

International Environmental Governance

A Legal Analysis of Selected Options

Ole Kristian Fauchald



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Professor dr. juris Ole Kristian Fauchald
Senior Researcher, Fridtjof Nansen Institute

E-mail: okf@fni.no

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Ole Kristian Fauchald

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Abstract

This report concerns institutional reform of the environmental pillar of sustainable development. Its focus is on legal issues that arise in the context of institutional reform. The report discusses three models of institutional reform. These three models have been defined on the basis of the current debate in international institutions and on the basis of an identification of strengths and weaknesses of the current regime for international environmental governance. The three reform models are: 1) strengthening UNEP within its current mandate, combined with enhanced cooperation coordination within groups of MEAs; 2) strengthening UNEP by adding new elements to its mandate, including establishment of a High Commissioner for the Environment; and 3) the establishment of a World Environment Organization. In relation to each of these models the report analyses potential legal implications of reform for existing MEAs and modalities for how MEAs can be associated with the reformed institutions. The MEAs in question are all 15 global MEAs with significant links to UNEP, including MEAs concerning pollution, hazardous substances and biodiversity.

Key Words

environmental governance, multilateral environmental agreements, MEAs, environmental treaties, institutional reform, UNEP, World Environment Organization, UN reform

Orders to:

Fridtjof Nansen Institute
Postboks 326
N-1326 Lysaker, Norway.
Tel: (47) 6711 1900
Fax: (47) 6711 1910
Email: post@fni.no
Internet: www.fni.no

Contents

| | |
|---|-----|
| Summary of Findings | iii |
| 1 Introduction | 1 |
| 2 Strengths and weaknesses of the current regime for international environmental governance | 2 |
| 3 Models of environmental governance | 7 |
| 3.1 Introduction | 7 |
| 3.2 Model 1: Strengthening and coordinating the existing institutional framework | 9 |
| 3.3 Model 2: Strengthening UNEP | 10 |
| 3.4 Model 3: World Environment Organization | 11 |
| 4 Relationship between existing environmental agreements and possible models of environmental governance | 13 |
| 4.1 Introduction | 13 |
| 4.2 Strengthening and coordinating the existing institutional framework | 15 |
| 4.2.1 Strengthening UNEP | 15 |
| 4.2.2 Cooperation and coordination among chemicals conventions – ‘clustering’ | 27 |
| 4.2.3 Cooperation and coordination among biodiversity conventions | 29 |
| 4.2.4 The remaining MEAs | 35 |
| 4.3 Upgrading UNEP | 39 |
| 4.4 Establishing a World Environment Organization (WEO) | 45 |
| Annex 1 | |
| Overview of status quo regarding international environmental governance and initiatives to promote coordination | 51 |
| Annex 2 | |
| Overview of ratification status for selected key countries | 57 |

Summary of Findings

This report focuses on reform of the environmental pillar of sustainable development. It does not address issues arising from integration of the environmental, social and economic pillars of sustainable development. Moreover, the focus is on legal issues that arise in the context of institutional reform – not the political feasibility of or scientific or political need for such reform. Finally, this report discusses three models of institutional reform. These three models have been defined on the basis of the current debate in international institutions and on the basis of an identification of strengths and weaknesses of the current regime for international environmental governance. These three reform models are:

1. strengthening UNEP within its current mandate, combined with enhanced cooperation and coordination within groups of MEAs;
2. strengthening UNEP by adding new elements to its mandate;
3. the establishment of a World Environment Organization.

In relation to each of these models the focus is on the legal implications of reform for existing MEAs. The MEAs in question include all 15 global MEAs with significant links to UNEP: the Ramsar Convention (1971), the World Heritage Convention (WHC, 1972), CITES (1973), the Convention on Migratory Species (CMS, 1979), the Vienna Convention (1985) and the Montreal Protocol (1987), the Basel Convention (1989), the Convention on Biological Diversity (CBD, 1992) and the Cartagena Protocol (2000), the UNFCCC (1992) and the Kyoto Protocol (1997), the Desertification Convention (UNCCD, 1994), the Rotterdam Convention (1998), the Treaty on Plant Genetic Resources (ITPGRFA, 2001) and the POPs Convention (2001).

The report takes up two main issues in relation to the first model. The first issue is the legal implications for existing MEAs of strengthening UNEP on the basis of its current mandate. The main findings are the following:

- a) *Coordination of the timing and the venue of COPs*: The UNEP Governing Council is free to adopt recommendations concerning the timing and venue of COPs. However, such recommendations cannot be addressed to the COPs of the WHC and the ITPGRFA, due to their links to bodies of UNESCO and FAO.
- b) *UNEP implementation body*: Such a body would carry out tasks that overlap significantly with the tasks that MEAs assign to COPs, secretariats and, in exceptional cases, implementation bodies. The COPs are prevented from delegating tasks to a UNEP implementation body where MEAs state that specific tasks shall be carried out by the COPs or where delegation would involve transfer of powers to a UNEP implementation body. A UNEP implementation body could adopt specific or general recommendations to bodies of the MEAs and to member states as long as such recommendations assist the bodies of the MEAs in performing their tasks under the MEAs.

- c) *UNEP compliance body*: For the purpose of this report, the functions of compliance mechanisms are to determine whether specific actions or omissions of states are in compliance with specific obligations under the MEAs, and to recommend actions to remedy situations of non-compliance. A UNEP compliance body could function as a clearing house for information on the activities of existing compliance mechanisms. Moreover, it could be invested with the above functions of a compliance mechanism in cases where the COPs of MEAs decide to invest it with such functions – as an ‘opt-in’ mechanism. MEAs that could use a UNEP compliance body for such purposes without needing to amend the MEAs include the Ramsar Convention, the CMS, the UNFCCC (when the Kyoto Protocol expires), the CBD and the UNCCD.
- d) *Joint scientific body*: Factors facilitating the establishment of joint scientific bodies are that they are composed of experts, and that they do not necessarily have representatives from all MEA parties. Where MEAs contain provisions regarding the establishment of scientific bodies, such scientific bodies cannot be formally joined with or subordinated to external scientific bodies without amendment of the MEAs. Scientific bodies established by COPs can be joined with or subordinated to other scientific bodies through decisions of COPs. Otherwise, secretariats generally have the authority to enter into agreements (e.g., MoUs) with external scientific bodies.
- e) *Strengthening the administrative support functions of UNEP – formal and institutional elements*: Secretariats may be geographically relocated without amendments under any of the MEAs. Institutional affiliation of secretariats can be changed through COP decisions – with the exception of the WHC and possibly the ITPGRFA, where treaty amendments would be necessary. The Ramsar Convention and the Rotterdam Convention contain special requirements for such decisions. In general, the procedures for appointing heads of secretariats can be changed without amending the MEAs or their rules of procedure, except for the ITPGRFA.
- f) *Joint services*: All MEAs and rules of procedure define tasks that secretariats must perform. None of these provisions prevent the secretariats from seeking external assistance, including through MoUs with UNEP, when performing their tasks. Formal establishment of joint service functions would normally have budgetary implications, and secretariats would have to seek prior consent from the COPs. An alternative could be for UNEP to establish general service functions that are freely available. Secretariats of MEAs can in general make use of such service functions without seeking prior consent from the COPs.
- g) *Coordination of strategies*: Long-term strategic planning is a core function of COPs, and coordination among MEAs remains weak. The UNEP is free to assess the extent to which strategies of MEAs are supportive of UNEP’s strategies and other strategic documents adopted by bodies of the UN. Moreover, the UNEP Governing Council can adopt recommendations to COPs on how to improve synergies between strategies, as long as the COPs remain free to make final decisions on the strategies of the MEAs.

- h) *Coordination of funding*: Trust funds would in general be hosted by the institution acting as host to the secretariat, but there are no requirements to this effect in any of the MEAs. Only in exceptional cases, as with the WHC, do MEAs contain detailed provisions regarding other financial mechanisms. In general, the COPs enjoy broad discretion in making decisions on how to organize financial mechanisms under the MEAs.

Secondly, the report considers enhanced cooperation and coordination among groups of MEAs. It is important to consider such initiatives in light of plans to strengthen the functions of UNEP, so that participation in UNEP-based initiatives remains an option available where relevant. The report examines three groupings of MEAs:

- a) *Chemical treaties*, including the Rotterdam Convention, the POPs Convention and the Basel Convention: these have established the most advanced arrangements for cooperation and coordination ('clustering'). This is a small group of relatively homogeneous MEAs, but it is noteworthy that the Rotterdam Convention maintains its institutional link to FAO, and that the cooperation includes the 'mature' Basel Convention and the 'young' Rotterdam and POPs Conventions. The report identifies implementation, compliance and funding as areas with a potential for further cooperation and coordination.
- b) The *Biodiversity Liaison Group* was established in 2004. The MEAs are heterogeneous, and full inclusion of the ITPGRFA and the WHC is particularly challenging due to their affiliation with FAO and with UNESCO. *Coordination of COPs* can be accommodated through decisions of the COPs, except for the WHC and the ITPGRFA. Coordination of *implementation* could be achieved on the basis of MoUs or MoCs and through development of the UNEP-WCMC, but would encounter some difficulties in relation to the WHC. *Compliance* mechanisms have not been important among the biodiversity MEAs, with the exception of CITES and the ITPGRFA, and a joint mechanism based on an 'opt-in' approach could be considered. Cooperation concerning *secretariat functions*, including administrative services, can be achieved through MoUs and MoCs between secretariats. However, the mandates for secretariats to enter into such agreements remain unclear under many of the MEAs, and the COPs must be directly involved where such agreements have financial implications. Cooperation and coordination concerning *funding* can be achieved by integrating other MEAs in the existing framework of cooperation between the CBD and the GEF. Relevant initiatives to coordinate *scientific bodies* and *strategic planning* are currently under way.
- c) *Participation of other MEAs*: The UNFCCC and the Kyoto Protocol, and the Vienna Convention and the Montreal Protocol, are unlikely to join any of the above frameworks for cooperation. This report suggests that the UNCCD could participate in the Biodiversity Liaison Group, pointing out that the UNCCD is likely to focus on cooperation and coordination through the Joint Liaison Group of the Rio Conventions in the near future.

- d) The *Joint Liaison Group of the Rio Conventions* overlaps with the biodiversity group – an important factor when designing instruments for cooperation and coordination. Given the increasing formalization of cooperation in the Biodiversity Liaison Group and the central position of the CBD in both groups, as well as the broad thematic scope of the Joint Liaison Group and the significant differences between the MEAs, the report deems it likely that cooperation in the Joint Liaison Group will remain informal.

The second model is based on the mandate of UNEP from 1972. The model supplements the current mandate in two directions: 1) investing UNEP with extended decision-making power applicable to those MEAs that choose to participate in such arrangements, and 2) establishing new tasks for UNEP that can be associated with establishing a High Commissioner for the Environment.

1. *Extended decision-making power*: The report considers that it is not of significance to the issues discussed here whether the number of states meeting in the UNEP Governing Council is increased from the current 58. Problems of investing UNEP with decision-making power are related to differences in contracting parties to the MEAs, ranging between 114 and 196, and differences in the links established between MEAs and third actors, such as IGOs and NGOs. The report identifies three important problems: 1) A common structure that defines rights and obligations of MEAs would have to deal with complex issues concerning distribution of costs and benefits among the MEAs. 2) If the UNEP Governing Council is invested with decision-making power, non-parties may take part in decisions concerning MEAs. 3) Investing the UNEP Governing Council with decision-making power would require amending the relevant MEAs.
2. *New tasks (High Commissioner)*: The tasks of *monitoring and assessing* follow-up of UNGA resolutions and UN Declarations and of *recommending* action to address shortcomings can be designed so that they would not overlap significantly with the tasks of other institutions. Where the MEAs currently report directly to UN headquarters or to a specialized agency (i.e. the UNFCCC and the Kyoto Protocol, the UNCCD, the ITPGRFA and the WHC) the relevant body could request the MEA in question to report through UNEP. UNEP is free to address recommendations to relevant MEAs. Such recommendations would constitute problems only in relation to the WHC and the ITPGRFA, and these problems could be resolved through MoUs between UNEP and UNESCO and FAO, respectively. The task of *coordinating and mainstreaming* environmental protection throughout the UN could overlap with the tasks of other bodies, including MEAs. Such issues concerning division of labour can be resolved through decisions by the UNGA or the ECOSOC, and should be agreed upon in MoUs with relevant MEAs. The task of functioning as an *addressee and clearing house* for decisions of other agencies and bodies of the UN regarding issues that fall within the scope of MEAs can be accommodated through agreements between UNEP and the relevant agency or body, and would, from a legal perspective, not require the MEA in question to be involved. The task of performing periodic *environmental policy reviews* could be related to

efforts to harmonize existing report mechanisms. As long as such reviews do not focus on implementation of or compliance with specific provisions of MEAs, they can be established without the consent of COPs or secretariats. The task of addressing situations of *gross and systematic non-compliance with international environmental law* would overlap with the non-compliance mechanisms of MEAs. While it would probably not be necessary to amend the relevant MEAs in order to resolve problems of overlap, the COPs would have to adopt amendments to existing non-compliance procedures in order to ensure coordination with a UNEP-based mechanism. The task of *responding to environmental emergencies* should be considered in light of current instruments set up for such purposes under specialized agencies of the UN. They would need to be treaty-based to the extent that measures would interfere with the sovereignty of countries. The task of providing *services or assistance to countries upon request* would not need consent from treaty bodies. The task of setting up mechanisms to ensure effective *technology transfer* would overlap significantly with the tasks of relevant bodies of MEAs. While MEAs include broad margins of appreciation concerning such activities, it can be assumed that the COPs would have to decide on the relationship between the MEAs and a UNEP-based technology transfer mechanism.

The third model involves the establishment of a World Environment Organization as a specialized agency of the UN through the adoption of a WEO treaty. Only parties to that treaty would be members of the WEO, and establishing an effective WEO can be expected to take some time. The report identifies three ways in which MEAs can be related to the WEO: 1) MEAs annexed to the WEO treaty; 2) freestanding MEAs that are brought under the auspices of the WEO through agreement between the WEO and the COP of the MEA; and 3) freestanding MEAs in respect of which the WEO exercises depositary functions and associated institutional and procedural services. For these situations, two issues are taken up: a) including substantive, procedural or institutional requirements in the WEO treaty, and b) investing the WEO with decision-making power.

1. *MEAs annexed to the WEO treaty*: First, a WEO treaty cannot be expected to contain strict substantive, procedural or institutional requirements applicable to MEAs. Requirements concerning the *scope and purpose of MEAs* may raise issues in relation to the WHC and the ITPGRFA, but would not be any problem for other MEAs. Rights of all members of the WEO to *join the MEAs* could raise issues in cases where MEAs require implementation of certain policies before ratification of the MEAs, but this is not a major problem under current MEAs. Requirements concerning the *official languages* of treaties could be an issue in relation to CITES, the CMS, the Ramsar Convention and the WHC.

Secondly, a WEO treaty cannot be expected to invest the new organization with extensive decision-making powers. The WEO could freely decide on its plans and programmes, and it could set up procedures for assessing how MEAs follow up such plans and pro-

grammes, as well as advising COPs and other MEA bodies on how to improve their performance. Such arrangements may, however, require amendments to rules of procedure of the MEAs in order to ensure appropriate decision-making processes. Power to instruct bodies of the MEAs would in general require amendments to the MEAs. The most complex legal issues arise in relation amending MEAs and adopting protocols. This report concludes that such issues can most easily be resolved by not involving the WEO directly in such decisions, and by including a safeguard in the WEO treaty which would allow the WEO to subsequently delete the MEA or the relevant protocol from its annex.

2. *Association based on agreement between the WEO and the MEA:* Such association agreements could be adjusted to the MEA in question. This would make it possible to resolve some of the problems that might otherwise arise if the MEA were to be annexed to a WEO treaty. The extent to which such problems could be resolved would depend on the flexibility the body of the WEO enjoyed when signing such agreements. Any major remaining problems would most likely be related to the decision-making power of the WEO. Provided that the WEO were not allowed to adopt mandatory decisions, such problems could be resolved through standard requirements concerning reform of rules of procedure of the MEAs. Should there be significant differences between the membership of the WEO and the parties to the MEAs, issues may be expected to arise concerning the legitimacy of the decisions of the WEO.
3. *Investing the WEO with depositary functions:* This would involve considerable problems for all existing MEAs, since they contain provisions assigning depositary functions to IGOs or specific countries. None of the MEAs invests the UNEP Executive Director with depositary functions. Hence transfer of depositary functions to a WEO cannot take place for existing MEAs without prior amendments of the MEAs.

1 Introduction

The objective of this study is to identify and discuss legal issues that may arise as a consequence of possible initiatives to reform the current regime for international environmental governance (IEG regime). An overview of current reform initiatives and their background is set out in Annex 1 to this study.

The report begins by identifying the strengths and weaknesses of the current IEG regime (section 2). The subsequent analysis is based on three reform models: a) strengthening and coordinating the existing institutional framework; b) upgrading UNEP to an authority with a broader and stronger mandate; and c) establishing a World Environment Organization as a UN specialized agency (section 3). The main part of the study (section 4) analyses the extent to which a selection of 15 core multilateral environmental agreements (MEAs) will need to be reformed in order to be included in a reformed IEG regime. The MEAs in question are:

- Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention, 1971)
- Convention concerning the Protection of the World Cultural and Natural Heritage (WHC, 1972)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973)
- Convention on the Conservation of Migratory Species of Wild Animals (CMS, 1979)
- Vienna Convention for the Protection of the Ozone Layer (Vienna Convention, 1985) and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol, 1987)
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention, 1989)
- United Nations Framework Convention on Climate Change (UNFCCC, 1992) and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol, 1997)
- Convention on Biological Diversity (CBD, 1992) and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol, 2000)
- United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD, 1994)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention, 1998)
- International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA, 2001)
- Stockholm Convention on Persistent Organic Pollutants (POPs Convention, 2001)

This report is based on the following definition of ‘international environmental governance’:¹

- a) coherent decision-making and objective-setting for international environmental policies among different environmental agreements and institutions;
- b) institutional architecture to implement and coordinate environmental policies and decisions;
- c) management and operationalization of the policies and decisions;
- d) coordination of the effective implementation of international environmental governance decisions at the country level.

Measures taken through MEAs to protect the environment can be systematized on the basis of various criteria, including in particular the environmental good to be protected and the human activities that threaten environmental goods. The organization of action programmes to follow up Agenda 21, including the establishment within the UN of inter-agency mechanisms to follow up the World Summit on Sustainable Development (UN-Water, UN-Energy and UN-Oceans), has been based on the environmental goods to be protected.² Of the MEAs above, some focus on environmental goods to be protected and address a broad range of activities that constitute relevant threats (the Ramsar Convention, the WHC, the CMS, the Vienna Convention and the Montreal Protocol, the CBD, the UNFCCC and the Kyoto Protocol, and the ITPGRFA), while others focus on specific human activities that constitute threats to a broad range of environmental goods (CITES, the Basel Convention, the Rotterdam Convention, the POPs Convention, and the Cartagena Protocol). This study assumes the continued existence of the current MEAs and their related institutions, while acknowledging that some adjustments will be needed depending on the reform model.

2 Strengths and weaknesses of the current regime for international environmental governance

The strengths and weaknesses of the current IEG regime can be determined by examining the extent to which the regime fulfils generally recognized objectives. Such objectives have been identified by the Consultative Group of Ministers or High-level Representatives on International Environmental Governance (Consultative Group):

- (a) creating a strong, credible and accessible science base and policy interface;

¹ This definition is the same as that agreed at the Consultative Meeting of MEAs on IEG on 12 April 2001 (see UNEP/IGM/2/INF/3) and subsequently used in the report of the Joint Inspection Unit (see JIU/REP/2008/3, para. 4, the report is also reproduced in UNEP/GC25/INF/33: see p. 9).

² See www.unwater.org/flashindex.html, <http://esa.un.org/un-energy/index.htm>, www.un-oceans.org/. See also United Nations Forum on Forests, www.un.org/esa/forests/.

- (b) developing a global authoritative and responsive voice for environmental sustainability;
- (c) achieving effectiveness, efficiency and coherence within the United Nations system;
- (d) securing sufficient, predictable and coherent funding;
- (e) ensuring a responsive and cohesive approach to meeting country needs.³

The current analysis cannot examine in depth and with authority the extent to which the existing IEG regime contributes to these objectives. The following overview over factors that have been advanced as strengths and weaknesses of the current regime has been identified by the author for the purpose of this study. The overview is followed by some comments relating to the current regime and its fulfilment of the above five objectives.

The *strengths* of the current regime can be summarized as follows:

1. Flexibility – in particular:
 - a. the availability of a broad range of options when designing rules, procedures and institutions,
 - b. the possibility of choosing informal arrangements,
 - c. the opportunity to find pragmatic solutions to concerns regarding the relationship to other treaties and institutions, and
 - d. extensive opportunities for developing regional initiatives.
2. Adaptability – the current regime arguably facilitates a high degree of dynamism and thus adaptability to changing circumstances.
3. Emphasis on facilitation and progressive fulfilment of obligations – the current regime arguably avoids confrontational and dispute-oriented approaches to environmental protection.
4. Emphasis on cost effectiveness – the current regime arguably allows countries considerable discretion in determining how to fulfil their obligations, thus facilitating resort to the least costly measures.
5. Emphasis on specialization – the current regime arguably promotes the identification of technically and scientifically sound approaches to specific challenges.
6. Emphasis on level of obligations – the current regime arguably makes it possible to agree on an advanced level of obligations that might not be possible within a more generalized regime.
7. Willingness to contribute funding – the current regime arguably provides countries with a significant possibility of determining funding priorities, and can thus be assumed to secure a high degree of willingness to provide funding among governments and other funding institutions (allowing such funding institutions to take ownership of initiatives, thereby increasing their interest in investing reputation, time and money).

³ See UNEP/CGIEG.2/INF/2 at 6.

8. Keeping the number of administrative layers as low as possible – the current regime arguably avoids creating additional administrative layers that would be needed if regimes were to function as part of a broader regime.

One success story frequently quoted as evidence of the strength of the current IEG regime is the Montreal Protocol and the Multilateral Fund for its implementation.⁴

Several analyses have been carried out in order to identify weaknesses of the current IEG regime. As initiatives have been taken and are under way to address shortcomings, and as the various sectors and MEAs have pursued different approaches to deal with challenges, statements concerning weaknesses are open to questioning and dispute. The report of the Joint Inspection Unit,⁵ the above-mentioned objectives identified by the Consultative Group and the objectives to be achieved through the clustering of the chemicals conventions⁶ are three recent and important points of reference for discussing the weaknesses of the current IEG regime. In light of these points of reference, weaknesses of the current IEG regime can be summarized as follows:

1. Despite important efforts of states and international institutions, many environmental indicators continue to deteriorate significantly.⁷
2. Lack of coordination among and between MEAs, in particular:
 - a. the lack of a single strategic planning framework (commonly referred to as the need for ‘system-wide instruments’);
 - b. the occurrence and risk of incoherence between MEAs and between their associated decisions;

⁴ See Information note by the Executive Director, Environment in the UN system, draft submitted to the Consultative Group of Ministers or High-level Representatives on Broader International Environmental Governance Reform on 7 June 2010, para. 45.

⁵ See, in particular, JIU/REP/2008/3 para. 67: ‘the international environmental governance system continues to suffer from inadequate coherence and coordination due to the lack of: (a) a common mechanism to resolve contradictions between MEAs, (b) a United Nations system-wide planning document on environmental assistance, and (c) a framework for common administrative, financial and technical support services to promote synergies between United Nations agencies and MEAs.’

⁶ See UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 at 12. The objectives were: ‘a) Strengthening of the implementation of the three Conventions at the national, regional and global levels; b) Promoting coherent policy guidance; c) Reducing administrative burden; d) Maximizing the effective and efficient use of resources at all levels; e) Taking into account global concerns and the specific needs of developing countries and countries with economies in transition; f) Protecting human health and the environment for the promotion of sustainable development.’

⁷ See A/CONF.216/PC/2, paras. 10, 19–21 and 37. Among the three pillars of sustainable development, the report states that the ‘environmental pillar is perhaps where progress has been the slowest’. Further, in para. 23: ‘most indicators of environmental improvement have not demonstrated appreciable convergence with those of economic and social progress; indeed, the overall picture is one of increased divergence, although a few positive developments can be applauded.’

- c. duplication of work;
 - d. failure by bodies to establish sufficient information-sharing and coordinating mechanisms on environment-related projects, with the consequence that potential synergies are not sufficiently realized;
 - e. sub-optimal distribution of resources among MEAs and their funding mechanisms and secretariats;
 - f. unbalanced geographical distribution of staff.
3. Resource-demanding – as pointed out by the Joint Inspection Unit: ‘During the period under review, the unit cost of the MEAs grew by a factor of 4.7, compared to 1.2 for conventions under the custody of the United Nations agencies.’⁸
 4. Lack of transparency and visibility – the complexities of the current regime arguably contribute to problems of communicating effectively with relevant stakeholders.
 5. Funding problems – the current regime arguably makes it possible for countries to pursue specific and changing priorities when determining where to channel their financial support, which can result in lack of sufficient and predictable funding for some MEAs. Arguably, the current regime favours priorities based on available funding rather than on available scientific evidence.
 6. Weak and fragmented implementation – the extent of fragmentation of the current regime arguably leads to fragmented domestic strategies, instruments and responsibilities of implementation.
 7. Weak compliance and enforcement mechanisms – the current regime supports an approach to multilateral compliance and enforcement mechanisms based on the assumption that specific needs for such mechanisms must be clearly demonstrated in each individual MEA.
 8. Weak legal status when coordinated with and confronted by other regimes – MEAs risk being set aside or applied on the basis of other regimes that have a higher degree of coherence and stronger mechanisms for implementation, compliance and enforcement.
 9. Many of the above weaknesses are particularly detrimental to the interests of the developing countries – it can be assumed that the above weaknesses could involve more serious negative effects for countries with limited administrative and financial resources.⁹

The current challenges of the climate regime and the regimes for the conservation and sustainable use of biodiversity are illustrative of the weaknesses of the current IEG regime, including its vulnerability to changing political priorities.

⁸ UNEP/GC25/INF/33 at 19–20.

⁹ This is emphasized in ‘Delivering as One’, Report of the High-level Panel on United Nations System-wide Coherence in the areas of development, humanitarian assistance and the environment, A/61/583, paras. 35–36.

Against this background, the following comments can be made concerning the extent to which the current regime fulfils the five objectives identified initially in this section:¹⁰

- a) 'Creating a strong, credible and accessible science base and policy interface':
 - There is inadequate representation of developing countries in global science processes.
 - The intergovernmental policy interface of the current regime is weak compared to that of other international regimes.
 - The credibility of the science base is to a significant extent questioned, in particular within the field of climate change, and there are many examples where policy-makers have ignored scientific advice.
 - Both the science base and the policy interface face considerable challenges in terms of accessibility; this is especially a problem for developing countries and for effective communication with the public.
- b) 'Developing a global authoritative and responsive voice for environmental sustainability':
 - Institutions dealing with environmental sustainability remain fragmented; their mandates are overlapping and often unclear.
 - The environmental pillar of sustainable development remains poorly integrated with the social and economic pillars despite more than two decades of policy development on the basis of the principle of sustainable development.
 - While there is broad consensus on the objective of sustainable development, significant disagreement remains regarding measures to be taken to meet this objective and the relationship between sustainable development and other policy objectives.
- c) 'Achieving effectiveness, efficiency and coherence within the United Nations system':
 - So far, effectiveness in achieving environmental objectives has been poor in such important areas as greenhouse gas emissions and biodiversity conservation.
 - There are considerable gains to be made in improving the efficiency of the current environmental regimes.
 - While there have been few clear examples of incoherence between environmental regimes, there is significant concern that incoherence will occur more frequently in the future, and there is considerable room for enhancing mutual supportiveness among the regimes.

¹⁰ Summaries of how the co-Chairs of the Consultative Group view the status of these objectives are set out in the Information Note from the co-Chairs of the Consultative Group, Elaboration of Ideas for Broader Reform of International Environmental Governance, submitted to the Consultative Group of Ministers or High-level Representatives on Broader International Environmental Governance Reform on 27 October 2010.

- d) 'Securing sufficient, predictable and coherent funding':
 - In general, there is insufficient funding for environmental sustainability demands.
 - Challenges related to funding vary considerably among environmental regimes, so a main problem seems to be to secure coherence.
 - Some regimes face significant challenges relating to the sufficiency and predictability of funding.
- e) 'Ensuring a responsive and cohesive approach to meeting country needs':
 - The current regime is highly responsive to the needs of countries that are able to express and lobby for their needs, but it faces significant challenges in being sufficiently responsive to the needs of countries that lack such abilities.
 - There are considerable challenges relating to the cohesiveness of the regime in meeting country needs, especially as regards prioritizing among the environmental challenges to be addressed and choosing measures to address the environmental challenges.

3 Models of environmental governance

3.1 Introduction

The Consultative Group has concluded that the work on identifying and discussing models of IEG should be guided by the following concepts:

- (a) Any reform to international environmental governance should be based on the principle that form should follow function.
- (b) Consultations on functions will lead to a discussion on forms that could range from incremental changes to other broader institutional reforms.
- (c) The international environmental governance debate should be addressed in the broader context of environmental sustainability and sustainable development.
- (d) Developing a set of options for improving international environmental governance should follow from a fresh examination of multiple challenges and emerging opportunities.
- (e) Incremental changes to international environmental governance may be considered alongside other more fundamental reforms.
- (f) The work of the consultative group should continue to be political in nature.¹¹

The first phase of the work of the Consultative Group on IEG identified the following models to be used as a basis for its work during the second phase:

- i. enhancing UNEP; ii. a new umbrella organization for sustainable development; iii. A specialized agency such as World Environment Organization; iv. possible reforms to ECOSOC and the Com-

¹¹ UNEP/GCSS.XI/4 at 2.

mission on Sustainable Development; and v. enhanced institutional reforms and streamlining of present structures.¹²

The Joint Inspection Unit identified the following models:

(a) the upgrading of UNEP to a real authority endowed with normative and analytical capacity and a broad mandate to review progress towards improving the world environmental situation; (b) creating a new World Environment Organization; and (c) strengthening the existing institutional framework.¹³

A Report from the UN Secretary-General on progress and remaining gaps in the implementation of sustainable development submitted to the Preparatory Committee for the United Nations Conference on Sustainable Development in April 2010 discusses possible reforms of the Commission on Sustainable Development. The following alternatives were identified:

... transforming the CSD into a sustainable development council under the General Assembly; converting the UN Trusteeship Council into a sustainable development council; and initiating a sustainable development segment as part of the annual sessions of the UN Economic and Social Council.¹⁴

While any IEG reform must be considered in the broader context of sustainable development, the present study does not aim at considering alternatives for establishing institutions to address all three pillars of sustainable development. This study considers only models for reform of the environmental pillar.

Against this background, the following three models serve as the basis for the present study:

1. *Strengthening and coordinating the existing institutional framework:* This model is based on a continuation of current approaches, taking into account that the institutional framework will be further developed and adjusted. Such development and adjustment will be based on the recommendations submitted by the Joint Inspection Unit, taking into account comments made on its recommendations, and guided by experiences gained from efforts to enhance cooperation and coordination among groups of MEAs, in particular among the chemicals conventions.
2. *Strengthening UNEP by adding new elements to its mandate:* This model is based on the mandate of UNEP from 1972 as specified by the UNEP Governing Council in the Nairobi Declaration of 1997. The model supplements the current mandate in two directions: 1) investing UNEP with extended decision-making power applicable to those MEAs that choose to participate in such arrangements while

¹² 'Set of options to improve international environmental governance', document issued to the second meeting of the Consultative Group in October 2009, para. 13(b). See also UNEP/GCSS.XI/1 para. 8.

¹³ UNEP/GC.25/INF/33 at 38.

¹⁴ A/CONF.216/PC/2 para. 68.

maintaining its formal status as a UN Programme, in accordance with the recommendations of the Report of the High-level Panel on United Nations System-wide Coherence in the areas of Development, Humanitarian Assistance and the Environment;¹⁵ and 2) establishing new tasks for UNEP that can be associated with establishing a High Commissioner for the Environment, using the Office of the High Commissioner for Human Rights as a source of inspiration.

3. *Establishing a World Environment Organization as a specialized agency of the UN*: This model is based on the existing modalities for UN specialized agencies as set out in and practised under articles 57 and 63 of the UN Charter. FAO and the WTO have been used as sources of inspiration for designing models for how a WEO can relate to existing MEAs.

3.2 Model 1: Strengthening and coordinating the existing institutional framework

The current status of the IEG regime and existing reform initiatives is set out in Annex 1. Against this background, model 1 combines two approaches to reform: strengthening UNEP within its current legal framework,¹⁶ and a sectoral approach based on current initiatives to coordinate treaties and related institutions. The discussion of strengthening UNEP will examine the potential function of UNEP in relation to the elements of coordination as identified below. The main focus will be on UNEP's role in relation to bodies and secretariats of the MEAs and the possibility of establishing joint bodies and institutions.

As to the coordination of treaties and their institutions, the analysis will be based on the following two initiatives:

1. The chemicals 'cluster': the Basel Convention, the Rotterdam Convention and the POPs Convention.
2. The Biodiversity Liaison Group: the Ramsar Convention, the WHC, the CMS, CITES, the CBD and the Cartagena Protocol, and the ITPGRFA.

Three of the treaty regimes examined for this study fall outside these initiatives as they are currently framed: the UNFCCC and the Kyoto Protocol, the Vienna Convention and the Montreal Protocol, and the UNCCD. Two main options are available to these MEAs: 1) to join one of the above initiatives, or 2) to establish a third initiative. Both these options will be considered.

¹⁵ 'Delivering as One', A/61/583 para. 39.

¹⁶ The current formal framework for UNEP follows from UN General Assembly resolution 2997(XXVII), which must be understood against subsequent developments, in particular Agenda 21 and the Nairobi Declaration (1997, UNEP Governing Council resolution 19/1). See Official Records of the General Assembly, Fifty-second Session, Supplement No. 25 (A/52/25), decision 19/1, annex.

Cooperation and coordination among MEAs along the lines to be discussed below will include some degree of institutional integration. Hence, each treaty can take active part in one initiative only. Other efforts at coordinating work under the treaties, as in the Joint Liaison Group of the Rio Conventions, will be addressed separately below.

Using the clustering of the chemicals conventions as a source of inspiration, this study will examine the following main issues:

1. coordination of the timing and the venue of COPs;
2. joint body for the purpose of implementation;
3. joint body for the purpose of compliance;
4. joint scientific body;
5. strengthening common secretariat functions – formal and institutional elements;
6. joint services, including financial and administrative support, legal services, information technology services, information services and resource mobilization;
7. coordination of activities, in particular activities planned for in long-term strategies;
8. coordination of funding and financial mechanisms.

3.3 Model 2: Strengthening UNEP

In ‘Delivering as One’, the report of the High-level Panel on United Nations System-wide Coherence in the areas of development, humanitarian assistance and the environment, the Panel favoured ‘upgrading UNEP with a renewed mandate’.¹⁷ It recommended that the mandate should include ‘real authority as the environment policy pillar of the United Nations system, backed by normative and analytical capacity and with broad responsibility to review progress towards improving the global environment’. However, environmental governance as set out in this report is not among the four priority areas identified in the follow-up resolution of the UN General Assembly on ‘System-wide Coherence’.¹⁸

This section will discuss the issues arising if UNEP were to be developed into an institution with a strengthened mandate and with the establishment of an Office of the High Commissioner for the Environment (OHCE) within this institution. This model uses the UN General Assembly resolutions establishing the Office for the High Commissioner for Human Rights and the Human Rights Council¹⁹ as sources of inspiration and is based on options identified in documents presented to the

¹⁷ See UN doc. A/61/583 (2006), para. 39.

¹⁸ See UNGA A/RES/62/277, para. 3.

¹⁹ UNGA A/RES/48/141 and A/RES/60/251.

Consultative Group of Ministers.²⁰ The elements selected for this study include only those that involve functions which are additional to or clarify those currently falling within UNEP's mandate and which might have significant legal implications. The elements include the following tasks:

1. to monitor and assess initiatives taken to follow up UNGA resolutions and UN Declarations and adopt recommendations to address shortcomings;
2. to coordinate environment-related activities and promote the effective mainstreaming of environmental protection throughout the United Nations system;
3. to carry out the tasks assigned by the competent bodies of the UN system in the field of the environment and to make recommendations to them with a view to promoting protection of the environment;
4. to undertake periodic review, based on objective and reliable information, of the fulfilment by each state of its environmental obligations and commitments in a manner that ensures universality of coverage and equal treatment with respect to all states; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism is to complement and not duplicate activities under MEAs;
5. to address situations of gross and systematic non-compliance, and make recommendations thereon;
6. to respond promptly to environmental emergencies;
7. to provide advisory services and technical and financial assistance, at the request of the state concerned and, where appropriate, relevant regional organizations, with a view to supporting actions and programmes in the field of the environment;
8. to set up mechanisms to ensure effective technology transfer and cooperate with relevant international institutions to remove barriers to such transfer;
9. to establish a joint management mechanism for trust funds for the environment.

3.4 Model 3: World Environment Organization

This model is based on the existing modalities for UN specialized agencies as set out in and practised under Articles 57 and 63 of the UN Charter. The creation of a World Environment Organization (WEO) as a specialized agency of the UN will require negotiation of a separate treaty establishing such an organization (hereinafter: the WEO treaty). A decision to commence negotiation of a WEO treaty, including a mandate

²⁰ See in particular Information Note from the co-Chairs of the Consultative Group, Draft Elaboration of Ideas for Broader Reform International Environmental Governance, 7 September 2010.

for the negotiations, could be made by the UN General Assembly upon recommendation from ECOSOC or from the UNEP Governing Council. Draft elements for a WEO treaty to be used as a starting point for negotiations could be commissioned from the International Law Commission or from an independent group of experts.

We will assume that there is agreement on establishing a WEO. The issue to be addressed is the potential relationship between the WEO and existing MEAs. The following three models of relationship between the MEAs and the WEO will be used here:

1. MEAs to be annexed to the WEO treaty, i.e. constituting parts of an integrated treaty regime;²¹
2. freestanding treaties either adopted according to procedures established in the WEO treaty or brought under the auspices of the WEO treaty through agreement between the WEO and the MEA in question;²²
3. freestanding treaties concluded outside the framework of WEO in respect of which the WEO exercises depositary functions and, depending on arrangements made between the WEO and the MEA in question, institutional and procedural services.²³

A WEO will be assumed to have functions similar to those of an upgraded UNEP: see the previous sub-section. While the same functions are relevant, the specific design of the functions may differ due to the different roles of UNEP as a subsidiary body within the UN and a WEO as a specialized agency. Nevertheless, it is not deemed necessary here to undertake a separate discussion of the legal implications of assigning such functions to a WEO. The functions of a WEO discussed here are those that would be additional to or more far-reaching than the functions identified in the sub-section above.

One basic challenge in the context of this model is that it might take time for states to join a WEO, and some states may choose not to join. This issue must be related to the near-universal participation in some MEAs.²⁴ Against this background, this study assumes that, in order to achieve near-universal membership as quickly as possible, a WEO treaty will be limited to establishing basic institutional structures and procedures, with few substantive provisions. Moreover, in order to make it possible for existing MEAs with almost-universal membership to become formally related to the WEO treaty, it is assumed that the WEO will generally not have authority to take decisions directly binding on the MEAs. Hence,

²¹ This can be referred to as a 'WTO model'.

²² This can be referred to as FAO model 1. In FAO, such treaties are adopted according to Article XIV of the FAO Constitution. For a list of such treaties under FAO, see www.fao.org/Legal/treaties/list1-e.htm.

²³ This can be referred to as FAO model 2. Treaties that have established such a relationship to FAO are regional or otherwise geographically limited treaties: see www.fao.org/Legal/treaties/list2-e.htm.

²⁴ For example, the Vienna Convention and the Montreal Protocol have 196 parties, the UNFCCC has 194 parties, and the CBD and the UNCCD have 193 parties. The UN has 192 members.

this study will examine the following main issues in relation to the above three options for relating existing MEAs to the WEO treaty:

1. Including substantive, institutional or procedural requirements in the WEO treaty with possible implications for existing MEAs should they be covered by such a treaty:
 - a. requirements concerning the scope and purpose of MEAs;
 - b. rights of members of the WEO to join MEAs;
 - c. rights of members of the WEO to observer status in bodies of the MEAs;
 - d. defining the object and purpose of the WEO and the relationship between the object and purpose of the WEO and the MEAs;
 - e. minimum requirements concerning official languages.
2. Coordinating decision-making processes of MEAs with decisions made by the WEO:
 - a. adopting plans, programmes and priorities of the WEO, and linking these to activities under MEAs;
 - b. establishing procedures and a body for monitoring the activities of the MEAs;
 - c. the authority to adopt recommendations directed to relevant institutions of the MEAs;
 - d. establishing procedures and a body for coordinating activities under the MEAs, including financial issues;
 - e. including an option to negotiate future amendments or protocols to MEAs under the auspices of the WEO.

4 Relationship between existing environmental agreements and possible models of environmental governance

4.1 Introduction

The analysis of legal issues relating to IEG reform will look into the following main questions:

1. whether the reform will require amendments to the existing legal framework of the MEAs, including rules of procedure;
2. whether the reform will require decisions by bodies of the MEAs, with a focus on decisions by the conferences of parties, the bureaus or similar bodies, subsidiary bodies or the heads of the secretariats;
3. whether the reform will require revision of agreements between the MEA in question and third parties, with a focus on agreements with intergovernmental institutions;
4. whether the reform will require decisions by intergovernmental organizations (IGOs), with a focus on the UN General Assembly and UN specialized agencies (such as FAO and UNESCO).

Legal issues that will not be taken up here include implications of potential reforms for headquarter agreements, employment contracts,

privileges and immunities of officials, and secondment of staff. Such legal issues can normally be resolved at the technical/ administrative level.

One general issue of relevance in the following is how to establish joint bodies – be they joint implementation bodies, joint compliance bodies or joint scientific bodies – between and among MEAs. There are four main approaches to the establishment of such bodies:

1. Establishment through *adoption of a treaty among states* intending to participate in the body. Such a treaty would be needed to the extent that the powers of the body would affect the rights and obligations of states under international law beyond the powers authorized under existing treaties. Since such a treaty would apply only between the states joining the treaty, this approach would raise problems regarding differences between the range of states that are parties to the treaty and those that are parties to relevant MEAs.
2. Establishment as a *subsidiary body* to an existing institution, such as UNEP. A decision to establish such a body could be taken by the UNEP Governing Council. In order to invest such a body with tasks relating to MEAs, the decision to establish the body may have to be supplemented by decisions of the COPs of the MEAs, or by MoUs or MoCs between the body and secretariats of the MEAs.
3. Establishment through adoption of a *treaty* or ‘an international agreement’²⁵ *among the COPs* of the MEAs participating in the body. Whether COPs have the authority to adopt treaties or other international agreements may be questioned in individual cases, but the general starting point is that they have such powers.
4. Establishment through *MoUs or MoCs between the secretariats* of the MEAs. Main issues in this context would be whether such MoUs or MoCs would fall within the authority of the secretariats as set out in the MEAs or related rules of procedure, and whether the secretariats would have to seek the consent of their COPs before entering into such agreements.

In general, it will be assumed that there would be a preference for establishing joint bodies through alternatives 2–4 where possible. Further, we assume that the threshold for establishing such bodies should be kept as low as possible, which means that alternative 4 would be preferred over alternative 3, and that MoUs or MoCs between the body and secretariats would be preferred under alternative 2. The applicability of and choice between these alternatives will be commented upon as relevant.

The MEAs contain varying rules concerning the decision-making power of the COPs. Disagreement has occurred when the COPs have attempted to specify such rules in rules of procedure. Agreement on decision-making procedures has been achieved under most of the MEAs, among them the Vienna Convention and the Montreal Protocol, the CMS, the

²⁵ See art. 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

Ramsar Convention, the ITPGRFA,²⁶ the WHC, CITES, and the Basel Convention.²⁷ However, significant disagreement on decision-making procedures, including requirements concerning consensus, remains under many treaties, including the UNFCCC,²⁸ the CBD,²⁹ the UNCCD,³⁰ the POPs Convention,³¹ and the Rotterdam Convention.³²

One general issue that has been discussed is the possibility of organizing joint COPs. This issue is parallel to the topic of how to organize meetings under a treaty and its protocols in cases where the treaties are independent sets of rules, such as for example the COPs and COP/MOPs under the UNFCCC and the Kyoto Protocol. As long as the treaties remain independent of each other and may differ in membership, meetings under the treaties must in general be organized as separate meetings. Nevertheless, it is at least theoretically possible to amend the treaties so that they provide for joint COPs. The main problem with such an arrangement is that it would give non-parties the possibility of exerting influence on a treaty. The extent of influence would depend on the specific arrangement set up for the meetings. Taking the ‘chemicals cluster’ as an example, the contracting parties differ as follows: the Basel Convention has 174 parties, the POPs Convention has 172 parties and the Rotterdam Convention has 139 parties. Hence, even for these three relatively homogeneous treaties, organizing joint COPs would involve significant legal and institutional problems.

4.2 Strengthening and coordinating the existing institutional framework

4.2.1 Strengthening UNEP

According to the original UNEP mandate, ‘a small secretariat shall be established’ and ‘the costs of servicing the Governing Council and providing the small secretariat ... shall be borne by the regular budget of the United Nations’.³³ The reference to a ‘small secretariat’ is now outdated, and cannot be regarded as any limitation of the freedom of the UN to strengthen UNEP.

²⁶ See Rule VI of the Rules of Procedure, which sets out a strict requirement of consensus.

²⁷ But see www.basel.int/legalmatters/index.html on art. 17.5 and the ‘ban amendment’.

²⁸ See Rule 42 of Draft Rules of Procedure. See also para. 9 of the report from CoP 15, UNFCCC doc. FCCC/CP/2009/11.

²⁹ See Rule 40 of the Rules of Procedure.

³⁰ See Rule 47.1 of the Rules of Procedure.

³¹ See Rule 45.1, second sentence of the Rules of Procedure.

³² See Rule 45.1, second sentence of the Rules of Procedure.

³³ See section II, paras. 1 and 3 of UN General Assembly resolution 2997(XXVII).

1. Coordinated meetings of the COPs: The MEAs pursue different policies regarding meetings of the COPs, in terms of frequency, venue, coordination with other meetings, funding and duration. Some MEAs specify relevant rules in the treaties, most MEAs set out rules in their rules of procedure and a few MEAs do not have rules regarding venues. All MEAs allow the COPs to make final decisions on date, frequency and venue of future COPs. Hence, even if some treaties state that COPs shall be held every year, and other treaties state that intervals between COPs shall not exceed three years, the COPs are free to decide on how to coordinate the dates and venues of their meetings. To the extent that there are relevant rules, most MEAs state that the venue of COPs shall be at the seat of the secretariat unless the COPs, or in some cases the head of the secretariat, decide otherwise. In practice, the venues of COPs are rotated among parties to the MEAs under most MEAs. Such rotation may be beneficial for political reasons and to secure funding. This is an important factor when discussing the feasibility of coordinating meetings.

The WHC is the main exception concerning rules on date, frequency and venue of COPs. According to art. 8.1, the meetings of the General Assembly of the WHC shall take place ‘during the ordinary session of the General Conference’ of UNESCO. Another special rule can be found in art. 19.9 of the ITPGRFA: Its Governing Body ‘should, as far as possible’, hold its sessions back-to-back with the regular sessions of the Commission on Genetic Resources for Food and Agriculture.

Thus it is possible for all COPs, except for the WHC, to coordinate the timing and venue of their COPs without treaty amendments. However, the COPs cannot delegate decision-making power in this regard to external institutions, such as the UNEP Governing Council (UNEP GC), unless the MEAs in question are amended to that effect. The UNEP GC could adopt recommendations to relevant COPs and secretariats, and such recommendations would fall within the mandate of UNEP.³⁴ However, it can be argued that it would be inappropriate (albeit not unlawful) for UNEP to adopt such recommendations in the absence of explicit or implicit acceptance by relevant COPs.

*2. Joint body for the purpose of implementation:*³⁵ According to para. 2(c) of section II of the mandate of UNEP,³⁶ the Executive Director of UNEP shall ‘advise, as appropriate and under the guidance of the Governing Council, intergovernmental bodies of the United Nations system on the formulation and implementation of environmental programmes’. Moreover, para. 3(c) of the Nairobi Declaration states that UNEP is to

³⁴ See paras. 3(b): ‘development of coherent interlinkages among existing international environmental conventions’ and 3(c): ‘stimulate cooperative action to respond to emerging environmental challenges’ of the Nairobi Declaration (1997).

³⁵ This report distinguishes between ‘implementation’ and ‘compliance’, and uses a narrow definition of compliance (see below). For an explanation of the concepts as used by UNEP, see www.unep.org/DEC/OnLineManual/Compliance/Background/tabid/582/Default.aspx.

³⁶ See UN General Assembly resolution 2997(XXVII).

‘advance the implementation of agreed international norms and policies’. For that purpose UNEP has established a Division of Environmental Law and Conventions (DELIC).³⁷ The DELIC is charged, *inter alia*, with providing support for enhancing the implementation of MEAs and for improving synergies among them.

All the MEAs set out rules concerning implementation-related tasks to be carried out by the COPs. A standard formulation is for the COP to ‘keep under review the implementation’ of the MEA, and thereafter follow provisions specifying activities that the COP shall or may perform to fulfil this task. In addition, most MEAs assign tasks related to implementation to the MEA secretariats.³⁸ Of the MEAs examined in this study, only the UNFCCC contains a provision establishing a body to oversee implementation activities³⁹ and the WHC provides for procedures to oversee implementation.⁴⁰ Many of the COPs have established implementation bodies.⁴¹

In focus here are the potential legal consequences if UNEP were to establish a separate body to oversee the implementation of MEAs (UNEP implementation body). We assume that such a body would be invested with a mandate to deal with specific matters relating to the implementation of MEAs. It might be given three main tasks: to undertake activities to assist countries to implement MEAs; to monitor countries’ implementation of MEAs; and to adopt related recommendations. Against this background, the mandate of a UNEP implementation body would in general overlap with the mandates of COPs, implementation bodies and secretariats, and would arguably interfere with the legal integrity of MEAs. Whether COPs could delegate tasks related to facilitation, monitoring and recommendations concerning implementation to a UNEP implementation body would depend on the relevant provisions of the MEAs. The COPs would in general be prevented from delegating tasks to a UNEP implementation body in cases where MEAs state that specific tasks are to be carried out by the COPs⁴² or where delegation would

³⁷ See www.unep.org/DEC/Support/index.asp. In addition, some of the projects carried out by the UNEP Division of Environmental Policy Implementation (DEPI) have been of relevance to implementation of treaty obligations, but this has not been any main focus of its activities.

³⁸ See, e.g., art. XII:2(c) to (h) of CITES.

³⁹ See art. 10, which establishes the Subsidiary Body for Implementation.

⁴⁰ See art. 29 of the WHC.

⁴¹ The Joint Implementation Supervisory Committee of the Kyoto Protocol; the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol; the Ad Hoc Open-ended Working Group on the Review of Implementation of the CBD; the Standing Committee of CITES; the Oversight Panel for the Communications, Education, and Public Awareness activities of the Ramsar Convention; the Committee for the Review of the Implementation of the Convention of the UNCCD; and the Mechanism for Promoting Implementation and Compliance of the Basel Convention.

⁴² One example is the examination of state reports under the CBD: see art. 23.4(a).

involve transfer of powers to a UNEP implementation body. Arguably, transfer of power would include cases where a UNEP implementation body is charged with making policy recommendations directly to states. It would not include cases where it is charged with making recommendations to bodies of the MEA. In general, COPs would be allowed to delegate tasks to a UNEP implementation body where such delegation was limited to tasks that would assist COPs, implementation bodies under the MEAs and secretariats in performing their tasks according to the MEA.

An alternative could be for UNEP to establish a UNEP implementation body that would operate independently of agreements with COPs of MEAs. Such a body could be charged with information gathering and making the information available in various formats (acting as a 'clearing house' for information). Further, it could assist countries in identifying options for implementation of the MEAs. Such functions could be related to specific MEAs. Even though it would be lawful for such a body to provide policy analyses and recommendations, such activities could be argued to constitute inappropriate interference with the mandate of COPs, MEA implementation bodies and secretariats. An illustrative example of such activities is the cooperation among biodiversity-related treaties in coordinating national implementation of the treaties.⁴³ Against this background, a UNEP implementation body could be set up with a core function of assembling and making available information concerning implementation of MEAs, including drawing up options for implementation (e.g. in the form of 'best practices' examples), and with the additional possibility of providing specific policy analyses and recommendations if so requested by COPs, MEA implementation bodies or secretariats. Such functions should include assistance in coordinating the formats for reporting on national implementation.

3. Joint body for the purpose of compliance: According to para. 3(c) of the Nairobi Declaration, UNEP has the mandate to 'monitor and foster compliance with environmental principles and international agreements'. The DELC is charged, *inter alia*, with providing support for enhancing compliance with and enforcement of MEAs. For the purpose of this study, the activities carried out by the DELC in this respect are regarded as relating to implementation rather than to compliance. In 2002 the UNEP GC adopted Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements,⁴⁴ and in 2006 UNEP published its 'Manual on Compliance and Enforcement of MEAs'.⁴⁵ These documents remain very general, however, and offer little guidance on options available when establishing compliance mechanisms.⁴⁶

⁴³ See, in particular, para. 3 of the decision on 'Implementation of the Convention and the Strategic Plan' of COP 10 of the CBD, and paras. 12–14 and 16 of the decision on 'Cooperation with other conventions and international organizations and initiatives' of COP 10 of the CBD.

⁴⁴ UNEP Governing Council decision SS.VII/4: see www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf.

⁴⁵ See www.unep.org/dec/MEA_Manual.html.

⁴⁶ See UNEP Manual on Compliance and Enforcement of MEAs, pp. 115–19.

The situation in question here is where UNEP establishes a body to oversee compliance with MEAs (hereinafter: UNEP compliance body). We assume that such a body would be given an explicit mandate to deal with specific matters relating to compliance with MEAs. Hence, it would have the mandate to determine whether specific acts or omissions of states are in compliance with specific obligations under the MEAs, and to adopt recommendations to remedy situations of non-compliance. Such activities would necessarily involve applying the text of MEAs to specific situations, and would in many cases involve interpretation of provisions of the MEAs and determining the facts of cases.

Many MEAs contain provisions regarding the establishment of compliance mechanisms and procedures, and the establishment of such mechanisms and procedures has been a controversial topic under many MEAs. Compliance mechanisms and procedures that have been established include the Compliance Committee of the Kyoto Protocol,⁴⁷ the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol,⁴⁸ the Compliance Committee of the Cartagena Protocol,⁴⁹ the Compliance Procedures of CITES⁵⁰ and the Mechanism for Promoting Implementation and Compliance of the Basel Convention.⁵¹ Treaties so far unsuccessful in establishing compliance mechanisms despite obligations to do so include the POPs Convention (art. 17), the Rotterdam Convention (art. 17) and the ITPGRFA (art. 21).

The design of compliance mechanisms have been based on the specific needs of the MEAs. This is in accordance with the UNEP Guidelines, which highlight ‘the importance of tailoring compliance provisions and mechanisms to the agreement’s specific obligations’ (para. 14(d)). Among the common features of the existing compliance mechanisms are their focus on facilitating compliance and their non-confrontational character. Moreover, all these compliance mechanisms consist of a limited number of members, ranging from 10 (Implementation Committee of the Montreal Protocol) to 20 (Compliance Committee of the Kyoto Protocol). The mechanisms differ significantly as to procedures, decision-making powers and composition. Two of the mechanisms are made up of state parties⁵² while the remaining three are composed of persons serving in their individual capacities as experts.⁵³

A UNEP compliance body cannot be given a mandate that would overlap with the mandates of existing or to-be-established compliance mechan-

⁴⁷ See http://unfccc.int/kyoto_protocol/compliance/items/2875.php.

⁴⁸ See http://ozone.unep.org/Meeting_Documents/impcom/index.shtml.

⁴⁹ See http://bch.cbd.int/protocol/cpb_art34.shtml.

⁵⁰ See www.cites.org/eng/res/all/14/E14-03C15.pdf.

⁵¹ See www.basel.int/legalmatters/compcommittee/index.html.

⁵² The Implementation Committee of the Montreal Protocol and the Standing Committee of CITES.

⁵³ The Compliance Committee of the Kyoto Protocol, the Compliance Committee of the Cartagena Protocol and the Compliance Committee of the Basel Convention.

isms. That would rule out nine of the 15 MEAs. For these MEAs, a UNEP compliance body could function as a 'clearing house' for information on the activities of the compliance mechanisms. Such a function could serve to ensure coordination of the compliance mechanisms, in terms of how they fulfil their mandates and in individual cases.

For the remaining six MEAs – the UNFCCC, the CBD, the WHC, the Ramsar Convention, the UNCCD and the CMS – the COPs could refer responsibilities concerning review of compliance to a UNEP compliance body. Such a body would have to be designed so that it could be tailored to the special needs and legal framework of the individual MEA. To include the WHC raises institutional issues concerning its affiliation with UNESCO – issues most appropriately resolved by amending the WHC. Moreover, it must be taken into account that if a UNEP compliance body is to be given a mandate that could involve activities that would interfere with rights and obligations of states, for example a right to impose or authorize sanctions on a non-complying state, such activities may have to be authorized in the MEA in question.

4. Joint scientific body: According to section I, para. 2(d) and (e) of its mandate, the UNEP Governing Council shall 'keep under review the world environment situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments', and 'promote the contribution of the relevant international scientific ... communities to the acquisition, assessment and exchange of environmental knowledge and information'. Moreover, paras. 3(a) and (e) of the Nairobi Declaration state that UNEP shall 'analyse the state of the global environment and assess global and regional trends, provide policy advice, early warning information on environmental threats' and 'serve as an effective link between the scientific community and policy makers at the national and international levels'. The UNEP Division of Early Warning and Assessment (DEWA) assesses the state of the world's environmental situation, in order to foresee environmental trends and provide scientific reference material.⁵⁴

There exists a complex web of intergovernmental, IGO-based, NGO-based, state-based and other scientific institutions. The UNEP has been instrumental in establishing and is partner to a broad range of such institutions. The most noteworthy for the purposes of this study are the Intergovernmental Panel on Climate Change (IPCC), the International Science Policy Platform on Biodiversity and Ecosystem Services (IPBES, currently in the final stages of being established), the World Conservation Monitoring Centre (UNEP-WCMC), UNEP's Global Resource Information Database (GRID), and the Group on Earth Observations, which coordinates efforts to build a Global Earth Observation System of Systems (GEOSS). In addition, UNEP publishes a yearbook in which it presents scientific insights of particular interest to policy-makers.⁵⁵ As part of the process of the Consultative Group it has been proposed to create a 'multi-scaled, multi-thematic global information network' to 'be

⁵⁴ See www.unep.org/dewa/index.asp.

⁵⁵ See www.unep.org/yearbook/.

undertaken by a body of government nominated experts', established as a 'subsidiary intergovernmental body in the UN system.'⁵⁶

Most of the MEAs include provisions establishing or instructing the COPs to establish science bodies.⁵⁷ In addition, several science bodies have been established, at COP initiative.⁵⁸ Many of these science bodies are composed of experts participating in their personal capacity, and are thus assumed to provide objective scientific advice. In some cases, they are asked to present policy recommendations on the basis of their scientific knowledge. A special case is the WHC, which approaches the issue of scientific bodies by referring to external institutions (see arts. 8.3 and 14.2).

Against this background, the challenge for the current IEG regime is not a lack of scientific bodies, but the need to coordinate those that exist. Many MEAs contain provisions regarding the establishment of scientific bodies as subsidiary bodies. Hence, unless these MEAs are amended, such scientific bodies must remain bodies under the MEA in question and cannot be formally joined with or subordinated to external scientific bodies. Scientific bodies established on the initiative of COPs can be joined with or subordinated to other scientific bodies through decisions of COPs.

The extent to which scientific bodies can be coordinated with other scientific bodies must be determined on a case-by-case basis. Two factors make it easier to coordinate scientific bodies than other bodies under MEAs: that most scientific bodies are composed of experts participating in their personal capacity; and that some scientific bodies are made up of a limited number of experts – many contracting parties do not have experts participating in the bodies. In general, nothing would prevent scientific bodies of MEAs from participating in joint activities or contributing to joint programmes, although the respective COPs would have to be involved to the extent that such initiatives entail budgetary implications. Moreover, as long as a scientific body under a MEA does not act outside its mandate, it should be able to enter into MoUs or MoCs

⁵⁶ Information Note from the co-Chairs of the Consultative Group, Draft Elaboration of Ideas for Broader Reform International Environmental Governance, 7 September 2010 at 7-9.

⁵⁷ UNFCCC art. 9: Subsidiary Body for Scientific and Technological Advice; CBD art. 25: Subsidiary Body on Scientific, Technical and Technological Advice and art. 18.3: clearing-house mechanism; ITPGRFA art 17: Global Information System on Plant Genetic Resources for Food and Agriculture; UNCCD: art 24: Committee on Science and Technology; CMS art. VIII: Scientific Council; POPs Convention art. 19.6: Persistent Organic Pollutants Review Committee; and PIC Convention art 18.6: Chemical Review Committee.

⁵⁸ UNFCCC: Expert Groups; Vienna Convention and Montreal Protocol: Meeting of Research Managers (joint UNEP/ WMO), Technology & Economic Assessment Panel, Technical Options Committees; CITES: Animals and Plants Committees; Ramsar Convention: Scientific and Technical Review Panel, STRP Oversight Committee; UNCCD: Group of Experts; and Basel Convention: Open-Ended Working Group.

with other scientific bodies in order to improve its ability to fulfil its tasks. To the extent that an MoU or MoC would conflict with the current mandate of a scientific body, it would have to seek amendment to its mandate through the proper decision-making procedure, i.e., a decision by the COP or amendment of the MEA. Against this background, it can be concluded that there are few legal limits to the possibility of coordinating the activities of scientific bodies, and that such coordination can often be effected through decisions in the scientific body in question or through MoUs or MoCs between the relevant scientific bodies.

5. Strengthening the administrative support functions of UNEP – formal and institutional elements: According to para. 3(b) of the Nairobi Declaration, UNEP is charged with the ‘development of coherent interlinkages among existing international environmental conventions’. This can be done by coordinating the secretariat functions of the MEAs. All the MEAs examined include provisions on secretariats. Such provisions set out: a list of secretariat functions,⁵⁹ the institutional affiliation of the secretariat,⁶⁰ and who has the power to appoint the head of the secretariat.⁶¹ In addition, rules on secretariat functions in relation to COPs are set out in the respective rules of procedure. The rules concerning secretariat functions differ considerably among the MEAs.

None of the MEAs contain provisions concerning the physical location of the secretariat. Such decisions are generally made by COPs, and subsequently followed up through agreements with host countries and host institutions. Currently the secretariats are located as follows:

- Geneva: CITES, the ITPGRFA, the POPs Convention, the Rotterdam Convention and the Basel Convention;
- Gland: the Ramsar Convention;
- Bonn: the UNFCCC and the Kyoto Protocol, the UNCCD and the CMS;
- Nairobi: the Vienna Convention and the Montreal Protocol;
- Montreal: the CBD and the Cartagena Protocol;
- Paris: the WHC;
- Rome: the Rotterdam Convention.

The secretariat functions are distributed as follows among international host institutions:

- UNEP: the Vienna Convention and the Montreal Protocol, the CBD and the Cartagena Protocol, CITES, the CMS, the POPs Convention, the Rotterdam Convention and the Basel Convention;

⁵⁹ UNFCCC art. 8, Vienna Convention art. 7, Montreal Protocol art. 12, CBD art. 24, Cartagena Protocol art. 31, CITES art. XII, ITPGRFA art. 20, Ramsar Convention art. 8, UNCCD art. 23, CMS art. IX, POPs Convention art. 20, Rotterdam Convention art. 19, and Basel Convention art. 16.

⁶⁰ CITES art. XII: UNEP; WHC art. 14: UNESCO; Ramsar Convention art. 8: IUCN; CMS art. IX: UNEP; POPs Convention art. 20: UNEP; and Rotterdam Convention art. 19: UNEP and FAO.

⁶¹ WHC art. 14: UNESCO Director-General; and ITPGRFA art. 20: Director-General of FAO.

- UN: the UNFCCC and the Kyoto Protocol, and the UNCCD;
- FAO: the ITPGRFA and the Rotterdam Convention;
- UNESCO: the WHC;
- IUCN: the Ramsar Convention.

Rules on appointment of heads of secretariats are unclear under most of the MEAs. Only exceptionally are there specific rules set out in the MEA or in the rules of procedure of the COPs. Moreover, COPs are rarely directly and explicitly involved in the appointments, and in cases where they are involved, such involvement is limited to consultation. Two main approaches to appointment of head of secretariats have been chosen.⁶² The first is for the heads of secretariats to be appointed by the head of the institution hosting the secretariat, after consultation with the bureau of the MEA.⁶³ The second is for the UN Secretary-General to appoint the head of secretariat, after consultation with the COP or bureau of the MEA.⁶⁴ These MEAs follow the UN-based rule that officers of the UN at the level of Director (D-2) are to be appointed by the Secretary-General of the UN.⁶⁵

As shown by the above overview, MEA secretariats remain fragmented as to physical location and institutional affiliation. One treaty with a particularly complex situation as regards secretariat functions is the CMS. The 'CMS family' includes the CMS, seven legally binding treaties, 17 non-legally binding MoUs setting up separate arrangements for the protection of migratory species, as well as additional action plans and documents on coordinated actions. The CMS secretariat is hosted by UNEP; this secretariat is additionally responsible for two of the seven treaties. Another two of these treaties have secretariats that are co-located with the CMS secretariat. Three treaties have independent secretariats, located in Hobart, Monaco and Wilhelmshaven. Administration of the MoUs is often 'outsourced' to states or NGOs. The experiences of the CMS concern a global instrument that to a significant extent is implemented through regional initiatives. The effort under way to reform this complex administrative structure may illustrate some of the challenges faced when attempting to reform the IEG regime.⁶⁶

⁶² The only exception to these two approaches is the WHC, for which the Director-General of UNESCO functions as head of secretariat.

⁶³ The Executive Director of UNEP appoints heads of secretariats for the following MEAs: the Vienna Convention and the Montreal Protocol, the CBD and the Cartagena Protocol, and the CMS. The Director General of FAO appoints heads of secretariats for the ITPGRFA and the Rotterdam Convention. The Director General of the IUCN appoints the head of secretariat for the Ramsar Convention.

⁶⁴ This is the arrangement in place for the UNFCCC and the Kyoto Protocol, the UNCCD, CITES and the new arrangement for a joint head of secretariat for the POPs Convention, the Rotterdam Convention and the Basel Convention.

⁶⁵ On the procedure for appointment, see Rule 4.15(a) of the Staff Rules of the UN, UN doc. ST/SGB/2009/7.

⁶⁶ See www.cms.int/bodies/future_shape/future_shape_mainpage.htm.

A strengthening of the role of UNEP as host to or coordinator of the secretariats can be achieved without physically relocating these secretariats. Most of those MEAs can decide to change the affiliation of their secretariats to UNEP through an ordinary decision by their COPs. However, moving the environmental parts of the secretariat functions of the WHC from UNESCO to UNEP would require treaty amendment.⁶⁷ Arguably, it would be necessary to amend the ITPGRFA if the secretariat were to be moved from FAO to UNEP (ITPGRFA art. 20). Moreover, two of the other MEAs set out special requirements for decisions on affiliation of the secretariats. According to art. 8.1 of the Ramsar Convention: ‘another organization or government [than the IUCN can be] appointed by a majority of two-thirds of all Contracting Parties’,⁶⁸ and according to art. 19.4 of the Rotterdam Convention: ‘The Conference of the Parties may decide, by a three-fourths majority of the Parties present and voting, to entrust the secretariat functions to one or more other competent international organizations, should it find that the Secretariat [which is split between UNEP and FAO] is not functioning as intended.’

6. Joint services, including financial and administrative support, legal services, information technology services, information services and resource mobilization: UNEP can offer joint secretariat services on a subject-by-subject basis, for example through the establishment of an office for joint legal services. The provision of such service functions does not depend on locating secretariat functions with UNEP on a general basis, as such service functions can be carried out on the basis of MoUs or MoCs between relevant MEAs and UNEP. The UNEP can also draft standard MoUs or MoCs on joint services and otherwise encourage or recommend that such agreements be concluded between the MEAs.

The issue in focus in the following concerns the extent to which decisions on cooperation and coordination of services can be made at the level of secretariats, or have to be made at the level of the COPs or bureaus of the MEAs. It is clear that for none of the MEAs examined would such decisions necessitate amendments of the MEA.

The competence of the secretariats to enter into MoUs or MoCs with UNEP or other secretariats concerning joint services is generally set out in the MEAs. The MEAs examined have three main approaches to this matter:

1. competence to enter into ‘administrative’ arrangements ‘as may be required for the effective discharge of its functions’, under the ‘overall guidance’ of the COP;⁶⁹
2. competence to enter into ‘administrative’ arrangements ‘as may be required for the effective discharge of its functions’, with no reference to any role of the COP;⁷⁰

⁶⁷ See WHC, art. 14.

⁶⁸ It has been proposed to move the secretariat functions of the Ramsar Convention to UNEP, but there is currently no consensus on this issue. See www.ramsar.org/pdf/Report_6thMeeting_May2010.pdf.

⁶⁹ UNFCCC art. 8(e), UNCCD art. 23.2(e), POPs Convention art. 20.2(e), Rotterdam Convention art. 19.2(d).

3. competence to seek the assistance or cooperation of institutions, in some cases explicitly including non-governmental institutions.⁷¹

Two MEAs do not fall into any of these three categories. The Ramsar Convention does not contain relevant rules, and art. 13.7 of the WHC invests the World Heritage Committee with the competence to ‘co-operate with international and national governmental and non-governmental organizations’. In many cases, the COPs are informed of, comment on and make requests concerning MoUs or MoCs.⁷² No COP decisions on ‘overall guidance’, as set out in the first approach above, have been found.⁷³

Against this background, it can be concluded that secretariats of MEAs have broad competence to enter into MoUs and MoCs with UNEP and with other MEAs in order to perform their duties under the MEAs. However, to the extent that such arrangements would have long-term budgetary implications (extending beyond the next session of the relevant COP), it must be assumed that the secretariats have a duty to secure appropriate prior backing from the COPs or the bureaus of the MEAs before signing such instruments.

7. Coordination of activities, in particular activities planned for in long-term strategies: According to section II para. 2(c) of UNEP’s mandate, the Executive Director shall ‘advise, as appropriate and under the guidance of the Governing Council, intergovernmental bodies of the United Nations system on the formulation and implementation of environmental programmes’.⁷⁴ Moreover, paras. 3(a) and (c) of the Nairobi Declaration instruct UNEP ‘to catalyse and promote international ... action, based on the best scientific and technical capabilities available’ and to ‘stimulate cooperative action to respond to emerging environmental challenges’. In order to fulfil these elements of its mandate, UNEP could become more deeply involved in the long-term planning of activities under the MEAs.

Documents setting out long-term plans are labelled differently under the various MEAs. Examples include strategic plans, action plans, work programmes, action programmes, strategic framework and various reform initiatives. Long-term strategic planning is a core function of the COPs of the MEAs. Moreover, the long-term strategic planning of COPs is affected by a range of factors, not least the declarations, plans and programmes adopted by high-level meetings. The UNEP plays a significant role in the preparation of such high-level meetings, and the

⁷⁰ Vienna Convention art. 7(e), CBD art. 24.1(d), Basel Convention art. 16.1(d).

⁷¹ CITES art. XII:1 (including NGOs), CMS art. IX:2 and 4(b) (including NGOs), ITPGRFA art. 20.5.

⁷² See, for example, the decisions on administrative and financial matters taken by the COPs of the UNFCCC.

⁷³ Time has not permitted any extensive search for such decisions. Hence, this statement should not be read to indicate that no such decisions exist.

⁷⁴ See UN General Assembly resolution 2997(XXVII).

subsequent coordination of the activities of MEAs can be seen as an important function to be performed by UNEP.

It is clear that UNEP cannot under the current IEG regime instruct the COPs concerning their long-term planning of activities. The issue to be addressed here is the extent to which UNEP can assess whether long-term planning documents of MEAs are in accordance with recommendations of high-level meetings, are in accordance with strategic documents adopted by UNEP, and have been appropriately coordinated with corresponding documents of other MEAs. On the basis of such assessments UNEP could make recommendations to the COPs. On the one hand, it can be argued that such assessments and recommendations would constitute inappropriate interference with core tasks of the COPs. On the other hand, it can be argued that as long as such assessments and recommendations are regarded merely as input to the decision-making processes of the COPs and the COPs remain free to determine whether to follow the recommendations, UNEP should be free to carry out such activities. In any case, UNEP is not legally prevented from making such assessments and recommendations.

8. Strengthening UNEP's role in relation to funding: The Environment Fund was established by UN General Assembly resolution 2997(XXVII), to be administered by the Executive Director of UNEP under the authority and guidance of the UNEP Governing Council. According to para. 3(d) of the Nairobi Declaration, UNEP shall 'strengthen ... its role as an Implementing Agency of the Global Environment Facility (GEF), based on its comparative advantage and technical expertise'. The UNEP Division of the Global Environmental Facility (DGEF) executes UNEP's role in the GEF. This role consists in developing and implementing projects, ensuring administrative (financial and technical) reporting to the GEF, and providing scientific support through the secretariat for the Scientific and Technical Advisory Panel of the GEF.

Six of the examined MEAs contain provisions establishing or providing for the establishment of financial mechanisms.⁷⁵ These provisions differ significantly. Four of these mechanisms have the GEF as operating entity.⁷⁶ The trust funds established for the MEAs are located with different host institutions, especially the UN and UNEP. For all MEAs, the COPs remain the main decision-making bodies in financial matters. The fact that the frequency of COPs ranges from yearly to every third year is an important factor when exploring opportunities for coordination.

Only in exceptional cases do the MEAs contain detailed provisions regarding financial mechanisms – a noteworthy example being the World Heritage Fund set up by articles 15–18 of the WHC. In general, the COPs enjoy broad discretion when making decisions on how to organize funds and financial mechanisms under the MEAs. A general feature of the approaches to funding under the MEAs seems to be a wish to keep open

⁷⁵ UNFCCC art. 11, Kyoto Protocol art. 12, CBD art. 21, WHC art. 15, UNCCD art. 20.2(b) and art. 21.4, and POPs Convention art. 13.6 and art. 14.

⁷⁶ UNFCCC, CBD, UNCCD and POPs Convention. In addition, a partnership has been established between the Montreal Protocol and the GEF.

various options on how to organize funding. The main underlying reason seems to be to ensure continued interest among potential donors in providing funding. As there is competition to attract funding, the MEA that offers most freedom to potential donors may prove most successful in attracting funding.

In conclusion, there is a significant need to coordinate the financial mechanisms of MEAs. Such coordination would in general depend on establishing agreement between UNEP and COPs. Two main elements can be explored. One is whether trust funds could be hosted by UNEP. This would generally be an option only where UNEP is host to the secretariat of the MEA. The second element is the coordination of relevant financial mechanisms, where clarifying the respective roles of the MEAs, UNEP and the GEF is the most important issue. One study concludes as follows: ‘Initiating the integration of the environmental financing architecture would require agreement of the governing bodies of the various funds and mechanisms as well as the COPs of relevant MEAs and implementing agencies.’⁷⁷ Such agreements could be set out in the form of MoUs or MoCs between the joint management mechanism and relevant trust funds. Such MoUs or MoCs would then have to be accepted by the COPs of the MEAs.

4.2.2 *Cooperation and coordination among chemicals conventions – ‘clustering’*

The most advanced form of cooperation / coordination has been carried out under the chemicals conventions – the Basel Convention, the POPs Convention and the Rotterdam Convention. These three conventions held their first simultaneous meetings of COPs in April 2010 and made parallel decisions on cooperation.⁷⁸ The main outcome was the establishment of a joint head of the secretariats of the conventions⁷⁹ and of joint services, including financial and administrative support, legal services, information technology services, information services and resource mobilization. Prior to the simultaneous meeting, the three COPs had made parallel decisions on cooperation and coordination, including in particular decisions regarding joint activities.⁸⁰ It is noteworthy that the Rotterdam Convention maintains FAO as a co-host to its secretariat.

While this clustering effort has been successful, it has taken several years, and has been characterized by the Joint Inspection Unit as ‘a costly

⁷⁷ See Information note from the co-Chairs of the Consultative Group, Draft Elaboration of Ideas for Broader Reform International Environmental Governance, 7 September 2010 at 27-30.

⁷⁸ UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 at 8-25

⁷⁹ A precedent had already been in place in the form of a Joint Executive Secretary for the POP Convention Secretariat and the UNEP part of the PIC Convention Secretariat.

⁸⁰ Basel Convention CoP decision IX/10, PIC Convention CoP decision RC-4/11 and POP Convention CoP decision SC-4/34.

exercise'.⁸¹ The analysis below will examine some legal issues that would arise should the three treaties seek further integration in accordance with the nine elements identified above:

1. *Coordinated meetings of the COPs*: Such meetings have already taken place, and this issue does not require further considerations here.
2. *Joint body for the purpose of implementation*: The POPs and Rotterdam Conventions contain provisions establishing separate bodies responsible for issues concerning implementation.⁸² The tasks of these bodies are set out in some detail in the treaties. Any coordination of these bodies through a joint implementation body would have to respect the independence of these bodies when fulfilling their mandates under the treaties. The Basel Convention does not itself establish any implementation body, but its COP has established an Open-ended Working Group with tasks related to implementation. Against this background, a joint implementation body could be established through decisions of the COPs or MoUs between the treaties, as long as the body does not have the authority to make decisions on issues falling within the mandates of the Persistent Organic Pollutants Review Committee and the Chemicals Review Committee as set out in the respective treaties.
3. *Joint body for the purpose of compliance*: The POPs Convention (art. 17) and the Rotterdam Convention (art. 17) contain parallel provisions concerning the establishment of compliance mechanisms, without setting any conditions. The COPs have so far been unsuccessful in establishing any such mechanisms. The Basel Convention has established a Mechanism for Promoting Implementation and Compliance. A joint compliance body could thus be established without any treaty amendments. In order to avoid problems associated with differences in the parties to the treaties, such a compliance mechanism should be composed of a limited number of experts meeting in their personal capacity. The Basel Convention Compliance Committee could serve as a starting point for developing a joint compliance mechanism. However, given the lack of consensus on compliance mechanisms under the POPs and Rotterdam Conventions, it may be unlikely that the COPs would agree to establish a joint compliance mechanism.
4. *Joint scientific body*: There are no scientific bodies under the treaties other than the three mentioned in the discussion of a joint implementation body above. These three bodies have tasks regarding clarification of facts and assessment of effects of measures. Against

⁸¹ UNEP/GC25/INF/33 at 21. For other comments, see Urs P. Thomas, Chemicals and Wastes – A Model for Clustering MEAs, or More Complicated than Appearances? In *EcoLonomic Policy and Law. Journal of Trade and Environment Studies*, Special Edition 2008–2010, at 114-57 and Mirina Grosz and Pierre Portas, Environmentally Sound Management – Towards a Coherent Framework Bridging the Basel, the Rotterdam, and the Stockholm Conventions, in *EcoLonomic Policy and Law. Journal of Trade and Environment Studies*, Special Edition 2008–2010, at 45-67.

⁸² See art. 19.6 and art. 18.6 respectively.

this background, the conclusions above would apply equally to the question of establishing a joint scientific body. However, given the less political nature of a scientific body, it can be assumed that such a body will not make any decisions that could conflict with the mandates of the Persistent Organic Pollutants Review Committee or the Chemicals Review Committee

5. *Strengthening common secretariat function*: The COPs have already established joint secretariat functions. One issue that remains is the secretariat functions of FAO in relation to the Rotterdam Convention. According to art. 19.5 of the Convention, the COP may decide ‘by a three-fourths majority of the Parties present and voting, to entrust the secretariat functions to one or more other competent international organizations, should it find that the Secretariat is not functioning as intended.’
6. *Joint services, including financial and administrative support, legal services, information technology services, information services and resource mobilization*: Decisions on such issues have already been taken by the COPs.
7. *Coordination of activities, in particular activities planned for in long-term strategies*: Decisions on such issues have already been taken by the COPs.
8. *Coordination of funding and financial mechanisms*: The issue of funding and financial mechanisms is complex in relation to these three treaties. First, the Rotterdam Convention differs from the other treaties in its link to FAO. Secondly, among the three treaties, the POPs Convention is the only one with a financial mechanism that is administered by the GEF. Thirdly, the Rotterdam Convention is the only treaty that has not yet established any financial mechanism, although it is seeking cooperation with the Montreal Protocol in this respect.⁸³ Finally, both the Basel Convention (art. 14) and the POPs Convention (art. 13 and 14) contain mandatory rules on funding and the establishment of financial mechanisms. Against this background, there is a clear need for coordination of financial mechanisms under the three treaties. While the provisions of the Basel Convention and the POPs Convention would have to be respected, there are no additional legal conditions to be fulfilled before the COPs can decide to establish joint financial mechanisms. Moreover, the COPs are free to establish such mechanisms under the auspices of the GEF.

4.2.3 Cooperation and coordination among biodiversity conventions

In 2004, in order to follow up a decision by the COP of the CBD and its strategic plan, the Executive Secretary of the CBD took the initiative to establish the Liaison Group of the Biodiversity-Related Conventions (Biodiversity Liaison Group), comprising the CBD, CITES, the Ramsar Convention, the CMS, the WHC and, from 2006, the ITPGRFA.⁸⁴ The

⁸³ See UNEP/FAO/RC/COP.4/24 at 30.

⁸⁴ CBD decision VII/26. See www.cbd.int/cooperation/ and www.cbd.int/blg/.

secretariats of the treaties are in the process of establishing a web of MoUs, MoCs and joint programmes.⁸⁵ The Biodiversity Liaison Group has been invited by the CBD to examine the clustering process of the chemicals treaties ‘with a view to identify options for improved implementation of and cooperation among the biodiversity-related conventions’.⁸⁶

To a significant extent in contrast to the chemicals cluster, the Biodiversity Liaison Group consists of a heterogeneous gathering of treaty regimes:

- There are major differences in the numbers of contracting parties, ranging from 193 for the CBD to 114 for the CMS.
- The treaties have different institutional affiliations: for instance, the ITPGRFA has been adopted according to art. XVI of the FAO Constitution; the WHC is integrated as a part of UNESCO, and the Ramsar Convention is hosted by the IUCN.
- The adoption of the treaties spans a period of 30 years, from the Ramsar Convention (1971) to the ITPGRFA (2001). International environmental law and its related institutional framework have developed significantly during this period.
- The rights and obligations of states under the treaties vary considerably – from the general and ‘soft’ obligations of the CBD, to the detailed and technical obligations of CITES; and from the establishment of intergovernmental institutions and mechanisms under the ITPGRFA, to the internationalization of national legal regimes under the Ramsar Convention.

The analysis below examines legal issues that would arise should the Biodiversity Liaison Group seek further integration:

1. *Coordinated meetings of the COPs*: As it would be impractical to organize back-to-back COPs or otherwise coordinate the meetings of COPs for more than a limited number of treaties at the time, it may be an advantage, when coordinating the meetings of the COPs, that the frequency of the COPs varies between once every year and once every third year. Two of the treaties contain rules which merit further consideration. According to art. 8.1 of the WHC, the meetings of the General Assembly of the WHC shall take place ‘during the ordinary session of the General Conference’ of UNESCO. Hence, coordination of the timing of COPs between the WHC and other treaties of the Biodiversity Liaison Group cannot be undertaken without prior amendment of the WHC. The provision does not, however, prevent substantive coordination of the General Assembly of the WHC with the COPs of other treaties. Moreover, according to art. 19.9 of the ITPGRFA, its Governing Body ‘should, as far as possible,’ hold its sessions back-to-back with the regular sessions of the Commission on Genetic Resources for Food and Agriculture. The flexibility included in this provision implies that the Governing Body can to a significant

⁸⁵ See www.cbd.int/cooperation/related-conventions/mandates.shtml.

⁸⁶ CBD decision IX/27.

degree coordinate its meetings with the COPs of other treaties of the Group. The other COPs in the Biodiversity Liaison Group could coordinate their meetings through decisions of the COPs.

2. *Joint body for the purpose of implementation:* So far, the MEAs of the Biodiversity Liaison Group have paid much attention to the coordination of national activities related to implementation.⁸⁷ The MEAs of the Biodiversity Liaison Group have organized their implementation bodies in distinct ways, ranging from no such body separate from the COP in the case of the CMS, and the ‘soft’ Oversight Panel for the Communications, Education, and Public Awareness activities of the Ramsar Convention, to the Working Group on the Review of Implementation of the CBD and the Compliance Committee of the ITPGRFA. There is thus a considerable potential for coordinating implementation activities through activities of a joint implementation body. Of the treaties, only the WHC contains a provision setting up a procedure to oversee implementation. Hence, a joint implementation body can be established and function without the necessity of amending the treaties. One project of some relevance to such a body is the UNEP-WCMC Knowledge Management Project which included development of joint reporting frameworks, and which involved the CBD, CITES, the CMS and the Ramsar Convention.⁸⁸ Moreover, the GEF is involved in a project to streamline reporting to the biodiversity-related treaties.⁸⁹ A joint implementation body could be given the task of developing joint projects on various implementation issues. In general, such coordination would fall within the mandate of COPs, but could also, depending on the implementation measure in question, fall within the mandate of secretariats. In these cases, the secretariats would be competent to enter into MoUs or MoCs with the implementation body, without prior consent from their COPs.
3. *Joint body for the purpose of compliance:* Only two of the treaties – CITES and the Cartagena Protocol – have established compliance

⁸⁷ For a recent initiative, see para. 3 of the decision on ‘Implementation of the Convention and the Strategic Plan’ of COP 10 of the CBD: ‘Invites Parties and Governments to involve national focal points of all the biodiversity related agreements, as appropriate, in the process of updating and implementation of national biodiversity strategies and action plans and related enabling activities’.

⁸⁸ See www.unep-wcmc.org/conventions/knowledgemanagement.aspx. In addition, the project involved two instruments of the CMS ‘family’: the African–Eurasian Migratory Waterbird Agreement and the Indian Ocean South-East Asian Marine Turtle Memorandum of Understanding.

⁸⁹ See para. 8 of the decision on ‘Cooperation with other conventions and international organizations and initiatives’ of COP 10 of the CBD: ‘Invites the Liaison Group of the Biodiversity-related Conventions to continue giving consideration to the harmonization of national reporting and, in this context, welcomes the progress made in the GEF Project on Facilitating National Reporting to Rio Conventions (FNR-Rio), as well as the project to streamline reporting by Pacific island countries to the biodiversity-related multilateral environmental agreements’.

mechanisms. In addition, the ITPGRFA is in the process of developing a compliance mechanism in accordance with its art. 21.⁹⁰ On the one hand, the considerable differences among the treaties of the Biodiversity Liaison Group indicate that the gains from establishing a joint compliance body would be limited, as the functions of a compliance body would have to differ significantly in order to reflect the characteristics of the treaties. On the other hand, the availability of a joint compliance body could lower the threshold for making use of such mechanisms under the treaties, and thus promote a more harmonized use of such mechanisms despite the differences among the treaties. In any case, a joint compliance body would have to operate on an 'opt-in' basis and would have to be designed so that various options were available to the MEAs. As the establishment of a compliance body might affect the rights and obligations of states, it can be asked whether such a body must be established through a separate treaty between those states that accept such a body.⁹¹ In light of the priority given to facilitative and non-confrontational approaches to compliance under MEAs, it would not seem necessary to adopt such a treaty for the purpose of establishing a joint compliance body. However, it would probably be necessary to establish such a body through a treaty or international agreement between the COPs of the relevant MEAs. Alternatively, such a body might be established through a decision by the UNEP GC.

4. *Joint scientific body*: The UNEP, with the endorsement of the CBD,⁹² has initiated the establishment of an intergovernmental science-policy platform on biodiversity and ecosystem services (IPBES). Its formal establishment is planned to take place during the 65th session of the UN General Assembly.⁹³ In addition, several initiatives have been taken to coordinate the scientific activities of relevance to the MEAs of the Biodiversity Liaison Group.⁹⁴ Against this background, there is no need to further elaborate on the issue of establishing a joint

⁹⁰ See resolution 2/2009 of the Governing Body.

⁹¹ Examples of such treaties are the optional protocols establishing complaints procedures under the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (2008).

⁹² CBD decision IX/15.

⁹³ See UNEP/IPBES/3/L.2/Rev.1. The ad hoc intergovernmental and multi-stakeholder meeting has recommended that: (para. 6(f)) 'The new platform should be established as an independent intergovernmental body administered by one or more existing United Nations organizations, agencies, funds and programmes', and that: (para. 7) 'In carrying out its work an IPBES should: a) Collaborate with existing initiatives on biodiversity and ecosystem services, including multilateral environmental agreements and United Nations bodies ... to address gaps and build upon their work, while avoiding duplication ... e) Provide policy relevant information but should not provide policy prescriptive advice mindful of the respective mandates of the Multilateral Environmental Agreements'. See also <http://ipbes.net/>.

⁹⁴ This include Meetings of the Chairs of the Scientific Advisory Bodies of Biodiversity-related Conventions (for the most recent meeting documents, see www.cbd.int/doc/?meeting=CSAB-03), the establishment of the Global Biodiversity Information Facility (GBIF) (see www.gbif.org/), and UNEP's World Conservation Monitoring Centre (see www.unep-wcmc.org/).

scientific body under the Biodiversity Liaison Group for the purpose of this study.

5. *Establishing common secretariat functions, including joint services, such as financial and administrative support:* The secretariats of the treaties of the Biodiversity Liaison Group are hosted by different international institutions: UNEP hosts the CBD, CITES and the CMS; FAO hosts the ITPGRFA; UNESCO hosts the WHC; and the IUCN hosts the Ramsar Convention. It has been proposed to move the secretariat functions of the Ramsar Convention to UNEP, but so far there is insufficient agreement on this issue.⁹⁵ Moreover, the secretariats have different locations: CITES and the ITPGRFA are located in Geneva; the Ramsar Convention is located in Gland; the CMS in Bonn; the CBD in Montreal; and the WHC in Paris. Common secretariat functions can be organized relatively independent of the physical location of the secretariats, whereas the differences regarding the hosts of the secretariats may constitute a significant challenge. Nevertheless, it would in most cases be within the mandate of the secretariats to enter into MoUs or MoCs with other secretariats in order to establish arrangements for common secretariat functions. The MEAs of the Biodiversity Liaison Group differ considerably as to their rules on the competence of the secretariats to enter into MoUs or MoCs with other secretariats. Whereas art. 24.1(d) of the CBD invests its secretariat with a broad mandate, CITES, the CMS and the ITPGRFA are less explicit on this issue,⁹⁶ and the Ramsar Convention and the WHC do not contain relevant rules.⁹⁷ Against this background, there is significant uncertainty regarding the mandate of the secretariats of the Biodiversity Liaison Group to enter into agreements concerning joint secretariat services. It would thus be appropriate to involve the COPs to a significant extent in such processes. One approach could be to ask the COPs to approve establishment of a common framework, for example under the auspices of UNEP or the CBD, for common secretariat services, with which the secretariats subsequently can enter into agreements concerning specific categories of services.
6. *Coordination of activities, in particular activities planned for in long-term strategies:* The COPs of the Biodiversity Liaison Group have somewhat differing approaches to strategic planning. CITES adopts its Strategic Vision for a six-year period, the current Vision covering the period 2008–2013. The same is the case for the Strategic Plan of the CMS for the period 2006–2011,⁹⁸ and the Strategic Plan of the ITPGRFA for the period 2009–2014. The Ramsar Strategic Plan

⁹⁵ According to art. 8.1 of the Ramsar Convention: ‘another organization or government [than the IUCN can be] appointed by a majority of two-thirds of all Contracting Parties’. See www.ramsar.org/pdf/Report_6thMeeting_May2010.pdf

⁹⁶ See art. XII:1, art. IX:2 and 4(b), and art. 20.5, respectively.

⁹⁷ See, however, art. 13.7 of the WHC.

⁹⁸ On the discussion of the new plan, see www.cms.int/bodies/StC/37th_stc_meeting/Doc_10_assessment_strategic_plan.pdf.

covers a seven-year period, 2009–2015.⁹⁹ The WHC adopts its strategic plans in the form of a ‘living document’: the Operational Guidelines for the Implementation of the World Heritage Convention.¹⁰⁰ The CBD’s Strategic Plan covers a ten-year period: 2011–2020. All the heads of secretariats of the MEAs of the Biodiversity Liaison Group, except the Secretary General of the ITPGRFA, have agreed to use the CBD Strategic Plan ‘as a common framework for action over the next ten years.’¹⁰¹ Hence, there has been established a form of coordination of planning activities in the treaties. However, the facts that the ITPGRFA is not fully participating in such coordination efforts and that such coordination mainly is carried out at the level of heads of secretariats and not through the strategic plans adopted by the COPs are weaknesses of the current approach. It will be difficult to ensure that planning documents are adopted for the same time periods, given the variations in timing of the COPs. It is to be expected that the COPs of the other MEAs will take into account the CBD Strategic Plan when adopting new strategic plans, and that the CBD will ensure sufficient input to its own strategic planning from the other MEAs.

7. *Coordination of funding and financial mechanisms:* Two of the treaties include provisions on funding mechanisms: the CBD (art. 21), which has established an extensive cooperation with the GEF,¹⁰² and the WHC (articles 15–18), which has established detailed rules concerning the World Heritage Fund administered by UNESCO. The CBD, CITES and the CMS have UNEP-administered trust funds. The ITPGRFA has established a Benefit-sharing Fund as part of its obligation to ensure equitable sharing of benefits arising from the use of genetic resources, and two Special Funds – one for ‘agreed purposes’ and one to ensure active participation of developing countries. The Trust Fund of the ITPGRFA is administered by FAO. The most important funding mechanism under the Ramsar Convention is the Small Grants Fund for Wetland Conservation and Wise Use. In addition, special funds have been set up for more specific purposes.¹⁰³ The IUCN administers the funds of the Ramsar Convention. Against this background, it can be observed that the funding of the MEAs of the Biodiversity Liaison Group remains fragmented. Moreover, there are few rules on funding set out directly in the MEAs. Hence, the COPs and secretariats enjoy significant freedom to organize funding activities without having to amend their respective treaties. One approach would be for the MEAs to get more closely involved in the cooperation between the GEF and the CBD, for example through MoUs with the CBD. Another approach would be for the MEAs to establish individual MoUs with the GEF. Such

⁹⁹ On the strategic plans of the Ramsar Convention, see www.ramsar.org/pdf/key_strat_plan_2009_e.pdf.

¹⁰⁰ See <http://whc.unesco.org/en/guidelines/>.

¹⁰¹ See Press Communique of 7 September 2010, www.cms.int/news/PRESS/nwPR2010/09_sep/meas-geneva_communique.pdf.

¹⁰² See, in particular, COP decision IX/31, www.cbd.int/decision/cop/?id=11674.

¹⁰³ See www.ramsar.org/cda/en/ramsar-activities-grants/main/ramsar/1-63-68_4000_0__.

MoUs would in general need the involvement of the COPs. Due to their links to other institutions, it is not realistic to expect the ITPGRFA and the WHC to transfer administration of their trust funds to UNEP, but nothing would prevent them from cooperating with the GEF.

4.2.4 *The remaining MEAs*

Three of the treaty regimes examined for the purpose of this study currently fall outside the frameworks of the above arrangements for cooperation and coordination: the UNFCCC and the Kyoto Protocol, the Vienna Convention and the Montreal Protocol, and the UNCCD. Two main options are available to these MEAs: either to join one of the above arrangements, or to establish separate arrangements.

The UNFCCC and the Kyoto Protocol could arguably belong to both arrangements above. But there are several reasons why it is unlikely that these MEAs will join any of the arrangements. The UNFCCC and the Kyoto Protocol are large treaty regimes in terms of volume and complexity of rules and decisions, size of institutions and budget, and implementing activities. Such a treaty regime would easily dominate an arrangement. Moreover, the UNFCCC and the Kyoto Protocol do to a significant extent address topics that go beyond those covered by the two arrangements above. Including the treaties would thus risk eroding efforts to establish thematic focus within the arrangements. Finally, the UNFCCC and the Kyoto Protocol are currently facing important challenges regarding the future of the treaty regime, and will need to focus on such issues rather than on establishing formal arrangements with other treaties. Against this background, this study will not further examine issues that may arise as a consequence of the UNFCCC and the Kyoto Protocol joining the above arrangements.

The Vienna Convention and the Montreal Protocol could thematically be related to the chemicals 'cluster'. The measures applied under the Montreal Protocol are similar to those applied under treaties of the chemicals cluster. Moreover, the treaties cover similar issues – the control of a limited range of hazardous substances. However, hardly any interest in cooperation with the other chemicals treaties can be traced in the documents of the MOPs to the Montreal Protocol.¹⁰⁴ There may be many reasons for this lack of interest in promoting coordination with chemicals treaties within the Vienna Convention and the Montreal Protocol. The Montreal Protocol is frequently regarded as a success story and there seems to exist an assumption that it would risk losing more than it would gain from coordination with the other treaties; the Protocol is in a much more advanced stage of implementation than the other chemicals treaties and would therefore have less interests in cooperation than the

¹⁰⁴ The main decision of interest is MOP decision XVI/34. This decision has subsequently not been followed up by the MOP.

other treaties; in contrast to the other treaties,¹⁰⁵ the Vienna Convention and the Montreal Protocol enjoy universal membership; the Protocol can be expected to focus its limited resources on specific issues that need to be resolved to ensure high effectiveness of the treaty and would thus give priority to case-by-case cooperation with other MEAs to solve specific problems. Against this background, it does seem unlikely that the Vienna Convention and the Montreal Protocol would wish to participate actively in the chemicals cluster, and this study will not further examine issues that could arise should the treaties decide to join this cluster.

Finally, the UNCCD could thematically be related to the Biodiversity Liaison Group. So far, this issue has not been high on the UNCCD agenda, which has focused on the Joint Liaison Group of the Rio Conventions. The UNCCD has emphasized its interest in developing cooperation with the UNFCCC on issues concerning adaptation to climate change.¹⁰⁶ Moreover, the UNCCD secretariat has endeavoured to explore ways and means of strengthening the partnership and cooperation agreements that have been concluded among the secretariats of the Rio Conventions. The Joint Inspection Unit produced a report on the activities of the UNCCD secretariat, and this report has been an essential basis for initiatives to reform the UNCCD through the adoption of a ten-year strategic plan.¹⁰⁷ The strategic plan does not emphasize or elaborate on cooperation and coordination with other MEAs.

As to the potential for interest in joining the Biodiversity Liaison Group, two factors should be noted. First, a special relationship has been developed between the UNCCD and the CBD in the form of a Joint Work Programme (JWP). This 'JWP contains three main elements: assessments, targeted actions for conservation and sustainable use of biological diversity and enabling activities, and joint reporting.'¹⁰⁸ Specific indicators concerning the achievement of biodiversity targets are being developed jointly by the UNCCD and the CBD. Secondly, the UNCCD has entered into a MoC with the Ramsar Convention, which includes an obligation to 'explore the possibility of harmonizing the reporting requirements'.¹⁰⁹ Against this background, there is reason to explore the issues that might arise should the UNCCD express a wish to join the Biodiversity Liaison Group. However, one significant point is whether the UNCCD would face a choice between joining the Biodiversity Liaison Group and continuing its active participation in the Joint Liaison Group of the Rio Conventions. This would be both a resource issue and a policy issue, and will not be further explored here.

The following is an overview of issues that might arise if the UNCCD should wish to join the Biodiversity Liaison Group:

¹⁰⁵ Among key countries, the USA is not party to any of the treaties of the chemicals cluster, and Russia is non-party to the POPs Convention and the Rotterdam Convention.

¹⁰⁶ See ICCD/COP(8)/4 at 1 (summary).

¹⁰⁷ On the JIU report, see UNCCD doc. ICCD/COP(9)/4. The strategic plan was adopted by UNCCD decision 3/COP.8.

¹⁰⁸ See ICCD/COP(8)/4 para. 7.

¹⁰⁹ See www.ramsar.org/cda/en/ramsar-documents-mous-memorandum-of-21238/main/ramsar/1-31-115%5E21238_4000_0__.

1. *Coordinated meetings of the COPs*: According to art. 22.4 of the UNCCD, its COPs are to be held every two years unless otherwise decided by the COP. No particular issue would arise concerning coordination of the COPs of the UNCCD with those of other treaties of the Biodiversity Liaison Group.
2. *Joint body for the purpose of implementation*: The UNCCD established a Committee for the Review of the Implementation of the Convention (CRIC) in 2001. The CRIC was made permanent in 2009 and was given new terms of reference.¹¹⁰ The CRIC focuses on state reports submitted in accordance with UNCCD art. 26, on performance reviews of the institutions of the UNCCD and on assessing the achievement of objectives under the strategic plan. While an MoU or an MoC could establish a framework within which a joint implementation body could provide input to the processes of the CRIC, it is unlikely in light of the recent reform of the CRIC that there will be interest in significant reforms of the CRIC in the near future.
3. *Joint body for the purpose of compliance*: There are no rules on any compliance mechanism under the UNCCD. Its approach has been to facilitate implementation of the obligations, and there are few provisions that would fit well as bases for procedures of a compliance mechanism. The UNCCD would thus not be likely to make use of a joint compliance body.
4. *Joint scientific body*: Article 24 of the UNCCD establishes a Committee on Science and Technology. In addition, a Group of Experts has been set up in order to assist the Committee, but COP 8 discontinued the practice of establishing the Group. The strategic plan of the UNCCD sets out a framework for reforming the Committee on Science.¹¹¹ The UNCCD has participated in the discussions on establishing an IPBES. In light of the close cooperation between the UNCCD and CBD in the form of the Joint Work Programme, the UNCCD is likely to take active part in coordination through the IPBES.
5. *Establishing common secretariat functions, including joint services, such as financial and administrative support*: The Secretariat of the UNCCD is located in Bonn and hosted by the UN, its Executive Secretary appointed by the UN Secretary-General.¹¹² In the process of selecting a host for the Secretariat, the offer from UNEP to host the Secretariat was turned down.¹¹³ As to the links to the secretariats of the Biodiversity Liaison Group, the only treaty that has located its secretariat to Bonn is the CMS, and no particular links have been established between the secretariats of the CMS and the UNCCD. The arrangements chosen by the UNCCD for secretariat functions are thus more closely related to those of the UNFCCC than to any of the

¹¹⁰ See UNCCD decision 11/COP.9.

¹¹¹ See UNCCD decision 3/COP.8, para. 14 of the strategic plan.

¹¹² See UNCCD decision 3/COP.1.

¹¹³ See A/AC.241/55/Add.2.

treaties of the Biodiversity Liaison Group. The UNCCD strategic plan states as follows: ‘The secretariat works with the Joint Liaison Group to strengthen cooperation in the implementation process of the Rio conventions in order to move towards more concrete modalities of substantive cooperation in line with JIU recommendations.’¹¹⁴ Against this background, it is more likely that the UNCCD will seek and benefit from cooperation with the UNFCCC regarding secretariat functions, than with the treaties of the Biodiversity Liaison Group. In terms of legal issues, there is nothing in the UNCCD or its Rules of Procedure to prevent the Secretariat from entering into MoUs or MoCs with treaties of the Biodiversity Liaison Group or UNEP concerning secretariat functions.

6. *Coordination of activities, in particular activities planned for in long-term strategies:* The UNCCD currently has a ten-year strategic plan, adopted for 2008–2018.¹¹⁵ This plan has not been coordinated to any significant extent with the plans of other MEAs, nor does it to any significant extent mention cooperation or coordination to be undertaken in the future. These issues are thus left open and may be further explored in work programmes of the COPs, subsidiary bodies or the Secretariat. Reviews of the strategic plan may focus more clearly on coordination issues, and we could expect this issue to be brought higher on the agenda once internal reorganization of the UNCCD has advanced. It is likely that the UNCCD will focus such coordination efforts on the CBD, the UNFCCC and the Ramsar Convention.
7. *Coordination of funding and financial mechanisms:* The UNCCD has split its funding mechanisms between the GEF (see art. 20) and the International Fund for Agricultural Development (IFAD), which hosts the Global Mechanism (established by art. 21.4).¹¹⁶ The existing collaboration with the GEF would facilitate coordination with other treaties of the Biodiversity Liaison Group. As long as the UN remains the host of the Secretariat, the trust fund will not be transferred to UNEP.

Thus, it is possible for the UNCCD to join the Biodiversity Liaison Group and to participate in several of its coordinating activities, in particular related to coordination of funding in the context of the GEF. However, the UNCCD will have to consider the possible implications of such participation in light of its participation in the Joint Liaison Group of the Rio Conventions.

The final issue to be discussed here is the potential development of a third arrangement based on the Joint Liaison Group of the Rio Conventions (JLG).¹¹⁷ The JLG was established in order to promote cooperation among the three Rio conventions at the national and international levels, with the ultimate aim of developing complementarities and synergies in their activities on issues of mutual concern. Participants in this arrange-

¹¹⁴ See UNCCD decision 3/COP.8, para. 20(b)(iii)(c) of the strategic plan.

¹¹⁵ See UNCCD decision 3/COP.8.

¹¹⁶ The MoU with IFAD was adopted as UNCCD decision 10/COP.3.

¹¹⁷ The Group has its background in a UN General Assembly resolution, A/RES/53/186. See www.cbd.int/cooperation/liaison.shtml.

ment are likely to remain the current ones: the CBD, the UNFCCC and the Kyoto Protocol, and the UNCCD. The Ramsar Convention participated in the JLG at one point, but has not been involved in its recent activities.¹¹⁸

The activities of the JLG are more restricted than those of the chemicals cluster and the Biodiversity Liaison Group. The JLG constitutes a meeting place for the officers of the treaties' Executive Secretaries, scientific subsidiary bodies, and members of the secretariats. The JLG has identified adaptation, capacity building and technology transfer as its core focus. Hence, there is currently not much focus on institutional coordination beyond the meetings of the JLG and the organization of selected joint activities. As the CBD is committed to the Biodiversity Liaison Group, it must be assumed that its participation in the JLG will remain limited to the current level. The question is thus whether the other participants in the JLG will move towards closer institutional coordination regardless of the participation of the CBD in such efforts. Nothing would prevent such a development, since CBD participation would not be needed under the current arrangement. Problems associated with the participation of the UNFCCC in such efforts would be the same as those discussed above. It would thus seem that, for the time being, a coordinating framework like the existing JLG would be the preferred option from the perspective of the UNFCCC.

4.3 Upgrading UNEP

As UNEP is a subsidiary body to the UN General Assembly,¹¹⁹ all members of the UN are 'members' of UNEP as well. The highest authority of UNEP, its Governing Council, is composed of 58 states which represent the UN regions in an equitable manner. Currently, there is discussion on whether to expand the representation to the UNEP GC in order to increase its legitimacy.¹²⁰ Expanding the UNEP Governing Council so that all members of the UN would be represented would require adopting a new mandate for UNEP by the UN General Assembly. For the purpose of this study, it is not of significance whether the number of states meeting in the UNEP GC is increased or not.

This model must be considered while keeping in mind that many MEAs have explicitly or implicitly chosen not to be formally related to UNEP. One example is the limited number of MEAs that make use of UNEP as

¹¹⁸ See UNFCCC decision 13/CP.8.

¹¹⁹ UNEP has been established in accordance with art. 22 of the UN Charter: 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

¹²⁰ The general practice of the UN General Assembly is to invest programmes and similar bodies with governing bodies composed of a limited number of member states, between 30 and 60. See Note by the UNEP Executive Director to the Consultative Group, United Nations Specialised Agencies versus United Nations Programmes, 7 June 2010, at 10.

host to their secretariats.¹²¹ One basic challenge is how a strengthened UNEP can be made more attractive to the MEAs than the current version of UNEP. Given that MEAs may be assumed to be generally sceptical to the establishment of common structures that will have power over their bodies and activities, such power would have to be matched by increases in resource allocation. Against this background, we assume that a strengthened UNEP will be invested with considerably enhanced resources which those MEAs that choose to be associated with UNEP can benefit from.

This model assumes that the current mandate of UNEP is supplemented in two directions: 1) investing UNEP with extended decision-making power applicable to those MEAs that choose to participate in such arrangements, and 2) establishing new tasks for UNEP that can be associated with establishing a High Commissioner for the Environment.

1) As to investing UNEP with extended decision-making power applicable to those MEAs that would take part in the upgraded UNEP regime, a basic problem is the fact that the number of parties to the MEAs varies widely, from 196 to 114 parties.¹²² Key international actors remain non-parties to several of the MEAs of this study and are likely to remain so in the foreseeable future. The most significant of these is the USA, which has joined only seven of the 15 MEAs examined.¹²³ This represents a main challenge to the establishment of common structures for the MEAs.

Another cross-cutting issue that raises challenges for the establishment of common institutional and decision-making structures concerns differences in the relationship between MEAs and actors other than states. One issue is relationships established between MEAs and intergovernmental institutions, in particular in terms of agreements on secretariat functions and financial mechanisms. A second issue is the relationship between MEAs and non-governmental organizations, in particular in terms of agreements concerning the provision of science input, assessments, participation in activities and 'outsourcing' of activities under the MEAs. A third issue is relationships established between MEAs and other private parties, in particular in the form of various 'partnership agreements'. The relationships between MEAs and such external actors are generally set out in MoUs, MoCs and Letters of Intent. The extent to which MEAs have entered into such agreements with various actors differs significantly. Such agreements seem to be most common and include the broadest range of third parties among biodiversity-related MEAs, while they are less frequent among other MEAs.¹²⁴ One main issue is the extent

¹²¹ Among the MEAs examined, the UNFCCC and the Kyoto Protocol, the WHC, the ITPGFA, the Ramsar Convention and the UNCCD do not use secretariat services from UNEP.

¹²² Figures for the individual treaties are set out in Annex 2.

¹²³ Among five countries examined, Brazil is non-party to one treaty, China is non-party to two treaties, India is party to all treaties, Russia is non-party to five, and USA is non-party to eight. A table setting out the status for the individual treaties is included in Annex 2.

¹²⁴ For biodiversity-related agreements, see the CBD www.cbd.int/agreements/ and www.cbd.int/cooperation/partnership.shtml, the WHC <http://whc.unesco.org/>

to which efforts should be made to harmonize of the policy of entering into such agreements among MEAs.

Against this background, it can be concluded that investing UNEP with extended decision-making power raises three main problems:

- a) A common structure that defines rights and obligations of MEAs would have to deal with complex issues concerning distribution of costs and benefits among the MEAs.
- b) If the UNEP Governing Council is to be invested with decision-making power, non-parties may take part in decisions concerning MEAs.
- c) Investing the UNEP Governing Council with decision-making power would require amending the relevant MEAs.

2) In the following, we examine relevant legal aspects of investing UNEP with new tasks that may be associated with establishing a High Commissioner for the Environment within UNEP:¹²⁵

1. *To monitor and assess initiatives taken to follow up UNGA resolutions and UN Declarations and adopt recommendations to address shortcomings:* Such tasks could to some extent overlap with the tasks undertaken by the UN Joint Inspection Unit (JIU).¹²⁶ However, while the JIU would focus on general issues of effectiveness, efficiency and coordination, a strengthened UNEP would focus on specific issues related to achieving the objectives set out in key environmental policy documents and decisions. Another body for which overlap may be discussed is the Commission on Sustainable Development (CSD), whose work is split into thematic clusters, with limited focus on the role of MEAs and their institutions.¹²⁷ A UNEP charged with monitoring and assessing MEA activities in light of central UN documents would thus not overlap significantly with the mandates of existing relevant bodies.

We may distinguish between cases where UNEP addresses its recommendations to the MEA in question and to the ECOSOC, or the UN General Assembly. As to the latter, the UNEP Governing Council currently submits a report to the ECOSOC, and the ECOSOC decides what is relevant to be reported to the UN General Assembly.¹²⁸ Of

org/en/partners/, the ITPGRFA <ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3w18e.pdf>, the Ramsar Convention www.ramsar.org/cda/en/ramsar-documents-mous/main/ramsar/1-31-115_4000_0__, and the CMS www.cms.int/species/index.htm.

¹²⁵ Section IV of the UNEP mandate provides for the establishment of an Environment Co-ordination Board. A potential mandate for a High Commissioner for the Environment could build on the mandate as set out in section IV; see UN General Assembly resolution 2997(XXVII).

¹²⁶ See the statute of the JIU: www.unjiu.org/en/statute.htm.

¹²⁷ See the mandate of the CSD: www.un.org/esa/dsd/csd/csd_mandate.shtml.

¹²⁸ See Note by the UNEP Executive Director to the Consultative Group, United Nations Specialised Agencies versus United Nations Programmes, 7 June 2010, at 10.

particular interest here is whether UNEP can report on topics relating to MEAs that have been established directly by the UN General Assembly and that use the UN as host to their secretariats. This is the case for the UNFCCC and the Kyoto Protocol, as well as the UNCCD. A parallel issue can be raised in relation to MEAs established by specialized agencies, i.e. the WHC and the ITPGRFA. It can be argued that topics related to such treaties should be reported directly from the treaty body or the specialized agency to the UN General Assembly or the ECOSOC, and that UNEP should not be involved in any separate assessment of these MEAs. However, nothing would formally prevent the UN General Assembly from requesting such reports from UNEP. The extent to which the General Assembly or the ECOSOC would prefer to communicate directly with the COPs of the MEAs/ specialized agencies or rather receive relevant information and recommendations through UNEP would be up to the General Assembly or the ECOSOC to decide.

Where UNEP addresses its recommendations to the MEAs in question, decisions to invest UNEP with such powers would be made by the COPs of the MEAs. In such cases, there would be no legal problems related to investing UNEP with a mandate to monitor and assess the MEAs and adopt recommendations to the COPs or to other relevant institutions under the MEAs. It can be asked whether the situation would be different if UNEP were to be invested with such a mandate also in relation to MEAs that have not explicitly recognized its competence. A distinction should be drawn between MEAs that have been adopted by UNEP or the UN General Assembly and those that have been adopted by specialized agencies of the UN. It can be assumed that the General Assembly would be prevented from investing UNEP with a mandate to monitor, assess and recommend action only in relation to MEAs adopted and administered by specialized agencies – in practice the WHC and the ITPGRFA. Investing UNEP with such a mandate in relation to the WHC and the ITPGRFA should be based on agreements between the relevant bodies of UNESCO and FAO on the one hand and UNEP on the other.

2. *To coordinate environment-related activities and promote the effective mainstreaming of environmental protection throughout the United Nations system:* Investing UNEP with the task of mainstreaming environment in the UN might lead to considerable overlap with the tasks of other bodies, especially the CSD. This issue, which relates to the division of labour between subsidiary bodies of the UNGA, will not be further explored here since it should be sorted out at the political level. A second issue is whether such tasks, if they are specifically related to MEAs, could be said to overlap with the functions of the COPs of the respective MEAs. For example, it could be argued that it is for the UNFCCC and the Kyoto Protocol to ensure mainstreaming and coordination of climate issues within the UN, and that investing UNEP with such tasks could be in conflict with the mandate of the COPs of these instruments. Against this background, it seems best that UNEP should be invested with tasks of coordinating and mainstreaming only specific issues that fall under the

responsibility of COPs of MEAs where there is agreement between UNEP and the relevant COPs on the division of labour between them.

3. *To carry out the tasks assigned by the competent bodies of the United Nations system in the field of the environment and to make recommendations to them with a view to promoting protection of the environment:* Investing UNEP with such tasks would constitute a problem only to the extent that the tasks overlapped with the responsibilities of MEAs. If the body requesting tasks to be performed by UNEP is 'the competent' body of the UN, it can be argued that the body would be free to seek advice and recommendations from whichever bodies it considers relevant. This will clearly be the case where the request is adopted by a body that is superior to the COP of the MEA in question. The matter may be more controversial where the UN body in question is not superior to the COP of the MEA, such as would be the case where the MEA has been adopted by a specialized agency, such as UNESCO and FAO. Nevertheless, from a legal perspective it must be assumed that the body is free to seek advice from UNEP rather than from relevant MEAs even in such cases. Only where the MEAs have been given exclusive competence over a topic within the UN system would a body be prevented from seeking the advice of other institutions. That is not the case for any of the MEAs.
4. *To undertake periodic review, based on objective and reliable information, of the fulfilment by each state of its environmental obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate activities under MEAs:* This language has been developed on the basis of the decision on Universal Periodic Reviews adopted as part of the UN General Assembly resolution to establish the Human Rights Council.¹²⁹ Such a periodic review could constitute the core of efforts to coordinate and harmonize reports on implementation of obligations under MEAs. If this is to be achieved, the COPs of the relevant MEAs will need to be involved in the process of establishing a system for periodic review, including modalities for how such review arrangements can serve to coordinate and avoid duplication with existing report procedures. One question is whether MEAs that do not find it useful to participate in efforts to establish a periodic review system can prevent such a system from being applied to issues that fall within the scope of the MEA in question. The answer seems to be that a comprehensive periodic review system can be established regardless of the cooperation of all MEAs in question. However, such a system should be careful to avoid focusing on specific issues regarding implementation of those MEAs that choose not to

¹²⁹ See UNGA res. A/RES/60/251 para. 5(e). See also www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

be involved. In such cases, a periodic review of the implementation of the MEAs would overlap with the tasks of the bodies of the MEAs, in particular the COPs, and might conflict with decisions adopted by relevant bodies of the MEAs.

5. *To address situations of gross and systematic non-compliance with duties to protect the environment, and make recommendations thereon:* Challenges associated with co-ordinating measures to be taken to address problems of non-compliance have been discussed above. As has been indicated, the establishment of a mandatory non-compliance mechanism among the MEAs does not seem to be a viable option for the time being. Hence, strengthening UNEP in relation to non-compliance procedures would have to be on an 'opt-in' basis, i.e. establishing a framework mechanism that the COPs of MEAs can decide to join. Such a mechanism must be designed so that it has sufficient flexibility and can be adjusted to the specific needs of the various MEAs. The differences between the current non-compliance procedures of MEAs clearly demonstrate the need for such flexibility.

A somewhat separate issue is whether it might be useful to single out gross and systematic non-compliance for separate treatment by a general mechanism. It can be argued that less serious cases of non-compliance would most appropriately be dealt with by the non-compliance mechanism of the MEA in question where such exist, but that such compliance mechanisms may be less suited for dealing with fundamental problems of non-compliance. An additional argument in such cases could be that such situations of non-compliance may frequently involve more than one MEA, and should therefore be dealt with by a body that could appropriately take into account all the relevant facts and rules. Such arrangements would necessitate reconsideration of the existing MEA-based non-compliance mechanisms in order to draw up procedures for referring cases to a UNEP-based non-compliance mechanism. A UNEP-based non-compliance mechanism would depend on the 'opt-in' of the MEA in question and on related amendments of the mandates of existing non-compliance mechanisms under the MEAs.

6. *To respond promptly to environmental emergencies:* None of the MEAs examined in this study have set up specific regimes for responding to environmental emergencies. The main focus of these MEAs is prevention of environmental harm – with the notable exception of the UNFCCC, which to some extent emphasizes the issue of 'adaptation'. Nevertheless, investing UNEP with powers and resources that would improve its ability to respond to environmental emergencies would not require amendment to any of the MEAs. But there are other treaties that deal more explicitly with specific categories of environmental emergencies, such as nuclear disasters, marine oil spills and accidents related to production, transport or use of hazardous substances. Investing UNEP with the ability to respond to such environmental emergencies might necessitate coordination with these instruments. Moreover, depending on the extent to which response measures would involve interference with the sovereignty of countries, investing UNEP with the power to carry out relevant measures

would not be effective unless such power were supported by a treaty setting out the commitments of countries.

7. *To provide advisory services and technical and financial assistance, at the request of the state concerned and, where appropriate, relevant regional organizations, with a view to supporting actions and programmes in the field of the environment:* The main legal issues related to investing UNEP with tasks involving advisory, technical and financial assistance concern potential overlap with the tasks of secretariats and bodies of MEAs. The question here is whether making the assistance dependent on requests from the states concerned resolves legal problems that might otherwise arise. As long as a state is not under any obligation to seek specific assistance from the secretariat or a body of the MEAs, nothing would prevent that state from seeking assistance elsewhere, including from UNEP. While UNEP could be expected to coordinate its assistance with that of relevant other institutions, there would be no legal obligation for it to do so.
8. *To set up mechanisms to ensure effective technology transfer and cooperate with relevant international institutions to remove barriers to such transfer:* Even if a majority of the MEAs include provisions on technology transfer, few bodies have been set up in order to ensure effective implementation of such provisions. Nevertheless, the establishment of a UNEP-based mechanism would overlap with the provisions of MEAs and may risk overlapping with mechanisms established under MEAs, such as the Multilateral Fund of the Montreal Protocol and its Technology & Economic Assessment Panel.¹³⁰ There may thus be a need to coordinate such a UNEP-based mechanism with the rules and institutions of MEAs to avoid conflicting and duplicating measures. In order to resolve such problems of overlap, one might establish a mechanism to which MEAs or states can 'opt in'. No legal problems would occur if the mechanism is based on MEAs opting in. It can be discussed whether it would be sufficient to establish a mechanism to which only states can opt in. States joining such a mechanism would be well positioned to identify potential challenges regarding the relationship to arrangements under MEAs, and could be encouraged to propose relevant means to deal with such challenges. Moreover, it is hard to imagine that measures taken by a UNEP-based mechanism to facilitate technology transfer could conflict with measures adopted by MEAs. Rather, such initiatives can be assumed to be mutually reinforcing. Hence, it would not seem necessary to establish a mechanism to which MEAs can opt in.

4.4 Establishing a World Environment Organization (WEO)

Only parties to the WEO treaty would be members of the WEO. The establishment of a WEO would be a long-term undertaking, and a broad range of legal issues would have to be sorted out. Some of these would be

¹³⁰ See www.multilateralfund.org/ and http://ozone.unep.org/Assessment_Panels/TEAP/.

dealt with in the WEO treaty, while others could be left to subsequent decision-making in the WEO and to negotiations and agreements between the WEO and relevant institutions, including COPs, bodies and secretariats of MEAs. One general study has been drawn up by the Executive Director of UNEP which compares specialized agencies of the UN to subsidiary bodies within the UN.¹³¹

1) The first situation to be addressed here is an arrangement whereby *MEAs are annexed to the WEO treaty*, i.e. where the MEAs become an integral part of the WEO treaty. We begin by looking at the inclusion in the WEO treaty of substantive, institutional or procedural requirements with possible implications for existing MEAs.¹³² The first group of such requirements could be those that concern the negotiation of treaties to be adopted by the WEO. Such requirements would typically be that all members of the WEO should have the right to participate in the negotiations of the MEA and that the negotiations should aim at fulfilling the objectives of the WEO. That should not constitute any problem in relation to the existing MEAs, which generally fulfil such requirements.

A second requirement could be that all members of the WEO should have the right to join the MEA on terms no less favourable than those applicable to current members of the MEA. That would prevent the parties of an MEA from adopting strict requirements that must be fulfilled before a non-party is allowed to join. Such requirements could be to implement specific measures before being allowed to join the MEA, for example that relevant action plans and policy measures must be in place. An argument in favour of such requirements would be that those states that join the MEA after it has been operating for some years may need to bring their policies up to the same standards as the policies of the parties to the MEA. Otherwise, the achievements of the current parties to the MEA could be delayed or undermined. Hence, it can be argued that the provisions of a WEO treaty should leave MEAs with freedom to require non-parties to bring their policies up to par with the relevant group of parties (e.g., developed country parties) to the MEA before being allowed to join.

A third requirement could be that members of the WEO must as a minimum be allowed observer status in relevant bodies of the MEAs. In general, decisions concerning observer status in MEAs are taken by the COPs, and the practice of COPs has been to allow interested parties observer status. Thus, we can assume that a provision concerning observer status in the WEO treaty would not constitute any problem, as the COPs could easily deal with this issue in agreement with the WEO.

A fourth requirement could be that the MEA must fall within the scope of the WEO as defined in the WEO treaty. This would probably not be specified very clearly. Most likely, the scope would be defined through provisions setting out the objectives to be pursued by the WEO. It would therefore in general not be any problem to conclude that an MEA would

¹³¹ See Note by the UNEP Executive Director to the Consultative Group, United Nations Specialised Agencies versus United Nations Programmes, 7 June 2010.

¹³² A source of inspiration when selecting the requirements to be discussed here has been the FAO Constitution.

fall within the scope of the WEO. However, since some of the treaties examined for this study have been adopted under other specialized agencies, i.e. the FAO and UNESCO, situations are likely to occur where it can be asked whether the MEA in question should be associated with the WEO or another specialized agency of the UN. This issue would have to be sorted out by the negotiators or COPs of the MEAs in question, and would generally depend on policy choices of the negotiators or COPs. It could be asked whether the WEO treaty should establish an arrangement whereby an MEA could choose to be associated with both the WEO and another specialized agency of the UN. This could be relevant for the WHC, the ITPGRFA and the Rotterdam Convention. Whether such an arrangement would be acceptable would depend on the MEA and how it is associated with the specialized agency in question.

A fifth requirement could be that the official languages of the MEAs must correspond to the official languages of the WEO. These would be the same as the official languages of the UN: Arabic, Chinese, English, French, Russian and Spanish. That is currently not the case with several of the MEAs. Arabic is not an official language for CITES, the CMS and the Ramsar Convention; Chinese is not an official language for the WHC, the CMS and the Ramsar Convention; and Spanish is not an official language of the Ramsar Convention. Deciding to be associated with a WEO may thus force the COPs of these treaties to adopt additional official language versions of these treaties, and to introduce such languages as official languages of the treaty bodies. On the other hand, it should be noted that the WHC has been adopted under UNESCO even though Chinese is not among its official languages.

The second main question concerns the decision-making power of the bodies of the WEO. Depending on the extent to which negotiators are able to solve problems, there may be significant need for the WEO to be able to resolve issues through subsequent decision-making. First, the WEO would decide on its plans, programmes and priorities. Such decisions could be linked to the activities under related MEAs. It would be up to the COPs and relevant bodies of the MEAs to determine how the MEAs should follow up the plans, programmes and priorities of the WEO.

The WEO could subsequently review the follow-up actions taken by the MEA and offer advice if it considers the action taken to be insufficient. There would not seem to be any legal problems associated with an arrangement whereby the WEO could establish procedures and a subsidiary body to monitor the activities of the MEAs. Activities currently undertaken by UNEP and the CSD are parallel to such monitoring activities.

The next question is whether authority of the WEO to adopt recommendations directed to relevant institutions of the MEA would raise important legal issues. As long as the WEO were not empowered to instruct the COPs through such decisions, there would seem to be no significant legal problems associated with allowing the WEO to adopt recommendations, for example to the COPs of the MEAs. However, it

may be necessary for the COPs of the MEAs to adopt relevant amendments to their rules of procedure and other internal regulations. If the WEO were to be invested with power to instruct the COPs, more fundamental legal problems associated with the range of states that are members of the WEO and the range of state parties to the MEAs in question would have to be addressed.

The WEO must be assumed to include procedures and a body for coordinating activities under the MEAs. The resultant coordination could be based on agreements among the MEAs and between the MEAs and the WEO, binding decisions of the WEO or recommendations adopted by the bodies of the WEO. As indicated above, binding decisions of the WEO in this respect would give rise to important legal problems, and should therefore be avoided. Investing the mechanism of the WEO with a mandate to adopt recommendations would not raise significant legal problems beyond a possible need to revise rules of procedure or other MEA-internal regulations, including terms of references of financial mechanisms. Agreements among the MEAs and between the MEAs and the WEO would have to be in accordance with the power of the COPs under the MEAs in question.

A final issue concerns whether the WEO should be involved in adopting amendments or new protocols to the MEAs. The MEAs differ considerably in how they regulate procedures for adopting amendments. All treaties include provisions investing the COPs with the power to adopt amendments. Rules concerning the majority required for amendments vary from a requirement of consensus to a two-thirds majority. Moreover, some MEAs establish separate procedures for adopting amendments to annexes, including facilitated processes for entry into force and 'opt-out' clauses. Thus, there would be significant legal issues associated with involving the WEO in the decision-making process of adopting amendments to the MEAs. One possibility could be to invest the WEO with the power to review amendments in order to determine whether the amendment in question should lead to a decision to dissociate the MEA from the WEO.

Only some of the MEAs contain separate provisions for the adoption of protocols or other agreements.¹³³ Adoption of protocols or agreements related to MEAs associated with the WEO raises the question of whether such protocols or agreements should enjoy the same association with the WEO as their parent MEA. If automatic association is accepted, it would be necessary to involve the WEO in the decision to adopt the protocol or agreement. If there is no automatic association, a separate procedure for associating the new protocol or agreement with the WEO could be envisaged. However, such cases might entail an unfortunate and legally problematic situation where the parent MEA is associated with the WEO but its related protocols or agreements are not. It would seem most appropriate to seek to develop procedures whereby the WEO would be consulted and given the possibility of providing input during the

¹³³ MEAs containing such provisions are the UNFCCC (art. 17), the Vienna Convention (art. 9), the CBD (art. 29), the CMS (art. V), and the Basel Convention (art. 17.4 and 5).

negotiation of protocols and agreements, under the clear assumption that such instruments would subsequently be associated with the WEO in the same manner as their parent MEA.

2) *Freestanding treaties* which are either adopted according to procedures established in the WEO treaty or are *brought under the auspices of the WEO treaty through agreement between the WEO and the MEA in question*: In this study, we focus solely on the relationship between the WEO and existing MEAs – which means dealing only with association agreements between the WEO and the MEAs. The parties to the association agreements would be the COPs of the MEAs and the governing body of the WEO. In general, such association agreements would deal with the same issues as those indicated immediately above. Moreover, we can assume that association agreements would normally be standardized, although some adjustments to the individual MEA may be envisaged. This would be relevant especially where the MEA has institutional links to other specialized agencies, as is the case for the WHC, the ITPGRFA and the Rotterdam Convention.

The association agreements would generally have to respect the substantive, institutional and procedural requirements set out in the WEO treaty. However, such agreements can be assumed to be more flexible as regards some of the requirements, in particular those of a technical or formal character. It may for example be possible for the MEAs to avoid requirements that they use all the official languages of the UN or that non-parties should be able to join on terms as favourable as those applied when the treaty entered into force.

Association agreements would also have to address issues concerning the decision-making power of the WEO. In general, it can be assumed that the COPs would be allowed to include provisions concerning the exercise of such powers as the COPs have under the MEAs in such agreements. We can assume that provisions in MEAs concerning the power of the COPs should not be interpreted as requiring that the COPs must exercise the power in full freedom after having been associated with the WEO. Legal problems would arise if the association agreements were to include provisions investing the WEO with power to adopt decisions that would be legally binding for the COPs. However, such problems may not be fundamental, as the COPs generally do have authority to adopt decisions that would be binding for contracting parties. Hence, even if a WEO were allowed to instruct COPs, such instructions could not change the rights and obligations of countries. As long as the WEO is allowed to adopt decisions of a recommendatory nature only, we may expect few legal problems associated with situations where the WEO has higher or lower numbers of members than the MEA in question. However, should there be significant differences between the membership of the MEA and the WEO, serious issues concerning the legitimacy of the decisions of the WEO could arise.

3) Freestanding treaties concluded outside the framework of WEO in respect of which the WEO exercises *depositary functions* and, depending on arrangements made between the WEO and the MEA in question,

institutional and procedural services: This option would not require the MEAs to fulfil requirements set out in the WEO treaty, unless the WEO treaty explicitly set out such requirements. The extent to which the MEAs would be subject to the decision-making authority of the WEO would depend on the content of agreements regarding institutional and procedural services. In general, the decision-making authority of the WEO would be limited to its provision of such services. Such decision-making authority would not raise significant legal issues.

The main legal problem would concern including depositary functions in the arrangement. This would raise significant problems for all existing MEAs, as they contain provisions assigning depositary functions to IGOs or specific countries. No MEA has invested the UNEP Executive Director with depositary functions. Hence, for existing MEAs, the transfer of depositary functions to a WEO would require amending the MEAs.

Annex 1

Overview of status quo regarding international environmental governance

and

initiatives to promote coordination

Status quo regarding international environmental governance

The practice of establishing independent treaty secretariats under multi-lateral environmental agreements (MEAs) has been characterized as ‘rather exceptional under existing institutional arrangements for multi-lateral conventions within the United Nations system.’¹³⁴ The degree of fragmentation of the current regime for environmental protection can be summarized as follows:

- a) Currently, UNEP provides secretariat services ‘through seven secretariats for nine global conventions and protocols and eight secretariats for eight regional conventions.’¹³⁵ UNEP’s provision of secretarial functions has been criticized for ‘lack of clear operational delegation of authority [which] has often been the cause of delayed administrative action and inadequate support to the CoPs.’¹³⁶
- b) A broad range of intergovernmental organizations provide secretariat services within their responsibilities: these include IMO, FAO, ILO, IAEA, UNESCO and DOALOS (the latter for the UN Convention on the Law of the Sea and related agreements).
- c) The secretariats of UNFCCC, UNCCD, and to some extent CBD are institutionally linked to the UN, but without being fully integrated into its work programme and management structure.
- d) One study has shown that during a 15-year period (1992–2007), 16 MEAs held 540 meetings, during which a total of 5,084 decisions were made. The number of meetings and decisions must be expected to increase significantly in future.¹³⁷
- e) ‘There are 44 agencies in the UN system that are working on environmental issues. There are over 45 MEAs having at least 72 signatory countries and multiple funds and financial mechanisms. There is no longer one anchor institution that can see the whole

¹³⁴ UNEP/GC25/INF/33 at 5.

¹³⁵ *Ibid.* at 19.

¹³⁶ *Ibid.* at 34.

¹³⁷ UNEP/GC.25/16/Add.1, table 1. Information was listed as unavailable for two of the 18 MEAs studied. In addition, it should be taken into account that ten of the remaining 16 MEAs entered into force after 1992 (1993-1, 1994-3, 1996-1, 1999-1, 2001-1 and 2004-3).

picture and make broad recommendations on priorities and interlinkages between these multiple bodies.¹³⁸

- f) Among the three pillars of sustainable development, the rate of institutional growth in the environmental pillar has been faster than in the other pillars.¹³⁹
- g) One study concludes that the dispersion of the existing financial mechanisms 'is one of the major weaknesses of the current IEG system'; that it 'results in higher operational costs and inefficient use of resources' and that there 'are weak links between the governance of commitments and the governance of funds'.¹⁴⁰

Initiatives to promote coordination

Over the years there have been several efforts at integration and coordination of MEAs, partly through UNEP¹⁴¹ and partly through other institutional arrangements. The current status of such efforts can be summarized as follows:¹⁴²

- a) UNEP's work on integration and coordination of MEAs is based its original mandate, as updated in the Nairobi Declaration,¹⁴³ and on the 'Cartagena Package' adopted in 2002.¹⁴⁴ The UN Joint Inspection Unit commented as follows on an important aspect of UNEP's

¹³⁸ Information note from the co-Chairs of the Consultative Group, Draft Elaboration of Ideas for Broader Reform International Environmental Governance, 7 September 2010 at 12.

¹³⁹ A/CONF.216/PC/2 para. 61.

¹⁴⁰ Information note from the co-Chairs of the Consultative Group, Draft Elaboration of Ideas for Broader Reform International Environmental Governance, 7 September 2010 at 28.

¹⁴¹ The Joint Inspection Unit commented as follows on the role of UNEP: 'UNEP has fallen short in exercising effectively its original mandate to coordinate all environmental initiatives in the United Nations system. Responses to environmental challenges have become sector-specific, specialized and fragmented, despite some improvement through the formation of clusters. Institutionally, the convening power of UNEP is dwarfed compared to other institutions dealing with major environmental concerns such as climate change.'

UNEP/GC25/INF/33 at 38. See also 'Delivering as One', A/61/583 para. 37: 'UNEP, the principal environment organization of the United Nations – with its normative, scientific, analytical and coordinating mandate – is considered weak, under-funded and ineffective in its core functions.'

¹⁴² For an updated outline of how the UN is engaged in performing the key objectives and functions of international environmental governance, see UNEP/CGIEG.1/INF/2.

¹⁴³ The original UNEP mandate: UN General Assembly resolution A/RES/2997(XXVII). The Nairobi Declaration (1997): Official Records of the General Assembly, Fifty-second Session, Supplement No. 25 (A/52/25), decision 19/1, annex.

¹⁴⁴ UNEP Governing Council decision SS.VII/1 on international environmental governance. The Cartagena Package consists of the recommendations provided in the report of the Open-ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance annexed to the decision. On the background of the EMG, see UNEP/GCSS/VIII/8 at 29–39. UNEP's Division for Environmental Conventions has been important for the establishment of inter-secretarial channels.

efforts to follow up on the Cartagena Package: ‘Despite its mandate under the Cartagena Package to review the effectiveness of MEAs, UNEP has not developed concrete modalities or capacity to fulfil its mandate. Its various initiatives to create synergies and close inconsistencies among MEAs through intricate working arrangements have proved costly.’¹⁴⁵

- b) According to the Cartagena Package, the Governing Council of UNEP (GC) and the Global Ministerial Environmental Forum (GMEF) should ‘review the progress made by the conference of the parties of multilateral environmental agreements, with due regard to their respective mandates, in developing synergies in areas where common issues arise.’¹⁴⁶ However, according to the Joint Inspection Unit, ‘due to the limited membership of the GC/GMEF, its competence to engage in periodic reviews of the synergies and linkages between MEAs remains quite circumscribed. Furthermore, the “Cartagena Package” made coordination and support by UNEP conditional upon request by the CoPs.’¹⁴⁷
- c) The Consultative Group of Ministers or High-level Representatives on International Environmental Governance is a recent initiative linked to UNEP. Its current mandate is to ‘consider the broader reform of the international environmental governance system’ building on options identified by UNEP’s Executive Director.¹⁴⁸ The output of this process will be presented to the UN General Assembly and fed into the process preparing the UN Conference on Sustainable Development.
- d) Legal advice to the MEAs has been coordinated through the UNEP Division of Environmental Law and Conventions.¹⁴⁹
- e) The United Nations Offices at Geneva and Nairobi provide secretarial services to MEAs, and have concluded memoranda of understanding with MEA secretariats (UNFCCC, UNCCD and UNEP-administered MEAs) that specify the level and type of services to be provided. These agreements are currently being reviewed. In addition, an Administrative Service Centre has been established which serves mainly the PIC and POP Conventions.
- f) There have been three significant initiatives to ‘cluster’ MEAs:
 - i. The most advanced form of clustering of MEAs has been carried out in relation to the chemicals conventions – the Basel Convention, the POP Convention (Stockholm) and the PIC Convention (Rotterdam). The three conventions held their first simultaneous meetings of the COPs in April 2010

¹⁴⁵ UNEP/GC25/INF/33 at 5.

¹⁴⁶ UNEP Governing Council decision SS.VII/1, Appendix para. 30.

¹⁴⁷ UNEP/GC25/INF/33 at 22. The GC/GMEF has currently 58 members. The question of extending the membership of GC/GMEF has been discussed for more than ten years; see UNEP/GCSS.XI/5 para. 43. The issue was not dealt with by the UNGA at its 64th session; see UNGA res. 64/204 and 64/289.

¹⁴⁸ UNEP/GCSS.XI/1. See also www.unep.org/environmentalgovernance/Introduction/GCfeb2010/tabid/4556/language/en-US/Default.aspx.

¹⁴⁹ See www.unep.org/dec/support/.

and made parallel decisions on cooperation.¹⁵⁰ The main outcome was the establishment of a joint head of the secretariats of the conventions¹⁵¹ and of joint services, including financial and administrative support, legal services, information technology services, information services and resource mobilization. Prior to the simultaneous meeting, the three COPs had made parallel decisions on cooperation and coordination, including in particular decisions regarding joint activities.¹⁵² While this clustering effort has been successful, it has taken several years, and has been characterized by the Joint Inspection Unit as ‘a costly exercise’.¹⁵³

- ii. In 2004 the Executive Secretary of the CBD established a Liaison Group of the Biodiversity-Related Conventions, comprising CBD, CITES, Ramsar, CMS, the World Heritage Convention, and ITPGRFA (from 2006).¹⁵⁴ The conventions have established some formal Memoranda of Cooperation or Understanding and Joint Programmes of Work / Joint Work Plans with one another. The Group has been invited by the CBD ‘to examine the report of the Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm conventions (report of its third meeting in Rome 25–28 March 2008) with a view to identify options for improved implementation of and cooperation among the biodiversity-related conventions’.¹⁵⁵ In addition, UNEP, with the endorsement of the CBD,¹⁵⁶ has initiated the establishment of an intergovernmental science-policy platform on biodiversity and ecosystem services (IPBES). Its formal establishment may take place during the 65th session of the UN General Assembly.¹⁵⁷

¹⁵⁰ UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 at 8-25.

¹⁵¹ A precedent had already been in place in the form of a Joint Executive Secretary for the POP Convention Secretariat and the UNEP part of the PIC Convention Secretariat.

¹⁵² Basel Convention CoP decision IX/10, PIC Convention CoP decision RC-4/11 and POP Convention CoP decision SC-4/34.

¹⁵³ UNEP/GC25/INF/33 at 21. For other comments, see Urs P. Thomas, *Chemicals and Wastes – A Model for Clustering MEAs, or More Complicated than Appearances? EcoLonomic Policy and Law. Journal of Trade and Environment Studies*, Special Edition 2008–2010, at 114-57 and Mirina Grosz and Pierre Portas, *Environmentally Sound Management – Towards a Coherent Framework Bridging the Basel, the Rotterdam, and the Stockholm Conventions, EcoLonomic Policy and Law. Journal of Trade and Environment Studies*, Special Edition 2008–2010, at 45–67.

¹⁵⁴ CBD decision VII/26. See www.cbd.int/cooperation/.

¹⁵⁵ CBD decision IX/27.

¹⁵⁶ CBD decision IX/15.

¹⁵⁷ See UNEP/IPBES/3/L.2/Rev.1. The ad hoc intergovernmental and multi-stakeholder meeting has recommended that: (para. 6(f)) ‘The new platform should be established as an independent intergovernmental body administered by one or more existing United Nations organizations, agencies, funds and programmes’, and that: (para. 7) ‘In carrying out its work an IPBES should: a) Collaborate with existing initiatives on biodiversity and ecosystem services, include-

- iii. A Joint Liaison Group of the Rio Conventions was established in 2001. It is an informal forum to exchange information and explore opportunities for synergetic activities and coordination in accordance with decisions of the respective CoPs.¹⁵⁸ The Group has identified adaptation, capacity building and technology transfer as priorities for joint collaboration.¹⁵⁹ In addition, the CBD has invited ‘the subsidiary scientific and technical bodies of the three Rio conventions to enhance mutual collaboration’.¹⁶⁰
- g) The Environment Management Group (EMG) was established by the UN Secretary General, and has as its mandate, *inter alia*, to ‘promote inter-linkages, encourage timely and relevant exchange of data and information on specific issues and compatibility of different approaches to finding solutions to those common problems, contribute to the synergy and complementarity among and between activities of its members in the fields of environment and human settlements, and hence act in a complementary manner and add value to the existing United Nations system-wide inter-agency cooperation.’¹⁶¹ Another UN organ of significance for coordination efforts in the field of environment is the UN System Chief Executive Board for Coordination.¹⁶²
- h) There have been attempts at coordinating funding of the MEAs and activities related to their implementation, in particular through GEF and the UNEP Environment Fund. The GEF is autonomous from the MEAs it serves in the sense that it determines the level of replenishment and decides on projects and policies. According to the Joint Inspection Unit, ‘during negotiations for the replenishments of the GEF Trust Fund, the CoPs rarely submit specific information and accurate assessment of additional funds needed to meet the agreed incremental costs the implementation of the conventions.’¹⁶³ There

ing multilateral environmental agreements and United Nations bodies ... to address gaps and build upon their work, while avoiding duplication ... e) Provide policy relevant information but should not provide policy prescriptive advice mindful of the respective mandates of the Multilateral Environmental Agreements’. See also <http://ipbes.net/>.

¹⁵⁸ See CBD decision VI/20, UNCCD decision 12/COP.6 and UNFCCC decision 13/CP.8.

¹⁵⁹ See www.cbd.int/cooperation/liaison.shtml.

¹⁶⁰ CBD decision IX/27.

¹⁶¹ UNEP/GCSS.VIII/8 at 35. In addition to a broad range of specialized agencies, programmes and organs of the UN (a total of 38, including such diverse institutions as the Universal Postal Union and the World Trade Organization), the following MEA secretariats are members of the EMG: Basel Convention, CBD, CITES, CMS, Ramsar Convention, UNCCD and UNFCCC.

¹⁶² See, *inter alia*, A/64/83/Add.1 – E/2009/83/Add.1, where the UN Secretary-General provides his comments to the Joint Inspection Unit’s recommendations based on the views of the Chief Executives Board.

¹⁶³ UNEP/GC25/INF/33 at 32. The secretariats of the chemicals conventions have been commended for the ‘synergistic approach that has been taken in the

are separate trust funds for the individual MEAs, and contributions to these are treated as voluntary under the UN Financial Regulations.¹⁶⁴ The Executive Director of UNEP has authority over management of MEA trust funds that are under UNEP custody.

process for the fifth replenishment of the Global Environment Facility'. See UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 at 9.

¹⁶⁴ See ST/SGX/188 and ST/AI/284-286.

Annex 2

Overview of ratification status for selected key countries

| | Parties | USA* | China* | Brazil | Russia* | India |
|-------------------------------|---------|------|--------|--------|---------|-------|
| UNFCCC | 194 | + | + | + | + | + |
| Kyoto | 192 | - | + | + | + | + |
| Ozone (VC/MP) | 196 | + | + | + | + | + |
| CBD | 193 | - | + | + | + | + |
| Cartagena Protocol | 160 | - | + | + | - | + |
| CITES | 175 | + | + | + | + | + |
| WHC | 187 | + | + | + | + | + |
| ITPGRFA | 126 | - | - | + | - | + |
| Ramsar | 160 | + | + | + | + | + |
| CCD | 193 | + | + | + | + | + |
| CMS | 114 | - | - | - | - | + |
| POPs | 172 | - | + | + | - | + |
| PICs | 139 | - | + | + | - | + |
| Basel | 174 | - | + | + | + | + |

*=UN Security Council Permanent Members

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**FRIDTJOF NANSENS INSTITUTT
FRIDTJOF NANSEN INSTITUTE**

**Fridtjof Nansens vei 17, P.O. Box 326, NO-1326 Lysaker, Norway
Phone: (47) 67 11 19 00 – Fax: (47) 67 11 19 10 – E-mail: post@fni.no
Website: www.fni.no**