Environment and Human Settlements,” UNEP’s GC Decision 20/17, 5 February 1999; BHARAT H. DESAI, *INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW*, 2004, 236–240.

<sup>39</sup> *See*, Improving International Environmental Governance among Multilateral Environmental Agreements: Negotiable Terms for Further Discussion, Doc. UNEP/IGM/2/4 of 4 July 2001 and Proposal for a Systematic Approach to Coordination of Multilateral Environmental Agreements, Doc. UNEP/IGM/2/5 of July 2001.

<sup>40</sup> Open-Ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance, *Reports of the Civil Society Consultations and Expert Consultations on International Environmental Governance*, Doc. UNEP/IGM/2/2, 18 June 2001.

<sup>41</sup> *See*, Global Ministerial Forum, *The Malmö Ministerial Declaration*; Sixth Special Session of the Governing Council of the UNEP; Doc. UNEP/GCSS.VI/I.3, 31 May 2000.

<sup>42</sup> Kofi Annan, *Renewing the United Nations: A Programme for Reform*, UN DOC. A/51/950 (July 14, 1997).

<sup>43</sup> *See*, Daniel C. Esty, *The Case for a Global Environmental Organization*, in ATB. Kenen (ed)., *Managing the World Economy: Fifty Years After Bretton Woods*, (1994), pat 287-309; Ford C. Runge, *Freer Trade, Protected Environment*, Council on Foreign Relations, 1994.

Environmental Organization (UNEO),<sup>44</sup> focuses on centralized power allocation,<sup>45</sup> based on the WTO model.<sup>46</sup> The WEO/UNEO model has some State and institutional support, particularly from Germany, France, and WTO.<sup>47</sup> However, significant skepticism has been expressed about the possibility of establishing another centralized organization in the face of growing concerns about the legitimacy of international decision-making, as also about its utility in addressing environmental concerns.<sup>48</sup>

The challenge therefore is not one of creating more supranational bodies, but of establishing an organization within which a network of different stakeholders can freely engage in discussing environmental concerns and possible

<sup>44</sup> See Progress Report published by French Ministère des Affaires étrangères, available at [http://www.diplomatie.gouv.fr/en/france-priorities\\_1/international-organizations\\_1100/unite](http://www.diplomatie.gouv.fr/en/france-priorities_1/international-organizations_1100/unite), last visited, 2/1/2006.

<sup>45</sup> Notable objectives of creating a WEO are, establishing a centralized umbrella organization with environmental expertise, providing a counterweight against WTO, and increasing efficiency in addressing environmental issues by improving its ability to coordinate with other organizations. See Steve Charnowitz, *A World Environment Organization*, 27 COL. J. ENV'T L. 323 (2002); see also Klaus Töpfer, 2003 at,

<http://www.glogov.org/upload/public%20files/pdf/events/speakers/toepfer.-pdf>

<sup>46</sup> See, Daniel C. Esty, *The Case for a Global Environmental Organization*, in ATB. Kenen (ed.), *Managing the World Economy: Fifty Years After Bretton Woods*, (1994), pat 287-309; Ford C. Runge, *Freer Trade, Protected Environment*, Council on Foreign Relations, 1994.

<sup>47</sup> See German Advisory Council on Global Change, *World in Transition: New Structures for Global Environmental Policy*, 2001; THE CHALLENGES OF GLOBALIZATION: REGULATION AND DEVELOPMENT, EXCERPTS OF PRIME MINISTER LIONEL JOSPIN'S SPEECH TO ECOSOC, Paris, (January 30, 2002), available at, <http://www.info-france-usa.org/news/statements/2002/global013002.asat>, last visited, 12/16/05; Renato Ruggiero, *A Global System for the Next Fifty Years, Address to the Royal Institute of International Affairs*, available at [http://www.wto.org/english/news\\_e/spr\\_e/chat\\_e.htm](http://www.wto.org/english/news_e/spr_e/chat_e.htm) (1998). See also H.E. Dr. Supachai Panitchpakdi, *Keynote Address: The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT'L. L. REV. 419 (2001).

<sup>48</sup> See Calestous Juma, *Stunting Green Progress*, FIN. TIMES 15, July 16, 2000. See also, Calestous Juma, *The Perils of Centralizing Global Environmental Governance*, in ENVIRONMENT MATTERS 13, 2000; see also Peter Newell, *A World Environmental Organization: The Wrong Solution to the Wrong Problem*, *The World Economy*, vol 25, 659-671.

solutions, including legal, to meet the new challenges of global trade and globalization. Such an organization would promote active networking among environmental agencies, increase large scale public participation, and carry on procedurally sound administration.

Such an organization need not be established anew. The structure and functions of one of the oldest international conservation organization, the International Union for Conservation of Nature (now known as the World Conservation Union or IUCN), could serve as a model.

#### **IUCN AS A MODEL FOR LEGITIMATE ENVIRONMENTAL GOVERNANCE**

The World Conservation Union was established in 1948 to promote international conservation of nature.<sup>49</sup> Since its establishment, IUCN has been influencing and shaping the global conservation movement through its network of scientists, government representatives and agencies, environmentalists, and others interested in conservation. IUCN members collect, disseminate, share information, and catalyze conservation efforts in all disciplines, including science, policy and law.<sup>50</sup> However, despite its longstanding work, the Union's global

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<sup>49</sup> See <http://www.iucn.org>, (last visited Dec. 15, 2006).

<sup>50</sup> The history of IUCN can be traced back to the creation of the Yellowstone National Park in the United States in 1864. The practice of setting aside nature conservation areas during President Roosevelt's presidency gained popularity in other Western countries, including Germany, Great Britain, France and Switzerland. As a result of these efforts, the idea of establishing an international organization to protect nature in all parts of the world germinated among some ecologists and government officials in the United States, Germany, Great Britain, and the Netherlands. Accordingly, seventeen countries convened in Switzerland in 1913, establishing a Consultative Commission for the purpose of examining the possibility of creating an international

conservation efforts have relatively received little attention since the expansion of the international environmental agenda in the 1970s.<sup>51</sup>

While it is commonly perceived as a non-governmental organization,<sup>52</sup> IUCN has also been described as a *lex specialis*.<sup>53</sup> From a historical perspective the membership structure of IUCN—comprising government and non-government organizations (GONGO)<sup>54</sup>—is similar to other international

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organization for nature protection, but succeeded only in creating a non-governmental organization, the International Office for the Protection of Nature, based in The Netherlands. The organization started its activities by collecting materials from all over the world on nature protection. These activities were interrupted by the two World Wars, but conservation concerns re-emerged following World War II. The possibility of vesting the United Nations Education, Scientific, Social and Cultural Organization (UNESCO), a UN specialized agency, with a conservation mandate, or, in the alternative, of creating an independent body similar to the International Council of Scientific Union to work with UNESCO on conservation issues was considered. However, the idea was rejected in favor of creating a separate organization because it was generally agreed that international nature protection had not just scientific, but legal implications as well. Consequently, after much deliberation States and non-state actors involved in the discussions agreed that international nature protection required an organization composed of State as well as non-state actors. The International Union for the Protection of Nature (IUPN) was established at a conference in 1947 in Fontainebleau, France attended by representative of twenty-three countries, eight international organizations, and 126 national bodies. The founders of IUPN consciously stressed that an international conservation organization could not be a purely intergovernmental organization, but had to necessarily involve experts in the field to work with governments and other organizations. Further, the importance of respecting regional autonomy while shaping a world view on nature protection and while developing international treaties on conservation, as well as the need for increasing the cooperation between governmental and non-governmental organizations were emphasized. Over the years, as IUPN grew steadily, it was renamed as the International Union for Conservation of Nature, in an effort move away from a “value-based,” inherent in the term nature protection, to a scientific approach of conservation; it is presently named World Conservation Union, but continues to be known as IUCN. Much of the history of IUCN is drawn from a book by a former Executive Director of IUCN. See MARTIN HOLDGATE, *THE GREEN WEB* 26 – 35, 63-65 (1999).

<sup>51</sup> For a history of international environmental policy, see, MARGARET E. KECK AND KATHYRN SIKKINK, *ACTIVISTS BEYOND BORDERS* 124 (1998).

<sup>52</sup> See e.g. Raustiala, *supra* note 4, referring to IUCN as a NGO.

<sup>53</sup> Nicholas A. Robinson, *IUCN as Catalyst for Law of the Biosphere: Acting Globally and Locally*, 35 ENVTL. L. 249, 300 (2005).

<sup>54</sup> Margaret AT Karns and Karen A. Mingst, *INTERNATIONAL ORGANIZATIONS, THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE*, 12, 2004.

organizations of that period. For example, the World Meteorological Organization (WMO) was initially established as a GONGO and later became a UN specialized agency.<sup>55</sup>

However, it is not the status of IUCN, but the lessons that its structure, in particular its membership structure, provides for legitimate governance that is important for the current discussion. IUCN's relevance in light of the conceptions discussed earlier, and in terms of legitimate governance are discussed under four categories of legitimacy, democratic, expert, substantive, and procedural legitimacy.

#### **DEMOCRATIC OR PARTICIPATORY LEGITIMACY**

It is premature to conceive a “global democracy,” and indeed debatable whether democracy as a general concept of governance can be effective on such a large scale. Thus, here, the complex concept of democracy is narrowly construed as a “shared sense of community,”<sup>56</sup> with respect to the objectives and goals of an international organization, both in theory and practice. Such a sense of participation is critical for building global consensus, which can in turn increase the efficacy of the rule of law, by enhancing internal and external viewpoints.

IUCN achieves such a shared community by opening membership to a wide range of individual and entities committed to conservation concerns, and by

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<sup>55</sup> See WMO in Brief, <http://www.wmo.ch/index-en.html>, (last visited March 16, 2006).

<sup>56</sup> See Bodansky, *supra* note 29, at 615.

enabling them to establish organizational priorities and work programs. IUCN members fall under three broad categories:<sup>57</sup> Category A—states,<sup>58</sup> political or economic integration organizations<sup>59</sup>; Category B—governmental agencies<sup>60</sup> and national<sup>61</sup> and international non-governmental organizations<sup>62</sup>; and Category C—affiliates.<sup>63</sup> Although eligibility for membership is determined by IUCN's Director General, acting in consultation with the Council and existing members,<sup>64</sup> membership is generally granted if an applicant meets requirements specified in

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<sup>57</sup> IUCN's Membership Policy Guidelines and a Compilation of the Provision of the Statutes and the Regulations; hereinafter Statute provisions will be referred to by the appropriate Article and Regulations as Regulation, <http://www.iucn.org>, (last visited Feb. 10, 2006). Article 4

<sup>58</sup> Article 5(a) defines States 'as those which are members of the United Nations or any of its Specialized Agencies, or of the International Atomic Energy Agency, or parties to the Statutes to the International Court of Justice'.

<sup>59</sup> These organizations are defined as those 'constituted solely by States to which those States have conferred legal competence in respect of matters within the objectives of IUCN'.

<sup>60</sup> Article 5(b) defines government agencies as 'organizations, institutions, and when applicable, government departments, which form part of the machinery of government in a State, including those agencies of the components of federal States or States having an analogous structure'.

<sup>61</sup> National NGOs are defined as 'institutions and associations incorporated within a State'. Article 5(d), *supra* note 57.

<sup>62</sup> International NGOs are defined as 'institutions and associations organized in two or more states'. Article 5(e), *supra* note 57.

<sup>63</sup> All other government agencies, national NGOs and international NGOs are designated as affiliates. Article (5) (f), *supra* note 57.

<sup>64</sup> In determining whether an applicant should be granted, the Council must seek comments and objections, if any, from existing IUCN members, at least hundred and forty days before it meets to decide to decide on the issue. *See* Regulation 14, *supra* note 47. Members are required to submit their objections to the Director General, within seventy-five days in accordance with the Statute and Regulations. *See* Regulations 15 and 16, *supra* note 47. An applicant is given an opportunity to respond to any comment or objection within forty-five days before the Council meeting is held. *See* Regulation 17, *supra* note 47. Membership approval requires a two-thirds majority vote. *See* Regulation 18, *supra* note 47.



its regulation,<sup>65</sup> which varies for different entities.<sup>66</sup> Moreover, rejected applicants can appeal at the World Conservation Congress<sup>67</sup> or reapply after three years.<sup>68</sup>

All Members are vested with certain rights and obligations, to ensure full engagement in the organization. The rights include participation in the World

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<sup>65</sup> States and political organization can become members by submitting a statement of their adhesion to the IUCN States to the Director General of IUCN. *See* Article 6, *supra*, note 57. In the case of States, the Head of State or Government or the Minister of Foreign Affairs may notify the Director General of a State's adhesion to IUCN statute. *See* IUCN Regulation 3(a), *supra*, note 57. In the case of a political/economic organization an authorized representative must submit a notification along with a statement "declaring the extent of its competence with respect to the matters provided in the Statutes." *See* Regulation 3(b), *supra* note 57. Similarly, Government agencies must demonstrate that they have the "competence to adhere to the Statutes." *See* Regulation 4, *supra* note 47.

<sup>66</sup> For example, States must establish a liaison with the IUCN Secretariat, generally done through their governmental departments. The Secretariat coordinates the execution of programs and other administrative matters and is headed by the Director General of IUCN. The Secretariat, in turn is responsible to the Council, which consists of 32 Councillors elected at the World Conservation Congress. For a detailed description of IUCN Secretariat, Council, and its budgetary structure, see, Appendix I. Regulation 3(c). *See also* BECOME A MEMBER OF THE WORLD CONSERVATION UNION, <http://www.iucn.org>, (last visited March In addition to meeting the above criteria, international organizations must also demonstrate that they comprise "duly constituted organizations or individuals, or a combination of organizations and individuals, with defined rules governing the admission of such members, and shall include members from atleast two States." Regulation 5 (c), *supra* note 47. Additional conditions are stated for international NGOs depending on whether they include organizations or individuals. International NGOs made up of organizations must operate in two or more States and have a minimum of five members. *See* Regulation 5(e). Where an international NGO consists of individuals, it must have branches or programmes operating in two or more States. *See* Regulation 5 (f), *supra* note 47. Further, international NGOs must open their governing bodies to nationals from atleast two States, and, like national NGOs, have periodic elections for appointment of its officers. *See* Regulation 5 (g) and (h), *supra* note 47. In addition to meeting specific conditions, these applicants must submit a written statement endorsing the mission of IUCN along with a deposit for the first year's dues, which would be returned if membership were not granted. Regulations 9 and 10, *supra* note 47. They must also show that they have been involved in conservation of nature or natural resources for at least three years. Regulation 13, *supra* note 47.16, 2006). Similarly international organizations must meet several requirements.

<sup>67</sup> The applicant may appeal through ten members who are eligible to vote and submitted to the World Conservation Congress. The Congress has the right to reverse the Council's decision by a two-third's majority. *See* Article 10, *supra* note 47. If the appeal fails, the applicant is barred from applying for membership for five years. In that case, the application can only be resubmitted to the Congress along with the Council's recommendation. *See* Article 11, *supra* note 47.

<sup>68</sup> *Ibid.*

Congress, the National and Regional Committees or other regional fora of members; involvement in the election of new members; receiving information on the Union's activities and its budget; the opportunity to present views to IUCN Committees or other departments; and to receive copies of meeting reports and publications.<sup>69</sup>

Members in Categories A and B enjoy additional rights. For example, they can submit motions to, and vote at, the World Congress, where Members adopt the Programme and where the Union's work for the next four years is determined. They can also propose to the Council candidates for President, Treasurer, and Chairs of the Commissions, who are appointed at the World Congress and nominate candidates for the position of President and Regional Councillors, for election at the World Congress.<sup>70</sup>

Membership obligations include the duty to publicize their association with IUCN<sup>71</sup> and to "support and facilitate the objectives, activities, and governance of IUCN." Members must also provide information about their activities, when requested; and cooperate in the calculation and payment of membership dues.<sup>72</sup>

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<sup>69</sup> Article 12(a), *supra* note 47.

<sup>70</sup> Article 12 (b), *supra* note 47.

<sup>71</sup> Regulation 11, *supra* note 47.

<sup>72</sup> Article 12 (c), *supra* note 47. Members who fail to pay dues for a year lose rights relating to voting, election, and motions. In case of those who fail to pay for two years, the World Congress has the authority to rescind rights depending on the violation and the category of the Member. In

IUCN currently comprises Members from 78 States, 111 government agencies, 900 NGOs, over 1000 organizations, and over 10,000 scientists and other experts,<sup>73</sup> organized into Committees and Commissions. Such a diverse membership, in addition to IUCN's bicameral system of participation, which ensures non-hierarchical decision-making, has created a sense of community within the organization. It has also fostered exchange of ideas and viewpoints on conservation, drawing lessons from the local to the global, and back.

**PROCEDURAL LEGITIMACY:**

Procedural legitimacy refers to the transparency and inclusiveness of an organization's decision-making processes. IUCN fosters such legitimacy by adopting major decisions and by discussing its work progress in a forum open to all Members, the World Congress.

The World Congress, described as the "general assembly of IUCN members,"<sup>74</sup> is a platform where Members convene to conduct the organization's business, assess progress of its six Commissions, elect officers and Council

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some cases the Congress may rescind all membership rights of a Member and in case of continued breach after a Congress action, the Council may decide to suspend membership or expel a member through a voting procedure. *See* Article 13, *supra* note 47. However, in the case of states and political/economic integration organizations a process for expulsion can only be initiated if at least two State members suggest it to the Council. Article 13 (c) (i), *supra* note 47. For all other Category B at least 10 members from the same Category must make the recommendation and for Category C, 10 members eligible to vote can make the suggestion. Article 13 (c) (ii), *supra* note 47. In general, there are two chambers of votes, a bicameral system of votes, some for governments and some for NGOs. *See* Holdgate, *supra* note 50, at 294.

<sup>73</sup> *Ibid*

<sup>74</sup> *See*

[http://www.iucn.org/congress/print\\_en.cfm?userPage=/congress/about/whats\\_the\\_wwc.htm](http://www.iucn.org/congress/print_en.cfm?userPage=/congress/about/whats_the_wwc.htm), (last visited Feb. 10, 2006).

members, and take stock of the status of global conservation issues.<sup>75</sup> Members also set out the policy of IUCN, advice governments and member organizations on achieving IUCN's mandate, and review reports submitted by departmental heads of different branches including Commission Chairs, Councillors, the Director General, and the chairpersons of recognized Committees and Forums.<sup>76</sup>

The Congress is organized into three elements—Commissions at Work, World Conservation Forum and Member's Business Assembly. The Commissions at Work is a mechanism for the Union's six Commissions to exchange relevant information to take decisions to advance IUCN's conservation mandate.

The World Conservation Forum is a platform for Members to discuss emerging challenges to conservation, a kind of ideas generating mechanism. The Forum is organized into several sessions, workshops, and events that focus on four broad themes—ecosystem management; health, poverty and conservation; biodiversity loss and species extinction; and markets, business and the environment.<sup>77</sup>

The Member's Business Forum facilitates interaction between governments and non-governmental actors in setting IUCN's agenda for the next

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<sup>75</sup> *Ibid*

<sup>76</sup> *Infra*

<sup>77</sup> For an understanding of the kind of sessions that are organization, see, the schedule of events and sessions of the 2004 Congress held in Bangkok, Thailand, [http://www.iucn.org/congress/print\\_en.cfm?userPage=/congress/wcforum/what\\_is.htm](http://www.iucn.org/congress/print_en.cfm?userPage=/congress/wcforum/what_is.htm), (last visited Feb. 10, 2006).

four years. In fact, the Assembly provides all members an opportunity to exercise their rights, such as electing Commission Chairs and Council members, approving Commission mandates, and determining the budget to carry out programme activities.<sup>78</sup> Further, Commission Chairs may be invited to participate in Committee activities, and to exchange information and expertise with Members, to maximize coherence in the policy and programmes within IUCN.<sup>79</sup>

Essentially, the Congress is an open forum for the Union's international network of Members to participate in the administration of the organization and to exchange of views and opinions on conservation issues.<sup>80</sup> It not only offers room for sharing concerns and expressing new ideas regarding conservation at the global, regional, and national levels, but also ensures that the procedure by which its work program and mandates are set out involves both governmental and non-governmental members, thereby enhancing the legitimacy of its decisions.

### **EXPERT LEGITIMACY**

Involving experts in the field relevant to an organization in decision-making processes enhances legitimacy. IUCN's Commissions comprising multidisciplinary experts on conservation—a volunteer network of scientists, lawyers, governmental officials, and non-governmental organizations enhances

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<sup>78</sup> See <http://www.iucn.org/congress/members/about.htm>, (last visited Feb. 10, 2006). The role and functions of the Council, the Commissions, the Secretariat, and the Committees are elaborated in the following section.

<sup>79</sup> Holdgate, *supra* note 50, at 9.

<sup>80</sup> See <http://www.iucn.org/congress/programme/index.htm>, (last visited Feb. 10, 2006).

the legitimacy of its actions and decisions. The Commissions' legitimacy in turn is assured by their relative autonomy, which is ensured by the fact that Commission Chairs are directly appointed by, and Commission programs directly approved by, the General Assembly.<sup>81</sup>

Since the work of the six Commissions is also critical to the overall legitimacy, their functions and achievements are discussed below with specific emphasis on the more established Commissions—Species Survival; Protected Areas; and Environmental Law will be discussed. Further, the work of the Commission on Environmental Law is discussed in depth given its role in shaping international conservation law and policy.

#### SPECIES SURVIVAL COMMISSION

The Species Survival Commission (SSC) was the first IUCN Commission, established in 1950.<sup>82</sup> Since 1962 The Commission has published the Red Data Book, which is used universally as a source for detailed information on endangered plant and animal species.<sup>83</sup> In fact, SSC provides authoritative advice on endangered species to the central Secretariat of CITES. The Commission also collects data for and assists in the operation of its Threatened Plant Committee in

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<sup>81</sup> Such an autonomous status was created at the 1958 Athens General Assembly. Holdgate, *supra* note 50, at 144.

<sup>82</sup> Originally the Survival Service Commission, SSC was based on the model of panels and commissions of the United States National Academy of Sciences. *See* Holdgate, *supra* note 50, at 13.

<sup>83</sup> The book provides information on the number, habitat, reasons for decline, and references, as well as the classification of groups of species. *Ibid.* *See also* IUCN Red List of Threatened Species, Introduction, <http://www.iucnredlist.org/info/introduction>, (last visited March 20, 2006).

coordination with its Conservation Monitoring Unit (CMU), which was established in 1979.<sup>84</sup>

Following the Stockholm Conference, SSC also assisted UNEP in setting up the Global Environmental Monitoring System (GEMS).<sup>85</sup> SSC still remains a significant IUCN Commission and an authority on species conservation.

#### WORLD COMMISSION ON PROTECTED AREAS

The establishment of the World Commission on Protected Areas (WCPA) dates back to 1959, when the UN requested IUCN to prepare the UN List of National Parks.<sup>86</sup> Since 1961, the publication has provided updated definitions and classification of protected areas, in accordance with the acceptable international taxonomy on the subject.<sup>87</sup> WCPA catalyzes the creation of protected areas<sup>88</sup> and national parks world over;<sup>89</sup> its Protected Areas Data Unit provides computerized information on 2000 national parks and other protected

<sup>84</sup> Holdgate, *supra* note 50, at 144. See also IUCN Red List of Threatened Species, [http://www.iucn.org/themes/ssc/redlists/background\\_EN.htm](http://www.iucn.org/themes/ssc/redlists/background_EN.htm), (last visited March 16, 2006).

<sup>85</sup> See generally Catherine Tinker, *Environmental Planet Management by the United Nations: An Idea whose Time Has Not Yet Come?*, 22 N.Y.U.J. INT'L. L. & POL. 793 (1990).

<sup>86</sup> Holdgate, *supra* note 50, at 9.

<sup>87</sup> Holdgate, *supra* note 50, at 70.

<sup>88</sup> This designation made in 1979 expanded the scope of conservation. See Nicholas A. Robinson, *Legal Systems, Decisionmaking, and the Science of Earth's Systems: Procedural Missing Links*, 27 ECOLOGY L. Q. 1077, 1120 (2001).

<sup>89</sup> The success of SSC led to the creation of a Provisional Committee on National Parks, in 1958, to develop programs for management of national parks and promote scientific exchange and cooperation among experts. The Committee became a full-fledged Commission on National Parks in 1960. Holdgate, *supra* note 50, at 69, 70 - 90

areas worldwide, valuable for implementing conservation treaties,<sup>90</sup> such as the World Heritage Convention.<sup>91</sup> In fact, the idea of an international treaty to conserve biological diversity germinated in this Commission.<sup>92</sup>

The Commission also regularly brings together conservation experts from different parts of the world, at the World Conference on National Parks.<sup>93</sup> WCPA is also active on a regional level, demonstrated by its vast research programs and publications on conserving the natural heritage of Africa, Latin America and the Caribbean.<sup>94</sup>

#### COMMISSION ON ENVIRONMENTAL LAW AND POLICY

The Commission on Environmental Law is comprised of an international network of lawyers, who contribute to the work of the Commission through its

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<sup>90</sup> For example, the Commission publishes a list of parks and identifies key issues according to regions as well as themes. *See e.g.* <http://www.iucn.org/themes/wcpa/pubs/region.htm>, (last visited Feb. 16, 2006). *See also* Note, *International Union for the Conservation of Nature and Natural Resources: The Issue of Sustainable Development*, 7 COLO. J. INT'L. ENVTL. L. & POL'Y 213, 214, 1996.

<sup>91</sup> *See* World Heritage, <http://www.iucn.org/themes/wcpa/wheritage/wheritageindex.htm>, (last visited March 16, 2006). Holdgate, *supra* note 50, at 245.

<sup>92</sup> A French environmental lawyer proposed the preparation of a global convention covering all habitats. Holdgate, *supra* note 48, at 170.

<sup>93</sup> Later conferences were organized periodically in United States, Indonesia – 1982 Bali Conference where the idea of biodiversity conservation took roots, and many others that followed thereon. *See* <http://www.iucn.org/themes/wcpa/wpc2003/english/about/intro.htm>, (last visited Feb. 16, 2006).

<sup>94</sup> The efforts between 1978 and 1980 resulted in major volumes on *Conserving Africa's Natural Heritage and Conserving the Nature Heritage of Latin America and the Caribbean*. *See* Holdgate, *supra* note 50, at 145.



Committee on Environmental Law (CEL).<sup>95</sup> The work of this Commission is discussed at length because of its role in shaping global conservation law.

The Commission was established in the 1960s, to prepare rules to conserve marshes and other wetlands in association with UNESCO, FAO, WWF, ICBP and the International Wildfowl Research Bureau (IWRB),<sup>96</sup> efforts that later led to the negotiation of the 1971 Ramsar Convention on Wetlands of International Importance Especially as a Waterfowl Habitat, and the Secretariat for which is hosted by IUCN.<sup>97</sup> Since then the Committee on Environmental Law has been instrumental in drafting several major MEAs, including UNESCO's 1972 World Heritage Convention,<sup>98</sup> CITES,<sup>99</sup> the Convention on Migratory

<sup>95</sup> See History of IUCN, <http://www.iucn.org/themes/law/cel02.html>, last visited, (last visited Feb. 10, 2006). The Commission on Environmental Law was formed in 1960 at the Warsaw General Assembly. It originated as Committee on Legislation, which was later elevated to the status of the Commission on Environmental Policy, Law and Administration in 1968 at the Delhi General Assembly. See also Holdgate, *supra* note 50, at 70-71. Wolfgang Burhenne, former Chairman of IUCN Commission on Environmental Law, believed that IUCN's ability to bring lawyers from all over the world is central to its success. Interview with author, United Nations, New York, NY, 16<sup>th</sup> April, 2004.

<sup>96</sup> Robinson, *supra* note 55, at 252; Holdgate, *supra* note 50, at 113-114.

<sup>97</sup> See About the Ramsar Convention, [http://www.ramsar.org/about/about\\_bureau.htm](http://www.ramsar.org/about/about_bureau.htm), (last visited March 23, 2006).

<sup>98</sup> See Brief History, <http://whc.unesco.org/en/169/>, (last visited March 24, 2006). The implementation WCPA continues to aid the implementation of this treaty.

<sup>99</sup> In 1962 the Committee concluded that a new international agreement on the importation of rare species of flora and fauna was required after its research revealed shortcomings in the then existing Convention on International Transport of Animals. With support from the General Assembly, the committee catalyzed several governments to negotiate the Convention on International Trade in Endangered Species (CITES). Even though it came into force in 1973, after the Stockholm Conference, the drafts for CITES were prepared by the Environmental Law Committee. Further, between 1973 and 1984, the CITES Secretariat was located at IUCN, even though it acted as an agent of UNEAT. These efforts show that the conservation movement was well established or at least, well on its way to becoming an established international discipline before the Stockholm Conference introduced the concept of 'human environment'. See DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 257 (1989). See

Species,<sup>100</sup> and the Convention on Biological Diversity. In fact, even though UNEP prepared the final draft and facilitated the negotiations for the 1992 Convention on Biodiversity, IUCN contributed significantly expertise to early drafts.<sup>101</sup>

The Commission also provided advice for drafting other major treaties, the UN Convention on Desertification, the UN Convention on the Law of the Sea,<sup>102</sup> and the Environmental Protocol to the Antarctica Treaty,<sup>103</sup> for which it provided

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also Anne Batchelor, *The Preservation of Wildlife Habitat in Ecosystems: Towards A New Direction under International Law to Prevent Species' Extinction*, 3 FLA. INT'L L. J. 307, 318 (1988). CITES is considered to be one of the more successful international treaties.

<sup>100</sup> IUCN worked on the draft legislation upon the request of the German government. Holdgate, *supra* note 50, at 134. See also Cyril De Klemm, *Migratory Species in International Law*, 29 NAT. RESOURCES J. 935, 952 (1989).

<sup>101</sup> Between 1984 and 1989, CEL prepared two drafts, which the UNEP Governing Council combined with its own initiative when submitting its final draft on CDB, in association with FAO. See Holdgate, *supra* note 50, at 213, 214; Désirée M. Mc. Graw, *The Story of the Biodiversity Convention: From Negotiation to Implementation*, GOVERNING GLOBAL BIODIVERSITY 7-38 ((Philippe G. LePrestre ed., 2002). See also Robert F. Blomquist, *Protecting Nature "Down Under": An American Law Professor's View of Australia's Implementation of the Convention on Biological Diveristy – Laws, Policies, Programs, Institutions and Plans, 1992-2000*, 9 DICK. J. ENVTL. L. & POL'Y 227, 236-238 (2000). The Commission contributed further by collaborating with UNEP, World Resources Institute (WRI), FAO, World Bank and World Wildlife Fund in the publication of the Global Biodiversity Strategy, which outlined the action that explained CBD and the action that Parties were required to take in order to comply with their treaty obligations. IUCN played a leading role in developing the idea of conservation of biodiversity through the work of its chief scientist, Jeffrey Mc. Neely. See Holdgate, *supra* note 50, at 213, 214. See also Nicholas A. Robinson, "Colloquium: The Rio Environmental Law Treaties" *IUCN's Proposed Covenant on Environment and Development*, 13 PACE ENVTL. L. REV. 133, 137 (1995).

<sup>102</sup> See Holdgate, *supra* note 50, at 142; Robinson, *supra*, note 55, at 251.

<sup>103</sup> Holdgate, *supra* note 50, at 185. See generally Timo Koivurova, *Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn from Each Other?*, 33 INT'L J. LEGAL INFO. 204, 217 (2005).

inputs for developing a conservation strategy. CEL is also involved in tropical timber conservation.<sup>104</sup>

Further, CEL provides assistance in drafting regional and national conservation legislation. Notable among its regional efforts are the 1968 African Convention for the Conservation of Nature and Natural Resources<sup>105</sup> and the European Convention for the Conservation of Wildlife and Natural Habitats,<sup>106</sup> in addition to several other regional agreements in Africa, the South Pacific and the ASEAN region (Association of South East Asian Nations).<sup>107</sup> It has also assisted several countries, including Eritrea,<sup>108</sup> India, Iran, Mongolia, Ethiopia and Afghanistan<sup>109</sup> to draft their national legislation.

<sup>104</sup> Holdgate, *supra* note 50, at 183. *See also* <http://www.itto.or.jp>, (last visited January 19, 2004). IUCN has a Tropical Forest Programme that was launched with the support of FAO, the World Bank and WRI. *See* Holdgate, *supra*, note 59, at 185. Although its initial effort to influence the International Tropical Timber Agreement in 1983 proved less successful, IUCN currently has a partnership arrangement with ITTO. *See* <http://www.itto.or.jp/live/PageDisplayHandler?pageId=227>, (last visited March 16, 2006).

<sup>105</sup> IUCN drafted the Convention on the behest of the Organization of African Unity (OAU). Holdgate, *supra* note 50, at 71. *See also* Overview, <http://www.iucn.org/themes/law/elp03.html>, (last visited March 16, 2006). *See also* Nicholas A. Robinson, *Befogged Vision: International Environmental Governance A Decade After Rio*, 27 Wm. & Mary Env'tl. L. & Pol'y Rev. 299, 322 (2002).

<sup>106</sup> Holdgate, *supra* note 50, at 143. *See generally* Elliot L. Richardson, Anotoli L. Kolodkin, Jon Jacobson, Alan E. Boyle, Donat Pharand, Elihu Lauterpacht, and Martin Tracy Lutz, *Legal Regimes of the Arctic*, 82 AM. SOC'Y INT'L L. PROC. 315, 328 (1988).

<sup>107</sup> Holdgate, *supra* note 50, at 245. *See also* Leif E. Christoffersen, *IUCN: A Bridge-BUILDER for Nature Conservation*, in, 22 GREEN GLOBE YEARBOOK 59 (1997).

<sup>108</sup> Holdgate, *supra* note 50, at 231.

<sup>109</sup> Holdgate, *supra* note 50, at 119. *See also* Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 1, 25 (2000). *See also* William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17, 24 - 25 (2000).

Presently, CEL's work is expanding into legal research and education. The IUCN Academy, established in 2004, aims at promoting environmental legal education worldwide.<sup>110</sup> The Academy, headquartered in Canada, aims to create a global network of engaged academic institutions interested in environmental protection.<sup>111</sup>

The Commission's global network of environmental lawyers, who volunteer their services in the preparation of new legal instruments, global, national and regional, provide critical services to strengthening the rule of law.<sup>112</sup>

#### THE COMMISSION ON ECOSYSTEM MANAGEMENT

The Commission on Ecosystem Management (CEM) was established in 1954,<sup>113</sup> to protect natural areas and landscapes and to promote ecological research and related education programs.<sup>114</sup> CEM led the way in shifting efforts from a culture-specific approach to nature "protection" to science-based

<sup>110</sup> See Nicholas A. Robinson, *The IUCN Academy of Environmental Law: Seeking Legal Underpinnings for Sustainable Development*, 21 PACE ENVTL. L. REV. 325 (2004) (for a detailed discussion of the Academy and its mission). See also Nicholas A. Robinson, "Coming 'Round the Bend" – *Global Policy Trends and Initiatives*, SK046 ALI-ABA 179 (2005).

<sup>111</sup> *Ibid.*

<sup>112</sup> Holdgate, *supra* note 50, at 244 -245. See also Commission on Environmental Law – An Overview, <http://www.iucn.org/themes/law/cel01.html>, (last visited March 24, 2006).

<sup>113</sup> Considered a relatively less effective Commission, it has since been recast especially in light of its inability to hold together scientists, many of whom moved either to UNESCO or the International Council for Scientific Unions. Several efforts to revive it, even recasting it at the 1996 Montreal General Assembly, however, has not been effective. See Holdgate, *supra* note 50, 144, 184.

<sup>114</sup> Originally the Commission on Ecology, it was renamed as CEM in the 1994 Buenos Aires General Assembly. After some restructuring it was launched in the 1996 Montreal World Conservation Congress. Holdgate, *supra*, note 50, at 221-230. See also <http://www.iucn.org/themes/cem/aboutus/cem.html>, (last visited Feb. 16, 2006).

“conservation.”<sup>115</sup> The Commission also pioneered the ecosystem approach, which is considered one of the most viable approaches to conserve natural resources.<sup>116</sup>

CEM has worked on multiple issues such as water and soil conservation within protected areas in Asia and Africa;<sup>117</sup> pesticides and toxic chemicals and their effect on conservation;<sup>118</sup> and conservation of wetlands.<sup>119</sup> It also published several papers, notably the “Principles of Ecosystem Management” for the 1996 Montreal World Conservation Congress and the Red List of endangered ecosystems;<sup>120</sup> it also contributed to World Conservation Strategy.<sup>121</sup>

#### THE COMMISSION ON ENVIRONMENTAL, ECONOMIC AND SOCIAL PLANNING

The Commission on Economic and Social Planning (CEESP) was established in 1979,<sup>122</sup> following the Stockholm Conference, to integrate broader environmental goals into existing IUCN programs.<sup>123</sup> CEESP works on

<sup>115</sup> CEM began this task in the 1940s before it was established. Holdgate, *supra* note 50, at 68

<sup>116</sup> For a description of the approach, see,

<http://www.iucn.org/themes/cem/ourwork/ecapproach/index.html>, (last visited Feb. 26, 2006).

<sup>117</sup> Holdgate, *supra* note 50, at 69.

<sup>118</sup> CEM created the committee on Ecological Effects of Chemicals Control in 1961 to advise IUCN. Holdgate, *supra* note 50, at 90.

<sup>119</sup> CEM helped UNESCO organize conferences on wetlands. *Ibid.*

<sup>120</sup> The Commission is also involved in the preparation of the Biodiversity Conservation Information System (BCIS). Holdgate, *supra* note 50, at 230, 231.

<sup>121</sup> CEM provided inputs on terrestrial, freshwater, coastal, and marine ecosystems. Holdgate, *supra* note 50, at 150.

<sup>122</sup> The Commission was formerly known as the Commissions on Environmental and Social Planning, Sustainable Development and Environmental planning or the Commission on Sustainable Development. *Ibid.*

<sup>123</sup> Towards this end CEESP focused on problems in urban fringes, devastated landscapes, resource management tools for Arctic indigenous communities, and the link between people's

sustainable development issues, notably human development, in cooperation with SSC.<sup>124</sup> It focuses on four themes that connect environmental protection with culture, society and economics—collaborative management, environmental security, sustainable livelihoods, and trade and investments.<sup>125</sup> In 1986, the Commission organized the International Conference on the World Conservation Strategy, to address the issue of “conservation in equity,” or concerns of developing countries. It also influenced environmental initiatives in Eastern Europe.<sup>126</sup>

#### THE COMMISSION ON EDUCATION AND COMMUNICATION

The Commission on Education and Communication is a as yet developing initiative, which was established to facilitate collaboration between IUCN and UNESCO in promoting education on conservation.<sup>127</sup> The Commission has

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cultural norms and conservation. Holdgate, *supra* note 50, at 144. *See also* Center for Sustainable Development Environment, <http://www.cenesta.org/>, (last visited March 16, 2006).

<sup>124</sup> In particular, the Commission focuses on the relation between social science and conservation. Holdgate, *supra* note 50, at 204 -205.

<sup>125</sup> *See generally* Mandate of the Commission on Environmental Education Social Policy, <http://www.iucn.org/themes/ceesp/About/About-CEESAThtm>, (last visited Feb. 10, 2006).

<sup>126</sup> Holdgate, *supra* note 50, at 190.

<sup>127</sup> Its inception can be traced back to the point when UNESCO sought IUPN assistance in the preparation of a 1949 conference on education for which, a Committee on Conservation Education was established. The UNESCO-IUCN Conference in 1949 stressed on the need to, ‘educate adults and children to realize the danger which lies in the alteration of natural resources and the necessity of action against such a danger’. Holdgate, *supra* note 50, at 17.

published a significant number of publications on environmental education,<sup>128</sup> but is yet to develop a well-defined environmental education.<sup>129</sup>

In sum, IUCN's Commissions comprise substantial, interdisciplinary expertise on conservation. The work and contributions that these commissions have made, particularly some of them such as CEL bear testimony to the IUCN's extant expert legitimacy.

#### **OVERALL GLOBAL LEGITIMACY:**

Overall global legitimacy refers to an organization's ability to vertically and horizontally integrate international, regional and national conservation efforts, and to collaborate with other international organizations. IUCN's fosters such integration by permitting Members to create committees and Forums within a State, region or part of a region. Such groups enhance cooperation among Members and coordination of IUCN programs.<sup>130</sup> Although Members can

<sup>128</sup> Complementing UNESCO's mandate on education, science and technology, CEC published several educational materials on nature protection for UN member countries Holdgate, *supra*, note 59, at 50,51.

<sup>129</sup> Holdgate, *supra* note 50, at 143-144

<sup>130</sup> Article 66, *supra* note 47. Any proposal for creating a Committee must comply with the IUCN Regulations. Generally, information regarding an effort to establish committees, its proposed chair, rules of procedure and address must be provided to the Director General who may provide advice on its conformity to IUCN Regulations and also inform the Council for consideration for recognition of a Committee. *See* Article 63, *supra* note 47. Further, all committees enjoy certain rights, such as adopting their own constitution, policies, by-laws, sub-committees, observers, and other matters that would promote IUCN goals and programs. Regulation 67, *supra* note 47. The Regulation provides a long list of issues on which the Committee can exercise its authority.

establish only one National or Regional Committee per State or a region, membership is open to all Members in that region or State.<sup>131</sup> Integration is further facilitated by a liaison officer, who coordinates the activities of the Commissions with the IUCN Secretariat.<sup>132</sup>

Moreover, even national and regional committees that establish a legal personality separate from IUCN must “work in partnership with the Secretariat and the Commissions to formulate, coordinate and implement the Programme of

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They also have obligations. For example, a Committee recognized by IUCN must use IUCN name and logo along with the name of the State, Region, or part of a Region as stipulated by the Council. *See* Regulation 65, *supra*, note 57. Recognized Committees are also required to establish their own procedures and structure so long as they send keep the IUCN Director General and the Council informed of their activities and involve them in their meetings. *See* Regulation 66, *supra* note 47. The recognition granted to a Committee may however be rescinded at any time by the Council for undertaking activities inconsistent with that of IUCN, upon the recommendation of the Director General. *See* Regulation 64, *supra* note 47.

<sup>131</sup> In fact, to qualify for recognition a National Committee must allow all IUCN members in a State to apply for its membership and comprise of a majority of members in its State. *See* Regulation 61, *supra* note 47. Similarly, to gain Council recognition, Regional Committees must ensure that all members from a particular region can participate equally in the Committee. *See* Regulation 62, *supra* note 47. All members from a State can join its National Committee and where a State is locate in more than one region a member can either join a Regional Committee where the State is located or the IUCN region to which the State belongs. *See* Article 70, *supra* note 47. They also have obligations. For example, a Committee recognized by IUCN is entitled to use IUCN name and logo along with the name of the State, Region, or part of a Region as stipulated by the Council. *See* Regulation 65, *supra*, note 57. Recognized Committees are also required to establish their own procedures and structure so long as they send keep the IUCN Director General and the Council informed of their activities and involve them in their meetings. *See* Regulation 66, *supra* note 47. The recognition granted to a Committee may however be rescinded at any time by the Council for undertaking activities inconsistent with that of IUCN, upon the recommendation of the Director General. *See* Regulation 64, *supra* note 47.

<sup>132</sup> The Director General nominates the officer. Matters on which the committees and the IUCN Secretariat coordinate include reviewing membership applications, participation in IUCN programs, implementation of World Congress decisions relevant to a particular State or Region, preparations for World Congress sessions, consultations on developing IUCN programs in a particular State or region, consultation sought from IUCN on issues significant to the State or region, and information on visits o IUCN officials and senior staff to a particular State or region. *See* Regulation 68, *supra* note 47.



IUCN within their State or Region.”<sup>133</sup> They must also involve IUCN Regional Councillors and members of Commissions in that region or state to participate in their activities, who in turn bring their expertise to meetings.<sup>134</sup> Councillors establish critical links with between regional members and the IUCN Secretariat.<sup>135</sup>

In addition to Committees, members can organize Forums through which Members participate in the preparation and evaluation of IUCN programmes and activities, prior to the World Congress. The Forum is open to all members in the region of its location.<sup>136</sup>

IUCN’s integration efforts are supplemented by its Conservation for Development Center (CDC), established in 1981. Among several of its functions, the Center advises development aid agencies on incorporating conservation concerns in their development work; provides project assistance to developing countries; promotes international agreements, and assists developing countries in complying with their international obligations. CDC has also catalyzed governments in various regions to take conservation initiatives, leading to an

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<sup>133</sup> Article 71, *supra* note 47. Although the Committees and *fora* have the right to organize themselves they are not allowed to ‘undertake substantial financial obligations’ until their own legal status or personality is approved by the Council. They must be self-governing and cannot impose financial obligations on IUCN unless they are specifically authorized by the Council. *See* Article 69, *supra* note 47.

<sup>134</sup> Article 72, *supra* note 47.

<sup>135</sup> IUCN’s Membership Guidelines, *supra* note 47, at 7.

<sup>136</sup> The Forum can determine its own system of organization as long as it follows the Rules of Procedure of the World Congress. Article 68, *supra* note 47.

increase in the number of IUCN regional offices worldwide.<sup>137</sup> This increased regionalization has strengthened connections between experts in the Commissions, as well as between them and local groups interested in conservation efforts.<sup>138</sup>

The benefits of these regional integration efforts are evident in number of the protected areas and national parks established across the globe in collaboration with IUCN, despite being a Western initiative.<sup>139</sup> In Asia, IUCN initiated conservation programs in several countries.<sup>140</sup> Particularly noteworthy is its wildlife conservation efforts in Africa beginning in the wake of the decolonization.<sup>141</sup> In Latin America, IUCN launched sustainable development programs, and its IUCN-SUR chapters or offices, continue to support

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<sup>137</sup> Backed by sufficient funding and programs, CDC increased the regional presence of IUCN. See Holdgate, *supra* note 50, at 178-180. For a current list of all regions that have IUCN presence, see, <http://iucn.org/en/regions/>, last visited March 24, 2006.

<sup>138</sup> Holdgate, *supra* note 50, at 229.

<sup>139</sup> *Ibid.*, at 63, 186.

<sup>140</sup> These include, Sri Lanka, Indo-China, Nepal, Bangladesh, Vietnam, and Cambodia. In Pakistan, it launched the National Conservation Strategy, to conserve mangrove forests and the surrounding rural regions. In India, it was instrumental in the establishment of the Gir National Forest. See Holdgate, *supra* note 50, at 63.

<sup>141</sup> IUCN's work in Africa began with organizing several conferences in cooperation with UNESCO, FAO, and OAU. The 1960 Warsaw General Assembly approved the Special Africa Project. Several regional advisory councils consisting governmental and non-governmental representatives were created in South Africa and other regions to facilitate its work in the continent. IUCN programmes in Africa extended to Tanzania, Uganda, Namibia, Mauritania, Botswana, Burkina Faso, Chad, Ethiopia, Guinea Bissau, Mali, Niger, Senegal, Malawi, Mozambique, Namibia and Mauritania, in which governments and local NGOs were involved. Holdgate, *supra* note 50, 71-74, 228-229. See generally Joseph R. Berger, *The African Elephant, Human Economies, and International Law: Bridging A Great Rift for East and Southern Africa*, 13 GEO. INT'L ENVTL. L. REV. 417 (2001).

conservation programs.<sup>142</sup> IUCN also launched several programs in Australia and New Zealand, as well as Eastern Europe.<sup>143</sup> All these efforts have significantly influenced national conservation policies, in effect catalyzing harmonization of conservation law and practice.<sup>144</sup>

IUCN also enjoys overall legitimacy because of its long-standing relationship with other international organizations. Since its establishment, IUCN has collaborated with many UN organizations, including UNESCO, FAO,<sup>145</sup> the World Bank and WHO, on conservation related projects.<sup>146</sup> Since the establishment of UNEP at the Stockholm Conference, for which it brought together national representatives and NGOs from developing countries,<sup>147</sup> the two

<sup>142</sup> Holdgate, *supra* note 50, at 208. Some of the countries where these programs were launched are, Argentina, Bolivia, Ecuador, Venezuela, and Peru. *See also* <http://www.sur.iucn.org/>, (last visited March 16, 2006).

<sup>143</sup> The Eastern European Regional Committee of CEC has actively promoted conservation and management programs since 1966 through its offices in Warsaw, Moscow, Prague, Bratislava, and Budapest. *See generally* <http://www.iucn.ru/>, (last visited March 16, 2006).

<sup>144</sup> *See Note, International Union for the Conservation of Nature and Natural Resources: The Issue of Sustainable Development*, 7 COLO. J. INT'L. ENVTL. L. & POL'Y 213, 214, 1996.

<sup>145</sup> For instance, in coordination with UNESCO, FAO and other international organizations, IUCN organized the first international Conference on Nature and Natural Resources in Tropical Southeast Asia in Bangkok, in 1961, which catalyzed the conservation movement in Asia. *See* Holdgate, *supra* note 50, at 88.

<sup>146</sup> *See*

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXT/0,,contentMDK:20041174~menuPK:368096~pagePK:141137~piPK:141127~theSitePK:368057,00.html>, for an instance of IUCN-World Bank collaboration in addressing issues surrounding construction of dams. Similarly, see, <http://www.who.int/zoonoses/institutions/en/>, for an example of WHO-IUCN collaboration on an issue related to the broad area of conservation biology, (last visited March 16, 2006).

<sup>147</sup> Holdgate, *supra* note 50, at 112-113.

organizations have worked together on several projects,<sup>148</sup> to establish “new strategic partnership for the environment.”<sup>149</sup>

Also, the UN General Assembly granted IUCN an observer status in all its proceedings, specifically in acknowledgment of the “intergovernmental organization’s”<sup>150</sup> contribution to complement conservation efforts of the United Nations.<sup>151</sup> Similarly, the International Seabed Authority granted observer status to IUCN, in recognition of its contribution to marine conservation efforts.<sup>152</sup>

In sum, the structure of IUCN facilitates the expansion of a global network on conservation, which boost conservation efforts by providing a platform for a broad range of entities and individuals, both from governmental and non-governmental sectors, and by encouraging experts and others to engage in an open global dialogue. It also provides a valuable alternative model for an international environmental organization. In fact, like WMO, IUCN could be elevated to the

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<sup>148</sup> The World Conservation Strategy published in 1980 to articulate the link between conservation and development was perhaps their most notable joint contribution. It emphasized the importance of taking into account social, economic and other issues into consideration in shaping conservation.

<sup>149</sup> See

<http://www.uneat.org/Documents.Multilingual.Default.asp?DocumentID=424&ArticleID=4737&1=en>, (last visited Dec. 12, 2006).

<sup>150</sup> See Press Release GA/9691,

<http://www.un.org/News/Press/docs/1999/19991217.ga9691.doc.html>, (last visited March 16, 2006). The Status was granted in December 1999.

<sup>151</sup> *Ibid*

<sup>152</sup> See International Seabed Authority Begins Eleventh Session in Kingston, Press Release SEA/1830, 15/8/2005, <http://www.un.org/News/Press/docs/2005/sea1830.doc.htm>, last visited (last visited Dec. 12, 2005).

status of either an UN specialized agency, or an autonomous international environmental organization.

However, such an exercise will depend on several factors, not least of them IUCN's willingness to undertake such a responsibility. This may be especially significant, since even if it agrees to don the mantle of *the* global environmental organization, the Union will have to undergo some transformation to adjudicate on environmental disputes or similar such responsibility, as required under the modern legal system. Further, other UN agencies and programs addressing environmental issues, of which there are several as described in Appendix II, may not be willing to share their powers and functions. Thus, this too may require some restructuring.

The main focus of this discussion, however, is not to provide an answer to all the discussions on global environmental governance. Rather, it is merely to draw attention to more legitimate models for restructuring environmental organizations.

## **CHAPTER 4**

### **A BRAVE NEW ENVIRONMENT**

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For several decades, continuous efforts have been made to strengthen global environmental governance and to ensure that natural resources are used in a fair, sustainable and just manner for present and future generations. Deep disparities in economic conditions and in ideological pursuits hindered the full realization of these goals. The current world order presents an opportunity to strengthen environmental governance in a systematic manner.

As examined in Chapter 1, globalization is changing the world. There are no ideological conflicts on the issue of economic development among countries similar to those of the Cold War period. Many countries are adopting comparable development strategies and approaches, driven by the engine of global free trade. By creating a global open market, trade is bolstering globalization. Free trade, and thus globalization, is in turn galvanized by the technological development of the 1990s that revolutionized global communications and connectivity. The result is the rise of a global community—a pervasive sense of experiencing the same issues and problems, as well as expecting and aspiring for common lifestyles, unconfined by the “national position.” States do not necessarily represent the views of their people on all issues always. On many issues, the notion of state sovereignty itself is shifting.

These consequences of globalization will be dangerous to the sustained availability of natural resources if the process is inadequately channeled. Many countries that rigorously pursue resource-intensive strategies will increase environmental problems and substantially add to the current array of global problems. However, if it is properly channeled, globalization provides an opportunity to build coherent and effective global environmental governance mechanisms. The convergence of expectations of better environmental conditions, increased interaction among people sharing common concerns without relying solely on State representation, and a growing hope of better economic conditions from trade and development fuel such the opportunity to coherently strengthen environmental governance. Much like a tool to cut diamonds, globalization can only be managed by globalization. The challenges of the process are best met by tapping its benefits. Hence, strengthening global environmental governance requires not a reversal of globalization, or of free trade, but the creation of mechanisms that can deliver adequate protection to the environment, and implicitly drive globalization into a direction of a more just world order.

A governance mechanism that requires foremost attention is the rule of law and strengthening of global rules on environmental protection. One of the first important steps is the discontinuance of *ad hoc* treaty making. The practice of negotiating treaties in response to one specific problem is no longer satisfactory. In the current global order, there are myriad common environmental problems and

common expectations for resolving these problems calling for a more affirmative approach to rule-making. This requires the establishing of systematic rules on various aspects of environmental protection, drafted at the international level and applicable uniformly at the national level. Such rules should enjoy primacy over unilateral regional or domestic rules on environmental protection or related issues.

As analyzed in Chapter 2, GATT 1994 and related agreements, or WTO law, reveals that WTO is successful in strengthening the rule of law on free trade because its legal structure satisfies the positive law requirements of a modern legal system, as propounded by Hart. Both Members and non-members share internal and external viewpoints on the legal obligations under WTO law. The law comprises primary rules as well as secondary rules of recognition, change, and adjudication. Additionally, WTO law provides enforcement and sanctions provisions. The current body of international environmental law, on the other hand, does not constitute such a modern legal system.

As seen in Chapter 2, declarations and resolutions, or “soft law,” cannot be considered positive law. Customary international law is not regarded by states as requiring obedience and, furthermore, it does not comprise secondary rules. While MEAs establish primacy over national rules and create uniform standards, states do not necessarily share external and internal viewpoints with respect to all treaties. Similarly, not all MEAs provide for rules of change, and their rules of



adjudication are poorly developed and highly restricted due to a lack of enforcement mechanisms.

Therefore, a modern legal system for environmental protection, or a global environmental legal system needs to be established, on the basis of the existing WTO law model. This in turn requires the adoption of an integrated treaty that sets out rules of recognition for all primary global environmental rules, and which provides adequate rules of adjudication and change, as well as administrative structures, in the same way that WTO law provides.

To date, attempts to establish an integrated treaty on environmental protection have failed. Determining the scope of environmental law is a challenge in this regard, which has to be addressed. Ultimately, the creation of a global environmental legal system depends on the existence of a universal perception of “environment.” Generally, lack of common experiences and insufficient scientific knowledge limits the growth of such a common perception. But, globalization enables the formation of a universal perception, of shared external and internal viewpoints, and provides a basis for establishing a comprehensive treaty.

The integrated treaty should comprise secondary rules that are archetypal of environmental protection. Conservation of natural systems and natural resources is such an archetype, and would serve as the rule of recognition for all other rules. The treaty should also provide rules of adjudication and dispute

settlement mechanism should be created to address all environmental disputes. Any exception to the rules must be provided within the treaty.

Primary rules should be developed and to the extent possible address not only the commons, but also national issues, such as water pollution standards. These standards may in turn be structured to apply in the context of processes used to manufacture products that are part of global trade. Other MEAs can be clustered within the integrated treaty.

In addition to establishing a global environmental legal system, attention must be paid to properly administering it. This can only be done through an international organization. Such organization, however, may not merely be another powerful bureaucratic mechanism. As globalization gains momentum there is heightened concern about creating powerful bureaucratic mechanisms without checks and balances. In fact, its weak legitimacy is one of the most common criticisms leveled against WTO, as mentioned both in Chapters 1 and 3. It would, therefore, be myopic to assume that shifting centers of power from states to international bureaucracies will strengthen global environmental governance. It is critical to establish a legitimate and effective administrative authority.

The legitimacy of an organization can be measured through certain criteria. It must ensure substantial public participation, which can be best assured by extensive networking between governmental and non-governmental bodies

within the organization. It must also support democratic participation in making decisions; there must be a sense of community in the decision-making process. This sense, as explained in the third chapter, can be created by increasing expert participation and by ensuring that both state and non-state actors participate together in the process. Furthermore, the organization must provide sufficient room for discussion and deliberation throughout its network system, at local and national, and at regional and international levels.

The World Conservation Union (IUCN) is a global conservation organization that has demonstrated that an international organization can achieve such legitimacy. Its network of experts from different disciplines has led to the development of one of the most comprehensive approaches to conservation, biological diversity conservation, one among its many other achievements. The structure of IUCN, comprising both governmental and non-governmental members, its vast network of experts within the six Commissions, its committees and general functioning mechanism foster its global legitimacy.

However, IUCN has no rule-making or adjudication powers. Moreover, there are several UN organizations, agencies and programmes competitively involved in environmental decision-making.

Thus, a few alternatives may be considered in providing an administrative structure to manage the global environmental legal system. The first is the establishment of a new organization that duplicates IUCN' structure, but that has

more “teeth” to effectively administer the legal system. Alternatively, UNEP could be restructured along the lines of IUCN and be vested with dispute settlement and related authority.

In conclusion, establishing another environmental organization, by whatever name, will not help resolve deep issues surrounding environmental protection. What is required is a concerted effort to build consensus towards establishing a treaty, even if it takes thirty plus years, as in the case of WTO, while at the same time maintaining efforts to address immediate concerns. Further, as international organizations come under increasing scrutiny, and given the nature of the subject matter, an organization that is more inclusive and legitimate, as well as equipped with dispute settlement and enforcement mechanisms. Falling short of these necessary steps, may not actually lead to strengthening global environmental governance.

## **APPENDIX I**

### **ADMINISTRATION OF IUCN**

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In addition to the commissions and committees discussed in Chapter III, IUCN consists of three main organs—the Secretariat, Congress and Council. The work of the Congress has been discussed in Chapter III as an integral part of IUCN’s legitimacy. However, the structure and functions of the Secretariat and the Council, as well as financial management of IUCN were not discussed since they do not directly relate to the legitimacy of IUCN. At the same time, understanding these three aspects is required to get a complete picture of IUCN’s structure, as discussed in this Appendix.

#### **THE SECRETARIAT**

The IUCN Secretariat is headquartered in Gland, Switzerland with a decentralized system of regional, outpost, and country offices<sup>1</sup> with over 1000 full time staff located in 62 countries.<sup>2</sup> The Director General heads the Secretariat. The Secretariat is structured around four broad areas – Regional Offices, Global Programme, Global Strategies, and Global Operations. The regional offices are headed by Directors who report to the Director-General and who implement IUCN’s activities in their regions. The Global Programme comprises numerous programmes and themes to implement IUCN’s programme of work throughout the world. The Global Strategies manages aspects, such as budgets and finance,

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<sup>1</sup> See <http://www.iucn.org/en/about/#5>, (last visited Feb. 10, 2006).

<sup>2</sup> *Ibid.*

membership and governance, and communications and publications. The Global Operations area is focused on technical aspects such as administration, finance, human resources, information technology management, and legal counsel.<sup>3</sup>

Within these broad focus areas, the Secretariat carries out three levels of functions —governance related, programme-related, and Membership-related. Its governance-related activities include facilitation of the work of the IUCN Congress and the Council, discharging “the provisions of the Statutes and Regulations,” implementing IUCN policies, and managing finances.<sup>4</sup> Its programme-related activities include acquisition and integration of member inputs into IUCN Programme and policies, implementing IUCN’s Programme globally, regionally, and nationally in collaboration with its Members, disseminating “knowledge on science, policy and practice of conservation, and the ecologically sustainable and equitable use of resources,” and advocating “IUCN policies and positions in international fora relevant to the objectives of IUCN.”<sup>5</sup> Its membership-related activities include the engagement of members in IUCN governance and also in connecting them with the Commissions, which have been discussed in Chapter III.<sup>6</sup>

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<sup>3</sup> National NGOs are defined as “institutions and associations incorporated within a State” – Article 5(d).

<sup>4</sup> IUCN Regulation 3(a).

<sup>5</sup> IUCN’s Membership Policy Guidelines and a Compilation of the Provision of the Statutes and the Regulations; hereinafter Statute provisions will be referred to by the appropriate Article and Regulations as Regulation, available at <http://www.iucn.org>, (last visited Feb. 10, 2006), at 8.

<sup>6</sup> *Ibid.*

### THE COUNCIL

The Council is composed of 32 Members who “serve the interests and needs of the global Union.”<sup>7</sup> The Councillors are elected every four years at the World Conservation Congress. They serve in their personal capacity and not as representatives of their respective States or Organizations. The Council “represents the collective membership in its policy-making functions and has responsibility for the oversight of the affairs of the Union.” It comprises a President, Treasurer, three Regional Councillors representing IUCN’s eight statutory regions,<sup>8</sup> a representative from Switzerland where its headquarters is located, IUCN Commission Chairs, and five additional Councillors whom the Council may appoint based on their qualifications and expertise.<sup>9</sup>

The Regional Councillors must bring their “overall knowledge of conservation issues, policies, priorities and programmes in their own region” to the Council. They are considered the link between their regional members, including Committees, and other components of IUCN, especially the

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<sup>7</sup> IUCN’s Membership Policy Guidelines and a Compilation of the Provision of the Statutes and the Regulations; hereinafter Statute provisions will be referred to by the appropriate Article and Regulations as Regulation, (last visited Feb. 10, 2006).

<sup>8</sup> The eight regions are Africa, Meso and South America, North America and the Caribbean, South and East Asia, West Asia, Oceania, East Europe, North and Central Asia and West Europe.

<sup>9</sup> *Ibid.* See also <http://www.iucn.org/members/council/index.htm>, (last visited Feb. 10, 2006).

Secretariat.<sup>10</sup> Commission Chairs who are members of the Council must bring “expertise and knowledge from their volunteer networks” to IUCN.<sup>11</sup>

The main function of the Council is to provide “strategic direction for the activities of the Union, the discussion of specific policy issues and the provision of guidance on finance and the membership development of the Union.”<sup>12</sup> It carries out several other functions, including approving IUCN’s annual programme and budget for activities decided at the Congress and appointing and evaluating the work of the Director General.<sup>13</sup> The Council meets twice a year.

### **FINANCIAL ARRANGEMENTS WITHIN AN INTEGRATED STATE-NON-STATE SYSTEM**

IUCN derives its finances from various sources including, membership dues, contracts, donations, and investments.<sup>14</sup> Presently, IUCN’s programme and activities are funded mainly by bilateral government agencies. This income is supplemented by funding from “multilateral and intergovernmental institutions, international conventions, non-governmental organizations, foundations,

<sup>10</sup> IUCN’s Membership Guidelines, *supra* note 7, at 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> <http://www.iucn.org/members/council/>, (last visited March 16, 2006).

<sup>13</sup> The work is done through Committees. The Committees are Finance and Audit, Human Resources Policy Committee, Membership Committee, Programme and Policy Committee, and Preparatory Committee for the next World Conservation Congress. *Ibid.*

<sup>14</sup> See Article 87 of the Statutes and Regulations of IUCN, 1948 as revised in 1996 and amended in 2004. In its early days, IUCN attempted to create a separate wing for funding its activities, the World Wildlife Fund, which eventually became a separate unrelated entity. See also MARTIN HOLDGATE, THE GREEN WEB, 1998.



corporations and individuals” along with membership dues.<sup>15</sup> In order to improve the flow of funding a Corporate Strategy Group was created in 2002 to ensure “an effective coordinated membership, communications, fundraising, donor relations, publications and multilateral relations programmes.”<sup>16</sup> On the financial side, the strategy resulted in expanding the Donor Relations Unit (the Unit) into a Conservation Finance and Donor Relations Unit to go beyond conventional financial system to a “sustainable conservation finance mechanisms” or funding that would enable the creation of long-term financing to protect the environment. Illustrations of such mechanisms are, “conservation trust funds, tourism-based user fees, debt-for-nature swaps, natural resources extraction fees and investment funds to support biodiversity-friendly businesses.”<sup>17</sup>

More systematically, the Unit has recognized what it terms as Key Results Areas or KRA where it tries to maximize funding as well as manage the funds effectively and efficiently. In order to achieve these goals, it has focused on a few basic targets that were identified in 2001, namely expanding the relationship with bilateral partners and multilateral agencies, and increasing the core funding base from all sources.<sup>18</sup> Bilateral partnerships have been strengthened by creating a Joint General Framework Agreement (JGFA) between IUCN and its core donors

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<sup>15</sup> See THE WORLD CONSERVATION UNION, CONSERVATION FINANCE & DONOR RELATIONS UNIT PROGRESS AND ASSESSMENT REPORT -2002, IUCN/SMW/28FEB03, p. 1, <http://www.iucn.org>, (last visited Feb. 10, 2006) (on file with author).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra* note 7.

<sup>18</sup> *Supra* note 7, at 2.

through which funding is provided for Intersessional Programmes or for activities between the Congresses rather than for a particular programme or project. As the result, the Report indicates that there has been an equitable sharing of the funding burden among the several governmental agencies and an increase in the funding base from SFR 10, 152 million in 2000 to SFR 15, 857 in 2001.<sup>19</sup> There has also been an increase in the regional programme financing reported because the new Agreement.<sup>20</sup>

In improving multilateral institutional funding, IUCN acquired a General Assembly Observer Status in 2000 thereby renewing its close work with GEF, UNEP, UNDP, and UNESCO as well as regional development banks. As a result it has been successful in obtaining some funding from GEF for two regional programmes.<sup>21</sup>

Finally, IUCN expanded its funding from the private sector and entered into innovative schemes to increase its income such as an Earth Future Lottery and arrangements with a toy maker to manufacture toys of threatened animals, proceeds from which would generate donations for IUCN.<sup>22</sup> In 2002 it also created a Conservation Finance Alliance (CFA) to increase outreach and

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<sup>19</sup> *Supra* note 7, at 3.

<sup>20</sup> *Ibid*, at 3-4.

<sup>21</sup> *Supra* note 7, at 4

<sup>22</sup> *Supra* note 7, at 5-6.

education with respect to conservation by using different media. Similar funds have been created such as the Gulf and Russian Conservation Funds.<sup>23</sup>

The new strategies adopted by IUCN showed their worth in the substantial contributions received by IUCN in 2002 from countries, multilateral agencies, foundations, and other sources. It received over 12 million Swiss Francs from multilateral agencies and substantial contributions from some governments and others.<sup>24</sup> Of these finances, IUCN allocated 69% to Regional Programmes while 18% went into Global Thematic Programmes<sup>25</sup> and 13% for the rest.<sup>26</sup>

Despite these innovative funding arrangements, OECD has indicated that the amount of funding required for addressing biodiversity concerns is greater than the funding that is currently available to address the problems. At the same time the fact that IUCN has been continuing to maintain its finances in order to obtain funds to address numerous problems in different parts of the world demonstrates that network organizations can attract diverse sources of funding, which is presently essential for environmental initiatives.

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<sup>23</sup> *Ibid*, at 7.

<sup>24</sup> See IUCN CHARTS, FIGURE 2, 2002 CONTRIBUTIONS FROM IUCN'S DONORS RESTRICTED FUNDS (IN MILLIONS OF SWISS FRANCS), available at <http://www.iucn.org/en/about/finances.htm>, (last visited March 16, 2006).

<sup>25</sup> For an allocation overview on programmes such as environmental law, policy and international biodiversity agreements, and protected areas, see, Figure 4, 2002 Total Expenditure by Global Thematic Programme, *ibid*.

<sup>26</sup> See Figure 3, 2002 Total Expenditure, *supra* note 24.

## APPENDIX II

### STRUCTURE AND ENVIRONMENTAL FUNCTIONS OF KEY UN ORGANIZATIONS

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A number of international organizations address environmental issues and influence environmental policy and law presently. The structure and functions of some key agencies and programmes within the United Nations, including UNEP, which is generally accepted as the central international environmental organization, are described below.

#### 1. THE UNITED NATIONS ENVIRONMENT PROGRAMME

The United Nations Environment Programme (UNEP), headquartered in Nairobi, Kenya, was created in 1972 to implement the Action Plan on Human Environment.<sup>1</sup> Since it was established as a Programme within ECOSOC, UNEP is required to report to ECOSOC on the implementation of its mandate, which include identification and assessment of environmental problems.<sup>2</sup> The ECOSOC, in turn, reports UNEP's findings to the General Assembly, which determines whether a resolution is necessary to take action. This system varies from the approach taken to address certain other issues, such as agriculture or health, in that these are addressed by specialized agencies such as FAO or WHO. The structure and functions of UNEP are discussed below.

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<sup>1</sup> See Resolution on the Institutional and Financial Arrangement for International Environment Cooperation (Establishing the United Nations Environment Programme, UNEP), adopted by the U.N. General Assembly, 15 December 1972. G.A. Res.2997, U.N. GAOR, 27<sup>th</sup> Sess., Supp. 30, at 42, U.N. Doc. A/8370 (1973), *reprinted in*, 13 I.L.M. 234 (1974). The Action Plan set out three main functions for UNEP to perform, environmental assessment, environmental management, and supporting measures.

<sup>2</sup> *Ibid.*

### 1.1. The Governing Council

The Governing Council is the central organ of UNEP.<sup>3</sup> It is composed of 58 members who are elected by the UN General Assembly for a term of four years. To ensure adequate regional representation, reservations have been made for representation from different countries – 16 seats for African States, 13 seats for Asian States, 6 seats for Eastern European States, 10 seats for Latin American States, 13 seats for Western European States and other States.<sup>4</sup>

The main functions of the Governing Council, as envisaged in the 1972 General Assembly Resolution, include the promotion of international environmental cooperation by recommending appropriate policies, providing guidance for environmental policy coordination within the UN System, reviewing the Executive Director's reports on environmental programme implementation within the UN system, ensuring that emerging environmental problems of an international magnitude receive appropriate consideration from Governments, promoting data collection and exchange with emphasis on scientific information, monitoring the effect of national and international policies on developing countries while at the same time ensuring that these policies and laws are compatible with their development priorities, and reviewing and approving the use of the Environment Fund for various programmes.<sup>5</sup> The Governing Council reports to the UN General Assembly through the ECOSOC.<sup>6</sup>

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<sup>3</sup>See General Assembly Resolution A/Res/2997 (XXVII) of 15 December, 1972, (Institutional and Financial Arrangements for International Environmental Cooperation), in United Nations General Assembly Official Records, 26th Session, Supp. No. 30, at 43.

<sup>4</sup> *Ibid.*, Part I, para 1.

<sup>5</sup> See <http://www.unep.org/resources.gov.overview.asp>, (last visited Feb. 10, 2006).

<sup>6</sup> *Ibid.*

The details of the internal functioning of the Governing Council has been determined by the Council itself in the form of a set of Rules of Procedure (the Rules), which were first published in 1973 and have been amended over a period of time.<sup>7</sup>

### *1.1.1. Internal Functioning of the General Council*

Under the Rules, the Governing Council holds ‘one regular session every two years’<sup>8</sup> at the UNEP headquarters in Nairobi, Kenya, unless decided otherwise.<sup>9</sup> The quorum of the Governing Council is constituted by a majority of its members.<sup>10</sup>

At the regular sessions members of the Council elect its officers – a President, three vice-presidents and a Rapporteur, which together constitute the Bureau of the Governing Council. The office of the President or other officers can only be held so long as the state they represent remains a member of the Governing Council.<sup>11</sup> The Bureau, led by the President, must provide assistance to the Council in conducting its business. It holds its own meetings in which other committees or working groups may participate.<sup>12</sup> Mirroring the Governing Council itself, the Bureau’s composition must ensure ‘equitable geographical representation’.<sup>13</sup>

The provisional agenda for each session has to be provided by the Executive Director of UNEP. It must contain items that are suggested by either the Governing Council, any UN member state, member of a UN specialized agency or the International

<sup>7</sup> UNEP Rules of Procedure of the Governing Council, United Nations, New York, 1988, <http://www.unep.org/resources.gov.overview.asp>, (last visited Feb. 10, 2006)

<sup>8</sup> *Ibid.* Rule 1; Rules 2-3 specify the manner in which the dates for a session may be determined or changed.

<sup>9</sup> Rule 4, *supra* note 7.

<sup>10</sup> *Ibid.*, Rule 31.

<sup>11</sup> Rule 21, *supra* note 7.

<sup>12</sup> Rule 13, *supra* note 7. This is ensured by requiring that the offices of the President and of Rapporteur be rotated among the five groups of states mentioned in the 1972 GA Resolution, see, *supra* note 3. Rule 60 specifies all the groups that may participate in the meetings.

<sup>13</sup> Rule 18 (2), *supra* note 7.

Atomic Energy Agency (IAEA), the General Assembly, ECOSOC, or the Executive Director. The agenda must also reflect the suggestions of the 'Environment Coordination Board, a specialized agency, the International Atomic Energy Agency, and appropriate United Nations Body, or an intergovernmental organization'<sup>14</sup> as described in Rule 68.<sup>15</sup> Once the Council adopts the provisional agenda, the Executive Director must communicate it to relevant members.<sup>16</sup> This is followed by the adoption of the agenda subject to any suggestions by the General Assembly, ECOSOC or a member of the specialized agencies.<sup>17</sup>

The items on the agenda are allocated by the Council among its plenary meetings, session committees and working parties, which it creates by authority of Rule 60.<sup>18</sup> The Council may also allocate items for execution to its subsidiary organs,<sup>19</sup> or the Executive Director for further study or to prepare a report.<sup>20</sup>

Under certain circumstances, the Council may also hold special sessions, such as a request from the majority of the Council Members, the UN General Assembly, ECOSOC, or by five UN states members or a specialized agency, provided a majority of

<sup>14</sup> Rule 9 (3), *supra* note 7.

<sup>15</sup> Rule 9, *supra* note 7. Rule 68 allows specific organizations to participate in the deliberations of the Council.

<sup>16</sup> Under Rule 10 the relevant members include, "all State Members of the United Nations or members of the specialized agencies and of the International Atomic Energy Agency, the Chairmen of subsidiary organs of the Governing Council as appropriate, the President of the General Assembly when the Assembly is in session, the President of the Economic and Social Council, the appropriate United Nations bodies, the specialized agencies, the International Atomic Energy, the intergovernmental organizations referred to in rule 68 below and the international non-governmental organizations referred to in rule 69 below." Rule 69 international non-governmental organizations are those with special interest in the environmental field that have been granted an observer status to attend the meetings. *Supra*, note 13

<sup>17</sup> Rules 11, 12, and 15, *supra* note 7. Supplementary agenda may be added if necessary to UNEP.

<sup>18</sup> *Ibid.*

<sup>19</sup> The Governing Council can establish subsidiary organs or expert groups either on an expert basis or on a permanent basis.

<sup>20</sup> Rule 21, *supra* note 7.

the Council members approves such request.<sup>21</sup> Only urgent items may be included in the provisional agenda for discussion and these too must be communicated to all the entities, specified in Rule 10, to whom a normal session agenda is distributed.<sup>22</sup>

The formalities of General Council meetings are carried out by the President of the Bureau. The President has various powers and functions to steer and control the formalities of all Council meetings.<sup>23</sup> Elaborate provisions are made for allocation of speakers and intervention during the Council meetings.<sup>24</sup> For instance, representatives can seek suspension or adjournment of a meeting during the discussion of any matter, which the President can grant based on majority votes.<sup>25</sup> Further, representatives may also present motions to immediately address priority matters, adjourn a debate with respect to a question being discussed, or close discussions on a specific issue being debated in the meeting.<sup>26</sup> Provision is also made to address matters such as adoption of proposals, amendments to proposals, the voting procedure, elections, and voting rights of the members.<sup>27</sup>

In addition to regular members and Officers of the Council, special groups may be established periodically. The Council is authorized to establish subsidiary organs either on a permanent or on an *ad hoc* basis, either to assist in discharging its functions or to form an expert group when considering specific problems and making

<sup>21</sup> Rule 5, Rules 6-8 provides details of holding special sessions, *supra* note 7.

<sup>22</sup> *Supra* note 7, Rule 14.

<sup>23</sup> *Ibid*, Rule 33. *See supra* note 7, Rule 36 (for procedures regarding as appealing the President's decision). For example, under Rules 32 and 34, the President has the authority to open and close sessions, direct discussions, ensure that all rules are observed, and "accord the right to speak, put questions to vote, and announce decisions."

<sup>24</sup> Rules 34-40, *supra* note 7.

<sup>25</sup> Rule 41, *ibid*.

<sup>26</sup> Rule 42, *supra* note 7.

<sup>27</sup> Rules 43-58, *ibid*.



recommendations.<sup>28</sup> Such a subsidiary organ could include UN State members, members of the IAEA or UN specialized agencies based on their special interest in the subject matter and regional representation.<sup>29</sup> A subsidiary organ is bound by the same Rules of Procedure as the Council but may elect its own officers<sup>30</sup> and set its own priority within its work Programme.<sup>31</sup>

Similarly, the Council has the authority to establish working groups and session committees to refer specific items on its agenda for further study.<sup>32</sup> These committee or groups may establish sub committees or groups so long as they follow Council Rules 31-58.<sup>33</sup>

Finally, there are specific rules with respect to the languages in which meetings have to be recorded, sound recorded, and resolutions and other documents distributed.<sup>34</sup>

### *1.1.2. Participation of Non-Members in GC Proceedings*

Following the 1972 GA resolution to foster information sharing among scientific and other professional experts, three kinds of non-members can participate in GC meetings.<sup>35</sup> The first of non-members consists of states that are not represented in the GC, members of a specialized agency and members of IAEA. Although participants falling under this category do not have a right to vote they may submit proposals subject to vote and, similarly, participate in meetings of subsidiary organs.<sup>36</sup> The second category

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<sup>28</sup> Rule 62 (1), *supra* note 7.

<sup>29</sup> *Ibid*, Rule 62 (2).

<sup>30</sup> Rule 62 (3), *supra* note 7.

<sup>31</sup> *Ibid*, Rule 62 (4).

<sup>32</sup> Rule 60 (1), *supra* note 7.

<sup>33</sup> *Ibid*, Rules 60 (2) and (3).

<sup>34</sup> Rules 63-65, *supra* note 7.

<sup>35</sup> Part I, Para 5, *supra* note 9.

<sup>36</sup> Rule 67, *supra* note 7.

of participants consists of representatives of specialized agencies, IAEA, other UN bodies, and other intergovernmental organizations specified in the 1972 GA resolution. This includes intergovernmental organizations that are interested in environmental issues and that are invited by the Council.<sup>37</sup> While they cannot vote in the proceedings, these participants may submit written statements to the Council.<sup>38</sup> The third category is non-governmental organizations with interest in the field. They can designate a representative as an observer in public meetings of the Council and its subsidiary organs.<sup>39</sup> Observers may not vote or submit written statements, unless they are permitted to make submissions by the President or Chairman of the Council.<sup>40</sup>

### *1.1.3. Other Aspects*

In carrying out its functions the Governing Council has developed several programmes. In its efforts to identify international environmental problems and strengthen its action, it launched the Montevideo Programme in 1982. This programme is intended to periodically review environmental law and to strengthen enforcement and compliance.<sup>41</sup> The Governing Council has periodically adopted recommendations made by senior governmental officials with the Council as part of the Montevideo Programme in three phases.<sup>42</sup>

<sup>37</sup> *Supra* note 9, Part IV, Para 5. It states that the GA ‘also invites other intergovernmental and not-governmental organizations that have an interest in the field of the environment to lend their support and collaboration to the United Nations with a view to achieving the largest possible degree of co-operation and co-ordination’.

<sup>38</sup> Rule 68, *supra* note 7.

<sup>39</sup> Rule 69 (1), *ibid.*

<sup>40</sup> Rule 69 (2), *supra* note 7.

<sup>41</sup> Report of the Ad Hoc Meeting of Senior Government Officials Experts in Environmental Law, UNEP/GC/10/5/Add. 2, Annex, Ch. 11 (1981).

<sup>42</sup> *See generally* UNEP’S Environmental Law Activities: a 30 year review from Stockholm to Johannesburg, Global Judges Symposium, Johannesburg, 18-20, August 2002, UNEP (DPDL)/GJS/1/3, 19th July, 2002 (ON FILE WITH AUTHOR).

In 1999 the General Assembly adopted a resolution by which a Global Ministerial Environment Forum, comprising of senior government officials, is convened annually either as part of the Council's regular or special session.<sup>43</sup> At its first meeting the Forum adopted the Malmö Declaration, which among other matters emphasized on strengthening international environmental law, on improving the coordination between MEAs and on ensuring enforcement and compliance with the laws.<sup>44</sup>

In sum, the Governing Council is the fulcrum of UNEP where important decisions on international environmental cooperation are initiated.

### 1.2. The Secretariat

The Environment Secretariat of UNEP headed by the Executive Director is responsible for the operational and administrative functioning on UNEP. Primary among its functions are coordination of environmental action within the UN system, providing support to the Council, rendering advice to other intergovernmental bodies within the UN on environmental programs in consultation with the Council, ensuring the involvement of scientific and other professional communities in environmental programs, and administering the Environment Fund.<sup>45</sup> The Secretariat carries out its functions under the supervision and advice of the Governing Council. The powers and functions of the Executive Director and the Secretariat further elaborated in the Rules of Procedure.<sup>46</sup>

The Office of the Executive Director includes a Deputy Executive Director, a Secretariat for Governing Bodies, units for evaluation and oversight, resource

<sup>43</sup> See General Assembly Resolution 53/242, (Report of the Secretary-General on Environment and Human Settlements), 28 July 1999.

<sup>44</sup> See generally [www.unep.org](http://www.unep.org), (last visited March 16, 2006).

<sup>45</sup> See General Assembly Resolution A/Res/2997 (XXVII) of 15 December, 1972, (Institutional and Financial Arrangements for International Environmental Cooperation), Part II.

<sup>46</sup> *Supra* note 7.

mobilization, and programme coordination and management all report to the Executive Director or to the Deputy Executive Director. Several departments are also directly headed by the Directors, notably the departments on communication and public information; early warning and assessment; environmental policy implementation; technology, industry, and economics; regional cooperation, environmental assessment, and GEF coordination.<sup>47</sup>

Although the Executive Director primarily exercises executive powers and functions, some perceive the role of the Directors as pivotal in the negotiations of MEAs and initiation of other international environmental programmes.<sup>48</sup>

### 1.3. The Environment Fund

The activities of UNEP are primarily funded by the Environment Fund, which is built on voluntary contributions.<sup>49</sup> The Fund was originally aimed at financing programs that primarily focused on building an environmental data base, disseminating information on environmental management, public education, and research on better technological options for balancing economic growth and environmental protection.<sup>50</sup> The Executive Director, in charge of operating the Fund, is also responsible for taking into account the special needs of developing countries. Other requirements with respect to the Fund are laid out in the Council's Rules of Procedure.<sup>51</sup> Under the Rules, in expending the Fund

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<sup>47</sup> See UNEP Organigramme available at, <http://www.unep.org.Organigramme>, (last visited March 16, 2006).

<sup>48</sup> See e.g. MUSTAFA K. TOLBA AND IWONA RUMMEL-BULSKA, GLOBAL ENVIRONMENTAL DIPLOMACY: NEGOTIATING ENVIRONMENTAL AGREEMENTS FOR THE WORLD 1973-1992, (1998).

<sup>49</sup> *Supra* note 9, Part III, Para 1.

<sup>50</sup> *Ibid*, Part III.

<sup>51</sup> *Supra* note 7.

the Executive Director is required to seek the approval of the Council, which has to take into account the priority and urgency of a project before approving a proposal.<sup>52</sup>

In addition to the Environment Fund, UNEP receives funding through other sources, including the Global Environmental Facility (GEF). GEF was established by donor countries in 1991, during preparation for the Earth Summit, as an independent funding mechanism for environmental programmes.<sup>53</sup> UNEP also receives funds for hosting the Secretariat of several MEAs. Despite these sources, funding UNEP remains a challenge. Some other Programmes receive more funding than UNEP.<sup>54</sup> Moreover, the system of voluntary contributions implies that member states are not bound to finance UNEP activities.<sup>55</sup> Finally, the budget allocation for environmental programmes within specialized agencies such as UNESCO and FAO are also substantial and carried by the same member states.<sup>56</sup>

Some of the main programs and treaties initiated by UNEP are as follows – its programs include the Earthwatch Network, the Global Resources Information Database (GRID), the Global Environment Monitoring System (GEMS), the Global Resource Information Database (GRID), the International Environmental Information System

<sup>52</sup> *Ibid*, available at, <http://www.unep.org>, (last visited Jan. 16, 2006).

<sup>53</sup> See <http://www.gefweb.org/>, last visited, 3/16/06. See also, Stephen A. Silard, *The Global Environment Facility: A New Development in International Law and Organization*, 28 GEO. WASH. J. INT'L. L. & ECON. 607 (1995). For an evaluation of GEF, see, Alan S. Miller, *The Global Environmental Facility and the Search for Financial Strategies to Foster Sustainable Development*, 24 VT. L. REV. 1229 (2000).

<sup>54</sup> See generally, Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291 (1990).

<sup>55</sup> Matthew Heimer, *The UN Environment Programme: Thinking Globally, Retreating Locally*, 1 YALE HUM. RTS. & DEV. L. J. 129, 137 (1998).

<sup>56</sup> UNESCO receives funding both from Members and other sources. See [http://portal.unesco.org/en/ev.php-URL\\_ID=3978&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=3978&URL_DO=DO_TOPIC&URL_SECTION=201.html), (last visited March 24, 2006). See also REGULAR BUDGET AND EXTRA BUDGETARY FUNDS, available at, [http://portal.unesco.org/en/file\\_download.php/393373f1410ecf35b97653c87937e30dBudget+and+Extrabudgetary+Funds.pdf](http://portal.unesco.org/en/file_download.php/393373f1410ecf35b97653c87937e30dBudget+and+Extrabudgetary+Funds.pdf), (last visited March 24, 2006). For FAO's budget, see, [http://www.fao.org/UNFAO/about/budget\\_en.html](http://www.fao.org/UNFAO/about/budget_en.html), (last visited March 24, 2006).

(INFOTERRA) and the International Register for Potentially Toxic Chemical (IPRTC).<sup>57</sup>

It has also worked with developing countries in establishing environmental ministries and agencies to enable them to strengthen their domestic response to environmental problems.<sup>58</sup> In addition to these programs, UNEP has facilitated the negotiation of major MEAs, including the UN Convention on the Transboundary Movement of Hazardous Waste, the United Nations Framework Convention on Climate Change, and the UN Convention on Persistent Organic Pollutants (POPS). Most notable of its achievements, however, is the Regional Seas Programme in the Mediterranean.<sup>59</sup>

UNEP also has several regional and liaison offices. It also has ‘out-posted’ offices that address specific issues. For instance, in The Hague UNEP has the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA) in The Hague, and various offices in Geneva, such as the Global International Waters Assessment, Earth Watch Coordination Office, and the Post Conflict Assessment Branch, as well as several UN programmes and secretariats on environmental issues. In addition to these divisions, UNEP has collaborating centres – World Conservation Monitoring, Global Resource Information Database, on Energy, Climate and Sustainable Development, on water and environment, Global Reporting Initiative, and Basel Agency for Sustainable Energy. UNEP also houses Conventions Secretariats including for CITES, CBD, the Montreal Protocol, and the Basel Convention. In addition, UNEP hosts the Scientific Advisory Groups–Ecosystem Conservation Group, Intergovernmental Panel of Climate Change, Joint Group of Experts on the Scientific Aspects of Marine

<sup>57</sup> For a detailed description of these initiatives, see UNEP Science Initiatives, available at <http://science.unep.org/systems.asp>, (last visited March 24, 2006).

<sup>58</sup> See generally Gray, *supra* note 54.

<sup>59</sup> For a detailed analysis of the involvement of UNEP in this issue, see, De Hoyos, *The United Nations Environment Programme: The Mediterranean Conferences*, 17 HARV. INTL. L. J. 639 (1976).

Environment Protection, Scientific and Technical Advisory Panel, and The UN Science Committee on the Effects of Atomic Radiation.<sup>60</sup>

The structure of UNEP is generally perceived to be weak, despite several reformation efforts.<sup>61</sup>

## 2. THE CONFERENCE OF PARTIES

Although not UN agencies or programs, the Conferences of Parties (COP) are discussed here to provide an insight into the important role that they play in addressing environmental issues. COPs are created under the aegis of each *ad hoc* international environmental treaty, oversees the implementation of treaty obligations. Hence, for each major international environmental agreement, either a Conference—or Meeting of Parties—has been created (COP/MOP), each of which has its own Secretariat and subsidiary organs. Since a COP is an *ad hoc* body, it cannot be classified as an international environmental organization.<sup>62</sup> However, COPs possess certain powers and function in a manner that resembles the structure of an independent international organization. At the internal level is a hierarchy that makes the COP superior to the Secretariat and subsidiary bodies. The COP takes decisions on budgetary matters, and it

<sup>60</sup> See <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=296>, (last visited Feb. 26, 2006).

<sup>61</sup> See e.g. Mostafe K. Tolba, *Redefining UNEP*, in OUR PLANET (January 1997), <http://www.ourplanet.com/imgversn/85/tolba.html>, (last visited Feb. 26, 2006. See also John W. Head, *The Challenge of International Environmental Management: A Critique of the United Nations Environment Programme*, 18 VA. J. INT'L L. 269 (1978); BHARAT DESAI, INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW 264 (2004); Elizabeth Dowdeswell, *The Promise of Stockholm*, in OUR PLANET, (January 1997); Maurice F. Strong, *The Way Ahead*, OUR PLANET, (January 1997); Mark Allan Gray, *The United Nations Environment Program: An Assessment*, 20 ENV'T L. L. 291 (1990); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AJIL 259 (1992). Germany also supported the idea of reforming UNEP into an independent and powerful organization. See German Advisory Council on Global Change, *World in Transition: New Structures for Global Environmental Policy* 176 – 177 (2001), available at [www.wbgu.de](http://www.wbgu.de), (last visited March 16, 2006).

<sup>62</sup> See generally Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AJIL 623 (2000)

has the power to make recommendations or adopt resolutions regarding substantive parts of a treaty.<sup>63</sup> Even though the Secretariat is dependent on the host organization,<sup>64</sup> the COP has the power to establish subsidiary bodies to complement its work. These subsidiaries are usually of three types – advisory, finance and technology; implementation and compliance; and the Secretariat. The power to establish these bodies is provided under the corresponding agreement or Protocol.

Currently, there are several COPs, each addressing a specific issue and providing a collection of experts in a particular issue, such as ozone depletion or waste transportation.<sup>65</sup>

### 3. THE COMMISSION ON SUSTAINABLE DEVELOPMENT

The Commission on Sustainable Development (CSD) was established in 1992 at UNCED<sup>66</sup> as a body reporting to ECOSOC. It was created to monitor the implementation of Agenda 21 and the Rio Declaration. CSD regularly publishes reports on the progress made by countries in achieving the broad goal of sustainable development as presented broadly under Agenda 21.

CSD has been following up on the progress made in implementing Agenda 21 by organizing regular meetings, including organized the Rio +5 and Rio +10 conferences. Following the Johannesburg Conference, CSD has been given the mandate to monitor the

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<sup>63</sup> *Ibid*, at 631-634.

<sup>64</sup> Usually UNEP hosts the Secretariat, although IUCN hosts the Secretariat for the Ramsar Convention.

<sup>65</sup> For a discussion of the several approaches to the regime theory, see, Stephan Haggard and Beth Simmons, *Theories of International Regimes*, 4/1/87 INT'L. ORG. 491.

<sup>66</sup> Adopted by the U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, 13 June 1992, U.N. Doc.A/CONF.151/26 (vols. I, II & III) (1992)



follow-up action of the Plan of Implementation of WSSD.<sup>67</sup> However, as a monitoring body, the contribution of CSD to international environmental law or its development has not been significant.<sup>68</sup>

#### 4. THE UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP)

UNDP is a development programme, which funds development-related activities in developing countries. Although UNDP in its present form was established in 1966, the history of the programme dates back to 1948 when UN established a fund to provide Technical Assistance for development to developing and under-developed countries along the lines of the International Bank for Restructuring and Development. A series of changes that it underwent culminated into the form of UNDP. One of the themes that UNDP works on and funds is energy and environment.<sup>69</sup> This component is managed through the UNDP Thematic Trust Fund (the Fund).<sup>70</sup>

UNDP distinguishes itself from UNEP by confining itself to matters of “environmental governance,” which it defines as, “not the normative role of brokering international agreements and convention, but the operational role of assisting countries to build cross-sectoral capacities and put in place effective policies and institutions to both protect the environment and reduce poverty.”<sup>71</sup> The Fund complements other UNDP funds such as Capacity 21, Office to Combat Desertification and Drought, Global

<sup>67</sup> See generally Johannesburg Declaration on Sustainable Development: Report of the World Summit on Sustainable Development, Ch. 1, resolution 1, annex, at 1-5, U.N. Doc. A/CONF.199/20, U.N. Sales No. E.03.II.A.1.

<sup>68</sup> See generally Joseph Tornberg, *The United Nations Commission on Sustainable Development*, 17 N.Y.L. SCH. J. HUM. RTS. 957 (2001). For an overview of CSD’s functioning, see also, Mary Pat Williams Silveira, *International Legal Instruments and Sustainable Development: Principles, Requirements and Restructuring*, 31 WILLAMETTE L. REV. 239, 246-248 (1995).

<sup>69</sup> See generally [www.undp.org](http://www.undp.org), (last visited March 16, 2006).

<sup>70</sup> The Fund supports six areas, land and forests, biological diversity, water, climate change and the crises emerging from environmental degradation.

<sup>71</sup> See Ruben P. Mendez, *United Nations Development Programme*, UNITED NATIONS STUDIES AT YALE 2, available at, <http://www.yale.edu/unsy/UNDPPhist.htm>, (last visited Jan. 12, 2006).

Environmental Fund, and the Montreal Protocol that provide assistance for environmental management at the national level.

## 5. THE WORLD BANK GROUP

The Bretton Woods Conference, convened after World War II, gave birth to the World Bank, which was conceived as a development and reconstruction organization.<sup>72</sup>

The main objective of the World Bank was to provide financial aid for development pursuant to which it financed several projects in developing countries, many of which were criticized for being blind to environmental issues or even against the environment.<sup>73</sup>

In the face of intense pressure for several years, the World Bank has been investing substantial resources in environmental issues.<sup>74</sup> The July 2003 report of the Bank represents its expansion into the environmental field.<sup>75</sup>

Unlike many UN agencies, the environmental work of the World Bank has been highly visible. One of the most notable transitions within the World Bank has been its Operative Directives on environmental impact assessment, which require nations to prepare an impact assessment statement before undertaking any World Bank funded

<sup>72</sup>See Jeremy J. Sanders, *The World Bank and IMF: Fostering Growth in the Global Market*, 9 CURRENTS INT'L TRADE L. J. 37, (Winter 2000); *see also* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20053333~menuPK:63762~pagePK:3672~piPK:36092~theSitePK:>, (last visited Dec. 3, 2006).

<sup>73</sup> *See e.g.* BRUCE RICH, *MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT* (1994). *See also* World Bank, *World Bank Development Report* (1992).

<sup>74</sup> *See* Todd Roessler, *The World Bank's Lending Policy and Environmental Policy*, 26 N.C. J. INT'L L. & COM. REG. 105 (2000). The four environmental objectives summarized by the author are, addressing potential adverse impacts of World Bank financed projects, addressing issues of poverty, economic efficiency and environmental protection, helping members to establish institutions and programs and, participation in the GEF.

<sup>75</sup> *See* Piet Buys et al., *Measuring Up: New Directions for Environmental Programs at the World Bank*, WORLD BANK POLICY RESEARCH WORKING PAPER 3097, July 2003, available at <http://www.worldbank.org> (on file with author).

development project.<sup>76</sup> Notable also is its establishment of independent review committees to assess the environmental impact on projects.<sup>77</sup> An example of a project in which such a Committee was established is the Narmada Dam construction in India, from which the World Bank withdrew after the Committee concluded that the dam was not environmentally feasible.<sup>78</sup> Like UNDP, the World Bank also funds several capacity-building projects all over the world.<sup>79</sup>

## 6. UNCLOS SYSTEM

The United Nation Convention on the Law of the Seas<sup>80</sup> forms a system in itself, with its own dispute settlement mechanism, the International Tribunal for the Law of the Seas. Not only does the Convention address the need for environmental protection,<sup>81</sup> but also it has integrated the International Maritime Organization within its system, a central organization that addresses marine environmental problems.

The International Maritime Organization (IMO) was established in 1948 with the objective of regulating shipping and international trade in the seas to ensure marine safety

<sup>76</sup> Kevin R. Gray, *International Environmental Impact Assessment- Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83 (2000).

<sup>77</sup> See e.g. Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law*, 2 HOFSTRA L. & POL'Y SYMP. 61 (1997).

<sup>78</sup> See generally Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L. J. 529 (2000). See also David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project Affected People*, 4 CHI. J. INT'L L. 201 (2003).

<sup>79</sup> For some of the environmental aspects addressed by the World Bank, see <http://inweb18.worldbank.org/ESSD/envext.nsf/47ByDocName/Policy>, (last visited March 15, 2006). See also WORLD BANK POLLUTION MANUAL, [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000094946\\_99040905052283](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_99040905052283), (last visited March 15, 2006). See also Charles E. DiLeva, *International Environmental Law and Development*, 10 GEO. INT'L ENVTL. L. REV. 501 (1998).

<sup>80</sup> U.N. DOC. A/CONF.62/122, 1994, 21 I.L.M. 261 (1982).

<sup>81</sup> For a discussion on environmental protection with the UNCLOS framework, see, Thomas A. Mensah, *International Marine Environmental Law, INSTITUTIONS, IMPLEMENTATION, AND INNOVATIONS* (Andree Kirchner ed., 2003).

and to prevent and control marine pollution.<sup>82</sup> In the wake of the Torrey Canyon oil spill,<sup>83</sup> the organization intensified its efforts to protect the marine environment from pollution resulting from shipping accidents as well as activities such as cleaning of cargo oil tanks. These efforts resulted in the International Convention for the Prevention of Pollution from Ships, 1973, which was modified by a Protocol in 1978 (MARPOL 73 and 78). MARPOL addresses “not only accidental and operational oil pollution but also pollution by chemicals, goods in packages form, sewage, garbage, and air pollutions”.<sup>84</sup>

Committees formed within IMO assist it in carrying out its numerous activities. The Marine Environmental Protection Committee of IMO consists of all member states and has the power to consider any matter concerned with the “prevention and control of pollution from ships.”<sup>85</sup> It is responsible for the adoption, amendment and enforcement of conventions and other regulations. The Committee is assisted by sub-committees such as Fire Protection and Flag State Implementation committees. Similarly, the Legal Committee, which was established in the wake of the Torrey Canyon accident, deals with

<sup>82</sup> Article 1(a) of the Convention on the Inter-Governmental Maritime Consultative Organization, 1958, states as its objective, “to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate in the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships”. *See*

[http://www.imo.org/Conventions/mainframe.asp?doc\\_id=678&topic\\_id=771](http://www.imo.org/Conventions/mainframe.asp?doc_id=678&topic_id=771), (last visited Feb. 26, 2006).

<sup>83</sup> The Torrey Canyon accident resulted in the spilling of 120,000 tons of crude oil into the English Channel. For details, *see* [http://www.imo.org/Conventions/mainframe.asp?doc\\_id=3](http://www.imo.org/Conventions/mainframe.asp?doc_id=3), (last visited Feb. 26, 2006).

<sup>84</sup> *See generally* [http://www.imo.org/Conventions/mainframe.asp?doc\\_id=678&topic\\_id=258](http://www.imo.org/Conventions/mainframe.asp?doc_id=678&topic_id=258), (last visited March 16, 2006). The annexes to MARPOL contain regulations on various sources of pollution such as garbage, oil, etc. *See also*, Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ship, 1978, I.M.C.O. Doc TSPP/CONF/11, 1341 U.N.T.S. 3, 1983.

<sup>85</sup> *Ibid.*

the legal matters of IMO and may be assigned responsibilities under other international agreements as accepted by IMO.<sup>86</sup>

IMO has also concluded cooperation agreements with intergovernmental organizations and instituted consultative arrangements with various non-governmental organizations that specialize in a variety of topics such as insurance and environment.<sup>87</sup>

In addition to IMO, the UNCLOS system consists of other bodies such as the International Seabed Authority and the International Tribunal on the Law of the Sea (ITLOS). The Seabed Authority addresses numerous issues including the effect of deep seabed mining on the marine ecosystem.<sup>88</sup> ITLOS has jurisdiction to decide cases involving disputes under UNCLOS.<sup>89</sup> It operates through a Chambers system where each Chamber exercises jurisdiction over specific issues. The Chamber for Marine Environmental Disputes has jurisdiction over environmental disputes under UNCLOS. These Chambers have the power to grant provisional measures and allow States to choose

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<sup>86</sup> For an overview of all the committees and sub-committees and their functions, see [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D7560/Basics2000.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7560/Basics2000.pdf), (last visited Jan. 12, 2006).

<sup>87</sup> See Focus of IMO, a report on some basic facts about the IMO, [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D7560/Basics2000.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7560/Basics2000.pdf), (last visited Feb. 26, 2006).

<sup>88</sup> See Michael W. Lodge, *Environmental Regulation of Deep Seabed Mining*, INTERNATIONAL MARINE ENVIRONMENTAL LAW, INSTITUTIONS, IMPLEMENTATION, AND INNOVATIONS 49-60 (Andree Kirchner ed., 2003).

<sup>89</sup> Article 21, Statute of the International Tribunal on the Law of the Sea, available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html), last visited, (last visited March 16, 2006).

the size of the bench.<sup>90</sup> ITLOS recently resolved the *Southern Bluefin Tuna*<sup>91</sup> dispute and has also decided other disputes.<sup>92</sup>

## 7. SPECIALIZED AGENCIES

The status of specialized agencies within UN is substantially different from that of UNEP because they are treaty organizations. As treaty organizations, specialized agencies are formed by UN Member nations with their own constitution, executive heads, regularly assessed budgets, and assemblies of state representatives. As a result of their financial, constitutional, and political independence, specialized agencies are not under the direct control of the United Nations.<sup>93</sup> The structure and work of some of the key agencies are discussed below.

### 7.1. UNESCO

UNESCO was created in 1945 as an UN-specialized agency with the objective of achieving peace by building the “intellectual and moral solidarity of mankind”.<sup>94</sup> Structured around the core goal of the UN to achieve peace and security goal, UNESCO was conceived as an agency that would strengthen the understanding between and among countries through education, science, culture and communication.<sup>95</sup> It consists of 191 member states, which have a Permanent Delegation in Paris to coordinate with the

<sup>90</sup> David Anderson, *The Role of ITLOS as a Means of Dispute Settlement under UNCLOS*, INTERNATIONAL MARINE ENVIRONMENTAL LAW, INSTITUTIONS, IMPLEMENTATION, AND INNOVATIONS 19 (Andree Kirchner ed., 2003).

<sup>91</sup> *New Zealand v. Japan, Australia v. Japan*, International Tribunal for the Law of the Sea, Order of August 27, 1999, Request for Provisional Measures, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html), (last visited Jan. 12, 2006).

<sup>92</sup> *Ibid*, at 23-27.

<sup>93</sup> See PAUL TAYLOR, INTERNATIONAL ORGANIZATION IN THE AGE OF GLOBALIZATION 18 (2003).

<sup>94</sup> See UNESCO 1945-2000: A Fact Sheet, <http://www.unesco.org/general/eng/about/history/back.shtml>, (last visited Feb. 26, 2006).

<sup>95</sup> The objective of the agency is “to contribute to the peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, for the rule of law, and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations”. *Ibid*.

organization on several matters.<sup>96</sup> Governments are advised by a National Commission that they established in July 2003. UNESCO is comprised of Governing bodies, and a Secretariat headed by the Director General.

### *7.1.1. Governing Bodies of UNESCO*

The intergovernmental governing bodies of UNESCO are comprised of the General Conference and the Executive Board. The General Conference is composed of State Members representatives of UNESCO. Each country has one vote, regardless of its size or budgetary contribution. The Conference meets once every two years to determine policies, program and budget for the Organization. The Conference is also responsible for electing the Executive Board Members and the Director-General. Although the Conference is composed on State members, non-Member-states, intergovernmental and non-governmental organizations are allowed to participate in its meetings as observers.

The Executive Board, which is made up of fifty-eight members elected by the General Conference, carries out its functions as specified in the UNESCO Constitution and the rules or directives of the Conference. It is also responsible for to carry out functions in order to satisfy any agreement between UNESCO and UN, other UN specialized agencies or intergovernmental bodies. The Board is also responsible to ensure that the Director General carries out his functions effectively.

### *7.1.2. The Secretariat of UNESCO*

The executive branch of UNESCO comprises of international civil servants appointed by the Director General.<sup>97</sup> The Secretariat headed by the Director General is

<sup>96</sup> See "Organization", <http://www.unesco.org/general/eng/about/history/org.shtml>, (last visited Feb. 26, 2006).

responsible for carrying out the goals set out by the Governing Bodies. The Secretariat is broadly organized into Programme sectors, Support sectors, Central Services and Field Offices and Institutes, with the Director General at the helm.<sup>98</sup>

The Programme Sector comprises of five departments – education, natural sciences, social and human sciences, culture, and communication and information. The Support Sector has two departments, External Relations and Cooperation and Administration. The Central Services branch of the Secretariat is comprised of several departments such as the Secretariat of the General Conference, Secretariat of the Executive Board, Bureau of Budget, and Bureau of Field Coordination.

Recently, the Secretariat underwent some significant transformation. Following the External Auditor's Report for 1998-1999, the Director General launched a series of reforms within the Secretariat. Five broad matters have been the subject of the reform— (i) downsizing staff in headquarters, while increasing field offices, (ii) changes in management (iii) reducing programmes by focusing on five priority areas—education, freshwater resource management, cultural preservation, bioethics, and access to information and technology, (iv) increasing voluntary contributions from public and private sector, and (v) improving system of international oversight and accountability by increasing transparency in all operations.<sup>99</sup> Of particular importance is the reform leading

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<sup>97</sup> The number of these civil servants as of July 2005 was 2,160 civil servants from around 170 countries. See [http://portal.unesco.org/en/ev.php-URL\\_ID=3976&URL\\_DO=DO\\_TOPIC&URL\\_SECTION](http://portal.unesco.org/en/ev.php-URL_ID=3976&URL_DO=DO_TOPIC&URL_SECTION), last visited 3/16/06.

<sup>98</sup> *Ibid.*

<sup>99</sup> For details of the reforms, see UNESCO's Reforms at a Glance, <http://portal.unesco.org/unesco/v.php>, last visited 1/12/06.



to strengthening the network among ‘regional, multi-country and national offices’ so as to increase and improve efficiency in the management of UNESCO.<sup>100</sup>

The emphasis on strengthening its network implies the importance of networks in a global world as discussed in the earlier chapters.

### 7.1.3. Major Environmental Programs

UNESCO’s involvement in environmental issues dates back to the time of its inception and, in fact, it was actively involved in the creation of IUCN’s predecessor the International Union for the Protection of Nature (IUPN) in 1948.<sup>101</sup> For decades, UNESCO worked with IUPN on various conservation initiatives all over the world. Of notable significance is its involvement in the World Heritage Convention (WHC).<sup>102</sup> The World Heritage Commission located within UNESCO helps maintain a list of world heritage sites including some endangered sites.<sup>103</sup> Some of these sites include natural sites, such as the Sunderbands in India that perform valuable ecological functions. UNESCO provides governments over the world expertise on protecting valuable natural and created monuments and sites.

UNESCO also launched the Programme on Man and Biosphere (MAB) in 1970, the groundwork for which began in 1968 at the Biosphere Conference. MAB aims at using both natural and the social sciences to encourage the sustainable use and conservation of biological diversity. The MAB has enabled UNESCO to establish biosphere reserves in numerous countries. These reserves not only promote conservation,

<sup>100</sup> *Ibid.* See also, Restructuring and Reforming UNESCO, <http://portal.unesco.org>, last visited 1/12/06.

<sup>101</sup> *Supra*, Chapter 3.

<sup>102</sup> See BRIEF HISTORY, available at, <http://whc.unesco.org/en/169/>, last visited, 3/24/06.

<sup>103</sup> See <http://whc.unesco.org>, last visited 3/24/06.

but also encourage the use of resources in the reserve for scientific research, as well as for providing a livelihood for communities residing close to the reserve areas.<sup>104</sup> The biosphere programme complements the Ecosystem approach that has been adopted under CBD.<sup>105</sup> MAB is managed by an elaborate structure of committees, councils, and other bodies, which work closely with state members.

MAB organs coordinate with other organizations at the local, national, and international levels in implementing its biosphere programme. Some of these organizations include the World Bank, UNDP, UNEP, FAO, IUCN, and the World Wildlife Fund (WWF). MAB also works with COPs created under MEAs such as the Ramsar Convention. In 1995 UNESCO created a World Network under a statutory framework, developed during the International Conference on Biosphere Reserves, to provide rules for creating a network of reserves and for their periodic review.<sup>106</sup>

Presently, UNESCO focuses on a wide range of thematic areas such as fresh water, oceans, earth sciences, science policy, and natural disaster reduction. Its intergovernmental and international programmes include in addition MAB those on water assessment, international basic science, and geosciences.

## 7.2. FAO

The Food and Agriculture Organization (FAO), another UN specialized agency, was created in 1945 to improve agricultural productivity and to raise standards of

<sup>104</sup> The reserve areas are managed through an elaborate zoning system consisting of core, buffer and transition zones. The core zone is protected from all human use by providing legal protection whereas the buffer zone and the transition zones are not legally protected. For a detailed explanation of the system, *see* <http://www.unesco.org/mab.nutshell.htm>, last visited 3/16/06.

<sup>105</sup> <http://www.unesco.org/mab/about.htm>, last visited, 3/16/06. *See also*, <http://www.cbd.org>, last visited, 3/16/06.

<sup>106</sup> *Supra* note 104.

nutrition and living, especially among rural populations. Management of FAO is undertaken by a Conference and a Council formed by its Member Nations. The Conference is the governing body, composed of 188 Member Nations and one Member organization—the European Union. The Conference meets once every two years to ‘determine the policies of the Organization, approve the Programme of Work and Budget, and make recommendations to Members and international organizations’ and elects members of the Council.<sup>107</sup> Non-member nations, intergovernmental organizations and NGOs are permitted to participate in the meetings as observers.<sup>108</sup> Member-nations are represented by their Minister of Agriculture in the Conference meetings.

The Council is a group of 49 Member Nations, elected for a term of three years to govern the Organization when the Conference is not in session. The Conference ensures that all regions are properly represented in the Council. It is headed by a Director General elected by the Conference.

In addition to the Conference and Council, the work of the governing bodies is carried through eight committees—programme, finance, constitutional and legal matters, commodity problems, fisheries, forestry, agriculture, and world food security.<sup>109</sup> Each committee has its own set of rules of procedure. For instance, the Committee of Forestry has elaborate rules regarding the election and appointment of its Chair and officers, its meetings and reports and documentation.<sup>110</sup>

<sup>107</sup> See FAO Governing Bodies, available at, [http://www.fao.org/unfao/govbodies/Conffinal\\_en.asp](http://www.fao.org/unfao/govbodies/Conffinal_en.asp), last visited, 2/10/06.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Supra* note 107.

<sup>110</sup> Rules of Procedure of the Committee on Forestry, available at *supra* note 107.

Further, FAO consists of eight departments as part of its management structure—administration and finance, agriculture, economic and social affairs, fisheries, forestry, general affairs and information, sustainable development, and technical cooperation.<sup>111</sup>

FAO's finances are derived from mainly from its Member Nations, whose contributions are determined at FAO Conference meetings, and are supplemented by contributions from other sources including Trust Funds and UNDP.<sup>112</sup>

Like UNESCO, organizational reforms were undertaken within FAO to focus on decentralization of operations, reduce costs and increase efficiency. As part of its reform FAO also has streamlined its focus areas by concentrating on food security, increasing field staff, introducing more developing countries perspectives, establishing greater links with the private sector and non-governmental organizations, and improving its database accessibility.<sup>113</sup>

### 7.2.1. Major Environmental Programs of FAO

Like UNESCO, FAO was involved in several programmes with IUPN in the early 1950s.<sup>114</sup> FAO's involvement in environmental issues continues with its focus on the conservation of nature resources in achieving sustainable agricultural practices.

Since the Rio Conference, FAO has been focusing on “sustainable dimensions” of several issues, including desertification, biological diversity and climate change.<sup>115</sup> It provides expertise in these areas and works with UNEP and other regional and

<sup>111</sup> See [http://www.fao.org/UNFAO/about/finance\\_en.html](http://www.fao.org/UNFAO/about/finance_en.html), last visited 3/31/06.

<sup>112</sup> See generally, [http://www.fao.org/UNFAO/about/budget\\_en.html](http://www.fao.org/UNFAO/about/budget_en.html), last visited 3/31/06.

<sup>113</sup> See generally, *supra* note 104. For a detailed discussion of FAO reform, see *Reforming FAO: Into the New Millennium*, available at <http://www.fao.org>, last visited, 3/16/06.

<sup>114</sup> *Supra* chapter 3.

<sup>115</sup> [http://www.fao.org/sd/ENdef\\_en.htm](http://www.fao.org/sd/ENdef_en.htm), last visited, 2/10/06.

international institutions to achieve the objectives of set out in the conventions relating to these issues by forming sub-groups within the agency on each matter.<sup>116</sup> Moreover, the agency is divided into eight departments, including on forestry, fisheries, and sustainable development. An extensive network of regional, sub-regional, liaison and other offices aids it in carrying out its functions.

Two aspects of FAO are worth noting at this point that allow it to actively address certain environmental issues. One is its budgetary structure, which is allocated for two broad programmes – the Regular and the Field Programmes. The latter provides for the implementation of development strategies through various projects undertaken in cooperation with national governments and other agencies.<sup>117</sup> Second, in 1994 FAO initiated a reform process to assist member nations more effectively in view of changing global perceptions of the UN. The outcome has been published in the form of a report, “Reforming FAO: Into the New Millennium.”<sup>118</sup> As a result, FAO was reorganized, leading to the reform of existing departments as well as the creation of new ones. For instance, the Sustainable Development Department was set up to provide expertise on matters such as natural resources management, gender and population issues, and people’s participation.<sup>119</sup> The reform process also demonstrates FAO’s continued commitment to environmental issues by its prioritization of issues such as food security and sustainable use of natural resources.

<sup>116</sup> See <http://www.fao.org>, last visited, 2/10/06.

<sup>117</sup> See <http://www.fao.org/UNFAO/e/wstruc-e.html>, last visited, 2/10/06.

<sup>118</sup> <http://www.fao.org/docrep/x4104e/x4104e01.htm>, last visited, 2/10/06.

<sup>119</sup> <http://www.fao.org/docrep/x4104e/x4104e08.htm>, last visited 2/10/06, at p. 2

Finally, FAO's involvement in plant variety protection is evident in its role in the Convention of Plant Variety Protection or UPOV, which is subject to significant debate in the wake of the WTO system.<sup>120</sup>

Hence, like UNESCO, FAO remains a significant environmental player in the international arena.

### 7.3. WHO

The World Health Organization was set up in 1948 as an UN-specialized agency for health with the objective of achieving "for all peoples the highest possible level of health."<sup>121</sup> The governance of WHO is carried out by the World Health Assembly consisting of all Member States, whose delegates meet every year at its headquarters in Geneva. The Assembly appoints the Director General of WHO, oversees its financial policies, and after review allocates proposed programme budgets. It also provides advice and recommendation to its Executive Board.

The Executive Board is comprised of 32 members who have technical qualification in the field of health. They are elected for a term of three years and their meetings precede the Assembly. All matters such as agenda of the Assembly and resolutions are prepared by the Board. In addition, the Board is responsible to carry out the decisions and policies of the Assembly.

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<sup>120</sup> For a discussion on the issue see Thomas Cottier and Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, 7 J. INT'L ECON. L. 371 (2004).

<sup>121</sup> WHO Constitution, Preamble, available at, <http://www.who.org>

A third level of management is vested in the Secretariat, which is headed by the Director-General under whom a staff of 3500 health professionals, experts, and administrative support work.<sup>122</sup>

Like UNESCO and FAO, WHO works closely with NGOs and the private sector through its Civil Society Initiatives on environmental issues.

### 7.3.1. Environmental Programs

The environmental aspect of WHO, which is more narrow and specific than that of UNESCO or FAO, is managed within the Secretariat by the Assistant Director-General, Sustainable Development and Healthy Environments. It is formed by departments on protection of the human environment, food safety, MDGs, health and development policy, ethics, trade, human rights and law, and country focus or country specific issues.<sup>123</sup>

Health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.<sup>124</sup> In view of this broad approach to health, WHO is closely involved with resolving environmental problems.

Although the intervention of WHO in environmental issues stems mainly from its interests in human health, unlike the other agencies, it covers a wide range of issues.<sup>125</sup>

In the recent past, outbreaks of diseases such as SARS and the avian flu, which can be monitored by their effect on animals and birds, have brought WHO’s role to the

<sup>122</sup> See <http://www.who.org.int/governance/en/>, last visited 3/16/06.

<sup>123</sup> See WHO Structure at Headquarters, available at <http://www.who.org>, last visited 3/16/06.

<sup>124</sup> *Ibid.*

<sup>125</sup> See <http://www.who.int/peh/burden/burdenindex.htm>, last visited 3/16/06.

forefront.<sup>126</sup> WHO has been involved in creating a “substantial basis for human health” even before these outbreaks occur. Some of the areas that it has identified as part of its programme include occupational health, climate change and solid waste.<sup>127</sup>

#### 7.4. World Meteorological Organization

The International Meteorological Organization was established in 1947 and became the UN-specialized agency, World Meteorological Organization (WMO) through an agreement between IMO and the United Nations. The objective of creating WMO was to establish an international organization to assimilate weather-related information in different regions of the world to serve a range of practical purposes.

The data collected and analyzed by WMO has been central to work on global climate change. However, this is not the only aspect addressed by WMO. Rather, numerous environmental issues are addressed by this agency. For instance, the Atmospheric Research and Environment Programme coordinates and encourages research on the atmospheric composition and chemical reactions that affect it. Sub-programmes have been set up under this Programme such as the Global Atmospheric Watch (GAW) that have created ‘systems’ to address specific issues. For instance, the Global Ozone Observing System set up in the 1950s helped identify the problem of ozone depletion, which in turn resulted in the negotiation of the Convention on Ozone Depletion with the help of UNEP. These systems are assisted by networks. The Background Air Pollution Monitoring Network (BAPMoN) is an illustration of a network that develops

<sup>126</sup> See for example, David P. Fidler, *Constitutional Outliners of Public Health’s “New World Order”*, 77 TEMP. L. REV. 247 (2004).

<sup>127</sup> Three separate WHO website links discuss ‘environmental’ issues; ecosystem and health, environmental health and the last one on environmental pollution. The last two primarily deal with issues of pollution while the first one address questions such water, biodiversity, pharmaceuticals and desertification. Yet, the main focus remains on issues related to pollution issues. See <http://www.who.int/topics/en/#E>, last visited, 2/12/06.



database on the effect of greenhouse gases. BAPMoN flows to the Global Climate Observing System, which is part of WMO's World Climate Programme. Similarly, the Meteorology Programme has provided information that led to the Conference on Desertification in 1977 and ultimately to the Convention on Desertification. The WMO Regional Programme supports regional implementation of WMO programmes and activities by providing information and infrastructure to regions in coordinating matters such as climate change and sustainable development.

In view of the importance of weather on all of nature and its living beings, including human beings, WMO continues to play a pivotal role in information dissemination.