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REALISM, UTOPIA AND THE FUTURE OF
INTERNATIONAL ENVIRONMENTAL LAW

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Abstract

In spite of its impressive development at the level of treaty law and soft law, international environmental law remains a weak and under-developed body of law. This is due especially to the persistent institutional “deficit” and lack of compulsory dispute settlement mechanisms that hamper effective monitoring and implementation of environmental standards. To overcome these limits, in a perspective that avoids wishful thinking, such as the project of an “international court for the environment”, and the hard realism of an unfettered sovereignty over the natural resources, this paper argues for a “realistic utopia” that recoups the original idea of the natural environment as a “common good”. Congruent with this idea is the re-discovery of the category of erga omnes obligations to be administered in the interest of the international community as a whole. At the normative level, this entails a re-conceptualisation of “sovereignty” in terms of responsible exercise of state powers over natural resources located in the national territory and over activities capable of impacting on the global environment, so as to make such exercise responsive and functional to the achievement of the goal of conserving the quality of the environment that sustain our life. At the institutional level this approach invites two responses: rejection of the need for reform of global institutions and reliance instead on market mechanisms of self-regulation and transnational private enforcement; or a search for reform of the institutional system of environmental governance in view of creating effective multilateral institutions that can mirror what has been done in other areas of international law, such as trade, investments and human rights. This paper argues that the two approaches are not mutually exclusive. They should be complementary because the first one can hardly work without the other.

Keywords

International law – environmental law – sovereignty – common goods

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Realism, Utopia and the Future of International Environmental Law

1. Introduction

If one looks at the contemporary scene of international environmental law, three basic features stand out as elements capable of influencing future developments of this law, both as a distinct branch of international law and as a legal discipline: (i) the meaning and role of 'sustainable development', a concept that for more than twenty years has been at the heart of diplomatic and judicial efforts at reconciling environmental protection with the demands of economic growth; (ii) the increasing polarization of the academic debate and judicial practice around the dilemma of environmental protection versus scientific and technological advancement; and (iii) the continuous search for an institutional framework to ensure environmental governance in a world of increasing economic and social interdependence. The most serious weakness of international environmental law is the lack or deficiency in enforcement mechanisms. Other branches of international law have proved helpful in some instances. The World Trade Organization (WTO) dispute-settlement Panels and especially the Appellate Body have occasionally reconciled their responsibility to guarantee the observance of the specific obligations arising for the member states under the WTO agreements with the need to give proper consideration to the legitimate goals pursued by member states in protecting their local environment or even the general environment beyond the limits of their national jurisdiction. Other times, however, the WTO Dispute Settlement Body has been impervious to claims of environmental sustainability and has mechanically applied WTO rules even in the face of legitimate environmental concerns raised by the rigid implementation of free trade rules. In the field of investment law progressive incorporation of environmental issues within the sphere of investment arbitration has taken place in the past ten years. Human rights courts and monitoring bodies have increasingly paid attentions to the environmental dimension of human rights, when environmental degradation threatens health, private and family life, and even the very right to life, The International Court of Justice (ICJ) has had the opportunity to adjudicate an increasing number of cases with a distinct environmental law dimension. However, international environmental law, in spite of its impressive development at the level of treaty law and notwithstanding the abundance of soft law instruments, declarations, and 'understandings', remains an immature and underdeveloped body of law. What are the prospects for further developments? At the normative level, a 'realistic utopia' entails the recouping of the original promise of the environmental movement, that is the conceptualization and the legal treatment of the natural environment as a 'public good' to be administered in the interest of all and of the generations to come. At the institutional level two approaches are possible: (i) consciously to shun the need for institutional reform as too costly and ineffective and rely on market mechanisms of self-regulation and transnational private enforcement and (ii) a reform of the institutional system of environmental governance by creating effective multilateral institutions that can mirror what has been done in the international economic law and human rights. The two approaches are not mutually exclusive. They should be complementary because the first one can hardly work without the other.

2. The Method

Even imaginative thinking about the future of international environmental law requires a method. The method I have chosen in this paper combines two of the fundamental elements of a legal order: stability and dynamic evolution. Stability requires that we avoid the extremes of virtuous models of environmental protection based on pure rationality and on abstract ethical considerations divorced from the hard realities of international power and economics. Dynamic evolution entails consideration of the capacity of the international legal order of self-renewal when faced with new challenges, as in the case of environmental degradation. Such renewal or progressive reform seldom occurs by way of a radical change in the fundamentals of the legal order, which, in the case of international law, are its persistent state-centred nature and the decisive role of sovereignty. While real and resilient, these fundamental features of international law are progressively modified by the increasing role of non state actors, including NGOs, individuals, business corporations and civil society at large, which in multiple ways contribute to norm creation and adjudication in the field of environmental law. In this complex reality and in the consequent dynamics between stability and progressive reform we can understand the negative attitude of those who after more than 40 years of environmental law making question the identity of environmental law as a legal discipline and its maturity as a distinct branch of the law.¹ This scepticism seems justified in light of the glaring failures to prevent the continuous degradation of the natural environment and inability to reach consensus on what system of environmental governance should be set up to tackle global environmental problems such as climate change. On the positive side, however, the language of environmental law is increasingly penetrating into every aspect of our economic, social, and cultural life. Environmental considerations are becoming more and more relevant in the process of international adjudication in areas of international economic law and human rights². Innovative methods of law making have emerged and new forms of enforcements, such as non-compliance procedures, are being experimented. Paradoxically, the growing awareness of the importance of environmental preservation for our life and welfare seems to go hand in hand with the perception of a decline and failure of environmental law.

To grasp this complex reality and at the same time to steer a path for future progress, the best approach is to begin with a retrospective analysis of the achievements and shortcomings of international environmental law and then try prospectively to set out, hopefully as a 'realistic utopia', a path for reform and innovation. This approach fits also this writer's conviction that any imaginative leap forward can only come from a full comprehension of the past, from the awareness and state of mind that combines 'wisdom and youth'.³

¹ E. Fisher, Bettina Lange, Eloise Scotford, and Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', 21 J Env L (2009) 213–50, with a response by R. Macrory.

² See below Section 4.

³ I borrow these felicitous words (in English in the original Italian text) from Cesare Pavese, who in his diary (12 June 1939) observed that 'La vitalità creatrice è una riserva di passato. Si diventa creatori—anche noi—quando si ha un passato. La giovinezza . . . è una ricca vecchiaia (genius is wisdom and youth)', *Il mestiere di vivere* (Turin: 1962), 148.

3. The Acquis

There is general agreement that the origin of international environmental law—that is, the branch of international law dealing with the protection of the natural environment—can be traced to the early 1970s with the organization by the United Nation of the first conference on international law and the environment and the adoption of the Stockholm Declaration on the Human Environment.⁴ The Stockholm Declaration contained innovative elements and had the potential for progressive development of international law. It contributed to the consolidation of the idea that the conservation of the environment is a concern of the international community, thereby removing environmental law from the narrow confines of private law regulating reciprocal relations between neighbouring states.⁵ It gave substance to the novel concept of *erga omnes* obligations, enunciated just two years earlier in the famous dictum of the International Court of Justice (ICJ) in the *Barcelona Traction* case.⁶ It proclaimed the responsibility of every state to prevent damage to the environment, not only of other sovereign states but also of the common environment beyond the bounds of national jurisdiction.⁷ It linked the safeguarding of environmental quality to fundamental rights and human dignity and to the duty ‘to protect and improve the environment for present and future generations’.⁸

The wave produced by the Stockholm Declaration in the 1970s and 1980s led to the adoption of the first generation of treaties and conventions dealing with the protection of the environment. Among them one can recall innovative treaties, such as the World Heritage Convention,⁹ which combines the protection of cultural and natural heritage of outstanding importance; the Washington Convention on trade in endangered species;¹⁰ the MARPOL system on the prevention of marine pollution from ships and Part XII of the Law of the Sea Convention;¹¹ the Geneva Convention on Long-Range Transboundary Air Pollution;¹² and the evolving system of protection of Antarctic fauna and flora.¹³ These and many other treaties adopted in this period have contributed to the emergence of some general principles of environmental protection, as well as to the consolidation of international environmental law as a discrete area of legal study and research. At the same time, there is no denying that this first wave of legal instruments presents some significant defects and shortcomings. With few exceptions,¹⁴ these legal instruments address environmental problems following a sector-by-sector approach, resulting in a multiplication and fragmentation of legal regimes, which does not take into account the interdependence of various elements of the biosphere and the need for an ecosystem approach to the preservation of environmental quality. Another weakness is the inadequate integration of environmental standards into economic development policies. To this, one has to add the systemic

⁴ Adopted 16 June 1972, 11 ILM 1416 (1972).

⁵ *Trail Smelter Arbitration* (Canada-US), 16 April 1938–11 March 1941, RIAA Vol. III, pp 1905–82.

⁶ *Barcelona Traction, Light and Power Ltd*, judgment, ICJ Reports, pp 3ff, paras 33–4.

⁷ Principle 21.

⁸ Principle 1.

⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by the UNESCO General Conference on 16 November 1972. For the text and analytical commentary see F. Francioni with F. Lenzerini (eds), *The 1972 World Heritage Convention—A Commentary* (Oxford: Oxford University Press, 2008).

¹⁰ Adopted 3 March 1973, 12 ILM 1085 (1973).

¹¹ International Convention for the Prevention of Pollution from Ships, 1973 (with following Protocol and Annexes), 21 ILM 1319 (1973); UNCLOS, 21 ILM 1261 (1982).

¹² Adopted 13 November 1979, 18 ILM 1442 (1979).

¹³ See *Handbook of the Antarctic Treaty System*, US Department of State, especially chs X and XI.

¹⁴ One such exception is the Canberra Convention on the Conservation of Antarctic Marine Living Resources, which inaugurated the so-called ‘ecosystem approach’ to the conservation of fisheries in the Antarctic seas, see *Handbook*, *ibid*, at fn 13.

avoidance in this first generation of environmental treaties of ‘secondary rules’ on liability for breach of the substantive obligations to respect and protect the environment.¹⁵

A second wave of international environmental law coincides with the emergence of global ecological issues at the end of 1980s and with the Earth Summit that led to the Rio Declaration of 1992. This was the era of the discovery of the relentless erosion of the ozone layer and of the adoption of the related Vienna Convention and the Montreal Protocol on the control of substances that deplete the ozone layer;¹⁶ of the emergence of global warming as a scientific, political, and economic issue, with the attendant adoption of the 1992 UN Framework Convention on Climate Change¹⁷; and of the perception of biodiversity degradation as a ‘common concern’ of humankind.¹⁸ Increased awareness about the dangers posed by the irreversible degradation of the environment spurred in this period the emergence of the ‘precautionary approach’ in its twofold expression as a radical ban on activities deemed to be harmful to the environment—as in the case of the 1991 Madrid Protocol on the protection of the Antarctic environment¹⁹—and, in its moderate form, as an obligation to provide a prior assessment of the foreseeable environmental impact of planned industrial, technological, and scientific activities.

Another important feature of environmental law in this period is the ‘constitutionalisation’ of some fundamental principles in regional economic integration in systems, notably the European Community and later in the North American Free Trade Agreement (NAFTA). In the former, the Single European Act of 1987 first and the Maastricht Treaty later gave the status of fundamental norms to several principles, including not only the already mentioned precautionary approach, but also the principle of prevention, the ‘polluter pays principle’, and the principle of correction of adverse environmental impacts at the source, which provide the ‘constitutional’ framework for the development of one of the most advanced systems of environmental legislation in the world.

As already pointed out in the introduction, today three basic features stand out as elements capable of influencing future developments of environmental law both as a distinct branch of international law and as a legal discipline.

The first concerns the meaning and role of ‘sustainable development’, a concept that for more than twenty years has been at the heart of diplomatic and judicial efforts at reconciling environmental protection with the demands of economic growth. As we shall see later, this concept, in spite of its initial indeterminacy, is increasingly acquiring a normative content. This is especially reflected in the arbitral and adjudicatory practice of the past ten years.

The second feature is the increasing polarization of the academic debate and judicial practice around the dilemma of environmental protection versus scientific and technological advancement. In no other area has this dilemma caused as much friction and disagreement as in the field of commercial application of biotech products, which has provided a fertile field of disputes before the World Trade

¹⁵ The well-known example of deliberate avoidance of liability and responsibility implications in the footnote attached to the Geneva Convention on Long-Range Transboundary Air Pollution of 13 November 1979 (reprinted in 18 ILM 1442 (1979)) which explicitly declares that it does not cover issues of responsibility.

¹⁶ Montreal Protocol of 16 September 1987, reprinted in 26 ILM 1550 (1987), additional to the Vienna Convention on the Protection of the Ozone Layer, 22 March 1985, *ibid.*, at 1529.

¹⁷ Rio de Janeiro, 9 May 1992, reprinted in 31 ILM 849 (1992).

¹⁸ See the Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992, reprinted in 31 ILM 818 (1992).

¹⁹ Protocol on Environmental Protection to the Antarctic Treaty, *Handbook*, above n 12, Art. 7 of which establishes a ban on mineral resource activities in Antarctica for a period of 50 years from the entry into force of the Protocol, with the possibility of further extension, thus reversing the earlier decision of the Antarctic Treaty Consultative Parties to proceed with opening Antarctica to mineral activities and adopting a specific convention aimed at regulating such activities. See the Convention on the Regulation of Antarctic Mineral Resource Activities, adopted in Wellington, June 1988, *Handbook*, above n 12.

Organization (WTO),²⁰ the EU courts,²¹ and national courts. Beyond the technical aspects of the legal dispute over the extent of free trade and the applicability of the precautionary approach, looms a more radical clash between the different world views of those who, on the one hand, see traditional methods of agriculture and local control over food production as an essential condition for the preservation of environmental quality and socio-cultural cohesion, and of those who, on the other hand, support the progressive industrialization of agriculture and downplay the risk of putting food production in the hands of a few biotech companies which control the chain of agricultural production.

The third feature one has to consider is the continuous search for an institutional framework to ensure environmental governance in a world of increasing economic and social interdependence. Some limited progress has been achieved by the establishment of quasi-institutional arrangements in global environmental treaties—such as the Convention on Biological Diversity, the UN Framework Convention on Climate Change and the Montreal Protocol on the ozone layer. These arrangements, although they fall short of amounting to a traditional international organization with distinct legal personality, have produced Conferences of the Parties (COPs) and Meeting of the Parties which ensure continuity in the implementation of the environmental standards and monitoring of the parties' compliance with the treaty obligations. At the same time, innovative solutions have been introduced in this embryonic institutional setting to deal with cases of failure by state parties to abide by treaty obligations, short of specific procedures to enforce international responsibility and liability. I am referring to the alternative methods (alternative to liability) introduced with the so-called 'non-compliance procedures', which entail the examination by ad hoc treaty bodies (the non-compliance committees) of cases of suspected or ascertained breach by state parties of treaty standards or commitments with a view to assisting in redressing the wrongful conduct rather than to enforcing liability or securing some form of reparation.

4. The Context

Given this origin and this less than robust evolution, what is the place of environmental law within the larger context of international law today? The answer to this question is that, surely, environmental law has become an established branch of international law—in the sense that it is constituted of a coherent set of norms having the common goal of establishing obligations for states and other actors in the international community to respect and protect the environment. At the same time, unlike other areas of international law that have undergone a dynamic evolution, such as human rights and international economic law, international environmental law remains an incomplete body of law. This is due to various factors.

First, the object of protection remains elusive. It is not easy to find general consensus over what constitutes a 'safe', 'healthy', or 'good' environment. This uncertainty hinders the consolidation of general principles and norms laying down precise obligations for states and other international law actors to respect, protect, and redress the environment. In addition, even after 40 years of development, international environmental law is still comprised mainly of treaties and soft law instruments, with the consequence that even in relation to global issues such as climate change and biodiversity degradation, regulatory gaps persist due the inability to co-opt important actors within the relevant treaty system.

But the most serious source of the weakness of international environmental law is the lack or deficiency in enforcement mechanisms. In other areas of international law, such as the already

²⁰ See the the *Biotech* dispute between the EU and the United States, Argentina, and Canada, Dispute Settlement Body, Panel report of 29 September 2006.

²¹ See, eg, *Commission v Poland*, ECJ (Second Chamber), judgment of 16 July 2009.

mentioned human rights and international economic law, the progressive development at the normative level has been accompanied in the past half-century by a parallel development of dispute-settlement institutions and enforcement procedures.

In the field of human rights law this has led to the constitution of regional courts—notably, the European,²² American,²³ and African²⁴ Courts of Human Rights—and of quasi-judicial treaty bodies competent for the supervision of state compliance with treaty obligations.²⁵ The existence of enforcement procedures, sometimes open to individual applications, has proved to be not only a guarantee of the effectiveness of the law; it has provided the platform for the elucidation of the law, its jurisprudential development into a living body of norms and principles beyond the bare skeleton of the constitutive treaty. It is thanks to this jurisprudential development that today we can speak of a true ‘international legal order’ of human rights protection. This legal order is constantly renewed and refined thanks to inter-judicial dialogue and comparative analysis of different adjudicatory experiences. This feature contributes in no small measure to the universality of international human rights law.

The ethical and legal strength of the human rights jurisprudence has positively reflected upon the protection of the environment. This has happened by way of the development of an ‘environmental dimension’ of human rights through an expansive interpretation of the human rights obligations incumbent upon state parties to the relevant conventions. The European Court, in particular, has made extensive use of Article 2²⁶ and Article 8,²⁷ concerning respectively the right to life and the right to private and family life, to extend the protection of the European Convention on Human Rights to persons exposed to hazardous industrial and technological activities incompatible with the respect of such rights. It has developed the concept of ‘positive obligations’ of state parties effectively to enforce legal, administrative, and judicial measures designed to prevent or remedy harmful environmental interferences by private parties with the sphere of protected rights. Further, in the absence of specific treaty provisions, the Strasbourg Court has fashioned a procedural requirement of information and consultation with affected parties as a condition for the fulfilment of the obligations arising under specific human rights provisions, such as Articles 2 and 8.²⁸ Similar development can be found in the system of American Convention on Human Rights²⁹ and of the African Charter on Human and Peoples’ Rights.³⁰

In the field of international economic law the ‘weakness’ of traditional norms on trade and investments has been overcome by the setting up of a worldwide system of dispute settlement and arbitration. In the domain of trade, such system is guaranteed by the compulsory and binding dispute

²² European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) 213 UNTS 221.

²³ American Convention on Human Rights, adopted 22 November 1969 and entered into force, 18 July 1978, 1144 UNTS 123.

²⁴ African Charter on Human and Peoples’ Rights, 26 June 1981, with its 1998 Protocol establishing an African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1Rev 2 (1997).

²⁵ The United Nations Human Rights Committee, established pursuant to Article 28 of the International Covenant on Civil and Political Rights is competent, under its additional optional Protocol, to receive and consider communications from individuals - subject to the jurisdiction of a State Party - who claim to be victims of a violation of the rights set forth in the Covenant. For the text of the Covenant and of the additional Protocol, 999 UNTS 171.

²⁶ *Oneryildiz v Turkey*, App. no. 48939/99, judgment of 18 June 2002.

²⁷ *Lopez Ostra v Spain*, App. no. 16798/90, ECtHR, Series A, no. 303C; *Guerra v Italy*, App. no. 14967/89, ECtHR Reports 1998-1, 210; *Fadeyeva v Russia*, App. no. 55723/00, Judgment of 9 June 2005, ECtHR Reports 2005-iv, 255.

²⁸ For a detailed analysis of this case law, see F. Francioni, ‘Human Right in an Environmental Horizon’, 21 EJIL (2010) 41 at 48ff.

²⁹ See the ground-breaking judgment in *Mayagma Sumo Awas Tngni Community v Nicaragua*, IACHR Series C, no. 79, 31 August 2001.

³⁰ *Social and Economic Rights Action Center v Nigeria*, Case N0 ACHPR/COO/AO44/1, OUA Doc. CAB/LEG/67/3 rev. 5.

settlement procedure of the WTO, which is binding upon the overwhelming majority of the states controlling the world economy. In the field of investments, compulsory and binding arbitration is now a permanent feature of bilateral investment agreements, national laws, regional agreements such as NAFTA,³¹ and of the International Centre for Settlement of Investment Disputes (ICSID) under the 1965 World Bank Convention.³² It is hardly necessary to recall that, with respect to investment, the 'strength' of the law is further guaranteed by the possibility for private individuals and entities to bring claims directly against the host state of the investment. This possibility has spurred a vast jurisprudence and arbitral practice that has contributed to the consolidation and strengthening of international investment law especially in the period following the end of the Cold War and the almost universal acceptance of free movement of capital as a vehicle for economic growth and development.

5. Asymmetries and Imbalances

The asymmetry between international environmental law and these other areas of international law, besides disclosing the weakness and deficiencies of the former, produces further distortion and imbalances, especially with regard to the area of international economic law.

In this field, the lessons drawn from the WTO dispute-settlement practice and from international investment arbitration are particularly instructive.

As for the WTO, since the establishment of the new organization in 1995, many commercial disputes involving the legitimacy of national measures to protect the environment have been drawn within the sphere of the adjudicatory competence of the Dispute Settlement Body. This is quite understandable, since the WTO provides a compulsory system of dispute resolution and gives binding force to the rulings adopted on the basis of the Panels' and Appellate Body's findings. However, the absence of a comparable universal forum competent to adjudicate on the environmental law aspects of international disputes inevitably influences the normative perspective in which such disputes are adjudicated. That normative perspective is trade law, and more precisely the relevant WTO agreements, which is the applicable law of the WTO Dispute Settlement Body. Thus the very existence of a strong system of international enforcement of trade rules exerts a powerful attraction and influence with regard to the settlement of disputes which arise or are related to questions of environmental law, for which no international forum is normally available.

In some instances, the WTO dispute settlement Panels and especially the Appellate Body have wisely taken upon themselves the complex task of reconciling their responsibility to guarantee the observance of the specific obligations arising for the member states under the WTO agreements with the need to give proper consideration to the legitimate goals pursued by member states in protecting their local environment or even the general environment beyond the limits of their national jurisdiction. This task has been accomplished by resorting to the interpretive tool offered by Article 31(3)(c)³³ of the Vienna Convention on the Law of Treaties,³⁴ by an expansive interpretation of the general exceptions under Article XX of the General Agreement on Tariffs and Trade (GATT),³⁵ and by giving relevance to the

³¹ North American Free Trade Agreement, ch. 11, ILM ____.

³² Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965.

³³ This Article lays down the general rule of treaty interpretation and provides that: 3. There shall be taken into account, together with the context . . . (c) any relevant rule of international law applicable in the relations between the parties.

³⁴ Signed in Vienna, 23 May 1969, entered into force 27 January 1980, 1153 UNTS 331.

³⁵ See *Shrimps and Turtle* case, WTO Doc. WT/DS58/AB/R, 12 October 1998, extending the application of the 'exhaustible natural resources' exception (Art. XX(g)) to living resources of the sea, and *Brazilian Retreaded Tyres*, finding that

Preamble of the WTO constitutive treaty. The first clause of the Preamble recognizes, as one of the purposes of the organization, the need to conduct trade and economic relations ‘in accordance with the objective of sustainable development, seeking both to preserve and protect the environment’.

Other times, however, the WTO Dispute Settlement Body has been impervious to the consideration of environmental sustainability and has mechanically applied WTO rules even in the face of legitimate environmental concerns raised by the rigid implementation of free trade rules. The apex in this attitude can be found in the notorious *Biotech* case³⁶ involving the claim by the United States and other countries that the precautionary procedure adopted by the European Community (now European Union) for the authorization of the import and marketing of genetically modified products amounted to a violation of the WTO obligations because of the undue delay in the administrative procedure followed in the authorization process. In spite of the fact that the EU procedure was motivated by legitimate environmental and health concerns and that it was *prima facie* consistent with the Cartagena Protocol on Biosafety, binding on the EU and other parties to the dispute, the ruling of the Panel concluded that the precautionary approach followed in the EU procedure would not justify departure from the timely observance of the obligations arising from the WTO Sanitary and Phytosanitary Agreement because the United States was not a party to the Cartagena Protocol. That Protocol’s relevance as a legal tool to interpret the applicable WTO rules could be justified, in the opinion of the Panel, only in the event that all members of the WTO were also parties to the Protocol.

It is regrettable that this ruling has never been challenged before the Appellate Body because it is wrong in terms of law and unacceptable in terms of sound environmental policy. From a strictly legal point of view, since WTO obligations are typical reciprocal obligations binding on member states in their mutual relations, the Panel should have recognized that the Cartagena Protocol was applicable in the relations between the EU and any other disputing parties which were also parties to the Protocol. This is consistent with the Vienna Convention on the Law of Treaties, Article 30(3) and (4). A different solution could have been reached for those disputing parties which (like the United States) were not parties to the Cartagena Protocol. From a policy point of view, a more appropriate solution would have been to try to accommodate the legitimate environmental and health concerns of the EU with the rules of the game applicable to the free movement of goods. This is the approach followed in more advanced regional economic integration systems, such as NAFTA, with its side agreement on environmental cooperation, and the EU, where the Court of Justice has always assessed the legality of measures entailing restrictions to the free circulation of goods to the twofold test of (i) the measure’s necessity to accomplish a legitimate environmental goal and of (ii) the proportionality of the measure’s impact on trade with the environmental goal pursued.³⁷ At the same time, this approach would have been more consistent with the emerging principle of ‘mutual supportiveness’ between trade liberalization and environmental protection which is already codified in a number of important normative instruments of recent adoption and the function of which is clearly to avoid or minimize the risk of fragmentation of international law.³⁸

In the field of investment law a similar phenomenon of progressive incorporation of environmental issues within the sphere of investment arbitration has taken place in the past ten years. Even more frequently than in the field of trade, regulatory measures adopted for the purpose of environmental protection have given rise to investment disputes because of the direct or indirect impact that such

(Contd.) _____

environmental and health considerations may justify the adoption of an import ban on retreaded tyres. See Panel report WT/DS 332/R (12 June 2007) and Appellate Body Report WT/DS 332/AB/R (17 December 2007).

³⁶ European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS 293/R (29 September 2006).

³⁷ See the seminal case, Case 302/86 *Commission v Denmark*, European Court of Justice, decision of 20 September 1988.

³⁸ For a timely analysis of the principle of mutual supportiveness and of its role in resolving conflict between WTO norms and environmental norms, see Pavoni, ‘Mutual Supportiveness as a Principle of Interpretation and Law Making: A Watershed for the “WTO-and-Competing Regimes” Debate’, 21 EJIL (2010) 649–79.

measures were deemed to produce on the rights of the investor. One may recall that the first claim brought before an investment panel under Chapter 11 of the NAFTA Agreement, *Metalclad*,³⁹ concerned a bitter dispute between a US investor who had planned the construction of a landfill for the disposal of hazardous waste in Mexico and the local government of the Mexican State of San Luis de Potosí, which strenuously opposed the use of its land for such purpose. In the end, the adoption by the local authorities of an administrative decision declaring the area that included the planned site for the landfill to be a nature reserve, and thus not susceptible to industrial development, triggered the investor's request for arbitration and led to an award adverse to Mexico. The environmental decision to designate the area as a nature reserve was deemed to be an interference with the property rights of the US investor, thus giving rise to an obligation to pay compensation.⁴⁰ Similarly, in the *Santa Elena* arbitration,⁴¹ the measures adopted by Costa Rica in order to enlarge a nature reserve in compliance with international obligations arising under the UNESCO World Heritage Convention were not deemed sufficient to exclude the liability of the government to pay compensation to the US investors for loss of investment opportunity in a tourist development project. The arbitral award in this case went so far as to reject that even the amount of compensation could be equitably affected by the legitimate environmental goal pursued by Costa Rica.

More recent arbitral practice, and the growing concern that investment arbitration may go too far in reviewing legitimate national regulation under the international parameter of investor's rights, has led to a more cautious attitude and to the opening of investment arbitration to environmental considerations. Two recent cases are especially relevant in this context. In *Glamis Gold*,⁴² a Canadian mining company had brought a complaint against the United States under NAFTA Chapter 11 on investment protection because of the alleged damage to its property rights and economic interests as a consequence of the adoption of regulatory measures both at the level of state law and federal regulation (Department of the Interior). Such measures were aimed at regulating the environmental impact of gold mining, particularly at ensuring proper rehabilitation of the land after extraction activities, taking into account also the rights of native tribes for whom the territory targeted for mining represented protected ancestral land. In its 2009 arbitral award, the NAFTA Panel concluded that the environmental legislation adopted by the United States, even if it had some adverse impacts on the investor's economic interests, could not be considered in breach of NAFTA investment obligations because it pursued a legitimate public interest and did not disclose any discriminatory treatment. Similarly, in an earlier case, *Methanex*,⁴³ the United States was confronted with a complaint by a foreign company engaged in the production of a fuel additive banned under legislation passed by the State of California—a state whose record of cutting-edge legislation in the field of environmental protection is well known—because of its polluting effects on ground water. The complaining company claimed loss of property rights, loss of market share, and discriminatory treatment because of the alleged unfair advantage that the new environmental legislation would give to US producers of alternative fuel additives. Again, the legitimate goal pursued with the environmental legislation, its abstract and general character, and the open and democratic process of its adoption, which also involved proper evaluation of independent scientific advice, led to an arbitral award favourable to the United States.

These are modest steps towards the desirable goal of a full integration of environmental considerations in the settlement of economic disputes. But they remain precarious steps because environmental

³⁹ *Metalclad v Mexico*, arbitral award 30 August 2000, Case ICSID No. ARB(AF)/97/1.

³⁹ The claimant company was awarded \$ 16.7 million in damages, which were later reduced to \$ 15.6 million at the execution stage by the courts of British Columbia, the jurisdiction of the arbitration.

⁴¹ *Compania del Desarrollo de Santa Elena v Costa Rica*, Case No. ARB/96/1, Final Award, 17 February 2000.

⁴² *Glamis Gold Ltd v Government of the United States*, available at <<http://www.state.gov/s/l/c10986.htm>>.

⁴³ *Methanex Corp v United States*, Final Award, 3 August 2005, 44 ILM (2005) 1345.

protection in WTO dispute settlement and in investment arbitration comes only as an exception to the rule, which is the enforcement of the economic rights of states and of investors.

This raises the question of the role of the ICJ, as a court of general jurisdiction, in the development and consolidation of international environmental law.

6. The International Court of Justice

In spite of the unhappy ending of the ‘environmental chamber’, which was never utilized and was finally abolished in 2006, the ICJ has had the opportunity to adjudicate an increasing number of cases with a distinct environmental law dimension. In the well-known 1997 *Gabčíkovo-Nagymaros* case,⁴⁴ the Court had to adjudicate a complex dispute between Slovakia and Hungary arising from Hungary’s refusal to follow up on a Communist-era project involving the construction of a series of dams on the Danube. In its judgment, the Court recognized the binding nature of the obligation to prevent damage to the environment,⁴⁵ thus reaffirming a principle already enunciated in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁴⁶ At the same time, the Court elaborated at length on the importance of the principle of sustainable development as a legal tool to couple economic development and the protection of environmental quality. Yet, when the Court came to address the question of whether the adoption of measures which are necessary to preserve the environment may justify non-compliance with prior treaty obligations (as maintained by Hungary), the answer was negative. The Court preferred to shun the uncertain path of progressive development of international law, as outlined in the bold Dissenting Opinion of Judge Weeramantry, and disappointingly reiterated traditional principles of the law of treaties and of state responsibility. No wonder that this has provided little help to settle the dispute, which remains pending 14 years after the judgment.

In the recent case *Pulp Mills on the River Uruguay*,⁴⁷ concerning a typical transborder environmental dispute between Argentina and Uruguay, the Court has correctly focused on the importance of procedural obligations, which include disclosure, consultation, negotiation, and environmental impact assessment prior to the initiation of a planned industrial project, but in the end the judgment does not mark any significant progress in the elucidation and consolidation of general international law on environmental protection. This is so essentially for two reasons. First, the judgment is based exclusively on specific treaty commitments undertaken by the disputing parties with respect to the management and conservation of the shared resources of the river Uruguay.⁴⁸ Secondly, despite the positive approach taken by the Court in clarifying the procedural obligations incumbent upon a state planning or authorizing⁴⁹ industrial activities in a transboundary context, in the end the judgment falls short of providing a meaningful connection between the breach of such procedural obligations and the substantive obligation to prevent environmental damage. On the contrary, the Court somewhat artificially separates the procedural and substantive obligations, and the ascertained breach of the former seems to have no influence—in the reasoning of the Court—on the latter. Furthermore, the Court did not deem reparation necessary for the breach of procedural obligations: the finding of the wrongfulness of Uruguay’s conduct in this respect was considered sufficient satisfaction for Argentina. This may be formally correct. However, in environmental disputes such as this, where complex questions of scientific evidence are posed to the Court, it may not be a good judicial policy

⁴⁴ Judgment of 25 September 1997, ICJ Reports 1997, pp 7–84.

⁴⁵ *Ibid.*, para. 53.

⁴⁶ Opinion of 8 July 1996, para. 29 available at <<http://www.icj-cij.org>>.

⁴⁷ Judgment of 20 April 2010.

⁴⁸ Treaty of Salto of 26 February 1975 establishing the Statute of the River Uruguay, UNTS Vol. 1295, N. I-21425, 340.

⁴⁹ In this case the potential environmental impact originated from a foreign private investment.

rigidly to separate the procedural and the substantive dimensions of environmental obligations. Procedural obligations of prior impact assessment, notification, and consultation are meant to avoid a *fait accompli* and to address environmental concerns before damage occurs. Therefore they are in a close functional relationship with substantive obligations to respect and protect the environment. Thus their breach should entail a careful scrutiny of the way in which the breach affects the overall conduct of the parties and their degree of compliance with substantive obligations. The approach followed by the Court risks giving an incentive to be negligent or even wilfully to ignore procedural environmental guarantees in the expectation that once the planned works are realized, the procedural breach will not affect the legality of the project and no meaningful sanction or obligation to provide reparation will ensue.⁵⁰

7. Reclaiming Legal Imagination

The above analysis confirms the initial assessment of this paper that international environmental law, with its main focus on “primary obligations” arising from treaties, declarations and ‘understandings’,⁵¹ remains weak on the side of “secondary obligations” and implementations mechanisms. The implementation ‘deficit’, and more specifically the lack of a strong generalized enforcement mechanism entails, on the one hand, reliance on voluntary procedures of non-compliance verification, and, on the other hand the ‘incidental’ enforcement of environmental standards by compulsory mechanisms of dispute settlement established for the adjudication of other specialised areas of international law, and, on rare occasion, by the ICJ. This comes at a price. The main price is the lack of coherent jurisprudential development and its insufficient integration into the adjudication of international economic disputes, as well as the lack of a systemic character of international environmental law adjudication.

Can international law develop into a more mature and effective system of environmental governance, similar to the one which has evolved in the field of international economic law and, to a lesser extent, of human rights? The answer to this question depends on how much in the epistemological assessment of the observer the balance will tilt on the side of utopia or on the side of hard realism. In any event, for the purpose of the present analysis, I think it is necessary to distinguish between two different but interconnected perspectives: the normative perspective and the institutional perspective on the future of international environmental law.

(A) The Normative Perspective

At the normative level, a ‘realistic utopia’ on the future of international law entails the recouping of the original promise of the environmental movement, that is the conceptualization and the legal treatment of the natural environment as a ‘common good’ to be administered in the interest of all and of the generations to come. The innovative project of the 1972 Stockholm Declaration was that of the progressive consolidation of a body of norms and principles governing the collective action of states and other international actors with the goal of safeguarding the essential elements of the environment

⁵⁰ Other cases involving environmental issues have been recently brought before the ICJ. See case *Aerial Herbicide Spraying (Ecuador v Colombia)*, proceeding instituted by Ecuador on 31 March 2008, alleging damage to human health, property and the environment by the deposit in its territory of toxic herbicide by Colombia; *Whaling in the Antarctic (Australia v. Japan)* introduced by Australia against Japan in May 2011; *Construction of a Road in Costa Rica*, case filed by Nicaragua against Costa Rica on 22 December 2011.

⁵¹ The last in time being the inconclusive ‘Understanding’ covering up the Copenhagen fiasco on post-Kyoto agenda to combat climate change.

as a ‘common good’, including water, air, climate, and the biosphere. From a legal point of view this agenda brought to the fore the very idea of *erga omnes* obligations, that is, obligations of solidarity of each towards all, of individual states towards the international community as a whole. The crisis and the decline of international environmental law go hand in hand with the failure of this original idea. Very little solidarity has materialized in this respect in the almost 40 years that have passed since the Stockholm Declaration. The adjudication of environmental disputes, as illustrated above, has provided little contribution to the elaboration of international environmental law as a system of *erga omnes* obligation. On the contrary, despite some abstract declarations of principle, the technique of adjudication has systematically followed the traditional path of reciprocal obligations—mainly arising from treaty law—binding the disputing parties in their mutual relations, with hardly any consideration of the collective dimension of the international community interest.

However, it would be wrong to attribute to the shortcomings of international adjudication the sole responsibility of the failure to give legal form to the need for collective action in the environmental field. The main responsibility lies with the major economic powers, which have pursued their national economic interests and their agenda of unsustainable growth by effectively withholding global environmental matters from the realm of international relations for which legally binding regulation is acceptable. This attitude may change under the pressure of the global environmental crises. However, the persistent refusal by the major economic actors, such as the United States and China, to adhere to a scheme of mandatory emission limits under the Kyoto Protocol or other internationally agreed mechanism, and their continuing reluctance to undertake legal commitments in the post-Kyoto agenda, does not facilitate the emergence of a new solidarity—which has contributed to the Copenhagen demise and to the inconclusive results of the 2010 Cancun meeting.

Legal scholarship in the field has not been of much help either in overcoming these normative limits of international environmental law. Study and research in environmental law and policy have proliferated, giving rise to countless specialized journals, books, and even specialized law faculties.⁵² But this has produced an increasingly fragmented scholarship, overspecialized in distinct areas of the law, self-concluded and self-referential, with a strong ‘militant’ attitude and yet unable to bring the environmental value to the top of the globalization agenda, where economic growth and development still dominate.⁵³ This does not mean that study and research in the field of environmental law have not influenced policy-making at the level of international negotiations and within competent intergovernmental organizations. In this respect the influence has been significant and, together with scientific expertise and non-governmental organization (NGO) activism, has provided the necessary support to specific lawmaking initiatives and environmental regimes.⁵⁴ However, judging from the results obtained by the environmental law community in terms of overall progress of international law, the conclusion is inevitable that doctrinal elaboration in this field has remained confined within the horizon of state sovereignty as the seat of the power to make environmental decisions. Sovereignty and democratic decision-making within the nation-state provide the political–legal framework for the legitimation of environmental measures that restrict human freedom. The will of the majority may override individual interests. But this framework presupposes the persistence of people’s loyalty to

⁵² This has occurred especially in the United States, where there has been a distinct trend toward specialisation of some law schools in the specific field of environmental law.

⁵³ This is made evident by UN documents indicating that more than 60 per cent of the countries of the world consider environmental protection as an obstacle to economic development rather than one of its necessary components. See UNDP, ‘Human Development Report 2005’, New York, 2005.

⁵⁴ This is suggested especially by the experience of this writer in the Antarctic Treaty system, where environmental protection has always been elaborated with the support of highly skilled legal experts capable of devising innovative models of environmental protection in order to accommodate conflicting views over the legal status of Antarctica and of the legal regime of its natural resources. See in this respect, the Convention on the Conservation of Antarctic Marine Living Resources, the 1991 Madrid Protocol on environmental protection of Antarctica, and the Annex on liability for damage to the Antarctic environment.

national institutions and interests, primarily economic interest, rather than a loyalty to a remote 'international' public interest in the preservation and protection of the general environment. It is this state-centred perspective that has hindered the passage of the idea of *erga omnes* obligation from a purely theoretical concept to a practical legal tool codifying the commitment of every state actively to engage in the promotion and protection of environmental quality as an essential public good. The shortcomings of international legal scholarship in facilitating this passage are revealed in the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts,⁵⁵ where even the expressions 'environment' and '*erga omnes*' obligations are avoided and the hypothesis of state responsibility for breach of an obligation owed to the international community as a whole remains marginal and confined to Article 48(1)(b).

Placing the idea of the environment as an international 'common good' at the centre of a hypothetical agenda of 'realistic utopia' entails certain legal implications.

First, it is necessary to reconsider critically certain categories of past international law, such as permanent sovereignty over natural resources. It is clear that if such a concept was justifiable in the wake of de-colonization to allow newly independent states to recoup control over their natural resources, today it may not be used to justify an irresponsible use of such resources, especially when this happens under the pressure of the insatiable demand of industrial production that leads to the unsustainable use of air, water, and minerals, within the legal framework of international investment law and trade liberalization.

Secondly, the idea of the environment as an international common good illuminates the limits of the economic theories that tend to reduce the natural world to a pure economic resource to be submitted to the logic of the market. This logic has gone very far in recent years. Hand in hand with the development of knowledge in the field of molecular biology, it has supported the claim to the propertization of genetic resources, both as a channel of information and as material valuable for the production of goods and services. This race to the enclosure of the most intimate essence of the natural world, our genetic patrimony, reduces life itself to merchandise to produce profit. It makes us lose the sense of what is the common good.⁵⁶ This enclosure cannot be morally justified, as in the past, with the need to increase productivity for the benefit of humankind, since the world today experiences an excess of production of goods but an uneven and inequitable distribution of them among the peoples of the earth.

This last point introduces the third and perhaps most important implication of our idea of the environment as an international common good. That is the necessity of looking at the environment also as a dimension and an essential condition for the enjoyment of human rights. As indicated in Section 4 above, the connection between environmental protection and human rights has already been captured in the case law of human rights courts. But this practice eludes the essential nature of the environment as a public good: it remains confined within the traditional conception of human rights as individual rights. In this perspective, forms of environmental degradation become relevant only to the extent that they amount to unlawful interferences with the sphere of human rights of a single individual claimant.⁵⁷ Today, such an individualistic approach is no longer adequate to counter the tendency to subtract essential components of the natural environment, such as water, from the public domain and treat them as tradable commodities. Nor can it effectively contend against the many unsustainable forms of pollution that affect the general environment in an indeterminate and diffused form, with risks for the health, integrity, and life of people at large and not just single individuals. This

⁵⁵ Adopted by the International Law Commission at its 53rd session, 2001, GAOR, 56th session, Supp. No.10(A/56/10), ch. IV, E.1.

⁵⁶ For in-depth analysis of the legal implications of the propertization of the genetic patrimony, see A. Rouvroy, EUI thesis; F. Francioni (ed.), *Biotechnologies and International Human Rights* (Oxford: Hart Publishing, 2007).

⁵⁷ Cf Francioni, above n 27.

is made evident by the current debate about access to water as a fundamental right of every person, a right that would be foolish to consider in a purely individualist dimension, since it is the fundamental component of our life and of the functioning of society as a whole.⁵⁸ It is made evident also by the emerging human rights implications of the worsening of global warming with its devastating effects in terms of desertification, flooding, and environmental disasters that affect the enjoyment of fundamental human rights of entire peoples and not only of single persons.

(B) The Institutional Scenario

As I have pointed out at the beginning of this paper, the insufficiency of global institutions for the monitoring of environmental compliance and the lack of compulsory mechanisms of dispute resolution are the true Achilles' heel of the present system of international environmental law.

To overcome this deficit two approaches are possible within the perspective of a progressive development of the law. The first approach would consciously shun the need for institutional reform as too costly and ineffective, and would rely on market mechanisms of self-regulation and transnational private enforcement. The second approach would entail a reform of the institutional system of environmental governance by creating effective multilateral institutions that can mirror what has been done in the other areas of international law examined in this chapter, namely international economic law and human rights.

It is the opinion of this writer that the two approaches are not mutually exclusive. They should be complementary because the first one can hardly work without the other. The reason is simple. International–transnational private regulation (e.g. trade in emission allowances, the clean development mechanism, and forest conservation), however effective it may be, intrinsically operates outside the sphere of state control, and in the long term it may pose an undesirable challenge to the very idea of sovereignty over the national territory and its resources. Besides, a 'realistic utopia' approach cannot ignore the bitter lesson of the contemporary financial crisis, the decline of confidence, or sheer market failure of the 'private' self-control mechanisms, and the contemporary—shift of focus back to the role of the state in regulating and controlling essential aspects of economic and social life in its relation to the vital components of the earth's environment.

For this reason, it is necessary to re-examine *de lege ferenda* what kind of improvements are needed and are politically feasible in order to modernize and strengthen the institutional framework of environmental governance. In this respect, an opportunity for institutional reform and for improved global environmental governance was offered by the 2005 UN reform. Several critical issues were on the table at that time, and had been clearly articulated also with the support of academic studies and research.⁵⁹ In the end, however, the 2005 UN mini-reform did not produce any meaningful improvement to the UN architecture of global environmental governance, and the institutional deficit remains unresolved at a time when we are facing the most dangerous of environmental threats, climate change.

⁵⁸ On 28 July 2010, the UN General Assembly adopted a resolution introduced by Bolivia on the human right of access to clean water and sanitation. The resolution was adopted by 122 in favour, no votes against, and 41 abstentions.

⁵⁹ See, among them, F. Biermann, 'The Emerging Debate on the Need for a World Environmental Organisation: A Commentary', 1 *Global Environmental Politics* (2001) 45; S. Charnowitz, 'A World Environmental Organization', 27 *Columbia J Env L* (2002) 321; F. Francioni and P.-M. Dupuy, 'Preliminary Feasibility Study for the Establishment of a UN Environmental Organisation or Agency', Study commissioned by the French Ministry of Foreign Affairs, European University Institute, Florence, 2005; F. Francioni, 'The Role of the EU in Promoting Reform of the UN in the Field of Human Rights and Environmental Protection', Chaillot Paper no. 78, ISS, EU, Paris, 2005, pp 32ff; R.G. Tarasofsky and A.L. Hoare, *Implications of a UNEO for the global architecture of the international environmental governance system* (London: Chatham House, 2004).

How can imagination contribute to the improvement of the institutions of global environmental governance?

The simplest way would be to proceed with the strengthening of the existing institutions, in particular the United Nations Environmental Programme (UNEP). This was the route which was indicated by the UN Secretary-General in his 2005 Report on the reform of the UN system⁶⁰ and which UNEP itself is exploring at the time of writing.⁶¹ This route is certainly still feasible. However, to yield a reasonable expectation of effective improvement, certain functional conditions should be kept in mind.

First, if UNEP were to remain a 'programme' as it is today, it would need to rely on adequate, predictable, and stable funding. This is not the situation today. From the mid-1990s funding has declined, both because of creeping dissatisfaction of some major contributing countries and because of increasing competition by other UN programmes, such as the United Nations Development Programme, which has an important role in promoting environmental sustainability.

Secondly, an enhanced role of UNEP would be possible only to the extent that it is given real authority and operational capacity with regard to the mounting complexities of the threats to the global environment. Since the time of its creation, following the 1972 Stockholm Conference, the UNEP mandate has been quite limited. It was meant to provide monitoring of environmental developments, serve as a 'clearing house' for environmental information, and provide impetus and coordination for the development and implementation of international environmental agreements. UNEP has performed these functions quite well; in some respects it has outperformed its original mandate, notably in its normative role as a sponsor of a great variety of multilateral environmental agreements ranging from hazardous waste to trade in dangerous chemicals, air pollution, land degradation, regional seas and water resources management. Today, however, it seems that it has stretched to its limits, and it is doubtful that more authority and enhanced operational capacity can be achieved without institutional reform and substantial upgrading.

This brings us to the examination of the second option, that is, the creation of a new environmental organization. This project could be pursued in two alternative directions. One would be the creation of a UN environmental agency, which would be an organization endowed with its own legal personality but placed within the UN system. The other alternative would be the creation of an independent world environmental organization on the model of the WTO with a distinct membership, secretariat, and implementing mechanisms. In spite of the intrinsic differences between these two models, they have in common several advantages. First, they would place the current system of international environmental governance on a more stable institutional basis. Secondly, they would bring under the same institutional umbrella the vast and diversified array of multilateral environmental agreements which today are served by sector-specific and often competing secretariats. Thirdly, they could work as a catalyst for stronger environmental solidarity and for the development of a fiduciary spirit among participants in view of greater coherence in the efforts for environmental protection. Finally, they could provide a single forum for global environmental monitoring, an issue that is acutely felt in the current post-Kyoto negotiations on climate change, and for dispute settlement.

There is no hiding that the creation of any of these environmental organizations would entail the investment of enormous political capital, in terms of limitations of national sovereignty necessary to establish a system of effective multilateral cooperation. It would entail also technical obstacles linked to the intractable issue of the reform of the UN Charter, or to the adoption of a new multilateral treaty, for which complex negotiations would be required. But that would also be an opportunity for a fresh approach involving in the negotiation process not only states, but also relevant UN agencies and programmes, the main secretariats of multilateral environmental agreements, the World Bank, the

⁶⁰ Kofi Annan, 'In Larger Freedom—towards development, security and human rights for all', 20 March 2005.

⁶¹ See UNEP Governing Council Decision 25/4 on International Environmental Governance of February 2009, and Governing Council Decision SS XI/1 of February 2010.

private sector, and the leading environmental NGOs. This is not an easy task. But I see no easy solution to the daunting challenge posed to the international community by the global environmental crisis. This is time to rebuild consensus, not to drift in the hope that something good will come from the “creative” destruction of the planet.

