

The Role of Non-State Actors in International Environmental Affairs

Joyeeta Gupta*

I. Introduction

With globalisation, the “rules of the game” of international environmental problem-solving through intergovernmental conferences and treaties is changing. A number of different trends in international environmental governance involving non-state actors is becoming visible. We are irrevocably leaving behind the notion that only nation states are authorised to participate in international governance. Instead, we are moving towards a different global system where problems are being addressed by various combinations and permutations of social actors at international and/or national level which may have to be implemented in countries at different levels of development.

At the global level, there are two major processes taking place – “spontaneous” and “managed” globalisation. The former refers to the spread of the internet and world-wide web, the global media, global markets, attempts at self-regulation, financial markets, crime, etc.;¹ the latter refers to the processes by which states use the tools of international law and policymaking to make decisions to protect the interests of nation states.

In relation to the latter and especially with respect to environmental management, we are presently witnessing three competing tendencies. There are competing tendencies to regulate at the highest political level to reduce the risk of loss of competitiveness in individual countries² or regulate everything at the lowest relevant administrative level (i.e. the principle of subsidiarity)³ or involve non-state ac-

* UNESCO-IHE Professor of Policy and Law on Water Resources and the Environment and Head of the Programme on International Environmental Governance at the Institute for Environmental Studies, Vrije Universiteit Amsterdam (email: joyeeta.gupta@ivm.vu.nl; jgu@ihe.nl). This paper has been written in the context of two on-going projects, one supported by the Vrije Universiteit Amsterdam on the Law of Sustainable Development and the other supported by the Netherlands Organization for Scientific Research (NWO) on Inter-governmental and private environmental regimes and compatibility with good governance.

¹ See G. Junne, *International Organisations in a Period of Globalisation: New (Problems of) Legitimacy*, in: J-M Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (2001), 189.

² This has been a common argument in the climate change debate where countries are unwilling to take unilateral actions since this is not effective and expensive in the bargain. They argue thus in favour of taking measures at the highest political level.

³ The principle of subsidiarity is a key principle within the European Union, see e.g. A. Dahl, *Competence and Subsidiarity*, in: J. Gupta/M. Grubb (eds.), *Climate Change and European Leadership: A Sustainable Role for Europe?* (2000), 109.

tors in governance since state power is arguably declining and society is no longer seen as manageable from above.

Against this background, this paper addresses the question: How has the role of non-state actors evolved in international law and governance and, in particular, how has the World Summit on Sustainable Development shaped the new role of these actors for the 21st century? What are the implications for international law? The non-state actor refers to civil society and business and industry. Civil society has defined itself at the World Summit as all social groups, indigenous people, women, youth, environmental groups, etc., and their common objective is to promote global solidarity.⁴ Business and industry focus on the bottom line of profits, although the new rhetoric is people, profits and planet and the need for corporate social responsibility.

This paper begins with a brief history of the changing role of the non-state actor in the area of environmental treaties (see section II). It then elaborates on the role of the non-state actor in the context of the World Summit on Sustainable Development (see section III). Section IV analyses the changing role in the context of the World Summit on Sustainable Development. Section V concludes that the role of non-state actors has been slowly evolving in the international arena since World War II. It has gone through the phases of being consulted, through observer status and behind the scenes management, to being also the subject of protection, and the object of empowerment and engagement, to taking initiatives into their own hand. But with the World Summit on Sustainable Development, the role of non-state actors has metamorphosised completely. They are now seen as partners in implementing international agreements. But what partnership means is unclear, the status of the partnership agreements even more so. In a positive light, one can argue that the new Type 2 agreements show that the UN is innovative and willing to forge new and complementary relationships and legal instruments with non-state actors to promote sustainable development within the context of a world that is losing its global solidarity and where the superpower – the US – is not ratifying the major global treaties, and worse still undermining the effect of Type 1 agreements by submitting reservations regarding the content and legal effect of these. In a negative light, one can argue that the United Nations is bowing to the pressure from the US and other non-state actors and developing a weak instrument as an alternative to interstate agreements and that this is a sign not of gaining control and oversight over the activities of the non-state sector, but a sign of losing control over cooperation at the interstate level.

⁴ The Global Peoples Forum: Civil Society Declaration, 24 August-3 September, <http://www.worldsummit.org.za/policies/cs_decl.html>.

II. History and Evolution

1. Non-State Actors, Governance and International Law

Before delving further, it might be useful to reflect on different perspectives on governance and international law. Global governance is defined as a “system comprised of an increasingly dense and interactive network of international regimes”.⁵ Some see it as a decentralised and disaggregated process and others as increasingly centralised and coordinated.

Perrez (2000) argues that there are three different visions of international law. One vision is that of the world as a billiards table, where each state is a billiards ball and comes occasionally in contact with other states. The second vision is that of a global community and an integrated market with state-boundaries as a disappearing concept. The third vision is that of “an asymmetrical three-dimensional net of complex interactions full of interdependencies, interrelationships, influences, and causations, where the actors are the knottings and the interactions and interdependencies are the cords”.⁶ There is asymmetrical power between the different actors and there is no real global unity. The last of the three runs somewhat in parallel with the decentralised, disaggregated vision of global governance.⁷ The billiards ball approach takes a very conservative view of the role of international law. This is not to say that it fails to take cognisance of the facts in the international environmental arena where non-state actors are taking a more active role. But, instead it is based on the assumption that the “facts do not override the normative centrality of the state”.⁸

In many ways, this analysis runs parallel to that of Junne who argues that the literature predicts three different pathways for governance.⁹ The transformationalists argue that it is unclear in what direction the globe is transforming. The hyper-globalists would argue that economic globalisation will lead to new institutions and regimes that will replace the nation state as the basic unit of international society and the UN Charter. The sceptics would argue that the state and the United Nations are persistent and sticky and that these will continue to play a major role in ensuring the legitimacy of international regimes.

What is clear is that we are in a state of transition, witnessing new and complex forms of legal pluralism.¹⁰ What is less clear is whether these unfolding develop-

⁵ See N.J. Vig, *The Global Environment: Institutions, Law and Policy*, in: N.J. Vig/R.S. Axelrod (eds.), *The Global Environment: Institutions, Law and Environment* (1999), 1 at 5; F. Snyder, *Global Economic Networks and Global Legal Pluralism*, in: G.A. Bermann/M. Herdegen/P.L. Lindseth (eds.), *Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects* (2001), 99.

⁶ See F.X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (2000), generally.

⁷ Some refer to this as post-statist models, see A. Franceschet, *Justice and International Organization: Two Models of Global Governance*, *Global Governance*, 8, No. 1, 19.

⁸ *Ibid.*, at 24 explaining Welch and Nardin.

⁹ See Junne (note 1).

¹⁰ See Snyder (note 5).

ments are compatible with the basic tenets of a stable and just international legal system and whether these developments can contribute to achieving sustainable development.

Although the history of the non-state actor in international law can be traced back to the 18th century,¹¹ since the establishment of the United Nations, the development and consolidation of the role of non-state actors in environmental issues can be clustered into five phases. The first four phases are described below.

2. Phase 1 – Non-State Actors: To Be Consulted

In the first phase, the non-state actor acquired the right to be consulted. The United Nations Charter was negotiated primarily as an instrument to promote peace and security and cooperation between the members of the United Nations Organisation, and the members were, by definition, sovereign states.¹² Article 4 explicitly states: "Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."¹³ In the Chapter on the Economic and Social Council, the Charter introduces the possibility of participation by non-state actors. It states:

"The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organisations after consultation with the Member of the United Nations concerned."¹⁴

Twenty years later, the Economic and Social Council (ECOSOC) adopted a Resolution in relation to non-state actors. In order to qualify for consultative status, non-state actors had to focus on the subject matter falling under the competence of ECOSOC, have principles and purposes consistent with the UN Charter, be supportive of the UN, have "representative character" and be "of recognized international standing", have headquarters and an executive officer, a democratically established constitution, authority to speak for its members, and be international. However, national non-state organizations could be admitted if it "helps to achieve a balanced and effective representation of non-governmental organisations reflecting major interests of all regions and areas of the world or where they have special experience upon which the Council may wish to draw."¹⁵ This was, however, only

¹¹ For a detailed history over the activities of non-state actors in the last two centuries, see S. Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, Michigan Journal of International Law 18 (1997), 183 at 245.

¹² See Arts. 1, 2 and 3 of the Charter of the United Nations (San Francisco) of 26 June 1945, and amended on 17 December 1963, 20 December 1965 and 20 December 1971, ICJ Acts and Documents No. 4.

¹³ Art. 4 of the UN Charter (note 12).

¹⁴ Art. 71 in Chapter 10 of the UN Charter (note 12).

permitted after the home state gave permission. The Resolution however clearly emphasises the distinction made in the UN Charter between states and non-states: "... the arrangements for consultation should not be such as to accord to non-governmental organisations the same rights of participation as are accorded to states ...".¹⁶

Article 71 was included essentially because 1200 non-state actors attended the Conference that finalised the UN Charter and lobbied to ensure the references to non-state actors and human rights.¹⁷ In this stage, non-state actors recognized by ECOSOC were consulted but had a somewhat passive role in influencing international treaties and were focusing primarily on human rights in the aftermath of the two world wars, work that has continued since then.¹⁸

3. Non-State Actors: Elite Observers and Behind-the-Stage Managers of Environmental Treaty Negotiations

The second phase probably started in the 1970s. With the rise of environmental issues, non-state actors became increasingly more and more important in the preparations for intergovernmental conferences, even though their right to make interventions was limited.¹⁹ It was fast becoming common practice in a number of environmental regimes to allow non-state actors to participate as observers at the negotiations.²⁰ They began to develop an arsenal of communicative strategies to cope with the processes of negotiation and in general provided their input to the secretariat on the early drafts of the proposed treaties. For example, the International Union for the Conservation of Nature (IUCN later renamed as World Conservation Union) helped in the drafting of the Convention on the International Trade in Endangered Species (CITES),²¹ the World Conservation Strategy, the World Charter for Nature,²² and the Convention on Biological Diversity,²³ IUCN served as the secretariat of CITES till UNEP took it over. IUCN, of course, has a distinct status being a combination of state and non-state parties. In this stage, elite and powerful environmental non-state actors began to pool their expertise and views

¹⁵ Arts. 1-11 of the Arrangements for Consultation With Non-Governmental Organizations, ECOSOC Resolution 1296 (XLIV), 1968.

¹⁶ See Art. 12 of ECOSOC Resolution (note 15).

¹⁷ See P. Willets, *Pressure Groups as Transnational Actors*, in: P. Willets (ed.), *Pressure Groups in the Global System* (1982), 11.

¹⁸ See, for a history of the NGOs focusing on peace and humanitarian activities, C. Stahn, *NGOs and International Peacekeeping – Issues, Prospects and Lessons Learned*, *Heidelberg Journal of International Law* 61 (2001), 379.

¹⁹ See Willets (note 17).

²⁰ P. Birnie/A. Boyle, *International Law and the Environment* (2002), 67.

²¹ *Convention on International Trade in Endangered Species of Wild Flora and Fauna* of 3 March 1973, text in: *ILM* 12 [1973], 1055.

²² *World Charter for Nature* (1982), UNGA RES 37/7.

²³ *Convention on Biological Diversity* of 5 June 1992, text in: *ILM* 31 [1992], 818.

and made joint statements at such meetings even though they came from different parts of the world. In doing so, they chose to focus on the main issue – how to address the environmental problem and focused on presenting a common front at the negotiations. Indigenous groups too became more and more powerful in this period.

4. Non-State Actors: Protected, Empowered and Engaged

The third phase started in the 1990s. Non-state actors, facilitated by the internet revolution demanded a more active role in international decision-making. New roles were identified for them by international treaties and declarations. By the 1992 United Nations Conference on Environment and Development (UNCED), 1400 non-state actors were accredited to the Conference.

On the one hand, the declarations and treaties aim at protection of the non-state actor. For example, the Rio Declaration on Environment and Development specifies that human beings were entitled to a healthy and productive life.²⁴ The environmental treaties aim to protect the environment but they mostly have an anthropocentric perspective. On the other hand, the Declarations and Treaties also aim at empowering the non-state actor. Principle 10 of the Rio Declaration states:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

Principles 20 – 22 aim at empowering women, youth and indigenous people respectively. Chapter 26 of Agenda 21²⁵ also lays down policy recommendations aimed at empowering the indigenous people. Chapter 27 emphasises the important role non-state actors play in promoting democracy and calls for recognizing as partners formal and informal organisations as well as grassroots movements. The following five chapters focus on local authorities, trade unions, business, the scientific community and farmers.

Following UNCED, 550 NGOs that had participated in the UNCED process were given consultative status in the newly formed UN Commission for Sustainable Development. The right to participate in decision-making was increasingly becoming more and more accepted. This was further articulated in the 1998 UN ECE Aarhus Convention:

²⁴ The Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I); Principle 1 states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

²⁵ Agenda 21, United Nations Conference on Environment and Development (note 24).

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”²⁶

This Convention also specifically calls on Parties to promote the “application of the principles of this Convention in international decision-making processes and within the framework of international organisations in matters relating to the environment”.²⁷

Environmental organisations have also been increasingly influential in international treaty negotiations. The International Toxic Waste Action Network and the Third World Network were key lobby groups that promoted and supported the negotiations of the Basel Convention on the Transboundary Movement of Hazardous Wastes.²⁸ Supporting and lobbying in the climate change treaty negotiations, was the Climate Action Network (CAN) and its members from around the world.²⁹ The Biodiversity Action Network (BIONET) influences the biodiversity negotiations. The International NGO Network on Desertification and Drought (RIOS) similarly influences the desertification negotiations. Environmental organisations also participate within the Environment Liaison Centre International (ELCI) to cooperate both with community based organizations and international treaty negotiations.

Industry organisations were also increasingly participating in the negotiations. In the Negotiations on the Montreal Protocol on Ozone Depleting Substances, eight industry organisations attended the first session of the Conference of the Parties. By the 8th session, the number of groups had increased to 32.³⁰ Observers in the negotiations of the Long-Range Transboundary Movement of Atmospheric Pollutants included the Union of Industrial and Employers’ Confederation of Europe, the European Solid Fuel Association, etc. The interests of industry are particularly at stake in the climate change negotiations. Participating industries represent interests ranging from those of the coal and oil interests to those of renewable energy and nuclear industries.³¹

²⁶ Art. 1 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, of 25 June 1998, ECE/CEP/43; see its text in: ILM 38 [1999], 517.

²⁷ Art. 7 of the Aarhus Convention (note 26).

²⁸ Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989, text in: ILM 28 I.L.M. [1989], 657.

²⁹ See M. D u w e, *The Climate Action Network: A Glance Behind the Curtains of a Transnational NGO Network*, Review of European Community and International Environmental Law 10, No. 2 (2001), 177.

³⁰ See list of participants at the various meetings of the Conference of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, text in: ILM 26 [1987], 154.

³¹ A. K o l k, *Multinationale Ondernemingen en Internationaal Klimaatbeleid*, Milieu, 4 (1998), 181.

Scientists too were getting into the business of preparing consensus reports and presenting results from monitoring exercises to create the scientific justification for action at domestic and international level. Increasingly, we see legal agreements where the role of non-state actors, especially epistemic communities, is explicitly arranged in order to achieve the scientific justification for taking precautionary measures³². In the discussions on the Long-Range Transboundary Air Pollution regime (LRTAP), the Co-operative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP) played a key role in monitoring the pollutants and in providing the evidence needed to deal with the issue which led to the adoption of the first Sulphur Protocol.³³ In the negotiations on the Montreal Protocol on Ozone Depleting Substances, there was close contact between the scientists and the negotiators. The Meetings of the Parties prepared a mandate for the Assessment Panels on Science, Environment and Technology, and Economics, and they then prepared a report that went to the open-ended working group, which integrated the results for the Meeting of the Parties.³⁴ In the climate change regime³⁵ clear institutional links have been established for a direct line of communication with the epistemic communities, via the Subsidiary Body for Science and Technology.³⁶ This body has established a communication channel with the Intergovernmental Panel on Climate Change (IPCC) so as to ensure that the scientific information developed is neatly channelled to the negotiators.³⁷ The latter is so successful that now other social actors are arguing for similar links with industry (a business consultation mechanism), with environmental NGOs and local governments.³⁸

³² Precautionary measures are defined in Principle 15 of the Rio Principles (note 24) as: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

³³ Protocol to the 1979 Convention on Long Range Transboundary Movement of Atmospheric Pollutants on the reduction of Sulphur Emissions or their Transboundary Fluxes by at Least 30 % of 8 July 1985, <<http://www.unece.org/env/lrtap/protocol/85sulp.htm>>; text in: ILM 24 [1985], 484.

³⁴ J. Gupta, Effectiveness of Air Pollution Treaties: The Role of Knowledge, Power and Participation, in: M. Hisschemöller/J. Ravetz/R. Hoppe/W. Dunn (eds.), Knowledge, Power and Participation, Policy Studies Annual (2001), 145.

³⁵ Art. 7.6 of the United Nations Framework Convention on Climate Change of 9 May 1992, text in: ILM 31 [1992], 822.

³⁶ Art. 9 of the FCCC (note 35).

³⁷ In 1988, UNEP and WMO set up the Intergovernmental Panel on Climate Change (IPCC) to undertake assessments of the available scientific research and to prepare five yearly reports. The IPCC also receives special requests from the climate negotiators to prepare special reports and accordingly does so.

³⁸ For a detailed analysis of the role of non-state actors within the context of the United Nations Framework Convention on Climate Change and the Kyoto Protocol, see J. Gupta, Non-State Actors: Undermining or Increasing the Legitimacy and Transparency of International Environmental Law, in: W. Werner (ed.), Contemporary Issues of International Law, *Nova Et Vetera Iuris Gentium* (2003), forthcoming.

In addition, the climate change regime has three distinct ways in which it involves the non-state actors. First, Article 7.6 allows them to participate as observers, and large numbers of non-state actors actually participate in the process. Second, non-state actors are also the focus of the Convention in that the creation of public awareness and involvement of public participation in decision-making are promoted.³⁹ Third, the private sector and other non-state actors are encouraged to participate in the flexibility mechanisms under the Kyoto Protocol.⁴⁰

It would perhaps also not be out of place to mention the principles of the newly emerging law of sustainable development, as identified by the International Law Association at its 73rd session in New Delhi in 2002.⁴¹ These include principles focusing on public participation, especially because it is a condition of responsive, transparent and accountable government. In order to promote public participation emphasis is laid on the human rights to hold and express views and access to information and on access to effective judicial or administrative procedures. Another set of principles emphasise that civil society and NGOs have a right to good governance by states and international organisations, and that non-state actors should themselves be subject to good governance. Further, they call for corporate social responsibility and socially responsible investments.

Given these various trends in the socio-environmental sphere, in 1996, ECO-SOC requested the General Assembly to establish arrangements to facilitate NGO participation in all UN activities.⁴² In 1997, the General Assembly asked the Secretary General for a report on the subject.⁴³ In 1998, the Secretary General's report recommended first harmonising the different NGO databases, increasing UN staff in the different departments to cope and cooperate with, and inform NGOs, and that NGOs should have access to documentation and funds.⁴⁴ The General Assembly then asked the Secretary General to prepare a new report which included the views of states and non-state actors.⁴⁵ In the meanwhile the NGOs have several offices in the UN system, nine service offices, 54 liaison offices, six UNEP regional offices, five offices in the UN Regional bodies and 19 specialised agency offices. In 2000, the NGOs held the Peoples Millennium Assembly as an experiment to communicate the views of NGOs to the UN.

Non-state actors are also securing a number of roles in terms of monitoring the implementation of norms and agreements. In the international arena we are seeing non-state actors trying to prevent the abuse of state power by monitoring and con-

³⁹ Art. 6 of FCCC (note 35).

⁴⁰ Arts. 6, 12, and 17 of the Kyoto Protocol of 10 December 1997 to the 1992 Framework Convention on Climate Change, text in: ILM 37 [1998], 22.

⁴¹ While most international lawyers will probably argue that there is no such thing as an international law of sustainable development, the International Law Association has recently adopted a document summarising the key principles of the emerging law of sustainable development, UN Doc. A/57/329.

⁴² E/1996/297.

⁴³ UN Doc. A/52/L/71.

⁴⁴ UN Doc. A/53/150.

⁴⁵ UN Doc. A/53/L.68.

trolling the process of international treaty making. They report on national implementation of international agreements. Thus, in the climate change regime, NGOs have made assessments of developed country implementation and developing country commitment.

Non-state actors are also using the national judicial processes to protect the environment. They are, for example, getting the right to represent the environment and future generations.⁴⁶ There are several cases in the United States,⁴⁷ the Philippines⁴⁸ and India⁴⁹ that show that public interest groups are getting the right of standing to bring cases before domestic courts to protect the environment. In these cases, the non-state actors are trying to ensure that new environmental norms are accepted by the national courts. NGOs are also slowly but steadily increasingly getting access to the proceedings before International Courts and Tribunals such as the International Tribunal of the Law of the Sea⁵⁰, and NAFTA. Recently, the World Bank Inspection Panel allowed NGOs to challenge actions of the Bank if these are in violation of the Bank's own rules and procedures. NGOs have requested the WHO to ask the International Court of Justice for an advisory opinion on the legality of nuclear weapons.⁵¹ NGOs appear to have even managed to break into the traditionally much more closed negotiating space in the WTO.⁵² In 1996, 159 NGOs attended the Singapore ministerial conference and since 1996 there are guidelines to recognise NGO work.⁵³ The access to justice however remains modest. For a more detailed analysis of the role of NGOs in international environmental litigations see the paper by Ulrich Beyerlin.⁵⁴

What the above analysis shows is that the demand of non-state actors to be involved in the process themselves coincided to some extent with the need to involve them and gain access to their support. The key focus in this period was on empow-

⁴⁶ This can be traced back to the article by C. Stone, *Should Trees have Standing: Towards Legal Rights for Natural Objects*, *S. California Law Review* 45 (1972), at 450.

⁴⁷ Non-governmental organisations are also even bringing actions in US courts in relation to tort-based climate change litigation, see K.Q. Seelye, *Global Warming May Bring New Variety of Class Action*, *New York Times*, September 6, 2001 at A14; S. Mihm, *The Year in Ideas: A-Z: Global Warming Law Suits*, *New York Times*, December 9, 2001, sec. 6 (Magazine) at 76.

⁴⁸ See the *Philippines: Minors Oposa* case as explained by A.G.M. La Viola, *The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case*, *Review of European Community and International Environmental Law* 3, No. 4 (1994).

⁴⁹ See, for example, *S.P. Gupta and Others v President of India and Others*, AIR 1982 SC 149, *Bangalore Medical Trust v Mudappa and Others*, AIR 1991 SC 1902.

⁵⁰ See Art. 187 (c) of the United Nations Convention on the Law of the Sea of 10 December 1982, text in: ILM 21 [1982], 1261.

⁵¹ See F. Yamin, *NGOs and International Environmental Law: A Critical Evaluation of Their Roles and Responsibilities*, *Review of European Community and International Environmental Law* 10, No. 2, 149.

⁵² See A. Reinisch/C. Irgel, *The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System, Non-State Actors and International Law* 1, No. 2 (2001), 127.

⁵³ WT/L/162

⁵⁴ See U. Beyerlin, *The Role of NGOs in International Environmental Litigation*, *Heidelberg Journal of International Law* 61 (2001), 357.

ering non-state actors. The empowerment came in the form of increased rights of access to information and participation in decision-making and limited access to justice.

5. Non-State Actors as Taking the Law into Their Own Hands

One may arguably hypothesise that in the next stage the non-state actors will be, metaphorically speaking, taking the law into their own hands. This can be seen from two major international trends.

First, the growing dissatisfaction with the content of international economic and trade summits from an environmental and social perspective has led to the rise of global movements that aim to provide a major countervailing force. The Jubilee 2000 movement is an example of such a countervailing force. At a North American Public Hearing, Richard Falk explained that:

“There is the rise of a global civic culture that is providing a transnational democratic foundation to challenge governments and to give them political space to act more decently and effectively. We have to remind those who think they have power that they have to really listen to the NGO world.”⁵⁵

There are several who argue in favour of a revision of the social contract à la Rousseau and John Locke where society was ruled by the state. They call for re-democratisation and mobilising the forces of the civil society. They argue that “the starting point of a new social contract will be the legal and pragmatic acknowledgement that sovereignty rests with the people”.⁵⁶ This dissatisfaction, on the one hand, leads to street protests or email actions that can even lead to the demise of intergovernmental processes. The Multilateral Agreement on Investment is a case in point.⁵⁷ When the negotiations began in earnest within the OECD countries, civil society began to organise itself on the key issues in the regime and started an active lobby process against the Agreement leading to its eventual demise.⁵⁸ Rahmatullah Khan provides a detailed analysis of the anti-globalisation protests and argues that this may even reflect law-making on the streets!⁵⁹

The second trend is that many non-state actors are becoming extremely impatient with the slow pace of international law, or wish to halt its development and by-

⁵⁵ See Report of the Independent Commission on Population and the Quality of Life, *A Radical Agenda for Positive Change* (1996), at 253.

⁵⁶ See Report of the Independent Commission on Population and the Quality of Life (note 55), at 312.

⁵⁷ The Multilateral Agreement on Investment was an initiative of the OECD to promote common investment rules within the OECD.

⁵⁸ J. Werksman/C. Santoro, *Investing in Sustainable Development: The Potential Interaction Between the Kyoto Protocol and a Multilateral Agreement on Investment*, in: W.B. Chambers (ed.), *Global Climate Governance: Inter-linkages Between the Kyoto Protocol and Other Multilateral Regimes* (1998), 59.

⁵⁹ R. Khan, *The Anti-Globalisation Protests: Side-Show of Global Governance, or Law-Making on the Streets*, *Heidelberg Journal of International Law* 61 (2001), 323.

pass its legal force. Let me explain. Increasingly in the western world there is a social commitment to sustainable development. People want to translate this commitment into action in their daily lives. Thus, there is a commitment to purchase products that are sustainable. This trend, *inter alia*, has led to voluntary initiatives on labelling and certification schemes on the part of the private sector to differentiate and sell their own products.⁶⁰ Such self-regulatory schemes are becoming increasingly popular⁶¹ and aim at imposing certain responsibilities on the producers of the products in relation to human and environmental aspects. This is being driven by the perceived need of industry to manage environmental risk and avoid liability, to protect the company's reputation, and because of social learning processes.⁶² These processes are in turn driven by the pressure from civil society.⁶³

This self-regulation focuses on either developing and promoting voluntary standards via the International Standards Organisation⁶⁴ or promoting voluntary measures such as codes of conduct and labelling and certification schemes.⁶⁵ Thus, for example, in the forestry regime, the lack of international consensus has led environmental groups to collaborate with retailers and establish the Forest Stewardship Council and a labelling programme to promote the use of wood from sustainably harvested and managed forests. Such measures do not necessarily countervene the WTO rules, since they are voluntary measures and less restrictive than making technical regulations on products. This is, however, an increasingly important topic within the WTO discussions since ecolabelling schemes based on production processes and methods may be perceived as covered by the Technical Barriers to Trade Agreement. In another paper, I argued that these so-called voluntary standards can become *de facto* mandatory, since these schemes are increasingly being adopted in vertically integrated markets and companies that do not comply with the standards may thus go out of business. Such standards may also over time appear to acquire legitimacy and enter the realm of soft and hard law. However, these standards and voluntary schemes in the context of vertically integrated markets and public relations activities in developed countries may make developing country producers even more vulnerable.⁶⁶ This is because increasingly national regulations in western

⁶⁰ See J. Bendell (ed.), *Terms for Endearment: Business, NGOs and Sustainable Development* (2000); R. Gibson (ed.), *Voluntary Initiatives: The New Politics of Corporate Greening* (1999); V. Haufler, *A Public Role for the Private Sector: Industry Self Regulation in a Global Economy* (2001), and J. Mannheim, *Corporate Conduct Unbecoming: Codes of Conduct and Anti-Corporate Strategy* (1999).

⁶¹ Haufler (note 60) lists the different self-regulatory initiatives of the private sector to the International Labour Organisation and the United Nations Environment Programme, at p. 13.

⁶² Haufler (note 60).

⁶³ See Bendell, generally (note 60).

⁶⁴ The International Standards Organisation is a private organisation consisting of at least 100 national standards organisations. Technical committees within the organisations draft standards and these have to be approved by at least 2/3rd of the delegations and should not be opposed by 1/4th of the delegations.

⁶⁵ Haufler (note 60), at 12.

countries refer to such standards. In recognition of this danger Principle 12 of the Rio Declaration explicitly states that:

“Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus”.⁶⁷

This principle has also been repeated in several treaties including the Climate Change Convention.⁶⁸

The point I am trying to make here is that these new forms of governance are not the result of interstate negotiations and are not based on a democratic process in which all the various interests are weighed against each other. Instead they are seemingly innocent and much needed self-regulatory measures; but they can have far-reaching consequences in the context of a globalizing world. At the same time, a new sort of legitimising process has been launched. From a literature analysis it is concluded⁶⁹ that there is pragmatic legitimacy which is based on the immediate self-interest of the organisation (participation in such eco-label schemes will help companies compete); moral legitimacy which is likely to win the support of other non-state actors and cognitive legitimacy which stems from conforming to international ISO and other standards. This new form of legitimacy competes with the traditional form of interstate agreement.

The above section has traced the role of the non-state actor in international environmental relations and has explained how slowly but surely, the position of the non-state actor is being accommodated in the international context. The position of the non-state actor has moved from consultative status for the super-elite non-state actors, to “behind-the stage-manager” for elite non-state actors, to include explicit principles to protect and to empower a much larger and broader category of non-state actors. Finally, we also see how the rising power of the non-state actor may lead to new forms of governance that operate outside the formal legal system. Cronin argues that the more complex intergovernmental organizations are, the more they will have to delegate or contract work out to non-state actors. “The greater the involvement of NGOs within the IGOs, the more transnational concerns threaten to replace the intergovernmental ones on the international agenda.”⁷⁰

⁶⁶ See, for details of this argument, M. Campins-Eritja/J. Gupta, *Non-State Actors and Sustainability Labelling Schemes: Implications for International Law, Non-State Actors and International Law*, 2, No. 3 (1992), in press.

⁶⁷ See the Rio Declaration (note 24).

⁶⁸ See Art. 3.4 of the FCCC (note 35).

⁶⁹ K. Webb (ed.), *Voluntary Codes: Private Governance, the Public Interest and Innovation*, Carleton University Research Unit for Innovation, Science and the Environment, Ottawa, Canada.

⁷⁰ See B. Cronin, *The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism*, *Global Governance* 8 (2002), 53, at 68.

III. Regaining Control: Non-State Actors as Partners in Implementation

1. Introduction

The following section examines what might be referred to as an effort by international organisations to regain control over the myriad initiatives of the non-state actor and to gain access to their vast human and economic resources. Till the World Summit, two trends were increasingly becoming visible.

The first trend was that of the setting up of international commissions that are apparently authoritative but have little legitimacy. The World Commission on Dams (WCD) is a good example. It was established in response to the growing investments in large dams and the growing perception of their negative environmental and social impacts on local people. It was set up by the World Bank, IUCN and selected stakeholders and recently came up with its report on the positive and negative aspects of international dams. This Commission consisted of 12 Commissioners whose job was to evaluate completed dams and lessons learnt from such dams. The two key objectives were to review the development effectiveness of dams and assess alternatives for water resources and energy development, and to develop internationally-acceptable criteria and guidelines to advise future decision-making in the planning, design, construction, monitoring, operation, and decommissioning of dams.⁷¹ These Commissions are seen as a way of moving international governance forward without waiting for bureaucratic decision-making procedures of the United Nations. *Ottaway*,⁷² however, argues that the setting up of such Commissions (e.g. The World Water Commission, Brandt Commission, The Commission on Environment and Development, Commission on Global Governance) leads to publications, but little more than that because of their limited legitimacy and limited "mandating authority", in other words they have no enforcement powers nor is there an associated compliance pull. The WCD which included stakeholders as opposed to the others which included eminent people had possibly less authority.

The second trend is that of setting up tripartite arrangements between groups. The Secretary General's Global Compact is an example of such an arrangement that aims to bring government forces in close contact with industry and environmental groups.⁷³ *Ottaway* also refers to the work of the Millennium Forum whose goal is to integrate NGOs in the UN system to increase the democratic functioning of the UN; and the UN's Vision Project on Global Public Policy too focuses on increasing the opportunities for participation by the non-state actor. The setting up of such tripartite agreements indicates the willingness of social ac-

⁷¹ See <www.dams.org>.

⁷² See M. *Ottaway*, *Corporatism Goes Global, International Organisations, Nongovernmental Organisation Networks and Transnational Business, Global Governance* 7, No. 3 (2001), 265.

⁷³ See <www.unglobalcompact.org>.

tors to engage as partners with the United Nations. But the question is – are these tripartite agreements legally binding and effective? These initiatives often give birth to a number of other initiatives and in the long-term may lead to the internalisation of new norms. However, because there are generally no measurable targets it is difficult to actually evaluate the effectiveness of such initiatives.

These efforts at collaborating between state and non-state actors have now reached apparently new heights at the World Summit on Sustainable Development (WSSD). Participation by non-state actors in the World Summit was encouraged by a General Assembly Resolution.⁷⁴ In another Resolution, the General Assembly went on to call for: “global commitment and partnerships especially between Governments of the North and the South, on the one hand, and between Governments and major groups on the other”.⁷⁵ This gave the official go ahead to legalise the participation of new groups in the World Summit.

Hence, in addition to the 2500 organisations with consultative status with the Economic and Social Council, 737 new organisations were accredited at the World Summit. More than 8000 representatives of these organisations attended the official meeting of the Summit, and were actively involved in the multi-stakeholder event, the high-level round tables and/or the plenary meetings. Forty geographical and issue based caucuses were established and these organized between 8-10 meetings daily. 220 Type 2 partnership agreements (agreements between non-state actors and sometimes with state actors) were registered. There were about 150 side events, many organised by civil society and business.

At Johannesburg, the major outputs were the Type 1 outcomes or inter-state agreements. Somewhat less concrete, but still contributing to the process of dialogue and social learning were the general debate which included statements by state and non-state actors, the “multi-stakeholder event” and the “Roundtables”. Outside the official processes of the World Summit, were the numerous side events and the parallel activities of the non-state actors. The products of these parallel activities include the declarations adopted by civil society, by the International Coalition of Local Environmental Initiatives, by the Indigenous People and the Youth. The role of the non-state actor in these products is highlighted below.

2. Type 1 Agreements: Promoting Participation and Accountability

Type 1 agreements include the Johannesburg Declaration on Sustainable Development and the Plan of Implementation. In the Declaration, the Heads of State declared, *inter alia*, “We recognize sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners we will continue to work for stable partnerships with all major groups respecting the independent, important roles of

⁷⁴ UN Doc. A Res/55/199.

⁷⁵ UN Doc. A Res/56/226.

each of these.”⁷⁶ The Declaration goes on to state: “We agree that in pursuit of their legitimate activities the private sector, both large and small companies, have a duty to contribute to the evolution of equitable and sustainable communities and societies.”⁷⁷ “We agree that there is a need for private sector corporations to enforce corporate accountability. This should take place within a transparent and stable regulatory environment.”⁷⁸

The Plan of Implementation of the World Summit includes chapters on several key issues including the participation of major groups. This section, consisting of three paragraphs, focuses on enhancing partnerships between governments and non-governmental actors; on the need to acknowledge the relationship between environment and human rights, including the right to development and the promotion of youth participation. Throughout the rest of the document the importance of stakeholder participation and partnerships is highlighted.

3. Type 2 Agreements: Promoting Partnership

The Johannesburg Summit is unique in that it initiated Type 2 Partnerships that only need to be agreed to by those directly involved, in particular the non-state actors. In other words this is an initiative to directly involve stakeholders in the process of addressing global problems. The Explanatory Note by the Chairman of the Preparatory Committee states that these outcomes would “consist of a series of commitments and action-oriented coalitions focused on deliverables and would contribute in translating political commitments into actions”.⁷⁹ The World Summit, however, specified that only sub-regional, regional and global initiatives could be registered, and that such activities needed to be focused on the implementation of Agenda 21, the Millennium goals and sustainable development activities in the developing countries and the countries with economies in transition.

The Secretariat of the WSSD then published some guiding principles on Type 2 outcomes.⁸⁰ Such partnerships were to be voluntary and based on mutual respect and shared responsibility; intended to complement, not substitute, agreements made by States – “serving as mechanisms for the delivery of globally agreed commitments by mobilizing the capacity for producing action on the ground”. Such agreements are to integrate the economic, social and environmental dimension, and

⁷⁶ Declaration on Sustainable Development, Report of the World Summit on Sustainable Development, 2002, A/CONF.199/20, Art. 26.

⁷⁷ See Report of the WSSD (note 76), Para. 27.

⁷⁸ See Report of the WSSD (note 76), Para. 29.

⁷⁹ Partnerships/Initiatives to Strengthen the Implementation of Agenda 21; Explanatory Note by the Chairman of the Preparatory Committee, available at <http://www.johannesburgsummit.org/html/documents/prep2final_papers/wssd_description_of_partnerships2.doc>.

⁸⁰ Guiding Principles for Partnerships for Sustainable Development (“Type 2 outcomes”) to be Elaborated by Interested Parties in the Context of the World Summit on Sustainable Development, 7 June 2002, available at <http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali_documents/annex_partnership.pdf>.

be consistent with sustainable development and poverty reduction strategies. The partnerships are expected to involve a number of stakeholders so that they are truly participatory. The partnerships are meant to be open and transparent, in good faith so that the outcomes are shared equally by all those participating. Tangible results and initial funding are a pre-requisite for such a process. They should be “new” and specifically developed in the context of the WSSD, include local involvement and have international impact.

As of 3 February 2003, there are 225 Sustainable Development Partnership Agreements and 29 processes or agreements to eventually establish such partnership agreements. Apparently there were also partnerships announced at Johannesburg that were not registered. The Agreements are classified into the following categories. These include: Changing Unsustainable Patterns of Production and Consumption, Protecting and Managing the Natural Resource Base of Economic and Social Development, Health and Sustainable Development, Sustainable Tourism, Sustainable Development of Small Island Developing States, Sustainable Development Initiatives for Africa, Capacity Building, Local Authorities and Urbanization. A quick review of the summary of these initiatives indicates that in most cases, the initiatives are being led by civil society organizations, and very few are led by the private sector. Some clearly are not new ideas, and most have very vague commitments.

4. WSSD Processes: Promoting Dialogue

At the World Summit, non-State entities were allowed to make presentations. These included primarily representatives of the different UN bodies, large business bodies such as the Business Action for Sustainable Development and international agencies such as the International Committee for the Red Cross. There was also a “Multi-Stakeholder event” where stakeholders including organisations representing youth, indigenous peoples, non-governmental organisations, local authorities, trade unions, business and industry, scientific communities, farmers and women presented their different perspectives on sustainable development. While each of these groups committed themselves to the goals of the UNCED and WSSD process, the youth groups highlighted the lack of progress made in debt cancellation, production and consumption processes and restructuring of global markets and, *inter alia*, the ratification of the Kyoto Protocol. The indigenous people focused on the right of self-determination and the unsustainable agendas of the World Bank, IMF and the WTO. The NGOs also focused on the need to reform the international financial institutions and to make WTO more transparent. The local authorities focused on the challenges in providing basic amenities to people and that there was need for horizontal cooperation between local authorities world wide. The trade unions focused on the need for decent employment opportunities and fair trade and the need for the ILO World Commission on the Social Dimension of Globalisation to become more proactive. Business and industry stated that they ap-

preciated the confidence of governments in their role to promote sustainable development through the use of market mechanisms. The scientific community focused on the role of Science and proposed the establishment of the Advisory Panel on Science and Technology as a formal link between the Commission on Sustainable Development and scientists. Farmers focused on the need for governments to promote sustainable agriculture; while the women's groups focused on the failure of the Summit to establish institutions to implement the goals of the Summit.⁸¹

5. Civil Society Re-Defined

At the World Summit, civil society defined itself in the Civil Society Declaration. "We are the major social groups named in Agenda 21 including women, youth, labour, indigenous peoples, farmers, NGOs, and others including, disabled people, the elderly, faith based organisations, peoples of African descent, social movements, people under foreign occupations and other under-represented groups."⁸² This definition of civil society implicitly excludes the private sector. The Global Peoples Forum also see themselves as the "key agents of social change and sustainable development" who promote their cause through networks and alliances and "in solidarity with impoverished, marginalized and subjugated people the world over, based on the principle of oneness of humankind".

Through their Declaration, civil society claimed to promote the principles of equality of all people and meaningful participation in sustainable development policy formulation.⁸³ It emphasises that all states must respect and enforce human rights, including that every person should have the right to income, food and social security.⁸⁴ In the area of economic issues, the Declaration focuses on fair trade based on the principle of common but differentiated responsibility, the principle of redistribution of wealth, legally binding global rules to ensure corporate accountability, debt eradication and anti-privatisation especially in the areas of water and sanitation, health care, education and housing.⁸⁵

In relation to political issues, the Declaration calls for transparency, which includes prior notice, consultation, participation and public disclosure on all transactions and agreements which affect the lives of people. This is addressed not only to state and inter-state agreements, but also state-business transactions, military and trade agreements. The Declaration also calls for the right to self-determination, participation at all levels of society, and reduced spending on military goals.⁸⁶

⁸¹ Chapter V of the Report of the World Summit on Sustainable Development, Johannesburg, South Africa (note 76).

⁸² The Global Peoples Forum: Civil Society Declaration (note 4).

⁸³ Social Paragraph, Art. 1, Civil Society Declaration (note 4).

⁸⁴ Social Paragraph, Art. 2, Civil Society Declaration (note 4).

⁸⁵ Economic Paragraph, Arts. 1-5, Civil Society Declaration (note 4).

⁸⁶ Political Paragraph, Arts. 1-5, Civil Society Declaration (note 4).

The environmental paragraph focuses on environmental sustainability, which is defined to include that people should have control over biological resources “as well as their rights to direct all development, including in agriculture and aquaculture, towards models that are ecologically and socio-culturally sensitive and which conserve or enhance biodiversity and biodiversity-based livelihoods”. They also argue that traditional and indigenous knowledge systems should be recognized as legitimate. The Civil Society Declaration categorically rejects genetic engineering, on the basis of the precautionary principle; that current “systems of unequal ownership, access to and use of marine and coastal resources” should be modified to allow sustainable and equitable use to the local communities and promotes renewable energy while calling for a phase-out of fossil fuels and nuclear energy.

The Programme of Action focuses essentially on the redistribution of land, the protection of small farmers and fishermen, the protection of biodiversity and the prevention of patenting of life, the promotion of peace, corporate accountability, debt eradication and reparations, climate change and energy, financing development, good governance in local through to global institutions, to “combat globalisation” and protect solidarity which ensures jobs, living wages and employment, in the area of water, household food security, etc.⁸⁷

IV. The World Summit

1. Type 2 Agreements: Regaining Control or Losing It?

What has become clear from the above discussion, is that the role of non-state actors is again in transition. I argued in section 2, that many non-state actors appear to be taking the “law into their own hands”. They are developing alternative schemes of self-regulation, they are in the process of developing and shaping global norms, they are also actively engaging in codification of rules that are yet to become prominent. The World Summit on Sustainable Development has, however, changed the rules of engagement with non-state actors. It has clearly enhanced the role of civil society and businesses and industry within the context of the UN system. The question is: Is the newly developing role for civil society and business and industry adding more clarity and improving the process of governance or not? I would like to answer this question, using two lines of argument. The first focuses on the role of these actors in norm development, and the latter focuses on partnership as a new form of empowerment.

⁸⁷ Global Peoples Forum: Programme of Action: A Sustainable World is Possible, <<http://www.worldsummit.org.za/policies/program.action.html>>.

2. Civil Society, Business and Industry and Their Role in Norm Institutionalisation

Increasingly non-state actors are playing a very important role in norm institutionalization and preparing the ground for their entry into soft and hard law. A norm expresses what a community expects from the behaviour of others and the normative force of a norm "contributes to the realisation of what ought to be".⁸⁸ Dijk argues that by its very existence, the adoption of a norm in a legally binding or non-binding international agreement, will gradually begin to influence the way people think.⁸⁹ But one can argue, that with globalisation the existence of a support group for a specific norm will also begin to influence the way other people think.

The development of environmental norms have originated primarily from non-state organisations.⁹⁰ The role of non-state actors in developing and enforcing norms can be traced back to the Christian Church which has been described as the first non-state actor to develop norms to promote business practices.⁹¹ The Brundtland Commission is often given credit for promoting sustainable development.⁹² Edith Brown Weiss is given credit for elaborating on the principle of intergenerational equity.⁹³ The International Law Association has tried to articulate the Law of Sustainable Development and hopes not only to reflect the state of emerging sustainable development law but also to accelerate the process of giving this law more legitimacy and recognition.⁹⁴

In the process of norm institutionalisation, non-state actors are playing a major role in defining and refining norms from legal and non-legal perspectives. This leads to a process of legal socialisation and the norm gradually becomes a popular term if not a binding legal concept. On the positive side, non-state actors can be seen as norm developers, nurturers, promoters, and implementers, arguably the "conscience keepers" in the environmental field.⁹⁵ They use tools at their disposal to point out to those that do not conform to the norms and so influence the process of environmental protection.

At the same time, the selection of a norm calls for weighing a range of different norms promoted by different people. Powerful social actors have taken up the challenge and are participating in a wide range of ways in the national to international negotiating process to facilitate this weighing process. The question remains

⁸⁸ See P. van Dijk, Normative Force and Effectiveness of International Norms, *German Yearbook of International Law* 30 (1987), 9.

⁸⁹ See also the analysis by P. Szasz, *International Norm Making*, in: E.B. Weiss (ed.), *Environmental Change and International Law* (1992), at 71 on why soft law norms are observed.

⁹⁰ See Szasz (note 89), at 51.

⁹¹ See J. Braithwaite/P. Drahos, *Global Business Regulation* (2000), at 497.

⁹² *World Commission on Environment and Development, Our Common Future* (1987).

⁹³ E.B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1998).

⁹⁴ See ILA (note 41).

⁹⁵ See Yamin (note 51).

however: Who do they represent and for how long? Are their perspectives more legitimate than those of others? In a separate paper I make the argument that at least in the climate change regime, non-state actors may have increased the amount of information available in the regime, but not necessarily the clarity, transparency or the legitimacy of the regime, since it is only the most resourceful and powerful non-state actors that have influence within the regime, and often their power is disproportionate in relation to the group they represent.⁹⁶ Further, if the legitimacy and democratic nature of non-state actors can be questioned, so too can that of the norms created, nurtured, pushed and pulled by them. "At an operational level, it is reasonable to assume that NGO-spearheaded voluntary code administrations will be susceptible to the usual litany of problems faced by those which regulate (e.g. incompetence, corruption, conflict of interest, unfair treatment, etc.)."⁹⁷

Another point that needs to be made is that while environmental and non-profit, non-state actors "push" for a range of norms at national to international levels, business non-state actors "pull" or convince others about the values and norms that they adopt in their businesses.⁹⁸ This "push" and "pull" has, *inter alia*, led to labelling and certification schemes (see section II.5) and corporate social responsibility. Today there are more than 60,000 corporations with 450,000 subsidiaries reaching into every corner of the globe,⁹⁹ with such huge financial and other resources that Hertz (2001) argues that multinationals are in the process of taking over the politics and policy in the world.¹⁰⁰ In the Western world corporate social responsibility is now the growing buzz word. But it is not as if corporate responsibility is a new idea. It has been on the international agenda for a long time in a different form. In response to the growing power of the multinational corporation in the 1960's, the developing countries urged the international community to table the issue of corporate responsibility. This led ECOSOC to establish the Commission on Transnational Corporations in 1974 to negotiate the United Nations Draft Code for Transnational Corporations. However, this effort was soon aborted. Since then, a number of codes have been developed.¹⁰¹ The OECD codes have had, however, little visibility and effect and were voluntary in nature. The ILO codes required ratification by governments and implementation by them. In response to the growing urge to control multinational activity, multinationals themselves began to regulate themselves and set standards for themselves. In 1998, the OECD analysed 233 corporate codes. The proliferation of reporting efforts and styles led

⁹⁶ See Gupta (note 38).

⁹⁷ Webb (note 69) at 19.

⁹⁸ The application of "push" and "pull" to non-state actors in relation to norms has been analysed by Webb (note 69).

⁹⁹ Haufler (note 60).

¹⁰⁰ N. Hertz, *The Silent Takeover* (2001).

¹⁰¹ These include the World Bank's 1992 Guidelines on the Treatment of Foreign Direct Investment, Legal Framework for the Treatment of Foreign Direct Investment, Volume II Guidelines; the OECD Guidelines on Multinational Enterprises, OECD Principles of Corporate Governance; ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which applies mostly to governments.

UNEP and the Coalition for Environmentally Responsible Economies (CERES) to initiate the Global Reporting Initiative (GRI) to standardise the formats and in 2000 they published the GRI Sustainability Reporting Guidelines on Economic, Environmental and Social Performance.¹⁰² In the meanwhile, the ISO¹⁰³ 14 000 standards also require companies to link corporate environmental codes with implementation. Attempts to regulate these transnational companies have been opposed by transnationals and the initiative is now in their own hands.¹⁰⁴ In the meanwhile there is no international legal framework for ensuring corporate accountability,¹⁰⁵ and although civil society called for such a framework at the World Summit, there was no real response.

In other words, civil society and the business and industry community are the new vehicles for promoting norms at the international level. The question remains – who elected them?

3. Type 2 Agreements: Regaining Control or Losing It?

One could argue that state actors and international organisations intend to regain control over non-state actors by attempting to register and monitor their activities. “If you can’t beat them join them.” In his Opening Statement at the World Summit on Sustainable Development, UN Secretary General Kofi A n n a n emphasised that sustainable development cannot be achieved by governments alone. “Civil society groups have a critical role, as partners, advocates and watchdogs. So do commercial enterprises. Without the private sector, sustainable development will remain only a distant dream. We are not asking corporations to do something different from their normal business; we are asking them to do their normal business differently.”¹⁰⁶ Nitin D e s a i, Secretary General of the WSSD, explained that there is a growing need to connect the work of governments with the work of non-state actors who are taking several local initiatives to promote sustainable development. “Partnerships basically serve to connect the dynamism that we see at local level with the commitments that governments need to make.” Registering these partnerships will imply an inventory of such efforts, transparency and access to information regarding such efforts and possibly even allow non-state actors to monitor and control such efforts. Registering such partnerships will also mean that the gaps in such efforts can easily be identified and possibly dealt with. The mere idea of registering such partnerships may set the ball rolling, and any large organisation worth

¹⁰² For details on the Global Reporting Initiative, see <<http://www.uneptie.org/outreach/reporting/gri.htm>>.

¹⁰³ For details on ISO 9000 and 14000 see <<http://www.iso.org/iso/en/iso9000-14000/index.html>>.

¹⁰⁴ Haufler (note 60), at 20-30.

¹⁰⁵ See also J. Dine, *Multinational Enterprises: International Codes and the Challenge of “Sustainable Development”*, *Non-state Actors and International Law* 1, No. 2 (2001), 81.

¹⁰⁶ Statement by Kofi A n n a n, Secretary General of the United Nations, Annex II of the Report of the World Summit on Sustainable Development (note 76).

its salt, will consider it a useful exercise to register their new activities here because of the huge public relations benefits that can be achieved and also because this might legitimise their activities, and make it easier to seek funding.

And yet, Type 2 agreements, essentially soft law agreements, are not universally acclaimed as a step forward in the international governance processes. These Type 2 agreements have been actively promoted by governments (e.g. the US) that want to move away from Type 1 agreements. This is also demonstrated by the written reservation of the US Government at the WSSD in relation to the fairly vague Type 1 Declaration and Plan of Action, where it clarifies that the US is not in favour of new commitments and does not see the Type 1 documents as laying down legal commitments.¹⁰⁷ On the one hand, this allows governments to abdicate their responsibility in negotiating and adopting legally binding quantitative commitments for dealing with global problems. This reflects the position of the most powerful domestic actors, and these same private sector actors are also active in the international arena to bypass such negotiations leading to fewer legally binding rules in favour of voluntary agreements. Merely registering such voluntary initiatives does not necessarily mean that they become more stringent and can instead serve as good public relations. The real fear is that Type 2 agreements, instead of complementing Type 1 Agreements, grow in importance to substitute for Type 1 Agreements. This fear was also felt by the Secretariat, which has included a specific comment that Type 2 agreements must complement Type 1 agreements in the Guidelines. The Norwegian Minister of International Development is cited to have said: "Why are we here if the only tangible results from the Johannesburg process will be Type 2 partnership initiatives financed from existing ODA flows, with no additionality, putting 'green paint' on old projects, or launching new ones primarily directed towards show-offs and flags for donor governments, undermining national ownership and coordination in the poor countries."¹⁰⁸ Northern NGOs claim that "Misplaced emphasis on the 'Type 2' Outcomes threatens to mask the failure of governments to agree on meaningful action and may result in the 'privatisation of sustainable development'". There is also lack of a legal framework for corporate accountability, access to information and decision-making. NGOs asked for a clear link between Type 1 and Type 2 agreements, avoiding "greenwash", establishing a follow-up process including oversight responsibility, public access to contracts and project documents, annual reporting and external audits, additionality, building on

¹⁰⁷ The US states that it would "not accept any interpretation of Principle 7 of the Rio Declaration that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution of the responsibilities of developing countries under international law", and that "notes that, like other such declarations and related documents, these documents [...] do not create legally binding obligations on States under international law". This written statement is reported in the Report of the World Summit (note 76), at 145-146.

¹⁰⁸ Cited by EcoEquity Submission of 20 August 2002 to the World Summit, prepared by Consumers International, the Danish 92 Group, Greenpeace International, the Northern Alliance for Sustainability (ANPED), OXFAM International, WWF International, available at: <<http://archive.greenpeace.org/earthsummit/docs/type2fin.pdf>>.

existing agreements, defining partnerships and ensuring equity and partnerships, strengthening the capabilities and influence of the poor, etc.

I have also been following some of the national follow-up discussion on Type II partnerships. For example, the Netherlands Government has committed itself to helping 10 million people gain access to water, food and energy. For this it is prepared to spend up to 100 million Euros. Recently the government sponsored a first meeting of stakeholders to discuss how best to establish such a process to help the world's poorest gain access to energy. During the course of the meeting many things became extremely clear. Industry wants returns on investment. Such returns will not come within a short time-frame from investments made on the poorest of the poor. They wanted to change the subject of the discussions to those who were slightly higher up in the economic hierarchy. It was also very clear that those who bring the finances will be the ones who will draw up the contracts. What the precise role of the remainder of the stakeholders will be in the process was extremely unclear. It became also apparent that the other stakeholders were afraid that they would be used as a sop to the conscience. Another important question is – what law will govern these partnerships? Even if the partnerships are registered with the UN, it is certainly not unimaginable that the actual contract for the implementation of specific projects will be undertaken under the rules of private international law and possibly also affected by the bilateral investment treaties that govern the investing partners. How transparent and open will such deals be? Even if governments contribute resources to these partnerships, initial indications show that they are not interested in taking responsibility for the execution of these projects and would rather leave these in the hands of the partner institutes.

V. Conclusion

Let us return to the idea of international law as expressed by the metaphor of the billiards table. Clearly this is no longer a reflection of the current status of the actors in the international law process. The supranationalist vision of a strong centralised governing system within the context of blurring state borders is also not reflected in the facts. The third model of an asymmetrical three-dimensional net of complex interactions of state and non-state actors is perhaps closer to the reality.

Non-state actors have broken into the realm of environmental governance. They have moved from consultative status to establish the right to participate as observers. They are not just back-stage managers, they are to some extent orchestrating the entire show. The processes of communication between treaty organisations and non-state actors is fast becoming institutionalised. Non-state actors are also increasingly becoming, on the one hand, enforcers of international commitments (especially the green non-state actors), and on the other hand, to the extent that they see the international legal process as irrelevant, they are even willing to bypass it and create their own rules and regulations. At the World Summit, they have

moved centre stage from major groups to partners in implementation through Type 2 agreements.

Here it may be of some importance to point to a vital difference between the role of non-state actors under the Climate Change Convention and under the World Summit. In the climate change regime, there are legally binding treaties with quantitative targets for some countries. There are clear articles, rules and regulations about how the non-state actors will be involved in the implementation process. The private sector projects will be controlled by states and, if necessary, by the organisations set up by the treaties, including the Executive Body of the Clean Development Mechanism. Although much of the implementation is left in the hands of the non-state actors, states will be held responsible for non-compliance under the Compliance Mechanism set up under the regime. In contrast, the World Summit has only soft law Type 1 agreements. The Type 2 agreements are meant to be complementary and to implement the Type 1 agreement. The Type 2 agreements are voluntary in nature and as most do not have any targets measuring their effectiveness will be difficult. States do not have legally binding targets and, hence, they are not held accountable for non-compliance. The early indications are that States may be willing to put in resources into Type 2 Partnerships but do not wish to be held accountable for failure of these Partnerships.

This means that although there is a definite evolution in the role of the non-state actor in the international arena, although their empowerment has reached the pinnacle of partnership, possibly this has come at a very high cost to civil society; the cost of increasing abdication of responsibility by states. Civil society wanted partnership, which meant more responsibility, status and authority within the context of legally binding Type 1 agreements. Instead they got partnership rights within the context of Type 2 agreements! In other words: It is not so much that non-state actors are now equal partners within the process of interstate negotiations on legally binding agreements, but rather the nature of the agreements have changed to allow non-state actors to become partners. This turn of events suits business and industry well, because they can avoid regulation, while capitalising on the public relations returns of adopting self-regulatory codes and postures. I would also go so far as to argue that, in fact, the evolution of the power of civil society (as opposed to business and industry) had reached a high point in the climate change regime, but has possibly receded at the World Summit.

Why is this happening? This is because of a three-way pull and push process. The most powerful states are opposed to the agenda of such large meetings and to their ostensible commitment to addressing global environmental and developmental problems. This brings me back to Cronin's argument that possibly states are only interested in issues of inter-governmental concern; while the (environmental and developmental) issues pushed by civil society are more transnational in nature. Many states do not feel obliged to become involved in such transnational concerns, and hence the so-called "abdication" of responsibilities by states.

Civil society has been pushing for greater responsibility by states and business and industry and has demanded a greater role for itself. This would ensure more

transparency, commitment and accountability from states and business and industry. This would also provide a greater compliance pull because civil society would be informed of the commitments and would also play its part in communicating and implementing the international agreements.

Business and industry has always opposed strong regulatory control, and have supported instead voluntary codes of conduct and self-regulation, except when it suits their interests as in the case of the WTO-TRIPS negotiations. They have thus lobbied domestically and internationally against binding legal agreements and in favour of voluntary measures.

The World Summit on Sustainable Development, saddled with the uneasy weight of the fact that the United States has not ratified the major environmental (and other) treaties of the last decade, was grimly aware of the inability of making any major headway in the area of legally binding Type 1 agreements. At best the Millennium goals could be further articulated in a soft law document. The only way forward was to gain control over the activities taking place in the arena of "spontaneous globalisation" by registering them and ensuring legitimacy by demanding that such efforts be complementary to the Type 1 agreements and initiated as a result of the WSSD. In the interactions between these three categories of actors, it was not unlikely that binding commitments would be pushed to the backburner and voluntary partnerships would be pushed forward. But while the new Type 2 agreements are a brave attempt to coordinate, centralise and direct the voluntary initiatives of non-state actors decision-making process, they may end up being no more than a registration process of possibly thousands of unconnected efforts world-wide. While Type 2 partnerships may be expected to recognize that "sovereignty rests with the people" and unleash the human power necessary to transform global society, it may instead lead to more and more bureaucracy at UN level (as already indicated by earlier trends)¹⁰⁹ and multiple conflicting voluntary initiatives. If the UN is unable to coordinate and ensure consistency between a handful of international environmental treaties, it will be in no position to ensure the consistency of thousands of partnership initiatives. Since states will not be held accountable for achieving the Type 1 agreements, this whole process may not yield more than bureaucracy and confusion.

In other words, in the environmental area, States are becoming "quasi" states in the context of environmental management. While some lawyers cling to Westphalian notions, post-statists are increasingly recognising the growing reluctance of state actors and the growing power of non-state actors. Others even go so far as to argue that the non-state actors are fast becoming "surrogate States" as Doern refers to them.¹¹⁰

But such "surrogate" states have neither authority, nor legitimacy. They come and go without taking on long-term responsibilities, and are dependent on unde-

¹⁰⁹ Ottaway (note 72), at 277; C. Alger, *The Emerging Roles of NGOs in the UN System: From Art. 71 to a Peoples Millennium Assembly*, *Global Governance* 8, No. 1 (2002), 93, at 29.

¹¹⁰ Cited in Webb (note 69), at 21.

pendable external sources for financial resources.¹¹¹ While this paper may have given the impression that some non-governmental actors focus on the global good and others on promoting their private self-interest, the point I would like to make is that it is very unclear who both civil society and business and industry represent. Although such groups can increase the legitimacy of agreements by demanding transparency, accountability, due process and democratic values, they can also decrease the legitimacy because those forces that are organised at national and/or international level have often more power than justified by the constituencies represented.¹¹² The mere inclusion of non-state actors may increase the transparency of the negotiations, but not necessarily create clarity. In fact such presence may create more confusion. Furthermore, the information provided is subject to the mandates and stakes of the stakeholders involved and these may not be representative of the wide range of interests. The stakeholder may demand accountability from the states but may not be accountable themselves. How does one increase the democracy of the stakeholders? Does each stakeholder get one vote? Who decides which stakeholders are to be allowed into the discussion? When is a stakeholder legitimate and when not? Who screens the material made available by stakeholders? To what extent is the material legitimate? To what extent do these non-state actors have capacity for making accountable and legitimate policies?

By throwing open the field to those who are financially capable and organisationally motivated to participate, the international negotiation process becomes little more than a market place, where strong states, supported and egged on by strong non-state actors push treaty rules in a certain direction. Is this not replacing state responsibility and sovereign equality with a stakeholdercracy? The Dialogue Paper prepared by the non-governmental organisations emphasises that the increasing role of business as partner is “characteristic of the decade of continuing deregulation and supremacy of market forces ... increased the concentration of wealth and power in the hands of a small part of the world’s business community, to the detriment of sustainable development and human rights”.¹¹³ This trend might undermine the very concept of justice or fairness that international law embodies and may lead to the long-term failure of international law as a tool for problem solving. As Helleiner puts it:

“If the global rules system is to be ‘harmonised’ through deeper integration among national economies within an agreed overall framework, as most now forecast and many advocate, there must, above all, be full and reasonable democratic representation as the rules and framework are created and implemented. There can be no ‘harmonisation without representation’.”¹¹⁴

¹¹¹ Stahn (note 18), at 401.

¹¹² See S. Marks, Democracy and International Governance, in: J-M. Coicaud/V. Heiskanen (eds.), *The Legitimacy of International Organizations* (2001), 47.

¹¹³ UN Doc. A/CONF.199/PC/18/Add.4, 6.

¹¹⁴ See G.K. Helleiner, Markets, Politics and Globalisation: Can the Global Economy be Civilized, *Global Governance* 7, No. 3 (2001), 243-264 at 250.

What becomes clear from the analysis in this paper is that the comfortable idea of the public international legal system as a procedurally regulated, internally consistent, isolated system of inter-state governance where governments who by virtue of nominal and functional sovereignty negotiate with each other and can and will implement what they agreed to at international level since they are bound by state consent is increasingly losing touch with reality.

Do these new events threaten international law itself? Allott argues instead that: "The state of development of international law at any time reflects the degree of development of international society."¹¹⁵ If the international society changes, then all legal developments part of this change will fall under the international legal system and so: "The international legal system contains all legal phenomenon everywhere, overcoming the artificial separation of the national and international realms and removing the anomalous exclusion on non-governmental transnational events and transactions".¹¹⁶ This is consistent with the view that the UN has two faces, one as an intergovernmental organization, the other as a transnational organization.¹¹⁷ J.G. Ruggie argues that the Global Compact and such corporatist ventures (which I suppose include Type 2 Agreements) are likely to become the most dominant forms of cooperation in the future.¹¹⁸ If we accept the thesis that international law reflects the state of society, then international law needs to continually modify to create a framework within which such partnerships are developed. But in the process its regulatory role must not be undermined if the global community is to achieve sustainable development. Perhaps, in the final analysis, the evolution at the World Summit is, in fact, a step backwards for the process of international multi-layered governance?

¹¹⁵ See P. Allott, *The Concept of International Law*, *European Journal of International Law*, 10 (1999), 31 at 31.

¹¹⁶ *Ibid.*, at 50.

¹¹⁷ See Cronin (note 70).

¹¹⁸ J.G. Ruggie, *global_governance.net: The Global Compact as Learning Network*, *Global Governance* 7, No. 4 (2001), 371.