Centre International de Droit Comparé de l'Environnement

FINAL REPORT
Extracts

State of the art on issues raised by public participation in international forums

For the Ministry of Ecology and Sustainable Development

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BACKGROUND

Article 3, paragraph7, of the Aarhus Convention requires each Party to "*promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment*".

To assist the Parties in applying Article 3, paragraph 7, a set of guidelines (known as the *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums)* was adopted in May 2005 at the second Meeting of the Parties in Almaty, Kazakhstan.

The Meeting of the Parties also established a Task Force, chaired by France, to enter into consultations regarding the Guidelines with the relevant international forums.

The present research on the "State of the art on issues raised by public participation in international forums" is intended to supplement the Task Force's consultation process and provide material for consideration by the Working Group of the Parties to the Convention.

This research has two objectives:

- firstly, to identify the various studies of the subject made by national and international experts and/or academics, and to prepare summaries of these documents.
- secondly, to identify the key players and sources in the academic and expert networks at international and national levels.

In what follows only twenty or so of the summaries included in the final report are reproduced, together with a general summary of the report as a whole.

PRESENTATION OF SUMMARIES

Title of paper/article/document:
Location:

I. General principles of international access:

1. Advantages

2. General theoretical obstacles:
   a. sovereignty
   b. lack of international legal personality

3. Legal modalities

4. Conditions:
   a. significant and fair/open and transparent access
   b. balanced process
   c. capacity building
   d. financial resources
   e. strategy of international NGOs
   f. strategy of national NGOs
   g. expertise of NGOs

5. Nondiscrimination:
   a. nationality, domicile
   b. legal person

II. International access:
1. to institutions:
   a. intergovernmental conferences
   b. international organizations:
      1. specializing in the environment
      2. not specializing in the environment
      3. convention secretariat

2. to processes:
   a. programmes, plans, strategies of the international organizations
   b. negotiation of Multilateral Environmental Agreements
   c. monitoring of national implementation of Multilateral Environmental Agreements
   d. international mechanisms for reviewing compliance

III. Access to information:
1. time to obtain (“timely access”)
2. cost
3. reasons for refusal

4. who?
5. access modalities/availability of documents

IV. Participation:
1. who?
2. when?
3. how (modalities)?

V. Appeal procedure:
1. concerning information
2. concerning participation
3. concerning monitoring and assessment
4. concerning implementation of Multilateral Environmental Agreements

VI. Specific cases:
1. concerning a particular Multilateral Environmental Agreement
2. concerning a particular international organization

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17. GRIMEAUD (David), "Le droit international et la participation des organisations non gouvernementales à l'élaboration du droit de l'environnement : une participation en voie de formalisation?" pp.87-167 in *La protection de l'environnement au cœur du système juridique international et du droit interne. Acteurs, valeurs et efficacité*/ eds. Michel Pâques and Michaël Faure, Proc. Conf. of 19 and 20 October 2001, University of

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SUMMARIES

ALBIN (Cecilia), "Can NGOs enhance effectiveness of international negotiation?"
***International Negotiation,* Vol.4(3), 1999, pp.371-387**

p.372

NGO participation remains largely unofficial, *ad hoc*, or subjected to the preferences of national governments.

Questions:

- how can NGOs enhance the effectiveness of international negotiations, in ways which governments and states cannot?
- would granting NGOs formal recognition, stronger and more independent representation, and greater roles in all stages of negotiation improve the process and the outcome?
- what evidence is there to suggest that a strengthening of their status and access would also strengthen their positive contributions?

IV.1
p.374

The number of NGOs that today claim a right to take part in international negotiations continues to grow: there is an obvious and urgent need for guidelines on their participation. The great diversity of NGOs and of issues covered in international negotiations makes it difficult to generalize. yet the accreditation-for-all approach is untenable because, apart from being unprincipled, it will eventually overwhelm the process and undermine its effectiveness. By contrast, a principled inclusion of select numbers and types of NGOs could enhance the effectiveness and legitimacy of international negotiations.

II.2.b.
p.377

A number of factors determine if and how far NGOs succeed in gaining access and influence in international negotiations. The structure, rules and procedures regarding participation, deliberation and decision-making are paramount.

The nature of the questions to be negotiated and the extent to which NGOs are perceived as able to contribute effectively to the discussion and resolution of them are also significant.

There is a range of NGO activities that can influence the negotiation process and outcome. NGOs undertake these in both informal and official roles, often in one and the same case. Seven types of activities can be distinguished:

- problem definition, agenda setting, and goal setting
- enforcement of principles and norms
- provision of information and expertise
- public advocacy and mobilization
- lobbying
- direct participation in the formulation of international agreements
- monitoring and other assistance with compliance.

In addition to these seven areas NGOs engage in activities outside the official negotiating room which can build support for dialogue and reconciliation, and prepare local communities for accepting and sustaining a negotiated political solution. This type of work is crucial to the success of official diplomacy in many countries now torn by ethnic-sectarian strife.

I.3.
p.382 :

Would the contributions of NGOs be enhanced if they gained a more official status in international negotiating fora? Not all NGOs wish to change their present unofficial status. In fact, some regard it as a cornerstone of their independence and separateness from formal political actors and processes, and as vital to their work.

Which parties ought (have a right) to be included in international negotiations? In what form or role, represented by whom, and in what stage of the process? On what grounds? These questions pose both practical and ethical problems. Traditionally, negotiations were a matter for states. Today, however, negotiations involve not only states but also civil society, which wants to be included in the process. The complexity lies not only in their number but also in their heterogeneity. Some parties are unable to participate in negotiations or select which others should speak for them (e.g., future generations).

p.383

Many scholars and practitioners have concluded that participation by non-state actors could be a way to boost the effectiveness, as well as the perceived legitimacy and justice, of international negotiation. (Some regard NGOs as advocates of the interests of future generations or as an ombudsman)

Clearly, in the current system the most successful and influential NGOs tend to be wealthy, well-connected (among national delegations), and well-groomed in public relations.

As a rule they are included in, or excluded from, participation on an *ad hoc* basis as a result of the positions and actions of a few governments.
This is not a satisfactory system. These arrangements are:

- unpractical
- wasteful
- unprincipled (power and luck can be more important in determining who “gets in” than the merits of each case)

IV.1. and IV.3.
What is needed is the development of a set of criteria, to guide or determine what NGOs are given access to international negotiations and on what terms. To establish what the nature of these criteria should be, and to generate international consensus on them and their operationalization, is a formidable task:

- the criterion of sovereignty governing admission to negotiating fora should be expanded; it no longer makes sense to exclude actors that are not states;

- the criteria should be discriminatory enough to avoid a continuous expansion of standing and the admission of so many actors that they overwhelm the negotiation process. The greater the number of parties and interests involved, the more difficult it is to produce timely and effective over lowest-common-denominator agreements.

Criteria should be formulated with the growing complexity of international negotiations in mind:

- decisions about the inclusion of NGOs should be based on more than narrow functional criteria;
- new criteria should be cross-cultural. New rules for access and participation must go beyond Western experiences and conceptions of NGOs which have dominated the debate so far.

Expanded criteria must not simply avoid treating all NGOs alike. They must also consider what differences (among NGOs and between NGOs and state representatives) are directly relevant to the "distribution" of opportunities for access to and participation in the various stages of negotiation. The profound differences among NGOs themselves have commonly been neglected or understated in studies because they focus on exploring these actors within a particular sector

ALKOBY (A.), "Non-state actors and the legitimacy of international environmental law", in *Non-State Actors and International Law,* vol.3(1), 2003, pp.3-98

Article on NGO participation based on theories of international relations. Focuses on the shift away from the state-centric paradigm evidenced by the rise of civil society. The explosion of NGOs is due to globalization which has led to the decline of state sovereignty.

Definition of NGOs (pp.29-32)

I.2.b.

NGOs lack legal status in public international law and are often forced to operate on the margins of the political process but still manage to have significant influence on the formation, maintenance and enforcement of environmental treaties (lack of status: NGOs are at the mercy of international organizations, but this lack of status allows them to define their own role in a creative manner, unconstrained by the law).

Expertise of NGOs: shape the political agenda; point out errors and inconsistencies in proposals of new conventions; by providing information, they help to reduce costs for governments, mobilize public opinion by bringing credibility to the issue at hand.

II

They are also active in negotiations: NGO participation is generally decided on an *ad hoc* basis. Recent conventions extend observer status to NGOs. NGO involvement in the international legal system does not cease once a treaty is agreed upon and signed (involvement in the monitoring and enforcing of states' obligations, mostly informal). NGOs sometimes have observer status in COPs, enabling them to provide information about breaches of states' obligations.

VI.1.

Example of NGOs in the climate change regime: (pp. 36-41)

I.2.b and I.3.

Obvious paradox: "the lack of formal status of non-state actors does not reflect their increasing influence and their potential utility. In spite of their significant influence on the building and design of international environmental regimes, they have no legal personality under international law". The lack of uniform rules governing their participation forces NGOs to find informal ways of influencing norms. The question is then to what extent NGOs should be formally involved in the legal process, and whether their activities should be institutionalized.

I.1.

Benefits of NGO participation (p. 40 ff.)

- instrumental benefits: NGOs can promote sustainable development goals; governments can profit from NGO activities (NGOs are utilized by governments to their benefit, by minimizing research and implementation expenditures): this approach provides a limited role for NGOs, since the state remains the basic unit and utilizes the NGOs so that there is no place for the institutionalization of their role; as long as they prove to be beneficial to governments, their role will be secured; the more beneficial they are, the more involved they will become;
- democratic benefits: the integration of NGOs into the international community extends beyond the instrumental argument. Their involvement enhances the legitimacy of

international regimes and advances their efficiency. There is a democratic deficit in environmental law, which is shifting from the national level to the international realm, and governing the conduct of NGOs, making conceptions of state consent as the source of legitimacy inadequate. The cure is public participation.

Problems with NGO participation:

The integration of NGO activities into institutional structures is far from being accepted, in spite of recognition of their increasing influence. The main objection comes from those who claim that their sources of legitimacy are complex and open to questioning. These concerns have prompted suggestions to develop a legal framework governing NGO activities in order to regulate their activities. This is also justified by the need to ensure their accountability (some authors suggest they be given full voting rights; others the creation of an elected global assembly, see Falk and Strauss).

There is no clear divide between advocates and opponents of NGO involvement. The calls for regulating NGO activities come from both sides, for different reasons:

- the advocates of NGO involvement are concerned that institutionalization might jeopardize their independence; allowing them to participate formally might change their confrontational behavioural patterns and cause them to lose the qualities that have made them influential;
- the opponents of NGO participation wish to limit their influence by depriving them of their freedom: regulating the NGOs is a way of limiting their influence.

There is evidence of a trend towards more cooperative behaviour of NGOs in regard to states (cooperation strategy).

The author describes the various liberal theses and their shortcomings (pp.50-64)

- "the domestic analogy debate" (transfer of domestic principles to the international system while leaving the sovereign state structure intact): the domestic analogy continues to prevail with regard to NGO involvement in international lawmaking (e.g. the article by Kal Raustiala on "the participatory revolution": analogy between the international and the United States).
- Thomas Franck's fairness theory ("the Power of Legitimacy among Nations").

Then, the author presents the different international relations theories, ending with the constructivist theory as an alternative (pp.64-72):

- neo-realist theory (states engage in power struggles to serve their interests); this theory ignores the role of non-state actors;
- institutionalist theory (institutionalism or neo-liberals): focuses on cooperation and recognizes the importance of norms and legal regimes; this theory leaves room for NGOs (Anne-Marie Slaughter) (instrumentalization of NGOs in the interest of states);

- liberal IR theory (alternative to the two previous theories);
- "social constructivism" (not yet a complete theory, but rather an approach to the empirical study of international relations) (sources in Durkheim and Weber) (p.72).

BODANSKY (Daniel), "The legitimacy of international governance: a coming challenge for international environmental law?", ***American Journal of international Law,*** **July 1999, Vol.93, No.3, pp.596-624**

The author wishes to show that the international environmental process is insufficiently democratic. Some environmentalists have deplored the democratic deficit in international institutions and have questioned the authority of semiautonomous international standard-setting organizations such as the ISO and the Codex Alimentarius Commission.

NGO participation would enhance the legitimacy of international environmental decisions.

International environmental law addresses subjects that, in the past, were addressed by national law. The more international environmental law resembles domestic law, the more it should be subject to the same standards of legitimacy that animate domestic law, in particular organized NGO participation in decision-making.

For international environmental policy to be democratized, it needs to be subject to the same safeguards and public accountability as domestic regulation. To overcome the democratic deficit in international decision-making, the international institutions and decision-making mechanisms need strengthening.

The difficulties of applying democratic theory at the international level have prompted some to focus on public participation. The bottom-up approach is difficult to organize internationally. Those excluded from participation are those who will subsequently demand the most.

In reality, participation by the "public" means participation by international NGOs which may or may not reflect the public interest, if such a thing exists. Even if NGOs had unrestricted access to international conferences, few members of the public would, as a practical matter, be able to participate.

In fact, transparency and participation confer a relatively weak form of legitimacy since they do not really justify the decisions made by international regimes.

There is a problem with global democracy, namely: how to provide everybody with information so that the public can make informed choices? Democracy is more than the mere aggregation of individual wills. It involves deliberation about the public good, which becomes progressively more difficult as the scale of the polity increases (footnote 130, p.617).

IV.

United States administrative law (notice and comment procedure) could be taken as a model at international level, by adopting administrative rules of procedure which would require regional and international organizations to publish their agenda and their drafts and grant the public and interested NGOs the right to comment and express their views.

BOMBAY (Peter), "The Role of Environmental NGOs in International Environmental Conferences and Agreements: Some Important Features", ***European Environmental Law Review,*** **July 2001, pp.228-231**

(Distinction between participation in the negotiating process leading to the adoption of a convention and participation in COPs once the convention has been adopted)

Interest of the article: mentions the draft rules of procedure for Aarhus COPs, very innovative as regards NGO participation.

Role of NGOs in MEA bodies: the involvement of NGOs in conventions features either in the Convention itself or in the rules of procedure adopted pursuant to the provisions of the Convention. The two most visible aspects of NGO involvement are the role played by the NGOs in the Conferences of the Parties (COPs) and their role in the compliance mechanisms. The NGOs participate both in the negotiations leading to the adoption of agreements and in the COPs (once the convention has been adopted).

II.1.a. and II.2.b

The role of the NGOs is generally recognized in the rules of procedure governing the negotiating processes (cf. negotiation of the 1998 Prior Informed Consent Convention and the 2001 Convention on Persistent Organic Pollutants (cf. Rules of Procedure for the meetings of the intergovernmental negotiating committee for the POP Convention)). Normally, NGOs are allowed to make contributions to the negotiating process without having any negotiating role. The origin of this practice of "contributing without negotiating" is to be found in the Rio Conference (the first decision adopted by the Preparatory Committee for this Summit focused on the role of NGOs in the negotiating process, and this decision was upheld by the UN's General Assembly (GA RES/45/211 of 21 December 1990, paragraph 13).

II.1.a. and IV

Most of the rules of procedure adopted by the first COP normally provide for an explicit clause on the role of NGOs in the framework of the COP and its subsidiary bodies. The standard practice provides for the right of an NGO to inform the convention secretariat of its wish to be admitted to a COP as an observer (this status entitles it to participate without the right to vote, and its participation may also be subject to veto by a given number of parties (cf. rules of procedure of the COPs under the Climate Change Convention, Rule 7.2).

The author cites the example of the Aarhus Convention and the draft rules of procedure submitted to the first COP (drawn up by a working group). As a basis for discussions, the working group used a Secretariat draft containing some innovative elements, reflecting the particular nature of the Convention in relation to NGO involvement in the work under the Convention. This draft (CEP/WG.5/2000/3) provided for:
- NGOs to acquire the status of "non-voting participants" instead of that of mere observers;
- in addition, an NGO representative would be eligible as Vice-Chair of a COP;
- lastly, the draft provided for a position in the Bureau for an environmental NGO representative.

This draft was discussed but no agreement could be reached at the first meeting of the intergovernmental working group. The interest of the draft stems from the proposal to have NGO representatives (2 out of 8 members) in the COP's Bureau. The Bureau's role is to assist the Secretariat in preparing the provisional agenda for each meeting and the relevant documentation.

As the COP is the supreme decision-making body, an enhanced status for NGOs there could have an influence on the decisions taken under a convention.

II.2.d.

NGOs and compliance mechanisms

NGOs have also acquired an implicit role in compliance mechanisms. This role is similar to that which individuals and civil actors can play within the EC infringement procedure by bringing complaints to the Commission. It is generally acknowledged that some elements are needed to render a compliance mechanism effective. This mechanism should be based on a system of "files".

Although NGOs are never formally entitled to trigger proceedings in the event of non-compliance by a party with its obligations under a convention, they are sometimes explicitly entitled to provide relevant information to those actors who are allowed to do so, enabling the latter to build up a credible case (this informal system stems from the 1979 Berne Convention which allows for an NGO to launch complaints, which, via the secretariat, will be followed up by the COP: it seems that this is the most far-reaching role given to NGOs under any existing MEA). This is specifically the case where a secretariat is allowed to play a role in starting the compliance mechanism (cf. the Montreal Ozone Protocol).

The participation of NGOs in compliance mechanisms is still not self-evident (cf. 2nd COP of the Espoo Convention: a committee was set up without any provision for receiving information from the general public.)

VI.2

Role of NGOs in shaping European Community positions in international fora

In recent years, the Community has developed a practice of including NGO representatives in its delegations (this has evolved from an *ad hoc* practice to observer status for NGOs within these delegations).

Numerous advantages: ability to draw on the expertise available within NGOs and be informed first hand on positions adopted by civil society, direct communication between the Community and civil society (enhancing the degree of understanding and acceptance of EC positions).

Limitations:

It is the Commission that invites the expert, via an NGO umbrella organization. The expert invited to be part of the delegation cannot participate in the conference as a member of the NGO community. Moreover, this expert cannot speak on behalf of the Community or participate in coordination meetings (EC and States) (sometimes circumvented).

BOTHE (Michael), "Compliance control beyond diplomacy: the role of NGOs", ***Environmental Policy and Law,*** **1997, vol.27(4), 1997, pp.293-297**

II.2.d. and IV

The effectiveness of implementation review procedures depends, in particular, on the quality of information brought before the Conference of the Parties and the political will of the Parties to take action in the event of non-compliance with the Convention. In both cases the role of NGOs is important, if not crucial. The essential point is that NGOs have access to the COP (which is either stipulated in the Convention itself or in the rules of procedure of the conferences).

The NGOs have the status of observers without the right to vote, which gives them the possibility of providing information to the COP.

The fact that NGOs can intervene in the debates of the COP prevents Parties from silently passing over non-compliance with conventions by other Parties. In this case, NGOs can disturb the debate and make it more transparent. Nevertheless, the practical possibilities which NGOs possess may be determined by certain procedures, such as the payment of a fee, the need for accreditation, denial of access to some intergovernmental meetings. In addition to these routine procedures, some treaties provide for *ad hoc* implementation procedures ("non-compliance procedure/implementation committee") but the role that NGOs can play in these procedures is not at all clear (since the procedures are intergovernmental, e.g., the Montreal Protocol). These procedures should be made more open for NGOs. Moreover, to improve transparency, the report of the implementation committee should be made available to any person on request, This would make the process more open to public scrutiny.

BROWN WEISS (Edith), "The emerging structure of international environmental law", pp.98-115 in *The Global Environment: Institutions, Law and Policy*/ ed. Norman Vig, Regina Axelrod, Washington, CQ Press, 1999
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I.1

Many non-state actors are contributing to the development, interpretation and implementation of international law.

NGOs have become leading actors in the negotiation and implementation of international environmental law (p.101).

The participation of non-state actors in the international legal system is making it much more necessary to produce a report, since that can afford citizens the opportunity to express their views, whereas normally they are not represented, and help ensure that the decisions taken correspond to local needs. This is leading to the effective maximization of human wellbeing (p.112).

I. 2.

The problem is that non-state actors are not necessarily accountable for their actions.

I. 3.

Questions that arise include how to structure NGO participation in the deliberations of international organizations constructively and how to be sure that transnational standards meet the needs of the public. It is time to invent a new process that legitimizes NGO participation in the international legal system (p.113). At the very least, an informal code of conduct is required, and the leading NGOs should take the initiative.

BRUCH (Carl), CZEBINIAK (Roman), "Globalising environmental governance: Making the leap from regional initiatives on transparency, participation and accountability in environmental matters", ***Environmental Law Reporter News and Analysis,*** **Vol. 32(4), 2002, pp.10428-10455**

I.1

The international institutions continue to expand their efforts to include civil society in the international environmental decision-making process.

Thus, IBRD and the International Finance Corporation make their documents public, including impact assessments on international projects.

The WTO's Appellate Body allows NGOs to submit *amicus curiae* briefs.

While global instruments have promoted environmental governance through general principles, they have provided little guidance on how to implement those principles (p.10431).

I. 3

The Aarhus Convention has codified the principles of environmental governance.

Description of the promotion of the Aarhus principles in various regions of the world:

- ISP, Inter-American strategy for the promotion of public participation in decision-making for sustainable development, adopted by the Organization of American States in 2000;
- ASEM, Asia–Europe meeting, guidelines on public participation, 2001;
- North American Agreement on Environmental Cooperation, which includes a noteworthy innovation, namely, the right of citizens to request the enforcement of environmental law. To facilitate participation there is provision for public meetings, calls for comments, and the dissemination of information;
- Africa MOU, 1998 Memorandum of Understanding for East Africa.

There is no general global framework for all these documents of variable legal value.

The international organizations should also give guidance on ways of improving transparency, participation and accountability in their operations.

Rio Principle 10 should be expanded to include the international organizations, in particular, those which implement environmental treaties and programmes (UNEP, UNDP, FAO), regional organizations such as the African Union, the Organization of American States, ASEAN and the various international water management authorities, as well as those institutions which contribute to environmental financing (World Bank, regional development banks, WTO).

The decisions, policies and practices of these institutions directly affect people's lives, health and environment, just as do the actions of governments, so they should include the public in their decision-making processes (p.10450).

CHAMOT (Céline), "La participation des ONG au système de contrôle de la Convention de Berne", pp.67-83 in *L'effectivité du droit européen de l'environnement: contrôle de la mise en oeuvre et sanction du non-respec*t/ edited by Sandrine Maljean-Dubois, La documentation française, CERIC, 2000, 308p.

I. 1. and I.3
In 1951, the Council of Europe became one of the first regional organizations to grant advisory status to NGOs.
Outside the formal institutional framework, other relations were established between the international organization and NGOs, in the form of exchanges of information, formation of expert groups, financing of studies and seminars, etc. The Council of Europe does not support only those NGOs that have been granted advisory status.
The NGOs inject a dose of transparency into meetings that normally take place behind closed doors.
A remarkable evolution: Initially, in 1979, states tended to seek the technical expertise of qualified NGOs; now the presence of NGOs is viewed rather as a means of accommodating civil society.
The presence of NGOs goes hand in hand with an obligation: to publicize the actions of the Council of Europe and to submit a biannual report to the secretariat on the steps they have taken with a view to disseminating the work of the Council.
VI. 2 and IV.
Within the Council of Europe: Berne Convention of 1979: one of the first to provide for NGO participation after CITES (1973).
NGOs may send representatives to the Standing Committee of the Convention (Art. 13-3) unless one-third of the Contracting Parties object. This is a genuine right of participation involving 20 to 30 NGOs. The goal of most of the NGOs present at the meetings is to protect the environment, not to represent trade and professional interests; hunters and anglers are represented.
In practice, NGOs take the floor after the state delegates without any particular restrictions on speaking times.
NGOs may submit complaints to the Standing Committee which may or may not decide to open a file.
NGOs also participate in expert groups.
The collaboration between NGOs and the Council of Europe is both institutional and informal, the framework being relatively light as compared with other conventions.
NGOs also play a specific role in implementation, acting as legal and technical advisers to states.
The effect of the existing arrangements is to enable the citizen to participate indirectly by making known his concerns as an ecologist or hunter. However, this "democratic representativeness" is restricted to the interests represented by the NGOs and dependent on their ability to make themselves heard and influence the decision-making process.

CHARNOVITZ (Steve), "Two Centuries of Participation: NGO's and International Governance, *Michigan Journal of International Law,* vol.18 (2), 1997, pp.183-286

A complete history of the involvement of NGOs in international governance since the l8th century and the evolution of that involvement

I.3.
p.185
The author asks what are NGOs.

I.2.b.
NGOs do not have international legal personality.

p.189
The author recounts the history of NGO involvement in international governance (since the 18th century), three sources of inspiration (abolition of the slave trade; pursuit of peace; solidarity).

p.206-208
Involvement of NGOs in environmental matters in the 19th century.

Period of engagement of NGOs: 1919-1934: governments allow NGOs to participate in intergovernmental meetings and international agencies, p.235.
NGO involvement at the beginning of the 20th century via the League of Nations, pp.239-241.
NGO involvement outside the League of Nations, in environmental matters.

Period from 1935 to 1944, p.246:
The role of the NGOs is limited.

Period from 1945 to 1949: formalization of relations with NGOs, in particular through Article 71 of the United Nations Charter.

Period from 1972 to 1991: intensification of the role of NGOs.

Period from 1992 to ?: empowerment of NGOs beginning with the preparation of the 1992 Rio Summit, p.265.

NGOs became more active than before (recognition of global problems leading to intergovernmental negotiations; end of the cold war; emergence of worldwide media; raised expectations about the transparency of international organizations and public participation).

Place of NGOs in ECOSOC (Economic and Social Council), which has three categories for NGO status.

I.1.
p.268

The debate today is whether NGOs should be playing a more extensive role and, if so, how to structure it to improve global governance.

The author considers that the impact of NGOs is cyclical and depends on two variables (the place of NGOs in intergovernmental meetings and their influence on governments); moreover, a theory of NGO involvement can be based on the needs of governments and the capability of NGOs to respond to those needs.

Aims of NGO involvement:

NGO involvement can be described in terms of seven functions:

- intelligence function: involves the gathering, analysis and dissemination of information relevant to decision-making;
- promotion function: advocacy of policy alternatives to decision-makers (particularly on the environment and social development);
- prescription function for the designation of policies;
- invocation function;
- application function;
- termination function: putting an end to prescriptions that do not contribute to the common interest;
- appraising function: for evaluating the degree of achievement of the policies of an international system.

The benefits of the NGO role and the problems it raises.

Benefits:

- technical expertise on particular topics for governments;
- facilitate negotiations by giving access to ideas from outside normal bureaucratic channels;
- help governments test controversial proposals by providing rapid feedback;
- help governments secure ratification or implementation of new treaties;
- vocalize the interests of persons not well represented in policymaking;
- be fiduciaries for future generations;
- enhance the accountability of international organizations;
- enhance the accountability of governments by monitoring negotiating efforts (reach compromises);
- strengthen international agreements by monitoring governmental compliance;
- improve the behaviour of NGOs by giving them a greater stake in policymaking.

Problems:

- the number of NGOs makes deeper participation impractical: this could be tackled by electing NGOs, but this raises problems of how to weight votes. NGOs are banding together (e.g. the European Environment Bureau);
- the NGOs (mainly from the North) may not reflect the views of the countries of the South;
- for some the participation of NGOs is unnecessary since they can exert influence through their own governments.

Span of NGO involvement (p.278)

II and IV
Techniques of NGO involvement (p.280)

- an individual from an NGO can be included on a government delegation to an international conference;
- an individual from an NGO can be included on a national delegation to an international conference (to represent the NGO);
- NGOs can send delegates;
- an international organization can establish a formal advisory group that includes individuals from NGOs (chosen for their expertise);
- an international organization can give NGOs an opportunity to participate in ongoing policy development;
- an international organization can enlist NGOs in the implementation of programmes;
- an international organization can give NGOs an opportunity to participate in an international conference to draft a convention/treaty;
- an international organization can give NGOs an opportunity to participate on a preparatory committee for an international conference;
- an international organization can hold a special session to give NGOs an opportunity to make presentations;
- an international organization can include NGOs as members (e.g., International Bureau of Education, International Commission for Scientific Exploration of the Mediterranean Sea).

Today, much NGO activity at intergovernmental conferences is unofficial and informal.

The challenge is now to structure NGO involvement so as to optimize the benefits for IOs. We need continuous experimentation with new methods.

IV.3

The most intensive form of participation (full voting rights) (as in the ILO) is unlikely to be replicated in the near future.

Ccl :

For the author, past experience needs to be taken into account in order to improve NGO involvement in the international debate.

CHARNOVITZ (Steve), "Nongovernmental organizations and international law",
***American Journal of International Law,* vol.100(2), 2006, pp.348-372**

p.354
II.2.d.

NGO participation in monitoring and state compliance mechanisms.

I.2.b.
p.355

Legal personality of NGOs. NGOs have legal personality in domestic law but not in international law.
(As early as 1910, consideration began to be given to an international convention to grant legal personality to NGOs) (work of the Institut de droit international and the International Law Association) (these early efforts were ambitious). The lack of international legal status for NGOs remains a problem, but not an insuperable one:

- granting legal personality to NGOs might help prevent interstate conflicts;
- on the other hand, states have worried that granting legal personality to NGOs might reduce control over them and NGOs that such recognition might entail a loss of autonomy.

I.3.
p.357 NGOs as consultation partners:

In the absence of international NGO Law, Article 71 of the UN Charter has served *de facto* as a charter for NGO activities.
The work of the committee that grants and reviews accreditation of NGOs has been criticized for overpoliticization and lack of due process. At present, no judicial review is available for a refusal by ECOSOC to grant an NGO consultative status.

The Article 71 procedure has influenced institutional developments outside the UN (e.g., the Organization of American States adopted guidelines for the participation of civil society organizations in OAS activities; in 2001, the Constitutive Act of the African Union called for the establishment of an advisory Economic, Social and Cultural Council composed of different social and professional groups of the member states; Antarctic Treaty).

I.
p.360

There is general acknowledgement of the importance of NGOs to developments in international law. With the rise of NGOs in international policymaking, writers have seen the increasing tensions between reality and international law orthodoxy.

Judge Higgins: "The reformation in international law"

The reformation of international law extends to both content and process. The expanded content of international law has been stimulated by NGOs, particularly in human rights, humanitarian and environmental law. NGOs helped to transform the processes of international law as they learned how to mobilize states and public opinion.

p.361
What made international law susceptible to being influenced by NGOs?:

- NGOs are independent and not burdened with the need to champion a national or government interest;
- they have the ability to construct and encourage new norms for an interdependent world;
- NGOs are dynamic and creative; their competition with other actors is important to the implementation of international law (Ranjeva);
- they have gained advantage through innovation and adaptation (use of the Internet);
- although the NGOs challenge the state-centricity of international law, that does not necessarily translate into a challenge to the state; actually, it is more likely to strengthen states when new norms are promoted by NGOs;
- why governments give access to NGOs in IOs: there are rational explanations (expertise, etc.);
- some analysts have compared IOs and NGOs, since both are non-state actors pursuing international goals (however, there are differences: the IOs are an arena where governmental and nongovernmental participants compete).

p.363
The legitimacy of NGOs.

I.3. and II
p.368

Toward a duty to consult NGOs?

The practice of consulting with NGOs is widespread. Only a few multilateral agencies continue to resist adopting an NGO consultation process:

- WTO;
- the International Law Commission does not provide opportunities for NGO consultation.

A review of specialized treaties shows an incorporation of NGO consultation processes, but the treaties typically do not enthrone a duty. Aside from the ILO, the usual practice in international regimes is that participation of NGOs is permissive rather than mandatory.

There is one important exception: the environment regime has given NGO participation “legal mooring”. Several MEAs call for the automatic admission of NGO observers (CITES was the first; ….Agenda 21)

One objection to this duty to consult is that there is not yet a binding international norm obliging states to consult with NGOs in domestic (legislative, executive, or judicial) decision-making. That would be an argument, on the assumption that a norm regarding the international level must move up from the national level. Yet that assumption may be unjustified.

Several commentators have suggested that decision-makers have an obligation to provide consultative opportunities for private groups or have contended that NGOs have a right to render advice.

CORELL (Elizabeth), BETSILL (Michele M.), "A Comparative Look at NGO Influence in International Environmental Negotiations: Desertification and Climate Change", *Global Environmental Politics,* Vol. 1(4), 2001, pp.86-107

The authors have established a framework for analyzing the influence of NGOs in international environmental negotiations. Seven types of indicators:

- the NGOs are present at the negotiations;
- they provide written information supporting their position;
- they provide verbal information supporting a particular position;
- they provide specific advice to delegations;
- they can define the issue under negotiation;
- they can shape the negotiating agenda;
- they are able to ensure that particular positions are incorporated in the text.

VI.1 and II.2.b.

The authors apply this framework to the negotiation of two conventions:

- Desertification Convention;
- Kyoto Protocol.

NGO participation:

- mainly African NGOs for the Desertification Convention;
- mainly Northern NGOs for participation in the Kyoto Protocol.

In both cases, they participated in the negotiations by meeting, holding seminars and lobbying delegates; for the Desertification Convention they created their own working and issue groups. The NGOs were also active in between negotiating sessions, holding conferences and creating NGO networks.

Access to negotiations:

- for the Desertification Convention: the NGOs had considerable access to negotiations, they could attend all meetings except those held behind closed doors. The NGOs had the support of the Chairman from the beginning;
- for the Kyoto Protocol, more limited access: the delegates met primarily in closed-door sessions. The NGOs then began cornering delegates in the corridors and even searched trashcans for documents; government delegates called NGOs from inside meetings to get their opinion. In each case, the NGOs possessed know-how the delegates needed. In each case, the NGOs were limited in their financial resources for participation. The convention secretariats were able to help the NGOs, thus allowing them to meet before negotiations.

Effects of NGO influence on negotiations:

The rules and practices governing the relations between actors, within the international institutions, can influence the opportunities of NGOs to participate. There are no set rules governing NGO participation at international level, each international organization responsible for negotiations establishes its rules on an *ad hoc* basis, and there is a great deal of variation among institutions. This affects the ability of NGOs to participate in negotiations (sharp difference between Kyoto Protocol and Desertification Convention negotiations).

DELMAS-MARTY (Mireille), ***Le pluralisme ordonné,*** **Seuil, 2006**
Location: Mr. Prieur's personal library

I.1 Privatization (pp.73-74)

Global legal instruments are fragmented with respect to both universal concepts (human rights, shared heritage of humanity) and responses to globalization (proliferation of environmental bodies, etc.); horizontal fragmentation of organizations (WTO, Kyoto, etc.).

At the same time, with the globalization of financial and information flows, the principal challenge is now privatization, without a common project. Privatization implies a distinction between subjects of public law (states) and subjects of private law who defend their own interests. The new forms of internationalization are gradually drawing private subjects (including NGOs) onto an international stage that is no longer restricted to inter-state relations. However, this process does not have the same significance for all.

The members of civil society are becoming actors on behalf of universalism… as victims of the violation of human rights (and victims of damage to the environment).

Even though the role of NGOs in international law (human rights) may be increasing, the legislative power of civil society is limited to indirect NGO participation, both in the drafting of world standards and in the establishment of judicial or jurisdictional structures.

Inter-solidarity and global citizenship (pp.189 to 194)

The stabilization of the processes of internationalization of the law on a global scale will be pluralist only if it succeeds in vertically articulating the regional and world levels and, at horizontal level, in moving beyond fragmentation and privatization so as to reconcile universalism and globalization. Horizontal stabilization implies the adoption of standards and institutions in relation with the universalism of values. The recognition of world public goods would be a step in the right direction. What is needed is a project built on a principle of inter-solidarity which would have the legal effect of committing not only States and international organizations but also private actors, enterprises and NGOs. This would involve encouraging the development of representative institutions at international and regional levels and promoting the emergence of global citizenship.

EPINEY (Astrid), "The Role of NGOs in the Process of Ensuring Compliance with MEAs", pp.319-352 in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*/ ed. Beyerlin, Stoll, Wolfrum, Leiden/Boston, Martinus Nijhoff Publishers, 2006, 393p. (Studies on Law of Treaties, Vol.2)
Location: CRIDEAU Droit International FB 23409

II.2.d.
Specific and comprehensive paper on the role of NGOs in compliance mechanisms (the author makes precise proposals).

p.322 Definition of an NGO
Classification of NGOs

p.324 Definition of "compliance mechanisms":
All instruments which apply after the coming into force of MEAs and which tend to assure, to improve or to control the "right" application of MEAs by the Parties, including mechanisms of judicial or quasi-judicial control.

Three types of mechanisms:

- partnership (non-confrontational) compliance mechanisms:
    - compliance assistance: NGOs are involved in various ways: building the capacity of the States Parties (through the UNEP or UNDP or by acting independently); through "Debt for Nature Swaps" where NGOs "buy" a debt from a country which promises to undertake certain measures; the convention may provide for NGO participation in carrying out local implementation projects (cf. Desertification Convention);
    - compliance control:
        specific mechanisms: monitoring is normally entrusted to large NGOs (IUCN), sometimes explicitly mentioned in treaties (TRAFFIC, IUCN, WWF); few MEAs accord an inspection role to NGOs (an exception is CITES with TRAFFIC);
        ad hoc non-compliance procedures (which tend to overcome the lack of compliance);
    - confrontational mechanisms: NGOs play a role in judicial review procedures (before the ICJ: NGOs have indirect access; before the International Tribunal for the Law of the Sea; the Appellate Body of the WTO has admitted *amicus curiae* briefs containing observations by individuals and organizations).

NGOs must benefit from a guarantee that their activities are not obstructed by the State (freedom of association, expression; freedom of information: States must guarantee the right of access of NGOs to information and to justice).

To sum up:
- marginal role of NGOs in international judicial review procedures, but have (limited) opportunities to present observations;
- NGOs play an important role in compliance assistance;

- in compliance control, the independent information given by NGOs is important.

There is no fundamental reason not to include NGOs in the compliance process or not to strengthen their involvement. One limit has to be respected: NGOs may not be made competent to take sanctions against private persons or public institutions; moreover, it seems necessary to define their role in a transparent and detailed way in the MEAs themselves or in the decisions of the COPs: such regulations would guarantee their competence.

It is also necessary for NGOs to fulfil specific conditions for participation: these conditions should be defined on the basis of the role NGOs should play in the framework of the compliance mechanisms.

The role of NGOs in compliance procedures should be strengthened if possible and useful, mainly by involving them in different ways in the procedure itself without conferring on them the power to judge a situation in an exclusive way, so that they do not have coercive competencies.

The systematic and formalized integration of NGOs should be developed, as far as this makes sense for the mechanisms concerned. Every formalized participation of NGOs in compliance mechanisms must try to guarantee that NGOs can fulfil the role they are intended to play: need for a system of accreditation (with the possibility of withdrawal) to control the fulfilment of these conditions (the author lists the criteria that NGOs should fulfil: expertise; transparency of financial and administrative organization, respect for the procedural rules laid down in the MEA).

Proposals:

- MEAs or the decisions of COPs should contain an obligation to have recourse to NGOs in the process of capacity building; if the MEA involves the realization of national or local projects, they should also mention the obligation to have recourse to NGOs.
- State reports should be systematically published, and NGOs should have the possibility to formulate observations in a formalized procedure. International bodies entrusted with the control of these reports should have the obligation to consider these observations, as well as those of states.
- With regard to monitoring, no general answer since it depends on several factors (the monitoring mechanism, the existence of strong NGOs to implement it).
- The strengthening of the role of NGOs in inspections depends very largely on whether inspections should be introduced in MEAs: a general principle can hardly be developed here.
- As far as *ad hoc* non-compliance procedures are included in MEAs, the role of NGOs should be strengthened. It would be necessary to introduce a formalized procedure in which observations of NGOs are considered (publication of the NGOs' observations and the obligation for international bodies and treaty parties to take a position on their content) (e.g., 2002 Convention on the Protection of the Alps: NGOs may participate (under certain conditions of confidentiality) in the controlling mechanisms concerning implementation and enforcement of the Convention).
- NGOs should be entitled to trigger the non-compliance procedure (as in human rights and labour law) (a political rather than a conceptual question) (the author proposes the establishment of an accreditation system).

- In general, NGOs (after accreditation) should be admitted to the COPs and have access to relevant documents, should have the right to intervene in deliberations and the right to submit written observations. This would involve access for NGOs to steering committees entrusted with the discussion of State reports and different measures of compliance control. As for the confidentiality of such meetings (which must be taken seriously), that would require appropriate provisions in the rules of procedure.
- If judicial control is foreseen, it would be useful to introduce a formalized possibility for NGOs to take a position on the issue.

There are numerous compliance regimes deriving from the various MEAs which differ in terms of their structure and details. It often lies in the competence of States to exclude NGOs from participation in certain procedures. This raises the question of whether to develop a general code for compliance mechanisms. Such a code could include a sort of “admission procedure” for NGOs which should ensure their competence and that they really pursue the objective of environmental protection. it might be objected that this general code could not take the differences between MEAs and obligations of international environmental law into account. However, the advantages of such a general formulation would be considerable: one could arrive at a categorization of different possible procedures, thus permitting an adaptation to the characteristics of each MEA. The author even proposes the drafting, at a later stage, of a convention that could be included in every MEA, while adapting the procedures to the specific features of each individual MEA. It should include the following points:

- the principle of access of NGOs to official documents;
- the different compliance mechanism;
- the institutional structure of compliance mechanisms;
- minimum standards for the participation of NGOs in compliance and enforcement;
- variants which present more expansive rights for NGOs;
- accreditation conditions and procedure for NGOs.

The conclusion of such a convention would be a step towards the recognition of a partial status of NGOs as subjects of international law

FRENCH (Hilary), "The role of non-state actors", pp.251-258, in *Greening International Institutions*/ ed. Jacob Werksman, London, Earthscan, 334p. 1996
Location: Bibliothèque FNSP 80 194.588

II.

Despite the recent growth in non-governmental interaction with the United Nations system, there are no provisions for public participation comparable to those existing at the national level in democracies, nor an elected parliament in the United Nations or other organizations.

There are no formal provisions for public review and comment on international treaties. International negotiations are often closed to the public and access to documents of critical interest is highly restricted.

The growing role of NGOs in international fora is raising difficulties of accountability, since NGOs cannot claim legitimacy conferred by the ballot box.

National NGOs can indirectly influence the positions of their governments at the international level, by enabling them to establish priorities.

I.4.f.
NGOs are organizing themselves into international coalitions which are transforming NGOs into representatives of global rather than parochial interests.

NGOs derive their influence in the international arena from a number of factors. They play the role of "information brokers". Daily newsletters produced by NGOs may reveal failures in negotiations and prevent the obscure language of international diplomacy from shielding governments from accountability (cf. the Earth Negotiations Bulletin).

II. 1.b.2.
Bretton Woods institutions:

New World Bank policies in 1993: more documents made publicly available and an information centre established (inspection panel also created).

To date (1996), the involvement of NGOs in the making of international environmental policy has been a largely *ad hoc* process. In the future, a more formalized role for NGOs seems inevitable.

Proposals:
- hold public hearings at international level;
- involve NGOs systematically in international organizations (cf. ILO);
- create a new assembly within the United Nations where the views of the people of the world could be more directly represented (cf. European Parliament). A more feasible alternative might be to create an assembly composed of representatives of national parliaments.

GEMMILL (Barbara), BAMIDELU-IZU (Abimbola), "The role of NGO and civil society in global environmental governance" in *Global Environmental Governance, Options and Opportunities*/ (ed.) Daniel C. Esty and Maria H. Ivanova, Yale School of Forestry and Environmental Studies, 2002
Location: Internet

I. 1

The UN is the organization that has most fully recognized the need for collaboration with the nongovernmental sector, in particular since 1992 on the environment. Chapter 27 of Agenda 21 makes it a condition of sustainable development.

New forms of NGO participation have changed the nature of international environmental policymaking. NGO involvement in environmental governance can take a variety of forms:

- expert advice and analysis from outside normal bureaucratic channels;
- intellectual competition to governments: NGOs have better skills and a capacity to respond more quickly than officials;
- mobilization of public opinion through campaigns;
- representation of the voiceless;
- operational services: NGOs can deliver technical expertise and carry out operational activities;
- monitoring and assessment: NGOs can help monitor compliance with conventions;
- legitimization of global-scale decision-making mechanisms: NGOs can improve the quality, authoritativeness and legitimacy of international public decisions.

I. 4 Future roles to be strengthened for NGOs:

1. information collection, dissemination and analysis both in the convention negotiating phases and the implementation phases at COPs;
2. initiatives in agenda-setting (for example, forestry in the 1980s) and participation in policy development: for that guidelines need to be established for the process of participation of NGOs in international bodies by clearly defining the rights and responsibilities of each;
3. engagement of NGOs as operational partners since they can do what governments cannot or will not do (for example, at local level for the management of natural resources);
4. assessment and monitoring;
5. defence of the environment in international dispute settlement: by improving the opportunities for the intervention of "friends of the court".

The acceptance of *ad hoc* and informal NGO participation should be replaced by institutional arrangements within the various international organizations.

VI Rapid presentation of three case studies:

- Crucible Group: established in 1993 to discuss the control of agricultural genetic resources (see www.idrc.ca/books/725.html);
- Global Environment Outlook participates in the assessment of the state of the global environment;
- TRAFFIC is an NGO responsible for monitoring the implementation of the CITES Convention.

GERTLER (Nicholas), MILHOLLIN (Elliott), "Public participation and access to justice in the world trade organization", pp.193-202 in *The New "Public". The Globalization of Public Participation*/ ed. Carl Bruch, Environmental Law Institute, Washington, DC, 2002, 261p.
Location: Internet

II.1.b.2. and VI.2.
Specific paper on public participation and access to information at the WTO.
WTO Guidelines for Arrangements on Relations with NGOs, 18 July 1996, Doc. WT/L/162.

III.
Access to information: (p.195)

- publication of WTO documents: the WTO is seeking to enhance the speed and extent of access to documents. While some documents are made public immediately upon adoption, other, internal, documents are restricted. In 1996, the WTO decided that its documents would become "derestricted" and available to the public, including through the Internet, but the procedure was cumbersome and slow.

In 2002, WTO members agreed on new procedures for the derestriction of documents. ("*Procedures for the Circulation and Derestriction of WTO Documents", WT/L/452, 16 May 2002).* The default assumption is that all WTO documents are unrestricted, but any WTO member still may submit a document as restricted.

- participation in symposia;
- publication of trade policy reviews.

IV.
Public participation:

- NGO participation in WTO policymaking remains largely at the national level, with the exception of Ministerial Conferences where NGOs can gain accreditation to participate.

Public participation in dispute settlement:

- access to information:

Non-WTO members (NGOs, business interests, private individuals, the general public and non-member states) have no right to participate in the settlement of disputes, nor to initiate proceedings. Moreover, these proceedings are confidential (unless a state party to the dispute chooses to make its written submissions public). The results are also confidential until the final decision binding the parties to the dispute.

- public participation in dispute settlement proceedings: non-members may not participate in dispute settlement; however, this poses problems for economic sectors whose interests might be harmed and for environmental groups wishing to protect their interests and draw attention to the impact of trade -related decisions on the environment or sustainable development.

Changes are being made: the Appellate Body has allowed non-member parties to submit *amicus curiae* briefs (however, panels and the Appellate Body have discretionary authority to ignore them). (Some countries (such as India) oppose the extension of *amicus curiae* briefs since they believe it would advantage the wealthy NGOs from developed nations).

GRIMEAUD (David), "Le droit international et la participation des organisations non gouvernementales à l'élaboration du droit de l'environnement : une participation en voie de formalisation? pp.87-167 in *La protection de l'environnement au cœur du système juridique international et du droit interne. Acteurs, valeurs et efficacité*/ eds. Michel Pâques and Michaël Faure, Proc. Conf. of 19 and 20 October 2001, University of Liege, Brussels, Bruylant, 2003, 482p.
Location: CRIDEAU Droit International FB 21280

Complete article taking stock of NGO participation at international level.

The spread of international environmental conventions has not been accompanied by a really conspicuous improvement in the environment, since the texts adopted generally reflect the lowest common denominator among states. Thus, NGO participation in international conventions can make an important contribution to improving environmental protection and come to the aid of environmental law.

IV.1
p.95
It is necessary to adopt suitable representativeness criteria in order to defend the interests of the greatest number. "It would be inappropriate for participation to be taken over by one or more powerful NGOs which then became the only ones entitled to be consulted by a particular international institution". Need for a fair distribution of all interests. Many NGOs establish networks within which they define common positions.

I.1.
NGO participation would help to optimize decision-making. Makes it possible to promote the more effective introduction of norms and standards (since private-actor NGOs will have had an opportunity to influence the form and content of the policy or text).

IV.3.
For NGOs to be able to participate effectively, they must be informed of the progress of the negotiations and allocated a space within which they can express opinions, support positions and provide feedback for the decision-makers.

IV.1
A fair geographical distribution must also be ensured (the NGOs which are to participate should represent the full range of interests present, including specific local interests in terms of development and environmental conditions).

II.2.d.
p.132 Need for international judicial remedies for NGOs:
If there is no possibility of a judicial remedy, then at the very least NGOs should be allowed to participate in the preparation and/or review of the reports which governments are often required to present concerning the measures they have taken to implement conventions and their outcome. In this case, the NGOs could provide information concerning instances of non-compliance and help to bring proceedings against states.

I.2.a

p.136
One obstacle to the formalization of the role of the non-governmental actors is the very nature of international law itself, which is based on the concept of national sovereignty. The exclusion of the NGOs is,, for some, precisely one of the reasons for the ineffectiveness of international law. The environment is a common concern of humanity as a whole, including individuals and groups. They must therefore be reintroduced into international negotiations if conventions are to be implemented in the field.

I. 2 b
Non-governmental actors must be granted international legal personality by being accorded the status of legal guardian of environmental rights. Paragraph 6 of the Hague Declaration of 11 March 1989 calls for the development of new principles, including decision-making and enforcement mechanisms.

Moreover, the granting of legal personality to actors other than the state raises the question of representativeness. The votes allocated to NGOs would have to be fairly distributed. “Who and which interests does a particular NGO represent and to what extent should the opinions formulated be incorporated in the final decisions?”

Again, if NGOs were given the right to vote, it would be necessary to modify the traditional model of “one state, one vote”, as well as to construct a suitable model for distributing that right equitably among thousands of NGOs. If the monopoly on representation enjoyed by states were left intact, then at the very least, in the spirit of Aarhus, NGOs should be accorded a consultation role at international level.

I. 3
NGO participation is based on precarious, *ad hoc* and often informal foundations. The NGOs played a genuinely important role at the beginning of environmental politics when states were not yet equipped with environmental administrations. The exclusivity of the NGOs in terms of environmental know-how and expertise has decreased. However, UNCTAD and Agenda 21 have strengthened the future role of NGOs by requiring an adjustment of the traditional model (cf. Chapters 27 and 38 of Agenda 21). They must now participate directly and no longer indirectly in policy design, decision-making, implementation and enforcement and follow-up, although the modalities have still to be established.

Chapters 27 and 38 of Agenda 21: These chapters indicate the need to institute procedures which, *inter alia*, enable NGOs to participate directly in “policy design”, “decision-making”, and the “implementation and evaluation” of the activities undertaken by each UN body and international organization, through broad access to information and the adoption of accreditation procedures based on those applied at UNCTAD.

In the absence of a binding and detailed international text, such as the Aarhus Convention, the nature and degree of NGO participation is likely to continue to develop in an *ad hoc* and differentiated manner depending on the instrument, convention or international institution. Problem of the balance between national sovereignty and participation.

VI.2
NGO participation in the UN system, including the Commission on Sustainable Development (CSD) and ECOSOC.

Resolution 1296 of 23 May 1968, adopted under article 71 of the UN Charter.
Resolution amended by Resolution 1996/31 of 25 July 1996, to take account of Agenda 21 (Chapters 27(9) and 38 (44)).
Concerning the CSD, Decision 1993/215 of 12 February 1993 for permitting the effective participation of the main groups.

Within the context of ECOSOC and the CSD, only NGOs with advisory status can propose a question in which they are interested for inclusion in the provisional agenda of the Council or the CSD. Accredited NGOs can submit a written communication relating to one of the items on the agenda of the Council or the CSD. NGOs may be invited to make an oral statement in the meeting by the Council or the CSD or by a subsidiary body.

The provisions adopted by ECOSOC are aimed at officializing and organizing the expert advisory role of NGOs within the UN system, but they do not establish a right to participate effectively.

Participation under international conventions:

- II.2.b and II.1.b.3: NGOs as partners: NGOs may be at the origin of an international convention (CITES, Ramsar). They then find themselves very much involved in the review and follow-up process, providing the secretariats concerned and states parties with technical reports so that the latter can revise the texts.
- non-partner NGOs:
    - II.2.b: in general, NGOs have the opportunity to be present at negotiations as observers (this also enables them to set up parallel fora, circulate documents and try to influence the decision-makers), but lack the right to vote;
    - III.: access to information, in particular, access to documents relating to the convention, to meetings of the parties and their proposals (in general, a great deal of information): example - the Internet site of the Climate Convention;
    - IV.3: to what meetings does observer status give access? This varies with the convention and its rules of procedure. Some conventions only allow NGOs to participate in plenary sessions (e.g., UNCLOS). In this case, NGOs only have access to the results of the negotiations;
    - IV.3.: even if NGOs have access to some meetings, they may not be able to influence the agenda (in general, only states can amend it, unless the NGOs can influence governments and discussions informally through oral or written communications).

IV.
Non-governmental actors mostly find themselves restricted to “exerting informal and unofficial pressure on the decision-makers by circulating information and technical reports, by establishing contacts with national representatives and the media, and by mobilizing public opinion” (p.157).

II.2.d and IV
p.157

Third aspect of public participation: ensuring that the international obligations entered into by states are fulfilled:

- draw attention to violations (examine, monitor and report on the actions (or inaction) of states in connection with the fulfilment of international environmental obligations (role of secretariats, but lack of personnel and variable quality of national reports). Therefore NGOs should play an important role and arrangements should be made for NGOs to provide official support for convention secretariats by submitting information, reports and complaints.

With regard to the formulation of official objections to failures by states to fulfil their obligations, most conventions reserve this activity to COPs. It is the states parties (through meetings of the parties) that are allowed to formulate recommendations specifying the violations concerned and the measures to be taken: "it appears that the role of NGOs in connection with the monitoring, review and treatment of possible cases of non-compliance by a party with obligations entered into under an international convention is confined, within the framework of the treaties, to the exertion of informal pressure".

- NGOs may sue to have cases of non-compliance with international obligations recognized and sanctioned. Under the WTO's dispute settlement mechanism, NGOs may intervene indirectly, by commenting on written reports or providing technical opinions.

KRUT (Rita), *Globalization and civil society: NGO influence in international decision-making,* UNRISD, 1997, 61 p.

Document based on the literature and a survey of NGOs.

p.13 Table of acronyms for the different kinds of NGOs.

p.28 NGO access to UN decision-making and global conferences.

II.2.b
There are several stages at which NGOs may intervene:

- NGOs can make their views known to their national representatives when pre-conference briefing papers are being circulated to countries (papers on which countries may comment before or during the conference);
- once countries have commented on these papers, they are redrafted and presented to preparatory committees ("prepcoms") which may include opportunities for NGOs to present their views.

IV.
While the door at the UN may now be open wider than before, there are more NGOs clamouring to get in. However, the doorway is too narrow to allow everyone in (the UN still allows only partial integration): (accredited NGOs, NGOs invited to participate in expert meetings, NGOs funded to support UN activities, NGOs used to deliver UN system technical assistance services). While these initiatives are no doubt integrating NGOs into the UN process, they may also create power struggles within the NGO community (between those with access and those without).

IV.1.
NGO access to the UN has always been uneven, depending on who is able to conform with the existing rules of access and who is not. Northern NGOs may have been favoured because they are located closer to the organizations and able to attend international meetings.

Some access problems can be resolved at national level (particularly when a government denies visas to certain NGOs wishing to participate in an international conference taking place on its territory).

II. 1.a.
The rules for each international conference are designed afresh and the decision to build on or reverse decisions made in previous conferences lies with the prepcom leadership and with individual governments. (Table of perceived restrictions on NGO access to intergovernmental conferences) (p.30).

II.1.b.2. and VI
Examples of open organizations:

- OECD: Ministers have recommended to the OECD Council that a permanent Environmental Non-Governmental Advisory Committee be established (to strengthen the role of NGOs within the OECD and increase the status of environmental issues);

- World Bank: access to information at the WB has been improved through a public information centre and the availability of some documents on the Internet.

Examples of closed-door international fora:

- WTO: the setting of trade standards is discussed in “green room consultations”, a deliberation process to which participants (diplomats) must be formally invited;
- 1996: adoption of “Guidelines for Arrangements on Relations with NGOs”.
- International Standards Organization (ISO): the ISO process restricts NGO access for both economic and procedural reasons.

UN strategies:

- participation of NGOs on government delegations (p.40);
- NGOs are interested not only in official conferences but also in events organized by NGOs (which have now become institutionalized within the framework of UN conferences);
- monitoring, implementation and follow-up of conferences (much needed but inadequately pursued);
- partnerships with intergovernmental agencies.

Beyond the UN: application of legal regimes:

- access to tribunals;
- codes of conduct;
- court actions.

MARAGIA (Bosire), "Almost there: Another way of conceptualizing and explaining NGOs' quest for legitimacy in global politics", *Non-State Actors and International Law*, Vol.2, 2002, pp.301-332.

I.2.b.
Paper in favour of recognizing the legal personality of NGOs at international level.

pp.305-306
Participation in the world system is rooted in the dual pillars of legitimacy and authority. (Only legitimate authority may command obedience, legitimacy provides justification for exercising authority)
(The author distinguishes between "sites of authority" and "sources of legitimacy")

I.2.b and I.3
This paper argues that today NGOs may be regarded as legal or legitimate actors if we understand global change as constituting shifts in sites of authority as well as corresponding shifts in sources of legitimacy.

There are no rules and procedures for attaining international legal personality. States' continued acquiescence of NGOs as partners could be interpreted as tacit conferment of legal personality on NGOs. Moreover, this legal personality could be consistent with customary international law, p.308.

Legitimacy means justified authority (cf. Bodansky, 1999).

Because NGOs play an important role in the promulgation and enforcement of international norms, their legitimacy is as important as the legitimacy of any other international actors (since states follow these rules heavily influenced by NGOs) (p.313).
Cullen and Morrow: "*rather than challenging the right of NGOs to participate in the development and implementation of international instruments, it would be far more productive to consider ways in which their representativity and accountability could be ensured*".

Attacking the legitimacy of NGOs constitutes an attack on the system itself. It is inconsistent (with international legal theory) to recognize the role of NGOs in international law, on the one hand, yet not grant them legal personality, on the other.

Arguments in favour of recognizing the international legal personality of NGOs:
- the international context has changed, there are multiples sites of authority and state consent alone is no longer relevant (discrepancy between theory, which does not accord NGOs legal recognition, and practice, where NGOs play a significant role) (p.318);
- NGOs may be regarded as legal persons even if legal personality is assumed to be contingent on state consent:
    - the increasing role of NGOs in environmental and human rights areas (negotiations, implementation, lobbying, etc.)…. is evidence of their legitimacy; despite the lack of legal personality they have pursued their agendas globally, building on their domestic legitimacy (p.325);

- moreover, NGOs have been recognized in international instruments (evidence of an emerging practice toward their official recognition as legitimate actors) (e.g., Article 71 of the UN Charter) and they have been given rights in certain areas (p.327). Because NGOs cannot be isolated from international norm-making without calling the validity and legitimacy of international law into question, they should be regarded as legitimate international actors clothed with legal personality, with the corresponding rights and obligations, including the ability to sue or to be sued for infractions of international rules (p.330); NGOs play an important role in the enforcement of international environmental law (CITES, Montreal Protocol, World Heritage Convention);
- finally, States co-opt NGOs as partners (p.331).

These three pieces of evidence provide support for recognition of the legitimacy of NGOs, consistent with customary international law.

The position of the NGOs is ambiguous: they do not possess international legal personality and are therefore not subjects of international law. Yet they play a salient role in global politics, demonstrating a disjuncture between the rules of international law and international practice. They should be recognized as legal persons. This would make them more effective while enabling the international community to hold them accountable for what they do.

PALLEMAERTS (Marc), MOREAU (Marlène), ***Le rôle des parties prenantes dans la gouvernance internationale de l'environnement,*** **Report for IDRI, Nov. 2004, 45p.**

Study of the role of stakeholders in international environmental governance based on the Cardoso Report (UN, 2004). Recommends the express recognition of most stakeholders.

Chapter 27 of Agenda 21 stresses the independence of NGOs: "independence is a major attribute of non-governmental organizations and is the precondition of real participation". The main criteria for being an NGO are:

- private foundation;
- independence criterion;
- grassroots organization;
- non-profit, in the general international interest;
- support of international organization;
- expertise.

Role of NGOs:

- to sound the alarm and liaise between the scientific community, public opinion and governments;
- to provide expertise and support for governments; propose new and original ideas;
- to legitimize: representative of a new transnational civil society, highlight problems;
- to raise awareness, educate and inform;
- to contribute to the production of norms;
- to contribute to policy implementation;
- to contribute to assessment and follow-up.

I.2. Criticisms:
Unrepresentative, underrepresentation of the South, operating methods, duplication of effort, rivalries between NGOs.

II. 1.b
Review of the practices of international organizations:

- within the General Assembly, at the Stockholm, Rio and Johannesburg Conferences, the practice of ECOSOC and its subsidiary bodies. The Cardoso report proposes that all the existing UN accreditation procedures be combined into a single mechanism to be placed under the authority of the General Assembly;
- UNEP;
- the specialized agencies: ILO, UNESCO, FAO, WHO;
- other organizations: OAS, Council of Europe, WTO.

II. b
The practice of universal and regional multilateral environmental conventions.

I. 3. Proposals:

- create an advisory council on which NGOs would be represented;
- organize participation in specific conferences;
- develop access for the public at large, not just NGOs, to meetings and documents;
- simplify and depoliticize accreditation procedures and base them on a series of objective and uniform criteria. Among the latter, stress on the transparency of the interests represented (sources of funding, composition of bodies) and public accountability.

***Participation of non-governmental organisations in international environmental governance: legal basis and practical experience, on behalf of the Umweltbundesamt, Final Report/* Ecologic (Oberthur, Buck, Müller, Pfahl, Tarasofsky) –FIELD (Werksman, Palmer), June 2002, 285p.**
Paper copy downloaded from Internet

Objective of the report: make practical suggestions for improving the contribution of NGOs to the effective formulation of international environmental governance policies.

Complete dossier taking stock of the various arrangements for NGO participation in environmental issues and in bodies that are not specialized in the environment but have an impact.

p.26
Summary table of NGO definitions and criteria by organization or convention (ECOSOC, UNCTAD, Biological Diversity Convention, etc.).
The authors also attempt to classify NGOs.

p.52
Summary table of functions, activities and channels of influence of NGOs in international environmental cooperation.

pp.53-115
NGO participation in the relevant international institutions (the authors review the various arrangements for participation and access to information):
- multilateral environmental agreements (participation through accreditation, observer status, access to formal and informal meetings, etc.);
- international economic institutions (OECD, WTO, ISO, IMF, WIPO, ILO, NAFTA).

pp.117-203
Case study of two environmental conventions and two organizations:
- Climate Change Convention;
- CITES;
- International Standards Organization;
- World Bank.

p.245
I.3. ; II ; III ; IV ; V
Recommendations :
NGO participation in international environmental governance has derived primarily from informal practice rather than explicit rules (advantages: flexible, but risk of erosion in the future). Formalization of the rules governing NGO participation could provide insurance against any such weakening. The formal codification and extension of best practice from certain regimes could enhance possibilities for participation where current practice is deficient.

Further formalization of the rules governing NGO participation in international institutions relevant to the environment should therefore be considered. Such formalization might best be done by developing minimum standards in the form of decisions, through the adoption of guidelines or revisions to rules of procedure. This might be preferable to treaty amendments.

- accreditation and access to information:

- as a general rule, all NGOs qualified in relevant matters should be entitled to accreditation in any international institution involved in environmental governance (including economic institutions);
- there is no urgent need to introduce further requirements (public accountability, internal structure, etc.) as preconditions for NGO accreditation;
- application of an accreditation fee would discourage participation and restrict transparency. It should only be considered where NGO participation places an unacceptable burden on available resources (the system should reflect the differentiated capabilities of NGOs);
- general rule: all NGOs and the public at large should have access to all information that feeds into the decision-making process. Limited exceptions might be justifiable but the criteria must be clearly defined (confidentiality);
- the international institutions should publicize their activities;

- access to meetings and active participation:
  - as a general rule, NGOs should be granted access to all relevant meetings, and should be entitled to distribute documents and intervene in official discussions;
  - logistical considerations (limitations of space and time) cannot justify the total closure of meetings and prohibition of the possibility of intervening in intergovernmental discussions. Where practical limitations cannot be remedied, means should be devised to allow for the best possible use of NGO contributions;
  - systems of "NGO constituencies" (environment, labour, etc.) might facilitate active participation by NGOs;

- unbalanced representation (between NGOs from North and South; from different constituencies):
  - additional resources for underrepresented NGOs could provide the means of redressing these imbalances;
  - priority should be given to the NGOs most in need;
  - beyond covering costs, it is necessary to analyze the structural causes of this imbalanced representation in the countries of origin;
  - the creation of advisory NGO bodies composed of limited numbers of NGOs would make it possible to coordinate the NGOs and structure their input in decision-making;
  - All NGOs should receive accreditation and equal treatment;

- dispute settlement and implementation review:

Elaboration of explicit rules governing NGO participation raises the question of how to ensure that the rules are followed. Enabling NGOs to trigger a public review of the application of the rules could provide a means of promoting their proper implementation.

- establishment of an implementation review mechanism: (e.g., independent ombudsman for NGOs or a review panel) could promote the proper application of the rules governing NGO participation. Establishing a regular evaluation of rules and practices regarding NGO participation could be a first step towards more encompassing review mechanisms (e.g.: the CITES COP complaints procedure, World Bank inspection panel).

p.257
Summary table of potential problems and proposals for enhancing NGO participation in international environmental policy.

PEEL (Jacqueline), "Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization", ***Colorado Journal of International Environmental Law and Policy,*** **Vol. 12(1), 2001, pp.47-76**

V.4.
p.48
Although states have been willing to allow NGO participation in international negotiations, the international community has been reluctant to grant NGOs the power to intervene in suits to enforce states' obligations. However, recent developments in the ECJ and the WTO's DSB suggest new avenues for NGO participation in dispute settlement.

VI.2 and V.4
pp.50-61 NGO participation in disputes before the ECJ (Article 173 and the Greenpeace case).
Impact of the Aarhus Convention on this procedure.

II.1.b.2. and VI.2
p.61 ff. NGO participation in the WTO and the DSB.

V.4.
The advantages of NGO involvement in international legal proceedings:

- NGOs can conceptualize problems and solutions without taking national interests into account;
- states cannot focus on a single concern such as environmental protection;
- NGOs are more representative of public opinion on environmental issues;
- NGOs are sophisticated international actors with access to a wide range of resources and expertise.

V.4. and II.1.b.2
The drawbacks (pp.72-73):

- environmental NGOs may find it difficult to balance their interests against other concerns such as economic development;
- the interests of Western NGOs will be privileged at the expense of those from the South;
- allowing greater access to environmental NGOs might be unfair to other interests, especially in trade disputes. Environmental NGOs already have significant influence, particularly in the negotiating and decision-making processes;
- if NGOs are afforded greater rights, perhaps the same rights should be afforded to all non-state actors, to ensure that they all have an equal voice in international law. However, excessive participation might overwhelm the structures, and that would be unlikely to lead to more effective representation of the public interest. On the other hand, limiting participatory rights to public-interest NGOs raises the question of how to identify which groups are suitable to participate in decision-making processes.

While the drawbacks of NGO participation may be legitimate, they do not pose insurmountable obstacles. NGOs have much to offer as regards the protection of the environment if granted direct rights of participation in the ECJ, WTO and other international tribunals. The problem of screening NGOs suggests the need for development of a process of accrediting NGOs to ensure and empirical basis for determining their representativeness (of the public interest) and expertise.

The criteria established by ECOSOC could be used in other fora. However, even with this selection process there may still be concerns that only the wealthiest NGOs will be able to take advantage of these rights. (International organizations and tribunals may have to provide funding for the other NGOs.)

RAUSTIALA (Kal), "States, NGOs, and International Environmental Institutions"/ ***International Studies Quarterly,*** **Vol. 41(4), 1997, pp.719-740**

NGOs are playing an increasingly prominent role in international institutions, participating in many activities (negotiation, monitoring, implementation) traditionally reserved to states.

- What roles do NGOs play in the creation and operation of environmental institutions, and how have these roles changed over time?
- What explains the development of their role?
- What is their significance for the evolution of the international states system?

p.720. For the author, NGO inclusion does not come at the expense of state centrality; rather it is to the advantage of states (for others the expansion of NGOs may signal an end or at least a fundamental challenge to the concept of state sovereignty and to the primacy of the state in international law) (cf. Cameron and Mackenzie, 1995)

States have incorporated NGOs because their participation enhances their ability to regulate, in both technocratic and political terms. NGOs provide advice and help monitor commitments and delegations; NGO participation minimizes ratification risk, and facilitates signaling between governments and constituents. By examining the specific forms of participation granted to NGOs, this analysis highlights the services NGOs provide and the bases of their new-found roles. However, neither the effectiveness nor the democratic character of international cooperation is necessarily enhanced by expanded NGO participation. (Raustiala, 1996). Increased NGO participation may also impair regime effectiveness, create policy gridlock and lead to poor outcomes from an environmental perspective.

NGOs are an integral part of the negotiating process and have changed the face of international environmental law (apparent to nearly all observers).

All NGOs interested in participating in UN negotiations (nearly all environmental negotiations) must become formally accredited (cf. Article 71 of the UN Charter). Given the lack of transparency in the accreditation process, it is not surprising that many should have called for its overhaul. While accreditation allows for a limited role for NGOs in the UN process, recent environmental treaties have gone further by formally mandating or permitting NGO participation in their activities (NGOs were rarely granted access in the treaties from before the 1970s; the latest treaties contain expansive rules for NGO participation.)

VI.
Survey of NGO rules in environmental treaties (p.722) (e.g., CITES, Ramsar, NAFTA).

"The inalienable right of NGO access has yet to be accepted as a principle of international law", p.724.

NGO participation remains a privilege granted and mediated by states.

p.726
I.1.
The paramount benefit that NGO participation provides is information (expertise) about policy options (because of the complexity and interactivity of environmental problems; emergence of novel problems, etc.). The quality and quantity of the information vary considerably between the different NGOs. Some NGOs, with professional staffs, produce extensive policy papers (e.g., IUCN, which has helped draft several conventions). The chief result of all this information is that states are enabled to maximize information and research while minimizing expenditures.

II.2.c

Monitoring state commitments (p.728).

NGOs provide an alternate route for information about state behaviour (since the states themselves may not report).

NGOs can also monitor the actions of state delegations during negotiations. In international negotiations, governments want to control the decisions of their delegates. NGO participation is one means by which governments can create “fire alarms” that alert them to undesired delegation actions.

II.2.b.
NGOs provide information on the negotiations (alleviates the problem of multiple working groups and the inability of delegates to keep track of everything that is going on) by issuing bulletins.

II.2.b
By participating in the negotiations, NGOs can learn the positions of the different parties and thus see what is at stake (the bargaining game) (which enables governments to signal to domestic groups and pass the blame for failure or an unsatisfactory outcome to other states).

Anomalies (no provision for NGO participation yet NGOs participate):

- transboundary air pollution regime (despite there being no procedural rule for NGOs, NGOs now participate: informal rules on participation);
- CITES: the anomaly stems from the fact that CITES was negotiated in the 1970s, but provides for NGO participation and many of the best examples of NGO participation come from CITES.

p.733
The innovation of informals and informal-informals is significant. Governments have adapted to the increased presence of NGOs by creating new, flexible fora within which to conduct business. Informal-informals enable delegations to escape from NGO scrutiny when they address delicate issues (which makes sense, since it maximizes benefits while minimizing costs and allows them to retain control over outcomes).
The roles NGOs have played are not randomly determined:

- states have empowered only a subset of NGOs;

- states have clearly restricted and determined the activities of that subset;
- states have introduced diplomatic innovations, such as informal-informals.

For the author, this provides evidence for his claim that the specific forms of NGO participation granted are systematically linked to the specialized resources that NGOs possess.

VI.2.
The example of GEF (pp.734-736):
To gain accreditation NGOs must demonstrate competence and relevance to the work of the GEF.

REINALDA (Bob), "Private in forum, public in purpose: NGOs in international relations theory", pp.11-40 in *Non-State Actors in International Relations*/ ed. Bas Arts, Math Noortmann and Bob Reinalda, Ashgate, 2001, 318p.
Location: BU DAUPHINE 327 NON

I. 1
As international actors NGOs are a longstanding phenomenon dating from the second half of the 19th century.

Distinction between international and national NGOs. International if they include persons from several countries together with nongovernmental members (sometimes states take part, e.g., IUCN). National NGOs may act internationally while representing *a priori* only the national viewpoint of one group. International NGOs increased in number from 110 in 1953 to 631 in 1993. Environmental NGOs accounted for 1.8% of all NGOs in 1953 and 14.3% in 1993.

THE FUNCTIONS OF NGOs:

1. Express pluralism in a democratic society: the aim is not to represent but to contribute to an open system. Functionalism has extended pluralism to international systems by giving NGOs an advisory status (Art. 71 of the Charter) and by paying heed to NGO expertise in international conferences. International pluralism makes it possible to introduce new actors and provide more information. Participation gives NGOs a better understanding of intergovernmental decision-making and helps to get international decisions accepted at national level. It is also a means of contact between international companies and populations (p.19).
2. Express the transnationalism brought to the fore in 1970 by the theory of international relations. NGOs help to formulate and expand the foreign policy agenda, acting like a transmission belt between countries. International organizations and states are strong in authority and weak in legitimacy, whereas NGOs are weak in authority but strong in legitimacy.

According to Williams (1990, p.265), NGOs have the following functions:

1. defence of major public interests;
2. provide expertise and advice in areas of state interest and/or in which the state lacks appropriate information;
3. executive agents for UN agencies;
4. act as PROs for the UN and its agencies.

The NGOs make global governance plural. What is their influence?

- have the right to participate beyond mere consultation, towards partnership;
- influence more indirect than direct;
- artificial nature of the rule: right to speak but not the right to negotiate;
- in 50 years the practice of participation has become an international custom.

Actors of the social movement: NGOs are agents of transformation because they express social tensions and the new ecological social movement in reaction against the state; a collective actor with the power to mobilize the masses. NGOs both serve as the world's conscience and represent specific interests.

REINALDA (Bob), VERBEEK (Bertjan), "Theorising power relations between NGOs, intergovernmental organizations and states", pp.145-160 in *Non-state Actors in International Relations*/ ed. Bas Arts, Math Noortmann and Bob Reinalda, Ashgate, 2001, 318p.
Location: BU DAUPHINE 327 NON

I.1
In international relations NGOs are often regarded as a negligible and inconsequential movement. It is a question of being able to theorize their influence:

1. Theory of the role of NGOs: what is their place in the exercise of power in international relations?
    - Realism and neo-realism: states dominate international relations, NGOs exist but with few powers and little real standing (Morgenthau, 1993, and Bull, 1977).
    - Pluralism incorporates non-state actors considering that in the international system power is dispersed (Brown, 1974). State and non-state actors have equal influence. The authors of pluralism such as Reinalda have theorized about international organizations and multinationals more than about NGOs.
    - Understanding the role of NGOs in IOs thanks to theory of the balance of powers.
    - Role of international "agenda setting" in forcing issues onto the international agenda (Alleyne, 1995).
2. Which NGOs?

The distinction between "profit-making" and "non-profit-making" bodies is not relevant. The definition of the Yearbook of International Organizations is to be preferred: NGOs are bodies not created and not formally controlled by the national government, they are created and managed by citizens. In 1968, ECOSOC accepted NGOs designated by governments to the extent that the state does not interfere with the free expression of NGOs.

3. What is the source of the NGOs' influence?
    1. expertise: makes them the partners of governments and international organizations in policy implementation;
    2. proximity to the target groups of international policies;
    3. ability to influence national policies;
    4. good access to the media for informing the public and other actors;
    5. donor resources;
    6. ability to link up with other NGOs.

NGOs may compete for advisory status. Agreeing to give NGOs a role in international organizations leads necessarily to their incorporation in the international system.

SHELTON (Dinah), "The participation of nongovernmental organizations in international judicial proceedings", *American Journal of international Law*, Oct. 94, vol.88, no.4, pp.611-642

V.
Systematic study of NGOs in international court proceedings.

The International Court of Justice may accept NGO submissions in advisory proceedings. A change in the Rules of Court would be necessary for NGOs to participate in contentious cases. However, even without amending the rules, the Court could permit an NGO to submit information in the form of an expert opinion. NGOs may also ask one of the parties to annex NGO opinions to its submissions without necessarily adopting the views as its own. As the practice of other international courts demonstrates, such information communicated by NGOs could play a significant role in the Court's judgements.

Before the European Court of Justice, NGOs may intervene as *amici curiae*. There is little evidence of the impact of such participation.

Before the European Court of Human Rights, the filing of *amicus curiae* briefs can contribute significantly to the protection of human rights.

Inter-American Court of Human Rights: although the Convention and the rules of court are silent in this respect, this is the international court with the most liberal record of accepting NGO *amicus* briefs. The Court's practice is expansive in the exercise of its contentious jurisdiction, as well as in advisory proceedings. NGOs may even participate in oral hearings.

No state has objected to NGO participation as *amici curiae* in regional tribunals. Judge Jennings considers that it would be timely for the ICJ to accept and develop the submission of *amicus* memorials.

Justice requires that NGOs representing the public interest have the opportunity to submit information and arguments to the international courts. Such participation reinforces the concept of obligations *erga omnes* and can lead to the enhancement of the role of the courts and the long-term development of international law.

SPIRO (Peter J.), "Accounting for NGOs", ***Chicago Journal of International Law,*** **3,1, 2002, pp.161-169**

Questioning of the legitimacy of NGOs and the influence they exert at international level.

Those who resist the assertion of NGO power are perhaps most resistant to their participation in international fora. To the author, this seems to be the wrong answer to the NGO challenge, since wherever power is exercised there is opportunity for abuse.

Full and formal recognition of NGO power in international institutional architectures would make it possible to answer the accountability challenge. Formal NGO participation in international decision-making would have the effect of outing NGO power and advancing a transparency objective. It would also hold NGOs accountable to institutional bargains.

NGOs participate in international negotiations in hallways or through state surrogates. But because their participation is informal, they are free to reject the results. That threatens to keep the international lawmaking process unstable.

There are two types of accountability: internal and external:

- Internal accountability (problem of representation of memberships)

There is no argument against NGO participation in international institutions.

- External accountability

The question here is how to keep NGOs accountable to the system in which they are exercising power. Today, NGOs are independent players in the global system, and yet the system does not recognize them as such. As a result, NGOs comprise a potentially destablizing force. They can use the system to advance their agendas, but are not answerable to the system. They have not been held responsible for their conduct and cannot violate international law. This was fine as long as NGOs remained under the control of another entity which was held responsible for their conduct, but as that control has eroded, NGOs have been able to play the role of policy potentates.

NGOs participate in international standard-setting, by influencing state parties to formal negotiations, through delegation capture. Participation in environmental negotiations is rarely formal, or at least participation is consistent with traditional conceptions of international law under which NGOs have no legal personality.

This lack of standing can work to NGO advantage: because their participation in negotiations is informal, they have no obligation to respect the results. They first work to secure what they can in formal results (conventions), and what they don't get they then try to secure by other means, rejecting the elements of institutional bargains not to their liking. Thus, they enjoy the advantages of participation rights without the downside of having to abide by agreements that will inevitably reflect compromise: this leads to the "inclusion paradox".

States resist enhancing the formal status of NGOs in international decision-making for fear that it will further fuel the rise of |NGOs and threaten the monopoly of states over international lawmaking. But the informal inclusion of non-state actors in international decision-making might act more as a restraint on NGO power than as an accelerant. Major NGOs already have a seat at the negotiating table. Formal and direct participation would not add much to their influence, but it would increase their external accountability. Formal inclusion would also enhance transparency, as well as accountability, among NGOs.

As a matter of international legal doctrine, the upshot would be formal legal personality for non-state actors with the corresponding rights and responsibilities.

Rights would apply primarily in matters of participation: the modalities might be complex and variable. Selecting participants from among an infinite number of eligible NGOs would present one notable question. This appears to have been overcome, for instance, in composing "liaison" committees between non-state and governmental fora: e.g., ILO; certain advisory committees (World Bank, OECD); *amicus curiae* briefs.

On the responsibilities side, symmetrical to rights of participation would be obligations to respect negotiated results. In most cases, it would be difficult to speak of "NGO compliance", insofar as NGO conduct is not the object of regulatory regimes.

External accountability is being innovated outside international law, in particular with the elaboration of codes of conduct (between NGOs and the private sector). But this also raises its own accountability concerns.

Enhanced NGO participation is a necessary condition of the stability of standards established in public institutional contexts. NGOs cannot be forced to participate, but if major institutions extended formal channels for participation, there would be powerful incentives for NGOs to sign on.

The formal inclusion of non-state actors in institutional decision-making will not only advance the accountability of NGOs to the system but will also advance the system itself. Non-state power is a fact of the new world. International law will need to be accountable to that power if it is to emerge as the governor of global affairs into the future.

TAMIOTTI (Ludivine), FINGER (Matthias), "Environmental Organizations: Changing Roles and Functions in Global Politics", ***Global Environmental Politics*****, February 2001, Vol.1(1), pp.56-76**

The environmental organizations perform three functions in international politics:

II.2.b.

- Participation in the international environmental decision-making processes:
    - o before negotiations: thanks to the information collected and the scientific studies carried out, environmental organizations can identify issues and put pressure on governments to negotiate agreements. They play a significant role in stimulating environmental treaties (cf. IUCN);
    - o during negotiations: since the Rio Conference which created a space for NGOs, a number of conferences and international institutions have introduced NGOs into the negotiating process;
    - o however, the resources available to NGOs for participation in the negotiating process are not unlimited. They usually focus on selected issues and only the biggest NGOs can take part in all negotiations. NGOs must single out their priorities;
    - o within the context of the negotiations, the environmental NGOs often find themselves in competition with the multinationals which are organizing themselves and increasingly providing financial support for environmental NGOs (problem of the financial independence of these organizations?).

II.2.c.

- Participation in the implementation of agreements: most environmental conventions include provisions for the participation of NGOs. The first to do so was the World Heritage Convention.

II.2.d

Monitoring and controlling compliance (which goes beyond the mere assessment of implementation) (cf. CITES; implementation of Action 21). The COP is the institution in charge of monitoring, implementation and compliance. Here, environmental organizations play a crucial role, especially when they have observer status (article 11(5) of the Montreal Protocol; article 11 MARPOL). The organizations can provide COPs with independent information (but this requires them to be independent of states and donors). This independence will be strengthened if the organizations develop their own reporting system (they act as watchdogs in the implementation of environmental agreements).

The extent to which the environmental organizations are capable of taking advantage of these three opportunities depends on their history and their strategic outlook, but also on the strategies of governments and international organizations, which determine the role they want NGOs to play.

I.4.e.

Strategies of environmental organizations in global politics: many NGOs seek international visibility by participating in conferences and conventions. NGOs are increasingly concerned with getting accredited and preparing papers as such participation in international fora provides them with additional legitimacy and, as a result, with more funds.

The involvement of NGOs in international politics is explained by their "capability" (resources, membership, communications, political autonomy, expertise). This capability determines their strategy. The cost of participating in international politics is crucial (frequent travel) and

favours the richer NGOs. However, this financial power should be weighed against considerations of independence and, therefore, credibility. One of the main sources of legitimacy of NGOs at international level is their freedom to express international public opinion; their intellectual autonomy and credibility is built up over time.

IV.1.
Strategy of governments and IOs:

Governments and IOs consider NGOs to be important actors and therefore their attitude towards these organizations is more and more a strategic one (as they want to stay in control):

- states are selective. Admittedly, international institutions are slowly opening up to "NGO participation", but states are retaining their autonomy of negotiation through "corridor diplomacy". Thus, there are two diplomacies: an official diplomacy (due to the presence of NGOs), which involves governments and civil society; and an unofficial diplomacy, reserved to state representatives. States still carry out informal talks outside the scrutiny of the NGOs;
- the next step in this instrumentalization process concerns the management of NGO participation, where the NGOs have access. Access does not necessarily mean participation. Information is a tool that allows NGOs to take an active part in negotiations. NGOs are often better informed than governments. (Thus, governments use NGOs whenever they are useful to them). Consequently, NGO representatives may be involved in national delegations (they take part in the drafting of the agenda and in meetings).

WISER (Glenn M.), "Transparency in 21st century fisheries management: Options for public participation to enhance conservation and management of international fish stocks", *Journal of International Wildlife Law and Policy,* Vol. 4(2), 2001, pp.95-129

I. 1
Benefits of participation: (p.100 et seq.):

- enhanced legitimacy of a treaty institution and facilitation of public acceptance of its decisions;
- improved quality of decision-making as a result of the technical expertise of NGOs and their global perspective, states being obliged to take a narrower national approach. Their independence enables them to serve as channels between delegations and help find compromise solutions;
- enforcement of transparent accounting and hence treaty compliance; publicization of cases of states that comply with their commitments and ensuring that their efforts are not undercut by "free riders" who seek economic benefits at the expense of parties that fulfil their commitments. Thus, NGOs can validate and publicly give added value to those who observe the international rules;
- means of assisting small and less-developed states to fulfil their commitments while recognizing their special needs.

I.4.d
The Climate, Biodiversity and Desertification Convention secretariats do not charge NGOs for receiving documents. By contrast, CITES makes them pay a registration fee of 600 dollars, half of which is attributed to the cost of document distribution. The Dolphin Agreement and the Inter-American Tropical Tuna Agreement give their respective Directors discretion to charge NGOs reasonable fees to cover document copying expenses.

VI. 1.
Review of the modalities of participation within the framework of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 4 September 2000. This convention created one of the first regional fisheries management organizations (RFMO). It was adopted with a view to applying the 1995 Agreement on the Management of Straddling Stocks.

VI.1 and III.1
According to Art. 12 of the 1995 Agreement, NGOs are to have "timely" access to the documents of regional fisheries organizations, such as records and reports. They may also take part in meetings as observers or otherwise. The rules governing this participation must not be "unduly restrictive" (Art. 12.2).

III.1.
The 2000 Convention for the Pacific authorizes timely NGO access to pertinent information subject to the rules and procedures adopted by the RFMO regional commission (Art. 21). Previous fisheries conventions gave NGOs none of these rights.

The 1995 Straddling Stocks Agreement established for the first time the principle of the transparency in the activities of sub-regional and regional fisheries management organizations: "States shall provide for transparency in the decision-making process and other activities of sub-regional and regional fisheries management organizations and arrangements" (Art. 12).

III.5.
Access to information (pp.105 to 108):

- Principle of access to documents concerning the implementation of multilateral treaties: authorized in the Climate, Biological Diversity and Desertification Conventions: in the Climate Convention, the rules of procedure instruct the secretariat to reproduce and distribute documents at the sessions and distribute official documents. The Convention website has become the most important public access point. Several states have supported enhanced public access to information (see "Mechanisms for consultation with NGOs". Subsidiary Body on Implementation 6th and 7th sessions FCCC/SBI/1997/14 (1997)).

Types of information available:

- no basic restrictions in the three above-mentioned major conventions. Thus, working documents are also accessible. Materials from closed sessions are not distributed;
- CITES and the Dolphin Convention do not distribute sensitive documents or those containing business-confidential data. Even the World Bank is willing to make documents available (cf. its Policy on Disclosure).

IV.
The 1949 Inter-American Tropical Tuna Commission is amending its rules of procedure to enable NGOs to participate and be kept informed. An annex will be devoted to these new rules on participation. The Dolphin Conservation Agreement of 15 May 1998, Annex X, also establishes the principle of NGO participation.

IV.3
Access to decision-making provides for participation in meetings (pp.108-114):

- accreditation: under the conventions, fairly detailed documentation is required from NGOs seeking accreditation. This may be denied if one third of the parties object (Climate, Biological Diversity, Desertification) or if half of them object (Dolphin Convention) within a certain time limit. No application has ever been denied. Accreditation is sometimes valid only for one session or it may be open-ended. The rules of procedure of the Northwest Atlantic Fisheries Organization (NAFO) are particularly complex and burdensome. Sometimes there is provision for several different statuses (cf. ECOSOC). Sometimes the NGO is required to support the work of the organization or subscribe to its objectives (ECOSOC, NAFO);
- attending meetings: notice of meetings; types of meeting open: plenary meetings, working groups, contact groups; right to express views: written statements, oral statements, at the chair's discretion. There has even been a plenary meeting co-chaired by an NGO (CBD, March 2000); opportunities for NGOs to distribute documents, make submissions (Desertification), and organize special events and seminars.

V.3 and II.2.d

NGOs may assist implementation (pp.119-123): participation in monitoring, data collection; acquisition of partner status by signing a cooperation agreement; right to submit petitions or complaints (see NAAEC within the NAFTA framework).

GENERAL SUMMARY

I. General principles of international access

(1) Consensus on the benefits of public participation

All the documents stress the benefits of public participation at the international level *(Dupuy, Klein, Dias Varella, Doucin, Pallemaerts, Wiser, Lallas, Reinalda).* NGOs have a number of advantages but also create problems (their participation might overwhelm the institutional process) *(Peel).*

However, even though public participation is given prominence, in particular by enunciating broad principles of participation, there are no instructions for applying these principles *(Bruch/Czebiniak).* The participation of NGOs is mainly regarded as being advantageous because of the expertise they can provide. Their role in reflecting world public opinion is also emphasized, together with their flexibility, diversity, creativity, adaptability and independence and the rapidity of their modes of intervention, in sharp contrast to the inflexibility, slowness and bureaucracy which characterize the actions of states. NGO participation also makes it possible to monitor states (whether it be the behavior of delegates or the behaviour of other states in order to explain *ex post facto* the results of the negotiations) *(Raustalia,* 1997). NGOs perform functions additional (independent information) and parallel *(Chayes)* to those which are or should be performed by states or international organizations (technical assistance for developing countries). Through their characteristics, NGOs have succeeded in influencing international law and have participated in its "reform" *(Charnovitz,* 2006*).*

There is an inconsistency between the increasing presence of NGOs on the international stage *(Merle:* "increasing proliferation foreshadowing a radical transformation in the structure of international relations"), their lack of international legal personality *(The emergence of international civil society; Alkoby),* and the mistrust of NGOs displayed by states *(Klein).* Some democratic states have or may have had reservations about the activities of NGOs *(Willetts,* 2006, cites France, in particular).

(2) The new theoretical foundations of participation

First regarded as an expression of mere technical and scientific support for international organizations, the international action of the NGOs seems to be acquiring ever-increasing political significance in the context of an international society whose basis is being questioned in connection with the crisis of the state, globalization *(Beck; Fitzmaurice)* and the expanding role of international organizations and international environmental conventions.

Thus, NGOs are increasingly being seen as an expression of world public opinion and hence as a reflection of the peoples of the world and humanity as a whole (and future generations) *(Albin).* They are not bound by national interests but can see things from a global perspective and play a transcendental role *(Tarlock).* By analogy with the anti-establishment forces in states, they create the impression of being the anti-establishment forces of international society. In the absence of representative democracy in international society, the NGOs serve, at international level, as a counter-democracy through their monitoring and enforcement role, expressing the "mistrust" of the citizens of the world *(Rosanvallon,* 2006*).*

By according a role to the NGOs, the UN is seeking to improve its social recognition and to consolidate its legitimacy. Given the lack of democracy at international level, it is the anti-

establishment forces such as NGOs that act as peoples' representatives *(Lamy)* albeit, in contrast to the situation at national level, without usurping the representative functions, these being nonexistent at international level. It now seems necessary to develop international and regional representative institutions *(Delmas-Marty),* even an elected global assembly (proposal by Falk and Strauss cited by *Alkoby*).

Whereas at national level the erosion of public trust and the role of the anti-establishment forces are creating a "destructive" legitimization dynamics (those who govern are seeing their powers decline), internationally, as there are none who govern and the international bodies are weak, the anti-establishment forces resulting from the activities of the NGOs are creating a "constructive" legitimization dynamics *(Rosanvallon,* 2006*).* It might therefore be concluded that the role of the NGOs, whether effective or not and contrary to received ideas, rather than encroaching on state sovereignty is helping to build an emerging international democracy by allowing states no longer to be the sole legitimate representatives of society. This recognition of NGOs is to the advantage of states rather than taking place at their expense *(Raustalia,* 1997*)* (in particular when their participation leads to the adoption of new norms) *(Charnovitz,* 2006*).* NGO participation is helping to strengthen democratic pluralism *(Willetts*, 2006*).* A minority view is that, on the contrary, the existence of civil society would be a form of "legal imperialism alternative to state imperialism" *(Cullen* citing Anderson), imposing rules on states without their consent.

(3) The recurring debate concerning the legal personality of NGOs

Views are divided as to whether or not NGOs should be granted international legal status/personality *(Carreau:* "limited, but clearly defined international personality"; *Ranjeva:* the legal status necessary to implement international law; *Dupuy:* the question of legal status is unimportant, what matters is adapting the conditions of NGO participation; *Merle:* the lack of status is a regrettable gap in the international legal system; *Charnovitz*, 2006: the lack of international legal status for NGOs remains a problem, but not an insuperable one).

There is now some evidence for recognizing the international legal personality of NGOs *(Maragia),* particularly in view of current global change. There has been an evolution and NGOs appear to have become genuine partners, or indeed a third category of subjects of international law *(Willetts,* 2000*).* For this author, the provisions concerning the status of NGOs form part of customary international law, and recognizing standing rights (at the UN General Assembly) would not bring any significant change, just political prestige for the NGOs.

(4) The multiplicity and diversity of the legal regimes organizing participation

Article 71 of the United Nations Charter *(Doucin; Tornquist-Chesnier; Beigbeder; Article 71-Simma)* serves as a benchmark for establishing a status for NGOs; it could serve as a model

(Ranjeva; Peel), even though it has been criticized *(Charnovitz*, 2006*)*. Article 71 provides for NGOs to be granted advisory status with the Economic and Social Council under certain conditions *(Merle:* advisory status is merely a "*trompe l'œil*") and confers different degrees of participation (cf. Annex 1 to the Final Report). The example of the Council of Europe is regularly cited as a model *(Chamot)*, (in particular, with respect to the text and practice of the Berne Convention *(Bombay)*, as well as the internal practice of the Council of Europe which confers participatory status on INGOs that participate in the annual plenary conference of INGOs and specialized NGO groupings (e.g., rural world and environment group). The Council of Europe has strengthened its formal relations with INGOs by raising their status from advisory (Resolution (93)38 of the Committee of Ministers of the Council of Europe of 18 October 1993) to participatory (Resolution 2003(8)) *(Doucin).*

Even more systematically, the International Labour Organization *(Bannelier-Christakis)* has long had in place participation mechanisms open to non-governmental actors which could serve as a source of inspiration for environmental NGOs.

There are various legal arrangements for NGO participation *(Dias Varella)*, there being no Aarhus-like convention. Consequently, the nature and degree of NGO participation will continue to develop in an *ad hoc* and differentiated manner *(Grimeaud)*. There are some who propose the formalization of the rules of NGO participation as guidelines or minimum standards, without amending the conventions *(Ecologic-Field Report).*

In general, the question is whether an improvement in NGO status as far as access is concerned could actually improve world environmental governance *(Charnovitz*, 1997*)* and enhance the negotiating process and its outcome *(Albin)*. Access does not mean participation *(Tamiotti and Finger)*; for example, the advisory status granted by ECOSOC does not correspond to observer status without the right to vote *(Willetts)*. This question also arises in connection with the way in which states can instrumentalize NGO participation (in their interests) *(Tamiotti and Finger)*; participation remains largely unofficial and subject to national government preferences *(Albin)*. There is also a distinction to be made between official diplomacy due to the presence of NGOs and unofficial participation reserved for diplomats *(Tamiotti and Finger).*

As far as the NGOs are concerned, some regard this unofficial status as the cornerstone of their independence and vital for their activities *(Albin)*. Is it then in their interest? (*United Nations University; Alkoby)*

Whichever option were to be chosen, the granting of a status (variable-geometry status) to NGOs by subjects of international law would establish their legitimacy in the eyes of those same subjects *(Olivier).*

(5) The importance of informal practices

Irrespective of the existence, or non-existence, of official status for NGO access, informal practices remain numerous and varied. Thus, there are frequent references to the practice of corridor diplomacy, green room consultations and closed-door meetings *(Doucin; Betsill-Corell; Grimeaud; Albin)*, as well as to the problem of the transparency of these negotiations. This informalism (introduced by states in response to the proliferation of NGOs in the negotiations) reflects the state instrumentalization of NGOs, by maximizing the benefits of NGOs (e.g., expertise) while minimizing costs and, in particular, retaining control over outcomes *(Raustalia*, 1997*)*. However, these informal practices are not preventing them from

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influencing the progress of the negotiations.

NGOs are organized into networks, which enables them to communicate information *(Guilbeault).*

(6) The obstacles to NGO participation

The international activities of the NGOs are encountering obstacles linked with the international legal system *(McCormick),* in particular, the principle of the sovereignty of states and their monopoly on representation due to the lack of bodies elected by the citizens of the world at global level.

There are few references to the question of the provision of financing for NGOs to enable them to participate *(Klemm:* payment of registration fees); paradoxically, it is the NGOs themselves that sometimes finance states to help them participate *(Dias Varella).*

The NGOs are not necessarily viewed in a good light, particularly when they engage in lobbying *(Lang:* the NGOs need to channel their activities by means of codes of conduct; *Brown Weiss:* need for an informal code of conduct).

The problems associated with NGO participation include the fact that they are so numerous, which raises the question of representativeness. Who is entitled/has the legitimacy to participate on behalf of a particular interest *(Charnovitz,* 1997*)*? What should be the criteria of representativeness *(Grimeaud; Albin)*?. There is also the risk of power struggles between NGOs *(Krut);* some authors suggest that NGOs ought to be selected (no accreditation for all) in order to enhance the effectiveness and legitimacy of the negotiating process *(Albin)* but also to enable them to gain access to the international courts *(Peel).*

In addition, there is the matter of the underrepresentation of the NGOs from the South as compared with those from the North, together with the overrepresentation of the wealthier NGOs to the detriment of the poorer *(Albin).* The treatment of observers appears to vary according to whether the NGOs represent environmental or other (economic) interests, depending on the international forum *(Wirth and OECD).*

(7) The legitimacy of NGOs and social control over their activities

Although public participation at international level allows international organizations to be accountable *(Streck),* there is less mention of the accountability of NGOs (civil society is not necessarily accountable) *(Brown Weiss),* even though they wield real political power *(Tarlock).* This question of the accountability of NGOs or their responsibility vis-à-vis the interests that they represent and, more generally, the international community as a whole, comes up repeatedly *(Spiro; French*). Although NGOs may not be subject to the principles of international law, such as the principle of non-interference (which they may infringe by their practice of lobbying) or may not have to comply with the international rules in which they collaborate, they should nonetheless be subject to the rules of accountability in order that their activities and outcomes may be monitored *(Tarlock).* This question relates, in particular, to the legal status to be granted to NGOs (formal legal personality with the rights and obligations that entails) *(Spiro).* Formal recognition would make it possible to strengthen the external accountability of the NGOs while enhancing the legitimacy of the institutions and the international system *(Spiro,* 1995, 2002*).*

II. International access to institutions and processes:

(1) The proliferation of modes of access to institutions:

There are various levels of NGO access where MEAs are concerned. Thus, NGOs may participate in the MEA negotiating process *(Tamiotti)* (without having any responsibility for the negotiations) or in the Conferences of the Parties (COPs), once the MEA has been adopted *(Bombay).* They may be the originators of the convention. (e.g., IUCN) *(Olivier).*

NGOs participate as observers in international organizations or conventions, but their status confers different rights of access depending on the convention (access to plenary sessions, access to committee meetings at COPs *(Grimeaud)*), and rights of written and oral participation that vary with the international organization *(Garcia).*

They now participate in the large international conferences (Stockholm, Rio, Johannesburg) almost as of right, through accreditation. The access arrangements *(Breton-LeGof)* are determined either by the conventions themselves (Framework Convention on Climate Change; Berne Convention, CITES) *(Chamot),* or by the internal regulations of the international organizations *(Maljean-Dubois),* or by the meeting chairs at COPs *(Krut),* or by the rules of procedures generally adopted at the first COP *(Bombay).* In this latter connection, it is worth mentioning the innovative draft Rules of Procedures suggested for the Aarhus Convention *(Bombay)* which conferred a role almost equal to that of states.

Alongside the international conferences, the international institutions or NGOs create parallel participation and information mechanisms, outside the formal framework of the negotiations *(Mazalto).*

(2) Access to compliance mechanisms

NGO access to the compliance system, which differs sharply from one convention to another, is often mentioned and encouraged *(Wolfrum, Grimeaud, Bombay; Epiney* 2006*),* even though the monitoring of state compliance by private individuals might seem inconceivable from the standpoint of international law *(Ranjeva; Charpentier).* There is no fundamental reason why NGOs should not be included in this process, but a framework should be provided in order to optimize their role (no coercive competencies; accreditation system; general code for all compliance mechanisms, or even a convention that could be included in every MEA while adapting the procedure to each individual MEA) *(Epiney,* 2006). This participation is open to criticism *(Pitea).*

The Aarhus Convention provides for an advanced compliance mechanism that could serve as a model for other environmental agreements *(Koester)*.

NGOs can launch complaints (Berne Convention, *Chamot; Bombay),* trigger investigations *(Dias Varella)* or petitions *(Kiss,* 1996). They ought to participate more in compliance committees *(Imperiali).* They contribute information to strengthen compliance *(Maljean-Dubois* 2005; *Bannelier-Kristakis).*

III. Access to information

An area on which the literature appears to turn its back is that of access to the information held by international bodies. Astonishingly, the Cardoso Report (2004) totally ignores this question, despite its being an indispensable condition of participation. There are papers concerning information, but in non-environmental organizations (OECD-*Wirth*; WTO-*Gertler).*

The paradox of access to information is that there is much talk of the information supplied by NGOs to national delegations *(Guilbeault; Raustalia)* or to convention secretariats, but little mention of access to information for NGOs *(Bothe,* 2006*).*

A study has been made with a view to harmonizing the information collected by the secretariats of four conventions, but paradoxically it fails to envisage a role for civil society *(Johnson/Crain/Sneary,* 1998*).*

One author suggests the creation of a universal convention on the right to information, which would apply to states within international organizations *(Harrisson,* 2002*).*

Some conventions do not restrict the information available *(Wiser).* The implementation of some conventions is accompanied by rules or mechanisms for consultation with NGOs (for example, the Note of the Secretariat of the Framework Convention on Climate Change of 5 June 1997). At the same time, many international organizations have developed procedures for obtaining access to the information they hold, but each one has its own rules and the channels for making complaints are not necessarily satisfactory (for example, the information policy of the World Bank, 2002; the FAO's strategy for cooperation with NGOs, 1999).

Disparities remain since the rules of access to information, where they exist, vary from one organization to another and from one convention to another. Thus, the classical question of public access to reports drawn up by states in connection with the implementation of conventions remains unsettled at international level, thereby introducing discrimination depending on the practices followed.

IV. Participation (This part should be supplemented by part I on international access)

Although there may be general agreement on the principle of participation, there still remains much uncertainty and variability with regard to the practical modalities of participation.

There is no international organization that could play a centralizing or unifying role with respect to NGO participation. The only apparent model is that of advisory status *(Bannelier-Christakis),* but there are limits to this status (particularly as regards participation in the subsidiary bodies of the conventions). For some authors, the term "advisory status" was chosen to reflect the second role of NGOs (to be available to provide advice, without being

included in the decision-making (no right to vote)) *(Willetts,* 2000*).*

Participation should not involve case-by-case criteria, to avoid favouring certain NGOs *(Hierlmeier)* (problem of the large number of NGOs and that of representativeness), but criteria should nevertheless be established *(Albin)* (multicultural criteria, consideration of the differences between NGOs, etc.), and in particular functional criteria *(Fitzmaurice).*

NGOs may intervene at several stages *(Yamin),* and there are several techniques for involving NGOs (through national delegations; NGO representatives). NGOs should be involved upstream of the negotiations (*Raustalia).*

However, what does it mean to participate? What powers and rights are NGOs being granted? *(Grimeaud)* How can they influence negotiations? *(Albin; Corell and Betsill).* The right to speak does not signify the right to negotiate. This corresponds to the distinction between contributing to the negotiations (having a direct influence on the negotiations) and participating by making comments, etc., a distinction difficult to establish *(Willetts,* 2000*).*

V. Remedies:

(1) Lack of documentation on remedies where information or participation is denied

There are no documents dealing with appeals to the organs of the international institutions concerning compliance with their rules or practices relating to information and participation.

(2) Proceedings before international courts

The only remedy envisaged in the literature is proceedings before the courts and, in particular, access to international justice for NGOs *(Valticos, Dias Varella, ICTSD, Gautier; Shelton; Rest; Peel; Rubinton; McCallio; Birnie-Boyle).* The concrete examples also concern access for NGOs to the WTO's dispute settlement mechanism through *amicus curiae* briefs *(Gertler; MacKenzie).*

Some authors mention international bodies willing to accept complaints from the public, in particular with regard to the implementation of MEAs *(Prieur, Maljean -Dubois,* 1998*).*

(3) Non-judicial remedies (cf. II.2 above)

VI. Specific cases (non-exhaustive list)

(1) Concerning particular multilateral agreements:

Kyoto Protocol *(Guilbeault-Vaillancourt; Gulbrandsen -Andresen)*
Climate Change Convention *(Tolbert; Ecologic-FIELD report)*
Biodiversity Convention and Climate Change Convention *(Arts,* 1998)
Biodiversity Convention and Climate Change Convention *(Arts,* 2003)
Montreal Protocol, HELCOM *(Victor/Raustalia,* 1998)
Barcelona Convention *(Scovazzi,* 1996*)*
CITES and Greenpeace *(Currie,* 2005*)*
Aarhus Convention and role of Ecoforum *(Lapin,* 1999) *(Wates,* 2005)
Biodiversity Convention *(Arts,* 2004*)*
Carthagena Protocol *(Arts and Mack,* 2003*)*
Convention on Persistent Organic Pollutants (POP) *(Lallas)*
Convention on the Protection of the Alps *(Gotz)*
Convention on the Law of the Sea *(Gamble and Ku)*
Convention on the Prohibition of Anti-Personnel Mines *(Gamble and Ku)*
MAI *(Gamble and Ku)*
CITES Convention *(Princen, Slaughter; Birnie -Boyle; Ecologic-FIELD Report)*
Conventions on the Protection of the Marine Environment *(Stairs and Taylor)*
Desertification Convention *(Corell,* 1999)
Desertification Convention and Kyoto Protocol *(Corell and Betsill,* 2001*)*
Montreal Protocol (*Wirth)*
Basel Convention *(Kempel)*

(2) Concerning certain international organizations:

Council of Europe, Organisation internationale de la francophonie, World Bank *(Doucin)*
ECOSOC *(Commentary Article 71 of the United Nations Charter; Martens; Grimeaud)*
WTO-DSB *(Shafer; Gertler; Wirth; Hernandez Zermeno)*
FEM-GEF *(Raustalia,* 1997*)*
OECD *(Wirth)*
International Standards Organization *(Ecologic-FIELD Report)*

(3) International conferences:

Conference on Environment and Development (UNCED) *(Finger,* 1994*; Hernandez Zermeno)*

(4) NGOs:

IUCN *(Olivier)*
Greenpeace (*E.J.Currie; Parmentier)*
CIEL-FIELD *(Chayes)*

Conclusions :

(1) Current trends in research

Most of the research appears to be focused on assessing the effectiveness of NGO participation in international negotiations or the activities of the secretariats of the major environmental conventions, by trying to measure the weight carried by NGO interventions and proposals (their influence), or on the legal and informal modalities of participation.

With regard to this latter point, the studies are too often subject-specific, relating to examples taken from a particular convention or phase of negotiation, thus demonstrating that the range of situations is so broad as to make it impossible to propose common rules.

However, the universalism of environmental law ought in fact to facilitate the establishment of common principles, in the spirit of the Aarhus Convention.

The development of environmental convention compliance mechanisms forms the subject of many descriptive studies and constitutes an original feature of international environmental law unchallenged by legal doctrine. The need for an effective environmental law makes it possible to justify these mechanisms without having to bother with theoretical considerations or regret the lack of recourse to the traditional modes of dispute settlement.

Few recent theoretical studies go beyond repeated reflections on the question of NGOs as subjects of international law faced with the monopoly on the representation of international society exercised by sovereign states alone. A link between the progressive recognition of humanity, as a new entity, and the representation of that humanity by both states and NGOs has not yet really been established.

(2) Issues that need to be examined in greater depth

(a) *General:*

- Are the many objectives of NGO participation compatible, complementary or contradictory (representation of the public, expertise, lobbying, dissemination of information, etc.)?
- Need to define environmental NGOs and to distinguish those that defend the general environmental interest from those that represent particular interests.
- Can and should NGOs become subjects of international law and, if so, how?
- Should NGOs have an international legal status regardless of their recognition as subjects of law?
- Should this legal status be specific to environmental NGOs (particularly the more important ones) or apply to all international NGOs?
- Advantages and drawbacks of treating public participation uniformly at universal level as compared with treating it on an *ad hoc* basis by organization and convention.
- Are there common principles of participation applicable to the workings of international organizations and the workings of the secretariats of international conventions?
- How should the representativeness of international NGOs be verified?

- How can the public become acquainted with the control procedures applied to NGOs by the international institutions?
- Should there be a duty/obligation to consult the NGOs?
- Should there be a protocol to the Aarhus Convention on NGOs in international environmental law?

(b) *Modalities of participation:*

- These modalities cannot be the same for all international politics. It is therefore essential to give separate consideration to treaty negotiation and compliance (which is legally part of the law of treaties) and participation in international conferences and the activities of international organizations (which belongs to the law of international organizations).
- Is it legitimate to establish common rules on public participation in the area of the environment and not in other areas? Should there be common rules for all international organizations? Should there be rules common to all areas (e.g., human rights)?
- Any adaptation of the modalities of participation should vary the degree and the techniques of participation according to whether it is a question of reflection on programmes and strategies, a decision to approve an international project, the negotiation of binding texts, etc.
- Can NGO access to international remedies form the subject of recommendations valid for all forms of remedy (non-contentious, judicial)?
- Can the administrative appeal procedures for NGOs within the United Nations Organization be harmonized?
- How can NGOs be assured of a right of reply?

(3) Unexamined issues that need to be investigated:

There appears to be a flagrant lack of research into the administrative science and administrative sociology of the international organizations in the area of the environment. The following issues merit further investigation:

- The conditions of access to administrative documents held by international organizations and the related remedies.
- The limits and conditions of protected confidentiality with respect to international documents.
- Direct internet access to international documents.
- Public access to reports on environmental treaty implementation held by secretariats.
- The legal regime applicable to archives held by international organizations and the right of access to those archives.
- The possibility of an international convention on this subject or of an agreement between the various organizations concerned.
- The respective powers of conferences of the parties and secretariats concerning public participation.
- Public participation as a new environmental conditionality (World Bank).
- The impact on the national public of NGO participation at international level, in terms of both information and the pressure of public opinion on national governments.