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Future Directions in International Environmental Law: Precaution, Integration and Non-state Actors

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Future Directions in International Environmental Law: Precaution, Integration and Non-state Actors

In this, the Horace E. Read Memorial Lecture for 1995, James Cameron discusses three developments in international environmental law,—the principles of precaution and of integration and the roles of non-state actors. The precautionary principle calls for regulatory intervention to prevent environmental harm even though the risk of damage remains scientifically uncertain. A wide consensus exists in favour of a precautionary approach to environmental management and state practice is sufficient to assert the principle has attained the status of customary international law, but it remains controversial because it demands changes in practice. The principle of integration takes a holistic approach to regulation. It requires the integration of environmental considerations into all public policy decisions from the outset. It also demands the integration of pollution prevention measures with pollution controls so as to minimize environmental degradation. Application of this evolving principle will place environmental policy on a more efficient and effective course. Large numbers of non-state actors with varied environmental, scientific, legal, academic and corporate backgrounds now participate in international environmental fora and thus pose a challenge to fundamental notions of state sovereignty. Yet states have begun to use, even to depend upon, the expertise of non-state actors in developing international environmental policy, so it has become essential legally to recognise their roles and to develop workable mechanisms for their participation. The author concludes the incorporation of these legal concepts demonstrates the growing maturity of international environmental law.

Dans le cadre de la conférence commémorative Horace E. Read de 1995, James Cameron traite de trois développements en droit international de l'environnement: les principes de precaution et d'intégration, ainsi que les rôles des intervenants non-gouvernementaux. Le principe de précaution requiert une réglementation visant à prévenir les dommages à l'environnement, même dans les cas où les risques demeurent scientifiquement incertains. Il existe un consensus général qui s'exprime en faveur de l'approche de précaution dans la gestion de l'environnement, et la pratique des États en est suffisamment répendue pour élever le principe au rang de règle de droit international coutumier. Toutefois, ce principe demeure controversé puisqu'il exige des changements au niveau de la pratique. Le principe d'intégration adopte une approche globale face à la réglementation. Il nécessite l'intégration de considérations environnementales à toutes les décisions affectant les politiques d'ordre public, et ce, dès le début des discussions. Il exige également l'intégration de mesures pour la prévention et le

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contrôle de la pollution de façon à minimiser la détérioration de l'environnement. L'application et l'évolution de ce principe rendra les politiques en matière d'environnement plus efficientes et plus efficaces. De nombreux intervenants non-gouvernementaux provenant des milieux environnementaux, scientifiques, juridiques, académiques et corporatifs participent maintenant aux différents forums internationaux en matière d'environnement, ce qui pose un défi au concept fondamental de la souveraineté des états. Pourtant, les états ont commencé à utiliser, et même à s'appuyer sur l'expertise de ces agents non-gouvernementaux dans l'élaboration de politiques environnementales internationales. Il est donc devenu essentiel de reconnaître légalement leur rôle et de formuler des mécanismes pratiques de coopération pour assurer leur participation. L'auteur conclut que l'incorporation de ces concepts juridiques démontre la maturité grandissante du droit international de l'environnement.

Introduction

International environmental law is a subject that bears a heavy responsibility. It carries the hopes and expectations of international society for its future generations. I also find the sheer scale of global environmental problems can be overwhelming. International law is struggling to cope with what Eric Hobsbawm described as the defining characteristic of the end of the twentieth century—the trend toward globalization and the inability of individuals and their public institutions to cope with this trend.

We now know that international society is more than a collection of sovereign states. We know that states do not possess the sum of real world power capable of solving global environmental problems. We know also that governments do not control the flow of natural resources or money. We sense that new international means are necessary and evolving. What follows is a brief examination of the emerging legal bases underlying developments in international environmental protection as policy-makers, bureaucrats, scientists and lawyers work to understand and manage this modern world system. I shall consider the principles of precaution and integration and the roles of non-state actors.

I. *Precaution*

1. *Introduction*

"If in doubt, don't pump it out!" "Better safe than sorry."

"Giving the environment the benefit of the doubt."

These sayings convey the essence of precaution. From the perspective of decision-makers, they also express a sense of the search for an environmental policy instrument to take the pressure off the planet's life support

systems, to remove stress from our ecosystems and to allow them the time to repair themselves.

Where there is a proven risk of environmental harm, a regulatory action is preventive. When scientific uncertainty is present, the same action is called precautionary. During the 1980s the precautionary approach began to appear as a guiding principle in international environmental law. Although its formulation varies from instrument to instrument, this principle generally consists of three main elements, which have been captured thus:

> Where there is a non-negligible risk of serious or irreversible harm to the environment, regulatory inaction is unjustifiable, even where there is no certainty that the activity giving rise to the risk actually causes the foreseen harm.[1]

The legal status of this principle of law is evolving, but, as will be shown, there is sufficient evidence of state practice to support a claim that the precautionary principle has emerged as a part of customary international law.

2. *Sources of International Law*

According to Article 38(1) of the Statute of the International Court of Justice, traditional sources of international law are treaties, international custom, principles of international law and writings of jurists. Further, the International Law Commission has proposed that binding decisions of international organizations and judgments of international courts or tribunals should constitute additional sources of international law.[2] It is the role of custom, however, and in particular the interplay between treaty law and customary obligation, which is of primary concern when evaluating the legal status of the precautionary principle.

Developing rules of customary law is not a formal legislative process but derives from evidence of consistent state practice and *opinio juris*.[3] State practice is the actual conduct of states which indicates a repeated application of a particular custom. Such conduct may include the ratification of treaties, participation in treaty negotiations, national legislation, national court decisions and governmental policy statements. *Opinio juris* is evidence that a state's action was motivated by a conviction its

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1. J. Cameron & W. Wade-Gery, "Addressing Uncertainty: Law, Policy and the Precautionary Principle" in B. Dente, *Environmental Policy in Search of New Instruments* (Norwell MA: Kluwer Academic Pubs., 1995) chap. 6.
2. As cited in P. Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation* (Manchester: Manchester University Press, 1995) at 103.
3. *Ibid.* at 118.

conduct was required by law. Thus, if a state does not persistently object to a practice of other states, binding obligations may be created based on the evidence of that practice. For example, the decision in the *Trail Smelter Arbitration*,[4] to impose liability for environmental harm between states, later developed from this incidence of state practice between Canada and the United States into the well known customary rule which was articulated in Principle 21 of the Stockholm Declaration,[5] and which has been incorporated into numerous treaties.

3. *Precaution as Customary Law*

The precautionary principle has been endorsed in one form or another by national legal systems. In Germany, for example, implementation has centred on basic research, liability schemes, investment incentives and economic measures, while in the United Kingdom the principle is applied to governmental action enabling a reduction in pollution through regulation.

It is on the international level, however, that the precautionary principle has gained most recent prominence. Precautionary language has appeared in almost every recently adopted multilateral and regional environmental convention and declaration, particularly in relation to the protection of the marine environment.[6] For example, Principle 15 of the Rio Declaration, prepared at the United Nations Conference on Environment and Development (UNCED), provides:

> 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.[7]

Likewise, the Convention on Biodiversity[8] and the Climate Change Convention,[9] both documents resulting from hard negotiations between states with diverse interests, incorporate the precautionary principle as a vital means for meeting the threats of irreversible environmental damage.

There is not, however, a uniform understanding of the precautionary principle among members of the international community. The level of scientific certainty required to postpone preventive measures is unclear.

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4. (*U.S.* v. *Canada*) (1931–1941), 3 R.I.A.A. 1905.
5. *Stockholm Declaration on the Human Environment*, 16 June 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1973), 11 I.L.M. 1416.
6. *Supra* note 2 at 209.
7. *Rio Declaration on Environment and Development*, 14 June 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874.
8. *Convention on Biological Diversity*, 9 May 1992, U.N. Doc. UNEP/Bio.Div./N7INC.5/4 (1992), 31 I.L.M. 822, art. 3.
9. *United Nations Framework Convention on Climate Change*, 9 May 1992, U.N. Doc. A/A.C.237/18 (Part II)/Add.1 and Corr.1 (1992), 31 I.L.M. 851.

The Convention for the Protection of the Marine Environment of the North-East Atlantic (the 1992 OSPAR Convention),[10] for example, requires preventive action to be taken "when there are reasonable grounds for concern."[11] How does this compare with the "serious or irreparable damage" threshold expressed in the Rio Declaration? Clearly, there has to be a non-negligible threat of harm, though one interpretation of the principle supports merely a shift of the burden of proof from the party opposing the polluting activity, where it traditionally lies, to the polluter. This interpretation has found some support in state practice. Under the 1992 OSPAR Convention parties wishing to dump low and intermediate radioactive waste at sea must first demonstrate scientifically that no serious environmental harm will result.

Further evidence of the status of the precautionary principle as customary international law is provided by recent judicial decisions favouring the principle. In cases in Australia and the United Kingdom,[12] the courts have accepted the existence of the principle. More significant, however, is the incorporation of the principle as a legal obligation by international organizations. For example, the Maastricht Treaty amongst the member countries of the European Community declares:

> Community policy on the environment . . . shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.[13]

In light of this agreement, the Commission has the legal authority to issue Regulations and Directives based on the precautionary principle and member states must implement the results as national law.

Similarly, the Ninth Conference of the Parties to the Convention on Trade in Endangered Species (CITES)[14] has adopted a resolution incorporating the precautionary principle in explicit language in the listing procedure for species either threatened with extinction, or potentially threatened with extinction.[15] This resolution is doubly remarkable in that

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10. (1993), 32 I.L.M. 1069.
11. *Ibid.* art. 2(a).
12. *Leatch* v. *National Park and Wildlife Service* (1993), 81 L.G.E.R.A. 270 and *R.* v. *Secretary of State for Trade and Industry, Ex parte Duddridge and Others*, [1995] 3 C.M.L.R. 231 (C.A.) respectively.
13. *Treaty on European Union*, 7 February 1992, O.J. (1992) No C191/1, art. G(38), 31 I.L.M. 247 at 285 (new Art. 130r(2) of the 1957 EEC Treaty).
14. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 2 March 1973, 993 U.N.T.S. 243.
15. See CITES Res. Conf. 9.17, respecting Appendices I and II.

it not only shifts the burden of proof to the party supporting the downlisting of the species, but it also establishes a specific precautionary mechanism for downlisting. Indeed, this result may perhaps signal a new trend toward a clear definition of precautionary thresholds. Most recently, at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, the new convention concluded there[16] requires states to apply a "precautionary approach" in accordance with detailed implementation procedures, including specific guidelines set out in a separate annex.[17] Here is further evidence that the precautionary principle has evolved beyond a mere term of art.

4. *Conclusion*

Implementation of the precautionary principle through national legislation, ratification of treaties, endorsement and promulgation by international organizations as well as national judicial decisions provides evidence of sufficient state practice to assert that the principle has attained the status of customary international law. Indeed, in the International Court of Justice, arguments based on the obligatory nature of the precautionary approach have recently been made by New Zealand in the Nuclear Tests Case against France, in which the concept was characterized as "an operative principle of international law."[18] The argument was also made by Hungary in the Gabcikova Dam Case against Slovakia.[19] That specific procedures are being designed in various contexts for establishing precautionary thresholds is perhaps the final evidence that precaution is becoming an operative policy for environmental protection.

Yet the precautionary principle remains controversial. This is because it makes a difference. If it did not, vested interests in the status quo would not expend time and money challenging it. At this stage, there is a wide consensus in favour of a precautionary approach to environmental management,[20] at the same time trepidation about its application to particular problems persists. The fear of going beyond principle to practice is understandable. We need to work on designing precautionary procedures which are flexible enough to cope with uncertainty and

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16. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995, U.N. Doc. A/CONF.164/37 (1995), 34 I.L.M. 1547.
17. *Ibid.*, arts. 5(c), 6 and Annex II.
18. See transcript of N.Z. argument.
19. See P. Sands, R. Tarasofsky & M. Weiss, eds., *Documents in International Environmental Law* Vol. IIA (Manchester: Manchester University Press, 1994) at 696–97.
20. On this the International Chamber of Commerce agrees with Greenpeace.

competing interests, but not so relativistic that the community is incapable of saying "No, that you cannot do." The principle needs to be harnessed to positive proposals for change, so as to provide, for example, a lever for inducing technological innovation in the search for clean production techniques.

II. *Integration*

1. *Introduction*

Another emerging trend in environmental protection is to incorporate ecological principles into policy making. Recent problem solving methods take a holistic approach by recognizing the inherent interdependence of natural and social systems, rather than focusing on individual problem areas or pollutants. On the technical side, this new approach, known as integrated pollution prevention and control, seeks to minimize environmental degradation by focusing on production processes. On the policy side, the goal is to integrate environmental and developmental decision making at the outset of problem solving.

2. *Integrated Pollution Control*

The traditional approach to environmental regulation has been to focus pollution control efforts on particular activities or media. This sector specific approach, however, has proved an ineffective and inefficient means for protecting the environment since pollution may be easily shifted from one medium to another. As a result, new policy directives are emerging which attempt to integrate pollution prevention and control by focusing on the production processes themselves. For example, in the United Kingdom, the Environmental Protection Act of 1990 sets out a system of Integrated Pollution Control, which is "exercisable for the purpose of preventing or minimising pollution of the environment due to the release of substances into any environmental medium."[21] Enforced centrally, this approach replaces a Best Practicable Means test with a more strict Best Available Techniques Not Entailing Excessive Cost (BATNEEC) test that is applied immediately to all new or substantially changed manufacturing processes.

Likewise, a 1991 Council Recommendation of the Organisation for Economic Cooperation and Development calls for states to take into account "the effects of activities and substances on the environment as a

21. (U.K.), 1990, c. 43, s. 4(2).

whole and the whole commercial and environmental life cycles of substances when assessing the risks they pose and when developing and implementing controls to limit their release."[22] An Appendix on Guidance attached to the Recommendation identifies five elements of an integrated approach: "cradle-to-grave" model; anticipation of environmental impacts in all media; waste minimization; common means of environmental assessment; and complementary use of effects and source oriented measures. To accomplish these ends, the Recommendation proposes new institutional, management and technical approaches which focus on system integration and state cooperation.

The European Community has also recognized the need for an integrated pollution control policy. In 1993 the European Commission issued a draft directive on Integrated Pollution Prevention and Control which calls for member states to implement programs to prevent pollution at source, though individual member states would be responsible for setting specific pollution emission limits.[23] As for implementation, each industrial plant would have to apply to the appropriate competent authority for authorization to operate. Actual emission limit values would be referenced to a Best Available Techniques test which, as with the BATNEEC test of the United Kingdom, includes a reference to technical and economic feasibility.[24] Thus, as the foregoing examples indicate, a more holistic approach to environmental protection is being proposed and implemented at various governmental levels with an emphasis on evaluating actual production processes.

3. *Integration of Environment and Development*

A corollary to the precautionary principle is the principle of sustainable development, since "[b]oth principles emphasize foresight and the need for proaction rather than reaction."[25] One important element of sustainable development is the notion that environmental concerns must be integrated into economic and other developmental decision making. Integration of the environment and development is not, however, a new policy. Principle 13 of the 1972 Stockholm Declaration called on states "to adopt an integrated and coordinated approach to their developmental

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22. OECD Council Recommendation on Integrated Pollution Prevention and Control, OECD Doc. C(90)164/FINAL (1991), para. I(a), in P. Sands, *Documents, supra* note 19, vol. IIB, at 1198.
23. COM (93) 423.
24. *Ibid.* art. 2(10).
25. J. Cameron, "The GATT and the Environment" in P. Sands, ed., *Greening International Law* (New York: New Press, 1994) 100 at 117.

planning so as to ensure that their development is compatible with the need to protect and improve the human environment."[26] Nonetheless, integration was slow to occur, since traditional institutional structures isolated economic and developmental activities from environmental activities.

In the late 1980s, however, the international community began to recognize the need to adopt new policy approaches to slow the pace of environmental degradation. Structural changes were instituted, signalling the emergence of an integrated approach.[27] Notable examples include the incorporation of a title on the environment into European Community law by amendment of the 1957 EEC Treaty,[28] the foundation of an Environmental Department at the World Bank, and the convergence of trade and the environment in the General Agreement on Tariffs and Trade (GATT).

A more explicit endorsement of the integrated approach was spelled out in the amendments to the EEC Treaty introduced by the Maastricht Treaty,[29] which require Member States to include environmental considerations in all Community policy decisions. Such a major policy shift is, however, much more easily said than done. Critical to the success of these efforts are the collection and dissemination of environmental information, including the conduct of environmental impact assessments. In 1993 the Council of the European Community adopted a resolution to implement a strategy on sustainable development within Community policy.[30] Though this resolution seems to indicate that the integration of environmental and developmental policy is moving forward, given the Community-wide economic and trade interests at stake, immediate achievement of this goal seems unlikely.

Despite the potential for mutual supportiveness, international environmental and trade policy are divergent in many respects. There is no parallel policy commitment to integrate environmental concerns into the World Trade Organization (WTO). The preamble to the WTO constituent instrument[31] works protection of the environment into the objectives of trade liberalisation, but experience to date suggests that the fundamental obligations of WTO membership—adherence to most favoured nation

26. *Supra* note 5.
27. *Supra* note 2 at 206.
28. EC, *Single European Act*, O.J. Legislation (1987) No L109/1, 25 I.L.M. 506, art. 25.
29. *Supra* note 13.
30. O.J. Information (1993) No C138.
31. GATT Multilateral Trade Negotiations (The Uruguay Round), Agreement Establishing the Multilateral Trade Organization, Doc. MTN/FA, Part II (1993), 33 I.L.M. 13.

disciplines, non-discrimination and national treatment—have been interpreted as narrowly and as strictly as ever.

A symbolic divergence, which is of everyday practical concern to traders, lies in the "like products" debate. GATT rules require that members apply uniform (no less favourable than their own producers) treatment to like products regardless of production and process methods.[32] Environmental policy makers are concerned with distinguishing, and even discriminating, between the method of producing products on environmental grounds. To the trade policy experts, for example, tuna is tuna: how it is caught is irrelevant. Likewise, oil is oil and how it is refined is not the business of the importing nation, despite the fact that it is consumed in that country, releases emissions and is therefore a contributor to a global, as much as a domestic, environmental problem. However, the environmentalist who urges discrimination in production methods must contemplate the complexity of reviewing exporters' production processes, the intrusiveness of such a task, the fact that usually only the strongest can demand it, and the fundamental fairness of non-discrimination.

The challenge to environmental policy makers is immense. They may frequently find themselves caught between the pincers of a domestic lobby to lower environmental standards, and an external lobby to remove potential barriers to trade caused by environmental standards. Life becomes very difficult when domestic legislators buy off the local lobby with an exception to environmental standards which they do not make available to non-voting exporters, and therefore discriminate unlawfully. It may become necessary to return to international negotiations or to lower standards generally to remove the grounds for a challenge. In some key sectors such as energy, the temptation to orchestrate a campaign based on this scenario has probably not been resisted.

Until GATT rules actually support the worldwide integration of development and environmental policies, the WTO will run counter to the principles agreed to by the states present at UNCED. There, in very explicit language, the separate policy objectives of environmental protection and development were bound together. Though not mandatory, Principle 4 of the Rio Declaration provides:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[33]

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32. GATT 4 BISD (1969), 55 U.N.T.S. 194, art. III(2).
33. *Supra* note 7.

Trade liberalisation is an enterprise designed to deliver global economic development more rapidly and more securely than any other economic policy instrument or process. The trend towards globalization depends upon it. But the system that drives this enterprise must not ignore the effects on the environment which sustains all life. Ultimately the participants in the system, whether governments, corporations or non-governmental organizations, must be bold about declaring where development priorities lie. If trade liberalisation does not aim to achieve sustainable development but proceeds as an end in itself, then its tremendous energy is likely to be applied destructively. Environmental values are at risk; however, they need not be.

4. *Conclusion*

With new regulation favouring an holistic, over a single sector, approach, as well as legal principles integrating development and the environment, environmental policy is on a more efficient and effective course. The Committee on Trade and Environment of the WTO is expected to report its views on these matters to the first Ministerial Conference of the members of the WTO in December 1996 in Singapore. The Committee may find ways to support multilateral environmental agreements by removing the threat of challenge in the WTO. It may create rules which would sanction and yet guide the development of eco-labelling schemes. It may make the connection between access to the markets of the North for the South, and concerns in the South about the effect on biological resources which the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights regime might have. We will have to wait and see. What the Committee must demonstrate in Singapore is that the trade liberalisation system can support global efforts to protect the environment and achieve sustainable development. The surest way to achieve this end would be to amend the WTO treaty. I suggest that GATT Article XX should be amended to refer expressly to the environment by the addition[34] of an interpretative understanding. It would provide an explicit exception for multilateral environmental agreements,[35] defined by their transnational environmental objectives, and concluded under the auspices of an intergovernmental organization with an interest in the environment.

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34. Probably to subparagraph (b), but perhaps a new subparagraph (k).
35. Subject to international law.

III. *Non-State Actors*

1. *Introduction*

Except in the area of human rights law, public international law does not recognize non-state actors. In the field of international environmental law, the traditional means for non-state actors to affect international outcomes was through political influence or by recourse to judicial procedures for implementation and enforcement at the national level. Recent advances in international environmental law indicate, however, that non-state actors now have greater opportunities for participation in international fora and, in limited situations, have actually been endowed with *de jure* rights.[36] As will be discussed, this change derives from the recognition that global environmental problems can only be solved through broadly based cooperation among state and non-state actors.

2. *Non-state Actors*

Important non-state actors are environmental, scientific, legal, academic and corporate organizations, as well as individuals. The involvement of non-state actors, and particularly non-governmental organizations (NGO), in multilateral fora is not new. In 1945 the United Nations formalised NGO participation by granting consultative status, though voting rights were withheld.[37] In recent years, however, as the global nature of environmental degradation has become more evident, the involvement of NGOs in multilateral institutions has increased, though there has been little change in their legal status.

On the contrary, multilateral institutions remain organizations of states, a fact which does not coexist well with recent shifts in functional arrangements that allow NGOs active involvement in the creation of new international law. As will be briefly examined below, NGOs representing diverse interests now routinely participate in multilateral discussions, circulate documents and address delegates. Such arrangements, though perhaps inevitable due to the ever increasing need for wide ranging expertise in the solution of environmental problems, represent a clear challenge to fundamental, or perhaps fundamentalist, notions of state sovereignty.

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36. *Supra* note 2 at 158.
37. See UN Charter art. 71 and UN Secretary General, *Report on the General Review of Arrangements for Consultations with Non-Governmental Organisations*, UN Doc. E/AC.70/1994/5(1994).

3. *State Sovereignty*

State sovereignty is, it is said, the cornerstone of international law. A community of equal states exercising equal rights with associated duties is the legal model underlying all international institutions and instruments.[38] The increasing influence of non-state actors on international law making poses difficulties for the doctrine of state sovereignty, as issues of representation and accountability arise. Currently, there is no review mechanism whereby non-state actors are held accountable when and where they exercise power. A major challenge facing international environmental law is to find a way to maintain a superstructure of states, while at the same time effectively channelling the political will and expertise of non-state power holders and participants.

4. *Evolving Role of Non-state Actors*

Major international functions of NGOs include information collection, analysis and exchange; identification of issues; participation as observers in international organizations and treaty negotiations; and the informal monitoring of compliance with convention provisions. Instances of NGO participation in specific conventions are too numerous to list. The following examples demonstrate the current trends in the evolution of NGO participation.

In CITES,[39] NGOs played an important participating role, including calling for the convention in the first place. Once CITES was adopted, NGOs were actively involved in monitoring compliance with its provisions and later used their observer status to affect specific listings and listing criteria for endangered species. CITES is perhaps most notable as an early example of NGO participation expressly being written into an inter-state convention, the text allowing for any qualified non-state actor to have the right to participate but not vote.[40] More recently, similar language was incorporated into the Montreal Protocol,[41] the Climate Change Convention[42] and the Convention on Biological Diversity.[43]

The greatest shift in the participation of non-state actors in international fora is widely recognised as having occurred at UNCED. From the initial preparations through the final negotiations, the UNCED process

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38. *Supra* note 2 at 15.
39. *Supra* note 14.
40. *Supra* note 14, art. 11(6) and (7).
41. *Protocol on Substances That Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1541, art. 11(5).
42. *Supra* note 9, art. 7(6).
43. *Supra* note 8, art. 23(5).

relied extensively on non-state actors. Indeed, they were often quite close to the heart of decision making. It has been observed that:

> At the preparatory sessions for UNCED, NGOs worked alongside the government delegations to prepare reports, to find issues, provide data and advocate positions. This expanded NGO role is forcing a new examination of the traditional state decision-making process and is stretching the boundaries of the United Nations negotiation structures.[44]

Not surprisingly, the Rio Declaration and Agenda 21 both affirm this expanded role for nonstate actors. Agenda 21 declares:

> The organizations of the United Nations system and other intergovernmental organizations will need to provide increased financial and administrative support for nongovernmental organizations and their self-organised networks, in particular those based in developing countries, contributing to the monitoring and evaluation of Agenda 21 programmes, and provide training for non-governmental organizations . . . to enhance their partnership role in programme design and implementation.[45]

Principle 10 of the Rio Declaration[46] recognises the procedural rights for all individuals in asserting:

> 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.

Clearly, after UNCED, the involvement of non-state actors in international environmental problem solving have received a significant political boost as well as legal and institutional backing, though theoretical and practical difficulties related to the traditional role of the state remain.

Perhaps the institution which has provided the best illustration of the evolution of ideas about the appropriate level and form of non-state actor involvement has been the Global Environment Facility (GEF). During its pilot phase, GEF had few formal rules governing NGO participation, and as a result, NGOs contributed at all levels of policy discussion. Once an administrative structure was in place, however, NGO participation was formalised. Prior to participant meetings, NGOs were given access to documentation under consideration and invited for one to two day consultative meetings, for which travel grants were made available for some organizations from developing countries. Later, after a restructuring of the GEF, there was intense debate on whether or not NGOs should

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44. N. Lindborg, "Future Role of Non-Governmental Organisations in International Environmental Negotiations" in Susskind, Dolin & Breslin, eds., *International Environmental Treaty Making* (Cambridge, Mass.: Program on Negotiations at Harvard Law School, 1992) 1 at 2.
45. U.N. Doc. A/CONF.151/26 (1992) chap. 27.12.
46. *Supra* note 7.

observe GEF Council meetings, and it was decided that five NGOs would attend the meeting and five would view the proceedings on closed circuit television. Further discussion on NGO involvement is currently taking place while the Council considers how to develop criteria for the selection of NGO representatives based on such factors as regional representation, technical expertise and self-selection procedures.

The GEF example points to the main institutional issues at the heart of the debate on non-state actor participation. Current Council proposals are, in fact, rather innovative in the way they suggest a legal structure of rules for allowing NGO involvement that addresses sovereignty objectives. Major features of these proposals include the self-selection by NGOs of their representatives, subject to approval by the Council. Further, the Council will develop criteria for NGO accreditation based on broad based geographic distribution, technical expertise, and a balance between international, national and local representation. Clearly, the Council is suggesting a new political structure based on networks and constituencies outside the domain of states.

As a final example, at a recent meeting of a consensus building initiative focused on trade and development,[47] I provided a modest proposal outlining possible procedural rules for NGO participation at the World Trade Organization (WTO). In addition to the principles of selfselection, equitable geographic distribution and expertise considered by the GEF, with which I agree, I offered other suggestions specific to the WTO:

1. Access to information is essential for building trust, ensuring credibility and in building the conditions for accountability. There should be a presumption in favour of open access to information, including all Secretariat documents and official decisions, with a set of rules explaining clearly when that presumption may be overturned. There should be no presumption of openness for negotiation documents.
2. A distinction must be made between the various forms of participation which might be available to non-state actors. There is a clear distinction between negotiating and discussing policy. For instance, a clear distinction exists between negotiating trade concessions and discussing the compatibility of multilateral environmental agreements and trade rules, which may or may not lead to negotiating

47. Consensus Building Institute, Trade and Environment Policy Dialogue. The policy dialogue is a private initiative to bring together environment and trade experts, diplomats, negotiators and opinion formers to find ways of better understanding the relationship between trade and environmental policy and specifically to feed creative solutions into the Committee on Trade and Environment of the WTO.

processes later on. NGOs may not be present in trade negotiations, though they may be called upon for consultation by agreement if a state has asked an expert not in government employ to join its delegation and advise.

3. NGOs may speak at the beginning and end of meetings through their selected representatives, and whenever a state asks the chair of the meeting to give them the floor owing to their expertise. The chair (following GEF principles) may still refuse the floor.
4. The WTO Secretariat is often requested to produce documents for members states. These documents should be peer reviewed for outside opinion. For example, the Intergovernmental Panel on Climate Change follows this procedure to good effect for both science and policy response documents.
5. A Secretariat-NGO liaison office should be established to facilitate cooperation.
6. One model for NGO representation could consist of three NGOs chosen by their peers representing environmental, development and business interests in that order. A separate room with a television monitor should also be made available for other interested NGOs.
7. Confidentiality concerning matters of non-environmental concern between states must be strictly respected. This principle should be fundamental to any model of participation that may be developed.

The culture of the WTO and its members, which are ironically the same states that have supported the involvement of NGOs in environmental fora, are unreceptive, to put it politely, to these ideas. There may be some movement on access to information. In future, more documents previously restricted may be made available more quickly. The WTO now has a website! But no NGOs may observe meetings, let alone participate. UNEP may attend as an observer but cannot speak to the Committee on Trade and Environment except through the agency of a government representative. It is argued that the place for NGO lobbying (it is assumed by the WTO and it's members that all NGOs are lobbyists—no thought is given to independent non-governmental experts, for example) is within the national political system and not at the international level, because it would be unmanageable. It is said that the institution will be overrun with mad French farmers! This posturing is woefully out of step with developments in international society as is evidenced by the other multilateral agreements referred to previously. If it marks a trend back towards a reactionary expression of state sovereignty, it will do damage to the very spirit of multilateralism on which the WTO is built.

5. *Conclusion*

That states have come to use, and even depend upon, the expertise of NGOs in developing international environmental policy is not surprising. Given the scale and complexity of environmental problems, finding adequate and equitable solutions which address the diversity of geographic and economic interests is a formidable task, and states do not possess the sum of real world power necessary to meet this challenge. Moreover, the extraction and movement of natural resources, activities which are increasingly seen to impact all the world's populations, should be monitored at some supranational level. As a result, non-state actors have begun not only to assume a fiduciary role in the interests of the environment on behalf of international society, but also to save states much time and expertise gathering information and monitoring conditions.

A significant challenge remains, however, to develop a workable mechanism for non-state actor participation in environmental protection which best represents the interests at stake in each forum. Choosing among non-state actors willing to participate, and developing a method which fairly incorporates the vital interests of both state and not-state actors is critical to future success. It is time formally to recognize that non-state actors play an indispensable role in international environmental law making.

Conclusion

Although most early developments in international environmental law were reactive to specific incidents or new scientific evidence, recent advances in the field have begun to reflect a measure of maturity as underlying policy objectives increasingly embrace more comprehensive methods. Specifically, environmental problem solvers no longer feel they have the luxury to wait for conclusive scientific evidence of environmental degradation before designing regulatory programs. They are building into their decision making systems an element of precaution, which is gradually emerging as a principle of customary law. Similarly, environmental media are no longer seen as closed independent systems, nor are economic and environmental problems viewed as solvable separately. Here an integrated approach is recognized as crucial to achieving sustainable development. Finally, the players themselves, the problem solvers engaging in this evolving enterprise, are no longer affiliated only with the states of their birth, but represent wider and more diverse interests than those which attach to citizenship. They need to be formally incorporated into the decision making process.