Improving the Organization of Global Environmental Governance

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The Nairobi-Helsinki Outcome posited five options for broader institutional reforms, two of which are (1) enhancing the United Nations (UN) Environment Programme (UNEP) and (2) establishing a specialized agency such as a World Environment Organization.[1] At the UNEP Governing Council meeting in February 2011, the Council invited the Preparatory Committee for the UN Conference on Sustainable Development at its second session to initiate a full analysis of the financial, structural and legal implications and comparative advantage of the five options.[2]

The idea for an international entity with overall responsibility for environmental governance goes back many decades. Yet no progress over the past 20 years has been made in establishing such a new entity. Of course, in the intervening years, UNEP has enhanced its operations and is now joined by a Global Ministerial Environmental Forum (GMEF).

The need for improvements in global environmental governance seems beyond question. As the Co-Chairs of the Consultative Group of Ministers or High-level representatives on International Environmental Governance have noted, "The world has continued to witness rapid environmental degradation, deforestation and deterioration in conservation capabilities."[3] Moreover, progress in meeting some of most pressing environmental challenges (e.g., climate change) has slowed. Current environmental governance appears overly fragmented resulting in inefficiencies.

The purpose of this paper is to analyze some of the leading proposals for improvements in environmental governance. The paper contains three parts: Part 1 will examine the proposal for a new global agency for the environment. Part 2 will examine the proposal for enhancing UNEP. Part 3 will offer a specific proposal for an institutional recommendation by the Rio + 20 Conference.

1. World Environmental Organization

In October 2010, the Executive Director of UNEP offered an indicative formulation of the proposal for a World Environment Organization as a specialized UN agency.[4] The UN World

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[1]Nairobi-Helsinki Outcome, 23 November 2010, para. 11A.

[2]UNEP, International Environmental Governance, Decision 26/1, 24 February 2011, para. 5.
[3]UNEP/CGIEG.2/2/2, 27 October 2010, at 11.

[4]Annotated table of broader IEG reform in a standardised format, Information note from the Executive Director of UNEP, UNEP/CGIEG.2/2/3, 22 October 2010, at 4–5

Environment Organization (UNWEO) would be "the world authority for the environment" with a "mandate … to direct and coordinate environmental issues within the United Nations system." Its General Council would "have legal authority over MEAs [multilateral environmental agreements] and would provide overall direction and guidance for COPs." The proposal is explicitly based, in part, on the model of the World Trade Organization (WTO) except that the UNWEO's General Council would have a regionally balanced executive body of 40-50 members which would prepare decisions for the General Council. The WTO has no such body.

The UNWEO[5] is one popular reform proposal; another is to place the new organization outside of the UN system.[6] Such an extra-UN World Environment Organization (WEO) could be justified for several reasons: First, as noted above, the mandate of the UNWEO would be limited to environmental issues *within* the U.N. system. Second, the UN suffers many administrative infirmities such a policy of age discrimination against employees and a lack of universality in that Taiwan is not allowed to be a member or a permanent observer. Third, a new body could be located in a geographically advantageous location, rather than being expected to be headquartered in Nairobi.

Whether set up as a specialized UN agency or a functional non-UN agency, a new environmental body would have a hard time getting accepted as a "world authority" and a hard time asserting "legal authority" over the MEAs. The governments that negotiated MEAs intentionally sought to establish independence from UNEP, and it is not clear that the epistemic community surrounding each MEA would be pleased with rationalization in the form of folding it into a new organization. Moreover, the innovativeness that has characterized the autonomous institutional arrangements in MEAs could be doused by an attempted takeover by a new organization.

The main problem in environmental management today is not that MEAs are unchaperoned. Obviously, they receive a great deal of ongoing oversight by key governmental participants. Rather, the main problems are weaknesses in comparative data collection, benchmarking environmental regulatory implementation, establishing norms for transnational problems, and developing and diffusing new technologies. In my view, the UNEP Executive Director's proposal is too focused on strengthening a central agency vis-à-vis the MEAs rather than on upgrading core environmental functions that are best carried out internationally.[7]

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[5]The UN World Environment Organization is sometimes referred to as the UN Environment Organization (UNEO). UNEP, *Legal Questions and Answers on IEG Reforms: WEO and UNEO?*, undated. For a good analysis of the UNEO option, see Nils Simon, International Environmental Governance for the 21st Century, February 2011, at 29–30.

[6]In a study written a decade ago, I argued that locating a WEO outside the UN was an unrealistic option. Steve Charnovitz, *A World Environment Organization*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 323, 343 (2002).

[7]In a recent excellent paper, Professor Fauchald has discussed in detail many of the legal issues involved in giving the WEO jurisdiction over the MEAs. Ole Kristian Fauchald, *International Environmental Governance, A Legal Analysis of Selected Options*, Fridtjof Nansen Institute, November 2010, at 11–15, 45–50.

As noted above, the institutional provisions of the UNWEO proposal are inspired to some extent by the model of the WTO. Certainly, there are positive aspects of the WTO model that could be replicated in a UNWEO.[8] For example, the WTO's single undertaking tying together disparate agreements is suggested as a model for unifying the MEAs. Another salient feature for mimesis is the capacity of the WTO to carry out legislative, executive, and judicial functions, and to respect, to some extent, a balance of power among these functions of governance.[9] If the UNWEO were to borrow from the judicial functions of the WTO, that would be a very worthwhile development. Yet few of the leading discussions of environmental governance reform make that connection.[10]

Moreover, the WTO analogy does not look as promising as it did a decade ago. Although the WTO judicial branch is robust, the legislative branch of the WTO has failed to consummate the Doha Trade Round. To be sure, the WTO itself is not at fault here; the fault lies with protectionist ambitions that animate key WTO governments like the United States. Still, if the WTO were not mired with a decisionmaking rule based on consensus, it might be possible for a coalition of like-minded countries to move forward with a new trade liberalization package.

Any new UN body needs to have organic law that would provide space for new plurilateral agreements that do not require consensus of all members. Such space does not fully exist in the WTO and is also lacking in the climate regime. To be sure, the possibility does exist within the UN to move forward on new rulemaking without consensus. For example, the Constitutions of both the International Labour Organization (ILO) and the World Health Organization provide for two-thirds votes for adoption of new norms. But there is no provision for 20 leading countries to adopt new norms *inter se* within those organizations.

The proposal for a UNWEO is also naïve in suggesting that the new organization should provide "a single authoritative and responsible voice for environmental sustainability."[11] There are several problems with this formulation: First, there are too many difficult issues on the environment to boil them down to a single voice. Rather, we need a medley of voices in the system. Second, there are practical limits on an international organization's power of voice given the differences of opinion among members. For example, the WTO itself cannot be a

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[8]There is considerable literature on what can be drawn from the WTO model. For example, see Daniel C. Esty, GREENING THE GATT (Institute for International Economics, 1994); Steve Charnovitz, *Toward a World Environment Organization: Reflections upon a Vital Debate*, *in* Frank Biermann & Steffen Bauer eds., A WORLD ENVIRONMENT ORGANIZATION (Ashgate, 2005), at 87–115.

[9]Steve Charnovitz, *A Post-Montesquieu Analysis of the WTO*, in Thomas Cottier & Manfred Elsig, GOVERNING THE WORLD TRADE ORGANIZATION (Cambridge University Press, 2011), at 265-88.

[10]One excellent article that does is Joost Pauwelyn, *Judicial mechanisms: Is there a need for a World Environment Court?, in* W. Bradnee Chambers & Jessica F. Green (eds), REFORMING INTERNATIONAL ENVIRONMENTAL GOVERNANCE (UNU University Press, 2005), at 150–77.

[11]UNEP/CGIEG.2/2/2, 27 October 2010, at 11.

voice for free trade or sustainable trade. Third, if one wants to enhance the voice of an international organization, this should be done by expanding participation and participants. As many commentators have suggested with respect to environmental governance, the ILO model of full participation by NGOs from employers and workers could be replicated in a UNWEO that provided for representation on the Governing Council of business and environmental organizations.[12] Indeed, one could go further by also building in participatory opportunities for subnational governments, parliamentarians, and scientists. A UNWEO relying merely on government diplomatic and bureaucratic representatives would commit the sin of statism in the field of international law where national boundaries are least relevant.

Although I would favor establishing a UNWEO over the current system, the challenges of setting up a new international organization have led some analysts to propose less formal reorganization. The leading proposal comes from Daniel C. Esty and Maria H. Ivanova who have proposed a function-driven Global Environmental Mechanism (GEM).[13] As they explain, the GEM would not add a new layer of international bureaucracy, but rather would shift to a modern, virtual organizational structure.

2. Enhancing UNEP

The leading proposal for enhancing UNEP is based on a serious misconception. That is, that UNEP's main problem is that its Governing Council does not have universal membership. When UNEP was chartered in 1972, it was given a Governing Council of 58 regionally elected Members. At this time, this was a progressive initiative that gave UNEP a larger than normal governing body. (The ILO Governing Body includes 28 governments.) Although Africa seems overrepresented at 28 percent of the UNEP's Governing Council seats, the lack of universal membership in the Governing Council has not been a handicap because under UNEP Rule 67, all States may participate in Governing Council in debate including the submission of proposals. States not a member of the Governing Council cannot vote, but close votes are unusual in UNEP decisionmaking.

Despite this reality, the Co-Chairs of the Consultative Group are offering the argument that universal membership on UNEP's governing body would give it greater "authority and credibility," "political weight," and "more legitimacy and impact than if the advice were coming from a body of limited membership."[14]

In my view, this thesis cannot be taken seriously. UNEP's credibility and legitimacy is derived from its effectiveness. Lack of universal membership has not contributed significantly to UNEP's poor performance and providing universal membership for its Governing Body seems

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[12]This suggestion was most famously articulated by Sir Geoffrey Palmer in his article *New Ways to Make Environmental Law*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 259, 281 (1992). *See also* Kenneth W. Abbott, "Civil Society and Global Environmental Governance: Institutional Innovations and Issues," June 2011, at 4 (calling for direct civil society participation).

[13]Daniel C. Esty & Maria H. Ivanova, *Revitalizing Global Environmental Governance: A Function-Driven Approach*, in GLOBAL ENVIRONMENTAL GOVERNANCE. OPTIONS & OPPORTUNITIES (Yale Center for Environmental Law & Policy, 2002), at 181–204.

[14]UNEP/CGIEG.2/2/2, 27 October 2010, at 12.

unlikely to rapidly improve UNEP's effectiveness. Rather, the opposite effect may be more likely as there will be a trade-off between size of the governing body and its ability to make decisions. Moreover, if there are benefits to be gained from greater governmental participation in UNEP, these have probably already been reaped from the regular parallel meetings of the Council and the GMEF.

All that said, there are certainly improvements in the functioning of UNEP that could be made. For example, Maria Ivanova has recommended that UNEP establish an Executive Board of no more than 20 members comprising representatives of both member states and civil society.[15]

3. International Green Economy Organization

The upcoming June 2012 UN Conference on Sustainable Development has been given the two themes of (a) a green economy in the context of sustainable development and poverty eradication; and (b) the institutional framework for sustainable development. The idea of the green economy was endorsed at the Group of 20 Meeting in London in 2009 which called for accelerating the "transition to a green economy."[16] At the recent G8 Summit, the Declaration endorsed cooperation to promote "green growth" and "green jobs."[17]

The logical linkage between themes a and b are to establish a new institution to promote the green economy.[18] This paper endorses creating such an institution and calls it the "IGEO", the International Green Economy Organization. The 2012 Conference could write the charter for the IGEO as a new intergovernmental organization with a mandate to define and promote policies that green the world economy and to identify policies that detract from greenness (e.g., wasteful and counterproductive government subsidies).

In calling for a new IGEO, this paper should respond to the potential question of why not assign that function to UNEP. Although UNEP has a green economy program, UNEP is not the right institution to promote the green economy. As Peter M. Haas has explained, "UNEP is best positioned to work on environmental problems, rather than the broad scope of Sustainable Development and the green economy,"[19]

The IGEO should look for opportunities to review and evaluate the work of other international organizations such as the WTO, the ILO, the World Intellectual Property

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[15]Maria Ivanova, Global Governance in the 21st Century: Rethinking the Environmental Pillar, undated, at 17.

[16]G20, The Global Plan for Recovery and Reform, 2 April 2009, para. 6.

[17]Deauville G8 Declaration, Renewed Commitment for Freedom and Democracy, 26-27 May 2011, paras. 31–36.

[18]*See* Nils Simon, "Reforming International Environmental Governance, One Year Ahead of Rio 2012," June 2011, at 4 ("When a transformation towards a global green economy is considered both a necessary and viable goal, we need to think about a form the UN needs to take to get it done. When the function is huge, the form needs to be bold….").

[19]Peter M. Haas, "Transforming the World Economy at Rio Plus 20," September 2011, at 2.

Organization, the World Bank, and the UN Security Council, and also of regional organizations such as the North American Commission on Environmental Cooperation and the ASEAN Working Group on Nature Conservation and Biodiversity. The central question for the IGEO should be: Are the policies and programs being pursued conductive to achieving a green economy?[20] The IGEO should also conduct reviews of the initiatives of national policies in the world's Major Economies (the 17 biggest).

The IGEO should be headquartered in Beijing for at least two reasons. First, China lacks its share of public international organizations. Second, China is doing at least as much to promote a green national economy as any country.[21]

Institutionally, the IGEO should be cutting-edge. As a symbol of its greenness, the organic act creating the IGEO should set a term limit for they organization, say 15 years, after which it would be recycled. The members of the IGEO should be governments, but the organization should also provide for active participation by business, NGOs, scientists, parliamentarians, and others. In addition, the IGEO should have a strong in-house economic research and policy institute to improve data and guide its work. As the WTO is now doing with its "Made in the World" initiative which has pointed out the biases in statistics measuring trade content, the IGEO should seek better measurements of economic growth that adjust for the internalization of environmental costs.

The IGEO would fill a gap in current governance. No agency at present has the sole mandate to promote a greener world economy. To be sure, many programs in existing international organizations are closely aligned-- for example, the "Green Growth" initiatives in the OECD and the "Green Jobs" initiatives in the ILO. At the World Bank, a senior official has recently called for the creation of a "Global Green Growth Platform." And last week, the World Bank sponsored a conference in Korea on "Green Growth and Transport." All of these initiatives are useful and could be enhanced by using the Rio + 20 conference next year to globalize and strengthen the world's vision as to what a "green economy" is the best path toward achieving it.

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[20]For example, for the WTO, an important question is whether completing the Doha Round would move the world closer or further away from a green economy. For a recent study looking at the linkages between trade openness and national environmental performance, see Yale Center for Environmental Law & Policy, *Exploring Trade & the Environment, An Empirical Examination of Trade Openness and National Environmental Performance*, May 2011.

[21]See *Alex Morales, China "Winning the Green Economy Race," UN Climate Chief Says*, Bloomberg, 27 January 2011; *China Agrees to Halt Wind Power Subsidies Rather Than Fight U.S. in WTO,* World Trade Online, 8 June 2011.