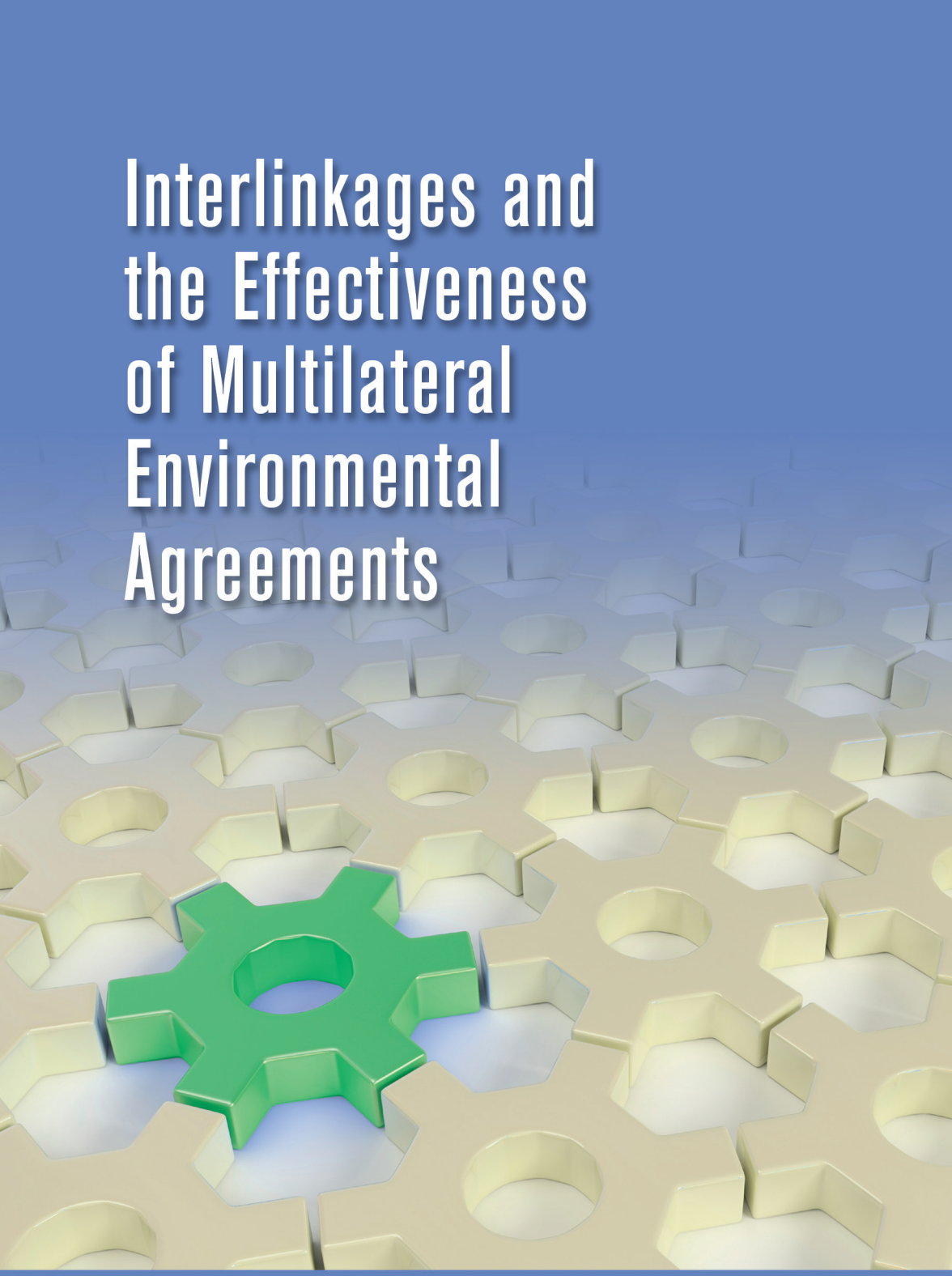
Interlinkages and the Effectiveness of Multilateral Environmental Agreements



W. BRADNEE CHAMBERS

Interlinkages and the effectiveness of multilateral environmental agreements

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Introduction and overview

> A major challenge to policy-makers is to develop a more integrated approach, identifying the natural synergies between different aspects of our environment and exploring the potential for more effective policy coordination.
>
> Kofi Annan, United Nations Secretary-General, 1992–2006[1]

The 1997 UN reforms breathed new life into an issue that academics and experts have been debating since Stockholm – this was the idea of how best to create a coherent and well-coordinated international governance structure for the protection of the environment. At the 1972 Stockholm Conference it was a critical issue that eventually led to the creation of the United Nations Environment Programme (UNEP), not as a fully fledged organization but as a programme that would act as a catalyst to bring all the other organizations to work together on environmental issues. At the Rio Earth Summit, once again the creation of this governance structure became an important issue and the result was the Commission on Sustainable Development (CSD), yet another creation seeking to bridge existing work but this time on the new concept of sustainable development.

By 1997, the failure of Rio+5[2] showed the ugly side of the lack of cooperation on issues of environment and sustainable development. As the

1. Speech by the Secretary-General on the occasion of the 1999 UNU Conference on Synergies and Coordination among Multilateral Environmental Agreements, on file with the author.
2. Rio+5 refers to the Fifth Anniversary of the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, 1992.

Interlinkages and the effectiveness of multilateral environmental agreements,
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president of the General Assembly at the time, Ismail Razali of Malaysia, said, the results were ''sobering''; the failure reflected a new low point for the environmental sustainable development movement. More importantly, it was a wake-up call and showed that in order to continue the momentum of the past decades, especially in the field of treaty-making, international policy-making would require more innovative approaches and politically and economically[3] sound policies to recapture the attention and the commitment of the policy-makers.[4] The concept of interlinkages was one that ideally met these needs.

The debates that ensued over coherence and integration (interlinkages) were reminiscent of the political debates that had taken place at Stockholm and at Rio on coordination, but they were to be more sophisticated because they built upon the existing system of environmental treaties and environmental institutions. Unlike past attempts to have an integrated governance system for the environment, this time the debates did not call for a new organization to replace all existing ones; rather they advocated a simple notion of better cooperation between existing Multilateral Environmental Agreements (MEAs) and international organizations and institutions, calling for these bodies to resolve their conflicts, end their turf wars and create synergies in their work.[5]

In many ways the concept of interlinkages was not a new one. The roots of interlinkages can essentially be found in the practical elements of policy-making and treaty negotiations. Academics later tried to conceptualize this behaviour by developing theories and models to explain what was happening in practice. In the policy arena interlinkages theories emerged firstly from early international trade, navigation and commercial agreements. Steve Charnovitz has traced the linkage between such agreements and other issues such as religion, slavery, emigration, narcotics and labour issues from as early as the mid-1800s industrial revolution period.[6] In contemporary terms, linkages models and theories have continued in the area of global trade liberalization, investment and financing and their

3. At UNCED developed countries agreed to give 0.7% of their GNP to ODA. However, this declined dramatically in the years following Rio in 16 out of 21 members of the OECD's Development Assistance Committee (DAC), which led to an overall decrease in combined aid from 0.34% of GNP in 1992 to 0.27% in 1995 and 0.25% at present. See OECD online statistics at www.oecd.org/dac/stats/dac (accessed 30 August 2006).
4. See W. Bradnee Chambers (2002), ''Why the Summit Must Fail to Succeed'', Special to *The Daily Yomiuri*, 21 August.
5. On turf wars and cooperation problems among MEAs see Kristin Rosendal and Steinar Andresen (2004), *UNEP's Role in Enhancing Problem-Solving Capacity in Multilateral Environmental Agreements: Co-ordination and Assistance in the Biodiversity Conservation Cluster*, FNI Report Oct. 2003. Lysaker, Norway: Fridtjof Nansen Institute, p. 29.
6. Steve Charnovitz (1998), *Symposium: Linkages as a Phenomenon: An Interdisciplinary Approach: Linking Topics in Treaties*, 19 U. Pa. J. Int'l Econ. L. 330.

impacts on social issues such as human rights, labour and intellectual property.

The most heated debates in this context have concerned trade and environment linkages. In the late 1980s and throughout the 1990s, there was increased pressure towards globalization and economic interdependence. At the regional level this produced trading blocs, which emerged in the Americas, blocs such as the North American Free Trade Agreement (NAFTA) and Mercosur (Southern Cone Market), which created concerns about pollution and lapses in environmental standards. At the same time in global forums, such as the Bretton Woods institutions and the World Trade Organization (WTO), NGOs (non-governmental organizations) raised questions of balancing economic development and environmental safety and developing countries suspected green policies from the North as being potential protectionist measures.

It was not until the 1990s that we see interlinkages developing as a concept between environmental treaties. This occurred for several reasons, both conceptually and from a policy-making point of view. The 1987 Brundtland Report had established the connection between environmental issues and socio-economic concerns and reversed the conceptual trend of approaching ''environment'' and ''development'' issues separately. The Report noted: ''We can see and study the Earth as an organism whose health depends on the health of all its parts. We have the power to reconcile human affairs with natural laws and to thrive in the process. In this our cultural and spiritual heritages can reinforce our economic interests and survival imperatives.''[7] The report laid the foundations for an integrated approach under the broader principle of sustainable development. This approach became the basic concept underlying environmental issues as the largest gathering of countries and heads of state endorsed the concept at the United Nations Conference on Environment and Development, and developed in 1992 a global action plan for the twenty-first century: Agenda 21.[8]

From the legal standpoint the increasing number of treaties and suggestions of how to improve their effectiveness led to concern in several contexts. Compliance theory, spurred by Louis Henkin's hypothesis that ''almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'' became a major focus in the 1980s and linked the concepts of compliance and effectiveness together. The UNCED Preparatory Committee in 1991 defined criteria for evaluating the effectiveness of existing environmental agree-

7. The World Commission on Environment and Development (1987). *Our Common Future*, Oxford: Oxford University Press.
8. Agenda 21 could be seen as one of the first approaches using interlinkages as it tries to bridge many environmental issues and multiple sectors based on the concept of sustainable development.

ments.[9] In 1993, Martti Koskenniemi also talked of the need for international law to concentrate more on making existing treaties more effective and on designing better treaties.[10] In 1995, in an article reflecting on several years of environmental treaty-making and the emergence of issues for the future of public international environmental law, Edith Brown Weiss introduced the concept of ''treaty congestion''; a concept that soon became a catchword in international legal discourse[11] as well as in the policy-making world. Brown Weiss argued that success in negotiating a large number of new MEAs has led to ''treaty congestion'' that has had a number of side effects. These side effects included ''operational inefficiency'' (the time and resources required by a country to participate in numerous policy forums), inconsistencies and overlap between treaty coverage, and a general overload at the national level in implementing international agreements.[12]

This concept slowly became defined in policy literature as a concern for treaty conflicts and the reason why environmental treaties, though strongly connected with natural ecosystems, had few connections as legal instruments. At the time, there was also a growing realization that international legal mechanisms have not been adequate. For instance, the authors of the Vienna Convention on the Law of Treaties could never have imagined the explosion in the number of treaties that would take place in the few decades since its adoption. Many would agree that it is therefore unable to deal with the complexity and uncertainty that exist over the legal relationships between successive treaties.[13]

During this period, environmental scientists began to see the need to address more concretely the complexities and the interconnectivity of issues such as climate change, biodiversity loss, soil degradation and water issues. As the negotiations on climate change intensified, the enormity of its scope and how it had the potential to be a major direct driver of environmental change soon became apparent. In 1997, the first group of prac-

9. See Peter Sand, ed. (1992) *The Effectiveness of International Environmental Agreements*, Cambridge: Grotius.
10. Martti Koskenniemi (1993) *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. Int'l Envtl. L. 123. Also see David G. Victor (1996) *The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, ER-96-2, Laxenburg, Austria: International Institute for Applied Systems Analysis, May.
11. Gunter Handl observed that ''treaty congestion'' had ''become [a] buzz word … in international environmental legal discourse''. See Gunter Handl (1997) *Compliance Control Mechanisms and International Environmental Obligations*, 5 Tul. J. Int'l & Comp. L. 29, 29–30.
12. Edith Brown Weiss (1995) *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 Geo. L. J. 675, 697–702, 698.
13. See Bethany Lukitsch Hicks (1999) *Treaty Congestion in International Environmental Law: The Need for Greater Coordination*, 32 U. Rich. L. Rev. 1643, 1659.

titioners and science experts convened a small workshop in Israel on the synergies between the so-called Rio Agreements (UNFCCC, CBD, UNCCD and Forestry Principles).[14] The following year, one of the scientists, Robert Watson, who believed in the importance of the interlinkages issue very early on, led a collaboration of other scientists under a joint project of the World Bank, UNEP and NASA. The project looked at the primary scientific connections between some of the key environmental and development issues.[15] The ground-breaking report concluded that the scale of human demands had now grown so large that human beings are degrading the ecosystems upon which their health and livelihood depend at an unprecedented rate with a potential for surprises and non-linearities. They argued, however, that sustainable development can be realized by adopting an appropriate mix of technologies, policies and practices that explicitly recognize the linkages among environmental systems and human needs. The report stressed that environmental issues can be addressed in an integrated manner through many of the same technologies and policy instruments that are used to contend with the issues separately, but in different combinations and through improved institutions.

These initiatives and concepts culminated in the first international conference on the concept of ''interlinkages''[16] convened by the United Nations University and UNEP in 1999. The conference involved most of the key international actors that were significant in moving the interlinkages concept forward, including the MEA secretariats, UN and international organizations and respected experts and NGOs. Up until this point, these diverse groups saw the interlinkages concept as a threat to their own coherent programmes and had fervently defended their turf. This conference was the first time they were assembled in one place. For smaller conventions, such as Ramsar, the concept provided the opportunity to reinforce its own importance and link to more recent MEAs that had significant implications for their own mandates. For larger MEAs, like the Climate Change Convention, the connection with issues other than their own was seen as an unwanted distraction, particularly when the FCCC parties were in the midst of negotiating the Kyoto Protocol – a process

14. See UNDP (1997) *Synergies: National Implementation of Rio Agreements*, UNDP Report (on the expert meeting organized by the Sustainable Energy and Environment Division and held in Israel March 1997, New York: UNDP.
15. R. T. Watson, J. A. Dixon, S. P. Hamburg, A. C. Janetos and R. H. Moss (1998) *Protecting Our Planet Securing Our Future: Linkages Among Global Environmental Issues and Human Needs*, Nairobi: UNEP.
16. The UNU Meeting defined interlinkages as ''a key to developing a more integrated approach, is the identification of the inherent *synergies* that exist between different aspects of the environment, and an exploration of the potential for more effective *coordination* between multilateral environmental agreements.'' See UNU (1999) ''Interlinkages: Synergies and Coordination between Multilateral Agreements'', Tokyo: UNU.

with its own complexities. This attitude was reflected in their decision not to participate in the interlinkages discussion.

The 1999 Interlinkages Conference marked the beginning of a series of activities in the field of policy-making that attempted to rationalize and manage the complexities of multilateral environmental agreements. The historical record of these activities occurred mainly in the context of UN reforms under Secretary-General Kofi Annan, the preparations for the World Summit on Sustainable Development and the UNEP's International Environmental Governance process. Through the academic experts who attended, and others researching in the area, the conference sparked further development of the idea of interlinkages into a concept and theory that would try to promote and explain the interaction of regimes and international accords.

From that time, the concept has firmly taken hold internationally and it has become the topic of continual discussion within policy-making forums such as the General Assembly,[17] the UNEP Governing Council[18] and many decisions of COP/MOPs. In 2005, the World Summit continued to reaffirm the desire of governments to create better interlinkages between environmental activities:

> Recognising the need for more efficient environmental activities in the UN system, with enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, while respecting the legal autonomy of the treaties, as well as better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building, we agree to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions, and internationally agreed instruments, as well as the treaty bodies and the specialised agencies.[19]

This outcome, together with the UN Reform process, has led to ongoing analysis of coherence within the UN System. One aspect of this coherence relates to the environment regime and includes the promotion of synergies among MEAs and the mainstreaming of their goals within broader poverty-reduction strategies and plans.

Similarly, the letter dated 1 February 2006 from the Permanent Representative of France to the United Nations addressed to the President of the General Assembly (GA A/60/668) mentions:

17. UN General Assembly Resolutions 52/445, A/53/463, 53/242, 53/190, 53/186, 54/216, 54/217, 54/221, 54/222, 54/223, 55/201, 55/198, 56/199, 56/197, 56/196, 57/270, 57/260, 57/259, 57/257, 57/253, 58/243, 58/242, 58/240, 58/218, 58/212, 58/209, 59/236, 59/235, 59/234, 59/227, 59/226, 60/1 2005, 60/189, 60/193, 60/202.
18. See UNEP Documents 17/25, 18/9, 19/9c, 20/18B, 21/21, 21/23, *Decision VII/I of the Seventh Session of the Governing Council*, UNEP/GCSS.VII/6.
19. Declaration of the 2005 World Summit, para. 169.

> Problems of coherence and efficiency linked to the increasing number of multilateral environmental agreements (MEAs) and environmental forums: although the development of this architecture has made positive advances possible, international environmental governance is characterized by fragmentation. It is often a source of inconsistency, inefficiency, additional cost and imperfect allocation of human and financial resources. It weakens the capacity of international environmental governance to contribute to sustainable development.

Given this background, it is evident from both legal scholarship and policy-making that there is interest in using the interlinkages approach. However, what is not well known is that, contrary to the research that is under way on natural and environmental sciences concerning interlinkages,[20] there is a serious lack of understanding of interlinkages in social science research and law, and an absence of any conceptual frameworks by which to focus policy and scholarship on the topic. Since Brown-Weiss's paper coining the term of ''treaty congestion'', there has been relatively little written on the topic in the field of law and few legal studies have been applied to the other side of the coin, which is treaty cooperation and which this book views as ''interlinkages''.[21]

20. Several scientific studies have looked at the natural environmental drivers of interlinkages. See for example Habiba Gitay, A. Suárez, R. T. Watson and D. J. Dokken, eds (2002) ''Technical Paper V on Climate Change and Biodiversity'', *Intergovernmental Panel on Climate Change*, available from http://www.ipcc.ch/pub/tpbiodiv.pdf; Convention on Biological Diversity (2002) *Ad Hoc Technical Expert Group on Biological Diversity and Climate Change*, UNEP/CBD/AHTEG-BDCC/2/2, available from http://www.cbd.int/doc/meetings/cc/tegcc-02/official/tegcc-02-02-en.pdf; OECD (2002) *DAC Guidelines Integrating the Rio Conventions into Development Cooperatio*n, available from http://www.oecd.org/dataoecd/49/2/1960098.pdf; ICSU's Sustainability Science Initiative, at http://sustainabilityscience.org; GEF Scientific and Technical Advisory Panel (2004) *Assessment of Inter-linkages between Biodiversity, Climate Change, Land Degradation and International Water – A report focusing on the needs of the GEF*, Washington, DC: Global Environment Facility.
21. The exception to this is Rüdiger Wolfrum and Nele Matz (2003) *Conflicts in International Environmental Law* (Berlin: Springer), which does discuss how environmental treaties cope with possible conflicts and approaches to coordination but most works have focused on treaty conflicts rather than treaty cooperation. For these works see Charles Rousseau (1932) *De la Compatibilité des Normes Juridiques Contradictoires dans l'ordre International*, 39 Revue Générale de Droit International Public 133, 150–151; C. Wilfred Jenks (1953) *The Conflict of Law-Making Treaties*, 30 Brit. Y.B. Int'l L. 401, 426; Bethany Lukitsch Hicks, op cit.; Jonathan I. Charney (1999) *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. Int'l L. & Pol. 697; Benedict Kingsbury (1999) *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?* 31 N.Y.U. J. Int'l L. & Pol. 679; Wolfram Karl (2000) ''Conflicts between Treaties'', in Rudolf Bernhardt ed., *Encyclopedia of Public International Law*, 935, 936; Int'l Law Comm'n (2002) *Report of the Study Group on Fragmentation of International Law*, U.N. GAOR, 54th Sess., U.N. A/CN.4/L.628 at 2; Gilbert Guillaume (1995) *The Future of International Judicial Institutions*, 44 Int'l L. & Comp. L.Q. 848; Christopher Borgen (2005) *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l L. Rev. 573.

The end result of this absence of reliable studies from these disciplines is that this will likely hinder progress towards improving environmental legal instruments and public international law through coordination and synergy. Without first understanding how treaty performance can be improved through treaty-to-treaty cooperation it is unlikely that treaty bodies and contracting parties will be motivated to work more cooperatively together. Moreover, without knowing what types of interventions work more than others or how interlinkages can improve treaty effectiveness it is difficult to direct policy interventions at the right target.

This book therefore raises two questions:

(1) *Can interlinkages improve the effectiveness of multilateral environmental agreements?*
(2) *Can interlinkages improve the effectiveness of MEAs outside the branch of international environmental law and outside the sector of the environment but still under the umbrella of sustainable development?*

To answer these questions, and in doing so contribute to the better understanding of the greater corpus of international law and the understanding of a subject rarely written about in the field of law in general, this book will create, in chapters 4 and 5, a conceptual framework showing how environmental treaties work together and how this cooperation can improve their effectiveness. In chapters 6 and 7 the book will test this framework on two types of case studies: one within the traditional ambit of environmental treaties and the other across treaties that are considered to be cross-sectoral and connected by the principle of sustainable development. The case studies will use the same subject matter as genetic resources[22] so that their results are comparable across treaties. According to these parameters, the first case study in chapter 6 will examine the interlinkages between the 1992 Convention on Biological Diversity[23] and the International Treaty for Plant Genetic Resources for Food and Agriculture[24] while the second case study in chapter 7 will examine the relationship of CBD and ITPGRFA to the Trade-Related

22. Plant genetic resources are any materials of plant that contain functional units of heredity and are of actual or potential use (see Convention on Biological Diversity, Article 2).
23. The Convention on Biological Diversity [hereinafter CBD], negotiated under the auspices of UNEP, was opened for signature on 5 June 1992 and came into force on 29 December 1993. 31 ILM, 818 (1992).
24. The International Treaty on Plant Genetic Resources for Food and Agriculture [hereinafter ITPGRFA], negotiated under the Food and Agriculture Organization's Commission for Genetic Resources for Food and Agriculture [hereinafter CGRFA], was adopted on 30 November 2001 and came into force on 29 June 2004. Available online at http://www.fao.org/ag/cgrfa/IU.htm.

Intellectual Properties Agreement,[25] a treaty outside the sector of the environment and outside the branch of international environmental law. Thus, the second case study will examine treaties that are interrelated but exist under different sectors of sustainable development.

The first two chapters of the book support the principal and secondary theses and serve as a background. Chapter 2 shows the legal history on interlinkages and examines the *travaux préparatories* on coordination and synergy efforts from Stockholm to Johannesburg (1972–2002). Chapter 3 looks at existing legal mechanisms under international law, such as the Vienna Convention on the Law of Treaties, and examines the new concept of ''autonomous institutional arrangements'' as well as examining more thoroughly aspects such as memorandums of understanding (MOUs) between treaties and other legal institutional arrangements. Chapter 8 is the concluding chapter where I will extrapolate from the analysis how interlinkages can be a means to improve effectiveness for international environmental and sustainable development treaties and what this implies for future law-making. The concluding chapter will also draw implications for the future of public international law and treaty management.

25. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, *Legal Instruments–Results of the Uruguay Round*, Vol. 31, 33 ILM 81, (1994) [hereinafter TRIPS Agreement].

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Interlinkages and the Effectiveness of Multilateral Environmental Agreements

By W. Bradnee Chambers

In recent years there has been growing awareness that a major reason for the worsening global environment is the failure to create adequate institutional responses to fully address the scope, magnitude and complexity of environmental problems. Much of the criticism directed at the global institutions has focused on the necessity for greater coordination and synergism among Multilateral Environmental Agreements (MEAs) and among policies and laws that take better account of the inter-relationships between ecological and societal systems. This book seeks to fill the gap in knowledge and policy-making that exists and push our understanding on how we approach international environmental law. In the course of doing so, it examines the essence of the assumptions made about cooperation among MEAs, provides a framework for measuring the effectiveness of MEAs and shows how the effectiveness of MEAs can be improved through strengthening their interlinkages. Moreover, it demonstrates how MEAs that cooperate with treaties outside the environment under other pillars of sustainable development can also improve their effectiveness.

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