

UNEP plus X? A Critical Assessment of Reform: Proposals and Implications for the International Climate Regime*

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Abstract

The author discusses recent proposals to upgrade the United Nations Environment Programme in order to deal with its alleged deficiencies. Conceding that moderate reforms of global environmental governance may be useful, he views the creation of a fully-fledged international environmental organisation with scepticism, especially where implying a marginalisation of the Commission on Sustainable Development. Stressing the advantages of institutional flexibility, he views the implementation of existing substantive rules as stipulated by Agenda 21 and by issue-specific international regimes (such as the climate regime) as current main challenges of global environmental governance. They may only be tackled successfully if negotiators make sure they do not overemphasise procedure to the possible detriment of substance, the latter involving the quest for suitable models of long-term distribution of international environmental costs in times of economic instability.

A. Introduction

Recent attempts to reform the United Nations Environment Programme (UNEP) have stirred a lively academic debate.¹ While scholars disagree as to the ideal design of the potentially emerging new institution, many seem to suggest that the transformation as such is a useful and necessary pro-

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1 For an overview, see e.g. Biermann (2011). According to Biermann (2012:1f.), “proposals to create an international agency on environmental protection have been debated for over 40 years now”. He also sketches a brief history of the conduct of political and academic debate since then, including the more sceptical voices.

cess.² The author wishes to challenge this notion to a certain extent by maintaining that, while a better fine-tuning of the existing institutional set-up is certainly useful, at least the more ambitious of the current reform efforts may run the danger of actually hampering implementation of Agenda 21³ and issue-specific environmental efforts, such as those envisaged by the international climate change regime.⁴ There can be no doubt that negotiations on institutional reform are important in order to address current issues such as fragmentation, duplication, lack of funding, and lack of political support.⁵

2 See e.g. Najam et al. (2006:3), who say that “the GEG [Global Environmental Governance] system has outgrown its original design and intent. The system’s high maintenance needs, its internal redundancies and its inherent inefficiencies have combined to have the perverse effect of distracting from the most important GEG goal of all – improved environmental performance”; or (*ibid.*:4): “Much like children who outgrow their clothes as they mature, the GEG system needs to be rethought so that it can meet the challenges of its own growth, respond to future issues and move from its current emphasis on awareness-raising and treaty creation to actual environmental action and implementation”. To the extent that institutional reform may actually spur the latter two aspects, it is hard to disagree with such reform; the question is whether it really will do so.

3 For the text of this non-binding action plan adopted at the UN Conference on Environment and Development in Rio de Janeiro in 1992, see <http://www.unep.org/documents.multilingual/default.asp?documentid=52>, last accessed 20 April 2013.

4 For a cautious account regarding major UNEP reforms, see also Ivanova (2012a:566), who argues that “granting UNEP specialized agency status is not a panacea for the difficulties besetting global environmental governance”. She (*ibid.*) goes on to say that “the reasoning and exceptional foresight of UNEP’s designers in creating a small, agile subsidiary body, to catalyse [sic] and coordinate environmental action remains valid today”. Similarly, Young (2008:15ff.) views organisational reforms as a less pressing issue, while distinguishing between organisational and institutional (i.e. regime) reform: “Without a doubt, UNEP suffers from a number of weaknesses. But reorganising UNEP cannot serve as an effective substitute for more fundamental changes in the system of rights, rules, and decision-making procedures covering matters ranging from the use of environmental services... to the destruction of major ecosystems”. He adds that such “institutional arrangements need to be well-matched to the defining problems they address” (*ibid.*:20).

5 See e.g. Chulkov & Zhang (2008:3): “The current framework of international environmental governance is weakened by institutional fragmentation and specialization and the lack of a holistic approach to environmental issues and sustainable development. The duplication and fragmentation of the work of United Nations system organizations stem principally from a blurred distinction in their work programmes between environmental protection and sustainable development and the absence of a single strategic planning framework”. On the existing challenges, see also Simon (2011:7ff.).

However, in terms of strategy, one should be aware of the risk that efforts regarding the reorganisation of international environmental governance that go beyond a mere fine-tuning might absorb energy urgently needed for negotiations on substance.

The underlying assumption guiding this hypothesis is that recent setbacks with regard to the solution of international environmental problems may be less due to actual governance deficits than to a lack of political will to move forward. In order to at least maintain the pressure on the pivotal actors, i.e. the governments negotiating issue-specific regimes (e.g. regarding climate) and cross-cutting processes such as the recent Rio+20 Conference, one should be cautious to avoid opening new playing fields that may be used in order to demonstrate progress without getting to grips with the substantive issues, e.g. emission reduction, funding, and technology transfer. In addition, to the extent that current institutional efforts envisage a bypassing of the Commission on Sustainable Development (CSD), they may endanger the continued support of any future environmental negotiation processes from the side of the developing countries; this support, however, is a clear precondition for success – as was aptly conceptualised by the Rio Conference 1992.

B. The Genesis and Status Quo of UNEP

UNEP resulted from the Stockholm Conference in 1972 which successfully called upon the United Nations General Assembly (UNGA) to establish such an institution for purposes of action and coordination.⁶ The initial idea was to avoid a large bureaucracy and, hence, to keep UNEP small.⁷ Since the institution was not set up by a treaty, it lacks legal personality and merely

6 See Sands (2008:60); Sands & Peel (2003:60ff.); see also United Nations General Assembly (UNGA) Res. 2997 and UNGA Res. 3004 (XXVII), 1972, and Pushkareva (2011:para. 1). On the history and development of UNEP, see also Ivanova (2007). Furthermore, Ivanova (2005a:iii) describes UNEP as an “anchor institution” that was created as a “lean, flexible, and agile entity to gather and transmit information, catalyze action, and coordinate environmental activities in the UN system”.

7 Pushkareva (2011:para. 1); Ivanova (2007:347ff.).

constitutes a subsidiary body of the UN.⁸ This means it cannot enter into international agreements, claim damages, pass binding secondary law, etc.⁹ Further shortcomings include limitations with regard to its mandate, budget and political support.¹⁰

Nevertheless, UNEP has shown remarkable success in many fields, e.g. with regard to its coordinating and financing role.¹¹ Furthermore, despite lacking legal personality, it has sponsored intensive lawmaking activities through its Division of Environmental Law and Conventions.¹² In terms of the Programme for the Development and Periodic Review of Environmental Law (the *Montevideo Programme*), it aims at –¹³

... catalysing progressive development of environmental law aimed at sustainable development; providing legal and technical assistance; and capacity-building training to developing countries and countries with economies in transition to strengthen their capacity to develop and enforce environmental law.

An important precondition for lawmaking is setting agendas.¹⁴ In this regard, UNEP has been particularly successful in setting up its regional seas programme, which created a blueprint for effective environmental rule-making in many instances.¹⁵ It has contributed to a number of multilateral environmental agreements, including –

- the Convention on the Conservation of Migratory Species of Wild Animals (1979)
- the Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
- the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (1989)

8 Pushkareva (2011:para. 2); Ivanova (2007:349): “The United Nations Environment Programme was ultimately established as a subsidiary body to both the General Assembly and ECOSOC [Economic and Social Council] reporting to the General Assembly through ECOSOC”.

9 Pushkareva (2011:para. 2).

10 (ibid.:para. 3).

11 (ibid.:para. 16ff.). For a thorough assessment of successes and failures of UNEP, see Ivanova (2010); on the controversial scholarly assessment of UNEP’s achievements, see Simon (2011:8).

12 Pushkareva (2011:para. 19); see also Ivanova (2005a:7ff.).

13 Pushkareva (2011:para. 12).

14 Ivanova (2005a:10).

15 Pushkareva (2011:para. 25).

- the UN Framework Convention on Climate Change (1992), and
- the Convention on Biological Diversity (1992).¹⁶

In addition, UNEP has become engaged in extensive environmental assessment activities, in particular through the Global Environmental Outlook.¹⁷

C. Reform Debate

However, one needs to concede that due to its lacking legal personality, UNEP's activities are limited, particularly because the institution cannot create binding secondary law or even adopt treaties by its members according to its own rules.¹⁸ Furthermore, while UNEP has played the role of an "anchor institution", it has found it hard to coordinate existing international Conventions.¹⁹ After the failure of the World Summit on Sustainable Development in 2002, which also displayed the deficits of the CSD, reforms of international environmental governance were, therefore, vividly discussed, most of them focusing on UNEP, not the CSD. Ultimately, more than 50 governments, including the member states of the European Union (EU), proposed the creation of a UN Environment Organization, while others pleaded for a less ambitious solution.²⁰

The various suggestions were pursued and gradually put into more concrete terms in the run-up to the Rio+20 Summit in 2012.²¹ Hence, the institutional design of future environmental governance became a central topic of this long-awaited conference, which meant that about half the time would be devoted to institutional matters and not to substance. The other half was indeed reserved for the implementation of Agenda 21, reframed under the

16 (ibid.:para. 25); see furthermore Ivanova (2005a:7).

17 Ivanova (2005a:9).

18 Pushkareva (2011:para. 26).

19 Ivanova (2005a:12).

20 Biermann (2012:1); Pushkareva (2011:para. 27). For an overview of the various opinions, see DGVN (n.d.); see also Biermann (2012:6ff.); Fauchald (2010), and Najam et al. (2006). According to Fauchald (2010:iii), the three major reform models are "1. strengthening UNEP within its current mandate, combined with enhanced cooperation and coordination within groups of MEAs [multilateral environmental agreements]; strengthening UNEP by adding new elements to its mandate; [and] the establishment of a World Environment Organization".

21 See e.g. Simon (2011). On the following analysis of the Rio+20 Summit, see also Hanschel (Forthcoming: 253ff., 262ff.).

term *green economy*.²² The Summit resulted in a 49-page, non-binding document entitled *The Future We Want*,²³ which had been circulated prior to the Summit as a draft resolution by its President and was ultimately endorsed by the heads of state or government.²⁴ The resulting General Assembly Resolution stresses the need to strengthen the institutional framework for sustainable development (IFSD).²⁵ On the one hand, a High-level Political Forum would be created to build on the “strengths, experiences, resources and inclusive participation modalities” of the CSD, ultimately replacing it.²⁶ This forum is meant to drive the further implementation of sustainable development in a cost-effective manner while avoiding an overlap with pre-existing institutions.²⁷ The main intention is, however, an enhancement of UNEP, as illustrated by “D: Environmental Pillar in the Context of Sustainable Development”. The UNGA is asked to pass a resolution for the strengthening of UNEP, with a view towards achieving universal membership, stable resources (from the regular UN budget), an upgrading and better linkages with other existing institutions, a strengthening of its competencies with regard to technology transfer and capacity-building, an improved transparency, and extensive inclusion of civil society.²⁸ On 20 December 2012, the UNGA passed a decision following up on these suggestions.²⁹

While this may be seen as a step forward, it also means that the parties clearly stopped short of setting up a UN Specialised Agency as some drafters

22 On these two topics, see UNGA, A/66/L.56, No. 12: “We express our determination to address the themes of the United Nations Conference on Sustainable Development, namely a green economy in the context of sustainable development and poverty eradication, and the institutional framework for sustainable development”; on the Rio+20 Summit, also see Martens (2012:27).

23 See <http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>, last accessed 20 April 2013.

24 See Beisheim et al. (2012).

25 UNGA, A/RES 66/288, Annex, IV; see also Martens (2012:24ff.).

26 UNGA, A/RES 66/288, Annex, IV, No. 84.

27 (ibid.); for the current state of discussion see furthermore <http://sustainabledevelopment.un.org/index.php?menu=1556>, last accessed 18 May 2013. To what extent this High Level Political Forum might manage to maintain the assets of the CSD whilst avoiding its weaknesses, remains to be seen.

28 (ibid.:No. 88); see also DGVN (n.d.).

29 See <http://www.unep.org/newscentre/Default.aspx?DocumentID=2700&ArticleID=9363&l=en>, last accessed 16 January 2013; see also UNGA, A/RES/67/203.

had suggested beforehand.³⁰ Instead of a fully-fledged “United Nations Environment Organization (UNEO)” as envisaged by some states,³¹ the Rio +20 Declaration called for a more low-key solution that would require neither a treaty nor a fully-fledged international organisation with legal personality. The advantage of this construction is that UNEP may still be sponsored through the regular UN budget.³²

One may assume that this compromise will not have discouraged the proponents of a still larger solution. A full upgrading of UNEP towards a UNEO, IEO or WEO sounds charming indeed, since it may allow this institution to meet other international organisations such as the World Trade Organization or the International Labour Organization (ILO) at eye level. Theoretically, this could also provide the climate negotiations with a new thrust. One way of achieving this could be, as some have suggested, modelling the new institution according to the tripartite system employed by the ILO, i.e. to engage not only states, but also environmental as well as business non-governmental organisations in the process.³³ However, doubts remain not only as to whether this would increase institutional effectiveness, but also whether this is a feasible option in the first place.

Generally, focussing on the nuts and bolts of institutional design can be very useful with regard to environmental issues, since it may often be easier to achieve consensus on this than when tackling the intricate substantive questions, such as the implementation of Agenda 21. The framework-protocol approach operates precisely on that assumption by focusing on procedure (the framework) before substance (which then follows in the protocols). The drawback, however, is that this may delay the process of agreeing on substance and reduce the pressure, since procedural success may be used as a fig leaf for a lack of substantial progress. Once a suitable institutional and

30 On this idea, see UNEP, Issues, Brief #4; for an overview, see Ivanova (2012a: 567ff.); on the discussion of whether a UNEO as a UN Specialised Agency is needed or merely an upgrading of UNEP (UNEP +) within the existing framework, see Martens (2012:26ff.).

31 See <http://www.uncsd2012.org/rio20/content/documents/german-inst-frame.pdf>, last accessed 18 September 2012; <http://www.uncsd2012.org/rio20/content/documents/EU-Commission-1st-Intersessional-11Jan.pdf>, last accessed 18 September 2012; on the German perspective, see Umweltbundesamt (2011), suggesting a participation of civil society as well as the economic actors, following the ILO model of tripartism.

32 See UNEP, Issues, Brief #4; Hanschel (Forthcoming:262ff.).

33 See Umweltbundesamt (2011:6ff.); Hanschel (Forthcoming:262ff.).

procedural framework is in place, the right way forward would, therefore, be to focus primarily on substance rather than procedure. Going back to the drawing board might otherwise distract from the solution of the actual political conflicts of distribution of environmental costs that have been imminent in environmental negotiation processes conducted since the Rio Conference in 1992.³⁴

In addition, one may doubt whether the developing countries will, in the long run, accept the strengthening of UNEP to the detriment of the CSD. Even if the latter may not have proved very effective so far, the intrinsic blending of environmental and development topics as envisaged by the original Rio Conference in 1992 has, in fact, been a major stepping stone towards a truly global engagement regarding the pressing issues such as climate change, loss of biodiversity, and desertification.³⁵ One should concede that a skilfully designed tripartite model might appeal to the interests of developing countries and at the same time engage civil society. But such effects may also be achieved by a more loosely knit institutional set-up that continues to view UNEP as a power broker rather than a power centre, while maintaining the CSD in parallel instead of working towards its abolishment. This may work if the respective competencies are clarified and strengthened,

34 On the framework–protocol approach, see Gollnisch (1995:89ff.); Kelly (1997:481ff.); Susskind (1994:32); and Weiss (1996:276); on the whole discussion, see also Hanschel (2003:260ff.). With regard to the current debate on UNEP, Ivanova (2005b:46), aptly asserts that “[t]he institutional recommendations... need not add a new layer of international bureaucracy. Quite to the contrary, they entail consolidation of the existing panoply of international environmental institutions and a shift towards a more modern ‘virtual’ environmental regime”; see also Hanschel (Forthcoming:263ff.).

35 As a consequence, China and the Group of 77 (G77), a coalition of developing nations at the UN, stressed the following in their declaration on institutional reform in 2011: “We need to keep in mind that nowadays the Commission is currently the only forum that addresses the three pillars of sustainable development and for that reason we believe that we need to review the CSD in order to strengthen it and to make it more efficient”; available at <http://www.g77.org/statement/getstatement.php?id=110308c>, last accessed 20 April 2013. Furthermore, the work of UNEP is acknowledged and a better coordination with other UN institutions deemed necessary; available at <http://www.uncsd2012.org/rio20/content/documents/g77-inst-frame.pdf>, last accessed 20 April 2013. Martens (2012:26) points out the rather reluctant reaction of the developing countries with regard to a weakening of the CSD, as well.

and if coordination, cooperation and funding of the two organs improve.³⁶ There is some reason to hope that the recent UNGA Resolution referred to above³⁷ is a step in that direction. One might add that the ‘either/or’ solution may fuel a rather difficult and potentially fruitless debate about the right seat of the remaining environmental institution – be it New York or Nairobi. Hence, the debate on the ‘right’ institution might, to some extent, disguise a hidden controversy between nations or regions struggling for the maintenance of the status quo.³⁸ At the same time, this reveals a certain path dependency with regard to the creation of international institutions by showing that initial decisions are hard to change once they have become entrenched by long-standing practice and corresponding interests.³⁹

More importantly, however, one may doubt whether a UNEO would really display more power, e.g. with regard to the climate negotiations. In spite of the current deficits⁴⁰ (which may call for minor revisions of the existing format), the current informal structure has its own advantages: it has allowed for a less noisy, but not less effective, coordination of interests and the placement of new topics on the international agenda of cross-cutting environmental negotiations since 1992. This, in turn, is neatly linked to the treaty-based, issue-specific approach regarding areas such as long-range trans-boundary air pollution, ozone depletion, and biodiversity – even if this approach has shown certain limitations with regard to the climate negotiations, which have proven particularly difficult.⁴¹

36 Some of these elements are also contained in the suggestions of the Head of the German delegation, Stephan Contius, available at <http://www.uncsd2012.org/rio20/content/documents/german-inst-frame.pdf>, last accessed 20 April 2013.

37 UNGA, A/RES/67/203.

38 One should concede, however, that UNEP’s location away from the main hosts of UN institutions, such as New York or Geneva, has, in fact, restrained its influence; for more on this see Ivanova (2005a:19); on the historical decision-making process with regard to Nairobi, see Ivanova (2007:355ff.).

39 On these suggestions, see Hanschel (Forthcoming:262ff.).

40 See UNEP, Issue Brief #4:3f.), which points out the relative weakness of the environmental pillar of the concept of sustainable development in comparison with the economic and social pillars; on the normative contents of these pillars, see Gehne (2011:107ff.).

41 With regard to this paragraph, see also Ivanova (2012a:584): “The need for a strong, legitimate and credible authority for the environment is undeniable, but the causal link between specialized agency status and the possession of such authority is unclear at best”. On the success of UNEP in its current shape, see Sands & Peel (2003:60f.). For a focus on the existing set-up rather than major new solutions, also see Najam

D. Conclusion

Nobody knows whether the strong focus on institutional design at the Rio+20 Conference has actually prevented a more effective deal with regard to the burning issues of Agenda 21. But one may hope that it has not opened a Pandora's box that will be difficult to close. Otherwise, attention might be diverted from an admittedly painful, but unavoidable, struggle regarding questions such as the distribution of environmental costs and, potentially, certain limitations on short-term economic growth for the sake of long-term benefits. Reviving the former Club of Rome debate on limitations to growth may sound illusionary for many, but could in the long run prove to be unavoidable in light of increasing environmental damage occurring throughout the world. The weak substantial outcome of Rio+20 shows that, against the background of the global financial crisis and other pressing issues, it has become much more difficult to find common ground in matters of international environmental protection.⁴² This should not be a reason to defer matters and to focus too much on institutions instead of substance. To be fair, one should stress that the institutional results of the Rio+20 Summit may constitute some progress, and that the other half of the Summit was, in fact, devoted to substance – even though the relabelling of sustainable development by the term *green economy* may not be entirely satisfactory in that it apparently weakens the human (rights) dimension.⁴³

The sectoral approach as employed in the climate regime has the advantage of usually producing binding results that display long-term effectiveness.⁴⁴ UNEP should continue to serve as an interface between these issue-specific regimes. What it needs in order to improve its work is primarily money and political acceptance rather than a major institutional trim. At the same time, one main function of UNEP will be to set the agenda for future negotiations and to provide and promote often non-binding, but nevertheless authoritative, principles which may later turn into binding law and serve as a focal point of orientation. Fragmentation resulting from the issue-specific approach might be reduced by a UNEO, e.g. by centralising the functions of

et al. (2006:iii): "... rather than proposing grand institutional reform, the study proposes to work with the existing pieces". On the intricacies of the climate negotiations, see e.g. Droege (2010:11ff.), Hanschel (2013a:277ff.) and Hanschel (2013b:11ff.).

42 See Hanschel (Forthcoming:265).

43 (ibid.:259ff.).

44 See e.g. Hanschel (2003).

secretariats or even Conferences of the Parties.⁴⁵ But this might also endanger the advantage of pinpointed bargaining processes as well as specialised expertise evolving from long-term engagement on a particular topic – apart from the fact that such centralisation would be very difficult to achieve, as the Rio+20 negotiations have shown.⁴⁶ Environmental regimes are dependent on the coordination that UNEP can provide in its current (or recently amended) format on condition that the institution is properly funded.⁴⁷ The most critical issue is its relationship to the CSD, the intricacies of which should, however, not be solved by the latter's abolishment. At the same time, UNEP is linked to many fully-fledged international organisations that provide the legal status that it lacks.⁴⁸ Strengthening these linkages may in fact be one of the major steps towards more effective international climate governance.

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45 On the problem of fragmentation in the existing system, see UNEP Issues Brief #2.

46 Compare UNEP Issues Brief #4.

47 On the crucial issue of funding, see Ivanova (2012a:583f.); for reform proposals, see e.g. Gerstaetter et al. (2012); on further proposals for reform within the UNEP framework, see Ivanova (2005b: 44ff.); see also Ivanova (2012b).

48 See e.g. the report of the Governing Council of the United Nations Environment Programme, Environment in the United Nations System, UNEP/GC.26/INF/23; see also the table displayed by Simon (2011:11).

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