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THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

A. DAN TARLOCK*

I. INTRODUCTION: GLOBAL ENVIRONMENTALISM OPENS THE DOOR FOR NON-GOVERNMENTAL ORGANIZATIONS

This Essay explores the role of Non-Governmental Organizations [NGOs] in the establishment and enforcement of global environmental priorities. It examines the deficiencies in classic international law that NGOs are helping to overcome as well as the different roles that NGOs now play in priority setting and the enforcement of international norms. It concludes with the suggestion that as NGOs acquire more political power, we need to develop minimal standards to assess NGO performance.

Protection of the global environment from continuing degradation is the most difficult problem facing the international community.¹ The most distinctive aspect of global environmental protection is that it is primarily scientifically driven. International environmental standards have been greatly influenced by priorities established by cosmopolitan scientific elites and to a lesser extent by advocates of global social equity.² For this reason, calls for increased levels of global environmental protection challenge both the ways in which individual countries use natural resources and the distribution of resource use between north and south. These pleas thus challenge the basic assumptions of domestic legal systems as well as those of classic international law and the post-World War II structure of international organizations.

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I would like to thank Ms. Susan Hahn-Reizner, J.D. Chicago-Kent College of Law, 1992, for her research skills in locating a great deal of valuable information about the activities of non-governmental organizations (NGOs).

1. See WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-91 (1990), for an excellent narrative and quantitative survey of global environmental degradation. Vice President Albert Gore develops this theme in *THE EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

2. Equity has become a much more pervasive theme in the global environmental debate. WORLD RESOURCES, *supra* note 1, at 1, observes that "[t]he world's environmental dilemma is that the scale on which natural resources are being consumed and wastes are being produced is already immense, yet many poor countries still lack and desperately need the benefits of industrialization and economic development."

The developing set of environmental principles adopted in a host of international fora, most recently in Rio de Janeiro, set resource use priorities that have the potential to intrude deeply on the traditional autonomy of the nation-state. This makes it difficult for international law to accommodate environmental protection because the preservation of nation-state autonomy has been the principal objective of modern international law. Environmentalists, in contrast, view this objective as subordinate to the prevention of global degradation. Environmental norms are initially established to address problems that are defined without regard to national boundaries. These norms initially address physical not political problems. For problems such as global warming, a ton of soft coal burned in China is the same as a ton burned in England.

Science alone, of course, cannot control the definition and responses to environmental problems. Because they are fundamentally resource allocation and distribution conflicts, they are political problems. Nations will therefore address them in the context of their own self-interest. Thus, these problems must be addressed within the context of national and international legal systems and politics. However, science-driven legal and political problems are different from other problems for two reasons. First, the experience with global environmental standards shows that individual nations have less of an ability to control the global agenda by blocking efforts to establish high environmental standards. Second, nations also have less control over the range of acceptable internal responses. The ability of political systems to respond by non-action is constrained. If the science is right, then the political response must be adequate to address the problem as scientifically defined; half a loaf is the same as no loaf.

The international community's response to ozone depletion illustrates these differences at work. The 1987 Montreal Protocol is a science-driven international agreement that subordinates self-interest to science. Disturbing scientific research led the United Nations Environmental Program to make ozone depletion a priority and broke down national resistance, in both the developed and developing world, to banning a wide range of chlorofluorocarbons (CFCs). This is the first international agreement to take preventative action to minimize a risk, rather than to respond to an existing condition of global resource degradation. Since 1987, the international community has moved to ban the offending chemicals at an accelerating rate.³ The politics of ozone protection were in-

3. RICHARD E. BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 105 (1991).

tense and complex and all countries took "unscientific" self-interest positions at various times, but in the end both industrialized and developing countries, aided by a unique technology-transfer process, participated in strengthening the Montreal Protocol. The former United States Ambassador, who represented the United States at the Montreal Protocol Negotiations, observed that the "new wave of ecological consciousness" meant that "failing to accept a share of responsibility and opting actively to threaten the ozone layer would not be an easy course for a government to follow."⁴

The expanding role of science in defining environmental problems is changing the politics of environmental priority setting and enforcement by increasing the influence of NGOs.⁵ NGOs helped to spur action to accelerate the phase-out of CFCs and play an increasingly powerful role in setting the global environmental agenda. For example, the ratio of NGO participants to United Nations and government officials at the June 1992 United Nations Conference on Environment and Development in Rio de Janeiro was approximately one to one. NGOs are now permanent players in the international arena as they are in the United States. Ironically, their domestic role was originally conceived of as a temporary antidote to correct the failure of scientific management to encompass environmental values. Domestic NGO activism was a way to "jump start" government agencies which were unresponsive to environmental values because they had degenerated from progressive regulatory agencies to ossified mission agencies. Once these agencies broadened their values, it was hoped that they would once again merit the trust of the public to manage resources scientifically. The opposite happened. NGOs became permanent players in the regulatory game with the capacity to influence all phases of policy, and NGO participation in law making has now become a political theory. The existence of strong NGOs has been identified as a hallmark of democratic government and thus a necessary condition for effective environmentalism.⁶

4. *Id.* at 152.

5. After this article was written, David Tolbert, Lecturer in Law at the University of Hull, England, published part of his L.L.M. dissertation on NGOs as *Global Climate Change and the Role of International Non-Governmental Organizations*, in *INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE* 95 (Robin Churchill & David Freestone eds., 1991). Much of his extensive research and analysis tracks my argument, although we differ modestly in the need to subject NGOs to minimal standards of conduct.

6. Ibrahim J. Wani, *Poverty, Governance, the Role of Law, and International Environmentalism: A Critique of the Basel Convention on Hazardous Wastes*, 1 *KAN. J.L. & PUB. POL'Y* 37, 45 (1991).

II. THE PARADOX OF NGOS: POWER WITHOUT LEGAL STATUS

NGOs lack legal personality in classic international law and in the theory of international organizations, but their lack of formal status has not hindered their growing influence in foreign countries and international organizations. NGOs thrived in the United States and in Europe⁷ because they had a legal status which served as the basis of a broader political role. In contrast, international NGOs lack an international legal personality, but they have been able to build on the legitimacy of domestic NGOs to project themselves into the international arena.

NGO participation in the establishment and enforcement of global environmental priorities is modeled after the experience with citizen standing and intervention in the United States. Domestic and international NGOs seek to exercise the same kind of legal and political influence, but the legal position of NGOs in the international community is different. In the United States, NGOs have a tenuous constitutional status and thus are subject to the discipline of the legal as well as the political process. International and many foreign NGOs generally lack any legal status and sometimes operate on the margins of established political processes. This extra-legal character of NGOs has both positive and negative consequences: NGOs are at the mercy of international organization and foreign domestic rules on access and participation; however, their lack of legal status allows them to define their role unconstrained by the law. This allows them to develop more creative and effective approaches to environmental protection than those offered through litigation, especially before international tribunals.

NGO success and involvement in both international organizations and individual nations has generally been hailed as a positive development because they fill such a large void in both domestic and international environmental competencies. This is a powerful justification for their role. Adequate responses to environmental problems require large allocations of scarce resources. NGOs help allocate scarce resources to environmental issues in advance of the nation-centered international community. They police international organizations and provide valuable information and other assistance to developing nations. To date, NGOs have been a positive force in bringing environmental issues onto domestic and international political agendas since so much in current

7. The role of private individuals in the enforcement of European Community environmental law is discussed in Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI. KENT L. REV. 173 (1992).

economic and political organizations is hostile to effective environmentalism. There is, however, a need for a more critical assessment of their role.

My thesis is that NGOs have progressed from influencing the articulation of environmental aspirational standards of conduct, to the formulation and implementation of policies both in international organizations and individual nation-states, through moral and scientific persuasion, to the exercise of power. NGOs now have the capacity to influence multinational organization policy and to intervene directly in choices traditionally reserved to individual sovereign states under international law. They cannot alone overcome the difficulty of international law to adapt to the imperatives of protection, but they exercise real power in the international community. In the main, the growth of NGOs has been a positive factor in the development of international environmental protection regimes, but there is reason for caution. Because they exercise real political power, the role of NGOs must be assessed critically, and ultimately they must be held to some standards of performance.

III. NGOs FIND A NICHE

International environmental priorities are an interesting example of the influence of intense preference groups in the establishment of environmental priorities transcending the inability of formal governmental institutions to respond to scientific information. These groups have great success in shaping the environmental agenda of individual states, convention and treaty processes, and the work of the United Nations. Environmental NGOs can be traced back to the formation of the International Union for the Conservation of Nature in 1948, but the first United Nations conference on the environment gave their current status. Since the 1972 Stockholm conference, NGOs have played an increasingly important role in the development of global environmental standards and institutions as well as in the implementation of policies in individual countries. NGO success can be attributed to advantages that they possess over action by nation states. First, in the formulation of standards of performance, they can articulate powerful universal, single-purpose standards. They need not trade-off environmental to other objectives because they are not bound by the need of political leaders, elected and non-elected, to avoid offending powerful constituencies. Second, for the same reason, there is little incentive to subordinate science to other considerations. Third, NGOs can often work with local environmental groups, who lack both resources and political legitimacy, to support environmental initiatives. Greenpeace's work with local NGOs in Central America

to monitor attempts to import toxic wastes into the region is an example of this role.⁸

NGOs fill a niche in international law created by the state-centered notion of international law. The replacement of the relatively decentralized power centers that were called states in the Middle Ages by powerful sovereign states during the Renaissance was one of the defining moments in western history. Classic international law, which crystallized in the nineteenth century, reflects this moment and has remained frozen in it. The two World Wars have produced the United Nations and a number of international organizations which play an increasingly powerful role,⁹ but respect for state sovereignty remains at the center of international law.¹⁰ The international legal system remains bound by the principles of absolute nation-state sovereignty except for vague and virtually unenforceable limitations when a state causes transnational harm.¹¹

NGOs do not accept international law and the international community as they find it. Environmental advocates reject the primacy of exclusive national sovereignty. Sovereignty is often seen as a barrier to the formulation and implementation of effective environmental policies. The current expectation is that national self-interest will be reflected in standards that represent and processes that reflect the lowest common denominator standard. Reliance on traditional international cooperation processes creates a highly centralized international environmental protection process which ensures that nations will almost inevitably reach consensus on only the lowest common denominator standards and thus will "underinvest" in environmental protection. Since Grotius' *De Jure Belli ac Pacis*, international law has been concerned with the establishment of the ground rules of "civilized" conflict among nations.¹² Only general or lowest common denominator standards are accepted as law. The eighteenth and nineteenth century triumph of John Locke's idea of constitutional governments with limited power changed the theory of international law by making consensus the only criterion of legitimacy.

8. *Greenpeace Claims Foreign Companies Dumping Waste in Seven Latin Nations*, 15 Int'l Env'tl. Rep. (BNA) 16 (Jan. 15, 1992).

9. See generally PAUL F. DIEHL, *THE POLITICS OF INTERNATIONAL ORGANIZATIONS: PATTERNS AND INSIGHTS* (1989).

10. PHILLIP TAYLOR, *NONSTATE ACTORS IN INTERNATIONAL POLITICS: FROM TRANSREGIONAL TO SUBSTATE ORGANIZATIONS* 3 (1984).

11. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58-70 (4th ed. 1990).

12. J. C. RANDALL, *THE MAKING OF THE MODERN MIND: A SURVEY OF THE INTELLECTUAL BACKGROUND OF THE PRESENT AGE 197-201* (1926) remains a masterful examination of the intellectual origins of modern international law.

Constitutional governments thus robbed the most powerful nations of their power to transcend international relations.

From the sweep of world history, the aspiration for "civilized" conflict among nations is a grand one. However, from an environmental perspective, the ideal of achieving a slightly less worse human condition must be rejected as inadequate. If the warnings of scientists on issues such as global warming, ozone depletion, and rain forest destruction are correct, we can only aspire to higher not minimal standards of national performance. Thus, global environmental protection poses an even more difficult challenge to the international legal system than the effort to limit war. International environmental law seeks ways to bring all nations up to high standards of environmental protection consistent with notions of inter-generational and inter-regional equity. This aspiration is reflected in the current efforts to promote sustainable development in both the developed and developing world.

The direct doctrinal underpinning for the recognition of NGOs in international law, is the theory of the "private attorney general" as articulated by Judge Jerome Frank,¹³ although ironically the Supreme Court is moving away from the private attorney general theory in the direction of the "statist" theory of classic international law.¹⁴ No such concept can exist in international law because only states have standing to sue before the International Court of Justice (ICJ).¹⁵ However, the wide spread de jure and de facto democratization of the judicial process and the increasingly prominent role of multi-national organizations has made it possible to analogize from domestic to international law. The Grotian idea that individuals as states are part of international society, rejected in the nineteenth century, also supports the recognition of international legal status for NGOs.¹⁶

NGOs' arguments for a formal legal status ultimately build on two post-World War II attacks on the premise of classic international law that co-existence is the objective of the international legal system as well

13. The leading case is *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See generally Roger C. Cramton & Barry B. Boyer, *Citizen Suits in the Environmental Field: Peril or Promise*, 2 *ECOLOGY L.Q.* 407 (1972); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 *COLUM. L. REV.* 1432 (1988). For an application of this model to international NGOs, see David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 *YALE L.J.* 2645 (1991).

14. See, e.g., *Lujan v. National Wildlife Fed.*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

15. See Phillippe J. Sand, *The Environment, Community and International Law*, 30 *HARV. INT'L L.J.* 393, 397 (1989).

16. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in *HUGO GROTIUS AND INTERNATIONAL RELATIONS* 65, 83-87 (Hedley Bull et al. eds., 1990).

as on the Grotian idea of an international society. The first post-World War II development is the McDougall "deconstruction" of international law. McDougall and his school accepted co-existence among the major power blocks as the objective of international law, but applied American realist jurisprudence to include both *de jure* and *de facto* actors. The second is the argument of the late Wolfgang Friedman that as international law progressed from co-existence to cooperation, the category of entities with an international legal personality expanded.¹⁷ From this perspective, NGOs can be seen as an extension of the growing status of international organizations.¹⁸ As a leading treatise observes, "There is no general rule that the individual cannot be a 'subject of international law'. . . ."¹⁹

While American theories of citizen standing provide the primary legal rationale for NGO legitimacy, the ability to capitalize on this position derives from the science-driven nature of environmental politics. Most environmental problems have secured a place on political and policy agendas only because members of an educated elite believe what scientists warn. Environmental agendas are formulated at the top and then supported by the most educated segments of an electorate. They seldom come from the bottom up, although in the former Soviet Union and Eastern European block countries environmentalism was one of the only means of general protest against communist control.²⁰ For example, ozone depletion is a problem because scientists predict that continued ozone depletion will cause serious health risks and contribute to global warming. Scientists, however, only influence, they do not control the policy agenda. The environmental protection agenda is set by political institutions which respond to specific constituencies with perceptions of the problem that are science-based but not limited by the canons of scientific evidence.

There is a growing literature on the factors which influence the rise and fall of issues on political agendas, and this literature explains the influence of NGOs. The basic conclusion of this research is familiar to the parents of teenage children: both legislators and teenagers have short attention spans and respond primarily to noise. Increasingly, noise is a function of information not just numbers. Environmental issues are char-

17. WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

18. At the present time, however, international law only recognizes organizations that are a permanent association of nation states and exercise similar powers. BROWNIE, *supra* note 11, at 680-83.

19. *Id.* at 67.

20. See MURRAY FESHBACH & ALFRED FRIENDLY, JR., *ECOCIDE IN THE USSR* (1992).

acterized as political problems when there is a perceived crisis. Historically, the crisis has been a specific disaster, such as an oil spill, but, contrary to public choice and interest group political theory,²¹ knowledgeable interest groups can serve as "information brokers" and "exercise important influence in the legislative process."²²

IV. NGOs: NEW VOICES, NEW ACTORS

NGOs perform at least four related functions. They bring neglected as well as transcendent perspectives to bear in different fora, they monitor the environmental impacts of various activities, and they participate directly in resource allocation.²³ In short, they increasingly perform roles traditionally assigned to state agencies.

A. Infusion of Alternative Perspectives into Narrow Mission Programs

The case for NGOs rests on the premise that non-governmental entities have a positive role to play in contributing new information and perspectives to policy formulation. This role is a major extension of their traditional role as information synthesizers. NGOs have deep roots in the international community; they reflect a long tradition of international scientific meetings and semi-official international organizations, but their role has evolved to one of claimed parity with established governmental institutions. The modern NGO as a direct political actor with non-state interests in the international affairs emerged at the 1972 United Nations Conference on the Environment in Sweden. NGOs did not have a substantial direct influence on the conference²⁴ but they gained a legitimacy that they lacked before Stockholm.

The Stockholm Conference is generally counted as one of the most successful environmental conferences. It projected environmental concern into international politics where it remains an expanding priority. It also articulated a set of principles that remain the starting point for discussions of international law and treaty standards and it institutionalized

21. See RICHARD J. TOBIN, *THE EXPENDABLE FUTURE: U.S. POLITICS AND THE PROTECTION OF BIOLOGICAL DIVERSITY* 15-26 (1990), which used agenda theory to explain why endangered species protection is a very small dot on the congressional radar screen.

22. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. LAW, ECON. & ORG. 59, 72 (1992).

23. Tolbert, *supra* note 5, at 98-106, identifies four NGO functions beyond traditional scientific advisory functions: (1) the identification of environmental issues and general principles of international environmental law, (2) ombudsmen or guardian activities, (3) creation of international standards and norms, and (4) enforcement of international standards.

24. LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* 58 (2d ed. 1990).

this concern within the United Nations through the U.N. Environmental Program. Much of the success of the conference was the result of careful preparation and masterful diplomacy by conference secretary general Maurice Strong. However, the presence and participation by NGOs created a precedent that remains.

NGOs now seek political parity to counter the narrow self-interest politics of nation states. If politics is all interest groups, then all interest groups should have access to decision making processes. In the United States the opening of both administrative and judicial processes to interest group plaintiffs was justified because it furthered interest group liberalism. Environmental advocates in both Europe and the developing world have admired and emulated this model. As a Ugandan emigre teaching in the United States recently put it, "[e]ffective environmentalism is virtually impossible without basic democratic conditions."²⁵

The international law argument for NGOs' status is also a major extension of the argument for citizen or public interest standing in the United States. United States law draws a sharp distinction between adjudication and political action which will not hold in the international context. In the United States, the case against the citizen suit is that it politicizes the judiciary. This is a false concern since courts are limited to cases and controversies under Article III. To cabin citizen standing, United States courts grant "injured" public interest plaintiffs standing only to enforce existing statutory mandates ignored by the agency. Citizen standing is justified by notions of pluralism that define legitimate decisions as those based on all legitimate view points. The idea of judicial participation in the establishment and enforcement of environmental priorities appeals to environmentalists in strong central administrative states as well, and this argument has become the basis for the integration of NGOs into the international community.

The analogy between domestic citizen standing and NGO participation in international law-making is apt, but concerns about the NGO role are more justified because there are no institutional constraints on NGO roles. This is a matter of considerable concern because in many international agencies the split between politics and technical expertise is a matter of great concern, and it is harder to maintain the line between the two. International organizations often provide an effective forum for developing countries to vent their frustrations, and NGOs can veer from articulating scientific positions that try to bring disparate interests together to articulating polarizing positions. NGO actions reflect the full

25. Wani, *supra* note 6, at 41.

range of contributions and have generally been hailed as positive. However, NGOs are not bound by the limitations of domestic law because their international legal status is different. At the present time NGOs participate at the discretion of the international organizations of the states. Some organizations have procedures to accredit NGOs.

NGO access is often more difficult, but once access is obtained, NGOs are free to use their influence to define agendas as they choose. Under the United States model, citizen suits are open to all who have standing and the law of standing does not screen directly for citizen competence. The idea of a case limits what the NGOs can do in a law suit. No similar limitation exists at the international level. The limitations, such as they are, are solely on access to a process. International organizations have adopted Professor Jaffe's suggestion that courts screen citizen plaintiffs. This allows agencies to limit participation to those most likely to advance the work of the agency but this procedure is biased in favor of well-financed groups.

Putting fresh alternative approaches on the table has been the bread and butter activity of NGOs. Most governments still pursue short-term economic development with little serious consideration of alternatives such as sustainable development. For example, a group of Spanish NGOs issued a report which not only criticized the Madrid-Seville high-speed train, but offered a detailed blueprint for sustainable rural development. The report recommends that rural areas participate in the coastal and urban boom in Spain by being allowed to market their natural value and products to urban dwellers under carefully controlled conditions.²⁶

One of the major success stories of NGOs has been the role that they have played in the transformation of the World Bank's mission, which is under continuing criticism for its support of projects with large adverse environmental and social consequences. NGOs lobbied the Bank directly as well as the United States Congress, and in the past few years Congress has enacted legislation requiring that U.S. agencies urge the Bank to adopt environmentally responsive lending policies.²⁷ Since 1986, the Bank has taken impressive steps to make sustainable development the operating standard for future loans. My colleague Bartram Brown has evaluated efforts to politicize the technical mission international organizations. He distinguishes between political activity which is unrelated to the mandate of the agency and impairs its ability to carry out its mission

26. *Development Plans Being Pursued at Expense of Environment, Groups Claim*, 15 Int'l Env'tl. Rep. (BNA) 18 (Jan. 15, 1992).

27. 22 U.S.C.S. § 2621-m (Law. Co-op. 1992).

and that which enhances mandates. NGO pressure, aided by United States legislation, is an example of beneficial political pressure because "the Bank's ability to function and to fulfill its mandate has been enhanced by these reforms. It is true, of course, that the Bank's Charter never specifically mentions protecting the environment . . . nonetheless, this objective is very much consistent"²⁸ with its mandate to improve the world standard of living through useful projects.

B. The Articulation of Universal Perspectives

NGOs play a role which is both similar and more powerful than public interest plaintiffs in domestic law. In domestic law, public interest adds a perspective to that of the agency by presenting the court with an ignored statutory or constitutional value. This is a familiar role for NGOs and commentators have urged that international agencies allow wide-spread NGO participation. In the international arena, NGOs often play a more transcendent role. They offer a fundamentally different perspective from ones urged by nation states. One of the major criticisms of international environmental law making²⁹ is that it is overly constrained by the state sovereignty which allows states to put state interest first in international negotiations. When agreement is reached, it reflects the lowest common denominator. NGOs, in contrast, are not bound by state interest but can articulate and advocate a global perspective. This can be a modest role such as the presentation of neutral scientific information to break a deadlock over the science of an issue or the articulation of the heretical idea that there should be no compromise on environmental issues.

The flip side of transcendence is, of course, ideological intransigence which can conflict with the underlying science as well as with legitimate non-environmental concerns. The positions taken by international wildlife organizations at the 1992 Kyoto Convention on International Trade in Endangered Species (CITES) illustrate the problem of NGO inflexibility. Several southeast African nations wanted to relax the CITES ban on trade in elephant hides and tusks. Relaxation was successfully opposed by many wildlife conservation NGOs, supported by thirty United States Senators, who saw the problem as a standard anti-species conservation move. However, the issue is more complicated. The nations, the United States Fish and Wildlife Service, and other NGOs saw the issue

28. See BARTRAM BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY* 238 (1992).

29. *Developments in the Law: International Environmental Law*, 104 HARV. L. REV. 1484, 1490 (1991).

as a sustainable development problem and were willing to entertain the counter-environmentally intuitive proposal that limited trade in Elephant products was not inconsistent with species conservation.³⁰ There is no requirement that politics produce rational or right decisions, but the ability of NGOs to block creative science-based solutions is troublesome.

C. *Direct Participation in Enforcement*

NGOs are playing an increasing role in the enforcement of international environmental standards. There is no basis for this role in international law but nonetheless NGOs have carved out a role. Under United States law and the laws of a few European countries, citizen organizations have a statutory enforcement role through the ability to bring citizen suits. There is no corresponding role in international law both because of the principle that only states have standing and the law of effective judicial and administrative enforcement mechanisms. Paradoxically, the non-role of the International Court of Justice and the limited enforcement powers of the United Nations Environmental Program have given NGOs the flexibility to play more diverse and creative roles.

NGO participation in the area of environmental norms is the easiest to justify, especially in developing countries which lack an effective regulatory infra-structure. NGOs are free to do what international law proscribes—to intervene in a nation's affairs which would fall under that nation's exclusive sovereignty under classic international law. NGOs are not bound by the non-intervention principles of international law. They are free to lobby international organizations as well as to use their influence to shape domestic political agendas. For example, recently a coalition of local and international environmental groups played a significant role in persuading the government of Honduras to reject a United States corporation's proposal to construct a large pulp and paper mill because the project threatened to destroy a tropical forest.³¹

D. *Direct Participation in Resource Allocation*

NGOs have played their most creative role in pioneering incentives for developing nations to adopt environmental practices. Inter-generational equity requires that environmental protection be integrated with economic development. The north-south split is the most difficult un-

30. Stephen R. Weisman, *Bluefin Tuna and African Elephants Win Some Help at a Global Meeting*, N.Y. TIMES, Mar. 11, 1992, at A8.

31. *Ecological Concerns Prompt Government to Reject Proposals from West*, 15 Int'l Env'tl. Rep. (BNA) 192-93 (Apr. 8, 1992).

resolved environmental issue and the resolution of this issue increasingly drives global environmental issues. The issue has been framed as a classic redistribution issue: the north took resources from the south through colonialism and transformed them through technology and must now make restitution. The actors have been states and state-controlled multinational organizations such as the World Bank. Since World War II, there has been limited technology transfer in the form of foreign assistance. After the OPEC oil embargo and consequent rise in the price of oil, money flowed into private and public banks and was recycled to developing countries in the form of loans. These loans are now a crushing debt burden for many countries and puts intense pressures on countries to continue to exploit rapidly their natural resources bases. This burden has also provided a small but growing window of opportunity for NGOs to change internal resource use priorities.

In 1984, Thomas Lovejoy proposed a new form of private debt relief: debt-for-nature swaps. In brief, NGOs purchase from a bank a portion of the debt of developing countries faced with a write-off or write-down prospect. Developing country "paper" is plentiful and relatively cheap. The NGO must fund a debt instrument with hard currency that the developing country would like to retire as quickly as possible, often high interest, short term bonds. After the NGO purchases the instrument, it is converted into the local currency of the debtor country and the debt service is applied to purchase land threatened by development or to finance a conservation program. Debtor countries gain the benefit of servicing its debt with local rather than hard currency, subject to NGO control over the country's natural resources. Banks may deduct the original amount of the debt donated rather than the current fair market value of the debt.³² This strategy has been adopted by the United States government because it makes the best of a bad situation, helping developing nations with crushing debt burdens, and offers a modest way to support sustainable development projects.

In 1987, Conservation International purchased \$650,000 of Bolivian debt for Citicorp at an 85% discount and cancelled the debt in return for Bolivia's promise to protect 3.7 million acres of rain forest surrounding the Beni Biosphere reserve. The World Wildlife Fund used the proceeds of its swap to fund an Ecuadorian NGO. A Mexican environmental group, Pronatura, negotiated a \$3,000,000 swap with its government in 1991.

Debt-for-nature swaps are unlikely to be a major vehicle for devel-

32. Rev. Rul. 87-124, 1987-2 C.B. 205.

oping country debt relief but they have considerable potential to save high priority natural areas such as rain forests. From a legal point of view the most interesting aspect of debt-for-nature swaps is the creative NGO circumvention of the basic principle of international law, proclaimed by the United Nations at the height of the Cold War,³³ that each nation has the right to exploit its natural resources. Debt-for-Nature-Swaps have been criticized as a new form of economic imperialism,³⁴ but the device is preferable to traditional economic development which was dictated by the donor country and the World Bank. There are, however, many difficult issues to be faced in the future. For example, the traditional model of resource preservation, the protected enclave such as a national park, has limited application to the rain forests and other productive but environmentally sensitive areas of the developing world.

V. CONCLUSION

The late twentieth century is another defining moment in world history. The international community is both fragmenting into the worst excesses of nineteenth century nationalism and coming together around a series of basic norms. Science and technology limit state monopolies on power, and it will be increasingly difficult for states to maintain resource use policies which deviate from international environmental norms. NGOs have a major and positive role to play in this process. At the present time, their activity needs only to be encouraged and monitored. However, as they acquire more real power, they must be brought into established legal systems so that they can be subjected to standards of accountability. NGOs should not be held to the standards of national states or international organizations, but minimum norms of responsible environmental participation should be developed to monitor their performance.³⁵

Because information is the source of NGO power, their use of information should be the measure of their activities. NGOs have a responsibility to use the best available information to advance the norms of environmentalism such as biodiversity protection, sustainable development and a decent level of freedom from exposure to harmful substances. They are not limited to "good science" since environmentalism is at base

33. *Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, UN GAOR 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

34. See Michael Chamberlain et al., *Sovereign Debt Exchanges*, 1988 U. ILL. L. REV. 415-41.

35. *But cf.* Tolbert, *supra* note 5. Mr. Tolbert argues that because NGOs possess limited formal powers "any attempt to regulate NGOs, without a substantial increase in their rights and powers, appears to be unjustified." *Id.* at 95, n.2.

an ethical theory of science, but NGO activities must adhere to some higher standard than simply “interest” if they are to maintain their legitimacy.