HELSINKI process

Track One: Global Problem Solving

International Environmental and Sustainability Governance: Options Beyond Institutional Reform

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1. Current Institutional Reform Initiatives

In this era of de-regulated trade and investment flows, global indicators demonstrate an accelerating decline in environmental conditions, including resource depletion (forests, fisheries, arable land, biodiversity) water crises, and grave atmospheric effects of greenhouse gases and ozone depletion. Serious global inequities exist, as 20% of the world's population appropriates 80% of its resources. As the Secretary-General has stated "the natural resource base is under siege". (Pallemaerts 2004)

A myriad of proposals of reform to international environmental governance have been released and debated during the past decade and the options thoroughly reviewed elsewhere. (Bernstein 2004a) Fundamental concerns include:

- The concentration of power and resources in world financial and trade organizations and lack of a corresponding center and influence for environmental governance;
- A plethora of environmental conventions and institutions lacking sufficient co-ordination and effective implementation;
- The lack of secure funding and mandate of the United Nations Environment Program (UNEP);
- Lack of financial and technical capacity to implement agreements in many countries;
- Insufficient reporting, monitoring and compliance with multilateral environmental agreements (MEAs); and
- Lack of a strong enforcement mechanism, such as a world environmental court.

France has proposed a World Environment Organization (WEO) as a balance to the World Trade Organization, a suggestion also made by former WTO-Director-General Ruggiero.

Others, including Sir Geoffrey Palmer, former Prime Minister of New Zealand, have called for a specialized agency for the environment within the UN, an International Environmental Organization modeled loosely on the ILO. Numerous academic writers have contributed to the debate (Charnovitz, Esty, Runge, Biermann). The German Advisory Council for Climate Change and others have recommended that UNEP be upgraded to an international environmental agency as an entity or a specialized agency with the UN system.

Similarly, the Zedillo Commission (UN High-Level Panel on Financing for Development) proposed the consolidation of organizations now dealing with environmental issues into a Global Environmental Organization. William Pace of the World Federalist Movement has also called for a World Environment Organization and, as a first step, the upgrading of UNEP to a specialized agency. Some of the writers have additionally called for the establishment of a world environmental court, without specifying what its jurisdiction should be.

The results of the reform discussions within the UN were adopted by a decision of the UNEP governing council at its 7th special session in Cartagena on 15 February, 2002, and endorsed at the World Summit on Sustainable Development (WSSD) and presented to the 8th session of the UNEP Governing Council, March 2004. The decisions of that meeting have been followed by ongoing meetings on technical support and capacity building of both civil society and the High-level Open-ended Intergovernmental Working Group on an Intergovernmental Strategic Plan for Technology Support and Capacity-building. The decisions of UNEP include:

The role and structure of the UNEP Governing Council and Global Ministerial Environmental Forum which:

- Will enable Ministers to take policy decisions on global environmental issues, and provide policy advice to enhance coordination of environmental programmes within the United Nations system, considering synergies amongst MEAs, and including the environmental contribution to development challenges.;
- oversee the proposed establishment of an inter-governmental panel on global environmental change and
- promote the meaningful participation and involvement of major groups, NGOs and the private sector and
- provide opportunities for Governments to be informed of their views.

Strengthening the role and financial situation of UNEP:

Various proposals were made:

- to strengthen the role and financial situation of UNEP through resources from states and member groups, strategic partnerships with the UN Development Program and Global Environment Facility, and
- to improve coordination and effectiveness of MEAs, including pilot projects, back to back meetings of the Conference of the Parties of MEAs and co-location of future MEA secretariats.

Capacity building, technology transfer and country-level capacity co ordination for the environmental pillar of sustainable development are to promoted by:

- considering environmental governance also at regional, sub-regional and national levels,
- supporting regional initiatives such as the New Partnership for Africa's Development (NEPAD) and
- an inter-governmental action plan for technology support and capacity building for developing countries to be developed by UNEP to improve the effectiveness of capacity building with greater collaboration with the UNDP.

The Environmental Management Group, which includes specialized agencies, funds and programmes of the UN system and the secretariats of multilateral environmental agreements (MEAs) was confirmed as an instrument for ensuring that the environment is brought into the mainstream of relevant activities within the UN system, reporting annually to the UNEP Governing Council/Global Ministerial Environmental Forum.

For the effective incorporation of the environmental dimension with social and economic activities of the UN system, it was recommended that UNEP should join the UN Development Group.

The UNEP reform-led process indicates the extent of political and organizational will for reform and consolidation at this time and is a building block for future improvements in environmental global governance. It includes a plan to respond to many of the oft-repeated concerns regarding institutional environmental global governance problems, including the need for co-ordination of MEAs and agencies and UNEP funding needs. The process did not result in promotion of a World Environmental Organization or court.

This paper will not restate those issues, but will focus on other elements of environmental and sustainability issues, including influence of trade law, the continuing deficit of compliance and sustainability in developed countries' regimes, the need to consider national level solutions to environmental problems, regulation of transnational corporations, and the possible contributions to be made from human rights law and civil society engagement.

New York City "Brainstorming Session"

A "Brainstorming" discussion session in April 2004 ("New York Session") on strengthening sustainable development governance recorded ongoing concerns. These include;

- the lack of a political climate conducive to reform;
- the continuing lack of an international environmental regime sufficient to the depth of ecological problems;
- whether there should be change in fundamental incentive structures (funding arrangements, the trade regime) rather than to institutional architecture;
- conceptual confusion between international environmental governance and sustainable development governance;
- continued resistance to implementation of sustainable development;
- fragmentation of MEAs and of national-level policy making; and
- the difficulty of improving co-ordination at the international level.

The discussion indicates the serious degree of difficulty that remains if significant improvement in governance is to occur. Suggestions for moving forward include the need for:

- a robust definition of effectiveness, for measurement of performance;
- attention to the balance between the national and global environmental agendas;
- strengthening the instruments of coordination and linkage;
- addressing the implementation gap which exists in both developed and developing countries;
- mobilizing non-state actors in the reform effort;
- a mix of formal and informal discussion processes;
- response to the **urgency** of worsening environmental and social conditions;
- strengthening existing incentive structures, including increased funding of the GEF; and finally,
- addressing the "ethics deficit," the worsening wealth gap and lack of a commitment to equity, including the non-implementation of such commitments as those in the *Convention on Biological Diversity.*

2. Conceptual confusion between international environmental governance and sustainable development governance:

The Johannesurg Plan of action suggests what would constitute sustainable development: implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development, meeting the Millennium Development Goals, implementing the Monterrey Consensus and outcomes of the major UN conferences and international agreements since 1992. It also notes a "continuing resistance to the sustainable development imperative." This inventory represents a formidable challenge.

In practice, environmental policy, local to global, is greatly affected by economic planning and activity, so that consideration of environment in isolation from economy and from development needs (poverty alleviation, health, water and sanitation) is not an effective approach. Equally, economic planning that ignores environmental impacts may be counter-productive, resulting in increased negative impacts on resource use and human health. Whatever the architectural, institutional basis within the UN for decision-making, it is necessary to integrate environmental and economic decision-making in order to create sustainability of nature, economies and communities. It is therefore important to promote better international environmental governance within a context of sustainable development. The NY Session found that sustainable development is not being "lived" within the UN system. However, abandoning the goal of integration of these needs would be a significant step backward.

3. Recognize the critical impacts on the environment and development from the trade regime, both from the content of the rules and from their impact on international negotiations for other public needs.

Participants at the New York Session questioned whether new UN Environment Organization could fix the institutional gap or whether there's a need to change "fundamental incentive structures" including those reflected in trade regimes. It also noted the problem of policy fragmentation at the national level which exacerbates fragmentation and lack of coherence at the international level and results in countries' negotiating stances sometimes being at cross purposes.

The trade law regime

In the consideration of how to achieve coherence and effectiveness of international environmental and sustainable development governance, it is necessary to recognize the widespread impacts of trade rules and processes on environmental policy and UN law-making. The rules regulate governments' exercise of their domestic constitutional powers in a one-rule-for-all regime which does not account for economic, social and ecosystem differences.

It is important to recognize the sheer volume of trade rules which affect countries' decision making regarding the environment and sustainable development.

Problems for environmental and health protection and resource conservation are founded in the wording of the WTO agreements, including the Agreements on Agriculture, Services, Intellectual Property, Sanitary and Phytosanitary Standards (SPS), and Technical Barriers to Trade (TBT). Their limits on governmental authority to regulate and their promotion of poor or non-existent international environmental and health standards create barriers to the solution of both domestic and international environmental crises.

Developing countries have justified concerns that environmental and health standards in industrialized countries may be used for protectionist purposes to their disadvantage as exporters. The past decade of discussions of trade and environment have been underlined by Southern concerns that industrialized countries, particularly the United States, may use trade sanctions for allegedly environmental purposes against developing countries. The lack of resolution of this concern has blunted efforts to approach other facets of the intersection of economic and environmental concerns.

However, it is now evident that the impacts of the trade rules on domestic policy are extensive and multi-faceted, including:

- the impact of the standards chapters of the agreements on national and local standard-setting and policies;

- the over-reaching in the use of the concept "trade-related" regarding standards and intellectual property;

- the impacts of intellectual property including patents on life, on peoples' access to the benefits of biodiversity;

- the services trade pressures for privatization and deregulation of essential services like water, sanitation, waste management and transportation.

Experience now demonstrates that trade rules may have negative effects on initiatives broadly supported in Developing Countries such as the *Cartagena Protocol on Biosafety*, climate change responses, and negotiations for a treaty on persistent organic pollutants.

In addition, there now exists a proliferation of bilateral and plurilateral international investment agreements. These are asymmetric agreements which promote corporate rights by limiting the authority of governments to regulate investors, while providing no corresponding obligations on business to invest in a socially and environmentally responsible manner. Particularly egregious are the impacts on governments arising from the inclusion of investor rights to sue governments directly under investment agreements for alleged (direct or indirect) expropriation for other alleged breaches of investor rights.

These claims are arbitrated in confidential tribunals, pursuant to a jurisprudence which includes no limits on what constitutes expropriation when legitimate government regulatory action is at issue. Numerous cases under the North American Free Trade Agreement have involved environmental issues, and additional and resource additional cases are ongoing under other bilateral agreements.

While extolling the benefits of the Internet in relation to liberalization of services trade, Michael Moore, former Director-General of the WTO, spoke of the value of destroying "the tyranny of location." However, sustainable development, ecological management and provision of ecological services require a focus on **local** ecological opportunities and constraints. His views illustrate the dangers in liberalization of services, if essential environmental and resource services (provision of water, energy services, forest management services) are deregulated and privatized.

Although GATT Article XX permits countries to enact rules "necessary" to protect human, animal or plant life or health …(and) relating to conservation of exhaustible resources," the WTO dispute process has not upheld national measures when challenged in eleven out of twelve cases. (Swenarchuk 2003)

Although the WTO established a Trade and Environment Committee ten years ago, its discussions have not resulted in any substantive contribution to international trade policy, and have essentially been at an impasse for several years.

The solutions to pressing global problems such as climate change, water shortages, pollution, and destruction of biodiversity require diverse policy responses, for which WTO rules provide little space or flexibility. As the UNDP has noted:

> …an evaluation of the multilateral trade regime should be based on whether it maximises possibilities for human development - especially for developing countries… Multilateral trade rules need to seek peaceful co-existence among national practices, not harmonization, a point that has obvious implications for the governance of global trade, not least because of the need to permit asymmetric rules that favour the weakest members…Today, global governance of trade is generating inequitable outcomes…A human development perspective implies that the importance of achieving certain outcomes outweighs the need for one-size-fits-all rules... Required are minimum, universally agreed rules that can be applied in a country-specific manner and tailored to different development circumstances. Instead of focussing on harmonizing trade rules, the WTO should be concerned with managing the interaction between different national institutions and rules… (UNDP 2003)

UNDP's arguments against a one-size-fits-all approach to trade law apply equally to environmental protection, since the ecosystems of the planet are extraordinarily diverse,

as are the human communities which depend on them. Forcing local-specific strategies for protection of the environmental pillar of sustainable development through the rigid economic screen of WTO trade rules inhibits the necessary creativity needed to respond to urgent problems.

Impact of trade rules on the negotiation of other UN conventions

A direct and serious challenge to UN law-making in social, health and environmental fields now arises consistently during international negotiations as certain developed countries attempt to ensure that trade rules have primacy over the terms of new conventions. This issue has been prominent in recent negotiations for the *Cartagena Protocol on Biosafety, the Framework Convention on Tobacco Control,* and *the Stockholm Convention on Persistent Organic Pollutants*. It is currently contested in negotiations for an international instrument to protect cultural diversity.

While some argue that this approach provides policy coherence, in effect, if implemented, economic policy will not only supercede but also pre-empt and prevent the development of necessary policies for social, health and environmental priorities through legitimate international legal processes. Rather than policy coherence, it is a route to policy privation.

Some authors, notably from the WTO, have called for a World Environmental Organization as a counterpart environmental body to the WTO, and this concept implies that the power of trade policy comes from the institution of the WTO. However, the power of the trade regime does not flow from the institution *per se*, but from the over-arching, quasi-constitutional legal regime created by the web of international trade agreements which it administers. The power of the agreements flow form the political will and pressures which result in countries' putting economic relations before other policy fields.

A WEO would have no such web of enforceable agreements to administer, nor the support equivalent to that provided by the Bretton Woods Institutions to the current world wide economic system.

In considering international environmental and sustainable development governance, it would be helpful to examine the aggregated impacts of WTO trade rules on the environmental pillar of sustainable development, in developed and developing countries, as UNDP has done on the economic pillar.

Further, an assessment of the effects on UN negotiations of repeated efforts to make these processes and laws conform to one-dimensional views of trade law, would be

helpful in current and future law-making efforts to ensure that governments do not lose jurisdiction to use policy flexibility for social, environmental and development priorities.

3. Recognize the role of developed countries' production and consumption patterns in creating world environmental problems.

Numerous contributors to the global environmental governance debate emphasize the need for increased environmental infrastructure in Southern countries, and identify the need for increased capacity building and technology transfers to the developing countries. While these concerns and needs are genuine, the debate suffers from a lack of attention to the contribution of industrialized countries to world environmental problems, and the deficiencies in northern environmental regimes. The need for sustainability of nature and economics in the North has been largely absent from the discussion.

Analysis of the ecological footprints of nations provides insight into this problem. (Wackernagel and Rees 1996)

Adopting the definition of sustainability articulated by the World Conservation Union, being "improving the quality of human life while living within the carrying capacity of supporting eco-systems," the authors studied the comparative impacts of 52 countries on the carrying capacity of the world environment.

Carrying capacity is conventionally defined as the maximum population of a given species that an area can support without reducing its ability to support the same species in the future. The authors observe that that the world trading system disguises the problem that Northern consumption levels exceed local carrying capacity, since trade permits appropriation of distant carrying capacity.

Trade that exceeds sustainable limits robs other peoples and natural areas of their life-sustaining biological productivity. Supported by trade, populations of cities and whole countries are living beyond their domestic carrying capacity, appropriating carrying capacity from elsewhere. In other words, the ecosystems that actually support typical industrial regions lie invisibly far beyond their political or geographic boundaries.

Current terms of trade entrench the unconscionable appropriation of carrying capacity from the South to the North. As the ecological footprints calculations verify, there are great disparities between Northern and Southern consumption, causing "a quasi-parasitic relationship between advanced economies and the rest of the world". Some areas constantly give up ecological productivity, while others such as Hong Kong, Switzerland, and Japan, constantly draw on it. Not everyone can be a net importer of ecological goods and services; for every importer there must be an exporter. The increasing polarization of wealth appears to prevent implementation of sustainable development.

Since a considerable proportion of Southern goods traded globally are natural resources, whose extraction frequently causes damage to the ecosystems from which they originate, Southern trading nations are particularly prone to time-limited gains in income and long term depletion of the wealth that flows from natural capital.

The ecological foot-prints calculations indicate that the Earth cannot provide for all humans at current Northern consumption levels.

An examination of the Canadian ecological footprint helps put this belief in perspective. With the current Canadian pattern of production and consumption, Canadians require approximately **4.3 hectares of land (10.7 acres)** per capita, or roughly the area of three city blocks. However, the amount available per capita globally decreased constantly in the twentieth century to **1.5 hectares (3.7 acres)** per person. To support the entire present world population at the Canadian ecological level, assuming present technology and current efficiency levels, would require two additional Earths.

Other industrialized countries have similarly high consumption levels, while Southern ones consume much less. For example, the ecological footprint for the USA is 5.1 hectares (11.4 acres); for Holland 4.4 ha. (9.85 acres); for Japan 2.5 ha (5.6 acres); for India 0.4 ha (.89 acres).

As Wackernagel and Rees reflect:

> The notion that the current lifestyle of industrialized countries cannot be extended safely to everyone on Earth will be disturbing to some. However, simply ignoring this possibility by blindly perpetuating conventional approaches to economic development invites both eco-catastrophe and subsequent geopolitical chaos. To recognize that not everybody can live like people do in industrialized countries today is **not** to argue that the poor should remain poor. It is to say that **there must be adjustments all round and that, if our ecological analyses are correct, continuing on the current development path will actually hit the less fortunate hardest[1].** (emphasis added)

In discussions of environmental global governance, it is important to recognize the role and responsibility of developed nations in causing current environmental problems, and the barriers caused by Northern consumption patterns for global sustainability in order ultimately to "redress the ethics deficit" registered in the New York Session.

4. Balance the national and global environmental agendas and address the implementation gap which exists in both developed and developing countries. (New York session)

All environmental problems are ultimately local (have local effects) so it is crucial

to pay more attention to the national/international intersection (NY session):

> While the new generation of environmental problems are increasingly global in scope, it is important to continue to sustain political attention to key problems on the national and local scales. It is critical that national governments do not give the impression to the general public that just because increased efforts must be scaled up to the global level, that problems on the national level have been duly resolved[2].

This problem is compounded by the complexity of modern societies, and the interlinking of environmental, social and economic policies, as a reflection of the impacts on nature from human activities. The global governance debates would benefit from more recognition of the difficulties inherent in implementation of environmental protection "on the ground" and the consequent need to support policy formation and implementation at the national level and sub-national levels world wide. This problem was recognized at the New York Session:

> Notwithstanding all the various attempts to enhance coordination among the MEA regimes, attention must not be diverted away from the important issue of whether substantive commitments are actually being realised or not. Efforts are needed to strengthen compliance and enforcement. But as well, they must be directed towards understanding the factors that impede implementation at the national level**…** It is equally important to recognise that implementation is a problem not just in developing but in developed countries. To that end, efforts to redress the implementation gap must take into account the differentiated needs and conditions of individual countries. Increased efforts are needed by UNEP to support the capacity-building of national governments for monitoring, implementation. The generation of scientific knowledge and law enforcement and engaging with civil society are equally important. It is critical that capacity-building efforts focus on **how best to strengthen existing institutions at the national level[3].** (emphasis added)

In much of the global debate, the key question of implementation and lack of implementation of existing UN conventions has not been sufficiently addressed. While there has been discussion of the need for capacity building for developing countries in order to achieve compliance, it is also necessary to address the problem of non-implementation of agreements by developed countries. Examples include the non-ratification of *Convention on Biological Diversity* and the *Kyoto Protocol* by the United States and Canada's failure to ratify the *Cartagena Protocol on Biosafety* as well as its protracted and incomplete process to identify a national strategy to meet Kyoto requirements.

For example, significantly, Canadian national regulatory policy requires compliance with the WTO agreements and implementation of their requirements in national law, but does not require compliance with any other international treaty which Canada has signed.

(Canada 1999) During the 1990s, the Canadian federal government and provinces significantly reduced budgets and staffing of environmental protection ministries, reducing capacity to continue building the necessary legal and practical bases for sustainable management of the economy. At the same time, environmental problems occurred, including deadly instances of water pollution in several Canadian communities.

There is considerable debate about the strengths and weaknesses of compliance regimes in MEAs. Proposals for clustering MEAs for better implementation, co-locating secretariats, and back-to-back meetings and conferences of the Parties may assist in better co-ordination of international environmental governance. Further study of innovative compliance mechanisms, such as public audits and accounting, would be helpful in obtaining wider compliance.

5. The global environmental governance discussion largely excludes the impacts and driving force of transnational corporations in shaping the global environment and the need to address their central role.

International economic activity is increasingly dominated by large transnational corporations, but the examination of international environmental governance has not included consideration of their role in creating impacts on the global environment, nor recommendations on approaches to governing those interactions.

Both domestically and internationally, business benefits from the creation of a "level playing field" through a well-functioning regulatory system. (Gleckman 2004) However, in the OECD countries, in the past two decades, business has successfully pursued a strategy of increased voluntary environmental management to replace and curb public mandatory environmental regulation. Elements of the voluntary schemes include voluntary codes and standards, self-defined implementation standards, self-financed certification schemes, and elective public reporting. These approaches differ significantly from state regulatory measures, which typically include laws, regulations, enforcement and public disclosure. The differences have contributed to the shift in political balance towards commercial control of environmental matters through reduced public engagement with environmental policy, reduced business "overhead" costs, and increased public support for voluntarism to replace regulation.

At the international level, there is no institution equivalent in strength to the nation-state with their public governmental hearings, courts, political parties and civil liabilities. The diverse environmental conventions and cumbersome administrative mechanisms (COPs) and primacy of trade rules during drafting processes also reduce oversight of corporate environmental practices and impacts. NGOs have been prominent at the international level in proposing policies that would affect business practices, including debt cancellations, reparations of illicit funds sent abroad, the Tobin tax, and controls on corrupt business transactions.

However, at this time, there is not an effective international regime to govern business practices that affect the environment and sustainable development. Impediments to such a regime include the multi-jurisdictional character of global corporate law, national governments' interventions to protect "their" corporate firms, and the absence of effective international civil liability regimes. Private sector standard setting has advanced very significantly through the International Standards Organization, a private, business – dominated body which has received added legal influence through the WTO, since both the Sanitary and Phytosanitary Standards and Technical Barriers to Trade chapters have endorsed ISO standards. In addition, during the 1990s, the ISO expanded the subject matter of its standard-setting from its historical role dealing with technical standard setting to process standards as well.

The move to business-dominated standards-related initiatives is only one element of the role of transnational corporations in global governance, but it has resulted in environment-related controversies in instances of forest management certification schemes, environmental management systems, and standards governing genetically modified foods. World-wide, the conduct of corporations in resource-extraction industries, in the patenting of Southern biodiversity, and in all spheres of economic activity, requires consideration in any system of effective global governance.

Gleckman considers that a World Environment Organization would need to come to grips with governance of corporate practices, and proposes specific responses to this challenge. He proposes:

- standards in MEAs specific to corporate firms to complement state standards;
- an agreement to interpret current MEAs as applying to private sector actors;
- consider corporate codes legally binding in fields that lack MEAs;
- the establishment of an international environmental court;
- have committees of corporate and civil society advisors to the Conference of the Parties of MEAs;
- enhance the participation of civil society in processes of the International Standardization Organization;
- develop joint industry/state/civil society certification bodies similar to the Forest Stewardship Council and Marine Stewardship Council;
- develop joint business and state investigation and enforcement arrangements; and
- implement a non-elective version of the Global Reporting Initiative on Sustainable Reporting Guidelines. [4]

Civil society has also expressed support for the establishment of corporate and civil society advisory committees to the COPs of MEAs, other joint standard-setting bodies, and agreements to conduct joint investigation and enforcement arrangements. (Bernstein 2004a)

6. Recognize the perspective and key role of civil society in improving global governance.

Civil society organizations have been deeply involved in the discussions of reform of the international governance of the environment and sustainable development. (Bernstein 2004a) Civil society consultations within the rubric of the UNEP reform process were taken into account in the Director's initiatives, but merit further attention.

Notably, civil society groups have particularly focused on the related questions of implementation and compliance with international agreements and have addressed the question of political will:

> Ultimately, the strengthening and revitalization of international environmental governance required a stronger political will, and political will was only generated when enough people dared to dictate to political elites. The future of international environmental governance and the sustainability of life on the planet thus hinged on the ability of civil society groups to galvanize and channel the power of the people they represented. (Civil Society Consultations Summary Report)

Consistent with other contributors to the discussions, CSOs have varying opinions about how to improve global governance:

> One school of thought focused on form, holding that global governance was mainly a matter of assigning and developing appropriate intergovernmental roles and capabilities. Another perspective framed global governance in terms of the relationship between the State and civil society, while a third saw it as the management of governance regimes in such a way that legitimacy and effectiveness were increased. (Civil Society Consultations Summary Report)

Participants supported co-ordination of MEAs and the location of secretariats within UNEP, and considered that further policy development is needed in two areas:

> The establishment of binding rules to regulate the conduct of transnational corporations, and the establishment of legally binding agreements on agriculture, which would aim at banning dumping and export subsidies, preventing biopiracy and further strengthening the current regimes on pesticides and genetically modified organisms.

However, all participants agreed that although most of the literature on global governance focuses on a top-down approach (reforming government and its related institutions), in fact, "global governance existed at the interface between the top-down and bottom-up processes." For some, the solution lies in "building a social basis for environmental action" through global issue networks, global public policy networks or regime management. The network approaches are oriented to maximizing the impact of already

existing political will and public support, to focus on an incremental agenda for change, building on the existing political will and integrating the environmental agenda into broader social and economic goals.

Reflecting the focus of civil society on actual implementation of agreements, commentators from developing countries complained that though they were unable to obtain funds to environmental protection programmes, "there always appeared to be plenty of money available for meetings."

Civil society organizations also advocate for improved compliance mechanisms in international environmental agreements, which require "better devices for monitoring and verifying the performance of countries in meeting their treaty obligations."

Countries' annual reports on how they have implemented commitments are not very meaningful unless they can be assessed against a set of performance benchmarks, previously agreed upon, such as the emission reduction targets and timetables under the Kyoto Protocol. (Bernstein 2004a)

Another proposal for improved monitoring comprises "freestanding regular standing committees reporting to the MEA" on the grounds that, unlike ad hoc reporting committees, regular ones would provide uniform reporting with no loss of institutional memory, and could be the basis of consolidating an ongoing policy network. (Bernstein 2004a)

Civil society organizations place an important focus on the need for democratization of decision-making concerning the environment and sustainable development at national, sub-national and international levels. A first step in democratization is the right of the public to have access to information in environmental matters, including information about states' projects, plans and policies and companies' activities that will impact the environment. This information is essential to states' accountability, and as a tool to improve compliance through reporting and verification.

Information is a basic and necessary tool for another hallmark of civil society concerns, namely, increasing opportunities for the public to participate in decision-making concerning the environment through involvement in consultation, advice to government and private companies, and rights to judicial processes to intervene and obtain remedies for environmental harm, past or potential. Civil society organizations have proposed the inclusion of civil society in negotiation, compliance mechanisms, and through access to dispute settlements.

Like other commentators on global governance, they recognize a need for capacity building of states, civil society, and the judiciary, in many related fields: international and national environmental law, and technical and scientific capacity.

The focus of civil society on democratization and implementation of environmental protection "on the ground" is an important element in addressing the concern at the New York Session to "respond to the urgency" of global and local environmental problems. To create a focus on these issues, it is important to provide tools to civil society to work actively and consistently to increase political will to get things done.

7. The value of recognition of a human right to a safe and clean environment and the political and civil rights essential for citizens' means to work for it.

The environment is always ultimately local, and stewardship by inhabitants of any part of the earth is indispensable for the conservation and protection of any particular ecosystem. As Rio Principle 10 recognized, it is important to deal with environmental challenges at the relevant level. Local inhabitants most immediately experience the impacts of economic planning that does not account for environmental impact; in addition, on a global scale, the global economy affects the local environments of citizens far removed from the origins of such environmental problems as greenhouse gas emissions, long-range transport of air pollutants, ocean dumping etc.

The human right to a safe environment has been elaborated in numerous agreements as implicit or required for the effective existence of other rights. The *Universal Declaration of Human Rights* includes:

> Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services…(Article 25 (1)

Although the environmental dimension of these rights is not explicitly provided for, it is evident that the enjoyment of the right to health and well being cannot be achieved without a safe and clean environment.

More specifically, the 1972 *Stockholm Declaration* principles include that

> 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

An expanded elaboration of a human right to a safe environment and its linkage to other human rights including rights to life, health, water, food, and safety was articulated in the

1994 *Draft Declaration of Human Rights and the Environment.* The definition of environmental human rights in the Declaration is valuable for its precision and relation of human rights, peace and the environment.

> 1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
>
> 2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.

Further, the *Declaration* articulates rights to freedom from pollution, to preservation of air, soil, water, sea-ice, flora, fauna and essential natural processes. It repeated the right to the highest attainable standard of health and includes the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes, including "ecologically sound access to nature." The named environmental rights are related to rights to housing, security, natural resource use, and essentials of life and livelihood.

Between 1991 and 2001, more than forty international and regional environmental and human rights treaties included varying definitions of the right to a safe environment and/or public rights to information, participation in decision-making regarding the environment, and access to justice. (Shelton 2002)

The WSSD Plan of Implementation provided a tepid authorization for further analysis of these rights:

> Acknowledge the consideration being given to the possible relationship between environment and human rights, including the right to development, with full and transparent participation of Member States of the United Nations and observer States." (para.152)

The *Draft Declaration* enumerates the informational and political rights of citizens which are essential to their ability to act as stewards of the environment, namely

- the **right to information** concerning the environment and concerning actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making;
- the **right to hold and express opinions** and to disseminate ideas and information regarding the environment and to environmental and human rights education;
- the **right to meaningful participation** in planning and decision-making activities and processes that may have an impact on the environment and development, including the prior assessment of the environmental, developmental and human rights consequences of proposed actions;
- the **right to freedom of association** for purposes of protecting the environment or the rights of persons affected by environmental harm, and

- the **right to effective remedies and redress** in administrative or judicial proceedings for environmental harm or the threat of such harm.

The Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, which was concluded in 1998 and entered into force in October 2001, has been described by Secretary General Kofi Annan as "the most ambitious venture in environmental democracy so far undertaken under the United Nations." The *Convention* is open for signature to countries which are members of the Economic Commission for Europe or have consultative status with the Commission, and to regional economic integration organizations of these states. To date, thirty nine countries and the European Community have signed the *Convention,* and thirty states have ratified it.

The convention elaborates principle 10 of the Rio Declaration[5]. Its major principles include:

- a preambular statement that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations;"
- A requirement that states prepare and disseminate a national report on the state of the environment every three to four years as well as other legislative and policy documents;
- provisions ensuring citizens' rights of access to information, including a detailed code for access-to-information legislation;
- public participation in decision-making regarding the environment, and in development of policy, programs and plans;
- consideration of public opinion in such planning;
- ensuring access to justice for citizens in environmental matters, including an independent and impartial review body, and rights of review for decisions, acts or omissions under the convention or in relation to other national environmental law;
- support for non-governmental organizations in national legislation, and Parties' application of *Aarhus* principles in international environmental decision-making.

Other international agreements vest oversight over compliance and implementation only in Meetings or Conferences of the Parties. The trilateral NAFTA environmental side agreement allows citizens' petitions to the Commission on Environmental Co-operation related to enforcement of national environmental laws. In contrast, the *Aarhus Convention* includes "small steps" (Shelton 2002) toward compliance procedures and public participation at the international level. While primary review of implementation is assigned to Parties meetings, NGOs "qualified in the fields to which this Convention relates" may petition to participate as observers in the "non confrontational, non-judicial

and consultative" optional arrangement for compliance review, a first petition procedure in an international environmental agreement.

The *Aarhus Convention* is the first multilateral treaty on the environment whose main aim is to impose obligations on states in respect of their own citizens and has similarities to international human human rights protections. (Pallemaerts 2004) Aiming to increase openness and democratic legitimacy of governmental policies on environmental protection, and to develop" a sense of responsibility amongst citizens, it underscores that

> As a popular target for citizen activism, environmental policy has, in a way, become a testing ground for efforts to transcend traditional models of representative democracy[6].

The *Convention* gives particular status to "non-governmental organizations promoting environmental protection" which, if they meet national legal requirements, are deemed to have an interest matters affecting the public.

Its provisions on compliance review, including the review mechanism accessible to individuals as well as states, marks another similarity between this convention and human rights law.

Its implications go beyond Europe, since parties seek to promote the application of the principles of the *Convention* in international organizations and international environmental decision-making. (Article 3, para 7)

An example of sub-national legislation which implements many of the principles of the *Aarhus Convention* in workable form is *The Ontario Bill of Environmental Rights*[7]*,* adopted in 1994. It is founded on two essentials of engagement:
the right of citizens to know of government and business decisions that affect the environment and public health, and their right to participate and be heard in such decisions. Its description of environmental rights is innovative:

> The people of Ontario recognize the inherent value of the natural environment;
> The people of Ontario have the right to a healthful environment;
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations;
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner. (Preamble)

The core of the bill is public participation, as it

> establishes a regime that provides minimum rules for public participation in the development and finalization of proposals for new statutes, policies, regulations and approvals. It also provides a process for residents to request that existing laws, policies, regulations, or approvals be reviewed, or that new ones be developed. (Lindgren and Muldoon, 1995)

The Bill established an Environmental Registry, an electronic clearing house informing citizens of thousands of proposals for new laws, regulations, policies and approvals originating from both state and corporate activities which is widely utilized by citizens engaged in environmental protection activities.

Many global and regional human rights bodies have considered the link between internationally guaranteed human rights and instances of environmental degradation, based on rights to life, property, health, information, family and home life. (Shelton 2002a)

The *Aarhus Convention* is an important international model for a comprehensive scheme of rights to a safe environment coupled with political and civil rights to enable citizens to engage effectively in enhancing environmental protection and conservation. Its contribution to international law would be bolstered by an internationally recognized right to a secure, healthy and ecologically sound environment based on the recognition (expressed in the Draft Declaration) that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

The rights adopted in the *Aarhus Convention*, if implemented nationally in statutes similar to the *Ontario Environmental Bill of Rights*, would boost the advantages for sustainability that would flow from a nexus between "top-down" and "bottom up" strategies for environmental protection.

8. Conclusion

The UNEP reform process has rightly focused on institutional reform to improve co-ordination of environmental and sustainable development policies as well as capacity-building to improve implementation and compliance with international law. In addition to those reforms, it would be helpful to look to additional factors affecting global environmental governance, including developed countries' consumption and production patterns and the ever-widening encroachment of trade rules into important domains of public protections. Increased support for democratization of environmental decision-making and support for civil society organizations acting nationally and internationally would provide a valuable impetus for deepening action regarding the environmental pillar of sustainable development.

RECOMMENDATIONS

1. Promote broad implementation of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at the national level. As the Convention was developed under the auspices of the Economic Commission of Europe, and has obtained relatively rapid adhesion from the Commission's member states, initiatives should be promoted at other regional organizations in the Americas, Africa, and Asia.

2. Building on the initiatives suggested in the Report of the Panel of Eminent Persons on United Nations-Civil Society Relations (Cardoso Panel), create inter-national standing committees, including environmental experts, parliamentarians nominated by national parliamentary standing committees, and civil society representatives to report regularly on compliance and implementation by states to the Conference of the Parties of Multilateral Environmental Agreements.

3. Promote innovative mechanisms to encourage compliance with environmental laws in both developed and developing countries, including regular public audits and accounting, with meaningful benchmarks, and joint business, state and civil society investigation and enforcement arrangements.

4. Promote synergies between human rights and environmental provisions through improved co-operation between UNEP and OHCHR and other relevant bodies, with a view to develop effective and transparent procedures to monitor and report on the compliance with established international environment and human rights obligations, and develop effective means for access to justice and redress.

5. Further, UNEP and OHCHR should pursue the legal definition and interpretation of substantive environmental human rights and develop appropriate instruments and tools for implementation of these rights.

6. Request that the Secretary–General establish an expert panel to study the establishment of a World Environmental Court, including potential jurisdiction, relationship to other dispute processes including those at the WTO and investment arbitral tribunals, and effective methods to achieve compliance, including through Security Council authority.

7. Support the proposed establishment of an inter-governmental panel on global environmental change within UNEP, as recommended by the Intergovernmental Group of Ministers to the Governing Council/Global Ministerial Environment Forum, and strengthen UNEP's scientific capacity, through the inclusion of high- level independent scientists, to study and report on the current state of the environment and trends in environmental changes.

8. Support a study by UNEP to examine the multi-faceted impacts of international trade and investment rules on the environmental pillar of sustainable development, in both developed and developing countries, as UNDP has done on the economic pillar.

9. UNEP, UNCTAD and the WHO should assess the effects on UN negotiations of continuing efforts to subject these processes and laws to dominance by international trade rules, and develop legal strategies to ensure that governments retain the flexibility to negotiate necessary laws for environmental and health protections and sustainable development.

10. Acknowledging the central role of transnational corporations in creating impacts on the global environment, initiatives are needed to develop an international legal regulatory regime to respond at the firm level to business activities. These could include:

- within UNEP, include firm-level standards within MEAs (to complement state standards) and binding corporate legal codes in fields lacking MEAs;
- within the International Standardization Organization, financial support to enable more democratization through civil society participation in its standard-setting processes;
- the implementation of a mandatory version of the Global Reporting Initiative on Sustainable Reporting Guidelines by its multi-stakeholder group.

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[1] Wackernagel and Rees, p.16.

[2] Bernstein (2004c) p. 5

[3] Ibid. p.6

[4] The Global Reporting Initiative is **a "**multi-stakeholder process and independent institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines. These Guidelines are for voluntary use by organisations for reporting on the economic, environmental, and social dimensions of their activities, products, and services." It is an official collaborating centre of the United Nations Environment Programme (UNEP) and works in cooperation with UN Secretary-General Kofi Annan's Global Compact."

[5] The *Convention* was followed by the *Kiev Protocol on Pollutant Release and Transfer Registers,* 21 May 2003, which is not yet in force.

[6] Pallemaerts (forthcoming)

[7] *Ontario Environmental Bill of Rights*, Ontario S.O.1993, c.28, preamble.