

Mapping the Future of International Environmental Governance

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I. INTRODUCTION

Have the institutions entrusted with international environmental governance (IEG) kept pace with the changing needs of the international community? Multidimensional challenges to the human environment have necessitated responses in kind, both in terms of legal instruments as well as effective institutional structures. International regulatory efforts are required, in addition to efforts at the national level, to address environmental problems with global dimensions.¹ While it is well recognized that the legal underpinnings of the current drive to protect the global environment remain embedded in the general principles of international law,² states are increasingly reliant upon treaty law, in the form of multilateral environmental agreements (MEAs), to respond to new and complex challenges as they arise. MEAs have also created a new institutionalized form of intergovernmental cooperation. In a way, this ‘form’ of governance is *sui generis*, as it has many of the trappings of an international organization without formally being one. MEAs cater to the need for *ad hoc* and

¹ For writings on this issue, see generally Peter H. Sand, *Lessons Learned in Global Environmental Governance* 1–60 (1990); Peter M. Haas, *Global Environmental Governance*, in *Commission on Global Governance* (ed.), *Issues in Global Governance* 333–69 (1995); Rahmatullah Khan, *The Thickening Web of International Law*, in *Commission on Global Governance*, *supra* note 1, at 249–62; Peter M. Haas and Ernst B. Haas, *Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique*, in *Commission on Global Governance*, *supra* note 1, at 295–331; Bharat H. Desai, *Global Accords and Quest for a New International Ecological Order: From Law of Indifference to Common Concern* 9(3) *Bus. and the Contemp. World* 545–72 (1997); Hilary French, *Strengthening Global Environmental Governance*, in *<editors?>Vanishing Borders: Protecting the Planet in the Age of Globalization* 144–62 (2000).

² Ian Brownlie’s leading textbook on international law does not consider the need for a separate branch to address environmental problems and did not have, until recently, even a separate section on the subject. For the first time, in the 1998 (fifth) edition of the book, Brownlie has devoted just a six-page section (chapter XIII) to the subject, which is entitled “Legal Aspects of the Protection of the Environment.” As a “generalist” in this context, Brownlie has argued that “[t]he fact is environmental concerns have for long been reflected in general international law and the relevant categories include the law of the sea, state responsibility, space law, the legal regime of Antarctica, and the non-navigational uses of international watercourses”; see Ian Brownlie, *Principles of Public International Law* 283–8 at 283 (5th edition, 1998).

“autonomous”³ arrangements that are tailored to address a specific global challenge. In view of the very nature of this institutional arrangement, a MEA is expected to be ‘wound up’ as and when its desired objectives are met. Its autonomous nature is determined by the political will of the contracting states as reflected through the decisions of the Conference (or Meeting) of the Parties of the MEA. Although the continued growth of these institutional arrangements suggests that states have developed some confidence in their effectiveness, questions have been raised about whether their *ad hoc* and disjointed nature can have a long-term and coherent impact on global environmental problems. Indeed, recent academic studies have concluded that the current system of IEG is “not only too complicated, but it is also steadily getting worse.”⁴

This article chronicles one recent effort to bring MEAs and other aspects of IEG into a more coherent and stable institutional framework—the work of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance (IGM on IEG) and the follow up to this work at the World Summit on Sustainable Development (WSSD).⁵ The IGM was established by the Governing Council of the United Nations Environment Programme (UNEP) to “undertake a comprehensive policy-oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened international environmental governance including financing of the United Nations Environment Programme.”⁶ The IGM’s work focused, in particular, on the changing fortunes and future role of UNEP in a constantly shifting landscape of global

³ Robin Churchill and Geir Ulfstein have preferred to describe these institutional arrangements as “autonomous.” The autonomous character of the MEA institutions emanates from their in-built law making powers as well as respective compliance mechanisms. See Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law*, 94(4) Am. J. Int’l L. 623–59 at 623 (2000).

⁴ See Institute of Advanced Studies of the United Nations University, *International Sustainable Development Governance: The Question of Reform: Key Issues and Proposals*, Final Report 10 (2002).

⁵ The twenty-first session of the UNEP Governing Council adopted Decision 21/21 on 9 February 2001 on international environmental governance [hereinafter IEG]. It decided “to establish an open-ended Intergovernmental Group of Ministers or their representatives, with the Executive Director as an ex-officio member, to undertake a comprehensive policy-oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened international environmental governance, including the financing of the United Nations Environment Programme, with a view to presenting a report containing analysis and options to the next session of the Governing Council/Global Ministerial Environment Forum.” The text of this decision is available at <www.unep.org/gc_21/Documents>.

⁶ The twenty-first session of the UNEP Governing Council adopted Decision 21/21 on 9 February 2001 on International Environmental Governance. It decided “to establish an open-ended Intergovernmental Group of Ministers or their representatives, with the Executive Director as an ex-officio member with a view to presenting a report containing analysis and options to the next session of the Governing Council/Global Ministerial Environment Forum.” For the text, see <www.unep.org/governingbodies>.

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conferences and international negotiations. The IGM's recommendations were fed into the WSSD,⁷ which was held in Johannesburg from 26 August to 4 September 2002. The WSSD sought to take stock of the progress during the ten years since the UN Conference on Environment and Development (Rio Earth Summit) and had the explicit mandate to address "ways of strengthening the institutional framework for sustainable development." Therefore, it was expected that the WSSD would give attention to a decision on concrete action on the institutional architecture for IEG. As will be seen, the results of this process were inconclusive, but the process itself has helped to identify the range of what is both theoretically and politically possible at this stage in the evolution of strengthened architecture of IEG.

II. THE "PROLIFERATION" OF INSTITUTIONS

UNEP was established by the UN General Assembly in 1972 to meet the "urgent need for a permanent institutional arrangement within the United Nations system for the protection and improvement of the environment."⁸ By 1998, as part of the overall effort to reform the UN system, the UN secretary-general established a Task Force on Environment and Human Settlements, which was headed by UNEP's executive director, Klaus Toepfer.⁹ The

⁷ At its fifty-fifth session, the UN General Assembly [hereinafter UNGA] decided to organize a ten-year review of progress achieved in the implementation of the outcome of the United Nations Conference on Environment and Development [hereinafter UNCED] in 2002 at the summit level to "reinvigorate the global commitment to sustainable development." UNGA by a Resolution [A/RES/55/199 of 20 December 2000] decided that the focus of the proposed review at World Summit on Sustainable Development [hereinafter WSSD] should be on the identification of accomplishments and areas where further efforts were needed to implement Agenda 21 and other outcomes of UNCED. It also decided to focus on "action-oriented decisions in areas where further efforts are needed to implement Agenda 21, address, within the framework of Agenda 21, new challenges and opportunities, and result in renewed political commitment and support for sustainable development, consistent, inter alia, with the principle of common but differentiated responsibilities." See UNGA Resolution A/RES/55/199, 20 December 2000, reprinted in 31(1) *Envtl. Pol. & L.* 63-4 (2001).

⁸ UNGA Resolution 2997 on Institutional and Financial Arrangements for International Environmental Cooperation, UN GAOR, 27th Session, Supp. no. 3015, December 1972 Doc. A/RES/2997.

⁹ In early 1998, the UN secretary-general set up a high-level twenty-one-member United Nations Task Force on Environment and Human Settlements. It comprised ministers, government advisors, and members of the civil society as well as representatives from the UN Secretariat. It was headed by Klaus Toepfer, who was the executive director of UNEP. The task force presented its report to the secretary-general on 15 June 1998. See UN Task Force on Environment and Human Settlements, *Report to the Secretary-General*, 15 June 1998 [on file with the author]. See also UN, *Report of the Secretary-General "Environment and Human Settlements,"* 6 October 1998, Doc. A/53/463, Annex, at 11-28; and UN, *Report of the Secretary-General on Environment and Human Settlements, Presented to the UNGA at Its Fifty-Third Session,* 20th Sess., 6 January 1999, Doc. UNEP/GC.20/INF/13 [hereinafter *Task Force Report*].

Toepfer task force identified a “proliferation”¹⁰ of environmental institutions that had altered the UN’s environmental structure as well as led to the creation of institutional structures parallel to UNEP. In the view of the Toepfer task force, this proliferation had given rise to “substantial overlaps, unrecognized linkages and gaps.”¹¹ The task force expressed grave concern that

[t]hese flaws are basic and pervasive. They prevent the UN system from using its scarce resources to best advantage in addressing problems that are crucial to the human future; harm the credibility and weight of the United Nations in the environmental arena; and damage the UN’s working relationship with its partners in and outside of Government.¹²

A variety of reasons can be found for this multiplicity of institutions, including the growth in ad hoc, piecemeal, and sectoral environmental law-making, which was represented by the MEAs; periodic efforts at “global conferencing”¹³ on environment and sustainable development, which was represented by the Rio and Johannesburg summits; as well as the creation of more permanent structures with mandates that overlap with UNEP’s existing or potential mandate, such as the Global Environment Facility (GEF) and the Commission on Sustainable Development (CSD). In the environmental arena, the General Assembly has also provided crucial political guidance to states, acted as a catalyst for the law-making process, and adopted resolutions comprising constituent instruments for some of the specialized environmental institutions including UNEP and the CSD (see Figure 1).

The role that is being played by these institutions has often resulted in overlapping jurisdictions, working at cross-purposes, turf wars, and a waste of resources. Cumulatively, they have not helped in efficiently and effectively realizing the goal of institutionalized international environmental

¹⁰ In the post-UNCED proliferation of environmental institutions, including the Commission on Sustainable Development [hereinafter CSD], the Inter-Agency Committee on Sustainable Development, and the Global Environment Facility. There has also been considerable “greening” of other development-oriented international institutions within the UN system, such as World Health Organization, the World Meteorological Organization, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization [hereinafter UNESCO] as well as the UN’s regional economic commissions (the Economic Commission for Africa, the Economic Commission for Europe, the Economic Commission for Latin America and the Caribbean, the Economic and Social Commission for Asia and the Pacific, and the Economic and Social Commission for Western Asia).

¹¹ See UN Task Force on Environment and Human Settlements, *Report to the Secretary-General*, 15 June 1998, at 29–30 [on file with the author] [hereinafter *Task Force Report*]. See also UN, *Report of the Secretary-General “Environment and human settlements,”* 6 October 1998, Doc. A/53/463, 11–28, at 85.

¹² *Ibid.*

¹³ For details of a series of UN convened global conferences in recent years, see United Nations, *The World Conferences: Developing Priorities for the 21st Century* (1997).

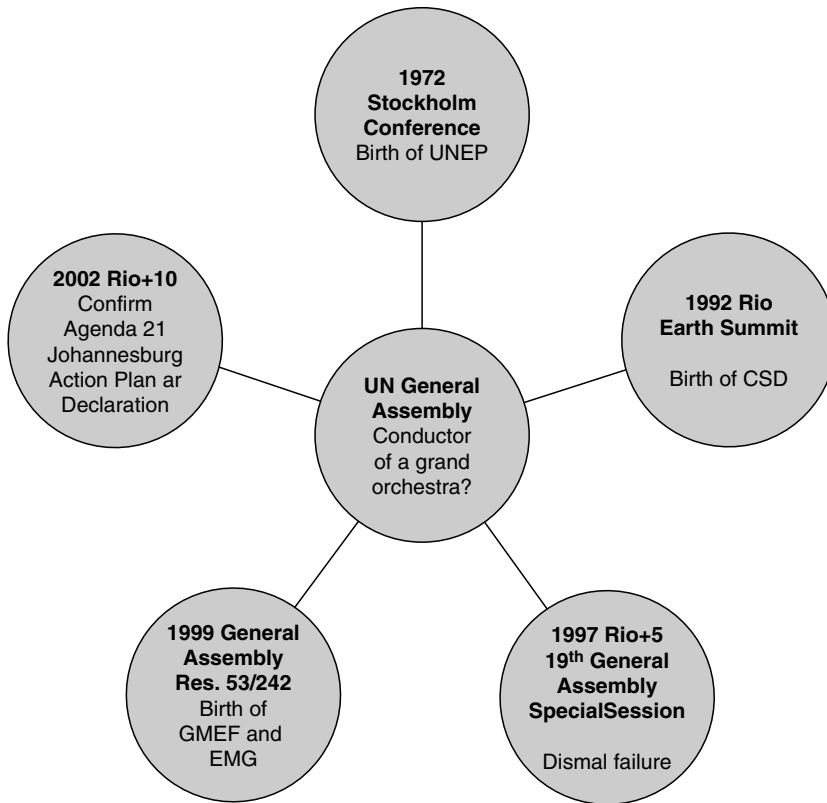


FIG. 1. Global environmental conferences convened by the UN General Assembly

cooperation. At the same time, the multiplicity of institutions has also made the task of ‘coordination’ very difficult. In fact, this lack of coordination has emerged as one of the major challenges of international environmental governance.

III. UNEP UNDER STRESS

This institutional proliferation has taken a particularly heavy toll on the role, effectiveness, and authority of UNEP. The erosion in the status and authority of UNEP is best reflected in the drastic decline in UNEP’s voluntary Environment Fund. Although the core costs of servicing UNEP’s Governing Council and its “small secretariat” are borne by the regular budget of the United Nations, operational program costs and program support were intended to be funded by voluntary contributions to the Environment

Fund (see Table 1).¹⁴ Similarly, the funding base, in terms of the number of countries making contributions, has declined from eighty-eight countries in 1997, to seventy-three countries in 1998, to sixty-six countries in 1999, and then to fifty-six countries in 2000,¹⁵ making it a clear barometer of the state of this premier UN environmental institution. Even in 2001 (as of 31 December 2001), of the pledges given by seventy-three countries (for an amount of US \$43.53 million), only sixty-five countries had paid what they owed (US \$41.64 million).¹⁶ In the biennium 2000–1, the bulk of the contributions to the

TABLE 1. *Decline in UNEP's Environment Fund (US \$millions)*

Biennium	GC approved appropriation	Actual contributions	Amount	Shortfall % (approx.)
1994–1995	166.80	124.00	42.80	26
1996–1997	137.00	88.82	48.18	35
1998–1999	107.50	95.41	12.09	11
2000–2001	119.23	85.60	33.63	28
2002–2003	116.60	95.00 (<i>projected</i>)	21.60	18
2004–2005	130.00 (<i>proposed</i>)	115.00 (<i>projected</i>)		

Sources: UNEP, *Report of the Governing Council*, 5th Special Session, 20–2 May 1998, *Opening Address of the Executive Director*, UN GAOR, 53rd Sess., Supp. 25, Doc. A/53/25, at 40–2; *Policy Statement of the Executive Director to Twentieth Session of the UNEP Governing Council*, 1 February 1999; Report of the Executive Director, Global Ministerial Environment Forum [hereinafter GMEF], 6th Special Session of the Governing Council, Malmö, Doc.UNEP/GCSS.VI/6, 11 April 2000, at Annex I (status of the Environment Fund). Governing Council Decision 21/31, 9 February 2001, 21st Sess. of the UNEP Governing Council, at <<http://www.unep.org/decisions>>; *Report of the Executive Director on the Implementation of the Decisions Adopted at the 21st Session of the GC/GMEF*, 7th Special Session of the GC/GMEF, Cartagena, 14 November 2001, Doc. UNEP/GCVII/4; *Report of the Executive Director*, 22nd Sess. of the Governing Council/GMEF, 26 November 2002, Doc. UNEP/Gc.22/6/Add.1.

¹⁴ In terms of funding (Governing Council-approved appropriation), UNEP has witnessed a drastic decline from US \$166.8 million in 1994–5 to US \$107.5 million in 1998–9. See UNEP, *Report of the Governing Council*, 5th Special Session, 20–2 May 1998, available at <www.unep.org/governingbodies>; *Address of the Executive Director*, UN GAOR, 53rd Sess., Supp. 25, at 40–2, UN Doc. A/53/25; *Policy Statement of the Executive Director to 20th Session of the UNEP Governing Council*, 1 February 1999, available at <www.unep.org/governingbodies>; *Report of the Executive Director, at the Global Ministerial Environment Forum*, 6th Special Session, 31 May 2000, available at <www.unep.org/governingbodies>, at Annex I (status of the Environment Fund); Governing Council Decision 21/31, 21st Sess., 9 February 2001; available at <www.unep.org/gc_21/Documents>; and *Report on the Implementation of the Decisions of the Twenty-First Session of the Governing Council/GMEF*, 6 February 2002, Doc.UNEP/GCSS.VII/INF/8, at 4–7.

¹⁵ Global Ministerial Environment Forum [hereinafter GMEF], *International Environmental Governance: Report of the Executive Director*, 7th Special Session, 27 December 2001, Doc. UNEP/GCSS VII/2, at 26.

¹⁶ *Report on the Implementation of the Decisions of the Twenty-First Session of the Governing Council/Global Ministerial Environment Forum: Status of the Environment Fund and Other Sources of Funding for the United Nations Environment Programme*, 7th Special Session, 6 February 2002, Doc.UNEP/GCSS.VII/INF/8, at 4.

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Environment Fund, which totalled US \$ 85.6 million, came from a group of just fifteen countries, which contributed 92 per cent of the total funds. However, neither the number of countries nor the amount of contributions pledged and paid for in 2001 had reached the levels of 1998 and 1999.

It is difficult to pinpoint exact reasons for the downward trend in the Environment Fund. UNEP has relied heavily over the years on the leadership of its executive directors who set the direction for the organization and lead efforts at resource mobilization. The first UNEP executive director was Maurice Strong of Canada, who served from 1972 to 1975. He was succeeded by Mostafa K. Tolba of Egypt, who held the position for seventeen years, until Elizabeth Dowdeswell of Canada was elected in December 1992. Klaus Toepfer of Germany has held the post since 1997. During Dowdeswell's tenure, the fund seems to have experienced an exceptional decline (paid contributions came down to just US \$88.82 million). In the course of discussions with her, the author was given the impression that a "refusal to toe the line pushed by some states" might have jeopardized pledges to the Environment Fund. The situation improved to some extent (with paid contributions reaching US \$95.41 million in 1998–9) when Toepfer, former German federal environment minister, took over as executive director. However, even during the biennium that followed, the actual amount of paid contributions reached the lowest level ever of US \$85.60 million. Thus, even recent efforts to build the political confidence of states in UNEP did not achieve a quantum leap.

Considering the attitudes of some of the powerful developed countries, it could have been the result of fatigue from the seventeen-year-long Tolba era, a simple disdain for an entity that has been engaged in down-to earth-subjects that are only of interest to the poorest countries, or the prospect of funding ambitious proposals that might address issues such as unsustainable production and consumption patterns as well as profligate lifestyles. Even the high-profile initiatives and diplomatic blitzkrieg of Toepfer's era could only arrest the sharp decline, and the annual amount that is now made available to the fund hovers around US \$43–5 million.

It is possible that some of the developing countries making regular contributions to the Environment Fund found it difficult to sustain the level of previous years as a result of the funding contributions required by a growing number of MEAs and other parallel structures that have emerged in the post-1992 Rio summit period. Small and developing countries, for whom UNEP matters most in terms of support for a series of programs, including scientific assessments and capacity building, might have reduced or stopped contributions to the fund in response to a genuine funding crunch and/or growing cost of participation in intergovernmental meetings taking place throughout the year.

The most worrying outcome of this process is the extent to which the funding base itself has shrunk and UNEP's reliance on an ever-smaller

number of countries has increased. Implicit in this problem is the message that, at least for some of the leading donor countries, UNEP matters less than it did in the pre-Rio period or that these countries are using the funding squeeze to put pressure on UNEP. As the Toepfer task force report emphatically states, the UN office in Nairobi did not get the same attention and resources as other UN offices in New York, Geneva, and Vienna.

IV. UNEP GOES BACK

UNEP's Governing Council has responded to declining resources and eroding authority by seeking to reassert the program's pre-eminence in the field of the environment. Serious efforts began in 1997, when the Governing Council's Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme asserted that the institution

has been and should *continue to be the principal United Nations body in the field of the environment* . . . the role of the United Nations Environment Programme is to be the leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and that *serves as an authoritative advocate for the global environment*.¹⁷

Although, as has been seen, these assertions have not been reflected in states' willingness to commit to UNEP financially, some modest efforts have been made to transform this mandate into an institutional reality.

The Nairobi Declaration was followed by the inauguration of the Toepfer task force by the secretary-general, as mentioned earlier in this article. The task force's report was duly examined by the General Assembly,¹⁸ which, in turn, gave direction for a series of institutional steps both within the UN Secretariat as well as at the intergovernmental level.¹⁹ It brought into being two distinct forums, namely the Environmental Management Group

¹⁷ See the Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme, Governing Council Resolution 19/1, UN GAOR, 52nd Sess., Supp. 25, 7 February 1997, Doc. A/52/25, at annex [emphasis added]. The declaration is reprinted in UNEP, Annual Report 1998, 5 (1998); and 7 Bulletin of Environmental Law 4–5 (June 1997).

¹⁸ The UNGA considered the *Report of the Secretary-General on Environment and Human Settlements* and the report of the UN task force (annexed to it) at its fifty-third session in 1999 (see UNGA Resolution 53/242, 10 August 1999, Doc. A/RES/53/242, available at <www.un.org> and *Task Force Report*, supra note 11). It also took cognizance of the decision of the Governing Council (Decision 20/17 of 5 February 1999, Doc. A/54/25, annex 1, which is available at <www.unep.org/Documents>), and the resolution of the Commission on Human Settlements (Resolution 17/6 of 14 May 1999, which is available at <www.chs.org> as well as the need to strengthen the institutions of the United Nations in the field.

¹⁹ For a comprehensive discussion on this issue, see Bharat H. Desai, *Revitalizing International Environmental Institutions: The UN Task Force Report and Beyond*, 40(3) Indian J. Int'l L. 455–504 (2000).

(EMG),²⁰ for inter-agency coordination within the UN system, and the Global Ministerial Environment Forum (GMEF),²¹ for high-level policy dialogue at the intergovernmental level. The UN General Assembly has provided an overarching guidance to the entire process, coupled with the crucial policy guidance contained in UNGA Resolution 53/242.

Through the EMG,²² the UNEP executive director chairs the coordination meeting of all UN system-wide institutions working in the field of environment. It remains to be seen how much headway the EMG will make. Early reports have not been very encouraging. Furthermore, the UNEP executive director has been periodically chairing the coordination meetings of secretariats of MEAs. The process for crafting many of these MEAs was actually initiated by UNEP, pursuant to its mandate to catalyze the development of international environmental law,²³ and a number of MEA secretariats are administratively housed within UNEP. However, as has been mentioned, MEA secretariats and their conferences of the parties are not accountable to UNEP since their destiny is decided by their own parties and by their constituent treaty rules and procedures.

²⁰ UNGA Resolution 53/242, *supra* note 18, supported the proposal of the secretary-general on the establishment of an environment management group [hereinafter EMG] for the inter-agency coordination in the field of environment and human settlements. It asked the secretary-general to develop the mandate, terms of reference, criteria for membership, working methods, and so on in consultation with the member states and the Administrative Committee on Coordination. Its membership comprises the specialized agencies, programs, and organs of the United Nations system, including the secretariats of multilateral environment agreements [hereinafter MEAs].

²¹ The first meeting of the GMEF was at held in Malmo, Sweden; see *Notification by the Executive Director, Global Ministerial Environment Environment Forum*, 6th Special Session, 9 March 2000, available at <www.unep.org/governingbodies>. The notification stated that the forum was being convened pursuant to Governing Council Decision 20/17 of 5 February 1999, *supra* note 18, and General Assembly Resolution 53/242 of 28 July 1999, *supra* note 18, and in accordance with Rules 5 and 6 of the Rules of Procedure of the Governing Council.

²² The EMG came to be set up, following the recommendation of the Toepfer task force report (*Task Force Report*, *supra* note 11, at para. 22) in order to have better coordination and joint action by replacing the Inter-Agency Environmental Coordination Group. The new institution, headed by the UNEP executive director, comprises at its core all the leading UN entities in the field of environment and human settlements as well as other UN entities, financial institutions, and organizations outside the UN system, including MEA secretariats whenever required. See GA Resolution 53/242, *supra* note 18.

²³ Under the Montevideo Programme I (1981) and II (1993), UNEP has organized and coordinated its environmental law activities through a series of ten-year programs for the development and periodic review of environmental law. For two decades, this program provided UNEP with strategic guidance in the field. Now the UNEP Governing Council has launched, through Decision 21/23 of 9 February 2001, the third phase of the Montevideo Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-First Century. For the text of the Montevideo Programme I and II, see 36 Yearbook of the United Nations 1030 (1982) and 47 Yearbook of the United Nations 820-1 (1993). For the GC Decision 21/23, see <www.unep.org/gc_21/Documents>.

V. THE GMEF AND THE IGM/IEG

It was recognized early on in the discussion on IEG reform that any major change in UNEP's situation, or in IEG more generally, would require high-level ministerial intervention. Thus, the launching of the GMEF represented a bold political initiative to revive the sagging fortunes of UNEP. It was also an attempt to regain policy coherence in the field of environment, which, as has been described earlier in this article, has suffered from the fragmentation of the environmental agenda as well as from the multiplicity of institutions.²⁴

These efforts received further momentum from the initiative taken by the Malmö Ministerial Declaration²⁵ and the twenty-first meeting of the UNEP Governing Council, which decided to establish the IGM. The IGM was given a mandate to make a comprehensive assessment of the existing institutional weaknesses as well as the future needs and options for strengthened international environmental governance. In the course of more than one year of marathon work, the IGM held six meetings, in addition to carrying out consultations with civil society and experts.²⁶ The negotiations were tortuous,

²⁴ Bharat H. Desai, *UNEP: Coming Out of Coma*, 9(20) *Down To Earth* 49 (2001). See also Bharat H. Desai, *Towards WSSD: Future of International Environmental Governance*, ECSP Report 2002 42–43 (8th issue, 2002).

²⁵ The Malmö Ministerial Declaration stresses that “[g]overnments and UNEP have a major role in the preparation for the 2002 review of UNCED at the regional and global levels . . . The 2002 conference should review the requirement for a greatly strengthened institutional structure for international environmental governance based on an assessment of future needs for an institutional architecture that has the capacity to effectively address wide-ranging environmental threats in a globalised world. UNEP's role in this regard should be strengthened and its financial base broadened and made more predictable.” See Malmö Ministerial Declaration, Global Ministerial Environment Forum, 31 May 2000, Doc. UNEP/GCSS.VI/L.3, available at <www.unep.org>.

²⁶ In order to ensure the cost-effectiveness of the work of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance [hereinafter IGM] and to maximize the attendance by ministers, IGM meetings were held on the margins of ministerial meetings already scheduled to take place. The IGM meetings and consultations were held as follows: (1) IGM-1 took place on 18 April 2001, immediately prior to the high-level segment of the ninth session of the CSD; (2) IGM-2 was held on 17 July 2001 in Bonn, Germany, on the margins of the resumed sixth Conference of the Parties to the UN Framework Convention on Climate Change; (3) IGM-3 was held on 9–10 September 2001 in Algiers, Algeria; (4) IGM-4 was held from 29 November to 1 December 2001 in Montreal, Canada, after the conclusion of the Intergovernmental Review Meeting on the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities; (5) IGM-5 took place in New York, United States, on 25 January 2002, prior to the second session of the Preparatory Committee for the WSSD from 28 January to 8 February 2002; and (6) IGM-6 took place on 12 February 2002 in Cartagena, Colombia, immediately prior to the seventh special session of the UNEP Governing Council and the third GMEF on 13–15 February 2002. The IGM also benefited from the Civil Society Consultations, which were held in Nairobi on 22–3 May 2001 as well as the Expert Consultation in Cambridge on 28–9 May 2001. At its seventh special session, the Governing Council/GMEF adopted the report of the IGM. See

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and the IGM saw its final meeting gavelled to a close in Cartagena on 15 February 2002. The main focus in the course of the debate was on the structural aspects of IEG and, in particular, on the role of UNEP and of the MEAs. The IGM was expected to come out with concrete proposals for the GMEF as well as to revitalize international environmental governance, in general, and UNEP, in particular.

An agreed starting point for this effort was, to the extent possible, to avoid the creation of new institutions. In view of the large number of institutions that are active in the field of environment, this aspect of the exercise was significant. As a corollary, the IGM was to address issues of overlapping jurisdiction, waste of resources, and 'turf wars', which have marred the performance of many of the existing institutional structures and, in particular, have reduced UNEP's effectiveness.

The IGM discussions confirmed that in the last three decades since the establishment of UNEP in 1972, the number of IEG structures has grown many fold. This growth has raised fundamental concerns about overlap and conflict in both structure and substance. These governance structures have been produced through the state-centric process and work of the UN system, along with several multilateral regimes that are regarded as "treaty bodies" having their own "autonomous,"²⁷ institutional standing under international law. Cumulatively, they have made the puzzle of IEG more confusing and difficult to grapple with than ever before. The resulting effect has even been dubbed the "organization of the impossible."²⁸

Since many international institutions have entered the environmental scene, the role and authority of UNEP as an entity that is expected to set the global environmental agenda has diminished. As such, there has been in the post-Rio period an intensive debate on the "needs and options" concerning IEG. In fact, the complex and thickening web of IEG affects the fate of not only UNEP but also the future effectiveness of other structures and multilateral processes, multilateral agreements, and consultative mechanisms that address environment and environment-related issues.

Report of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance, 15 February 2002, UNEP GC Decision SS.VII/1, at annex, available at <www.unep.org/GoverningBodies>.

²⁷ Churchill and Ulfstein have described these as "autonomous" since they have their own built-in law-making process, in addition to the fact that the institutional building is *sui generis*. See Churchill and Ulfstein, *supra* note 3, at 623–59.

²⁸ For details of this argument, see Konrad von Moltke, *The Organization of the Impossible*, 1(1) *Global Env'tl. Pol.* 23–8 (2001).

The substantive role of MEAs, as well as their coordination²⁹ and coherence³⁰ remain the second part of the challenge of IEG. Linkage, synergy, and coordination of the work of MEAs was an important focus of the IGM process. On the one hand, these MEAs have set in motion independent international institutional structures to cater to the need for international cooperation on numerous sectoral issues. Among these MEAs, a majority fall within the broad categories of regional seas³¹ (marine pollution); biodiversity, such as the Convention on Wetlands of International Importance Especially as Waterfowl Habitat,³² the Convention for the Protection of the World Cultural and Natural Heritage,³³ the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),³⁴ the Convention on the Conservation of Migratory Species of Wild Animals (CMS),³⁵ and the Convention on Biological Diversity (CBD);³⁶ and chemicals and hazardous wastes-related (International Labour Organization (ILO) conventions on occupational hazards, transboundary movements of hazardous wastes,³⁷

²⁹ In this respect, it needs to be noted that the task of "coordination" is a part of a process of governance on multilateral environmental issues. It seems the task of coordination of various MEAs has become difficult especially due, *inter alia*, to their different mandates, different membership, their dispersal in various parts of the world, and the location of these MEAs within some "host institution," such as UNEP, the IUCN, UNESCO, and so on). The task of coordination is still defying a clear solution, despite UNEP holding coordination meetings of convention secretariats, and it gets further complicated in the absence of an effective central overarching institution. For a detailed assessment of this issue, see generally IGM, *Proposal for a Systematic Approach to Coordination of Multilateral Environmental Agreements*, 4 July 2001, Doc. UNEP/IGM/2/5. See also UNEP, "Improving International Environmental Governance among Multilateral Environmental Agreements: Negotiable Terms for Further Discussion," 4 July 2001, Doc. UNEP/IGM/2/4.

³⁰ See 16(24) Earth Negotiations Bulletin 6 (18 February 2002).

³¹ The regional seas conventions are regarded as the "jewel in the crown" for UNEP and represents a regional approach to environmental problems at work. The regional seas program (RSP) has so far covered fourteen regions with 150 coastal states participating, through a network of nine regional conventions, three action plans as well as twenty-seven protocols. The fourteen regions so far covered under the RSP include the Mediterranean, Kuwait region, west and central Africa, southeast Pacific, south Pacific, Red Sea and Gulf of Aden, wider Caribbean, eastern Africa, Black Sea, east Asian Seas, east-central Pacific, northwest Pacific, south Asian Seas, and southwest Atlantic. Out of these fourteen RSPs, nine have full regional conventions, three have action plans, and two have cooperative programs that are under development. See UNEP website at <www.unep.org/regionalseas>.

³² Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, in force 21 December 1975; see 22 ILM 698 (1982).

³³ Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 11 ILM 1358 (1972).

³⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, in force 1 July 1975, 993 UNTS 243 (1973).

³⁵ Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, in force 1 November 1983, 19 ILM 15 (1980) [hereinafter CMS Convention].

³⁶ Convention on Biological Diversity, 5 June 1992, in force 29 December 1993, 31 ILM 322 (1992).

³⁷ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, in force 24 May 1992, 28 ILM 657 (1989) [hereinafter Basel Convention].

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chemicals in international trade,³⁸ and persistent organic pollutants)³⁹ and atmosphere-related instruments (such as ozone depletion,⁴⁰ and climate change⁴¹).⁴² The MEAs generally bring into being a separate set of institutional structures, including a conference of parties, subsidiary bodies (on implementation, science and technology, so on), a funding mechanism, and a secretariat. Through the creation of these new and autonomous institutions, each new MEA can contribute to the increasing fragmentation of the environmental agenda. Each of these MEAs comes into being due to different factors and the converging interests of various states. Moreover, they also are dispersed in different countries (and continents) and have differing administrative links to the UN system (such as UNEP, the UN Educational, Scientific, and Cultural Organization, the International Maritime Organization, the ILO, the International Atomic Energy Association, and so on) and other entities such as the World Conservation Union (IUCN).

Parallel to the work of the IGM, UNEP's executive director prepared a report⁴³ on IEG. It served as a "living document," which took into account the deliberations of the IGM and sought to identify an emerging consensus. The executive director's report basically sought to synthesize the entire gamut of issues concerning IEG and included a section on the "needs and options" that underscored alternatives for strengthening the institutional architecture as well as achieving coordination, synergy, and linkages among the MEAs. A further UNEP document listed a summary of selected papers⁴⁴ that contained outlines of various proposals put forward by governments, institutions, and eminent experts. The main thrust of these proposals has been that the existing architecture of IEG needs to be strengthened, in order to better address the emerging environmental challenges as well as to better meet the expectations of the member states.

In the specific case of UNEP, as a principal UN environment program, several elements were flagged in the IGM discussion, such as the need to build the political confidence of states in the effectiveness of UNEP's institutional mandate as well as to provide more reliable funding. Resolving these

³⁸ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998, see <www.irptc/pic/incs/dipcom/finale.htm#convention>.

³⁹ Convention on Persistent Organic Pollutants, 2001, not yet in force, see <www.pops.int>.

⁴⁰ Convention for the Protection of the Ozone Layer, 1985, in force 22 September 1988 and the Montreal Protocol on Substances That Deplete the Ozone Layer, 1987, in force 1 January 1989, 26 ILM 1529 and 1550 (1987) [hereinafter Vienna Convention].

⁴¹ United Nations Framework Convention on Climate Change, 1992, 31 ILM 849 (1992) [hereinafter UNFCCC] and the Kyoto Protocol to the UNFCCC, 1997, not yet in force, see <www.unfccc.int>.

⁴² IGM, *Multilateral Environmental Agreements: A Summary*, 30 March 2001, UN Doc. UNEP/IGM/1/INF/1.

⁴³ IGM, *International Environmental Governance: Report of the Executive Director*, 16 November 2001, UN Doc. UNEP/IGM/4/3.

⁴⁴ IGM, *Summary of Selected Papers*, 5 April 2001, UN Doc. UNEP/IGM/1/INF/2.

issues will ultimately hold the key to the emergence of a concrete blueprint to strengthen the existing UNEP. In this context, the various options and proposals put forward were seen to be “building blocks”⁴⁵ for the IEG process. These options included providing a new mandate for the UN Trusteeship Council on environment protection and global commons; launching a new world environment organization; enhancing the status of UNEP from a UN program to a UN “specialized agency,” or continuing the existing UNEP, but with more secure and predictable funding.⁴⁶

The IGM discussions fed into the three sessions of the GMEF, which began in May 2000. The GMEF, in turn, sought to set an agenda for WSSD, which was scheduled to be held in Johannesburg in 2002. In fact, the GMEF explicitly stated, through the Malmö Ministerial Declaration that

[t]he 2002 [WSSD] conference should review requirements for a greatly strengthened institutional structure of IEG based on an assessment of future needs for an institutional architecture that has the capacity to effectively address wide-ranging environmental threats in a globalizing world. UNEP’s role in this regard should be strengthened and its financial base broadened and made more predictable.⁴⁷

By the final session of the IGM in Cartagena in early 2002, the positions of the main negotiating blocs were clear, and many of the ambitions that had launched the IEG process had been fully explored. The Group of 77 (G-77) and China supported “strengthening UNEP within its current mandate” and emphasized that the “proposals on MEAs must respect the autonomy of the COPs.”⁴⁸ This support can be explained, in part, by the developing countries’ long-standing concern that the strengthening of environmental institutions will undermine a development-focused agenda. The idea of enhancing UNEP’s status into a specialized agency was not favoured by either the G-77 and China, the United States, or Russia.⁴⁹ The European Community had earlier called for strengthening the IEG based on the existing structures, in particular, UNEP, but had indicated the need to adapt these structures to the new requirements leading, ultimately, to a world environment organization.⁵⁰ The idea of creating a new world environment organization did not, however, find favour with delegations, particularly not with the United States.

The outcomes of the IGM process can be distilled as follows:

- The GMEF has been established as a high-level deliberative forum of environmental ministers with universal membership, raised ministerial awareness, and support for the need to expand participation in UNEP’s

⁴⁵ IGM, *Report of the Chair*, 27 December 2001, UN Doc. UNEP/IGM/4/6, at 3.

⁴⁶ See Desai, *supra* note 19, at 28–9, para. 136–7.

⁴⁷ See Malmö Ministerial Declaration, *supra* note 25, at para. 24.

⁴⁸ See Earth Negotiations Bulletin, *supra* note 30, at 5.

⁴⁹ See *ibid.* ⁵⁰ See *ibid.*, at 6.

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governance structures, including the possibility of expanding the Governing Council membership beyond its current fifty-eight members. For UNEP, which is a mere “program” and subsidiary organ of the General Assembly, universal membership would be a significant advance.

- UNEP’s executive director has begun coordinating meetings of the secretariats of MEAs. The effectiveness of this role generally remains limited to the secretariats for which UNEP acts as a “host.” Currently, the executive director has an important say in the functioning of five secretariats (CITES, the CMS, Convention for the Protection of the Ozone Layer,⁵¹ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,⁵² and the CBD). The coordinating role is, however, limited even with respect to these secretariats as they are primarily responsible to their own conferences of the parties.
- UNEP’s financial position has been a matter of great debate, especially following the sharp decline it has witnessed in the past few years. During the IGM process, controversy surrounded how best to make funding of UNEP adequate, stable, and predictable, which will be essential to avoid large gaps between pledges made and actual contributions received from the states. Therefore, the executive director has now mooted the idea of having an “indicative” scale of assessment by the states. This move will make states accountable for providing the funds committed by them and would impart certainty to the budget of UNEP.
- In view of the proliferation of MEAs, it is essential to have proper coordination and coherence in the work of these MEAs. Various ideas that have been put forward include the co-location of the secretariats to take advantage of cost-effective common administrative facilities and other support services (following the examples set by the co-location of secretariats of the UN Framework Convention on Climate Change,⁵³ the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,⁵⁴ and the Convention on the Conservation of Migratory Species of Wild Animals⁵⁵ at the UN premises in Bonn or the co-location of the Secretariats to CITES and the Basel Convention at the Geneva Executive Centre in Geneva). Proposals have also been mooted in regard to the “clustering” of convention secretariats that have close interests or are in

⁵¹ Vienna Convention, *supra* note 40.

⁵² Basel Convention, *supra* note 37.

⁵³ UNFCCC, *supra* note 41.

⁵⁴ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 33 ILM 1328 (1994).

⁵⁵ CMS Convention, *supra* note 35.

the same field (such as biodiversity-related conventions, atmosphere conventions, or chemicals and hazardous wastes-related conventions). An important element that has emerged from the IGM process is the recognized need to enhance the synergies and linkages between MEAs with comparable areas of focus or of a regional character keeping in view their respective mandates. UNEP Governing Council has asked the executive director to continue efforts to enhance policy coherence and synergy among international legal instruments related to environment and sustainable development at both the inter-agency and inter-governmental levels.⁵⁶

- The issue of coordination in the UN system is as old as the UN itself. With the fragmentation of the environmental agenda and the proliferations of institutions working in the field, it has been felt that there is a need to have an effective mechanism for the purpose of coordination. General Assembly Resolution 53/242 brought into being the EMG. The EMG is chaired by the UNEP executive director and follows an issue-management approach. This approach facilitates the establishment of issue-management groups in order to address specific issues within a fixed time frame. It is now being felt that the EMG, among others, needs to have senior-level participation by member institutions, transparency in its work, and adequate funding.

In a way, the recommendations of the IGM process set the tone for realizing the goal of a greatly strengthened environmental institutional structure in due course. It seems that both at the intergovernmental level generally, as well as within UNEP in particular, a step-by-step approach is being preferred to radical changes. In view of the cautious approach of most of the states as well as their preference for strengthening existing institutions, a clearer picture may emerge in the next few years. In judging the outcome, one will need to look at the content rather than at the form that finally emerges.

VI. THE IEG AT THE WSSD AND THE UN GENERAL ASSEMBLY

The deliberations and recommendations of the IGM process provided a basis for discussion as well as some concrete proposals during the third (25 March to 2 April in New York) and fourth (27 May to 7 June in Bali) meetings of the Commission on Sustainable Development (CSD), which served as the preparatory body for the WSSD.⁵⁷ Among the issues that came to the fore at the Johannesburg summit, two stand apart as being significant for their implica-

⁵⁶ UNEP GC Decision 21/20, 9 February 2001; available at <www.unep.org/gc_21/Documents>.

⁵⁷ See 22(19) Earth Negotiations Bulletin (11 February 2002). See also <www.johannesburgsummit.org/html/prep_process>.

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tions for the future of UNEP as well as being a precedent within the UN system. They include a proposal for the universal membership of the Governing Council of UNEP as well as a means for providing stable and predictable funding for the Environment Fund.

In this respect, the Johannesburg Plan of Implementation has called upon the states to

[f]ully implement the outcomes of the decision on international environmental governance adopted by the Governing Council of the United Nations Environment Programme at its seventh special session and invite the General Assembly at its fifty-seventh session to consider the important but complex issue of establishing universal membership for the Governing Council/Global Ministerial Environment Forum.⁵⁸

As a follow-up to the Plan of Implementation, the General Assembly adopted Resolution 57/251,⁵⁹ which invites governments to submit written comments on the universal membership of the UNEP Governing Council. Several of the issues surrounding the IEG debate were considered and discussed at the twenty-second session of the UNEP Governing Council, which coincided with the fourth meeting of the GMEF, which was held in February 2003.⁶⁰ The Governing Council has invited the governments to submit their written comments concerning both the subject of universal membership of the Governing Council, especially its legal, political, institutional, financial, and system-wide implications, as well as on the pilot phase for a voluntary indicative scale of assessment for the Environment Fund.⁶¹

In the post-Johannesburg period, states are facing a crucial litmus test of their sincerity to grapple effectively with the problems afflicting IEG. The test of sincerity was also pointed out by Achim Steiner, the director-general of the IUCN, in his presentation at the IGM's final session in Cartagena:

The world has become weary and cynical about grand policy statements and new institutions being touted as the answer to our environmental problems. The world

⁵⁸ WSSD, Plan of Implementation, available at <<http://www.johannesburgsummit.org>>, at chapter XI (on institutional framework for sustainable development), para. 140(d)

⁵⁹ General Assembly Resolution 57/251 has required comments from the governments to be sent by 31 October 2003. The executive director of UNEP has been asked to submit a report on the matter for the consideration of the eighth special session of the Governing Council/GMEF in 2004. See UNGA Resolution 57/251, 20 December 2002, Doc. A/RES/57/251, available at <www.un.org>.

⁶⁰ For a detailed discussion on these issues, see *Report of the Executive Director on "Implementing Outcome of the World Summit on Sustainable Development: International Environmental Governance,"* 22nd Sess., 16 December 2002, Doc. UNEP/GC.22/4.

⁶¹ See UNEP Governing Council Decision 22/17, 7 February 2003, available at <www.unep.org/GoverningBodies/GC22/Document/GC22_GMEF_decisions.doc>. See also *Summary of the 22nd Session of the UNEP Governing Council and the Fourth Global Ministerial Environment Forum 3-7 February 2003*, 16(30) Earth Negotiations Bulletin, 1-14 at 9 (10 February 2003). See also <www.unep.org/governingbodies>.

today is calling out for delivering on commitments and this has been clearly acknowledged through the IEG process.⁶²

This observation, to some extent, underscores the problems that lie at the base of IEG discourse. It is the states that possess the key to deliver on this matter. The IEG process has dealt with a large number of issues during its work spanning six meetings and numerous consultations. However, the states will be facing a test of their sincerity in regard to the broad outline proposed in the report of the IGM. The deliberations at the Johannesburg summit, true to the nature of UN global conferences, did not provide any clear mandate for this purpose. It appears that it is the UN General Assembly, as demonstrated in Resolution 57/251, that will finally need to provide concrete political guidance to solve the jigsaw puzzle of IEG.

UNEP has been the focus of the IEG process. If the main policy options that emerged from the process, including universal membership and a secured funding base, are achieved, the cumulative effect will be profound for the future of UNEP. Providing universal membership, as compared to mere “participation,” will bring about more legitimacy as well as more authority to the work of the Governing Council of UNEP. It may also contribute to widening the funding base. Since the Environment Fund is voluntary, states that are currently not among the fifty-eight elected members of the Governing Council may not feel the same obligation to commit funding.

UN General Assembly Resolution 53/242 did not decide to establish a “new organ.”⁶³ However, in institutional terms, a UNEP with a Governing Council of universal membership could formally emerge as a truly global environmental forum that reflects the wishes and expectations of all the members of the United Nations. This reform, coupled with adequate, stable, and predictable funding, could be a prelude to elevating UNEP to the level of a UN “specialized agency.” It remains to be seen if the states take such a course of action in the coming years.

Similarly, the challenge for attaining synergy, linkages, and coordination of MEAs will be a long process and will necessitate accommodating the convention secretariats in order to prevent turf wars, as each MEA seeks to guard its sectoral interests. MEA host institutions will also need to minimize control over “administering” secretariats and will need to work out clear relationship agreements to avoid potential conflicts. Similarly, if co-location is to be achieved, some current host countries will have to forgo benefits of

⁶² Achim Steiner, *Intervention to the Global Ministerial Forum, Cartagena, Columbia, 12–15 February 2002*, 1–5 at 3 [paper on file with the author].

⁶³ General Assembly Resolution 53/242 in fact stated that an arrangement was needed at a “ministerial level” to provide a forum “in which participants can gather to review important and emerging policy issues in the field of environment . . . and that the Governing Council of UNEP should constitute such a forum.” See UNEP, *Legal Status of the Global Ministerial Environment Forum*, 1 December 2001, Doc.UNEP/IGM/4/INF/5/Rev.1, at 2.

hosting a major multilateral institution. Such accommodations will demonstrate that states are indeed willing to address the challenges of some of the global environmental problems widely regarded as “common concerns of humankind.”

VII. CONCLUSION

In the course of the final deliberations of the IGM in Cartagena, several states, including the United States, Russia, as well as the G-77 and China, expressed reservations about the proposals for a world environment organization and even about the conversion of UNEP into a specialized agency. However, if states sincerely wish to realize the ambitious objectives expressed in the 1997 Nairobi Declaration as well as in the 2000 Malmö Ministerial Declaration, they will need to move forward in an *incremental* manner. Some of the steps that have already been taken, including the GMEF, will serve as the “building blocks” of a revitalized IEG. Moreover, when the Governing Council of UNEP meets at the GMEF—a deliberative global environmental forum with universal participation—and UNEP is provided with adequate, stable, and predictable funding, UNEP will gain far greater institutional legitimacy and authority. UNEP will be just one step away from elevation into a specialized agency, which will directly address the crisis of perception as well as legitimacy that UNEP currently faces from UN member states, specialized agencies, and the secretariats of MEAs and non-governmental organizations.

In view of the nature of intergovernmental deliberations so far on IEG, no dramatic results were expected to emerge at the WSSD. The indications of the views of the states, which were confirmed by the twenty-second Governing Council of UNEP, show that at last there seems to be a felt need to confront the core issues in the IEG debate. It seems that the key goal in the immediate future will be to *upgrade* environment protection within the UN system through UNEP and to strengthen its location in Nairobi, which hosts the only major UN institution in the developing world. The process will be evolutionary. Similarly, considering the manner in which MEAs have progressed as sectoral legal restraints upon the behaviour of states, it would be difficult either to dismantle them or to bring them under the control of a single entity. It would be prudent to find better ways to coordinate the work of different MEAs, preferably through the “clustering” approach, while respecting their autonomous legal status. As such, the future direction of IEG will be dictated more by the political will of the states—how far they wish to go in the process, how much they want to translate their international environmental commitments into action, and how willing they are to allow transparency into the functioning of different institutional structures—in order to address the global environmental challenge.

