

NGOs AND INTERNATIONAL ENVIRONMENTAL LAW: A CRITICAL EVALUATION OF THEIR ROLES AND RESPONSIBILITIES

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Introduction

The last ten years have seen an extraordinary rise in the level of international activities undertaken by non-governmental organizations (NGOs).¹ UN and convention-based meetings are attended by record numbers of NGOs despite the proliferation of meetings and the high costs of travel.² Rarely a month went by without the director of a major UN organization emphasizing the vital contribution of NGOs to delivering sustainable development. Notwithstanding the recent evidence of disruptive, sometimes violent, NGO protests at international summits such as Seattle and Gotenburg, papers examining the contribution of NGOs to international affairs abound in academic journals of various disciplines as do reports from think tanks examining ways to enhance the participation of NGOs in international regimes.³

But what is the real significance of increased NGO presence on the international sphere? [Is their rise evidence for the relative decline in the influence of the state?] How are their activities different, if at all, from the past? And are expectations of what NGOs should deliver in the achievement of sustainable development, with all the implications this has for assessing how well resources devoted to NGOs are being used, realistic? This article seeks to address these fundamental questions. Answers are not easy to glean given the disparate academic literature and the difficulties inherent in rapidly evolving international practices in this area. As we near the tenth anniversary of the 1992 Rio Earth Summit the need for discourse on how we assess the contribution of NGOs to international environmental law is surely evident.

¹ S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' 18:2 *Michigan Journal of International Law* (1997) at 183-286

² A breakdown of the first two climate change and biodiversity convention meetings shows that over two hundred NGOs attended. See Farhana Yamin, *NGO Participation in the Convention on Biological Diversity: Insights and Recommendations for the UNFCCC Process*. FIELD Working Paper, July 1997. At the Sixth Conference of the Parties to the United Nations Framework Convention on Climate Change, The Hague, November 2000, participants from 323 intergovernmental and non-governmental organizations were present with the addition of several thousand media representatives. For a breakdown of attendees see the participants lists of each meeting available from the convention secretariat websites. <http://www.iisd.ca/recent/recclimate.html>

³ See e.g. Claudia Saladin and Brennan Van Dyke, *Implementing the Principles of the Public Participation Convention in International Organizations*, Background Document for 4th Ministerial Conference "Environment for Europe", Aarhus, Denmark, June 1998, European ECO Forum.

The first section of this article examines what we mean by the term “NGO”, their historical development and the kinds of activities undertaken by them in the sphere of international environmental law. The second evaluates the roles played by NGOs, and the challenges for NGOs posed by the concept of sustainable development. The third and concluding sections focus on the nature and direction of future developments.

Defining NGOs

The term non-governmental organization covers, quite literally, every kind of organization that is not a State. This negative definition is broad enough to catch the activities of intergovernmental organizations (IGOs) as well as the entire realm of “civil society” – that slice of collective life that takes place above the individual yet below the state.⁴ Most writers now define the term NGO to exclude IGOs and civil society. NGOs are typically defined as “private organisations not established by a government or by intergovernmental agreement which are capable of playing a role in international affairs by virtue of their activities” or as a “private international organisation that serves as a mechanism for co-operation among private national groups in international affairs...”⁵ These somewhat formalistic definitions belie the fact that the term NGO is now fairly widely accepted as being synonymous with “pressure group” or “interest group” - groups that engage in the political realm but without any ambitions on their part to usurp the role of the state as the formal maker and enforcer of laws.

Additional insights on what is commonly understood by the term “NGO” in international parlance can be gleaned from Chapter 27 of Agenda 21, the blueprint for sustainable development adopted by governments at the 1992 Earth Summit.⁶ This chapter identifies *independence* and a *sense of a common purpose* as hallmark attributes of NGOs – whether or not formally organized or established as not-for-profit organizations. Finally, although under the jurisdiction of particular states, one of the defining features of NGOs active in international environmental issues is their *transnational* nature – their ability to work at multiple levels of governance across national boundaries. NGOs, as defined above, participate in international affairs not just through the interface with states but also with IGOs, sometimes acting as the identifiable voices of broad segments of civil society and sometimes pursuing specific goals.

It is interesting to note that by lumping together the myriad categories of actors that are part of the international scene, the term “NGO” thus reinforces the traditional, simplistic *state-centric* view of international law. This view regards states as the primary unit of analysis with the contribution of others actors being assessed principally in terms of how

⁴ P.Wapner, *Environmental Activism and World Civic Politics*, (SUNY 1996), at 158

⁵ Encyclopaedia of Public International Law and The International Law Dictionary respectively, as in S. Charnovitz, *Two Centuries... as above*, p.186.

⁶ Chapter 27: Strengthening the role of non-governmental organizations: Partners for Sustainable Development.

much impact they have on state behaviour.⁷ Within the state-centred perspective, the key theoretical question about NGOs becomes to what extent NGOs have influence over or are about to replace the role of the state.⁸ There is growing realization that international life is far more complex than *state-centric* views imply (and the rather simplistic lines of inquiry such views give rise to) and fortunately more recent writing evidences a better appreciation of the role and interdependencies between states and other kinds of non-governmental actors.⁹

Historical Development

NGO participation in international affairs is not a new phenomenon. It can be traced back to the 18th century when numerous NGOs contributed to the development of international law concerning significant economic, political and social issues.¹⁰ NGOs were instrumental in sensitising states to the need for international regulation concerning, for example, the abolition of slavery, recognition of labour rights and the reduction in tariffs and barriers to trade, and promotion of the rights of women.¹¹ Significantly, many of these organizations that promoted these campaigns had an international dimension and operated in many ways not dissimilar from NGOs active today. Charnovitz cites examples of NGOs organizing parallel workshops, briefing documents, lobbying government delegates through pamphlets and NGO “newspapers”, and providing technical expertise, including through membership of governmental delegations.¹² All of which are now regarded as routine techniques for NGO involvement in international affairs.

⁷ See e.g. Ed. Jennings and Watts, *Oppenheim's International Law*, Volume 1, Part 1, 9th edition, (Longman, 1996) which sets out the starting point for most writers: that States are primarily, but not exclusively, the subjects of international law. However, the possibility that Intergovernmental Organisations (IGOs) may possess international legal personality is now accepted. See also *Reparation for Injuries Suffered in the Service of the United Nations* Case, Advisory Opinion, I.C.J. Reports 1949, at 174.

⁸ As Wapner points out there are two stands to this discourse. The supra-statist stand emphasizes the increased importance of international institutions, or some form of world government, to take over functions traditionally undertaken by states. Whilst the sub-statist strand emphasizes argues for decentralizing governmental power, at 153.

⁹ Peter Newell, *Climate for Change: non-state actors and the global politics of the greenhouse*, (Cambridge University Press, 2000).

Wapner, n. 4 above.

¹⁰ For a detailed historical account of NGO participation see S. Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, n. 1, above.

¹¹ Charnovitz

¹² Charnovitz

In the early 20th century, activities under the auspices of the League of Nations provided for a relatively high degree of NGO participation by allowing NGOs to attend intergovernmental committees, including significantly those dealing with economic and trade issues, which at present seem “off-limits” so far as direct participation of NGOs is concerned.¹³ The establishment of many IGOs, such as the Red Cross and the International Labour Organization, was due in many cases to the idealistic and active behind the scenes involvement of NGOs. Although at this stage in history, the development of substantive rules of international environmental law was largely ad hoc and fragmented in nature, “NGO fingerprints” can be found on the initiatives and treaties adopted during this period.¹⁴ The ability of NGOs to influence substantive developments was (and still remains), underpinned by the fact that scientific and environmental associations possess the technical expertise that is so often needed to ground international environmental policy-making processes.¹⁵

The flourishing contribution of NGOs to international affairs was terminated by the Second World War. The UN Charter formalised the NGO arrangements that had been used by the League,¹⁶ but it is widely accepted that in comparison with earlier periods, the contribution of NGOs declined, or seemed somewhat stagnant, in the post-war years until the mid-1970s.¹⁷ Factors accounting for this include the fact that the increased mandates of governments and IGOs, particularly the UN and its many newly established agencies, which increased the need to have “in-house” the expertise that had hitherto been provided by NGOs. In the case of the environment, however, the lack of a dedicated UN agency in the post-war period meant that NGOs still had a very significant important role to play in the development of environmental treaties. The establishment of International Union for the Protection of Nature (know as IUCN) in 1948, with membership from governments and NGOs, provided a focal point for international environment NGOs. The contribution of IUCN and its constituent NGOs members to the development of conventions such as 1972 Convention on International Trade in Endangered Specified of Flora and Fauna (CITES) and the 1991 Ramsar Convention on international wetlands are relatively well documented.¹⁸

¹³ The issues of NGO participation in the affairs of the WTO, discussed below, is particularly vexatious.

¹⁴ P. Sands, *Principles of International Environmental Law*, Manchester, 1995.)

¹⁵ Sands, n. 14 above at 28.

¹⁶ Article 71 of the UN Charter provides “The Economic and Social Council may make suitable arrangement for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations, after consultations with the Members of the United Nations concerned.”

¹⁷ Charnovitz, n. 1 above

¹⁸ See P.W. Birnie & A.E. Boyle, *International Law and the Environment*, (Clarendon Press, Oxford, 1992) and Sands, n. 14 above

The early 1970s witnessed the prioritisation of environmental concerns evidenced by the founding of Greenpeace International and Friend of the Earth, both in 1971, and the establishment of the United Nations Environment Programme in 1972 as a follow up to the Stockholm Conference on the Human Environment. Around four hundred NGOs attended this meeting, organizing a parallel NGO conference, and distributing ECO - a daily “newspaper” to brief delegates— two initiatives which have become established features of virtually all subsequent international conferences.¹⁹

The 1992 Rio Earth Summit marked a watershed in the relationship between governments and NGOs. The preparatory committees for the Summit were followed in detail by hundreds of NGOs who contributed to development of Agenda 21, the Forest Principles and the Rio Declaration as well as the climate change and biodiversity treaties which were opened for signature at Rio. Some 10, 000 NGOs were reported to have attended the Rio Conference, lobbying not only governments, but also establishing their own “NGO Forum” and innovating new relationships amongst major groups in civil society through literally hundreds of myriad meetings and cultural events.²⁰ As a result of their collaborative and constructive efforts, Agenda 21 called on governments to recognize that NGOs “possess well-established and diverse experience, expertise and capacity in fields...of particular importance to the implementation and review of environmentally sound and socially responsible sustainable development.” And that the resources of NGOs “should be tapped, enabled and strengthened” in efforts to meet the common goals set out in Agenda 21.²¹

Since Rio, NGO involvement in environmental policy-making has mushroomed at all levels. This is due in part to IGOs re-organizing their relationship with NGOs, as mandated by Agenda 21, to provide for regular channels for NGOs “to contribute to policy design, decision-making, implementation and evaluation” of IGO activities.²² The pattern of NGOs attending international meetings in record numbers to hold “side-events” has continued. As has NGOs distributing information and lobbying governments, in some cases, with such effectiveness that by the end of the mid 1990s, some commentators were beginning to talk of NGOs having “hijacked” a number of international organizations, notably the International Whaling Commission and CITES Conference of the Parties.²³

These gains in NGO input to international processes, and their influence, have been made possible by the increased sophistication of NGO interventions, including highly effective use of the media, and targeted expert information and lobbying work. This in turn has been supported by increased membership (and hence finances) of NGOs, which if

¹⁹ See Tom Burke, cited at n. 738 in Charnovitz, and Chayes and Chayes, at 251.

²⁰ See Agenda 21, Chapter 27

<<http://www.un.org/esa/sustdev/agenda21chapter27.htm>>

²¹ Agenda 21, Chapter 27, para 3.

²² Chapter 27.

²³ Birnie and Boyle, n.18 above

totalled would easily exceed the amount of resources available, for example, to UNEP.²⁴ WWF has around 5 million supporters from across the world with a combined income of around SFr 470 million; Greenpeace International has more than 2.5 million member in 158 countries with an annual budget in the region of \$30 million and Friends of the Earth has over 1 million members in 58 countries.²⁵ The human and financial resources of other influential international NGOs, such as Sierra Club, Society for International Development, and Third World Network (TNW), also add to the increased ability of NGOs to track, influence and monitor international developments, and to do so increasingly on a global, interconnected and instantaneous basis.

Since the early 1990s, the individual strengths and resources of particular NGOs has been further augmented by the emergence of specialized “NGO networks” facilitated by web and internet based technologies. Notable examples include Climate Action Network (CAN), Pesticide Action Network (PAN), Regional Environmental Centre for Central and Eastern Europe (REC), Global Legislators for a Balanced Environment (GLOBE) and Both Ends. These networks help coordinate NGOs positions but a number of these exist specifically to provide “services” to help other NGOs undertake their functions more effectively, particularly where those NGOs are from developing countries or countries with economies in transition.

The late 1990s have seen NGOs continue the “Rio” pattern of involvement but an alternative presence has, quite literally, erupted onto the international scene. A cross between an NGO and a new political movement, the new “group” is an informal “network of networks” comprising among others, environmental groups, anti-corporate activists, anarchists, sweatshop workers, community, developmental and grassroots organizations as well as large numbers of unaffiliated but interested citizens from the North and South.²⁶ This collection of individuals and groups defies categorization by refusing (thus far) to create institutional structures that would bring their disparate elements together in any formalized fashion. Termed loosely as “anti-globalization” protestors, this new breed of international actors is constructing complex, shifting alliances between NGOs through “hotlinking” and modern communication technologies.²⁷ A major defining ethic is to redress the position of those disadvantaged by market-based globalization and to highlight the lack of transparency and accountability of existing political institutions and the resulting marginalization and exclusion from decision-making of ordinary citizens. Thus far they have targeted international economic institutions and major political or economic summits, rather than meetings of international environmental institutions or COPs, but their influence on the environmental landscape is palpable enough.

²⁴ Id.

²⁵ *Yearbook of International Co-operation on Environment and Development*, (1999/2000).

²⁶ For a description of the new forms of anti-globalization, anti-corporate activists see Naomi Klein, *No Logo*, (Harper Collins, 2000)

²⁷ Id.

Their methods are a combination of disruptive, sometimes violent, but locally organized protests that appear designed to question the very nature of the work programme of existing mainstream international economic institutions. The first major international target for these actors was the proposed Multilateral Agreement on Investment (MAI) which was taken off the OECD agenda in April 1998 largely as a result of actions resulting from an internet based campaign. Since then, instead of holding parallel, “NGO forums” typical of the early 1990s that aimed to support governmental process by providing constructive comments, the new actors have organized “counter-summits” that aim to challenge, and sometimes to stop, the official government agenda in its track. The Ministerial Summit of the World Trade Organization (WTO) held in Seattle in December 1999 is the best known example of these alternative strategies. At Seattle, street protests, combined with radicalising lobbying of developed country delegates, and intimidation of others, thwarted Northern government ambitions for a further round of trade liberalization. These were replicated, with more violence but less effect, at the Gothenburg Summit between the EU and US held in June 2001.

This brief historical sketch of NGO involvement in international affairs demonstrates the difficulties of analysing the contribution of such a large variety of NGOs in different institutional settings and over time. As Chayes and Chayes put it “the multitude of groups is so disparate and varies along so many dimensions – size, organization, objectives, location, staffing, funding sources, membership, strategy, life cycle – that it is hard to generalize about their activities or impact.”²⁸ The paucity of empirical data, indeed the difficulties of gathering this given the tension that exist between governments and NGOs in claiming “responsibility” for successes (and denials for failure), point to the need for further scholarship. In this context, the development of methodologies to categorize and assess the various kinds of influence that can be attributed to NGOs must rank as important policy relevant research tasks.²⁹ Charnotvitz’s suggestion – that NGO involvement in international affairs is cyclical and the implication that it can decline as well as increase - also points to the need for further historical and empirical study. After all, if there is no common language to evaluate the contribution NGOs make to international life, and little understanding of the underlying patterns, it is impossible to assess the contribution NGOs claim for themselves, or others attribute to them, in any meaningful way.

The purpose of the remaining section is not to provide a detailed account of the contribution of a particular NGO or the effectiveness of certain kinds of campaigning and lobbying techniques. Other articles in this volume provide such a perspective. Rather the remaining section examine the kinds of roles NGOs play in international affairs and how

²⁸ Chayes and Chayes, *The New Sovereignty*, (Harvard University Press, 1995) at 252.

²⁹ For a meticulous attempt at empirical measurement of NGO influence on the climate and biodiversity regimes see Bas Aarts, *The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions*, (International Books, 1998).

we might begin to approach judging whether or not they have been successful in fulfilling such roles.

Evaluating NGOs Contributions

A contribution of recent research in this regard has been to identify the different stages in the “life cycle” of international environmental law. NGOs intervene at different points in this cycle using different kinds of influence, or power, at different stages. In his account on the role of non-state actors in the climate regime, Newell elaborates such a *regime breakdown* approach to enable a more thorough analysis of role of different NGOs and their activities. In common with other political scientists, he identifies three main stages in the development of international regimes.³⁰ The first stage, *agenda-setting*, refers to the stage of the policy process when the nature and scope of the problem are being identified and the need for international regulation being determined.³¹ The *negotiation-bargaining* stage refers to the process of negotiations and bargaining, traditionally regarded as domain in which only sovereign states participate. This stage thus coincides with what lawyers regard as commencement of international negotiations and the rules agreed at the end of such negotiations. The third stage is that of *implementation* which Newell regards as the mainly national process of executing the rules that have been agreed at the international level. International lawyers tend to add to a fourth stage, often missed by political scientists, *enforcement*, which concerns processes to ensure that states comply with their international obligations.

It is important to note that in practise, other than at the very early establishment of a new international regime, these various stages are rarely sequential. More often than not, the development of new norms is contemporaneous with enforcement of existing rules as, of course, is the on-going process of implementation. This is particularly the case for environmental issues as problems require periodic adjustment of rules to take into account the latest scientific information.

NGOs as agenda setters

Most international institutions and Conferences of Parties (COPs) leave the setting of a meeting’s agenda and its formal adoption entirely in the hands of states. The 1992 Framework Convention on Climate Change (FCCC) is typical. FCCC rules of procedure require head of the FCCC Secretariat to propose a draft agenda which the Parties to the Convention amend and approve as they see fit.³²

Although NGOs generally have no legal rights to put something formally on the agenda of a meeting, it is widely accepted that they exercise informal power which is effectively utilized by them to shape the way in which problems are addressed, the priority they receive and the way in which governments collaborate to solve them. Agenda-setting

³⁰ Peter Newell, n.9 as above.

³¹ Id.

³² See FCCC rules of procedure, Rule [9]

processes, in this informal sense, the sense most often referred to by political scientists, generally occur outside confines of the international forum established to address a problem.³³ On environmental matters, national and international policy makers are often alerted to the need for action by NGOs when an issue circulating within the scientific community achieves sufficient public attention as a result of NGO campaigns. NGOs play a crucial role in this “problem definition” process. They help translate complex scientific issues into “problems” the public can understand generating “demand” for action by the state or international community along the way to provide solutions. To this end, NGOs galvanize their membership networks to demand action but probably more importantly, they educate the public about the “existence” of a problem by getting media coverage. Although an inchoate element of the policy-making process, the generation of public pressure is widely regarded by NGOs themselves, and a significant number of researchers studying their influence, as probably the most significant role that NGOs play in international affairs.³⁴

The “hole in the ozone layer”, for example, was not discovered in 1987 but invented through a series of clever NGO campaigning using scientific information available in dense, technical reports for quite some while.³⁵ The “need” for a global biodiversity “umbrella” treaty, bringing together the patchwork of regional and species-specific agreements was not an obvious policy response to the problem of declining biodiversity until highlighted by IUCN as a rationale for the negotiations of the Biodiversity Convention.³⁶ Analysis of the now decade long effort of predominantly Northern governments to press for a global forest convention treaty illustrate well the difficulties that can arise when NGO involvement in the early definition of a problem, and its solution, is weak or non-existent. In the run-up to the 1992 Earth Summit, G-7 governments backed international negotiations for a global forests convention.³⁷ It soon became clear they lacked sufficient support from NGOs, as few of the leading NGOs actors, from North and South, had worked out clearly what the “global forest problem” was and whether it, in fact, required a co-ordinated international response in the form of a legally binding convention.³⁸ The forests convention saga demonstrates clearly that on

³³ This makes it more difficult to study, particularly for global environmental issues as several levels of governance are involved.

³⁴ Newell, n. 9 at 129.

³⁵ For a history of the ozone regime, see R. Benedick, *Ozone Diplomacy* (Harvard University Press, 1998).

³⁶ For a history of the Biodiversity Treaty, see Bernstein et al ‘A Brief History of the Convention on Biological Diversity’ *Earth Negotiations Bulletin* (1993) and Michael Bowman & Catherine Redgewell (ed.), *International Law and the Conservation of Biological Diversity*, Kluwer, 1996.

³⁷ F. Yamin and J. Cameron, in “Forests” Reports for 2 *Yearbook of International Environmental Law* (1991) at 213

³⁸ The discussions of the need, scope and (dis)advantages of a binding forest convention have continued under various multi-stakeholder processes established by the Commission for Sustainable Development, including the

their own, even the most powerful governments cannot create the “demand” for their own services.

Wapner’s study into forms of environmental activism highlights the diffuse, but fundamental role, NGOs play in creating “demand” for state action, including for international co-operation. He argues that Greenpeace, for example, expresses itself through extremely sophisticated use of mass media “to joggle the minds of the world.”³⁹ Its rubber-dingy crews stand in the way of whaling fleets and its activists “bear witness” to oil slicks, but they are not really trying to prevent disaster there and then, but rather, to communicate through images, an “ecological sensitivity” which calls on governments and individuals alike to put the environment first.⁴⁰ As pointed out by Klein, Greenpeace’s objections to Shell’s disposal of a rusty, toxic-loaded oil-storage platform by sinking it in the Atlantic Ocean had little effect on UK regulators until Greenpeace broadcast video footage of its activists landing on the platform to stop it being tugged out to sea.⁴¹ That one image catalysed public opinion which was against rich corporations using untouched spaces, such as oceans, as dumping grounds – even if the technocrats had decided that such dumping was the “best” environmental option.⁴² This message was, quite literally, driven home to Shell as hundreds of thousands petrol consumers joined in a virtually spontaneous boycott of Shell stations across Europe, resulting in Germany, for example, of a sales drop of between 20-50%.⁴³

It is interesting to note that the elements of the Brent Spar campaign that made Shell reverse its decision to dispose of the platform at sea (incidentally, to the disgust of the UK government) were played out outside the decision-making channels where government agents exercise formal power. The *power* that NGOs have to define a problem, outline the scope of its solution and to mobilize public pressure in support of their definition is difficult to measure in an objective fashion, precisely because it operates outside the formal sphere. It is more difficult to grasp because it cannot be equated with, or reduced to, the kind of power exercised by states. The latter has a coercive (law-enforcement) element and is exercised through formal channels, whereas the former operates informally and is voluntaristic in nature.⁴⁴ The problematic nature of operationalizing different notions of power and then analysing who exerts how much

Intergovernmental Panel for Forest and the International Forum for Forests. See subsequent editions of the Yearbook of International Environmental Law, note 38, for more details.

³⁹ Wapner , n.4 above at 157.

⁴⁰ Wapner

⁴¹ Klein, p381.

⁴² For a more detailed account of the 1995 Greenpeace and Brent Spar incident see Klein.

⁴³ Klein.

⁴⁴ For a discussion of the different kinds of power exercised by states and NGOs, see Wapner.

and which context, should not, however, detract from accepting the very real significant role NGOs play in agenda-setting processes at the national and international level.

NGOs as “conscience-keepers”

Recognizing their distinctive contribution in raising and generating new forms of ecological sensibility, a number of writers have argued that NGOs have a special role in moving societies towards sustainable development. Wuori, for example, suggests we see NGOs as the “clearest expression” of the emerging transnational civil society.⁴⁵ NGOs are regarded as the keepers of the “conscience” of the emerging international moral community whilst governments are seen to be “always one lap behind”. Echoing thoughts expressed in many different strands of legal and political writing, he also regards present governmental structures as lacking in *legitimacy*, i.e., moral, rather than formal, authority.⁴⁶ And suggests that NGOs provide much needed legitimacy to the emerging new international order.

The last few decades have indeed witnessed decision-making being “transferred both upwards towards international and supranational levels, and downwards to local and regional concerns.”⁴⁷ Assessing the literature on whether the state is in decline, and if so, what will replace it, is beyond the scope of this article but it is widely recognized that the state is at the same time too big and not big enough, particularly in the face of environmental threats facing the planet. The increasing popularity of NGOs, social research findings that publics trust NGOs more than they do governments and low voter turnout in most democracies, do indeed call into question the political authority of the state and with it the consensual based system of international law. After all, if the majority of voters didn’t give positive consent to their national representatives through voting, whose interests are these politicians representing at the international level?⁴⁸

That some international organizations, like the WTO, can take actions that effectively override domestic environmental and health laws, also exposes again the frailty of legitimacy of international organizations. Particularly when they operate, as the WTO does, behind closed doors beyond the scrutiny of parliamentarians and NGOs.⁴⁹ But the

⁴⁵ M. Wuori, ‘On the Formative Side of History: The Role of Non-Governmental Organizations’, in Rolen, Sjoberg and Svedin, *International Governance on Environmental Issues*, (Kluwer, 1997).

⁴⁶ For a more detailed account of the need to consider the legitimacy of international institutions, see D. Bodansky, ‘The legitimacy of International Governance: A coming challenge for International Environmental law’ *93 American Journal of International Law* (1999) at 596

⁴⁷ Wuori, n. 45 above.

⁴⁸ On the problems of democracy in globalized context, see D. Held, *Democracy and the Global Order : from the Modern State to Cosmopolitan Governance*, (Polity Press, 1995).

⁴⁹ Bodansky, n. 46 above

rise of international organizations with strengthened legal powers, also demonstrates that without “pooling their sovereignty” states simply do not have the *capacity* deliver citizens’ demands because no state acting alone can control what happens to its economy. This suggests that whilst international institutions are here to stay, so too are demands that they become more transparent and accountable.

It is against this background that Wouri suggests NGOs be seen from “the perspective of the legitimation void that has appeared in the eroding political system.” Their independence, and critically, their capacity to “transcend the customary ethnic, family, tribal or national barriers” is cited as a credible basis for them to act as the “designated conscience of the world.”⁵⁰ Many international institutions, particularly those searching for new mandates, have quickly cottoned onto the fact that NGOs provide a source of legitimacy and political support in these budget-cutting times. The 1994 statement by UN Secretary-General Boutros Boutros-Ghali on the role of NGOs is illustrative: He stated that “non-governmental organizations are a basic form of popular representation in the present day world. Their participation in international organizations is, in a way, a guarantee of the political legitimacy of those international organizations.”⁵¹

NGOs as partners

It is not surprising therefore that UN institutions, particularly those with budget and “popularity” problems, such as the World Bank, UNCTAD, UNEP and FAO, have made extensive efforts to build partnerships with NGOs. Whether such partnerships have served to re-orientate these institutions towards actions promoting sustainable development remains difficult to assess. This is because achieving sustainable development requires integration of environment and development concerns, a huge amount of institutional coordination as well as development of substantive policy and coherence of existing policies. NGOs have put themselves forward as actors with “solutions.” But it is hard to have an objective assessment of the contribution that one NGO working on a specific issue has to make to such the difficult, long drawn out project of global sustainability. It would be fair to say, however, that the efforts made in the ten years since Rio by NGOs and international organizations to pursue sustainable development are at an early stage in overturning the institutional anarchy, turf wars and disparate policy-making processes entrenched in the prevailing international order. The achievement of results achieved through the new partnerships are, thus far, hard to gauge.

As Gough and Shackley point out, there are benefits, but also disadvantages for NGOs working too much in the “partnership mode.”⁵² NGOs may get divorced from their

See also James Cameron and Ross Ramsey, ‘Participation by Non-Governmental Institutions in the World Trade Organization,’ *Global Environmental and Trade Study, Study No.1*.

⁵⁰ Wouri, at 166.

⁵¹ Cited by P. Mucke, ‘Non-Governmental Organizations’, in ed. F Dodds, *The Way Forward: Beyond Agenda 21*, (Earthscan, 1997), at Chapter 8

⁵² Clair Gough and Simon Shackley, ‘The respectable politics of climate change:

claimed constituency and too engaged with the policy process. NGOs may, as a result, simply be “coopted” into existing patterns, undermining their ability to play the “conscience keeping” role. They can also become too financially dependent on the government or international agency they are partnering. This is an important concern given the never-ending difficulties NGOs face with regards to maintaining independent sources of funding. NGOs crave, but rarely achieve, large amounts of “unrestricted funds” - i.e. funds that are not tied to particular projects or specific campaigns. NGO funding is also rarely truly independent. Whether raised through public appeals, charitable foundations or individual benefactors, at some stage or other, someone other than the NGO has helped shape the kinds of issues or activities the NGO should be pursuing.

The filtering and channelling process that takes place between donors and NGOs applies to all NGOs but is often highlighted by NGOs based in developing countries. These NGOs often do not have access to the kinds of fund-raising opportunities enjoyed by NGOs based in richer countries.⁵³ Where funding is available it may be tied to work on issues identified by others as priorities (“designer injustices”) or provided only for projects undertaken in collaboration with particular (Northern) NGOs. Although there are some laudable NGO led efforts to assist southern NGOs attend international meetings, or gain access to funds for local, truly country-driven projects, it is still the case that NGO participation in international affairs is unbalanced.⁵⁴ As Mucke points out “whoever has the requisite personnel and financial resources participates...(e)veryone else stays at home – in particular, organizations from developing countries or from Eastern Europe, and local and regional grass-roots initiatives.”⁵⁵

Claims that NGOs do, or should, act as the “world’s conscience” thus need to be tempered by these harsh realities. The question of who NGOs represent is crucial yet one that governments, international organizations and NGOs themselves have yet to examine in detail. Suggestions made by this author that the Climate change Secretariat should collect information about how many of the hundreds of accredited FCCC NGOs actually belong to the three recognized “constituencies” and how many are based in developing countries have, for example, have not received much attention.⁵⁶ The situation is little

the epistemic communities and NGOs’, 77:2 *International Affairs*, (2001) at 329 - 345.

⁵³ Id.

⁵⁴ Climate Action Network, for example, is one such organization that tries to fund-raise for southern groups to attend.

⁵⁵ Mucke, n 51 above at 99.

⁵⁶ The three constituencies are environmental groups (ENGOS), Business and Industry organizations (BINGOs) and Local Government and Municipal Authorities (LGMAs). See Farhana Yamin, ‘NGOs Participation in the Convention on Biological Diversity: Insights and Recommendations for the UNFCCC Process’, FIELD Working Paper, (July 1997), distributed at the sixth session of the Subsidiary Bodies.

better in other environmental regimes. Perhaps there is a fear that any such classifications, requiring as all classifications do, the application of criteria that might need to be explained and justified, will simply highlight the skewed nature of NGO participation in the climate regime. Yet, if the collection of such information leads to improved funding provisions enabling greater, and more predictable, Southern and grass roots NGOs, or if it leads to pro-active efforts to search out and invite NGOs from parts of the world currently underrepresented, it will surely contribute to a more robust, and more widely supported, (and implemented) regime. Despite accepting the merits of NGO participation, funding their actual contribution whilst remaining at arm's length, remains a future challenge.

An additional challenge arises from the fact that in the last two decades NGOs have also put themselves forward as better able to organize the process of "participation" and thus better able to implement social and economic development projects than governments.⁵⁷ Increasingly, NGOs are "seen as both as an improved funnel for aid and an important prerequisite for the end of aid altogether."⁵⁸ As a result, many NGOs now absorb very significant sums of development money and this looks likely to continue.⁵⁹ That NGOs are being seen as "not only as more effective, credible and equitable agents" but also as "replacement agents, filling in the ranks left by states, and by donors, alike", has significant consequences for the achievement of sustainable development.⁶⁰ For example, NGOs that specialize on the "environment" side of the sustainable "development" equation, may have to focus their energies away from lobbying *states and international organizations*, as they will increasingly have to influence, criticize and work alongside the increased numbers of NGOs involved in the delivery of development projects.

NGO as experts

Charnovitz's history of NGO involvement suggested that governments placed a high degree of reliance on the expert advice provided by NGOs in the period up to the establishment of the UN and much less in the years that followed the second world war.⁶¹ Since the 1972 Stockholm Conference, there has been a steady rise in the number of

⁵⁷ Majid Rahnema, on the concept and history of participation in *The Development Dictionary: A Guide to Knowledge as Power*, ed. W. Sachs, (Zed Books, 1996).

⁵⁸ Civil Society: The Development Solution? Working Paper presented at a Civil Society Seminare held at the Insitute of Development Studies, Sussex, June 1996, by [The North-South Institute, Ottawa, Canada](#).

⁵⁹ According to Majid, by 1983, no less than \$3.6 billion was granted by European government to NGOs, a sum three times larger than the total funds allocated to developing countries through UNDP. By the mid- 1990s the US Vice-President Al Gore was promising a "whopping 40% of the U.S ODA budget to be dispensed via NGOs" a move followed by other donors. [See Institute of Development Studies \(IDS \) report, n. 58, above](#)

⁶⁰ IDS report, at 8 and 11.

⁶¹ Charnovitz, n. 10 above.

NGOs and greater calls upon their expertise.⁶² The increase in density of networks of regional and global interconnectedness and the recognition that the biophysical, institutional and economic realities have to be treated simultaneously have made devising solutions to environmental problems more complex. Because NGOs can build connections across boundaries, political and hierarchical, and because they can represent constituencies, such as the planet or future generations, not currently well represented by states, governments have looked to NGOs to provide expert scientific, technical and policy advice.

It is widely recognized that NGOs have responded to the challenge of devising “solutions” with vigour.⁶³ NGOs have built up expertise in the many of the scientific, economic and social and technical disciplines relevant to sustainable development. NGOs are, for example, important members of the “epistemic communities” underpinning the development and on-going work of many environmental regimes.⁶⁴ Research based institutions such as World Resources Institute, Union of Concerned Scientists, Worldwatch Institute, Tata Energy Research Institute and FIELD are, to name but a few, some of the leading knowledge-based institutes providing the results of cutting edge research on scientific, environmental, legal, and economic issues to international environmental policy-makers.⁶⁵

By publishing reports and providing information to states through “briefing papers”, and in many cases behind-the-scenes discussions with policy-makers about the implications of latest research before this has been published in peer reviewed journals, such groups provide add enormously to *government capacity* to undertake international negotiations on an informed basis. The frequency and scope of international environmental negotiations have increased since Rio. And even the ministries from the richest, most well resourced countries are complaining of “negotiations fatigue” caused by the never ending cycle of diplomatic conferences, subsidiary body and bureaux meetings. For diplomats from developing countries and economy in transition countries, the situation is significantly worse. Diplomats rush from meeting to meeting, often only reading the paperwork on flights, and becoming increasingly reliant that the “briefings” provided by their favoured NGOs in the hope that these will provide them with sufficient analysis of the issues at stake and the stance they should take.⁶⁶ The ever increasingly numbers of NGO briefing papers competing for their attention itself imposes new challenges. As does the “objectivity” of the widely varying advice on offer. The provision of NGO analysis and recommendation of policy options is, of course, not new – it is indeed a

⁶² Id.

⁶³ See Gough and Shackley , n. 52 above

⁶⁴ See.e.g., the work of Peter Haas, ‘Do Regimes Matter? Epistemic Communities and the Mediterranean Pollution control’, 43 *International Organization*, (Summer 1989) and more recent researchers cited by Gough and Shackley.

⁶⁵ For a detailed table describing the contribution of various types of NGOs, see Gough and Shackley, n.52 above.

⁶⁶ For an account of how developing country negotiators negotiate, see Joyeeta Gupta, *The Climate change Convention and Developing Countries*, (Kluwer, 1997).

hallmark of their lobbying efforts - but the degree to which it appears to be relied upon by many government, without further checks, may be.⁶⁷

The need for “endogenous capacity-building” in the sciences to avoid undue dependence on external NGOs, and/or to improve the participation of developing countries in international regimes, and to enable them to implement agreements, is widely acknowledged as essential.⁶⁸ And NGOs, working with IGOs such as UNITAR and UNDP, are certainly helping to fill the gap. But effective capacity-building takes a long time as it is reliant upon the “slow-bearing fruit” of training of skilled personnel, and increased education and public awareness. Before these efforts bear fruit, continued reliance upon “outside” consultants may be a necessary, and perhaps cheaper, effective option. Due to their funding needs, there is a risk however, that no matter how well intentioned the NGO may be, being service providers of “capacity” may inadvertently create a dependency relationship. Moreover, because, NGO expertise is not evenly distributed across the globe, increased use of NGOs as experts and/or to build capacity, can easily translate into increased channels of influence by Northern NGOs, unless concerted efforts to avoid that are made.

NGO as lobbyists

The ability of NGOs to influence policy-makers depends on what “goods” (expertise or public pressure) NGOs have to offer. But it also depends on the degree of access NGOs have to policy-makers and relevant documentation. Much lobbying work takes place at national levels. As Mucke points out, international conferences constitute only one

⁶⁷ In complex areas such as climate change, where policy-makers rely upon economic models, statistics and scientific assessments, it is very easy to incorporate value judgements which have significant policy outcomes. For example, in the IPCC’s second assessment report, the statistical assumptions used by predominantly Northern economists to value loss of human life resulting from climate change gave richer countries higher losses than equivalent losses in developing countries. This was due to the fact that used standard economic assumption that give less value to lives lost in developing countries than lives lost in developing countries. These assumptions were exposed by Global Climate Institute campaigning for equity for developing countries. See M. Grubb, *The Kyoto Protocol, A Guide*, (Earthscan, 1998). The Centre for Science and Environment in India has also challenged the construction of past and future GHG emissions as many fail to incorporate historical responsibility of developed countries. See A. Agarwal and S. Narain, ‘Global Warming in an Unequal World’, CSE Report, New Dehli, 1991.

⁶⁸ Agenda 21, chapter 35, and almost all post-1992 negotiated conventions contain provisions mandating “capacity building” in developing countries and the post-1992 work programmes of international organization stress related concepts such as “human resource development”.

element of lobbying.⁶⁹ Nevertheless, as international forums are where the final trade-offs are made and new rules actually agreed, lobbying at the international level is an important strategic component of NGO lobbying work. And one that is growing because transboundary effects, free-rider problems and global competitiveness concerns mean that more rule-making on environmental issues is taking place at the regional or multilateral level.

Formal access to policy-makers and documents at the international level is determined by treaty rules, the detailed rules of procedure adopted by COPs as tempered by changing state practices. An examination of these formal rules in international environmental treaties reveal there is some variety but the general thrust is similar.⁷⁰ NGOs “may” be represented at COP meetings as “observers” if Parties so agree.⁷¹ NGOs who want to attend meeting have to be “qualified in matters covered by the Convention”, have informed the Secretariat and met the accreditation procedures set in place. These range from checks on the bona fide character and non-profit-making nature of the NGO to requirements they sign a declaration of support for the convention’s objective.⁷²

So far as access to documentation for meetings is concerned, the web has provided an important levelling mechanism for ensuring easy access to documentation in advance of meetings – at least for those able to access the web – which thankfully is becoming more widely available in developing countries but remains far from ubiquitous. So far as circulation of documents written by NGOs is concerned, practices vary across environmental regimes but there are significant similarities. International organizations and COPs rely on NGOs producing, photocopying and distributing their own materials – normally through advance mail outs or leaving batches on strategically placed tables outside meeting rooms/coffee bars. Some regimes have made it easier to access NGOs documents by establishing formal “clearing house mechanisms” or via housing “links” to NGO websites. Most secretariats have NGO liaison officers who provide facilitate information flows to/from NGOs, including through dedicated NGOs briefings sessions organized by the heads of secretariats, as well as administrative support for the ever larger numbers of “side-events” and stalls NGOs now set up at meetings to help them lobby or disseminate their expertise.

Once added to the list of those entitled to come, NGOs can begin to attend international meetings, assuming, of course, they have raised the requisite funds! Opportunities for NGOs to intervene in debates in meeting are usually (but not always) restricted to a specific number and/or at specific moments in time, e.g. the opening or closing plenary sessions. The key point to note is that their ability to make oral interventions lies in the discretion given by Chairman of the meeting concerned and ultimately rests with Parties.

⁶⁹ Mucke, ‘Non-Governmental Organizations’, n. 51 above ,at 100.

⁷⁰ See Farhana Yamin and Tania Wasserstein, ‘*NGO Participation in the FCCC*’, FIELD working paper, March 1999, which examined participation of NGOs in a number of international environmental regimes.

⁷¹ Article 7 paragraph 6 of the FCCC is a fairly typical treaty rule.

⁷² See Yamin and Wasserstein, n 70, above.

Access to be present at meetings is also restricted. Generally, all plenarys are open to attendance by observers but the more high level the meeting, the less access there is for NGOs to be present. Parties often cite concerns that last minute “trade-offs” and compromises are more difficult to make if each step is being watched by a large group of observers. Many NGOs understand these concerns, and in any case have no real desire or need to be present at “closed” meeting. Knowledge-based NGOs, or those concerned with maintaining transparency of processes and accountability are not in the same situation. With typical ingenuity, such NGOs have increasingly found ways to be included as members of official national delegations. As a result many countries delegations include representatives from the environmental and/or business constituencies both as a means of increasing input from these groups as well as enhancing legitimacy. The use of non-national technical or legal experts to assist delegations in complex negotiations, in the way FIELD lawyers assist representatives of the Alliance of Small Island States, is becoming more widely accepted.⁷³

These developments in state practise flesh out the way in which formal rules on NGO participation are applied. Advances in modern communications, particularly the increased availability of mobile phones, has undermined the significance of formal rules which were devised in an era when limiting physical access of NGOs to official meetings was sufficient to ensure governments had the necessary “political space” in which to forge delicate, last minute deals. The ability to influence is available to those outside meetings room provided they have access to phones. In the last few hours of negotiations at the failed Hague Climate Change Summit in November 2001, the “big” NGOs were able to “number crunch” the figures and submit their analysis via phones more or less in “real time.” Because some of the deals being struck were being made in corridors outside the ministerial meeting, some of these NGOs were actually more in touch with what was going on than developing country negotiators in discussions with President Pronk.⁷⁴ What counted was who was an “insider” not who was physically outside.

The distinction between “insider/outsider” NGOs is highlighted by Newell in his account of climate politics but his theoretical insights are more widely applicable to other regimes.⁷⁵ Blue-chip knowledge based NGOs from North and South, particular individuals with known contacts with key decision-makers nationally and internationally are “insiders” who constantly consulted as are industry lobbies. So far as direct lobbying is concerned their modus operandi is similar in some respects to those of environmental NGOs, albeit industry has far more funds. But in many others the ability to influence is very different as industry has privileged access to governments on a scale not enjoyed by

⁷³ For a longer discussion about the role of FIELD on AOSIS delegations see Chayes and Chayes, n. 21 above and Bas Aarts, n. 29 above.

⁷⁴ For an account of what happened at the Hague and role of NGOs see Michael Grubb and Farhana Yamin, ‘Climate Collapse at the Hague: what happened, why and where do we go from here?’ 77 : 2 *International Affairs*, (2001).

⁷⁵ Newell, *Climate for Change:- non-state actors and the global politics of the greenhouse*, (Cambridge University Press, 2000)

others.⁷⁶

The lobbies present at international meetings are the “visible tip of a vast bedrock of industrial power” embedded in the very structures of national and international decision-making. Ministries representing industry, enterprise and trade departments are far more powerful than environmental ministries and privilege the concerns expressed by CEOs of companies that have enormous control over key production, investment and employment decisions.⁷⁷ Any proposed environmental legislation impinging on company profits, employment and expansion plans is frequently leaked in advance to industry who make its views known at the very highest echelons of governments. Evidence of regulatory “chill effect” – not proposing legislation because of anticipated, rather than actual, industry lobby support recent contentions that there has been a “silent takeover” of democratic institutions and suggest that industry/business influence is so pervasive that actual lobbying efforts by such groups play a minor part in the level of influence they have with policy-makers.⁷⁸

It is this structural power that anti-globalization protesters are drawing attention when they choose to not become “insiders” of processes deemed by them to be fundamentally tilted in favour of corporate interests. Thus whilst “process minded” NGOs look set continue their partnership and peaceful lobbying work within international institutions, newer types of NGOs are working largely outside these processes to challenge the way such processes operate through characteristically “disruptive actions.” The decision to concentrate on non-process channels is in some ways a forced one. Because unlike international environmental regimes with their incorporation of rules and state practises enabling NGOs participation, the major international economic institution, the WTO, regarded as a key player in the market globalization process, remains effectively closed to NGOs. Thus forcing NGOs to operate in the informal sphere. This means that for now, NGOs will try to use images, strategically targeted actions and social and cultural networks to create public pressure strong enough to force states to overhaul outmoded institutional mandates which rely on increasingly archaic notion of state sovereignty and which see NGOs as mute observers or a mere vehicle for providing information, rather than as material political players.⁷⁹

NGOs as enforcers

The perceived failure of democratic processes to hold governments and international organizations to account for decisions resulting in environmental damage has resulted in a rise in interest in using court proceedings at the national and international level.

⁷⁶ Although his book analyzes climate change, the theoretical insights are more widely applicable to other regimes.

⁷⁷ *Id.*

⁷⁸ Naomi Klein, *No Logo*, n. 26 above

⁷⁹ Mucke, n.51 above, at 95.

The intellectual foundations for NGOs to see themselves as the legal guardians of environmental interests was laid down by Professor Christopher Stone's article - Should Trees Have Standing: Towards Legal Rights for Natural Objects.⁸⁰ As a direct result of this suggestion, US NGOs routinely take cases involving environmental interests to courts. Elsewhere, since Rio national courts have been far more open to NGO interventions to protect the environment. The *Minors Oposa* case allowing an association to bring claims on behalf of future generations is often cited.⁸¹ Many legal and procedural hurdles, however, such as restrictive interpretation of rules concerning *locus standi*, remain, as illustrated by the case brought by Greenpeace against the EU Commission, and these stand in the way of robust enforcement efforts by NGOs, at least in Europe.⁸² Interestingly some of the most compelling legal battles have been fought by multinationals against environmental campaigners. The most famous being the "McLibel" trial, instigated by McDonalds against two activists – Helen Steel and Dave Morris – when the two activists circulated a pamphlet linking McDonalds to tropical forest destruction, third world poverty, animal cruelty, lack of labour rights and bad diet.⁸³ The trial, the longest lasting libel case in British legal history, proved to be a PR disaster for McDonalds, requiring them to disclose areas of company policies and practices that would otherwise not have come to light. McDonald's decision to use libel law was seen as an aggressive, disproportionate response by a billion dollar multinational to stifle criticism. Although Steel and Morris were ordered to pay McDonald's a modest sum of money, McDonald's has not dared to enforce its lawfully won damages given the judicial and public reaction Steel and Morris had effectively generated against McDonald's.

As a result of the McLibel trial, NGOs were quick to realize how effective a long, dramatic trial could be in stoking public sentiment and in subjecting multinationals to a lengthy, detailed and critical public scrutiny not possible through traditional political and regulatory channels.⁸⁴ Not wanting to make the same mistakes as McDonald's, however, few multinationals have dared to use the courts to pursue their critics.⁸⁵ NGOs, on the other hand, are likely to continue to seek opportunities to use court proceedings in a proactive manner to draw public attention to specific instances of corporate abuse of the environment and/or social injustices, such as poor wages and labour rights.⁸⁶

⁸⁰ 45 S. Cal. L. Rev. (1972) at 450

⁸¹ Antonio G. M La Viña 'The Right to a Sound Environment in the Philippines : The Significance of the *Minors Oposa* Case' 3:4 *RECIEL* (1994)

⁸² Diana Torrens, 'Locus Standi for Environmental Associations under EC law- Greenpeace – A missed opportunity for the ECJ', 8:3 *RECIEL* (1999).

⁸³ See Naomi Klein.

⁸⁴ Klein, at 392.

⁸⁵ Klein cites examples of multinationals dropping legal cases as they also digested the lessons of the McLibel trial.

⁸⁶ Halina Ward 'Governing Multinationals, the Role of Foreign Direct Liability' 18 *Royal Institute for International Affairs, Briefing Paper* (2001)

Professor Stone's argument - that legal rights be created in favour of natural objects such as forests, rivers and mountains, and that these should be subject to enforcement by NGOs - has been used to support similar claims in international law.⁸⁷ On the international level, establishment of the World Bank Inspection Panel, allowing NGOs to challenge any act of the Bank that contravenes its own operating rules and procedures, has legitimised NGO scrutiny of international institutions and thus signals an important future developing role for NGOs.⁸⁸ Similarly, the request by the World Health Organization to seek an advisory opinion from the ICJ on the legality of nuclear weapons has shown that when they marshal their resources well, NGOs can have "indirect" access to the ICJ - albeit in a non-litigious manner.⁸⁹ NGO "fingerprints" were all over this development - from the point of persuading WHO and then the UN General Assembly, to request the opinion to the filing of written pleadings and final oral arguments in which NGOs took extensive part. NGO initiatives to intervene in the binding dispute settlement procedure of the WTO to ensure the environmental concerns were taken in the Panel's decisions have, however, met with huge resistance.⁹⁰ Despite some encouraging signs that the WTO might allow filing of amicus briefs on behalf of various consortia of environment/development groups in environment/development related disputes, the rejection of all amicus briefs filed in relation to the Europe/Canadian WTO dispute relating to the French ban on imports of cancer-causing asbestos case illustrates that there is some way to go before such initiatives become an accepted part of WTO dispute settlement process⁹¹. So long as the WTO remains closed, however, NGO efforts to use legal means to challenge the lack of transparency as well as the substantive application of WTO law resulting in environmental injustices look set to continue.

It is important to recognize however that these litigious strategies will always, supplement rather than overtake, the much larger, and effective, "whistle-blowing" efforts NGOs have played in decision-making for many years.⁹² International and grassroots NGOs expend considerable effort uncovering government failure to live up to international commitments.⁹³ And with good reason: "naming and shaming" remains an important method of bringing recalcitrant states back on the implementation track. In climate change, for example, the environmental NGOs have produced a detailed analysis

⁸⁷ See e.g. Philippe Sands, 'The Environment, Community and International Law', 30 : 2 Harvard Int. Law Journal, (Spring 1989).

⁸⁸ For a discussion of the procedures of the Panel, see Sands et al. , *Manual on International Courts and Tribunals* (Butterworths, 1999) at 303

⁸⁹ cite Philipps book on WHO.

⁹⁰ See FIELD press release on WTO ruling in favour of a French ban on asbestos 14th March 2001, <http://www.field.org.uk/papers/pdf/asbest%7E2.pdf>

⁹¹ For a background to the dispute and filing of amicus briefs in the WTO, see FIELD press release, n.90 , above ? change n.90 to article RECIEL article on decision in asbestos case or general article by diana shelton, suggested by AP ?KEEP NOTE 90 BUT ADD SHELTON ARTICLE. THANKS

⁹² Chayes and Chayes, n.28 as above.

⁹³ Id.

of developed countries national communications highlighting gaps in data and where relevant, rising emission trends. Without the monitoring of infringements of CITES regulation undertaken by Traffic International, the work of the Convention would not be as effectively undertaken. Ditto re the work of Greenpeace and other tracking the unlawful movement of ozone depleting substances.

Naming and shaming has its limits though particularly in relation to larger states who chose to stay out of international regimes – free-ride- or where the source of non-compliance is stated to be dependent on financial resources but it remains an important role for NGOs. In these cases, the development of specialized non-compliance procedures established or under elaboration under several other environmental regimes, such as the 1987 Montreal Protocol the 1989 Basel Convention, and eventually the climate change regime may allow NGOs to provide information to the respective panels to help ensure governments are held to account.

Conclusions

Sustainable development provides complex challenges for NGOs. Present-day unsustainable production and consumption patterns require fundamental changes to the global economy and this cannot be made without much greater level of public support than environmental NGOs have mobilized thus far. This will require NGOs to intensify efforts to help instill a new kind of consciousness across the globe and in much larger parts of civil society .

Sustainable development requires an integration of environmental concerns and developmental aspirations at all levels of governance which requires overhauling national and international institutional structures to provide a high degree of institutional co-ordination and policy coherence. But apart from a few of the very largest NGOs, most NGOs have worked on either the environment or the development side of the equation, and/or focused on a single-issue or a small cluster of issues. This has allowed NGOs to specialize, be tightly focused and utilize their limited resources in an effective manner. But it means that NGOs efforts to promote sustainable development by helping governments “connect all the dots” in the environment, development, social, economic, cultural and political domains, are at an early stage.

Generating and instilling new norms of behaviour for individuals, corporations and governments to take environmental concerns into account at all levels of decision-making is a slow, mostly intangible, process. Although perfectly compatible in theory, in practical terms, this *agenda-setting* role competes with the much quicker, or at least more visible (and hence more fundable) element of *negotiations* which involving NGOs lobbying governments and/or devising “solutions.” The burgeoning use of NGO partnerships with governments/IGOs to provide and implement novel policy solutions is recognition that states do not have all the answers. But this can mean that NGOs become *de facto* policy-makers thus weakening their ability to stand back and criticize the direction and pace of policy implementation. Given that states are “locked” into

bureaucratic, formalized channels of decision-making, states may well turn out to be structurally disadvantaged in playing a catalysing role in the pursuit of sustainable development. NGOs may indeed have a “vanguard” role. But playing that role will require NGOs to examine their own *modus operandi* particularly with respect to issues relating to representation, funding and priority-setting. This will require greater sensitivity to North/South issues as well as how to strike the balance between human-centred developmental concerns stressed by Southern groups and nature-centred environmental ones more highly targeted by Northern ones. As a result, local issues such as poverty alleviation, food security, land tenure, waste disposal, sanitation, clean water and transportation, may begin to come to the fore instead of the global commons issues currently prioritised by most international NGOs .

This will require much more discussion about whether NGOs should focus on “processes” rather than delivery of “end results.” With the US rejection of the Kyoto Protocol amidst signs of increasing US isolationism given by the Bush Administration, many NGOs are privately asking whether it is time to prioritise other channels of influence to achieve results. The lack of responsiveness of (some) international institutions also points to increased use of courts rooms and street protests outside the formal process of decision-making. The multitude of initiatives aimed at harnessing the *market* to fast track take up of new technologies and/or to reward corporations that act in an environmentally and socially responsible manner, including through the use of eco-labelling, consumer boycotts and pension fund/shareholder disinvestment campaigns, also evidence NGO acceptance of the fact that traditional NGO techniques are on their own inadequate ways of instigating significant, real changes.⁹⁴ NGO involvement in international affairs looks set to be multi-faceted and a complex set of interactions inside and outside formal decision-making forums.

One thing is clear from the analysis in this article: NGOs are no longer mute observers of international processes or mere vehicles for providing information to policy-makers but material political players in their own right.⁹⁵ Reconciling this insight with state-centric accounts of international policy-making is more of a theoretical challenge because in practice, it is abundantly clear that formal legal rules assigning NGOs a peripheral role in the international affairs, represent an inaccurate and obsolete view of the international legal order. In the coming decade, the contribution of NGOs will continue to grow in significance and scope because the concept of sustainable development demands connections between governments, across policy areas and throughout all layers of governance. NGOs will certainly play a key role in providing the vision and the “social glue” necessary to help achieve sustainable development.

⁹⁴ See e.g. the work of Solar Century, a business set up to promote solar power by a former Greenpeace campaigner , <<http://www.solarcentury.co.uk/>>

⁹⁵ Mucke, n. 51 above, at 95.