PART V

INTERACTIVE EXERCISE

INTERNATIONAL ENVIRONMENTAL LAW AND GOVERNANCE: WHERE NEXT?

Editorial note

The last section of this Review reflects the interactive character of the Course. During the Course, three selected participants were given the following issues and topics to prepare for discussion:

1. Fundamental environmental rights (Rapporteur: Ed Couzens)

It has been said that now is the time for the world community to negotiate a global treaty on fundamental environmental rights. Is this correct? If so:

- Which international organization(s) should be responsible for carrying out such an exercise?
- Which rights should such a MEA include and which rights should it exclude?

2. Clustering (Rapporteur: Kong Xiangwen)

Many MEAs have overlapping subject matter. Different bodies are often responsible for MEAs that deal with the same, or similar, issues.

- Why not cluster as many of these agreements as possible into a limited number of units based on subject matter such as chemicals and waste, the atmosphere or nature conservation?
- What problems would there be in achieving such a rationalization? Can they be overcome?

3. Governance (Rapporteur: Cam Carruthers)

Many international organizations – ranging from UNEP and FAO to WTO and the Antarctic Treaty System – are involved in environmental policy.

- Wouldn't it be a lot more simple and efficient if the environmental work of all these organizations were carried out by a single global organization?
- What would be the difficulties in achieving such a reorganization? Can they be overcome?

FUNDAMENTAL ENVIRONMENTAL RIGHTS[1]

Ed Couzens[2]

Environmental racism and environmental justice

The concept of environmental racism, or at least the term itself, is generally credited to The United Church of Christ, which in 1987 'published a report demonstrating that hazardous waste disposal facilities were disproportionately sited in African-American communities. This was not explained by income or other factors: the authors coined the term environmental racism to explain this phenomenon.'[3]

In 1991 the term made its formal appearance in the USA, at a United Church of Christ Summit in Washington D.C., which produced a Declaration on the Principles of Environmental Justice.[4] Principle 2 reads as follows:

> Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

Further principles call for ethical, balanced and responsible uses of land;[5] the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation;[6] the strict enforcement of principles of informed consent;[7] and for governmental acts of environmental

[1] This paper is based on a presentation given by the participant on 1 September 2004.

[2] Attorney, Senior Lecturer, School of Law, University of KwaZulu-Natal, Durban, Republic of South Africa.

[3] Analia Penchaszadeh, 'The Beginning: Environmental Justice in the United States', www.risingtide.nl/greenpepper/envracism/beginning.html.

[4] Delegates to the First National People of Color Environmental Leadership Summit held on October 24-27 1991 in Washington DC, drafted and adopted 17 Principles of Environmental Justice, www.ejnet.org/ej/principles.html.

[5] Principle 3, ibid.

[6] Principle 7, ibid.

[7] Principle 13, ibid.

injustice to be considered violations of international law, the Universal Declaration of Human Rights and the United Nations Genocide Convention.[8]

Environmental racism and environmental justice are the result of historical disparities and inequities in the effects of environmental degradation and hazards on different peoples. For our present purposes, the references to international law and to principles of international environmental law such as public participation and prior informed consent are of interest. While the evolution of environmental principles flows logically from the national to the international, with national concerns becoming international concerns, the relationship is mutually reinforcing.

The idea of environmental crime – that certain acts of environmental degradation are punishable in law – is no longer seriously questioned. It is widely accepted that an entity which either wilfully or through gross negligence damages the environment is to be punished. The jurisprudential nature of the crime is, however, more difficult to explain. Is the crime committed against the specific people directly affected, the people of the world in general, including unborn generations, or against the environment itself?

One of the clearest examples of an act of environmental degradation that might be considered a crime is the spilling of large quantities of oil from a grounded tanker. Usually, this would be governed by the national laws of the affected state, as well as the United Nations Convention on the Law of the Sea[9] and various international conventions dealing specifically with oil pollution.[10] Sometimes, however, it can be difficult to ascertain exactly who has the duty to prevent such damage.

Consider, for example, the breakup of the oil tanker *Prestige* some 130 miles off the coast of Spain on 19 November 2002.[11] The resulting oil spill caused serious damage to the Spanish coastline and to fishery beds. While the International Oil Pollution Compensation Funds (IOPC Funds) allotted US$154 million in damages for the spill, Spain's government reserved the right to take all appropriate legal action under mari-

[8] Principle 10, ibid. See also Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948, UN Doc. A/810/71 (1948), www.un.org/Overview/rights.html; Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, in force 12 January 1951, 78 *UNTS* 277, www.unhchr.ch/html/menu3/b/p_genoci.htm.

[9] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[10] See, for example, Convention on Civil Liability for Oil Pollution Damage, London, 27 November 1992, in force 3 May 1996, www.admiraltylawguide.com/conven/protocivilpol1992.html; Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 27 November 1992, in force 30 May 1996, www.admiraltylawguide.com/conven/protooilpolfund1992.html.

[11] See, for example, CNN, 'Crippled Fuel Oil Tanker Sinks', www.cnn.com/2002/WORLD/europe/11/19/spain.oil/; World Wide Fund For Nature, 'Oil Spill off Spain's Northwest Coast', www.panda.org/news_facts/crisis/spain_oil_spill/index.cfm; CNN, 'New Oil Slick Forms Above Tanker' edition.cnn.com/2002/WORLD/europe/11/20/spain.oil.wait/.

time law. This is not contentious. What is perhaps more interesting for the purpose of this paper is that the *Prestige* broke in two while being dragged out to sea after both Spain and Portugal, to protect their fishing and tourism industries from further damage, barred salvagers from towing the *Prestige* into any of their ports.

In other words, the damage occurred when the tanker was being towed away from the ports where damage could perhaps have been more safely contained. While attention was focused on the negligence of the tanker's captain and on the potential liability of the owners – a Greek company called Mare Shipping Inc., registered in the Bahamas, which had chartered the *Prestige* to a Swiss-based subsidiary of a Russian industrial conglomerate – questions can also be asked about the conduct of the Spanish authorities in particular. Where was the tanker being taken? In the general direction of Africa, as a form of environmental racism? To break up on the high seas, to be seen as an offence against all states in general?

If a tanker founders and causes pollution, compensation is available from the IOPC Funds, which are paid for by oil companies.[12] However, this option does not prevent an aggrieved state from seeking further redress and certainly should not be seen as eliminating criminal liability. Furthermore, could the act be seen as an offence against the environment itself?

The author can easily think of only one act of environmental degradation which might fall obviously into the category of a deliberate act, intended to damage the environment, with no other motive to justify it. Usefully, this is an example of marine oil pollution: Saddam Hussein's flooding of the Persian Gulf with oil in the early part of 1990 Gulf War, as well as the firing of oil wells at the end of the war.[13] It can of course be argued that the flooding of the Gulf was an attempt to hinder a possible amphibious landing, but it might just as well have been purely an act of spite and/or a calculated act of defiance.

Might we at some point, however, be able to point to the environment itself as an aggrieved victim of a crime – whether deliberate, or in the more likely form of gross negligence – and hold an entity liable for that crime? In one of the seminal articles in environmental legal thinking,[14] Christopher Stone argued in 1972 that the history and process of law has been the gradual extension of legal rights to entities to whom it was at one time unthinkable that such rights should be granted. These include slaves, children, or women for example. Might it not be, he argues, that at some future time people will look back on today and claim that it was unthinkable that the environment should *not* have been given legal rights?

[12] See, for example, BBC, 'Tightening Rules on Tankers', news.bbc.co.uk/1/hi/world/europe/2496657.stm.

[13] See, for example, James Ridgeway, 'A Silent Spring in the Persian Gulf', multinationalmonitor.org/hyper/issues/1991/03/mm0391_06.html.

[14] Christopher D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects', in Christopher D. Stone, *Should Trees Have Standing: And Other Essays on Law, Morals and the Environment* (25th Anniversary Ed., Oceana Publications: New York, 1996).

The overlap between human rights and environmental rights

One of the arguments against convening a multilateral environmental agreement (MEA) forum for the purpose of establishing a Bill of fundamental environmental rights might be, strangely enough, the overlap between human rights and environmental rights. Many international human rights instruments already take cognizance of environmental rights and principles – as international environmental instruments do of human rights.

Consider, for example, the Stockholm Declaration,[15] a set of principles which emanated from the United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972. Principle 1 of the Stockholm Declaration reads as follows:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.

This link between human rights and environmental rights was also made by the World Commission on Environment and Development (WCED) in its 1987 report.[16] Principle 1 holds:

> All human beings have the fundamental right to an environment adequate for their health and well-being.

One also needs to consider how national instruments in the fields of human rights or the environment link to international human rights law and international environmental law. As we have seen, the United Church of Christ Summit Declaration on the Principles of Environmental Justice seeks to link its principles with those of international law.

Environmental protection: for the sake of humankind, or for the environment itself?

It is certainly true that many developments in environmental law, both in the national and international spheres, are designed to protect the environment *from* humankind. Take again as an example the problem of pollution from grounded oil tankers. However, would it be true to argue that insofar as such environmental protection measures have been implemented, they have been established for the benefit of human beings rather than for the environment itself? In truth, the two can probably never be entirely separated: law, after all, is a human construct.

---

[15] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503.

[16] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (1987)(Brundtland Report).

There are, however, some indications of a shift in focus from a purely anthropocentric approach toward a more biocentric or ecocentric one. This shift has been most apparent in national rather than international legislation.[17] Neither the Universal Declaration of Human Rights nor the International Convent on Civil and Political Rights,[18] for example, contain specific provisions relating to environmental rights.

International organisations which might organize a fundamental rights MEA

As the only specialized United Nations organization dedicated to environmental issues, the United Nations Environmental Programme (UNEP) would be an obvious choice of forum in which to organize a fundamental rights MEA. UNEP has experience of organising environmental conferences on a large scale and it would, indeed, be peculiar if the organization were not to be the principal driving force behind such an MEA.

In fact, one suggestion has been to increase UNEP's powers to parallel those of the United Nations Commission on Economic, Social and Cultural Rights, which can consider and comment on reports submitted to it by states.[19] Obviously this function would go beyond simply organising a convention and would become an important consideration as a possible aim of such a convention, [20] for example, and a powerful reason for having UNEP as the driving force behind it.

An alternative might be to seek the establishment of a permanent commission along the lines of the Brundtland Commission. In this case as well, however, UNEP would need to be involved in order to avoid overlap between its own work and that of the commission established for this purpose.

The only other serious contender for organising such a conference might be, loosely put, a coalition of non-governmental organizations (NGOs). Entities such as the International Union for the Conservation of Nature (IUCN) might play a role here. It can strongly be argued that were such a conference to occur, it would inevitably be driven

[17] Consider, for example, the South African National Environmental Management Act 107 of 1998, which grants locus standi to persons to litigate 'in the interest of protecting the environment.' Article 32(1)(e), National Environment Managament Act, www.polity.org.za/html/govdocs/legislation/1998/act98-107.html.

[18] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966, in force 23 March 1976, UN Doc. A6316 (1966).

[19] Edith Brown Weiss (ed) *Environmental change and international law: New challenges and dimensions* (United Nations University Press: Tokyo, 1992), www.unu.edu/unupress/unupbooks/uu25ee/uu25ee00.htm#Contents.

[20] This might even have an effect on the content of the proposed rights, given the constraints which enforcement would face.

by NGOs. Furthermore, as NGOs will necessarily be involved as commentators and critics, it might be useful to seek their engagement from the beginning.

As states will be the ultimate actors, it will be necessary for them to be convinced that there is both a need for such an MEA and a real possibility that it would be viable, convincing, and would result in real change. This may be too much to hope for, of course, but if there is to be any chance of meaningfully involving states, particularly from the developing world, the proposed MEA would need as much credibility as possible. As many actors as possible should therefore be involved.

The possible content of a 'Bill' of fundamental environmental rights

Within national legislations, one of the most recent attempts to formulate fundamental environmental rights can be seen in the 1996 South African Constitution.[21] The relevant section, Section 24, reads as follows:

> Everyone has the right –
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Words, phrases and concepts like health or well-being, for the benefit of present and future generations, and sustainable development and use of natural resources do not originate in the South African Bill of Rights, but instead are drawn from international instruments such as the Stockholm Declaration and the Brundtland Report. The use of this language places the South African clause in the context of international environmental legal thinking, and it can be argued that an international equivalent might have a similar content. Regrettably, it is also arguable that it would then be debatable whether such rights would be seen as fundamental, and therefore directly enforceable, or more as having the nature of socio-economic rights.

[21] Constitution of the Republic of South Africa, Act 108, 8 May 1996. See especially, Chapter 2: Bill of Rights, Section 24: Environment, www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1.

A number of other states have similar clauses in their national constitutions. The Portuguese Constitution, for example, contains the following clause:

> Everyone has a right to a healthy and ecologically balanced human environment and the duty to defend it.[22]

Article 225 of the Brazilian Constitution reads as follows:

> All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life and both the government and the community shall have the duty to defend and preserve it for present and future generations.[23]

In the Indian Constitution there is no explicit right to the environment, but under Article 48A the state 'shall endeavour to protect and improve the environment.'[24] As with all international conventions, negotiation of a possible future MEA on fundamental environmental rights would face the immediate problem of persuading enough states to join the process by watering down the level of commitment which they would need to make, while at the same time preserving enough commitment to the MEA for it to have any meaningful content.

The specific content of fundamental environmental rights

It is submitted that there are essentially two approaches which could be followed when undertaking such a process. Either particular principles could be entrenched as fundamental rights, or a more generalized approach could be adopted. Taking the first approach, principles which are today seen as soft law – guidelines in the international environmental sphere – could be entrenched in legally-binding mechanisms. The advantage of this approach for the international environmental lawyer is that it would represent a significant step toward the hardening of these soft law principles. The precautionary principle, the polluter pays principle, the hierarchy of waste principle, the cradle-to-grave principle, the principle of prior informed consent, the principle of access to information and other similar principles and concepts would all be strong candidates for inclusion as fundamental rights. There are many principles, even more specific than these, which could also be considered. For example, in the context of biodiversity protection, these could include rules relating to access to natural resources and benefit-sharing agreements.

[22] Constitution of the Portuguese Republic, 20 September 1997, Part I, Sec. III, Ch. II, Art. 66, www.presidenciarepublica.pt/en/main.html.

[23] Constitution of the Federative Republic of Brazil, 5 October 1988, Title VIII, Chapter VI, Art. 225, webthes.senado.gov.br/web/const/const88.pdf.

[24] Constitution of India, Part IV, Art. 48A, indiacode.nic.in/coiweb/welcome.html.

It is more likely, however, that the second, more general approach would be adopted. This essentially answers, therefore, the question of which rights might be excluded. Under the more generalized approach, concepts like sustainable development, inter- and intra-generational equity and the right to a healthy environment provide states with the option of committing themselves to principles which are aspirational in nature, rather than ones which require immediate and concrete action.

CLUSTERING OF MEAS[1]

Kong Xiangwen[2]

Introductory remarks

Clustering is a management strategy used for enhancing co-ordination and policy coherence among multilateral environmental agreements (MEAs). When defining a new term, it is necessary to make a distinction between this term and other related terms. In this case these may include synergy, co-ordination of the secretariats of MEAs and international environmental governance.

During international environmental negotiations, much has been said about synergies, a simplified definition of which could be to do one thing while achieving multiple outcomes. The clustering of MEAs could be a way of achieving synergies among existing MEAs. Co-ordination among the secretariats of MEAs is called for in dealing with issues that overarch or overlap different MEAs. To cluster existing MEAs, it might be necessary to have adequate co-ordination among the relevant convention secretariats. International environmental governance deals with general issues regarding the management of existing MEAs. The clustering of MEAs, synergies between them and co-ordination of their secretariats would probably all be on its agenda.

The origins of clustering

The idea of clustering MEAs may have developed from various sources. These include the following: First, participating in numerous meetings and submitting frequent reports has led to frustration on the part of many stakeholders. This is an issue particularly in developing countries which have very limited personnel and financial resources available. Second, the idea of clustering may also have resulted from the gradual acknowledgment of overlap between MEAs. In working to achieve sustainable development, countries have found that issues dealt with extensively in one convention may also be

[1] This paper is based on a presentation given by the participant 1 September 2004.

[2] Department of Treaty and Law, Ministry of Foreign Affairs, China.

touched upon in other fora. This in turn encourages countries to seek co-ordination domestically, and to raise awareness in international fora that such overlapping exists. Third, to facilitate the co-ordination of MEAs, the contracting parties to different MEAs have called for co-ordination among the various convention secretariats as a first step towards the full co-ordination among MEAs. This has given birth to a number of Memoranda of Understanding (MOU) between the various convention secretariats. Fourth, a practical step towards the co-ordination of MEAs is to seek synergies between them. Consequently, a number of workshops have been held discussing the possibilities presented by and pros and cons of seeking synergies. One of the prerequisites in this process is the identification of different clusters of MEAs. Fifth, the idea of clustering MEAs has emerged in the context of international environmental governance, which has partly been encouraged by the success of the WTO.

The benefits of clustering

A number of good things are advocated about clustering. At the international level, clustering could bring about the efficient use of collective resources, such as the adequate sharing of information, the improved allocation of financial resources, the sufficient deployment of international expertise and the reduction of duplication and overlap, which occurs naturally because of the interrelation of ecosystems and the international efforts aimed at achieving sustainable development. The clustering of MEAs also places strong emphasis on policy and program coherence, avoiding fragmented sectoral initiatives.

At the national level, the clustering of MEAs is advocated in order to reduce the burden of government reporting under different MEAs, to assist governments in establishing priorities and allocating resources in an era of shrinking budgets and to provide support in co-ordinating preparations and/or monitoring to reinforce decisions taken under various MEAs and intergovernmental processes.

Some drawbacks

Much has been said about the positive effects of clustering. These include policy coherence, the integration of sustainable development strategies, the co-ordination and consolidation of key functions, cost-effectiveness, etc. However, there is another side to this coin. The clustering of MEAs demands strong organizational and management abilities, presenting serious challenges for developing countries which are limited in both their capabilities and financial resources. Some have also been sceptical about the added value of clustering, believing that it represents more of a formality then a substantial reduction in workload as at the end of the day, the issues in the different sectors still need to be addressed separately. Some have even wondered whether clustering could be a form of trap set by developed countries; with limited international

financial resources available, donor countries would seek multiple outcomes with decreased financial input. It has also been asked whether clustering could be a way for developed countries to avoid the financial responsibilities they face under different MEAs. Furthermore, some countries are satisfied with the current system of MEAs which follows a convention plus protocol model.

Concluding remarks

Evidently, to move forward with the clustering of MEAs, it is necessary to carry out extensive education and public outreach, especially in developing countries, in order to build up capacity and confidence, to raise public awareness and to convince sceptics of the pressing need for clustering. A learning-by-doing approach might be necessary. Bearing in mind the ultimate objective of cost-efficiency, one also needs to keep all options open rather than sticking to a prescribed one.

The clustering of MEAs may be made possible by adopting a gradual process, by starting at the national level, for example, developing to the regional level and finally reaching the international level. This will allow the clustering of MEAs to gather more momentum as having witnessed its advantages through their domestic and regional experiences, countries find increased incentives to pursue clustering. To conclude, there is a long way to go before clustering is achieved. As many countries have experience of clustering, it is recommended that these countries begin by sharing their experiences and thereby contributing to the future success of this global endeavour.

DOES THE WORLD NEED A SUPER-COP?

INTEGRATED GLOBAL DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT[1]

Cam Carruthers[2]

The Need for Integrated Governance

The governance of global environment and sustainable development issues has come under increasing scrutiny in recent years. There has been a proliferation of deliberative and technical bodies, as well as of policy and legal instruments in the area. In particular, multilateral environmental agreements (MEAs) have emerged as focal points for decision-making and action. In some cases, these include agreement on practical outcome goals, such as emissions targets. Depending upon how they are counted, there are several hundred MEAs overall, a dozen or so of which are particularly active and effective.[3] In addition, there has been a corresponding growth in international co-operation, capacity-building, scientific and technical collaboration, as well as collaboration on approaches to implementation.

The apparently organic if not entirely ad hoc explosion in multilateral institutional development has prompted many observers to note that there is increasing fragmentation, and that co-ordination and consistency are a serious challenge in this system.[4] One highly placed official has referred to the 'jungle of treaties and international initiatives that currently take the place of any coherent global governance' related to the environ-

[1] This paper was developed from a challenge discussion piece presented by the participant on 1 September 2004.

[2] Assistant Director, Sustainable Development and International Affairs, Natural Resources Canada; member of the IUCN Commission on Environmental Law; Treasurer of the Canadian Council of Environmental Law.

[3] Based on a preliminary analysis of the literature, depending on how MEAs are counted, there are from 200 to 700 according to informal UNEP sources.

[4] See for example, Simon Upton, Chair of the OECD Roundtable on Sustainable Development, 'Sustainable Development, an International Policy Perspective': Address to the Inaugural Holcim Forum, 16 September, 2004, at 12; Patricia Birnie and Alan Boyle, *International Law and the Environment* (2nd ed.: Oxford University Press, 2002), at 35.

ment; he concluded that work in this area has 'lost momentum.'[5] The perception of the need for organizational reform which has emerged has led to an emphasis on budgetary discipline, increased accountability, policy and programme coherence, efficiency, and a focus on effectiveness – on delivering results. This sounds like a re-branding exercise built on administrative reform, based on a more conservative assessment of the political challenges and capital, which still is too ambitious in that context, yet not ambitious enough to produce the changes which are needed to address emerging substantive and organizational challenges. A more rigorously objective assessment could reasonably lead to the conclusion that there is a need for a more comprehensive renegotiation. Perhaps there is a middle road.

Sustainable Development

Before seeking solutions, it is useful to consider the persistent challenge of defining the scope and nature of the subject matter. The most common definition of sustainable development is: '[D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[6] At the United Nations Conference on Environment and Development (UNCED) held in Rio in 1992, the concept received broad international support. While integration was an underlying theme to the report it was not clearly articulated, nor given any form with respect to decision-making.

More recently, some have suggested that we now need to focus more on the links between the economy and the environment. One example is the Canadian Minister of the Environment, who has argued that the world is entering 'a new Industrial Revolution' driven 'by the understanding that long term economic success is not possible without environmental sustainability.' Speaking to a domestic audience, he said that 'This is going to take action by all governments, working together, to set the stage for the development of a new model.' He added, 'First and foremost, we need a better decision-making process. We need an approach to making the decisions that affect our environment and our economy, a governance model.'[7]

Sustainable development is generally considered to have three essential pillars: economic, environmental and social. Yet the most common governance preoccupations have been with protecting the society and environment pillars from the economy

[5] Upton, 'Sustainable Development', *supra* note 4, at 12.

[6] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (1987)(The Brundtland Report), at 43.

[7] Stéphane Dion, Minister of the Environment, 'Environmental action for economic competitiveness: Will Canada lead the new Industrial Revolution?' Calgary, Alberta, 10 September 2004.

pillar.[8] This is largely based on the undeniable reality that the economy can be a threat in these areas. Historically, rapid economic development has often been associated with social disruption and environmental degradation. In part, it may also reflect the fact that effective governance and decision-making institutions for the economy are already in place, and are not balanced or integrated with governance mechanisms for society or the environment.

In fact, economics is in itself simply another way of thinking about social and ecological activity. A balanced approach to sustainable development means managing change in ways that do not unduly undermine the economic systems or the social and environmental systems. Thus, it is important to ensure that regulation or other activity in the social and environmental spheres does not unduly undermine the economy. Each pillar of sustainable development depends on the others, and an imbalance which adversely affects one pillar will eventually adversely the others. 'Poverty', according to Indira Gandhi, 'is the worst form of pollution.'[9] One way to interpret this statement would be that poverty is a major contributing factor to pollution. This perspective could be extended to cover unsustainable resource use. Conversely, a healthy economy provides a society with the ability to invest in environmental protection and sustainable resource use. A more critical survey of the literature and an analysis of the conceptual structures behind sustainable development would provide a useful context for further discussion of balance and integration in governance.

For present purposes, the international discussion of regulation as an obstacle to growth – and to sustainable development – is particularly relevant here.[10] While there appears to be little analysis available on environmental regulation at the global level, there is considerable work at the national and regional levels. This analysis makes a compelling case that the regulatory burden in the area of environment and sustainable development is unnecessarily heavy, with duplication, overlap and lack of certainty.[11] Multilevel bureaucratic complexity and a risk-averse approach to regulation results in a situation where effort and resources are not efficiently allocated to maximize positive environ-

[8] One of the relatively balanced definitions of sustainable development is that of Dr. William E. Rees, University of British Columbia: 'Sustainable development is positive socio-economic change that does not undermine the ecological or social systems upon which communities and society are dependent. Its successful implementation requires integrated policy, planning and social learning processes; its political viability depends on the full support of people it affects through their governments, their social institutions and private activity.' International Institute for Sustainable Development, 1994, www.iisd.org/sd/principle.asp?pid=42&display=1.

[9] Indira Gandhi, speech at the United Nations Conference on the Human Environment in Stockholm, 1972.

[10] See for example, 'Doing Business in 2005: Removing Obstacles to Growth' (World Bank, International Finance Corporation and Oxford University Press, 2004).

[11] The External Advisory Committee on Smart Regulation (EACSR), *Smart Regulation: A Regulatory Strategy for Canada,* 23 September 2004, at 17.

mental outcomes, imposing costs and constraints on the economy, often in areas that need development the most. It is clear from this research that solutions must include changes in international governance.

The report of the Commission on the Private Sector and Development – known as the Martin-Zedillo Report – emphasized the key role of entrepreneurship and small business in producing prosperity.[12] Small business appears to be hit hardest by regulatory constraints, right from the beginning, with barriers to market entry. Many observers note that it is not development assistance but rather economic liberalization policies which have driven growth in developing countries.[13] Yet such development may not be sustainable in its current forms, with social and environmental impacts, including major income gaps, which need to be effectively managed.[14]

Consistent with the New Industrial Revolution concept, there is an argument that long-term economic growth will need to be maximized with a balanced approach to sustainable development. Economic growth is possible with fewer resources used and less pollution produced 'if the content of the growth tends away from environmentally-degrading activities.'[15] Natural resource extraction and pollution will continue to be essential to human economic and ecological activity. The challenge of the new Industrial Revolution is not just to manage this activity sustainably, but to maximize positive and equitable economic and ecological outcomes.

Balancing competing demands from different perspectives on sustainable development has proven to be a difficult challenge. There is a serious difference of views on the issues among stakeholders at the all levels. Any attempt to balance competing demands from different perspectives would benefit from integrated decision-making. Indeed, the United Nation's Commission on Environment and Development concluded that '[t]he ability to choose policy paths that are sustainable requires that the ecological dimensions be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions – on the same agendas and in the same national and international institutions.'[16]

[12] Commission on the Private Sector and Development, 'Unleashing Entrepreneurship: Making Business Work for the Poor' (UNDP, 2004).

[13] Upton, 'Sustainable Development', *supra* note 4, at 4.

[14] See 'Regional and Global Summaries', United Nations Environment Programme (UNEP), *The Global Environmental Outlook (GEO) 3* (Earthscan, 2002).

[15] Michael Jacobs, *The Green Economy: Environment, Sustainable Development and the Politics of the Future* (University of British Columbia Press, 1993), at 54.

[16] WCED, *Our Common Future, supra* note 6, at 308.

Review of Global Governance for Sustainable Development

Since the Rio Earth Summit in 1992, sustainable development has emerged as a broad concept for integrating the environmental, economic and social issues. Sustainable development is itself an inherently international concept. Due to the transboundary nature of many sustainable development issues, local issues often have international ramifications. Many of the issues that require co-operation among individuals, industry, and governments within Canada also require co-operation among nations. Key international environmental issues such as climate change, ozone depletion, and resource conservation must be seen with a sustainable development lens in order to approach effective solutions.

In retrospect, it is a striking feature of the international sustainable development discourse, that from the beginning there was no discussion of integrated decision-making.[17] The Brundtland Report sets the standard, such as it is, with considerable focus on coherence and co-ordination, articulated notably through a framework of principles and a broad policy implementation agenda,[18] as well as strengthening the different agencies, and co-ordination through the Secretary-General. Despite its conclusion that the different issues of sustainable development need to be considered 'on the same agenda'[19] it does not set standards on integrated decision-making mechanisms.

Key principles related to international environmental governance from the Stockholm Declaration[20] reflect the intent to leave control with states:

> Principle 13: In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.
> Principle 25: States shall ensure that international organizations play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment.

The more recent World Summit on Sustainable Summit (WSSD) continued in the same vein, calling for strengthened international institutional frameworks to support the full implementation of MEAs, and more broadly, the realisation of sustainable devel-

[17] Ibid.

[18] United Nations Conference on Environment and Development, *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

[19] WCED, *Our Common Future*, *supra* note 6, at 308.

[20] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503

opment. These developments suggest to many that the separation between developmental and environmental interests has been effectively addressed.[21] However, concrete proposals for integrated decision-making are still avoided.

Nonetheless, the United Nations Environment Programme (UNEP) plays a central policy-setting and scientific leadership role within the system. The Governing Council of UNEP is responsible for the direction of UNEP and reports to the General Assembly.[22] The 58 members of the Council are elected by the General Assembly, which takes into account the principle of equitable regional representation in its selections. However, one of the key issues in current discussions of UNEP reform is the perceived need for universal representation in order to increase the legitimacy of UNEP.[23] The functions and responsibilities of the Governing Council[24] do not include authoritative decision-making on implementation or substantive global action, or national or international measures. UNEP's mandate is focused on promoting co-operation and science, providing general policy guidance for environmental programmes within the UN system, including UN MEAs, as well as review functions. UNEP is actively engaged in examining issues of 'international environmental governance.'[25]

The United Nations Commission on Sustainable Development (CSD) provides one of the few examples of a broad-based integrated governance mechanism for the full range of sustainable development issues. The CSD was created in December 1992 to provide follow-up for UNCED with respect to monitoring and reporting on implementation of action at the local, national, regional and international levels.[26]

MEA Conferences of the Parties (COPs), by contrast, are given the power to make 'decisions necessary to promote the effective implementation of the Convention.'[27] This effectively makes such bodies the primary source of effective global sustainable development governance. As previously noted, hundreds of MEAs have been adopted.

---

[21] See for example, Birnie and Boyle, *International Law and the Environment*, *supra* note 4, at 41.

[22] Institutional and Financial Arrangements for International Environmental Co-operation, GA Res. 2997 (XXVII), 15 December 1972.

[23] See the article by Johannah Bernstein in the present Review.

[24] GA Res. 2997 (XXVII), *supra* note 22.

[25] See *Overview of progress on international environmental governance: Report of the Executive Director*, UNEP/GCSS.VIII/5, www.unep.org/gc/gcss-viii/working_docs.asp.

[26] See Institutional Arrangements to follow up the United Nations Conference on Environment and Development, GA Res. 47/191, 29 December 1992.

[27] See for example, Article 7(2), United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *ILM* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

Proposals for Institutional Change

Various academic and official proposals have been put forward to strengthen global environmental and sustainable development governance. Currently the most prominent concept is the model supported by Germany and France, among others, of a United Nations Environment Organization (UNEO) or World Environmental Organization (WEO) – largely a new and improved UNEP – that is an environment focused organization, somewhat similar in base concept to the World Trade Organization.[28] Another compelling vision is that of a World Environment and Development Organization (WEDO),[29] which would have a broader environment and development scope, but would otherwise be similar to the UNEO model in many respects. At the same time, there are also various proposals being discussed to upgrade the status of UNEP in the UN system, from a programme to a full agency, so that it could interact on a more equal footing with the other key UN agencies. Moreover, there is ongoing work led by UNEP on international environmental governance, focused on strengthening institutional mechanisms, science, policy and implementation capacity at all levels of governance, including UNEP itself, related UN agencies, national governments, and MEA secretariats.

What all of these models lack is an effectively integrated decision-making mechanism. Most of the important decisions in international environmental affairs are taken in MEA COPs. These bodies are entirely subject to the will of the parties to the agreements, as reflected in their decisions, which are limited by the scope, mandate and structure of the agreement.[30] The traditional view is that these bodies, as independent and supreme decision-making bodies,[31] cannot be subjected to effective integration or co-ordination mechanisms, certainly not any overarching ones. Therefore, according to this view, unless we completely reconstitute the forms of international agreement in the area of MEAs, we are constrained by existing legal structures.

These models for reform involve major change, and do not provide much flexibility in terms of step-by-step development of institutional outcomes. If there were an approach which would allow for integrated decision-making, learning-by-doing and incremental institutional change, it could provide states and stakeholders with more comfort and confidence, and allow for progressive change without a major leap into the unknown. Drawing on experience in MEA fora, where decisions are taken with respect to many agreements by what is effectively one body, such an approach is feasible.

[28] Informal room documents, distributed in relation to UNEP Governing Council meetings, 2004.

[29] See for example, Frank Biermann and Udo Ernst Simonis, *A World Environment and Development Organization: Functions, Opportunities, Issues* (The Potsdam Institute, 1998).

[30] Birnie and Boyle, *International Law and the Environment, supra* note, 4 at 36.

[31] This is based on treaty language. See again, for example, Article 7(2), Climate Change Convention, *supra* note 27.

A Modest Alternative Model

A model can be constructed using existing instruments, integrating incrementally, learning-by-doing, and preserving the option to consider if, how and when to proceed toward a legally binging umbrella agreement. The model can also go further than the proposed WEO or UNEO, and provide for effectively integrated decision-making. It is a modest but potentially provocative approach, which could catalyze the kind of systemic change which is much needed.

An integrated decision-making mechanism is feasible, building on the precedent of the Montreal Protocol, where decision-making for many separate agreements is carried out in what is effectively one body, performing the legal function of many bodies.[32] A similar precedent exists in the Convention on Long-range Transboundary Air Pollution (CLRTAP).[33] Each of these bodies makes decisions for their family of agreements through a Conference of the Parties or a Meeting of the Parties (MOP). Based on this approach a Super-COP could be constituted, simply by holding the COPs of multiple MEAs in one place at one time. In a Super-COP model, decisions could initially be taken formally by each COP in turn. Eventually they could be taken at the same time, by consensus, in the absence of objection. In the case of an objection decisions would then revert to each COP in turn.

This model for a decision-making mechanism is on the same level as existing mechanisms, which means that there are no issues related to creating some form of decision-making super-structure, or of altering the fundamental legal authority of COPs under existing MEAs, and no additional legal instruments are necessary. The proposal would support and complement institutional change, however, and it would have benefits in terms of decision-making coherence, efficiency and cost savings in relations to MEAs, even in the absence of institutional change related to UNEP, CSD and MEA secretariat functions.

The essential idea would be to have states come together to meet at the same time as the parties to MEAs. Aside from legal mandates, there would also be a need for practical leadership and co-ordination. A decision of the UNEP Governing Council could provide a broad mandate for a Super-COP meeting, including the scope to make recommendations on broader institutional change, as well as for initial UNEP support of a Super-COP in terms of a common secretariat function. Primarily, such a body could be based on the legal mandates of relevant MEAs. UNEP could also be a source of further delegated authority, whether or not UNEP itself is subject to

[32] See United Nations Environment Programme Ozone Secretariat, *Handbook for the International Treaties for the Protection of the Ozone Layer* (5th ed., UNEP, 2000), particularly at 65-216 on decisions taken, and at 324-345 on amendments.

[33] See United Nations Economic Commission for Europe, *Convention on Long-range Transboundary Air Pollution: Legal Instruments, Norms and Standards* (UNECE, 2004).

reforms. Accounting and opt-out solutions could be designed for states not party to specific MEAs.

By broadening the base of the new integrated structure to incorporate a broad range of MEAs, the decision-making perspective could be elevated effectively to cover the broader range of cross-cutting issues, yet in principle the level of decision-making authority would be the same as with existing institutions and mechanisms. Alternating annually between a Super-COP and multiple COPs would provide a balance between centralization and decentralization, allowing MEAs to take MEA-specific policy and technical decisions and the Super-COP to address cross-cutting issues. All of this could be accomplished without the negotiation of a new comprehensive agreement, such as was done in the case of the WTO[34] or the European Union.

A Super-COP would complement current proposals for UNEO or WEO, but would also be in line with the WEDO concept, as they would enable a more broad-based sustainable development approach. A systemic sustainable development approach is necessary in order to address issues of policy fragmentation and coherence effectively and to move from a model of incremental progress through additional incremental regulation, to the major transformation required to move toward integrated decision-making for sustainability. Reform could build on CSD and UNEP and integrate their institutional capital and leadership capacity into a more efficient and integrated structure, but this would need effective decision-making mechanisms in order to make a real impact. To make real progress toward managing the increasingly complex and demanding domain of sustainable development, a Super-COP, or something like it, is needed.

A Super-COP should involve fewer meetings and less travel for less people, and less of a strain on the capacity of all countries – but particularly of smaller, poorer countries – to participate. Moreover, a Super-COP should be better positioned to successfully address synergies issues and produce administrative savings. For donor countries concerned about cost, an integrated decision-making and institutional model is compelling. Most importantly, a Super-COP would be better positioned to undertake the kind of integrated decision-making in order to drive the kinds of systemic changes required to make further progress on sustainable development issues. This approach naturally leads to a broad sustainable development scope for institutional change, and therefore militates toward the WEDO model more than the UNEO model.

High-level political support and effort would be required to initiate significant movement toward integrated decision-making in sustainable development. A broad sustainable development approach is essential to secure developing country support – not

[34] Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, www.wto.org/english/docs_e/legal_e/03-fa_e.htm.

just for the institutional model, but for the decisions needed to make further progress on sustainable development. If the international community is to realize the promise of Rio, where economic development in developing countries would benefit from increased access to leap-frog technology and the kind of sustainable development policy coherence that results in better market access, integrated global decision-making is needed. The advantage of a Super-COP sustainable development approach is that progress can be made incrementally, building on existing mechanisms and institutions.

Primarily, there would be high-level challenges in developing a critical mass of political will and balancing developed and developing country interests. Other issues include issues related to non-parties and accounting, as well as organizational challenges with respect to legal and structural issues, rules of procedure (voting rules), and overall consistency with MEAs. These challenges should not be insurmountable given the strong effectiveness and efficiency interests that virtually all parties would have in making a Super-COP work.

Synergies, Regulatory Congestion and Reform

An integrated decision-making and sustainable development approach to international environmental governance reform will have important benefits in terms of efficient and effective regulation. The multi-level proliferation of regulatory instruments linked to MEAs creates economic and social congestion. A commonly held position among many parties to MEAs is that synergies and co-ordination among MEAs should be addressed initially and even primarily at the domestic level. This position is partly derived from a concern with state sovereignty and from the premise that because MEA COPs are independent and supreme in their own domains, they cannot be subject to an effective integration mechanism. With domestic decision-making and implementation increasingly linked to the international level, fragmentation is entrenched. An integrated global approach to sustainable development should lead to more integrated domestic mechanisms.

Of course, most of the implementation work must still be done at the national level, but important structural changes can be made at the global level. Most domestic regulatory systems are organized vertically, in discrete subject-specific structures with decision-making, policy-making and implementation strata. This system generally makes incremental progress on environmental issues through the production of additional end-of-pipe regulation. Co-ordination, coherence, cross-cutting and synergies issues are generally addressed through additional linkage mechanisms. This system is rooted in domestic governance structures, but is reinforced by a superstructure of parallel international mechanisms. There is a need for a holistic strategy to address the systemic issues at the core of the sustainable development agenda. Mutually reinforcing changes at international and domestic levels are required to move forward. There is a need for global leadership, to realign decision-making structures from the international to the national levels. There are a host of cross-cutting issues related to the balance of

economic and environmental interests, such as risk management and precaution, which demonstrate the need for integrated decision-making.

In Canada, as in many other developed countries, the need has been identified for broad systemic change and reform of the regulatory system. The goal is to institute a more integrated, effective and efficient approach to environmental protection, while at the same time setting conditions for maximizing sustainable economic growth. In the clean economy of the future, with increasing consumer demand for safe and environmentally friendly products, efficient and effective regulation will be an essential element of competitiveness. In developing countries, the regulatory burden is often much higher, as noted in the Word Bank study cited above. Regulatory reform in the South is an issue not only of unlocking economic growth by enabling small business, but also of day-to-day survival.

Underlying Environment and Sustainable Development Challenges

An investment in institutional change in the area of the global environment and sustainable development must be based, at least in part, on a recognition that there are serious environmental and sustainable development challenges to be addressed. Looking back to the 1950s and 1960s, it was feared at the time that developing countries – particularly China, India, and Indonesia – would not be able to feed their rapidly growing populations. Thanks to the green revolution in agriculture, the doomsday scenarios of famine and starvation did not materialize in these, the most populous, developing countries. In the 1960s and 1970s the Club of Rome and many other groups forecast that the Earth would rapidly run out of key natural resources. So far, this has not happened, again because changes in technology and in preferences have allowed the substitution of new resources for existing ones – for example, fibre optics in place of copper. Global action has also led to major strides in addressing problems like ozone depletion.

State of the Environment (SOE) reporting was first undertaken in the United States with the enactment of the 1969 National Environmental Policy Act (NEPA); it became a global activity following the Stockholm Conference on the Human Environment in 1972. In the beginning, the focus was on the biophysical environment — land, fresh water, forests and wildlife, for example. SOE reporting has over the years become more integrated and now takes into account the complex human-environment interactions in assessing and reporting on the changing state of the environment, and can better inform decision-making on broader sustainable development issues.

According to UNEP,[35] there has been considerable change in both human and environmental conditions over the 30 years from 1972-2002. In an unprecedented period of population increase, the environment has been heavily drawn upon to meet a multiple human needs. In many areas, the state of the environment is much more fragile and degraded than it was in 1972. A growing world population — over 6 billion people (and still climbing) — is exacerbating the demand on resources and environmental services, including the absorption of pollution. Overall, UNEP finds that measures taken in response have not been adequate to counteract the pressures imposed by increasing poverty and uncontrolled consumption. Particular examples include human impacts on the atmosphere, which have been enormous, with anthropogenic emissions a prime cause of environmental problems. Emissions of almost all greenhouse gases continue to rise. Over-exploitation of many of the surface water resources and great aquifers upon which irrigated agriculture and domestic supplies depend has resulted in more and more countries facing water stress or scarcity. The consequences include the deaths of 3–5 million people annually from water-related diseases. There has been a sharp global trend towards increasingly intense exploitation and depletion of wild fish stocks. Numerous fisheries have collapsed and others are threatened with overexploitation. With almost half of the world's population living in less-developed countries, urban areas and mega-cities, infrastructure and municipal services are inadequate to accommodate millions of the urban poor. Urban air pollution and deteriorating water quality are having major health, economic and social impacts.

Nonetheless, some suggest that the global environment has actually improved in recent decades. Dr. Bjørn Lomborg presents persuasively systematic statistical information from internationally recognized research institutes to examine a range of major environmental issues, to make this case.[36] Such views are by no means generally accepted. However, even if such an analysis were accepted as accurate, it is also nonetheless clear that with demographic and economic shifts and growth, as well as technological innovation, new challenges are constantly appearing with respect to the environment. Even if many of these challenges can be addressed by existing MEAs and structures, there will still be a tendency toward additionality at some level of institutional and regulatory structures, in ways which are likely to result in further governance fragmentation and regulatory congestion. An example of an emerging issue for which the system will be requested to find a response is the nitrogen cascade.[37] Moreover, as key economies such as those of China and India are poised on the prospect of much needed and possibly rapid growth, if this is not managed well there is a considerable risk of increased negative global environmental impacts.

[35] See UNEP, *GEO 3*, *supra* note 14; Malmö Ministerial Declaration, 31 May 2000, www.unep.org/malmo/malmo_ministerial.htm.

[36] Bjørn Lomborg, *The Skeptical Environmentalist* (Cambridge University Press, 2001).

[37] UNEP, *GEO 3*, *supra* note 14.

North-South and Financing Issues

A key concern is that the environmental agenda is perceived in the South as a northern agenda, while the South is concerned primarily with development. To reach agreement on changes to the system an effective North-South partnership is needed, among other things. Development must be a priority but raising aid levels an order of magnitude is untenable. Neither donor nor developing countries can afford to keep investing limited resources and capacity in this system. Ultimately, to deliver on the Rio promises – to realize essential environmental and development benefits – the world needs systemic change. To achieve it, a less-is-more, integrated approach to decision-making is needed.

Another key issue is financial support for new mechanisms. The United States and Japan contribute over 40% of the budget of UN organizations, and thus are likely to scrutinize closely any proposals for reform which would appear to increase the financial burden. Developing countries may have a higher level of concern about possible additional demands on their human capacity to engage in new institutions. All members of the UN have a similar interest in the use of limited capacity and resources.[38] Given such common incentives, an integrated system along the lines of a Super-COP model is likely to be subject to the kind of scrutiny required to ensure that potential efficiencies are realized, and that institutional growth is contained.

Path Forward and Conclusion

If activity in the area of MEAs has lost momentum, a Super-COP may be exactly what the world needs to catalyze the essential reforms needed in the domain of international environmental and sustainable development governance. The model offers the opportunity to generate positive outcomes balanced across the full range of North-South issues, balancing environmental and economic, as well as social interests, through non-threatening incremental change, which can be collectively managed, incrementally, step by step. This could be initiated by simple decisions in existing fora.

There should be no doubt that eventually a critical mass of political will is needed in order to initiate this change, as well as a shared vision of sustainable development which balances development and environmental protection interests. A Super-COP model could stand alone or complement a UNEO approach. In either case it would provide a much needed integrated decision-making mechanism for global environmental matters. It also provides a mechanism that can begin cautiously and incrementally or move quickly and comprehensively from MEA specific to broader sustainable development issues. Moving as quickly as possible would help to contain the ad hoc growth of current institutional cultures and mechanisms in increasingly fragmented patterns. A Super-COP may be exactly what the world needs and we could have one, if we so decided.

[38] A fact emphasized by Simon Upton, in Upton, 'Sustainable Development', *supra* note 4, at 12.