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THE DWINDLING MARGIN FOR ERROR: THE REALIST PERSPECTIVE ON GLOBAL GOVERNANCE AND GLOBAL WARMING

Paul L. Joffe¹

The young professor arrived in the United States in 1937, a refugee from the rise of Nazism in Germany and civil war in Spain.² After teaching in Brooklyn and Kansas City, he moved to the University of Chicago in 1943.³ In 1948 he published his book about power politics that brought him lasting prominence and established what became known as the realist school of international relations.⁴ But there was irony in his accomplishment.

Hans J. Morgenthau (1904-1980) was educated in Germany as a lawyer and wrote his dissertation on international law and politics.⁵ However, he brought the lessons of Old World power

¹ Paul Joffe is Senior Director, International Affairs, National Wildlife Federation, Washington, D.C.; J.D., Yale Law School. An earlier version of this article was presented at Rutgers University School of Law, Camden, New Jersey, November 8, 2006, in the Distinguished Speaker lecture series at a panel entitled "Global Governance & The Relevance of International Law."

² CHRISTOPH FREI, HANS J. MORGENTHAU: AN INTELLECTUAL BIOGRAPHY 62 (2001).

³ *Id.* at 66-72.

⁴ *Id.* at 73.

⁵ *Id.* at 31, 37.

politics to his adopted country, which he viewed as handicapped by an excessively legalistic and moralistic view of global affairs.⁶ He delivered his message at a propitious moment, when the United States emerged as a global superpower and American intellectuals and leaders were ready for the thesis of *Politics Among Nations: The Struggle for Power and Peace*.⁷ However, at that very moment the world was in the midst of radical changes that transformed the conditions confronted by statesmen. The year after publication of *Politics Among Nations*, the Soviet Union detonated a nuclear bomb. At nearly the same time, the plan emerged for a supranational “high authority” to coordinate French and German policy on coal and steel. This launched a project that replaced centuries of war and conflict in Europe with a path to European integration that is still unfolding.

Morgenthau understood the revolutionary character of the changes going on around him. He identified them. He explained their implications. But the irony was that most of his listeners seemed to hear what he said about power and national interest as it used to be. What he said about the new circumstances in the nuclear age was largely neglected. Moreover, many heard what he said about the fallacies of a moralistic and legalistic foreign policy, but they disregarded his explanation of the place that morals and institutions based on law should play in American foreign policy.⁸

Nuclear weapons, Morgenthau said, undercut old assumptions about national interest and sovereignty as considerations in foreign policy.⁹ The margin for error in the pursuit of national interest was suddenly reduced to the

⁶ *Id.* at 200-206.

⁷ See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (4th ed. 1967) [hereinafter MORGENTHAU, *POLITICS AMONG NATIONS*].

⁸ In 1960, in the preface to the third edition of *Politics Among Nations*, Morgenthau expressed frustration at the fact that his views regarding changes in international circumstances and the place of morals in foreign policy were being ignored. MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7, at ix.

⁹ *Id.* at 309, 512, 543, 549.

vanishing point.¹⁰ Security for one required security for all.¹¹ Survival in the nuclear age, he said, might require supranational authority, transforming what had once seemed utopian into the new realism.¹² Likewise, the course of European integration represented a radical change – something new under the sun.¹³ Instead of trying to balance Germany, France was solving the problem of Germany's superior strength by embracing her ancient rival.¹⁴

We can now see more clearly what Morgenthau saw at its inception. But we see not only the proliferation of nuclear weapons. We see the potential for such weapons to pass out of the hands of nations into the hands of terrorists. And, in combination with old problems such as poverty and social disintegration, we see new, unprecedented threats emerging such as global drug trafficking, pandemic disease, and global warming. On many fronts, we see humanity's margin for error dwindling. Having experienced personal hardships and lived through a dark period in world history that brought a dubious and threatened peace, Morgenthau tried to find a way out. In this later time of troubles, it is worth revisiting his thoughts as we try to find our own bearings.

I. THE ARTICLE IN BRIEF

I argue that global challenges are increasingly threatening and require us to quicken the pace of response in establishing more effective governance, especially regional and global governance. My focus is on global warming, one of the great global threats of our time, and on related environmental destruction, although the discussion is not limited to environmental issues.

¹⁰ *Id.* at 549.

¹¹ *Id.* at 543.

¹² *Id.* at 309.

¹³ *Id.* at 512.

¹⁴ *Id.*

Our consideration of these issues comes at a pivotal moment. Scientists warn that within ten years we must transform industrial society to chart a new, clean energy path to avoid unprecedented global environmental, economic, and social disruption. After years of inaction in Washington, there is at this writing a flurry of new activity. Yet, it remains to be seen whether measures will be taken that are a match for the urgency and magnitude of the task.

Addressing global challenges is a complicated undertaking. To organize our thinking, I will discuss three tasks which I suggest are priorities in creating an effective response to our current challenges. I call these the tasks of *reinventing sovereignty*, *recovering the public interest*, and *creating the conditions for consensus*.

Controversy and confusion surround these concepts. I suggest that is not a reason to avoid them but rather a reason to engage them. It is a reason to engage them because the controversy and confusion reflects their importance and the high stakes that surround understanding them.

It is a commonplace that the international system established in 1648 in the Treaty of Westphalia is undergoing a transformation. The system in which the actors were almost exclusively separate, sovereign nations no longer exists. While nations remain key players, they share the stage with an array of other actors, including international organizations, networks of official and unofficial decision-makers, nongovernmental organizations and activists, and regional organizations based on pooled sovereignty. In this new world, there is not only the “government” of the citizens of nation states, but “governance” on behalf of nations and other actors, to address regional and global issues. And, crucially, governance is a function of entities or mechanisms that do not, in the aggregate, constitute a state.

It is in the interests of the United States as well as other nations to understand this new world and to understand how to effectively pursue their interests in it. This is the only way that Americans and citizens of other countries can address many of the global challenges of our time. To do so will require new ideas and new forms of cooperation. If the old sovereignty was defined, at least by some, in unilateralist or isolationist terms, the new sovereignty is about engagement and cooperation.

The distinction between the public interest and private interests is as old as political philosophy. For several decades,

however, the concept has been eclipsed in American political discussion. I argue that we need to recover the idea of the public interest because the goals we seek in addressing global challenges are frequently public goods which require cooperation. For example, cleaning the air of global warming pollution is classically a problem of providing a public good. Beyond paying attention to the public interest with respect to particular problems, we need a conception of the general public interest that takes account of public interest considerations as well as private interests.

Citizens and leaders see the transformation of the old international system. They see the nature of the new global challenges, necessitating new levels of cooperation. Many, therefore, call for establishing new regional and global institutions to address the problems. The difficulty, however, is that institutions cannot simply be wished into effective operation. Effective institutions rest on a foundation of legitimacy and public support, which requires at least a minimum consensus concerning the ends and means involved. Often, however, when institutions are proposed to address global issues, no such consensus exists.

Accordingly, an integral part of creating the institutions is creating the political conditions that will make the institutions viable. Who will pay? Who will decide? With what means? For what ends? For whose benefit? And behind these questions may lie much deeper issues involving, for example, the differing interests and capacities of rich and poor nations. Therefore, to create the conditions of global political consensus involves addressing social issues. To create effective institutions to address global challenges, one must create the conditions of consensus, if not first, at least simultaneously.

This essay is not a detailed recipe for global governance. Rather, I suggest an approach or framework for thinking about the issues. However, in elaborating the three tasks, I show how they are interrelated and how they illuminate what needs to be done to address today's global challenges, using global warming especially as an example. Summarizing the relationship of the three tasks, the principal global challenges of our time, often because these challenges involve public goods, require a reinvention of sovereignty. The new sovereignty calls for new kinds of collaboration to facilitate cooperation across borders and issues to match the scale of the problems. This requires

renewed priority for public interest. Institutions must be designed to provide the incentives necessary to encourage provision of public goods on an international scale and to afford representation to the public. This in turn will not occur unless all concerned are convinced that the institutions and the ground rules rest on the legitimacy that results from fair procedures and fair outcomes effectively achieved. Often this will require social and economic changes in order to develop the conditions for consensus.

Examining global governance from the perspective of the three tasks highlights several important conditions that influence our work on today's global challenges. For example, the need to respond to present global threats is transforming international law. International law is no longer simply about the relations among nations, but also must facilitate greater cooperation and address domestic conduct, which must change to solve global problems. Also, issues like global warming must be viewed not narrowly as environmental issues, but as priority issues in international and global affairs. If there was ever a time when environmental issues could be somehow segregated and examined exclusively as separate issues in a world unto themselves, that time has passed. In outlining an agenda for U.S. foreign policy, Stanley Hoffman calls for a coalition of advanced countries to eliminate poverty.¹⁵ In this regard, he says national and international action, including a stronger climate treaty, are urgent to prevent the consequences of global warming. "Most other problems shrink compared to this one."¹⁶

In the past, the international community has often tried to address issues one by one through separate institutions with narrow mandates. The multifaceted challenge of global warming and other global problems require new, broader forms of cooperation and strategies that project the general lines of how nations will cooperate well into the future. This is because action must be taken on many fronts and because nations stand in different circumstances. Their actions must converge but

¹⁵ Stanley Hoffman, *The Foreign Policy the U.S. Needs*, N.Y. REV. BOOKS, Aug. 10, 2006 (book review), available at http://www.nybooks.com/articles/article-preview?article_id=19217 (last visited Oct. 27, 2007).

¹⁶ *Id.*

they will be acting at different speeds and with different obligations. Consensus and legitimacy require a sense of how the future will unfold. Effectiveness requires new forms of cooperation that recognize the linkages among issues and facilitate package deals that include simultaneous consensus and action on a range of issues.

I argue for a realist perspective on global governance recognizing that we cannot avoid severe consequences without greater urgency. I also argue that, given the character of today's global challenges, realism requires new forms of cooperation, consensus building, and enhanced priority for the public interest. A renewed realism will still be able to identify obstacles to cooperation, but will understand the possibilities for cooperation needed to confront today's global threats. In this regard, it is helpful to remember what the architects of foreign policy realism actually said. Some neo-realists seem to suggest that realism is about force and unilateralism, but that, as I will show, is not the case.

I begin with the thinking of one of the leading realists, Hans Morgenthau, to illustrate this point and I later refer to a few of his contemporaries. As noted at various points below, I do this not because I agree with everything they said. Much has happened in the decades since they were actively working and writing. But while they could not know what we know, we can know what they knew and said. Their observations help stimulate insight both where we may agree and where we may disagree.

II. REALISTS AND IDEALISTS

What practitioner or scholar of international relations would want to be known as unrealistic? As Professor Stanley Hoffman of Harvard said in a 1985 review of a posthumous edition of *Politics Among Nations*, "we are all 'realists' now."¹⁷ The realist school was contrasted with naïve idealism or utopianism often attributed to Woodrow Wilson and his failed campaign for the League of Nations. But from the beginning, the full scope of

¹⁷ Stanley Hoffman, *Realism and Its Discontents*, THE ATLANTIC, Nov. 1985, at 132 (reviewing Hans J. Morgenthau and Kenneth W. Thompson, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (6th ed. 1985)).

Morgenthau's analysis appears not to have been widely understood. Moreover, the use of the word "realism" seemed increasingly to diverge from his use, with others implying that alternatives to narrow realpolitik are suspect by definition, that multilateralism must inevitably recreate the Wilsonian experience with the League, and that force must be the primary instrument of foreign policy. Eventually, one critic said, the question became not, "how moral is the realist," but "how realistic is the realist?"¹⁸ What about the golden mean, a new realism, suggested Hoffman, that takes "a sophisticated approach to power" but also seeks "through cooperation and collective action in a variety of fields" to change things enough to avoid catastrophe?¹⁹

¹⁸ Timothy Garton Ash, *The Rules of the Game*, THE NEW REPUBLIC, July 18 & 25, 1994, at 42 (reviewing Henry Kissinger, DIPLOMACY (1994)). See also NEOREALISM AND ITS CRITICS (Robert Keohane ed., 1986). Mark Lacy finds that realism has contributed to unwillingness to confront non-traditional threats like global warming, but his focus is on the later, neorealist perspective. MARK J. LACY, SECURITY AND CLIMATE CHANGE: INTERNATIONAL RELATIONS AND THE LIMITS OF REALISM 5 (2005). By contrast, I argue here that insights of the founders of post war realism may assist our current efforts to confront global threats such as climate change.

¹⁹ Hoffman, *supra* note 17. Since so many now profess in some sense to be realists, it might help understanding to distinguish the skeptical realists who emphasize the obstacles to cooperation from those who see the possibilities, as did Morgenthau and others of the post war era. Speaking of those I would call the skeptical realists, Professor Keohane suggested that they help us "determine the strength of the trap," but do not "give us much assistance in seeking to escape." NEOREALISM AND ITS CRITICS 199 (Robert Keohane ed., 1986). In Keohane's own writings, however, he showed how nations voluntarily create or join international organizations to obtain the benefits of cooperation because institutions can overcome obstacles to coordination by sharing information, providing incentives to trade concessions, resolving disputes, and through other means. Peter A. Gourevitch, *Robert O. Keohane: The Study of International Relations*, PS: POL. SCI. & POL., Sept. 1999, at 625. As the need for cooperation increases because of the consequences of failure to cooperate, we can see more clearly the need for Hoffman's golden mean. A realism is still needed that can see obstacles to cooperation with clarity, but it cannot be realism if it ignores the genuine possibilities for cooperation needed to avoid disaster. Standard international relations discourse tends to reserve the term "realism" for balance-of-power analysis and "liberal" internationalism for analysis emphasizing cooperation through international institutions. JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICT: AN INTRODUCTION TO THEORY & HISTORY 281 (6th ed. 2007). However, there is increasing recognition of the

Actually, a good case can be made that this is the approach many American leaders had in mind in the immediate post World War II era. Franklin Roosevelt's conception of the United Nations blended concepts of collective security and power politics. The United States was prepared to, and did use force in Korea and elsewhere. Yet, the era was also a golden age of American leadership for multilateralism, from the creation of the U.N. and NATO and the Bretton Woods institutions (for trade and finance) to the Marshall Plan. The Marshall Plan, in turn, helped initiate developments that led to the unification of Europe.

In light of Morgenthau's subsequent reputation as the exponent of *realpolitik*, it is important to revisit what Morgenthau believed to be realistic in the face of new circumstances.

Morgenthau's realism in a nutshell was this:²⁰ To improve the world, one must work with human nature as it is and not assume it away. The real world is inherently one of opposing interests and conflicts. Moral ends are best approximated by continuous balancing of interests and working for settlement of conflicts in circumstances constantly in flux. Actions of statesmen are based on interest defined as power. The concept of interest defined as power is, however, historically contingent and can be changed. The crucial point distinguishing the realist from others is the question of how change can take place, which the realist maintains must take into account, primarily through diplomacy, the forces of interest and conflict. But as the experience of the founding of the United States itself indicates, under the right conditions, balance may lead to relative stability and peaceful conflict and even the old state system might be replaced with greater collaboration, "more in keeping with the

need to synthesize these perspectives. Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 819 (2001); G. John Ikenberry, *Grand Strategy as Liberal Order Building* (May 19, 2007) (unpublished article), available at <http://www.princeton.edu/~gji3/publications.html> (last visited Oct. 27, 2007). With Hoffman, I suggest we reclaim the word "realism" to characterize the synthesis so that thinking and language can be reunited.

²⁰ See MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7 at x, 3-10, 548 and *passim*.

technical potentialities and the moral requirements of the contemporary world.”²¹

As already noted, the expounder of realist doctrine was well aware that large changes were under way and that, among other things, nuclear weapons had brought a fundamental transformation. If one extrapolated from the circumstances that produce peace within a nation, Morgenthau suggested one might conclude world peace may only come about through a world state, but a world state was impossible due to the lack of a global parallel to the community that makes a domestic state possible.²²

Morgenthau also surveyed the possible constraints on conflict which might foster world community, including morality, world opinion, and international law, but he found them all weak and wanting.²³ He concluded that diplomacy was still necessary, not to perpetuate the status quo, but to work toward a global concert of some kind which would have to transcend old notions of national sovereignty, the touchstone of the old order.²⁴ He seemed to see in the emergence of the process of European integration and in NATO, however imperfect, the glimmerings of the new structures he had in mind, resulting from “the peace-preserving and community-building processes of diplomacy.”²⁵ How extensive a

²¹ *Id.* at 10.

²² *Id.* at 491, 499, 516, 549. While most writing about Morgenthau focuses on his discussion of the balance of power, a few authors have taken note of the supranational and multilateral themes in Morgenthau's writings. See, e.g., Daniel Deudney, *Nuclear Weapons and the Waning of the Real-State*, DAEDALUS, Spring 1995, at 229 n.4.

²³ MORGENTHAU, POLITICS AMONG NATIONS, *supra* note 7, at 219-321, 438-58.

²⁴ *Id.*

²⁵ *Id.* at 510-14, 548-49. Many years earlier, the Spanish philosopher Ortega y Gasset predicted “a probable unification of the states of Europe.” JOSÉ ORTEGA Y GASSET, *Unity and Diversity of Europe*, in HISTORY AS A SYSTEM AND OTHER ESSAYS TOWARD A PHILOSOPHY OF HISTORY 52 (1941). He said, presciently, that “public power” was not only embodied in states but in the larger Europe. *Id.* “The unity of Europe is not a fantasy, but reality itself. . . . It is understandable, however, that everyone should not clearly perceive the reality of Europe, for Europe is not a ‘thing’ but a balance.” *Id.* at 54-55. This essay

collaboration was needed, or possible in Morgenthau's view, is unclear. The important point is that Morgenthau did not juxtapose power politics and multilateral cooperation, but rather saw them both as essential elements of contemporary realism.

Why this strand of Morgenthau's views is often ignored, though it occupies nearly one half of the fourth edition of *Politics Among Nations*, deserves a separate essay about the history and political culture of recent decades. But of his motivation, at least with respect to the implications of nuclear weapons, there can be no doubt. In a 1960 review of fellow realist Reinhold Niebuhr's book, *The Structure of Nations and Empires*, Morgenthau said that nuclear weapons and the possibility of universal destruction made obsolete the old calculus by which nations could gamble in deciding whether to wage war.²⁶ He said that never in history had there been such a "radical qualitative transformation of the structure of international relations" and that this radical change "calls for correspondingly radical innovations in the sphere of policy."²⁷

Morgenthau argued that societies are repeatedly challenged to distinguish threats that are novel from those rooted deep in the past.²⁸ For a society lacking a strong historical sense and enamored of innovation, Morgenthau thought it paradoxical that America was missing the novelty of atomic weapons and the need, for the sake of human survival, of "an extreme effort of bold, innovating imagination."²⁹ Elsewhere that same year, Morgenthau explained what that meant, writing that the

seems to have been written sometime in the 1930s. *Id.* at foreword. Both Morgenthau and Ortega were teaching in Madrid on the eve of the Spanish civil war in the mid 1930s, although it is not evident whether they were in contact with each other.

²⁶ Hans J. Morgenthau, *The Intellectual and Moral Dilemma of History*, CHRISTIANITY AND CRISIS, Feb. 8, 1960 (reviewing REINHOLD NIEBUHR, THE STRUCTURE OF NATIONS AND EMPIRES (1959)), available at <http://www.religion-online.org/showarticle.asp?title=398>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

modern world had rendered sovereign nations by themselves inadequate for the performance of new, supranational tasks, including survival.³⁰ Governments, he said, need to make themselves obsolete for protection of their territories by giving their atomic weapons “to an agency whose powers are commensurate with the worldwide destructive potentialities of these weapons.”³¹ He said he did not doubt the difficulty of this, but failure to act would be like building a house on a volcano, which “barring a miracle, cannot fail to erupt.”³²

With respect to common interests beyond nuclear proliferation, Morgenthau suggested the common interests of the United States and Europe warranted something approximating a confederation of states merging their vital activities in defense, foreign affairs, finance, and economics.³³ Additionally, there was the need to establish a world order beyond Europe.³⁴

We next look at the three tasks, to begin to see how they help us to take a realist approach to confronting today’s global governance challenges.

III. REINVENTING SOVEREIGNTY

The need for international collaboration was seen clearly by the post World War II generation of American leaders. More recently, with the demise of the Soviet Union, the emergence of the United States as dominant in some respects seems to have

³⁰ HANS J. MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS* 308-309 (1960) [hereinafter MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS*].

³¹ *Id.*

³² *Id.* at 309. It is important to note that Morgenthau’s views on the need for supranational authority to control nuclear weapons were not at the time an aberration. Related ideas were advanced at the highest levels of the U.S. government. See George Bunn, *The Nuclear Nonproliferation Treaty: History and Current Problems*, ARMS CONTROL TODAY, Dec. 2003, available at http://www.armscontrol.org/act/2003_12/Bunn.asp?print.

³³ MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS*, *supra* note 30, at 179, 182.

³⁴ *Id.*

led some to believe cooperation is no longer important. However, such a turn toward unilateralism is based on an unrealistic assessment. Almost everywhere we look, the United States needs the cooperation of others to achieve its own interests. In fact, the greater power of the U.S. often requires greater, not less, effort to gain cooperation because unilateral U.S. action is less likely to be seen as legitimate.

As stated earlier, in our own time there are many tasks that require international attention. It is not suggested here that what Morgenthau may have thought desirable for management of nuclear weapons is what we now need to address global warming or other problems we face. Rather, the point is to consider his advice that there is a need to think boldly about possibilities for cooperation to avoid a revolutionary threat and to realize that what is defined as a nation's interest for purposes of realist analysis must take into account the character and magnitude of the danger. For example the challenge of global warming and related environmental destruction, due to the novelty and danger, and the need for cooperation among many nations, calls for unprecedented global innovation and collaboration. Pandemic disease and other new global threats have also arisen. Interacting with longstanding problems such as poverty, unemployment, and social disintegration, these issues are testing the capacity of existing national and global institutions. By contrast with the immediate post World War II era, the United States today declines to lead multilateral efforts to confront global warming and other urgent global threats.

A perennial objection among opponents of international cooperation is that participation in a treaty or international organization will inhibit freedom of action, with the suggestion sometimes that there is nothing between complete autonomy and loss of independence. This is, of course, a mistaken notion, since nations have entered treaties and cooperative arrangements to gain advantage throughout history.³⁵ What is perhaps clearer today is that there are virtually endless possible

³⁵ Noting the longstanding U.S. bipartisan support for international law, Professor Alvarez says that in this tradition, treaties to promote freedom, settle disputes, or promote shared goals have been seen "not as a diminution of sovereignty but as the exercise of it." José E. Alvarez, *Bipartisan International Law*, THE AM. SOC'Y OF INT'L L. NEWSL. (Am. Soc'y of Int'l Law, Wash., D.C.), Nov.-Dec. 2006.

arrangements that can be designed to balance autonomy and cooperation to achieve objectives that nations cannot reach on their own. For instance, policymaking by and within the European Union is an example of governance without a state, although the union is, of course, composed of states.

Morgenthau's prescient view of the European community as a revolutionary innovation is now recognized in legal scholarship. Dean Slaughter and Professor Burke-White say that international law was founded on traditions of state sovereignty and was a law for relations among states, while today's global problems require an international law "able to influence the domestic policies of states and harness national institutions."³⁶ As such, the authors suggest that the "European way of law uses international law to transform and buttress domestic political institutions" and marks the future path of international law.³⁷ Dean Harold Koh has suggested that theories that view international law in terms of relations among states miss the "transnational revolution."³⁸ That revolution is characterized by interaction of international institutions and domestic structures affecting the ability of transnational activists and others to achieve change.³⁹

All of this troubles some who would like to reinforce old notions of sovereignty. Professor Jeremy Rabkin warns that the United States will compromise fundamental constitutional principles by acceding to many of the emerging international arrangements.⁴⁰ He argues that the U.S. Constitution is structured to guarantee liberty and democracy, and delegation of authority to international organizations can undermine these

³⁶ Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006).

³⁷ *Id.* at 352.

³⁸ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2649 (1997).

³⁹ *Id.*

⁴⁰ See JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 130-33, 268-69 (2005).

guarantees.⁴¹ He is troubled by certain aspects of governance under the European Union, and he believes that, from the beginning, the European Court of Justice has exceeded its mandate.⁴² Professor Rabkin is particularly troubled by the idea that EU regulations might override the constitution of a member state.⁴³ He worries about U.S. enthusiasm for supranational authorities and warns the U.S. not to be bound by norms that merely “reflect the atmosphere of international discussion.”⁴⁴

Of course, the U.S. Constitution places limits on government action in the international realm just as it does with respect to domestic action, and the U.S. should take care in entering international agreements and arrangements that they are not detrimental and do not undermine constitutional safeguards. However, as other commentators have noted, Rabkin’s worries are greatly exaggerated.⁴⁵ The United States has participated in international organizations for decades.⁴⁶ The regulatory authority of these bodies is often hortatory, or the U.S. has veto power, or has constructed voting procedures to safeguard its rights in what is often simply a forum for negotiating more detailed implementing agreements.⁴⁷ Sometimes, Senate ratification of the original treaty might be viewed as including authority to regulate.⁴⁸ Often, issues of delegation are avoided since implementation of the international action involves U.S. enactment of implementing laws or other action.⁴⁹ If, contrary

⁴¹ *Id.* at 268-69.

⁴² *Id.* at 130-33.

⁴³ *Id.* at 133.

⁴⁴ *Id.* at 269.

⁴⁵ Eric Posner, Book Review, *PERSP. ON POL.* June 2006, at 432-33; G. John Ikenberry, Book Review, *FOREIGN AFF.*, Sept.-Oct. 2005, at 168-69.

⁴⁶ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 187, 253-59, 263-66 (2d ed. 1996).

⁴⁷ *Id.* at 263.

⁴⁸ *Id.*

⁴⁹ *Id.*

to expectations when the treaty was adopted, the international rule calls for action that would violate the U.S. Constitution, such as by impairing free speech, the U.S. can refuse to take implementing action and incur a violation.⁵⁰ Slaughter and Burke-White suggest that the essence of the EU model is that in affecting the domestic circumstances of member states, the EU specifies ends rather than means and it is up to the member states to decide how to implement.⁵¹ Other nations do not have to embrace the entire EU model in order to see the possibilities in adapting aspects of the approach.⁵²

It might suffice to discuss these issues in terms of whether more or less multilateralism is desirable. Instead, I raise the issue of sovereignty to suggest that old paradigms obstruct thinking about what we need to do in our own interests.

Sovereignty is often debated without defining the word and without an understanding of what is at stake. Often the word is used in an attempt to prejudge a debate about how much international cooperation is in the interest of a nation. What Morgenthau was suggesting was that narrow notions of sovereignty were no longer consistent with national interest, if they ever were. Realizing that in the world we live in our own interests require collaboration, a more useful definition of sovereignty is suggested in *The New Sovereignty*, namely that sovereignty is not defined exclusively by the ability to act independently or in *ad hoc* coalitions.⁵³ Rather it is about being an effective player in international and global networks and institutions whereby nations can best pursue their interests.⁵⁴

⁵⁰ *Id.* at 264. See also Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS. (forthcoming Jan. 2008). An abstract of the article and the July 2, 2007 draft are available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009600.

⁵¹ Slaughter & Burke-White, *supra* note 36, at 329.

⁵² *Id.*

⁵³ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27, 123 (1995).

⁵⁴ *Id.* It is also arguable that what appears today as a contrast between old and new views of sovereignty might be viewed as a recurring debate between different views about the interdependence of nations. Over a generation ago, in a classic discussion of sovereignty, Professor Briery asserted that extreme views

The significance of sovereignty in our time is also important in another way. It has been suggested that in a globalizing world, where interdependence is increasing, wealthy countries too often design the rules of global interaction in a way that disadvantages poor nations and that the rules need to pay more deference to the sovereignty of those countries.⁵⁵

Thus, the initial point about the sovereignty debate is that it causes us to think about the balance between autonomy and interdependence. We need a more sophisticated approach that recognizes that the proper balance depends on the circumstances. In his time, James Madison frequently had to remind people that the old paradigms did not fit the new demands on Americans. Late in life, Madison wrote that the American system is neither a “consolidated government” nor a traditional confederation of sovereign states. American federalism, he said, “is so unexampled in its origin, so complex in its structure, and so peculiar in some of its features . . . that in describing it the political vocabulary does not furnish terms sufficiently distinctive and appropriate, without a detailed resort to the facts of the case.”⁵⁶

Realization that our experience and traditions provide us with the flexibility to innovate new forms of more effective

about the autonomy of nations were a result of the rise of nationalism in the nineteenth century. The independence of nations, he said, “is no more ‘natural’ than their interdependence. Both are facts of which any true theory of international relations must take account.” J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 16, 41 (4th ed. 1949). Professor Ruggie suggested that sovereignty should be thought of not simplistically as autonomy, but as a principle that legitimates the relationship of the international system and its component parts, a relationship that can change over time. John Gerard Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, in *NEOREALISM AND ITS CRITICS* 143-48 (Robert Keohane ed., 1986). This formulation helps clarify that as the conditions of interdependence and the felt need for cooperation change, they can change the way in which nations define and pursue their interests. The result may be that nations place a higher priority on cooperation, making the new sovereignty also the new realism – or perhaps realism renewed.

⁵⁵ JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 62-63 (2006).

⁵⁶ See JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 178 (1990).

collaboration sets the stage for closer examination of why this is necessary.

IV. RETURN OF THE PUBLIC INTEREST⁵⁷

It is now almost commonplace that the forces of economic globalization have outpaced political and social institutions.⁵⁸ This means that unlike the domestic economies of industrialized nations, globalization is not subject to the standards and constraints that evolved in the last century to tame economic forces in the public interest.

Early in the twentieth century, a good deal of attention was given to the clash of public and private interests.⁵⁹ In the political struggles of that era, government was given responsibilities that channeled economic forces to address public concerns.

In the same year that Morgenthau published *The Purpose of American Politics*, E.E. Schattschneider (1892-1971) published his classic book on American democracy and the public interest entitled *The Semisovereign People: A Realist's View of Democracy in America*.⁶⁰ Although his views are now seldom remembered, E.E. Schattschneider was one of the most prominent political scientists of the day, president of the American Political Science Association and the chair of a

⁵⁷ See also the common good, the commonwealth, the commonweal, *res publica*.

⁵⁸ STIGLITZ, *supra* note 55, at 21.

⁵⁹ See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 15-16, 122-25, 142 (Swallow Press 1954) (1927).

⁶⁰ See E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 24-26, 39-40, 56, 122-23 (1960). Schattschneider did not suggest that his use of the word "realist" in his subtitle was related to the use of the word by the foreign policy realists, but like Morgenthau he emphasized the centrality in politics of conflict and the importance of institutional means to harness it for the public good. See *infra* text accompanying notes 62-63. At the same time, the legal realist movement was urging that historical, economic, and cultural analysis replace abstract logic as the basis for understanding law. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 8 (1973).

committee of the Association that wrote an important report on reform of the political parties.⁶¹

Schattschneider said that widely shared, nonexclusive interests are public interests, in contrast with private, narrowly shared, exclusive interests.⁶² The conflicts among narrow interest groups become political when private interests seek to involve the wider public by invoking the machinery of government.⁶³ A primary vehicle for transforming private interests into public policy is the political party.⁶⁴ Public authority, namely government, functions to modify private power relationships.⁶⁵ The function of democracy is to provide a second power system to balance economic power.⁶⁶ The public does not wish to resolve the tension between the two.⁶⁷ In fact, said Schattschneider, "In some ways *the public interest resides in the no man's land between government and business.*"⁶⁸ The public likes competition. It "wants both democracy and a high standard of living and thinks it can have both provided it can maintain a dynamic equilibrium between the democratic and the capitalist elements in the regime."⁶⁹

A sub-theme in Schattschneider's book was that the political scientists who tried to explain politics from the standpoint of group rivalry without recognizing the distinction between private and public interests were wrong.⁷⁰ "To abolish the

⁶¹ AM. POL. SCI. ASS'N., *Toward A More Responsible Two-Party System, A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. pt. 2, (Supp. 1950).

⁶² E.E. SCHATTSCHNEIDER, *supra* note 60, at 24-26, 39-40, 56, 122-23.

⁶³ *Id.* at 39.

⁶⁴ *Id.*

⁶⁵ *Id.* at 40.

⁶⁶ *Id.* at 122.

⁶⁷ *Id.*

⁶⁸ *Id.* at 123.

⁶⁹ *Id.*

⁷⁰ *Id.* at 39.

distinction is to make a shambles of political science.”⁷¹ “The notion that the pressure system is automatically representative of the whole community is a myth. . . . [P]ressure politics is a selective process ill designed to serve diffuse interests.”⁷² Democracy is a broader process in which broader competing organizations, such as parties, define public policy alternatives in such a way that the public can participate in the decision making process.⁷³

The importance of the public interest is not a notion that requires a departure from American tradition. On the contrary, our own constitution was established by people who believed that change was required because under the old order, “the public good is disregarded in the conflicts of rival parties.”⁷⁴ Moreover, American public opinion is much more in support of multilateral engagement than many officials seem to think.⁷⁵ Why then does it seem to many that private interests are running ahead of the public interest in the whirlwind of globalization?

The reason is that the broader, long term interests of the public are not spontaneously perceived or represented or defended. To be realized, they need an institutional vehicle. It is not that other interests are without any merit. Partial, private, and short run interests may be entirely legitimate and may, and often do, contribute to the general welfare. It is just that in some respects, at some times, lack of regard for the public interest may lead to disaster. So it is with global warming. So it would be if the United States were to conclude that its interests

⁷¹ *Id.* at 27.

⁷² *Id.* at 35.

⁷³ *Id.* at 23, 27, 35, 141.

⁷⁴ THE FEDERALIST No.10 (James Madison). For discussion of the sources of American ideas regarding the public interest in 17th century English republican theory, see SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 109 *passim* (1993).

⁷⁵ STEVEN KULL & I.M. DESTLER, MISREADING THE PUBLIC: THE MYTH OF A NEW ISOLATIONISM 80 (1999); Daniel Yankelovich, *Poll Positions: What Americans Really Think About U.S. Foreign Policy*, FOREIGN AFF., Sept.-Oct. 2005, at 16.

lie in persistent unilateralism instead of in resuming its traditional leadership in multilateral efforts to confront so many current global problems.

What Schattschneider meant in identifying his approach to American politics as a realist's approach was that it would be illusory to assume that the sum of contending special interests could achieve the public interest.⁷⁶ Rather, he saw the public interest emerging in the balance between government and the private sector. He argued that responsible political parties were the institutional vehicle to achieve the public interest because they would frame the issues so that the public could influence policy on public issues.⁷⁷ Along with his colleagues on the Committee on Political Parties of the American Political Science Association, he said that a failure to establish and maintain responsible political parties could result in a drift to an excessively powerful executive, alienation of the electorate and disintegration of the parties, or polarization of extremist political parties.⁷⁸

After Schattschneider's time, hopes for political party reform waned, perhaps because reform seemed increasingly difficult, but perhaps also because concern for the public interest was eclipsed.⁷⁹ Schattschneider and his colleagues may not have foreseen our political financing system, the financing demands of television and electronic media, and the accompanying interest group dynamics. They may not have foreseen the rise of attack politics, prosecutorial politics, and the politics of institutional combat, which would drive out debate over issues so that election victories provide little mandate to govern.⁸⁰

⁷⁶ See *supra* text accompanying notes 62-73.

⁷⁷ *Id.*

⁷⁸ AM. POL. SCI. ASS'N., *supra* note 61, at 91-96.

⁷⁹ See *infra* text accompanying notes 266-268; BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS AND THE PRESS FROM WATERGATE TO WHITEWATER* 184-191(1999).

⁸⁰ See GINSBERG & SHEFTER, *supra* note 79, at 16, 190. (1999); HAYNES JOHNSON & DAVID S. BRODER, *THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT* 613 (1996). The latter volume describes the multiple factors contributing to frustration of the public interest in health care reform. Sidney Milkis and Jesse Rhodes have recently seen signs of the emergence of a

They may not have foreseen the success of a public philosophy that there is no such thing as a public interest.⁸¹

Though prominent in his lifetime, Schattschneider was later little remembered. Following his death, the academic trends he saw as misguided often prevailed, and even the term “public interest” fell into disuse in academic and policy discourse.⁸²

The idea of the public interest, however, may be making a comeback and the reasons are fairly evident. Domestically, the old argument over where to draw the line between government and the private sector was fought to a stalemate. In recent decades, however, as economic forces have increasingly exceeded the ability of national governments to cope with the impacts of globalization, calls have arisen to constrain or channel international economic forces. History is not repeating itself because there is no global government to assume the role that the nation state assumed in the last century and there is no desire to create such an entity. Yet, the dynamic is similar. There can be certain adverse side effects of market forces that markets by themselves do not address, from environmental destruction, to erosion of labor standards, to aggravation of

new, presidency-centered party system, but they suggest it is an open question whether this system will work through principled parties articulating broad public views or parties that are simply a means for presidential aggrandizement. Sidney Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party and the “New” American Party System*, 5 PERSP. ON. POL. 461, 472-475 (2007).

⁸¹ See *supra* note 79.

⁸² See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 31 (1990). The idea of the public interest became a strawman in an academic debate increasingly preoccupied with the motives of political actors, often asserting that they are self-interested rather than altruistic. *Id.* at 31, 69 and *passim*. While the moral dimension of such issues as global warming is important, we do not assume universal altruism. The study of institutions, international law, and game theory teach that rational, self-interested actors can benefit from cooperation and can construct institutional means of collaboration to better achieve shared goals. See *supra* note 19 and *infra* notes 92, 131 and 237. Likewise, though Schattschneider wished to enhance the means to achieve the public interest, his focus was not on altruism but on the creation of institutions needed to achieve common interests. See *supra* text accompanying notes 63-65.

wealth and income disparities.⁸³ People seek institutional means to respond. However, as we shall see, even when institutions of global governance have been created, they are often criticized as too weak or as dominated by special interests which frustrate efforts to vindicate broader public interests.⁸⁴

Along with other new challenges in the global village, such as global warming, drug trafficking and pandemic disease, as well as the longstanding threat of nuclear proliferation, the problems of globalization require collaborative responses to develop and disseminate information, to harmonize rules, to mobilize resources, to coordinate implementation, to resolve disputes over all these functions, and to monitor results and inform further initiatives – in short, the functions of governance.

Perhaps not surprisingly, economists have been among the first to grasp what is happening. Since goods like clean air and security have been classic examples of what economists call “public goods” – goods that will not be produced by unaided market forces – economists have been in the forefront of a robust recent discussion about global public goods. Since the textbooks always said that governments produce or facilitate the production of many public goods, the discussion encompasses the question of what global governance mechanisms or forms of collective action might serve this function at the global or regional level.⁸⁵ Referring to peace, health, and environmental protection as examples, Professor Stiglitz comments that if such global public goods are not provided collectively by the international community, it is likely they will remain underprovided.⁸⁶

⁸³ For a classic discussion, see CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

⁸⁴ José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 341-47 (2006).

⁸⁵ See generally TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004); Nancy Birdsall, *Underfunding Regionalism in the Developing World* (Inst. for Int'l Econ., Ctr. for Global Dev., Working Paper No. 49, 2004).

⁸⁶ STIGLITZ, *supra* note 55, at 281. For an encyclopedic discussion of global public goods and global governance, see INGE KAUL ET AL., *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (2003).

The need for cooperation can be viewed not only from the standpoint of the nature of the goods and how they are provided, but the nature of the values at stake, including individual wellbeing, justice, and legitimacy. From this perspective, the impulse for international cooperation may arise from the desire for wellbeing that comes with security, environmental protection, or health care. It may arise from calls for justice in the distribution of the benefits and costs of globalization, and for legitimacy of governance and decision making, including accountability and effective performance.⁸⁷ In many, perhaps most, instances, these outcomes are also public goods in the technical, economics sense.

V. PUBLIC INTERESTS, THE PUBLIC INTEREST, AND REALISM

The eclipse of the public interest is partly the result of political and ideological combat. As globalization brings back the phrase and its significance, it will help to define some terms. The phrase is elusive because traditionally it has been used with different connotations. I suggest a few clarifying distinctions.

The public goods identified by economists and related outcomes such as fair distribution and accountability can be thought of as public interests. The economics definition is congruent with the more intuitive idea that there are certain interests that are shared, in the sense that they cannot be achieved without cooperation. This is a useful connotation of the term because domestically it is often necessary to use government to assist in obtaining public goods. Lacking this solution globally, concern has arisen regarding the dearth of public goods and various forms of cooperation have been attempted to produce them. Clean air free of global warming pollution is a classic public good.

Beyond particular public goods, there is a traditional usage of the term “public philosophy” as a more or less cohesive expression of the values of a whole society that is something more than the sum of the vectors of all the individual interests in

⁸⁷ See Frank J. Garcia, *Globalization and the Theory of International Law*, (Boston Coll. Law Sch., Faculty Paper, No. 55, 2005). See KAUL ET AL., *supra* note 86, for a discussion of the definition of public goods.

society. The public philosophy is used to determine what is in the “public interest.” Thus, used in this way, public interest means policies consistent with the values of society as a whole. Unlike the economist’s definition of “public good,” this sense of the term “public interest” does not have precise, technical content. Since it has a connotation of values, it is also often the subject of heated argument, as various parties on all sides of an issue try to assume the mantle of the public interest and identify their adversaries as “special interests.”⁸⁸

Although the concepts of the public interest and public philosophy have been primarily applied in domestic politics and law, they have kinship with ideas of legitimacy⁸⁹ and value oriented jurisprudence in international law.⁹⁰ The New Haven School of international law characteristically linked politics and law by emphasizing that in the process of decision-making, law is manifest in “authoritative and controlling decisions.”⁹¹ They also summarized the value orientation or public philosophy at the core of their jurisprudence as “a world public order of human dignity.”⁹² The prerequisites for legitimacy, human

⁸⁸ Regarding the meaning of “public interest,” see NOMOS V: THE PUBLIC INTEREST 86 (Carl J. Friedrich ed., 1962); MARTIN MYERSON & EDWARD C. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST (1955). Regarding the term “public philosophy,” see WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY (1955); DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 251-77 (Basic Books 1996) (1976) and MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). See also Symposium, *John Rawls and the Study of Politics: Legacies of Inquiry*, 4 PERSP. ON POL. 75 (2006).

⁸⁹ THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

⁹⁰ Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY (1983).

⁹¹ Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 9 (1959).

⁹² See Koh, *supra* note 38, at 2618; Myres S. McDougal, *The Dorsey Comment: A Modest Retrogression*, 82 AM. J. INT’L L. 51, 54-55 (1988). The McDougal reply to Dorsey contains a succinct summation of the New Haven School perspective by one of its architects. Relevant here, Professor McDougal challenged the assumption that rational people lack any conception of common

dignity, and the public interest are affected by the changing character of global challenges and the growing need for collaboration among nations. Accordingly, as we consider how the public interest is best pursued with respect to the new challenges of global governance, we can appreciate the remark of Columbia law professor W. Freidmann, who said that “the constant redefinition of the public interest—sometimes, though not always, expressed by lawyers as ‘public policy’—is one of the paramount tasks of the student of jurisprudence.”⁹³

Here, I do not attempt a comprehensive assessment of a public philosophy for global governance. What I suggest rather is that it is “in the public interest” (as the term is broadly used to connote consistency with a public philosophy) to ensure that “public interests” (such as provision of public goods) receive due weight in public policy. As already explained, when it comes to global affairs, they are often, perhaps usually, not given due weight because, among other reasons, the necessary institutions do not exist and resources for citizen participation do not exist to do so (or exist only in rudimentary form). The result is that, as people try to find solutions to global problems, we often hear calls for international cooperation and action to achieve common or shared goals.⁹⁴ Thus, to give due weight to global public goods, it is necessary to reinvent sovereignty and create conditions for global consensus on cooperation.

interests, and he criticized notions of sovereignty that preclude the “institutional reconstructions which are indispensable to security.” *Id.* at 56-57.

⁹³ W. Friedmann, *The Changing Content of Public Interest: Some Comments on Harold D. Lasswell*, in *NOMOS V: THE PUBLIC INTEREST*, *supra* note 88. Professor Beer explains that rule of law was viewed in 18th century republican theory as a means to achieve the common good, as contrasted with the arbitrary and exclusive privileges meted out by kings. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 345-46 (1993). Perhaps now we are seeing a recapitulation of this experience on the global level when perceptions of the legitimacy of the exercise of power rest on whether there is adherence to the rule of law.

⁹⁴ *See, e.g.*, THE BRUNDTLAND COMMISSION, *OUR COMMON FUTURE: REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT* (1987). As part of a strategy to create security and provide global public goods, Professor Ikenberry calls on America to reclaim its post World War II commitment to a “public philosophy of internationalism” that recognizes that global rules and institutions are in America’s national interest. Ikenberry, *supra* note 19.

From what has already been said regarding Morgenthau's views on the obsolescence of old notions of sovereignty, it is evident that realism in foreign policy is not somehow divorced from a conception of the public interest or at odds with greater attention to the need for cooperation.⁹⁵ Further insight is provided in Morgenthau's 1960 book, *The Purpose of American Politics*, where he set forth his view of America's public philosophy and explained its relationship to domestic politics and the international role of the United States.⁹⁶

The American purpose, Morgenthau said, was and is "the establishment of freedom conceived as equality of opportunity and minimization of political control."⁹⁷ He said that "freedom, equality, opportunity, power" were different manifestations of the same experience.⁹⁸ People came to America with the expectation that they could live and act under conditions of equality in freedom.⁹⁹ The success in establishing equality in freedom created a related purpose to maintain equality in freedom in America as an example for other nations and eventually gave rise to a third purpose, namely to expand the area of equality in freedom to maintain it at home.¹⁰⁰

Morgenthau traces through American history the effort to pursue the American purpose and the collision with obstacles to its fulfillment – the encounter with other nations, the closing of the frontier, and eventually the global conflicts of the twentieth century.¹⁰¹ The pivotal moment for Morgenthau was Woodrow Wilson's failure. In the 1960 book, however, Morgenthau makes clear his view that Wilson's error was not in trying to bring American purposes to the world stage but in failing to adapt

⁹⁵ See *supra* text accompanying notes 24-25.

⁹⁶ MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS*, *supra* note 30, at 20, 22, 34, 36.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 109.

them to the global realities, which differed from the domestic experience.¹⁰²

In fact, where circumstances would allow, Morgenthau charted an ambitious project for expansion of the domain of equality in freedom. As already noted, he thought the United States was too timid in failing to create a confederation of the Atlantic community. New conditions, he asserted, required departure from old definitions of territoriality and sovereignty. America, he believed, would not be so troubled by this if it understood the connection of the new tasks to its traditional purpose, which entailed expansion of the domain of equality in freedom by offering its example or by expansion of frontiers. “These two methods would become indistinguishable were America to become the spearhead of a free association of nations committed to the achievement of equality in freedom.”¹⁰³ Inside the association, frontiers would no longer be obstacles to freedom and, rather than being a model, America would share its purposes with its partners.¹⁰⁴

Beyond the association of free nations, Morgenthau said the failures of Wilson and more recent experience demonstrated the difficulty of making America’s purposes relevant abroad.¹⁰⁵ Improving our own society so as to serve as a model he said was a crucial basis for diplomacy.¹⁰⁶ The “plausibility of American purpose” would be “established in the eyes of the world by deeds” as the foundation of American global influence.¹⁰⁷ That influence “must serve the interests not only of the nation but

¹⁰² *Id.*

¹⁰³ *Id.* at 34.

¹⁰⁴ *Id.* at 308-310. For a recent proposal for a global “Concert of Democracies,” see THE PRINCETON PROJECT ON NAT’L SEC., FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY (2006).

¹⁰⁵ MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS, *supra* note 30, at 308-310.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

also of mankind; for it must build the foundations for a supranational order” to control atomic weapons.¹⁰⁸

In sum, when Morgenthau rejected a moralistic foreign policy, he did not reject morals. On the contrary, he believed that a foreign policy reflecting America’s purpose was necessary to engage America’s energy. He also believed that American purpose was an important basis for American power because of the attraction of the American example. This was central to his criticism of the Nixon administration for its failure “to restore those exemplary qualities of America where throughout its history the lasting roots of its powers have lain.”¹⁰⁹ America was feared because its conduct in Vietnam made the United States appear “capable of anything; but we are no longer admired for what we are capable of doing.”¹¹⁰ But that is not all. Beyond its relationship with power, he believed a moral foreign policy desirable for its own sake. The nations of the past we admire, he said, were those that were more than just organizations whose purpose was survival and growth.¹¹¹ “In order to be worthy of our lasting sympathy, a nation must pursue its interests for the sake of a transcendent purpose that gives meaning to the day-by-day operation of foreign policy.”¹¹²

Fifteen years earlier, at the close of World War II, Morgenthau wrote that each generation’s task is “to rediscover and reformulate the perennial problems of political ethics and to answer them in the light of the experience of the age.”¹¹³ He and

¹⁰⁸ *Id.* at 308-10.

¹⁰⁹ Hans J. Morgenthau, *Nixon and the World: Four Years of Achievement and Failure*, NEW REPUBLIC, Jan. 6, 1973, at 20.

¹¹⁰ *Id.*

¹¹¹ MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS, *supra* note 30, at 8.

¹¹² *Id.* For further discussion of this book and Morgenthau’s views regarding values and their relationship to power politics, see CHRISTOPH FREI, HANS J. MORGENTHAU: AN INTELLECTUAL BIOGRAPHY 211-226 (2001).

¹¹³ Hans J. Morgenthau, *The Evil of Politics and the Ethics of Evil*, 56 ETHICS 1, 1 (1945), *cited in* JOEL H. ROSENTHAL, RIGHTEOUS REALISTS: POLITICAL REALISM, RESPONSIBLE POWER, AND AMERICAN CULTURE IN THE NUCLEAR AGE 42 (1991).

other leading realists of the time – people such as George Kennan, Walter Lippman, Reinhold Niebuhr – sought for the United States to be an important player without seeking to impose its standards on the world. They sought for American foreign policy a “structure that reflected American morality without allowing a sense of moral superiority to dominate the endeavor.”¹¹⁴ The realists judged national interests in terms of power, but it was “power considered in relation to its possible political and ethical ramifications.”¹¹⁵

Morgenthau realized that revolutionary changes were transforming the conditions that underlay old notions of power politics at the very moment he published his famous book and rose to prominence. He did not abandon his insistence on confronting reality, but he framed his approach to the balance of power and old notions of sovereignty to address new realities, such as nuclear weapons and the emergence of European integration. The interests of the United States, he believed lay in more collaborative institutions of global governance and such collaboration would be consistent with America’s own traditional purposes. In fact, world conditions called for an articulation of American purposes in support of a great undertaking for global cooperation.

Thus, in the end, the realism of Morgenthau about international politics and the realism of Schattschneider about domestic politics converge. Conflict, they both said is central to politics and cannot be ignored. But both also believed it would be an illusion to think that dangers of the modern world could be avoided or the public good protected without institutional means to assert broader public interests. This was a realism that took into account not only the obstacles to cooperation but the possibilities.

¹¹⁴ ROSENTHAL, *supra* note 114, at 35, 48.

¹¹⁵ *Id.* See also ANATOL LIEVEN & JOHN HULSMAN, ETHICAL REALISM: A VISION FOR AMERICA’S ROLE IN THE WORLD (2006).

VI. CREATING THE CONDITIONS FOR CONSENSUS

Global warming and other global challenges of our time require a reinvention of sovereignty based on a renewed commitment to international cooperation and a new era of institution building. The return of the idea of the public interest is a reflection of this imperative. However, there will be no new cooperation or new institutions without a widespread sense that these efforts have legitimacy – that they fairly address the needs of all concerned. In short, they must rest on consensus support.

Legitimacy that gives rise to consensus has several aspects, including fair procedures and desired outcomes effectively achieved.¹¹⁶ Moreover, these cannot exist without supportive underlying economic, social, and political conditions. Thus to provide global public goods, one must create the conditions that will support cooperative institutions that will be viewed as effective and fair.

This is also an essential realist axiom. Nations pursue their interests, and it is futile to devise schemes for addressing global problems unless they take these interests into account. Solutions must be rooted in reality. This is not to say that the status quo must be preserved. On the contrary—as Morgenthau argued, it is simply that in changing the status quo, the interests of nations cannot be ignored. It may be that new institutional arrangements can be based on a new constellation of public and private interests, but such innovation cannot be achieved in the abstract because of the symmetry of the design. There must be actual support.

This seemingly obvious point is often ignored, resulting in paralysis. Discussions concerning the difficulties of global challenges often conclude with a pronouncement that “political will” is required, as if political will could be wished into existence. Alternatively, it is assumed that in the absence of political will the challenge must be abandoned, when what is needed is the work of building consensus. To build consensus

¹¹⁶ See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). For a discussion of Franck’s ideas, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2643 (1997).

one must design policies that provide the incentives for support and action to get results that will build further support and new opportunities.

In domestic policy, the deals that give rise to consensus are often embodied in legislation and are so deeply buried under layers of practice that they are taken for granted. On the international scene, there is a tendency to try to achieve consensus by reaching well-intentioned but vague and therefore often ineffectual agreements. By contrast, where international cooperation works, there is a tighter fit between concrete incentives and mutual action, as in the ozone treaty or the program to raise environmental standards in countries entering the European Union.¹¹⁷

The mistaken belief that international law and institutions could somehow magically substitute for political consensus was recognized by the realists as a fatal mistake on the road to the calamities of the twentieth century. That was a central theme of Walter Schiffer (d. 1949) in his major work, *The Legal Community of Mankind: A Critical Analysis of the Modern Concept of World Organization*.¹¹⁸

Schiffer was born and educated in Germany and earned a doctorate in law at Breslau and in political science at Geneva.¹¹⁹ He served as a judge in Germany and as a research fellow in Geneva until he emigrated to the United States in 1941 and worked at Brookings, Syracuse University, and Princeton.¹²⁰ Both in Europe and America, he wrote extensively on the League of Nations.

In *The Legal Community of Mankind*, Schiffer asserted that in medieval Europe, the Catholic church and the papacy provided a degree of authority and unity above states which

¹¹⁷ For a sophisticated discussion of the issue of political will in the context of addressing climate change, see JOSEPH E. ALDY ET AL., PEW CENTER ON GLOBAL CLIMATE CHANGE, BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE 3-9 (2003).

¹¹⁸ WALTER SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND: A CRITICAL ANALYSIS OF THE MODERN CONCEPT OF WORLD ORGANIZATION* (1954).

¹¹⁹ *Id.*

¹²⁰ *Id.*

disintegrated with the seventeenth century wars of religion.¹²¹ However, the founders of modern international law, such as Hugo Grotius, suggested that law could provide for cooperation among nations without world government.¹²² Schiffer believed this tradition had borne disastrous fruit in the assumption that the existence of the League of Nations would produce harmony without change in social and economic conditions and without political effort.¹²³ Schiffer identified several expectations of the League founders which he suggested were destined for failure in the absence of underlying political consensus. These included, for example, pooled sovereignty, diffuse reciprocity, use of experts to transcend politics, and application of international law to individuals as well as states.¹²⁴ He did not live to see a kind of proof of his thesis in the emergence of these within the European Union, where construction of the underlying political consensus took place over decades.

It is sometimes incorrectly said that the founding foreign policy realists believed international law to be a sham. This, as Morgenthau said, was a misconception; rather international law is “in most instances scrupulously observed.”¹²⁵ It is, however, in the struggle for power that it is often ineffectual.¹²⁶ While law is imposed in domestic society by central authority, international law is “the result of objective social forces.”¹²⁷ It exists due to shared interests and the balance of power.¹²⁸ Where these conditions are disrupted or do not exist, Morgenthau evidently concluded international law lost its effectiveness, and he urged the use of diplomacy to try to

¹²¹ *Id.* at 15, 26, 29.

¹²² *Id.* at 30-31.

¹²³ *Id.* at 300-301.

¹²⁴ *Id.* at 225, 235, 245-47, 292-95.

¹²⁵ MORGENTHAU, POLITICS AMONG NATIONS, *supra* note 7, at 265.

¹²⁶ *Id.* at 263-266.

¹²⁷ *Id.* at 266.

¹²⁸ *Id.*

reestablish order. In contemporary legal scholarship, however, we find articulated the means by which law can be an instrument to help create and extend consensus. Dean Koh argues that transnational legal processes promote interaction, interpretation, and internalization of international legal norms.¹²⁹ Dean Slaughter and Professor Burke-White argue that in addressing new global challenges, international law is influencing and altering domestic politics and mobilizing national institutions for global goals by backstopping, strengthening, and mandating domestic functions.¹³⁰ Without greater elaboration at this point, California presents a striking example, as it addresses global warming through state legislation and potentially via agreements with European countries. In turn, this is sending ripples through the American legal and political system, sparking lawsuits and putting pressure on industry and federal officials.¹³¹

In transforming conditions to support consensus regarding global challenges, we face a dilemma in the weakness of existing institutions. This, however, cannot be an excuse for inaction, since cooperation is imperative to meet the global threats. Realism teaches recognition of the shortcomings of existing means of cooperation but also the need in the short run to use the tools at hand of diplomacy and law, while building stronger institutions for the longer term. Of course, in order to build international consensus there must also be recognition of the imperative need for the results which can only be achieved through cooperation.

Instead, for years the Bush administration adamantly rejected international cooperation to address global warming and continues to reject agreement on mandatory global greenhouse gas reduction targets. Other examples of the Bush administration's opposition to multilateralism are well known,

¹²⁹ Koh, *supra* note 38, at 2603.

¹³⁰ Slaughter and Burke-White, *supra* note 36, at 328-29.

¹³¹ Felicity Barringer, *California, Taking Big Gamble, Tries to Curb Greenhouse Gases*, N.Y. TIMES, Sept. 15, 2006, at A1. For a summary of recent literature on international law and cooperation among nations, see Laurence R. Helfer, *The Impact of International Law on International Cooperation: Theoretical Perspectives*, 101 AM. J. INT'L L. 257 (2007) (book review).

from the International Criminal Court, to arms accords. All of which led Professor John Ikenberry to ask whether United States commitment to multilateralism might undergo fundamental decline over the long run.¹³² He concluded in the negative for three reasons: 1) Economic interdependence means that to get what it wants from other nations, the U.S. must subject itself to the same rules it seeks to apply to others;¹³³ 2) As a dominant power, the costs to the United States of exercising power are less if countries cooperate willingly;¹³⁴ and 3) American tradition enshrines the rule of law as the source of legitimacy, which also supports multilateralism.¹³⁵

While Morgenthau and his generation learned through bitter experience circumstances in which reliance on law without power could be disastrous, he insisted it is in U.S. self interest to take into account the interests of other nations, and he anticipated a process in which like-minded nations would collaborate to expand institutions for order and peace. What was implicit in Morgenthau's call for institution building, and what is now clearer in hindsight, is that the promotion by the U.S. of an expanding domain for the rule of law and willingness itself to play by the rules had momentous consequences. It became a principal means to take into account the needs of other nations, and this in turn helped transform American power into order and legitimacy.¹³⁶

It is in part in this sense that confronting threats such as global warming must be seen as critical issues of foreign policy. For the United States to take an isolationist and rejectionist position with respect to a looming threat to which it is a principal contributor is to pursue a policy of undermining its own legitimacy.

¹³² G. John Ikenberry, *Is American Multilateralism in Decline?*, 1 PERSP. ON POL. 533 (2003).

¹³³ *Id.* at 540-541.

¹³⁴ *Id.* at 541-542.

¹³⁵ *Id.* at 542-543.

¹³⁶ See G. JOHN IKENBERRY, LIBERAL ORDER AND IMPERIAL AMBITION: ESSAYS ON AMERICAN POWER AND WORLD POLITICS 218 (2006).

Thus, there are reasons both of interest and morality for us to seek consensus rather than domination, and, as Morgenthau argued, these reasons are related. Global poverty, for another example, interacts with the other causes of environmental destruction, disease, crime, and terrorism, threatening the United States and other nations.¹³⁷ Zbigniew Brzezinski argues that it is in the interest of the United States to create a global community of shared interests with institutions that will promote awareness of common interests.¹³⁸ The U.S., he says, should consciously seek to take into account the needs of other nations and give globalization a moral theme that will produce a consensus providing legitimacy for U.S. leadership.¹³⁹ As a nation that temporarily holds a position of global hegemony, Brzezinski says this is the wise alternative to a strategy of unilateralism and over reliance on force that will only provoke a sustained backlash of anti-Americanism.¹⁴⁰ In other words, realism calls for the United States to seek the consensus that must provide the foundation for international cooperation.

VII. PROBLEMS OF THE NEW CENTURY

Working with the institutional materials at hand, countries have tried to respond to the global challenges. The question is whether the materials and the responses are adequate. The

¹³⁷ Susan E. Rice, *The Threat of Global Poverty*, THE NAT'L INT., Mar. 1, 2006.

¹³⁸ ZBIGNIEW BRZEZINSKI, *THE CHOICE: GLOBAL DOMINATION OR GLOBAL LEADERSHIP* (2004).

¹³⁹ *Id.* at 215-219. *See also supra* note 19. As Dr. Brzezinski's argument indicates, consensus building and institution building interact and can be mutually reinforcing. Conditions for consensus are needed to support new institutions and institutions can help build consensus and cooperation. One of the principal architects of the European Union, Jean Monnet, sought to resolve conflict among nations by building new institutions. MICHAEL BURGESS, *FEDERALISM AND EUROPEAN UNION: THE BUILDING OF EUROPE, 1950-2000* 35 (2000). He was optimistic that they could remove the obstacles that prevent people from seeing their common interests, but he also thought that people do not see the need for institutional change without crisis, or at least "the force of necessity."

¹⁴⁰ BRZEZINSKI, *supra* note 138, at 227-29.

answer has to be no because, with business as usual, the prospects on many fronts are grim. This does not mean that nothing constructive is happening. It just means that not nearly enough is happening fast enough to match the magnitude of the threats. A change of course is required.

Focusing primarily on the problems of sustainable development, we can get an idea of the character of some of the challenges and the broad lines of response. These challenges often require the international community to grapple with the problems of providing global public goods through more cooperative institutions. As a result, we see recurrent difficulties. The nature of today's global threats has created demands that call for new forms of collaboration and thus a reinvention of sovereignty. For example, as more global issues intersect with one another, traditional methods of dealing with international issues through single issue regimes become inadequate. At the same time, broader global institutions are weak. They lack the tools to facilitate cooperation to provide public goods. Often, this in turn is because they lack the kind of legitimacy that exists at the national level for parliaments that address and reconcile interconnected issues. One fundamental source of this lack of legitimacy is the difficulty in developing consensus support among nations having great disparities in wealth.¹⁴¹

After summarizing efforts at global governance for sustainable development in the present section, in the next section we will look more closely at efforts to address global warming in light of the three tasks – reinventing sovereignty, recovering the public interest, and establishing the conditions of consensus. The global warming example provides an approach to global governance that has begun to address the problems just mentioned, but it also indicates major tasks that remain if we are to establish governance to meet today's global challenges.

¹⁴¹ See Robert O. Keohane & Joseph S. Nye, Jr., *Introduction to GOVERNANCE IN A GLOBALIZING WORLD* 29-30 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

A. THE PROBLEMS AND INITIAL RESPONSES

Scientists have concluded that humans are the main source of carbon dioxide (CO₂) and other greenhouse gases causing damaging global warming.¹⁴² Carbon dioxide in the atmosphere is increasing at historically unprecedented rates to levels in the atmosphere that have not been present on earth since millions of years ago when semi-tropical conditions existed in places like Colorado.¹⁴³

A leading U.S. government climate scientist says that the world has ten years to change fundamentally its path on greenhouse gas emissions, so that they level off during this decade and then decrease with increasing speed.¹⁴⁴ This will require a major shift in the energy sources used by industrial civilization. Failure to change course threatens the collapse of the great Greenland and Antarctic ice sheets, with sea levels then rising twenty feet or more per century, which could inundate major cities and produce “global chaos.”¹⁴⁵

¹⁴² Robert Socolow, Roberta Hotinski, Jeffery B. Greenblatt, & Stephen Pacala, *Solving the Climate Problem*, ENV'T, Dec. 2004, at 8.

¹⁴³ Andrew C. Revkin, *Gases at Level Unmatched in Antiquity*, *Study Shows*, N.Y. TIMES, Nov. 25, 2005, at A14; Elizabeth Kolbert, *The Climate of Man*, NEW YORKER, May 9, 2005, at 54.

¹⁴⁴ Jim Hansen, *The Threat to the Planet*, N.Y. REV. BOOKS, July 13, 2006, at 12; Jim Hansen et al., *Global Temperature Change*, PROC. NAT'L ACAD. SCI. U.S. AM., Sept. 26, 2006, at 14288.

¹⁴⁵ *Id.* Business as usual is expected to lead to dangerous concentrations of atmospheric greenhouse gas by 2030. JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* 62 (2004). Thus there is an urgent need to make a significant course correction in the next ten years. A twenty foot sea level rise, as mentioned by Hansen, is expected to put the site of the World Trade Center in Manhattan under water and otherwise transform the maps of the world. See AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* 196-209 (2006), which includes maps depicting this change. Hansen notes that some scientists say it could take centuries before ice sheets collapse causing catastrophic sea level rise, but he and others say business as usual will cause “sea level rise measured in meters this century.” James E. Hansen, Remarks on Acceptance of WWF Duke of Edinburgh Conservation Medal, *The Threat to the Planet: How Can We Avoid Dangerous Human-Made Climate Change?* (Nov. 21, 2006), available at http://www.columbia.edu/~jeh1/DukeEdin_21Nov2006_complete.pdf (last visited Oct. 27, 2007). Whether the full impacts are soon or not, the urgency and the ten-year window remain, in part because of

Other predicted consequences of a failure to change course include damage from violent storms, droughts and fires, spread of disease bearing vectors, and destruction of ecosystems and species.¹⁴⁶ In coming decades, many poor countries will likely

the long term effects of greenhouse gases, which once in the atmosphere remain there for many decades. See Hansen, *The Threat to the Planet*, *supra* note 144; Hansen, *Global Temperature Change*, *supra* note 144. For a comparison of the considerable impacts versus the extreme impacts, below and above dangerous levels of global emissions, see WORLD WILDLIFE FUND, *Climate Change: Why We Need to Take Action Now*, Oct. 3, 2006, available at http://assets.panda.org/downloads/2_vs_3_degree_impacts_1oct06.pdf (last visited Oct. 27, 2007). For charts comparing the increase of greenhouse gas emissions assuming “business as usual” with the path needed to avoid dangerous climate change and the path charted in bills pending before Congress, see Felicity Barringer and Andrew Revkin, *Measures on Global Warming Move to Spotlight in New Congress*, N.Y. TIMES, Jan. 18, 2007, at A24, available at http://www.nytimes.com/imagepages/2007/01/18/washington/18climate_graphics.html. For extensive discussion of the causes and impacts of climate change, the urgency of action, and solutions and opportunities, see TREASURY OF THE U.K., THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE (2006), available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm (last visited Oct. 27, 2007). For additional information, see *Climate Action Network*, available at <http://www.climatenetwork.org>.

¹⁴⁶ SPETH, *supra* note 145, at 61- 62; Paul R. Epstein, *Climate Change and Human Health*, 353 NEW ENG. J. MED. 1433 (2005). The latest summary statement of the U.N.’s authoritative science panel confirms and strengthens prior findings of human agency (primarily through burning of fossil fuels, land use change such as forest destruction, and agriculture) in causing global warming, future prospects for continued rising temperatures with business as usual, and severe consequences such as more frequent heat waves, more intense hurricanes, and rising sea levels. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policy Makers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE 4TH ASSESSMENT REPORT 2, 8, 12-13 (S. Solomon et al., eds., 2007), available at http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf. The representative of the U.S. joined 112 other countries in approving the findings. Elisabeth Rosenthal and Andrew C. Revkin, *Science Panel Says Global Warming is “Unequivocal”*, N.Y. TIMES, Feb. 3, 2007, at A1. Despite the report’s dire warnings, some scientists said, in light of very recent data, the report is likely overly optimistic in its analysis of sea level rise. Cornelia Dean, *Even Before Its Release, World Climate Report Is Criticized as Too Optimistic*, N.Y. TIMES, Feb. 2, 2007, at A7. For a summary of the history of climate change science by a science historian, see Naomi Oreskes, *The Long Consensus on Climate Change*, WASH. POST, Feb.1, 2007, at A15. The adverse impacts on people, animals, and ecosystems, including details on projected drought, pests, disease, fires, mass species

lose as much as twenty-five percent of their food production due to global warming.¹⁴⁷ Sir John Houghton, a British climate scientist and co-chair of a key U.N. climate working group, calls the problem of human induced climate change at least as dangerous as the problem of weapons of mass destruction.¹⁴⁸

Environmental destruction beyond climate change is underway worldwide. The recent Millennium Ecosystem Assessment (MEA) report found a range of drivers resulting in pervasive ecosystem degradation and unsustainable use worldwide and concluded that reversing this trend can not occur with business as usual.¹⁴⁹ For example, the team found human activities resulting in a largely irreversible loss in biodiversity, with 10 to 30 percent of animal species threatened with extinction and fisheries and fresh water unable to sustain current use, much less future demands.¹⁵⁰ The report concluded that degradation could get much worse in coming decades and the trend is a barrier to achieving the poverty reduction and other objectives of the U.N. Millennium Development Goals.¹⁵¹ According to the study, improvement is possible but “will require radical changes in the way nature is treated at every

extinction, coastal inundation and displacement of populations, and stunted economic growth are set forth in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policy Makers*, in CLIMATE CHANGE 2007: CLIMATE CHANGE IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE 4TH ASSESSMENT REPORT (M.L. Parry et al., eds., 2007), available at <http://www.ipcc-wg2.org/>. For discussion of circumstances surrounding release of the report, see Juliet Eilperin, *U.S., China Got Climate Warnings Toned Down*, WASH. POST, April 7, 2007, at A5.

¹⁴⁷ Usha Lee McFarling, *Warmer World Will Starve Many*, L.A. TIMES, July 11, 2001, at 3.

¹⁴⁸ John Houghton, *Global Warming is Now a Weapon of Mass Destruction*, GUARDIAN, July 28, 2003, available at <http://www.guardian.co.uk/comment/story/0,3604,1007042,00.html>.

¹⁴⁹ Millennium Ecosystem Assessment Board of Directors, *Living Beyond Our Means: Natural Assets and Human Well Being* (2005), available at <http://www.millenniumassessment.org/documents/document.429.aspx.pdf> (last visited Oct. 27, 2007) [hereinafter Millennium Ecosystem Assessment].

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

level of decision-making” and “coordinated efforts across all sections of governments, businesses, and international institutions.”¹⁵² The MEA is the work of a partnership of U.N. agencies and scientific organizations with input from the private sector and civil society.¹⁵³

For several decades, nations have foreseen the environmental crisis, although consensus concerning the threat of global warming is more recent. In response, countries joined in global treaties to address climate change, biodiversity loss, desertification and other issues. The first President Bush joined in the climate treaty at the 1992 Rio conference. The Clinton administration participated in negotiation of the Kyoto Protocol to put teeth in the Rio climate treaty, but the second President Bush rejected Kyoto.¹⁵⁴ Recently, after European nations ratified Kyoto, the agreement went into effect and requires the signatory nations to reduce their greenhouse gas emissions. Nations are enacting laws to achieve these reductions from coal fired power plants and automobiles and other sources that

¹⁵² *Id.* at 23, 3.

¹⁵³ *Id.* at Preface.

¹⁵⁴ In 1997, the U.S. Senate passed overwhelmingly the “Byrd-Hagel” resolution stating that the U.S. should not sign the Kyoto Protocol unless developing countries are required to limit emissions or if it would cause serious economic harm. S. Res. 98, 105th Cong. (1997). However, in 2005, the Senate passed a resolution as an amendment to an energy bill stating that Congress should adopt mandatory greenhouse gas limits in a manner that will not significantly harm the economy and that will encourage other nations to do the same. 151 Cong. Rec. S7034 (2005). Earlier, on the same day, the Senate considered and rejected, by a vote of 60-38, the McCain-Lieberman amendment to establish greenhouse gas limits through a cap and trade mechanism. 151 Cong. Rec. S7029 (2005). In the 2006 election, control of Congress changed hands and the new Congress began with a flurry of bill introductions and new activity on global warming. For a useful comparison of provisions of various bills, see the Pew Center chart available at <http://www.pewclimate.org/docUploads/110th%20Congress%20Economy-wide%20CapTrade%20Proposals%2010-18-2007.pdf> (last visited October 26, 2007). For a discussion of views on Capitol Hill and from other players regarding the tactics and politics of climate change legislation, see Juliet Eilperin & Michael Grunwald, *Internal Rifts Cloud Democrats’ Opportunity on Warming*, WASH. POST, Jan. 23, 2007, at A1.

contribute to global warming.¹⁵⁵ The record of the United States on support for multilateral efforts to address other global environmental issues has become increasingly negative. For example, the United States ratified the 1987 treaty to address ozone depletion but failed to ratify the 1992 Convention on Biological Diversity, and the current administration persists in promoting weak environmental provisions to address the impacts of liberalized trade and investment.¹⁵⁶

The promise of the Kyoto agreement is very modest and extends only to the year 2012. Proponents agree that stronger follow-on measures are needed. Negotiations are underway, but the prospects are uncertain, and the Bush administration remains reluctant.¹⁵⁷ Since global action and cooperation by all major countries is required to address this global problem, a

¹⁵⁵ The Secretariat responsible for the climate treaty has published an overview of the agreement in plain language, including the commitments agreed to by the parties: CLIMATE CHANGE SECRETARIAT, *CARING FOR CLIMATE: A GUIDE TO THE CLIMATE CHANGE CONVENTION AND THE KYOTO PROTOCOL* (Joanna Depledge and Robert Lamb eds., 2003).

¹⁵⁶ "Tufts Researcher Says CAFTA Endangers Environment" TUFTS e-news, available at <http://enews.tufts.edu/stories/042205TuftsResearcherSaysCAFTAEndangersEnvironment.htm> (last visited Oct. 27, 2007).

¹⁵⁷ Late in his second administration, President George W. Bush backed away from refusal to participate in any global warming negotiations, but still rejected the idea of mutually agreed binding targets sought by other countries. Mark Landler and Judy Dempsey, *U.S. Compromise on Global Warming Plan Averts Impasse at Group of 8 Meeting*, N.Y. TIMES, June 8, 2007, at A12. Domestically, the Bush administration has also opposed mandatory emissions limits and, while modifying its reluctance to acknowledge the problem, has offered measures inadequate to address the challenge. For a summary of President Bush's positions on the issue since he campaigned for president, see Peter Baker & Steven Mufson, *Bush's Climate Remarks Weighed for Policy Shift*, WASH. POST, Jan. 27, 2007, at A1. In his 2007 State of the Union Address, President Bush proposed new requirements for alternative fuels and reform of automotive fuel economy standards, which he said would help confront global climate change. George W. Bush, President of the United States, State of the Union Address (Jan. 23, 2007). Some saw this as a possible step in the right direction. Others, however, noted uncertainties and loopholes in the proposal, expressed disappointment that the President did not address stationary sources, utilities, or improved efficiency and said that the proposals at best would do too little to address climate change. Edmund Andrews & Felicity Barringer, *Bush Seeks Vast, Mandatory Increase in Alternative Fuels and Greater Vehicle Efficiency*, N.Y. TIMES, Jan. 24, 2007, at A14; Baker & Mufson, *supra*.

continued rejectionist position by the U.S. would have dire implications for the global effort.

With respect to the totality of the many treaties on the books, the results have been meager and, as the Millennium Ecosystem Assessment indicates, with only business as usual, the outlook is grim.¹⁵⁸ The Dean of the Yale School of Forestry and Environmental Studies has said that, despite a few successes, the treaties are not changing the overall trends of deterioration.¹⁵⁹ He argues this is because the issues are complex, the political support for international action is overwhelmed “by economic opposition and protection of sovereignty,” and the international response has rested on weak multilateral institutions and weak treaties.¹⁶⁰ Most of the blame, he concludes, lies with the low priority placed in recent years on global environmental problems by wealthy countries, especially the United States.¹⁶¹

The ongoing global environmental deterioration is detrimental in its own right and is also contributing to the climate crisis, since twenty to twenty-five percent of greenhouse gas accumulation in the atmosphere is a result of tropical deforestation.¹⁶² Likewise, global warming contributes to water shortages, fires, drought, and habitat and species loss. In short, global warming and environmental destruction are parts of a single urgent problem.

To mention one more example of the current U.S. position, consider the issue of global poverty, which is inextricably connected as cause and effect to environmental degradation. Over a billion people live in extreme poverty, receiving less than one dollar per day.¹⁶³ Interlinked problems of poverty, disease,

¹⁵⁸ MILLENNIUM ECOSYSTEM ASSESSMENT, *supra* note 149.

¹⁵⁹ SPETH, *supra* note 145, at 96.

¹⁶⁰ *Id.* at 116.

¹⁶¹ *Id.*

¹⁶² Paulo Moutinho et al., *Why Ignore Tropical Deforestation? A Proposal for Including Forest Conservation in the Kyoto Protocol*, 56 UNASYLVA 27, 27 (2005), available at <http://www.fao.org/docrep/009/a0413e/a0413E06.htm>. This figure is comparable to U.S. emissions as a percentage of global emissions.

¹⁶³ Rice, *supra* note 137, at 76.

environmental destruction, erosion of state capacity and the spread of crime and terrorism threaten the security of the United States and other nations.¹⁶⁴ The extent and complexity of the problem as well as the need for institutional legitimacy require cooperation among nations in addressing poverty. Most of the nations of the world joined in the year 2000 at the United Nations in agreement on the Millennium Development Goals (MDGs), to reduce poverty, improve health and education, and promote sustainable development.¹⁶⁵ The goals included time bound, measurable targets, with most of the goals to be achieved by 2015.¹⁶⁶ At the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, countries throughout the world agreed to include with the target on water a target to cut in half by 2015 the number of people without access to decent sanitation worldwide. The United States opposed that target and only acquiesced at the end of the conference to a compromise that defeated a proposal to establish also a global goal on clean energy. The clean energy goal would have offended the Bush administration's adamant opposition to action on global warming.¹⁶⁷

Moreover, the Bush administration continued to send mixed signals about whether it subscribed to the overall MDGs at all. A pattern ensued whereby the President or a cabinet official would indicate support for the MDGs but mid-level officials conveyed that the U.S. really was not on board. This became explicit when diplomats assembled at the U.N. for a five year review of efforts on the MDGs. The U.S. representative at the U.N., Ambassador Bolton, attempted to edit references to the MDGs out of the conference document. When the summit met, President Bush had to state that he supported the MDGs, which Bolton seemed to be repudiating.¹⁶⁸ Meanwhile, though the U.S. agreed to the

¹⁶⁴ *Id.* at 77.

¹⁶⁵ U.N. Millennium Development Goals, *available at* <http://www.un.org/millenniumgoals/> (last visited Oct. 27, 2007).

¹⁶⁶ *Id.*

¹⁶⁷ Jon Jeter, *Environmentalists See Losses at Summit*, WASH. POST, Sept. 4, 2002, at A14.

¹⁶⁸ Sebastian Mallaby, *At the U.N., Bluster Backfires*, WASH. POST, June 12, 2006, at A21. For discussion of the Bush administration's avoidance of

sanitation and other goals, the administration resisted proposals by other nations for detailed work plans to achieve the goals, thereby frustrating accountability. In 2005, Congress enacted a law requiring the administration to prepare such a plan for water and sanitation.¹⁶⁹

B. THE DIFFICULTIES OF ACHIEVING COOPERATION

We now consider the struggle of the international community to establish cooperation to address shared problems. One is first struck by the complexity of the problems and the difficulty inherent in any attempt at response. This quickly becomes clear from the summary of recommended actions offered by the authors of the Millennium Ecosystem Assessment. They list responses with a primary goal of conservation, such as expansion of protected areas; responses with a primary goal of sustainable use, such as sustainable agriculture, forestry, and fisheries; integrated responses, such as coordination of environmental treaties with economic institutions; increased integration of sectoral responses; and responses that address direct and indirect drivers, such as elimination of perverse subsidies, use of tax policy to internalize externalities, and establishment of transparency and accountability and wide availability of scientific information.¹⁷⁰ Dean Speth talks about the need to address the root causes of global environmental problems through achieving a stable or

multilateral cooperation with respect to the Millennium Development Goals and foreign aid and development generally, including with respect to climate, as well as the dangerous consequences of this policy, see Nancy Birdsall et al., *Reforming U.S. Development Policy: Four Critical Fixes*, Center for Global Development 18-20 (Feb. 2006).

¹⁶⁹ Senator Paul Simon Water for the Poor Act of 2005, Pub. L. No. 109-121, 119 Stat. 2533. In the right circumstances, trade, investment and aid can work together to alleviate poverty. However, while it is often argued that private investment makes up for weak efforts on foreign aid, private capital flows are concentrated in a few countries and they largely bypass such public goods as health and education. Joseph Stiglitz, An Agenda for Development in the Twenty-First Century, Keynote Address to the 9th Annual Bank Conference on Development Assistance, Washington, D.C (Apr. 30, 1997).

¹⁷⁰ MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: BIODIVERSITY SYNTHESIS 10-14 (2005).

smaller world population; achieving a world free of mass poverty; spreading environmentally benign technologies; promoting prices and price mechanisms that reflect full costs, including environmental costs; promoting sustainable consumption; education; improved governance; and values that support sustainability.¹⁷¹

One way to boil this down is to ask ourselves how we address domestic environmental problems and how the global situation compares. Due to the externalities and public goods involved, government plays an important role domestically. Economic development can help generate the financial resources for environmental protection, but the results are positive only if development is conducted in a sustainable manner. Solutions have arisen in response to a public constituency for solutions, and action sometimes results in regulation of business and other times in transfers of funds to communities or regions where preservation or restoration is needed. Other approaches such as green consumerism and corporate social responsibility also play a role.

On the global level, all of this is harder. As Professor Esty explains, the need for supranational environmental protection follows from basic economics.¹⁷² Shared natural resources, unless regulated, are at risk of overexploitation. Polluters avoid payment for uncontrolled transboundary pollution spillovers known in economics as uninternalized externalities. These market failures cause inefficiency and environmental degradation.¹⁷³ The scale and complexity of the problems require new forms of collaboration across borders and issues. Remedies in the form of public goods, discussed below, such as clean air and clean water, are often difficult to provide and institutions lack the tools to facilitate the necessary cooperation among nations. Institutions and regulation which might

¹⁷¹ SPETH, *supra* note 145, at 151-201.

¹⁷² Daniel C. Esty, *Global Environmental Governance*, in GLOBAL GOVERNANCE REFORM: BREAKING THE STALEMATE 108, 108-9 (Colin I Bradford Jr. & Johannes F. Linn eds., 2007).

¹⁷³ *Id.* The Stern Review calls climate change “the greatest and widest-ranging market failure ever seen.” TREASURY OF THE UK, THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE (2006).

address the problems may be weak and lack consensus support, often due to disparity in wealth among member nations. In many individual countries, the public may not have a chance to participate in government or there may be no mobilized constituency for sustainability. Poverty may prevent the expenditure of public funds on the environment and other public needs.

Countries have responded individually and through treaties to the global environmental challenges, but as noted, the results have often been weak. Plans have been made. National laws have been enacted. But environmental destruction has continued. Among an array of problems, lack of funding has been a primary cause. In the period leading up to the 1992 Rio conference, developing countries pursued an ambitious agenda seeking financing for sustainable development, but came out with little to show for their efforts due to opposition by the U.S. and other donor countries. When asked whether developing countries would accept such a result, a U.S. official said, "They won't have any choice."¹⁷⁴ Not surprisingly, this history is said to have contributed to a cooling of developing country attitudes toward the affirmative Rio environmental program.¹⁷⁵

Dean Speth states that developing countries will not have the confidence and hope to do what is needed without strong support by the international community for overall sustainable development.¹⁷⁶ Developing country views on international environmental issues are strongly shaped, he says, by their fear of the costs, their focus on their economic and social problems, and "their distrust of the intentions and policies of the industrial countries."¹⁷⁷

The failure so far to stem the tide of global environmental destruction has been, in affluent countries, especially the U.S., a fairly quiet crisis. However, with the rising consciousness of the threat of global warming, this is changing. Among many signs

¹⁷⁴ G. PORTER, J. BROWN & P. CHASEK, GLOBAL ENVIRONMENTAL POLITICS 160-61 (3d ed. 2000).

¹⁷⁵ *Id.* See also SPETH, *supra* note 145.

¹⁷⁶ SPETH, *supra* note 145, at 146-47.

¹⁷⁷ *Id.* at 174.

of the escalating concern of the American public was the April 3, 2006 cover of *Time Magazine*, which said “Be worried. Be *very* worried. Climate change isn’t some vague future problem—it’s already damaging the planet at an alarming pace. Here’s how it affects you, your kids and their kids as well.”¹⁷⁸

In the regime established by the Kyoto Protocol to address global warming, there was an attempt to account for the dilemmas of global governance mentioned above. By the 2012 deadline for initial, modest reductions of emissions of greenhouse gases, only industrialized countries have binding reduction targets.¹⁷⁹ Moreover, the Protocol provides benefits to developing countries by creating incentives for firms in industrialized countries to invest in clean energy projects in developing countries.¹⁸⁰

However, bigger challenges lie ahead. The United States, which is the source of one quarter of the world’s greenhouse gas emissions and has per capita emissions about twice the industrial country average, must reverse course and join in the global undertaking.¹⁸¹ This will require limits that will result in decreasing levels of greenhouse gas emissions, improvements in energy efficiency, and expansion of new fuel technologies.¹⁸²

¹⁷⁸ TIME MAGAZINE, April 3, 2006.

¹⁷⁹ See CARING FOR CLIMATE: A GUIDE TO THE CLIMATE CHANGE CONVENTION AND THE KYOTO PROTOCOL, CLIMATE CHANGE SECRETARIAT 21-22 (Joanna Depledge and Robert Lamb eds., 2003).

¹⁸⁰ *Id.*

¹⁸¹ SPETH, *supra* note 145, at 64-71.

¹⁸² *Id.*; see also Socolow et al., *supra* note 142. The September 2006 SCIENTIFIC AMERICAN is a special issue with numerous articles on climate solutions. For detailed recommendations on climate policy see Larry J. Schweiger, President and CEO National Wildlife Federation, Global Warming and Wildlife: Hearings Before the Senate Environment and Public Works Committee, Subcommittee on Private Sector and Consumer Solutions to Global Warming and Wildlife Protections, Statement to the 110th Cong. (Feb. 7, 2007), and The Environmental Community’s 2007 Energy Platform, available at http://www.saveourevironment.org/2007_Energy_Platform.pdf (last visited Oct. 27, 2007). The Intergovernmental Panel on Climate Change sets forth an array of policy measures to address climate change, indicating the feasibility of the necessary steps but warning that delay would make the task more difficult and increase the risk of severe

Opponents complain about the costs of this shift, but there are large opportunities for American industry in improved efficiency and in the global market for new technology, and of course the point is to avoid the greater costs of inaction.¹⁸³

Countries must adopt emission targets for the period following 2012. In the U.S., opponents of Kyoto argued that the U.S. should not commit to targets when countries like India and China did not do so under Kyoto. Of course, affluent nations were the source of most of the greenhouse gases in the atmosphere. Currently, however, developing countries are on a path of economic growth that will make some of them leading emitters of greenhouse gases during coming decades. Accordingly, affluent countries should lead, but an important question for the post-2012 period is how developing countries might join in stepped up action for clean energy and to reduce emissions. Various proposals have been made, including for example, the idea of relating the stringency of emissions commitments of developing countries to their wealth.¹⁸⁴

Speth suggests an array of measures and incentives to encourage participation by developing countries, including assistance for capacity building and technology, expansion of Kyoto's incentives for investment in climate projects, assistance

climate impacts. See TECHNICAL SUMMARY, IPCC FOURTH ASSESSMENT REPORT 27-33 (Working Group III, May 4, 2007), available at <http://www.ipcc.ch>.

¹⁸³ Regarding opportunities for American business, see Stuart Eizenstat & Ruben Kraiem, *In Green Company: If Kyoto is so dangerous, why is corporate America already playing by its rules?*, in FOREIGN POL'Y, Sept.-Oct. 2005, at 92-93. Regarding the costs and benefits of action on climate change see TREASURY OF THE UK, THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE *passim* (2006), and Frank Ackerman & Elizabeth Stanton, *Climate Change – the Costs of Inaction, Report to Friends of the Earth England, Wales, and Northern Ireland*, GLOBAL DEV. AND ENV'T'L INST., TUFTS UNIV. (Oct. 11, 2006), available at http://www.foe.co.uk/resource/reports/econ_costs_cc.pdf (last visited Oct. 27, 2007).

¹⁸⁴ Robert N. Stavins, *Global Climate Treaty*, ENV'T, Dec. 2004, at 23-26. For extensive discussion of the post-Kyoto options, see JOSEPH E. ALDY ET AL., BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE, PEW CENTER ON GLOBAL CLIMATE CHANGE (2003). See also SOUTH-NORTH DIALOGUE ON EQUITY IN THE GREENHOUSE, A PROPOSAL FOR AN ADEQUATE AND EQUITABLE GLOBAL CLIMATE AGREEMENT, FED. MINISTRY FOR ECON. COOP. AND DEV. (2004).

to reverse deforestation, reduced tariffs, and support by the World Bank.¹⁸⁵ More generally, the Stern Review calls for a scaling up of international collaboration on emissions limits, technology innovation, reduction of deforestation, and assistance to developing countries for adaptation.¹⁸⁶

The argument over whether significant climate change is occurring is essentially over and the tide is turning as well on the need for action. Now, the arguments for “go slow” policy turn on questioning whether human induced climate change is the main cause and the severity of the consequences. One such statement in *The National Interest* magazine acknowledges the need for action, urges the White House to adopt a policy of zero emissions by the end of the century, yet opposes a “strict target-and-timetables” approach.¹⁸⁷ Instead, the authors urge a policy of encouraging investment in new technology.¹⁸⁸

¹⁸⁵ SPETH, *supra* note 145, at afterword. Regarding the importance of technology transfer and other assistance to developing countries, see TREASURY OF THE UK, THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 516-37 (2006). In addition to the various measures that must be coordinated to make a regime work to limit global warming emissions, the problem is linked to other global challenges. For example, the international effort to manage the threat of nuclear weapons is currently unraveling. The 2005 Nuclear Nonproliferation Treaty (NPT) Review Conference collapsed. While Iran failed to provide guarantees that it would not develop nuclear weapons, the United States and other nuclear powers failed to satisfy other nations with respect to obligations under previous commitments to disarm and provide assistance on nuclear energy. Professor Ikenberry suggests that, primarily due to U.S. decisions, there is no progress in sight and “the NPT is in crisis.” G. John Ikenberry, *Global Governance*, INTERDEPENDENT, Spring 2006, at 33. What might previously have been seen as a serious but separate problem must now be viewed as related to the task of confronting global warming. To the degree that some nations rely increasingly on nuclear power to achieve greenhouse gas reduction targets, strong controls on nuclear proliferation become even more important. Robert Socolow, Keynote Talk at the Sustainable Energy Initiative Roundtable: Stabilization Wedges and the Urgency of Scale-Up (Oct. 27, 2005).

¹⁸⁶ TREASURY OF THE UK, THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 574-75 (2006).

¹⁸⁷ Paul J. Saunders & Vaughan C. Turekian, *Warming to Climate Change*, NAT'L INT., Summer 2006, at 78, 83.

¹⁸⁸ *Id.* at 80.

Yet, as noted above, the scientific consensus already exists regarding the importance of the human contribution to global warming and the conclusion that inaction will lead to severe damage. As for greater incentives for innovation, they would be welcome, but, unfortunately, without mandatory constraints on emissions, this is not going to do the trick. The necessarily large changes in investment in technology and industrial plants will not come without a market signal that reflects a future of lower emissions.¹⁸⁹

The *National Interest* statement suggesting the need for at least some forward movement is welcome, and for any other subject it might be taken as a sign that the normal workings of the American political system are functioning and that eventually things will turn out okay. Unfortunately, the global warming problem is not an ordinary issue. The normal, slow muddling-through will not be enough. Unless a significant change in direction occurs during this decade, “it will be impossible to avoid climate change with far-reaching undesirable consequences. We have reached a critical tipping point.”¹⁹⁰

C. THE STRUGGLE TO IMPROVE COOPERATION

The climate regime is perhaps the most important example of the struggle to make one of the environmental treaties drafted in the late decades of the last century effective. It illustrates the recurring challenges of international environmental cooperation – achieving cooperation across borders and issues, vindicating public needs left unaddressed by the clash of narrower interests, and developing consensus notwithstanding great wealth disparities among nations.

¹⁸⁹ Timothy E. Wirth, C. Boyden Gray & John D. Podesta, *The Future of Energy Policy*, FOREIGN AFF., July-Aug. 2003, at 132, 142. Regarding the need for both price signals to reduce emissions and for accelerated innovation, see EVALUATING THE ROLE OF PRICES AND R&D IN REDUCING CARBON DIOXIDE EMISSIONS, CONG. BUDGET OFF. (Sept. 2006) and TREASURY OF THE UK, THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 308-402 (2006).

¹⁹⁰ Jim Hansen, *The Threat to the Planet*, N.Y. REV. BOOKS, July 13, 2006, at 12.

Beyond the strengthening of the individual treaties, there is also a growing recognition of links among different issues and there is interest in whether institutions can be created to address fragmentation and related weaknesses of global environmental governance. Various problems have been addressed through single-subject, multilateral environmental agreements (MEAs), but a number of new, broader governance proposals are being raised. These include strengthening high level political support through the conference of environmental ministers; coordination among international environmental agencies; mainstreaming of environmental issues into other global and national economic and social policies; and improved implementation through plans, targets, and reporting.¹⁹¹ Some have also proposed a World Environmental Organization, comparable in stature and clout to the World Trade Organization, although the kind of support that existed for the latter among governments does not exist for the former.¹⁹²

There is a long history of proposals to overcome the fragmentation and weakness of global institutions for sustainable development. Proposals have often foundered in the past on disputes and concerns regarding representation of the

¹⁹¹ ADIL NAJAM, MIHAELA PAPA & NADAA TAIYAB, *GLOBAL ENVIRONMENTAL GOVERNANCE: A REFORM AGENDA* 69-91 (2006); Andrew M. Deutz, Special Advisor for Global Policy, International Union for the Conservation of Nature, Statement to the U.N. General Assembly 60th Session: Informal Consultations of the Plenary on Environment (April 25, 2006).

¹⁹² Regarding proposals for a world environmental organization, see *GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES* (Daniel C. Esty & Maria H. Ivanova eds., 2002). For a discussion of various approaches to reforming global environmental governance, see JAMES GUSTAVE SPETH & PETER M. HAAS, *GLOBAL ENVIRONMENTAL GOVERNANCE* 125-50 (2006). The authors suggest different scenarios of differing levels of ambition. They describe basic improvements, major reform, and even more significant transformation. In the first category are improved environmental monitoring, verification and enforcement, and rules for country voting in multinational bodies; heightened financial and knowledge transfers to poor countries; and enhanced efforts to build public concern. Examples of major innovations include establishment of a world environment organization and development of global issue networks. Transformational ideas include addressing the underlying drivers of destruction, redirecting market forces to work for the environment by increasing productivity and focusing investment on natural capital, increased local control to create alternatives to vested interests, and mobilizing citizen action.

interests of different nations. These include worries by some in developing countries that strengthened coordination on the environment might frustrate progress on development goals and disappointments about lack of follow through on past funding commitments.¹⁹³ This history highlights this article's assertion that creation of the underlying conditions for consensus is necessary to create institutions for global governance. There must be mutuality of commitments and recognition of the costs and benefits of action and inaction. The international community has resembled someone struggling with attempt after attempt to line up the sides of a Rubik's cube in different ways, while the clock is ticking on environmental degradation moving in many places and ways toward collapse.¹⁹⁴

A recent high level U.N. report offers a fresh attempt to overcome weakness and fragmentation among myriad agencies in dealing with the global environment and development.¹⁹⁵ The central theme is to establish a unitary U.N. presence at the country level with one leader, one program, and one budget.¹⁹⁶ The panel recommends creation of a U.N. Sustainable Development Board to oversee the unitary country programs.¹⁹⁷ The Administrator of the U.N. Development Program (UNDP) would chair a group made up of the heads of other relevant U.N. agencies and would report to the Board.¹⁹⁸ The Board would

¹⁹³ See GREEN POLITICS: GLOBAL ENVIRONMENTAL NEGOTIATIONS ch. 9 (Anil Agarwal et al. eds., 1999).

¹⁹⁴ Scientists warn that current practices involving overfishing and pollution will cause a collapse of global commercial fisheries and that the world, with a billion people dependant on seafood as their main source of animal protein, will run out of seafood by mid-century. Juliet Eilperin, *Scientists Warn of Disappearance of Seafood by 2048*, WASH. POST, Nov. 3, 2006, at A1. For a systematic discussion of many other examples, see MILLENNIUM ECOSYSTEM ASSESSMENT, *supra* note 149.

¹⁹⁵ Shaukat Aziz, Luisa Dias Diogo & Jens Stoltenberg, Co-Chairs of the Secretary-General's High-Level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment, Report of the Secretary-General's High-Level Panel: Delivering as One (Nov. 9, 2006).

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 30.

¹⁹⁸ *Id.* at 32.

govern a special funding mechanism, focusing on the Millennium Development Goals.¹⁹⁹ Specifically with respect to the environment, the panel recommends strengthening the U.N. Environment Program (UNEP) to lead in aiding countries to address environmental problems and strengthening UNEP's role in U.N. system wide cooperation.²⁰⁰ The panel recommends increasing the funding for the Global Environmental Facility and says sustainable development should be mainstreamed into the work of the U.N.'s Economic and Social Council.²⁰¹ Finally, the panel recommends that the Secretary General commission an independent assessment of the system of international environmental governance, reviewing the "specific roles and mandates" of UNEP, other U.N. agencies, and the multilateral environmental agreements.²⁰²

While the panel's report offers important suggestions, its recommendations offer the most progress on coordination of development efforts and seem less clear and offer less of a mandate when it comes to sustainability. For example, it is suggested that UNEP's role in coordination should be strengthened without saying how.²⁰³ The specifics seem to be deferred to the proposed independent assessment. In fact, a diplomatic expression of frustration seems to be contained in the tart comment that "[i]t is the judgment of the Panel that the international community must transcend differences and move forward. Economic growth, social justice and environmental care, advance best when they advance together."²⁰⁴

The panel points out that greater coordination is needed. However, the absence of detail on sustainability simply underscores the fact that the solution is not only, or perhaps primarily, one of institutional design. Rather, it is one of

¹⁹⁹ *Id.* at 31.

²⁰⁰ *Id.* at 18-19.

²⁰¹ *Id.* at 21.

²⁰² *Id.* at 22.

²⁰³ *Id.* at 21.

²⁰⁴ *Id.* at 20.

building consensus based on mutuality of commitments and benefits. Panels and independent assessments can suggest various frameworks, roles, and responsibilities, but progress will require that diplomats negotiate a deal.

Perhaps the beginning of one such effort is a consultative process on the U.N.'s environmental activities launched by the President of the General Assembly. The process addresses coordination, treaty compliance, policy and scientific advice, and integration of environmental with broader sustainable development issues, including capacity building. Reports from this process reflect the diversity of views one would expect from scores of countries, but whether there is a possibility for consensus on major reform is unclear.²⁰⁵ There is recognition of continued environmental deterioration and need for coordination but also a desire to maintain the autonomy of different multilateral treaty regimes. One theme that does seem to have strong support is the need for capacity building for poor countries and assurance that strengthened environmental governance will contribute to achieving the Millennium Development Goals, rather than being only an exercise in cutting costs. A related point is that many countries seem to support greater cooperation among the U.N.'s environmental and development agencies (UNEP and UNDP). Interestingly, there seems to be strong support for the idea that the forum of environmental ministers should play more of a role on discussion of substantive issues as well as an oversight role with respect to treaty regimes and interaction with other multilateral forums.²⁰⁶

²⁰⁵ Ambassador Enrique Berrua, Permanent Representative of Mexico & Ambassador Peter Maurer, Permanent Representative of Switzerland, The Informal Consultative Process on the Institutional Framework for the UN's Environmental Activities: Co-Chairs Summary (June 27, 2006).

²⁰⁶ *Id.* It may be that one difficulty in achieving consensus in the U.N. consultative process and other such efforts regarding global environmental governance is the sometimes abstract nature of the discussion. As suggested by Monnet, *supra* note 139, it may take a crisis to drive agreement. Evidence of a crisis of sustainable development already exists, *supra* text accompanying note 149. However, greater recognition of this may come in the context of confronting global warming, the threats from which are so pervasive that the challenge converges with that of sustainable development generally. See *infra* text at note 278.

While the future of these efforts is unclear, a deal will likely have to show that progress will be made simultaneously on sustainability and development, that there will be progress on the agendas of both industrialized and developing nations, and that the process will be a fair one in which all concerned will have influence. In their discussion of global environmental governance, Esty and Ivanova say that the world community has no choice but to act.²⁰⁷ Shared resources and transboundary pollution and accompanying environmental problems at unprecedented scale necessitate common action. “The traditional notion of national territorial sovereignty cannot protect us from global-scale environmental threats.”²⁰⁸ The effort must be part of a “‘global bargain’ that commits the world community to a more aggressive program of poverty alleviation.”²⁰⁹ While various structures are possible, Esty and Ivanova suggest the key elements for improved means of cooperation include analytical capability, a policy forum, and funding, all based on procedural and substantive fairness.²¹⁰ Later, the effort to achieve such a deal will be discussed in the concrete context of global warming, and we will also discuss the problem of what seems to be a missing sense of urgency. First, we turn to the broader context of global governance.

D. BROADER ATTEMPTS AT GLOBAL GOVERNANCE

Efforts to improve coherence on global environment and development issues should be viewed in the broader context of efforts on other issues. Environmental matters often intersect

²⁰⁷ GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 225-233 (Daniel C. Esty & Maria H. Ivanova eds., 2002).

²⁰⁸ *Id.* at 225.

²⁰⁹ *Id.* at 235. See also Frank Biermann, *Reforming Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: PERSPECTIVES ON THE CURRENT DEBATE 103-123 (Lydia Swart & Estelle Perry, eds., 2007), available at <http://www.centerforunreform.org/node/251>. Biermann suggests a world environmental organization could strengthen the collective bargaining power of small countries, as well as facilitate aid and technology transfer. *Id.* at 116.

²¹⁰ See *supra* note 207, at 230.

with other issues and it is also important to consider whether there are general structures of global governance that might be useful in addressing sustainable development. Morgenthau minimized the likelihood that cultural exchange or greater understanding among nations could build a world community. But he was attracted to the idea of a functional approach, establishing institutions to deal with individual concrete problems that would create a spreading web of activities and agencies leading to integration of the interests and lives of nations.²¹¹ He viewed NATO and the European Community as examples of this process, and this became a hope of internationalists in the 20th Century.²¹²

At the global level, recent decades saw a proliferation of functional institutions. They achieved many accomplishments. But fragmentation, gaps, and conflicts also emerged and the process did not graduate to integration and coherence as some had hoped. The environment is a prime example.

The United Nations, on the other hand, is an organization with potentially universal jurisdiction, yet it has been unable to resolve the problems of fragmentation. Important players preferred to deal with certain issues in separate compartments. The U.N. itself did not have sufficient political muscle to take on the task of integration. Periodically, the U.N. Security Council would come to life on regional conflicts, but no comparable investment of authority from home capitals flowed to the U.N. on other issues.

These flaws have not been lost on the international community, and creative efforts to address the problems have been initiated. One of the most interesting is the Millennium Development Goals mentioned above.²¹³ While some have questioned the value of such ambitious though nonbinding objectives, they provide a common framework to help coordination among the scores, even hundreds, of disparate

²¹¹ MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7, at 506.

²¹² *Id.* at 510-14.

²¹³ *Millennium Development Goals*, <http://www.unmillenniumproject.org> (follow "Millennium Development Goals" hyperlink) (last visited Oct. 27, 2007).

agencies and organizations working on global development.²¹⁴ They also provide a vehicle for participation and accountability and a bottom-up method of dealing with complex inter-linked problems.²¹⁵ Another initiative that provides a governance approach to cope with the need to address interconnected problems from the grassroots, while taking into account international implications, is the UNESCO World Network of Biosphere Reserves. Governance around local biosphere reserves mediates among stakeholders and environmental, social, and economic interests. Recently, the program has begun exploring application of these approaches to urban landscapes, by establishing a global network of urban biospheres based on local policy relevant research hubs.²¹⁶

In an extensive study of public goods and the governance structures needed to provide them, a group of authors at the U.N. Development Program, with other contributors, propose a basic framework for improving provision of global public goods, including mechanisms to match circles of affected stakeholders with decision makers, creating systematic financing, and fostering interaction across borders. They offer an array of proposals on improving the publicness of decision making, methods of financing, and tools for managing production of public goods. Among the tools for publicness, they propose criteria for fair negotiations, rules for interaction of states with nonstate actors, and review and response facilities to promote implementation. Several of their proposals highlight the point made earlier regarding the new character of international law in addressing domestic conditions and arrangements. These proposals include designating a national lead agency for each

²¹⁴ For discussion of the MDGs, with different kinds of suggestions for ways in which the U.S. and other nations can enhance the role of the MDGs in development, see Jeffrey D. Sachs, *The Development Challenge*, FOREIGN AFF., Mar.-Apr. 2005; see also Michael A. Clemens, Charles J. Kenny & Todd J. Moss, *The Trouble with the MDGs: Confronting Expectations of Aid and Development Success*, (Ctr. for Global Dev., Working Paper No. 40, 2004).

²¹⁵ COLIN I. BRADFORD, JR., GLOBAL GOVERNANCE FOR THE 21ST CENTURY 14, 24 (2005).

²¹⁶ Christine Alfsen-Norodom, Benjamin Lane & Melody Corry eds., *Urban Biosphere and Society: Partnership of Cities*, 1023 ANNALS N.Y. ACAD. OF SCI. 1 (2004).

global public good and linking foreign and domestic affairs through “matrix management and integrated budgets.”²¹⁷ In a revealing analogy, the authors say “The provision of public goods today—nationally and internationally—resembles the provision of public goods in the Middle Ages.”²¹⁸ It involves an array of authorities and jurisdictional levels, responding to crises, based more on politics than concern for the public.²¹⁹

One of the greatest shortcomings at the regional and global level in the functional approach to international problems is the lack of opportunity for tradeoffs and bargains in “legislating” and the lack of opportunities for coordination in implementation. Such bargains and coordination, however imperfect, are commonplace in the European Union. Current efforts to address this at the global level illustrate recognition of these problems and also the continuing difficulty in resolving them.

The U.N. Secretary General convened a blue ribbon panel to make recommendations on global governance. The panel observed that “[e]xisting global economic and social governance structures are woefully inadequate for the challenges ahead. To tackle the challenges of sustainable development, countries must negotiate across different sectors and issues, including foreign aid, technology, trade, financial stability and development policy.”²²⁰ Noting that “such packages are difficult to negotiate” and require senior political support, the panel said “[a]t the moment, there is no high-level forum which provides leaders from large industrial and developing economies a regular opportunity for frank dialogue, deliberation and problem solving.”²²¹

²¹⁷ INGE KAUL, ET AL., PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 5-6, 35, 47, 52 (2002).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ UNITED NATIONS, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 26 (2004) [hereinafter UNITED NATIONS].

²²¹ *Id.*

That said, the panel candidly described the problem of dealing with the governance challenges. The founders of the U.N. “understood that peace and security were inseparable from economic development.”²²² However, “decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations, and no amount of institutional reform will bring it back.”²²³ Thus, the panel recommended that the U.N. Economic and Social Council (ECOSOC) be strengthened to play a role as a high level “development cooperation forum,” focusing on the Millennium Development Goals and coordinating with the Bretton Woods institutions (WTO, IMF, and World Bank) and U.N. action at the country level.²²⁴

The panel went on to say that while action on trade and finance lies outside ECOSOC, “[t]here still remains a need for a body that brings together the key developed and developing countries to address the critical interlinking between trade, finance, the environment, the handling of pandemic diseases and economic and social development.”²²⁵ To do this, the panel recommended enhancement of the G20 group of finance ministers (which already represents 80 percent of the world’s population and 90 percent of its economic activity) with representation by the Bretton Woods Institutions and with attendance by the U.N. Secretary-General and the president of ECOSOC.²²⁶

Experience shows that there is value in multilateral institutions beyond what they accomplish on any one issue in achieving bargains and coordination. John Ruggie refers to this plus factor as “diffuse reciprocity.”²²⁷ What he means is that

²²² *Id.* at 86.

²²³ *Id.*

²²⁴ *Id.* at 87.

²²⁵ *Id.* at 88.

²²⁶ *Id.* See also JOHANNES F. LINN & COLIN I. BRADFORD, JR., PRAGMATIC REFORM OF GLOBAL GOVERNANCE: CREATING AN L20 SUMMIT FORUM (The Brookings Inst., Pol’y Brief No. 152, Apr. 2006).

²²⁷ John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, in MULTILATERALISM MATTERS 3, 11 (Ruggie ed., 1993).

there are incentives for cooperation and comity beyond direct reciprocity on a particular issue because the parties deal with each other across many issues.²²⁸ Also, rather than assembling infrequently for a two week conference on a single issue with senior officials who may rarely if ever see each other again, they interact on a continuous basis. The result is the establishment of stronger incentives for cooperation.²²⁹

A thoughtful overview of global governance concludes that the enterprise has outgrown the separated, functional approach to global issues. The authors state that the key challenges — ranging from health and environment to development, finance, and security -- involve relationships among what previously were separate domains. Consequently, there is a need for a summit-level forum involving senior political authorities who can achieve the bargains necessary to support consensus across issues. This might involve the U.N., but the difficult history of U.N. reform leads the authors to suggest a reformed and expanded version of the current G-8, transformed into an L-20 leaders group of nations. However, the authors find that the current political climate is not conducive to ambitious, systemic reform of the kind accomplished in the immediate post World War II era. Therefore, they suggest a path involving simultaneous reform of individual international institutions and broader global forums, in the hope that the cumulative results will move toward the needed coherence.²³⁰

Discussion of the framework of global institutions may sometimes seem abstract. The issues, however, have life and death significance across the globe. We are often, as General

²²⁸ *Id.*

²²⁹ *Id.* at 17.

²³⁰ COLIN BRADFORD ET AL., GLOBAL GOVERNANCE REFORM: BREAKING THE STALEMATE 3-4, 115-16, 119, 128-30 (2007). An important issue for further discussion is how to structure the relationship between global environmental and other functions to maintain the coherence of the former yet also integrate them with the latter, in policy making and implementation. This is a challenge also under consideration within the European Union. For an interesting discussion, see R. Andreas Kraemer et al., *EU Environmental Governance: A Benchmark of Policy Instruments*, BELGIAN FED. DEP'T OF THE ENV'T (June 1, 2002).

Marshall said in launching the cooperative efforts for European recovery,

“remote from the scene of these troubles. It is virtually impossible at this distance . . . to grasp at all the real significance of the situation. And yet the whole world of the future hangs on a proper judgment. It hangs, I think to a large extent on the realization of the American people. . . . What are the sufferings? What is the need? What can best be done? What must be done?”²³¹

Of course, today, we are less and less remote from many aspects of pressing global issues, as the causes of environmental damage, disease, and conflict cross borders. Sometimes the complexities still challenge the imagination, yet, as General Marshall said, “the whole world of the future hangs on a proper judgment.”²³²

We can summarize the efforts of the international community to respond to global challenges by saying many in the international community recognize the need for increased cooperation to address common concerns, often relating to provision of public goods. However, obstacles to progress are strong and the time is short. New forms of collaboration are required across borders and issues. International institutions need new tools to encourage the collaboration necessary to provide public goods. Yet, recurrent problems in building consensus result from such factors as economic disparities among nations and concern about the fairness of procedures and results. Strong consensus is lacking partly because the emerging framework still lacks legitimacy based on effectiveness and fairness.

We turn next to examples that suggest how the three tasks of reinventing sovereignty, recovering the public interest, and creating the conditions of consensus, provide a way for us to understand better what has to be done to overcome the obstacles and address urgent global challenges. Our focus is on the global challenges of sustainable development, with

²³¹ George C. Marshall, Sec’y of State, Address at Harvard University: The Marshall Plan Speech (June 5, 1947).

²³² *Id.*

particular attention to global warming, but these issues must be seen in the wider perspective of global governance generally. They well illustrate the interconnection among issues and the need for a more ambitious, more comprehensive approach.

VIII. THE REALIST'S PERSPECTIVE ON GLOBAL GOVERNANCE

Despite the urgency of the global problems and the rationale supporting the needed response, outdated ideas, narrow vested interests, and fragmented institutions delay action.

Scientists tell us that we have only ten years to accomplish a major change in course on global warming and more broadly that business as usual will destroy the earth's environment. Progress on the Millennium Development Goals is mixed, but we are far from on track to meet the 2015 targets. The nuclear proliferation regime is unraveling while the threat is no longer limited to states but includes the possibility of attack by non-state actors and terrorists. As the U.N. panel pointed out, we face threats not anticipated at the U.N.'s founding in 1945, such as nuclear terrorism, and "[s]tate collapse" from the "witch's brew" of poverty, disease and civil war.²³³

Yet while the threats are if anything more extreme and complicated than in 1945, fundamental insights from that time may help us to get our bearings. By the late 1940s, revolutionary changes had occurred that are still relevant to our situation today.

In stating his famous principles of diplomacy, Morgenthau said that countries have to be guided by their national interests, but in the nuclear age there can be no security for one without security for all.²³⁴ Nations must take each others' interests into account and be willing to compromise on nonessentials. Force is inevitably a tool of foreign policy but should be used infrequently and with restraint. A nation that does otherwise will find itself with "no friends, but only vassals and enemies."²³⁵

²³³ UNITED NATIONS, *supra* note 220, at 15.

²³⁴ See MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7; MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS*, *supra* note 30.

²³⁵ MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7, at 158.

In conducting foreign policy, statesmen must ordinarily endeavor to bend, circumvent, and dissolve obstacles rather than resorting to force. Old notions of sovereignty must give way. New forms of collaboration must be initiated that are a match for new and unprecedented threats.²³⁶

Remembering the ideas of Hans Morgenthau is useful now because it helps us to think about what is currently in the national interest. It has lately been assumed that using the national interest as our guide is somehow congruent with an emphasis on unilateralist notions of sovereignty and priority for the use of coercion or force. But rereading Morgenthau shows this was not the realist view. His was a realism that could see not only the obstacles to collaboration, but also the possibilities for collaboration needed to avoid disaster.

There is now growing recognition in the United States that we need to do better in addressing global threats, though there is not consensus about what the priorities are and how to address them. The suggestion of this article is that we should be guided in considering such proposals by underlying principles – the need to reinvent sovereignty, to recover the public interest, and to create the conditions for consensus. These three tasks are interrelated.

The principal global challenges of our time, often because they involve public goods, require new kinds and levels of collaboration and therefore a reinvention of sovereignty. The unaided interaction of contending interests will not solve the problems and avert the threats. New institutions to facilitate collaboration across borders and issues must be created. In turn, this will not happen unless all parties believe the institutions and ground rules for collaboration are fair and therefore legitimate, which requires development of the conditions of consensus.

In previous eras, one could be aware of this and yet conclude that collaboration would be too difficult, so one had to settle for little collaboration and a festering of the problems. What Morgenthau recognized was that the calculus had changed. Knowing what failure would look like, settling for failure was no

²³⁶ See MORGENTHAU, *POLITICS AMONG NATIONS*, *supra* note 7, at 543, 546-49; *see also* MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS*, *supra* note 30, at 176-77.

longer an option, and recognition of the consequences of failure might provide incentives to make collaboration work. With time and the emergence of new problems and new consequences, this analysis has only become more persuasive. That is the new reality. We can see this more clearly and begin to see some of the implications, if we consider the prospects for addressing global warming in light of the three principles.

A. BUILDING CONSENSUS

As has been said, an atmosphere in which greenhouse gas emissions are stabilized below dangerous levels is a classic public good. Caught in a global prisoners' dilemma, nations find that, unless there is cooperation, what might seem to some to be rational action for each individual nation actually has disastrous results for all. Individual nations are tempted to hold back from taking action in the hopes of free riding on the action of others. The game theorists tell us that in this kind of situation, either no one acts or the actions are feeble and agreements fraught with cheating.²³⁷ However, the game theorists also tell us that in these circumstances, various measures can be taken through cooperative action to change the incentives and solve the dilemma.

In the context of global warming, this might include side payments or incentives of various kinds for poor countries to help them meet their obligations. It might include benefits to private actors from growth in new technologies. And it might include incentives or sanctions to induce compliance. Nations are unlikely to agree to serious measures unless they understand that the benefits of the whole arrangement are significant or that the costs of action are justified by the greater costs of failure. Also, all important players must participate; it helps to have leaders; and it helps to have institutions that facilitate

²³⁷ SCOTT BARRETT, ENVIRONMENT & STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 55-56, 219, 269-71, 355-362 (2003); TODD SANDLER, GLOBAL COLLECTIVE ACTION 20-39, 221-23, 259 (2004). See generally TREASURY OF THE U.K., THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 450-67 (2006) available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm (discussing solutions to global warming in light of game theory) (last visited Oct. 27, 2007).

continuous interaction among the parties and a structure which enables the parties to see their common interests.²³⁸ The Kyoto Protocol includes some of these kinds of provisions, but it does not include some major greenhouse gas emitting nations, and its implementation provisions have been described as weak and insufficient.²³⁹

Here we can see clearly the relationship among the three tasks. The public nature of the good requires high levels of collaboration and the collaboration will only take place if it is structured in a way that is seen as fairly allocating burdens and benefits. Given the magnitude and duration of the undertaking, this means not only carefully drafted ground rules, but also a strategy that will create conditions supporting consensus across several, linked issues long into the future.²⁴⁰

For example, the proposal to phase in action by developing countries in a way that is linked to wealth, enables conditions to evolve over time so that countries know expectations will rise only as their ability to pay rises. Wealthy countries need to give

²³⁸ SANDLER, *supra* note 237, *passim*.

²³⁹ BARRETT, *supra* note 237, at 385-388. When it comes to global warming, it is not difficult to find confirmation in the real world of diplomacy of the problems and possibilities involved in achieving collective action as described in game theory. At the 2007 World Economic Forum in Davos, Switzerland, a vice president of the Bank of China said “[t]he ball is not in China’s court. The ball is in everybody’s court.” Fareed Zakaria, *After America’s Eclipse*, WASH. POST, Jan. 29, 2007, at A15. At the same conference, however, the president of the China Foreign Affairs University, seeming to recognize the incentive to agreement provided by the worldwide character of the threat of global warming, said that despite problems in achieving international cooperation on many issues, climate change may be an issue that could unite the world. James Kanter & Katrin Bennhold, *Emerging Economies are Under Pressure to Cut Emissions*, INT’L HERALD TRIB., Jan. 24, 2007, available at <http://www.iht.com/articles/2007/01/24/business/dclimate.php>.

²⁴⁰ The Stern Review explains in the context of game theory the need for international institutions to facilitate shared understanding and strategy for parallel action by nations. The report states that “[i]ncreasing understanding of action across different dimensions at different levels will build confidence amongst countries regarding the efforts of others and this could strengthen overall effort. Increasing information and monitoring may help to reduce free riding and improve accountability for the provision of public goods.” TREASURY OF THE U.K., THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 463 (2006).

priority to working with developing countries to integrate clean energy and economic development. This might include foreign aid for clean energy and adaptation, trade or climate treaty rules friendly to clean energy, technology transfer, and compensation for reduction of deforestation.²⁴¹ It is in the interest of all nations to reverse global warming. Developing countries and poor communities may often be hard hit by the consequences of climate change.²⁴² At the same time, poor nations also have urgent priorities to address in eliminating widespread poverty. To create the conditions of consensus, they have to see that a strategy is unfolding that enables them to do both, which is a feasible goal.²⁴³ Heller and Shukla argue that so far the climate

²⁴¹ DAVID G. VICTOR, CLIMATE CHANGE: A GATHERING STORM 11 (Int'l Relations and Sec. Network 2006); INSTITUTO DE PESQUISA AMBIENTAL DA AMAZONIA, TROPICAL DEFORESTATION AND CLIMATE CHANGE 125 (Paulo Moutinho & Stephan Schwartzman eds., 2005). The rules of the post-Kyoto climate regime can play an important role in integrating clean energy and economic development. See also Socolow, *supra* note 185. One suggestion is that even though developing countries may not initially have emissions reduction obligations, they could be allowed access to emissions allowance trading to market reductions below nonbinding "no-lose" targets. This way, developing countries could be engaged more in the climate regime as an attractive benefit rather than as a burden. For discussion of this and related proposals, see DANIEL BODANSKY, INTERNATIONAL CLIMATE EFFORTS BEYOND 2012 14-15 (Pew Center 2005).

²⁴² See Parry et al., *supra* note 146; ANDREW SIMMS & HANNAH REID, UP IN SMOKE? LATIN AMERICA AND THE CARIBBEAN: THE THREAT FROM CLIMATE CHANGE TO THE ENVIRONMENT AND HUMAN DEVELOPMENT (Mary Murphy ed., 2006); ANDREW SIMMS, JULIAN ORAM, & PETRA KJELL, THE PRICE OF POWER: POVERTY, CLIMATE CHANGE, THE COMING ENERGY CRISIS AND THE RENEWABLE REVOLUTION (Mark Murphy ed., 2005).

²⁴³ Robert H. Socolow & Stephen W. Pacala, *A Plan to Keep Carbon in Check*, SCI. AM., Sept. 2006, at 57. The Stern Review concludes that the world does not have to choose between "averting climate change and promoting growth and development" if the right policies are put in place limiting emissions and accelerating innovation. "Indeed ignoring climate change will eventually damage economic growth." THE STERN REPORT, *supra* note 145, at viii. Some developing countries struggling economically have been skeptical of what appears like a call for help in reducing emissions to preserve patterns of wasteful consumption in industrialized countries. Robert L. Paarlberg, *Lapsed Leadership: U.S. International Environmental Policy Since Rio*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 249 (Norman J. Vig & Regina S. Axelrod eds., 1999). However, there may be growing recognition that developing countries will be harmed by global warming and that it is in their

regime has delivered too little in the way of benefits to developing countries and that their involvement on climate should be structured to advance their development through aid and technology transfer.²⁴⁴ They also suggest that international development banks could perform an entrepreneurial role coordinating financing for public goods.²⁴⁵

B. REINVENTING SOVEREIGNTY

The global warming example also reveals important aspects of what reinventing sovereignty means in a world demanding unprecedented levels of cooperation and consensus building. Actions need to be taken at various levels – global, regional, and local. Establishment and revision of overall goals is taking place on the global level. Some actions, such as fulfillment of commitments to emissions reductions, are best implemented on a national basis. Others, such as coordination of research and development, might involve international networks of research institutions.

What is emerging is not a “world state” or even a monolithic governance structure, but rather a mosaic of governance. Interesting lessons for this kind of process can be learned from the experience of multilevel governance involving cities and

interest to urge industrialized countries to lead and to participate in ways appropriate to their levels of development. Larry Rohter, *Brazil, Alarmed, Reconsiders Policy on Climate Change*, N.Y. TIMES, July 31, 2007, at A3.

²⁴⁴ Thomas C. Heller & P.R. Shukla, *Development and Climate: Engaging Developing Countries*, in BEYOND KYOTO (J. E. Aldy et al. eds., 2003).

²⁴⁵ *Id.* Consensus requires not only an approach that addresses diverse interests but allocation of burdens in a way perceived as legitimate. The devastation expected from global warming, which threatens to overwhelm antipoverty and development efforts, is disproportionately attributable to the greenhouse gas emissions of industrialized nations which have accumulated in the atmosphere over many decades. See THE STERN REPORT, *supra* note 145, at 443. Industrialized countries have a responsibility to take the lead in reducing emissions to lessen the impacts and to assist in addressing the impacts that are unavoidable. This is in the interests of industrialized countries themselves for many reasons. These include not only that all nations will be damaged by global warming but that the impacts across the globe threaten to destabilize poor countries and contribute to conflict. See *infra* note 260 and Sewell, *infra* note 265.

regions within nation states and among nations in regional entities such as the European Union. A key lesson is that there are tradeoffs in organizing governance on a territorial basis, on the one hand, and in issue networks on the other.²⁴⁶ The two approaches have different advantages and coexist because they complement each other.²⁴⁷ One advantage of maintaining broader forums is that this facilitates logrolling, bargaining, and side payments, which as we have seen may be important for building consensus on global warming.²⁴⁸

A characteristic already noted regarding the collaboration needed to address global warming is that it must take place over years. Although significant steps must be taken within a decade, the process of transition to a clean industrial society will take decades. Given both the scale and duration of the required cooperation, the mosaic of cooperation will require creative means of coordination, monitoring, learning, and innovation. The example of the Millennium Development Goals is perhaps a fledgling example on which to build. The goals provide a framework for cooperation that still maintains a highly decentralized method of implementation. Regrettably, the United States pays at most lip service to the goals and makes virtually no attempt to coordinate with other nations in their implementation. This kind of lack of cooperation will make it impossible to confront global warming.

²⁴⁶ Liesbet Hooghe & Gary Marks, *Unraveling the Central State, but How? Types of Multi-level Governance*, AM. POL. SCI. REV., May 2003, at 233.

²⁴⁷ *Id.* at 240.

²⁴⁸ At this writing, the international community is struggling to find the institutional arrangements needed to confront global warming. Although the traditional arena for climate negotiations is the conference of the parties to the climate treaty, the deadlock there has led to new attempts by major countries and U.N. leaders to have the G-8 financial ministerial meeting and the U.N. General Assembly provide input to the treaty negotiators. Mark Turner, *U.N. Considers Climate Change Push*, FINANCIAL TIMES, Apr. 10, 2007, available at <http://search.ft.com/ftArticle?queryText=un+considers+climate+change+push&aje=true&id=070410010384&ct=0>; Alan Beattie, *Germany in Push to Set G8 Emissions Target*, FINANCIAL TIMES, Apr. 13, 2007, available at <http://www.ft.com/cms/s/0/59ebbb78-e95b-11db-a162-000b5df10621.html>.

In fact, because of the many issues that must be addressed, the global warming example provides strong support for the point mentioned in the previous section that more effective means must be found on the global level to link disparate issues.²⁴⁹ When it is considered that many of the greatest global challenges – global warming, energy, security, disease, and poverty – are linked, the importance of the point is even more evident.

The new scope, duration, and intensity of cooperation also call for new thinking about sovereignty because the cooperation cannot all be voluntary. Nations must bind themselves to results because at the end of the day the task is to change course to avert climate disaster.²⁵⁰ Of course nations have bound themselves in their own interest in the past. However, the cooperation required to address current global challenges is on a new scale, with far-reaching implications. As stated earlier, the need to address not only the relationships among nations but to deal much more with conduct within nations, such as the generation of greenhouse gas emissions, transforms international law. It now takes on to a great extent the functions of backstopping, strengthening, and mandating domestic functions.

The current challenge may seem novel to some mainly because of recent extreme assertions of the virtues of unilateralism. If it is thought that sovereignty is constrained by commitments that are subject to sanctions, the United States has not only submitted itself to sanctions under the World Trade Organization, but taken the lead in creating and supporting that regime. When it comes to the environment, the U.S. has been less forthcoming. Even there, however, the ozone treaty includes trade sanctions for noncompliance. All agree, however, that the ozone treaty was easier because, among other reasons, it was relatively easy to find substitutes for the chemicals creating

²⁴⁹ See LINN & BRADFORD, *supra* note 226.

²⁵⁰ As noted earlier, treaties have traditionally been viewed not as a diminution of sovereignty, but an exercise of it. A modern articulation of this is the insight of game theory that to change the behavior of others one must often make commitments that restrict one's own options and freedom of action. G. John Ikenberry, *Book Review*, FOREIGN AFF., Nov.-Dec. 2006, at 159 (reviewing Thomas C. Schelling, STRATEGIES OF COMMITMENT AND OTHER ESSAYS (2006)).

the problem. Yet, as we see in the next section, support is building, including among industry, to take action to confront global warming.

C. RECOVERING THE PUBLIC INTEREST

Given the extensive cooperation and consensus building required over decades to address global warming, we can now see the importance of a heightened priority for the public interest, without which the significant steps needed to preserve the public good we call the climate will not take place.

In his time, Morgenthau saw in America what he called a decline of the public realm. He saw a disinterest in public issues and a shrinking of the public sector. It was a mood, however, that he said was not borne out by “objective conditions of American existence.” Indeed, he said, “[t]he very survival of America and of the civilization of which it forms a part calls, as we have seen, for a new ordering of its relations with the outside world.”²⁵¹

Interests and organizations are emerging at the international and global level that may promote strengthening of multilateral institutions. But states remain the main players in global affairs.²⁵² Thus the leaders of nations must be advocates for global governance. For this to happen there must be recognition within nations of the meaning and importance of the public interest.

In current discussion about international economic development and the effectiveness of foreign assistance, great emphasis is placed on the need for good governance in developing countries. Likewise, even if ambitious international agreements are reached on global warming, sophisticated and competent administration in nations across the globe will be required to implement the agreements.²⁵³ We should not forget,

²⁵¹ MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS, *supra* note 30, at 201, 203.

²⁵² See JOHN G. RUGGIE, GLOBALIZATION AND GLOBAL COMMUNITY: THE ROLE OF THE UNITED NATIONS 4 (School of Policy Studies 2000).

²⁵³ Ruth Greenspan Bell, *What to Do About Climate Change*, FOREIGN AFF., May-June 2006.

however, that good global governance also requires good governance at home. A governing philosophy and institutions that downplay or even denigrate the public interest will be ill suited to address the challenges we face. Recognition of the relevance of reform of our own politics and governing for wise foreign policy is a neglected area of Morgenthau's work, but it was an insight which now appears more than ever prescient.

In discussing global warming and the public interest, one cannot avoid addressing the relationship between the public interest and private interests. However, this is a more complex issue than might at first appear, and therein may lie not only problems but also opportunities. One might expect that some fossil energy interests would oppose efforts to combat global warming along with some political leaders who adamantly oppose action.²⁵⁴ It should also be recognized that some major companies are supporting limits on greenhouse gas emissions.

As one might expect, some insurance companies, which are in the business of foresight, are starting to worry about the prospects of rising insurance claims from storms and other consequences of warming. Renewable energy companies are in the markets that will grow as markets shift toward clean energy. However, some of the major fossil energy companies also recognize the need for change. The president of Shell Oil Company has said that the debate regarding global climate science is over. Calling further debate of the science a waste of time, he said, "Policy-makers have a responsibility to address it. The nation needs a public policy. We'll adjust."²⁵⁵ Shell statements also say that the need to cut greenhouse gas emissions will provide a one trillion dollar global market for new technologies, products and services, which the company views as a "huge opportunity."²⁵⁶ In early 2007, the United States

²⁵⁴ Paarlberg, *supra* note 243, at 245-50; Elizabeth Kolbert, "The Climate of Man," THE NEW YORKER, May 9, 2005, at 58-63.

²⁵⁵ Cheryl Wittenauer, *Nation Needs Policy on Greenhouse Gases*, Shell Chief says, ASSOCIATED PRESS, Sept. 7, 2006.

²⁵⁶ Jeremy Lovell, *Global Warming Bill could Reach Trillions*, REUTERS, Oct. 13, 2006, available at http://www.int.iol.co.za/index.php?set_id=1&click_id=31&art_id=qw1160724241975B251; Larry Elliott, *Warming will Cost Trillions, says Report*, GUARDIAN, Oct. 13, 2006, available at <http://environment.guardian.co.uk/print/0,,329599960-121568,00.html>.

Climate Action Partnership (USCAP) called for nationwide limits on greenhouse gas emissions. The partnership includes utilities, oil company BP, and several large manufacturers, along with environmental groups.²⁵⁷

Another feature of global warming and the public interest is that global warming is not just an environmental problem, as United States dependence on imported petroleum means the matter is intertwined with fundamental economic and national security issues. James Woolsey, former director of central intelligence, told an interviewer that oil geopolitics, global warming, and Middle East conflict are all “aspects of a single problem, the West’s dependence on oil.”²⁵⁸ Implications for

²⁵⁷ Felicity Barringer, *A Coalition for Firm Limit on Emissions*, N. Y. TIMES, Jan. 19, 2007; see also John Browne, *Beyond Kyoto*, FOREIGN AFFAIRS, July-Aug. 2004. With respect to confronting climate change, USCAP says the scale of the undertaking is enormous and that for success, “the way we produce and use energy must fundamentally change.” However, they say the challenge “will create more economic opportunities than risks for the U.S. economy.” The group says a national mandatory climate policy will enable the U.S. “to assert world leadership in environmental and energy technology innovations” where the U.S. is unrivaled, and will “assure U.S. competitiveness in this century and beyond.” While the partnership says commitments by all major emitting countries are required, they say U.S. leadership is needed to establish the international framework and U.S. domestic action should not wait for others. U.S. CLIMATE ACTION P’SHP, A CALL FOR ACTION, 3 (2007), available at <http://www.us-cap.org>. The USCAP initiative demonstrates a new level of advocacy by some businesses to confront global warming. Some industry positions may have a tactical element based on recognition of rising pressure for action. The chief executive of one utility said, “We have the opportunity to construct something more pragmatic and realistic while President Bush is in office.” He said the political situation after 2008 could yield “solutions less sensitive to the needs of business.” Barringer, *supra*. Other industry views are diverse. There appears to be a gradually emerging trend within industry, even among some prior opponents of action, acknowledging the inevitability, if not always the desirability, of limits on greenhouse gas emissions. A spokesman for Exxon Mobile Corp., previously a strong skeptic of climate science and opponent of emissions limits, says “the risk is serious and action should be taken.” Jeffrey Ball, *Exxon Softens Climate-Change Stance*, WALL ST. J., Jan. 11, 2007, at A2. For additional information on business support for addressing climate change, see materials of the corporate social responsibility coalition, Ceres, and of the Pew Center on Global Climate Change, available at <http://www.ceres.org> and <http://www.pewclimate.org>.

²⁵⁸ Justin Gillis, *New Fuel Source Grows on the Prairie*, WASH. POST, June 22, 2006, at A01.

global stability are also evident in the warning of Britain's chief science advisor, Sir David King, that without immediate action, millions worldwide will be exposed to drought, floods, hunger, and diseases such as malaria.²⁵⁹ Former U.K. meteorological head, Sir John Houghton, calls global warming a long term security threat "at least as dangerous as chemical, nuclear or biological weapons, or indeed international terrorism."²⁶⁰

Closer to home, the ranking Republican on the Committee on Foreign Relations of the United States Senate, Senator Richard Lugar, is a lead sponsor of a bill to reengage the U.S. in climate change negotiations. The bill states that one of the reasons for action is that the national security of the United States will increasingly depend on devoting resources toward solving the problem of over-reliance of the U.S. and the world "on high-carbon energy."²⁶¹

²⁵⁹ *Global Warming 'biggest threat,'* BBC NEWS, Jan. 9, 2004, available at <http://news.bbc.co.uk/1/hi/sci/tech/3381425.stm>.

²⁶⁰ John Houghton, *Global Warming is Now a Weapon of Mass Destruction*, GUARDIAN, July 28, 2003, available at <http://www.guardian.co.uk/comment/story/0,3604,1007042,00.html>. At the request of Britain, which argues that climate change can contribute to conflict, the U.N. Security Council debated the issue on April 17, 2007, in an unprecedented session. *U.N. Council Hits Impasse Over Debate on Warming*, N.Y. TIMES, Apr. 18, 2007, at A-6. The same week, a report was released on the security implications of climate change, reflecting the views of a blue ribbon panel of former U.S. generals, admirals, and security experts. CNA CORPORATION, NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 1, 7 (CNA Corporation 2007). The group said that the "potentially devastating effects" of climate change can be "a threat multiplier" and that the risks "should be addressed now because they will almost certainly get worse if we delay." *Id.* The report calls for the U.S. to engage with other countries to set "targets for long term reductions in greenhouse gas emissions" and urges the U.S. to assist less developed countries build capacity to cope with climate impacts. *Id.* For background on release of the report and U.S. military consideration of the issue generally, see Juliet Eilperin, *Military Sharpens Focus on Climate Change*, WASH. POST, Apr. 15, 2007, at A6. See also Global Climate Change Security Oversight Act, S.1018, 110th Cong. (2007), a bill introduced by Senators Durbin and Hagel to require a National Intelligence Estimate to assess the security challenges presented by climate change.

²⁶¹ S. Res. 30, 110th Cong. (2007) (The principal sponsors are the Chairman and ranking Republican on the Senate Committee on Foreign Relations, Senator Joseph Biden and Senator Richard Lugar).

Senator Lugar says that America's oil and auto companies have failed to show "an inclination to dramatically transform their businesses in ways that will achieve the degree of change we need to address a national security emergency."²⁶² Explaining why the needed policy changes have not emerged, Senator Lugar states that competing interests protect themselves so well "that policy can achieve only least common denominator outcomes that do not solve the problem threatening the whole nation."²⁶³ Seeking a nationwide auto fleet with flex-fuel capability and widespread installation of fuel station pumps to handle ethanol, Senator Lugar said that mandates should be established if incentives and volunteer action do not work. Recent experience, he suggested, indicates that "the evolution of market forces won't be capable of producing the progress that we need to achieve our national security goals."²⁶⁴

What has been said shows that it is not inevitable that private businesses will oppose the need to address the public interest regarding global warming. While U.S. coal miners have been wary of regulation of fossil emissions to confront global warming, the United Mine Workers now support legislation with some modest emissions limits. Labor is playing a leading role in a coalition called the Apollo Alliance that urges an affirmative agenda of expanding job opportunities flowing from clean energy technology deployment. Numerous cities and states as well as an array of new players from farm groups to hunters and anglers to faith based groups are taking action to promote clean energy or emissions limits.²⁶⁵

²⁶² Senator Richard Lugar, Address to the Richard G. Lugar-Purdue University Summit on Energy Security (Aug. 29, 2006). For a summary of some of the challenges surrounding expansion of ethanol fuel supply, see Steven Mufson, *Ethanol Production Booming on Demand*, WASH. POST, Jan. 23, 2007, at A06.

²⁶³ Lugar, *supra* note 262.

²⁶⁴ *Id.*

²⁶⁵ Regarding the legislation supported by the mine workers, see John M. Broder, *Compromise Measure Aims to Limit Global Warming*, N.Y. TIMES, July 11, 2007, at A14. While most environmental advocates support stronger emissions limits, the debate is increasingly about how, rather than whether, to address the problem. Regarding other constituencies, see Dave Hurteau, *What*

Of course, in spite of the constructive statements by some business leaders and officials, a wave of new initiatives from many others, and support by public opinion for action, so far this has not been enough to overcome resistance to change. Another essay would be needed to trace the broader trends that led to this situation and the possibilities for new directions. It is evident from what has been said, however, that a new constellation of forces is emerging that can result in action. The need here is to recall Schattschneider's point along with the learning of the public goods economists -- that we are dealing with issues that require public action. The market remains a vital part of the solution, but it is not enough. As Schattschneider said Americans have long believed, the public interest lies at the intersection of business and government.

This in turn shows that, for a new constellation of forces to come together to confront global warming, it must be remembered that ideas matter in politics and policymaking. Two decades ago, political scientist Hugh Heclo wrote of what he called a time "when America stored up problems for the future" and remarked that "any ideology of negative government is likely to fall prey in the history books to the collective tasks left undone."²⁶⁶ A decade ago, historian Alan Brinkley wrote of a fifteen year ideological assault on the federal government in an effort to disable it. He said this assault posed a false choice between a strong private or public sector, arguing that both are

Sportsmen Think About Global Warming: A National Opinion Poll, FIELD & STREAM, May 15, 2006, available at http://fieldandstream.blogs.com/news/2006/05/a_survey_recent.html; *Green America: Waking Up and Catching up*, THE ECONOMIST, Jan. 25, 2007; and regarding the Appollo Alliance, information is available at <http://www.apolloalliance.com>. For discussion of the need to build domestic support for international cooperation by strengthening domestic social commitments, see William Antholis & Strobe Talbott, *Tackling Trade and Climate Change: Leadership on the Home Front of Foreign Policy* 15-16 (2007), available at http://www.brookings.edu/papers/2007/02trade_antholis_Opp08.aspx (last visited Oct. 27, 2007); and John W. Sewell, *The Realpolitik of Ending Poverty* 26 (2007), available at http://www.wilsoncenter.org/docs/staff/Sewell_realpolitik.pdf (last visited Oct. 27, 2007).

²⁶⁶ Hugh Heclo, *Reaganism and the Search for a Public Philosophy*, in PERSPECTIVES ON THE REAGAN YEARS 31-63 (John Palmer ed., 1986).

needed.²⁶⁷ Dean Speth suggests that the weak response of the United States under its current leadership to environmental challenges results from the fact that they “threaten the ascendant promarket, antigovernment ideology. They require major governmental responses, including action at the international level.”²⁶⁸

To whatever extent these statements may have been true in the recent past, the 21st Century did not take long to teach that more rather than fewer demands would be placed on American government – by September 11th, by the onrushing threat of global warming, and by the other global problems discussed here. Then the troubled response of the government to hurricane Katrina dramatized the consequences of the decline of the public realm. With all these developments, there may be an increasing recognition of the dangers of a lack of preparedness and capacity to address public needs and to provide public goods. If there is to be a recovery of the public interest, it will have to occur, at least in part, in the realm of ideas.

Senator Lugar’s comments about frustration of the common good recall Schattschneider’s insights about achieving the public interest. But if the task is difficult at the national level, the problem is greater for global challenges. As recognition grows of the need for regional and global governance, it is worthwhile recalling on this broader stage Schattschneider’s argument. The clash of contending special interests could not be relied upon spontaneously to produce the public interest. Good intentions are not enough. Even a commitment to the principle of participation would not be enough. He advocated a more active citizenry and greater efforts to mobilize the public. But he also urged recognition that not everyone can participate in everything. Life’s demands leave most people with limited time to exercise their rights as citizens even where they exist. This was why Schattschneider said that the people are semi-sovereign, but he sought to make them at least that. He sought the institutional means through which the public could influence major decisions.

²⁶⁷ ALAN BRINKLEY ET. AL., *NEW FEDERALIST PAPERS* 15, 101 (1997).

²⁶⁸ JAMES GUSTAVE SPETH, *RED SKY AT MORNING* 113 (2004).

As we think about the institutions needed to provide global public goods, we can begin by considering how such institutions can accomplish their mission when they must reconcile different national positions and address a multitude of private interests. Institutional shortcomings with respect to global governance include weak and fragmented institutions and inadequate means of representation. While there is nothing inevitable about private industry opposition to the public interest, it is harder to provide public goods and easier for those opposed to stymie action where the institutional means are weak.

The dangerous lack of important public goods such as key elements of environmental protections naturally involves the relationship of private and public interests because the impact on the public often results from the externalities generated by private industry. Since without any public policy framework, industry does not have to pay for pollution, when new constraints are put in place, new costs and benefits may result. New costs may be incurred for the new benefit of a cleaner, healthier environment. At the same time, those costs may be more than outweighed by opportunities for new products and services and by new efficiencies and technology.²⁶⁹ As we have seen, different firms react differently. Some not only adjust but seize the new opportunities. Others oppose, and it may be easier for them to prevail internationally where institutions to represent the public interest are fragmentary.

Professor Stiglitz suggests that multinational corporations are neither good nor bad per se but have potential for both and the problem is, with the environment being a prime example, that “private incentives are often not aligned with social costs and benefits.”²⁷⁰ This is not a new idea. Theodore Roosevelt

²⁶⁹ See William L. Thomas, *The Green Nexus: Financiers and Sustainable Development*, 13 GEO. INT’L ENVTL. L. REV. 899, 902 (2001).

²⁷⁰ JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK 190 (2006). In evaluating the prospects for global governance, it is important to understand both the influence of domestic interests on global environmental policy and the institutional, legal and other factors which may help shape results. See Dimitris Stevis, 8 J. OF POL. ECOLOGY (2001) (reviewing Elizabeth DeSombre, *Domestic Sources of International Environmental Policy*, 8 J. OF POL. ECOLOGY (2000)), available at http://jpe.library.arizona.edu/volume_8/501Stevis.html. Regarding the importance of the character of domestic institutions for the effectiveness of international law, see Oona A. Hathaway, *Between Power and*

said “I believe in corporations. They are indispensable instruments of our modern civilization; but I believe that they should be so supervised and so regulated that they shall act for the interest of the community as a whole.”²⁷¹

This Progressive Era wisdom provides a clue to a broader point about creating global capacity to provide public goods and address global challenges. Saying we need rules or incentives to encourage private interests to “act for the interest of the community as a whole” is similar to saying we need measures to facilitate cooperation to provide public goods. Various kinds of measures are needed. We know that under the right conditions, international institutions can encourage action that would not otherwise occur by facilitating agreements that channel decisions to achieve the desired results.²⁷² For example, by limiting CO₂ emissions, a climate regime can send a price signal to the market that can help guide investment into energy efficiency and cleaner fuels.²⁷³ However, to accomplish such a result involves more than just imagining elegantly designed rules. It requires the institutional means to organize choice and achieve consensus, provide oversight of implementation, and resolve disputes in a way that is responsive to the public interest on global issues.

The preceding section of this article reviewed a number of suggestions and initiatives to create more effective international cooperation. The focus was primarily on creating forums to organize choice and build consensus among decision makers

Principle: An Integrated Theory of International Law, 79 U.CHI. L. REV. 469 (2005).

²⁷¹ BRINKLEY ET AL., *supra* note 267, at 99. The movement for corporate social responsibility (CSR) also works from the premise of aligning private incentives with social costs and benefits. For an interesting example, see CERES & WORLD RESOURCES INSTITUTE, QUESTIONS AND ANSWERS FOR INVESTORS ON CLIMATE RISK, (Ceres & World Res. Inst. 2004), *available at* http://pdf.wri.org/qa_climate.pdf (discussing why firms should take into account liability and reputational risks of climate change and the prospect of regulation to address it).

²⁷² See Gourevitch, *supra* note 19; BARRETT, *supra* note 237.

²⁷³ See TREASURY OF THE U.K., *supra* note 186, at 347. See also TREASURY OF THE U.K., *supra* note 186 and accompanying text.

across borders and issues. Stiglitz addresses another aspect – implementation and dispute resolution. At the same time, he helps us understand the need for measures to facilitate representation of the public in the process of decision making and for measures that will create social conditions enabling citizens to seek policies favoring provision of global public goods.

Stiglitz argues that the problem of misalignment of incentives is aggravated in poor countries which are tempted to sacrifice health and the environment due to a desperate need for jobs. Moreover, this unequal power enables multinationals to bend attempts at international constraints through treaties to their advantage. To address damages inflicted by multinationals in poor countries, Stiglitz suggests new legal remedies allowing suits in the U.S. for damages resulting from conduct of American firms abroad and enforcement of judgments obtained abroad in U.S. courts.²⁷⁴ However, to address the disparity of influence, institutions must also address the underlying social conditions and provide channels through which the public can be heard and represented.

A central dilemma is that in order to overcome the asymmetry of influence to protect health, the environment and other public interest values, poor countries need the economic growth that may damage these same assets, which are important to the long term economic success of these countries.²⁷⁵ It is a myth that the people of poor countries are “too poor to care” about the environment.²⁷⁶ In fact, poor countries are struggling to take action on global environmental issues. Many do need help, but in important respects, U.S. assistance has declined.²⁷⁷

²⁷⁴ STIGLITZ, *supra* note 270, at ch. 7; *see also* HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT (2d ed. 2005).

²⁷⁵ *See* WORLD RESOURCES INSTITUTE (WRI) ET. AL., ASSESSING ENVIRONMENT’S CONTRIBUTION TO POVERTY REDUCTION (2005), and related publications, *available at* <http://www.undp.org/pei>.

²⁷⁶ PAUL F. STEINBERG, ENVIRONMENTAL LEADERSHIP IN DEVELOPING COUNTRIES, TRANSNATIONAL RELATIONS AND BIODIVERSITY POLICIES IN COSTA RICA AND BOLIVIA 27 (2001).

²⁷⁷ Carl Bruch, *Growing Up*, THE ENVIRONMENTAL FORUM, May/June 2006. For a related point with respect to deterioration of the balance between free

We have already seen with respect to global warming the need for institutions to promote a long term strategy that will create conditions supporting consensus. The task of addressing global warming converges with the challenge of sustainable development,²⁷⁸ because for poor nations to help address these related issues, they must know that taking on these responsibilities will not prevent them from escaping poverty. The challenge is to facilitate growth and still prevent the environmental damage. This can be done through fairer international rules for cooperation on energy, trade, and other issues and by help from abroad. Such action is needed not only to facilitate consensus building in multilateral bargaining, but to help enable constituencies to emerge in poor countries that can shape and support policies favoring public goods

To achieve this, measures will be required at global, national, and local levels. Some measures will involve building or strengthening cooperative decision making forums, but other tools are also needed. The Millennium Development Goals are an example of one such institutional means to help integrate sustainability and development. By providing a way to sort through complex issues and achieve focus, they may help in developing a clearer agenda and alternatives among which the public can choose and be heard. In a decentralized global system, they may help galvanize action by and for the poor. For this to happen, the United States must stop ignoring the MDGs and the U.S. and other nations must greatly increase support for these and related efforts.

trade and social policy safeguards in the trade regime, see the discussion of “embedded liberalism” in Howse & Nicolaidis, *Legitimacy and Global Governance*, in EFFICIENCY, EQUITY AND LEGITIMACY (Roger Porter et al. eds, 2001).

²⁷⁸ See Sir Nicholas Stern, Head of UK Government Economic Service, Inaugural Lecture of the EIAS Sustainable Development Series in Honour of Amartya Sen: Sustainable development, climate change and international action (Mar. 16, 2006); See also TERRY BARKER ET. AL., SUMMARY FOR POLICYMAKERS IN: CLIMATE CHANGE 2007 33-34 (B. Metz. et al. ed., Cambridge Univ. Press 2007), available at <http://www.ipcc.ch/spm040507.pdf>.

To achieve the public interest, it is also necessary for the public to be heard.²⁷⁹ In addition to facilitating cooperation across borders and issues and creating conditions that will support action to provide public goods, there must be means for the public to participate in or be represented in the global process. For the near term, this may often mean leadership on behalf of the public interest by nations in multilateral forums and increased transparency and inclusiveness of international organizations.²⁸⁰ But these are not likely to be achieved or maintained without a strong constituency urging these results and holding leaders accountable. Today when this occurs, it is often the result of advocacy by voluntary associations and political parties within countries or networks of non-governmental organizations working at the regional or global level.²⁸¹

²⁷⁹ Carl Friedrich observed that “[t]here is no ultimate way of determining what *the* public interest is, except by consulting the public.” CARL JOACHIM FRIEDRICH, *MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS* 312 (1963) (emphasis in original).

²⁸⁰ Stiglitz urges that voting structures in multilateral organizations should give greater representation to developing countries. JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK* 280-85 (2006). He argues for broader representation in global negotiations of different ministries and broader representation of interests and groups. *Id.* He urges greater transparency and improved accountability through independent evaluation. *Id.* Professor Keohane stresses that the domestic analogy of democratic participation does not apply at the global level but measures can be taken to achieve democratic principles by strengthening accountability. The focus should be on preventing abuse of power in major public and private entities through different types of accountability—supervisory, fiscal, legal, market, peer and reputational. Robert O. Keohane, *Accountability in World Politics*, *SCANDANAVIAN POL. STUD.*, June 2006.

²⁸¹ See generally ANN FLORINI, *THE COMING DEMOCRACY: NEW RULES FOR RUNNING A NEW WORLD* (2003); AMERICAN INSTITUTE FOR CONTEMPORARY GERMAN STUDIES, *JOHNS HOPKINS UNIVERSITY RESEARCH REPORT, GOVERNING BEYOND THE NATION-STATE: GLOBAL PUBLIC POLICY, REGIONALISM OR GOING LOCAL?* No. 11 (Carl Lankowski ed., 1999); José E. Alvarez, *International Organizations: Then and Now*, 100 *AM. J. INT’L L.* 324, 340-47 (2006); Josep M. Colomer, *How Political Parties, Rather than Member-States, Are Building the European Union*, in *WIDENING THE EUROPEAN UNION* (Bernard Steunenbergh ed., 2002).

Reinventing sovereignty, creating the conditions for consensus, and recovering the public interest are closely related aspects of the undertaking necessary to create fair and effective global governance. To achieve the necessary institutions of cooperation across borders and issues, capable of creating consensus to provide global public goods, it is necessary to have representatives and constituencies empowered, and institutions designed, to give voice to the public interest.

IX. CONCLUSION

Time is running out to address important global challenges that have emerged in recent decades. Business as usual will no longer suffice. For years, the consequences of business as usual on nuclear proliferation have been decried. Now, other issues, especially global warming, pose urgent challenges as well.

The problems of providing global public goods are central to the problem of global warming and other global challenges. International collaboration is required. Institutional means must be established to facilitate collaboration. The collaboration required is extensive, often transcending the levels of past collaboration among nations. Blocking such collaboration in the name of old conceptions of sovereignty or a return to isolationism would damage our own interests and prevent us from the course needed to avert today's threats.

To build the needed institutions requires collaboration among nations in very different circumstances and with disparate interests. Therefore, to achieve collaboration, nations must not only seek consensus but transform the conditions of poverty and other social disparities that are obstacles to consensus. This, in turn, contributes to the depth of collaboration required.

The nature and extent of the needed collaboration also require individual nations and the international community to give renewed priority to the public interest. This is not because private interests should be excluded. It is simply because public interests are currently neglected due to the lack of effective international institutions and of channels for full expression of the interests of the public on global issues.

Global warming provides a priority challenge and also a prime example of what must be done. Early steps, however imperfect, represent a beginning and highlight what is required. To achieve the global good of reduction of greenhouse gases requires global cooperation and action at many levels. To achieve cooperation requires consensus, which in turn requires changed conditions that will enable nations to cooperate. Also required is a renewed priority for the public interest based on strengthened institutions and newly mobilized constituencies.

To do all these things a strategy is necessary that projects general lines of action well into the future. Since addressing global warming requires nations in different circumstances to converge along pathways with different obligations and at different speeds, consensus and legitimacy will only be maintained if parties have an idea from an agreed strategy how the future will unfold.

Moreover, the many connections among such a strategy and other issues such as international economic and security policy mean that global warming and other global environmental challenges can not be treated in isolation as exclusively environmental issues. As noted by The Princeton Project on National Security, climate change threatens not only storms and drought and rising seas, but spreading disease and “political, economic, and social instability in the worst hit regions.”²⁸² The authors call on the United States to lead an effort by all nations to establish a common framework with mutual commitments.²⁸³

²⁸² G. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY 53 (2006). The Stern Review says that agreement on international frameworks for action on climate change “should be an urgent priority for all areas of government policy – extending beyond the remit of environment ministries to include heads of state, foreign ministers and ministers of finance.” TREASURY OF THE U.K., THE STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 574 (2006). For additional detail, from a European perspective, on integrating global warming policy and foreign and security policy, see ANJA KÖHNE, NEW ARENAS FOR CLIMATE POLICY: ENERGY & CLIMATE ISSUES IN EU FOREIGN RELATIONS (WWF European Policy Office 2006), Available at http://www2.kyotoplus.org/uploads/koehne_kyotoplus_fin.pdf.

²⁸³ IKENBERRY & SLAUGHTER, *supra* note 282, at 53.

The multifaceted nature of the climate challenge makes the case for global means to coordinate action on multiple fronts. The links among the problems of global warming and other global challenges, such as security, poverty, disease, and development only strengthen the case. Moreover, consideration of institutional options, while important, cannot remain an abstract exercise. Equally important is negotiation of a deal. This involves painstaking diplomacy to discover and reconcile interests, priorities, and tradeoffs on matters of substance and process, effectiveness and fairness among many constituencies and nations in disparate conditions. A beginning has been made on global warming, but hard work lies ahead on that issue and others.

If this picture suggests a very large challenge for this generation, it may be helpful to recall the challenges confronted and met a generation ago. In the shadow of two world wars in the twentieth century, great measures were taken to build new international institutions, in no small part because of the determination to avoid repetition of the horrors that generation experienced. Hans Morgenthau is remembered for his realist thesis and writings on power politics, but less remembered is the fact that he urged even greater measures of cooperation to avoid even greater future calamities. It is not too late to learn from his insights. In the years after he wrote about new, needed measures of collaboration and after Schattschneider wrote of the importance of institutions to vindicate the public interest, and Shiffer wrote of the need to build the foundation of international institutions on transformed social conditions, policy drifted in other directions.

The reality in the approach to global governance suggested in the present essay is this: When today we weigh our interests and the costs and benefits of various alternatives for action and inaction, realism requires new levels of cooperation, a transformation of global conditions to build consensus for such cooperation, and a renewed priority for the public interest to achieve these objectives. The realist will see not only the obstacles to cooperation, but the possibilities. The realist will be able not only to describe the trap, but the way out.²⁸⁴

²⁸⁴ Keohane, *supra* note 19.

X. POSTSCRIPT – THE PROSPECTS FOR ACTION

Instead of being a leader, as it once was, using diplomacy and commitment to the rule of law to help create consensus on the essential tools to confront humanity's greatest threats, the United States has recently often been absent from the discussion. When it comes to institutions of regional and global governance essential to provide public goods or address claims for greater fairness, on key issues the United States has been an opponent of multilateralism. The U.S. has been criticized for undermining the nuclear nonproliferation regime. It has tried to avoid the multilateral process to deliver on the Millennium Development Goals. It has rejected the Kyoto Protocol on global warming and has even been reluctant to engage in international negotiations about limits on global warming emissions after the first period covered by Kyoto. Instead it has touted the policy of encouraging voluntary action by nations and industry, a proven failure in light of the continuous growth in greenhouse gas emissions.

This isolationist turn has its unfortunate precedent. When the Senate rejected the treaty to establish the League of Nations, Judge Learned Hand wrote to Professor Felix Frankfurter that this was a result not just of the terms of the treaty but of an effort to show opposition to any international order. The treaty was imperfect, Hand said, but American participation was essential to improving it. "Without us the prospect is perilous."²⁸⁵

In 1945, the founders of the United Nations and the postwar order vowed not to repeat the mistakes of 1920. In 1960, Schattschneider warned that it was an illusion to think that the public interest would be spontaneously addressed by the action of special interests without public action. Morgenthau decried the eclipse of the public realm at home and urged his adopted country to put its own house in order as an example for others and as a foundation for credible leadership for international cooperation.

Abroad, Morgenthau urged America to defend its interests, but to use force with restraint and to take into account the needs of others. He urged the painstaking use of diplomacy to build

²⁸⁵ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 266 (1994).

collaboration and new institutions to transcend the old international system and tame the revolutionary, new forces of the era. He advocated as the centerpiece a widening collaboration among free nations and thus anticipated an expanding domain of order and the rule of law. In time, America's commitment to take into account the needs of other nations and to play by the rules established for all would become a principal source of American influence and the bedrock of the legitimacy of American power.

His biographer points out that in the last years of his life, which coincided with the Vietnam War, Morgenthau grew gloomy and discouraged about United States policy abroad and dismayed by conditions at home, including urban decay, poverty, and environmental destruction.²⁸⁶

The clock was ticking on the old threat of nuclear proliferation and new threats were closing in. Morgenthau's prescient concern about the environment was echoed by his colleagues among the founding generation of realists. In 1970, George Kennan, the misunderstood author of the Cold War policy of containment, wrote an article in *Foreign Affairs* proposing a multilateral environmental agency to clean up world-wide pollution. He argued that collaboration among nations to confront global environmental destruction should supersede what he called the "fixations" of the Cold War. Yet Kennan, like Morgenthau, was worried about the prospects for success.²⁸⁷

With the passage of some three decades, one must still avoid assuming it will be easy to create a more constructive politics and the institutional means to achieve the public interest at home or abroad. False optimism would be a mistake; but perhaps in the spirit of the founding realists we can hazard an assessment that takes account of both the threats and the possibilities.

American political culture has many facets and resources of ingenuity. History shows that the country can function for years or decades in one mode and then respond to challenges or crisis

²⁸⁶ CHRISTOPH FREI, HANS J. MORGENTHAU: AN INTELLECTUAL BIOGRAPHY 221-22 (2001).

²⁸⁷ ROSENTHAL, *supra* note 113, at 164-65, (citing George Kennan, *To Prevent a World Wasteland*, FOREIGN AFF., Apr., 1970, at 410, 413).

by shifting into another mode. The unprecedented, even revolutionary, nature of the present situation is that the time is too short for the slow but steady evolutionary change we have sometimes achieved, but the threats may not be sudden enough to result in the kind of mobilization brought on in the past by crisis. Our challenge, perhaps the most difficult test a democracy can face, is to have the foresight and insight to take the required action before it is too late.²⁸⁸

In his advice to the prince, Machiavelli compared statesmanship to the task of a physician confronting consumption, "which in the commencement is easy to cure and difficult to understand; but when it has neither been discovered in time nor treated upon a proper principle, it becomes easy to understand and difficult to cure."²⁸⁹ Likewise, in governing, he said that evils foreseen at a distance are easily cured, but when "for want of foresight" they are allowed to become obvious, "there is no longer any remedy."²⁹⁰

This is the higher realism, written, it would seem, with our time in mind.

²⁸⁸ Climate scientist Jim Hansen suggests that while typically we have not acted on environmental threats until we have felt their full impact, we cannot take a "wait and see" approach to global warming. Jim Hansen, *Special Interests are the One Big Obstacle*, THE TIMES, Mar. 12, 2007, available at <http://business.timesonline.co.uk/tol/business/columnists/article1499726.ece>. This is because such delay will "lock in future catastrophic and irreversible climate change." *Id.*; see also Hansen *supra* note 144.

²⁸⁹ J.R. MCNEILL, SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH-CENTURY WORLD 357 (2000) (citing N. MACHIAVELLI, THE PRINCE (1513)).

²⁹⁰ *Id.*