



# TOWARD COLLECTIVE ACTION

ON INTERNATIONAL  
ENVIRONMENTAL  
GOVERNANCE

Proceedings of the Paris Workshop, March 15-16, 2004



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**Toward Collective Action  
On International Environmental Governance**

**Proceedings of the Paris Workshop  
March 15-16, 2004**

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## LIST OF ACRONYMS

<b>AMCs</b>	ASEAN member-countries
<b>AMMH</b>	ASEAN Ministerial Meeting on Haze
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASMC</b>	ASEAN Specialized Monitoring Center
<b>ATHP</b>	Agreement on Transboundary Haze Pollution
<b>BSEP</b>	Black Sea Environmental Programme
<b>CBD</b>	Convention on Biological Diversity
<b>CBDR</b>	Common-But-Differentiated Responsibilities
<b>CGIAR</b>	Consultative Group on International Agricultural Research
<b>CSD</b>	Commission on Sustainable Development (UN)
<b>CITES</b>	Convention on International Trade in Endangered Species
<b>CLD</b>	Center for Legislative Development
<b>EMAS</b>	Eco-Management and Audit Scheme (UE)
<b>EMP</b>	Euro-Mediterranean Partnership
<b>ENSO</b>	El Niño-Southern Oscillation
<b>EU</b>	European Union
<b>GEF</b>	Global Environment Facility
<b>GHG</b>	Greenhouse Gas
<b>GMEF</b>	Global Ministerial Environment Forum
<b>GPA</b>	Global Programme of Action for the Protection of the Marine Environment from Land-based Sources
<b>GWP</b>	Global Water Partnership
<b>IAEG</b>	Inter-Agency Environment Management Group
<b>IDPM</b>	Institute for Development Policy and Management of the University of Manchester
<b>IEG</b>	International Environmental Governance
<b>IDDDRI</b>	Institute of Sustainable Development and International Relations
<b>IFAD</b>	International Fund for Agricultural Development
<b>IFPRI</b>	International Food Policy Research Institute
<b>IGM</b>	International Group of Ministers
<b>IHP</b>	International Hydrological Programme (UNESCO)
<b>IMO</b>	International Maritime Organization
<b>IWMI</b>	International Water Management Institute
<b>ISO</b>	International Standard Organization
<b>IUCN</b>	World Conservation Union

<b>MARPOL</b>	The International Convention for the Prevention of Pollution from Ships
<b>MCSD</b>	Mediterranean Commission on Sustainable Development
<b>MEA</b>	Multilateral Environmental Agreements
<b>MDG</b>	Millennium Development Goals
<b>MSSD</b>	Mediterranean Strategy for Sustainable Development
<b>NAFTA</b>	North American Free Trade Agreement
<b>NEPAD</b>	New Partnership for Africa's Development
<b>NOSA</b>	Non-Obligatory Specialized Assistance
<b>PIC</b>	Rotterdam Convention on Prior Informed Consent
<b>PM</b>	Particulate Matter
<b>PMM</b>	Prevention, Monitoring, and Mitigation
<b>POP</b>	Stockholm Convention on Persistent Organic Pollutants
<b>PPP</b>	Polluter-Pay Principle
<b>RDB</b>	Regional Development Banks
<b>RHAP</b>	Regional Haze Action Plan
<b>SOAS</b>	School of African and Oriental Studies
<b>SIA</b>	Sustainability Impact Assessment
<b>SRFA</b>	Sub-Regional Firefighting Arrangement
<b>THP</b>	Transboundary Haze Pollution
<b>TPM</b>	Total Particulate Matter
<b>UNDP</b>	United Nations Development Programme
<b>UNEO</b>	United Nations Environment Organization (proposed)
<b>UNEP</b>	United Nations Environment Programme
<b>UNEP/MAP</b>	Mediterranean Action Plan
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>UNIDO-ICS</b>	International Center for Science and High Technology
<b>WB</b>	World Bank
<b>WEO</b>	World Environmental Organization (proposed)
<b>WMO</b>	World Meteorological Organization
<b>WSSD</b>	World Summit on Sustainable Development
<b>WTO</b>	World Trade Organization

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## PREFACE

Why is it relevant to discuss governance now? Recent developments have presented challenges and opportunities that need to be considered if we are to achieve the twin goals of conservation and sustainable development. This requires, in part, addressing the limitations of the international governance system.

A main development in the international agenda was the 2002 World Summit on Sustainable Development (WSSD), especially the commitments that resulted from the Summit. In particular, the 2010 goal to reduce the rate of biodiversity loss provide an enormous opportunity to build momentum for environmental action. But it also makes evident the challenges represented in the current system that need to be overcome if we are to achieve this target.

The preparatory process for WSSD involved intense discussion and reflection at the inter-governmental process on International Environmental Governance. Key issues that were identified included financing for the environment, the structure, role and responsibilities of UNEP, its relationship with MEAs, the harmonization of the principles and norms embodied in trade, development and environmental regimes, and the importance of the environmental dimensions of the MDG, among others. Unfortunately, only the first two were seriously addressed and work on them was not picked up in the final stages of the WSSD process. It is important to review the reason of this relative neglect in order to understand the impediments to international movement on this issue at this level. But it is also important to draw from the findings of this process and develop any new initiatives.

Prior to the WSSD, a key moment in the international agenda was the Millennium Assembly in 2000. The commitments of heads of state and government represented by the Millennium Goals provide also an important window of opportunity as they provide a level of agreement on a road map for the international community. MDG 7 on environmental sustainability, as well as what is required in terms of governance to achieve it, needs to be highlighted. But focusing on MDG 7 is not sufficient as the achievement of other MDGs is dependent on environmental sustainability. This brings up another governance challenge: how to link environmental and development agendas which, although by nature inter-related, are often handled separately. This challenge is in two other major international processes. The Doha Development Agenda agreed at the fourth Ministerial Meeting of the World Trade Organization and the 2001 Monterrey Conference on Finance for Sustainable Development. Different ongoing processes are trying to address the challenges and opportunities derived from this international agenda, or they are seeing the symptoms of the complexities of the current system invading their own agendas.

The evolution of MEAs also illustrates how governance challenges are being reflected in the negotiation process of an individual agreement. For example, the

discussion within the CBD on how to evaluate the implementation of the convention and on the best means to reach the 2010 target showed the scientific and political difficulties of identifying indicators, getting the necessary information, and monitoring progress. The importance of trade in the CBD negotiations has been one of the most outstanding features of this complexity, as trade concerns appeared beyond the already known areas of invasive alien species and access and benefit sharing to become prominent in unexpected places, such as the programmes of work on mountains, inland waters, incentives and sustainable use. The concern there was the use of positive incentives that could have trade distorting implications.

From IUCN's perspective this raises several questions, including:

1. Should we support multilateral approaches given the level of criticism and lack of faith expressed by many sectors, especially after Johannesburg? And is this the way to go if we need to address global problems and ensure that this is done in an equitable manner?
2. Are existing processes adequate, and more importantly how can we improve them?
3. Are inter-governmental approaches sufficient? A number of actors increasingly form an important part of the international environmental governance system: how can we ensure that these contributions are recognized? And how should we address possible challenges related to the legitimacy of these contributions to the overall system?
4. Are environmental approaches sufficient? The perception that the main challenge of the international environmental governance system lies outside the environmental sphere is becoming increasingly undeniable. Further, development agendas are encroaching on environmental processes. Thus, how can we ensure that the linkages contribute to building mutual supportiveness in a way that furthers conservation and sustainable development?

It is thus very timely to address the limitations of the current system and build on opportunities provided by the international agenda. Achieving sustainable development requires international collective action. The WSSD reaffirmed the need for common responses to the challenges we face. To this end, it is necessary to agree on common objectives, reach a consensus on actions to be taken, and define a satisfactory framework for implementation. During the 1990s, a global consensus seemed to be within reach and many important international agreements were established. This apparent convergence of views has now been challenged. Disputes on objectives have emerged (for example as regards climate change) and agreement on the general objectives, when it exists (for example on the Millennium Development Goals), does not entail a consensus on actions. A new conceptual framework is necessary, taking into account the failures of the existing global governance system and the different — and sometimes opposed — solutions proposed to address these failures. Different

directions have been identified toward the renewal of the multilateral system. Most of the analyses emphasize three key problems in environmental governance: (1) low effectiveness, (2) limited legitimacy, and (3) persistent inequity. Reinforcing these three pillars of a new environmental governance system should be the focus of any international action aimed at giving the international community the means to face its environmental future.

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# Introduction

Laurence Tubiana, Philippe Le Prestre and  
Benoît Martimort-Asso

## 1. An Enduring Issue

Of the many issues in international environmental relations that clamor for attention, governance issues are one of the most difficult to present in a manner that will stimulate action while retaining empirical soundness, and one of the least glamorous in terms of the political dividends that can accrue from what is bound to be slow progress. Yet, it has also been one of the most pervasive since the emergence of international environmental politics in the early 1970s as the international community has attempted to give order to the collective search for solutions to evolving and multi-faceted environmental problems in a political and economic environment itself in transformation. The definition of the problem of international environmental governance and of its solutions reflects changing norms and power distributions and affects the nature and distribution of expected benefits. It is not surprising then, that these issues have been hotly debated within and outside the UN system, particularly when the end of the Cold War and the emergence of global environmental problems seemed to make this task both more opportune and more urgent.

Thirty-five years after Stockholm, fifteen after Rio and five after Johannesburg, the debate on international environmental governance continues, punctuated by recurrent attempts to promote new institutional arrangements. Much progress has been made in identifying problems and possible solutions, although the empirical soundness of both often looks thin. A consensus on the way forward, however, remains largely elusive.

Following the United Nations Conference on the Human Environment in Stockholm in 1972, states decided, on the pattern of the United Nations Development Programme (UNDP) and of the United Nations Industrial Development Organization (UNIDO), to ask the UN General Assembly to establish by resolution an Environment Programme within the United Nations (UNEP), rather than a full-fledged charter-based specialized agency, as it did in the health (WHO) and food and agriculture (FAO) sectors. States and international organizations which were members of the United Nations system, wanted an environmental program with limited jurisdiction and financial resources. Fearful that the new concern for the environment would interfere with their development priorities, developing countries also met the emergence of a strong UN environmental voice with much skepticism. As a result, UNEP has no operational mandate. Its main role is to stimulate and co-ordinate other international

organizations, collect and disseminate information, and help states implement environment policies and improve their sustainable development prospects.

Since 1972, the international community has developed a more complete view of the complexity of national, regional, and global environmental issues. The 2002 World Summit on Sustainable Development (WSSD) reaffirmed the need for common responses to the challenges we face. Achieving the environmental objectives of sustainable development requires international collective action; but how can we build environmental collective action in a moving world where multilateralism is under siege?

The implosion of the Soviet system and the emergence of global issues appeared to usher in the outline of a new global order based on the rule of law, co-operation among nations, integration of a broad range of stakeholders in international negotiations, and the creation of rules and standards through collaborative procedures. Co-operative strategies, initiated and guided by multilateral organizations in particular, seemed capable of forming the foundation of this process, as both a participant in and a balance to economic and financial globalisation. A global consensus seemed to be within reach and many important international agreements were established, particularly in the environmental domain.

This apparent convergence of views is now being challenged. Norms that were slowing emerging (e.g. the precautionary principle) and the importance of an international legal structure are being questioned. Disputes on objectives have emerged (e.g., on climate change). And agreement on the general objectives, when it exists (for example on the Millennium Development Goals), does not entail a consensus on actions.

The evolution of the international system since 1985-1987 brought to light the need for a reform of the United Nations, as the international system moved from loose bipolarity to uneven globalisation. The debate on United Nations reform was based on the observation that the structures and the working methods of the organization did not evolve in line with the changes of the international system. In the 1980s, the emergence on the international agenda of new global (climate change, ozone) and worldwide (biodiversity, water, POPs, fisheries) problems, including sustainable development, required novel, appropriate, and coherent responses. Several factors account for the forceful return of environmental questions onto the international agenda, including the degradation of environmental indicators, new disasters in the making, the emergence of new actors claiming a share of the traditional legitimacy of the State (NGOs, public policy networks, the private sector), and the declining importance of traditional security issues. This context is further complicated by the emergence of private international governance, the development of international regimes in a greater number of sectors (which further encourages the fusion of the domestic and international spheres and of

public and private actors, and poses the question of their interrelationships), the issue of the management of global commons and of global public goods, and the adoption of multilateral environmental agreements with major commercial and economic implications.

The international response to the increasing saliency of environmental issues has been primarily legal and institutional. Following the Montevideo Programme which UNEP adopted in 1982, international action has taken the form of issue-specific multilateral agreements. UNEP estimates that there are over 500 international treaties and other agreements linked to the environment, of which over 70% are regional. In practical terms, discussions on the reform of international environmental governance (IEG) center around fifty agreements. On the institutional front, there have been two types of responses: the expansion of the scope of existing organizations (UN, UNESCO, UNDP, FAO, WMO, UNEP, IMO) and the creation of secretariats of Multilateral Environment Agreements (MEA) with a variety of legal and administrative status. They can be autonomous (Antarctica, OSPAR), report to the secretariat general of the UN (UNFCCC, CLD), affiliated with an intergovernmental organization such as UNEP (Basel, CBD, CITES since 1984, POPs, Ozone) or UNESCO (World Heritage, MARPOL), or housed by an NGO such as IUCN (CITES since 1984, Ramsar Convention). Inter-organizational rivalry is sometimes intense, overlaps in areas of intervention plentiful, and attempts at co-ordination have had only meager results. According to UNEP, MEA secretariats have been set up without thought as to how they would be integrated into the system as a whole. Further to the Rio conference, UNEP had to face increasing competition from existing institutions (the UNDP under Gus Speth) and new ones (CSD), suffered substantial cut-backs in operational resources, and saw its mandate called into question and its own management practices severely criticized by a UN inspection mission.

Beyond the problems related to the crisis of multilateralism, some specific factors present obstacles that make it hard to chart the future of global environmental governance.

The issue of the environment has been redefined in terms of sustainable development (mentioned in the Brundtland report, re-stated in Rio, and set in stone in Johannesburg), the political trajectory of which is now centred on the Millennium objectives. The consequence of this redefinition has been a re-orientation of public action in favor of poverty reduction, the local – rather than global – level, and socio-economic – rather than scientific – dimensions of environmental protection. First, the steps already taken have not involved major changes and have only had a slight economic impact. Going further implies arbitration that is trying at the national level and even more problematic at the international one. Moreover, differences of opinion on means run deep. The perception of a global order based on the international rule of

law and co-operation among nations is not shared by everyone involved in international negotiations: it is overtly rejected by the Bush administration and criticized by developing countries. With some support from Japan and a number of emerging countries, it is Europe that defends this perception of global governance.

In addition to these perceptive differences, there is a debate on “models”, especially international agreements among countries, which are difficult to negotiate and implement.

On one hand, surfing on the legal wave and promises of the 1980s and 1990s, many legal activists push for a further rationalization and strengthening of the international legal system pertaining to the environment through the development of legal instruments to manage areas hitherto ignored on a global scale (water), though the centralization of existing instruments into an overarching regime (biodiversity, fisheries, chemicals), through the inclusion of powerful non compliance and enforcement procedures into existing and future MEAs, or through the expansion of the framework convention – protocol model of international agreement with universal membership. Calls for a world environmental organization directly follow this logic. Pragmatics, on the other hand, plead for regimes established on a case-by-case basis, perhaps with limited membership (so-called “coalitions of the willing”), covering a single issue-area, and combining private, public, local, and global actors.

There is also a fundamental criticism of the current governance system for its lack of effectiveness, the limited and sometimes questionable legitimacy of decisions and resulting institutions, and the unfair aspects of the process and subsequent results. All these factors explain why it is so difficult to arrive at a consensus. Matters of collective interest and the need for co-operative strategies have not disappeared, however, and negotiation is essential for articulating strategic choices and collective preferences, as attested by the discussions on the reform of international environmental governance (IEG).

Several options for a new architecture of international environmental governance have been identified and discussed but no consensus has been reached. The way in which they are presented make them look like alternatives : either we broaden the scope of GEF or we create a WEO; either we strengthen UNEP or we create an environmental tribunal. Now, these options are not all various alternatives to the same problem. Strengthening the mandate of GEF is one thing, creating a centralized institution of the WEO type is quite another; one does not preclude the other. Several options can be developed in parallel and offer fruitful synergies. It is quite possible, for example, to imagine merging part of the mandates of UNEP and UNDP, which would fit well with a strengthening of GEF and the creation of an environmental tribunal. UNEP has identified eight options for reforming international environmental governance, although discussions within the IGM process (2001/2002) quickly

emphasized that the reform process should be gradual and encompass sustainable development. The options were:

1. transforming and strengthening UNEP;
2. making greater use of the UN General Assembly or ECOSOC;
3. creating a World Environment Organization;
4. transforming the Trusteeship Council ;
5. integrating certain functions of UNDP and UNEP;
6. broadening the mandate of GEF;
7. strengthening the CSD;
8. establishing an international environmental court

Much has been written about some of these options, especially on the creation of a World Environment Organization (Biermann and Bauer, 2005). UNEP's list does not include all the proposals made in different forums over recent years. Clustering and strengthening MEA secretariats, for example, are options which have also been presented at UNEP-organized meetings. Clustering was discussed within the framework of the IGM process led by UNEP in 2001 and was the subject of a pilot project engaging the chemical conventions. Other options presented in summary documents by UNEP, such as the fusion of UNEP and UNDP, did not go very far and seem to have been abandoned fairly quickly. The international environmental criminal court<sup>1</sup> and the creation of a WEO have been the focus of NGO campaigns.

Various initiatives have taken place to improve the current system of international environmental governance. In 1999, the UN General Assembly<sup>2</sup> established the Global Ministerial Environment Forum (GMEF) as an annual, ministerial-level forum, tasked with providing political leadership within UNEP.<sup>3</sup> In May 2000, it adopted the Malmö Ministerial Declaration, which underscored the need for the adaptation of existing institutional arrangements in order effectively to confront the great variety of environmental problems in a context of globalisation which itself has increased the complexity of the formulation of coherent and adequate policies. Additionally, the IGM process led to the adoption of three initiatives designed to improve UNEP's role and the

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<sup>1</sup> For example, see the petition launched by the Cousteau team during the conference of the International Organization of Bio-politics entitled "Resolving the ecological crisis. The need to create an international criminal court for the environment", Athens, January 22nd 2001.

<sup>2</sup> Resolution 53/242 of July 28, 1999

<sup>3</sup> Resolution 53/242 of the United Nations General Assembly, July 28, 1999.

predictability of its financial resources: on an indicative scale of contributions to UNEP, on a Strategic Plan for Technology Support and Capacity-Building<sup>4</sup>, and on strengthening the scientific base of UNEP.

In March 2005, the UN Secretary General endorsed most of the findings of the Panel on *High Panel on Threats, Challenges and Change*<sup>5</sup> that had identified various institutional weaknesses in the current UN system in its December 2004 report, and noted a lack of coherence in environmental protection efforts at the global level. Regarding international environmental governance, the Secretary General stated:

It is now high time to consider a more integrated structure for environmental standard-setting, scientific discussion and monitoring treaty compliance. This should be built on existing institutions, such as the United Nations Environment Programme, as well as the treaty bodies and specialized agencies. Meanwhile, environmental activities at the country level should benefit from improved synergies, on both normative and operational aspects, between United Nations agencies, making optimal use of their comparative advantages, so that we have an integrated approach to sustainable development, in which both halves of that term are given their due weight. (Report of the Secretary General, A/59/2005, 21 March 2005 stated (No. 212)).

Following President Chirac's calls for the creation of a United Nations Environment Organization (UNEO) based on the present United Nations Environment Programme (UNEP) on 23 September 2003 at the United Nations General Assembly, the French government convened an informal intergovernmental working group<sup>6</sup> in New York and Nairobi in 2004 (Le Prestre, 2006). This "French initiative", strongly supported by Germany was designed to reinforce and improve the efficiency of the actual governance system, which is widely criticized for its lack of unity among several other problems, and keep the IEG debate on the international agenda. It received the official support of the European Union in May 2005 at the conclusion of its work, which endorsed the Secretary General's call for a more integrated structure in order to reinforce environmental standard setting, scientific discussion, and monitoring of treaty compliance<sup>7</sup>. On September 2005, the UN Summit on the MDG set up a dual process

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<sup>4</sup> The Bali Strategic Plan was adopted on December 4, 2004

<sup>5</sup> *A more secure world: our shared responsibility - the High Panel on Threats, Challenges and Change*, A/59/565.

<sup>6</sup> Belgium, Brazil, Burkina Faso, Canada, China, Colombia, Czech Republic, Germany, India, Indonesia, Italy, Japan, Kenya, Luxembourg, Mexico, Morocco, Nicaragua, Nigeria, Norway, Senegal, South Africa, Sweden, Switzerland, United Kingdom, Vietnam and the European Commission.

<sup>7</sup> 2660th Council meeting General Affairs and External Relations - Brussels, 23 and 24 May 2005 Par. 32 "The EU supports a more effective governance of the global environment through a more integrated structure

for examining ways to improve the coherence of the UN system, although it did not refer to this specific option:<sup>8</sup> under the Secretary General, a high-level panel was to examine UN coherence in the fields of development, humanitarian assistance and the environment, while the General Assembly was to conduct an Informal Consultative Process on international environmental governance.

While the institutional debate has been unable to produce a coherent system or recognized standards, other forums of discussion and regulation have emerged, based on partnerships among actors, with or without their countries' participation. Examples include ad hoc regional and international initiatives (NEPAD), "coalitions of the willing" (Kimberley Process), public private initiatives (Global Compact), and private initiatives (Forest Stewardship Council). They were promoted in the name of effectiveness, but their real long term impact on the environment or on the capacity of various actors to harmonize their interests is unclear. Although they make it possible to develop a normative framework, these initiatives have brought about further fragmentation of the current system: How can they be integrated into a broader system?

The process engaged by UNEP in 2001 with strong support from Canada, and the initiatives of France and Germany have breathed new life into the debate on environmental governance. The conditions for supporting one option over the other have not all been met, however. Political actors show marked differences of opinion regarding both the nature of the problem (the system's deficiencies and their impacts) and the solutions to these problems (that is the principles that should govern new arrangements).

One source of divergence came from the different perceptions that actors have of key dimensions of the debate. Beyond the characterization of the problem, effectiveness, legitimacy and fairness act as central drivers of the process and are central to any future system of governance. Yet their meaning, bases and consequences are understood differently. These discussions have also revived the debate between pragmatics and jurists; that is, between, on one hand, those who deplore the move away from a better understanding of the role of the state and of the limits of international organizations and multilateralism, and the proponents of collective action through the promotion of international law and the concept of global public goods on the other.

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in order to reinforce environmental standard setting, scientific discussion and monitoring of treaty compliance."

<sup>8</sup> United Nations, "Final Document of the 2005 World Summit," New York, United Nations, 2005 (A/60/L.1), p.41 (¶169).

## 2. The conference and the structure of the book

The following contributions were given at a workshop held in Paris in 2004<sup>9</sup> aimed at stimulating a dialogue among academics and practitioners, and at contributing to the policymaking process in the field of international and global environmental governance. After identifying why the existing international environmental governance system is so criticized and why a multilateral approach to solving global problems is necessary, the conference assessed the current state of the debate and the different options available, including their political feasibility.

The program of the conference was divided into three plenary sessions — as well as parallel sessions — which this book covers: 1) Building a common vision; 2) Going beyond divergent perceptions; 3) Devising a renewed architecture for the international environmental governance system. These workshops focused on available tools to build a collective action for an equitable, efficient, and legitimate system of environmental governance, on their limits, on the lessons to be learnt from their implementation and on ways to engineer this collective action.

### 1. *Building collective action*

For a number of observers, implementation remains the key issue. Are available instruments adequately designed? What kind of policy mix is needed? Four parallel workshops addressed these questions from a variety of perspectives.

**A. *Legal instruments: How hard, how soft?*** After twenty to thirty years of elaboration of international legal tools for environmental protection, how far have progressed toward implementation? What are the main enforcement issues? Can we have efficient legal instruments without coercion? Is implementation possible as long as issues such as capacity, financial resources, balance between environmental commitments, and development opportunities are not addressed? What are the relative importance and relationships of existing international legal tools?

**B. *Economic instruments: How far we can go?*** Economic theory suggests several types of instruments to correct market failures and develop incentives to protect the environment. How far have these instruments been implemented in practice?

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<sup>9</sup> Organized by IDDRI, with the collaboration of IUCN, the support of Yale Center for Environmental Law and Policy, Chaire Développement durable de Sciences Po Paris, the Observatoire de l'écopolitique internationale and the financial support of Ministry of Foreign Affairs, Ministry for Environment (France) and the Heinrich Böll Foundation (Germany).

**C. Information: A new strategic field?** Information is critical to monitoring the implementation of MEAs but also triggering alerts. Various clearing house mechanisms and databases have been created for this purpose. This addressed the issue of information, including the function of indicators: Who produces them and how? How do indicators match the goals of MEAs? Transparency and participation in the use of databases and Clearing House Mechanisms were also discussed.

**D. Scientific expertise: A questioned legitimacy?** Building a scientific community on global issues seemed a promising approach in order to identify and quantify environmental problems. Is this approach still relevant when the legitimacy of these communities is not determined? How can such legitimacy be firmed up?

## 2. *Providing collective action*

The current international governance system has demonstrated that the development of a consensus both on the issues at stake and on the tools that facilitate implementation is a necessary but not a sufficient condition to trigger collective action. Ensuring the effectiveness, the equity, and the legitimacy of the international governance system requires the proper design of institutions and procedures along three dimensions: the coherence and consistency of international norms, the articulation between various levels of governance, and the compatibility with other international governance systems. Finally, this design has to be evaluated through its impacts on the environment.

**E. Coherence and consistency of international norms.** How can the effectiveness, legitimacy, and equity of the process of elaborating standards and instruments be ensured? How can various systems of control and enforcement be established in a coherent manner when they may be founded on very different principles (e.g. WTO vs MEAs)? How can disagreements on the nature and importance of various environmental issues be settled?

**F. Articulation and coherence between various levels of governance.** How can various levels of governance (local, national, regional and international) interact in mutually supportive and complementary ways? How can synergy between instruments at each level be achieved? What role should capacity-building play in strengthening synergies among various levels of governance? What other strategies are needed?

***G. Articulation and coherence with other international governance systems.***

Environmental governance cannot be isolated from what happens outside the environmental arena. There is a serious risk of marginalization of environmental issues on the international agenda. How can the linkage between the environmental agenda and other agendas, such as the Millennium Development Goals, the World Summit on Sustainable Development Action Plan, and the Monterrey commitments be strengthened without rendering the goal of reforming the environmental governance system more elusive?



### Selected chronological events<sup>1</sup>

#### 1970

- George Kennan proposes establishing an International Environmental Agency.

#### 1972

- Lawrence David Levien suggests establishing a “World Environmental Organization” modeled after the International Labor Organization.
- Creation of the United Nations Environment Programme (UNEP).

#### 1989

- Adoption of The Hague Declaration.

#### 1992

- Sir Geoffrey Palmer, New Zealand Prime Minister, asks for a revision of the status of UNEP and for the creation of an International Environmental Organization.

#### 1994

- Following the creation of the WTO, Daniel Esty proposes establishing a Global Environmental Organization.

#### 1995

- UNEP establishes the Inter-Agency Environment Management Group (IAEG) as a mechanism to provide UNEP with an effective and strong co-ordinating role within the UN system on environmental matters.

#### 1997

- During the G7 summit in Denver (June), Chancellor Kohl proposes the creation of a World Environmental Organization;
- Maurice Strong endorses the creation of a World Environmental Organization on the basis of UNEP;
- Kofi Annan establishes a *Task Force on Environment and Human Settlements*, chaired by UNEP's Executive Director Klaus Töpfer, to prepare proposals on reforming and strengthening UN activities in the fields of environment and human settlements;
- Adoption of the Nairobi Declaration on strengthening UNEP.

#### 1998

- General Assembly resolution 53/187, entitled “*Report of the Governing Council of the United Nations Environment Programme*”, recognizes decision SS.V.2 on the revitalization, reform, and strengthening of UNEP.

#### 1999

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<sup>1</sup> Based on and translated from Observatoire de l'écopolitique internationale, « Éléments chronologiques axés sur la gouvernance internationale de l'environnement » ([www.ihqeds.ulaval.ca/oei.htm](http://www.ihqeds.ulaval.ca/oei.htm))

- Renato Ruggiero, WTO Director-General, calls for the creation of a World Environment Organization (WEO);
- Jacques Chirac, French president, calls for the creation of a world environmental authority;
- At their meeting in Schwerin (Germany), G8 Environment Ministers express the wish to "strengthen UNEP as the primary institution within the UN system for environment policy."
- The G8 Summit (Cologne) calls for "a more effective way within the WTO for addressing the trade and environment relationship and promoting sustainable development and social and economic welfare world-wide" (G8 paragraph 9);

#### 2000

- Lionel Jospin, Prime Minister of France, supports the creation of a WEO;
- First meeting of the Global Ministerial Environment and adoption of the Malmö Ministerial Declaration (May 29-31, Sweden);
- Bergen Informal Ministerial Meeting (Bergen, Norway, September 15-17);
- UN *General Assembly*, Resolution 55/198 (A/55/198, III) calls for « Enhancing complementarities among international instruments relating to environment and sustainable development ».

#### 2001

- UNEP Governing Council Decision 21/21 on International Environmental Governance establishes an open-ended intergovernmental group of ministers or their representatives to undertake a comprehensive policy-oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened international environmental governance (IGM);
- IGM 1, April 18, New York (USA);
- Civil Society Consultations on International Environmental Governance (Nairobi, Kenya);
- Committee of Permanent Representatives to UNEP, 75th Meeting and first meeting of the IGM (IGM-1);
- IGM-2, July 17, Bonn (Germany);
- International Eminent Persons Meeting on Interlinkages, "Bridging Problems and Solutions to Work Towards Sustainable Development", UNU, 3-4 sept., Tokyo;
- IGM-3, September 9-10, Algiers;
- IGM-4, November 30 – December 1<sup>st</sup>, Montreal.

#### 2002

- IGM "Briefing Session", New York January 25.
- IGM-5, Cartagena (Colombia), February 12.
- GMEF/7<sup>th</sup> Special Session of the UNEP Governing Council, Cartagena (Colombia), February 13-15. Adoption of the report of the Open-ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance (resolution VII/1).
- Consultations on sustainable development governance as part of the WSSD preparatory process (February-June).
- International Conference on Financing for Development, March 18-22, Monterrey (Mexico).
- World Summit on Sustainable Development Johannesburg, South Africa.

**2003**

- At the United Nations General Assembly, President Chirac calls for the creation of a United Nations Environment Organization (UNEO) based on the present United Nations Environment Programme (UNEP) (23 September).

**2004**

- The eighth special session of the UNEP Governing Council/Global Ministerial Environment Forum, held in Jeju (Republic of Korea), launches formal negotiations on the Strategic Plan for Technology Support and Capacity-building (February).;
- Following the French proposal, an informal intergovernmental working group charged with discussing the rationale and prospects for the creation of a UN specialised agency on the Environment is launched in New York and Nairobi;
- Adoption of the Bali Strategic Plan for Technology Support and Capacity-building, Bali (December).

**2005**

- End of the informal intergovernmental working group on a UNEO;
- Review of the achievements of the goals of the Millenium Summit (September);

**2006**

- Release of the *Report of the Secretary General's High-level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment* (November 9).

## **Effectiveness, Fairness and Legitimacy : Three Analytical and Organizational Concepts of International Environmental Governance**

Marie Törnquist-Chesnier and Benoît Martimort-Asso

The notions of effectiveness, fairness and legitimacy all refer to the actors of International Environmental Governance vocabulary and all can have multiple definitions. The aim of this chapter is to pinpoint the importance of these concepts in the debate on governance, to highlight the variety of existing definitions, and to offer alternative definitions on which to base the analysis of present IEG and the reform of the system.

These three notions are interdependent and reflection must be grounded on a threefold questioning of the institutional system, in particular: (i) of its lack of legitimacy, of effectiveness and equity; (ii) of the existence of a variety of standards for the implementation of international rules; and (iii) of the construction of regimes which largely reflect the interests and constraints of rich countries.

After twenty years of discussion, negotiation, and drafting of environmental regimes, the balance sheet is quite weak: many bilateral, regional and international agreements have been signed. It remains difficult, however, to determine how to go one step further, and in what direction. Evaluation and follow up of actions already taken are particularly problematic. Some even suggest that what has been done should, in fact, be undone.

Beyond the blockage and the more general questioning of multilateralism, a number of elements specific to the environment help sustain the confusion about its future on the international agenda. International regimes are accused of being ineffective, and the imbalance between trade and environment norms only accentuate that impression. Environmental issues are approached differently by different actors. The solutions proposed, therefore, diverge from one country to the next (American retreat from international conventions, weak adherence of developing countries; while the environment has become a major concern for European countries). Hence, a retreat from environmental preoccupations is being felt at the international level: one no longer knows what ought to be negotiated, how it should be approached, and which means should be used. What are the conditions necessary to move out of this dead-end? Adopting and acting on the basis of strong and consensual concepts is a prerequisite to progress.

Effectiveness, fairness, and legitimacy are well-known dimensions of the debate on global governance (Jacquet et al., 2002) which have their own dynamics. Effectiveness has long been supported by the United States in order to advocate

changes in the governance of the UN in general and in the implementation of multilateral environmental agreements (MEA) more particularly. The necessity of an economic effectiveness in order to attain environmental objectives now seems to gather consensus.

Fairness was fully acknowledged in Rio through the principle of common but differentiated responsibilities. It is a traditional claim of developing countries. First considered as sharing the burden of environmental responsibilities, it has broadened to include the procedural aspects of international negotiations, such as agenda-setting.

For its part, legitimacy is linked to the evolution both of the concept of national sovereignty and of negotiation and decision-making mechanisms. This concept is at the heart of EU concerns. Critics of WTO negotiations have questioned the role and legitimacy of negotiators (including the role played by international civil servants) and of the negotiation forum itself. The participation of members of parliament and of civil society members in national delegations and in the national preparation for international negotiations is an answer to the legitimacy crisis. Such initiatives have been adopted by the American government (under the Clinton administration) and the EU as well as by Canada, among others.

### *Effectiveness*

According to the standard meaning of the term, something is considered effective that produces the expected effect. The effectiveness of multilateral environmental agreements (MEA) lies at the heart of researchers' concerns. However, few authors actually define what they mean by effectiveness and some tend to confuse effectiveness and compliance. The various approaches to effectiveness considered below imply different goals and dependent variables, such as problem solving or actors' behaviors. Most authors, though, tend to consider that the present system of IEG is unable to deal with current environmental challenges. But is it a question of effectiveness or, rather, does it reflect that existing MEA or agreements under negotiation are in fact bad or insufficient?

Legal scholars, such as Maljean-Dubois and Richard, stress that translation of the term effectiveness may be a problem. In French, for instance, it corresponds to both "*efficace*" and "*effectif*". The first notion asks the following question: can the quality of the environment or the state of the resources improve thanks to the regime or treaty? The second one questions whether or not the agreement is capable of changing the behaviors of relevant parties in the right direction. The English "effectiveness" corresponds to the "impact of a given international institution in terms of problem-solving or achieving its policy objectives", and thus is not synonymous with implementation (Risse, 2001, quoted in Maljean-Dubois and Richard, 2005:14).

For political scientists, the notion of effectiveness is tightly linked with that of regime. Oran Young (1996) presents seven possible ways of understanding the notion: 1) a regime is effective when it leads to the resolution of the environmental problem at stake; 2) when its initial goals are achieved; 3) when it is implemented (via capacity-building and incentives to comply); 4) when parties comply with its dispositions; 5) when it induces a change in behavior; 6) when it improves co-operation; 7) and when it strengthens universal norms. Effectiveness, therefore, is a multidimensional concept (Von Moltke, 2000): a regime is considered effective provided it ensures the protection of the environment, leads to the respect of established rules and standards or to the expected modification of human behavior, is transposed to the different institutional levels (regional, national, local) through the adoption of laws and rules, and has an impact through its mere existence, regardless of the adoption of specific measures.

Of course, in addition to the variety of criteria for regime effectiveness, authors tend to introduce specific distinctions: Jacobson and Weiss insist that compliance need be distinguished from implementation since it implies more than the latter. It entails a dimension of adherence of a party to the dispositions of an agreement and to the implementation procedures it encompasses. Chayes and Chayes (1995) pinpoint the outstanding importance of transparency as a way both to reassure partners and to facilitate a co-coordinated pursuit of regime objectives. It also helps embarrass a state in case of blatant violation of the agreement. Non state actors, such as non governmental organizations (NGOs), but also multinational companies, definitely have a role to play in the process. As for Hasenclever, Mayer and Rittberger (1997), they insist on co-operation, socialization and internalization of the norms and goals of the regime as an indicator of regime effectiveness.

Difficulties emerge, however, both from the legal and the political definitions of the concept. Effectiveness is quite difficult to measure. Legally speaking, environmental law is characterized by proliferation, both institutional and normative, a characteristic it shares with human rights law. Soft law has gained in importance. Environmental law – as well as human rights law – appears to be the place of legal innovation. The importance gained by soft law highlights the North-South gap as well as the growing involvement of new actors in the legal process (Weil, 1996). An engagement of these new actors is also sought. Institutionalization is very lively but the newly-created bodies within the UN suffer from structural problems, from the absence of coercive powers, from a lack of transparency, and from endless discussions, among other ills.

Compliance and effectiveness are often used interchangeably. The latter corresponds in fact to part of what effectiveness actually means for lawyers. Moreover, compliance is equally difficult to evaluate. Jean Carpentier, in particular, proposes the creation of follow up mechanisms (*“filières de contrôle”*). A real need for reactive

follow up is expressed, as well as a transparency requirement: publicizing negotiations enables non state actors to step in and remind states of the issues at stake. Compliance as a measure of effectiveness is also problematic since actors may be in compliance with the rules without having taken any specific action. Eventually difficulties arise from the difference of conceptions that exist across disciplines: Weil (1996) notes that in international law (IL), it is not because international law rules are frequently violated that their status as legal rules is denied. Thus, the existence of a norm and its effectiveness tend to be disconnected. Lawyers also naturally will emphasize legal co-operation.

Scientists and economists will consider a regime effective if it has achieved its initial goals and solved the problem. OECD studies try to evaluate the effectiveness of economic instruments of environmental protection (OECD, 1997) with three main objectives in mind: (i) draw attention on the necessity to evaluate political instruments in general, and economic instruments in particular, (ii) develop a methodological procedure in order to gather data that can be evaluated; (iii) collect and analyze these data. Although this process has advantages (examine and compare performances; develop material for consulting and negotiation), it also requires an important investment in time and money, as well as presents technical difficulties, such as collecting the appropriate data, using simplified economic models that are easily criticized.

Political scientists will consider behavior and co-operation. But difficulties remain even within a single discipline. Oran Young identifies three categories of difficulties regarding international regimes or institutions which he calls fit, interplay and scale: Do needs and institutions fit? What is the interplay between international institutions? How difficult is it to move from one level of governance to the next?

Academic research has dealt with the conditions of effectiveness, but mostly theoretically without any real validation of hypotheses. According to Le Prestre (2005), regime effectiveness requires a number of preconditions such as the capacity of the regime to identify emergent problems, the structure and operation of the regime, the capacity to mobilize relevant actors and integrate them into international discussions, integration (both vertical — between the global and the local — and horizontal — across regimes—), the construction of a consensus on the nature of the problems and on a range of means to tackle them, innovativeness, learning, and legitimacy here referring both to transparency and fairness. To these criteria, Maljean-Dubois and Richard (2005) suggest adding the following ones related to implementation: strengthening implementation controls, improving the precision and reliability of information provided to the regime, and strengthening the capacity building of weaker parties. Harmonization and decentralization need to be rethought. Proposals to create a WEO (World Environmental Organization) also flourish, although the question of the effectiveness of the creation of an additional body remains. Regarding penalties, better

dispute settlement mechanisms ought to be installed. Some authors also suggest creating a specific International Environmental Tribunal).

This is what concerns academic research. But the notion effectiveness is also invoked by actors who try to make it more operational. A gap then remains between political needs and academic reflection. One way out would be to separate clearly two aspects of effectiveness: the legal one centred on compliance — do parties follow rules? Are the objectives of the convention achieved? Is it operational? — and the environmental one — is environment improving? This tackles the issue of the validity of the convention which can be quite problematic if the objectives are achieved but the environment has not improved.

### *Fairness*

With regard to the concept of *fairness*, the debate revolves around the difficulty to identify and set up a form of justice, of fairness, at the international level, one of the main issues being the transposition of the notion from the national to the international level. What is equity/fairness? A general definition distinguishes fairness from justice as it refers to natural justice, what is owed to each and every individual. Regarding international environmental agreements, developing countries and NGOs notably insist that all actors share common but differentiated responsibilities according to their wealth, their level of development, or their historical contribution to the problem.

The principle of ‘common but differentiated responsibility’ evolved from the notion of the ‘common heritage of mankind’ and is a manifestation of general principles of equity in international law. The principle recognizes historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Despite their common responsibilities, important differences exist between the responsibilities of developed and developing countries. According to Principle 7 of the *Rio Declaration*, “In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.” The principle of common but differentiated responsibility includes two fundamental elements. The first concerns the common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take into account the different circumstances, particularly each state’s contribution to the evolution of a particular problem and its ability to prevent, reduce, and control the threat.

Instances of common responsibility appear as early as 1949, when tuna and other fish were described as being “of common concern” to the parties by reason of their continued use by those parties. Outer space and the moon, on the other hand, are

described as the “province of all mankind,” waterfowl as “an international resource,” natural and cultural heritage as “part of the world heritage of mankind as a whole,” the conservation of wild animals as being “for the good of mankind” and resources of the seabed and ocean floor and subsoil as “the common heritage of mankind.” Recent state practice supports the emergence of the concept of “common concern” as reflected in the conventions on climate change and biodiversity. Differentiated responsibility appears in number of treaties. The 1972 London Convention requires measures to be adopted by parties “according to their scientific, technical and economic capabilities.” The special needs of developing countries are expressly recognized at article 11(3) of the 1976 Barcelona Convention and in the preamble to the UN Convention on the Law of the Sea. The principle of differentiated responsibility has also been applied to treaties and other legal instruments for developed countries. Examples include the 1988 EC Large Combustion Plants Directive, which sets different levels of emission reductions for each member state, the 1991 VOC Protocol, which allows parties to specify one of three different ways to achieve reduction, and the 1992 Maastricht Treaty. Differentiation within developing countries is specified, for example, in the Climate Change Convention which recognizes the “special needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change”. Thus, according to Shue (1999:1), “it is at least conceivable that rich states might now be willing to consider dealing co-operatively on equitable terms with poor states in a manner that gives due weight to both the economic development of poor states and the preservation of the natural environment.”

Various conceptions of distributive justice coexist at the national level. Principles of distributive justice are normative principles designed to allocate goods in limited supply relative to demand. The principles vary along numerous dimensions: over what should be distributed (income, wealth, opportunities, etc.); to whom should distribution be applied (natural persons, groups of persons, reference classes, etc.); and on what basis the goods should be distributed (equality, according to individual characteristics, according to free market transactions, etc.). We shall examine only a few relevant conceptions.

According to strict egalitarianism, every person should have the same level of material goods and services: people are owed equal respect and equality in material goods and services is the best way to give effect to this ideal. The two main problems are the construction of appropriate measurement indices, and the specification of time-frames. The most common criticism is a welfare-based one: everyone can be materially better off if incomes are not strictly equal. This fact partly inspired the difference principle according to which the most common way of producing more wealth is to have a system where those who are more productive earn greater incomes. Rawls in *A Theory of Justice*, (1971) and in *Political Liberalism* (1993) offers the following two

principles of justice: 1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. 2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society (Rawls, 1993: 5-6. Utilitarians object that the difference principle does not maximize utility while Libertarians see in it unacceptable infringements on liberty. This conception is also criticized on the grounds that it mostly ignores claims that people deserve certain economic benefits in light of their actions.

Resource-based principles prescribe equality of resources. People who choose to work hard to earn more income should not be required to subsidize those choosing more leisure and hence less income. Ronald Dworkin, (1981a, 1981b) proposes that people begin with equal resources but end up with unequal economic benefits as a result of their own choices. What constitutes a just material distribution is to be determined by the result of a thought experiment designed to model fair distribution. Everyone is given the same purchasing power and uses that purchasing power to bid, in a fair auction, for resources best suited to their life plans. They are then permitted to use those resources as they see fit. Although people may end up with different economic benefits, none of them is given less consideration than another in the sense that had they wanted somebody else's resource bundle, they could have bid for it instead. Dworkin proposes a hypothetical compensation scheme in which he supposes that, before the hypothetical auction, people do not know their own natural endowments. However, they are able to buy insurance against being disadvantaged in the natural distribution of talents and they know that their payments will provide an insurance pool to compensate those people who are unlucky in the 'natural lottery'.

Welfare-based principles are motivated by the idea that what is of primary moral importance is the level of welfare of people. The welfare functions proposed vary enormously both on what will count as welfare and on the weighting system for that welfare. For almost any distribution of material benefits there is a welfare function whose maximization will yield that distribution (at least in a one sector period). For Libertarians, the market will be just insofar as the exchanges permitted in the market satisfy the conditions of just exchange described by the principles. Just outcomes are those arrived at by the separate just actions of individuals; a particular distributive pattern is not required for justice. Nozick proposes a 3-part "entitlement theory". If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings: 1) A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding. 2) A person who

acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding. 3) No one is entitled to a holding except by (repeated) applications of (1) and (2). The complete principle of distributive justice would say simply that a distribution is just when everyone is entitled to the holdings they possess under the distribution. (Nozick, 1974: 151). According to Nozick's interpretation, an acquisition is just if and only if the position of others after the acquisition is no worse than their position was when the acquisition was not owned or 'held in common'. For Nozick's critics, his proviso is unacceptably weak, because it fails to consider the position others may have achieved under alternative distributions and thereby instantiates the morally dubious criterion by which whoever is first gets the spoils.

At the international level, one may first ask how the issue of fairness is dealt with in international law. Weil (1996: 245-260) establishes that the legalization of fairness is part of the extension of international law (IL). Traditionally fairness and international law were distinct; but fairness has been called upon to fill the gaps of IL. It inspires a certain number of IL rules such as *pacta sunt servanda*, *bona fide*, law abuse, or the obligation of reparation. These are often referred to as fairness principles, a material source of IL. According to the International Court of Justice, "fairness, as a legal disposition, directly proceeds from the idea of justice". In the 1970s and 1980s, fairness was considered a substitute for IL, especially regarding maritime boundaries. However, given the risk of having IL drift towards subjectivity and lack of determination or definition, adjustments have been made: fairness is now used to correct individual cases and not as a legal rule. It is a principle that ought to be resorted to reasonably. It is, in the words of Lauterpacht, "an instrument to be used with parsimony".

In *The Law of Peoples*, Rawls shows how a modern constitutional democracy, based on a liberal political conception, could and would be viewed as legitimate by reasonable citizens who on religious, philosophical, or moral grounds do not themselves accept a liberal comprehensive doctrine – as that of Kant, or Mill, or Rawls's own "Justice as Fairness," presented in *A Theory of Justice* (1971). *The Law of Peoples* extends the idea of a social contract at the international level to the society of peoples and lays out the general principles that can and should be accepted by both liberal and non-liberal societies as the norm for regulating their mutual interactions. In particular, it draws a crucial distinction between basic human rights and the rights of each citizen of a liberal constitutional democracy.

Amartya Sen's writings insist on the importance of democracy and of rethinking inequality in developing countries in the context of global economic integration. Globalization could be a major force for prosperity only if backed by adequate national policies in a conducive social and economic environment. But, if a country pursues economic integration in a globalized world at the fastest rate possible, while neglecting issues of social opportunity, literacy and health care, it is creating problems for itself.

Globalization needs to be put in the broader context of social and economic policies. Democracy is equally crucial, especially to avoid famines, since governments would come under pressure from the media and the opposition to solve the problem. In *Inequality Reexamined* (2000), Sen shows how all the major approaches to the ethics of social arrangements demand equality of something, but not of the same thing. In fact, when some things are equal others are not; let us then equalize higher and more basic values, such as the freedom to achieve objectives.

Regarding fairness and international environmental regulations, Godard notes that the breadth of material inequalities and the absence of a common problem definition, together with the lack of a long term perspective, make international co-operation very difficult. Three models have been proposed to overcome these co-operation problems: epistemic communities, mutually profitable agreements based on compromise and concessions, and principles and rules which refer to a virtual supranational community (humanity). However, each proposal has its own problems and limits.

Godard particularly considers fairness in burden-sharing, i.e. quotas. The problem is that each party has its own conception of fairness; it is, therefore, a subjective notion. Fairness ought to be both viable and acceptable and lead to the definition of a fair and equitable allocation of rights — itself bound by time and place. Regarding greenhouse gas emissions, one should take into account the equality of individuals, the present needs of production, the promotion of markets and market rules in order to fulfill the expectations of other production agents, and historical responsibility (countries from the North should compensate Southern populations for climate change). Moreover, when the North developed it did not have to meet the same environmental demands and international rules as exist today. Thus, multiple and complex criteria have to be met in order to establish a fair distribution of rights and obligations. According to Godard, the main issue is not to choose one criterion but to recognize the nature of a given situation and decide in the context of that situation. A certain degree of coherence is therefore necessary between the definition of each party's initial obligations and the regulations eventually implemented. Godard suggests four solutions: hegemony, issue linkage, aggregation of national policies, and partnerships with NGOs as an alternative to state action. All four proposals, of course, have their own limits. The main issue remains the question of shaping government behavior and changing lifestyles. At the heart of the actors' concerns, the issue of fairness remains a burning issue.

### *Legitimacy*

Like effectiveness and equity (fairness), legitimacy is also variously defined. In environmental law, it arises through a questioning of rules and procedures. The issue of who participates is especially acute. There is also ongoing unease with the lack of

compliance with written as well as non written rules – an issue which has been raised at the WTO. We shall first consider national sources of legitimacy, then focus on sources of legitimacy at the international level, particularly on civil society empowerment which is also tightly linked with knowledge and expertise.

The classic sources of legitimacy as identified by Max Weber lead to three forms of authority: traditional, that is to say personal authority grounded on tradition; legal-bureaucratic (also called rational) which implies obedience to rules, and charisma which is personal and rests on allegiance and faith in a specific individual. Both the tradition and charismatic forms of legitimacy are unstable, however, because they are arbitrary, that is based on loyalty rather than competence. Rational legitimacy, according to Weber, provides both flexibility and continuity, a legal and social framework. For Gelpi (2003), even coercive power needs some form of legitimacy to maintain control. Hoffe considers justice as the categorical imperative for the state, simply because it has the capacity to coerce. In Gellner's view (1974), people presume a government to be legitimate when they are getting something from it and people share the same idea of what the "right thing" is: if we are operating within the same cultural norms, we are more likely to trust that the mutual benefits will continue. Of course Locke and Rousseau's social contract are not far behind. For Bay, the primary criterion of the legitimacy of a government is its commitment to the protection of human lives and the fulfillment of basic needs. It is not based on loyalty, contrary to the cultural dimension present in Gellner's notion of legitimacy.

How do these various criteria apply at the international level? We shall focus on three elements: international institutions, civil society, and representation and knowledge.

International or global institutions are often criticized for their lack of legitimacy: they are deemed not democratic or representative enough, neither efficient nor fair enough. The UN itself has launched a vast reflection on its own shortcomings and has embarked on several reforms (regarding the Security Council, the UN approach to collective security or the coherence of its operations). The neglected role of the General Assembly is also being questioned. Regarding international institutions in general and international financial institutions in particular, the relationship between the level of financial contribution and decision-making power raises constant criticisms. Procedures are similarly questioned.

At the same time, civil society voices ask to be included in decision-making processes: globalization should shift from a top down to a bottom up approach. This call for inclusion is expressed in a growing body of international legal instruments that identify public participation as a prerequisite for promoting the goals of sustainable development. Yet, these dispositions tend to remain incantations since they are rarely implemented. Civil society movements continue to claim that they are insufficiently associated with decisions. Civil society networks have translated the notion of

sustainable development into practical actions and have linked it to the participation issue (Milani and Keraghel, forthcoming). Reforms of the UN system tend towards a greater inclusion of private actors. International regimes such as the ICC Rome Statute assign NGOs a specific fact finding (Article 15) and victims support role. “Global civil society”, however, remains quite difficult to define. Authors do not even agree on whether to call it “transnational” (Florini, 2000) or “global”. One of the main questions asked is: why should such movements be entitled to exert a particular influence on global governance since they are not democratically elected or necessarily transparent. One answer is that they possess a specific know-how and that they are effective in the actions they take. Their legitimacy could thus be qualified as being functional. This also shows that the three notions under consideration in this chapter — effectiveness, fairness and legitimacy — are intimately linked.

Expertise and experience are two crucial elements at the centre of international organizations such as the World Health Organization. However, Haas (this volume) reminds us of three limits to the role of scientific expertise: science is not wisdom (or truth), science is suspicious because politically marked, power is by no means interested in science. Attention should therefore be drawn to the political use which is made of the scientific and legal discourse. Moreover, if legitimacy is tied to science, then both the use and the origin of science ought to be questioned. Although expertise is a source of legitimacy, both for NGOs—which are becoming more and more professional and are increasingly consulted for their legal and scientific expertise by state and IGOs—and international organizations—the importance gained by IGOs was directly accompanied by the emergence of the expert on the international scene — (Smouts, 1995), resistances remain, as highlighted above.

Although the state remains at the heart of the system, it is today just one actor among others and cannot account for the entire legitimacy of the system. One of its roles is therefore to have the ability to create new dynamics and articulate the variety of legitimacies at stake, while taking into account the limits of the various claims and sources of legitimacy.

In summary, effectiveness, fairness, and legitimacy are three core requirements of international environmental governance. The notions appear so closely linked that it is quite impossible to deal with one without taking the other two into account. Each notion tends to strengthen the other two: to be effective, a convention needs both be fair and legitimate; to be legitimate, an agreement needs be fair, and to be fair, it needs to be effective.