

PART III

Providing collective action

SECTION 1

Coherence of the International System

Panel Report

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Coherence was one of the four pillars of MEA effectiveness that Canada's highlighted in its September 2000 discussion paper on international environment governance (Canada, 2000). There are different levels of coherence. At one level, it basically refers to the need to ensure that MEA be mutually supportive. At another, it seeks to give practical meaning to the assumption of a positive relationship between the three pillars of sustainable development, notably between the poverty, trade, and environmental agenda. A coherent international environmental agenda must be embodied in a comprehensive set of legal instruments and policy directions for environmental protection and conservation. This issue touches on many aspects, such as:

- What is meant by coherence and what type of coherence is actually needed in the international system?
- How does coherence relate to co-ordination, implementation, and effectiveness?
- How can we attain coherence among diverging perspectives and between the actions of a multiplicity of actors who tackle complex global issues?
- What are the latest efforts of the global summitry system to enhance coherence?
- Are the directions, concepts and commitments of the Monterrey ministerial, the WSSD and the Doha trade agenda compatible or do they pose significant challenges to environmental governance?
- How can disagreements involving environmental stakes be settled?
- What are the trade-offs between the three pillars of sustainable development at the international level? How can the environmental agenda be reconciled with the poverty agenda without being subsumed under it?
- How can we enhance coherence between multilateral commitments and national action?
- How can the various levels of governance better interact in mutually supportive and complementary ways?
- Is clustering a viable option?
- What are the basic requirements for enhanced synergies among existing instruments at each level (international, regional, national, and local)?

- What role can capacity building play in strengthening synergies between the various levels of governance?
- What can we learn from various regional or national experiences, such as the EU's integration of economic and political dimensions?

The panel was to consider the following points:

Linking environmental concerns with the MDGs — Environmental governance cannot be isolated from what happens outside the environmental arena. There is a serious risk of marginalization of environmental issues. How can the linkages between the environmental agenda and other agendas, such as the Millennium Development Goals, the WSSD Action Plan, and the Monterrey Commitments be strengthened? How can the effectiveness, legitimacy, and equity of the process of elaboration of norms and instruments be ensured? How can various systems of control and enforcement be put in place especially when they are founded on very different principles (e.g. WTO and MEAs)?

Complementing formal and informal arrangements — Enhancing coherence requires combining formal arrangements with informal efforts. It is important to look at practical solutions to international issues. All stakeholders need to be included in the process in order to bring in a diversity of ideas and contributions. Global policy networks are creative, active, and innovative and should have a stronger voice in the international governance system.

Strategies for building political will — Some maintain that the political will for reform and change on a theoretical level is greater than its manifestation in practice. In most negotiations for reform, authority is too often delegated to civil servants who more often have a vested interest in maintaining the status quo. Achieving change requires giving more weight to capitals and politicians instead of civil servants or UN missions appointees. Further, a reform process that engages all stakeholders will produce results that are more balanced and effective.

Clustering MEAs for greater coherence—Efforts should be directed towards clustering MEAs on the basis of their formal dispute settlement mechanisms. In this way the seeds of a more formal dispute settlement mechanism could be sown.

Creating coherence between the WTO and MEAs — How can MEAs be accommodated within the international trade regime? Different approaches tried at regional level should be combined in order to achieve a positive result. Re-negotiations of the development agenda should include the relationship between trade, environment, and development concerns. Dispute settlement mechanisms could help promote greater coherence in the environmental arena and the global governance system at large.

Discussions mainly addressed the failure of the current global environmental governance schemes to further policy integration and the implementation of international commitments. Emphasis was placed on the need to locate the IEG debate

firmly within the context of sustainable development (SD), with due regard to other governance mechanisms that have similarly embraced SD principles.

The importance of mainstreaming SD into all aspects of global institutional and policy frameworks was also highlighted. The exact ways in which this could and should take place was subject of debate.

The question of coherence as a factor affecting the quality, level and scale of implementation of intergovernmental commitments was discussed and several factors were identified as affecting policy integration. The solutions to the problem were however not so easily forthcoming.

Several obstacles to achieving greater coherence were mentioned:

- Institutional fragmentation and policy discrepancies;
- Practical difficulties encountered in making the all important inter-linkages to the MDGs, WSSD goals and targets, and Monterrey process. The 7th and 8th Millenium goals (Ensure environmental sustainability and Develop a global partnership for development) were specifically noted as significant to the IEG debate;
- Legal conflicts and perceived incompatibility of environment regimes with the emerging economic governance system and the multilateral trade frameworks. In order to ensure “mutual supportiveness” of the systems, a series of possible approaches towards accommodation were outlined and explained, including listing specific MEAs for exception in trade regime, using saving clauses, and using a principles and criteria approach.

Participants recognized that none of these legal measures, however, added predictability or clarity of purpose, let alone provided the assurance sought by smaller countries looking to enforce environmental measures.

The multilateral trade system’s firmly established sanctions machinery and effective dispute settlement mechanism continue to chill policy-makers with respect to the use of trade measures or other trade-related policy tools for environmental purposes.

It was also noted that the issues of WTO-MEA interface was complicated by the proliferation of bilateral and regional trade agreements after Cancun.

Apart from trade, finance and investment policies were also found to impact environmental measures. The MDGs and issues of debt sustainability, commodity pricing, and subsidies were all identified as being fundamentally linked to the issue of inequity in the international trading system.

The perennial problem of political will for implementation was also raised. Here the suggestions were that, for environmental concerns, political will does exist at the national, even regional levels. At the global level however, power asymmetries and

entrenched national interest considerations dominate. International outcomes invariably meet the interest of the more powerful countries.

There was agreement that empowering civil society or even global public policy networks may help enhance political will. To spur implementation, the need to provide adequate resource, capacity and appropriate technology as well as fostering and promoting regional processes was also underscored.

The other issue discussed was the role of the market, which emerged during discussions of standards, rules, and voluntary initiatives. The WSSD promoted voluntary measures, and the use of standards was contrasted against the WTO rules-based TBT/SPS measures. However, the impact of the latter on market access and economic development of poorer countries has not been adequately addressed, nor have credible assessments been made of the effectiveness of voluntary initiatives. Meanwhile, industry-driven standards and other developments, such as the organization of production under buyers-driven global value chains, continue to lead the evolution of process and production methods, particularly with respect to their environmental and social impacts.

Mainstreaming Environment Coherence Among International Governance Systems

Mohamed T. El-Ashry

In less than a dozen years, the response of the international community to the challenges of environment and sustainable development included four international summits, four ministerial conferences, three international conventions, two protocols, and a new financial entity—the Global Environment Facility (GEF).

At the Earth Summit in June, 1992, world leaders made a number of significant commitments for the pursuit of sustainable development. The Rio Declaration contained specific reference to the need for integrating the environment into economic development thinking and planning. The Conventions on Biodiversity and Climate Change were opened for signature, negotiations for the Desertification Convention were launched, and the GEF was recognized as the funding mechanism for the global environment.

At the Millennium Summit in September 2000, the Millennium Development Goals (MDGs) were adopted in order to eradicate extreme poverty and hunger, achieve universal primary education and ensure environmental sustainability, among other objectives. In March 2002, finance and development co-operation ministers met in Monterrey, Mexico at the International Conference on Financing for Development. A number of commitments on additional finance from donor countries were made in order to achieve the MDGs. Finally, in late August 2002, world leaders gathered again, this time in Johannesburg, to review and renew the commitment to sustainable development, and adopted a Plan of Implementation. In between the two summits, the Biosafety Protocol of the Biodiversity Convention and the Kyoto Protocol were agreed upon.

On the face of it, these are remarkable achievements. But despite all of the high-powered gatherings, agreements, and commitments, little progress has been achieved in improving the environment and in pursuing sustainable development. Global environmental trends continue to be negative and the promise of significant financial resources to address the challenges of environment and development has not materialized. The gap between rich and poor within and between countries continue to widen; 90 million people are added to our global village every year, mostly in developing countries; one person in three still lacks adequate freshwater; greenhouse gases are steadily increasing; ecosystems that are critical for human survival continue to be undermined; and land degradation threatens food security and livelihoods, especially in Africa. It is ironic that as the evidence for environmental degradation becomes more convincing, the political will for action becomes weaker or lacking.

There are many reasons for such lack of progress, key among them are: (1) rapid population growth and poverty in developing countries; (2) sectoral economic decisions that are made with little regard for their environmental impacts; (3) failure to integrate environmental sustainability into development planning; (4) current accounting frameworks for economic analysis that fail to treat natural resources as productive capital; (5) overexploitation of natural resources, which is proving to be unsustainable; (6) production and consumption patterns in OECD countries; (7) the debt burden of developing countries (\$2 trillion in 2000); (8) perverse subsidies for agriculture in OECD countries, and for water and energy services in developing countries; (9) inadequate finance for environment and sustainable development; (10) weak implementation capacity in developing countries; (11) the widening divide between developing and developed countries; and (12) fragmentation and ineffectiveness of international environmental governance. We can also add peace, security, and civil strife as factors hindering progress towards sustainability.

Since international environmental governance is the subject of this conference, the rest of my remarks will focus on governance issues.

Governance is about how decisions are being made, who is responsible, how decision-makers carry out their mandate, and how they are accountable. The international system is complex, fragmented fraught with duplication, and lacks coordination. There are at least 500 international agreements now in effect dealing with transboundary environmental issues. There are also 150 global environmental treaties that have been negotiated since the Stockholm Conference on the Human Environment in 1972. Many of these treaties focus on a single issue, like climate change or trade in endangered species, and few of them contain specific targets, timetables, or adequate enforcement. And financing for implementation is awfully inadequate.

Similarly, the array of institutions dealing with environmental issues is bewildering. Within the U.N. system alone, there are 21 separate organizations that play some role in environmental issues. In addition, the World Bank and other multilateral development institutions play a role in implementing policies and projects related to the environment. And there is the multitude of convention secretariats and their conferences of the parties.

This does not mean, however, that there should be only one international organization for the environment. Mainstreaming the environment in the operations of the World Bank, the Regional Development Banks, or UNDP, for example, is our hope for achieving truly sustainable development. But there are many weaknesses in the present system of international environmental governance that hamper its effectiveness.

The situation is no better at the national level, particularly in developing countries. National environmental ministries and agencies lack the political influence or the resources necessary to translate international agreements into national strategies for

sustainable development. And where such strategies have been developed, they are not being implemented because of lack of clout and co-ordination.

The lack of co-ordination among sectoral ministries at the national level is also reflected in the way commitments are made at the international level. For example, the International Conference on Financing for Development focused on finance, with environment and sustainability an afterthought. It was dominated by ministries of finance and development co-operation—no environment ministers were present. International financial institutions (e.g. World Bank and IMF) were the main players. At the WSSD, the focus was on sustainable development and on a plan of implementation of Agenda 21. The Summit did not address finance and no finance ministers were involved. It was dominated by developing countries, ministries of environment and European ministries of development co-operation, and the main players were the U.N. agencies. At the other extreme from Monterrey are the Conferences of the Parties to the global environmental conventions where the focus is on the implementation of the conventions with no consideration of the cost of such implementation or the source of financing. Here, they are dominated by environmental and foreign affairs ministries and the main players are UNEP and the GEF. This disconnection between different types of commitments related to environment and sustainable development cannot be simply resolved by the harmonization of international environmental agreements or by strengthening international environmental institutions. It is indicative of governments' failure to integrate the economic, social, and environmental pillars of sustainable development and of the widening divide between developing and developed countries on differentiated responsibilities.

The questions then, are: How can we build a global vision of environmental issues and enhance the implementation of equitable, effective, and legitimate international environmental actions in the context of sustainable development? And how can the linkage between the environmental agenda and other agendas be strengthened in order to avoid the marginalization of the environment in the international agenda?

Clearly, there is no shortage of international instruments or commitments on that front. The commitments made in Rio, Monterrey, Johannesburg, New York, and other places are important steps in the right direction. What is lacking is implementation. It is through the means of implementation that the linkage between the environmental agenda and other agendas such as the MDGs can be ensured. While Johannesburg correctly focused on implementation, the suggested means are extremely weak, however. One element of these means is international environmental governance.

Many experts have written on the subject of international environmental governance with a special focus on international institutions. Many argue for a "super" world organization. Some argue for strengthening the existing system, others for

employing innovative mechanisms and networks to complement a strengthened and perhaps a streamlined system. In my view, institutional arrangements for managing global change must perform at least six major functions. First, they must develop workable strategies for integrating environment and economic development. Second, they must assist in building the capacity in developing countries to implement international commitments for environment and sustainable development. Third, they must mobilize new financial resources for sustainable development and for protecting the global commons, including from the private sector. Fourth, they must monitor environmental conditions and trends comprehensively and disseminate the information widely for better decision-making and policy formulation. Fifth, they must negotiate and track compliance with international agreements on both the global and regional levels. And sixth, they must anticipate and resolve conflict over shared resources and trans-boundary environmental issues.

This does not mean that all these functions should be vested in one organization. The environment is fundamental to the mandate of many international organizations. In addition, experience has shown that decentralization and non-hierarchical arrangements are more effective at implementation than big bureaucratic organizations. In order to address duplication and inefficiency in the international system, the environmental roles and mandates of its component institutions, including UNEP, should be clarified. While partnerships, co-ordination and collaboration should be emphasized, a greater specialization with lead responsibilities based on comparative advantages should be assigned to only one institution.

If this were to occur, a strengthened UNEP would assume the lead role in monitoring and assessing the state of the world environment and in identifying gaps and challenges. There is a great necessity for good science and authoritative decision-making. Major environmental actions are being challenged because of the perceived high costs compared to benefits. UNEP would also have the lead in efforts to strengthen environment ministries and scientific capacity in developing countries and in the wide dissemination of information on best practices.

Strengthening international institutions and clarifying their mandates is one thing. How they co-operate towards a common program of action so that their combined effort would lead to greater results than is possible by any one agency acting alone is a real challenge. This is especially true in the case of co-operation and collaboration between development assistance institutions, like the World Bank, and U.N. environmental agencies, like UNEP. In this regard, the GEF provides a successful institutional model that addresses the linkages between the environment and development agendas.

In the past twelve years since Rio, the GEF has grown from a modest pilot program to the largest source of funding for the global environment and has become an important catalyst for sustainable development in developing countries. It has a

portfolio worth over \$16.5 billion and a membership of 175 countries. The GEF is a good example of international collective action with benefits at the global, national, and local levels.

The GEF is a unique strategic alliance between the United Nations and Bretton Woods institutions—a first for the U.N. system. GEF activities are implemented at the country level by UNDP, UNEP, and the World Bank, institutions with different cultures and mandates. Mechanisms and processes were put in place to overcome these differences and to strengthen the partnership. As this partnership became stronger, and the GEF continued to evolve, new partners were brought on board to enhance capacity. These included the Regional Development Banks (RDBs), FAO, UNIDO, and IFAD—each for a specific purpose based on comparative advantage. The presence of the World Bank, RDBs, and UNDP in the partnership allowed the GEF to integrate its global environmental actions within a national sustainable development framework at the country level. Early on, it was recognized that sustainable energy, sustainable forestry, sustainable fisheries, and sustainable trans-boundary water management were the means for capturing the global benefits related to climate change, biodiversity, and international waters—the main focal areas for GEF funding.

On the other hand, the GEF partnership included NGOs and the private sector. The GEF is the only international financial entity where NGOs are admitted as observers to its Governing Council meetings and are allowed to make interventions in its policy discussions. Operationally, many NGOs are also executing GEF projects on the ground.

The GEF has already become a model for new international organizations. The Global Health Fund is modeled to a large extent after the GEF. And there will be others in the future as the world grapples with ways and means for dealing with the growing agenda of global public goods.

The GEF experience and institutional arrangement can also help in addressing the fragmentation and the inefficiency in the U.N. system with regard to environment and sustainable development. The GEF model of "clustering" of activities and implementing and executing agencies can be applied to the clustering of organizations with shared environmental responsibilities with UNEP at the centre. For example, a water cluster would include UNEP as well as WMO, IOC, IMO, and FAO. As in the GEF, the premise is that, through a co-coordinated effort in which each agency contributes to a common program and policy objectives according to its strength and mandate, the combined effort would have greater results than the smaller, fragmented effort of individual agencies.

Besides international institutions, regional institutions can become important instruments for the implementation of international agreements and for linking the environment and development agendas. Many environmental problems are unique to a

particular region (e.g. desertification, deforestation) or transcend national boundaries but fall short of global status. The management of regional seas, international rivers, acid rain, and other resource challenges can best be tackled regionally. One approach would be to follow the model of the European Commission and the Organization of the American States in establishing regional environmental institutions. In the developing world, however, some existing regional bodies will need to be greatly strengthened if they are to fill such roles.

Forging the links and integration between environment and development at every stage of the development process will also require greater regional access to competent sources of information and advice. Co-locating UNEP regional or sub regional experts with local UNDP and FAO representatives could provide an effective means for achieving this goal. In order to enhance the prospect of implementation, there is also the need to complement formal institutional arrangements with informal ones. Bringing together international institutions, civil society, national governments, and private sector organizations can be an important part of achieving the common good of sustainability. As Secretary General Kofi Annan, in his Millennium report *We the People*, stated: "The rapid pace of change today frequently exceeds the capacity of national and international institutions to adapt [...] Part of the solution may be found in the emergence of 'global policy networks' [...] These loose creative coalitions give new meaning to the phrase 'We the People' by showing that global governance is not a zero-sum game. All the partners in such a network see their influence increase."

Some writers documented the work of a number of networks, including the Roll Back Malaria campaign, the Consultative Group on Agricultural Research (CGIAR), the World Commission on Dams, and the Global Water Partnership. Though they can take different forms, global policy networks share a number of features. They are non-hierarchical, they advance multi-stakeholder participation, they help raise public awareness, they develop and disseminate knowledge, they make it easier to reach consensus, and they create new means for implementing international commitments and agreements.

In closing, let me say that as we look ahead, the next decade presents a unique opportunity to ensure that environmental concerns are fully and effectively integrated into actions designed to achieve sustainable development and fulfill the aspirations of poor and rich people around the world. We have entered one of the most creative phases in human history, where science, technology, and communications advance at breathtaking speed and offer unmatched opportunities for political concerns and responsible change. We have new tools at our disposal, and a vastly increased understanding that our strength lies in working together to overcome the threats facing our planet—if we can muster the political will.

Accommodating MEAs in Trade Agreements

Kevin R. Gray¹

Introduction

The trade-environment interface has historically been characterized in conflictual terms. This provokes a deeper question as to whether trade liberalization and environmental protection can be reconciled. Such «conflict» is wholly evident in the discourse regarding the relationship between Multilateral Environmental Agreements (MEAs) and international trade obligations. International trade rules can potentially inhibit States' efforts to meet MEA objectives. Moreover, the drafting of new MEAs is circumscribed by negotiators' concerns that new provisions may render a State in violation of international trade rules.

Recent developments in dispute settlement and academic discussions suggest a possible overstatement of the problem. Decisions from the Appellate Body of the WTO have shown a greater sensitivity to the environmental objectives of challenged trade measures. This has opened the door to bridging a mutually supportive relationship since the scope of the conflict is limited to specific circumstances. There would only be a true conflict where implementing one treaty would require activity that would explicitly violate obligations set out in another treaty. In a narrow sense, there are only a few examples where a conflict would exist. Some MEAs require discriminatory treatment against the imports and exports of certain products which would run afoul of national treatment or most-favored nation treatment obligations in international trade agreements. Where such conflict exists however, parties who have agreed to the obligations requiring activity inconsistent with trade rules would not raise the conflict in a particular dispute (Brack and Gray, 2003).

The existence of MEAs reinforces the global nature of the environmental problems buttressing the “necessity” of the particular trade measure despite its possible arbitrariness or discriminatory effect. These are the types of questions that could be assessed in dispute settlement mechanisms such as under the WTO, where a party claims justification under the general exceptions². Article XX of the GATT, mirrored in several other trade agreements, is regularly interpreted by the WTO Appellate Body providing wider scope for the application of such exceptions. Seen in a continuum of more environmentally-friendly jurisprudence, some may assert that dispute settlement

¹ The opinions presented in this paper are those of the author and they do not reflect the opinions of the Government of Canada.

² For instance, see Article XX of the *General Agreement on Tariffs and Trade*.

perhaps provides the most efficacious forum to clarify the MEA/trade relationship (Mann H. and S. Porter, 2003).

However, addressing this relationship is still a relevant issue for policy makers and treaty negotiators. In fact, the Doha Development Agenda calls for negotiations precisely on the issue³. Irrespective of the limited scope for actual conflict, ideological as well as practical concerns about the MEA/trade interface engender arduous efforts to achieve a satisfactory negotiated outcome. This is evident not only in trade agreement negotiations but also in MEAs themselves, where concerns about the consistency with international trade obligations can complicate, and in some cases, stymie drafting efforts⁴.

Due to the proliferation of both MEAs and international trade agreements, a number of approaches to accommodating MEAs in trade agreements have emerged. This can range from the *NAFTA* regime, which specifically carves out selected MEAs from the ambit of trade rules under certain conditions, to the technical approach used in the WTO Committee on Trade and Environment Special Session, which aims to achieve mutual supportiveness under a prescribed mandate. Savings clauses, environment exceptions, information exchange and choice of dispute settlement forum are all tools employed to ensure that MEAs and international trade obligations can co-exist.

However, exercising certain options to achieve mutually supportive outcomes is perhaps more nuanced, reflecting the uniqueness of the proposed trade agreement and the needs of the State members. This becomes more disaggregated when the trade agreement is bilateral, regional or global in representation, potentially creating greater asymmetries in the overall trade-environment relationship.

Overall Objectives of the MEA-Trade Relationship

WTO members have agreed that the optimal use of the world's resources in accordance with the objective of sustainable development is an objective of the world trading system⁵. Many of the same States have also agreed, in other fora, to a mutually supportive relationship between international trade and environmental policies including MEAs⁶.

³ Paragraph 31(i), *Doha Ministerial Declaration*.

⁴ The recent 7th Conference of the Parties to the *Convention on Biological Diversity* saw trade as a prevailing horizontal issue for a number of the working groups, becoming the crucial deal-breaking issue in some cases.

⁵ *WTO Agreement*, preamble.

⁶ See, World Summit on Sustainable Development, *Plan of Implementation*, (2002), para 92, http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm. See also Principle 12 of the *Rio Declaration*, (1992), 31 *International Legal Materials* 874.

Other trade agreements have also called for the pursuit of free trade in a manner consistent with the protection and preservation of the environment and the strengthening of environmental laws and their enforcement⁷. Similar commitments to mutual supportiveness have been made in several MEAs⁸. In light of these objectives, there is still some degree of uncertainty on how to ensure that trade and environment will be mutually supportive where country measures that enforce, implement, apply or are simply motivated by MEAs, run afoul of international trade obligations.

A proscriptive route would be to allow for identified MEA provisions to prevail over trade rules although this may defeat the mutually supportive objective. In the absence of any operative clarification of the MEA-trade rules relationship however, there is perpetual uncertainty about how global environmental agreements can be reconciled with international trade agreements. Such clarification should provide guidance not only on how to deal with a dispute pitting two agreements against each other but generally how international environmental imperatives can be met without unduly impacting the free flow of trade in goods and services.

Article 104 – NAFTA and Choice of Forum

Perhaps the most optimal model to accommodate MEAs in trade agreements is to simply preclude MEA measures from the purview of trade rules. This can be done most effectively by listing the MEAs that would benefit from the exclusion. Under the NAFTA, three MEAs are listed in Article 104⁹ in addition to two bilateral agreements between NAFTA parties¹⁰. To prevent parties from bringing trade cases related to these MEAs to other bodies, a choice of forum provision was added so that the party, who relied on the MEA in their defense, could have the dispute adjudicated under a NAFTA

⁷ See *North American Free Trade Agreement*, preamble (1993) 32 *International Legal Materials* 289. The Environmental Side Agreement to the NAFTA (*North American Agreement on Environmental Co-operation* (1993) 32 *ILM* 1480 includes commitments to improve environmental protection through co-operation in environmental and economic policies. There is also an explicit commitment to avoid trade distortions and erect new barriers to trade in the form of disguised protectionism.

⁸ See for instance, the *Biosafety Protocol*, preamble, (2000) 39 *International Legal Materials* 127 and the *Stockholm Convention on Persistent Organic Pollutants (POPs Convention)*, UNEP/POPS/CONF/4, <http://www.pops.int/>, preamble.

⁹ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, (1989), 28 *International Legal Materials* 657; *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, (1973) 12 *International Legal Materials* 10, *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) 26 *International Legal Materials* 1550.

¹⁰ *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*; *Agreement Between the United States of America and the United Mexican States on Co-operation for the Protection and Improvement of the Environment in the Border Area*.

panel¹¹. Choice of forum provisions are integral to the operation of provisions like Article 104 to ensure that parties do not attempt to circumvent the codified MEA-trade relationship by resorting to another forum that is not bound by such provisions. Under the NAFTA, Article 2005(3) stipulates that if the responding party to a dispute is claiming NAFTA Article 104 as a defense, the complaining party would only have recourse under the NAFTA. Without such a provision, the complaining party could pursue their claim under other bodies such as those available at the WTO, who lack the authority to apply a NAFTA clause¹².

Measures pursuant to such MEAs are exempt from the NAFTA rules subject to a few conditions;

- the MEA prevails only to the extent of the inconsistency;
- the party to the MEA must choose the alternative, where there is a choice among equally effective and reasonably available means of complying with the MEA, that is least inconsistent with NAFTA; and,
- the measure must be a specific trade obligation (STO).

Although Article 104 has not been interpreted by any dispute settlement body, it is likely that the party introducing the measure would have the burden of demonstrating that their measure meets the aforementioned conditions. Considering that these conditions allow for differences in interpretation, such as what constitutes a specific trade obligation, the residual uncertainty may negate the benefits of having a prescriptive list. In addition, the prescriptive list approach may be less workable in a multilateral setting consisting of a large number of parties, some of whom may not be parties to all the proposed MEAs. By carving out specific MEAs, it could result in trade restrictions being imposed on parties exercising their sovereign right not to join a particular MEA.

If the problem is corrected by limiting the applicability of that section to MEA parties, it could foster a two-tiered relationship in the trade agreement, where non-parties to the MEAs would receive more favorable or less discriminatory treatment than MEA parties. In turn, the marked trade disadvantages may act as a deterrent to join the MEA. This phenomenon however will ultimately depend on how the list functions and whether the individual country taking the measure makes some concessions for nonparties who comply with the MEA.

Notwithstanding the non-party issue, a list of MEAs will most likely represent a low common denominator. Adding new MEAs to the list will be burdensome, often contingent on the ratification process of the MEA in all parties' domestic systems, in

¹¹ Article 2005, *NAFTA*.

¹² In addition, the WTO *Dispute Settlement Understanding* does not instill any authority to refer a dispute to another forum be it a regional trade agreement or a non-compliance or dispute settlement mechanism under a MEA.

addition to any amendment procedure in the trade agreement¹³. The MEAs that would be chosen will probably be the least contentious, since the parties have already agreed to the provisions requiring trade restrictive measures when signing the MEA. Inversely, an implication could be drawn that a MEA, not included in the list, would not benefit from the exception and even be deemed subordinate to the rules of the international trade agreement. This may serve as an artificial basis for differentiation between MEAs. Furthermore, there would not be guidance on how to incorporate new MEAs or even subsequent agreements and protocols made under the MEAs designated in the list. Overall, a more holistic clarification of the trade environment relationship, which would be helpful in these situations, would fall outside the scope of a prescriptive list provision.

Although there is a degree of symbolic importance and operational efficiency in having a list of MEAs, it may produce a countering effect. A hierarchy may be assumed that trade agreements normally supersede MEA obligations and therefore there is a strong need to exempt certain MEAs. Acting as a waiver or exception, it could imply that such a mechanism is needed in order to ensure that a MEA is consistent with a trade agreement. An MEA absent from such list could be held to be inherently inconsistent with trade provisions, reversing the burden of proof to the party to explain why the MEA is not on the list but should still benefit from the effect of such provisions that list certain MEAs. However, it is much more likely that measures taken pursuant to an unlisted MEA would simply be subject to the same rigorous analysis applied to any measure based on a general exception.

General Environmental Exceptions

Most trade agreements will allow for unilateral trade-restricting measures for environmental protection purposes. None explicitly articulate an exception for measures pursuant to a MEA or even the environment.¹⁴ Article XX of the GATT stipulates that parties can adopt or enforce measures necessary to protect animal or plant life or health or measures relating to the conservation of exhaustible natural resources although the word "environment" is not mentioned in the text.

Other trade agreements import the Article XX exceptions into their text although they can be modified. For instance, Article 2101 (1) of the NAFTA incorporates Article XX explicitly, while offering supplementary textual interpretation - Article XX (b) is to include «environmental» measures necessary to protect human, animal or plant life or

¹³ Parties to the trade agreement would still have the option to agree to new MEAs in the list despite not having signed or ratified that particular treaty.

¹⁴ Prior to the Doha Round, the European Union was proposing in the Committee on Trade and Environment that a new exception be added to Article XX of the *GATT* allowing for measures pursuant to MEAs.

health, while Article XX (g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

The jurisprudence under the WTO has shown an expansive interpretation of Article XX revealing an approach that can accommodate MEA measures. The Shrimp-Turtle,¹⁵ Asbestos,¹⁶ and US Gasoline rulings have renewed optimism that future cases can address the MEA -WTO relationship in a positive way (Mann and Porter, 2003). None of these cases have directly involved an MEA trade measure but the evolutionary rules of treaty interpretation, requiring the WTO Agreements to be interpreted in light of the “contemporary concerns of the community of nations about the protection and conservation of the environment” has opened the door for a broader interpretation of Article XX, reinforced by the preamble references in the WTO Agreement to sustainable development as being an objective of the WTO. Although not relevant to the challenged measure, a number of MEAs were referred to in the Shrimp-Turtle dispute to provide a modern context to consider the meaning of the GATT, which was agreed to in 1947.

These rulings could lessen the urgency to negotiate text on the MEA -trade relationship especially since there has never been a dispute involving a MEA trade measure heard before a WTO panel. Environmental exceptions may be seen as sufficient to facilitate the requisite judicial scope to clarify and elucidate the MEA - trade relationship. The exceptions permit States to take measures that restrict trade for the purpose of environmental protection, irrespective of any relationship between the MEA and the measure.

Disputes at the WTO have effectively laid the ground rules for when trade restricting environmental measures are WTO compatible. Despite the WTO rulings that have effectively set such framework, those decisions are not binding on future decisions and cannot operate to alter or amend the WTO Agreements.¹⁷ The

¹⁵ The *Shrimp-Turtle* Article 21.5 panel, concerning the implementation of the previous Appellate Body decision which had already reinforced the WTO objective of sustainable development, ruled that the US measure, motivated although not mandated by a particular MEA, was consistent with WTO requirements.

¹⁶ The Asbestos case did not concern so much an environmental issue (mainly an occupational, health and safety issue) but it did widen understanding on the “necessity” test by holding that necessity of a measure can be assessed against the significance of the objective. The salience of the MEA objectives could easily apply by analogy buttressed by the international consensus on such necessity as manifest in a multilateral agreement.

¹⁷ See Article 3(2) of the *Dispute Settlement Understanding*. Although the rulings can assist in better understanding the provisions of the WTO Agreements, the Agreements can only be amended through negotiations at the General Council or a Ministerial Conference.

interpretation of WTO Agreements must also be in conformity with international law which can preclude the applicability of MEA provisions to non-parties.¹⁸

Although MEAs would form part of the corpus of international law that could be referenced, their use would be restricted to merely clarifying the interpretation of the WTO Agreements. Whether the Appellate Body, or a WTO panel, can review the provisions of a MEA for the purpose of interpreting the WTO Agreements will depend largely on the facts. If the particular nature of the dispute would necessitate such analyses, it invites a situation where a body without environmental expertise and with less exposure to the non-confrontational nature of MEA compliance and enforcement, is making determinations concerning MEA provisions.

Without the power to interpret the MEA itself, it could create difficulties when ruling on Article XX questions - such as the necessity of the measure, its least trade restrictiveness, whether it was enacted in good faith (not intended to be discriminatory or endure financial hardships for the exporter) - as well as other issues including whether the negotiating process for the MEA was inclusive and fully participatory for all nations¹⁹. The complexity of the analyses can produce varying judgments on which MEAs would be deemed WTO compatible. The fact-specific nature of the dispute could also lead to rulings with opposite results regarding the same MEA.

The overall comprehension of the MEA -WTO relationship would not be elucidated in a decision unless the panel or Appellate Body's interpretative role toward resolving a particular dispute depends on such clarification. The amorphous concept of mutual supportiveness, which is not even expressed in the WTO Agreements per se, may not be delineated, although this concept could be imported into a deliberation where the concept is deemed to be recognized as a principle of customary international law. These functional limitations of dispute settlement hinder the ability of the Appellate Body to determine conclusively and comprehensively the MEA/trade relationship.

Primarily, the strongest support for the view that MEAs are already accommodated by the general exceptions is that there has never been a dispute where a trade measure taken pursuant to an MEA obligation, has been challenged. Historical record where no WTO members, be they party or non-party to the MEA, have ever launched dispute settlement, reinforces the conclusion that the relationship may not need to be codified. The developments in the jurisprudence, seen mainly in the *Shrimp-Turtle* and the *Asbestos* disputes where the WTO agreements have been interpreted in a broader

¹⁸ It is a general rule of international law that international treaties cannot be enforced against States that are not parties unless the State had consented or the rule forms part of what is known as customary international law.

¹⁹ The *Shrimp Turtle* dispute, although recognising that States can take unilateral measures, still scrutinised the "good faith" efforts of the U.S. to negotiate a multilateral solution.

fashion, could open up greater potential for MEA-sanctioned measures to be held consistent with WTO obligations in a dispute.

The absence of MEA related disputes however may be premised on factors unrelated to any perception of the MEA/trade relationship. The small volume of MEA related trade and the general international consensus behind MEAs (and resolution of a fledgling dispute under on MEA institutional body) could all equally explain why no MEA related dispute has occurred (Kerr, 2002). In addition, the existence of no MEA/trade disputes does not account for the number of MEA related conflicts that do not reach a final resolution by a trade dispute settlement body. The Chile-E.U. Swordfish dispute, invoking several provisions under the United Nations Convention on the Law of the Sea²⁰, was resolved albeit temporarily. Moreover, the potential of WTO challenges has also been raised in MEA negotiations themselves (Brack, 2002).

The clarification of the question of MEA/trade rules would also be subject to the ad hoc nature of dispute settlement that is focused on the particularities of the dispute and therefore does not engage all parties to the international agreement in the process. Dispute settlement would not be the preferred approach of many States who lack resourced to participate in dispute settlement proceedings, or who are unwilling to initiate a dispute, and therefore would not have the opportunity to participate in discussions concerning how MEAs should be accommodated.

Negotiating the outcome – the WTO Doha Declaration

The Doha Ministerial Declaration²¹ is significant as it marks the first multilateral attempts, and demonstrated general will of the WTO members, to negotiate particular aspects of the MEA -WTO relationship. This advances the mutually supportive objective by injecting substantive concrete terms outlining the MEA-WTO relationship. Paragraph 31(i) of the Doha Ministerial Declaration limits the mandate to the relationship between WTO rules and specific trade obligations (STOs) in MEAs, where the WTO Members are both party to the MEA in question. Since then, discussions on that paragraph have focused on examining individual MEAs, delineating and classifying STOs in those MEAs, and identifying the relevant WTO rules. These discussions must be concluded by January 1, 2005. The outcome from the Doha negotiations may have an impact on other international trade regimes.

In the Special Session of the WTO Committee on the Environment (CTESS), STOs have been broken down into four categories:

- trade measures explicitly provided for and mandatory under MEAs;

²⁰ (1985) 21 *International Legal Materials* 11261.

²¹ http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

- trade measures not explicitly provided for nor mandatory under the MEA but consequential of the obligation of results of the MEA (where an MEA lists possible measures and policies in order to achieve compliance);
- trade measures not identified in the MEA but that parties may decide to implement in order to comply with the MEA; and,
- trade measures not required in the MEA but where parties may implement them if the MEA contains a general provision stating parties can adopt more stringent measures in accordance with international law.

Some WTO members have put forth submissions on STOs in specific MEAs²². The WTO Secretariat has also compiled a list of trade measures pursuant to selected MEAs²³. There appears to be a general consensus that STOs are present in six MEAs.²⁴

Considering that developing an international consensus is difficult, yielding limited results, the Doha Mandate does not definitively clarify the overall MEA/trade relationship. The focus on specific trade obligations primarily addresses situations where MEAs potentially conflict with trade rules but does not account for the wider objectives MEAs are designed to achieve. A narrow approach to STOs, excluding discretionary measures by State parties, may perpetuate the uncertainty that States face when attempting to implement MEA. WTO Members would still be free to take such measures but these would be subject to the regular Article XX analysis.

At the CTESS, there has been little discussion on the overall impacts of accommodating the MEAs. It is uncertain whether a measure pursuant to a STO obligation in a MEA would benefit from a presumption of conformity with trade rules and therefore be wholly exempt from WTO disciplines, or still be assessed as to whether it is more trade restrictive than necessary or whether the measures are arbitrarily or discriminatorily applied in contravention of the chapeau of Article XX. As an interim solution to these questions, would adjudication of the validity and/or necessity of the STO measure be deferred to an MEA decision-making mechanism? These are practical issues that have not yet received full attention in the dialogue that remains largely at the conceptual level.

Moreover, how MEA measures could be enforced against non-parties to the MEA is explicitly removed from the Doha Mandate. Confining the applicability of the MEA - WTO relationship to MEA parties, may only confirm what MEA parties have already agreed to. It is unlikely that parties to an MEA would impugn a measure based on a specific trade obligation. If there is some level of contention, it is most likely that such

²² Submission by China, TN/TE/W/35/Rev.1, 3 July 2003.

²³ WTO Secretariat, *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*, TN/TE/S/5 WT/CTE/W/160/Rev.2.

²⁴ *Cartagena Protocol, POPs Convention, PIC Convention, Montreal Protocol, CITES, and the Basel Convention*.

a dispute would be resolved by the dispute settlement or non-compliance mechanism available under the relevant MEA²⁵. These can be enhanced by mandatory language requiring the MEA parties to bring their dispute exclusively to the MEA mechanism. However, the exclusion of the non-party issue does not prejudice WTO members in introducing MEA trade measures against non parties, but those members would not benefit from the Doha outcome and therefore would be under the Article XX scrutiny generally applicable to all environmental measures that violate WTO rules. Depending on the ruling, a two-tier MEA-WTO relationship could result depending on party status. If the discrepancy is wide, there may be disincentives to join MEAs thereby undermining global environmental governance objectives.

Principles and Criteria Approach

The principles and criteria approach has been advanced by Canada at the WTO in June 1996. The proposed approach or model aims to provide definitive guidance on some of the complicated issues of MEA accommodation, such as non-party status and specific trade obligations. The principles and criteria would assist WTO Panels and the Appellate Body in assessing MEA trade measures and MEA negotiators when contemplating the drafting of trade measures. The utility of this approach is that it contributes to greater predictability in the system and minimizes the grey area between legitimate MEA measures and ones that unnecessarily disrupt trade.

This approach would look to MEA qualifying principles and criteria for determining the need for trade provisions in MEAs. Qualifying principles specify that MEAs should:

- be open to all countries;
- reflect broad-based international support;
- contain precisely drafted provisions that specifically authorize trade measures;
- permit trade with non-parties on the same basis as parties, where non - parties provide equivalent environmental protection; and,
- require negotiators to have explicitly considered the criteria for the use of trade measures.

The criteria stipulate that trade measures must:

- be chosen only when effective and when they are other alternative measures are considered to be ineffective in achieving the particular environmental objective, or when other measures are ineffective without a trade component;
- not be more trade-restrictive than necessary to achieve the environmental objective; and,

²⁵ WTO Committee on Trade and Environment, WT/CTE/1, 12 November 1996.

- not constitute arbitrary or unjustifiable discrimination.

Other principles and criteria could be added so that the context of a particular trade agreement is accounted for, such as when almost every negotiating party is a developing country. For example, one additional requirement could be that the MEA must make appropriate provision to facilitate implementation by developing country parties to the agreement (i.e. technology transfer, capacity building) and otherwise give effect to the principle of common but differentiated responsibilities.

Ultimately, the principles and criteria approach would put decision-making on the MEA-trade relationship in the hands of dispute settlement bodies. It might be additionally useful for MEA negotiators to be mindful of this approach although the legitimacy of the principles and guidelines will ultimately depend on which body endorses it. If it is under WTO auspices, it would not be binding on MEA negotiators. The existence of such principles and criteria would more easily guide panels in rendering their decisions and better inform trade partners on the type and scope of MEA provisions that would meet such principles and criteria. One concern is that a decision in dispute settlement, although not formally setting a precedent, would indicate whether the particular MEA meets the principles and criteria. This could prejudice the issue of whether other provisions set out in that MEA meet the principles and criteria and therefore preclude any consideration of the particular facts and circumstances of the case.

The retrospective impact of the principles and criteria raises additional concern since its application to previously agreed MEAs may limit their effectiveness. The ability to amend pre-existing MEAs, necessitating the reopening of the text, in order to accommodate the principles and criteria approach would be nearly impossible. Where the principles and criteria are applied prospectively, it may assist MEA negotiators when crafting specific trade obligations as well as other trade related measures. This may even thaw the possible "chill" in negotiations since WTO compliance could be measured in advance. In particular, the principles and criteria could operate so that negotiators would include specific objectives in the MEA akin to the wording of the Article XX exceptions (i.e. for the protection of human, animal, plant life, or health); or explicitly state the objective of sustainable development as expressed in the preamble to the WTO Agreement; or be designed for the purpose of preventing transboundary pollution.

There may also be other uses for the principles and criteria. If a prescriptive list of MEAs, or even a narrower list of STOs is drawn up, the principles and criteria could inform efforts regarding the inclusion of new MEAs, thereby avoiding the difficulties in obtaining consensus in a multilateral setting on such a provision.

For the principles and criteria approach to be relevant for dispute settlement, they will have to reflect the qualifications set out in the other provisions - including the

environmental exceptions - of a trade agreement. A finding that the principles and criteria are met must address the general questions regarding the "necessity", "effectiveness", "least trade-restrictiveness", "proportionality", or "sound scientific basis" of the measure. In addition, whether such a finding concludes the matter or only answers certain questions regarding the legitimacy of the measure, but not its method of application, requires further thought. Dispute settlement bodies may be interested in the universal application of the measure and even any concessions afforded to States that are in compliance with the MEA without being a party to it.

Finally, principles and criteria will be applied solely to MEAs and not to trade agreements. This suggests a hierarchy between MEAs and the WTO, where the latter's rules dictate the outcomes of the former. However, developing principles and criteria at the WTO may have the practical value of encouraging drafting less ambiguous MEA provisions and of pre-empting conflicts.

Preamble references including use of a "savings clause"

Mutual supportiveness is the term most used in preamble language to characterize the MEA/trade agreement relationship. It aims to ensure the equivalence between MEAs and trade rules and avoid any interpretation suggesting that one is subordinate to the other. However, mutual supportiveness is premised on the lack of any conflict between MEAs and trade rules, be it real or imagined. The use of savings clauses may assist in resolving the question of what happens when two agreements conflict – i.e. implementing one treaty or meeting its obligations will lead to a violation of another agreement. The rules of treaty interpretation provide for such situations, recognizing that where a treaty specifies that it is not to be considered incompatible with an earlier or later treaty, its provisions would only apply to the extent of the compatibility.²⁶

Ultimately, a savings clause can provide a quick answer and even establish the subordinate status of one agreement to another when there is conflict. Savings clauses however, may be at odds with the objective of achieving mutual supportiveness. In trying to attain a balance, the wording of the savings clause can contribute to muddling rather than clarifying the MEA/trade relationship. For instance, the wording of the savings clause in the *Cartagena Protocol*, stipulates that the Protocol cannot be interpreted as implying a change in the rights and obligations of a party under existing international agreements but that the Protocol is not to be subordinated to other international agreements. Other MEAs, such as the *Rotterdam Convention*, contain similar language in their preambles.

²⁶ *Vienna Convention on the Law of Treaties*, Art. 30(2).

In addition, savings clauses are frozen in time, not operating to waive rights under future agreements. Therefore, uncertainty persists when future agreements (either MEAs or WTO agreements) are reached unless their subordination to earlier agreements is specified in the agreement. If not, the residual rules of treaty interpretation in light of a conflict would prevail.²⁷

Accommodating MEAs in other international agreements

Related to the need to ensure that MEAs are accommodated in international trade agreements, are concerns about how to ensure MEA measures are immune from challenges in other agreements, such as those concerning investment. International investment agreements, which are mainly bilateral, do not specifically address how MEA related investment measures that impact an investor's property or interest, should be accommodated. Greater clarification is desirable where States attempt to regulate investor activity consistent with MEA obligations or objectives. Unlike a specific trade obligation in a MEA, a MEA related measure affecting an investment would cover a broader range of regulatory activity. MEAs themselves would unlikely mandate that a specific investment related environmental measure be taken.

Expropriation or other measures geared towards MEA compliance may impact the value of an investment. One case where an MEA arose, concerned a Costa Rican measure to preserve an environmentally fragile area, effectively expropriating the land owned by an investor. Costa Rica conceded that this measure had a discriminatory effect but the fact the measures' objectives stemmed in part from the country's obligations under the Convention on Biological Diversity,²⁸ should be considered a mitigating factor when awarding compensation. The arbitration panel ruled that this was not a relevant consideration in determining the quantum of damages owed as compensation.²⁹

The question in this case dealt with the assessment of compensation owed which differs from the principled argument that MEA related expropriation measures should be exempt entirely from investment agreement requirements.³⁰ A report by the OECD

²⁷ *Ibid*, Article 30(3) provides that when States are parties to two agreements, the early treaty applies only to the extent that its provisions are compatible with the latter treaty.

²⁸ (1992) 31 *International Legal Materials* 818.

²⁹ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 *International Legal Materials* 317.

³⁰ In *S.D. Myers v. Government of Canada*, (2001) 40 *International Legal Materials* 108, Partial Award, November 13, 2000, one of the arguments raised by Canada was that their ban on the export of PCBs was required under their international commitments pursuant to the *Basel Convention* and the *Canada-U.S. Agreement Concerning the Transboundary Movement of Hazardous Waste*. The arbitration panel ruled that

Secretariat during the negotiations on the Multilateral Agreement on Investment (MAI) concluded that there were no prima facie legal incompatibilities between the MAI text and existing MEAs (OECD, 1998). However, it also indicated that other concerns about the investment-MEA relationship may still exist. Some commentary was offered on the relationship between investment measures and the Kyoto Protocol,³¹ in addition to a potentially discriminatory regime governing access and benefit sharing pursuant to the Convention on Biological Diversity.³² Another point raised is that international donor assistance given for the purposes of MEA implementation could conflict with of national treatment for investor obligations where the State receiving the assistance plays a role in selecting the enterprises or projects to benefit from such assistance (OECD, 1998). Technology transfer provisions, common in many MEAs, are also problematic when these are demanded by recipient countries as a condition of foreign investors.

Conclusions

It is unlikely that any of these methods of MEA accommodation can by itself lead to a satisfactory result. They are not mutually exclusive and can even work together toward enhancing mutual supportiveness in practical terms. The prescriptive list of MEAs would obviously provide the most determinative outcome although there is danger that it could be subject to the limitations seen in Article 104 of NAFTA. Guidelines in tune with the principles and criteria approach could supplement a list so that new MEAs, in addition to subsequent agreements and protocols under existing MEAs, could more easily be included in the list. Moreover, general exceptions allow for MEA accommodation although a more guaranteed outcome would be enhanced by an agreed list of principles and criteria. This would provide more predictability in dispute settlement, establishing a coherent test or checklist to inform WTO members on what type of measures they can introduce. Legitimate expectations of WTO Members could be based on such principles and criteria.

where a NAFTA party had a choice among equally effective and reasonably available alternatives for complying with the *Basel Convention*, the party should choose the option that is least inconsistent with the *NAFTA*. It also ruled that the Canada-US Agreement did not authorize the use of domestic law to ban the import or export of hazardous waste.

³¹ (1997) 32 *International Legal Materials* 1480. Questions include whether a permit or quota allocated for emissions would constitute an investment? Is a right to emit in other countries considered an investment in those countries or more of a cross border trade? For more on the *Kyoto Protocol* -investment interface, see J. Werksman and C. Santoro (1999).

³² It should be noted the parties to the *Convention* are currently negotiating the rules governing access and benefit sharing regimes although this is still at an early stage even with regard to the legal bindingness of the regime itself.

Negotiating the technical aspects of the MEA/trade agreement relationship on questions such as what constitutes an MEA or a STO, offers a valuable opportunity to finalize the discussion. Similar to the prescriptive list approach, it is subject to a limited mandate that only partially addresses the entire relationship. Principles and criteria or environmental exceptions could buttress the overall value of the negotiated outcome but the potential for a two-tiered relationship based on a strict understanding of what is an STO for instance is a relevant consideration. Reliance on saving clauses, although politically expedient, may not advance significantly the MEA/trade rules issue where the overriding objective is mutual supportiveness. It can only complement the other ways to accommodate MEAs in a superfluous fashion.

SECTION 2

Articulation and Coherence among Various Levels of Governance

Introduction and Panel Report

Sunita Narain

How does one build institutions that make a difference? The marine environment sector illustrates usefully the complexity of articulating the roles and responsibilities of various organizations. First, one must identify how regional conventions—16 existing regional sea conventions and thematic regional conventions with a marine dimension—interact with global conventions—Global conventions aiming at protecting the marine environment, Conventions that include some of the marine environment problems and the Global Programme of Action for the Protection of the Marine Environment from Land-based Sources (GPA). Then, the various regional regimes have to be made into a coherent system, even though regional seas frameworks exist precisely to address issues that are not necessarily common. Finally, each regime must accommodate a variety of actors and expectations in regions that are often culturally diverse and politically conflictual. In this context, the added value of an international organization for the environment remains unclear.

How do we move ahead? The one issue that definitely came out is that at least in the area of the marine environment, you have a well structured institutional framework at the global, regional and, to some extent, at the national level as well. There is a set of rules that come out of global conventions which then are borrowed to make rules at the regional level and to some extent at the national level. So a framework that is a very rich source of regional rules as well. This structure is very complex, which does not mean it is not synergistic. It is fragmented, but that does not mean that it does not work. This is very important for we are starting to use key words such as "fragmented", and think that the mere repetition of these words will lead to automatic answers: if you put it together, it will become less fragmented. It is not necessarily what will happen. At least, in the marine area, fragmentation reflects the different roles that various organizations (GEF, UNESCO, IMO, FAO, UNEP) play in the management of the marine environment. They are different institutions. So the system is indeed fragmented, but it does not mean it lacks coherence.

The other issue that came out is that the action is very rich at the regional and national level. That is where we have seen the change, that is where one can make a

difference. Yes, it is very difficult to get ministers of environment and economy together, but that can be achieved at the national level, and perhaps at the regional level. Therefore, ownership is easier at these levels; participation and change are more visible there.

What are the questions we should ask and what should we do?

1. Is the marine institutional structure a model for other areas? Such as other global commons (atmosphere) or concerns (biodiversity). There is a set of rules at the global level, but there is also space for regional and national rule-making and even law-making.
2. We do have institutions that are responsible for different facets of these global commons, but the entire effort is to structure and deepen the institutions at the regional and national levels. The investment in these levels has to be more focused, such as in the area of global climate change.

This [marine] model then suggests that, at the global level, what you need is rulemaking beyond national boundaries. But we also need rule enforcement at the global level. How will you enforce global rules with a new institution such as the WEO? From India, it seems to me that the action has moved to our part of the world. There is a greater trust in national policymaking than there is in global policymaking because global policy has never shown the spunk to be able to take itself seriously and to be able to enforce the rules that it makes for itself. That to me will be the big issue for the institution that we create at the global level. Will this global institution have the ability to rein in the world's most powerful nation, the US? And if it does not, why create a new institution to do what other institutions are already doing? We are already losing more and more trust in the workings of the current institutional framework. So the question is: if the problem is the US and the EU, is the solution a UNEO?

At Rio, we talked of thinking globally and acting locally. I think it is time to reverse it: we are thinking locally, when will we start acting globally? This is the big challenge that comes out of this panel.

Stakes of Environmental Governance at the Regional Level: The Mediterranean Case

Arab Hoballah¹

From environment to sustainable development: increasing concerns and awareness

Not long ago, the Mediterranean was the centre of the world, or at least one of its key centers. Today, it has almost no political existence and is generally perceived just as a zone of conflicts and a sensitive border. However, it is undoubtedly an eco-region that deserves special attention as it lies between the global and national levels, as well as for its past and present physical and natural features.

Soon after the creation of UNEP in 1973, attention was drawn to the quality of the Mediterranean Sea. The Mediterranean Action Plan, the first of UNEP's Regional Seas Programs, was established in 1975. Since then, a coherent legal framework has developed, dealing mainly with the control and prevention of pollution, while analysis and knowledge of the Region's environment, as well as its economic status and development prospects improved. As a result of the increasing interest about Mediterranean issues from within and outside the Region, economic, social, and environment pressures are well known and the assessment of their impacts on the sustainability of development has greatly improved. This extended knowledge and appraisal capacity has paved the way for the identification of policies and policy instruments needed to face these pressures. Co-operative mechanisms and partnerships were developed, awareness was promoted, and various environment and development programs were prepared and implemented. Civil society became an actor, UN organizations and the European Union developed Mediterranean programs, and national technical and institutional capacities increased in quantity and quality in response to emerging needs. Nevertheless, "red lights" and "yellow lights" keep on showing that the capacity of translating knowledge, decisions, and co-operative mechanisms into effective and efficient action is still lacking, highlighting a significant governance gap.

¹ The views expressed in this paper are those of the author and do not necessarily engage UNEP/MAP.

Towards sustainable development: the governance gap

Mediterranean countries and partners have realized early enough that their shared stakes and challenges required common responses through collective action. Progressively, Mediterranean parties have defined and agreed to a series of common objectives, reaching a consensus on required measures and on an implementation framework.

Slowly, the Mediterranean Action Plan and its Partners have paved the way to Sustainable Development. A complex regional legal framework, encompassing several MEAs (the Barcelona Convention and its six Protocols), was elaborated and adopted. A relevant program of activities to promote awareness, capacity building, and implementation was progressively developed, encompassing the interactions between the environment and development, as well as integrated coastal areas management. Soon after Rio in 1992, a Mediterranean Agenda 21 was prepared and a Mediterranean Commission on Sustainable Development (MCSD) was created in 1995. Established as a think tank and advisory body to UNEP/MAP, this Commission has raised a lot of interest and expectations, thanks in particular to its composition and its method of work. But, the MCSD also raised serious questions following the identification of a series of shortcomings, constraints, and gaps related to the policies and instruments of a Mediterranean Strategy for Sustainable Development (MSSD).

In order to assess objectively their progress towards sustainable development, Mediterranean Parties have undertaken a “Strategic Review for Sustainable Development in the Mediterranean Region” in 2000, which identified political and institutional shortcomings, and recognized the need for a Common Vision, together with a Regional Strategy for Sustainable Development.

Noticeably, it was accepted that achieving sustainable development would require deep structural changes, together with new ways and improved capacities of working in all areas of economic, social, environmental and political life. Consequently, the Mediterranean Parties and Partners recognize that sustainable development has important governance implications and that achieving sustainable development requires an efficient governance system, based on wide participation and integration mechanisms.

In developing a common and comprehensive sustainable development strategy for the region as a whole, the overall objective, therefore, is the achievement of a substantial change in the policy, institutional, and co-operation process through which sustainable development is generated. This implies that the primary emphasis would have to be placed on governance since the “Ministries of Environment”, the official counterparts of MAP, and the institutions generally responsible for the environment and sustainable development, would clearly not be powerful enough on their own to

bring about the necessary changes. This was also clearly acknowledged at the global level at the Johannesburg 2002 Summit.

The main actor influencing the capacity of the Mediterranean Region for collective action is the European Union, although due attention should also be given to the impacts of the policies from major geopolitical powers in the region. The 1995 Barcelona Declaration and its subsequent Euro-Mediterranean Partnership (EMP) represent a qualitative change compared with the traditional policy based on bilateral agreements. The new approach aims at a zone of peace and security, with shared prosperity. However, for the moment, the EMP represents a balance of interests rather than a genuinely common Euro-Mediterranean interest, and voices are increasingly asking for a substantial change in attitude and policy in favor of a shared vision. This was recently confirmed by the EMP Ministers for the Environment in relation to the preparation of the MSSD.

Building on existing achievements, legal frameworks and regional networks, the preparation of the MSSD offers an interesting opportunity to establish a regional public sphere where some of the most pressing challenges could be considered and the necessary institutional capacities and means to respond to these challenges would be outlined and developed.

Riparian Mediterranean states do face common stakes and are gradually developing a shared vision of the Region's future; and so are the relevant international and regional organizations, civil society, mainly NGOs, and the business sector. Structuring elements for a regional shared vision are emerging, which provide a framework for the preparation and the implementation of a MSSD. Such a common vision is structured around six major challenges: development and environmental protection, poverty and inequality, innovation and economic entrepreneurship, cultural diversity, governance, and peace and security.

Towards a Mediterranean Regional Governance

What is at stake is not just "peace and security" (that, to a certain extent, could be imposed by major regional and/or international powers), but rather sustainable development which requires collective action. However, there is no Mediterranean Political Authority, and there will not be, at least not in the foreseeable future. Therefore, the situation needs to be efficiently managed, and coherent governance could seriously contribute to preparing for and implementing sustainable development in the Mediterranean. Working without a constraining power, MAP has been successfully promoting environmental protection, environment and development integration, and institutional and capacity building. It has induced national and regional co-operation, promoted NGOs networks, and increased awareness.

As for environmental issues, at least in relation to sea and coastal pollution, UNEP/MAP can also be a bridge between global and national levels in relation to sustainable development and its necessary governance. In this context, the Mediterranean eco-region can be considered as a test case for regional and even global governance. In fact through its history, cultural heritage, sea, biodiversity, and landscape, the Mediterranean can be perceived as a “regional public good” that requires an adequate and efficient structure for its organization and management. Options between rigidity, flexibility, and softness need to be seriously considered so as to close the current gap between needs and results in “regional environmental governance.” Governance through networking seems to be the most adequate, but then how should it be structured while promoting the principles of transparency, accountability, and a participatory approach? And what would be the role of the European Union? As was the case with MAP and the MCSD, would Mediterranean partners be able to design and establish an innovative networking governance structure for the protection of the environment and promotion of sustainable development?

Considering the complexity of the regional situation, the uneven progress of economic development, and the sharp asymmetry between its sub-regions, preparing and implementing a sustainable development strategy at the regional level should be promoted through “soft” but well-structured governance, certainly not a normative one. Effectiveness of such governance, which does not lean on a formal regional authority, will depend largely on the capacity to build up awareness, trust, co-operation and mechanisms for dialogue among strategic actors representing government, business sector, NGOs, and other major groups.

Actually, MAP and its MCSD do offer an interesting context for discussion, negotiation, and consultation. But to be more effective and efficient in promoting sustainable development, similar governance system using networking and a participatory approach as driving forces should be developed at the national level. Moreover, the traditional system of governance through MAP, MCSD, and other regional institutions need to be complemented with innovative elements of networked governance, with a clear identification of the “rules of the game” and of actor’s respective responsibilities, associated with transparency and follow up mechanisms. This gap could be partially filled through the establishment of an Inter-Agency Committee for Sustainable Development in the Mediterranean Region, an advisory body on policy issues and watchdog on implementation and progress towards sustainable development. Such a committee could be composed of a limited number of members representing the key regional actors together with some representatives on behalf of the countries, the business sector, local authorities and NGOs.

In these circumstances, a MSSD should focus less on direct implementation and more on promoting mobilization and building the capacity of the actors, within a

system that is able to improve upon and complement the traditional system of “governance”.

Finally, peace and security in the Mediterranean region as well as protection of the Mediterranean Common Heritage are crucial sustainable development issues at the global, regional, and national levels. An adequate regional governance based on a “regional social contract” could greatly contribute to sustainable development. The Mediterranean Region has always been a crossroads of conflict and co-operation, of antagonism and co-existence. Perceived and treated as a global and regional public good that also includes several “subject” public goods (related to the sea, the natural and cultural heritage, etc.), the Mediterranean could become a test case in international, regional, and national environmental governance for the promotion and implementation of sustainable development.

In this context, the regional governance structure should define the necessary transition and sequencing process for a progressive and dynamic structural change before opening all the riparian markets to competition and the global economy, in terms of capacity building and development of appropriate education systems, innovation and entrepreneurship in conformity with sustainable development principles.

To that end, innovative co-operation and financial mechanisms and measures ought to be identified and developed, nationally in terms of adequate taxation systems, and at the regional level in terms of quantitative and qualitative aid, debt swaps, and special funding agencies. Considering the importance of migration in the region, the huge amount of remittances presents a major challenge for regional governance in defining efficient measures and mechanisms for channeling these funds towards regional sustainable development.

The Mediterranean community will not become a legal entity, such as the European Union, but the various common concerns and shared stakes need to be given due consideration as global and regional public goods that require an efficient regional governance “structure” so as to promote peace, security, and shared prosperity effectively. This is not just a Mediterranean issue; it is also a global challenge.

Save the Black Sea

Maia Beridze
(European Maritime Co-operation Agency - Georgia)

In the last 30 years, sewage and hazardous wastes from 17 countries have flowed into the Black Sea, causing catastrophic changes to biodiversity. The Black Sea is now considered the most polluted and endangered sea in the world.

Addressing an environmental problem such as this one implies local as well as international co-operation. The Black Sea Environmental Programme (BSEP), initiated in June 1993 at the urging of the governments of Bulgaria, Georgia, Romania, Turkey, and Ukraine, is a significant example of the development of international environmental policy. Funded by the Global Environmental Facility and a number of collateral donors, the BSEP is managed by UNDP in close co-operation with the World Bank, UNEP, and national donors, and co-ordinates the work of governmental and international experts, specialized UN agencies, and national and international NGOs. Its aim is to enhance the sustainable management of the Black Sea through capacity building, environmental assessment, the development and harmonization of policy and legislation, and the promotion of appropriate environmental investments. For instance, it was instrumental in assisting the Black Sea governments to develop the Black Sea Strategic Action Plan (1996) for its rehabilitation and protection.

The Black Sea Biodiversity and Fishery Institute (Batumi, Georgia) and the Black Sea Youth EcoAcademy (Batumi, Georgia) are two pillars of the implementation of the BSEP.

The Institute maintains a wide network of contacts with national scientists and international environmental organizations. Its Environmental Educational Center aims to improve the environmental education of people, especially the youth. In order to create new linkages, a system of thematic working parties has been established based upon Regional Activity Centers. The Batumi centre, for example, focuses on biodiversity.

The mandate of the Black Sea Youth Eco-Academy (AEA) Environmental Information and Educational Centre - a non-governmental non-profit organization founded by the Black Sea NGO Council in Batumi - is to create environmental awareness, support the development of youth environmental groups, and facilitate public participation in the decision-making process. Several projects of the AEA have been supported by the Netherlands, the United States and Japan, as well as by international organizations.

Their co-operation with each other and with numerous local government organizations, NGOs, IGOs as well as various embassies located in the Black Sea region, demonstrates how collective action can develop to solve both global and local environmental problems.

SECTION 3

Actors in the International Governance Systems

Panel Report

Hilary French

The panel emphasized the increasing role being played by a broad range of actors in evolving structures of international environmental governance. Participants considered the respective roles of governments, NGOs, local authorities, the private sector, and international institutions, and discussed how to engage these diverse actors most effectively in the elaboration of an effective, equitable, and legitimate international governance system. Participants also addressed the question of how best to link public-private partnerships and private initiatives with multilateral processes.

Governance was generally seen as a *broad concept* that extends well beyond governments, and can encompass civil society as well as the private sector. Workshop participants highlighted the different scales of operation of civil society, ranging from the local to the global, and noted that the global-local link is often weak. Participants also discussed the different modes of operation and influence of civil society, ranging from information gathering to policy influencing, and discussed different models for civil society engagement, including network governance.

The papers in this section focus on emerging paradigms of network governance, on the participation of the private financial industry in emerging structures of international environmental governance, and on issues related to the participation and disenfranchisement of civil society. In addition to the issues raised by individual papers, the ensuing debate highlighted three major dimensions: the question of the legitimacy of civil society actors, barriers to participation, and issues pertaining to the involvement of a variety of actors.

On the legitimacy question, Jessica Green's paper outlines some of the attributes that would justify participation in the governance system. But the questions of determining when an organization's participation has become legitimate, where it should participate and who should make that determination remain open. The discussion also evidenced differing conceptions of civil society: from a broad acceptance that includes activist NGOs, experts, and the private sector to more narrow approaches that speak of only NGOs and grass-roots associations.

Though the issue of participation has been discussed widely in an institutional context, the debate has tended to neglect participation from the point of view of

individual organizations. Internal issues matter. Several impediments limit the effective participation of local or regional organizations in international governance such as: language, national political instability (that prevents organizations from focusing on international issues), poor knowledge and access to information, the geo-political status of the organization, and limited capacities to pressure governments.

Participants emphasized the importance of ensuring that all relevant stakeholders participate in the multilateral arena. At the institutional level, participants noted that the rules of engagement for civil society vary in different regimes, and noted that consistency among them might usefully be enhanced. Particular reference was made to the importance of ongoing efforts to promote involvement of civil society organizations in the work of UNEP, the U.N. Commission on Sustainable Development (CSD), and in the Multilateral Environmental Agreements (MEAs), as well as to the work of the U.N. Panel of Eminent Persons on relations between the U.N. and civil society. The CSD's efforts to involve a variety of Major Groups in its work, including representatives of NGOs, farmers, the private sector, labor, and the scientific and technological community, was seen as a possible model for other institutions.

Participants discussed broader obstacles to civil society participation in international environmental policy processes, including a range of internal factors such as human and financial resources, language skills, and political stability. Transnational connectivity and geopolitical status were also seen as key factors influencing an organization's ability to effectively engage international processes. To respond to these issues, participants highlighted the important role of capacity building at the national level, of enhanced membership in expert networks and communities, of enhanced access to information and knowledge, and of including civil society representatives on national delegations to inter-governmental meetings. Participants also noted the importance of addressing the complex issues of legitimacy, representation, and accountability. Toward this end, they highlighted the importance of consultative and self-regulatory mechanisms, and agreed that more thinking was needed about how best to utilize them.

Finally, a number of issues were raised regarding the involvement of different actors in the international governance system:

- Achieving sustainable development objectives requires the involvement of a variety of actors. How can we involve these actors in the elaboration of an effective, equitable and legitimate international governance system? How can we take into account the contradictory positions that these actors may take and on what basis should their respective roles be defined?
- How can we link public-private partnerships and private initiatives with the multilateral process?
- How can we co-ordinate the activities of policy networks with developments in the multilateral process?

Participants emphasized the multilayered nature of the system, noting that the confusion that arises from different actors operating on different scales and with different roles can sometimes lead to conflicting objectives and failures of collective action. The paper that was presented on emerging environmental governance systems for the financial sector argued for some measure of reconciliation among the multitude of relevant codes of conduct and other policy instruments in order to avoid confusion. Participants discussed the merits of compulsory versus voluntary approaches. They also considered whether UNEP or other international institutions might have a role to play in helping to bring about the needed reconciliation, although it was noted that questions remain as to whether complete coherence is either possible or necessary.

The recognition of the multilayered nature of the international governance system implies that there are a variety of actors will play different roles, which unavoidably leads to conflicting opinions and objectives that need to be reconciled:

- There needs to be a clear definition of the role and the degree of participation that should be granted to the private sector and civil society. Some discussants suggested distinguishing between those organizations charged with collecting and disseminating data and information, those participating in the decision-making process, and those contributing to the evaluation of global, regional, or national public policy. One discussant questioned the legitimacy of allowing environmental NGOs to participate in technical discussions, alongside scientific experts, since NGOs' analyses have a normative and political function whereas scientists are deemed more neutral.
- What should be the scale of civil society participation? Although global and local linkages need to be enhanced, to what extent is it legitimate to allow local organizations to participate in global environmental governance when their concerns are essentially local and they do not seek a global role?
- At which levels should actors be allowed to intervene? There needs to be a clear identification of the policy stages (agenda-setting, implementation) that need the involvement of these actors and of the functions they should fulfill (rule making or simply the distribution of information?).

Panel participants discussed the internal governance of networks and noted the need to build democratic processes within networks, including stipulating clear norms and procedures. Participants examined the need to mobilize the capacities of actors for self regulation, highlighting the experience of the Global Biocollection Society and the Forest Stewardship Council, and discussed the need to integrate organizational learning within networks and to enlarge participation in them. They also noted the importance of linking networks with the multilateral system, and agreed that the question of how best to do so merits further consideration.

In summary, the papers presented at the outset of the workshop as well as the rich discussion that followed made clear that the participation of diverse actors is an essential component of effective international environmental governance. Participants emphasized that the question of how best to encourage broad and effective participation should thus be seen as central to ongoing discussions of the future international environmental architecture.

Network Institutions and Environmental Governance : Democratic Accountability Reconsidered

Tom Dedeurwaerdere

Introduction

The emerging networks of public and private actors aim to offer innovative answers, in the international context, to the present difficulties faced by the system of multi-lateral governance. These new forms of governance can be characterized by an attempt to take into account the increasing importance of NGOs, the private sector, scientific networks and international institutions in the performance of various functions of governance. Prominent examples of such networks that have been instrumental in forging successful working arrangements are the World Commission on Dams, the Global Environment Facility and the flexible mechanisms of the Kyoto Protocol (Streck, 2002). Another ongoing effort is the United Nations Global Compact which combines multiple stake-holders in a tri-lateral construction including representatives from governments, private sector and the NGO community (Haas, 2004, p. 6).

The main argument in the literature for the advantage of network governance over traditional command and control regulation or, alternatively, recourse to market regulation, is its capacity to deal with situations of intrinsic uncertainty and decision making under bounded rationality (Haas, 2004; Ostrom, 2001; Brousseau and Curien, 2001). This is typically the case in the field of global environmental governance, where one has to deal with complex and interrelated problems. In these situations, network institutions can create a synergy between different competences and sources of knowledge.

The focus in this literature on network governance is on the conditions for enhancing the efficiency and the effectiveness of governance arrangements in the global context.¹ On one hand, the efficiency is enhanced through distributed knowledge acquisition and decentralised problem solving. The effectiveness, on the other hand, is improved through the emergence of collective solutions to global problems in different self-regulated sectors of activity. As such, network institutions seem to offer an appropriate answer to the lack of effectiveness and efficiency that characterize a lot of the multilateral international agreements. However, critics of the network governance

¹ The effectiveness of an international regime refers to the realization of the goals of the international regime, whereas efficiency refers to the relation between the means and the accomplished goals. For example, a regime can be effective in the short run, but not sustainable, if the available resources (both informational and material) are not used in an efficient way (for a more elaborate discussion of this distinction, cf. Young, 1994, pp. 149-150).

model show that networks do not necessarily lead to more legitimate governance arrangements. Indeed, the legitimacy of network institutions raises many new questions: To whom are the networks accountable? What are the criteria used to determine network membership? If a network becomes more inclusive, and thus enhances legitimacy, will it not by necessity become less efficient because of the increasing complexity?

The network concept in governance theory

Generally speaking, a network is constituted of a set of nodes or interconnected units (agents, organizations, computers, etc.) and a set of connections transmitting the signal (information, energy, etc.) from one node to another, with a certain connection strength. In governance theory, the network concept has been studied both as a form of collective organization and as an information processing device.

(1) As an information processing device, the main property of a network is to allow decentralised problem solving and distributed information acquisition, through several individual information processing units or nodes of the network. For example, in the Water Sacramento Forum, different stakeholders were able to enhance their knowledge—and so their problem solving capacity—through distributed network interaction, without having recourse to a centralized governance agency (Innes and Booher, 2003).

(2) As a form of collective organization, the focus is on the self-organizing behavior of the governance network. In the case of a highly interconnected network, through the interaction dynamics between the different nodes, a form of co-ordination emerges that is an overall property of the network. For instance, in the so-called e-economy, a new form of economic co-ordination emerges from the interaction between a heterogeneous set of actors—both private and public—which are interconnected through the Internet (Brousseau and Curien, 2001, pp. 28-29).

In order to study these questions, and to assess how network institutions can strike a balance between efficiency, effectiveness and legitimacy, we will focus on a particular example within the field of environmental governance, the recent experiment of Sustainability Impact Assessment.

Network governance and democratic accountability

In this first section, we would like to argue for the necessity to broaden the category of democratic legitimacy considered in the normative evaluation of the governance networks. The concept of legitimacy that is used by the critics of network governance is still based on a model of vertical accountability of the state to its citizens. Nevertheless, it seems that what is at stake in the emerging forms of network governance is not so much the improvement of vertical accountability, but rather an evolution towards reflexive forms of accountability that play a role in second-order

problems such as the formulation of the problems to be dealt with or the definition of the rules of the game.

According to James Bohman (2004), we can observe an evolution in global governance, from forms of vertical accountability to so-called second order accountability. The former is an extension of the vertical accountability, characteristic of the nation state, to the global arena. It is this model of vertical accountability between a sovereign and its constituents that is at the heart of the construction of supra-national institutions such as the European Union or the United Nations Organization. In those cases, the accountability of the transnational institution to its constituents depends on vertical institutions, such as direct or indirect parliamentary representation, public consultation or participatory decision making.

However, in the global context, this form of accountability suffers from a lack of efficiency due to high transaction costs, and from a lack of legitimacy because of the difficulty to find agreements on a global level where the different stakeholders are deprived of the confidence acquired through reciprocal recognition. Indeed, in the presence of radical different cultural horizons, one has to find an agreement on common principles with an “other” whose intentions and preferences cannot be identified *a priori*, and whose values and definition of the good life may vary from one's own (Habermas, 2000: 119). Moreover, the particular form of governance that is common to many international institutions is rule by experts and theory-driven policies that allow little contestation. That is why, in global governance, another form of accountability plays an important role, acting on the second-order level of defining the problems and the rules for reaching agreement. According to Bohman, what is needed at the global level is not only a formal extension of vertical forms of accountability to transnational institutions, but also a change in the “modes of inquiry” of transnational institutions. A more democratic mode of inquiry, through emerging public spheres, opens up second-order forms of accountability, such as questions related to how problems are formulated, information sought, its relevance and salience determined, and, ultimately, the standards by which to judge success and failure (Bohman, 2004: ,p.47). In other words, organizing accountability in the absence of state-like institutions depends on the creation of public spheres around supra-national institutions, with the goal of making their forms of inquiry more transparent, accessible and open to a greater variety of actors and perspectives (*Idem*: 349).

According to contemporary accounts of the role of network governance in international relations (Sabatier and Jenkins-Smith, 1999; Haas, 2004; Drahos, 2002), network institutions precisely allow such forms of second order accountability. We can illustrate this contribution of network governance to reconsidering democratic accountability through the case of the ongoing experiment in Sustainability Impact Assessments at the level of the European Union.

Impact assessments play an important role in improving European governance. They have been developed as a way of integrating sustainable development in the different policies of the European Commission, by improving the evidence on which decisions are made, and hence the quality of decision making. In the Communication from the European Commission (CEC, 2001), the Commission announced its intention to launch impact assessments as a tool to improve the policy development process. In particular, all major policy initiatives would be subject to the new Sustainability Impact Assessment (SIA) method elaborated by the Institute for Development Policy and Management of the University of Manchester (IDPM). Hereunder, we essentially refer to this particular methodology as it has been applied and widely discussed in the Sustainability Impact Assessment of trade liberalization policies by the DG Trade of the European Commission.

The experiment on SIA under way in the DG Trade has a broad ambition and can be considered a potential extension of the Environmental Policy Integration (EPI) requirement mentioned in the E.U. founding treaties.² This requirement states that environmental considerations should be integrated into the design, adoption, and implementation of policies in all policy sectors. At the current state of the methodology this broad objective has been implemented through an institutional process that allows networking independent experts, key negotiators, and relevant stakeholders.

Initially, the SIA methodology was conceived in close connection to the official negotiation process on international trade in different multi-lateral organizations. The specific aim of SIA, in this respect, is to promptly identify and forestall the potential negative effects of trade liberalization, or alternatively, to set up adequate measures for mitigating such effects (Knigge and Kranz, 2005). This particular use of impact assessments, however, suffered from important shortcomings in terms of modeling capacity, timing, and legitimacy. That is why a second use of SIA has emerged, which focuses on the assessment as an ongoing process opening up new spaces of deliberation and accountability.

This alternative use aims to tackle two major difficulties of the current methodology. First, on the level of information gathering, there is a major difficulty in the actual design to integrate contextual information in the assessment process. For example, in one major assessment concerning the ACP countries (Africa, the Caribbean and the Pacific), several tools have been developed to address stakeholder participation, but in practice the major data used in the reports resulted from a compilation of existing World Bank data, due to the difficulty of obtaining direct field information in such a short time period (Thirion, 2003). Another example, also mentioned by one of the main contractors, concerns the restricted access of developing countries to electronic

² Initially in the 1987 Single European Act ; more recently in Article 6 of the 1997 Amsterdam Treaty.

communication, which is one of the main tools used in current SIA for enhancing transparency and broad public involvement (Kirkpatrick, 2003).

Second, the criterion of “sustainable development”, used in impact assessment, allows for a variety of interpretations. Godard (2005), for example, identifies at least three interpretations of sustainability : (1) a biocentric interpretation which maintains that all living beings have an intrinsic value and must therefore be protected, while taking into consideration complex interdependences between all living beings in the biosphere; (2) an anthropocentric interpretation which emphasizes the importance of preserving the earth’s ecosystems in order to maintain the potential for human development; and (3) an economic interpretation which balances the long-term costs of the destruction of ecosystems in relation to short-term benefits. As a result, the practical acceptance of the principle of sustainable development will vary according to the interpretation that is adopted. The legitimacy of the models therefore will depend not only on scientific data but also on the collective preferences of the populations affected by the policies evaluated in the impact assessments. In the context of SIA, for instance, one conflict with regard to collective preferences concerned the priority to be given in the models to protecting the environment on one hand, and promoting economic development in developing countries on the other (Borregaard and Bradley, 1999).

In order to analyze the possible contribution of reflexive forms of accountability in dealing with these difficulties regarding sustainability impact assessments, let us consider two important bodies of research: the work conducted on network governance as part of the Harvard Environmental Assessment Project, as it has been applied to impact assessments by Cash and Clark (2001), and the research into organizational learning in epistemic communities as conducted by Ernst and Peter Haas (1995).

Towards combining efficiency and legitimacy

Cash and Clark’s research (2001) provides an example of an interactive assessment concept with a view to integrating information coming from different types of actors and combining a heterogeneous set of social values. In their view, the assessment process must not be thought of as resulting merely from a dialogue between scientists and politicians, but as forming part of a polycentric network, bringing into play actors with a variety of areas of competence and developing different action strategies. In their opinion, the emphasis should shift towards the modeling process as a social communication process between scientists, decision-makers, interest groups and the media, with a view to defining relevant questions, selecting certain types of expertise and interpreting the results.

This interactive network approach has a number of advantages compared with traditional hierarchical assessment methods. First, combining heterogeneous sources of knowledge within a network allows for an interaction that enriches each of these sources and makes it possible to obtain an overall result which the different individual units would not have been able to achieve. For example, in the case of SIA, international organizations may have the computational and technical capacity to produce complex models, whereas local agencies associated with certain NGO actors may be skilled in collating contextual information. In isolation, neither of the two would have been capable of producing a model reflecting both the dynamics of the system on a larger scale and the consequences of these dynamics on the local situation. Another example of complex links between the local level and the global level can be highlighted in the context of climate change models (Cash and Clark (2001): 4). On the local level, it is possible to show that farmers, for example, use scientific information on climate change in their work, although they do not have direct access to the impact assessments produced by the Intergovernmental Panel on Climate Change (IPCC). Instead, they obtain their information via a widespread assortment of institutional resources—local universities, seed companies, local media—with which they have built up a relationship of trust over the years on the basis of other issues. In turn, these institutions use their own information sources, following a route that may ultimately lead back to the IPCC or its equivalent. In this example, widespread institutional resources link scientific impact assessments with local decision-making processes and facilitate links between the different levels. Similar results for linking global knowledge to local actors through a complex institutional chain have been obtained in areas such as the fight against acid rain in Europe, the construction of fluctuation models for El Niño and the attempts to limit the thinning of the ozone layer (*Ibid.*).

Second, the network approach considered by Cash and Clark (2001) allows for a polycentric interaction which makes it possible to contrast different criteria for assessing sustainability of the policies: scientific credibility, which takes into account the opinion of the expert community; saliency, which takes into account the opinion of negotiators and actors in the field, and legitimacy, which makes it possible to verify compliance with public policies that are of general interest (*Ibid.*: 6). According to Cash and Clark (2001), successful comparison of these different criteria in decentralized assessment systems rests on an institutional structure that allows interaction between different types of actors. Confronting these different evaluation criteria allows a public inquiry into the type of data to be included in the modeling process and the status of peer assessment, or into who is entitled to take part in the individual stages of the assessment.

This first strategy for developing reflexive forms of accountability emphasizes the assessment process as a social communication process. With regard to governance theory, the emphasis is on placing a number of heterogeneous actors within a network,

making it possible to create a self-adjustment process for the strategies used by these actors in the different self-regulated sectors of activity. However, the large-scale introduction of interactive communication in decision-making procedures does not automatically imply improved integration of sustainable development targets in the work program of the institutions in question. The interactive approach does in fact increase the efficiency of the social communication process, but does not lead to initiatives against the larger background of legitimization that determines the overall normative orientation of the interaction between different nodes in the network. In the specific case of SIA, this background is far from being stabilized. As shown by Godard's analysis, the sustainable development criterion is open to a variety of interpretations. Agreement is dependent on a series of legitimacy "tests" that take a variety of forms according to the different orders of legitimization in the social context in question. It will, therefore, depend on a learning process that will allow the different actors that make up this context to modify their normative beliefs so as to take into account the viewpoints of the largest possible community.

This is why a second strategy for developing reflexive forms of accountability is geared towards establishing an initiative concerned with developing the co-operative resources present in the institutional environment, on which the successful implementation of an interactive assessment concept is dependent.

For the specific case of impact assessments, we can analyze this second strategy on the basis of the research conducted by Ernst and Peter Haas on the conditions of social co-operation in international organizations. Their work reveals the important role that communities with a specific knowledge can play, so-called epistemic communities, which are geared towards the development of core concepts and common intersubjective meanings with respect to a certain problem (Haas and Haas, 2002). In historical terms, these communities fulfilled an important role in the field of environmental governance. Well studied examples include the role of the scientists involved in the Villach Group on climate change (Haas and McCabe, 2001) and the ecological community monitoring pollution in the Mediterranean (Haas, 1990). As their research clearly shows, the role of these communities with regard to the development of common intersubjective understandings can also be observed in other fields. For example, the United Nations' *Global Compact* can also be seen as "an effort to develop and apply within an institutional setting consensual knowledge about best corporate practices by trying to encourage participation from corporate actors, civil society and experts" (Haas and Haas, 2002: 597).

According to Ernst and Peter Haas, unlike incremental adjustment processes that are typical of the interactionist visions of assessment processes, the learning process that is possible thanks to epistemic communities leads to changes in the work programs of institutions by confronting them with a shared vision of cause and effect

relationships between social and physical phenomena. The explicit goal of epistemic communities is to develop a shared vision. This does not, however, imply a return to a unique definition of sustainable development. Rather, from an epistemological point of view, this shared vision actually occupies an intermediate position between a relativistic approach to interpretation, on one hand, and the elimination of the problem of interpretation through a rationalist approach, on the other. In fact, not unlike the arguments put forward by Godard, Ernst and Peter Haas show that there is no empirical way of deciding between the different interpretations of sustainable development, due to the complexity of the integrated systems considered by the epistemic communities. Any definition of sustainable development will be internal to an interpretation of the problems to be dealt with and thus has to be considered as an intersubjective phenomenon (Haas and Haas, 1995: 256). On the other hand, however, it does not imply that it is impossible to organize a learning process geared towards producing a common knowledge base. In fact, according to the authors, such a learning process is possible if core concepts are made to evolve along with intersubjective meanings that define the problem. From this point of view, the primary role of epistemic communities is to encourage the development of concepts and meanings in the direction of co-operation on a larger scale; or even, to use the words of Ernst and Peter Haas, in the context of their analysis of international co-operation, a role as “catalysts for self-reflection processes that can change the way in which states perceive their own interests”.

Assessment on the basis of a theory of reflexive governance

According to contemporary theories of governance, one of the main stakes involved in the development of network institutions is the creation of more reflexive forms of democratic accountability in the international context. This notion of reflexivity, as it has been applied by Bohman to the analysis of democratic accountability, is an extension to the field of global governance of the concept developed by Ulrich Beck in his work on the reflexive evolution of technical modernization. As he highlighted in his analysis, “reflexive” does not only mean the way in which the context of an activity (mental or physical) has an effect in return on this same activity, but also, as it is the case with forms of “reflexive modernization”, the way in which this “reflexive feedback” can cause a reconfiguration of the normative orientations that guide actors and institutions (Beck, 1997: 11-19).

Our hypothesis is that such a reflexive interpretation of network governance, acting both through a first order (reflexive feedback) and a second order (reconfiguration) mechanism, is able to go beyond certain insufficiencies of the recourse to reflexivity in current propositions to ameliorate global environmental governance. As we have seen, both the network governance approach developed by

Cash and Clark (2001) and the approach based on epistemic communities already aim to consider reflexivity in the context of employing impact assessment methods.

On the one hand, in the interactive concept of Clark, the reflexive resources of the actors are mobilized in the adjustment of their action strategies in response to the feedback from the environment. Thus, for example, after an initial impact assessment phase, experts may be prompted to review their strategies by placing more emphasis on qualitative approaches or to make it possible to incorporate more field knowledge in the analysis of the different scenarios.

The literature on organizational learning in epistemic communities emphasizes another use of the concept of reflexivity, i.e. the ability of institutions to review the background of intersubjective meanings that define the common action context within which the ongoing adjustment process between the strategies of the actors can take place. Learning in an epistemic community can thus lead to a perception of new opportunities for action for all interested parties or a reframing that allows a wider community of viewpoints to be taken into consideration when defining institutional objectives.

However, within these two perspectives, the emphasis is always on one dimension, sometimes on reciprocal adjustment of the strategies of the actors involved and sometimes on the ability of institutions to adapt, without considering the link between the two. In the first case, we are concerned with a reflexive adjustment between the different strategies of the actors in question, but do not take into account the transformation of the role of common beliefs in establishing a common action context. In the second case, the emphasis is placed on learning new contextual meanings in the institutional environment, but, symmetrically speaking, the assumption is that this common understanding automatically gives rise to reciprocity between the different functional roles of the actors involved. In other words, the progress from the establishment of a common context to establishment of new forms of solidarity between the different roles in the social context is not analyzed for itself.

The reflexivity mobilized by these two approaches is thus incomplete. A more complete approach to reflexivity should take account of the link between the two dimensions of reflexivity, one relating to the actors involved and the other to the institutions. It is only on these terms that the different strategies for reflexive amelioration can eventually give rise to a sustainable working program in the social context.

One can further develop this proposition by applying the network governance approach to perspectives that aim at linking the two dimensions of reflexivity. Two specific analyses of the inadequacies of the proposed improvements can be used to illustrate such a perspective. In the first instance, we can consider the research conducted by Schout and Jordan (2003) on network governance. This research

demonstrates the inadequacy of a network governance approach that only considers the actors' reflexivity, such as in the approach adopted in the European Commission's White Paper on governance. This approach does in fact intend to reform our modes of governance by delegating a greater number of tasks to networks of self-organized actors who negotiate their own collective co-ordination agreements. However, to some extent, this approach presupposes what it wants to achieve: the existence of a context of relatively consensual problems and homogenous actors linked by sufficiently strong interdependences to allow the emergence of decentralised solutions to co-ordination problems. Moreover, in the specific case of European environmental governance, the institutional context is made up of heterogeneous actors and different problems depending on the levels of interaction. The absence of any reflexivity on the institutional conditions for the emergence of collective action by self-organization has condemned the policy of self-regulation in the environmental domain to go unheeded.

Nevertheless, as Schout and Jordan demonstrate, another perspective is possible, which develops a reflexivity on the appropriate institutional framework for network operation. Thus, in their analysis, Schout and Jordan propose that networks should be supplemented with an institutional framework that guide the design of the network interaction, carries out audits, adopts a critical stance and formulates management alternatives (*Ibid.*, p. 12). Such a framework could also monitor the creation of co-ordination capacities between the different nodes in the network so as to permit the integration of common objectives into the network as a whole (*Ibid.*, pp. 18-19). In this account, implementation of a network governance policy in a particular context also presupposes that the institutionalization of this mode of governance will receive critical consideration in its own right.

The research of Frank Biermann (2000) reveals the other side of the coin. It shows that the creation of international networks of researchers focusing on the same subject area and the development of a consensual knowledge base do not automatically bring about acceptance of this consensual knowledge from the point of view of the concerned actors. In fact, by comparing the legitimacy, credibility, and saliency of three important scientific assessment reports—the 1995 report on climate change, the 1995 global report on the status of biodiversity and the report assessing the reduction in the ozone layer—he shows that these assessments had little impact on the behavior of the relevant actors in a developing country such as India (Biermann, 2001). What is often promoted as the consensus of “international science” comes up against a lack of relevance from the point of view of the socio-economic context in developing countries and a lack of legitimacy due to the absence of an ability to participate effectively in impact assessments.

These inadequacies also have repercussions on the interdependence between the new social roles created by the epistemic communities. Hence, as shown in a case study on the role of southern experts in the IPCC (Biermann, 2000), incomplete

information from the point of view of developing countries and the choice of certain methodologies and theoretical frameworks at the expense of others have given rise to a mistrust of experts from the North, who were considered to be biased in favor of the interests of industrialized countries. A well-known example of this bias is the Indian Methane Campaign, the aim of which was to demonstrate that emissions of methane—a major greenhouse gas—as a result of rice-growing activities were much lower than had been claimed by experts from the Environmental Protection Agency (EPA) in the USA (Biermann, 2001: 302-303). In fact, Indian scientists were able to establish that methane emissions had been overestimated by a factor of 10 in the EPA's reports. Such counter-assessments by local institutions have clearly played a significant role in the problematic relationships between experts involved in climate negotiations. In order to rebuild new forms of solidarity between expert organizations, with different horizons and interests, a greater degree of reflexivity is needed on the involvement of different actors in the new practical interaction context created by the establishment of epistemic communities.

Conclusion

We have argued for the necessity to broaden the categories of democratic accountability considered in the normative evaluation of network institutions. The concept of legitimacy that is used by the critics of network governance is still based on a model of vertical accountability of the state to its citizens. However, it seems that what is at stake in the emerging forms of network governance is not so much the improvement of vertical accountability, but rather the evolution to more reflexive forms of accountability, that play a role in the second-order problems such as the selection of the problems to be dealt with or the definition of the rules of the game.

We started with the hypothesis that the improvement of impact assessment methods proposed respectively by Cash and Clark (2001), in their research into polycentric governance, and by Peter and Ernst Haas (1995), in their work on the role of organizational learning in epistemic communities, makes it possible to develop a more reflexive approach to governance. On one hand, polycentric interaction between different selection criteria makes it possible to increase not only the scientific credibility, but also the saliency and legitimacy of impact assessment methods. On the other hand, encouraging organizational learning by epistemic communities may give rise to a reframing of the co-operative beliefs operating in institutions, by integrating the viewpoints of as wide as possible a community of users.

From the point of view of governance theory, this use of reflexive resources, both in terms of the actors involved and in terms of institutions, is an effective way of evolving towards more legitimate forms of governance in the global context. However,

as we attempted to show, these reflexive improvements are still incomplete, in that they alternatively place the emphasis on the reflexivity of the actors or on the reflexivity of the institutions, without considering the link between the two. This is why we have proposed a more complete approach in terms of an incentive policy that is based on enabling the co-operative resources of the actors and institutions in both uses of reflexivity. Such an epistemological viewpoint makes it possible to overcome the endless debates regarding the choice between actor-centered and institution-centered modes of network governance. Instead, the aim should be to incorporate a fuller degree of reflexive consideration in the two modes of network governance. This is what we have attempted to illustrate, albeit briefly, using the case studies conducted by Schout and Jordan and Biermann.

**Cutting the Gordian knot: banks entangled in the mesh
of their international environmental commitments**

Robin Edme, Maqassar (France)

The articulation and coherence of the various levels of governance should not be viewed only in a geographical perspective. Indeed, in terms of coherence, the dominant issues are the organic perspective (who is issuing the guidelines) and the implementation process perspective (voluntary or regulatory).

The numerous environmental commitments to which the finance industry is encouraged to subscribe do not necessarily emphasize similar environmental value drivers or have similar foci (society, business, or project level) and objectives. Therefore, the sum of all the individual business initiatives triggered by these different commitments might not appropriately address the collective needs in terms of environmental protection.

In the finance industry, the best practice rules in international environmental governance originate from numerous sources, such as :

- the environmental principles of the Global Compact; the OECD principles for multinational corporations;
- the UNEP Finance Initiative;
- the London Principles for Economic Prosperity, Environmental Protection and Social Development; the Equator Principles;
- the environmental reporting section of the Global Reporting Initiative and its Finance Industry supplement;
- the environmental guidelines for project financing of the World Bank, the IFS, etc.;
- various global summits, including Basel II;
- ISO14001, SD 21000 (for France), EMAS.

Not to mention the environmental programs of various international organizations, initiatives launched by institutional investors such as the Carbon Disclosure Project, national legislations which differ from one country to another or the pressure from environmental NGOs.

These are what we could call explicit rules. But there are also implicit environmental governance rules, such as those underlying the environmental questionnaires issued by socially responsible investors, or the social and environmental rating agencies to appraise the environmental governance and performance of the companies they review in their portfolio building process.

The accumulation of so many layers leads to confusion and incoherence. Moreover, since the pressure to follow scrupulously different environmental guidelines is relatively equal across all the issuing organizations, firms are clearly faced with a prioritization issue.

The fundamental question, therefore, is how to build a coherent set of international environmental governance principles and rules which would help companies prioritize their actions within the same global target framework.

This can be done in two ways:

1. Starting a “reconciliation” process of all these guidelines through the reinforcement of international co-operation under the authority of a UN body (such as UNEP);
2. Creating an international environmental governance body composed of all representative stakeholders.

Mapping the Disenfranchisement and Participation of Civil Society

Jessica F. Green and Dana R. Fisher

Introduction

In his contextual paper for the High-Level Panel on UN-Civil Society Relations, former president of Brazil, Fernando Henrique Cardoso, points out that, “[c]ontemporary global order is increasingly the outcome of multiple, interlocking patterns of transnational interaction shaped both by state and non state actors” (Cardoso 2003).

¹This new order presents myriad challenges for international governance; among them are the challenges of promoting coherence across levels of governance, and ensuring the meaningful inclusion of all stakeholders in the multilateral arena.

This essay develops a model for understanding the degree of political engagement of civil society actors within global governance for sustainable development. We use the term global governance in the broadest sense, as “a social function [which]...centers on the management of complex interdependencies among actors who are engaged in interactive decision-making” (Young 1997: 1). This expansive notion of global governance acknowledges that it is not simply an interstate phenomenon, but rather, includes a variety of state *and* non-state actors that work at a multiplicity of scales. Also, this definition does not imply a hierarchical model of global governance; rather, it also encompasses “governance from below” (Uemura 2002; see also the discussion in Appadurai 2001) as demonstrated by social movements, protests against international institutions, and what scholars such as Swyngedouw (1997) call “glocalization” where decision-making authority is simultaneously transferred up to international institutions and down to local actors. Throughout our discussion, we will refer to international policy-making processes and the multilateral arena as sites where global governance for sustainable development takes place.

Building on the growing literature that outlines the challenges to civil society actors within the global arena, we present a conceptual framework that explains how these actors are both enabled and prevented from participating effectively in the international policy-making process. The argument is divided into three sections. First, we will present the notion of *disenfranchisement*, a term that has been developed to reflect the limitations of social actors when they try to engage with international regimes for sustainable development. Second, we present a conceptual framework for

¹ This research was supported by a grant (03CEG-3501) from the Japan Foundation Center for Global Partnership.

understanding the determinants that impact the success of civil society actors in their participation and influence the international arena. In this section, the concept of disenfranchisement is disaggregated into what we identify as its constituent dimensions. We outline the different characteristics for civil society actors, and provide examples of the ways that these dimensions might be operationalized. Third and finally, we outline a future research program grounded in our conceptual framework that can be used to conduct empirical research that will explore the interrelations among these dimensions, and ultimately, explain why civil society actors are disenfranchised from the international policy-making arena.

Participation and influence in an increasingly globalized world

UN Secretary General Kofi Annan stated in his *2000 Millennium Report* that the “UN and the world’s people have much to gain from opening the Organization further to civil society,” which he described as “a vital source of energy and expertise” (2000: 69). Four years later, many UN processes, agencies and bodies continue to search for ways to increase civil society actors’ levels of engagement. Thus, despite the growing efforts by the UN, progress toward fuller engagement with civil society often remains problematic. Gemmill and Bamidele-Izu (2002), for example, point out that civil society participation in international governance remains informal and limited. As a result, participation of civil society actors such as NGOs is often the result of accepted practices that are codified into standard operating procedures (Oberthür et al. 2002). In other words, many UN policies and initiatives have come up short, leaving some civil society actors, particularly those from developing countries, at the periphery of international policy-making.

In spite of these obstacles, there has been a dramatic increase in the number and roles of civil society actors (for figures on civil society organization involvement with UN processes, see Clark et al. 1998; see also Smith 1997), who are active participants in discussions about international governance for sustainable development. Particularly in the years following the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, civil society actors have come to serve a variety of functions in international environmental policy-making (see, e.g., Raustiala 1997; Fox and Brown 1998; Fisher 1997; La Vina 2003; Smith 1997; Wapner 1996).

As a first step to understanding the ways in which civil society actors are limited in their involvement in the multilateral arena, it is important to understand the nature of their marginalization. For the sake of simplicity, we term this phenomenon disenfranchisement. In our analysis, disenfranchisement is the condition of being marginalized, which is the result of a number of different important determinants.

Specifically, disenfranchisement is defined as «Being deprived of the capability to participate and to influence agenda setting and decision-making in international regimes for sustainable development»²

This essay will use this term to represent the notion that civil society actors are not always able to participate effectively in policy-making when they interact in the multilateral arena. It is important to note that, according to our definition of disenfranchisement, participation and influence are necessary for meaningful engagement in the global arena. However, our project is not to measure the ways that civil society actors exert influence in the policy-making arena (for useful discussions of methodologies for measuring influence, see Zürn 1998; see also Betsill and Corell 2001). Rather, we will disaggregate the notion of disenfranchisement into its constituent dimensions and describe potential operationalizations of these dimensions that can be used to compare disenfranchisement across regimes and institutions. In other words, we describe the mechanics of disenfranchisement, outlining the reasons that we hypothesize these actors become disenfranchised. As a first step in this process, we will begin by reviewing briefly the definition of civil society.

Defining Civil Society—Most scholars who examine questions regarding this sector focus on defining and understanding the social sphere that has come to be known as civil society, rather than its interactions with the policy-making arena. Civil society was originally seen as a residual category: the space left over for social actors outside of the state and the market (but see Gramsci, 1971; Hegel, 1991; see also Wapner, 1996). Much of the scholarly literature on civil society focuses on conceptualizing the evolving role of the citizen in society. To date, it continues to be seen as a social sphere that is separate “from both state and economy” (Cohen and Arato, 1994: ix; see also Wuthnow, 1991). Perhaps in its most general form, civil society has come to be defined as involving a “self-organized citizenry” (Emirbayer and Sheller, 1999: 146; for a complete discussion, see Cohen and Arato, 1994; see also Hann and Dunn, 1996).

In contrast to a small number of scholars who have included businesses and the market sector in their definition of civil society (e.g. Gramsci 1971; Hegel 1991; Wapner 1996), we maintain the boundaries put forth in the majority of the recent work on the subject and exclude the market sector from our definition of civil society (see, e.g. Dewey 1927; Habermas 1989, 1998; Calhoun 1992; Cohen and Arato 1994; Emirbayer and Sheller 1999). As a result, the so-called business NGOs and those groups representing business interests are not considered included as civil society actors. Given the differences between the market and civil society sectors’ access to resources that affect the state—and, as a result, their power within the negotiations—this distinction is important to any discussion of disenfranchisement.

² This definition was developed by participants in both the US and Japanese roundtables in Summer 2003.

Conceptualizing the Dimensions of Disenfranchisement

As outlined in the previous section, the disenfranchisement of civil society actors from the multilateral process is a complex problem that extends beyond questions of legal or formal recognition. Disenfranchisement, in fact, involves multiple, interrelated dimensions. To understand what factors promote the disenfranchisement of civil society actors, it is important to disaggregate the notion into smaller, constitutive concepts. Thus, in this section, we present the concepts that we term the dimensions of disenfranchisement as a means of explaining some of the limitations to these actors' capability to participate and influence agenda setting and decision-making in international regimes for sustainable development. These dimensions attempt to explain some of the reasons why civil society actors are disenfranchised. Each of these three dimensions will be addressed in turn.

Endogenous Resources. This dimension describes the resources that come from within the civil society organization (CSO), or the nation within which it is based. It includes human resources, which involves the people, training, and knowledge needed to equip civil society actors to participate in international policy-making. Another critical aspect of human resources is the ability to communicate in English. Although there are six official UN languages, civil society representatives who are unable to communicate in English are often left out of the behind-the-scenes negotiating and lobbying that are crucial to the decision-making process.

An adequate endowment of endogenous resources allows civil society actors to obtain basic information about the mechanics of a given decision-making process. This knowledge and understanding is critical: when are the meetings held, and what is on the agenda? Equally important is the ability to follow the progress of an international process. Civil society actors must be able to determine what decisions were taken at certain meetings, and the implications for implementation as well as the future of that specific process.

Political stability can also be another important endogenous resource: it may enable actors' participation or create barriers to it. CSOs that are based in politically unstable countries may not be permitted to organize and advocate, or their attempts to reach out to the international community may be discouraged by the government (Fisher 1997: 51-57). In other instances, CSOs in politically unstable countries are likely to focus their attention on domestic issues, and therefore devote fewer resources to the global arena.

Transnational Connectivity Information is a key prerequisite for participation. On the international level, policy-making can often involve complex processes, with many governing and subsidiary bodies, and copious amounts of technical information about science and policy. This dimension is used to describe the means through which

disenfranchised actors obtain information that in turn promotes engagement in international policy-making.

First, as has been alluded to above, there are many different types of information that may facilitate participation and influence. In the case of policymaking related to environmental and social problems, knowledge of the relevant science or social science is also important for participation. Access to emerging regime-relevant research and/or consensus may also figure prominently in actors' ability to participate, or to advocate effectively for certain policies or outcomes.

Many of these types of information have an important minimum baseline needed to ensure a basic level of engagement; in order to participate in the climate change negotiations. For instance, civil society actors must have an understanding of the mechanics of the climate negotiations as well as of climate science. Exercising influence through the use of information is a more complex matter. Some scholars have suggested that influencing policy-making decisions is closely tied to persuading other actors to accept a specific set of scientific facts or logic (e.g. Litfin 1994; Jasanoff and Wynne 1998).

There are several avenues through which transnational connectivity can facilitate access to these various types of information. Membership in epistemic communities, such as the Intergovernmental Panel for Climate Change or the Millennium Ecosystem Assessment is an excellent example of the potential power of transnational connectivity (for a full discussion of epistemic communities, see Haas 1989, 1990). Through their membership in epistemic communities, civil society actors may be able to obtain information related to a given regime including, *inter alia*, emerging regime relevant research, new policy proposals and developments in related policy-making processes. These connections to a broader policy community may serve as a critical means of gathering knowledge, particularly when human capital, or other endogenous resources are lacking. However, membership is not the only way to benefit from the knowledge concentrated in epistemic communities; simply by accessing scientists and policy-makers from around the world, civil society actors can find and distill complex policy relevant information that might otherwise be labor-intensive with relative efficiency.

Transnational connectivity is also critical for providing policy information, and also, information about other civil society activity surrounding specific issues. The Internet has been an important tool for organizing and mobilizing civil society actors (e.g. Norris 2001). This type of connectivity may also involve transnational advocacy networks that can bring about what Keck and Sikkink (1998) call the "boomerang effect," where domestic civil society actors use their transnational connections to appeal to civil society actors and/or governments of other nations to pressure their country externally. In recent years, civil society actors have also begun to serve on

negotiating teams (e.g. Kanie 2003), which gives them more direct access to policy-makers within the global arena, allowing the potential for greater influence.

Geopolitical Status in contrast to endogenous resources and transnational connectivity, geopolitical status reflects the political realities that there are key actors in any given international regime. Key actors derive their power primarily from strategic alliances, and the alliances of their host country, as well as from its endowment of natural resources.

Although some literature has pointed to an emerging global civil society (e.g. Lipschutz 1992; Wapner 1996; Glasius et al. 2002), as has been previously noted, we acknowledge that civil society organizations frequently gain influence from the country in which they are based. In the context of this dimension, participants in civil society organizations are not considered global citizens. Rather, they are viewed as what Tarrow calls rooted cosmopolitans, that is “rooted in specific national contexts, but who engage in regular activities that require their involvement in transnational networks of contacts and conflicts” (Tarrow 2001b: 8; see also Fisher et al. 2003). In other words, even though these civil society actors are connected transnationally, we assert that this dimension points to the fact that civil society actors derive power from their specific national context. This power stems in part from these civil society actors’ perceived ability to pressure their national governments. In recent years, some civil society actors have also begun to serve on negotiating teams (e.g. Kanie 2003), which grants them direct access to policy-makers within the global arena, allowing the potential for greater influence. This point was demonstrated by the international NGO Friends of the Earth (FOE). Because this organization is based in the United Kingdom, a wealthy member of the European Union, it enjoys relative strength in contrast to civil society organizations from other parts of the world. With a representative on the European delegation to the climate change negotiations, it gains additional clout in the eyes of the international community due to its connections to governmental and its perceived ability to have its positions represented by its government and the European Union. The geopolitical status of a civil society actor can also be affected by a country’s natural resources. For example, countries that are classified as “megadiverse”—having high concentrations of biodiversity—enjoy higher levels of participation and influence in shaping the policies of the Convention on Biodiversity. Correspondingly, civil society groups in a position to influence these nations may also have greater levels of influence.

These dimensions are put forth to provide a framework for future research about disenfranchisement; nonetheless, there are some hypothesized relationships that are important to note at the outset. First, we hypothesize that the dimensions are not linear in their relationship to disenfranchisement, but rather, reach a threshold level that in turn allows actors to participate and/or exercise influence in international policy-making. Second, we acknowledge that interrelationships between these three

dimensions make threshold levels unclear. That is, a threshold endowment of endogenous resources, for example, may compensate for a lack of transnational connectivity or geopolitical standing, but further research must test the dynamics of the relationships between them.

Toward a theory of disenfranchisement

The three dimensions of disenfranchisement outlined above provide the first step in understanding the ways in which developing country and civil society actors are disenfranchised from the international policy-making process. By exploring the dimensions of disenfranchisement, it is possible to disaggregate the factors which contribute to developing countries and civil society actors' limited participation and influence within the global arena. Table 1 presents the three dimensions of disenfranchisement with examples of ways in which each dimension can be operationalized for developing countries and civil society actors³.

Table 1 : Operationalizing the dimensions of disenfranchisement

Dimension	Civil Society Operationalization
Endogenous Resources	<ul style="list-style-type: none"> ▪ Human resources ▪ Knowledge of English ▪ Financial resources ▪ Political Stability
Transnational Connectivity	<ul style="list-style-type: none"> ▪ Membership in epistemic communities ▪ Interactions with scientists, academics or policy-makers from other countries ▪ Serves on a nation's delegation ▪ Affiliations with transnational advocacy networks
Geopolitical Status	<ul style="list-style-type: none"> ▪ Connection, membership and proximity of organization's home country to colonial power / superpower ▪ Serving on a nation's delegation ▪ Natural resources

This framework for disenfranchisement focuses on the attributes of actors and their specific contexts as characterized by the dimensions, and the way that the dimensions contribute to their participation and influence in international policymaking. The framework does not incorporate structural realities of international institutions which

³ The examples are not meant to represent an exhaustive list.

are also important determinants of disenfranchisement— especially in the case of civil society actors. The norms and rules of each regime are different and have an effect on how transparent and accessible the institution is to civil society actors. Some institutions' rules, such as the Commission on Sustainable Development, permit many civil society actors to attend and even speak at negotiations. Other institutions, such as the World Trade Organization, have much more restrictive rules (Scholte 1999). This is an important issue when examining civil society participation, but one that exceeds the parameters of this model. The Panel of Eminent Persons on UN-Civil Society Relations has taken up this matter in its consultations with civil society; many of the discussions have focused on current mechanisms for civil society engagement, and their perceived shortcomings.

It is also important to underscore that though this framework posits a causal relationship between the dimensions and the level of actors' disenfranchisement, it is not an all-inclusive model. We acknowledge that there are other intervening variables which will also affect these actors' participation and influence.

Despite these constraints, future research must apply these dimensions toward understanding the factors that promote disenfranchisement, and how the dimensions of disenfranchisement are interrelated. In particular, future research should explore the variations across nation-states or civil society organizations. This research will provide necessary insights into the ways in which the dimensions are weighted against one another. Through this research, an understanding of why some civil society actors are able to participate more fully and exercise more influence than others will be developed. In addition, it will provide necessary insight into how the dimensions of disenfranchisement are related.

We propose a conceptual framework for understanding factors that contribute to developing countries and civil society actors' disenfranchisement from the multilateral arena. By disaggregating this notion of disenfranchisement into four specific dimensions, we provide a framework for research into this extremely important aspect of international politics. Without full inclusion of those that are disenfranchised, progress toward sustainable development will be limited.

In his report on the implementation of the Millennium Development Goals, the Secretary General calls on “the entire United Nations family of Member States, international organizations...and civil society [to] join together, [for] success requires solidarity” (2001:5). Any lesser level of inclusion will slow our collective progress toward a sustainable future.

SECTION 4

Towards Collective Action

A Round Table

Participants: Sunita Narain, Ricardo Meléndez Ortiz, Stephan Contius, Tom Spencer, Richard Ballhorn, and Martha Chouchenas.

This discussion was intended to collect ideas on the forms that collective action could take in order to improve international environmental government and make it more comprehensive and coherent. The aim was to start reflecting on the paths toward a renewed architecture of international governance, the subject of the following section.

Comment — What other areas did Sunita Narain have in mind when she mentioned the idea of replicating the marine environment model? Was it forests? Should that model be presented as a success story that should be fostered on other areas? We should be careful about that. Southeast Asian nations, for example, might not be accommodated to such forceful replication of regional environmental systems, in part because of different attitudes toward positive law.

Sunita Narain — I don't think anyone is suggesting replication. We discussed what was happening in the marine environment only as a way of understanding the nature of the relationship that has emerged in this area between local, regional, and international institutions and of identifying what we can learn from this experience. I only attempted to distil some lessons for you. And the question is, based on these lessons: how do we want to move ahead?

Comment — We have to differentiate more clearly between the kind of international relations that obtain within the European Union for instance, where we do not just have intergovernmental relations and international relations proper. The European Union is not a typical subject of international politics. This distinction is necessary because similar situations will certainly appear elsewhere.

Ricardo Meléndez-Ortiz — The issue of the coherence between international governance systems looks at the environment not in isolation but as part of a larger system of international governance. What emerged from our discussion is that there's nothing like a common project. We may have thought that a common project was

emerging out of the summits of the '90s; but the questions that have been raised by implementation issues basically have highlighted the various ways one can approach a common problem. Indeed, they made it evident that there was no common project, one with a clear vision and a clear purpose. It is only within the context of clarity of purpose that we can think about the role of an international environmental organization and about coherence in the international system. That is the biggest difference perhaps between the European project of political integration through economic integration and the quest for a coherent international governance system.

Stephan Contius — I think the proposal by the French Government does take care of these concerns. It is not a proposal which would ask for the establishment of a global environmental authority. Rather, it is a pragmatic proposal, compared to earlier proposals that have come from academia and other actors. The proposal reflects the debate that has been going on in the last years, and tries to make improvements through pragmatic steps and some more important steps as well. All these things have a merit of their own. By way of a comparison, you normally would not give up breakfast every day only because dinner might be a nicer and more effective time for discussion. All governance levels matter, not just particular ones at different historical times. Each needs to be as effective as possible.

Sunita Narain — I hate the word pragmatic, but I want to make it very clear that at no point during my report of the meeting have I said that there was no space for a global institution. I think you would have to think through this institution very carefully. The issue is not what you can clearly do at the regional or local level, which you don't need to replicate at the international level. Rather, at the international level, there clearly is space for both rule-making and rule-enforcement. The question, then, is: Can we create an institution that can actually enforce rules at the global level? What lessons can we draw from the dispute settlement processes within the conventions that exist and, therefore, what would such a dispute mechanism look like? If you look at the issue of the marine environment, a clear lesson is that the existence of global rules has given you the space to be able to enforce laws at the regional and local levels. But, as far as other areas are concerned, be they transboundary air pollution, global warming, or biodiversity, the issue we need to raise is: What is the imperative of the day? How would this new institution, restructured for efficiency purposes, be able to meet our expectations as well? The point I want to stress pertains to the current crisis of confidence at the global level, and we don't want to create an institution which only adds to the existing sense of disquiet about global governance.

Comment — If there is to be enforcement, it has to apply equally to everybody. There has been a perception in the past that enforcement only applies to developing countries

and not to the powerful. So, perhaps one way around sorting out what the mandate lies in taking reasonable steps rather than jumping all the way to the perfect setting, because the existing political climate is not conducive to the latter goal. It is not just a matter of one administration in the US; there's the Congress, there's the general political climate. Take, for example, the Climate and Biodiversity conventions. The enforcement of the Climate convention will take place in OECD countries because that's where the commitments are. Will they agree? The Biodiversity convention, on the other hand, will be enforced mainly in developing countries, because that's where the resources and biodiversity are. Will they agree? The mandate of a UN Environment Organization first must be to respond to the immediate existing needs, and not to try to pursue the optimal solution. This is basically the point that was just made, whatever the word, pragmatic or realistic, might best describe this process.

Tom Spencer — I have been struck by an extraordinary sense of innocence about our discussions. It is as if we are far too nice, too well informed. We have been in this game for far too long and we have lost the ability to distinguish the forest from the trees. If my client for a public affair's campaign to change political decisions were called the environment, or were called «how do we create a world environmental organization? », the very first thing I would want to do would be to assess the strength of the forces on my side of the argument, and, as importantly, the strength of the people opposing me. I don't find any analysis of that kind but for a passing reference in Simon' Upton's comments yesterday to the people who oppose everything the people in this room want to achieve. Unless we know who the enemy is, our political skills are wasted. We do not operate in sort of a value-free world. There are people out there who for their own very good reasons oppose everything we stand for. So a little more analysis of what the opposition is up to, both publicly and privately in committees, of who would find this gathering obnoxious would be very helpful in terms of actually turning our thoughts into deliverable action. On our side, a better analysis is needed of who we are, of our strengths and weaknesses, of whether we're tired after thirty years, whether we're making full advantage of the wisdom that three generations of environmentalists have brought to the world. I fear that all the rich ideas that have been put forward will not lead anywhere unless there's a greater degree of cynicism about the political processes.

Richard Ballhorn — We should really look back on what we can learn from the international environmental governance process which Canada had the honor to chair. It was a learning experience for all of us but for some more than others, because one really saw where some of the dangers were lying. Some of the more basic concerns that several big countries had were financial. What would they have to pay? Up to now,

UNEP has mostly been supported by developed countries, to the rate of about 90%. Even large countries who claimed to have a big interest in environment were paying nothing because there was no scale of assessment. It was not even voluntary. When we adopted the voluntary assessment scale, we faced great opposition mostly from developing countries. It is that basic. How much will I have to pay? And will there be a penalty if I don't pay? Do I have the money? Do I have to get the money from Treasury? Etc. We should circle back on some of those basic issues when talking about creating a world environment organization. Who pays? Who benefits? Canada is open to the idea of an environmental organization but we also have seen who wasn't and why they were not. We should keep that in mind as the discussion proceeds.

Martha Chouchenas — Regarding where we go from here and the next step, that of implementation, our discussions have focused more on looking at the problem and at the issues in terms of the three criteria of effectiveness, equity, and legitimacy that were provided by the organizers. Our panel tried to look at the linkages with ongoing processes. At some stage, we should have some kind of action plan. We cannot start from scratch. We need to look at the numerous existing processes and to follow up on them. We considered what the CSD is doing and what the UNEP. But we also need to look elsewhere and see whether the UN panel set up by the Secretary General is useful in that respect. The challenge will be to move from this conceptual thinking to some realistic agenda for action.

Sunita Narain — We have been fairly idealistic and bold in the course of our discussions of the last two decades. Our actions have been very pragmatic and realistic, but also weak and spineless. If you start thinking pragmatically, you will end up with things that are even more spineless whereas the times demand larger and bolder solutions. People are extremely worried and extremely concerned with the state of global governance. You don't want to create a stronger loss of confidence in institutions that already do not work.