

NON-STATE ACTORS IN INTERNATIONAL GOVERNANCE AND LAW: A CHALLENGE OR A BLESSING

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I. INTRODUCTION

Globalization has changed the way global society addresses common and global problems. While there is much talk about aiming at sustainable development, there are no real clear definitions of sustainable development and the term remains susceptible to much misuse. Globalization is defined in the literature in many different ways. It refers to the economic, social, financial, legal, communication and technological revolutions taking place and “rather than mere random encounters, globalization refers to these entrenched and enduring patterns of world-wide connectedness.”¹ Held and

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1. ANNE METTE KJAER, GOVERNANCE (2004).

McGrew argue that it encapsulates the notion that action taken in one place can have impacts elsewhere, that time and space are compressed through instant communication, that there is increasing interdependence as societies are dependent on each other because of the systems that link them, that we live in a shrinking world as countries appear to be much closer to each other, and that there is global integration.²

The rapid process of globalization is leading explicitly and implicitly to major changes in the way we manage our problems. These changes are leading academics and politicians to talk more in terms of governance, than in the limited terms of international law. Governance refers to the purposeful process of managing societal resources through institutions, from the family to international institutions.

Governance takes place in the context of global society. However, there is considerable controversy about whether we have a global community and society in the sense that the same legal values at national level are also operational at the international level. For those inspired by Hobbes, there is no global society, only global anarchy and the most powerful prevail.³ For others, we are inching gradually forward towards a rule based international society that shares some basic common norms and values and that is held together by solidarity.⁴

Whether we live in global anarchy or in a global society, we are dealing with global problems. While to the uninitiated it might seem fairly innocuous to talk about global problems, this term too is politically charged. The theoretical battle in the context of international law has been staged with respect to the concept of the common heritage of humankind. A parallel battle has been played out in the economics field in relation to the issue of what public goods are.⁵ Within the political sciences, the discussion has taken a different approach and scientists argue that problems are socially constructed and hence there is no objective definition of a problem.⁶ In the North-South context, there is considerable controversy about what global problems are, with many arguing that only when

2. See David Held & Anthony McGrew, *The Great Globalization Debate: An Introduction*, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 1 (David Held & Anthony McGrew eds., 2000).

3. ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003).

4. See *id.* at 3–5.

5. See generally PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul et al. eds., 2003).

6. See, e.g., David Held, *What Hope for the Future?: Learning the Lessons of the Past*, 9 IND. J. OF GLOBAL LEGAL STUD. 381 (2002); see also Detlev Vagts & Martti Koskenniemi, Book Review, 87 AM. J. INT'L L. 160 (1993) (reviewing PHILIP ALLOTT, EUNOMIA. NEW ORDER FOR A NEW WORLD (Oxford Univ. Press, 1990)).

problems may have negative impacts on the North are they labeled as global problems.⁷

In order to deal with this complex of global problems, ranging from social through economic to environmental, the concept of sustainable development has been adopted by scientists and politicians alike. Sustainable development is defined as progress “that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸ It is a process of change “in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.”⁹ The Brundtland Commission further states that sustainable development calls for citizen participation in decision making, a self-reliant and sustained economic system that generates surpluses, a social context in which social problems can be dealt with, a system in which production processes are compatible with the existing resource base and its conservation, a sustainable international trade and finance system and an administrative system that learns from past mistakes.¹⁰ The Rio Declaration defines sustainable development as “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”¹¹ Courts are reluctant to see more in this idea than a concept,¹² even though some judges see the concept as being an “inescapable logical necessity.”¹³ The concept has become very respectable since the World Summit on Sustainable Development held in 2002 focused all its energies on it.¹⁴ Environmental and trade organizations and

7. See, e.g., ANIL AGARWAL, ET AL., THE COMM’N ON DEVELOPING COUNTRIES AND GLOBAL CHANGE, FOR EARTH’S SAKE: A REPORT FROM THE COMMISSION ON DEVELOPING COUNTRIES AND GLOBAL CHANGE 25–26 (1992). See also THE SOUTH COMM’N, THE CHALLENGE TO THE SOUTH: THE REPORT OF THE SOUTH COMMISSION (1990).

8. WORLD COMM’N ON ENV’T & DEV., OUR COMMON FUTURE: WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 43 (1988).

9. See *id.* at 46.

10. See *id.* at 65.

11. Rio Declaration on Environment and Development, June 14, 1992, principle 3, U.N. Doc. A/CONF.151/26/Rev.1, 31 I.L.M. 874, 877. See also Report on the United Nations Conference on Environment and Development, June 3–14, 2002, Annex I, U.N. Doc. A/CONF.151/26/REV.1.

12. See, e.g., Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

13. See *id.* at 95 (separate opinion of Judge Weeramantry).

14. See Hans Christian Bugge & Lawrence Watters, Interview, A Perspective on Sustainable Development after Johannesburg on the Fifteenth Anniversary of our Common Future: An Interview with Gro Harlem Brundtland, 15 GEO. INT’L ENVTL. L. REV. 359 (2003).

agreements deal with it.¹⁵ The European Union has also adopted sustainable development as an operative goal in many of its legal and policy documents.¹⁶ While for some the concept of sustainable development is a single goal,¹⁷ for others it contains a body of principles.¹⁸ The International Law Association foresees the emergence of an international law of sustainable development, which includes seven critical principles.¹⁹

Against this background, this article highlights the key elements of new forms of governance, by referring to the new actors in governance, the shifts in the locus of governance, and the changing rules in traditional forms of governance. In doing so, it highlights the changing influence of non-state actors in policymaking (see Part II). It then argues that there are five types of governance relationships. It briefly examines the situation with respect to the issues of governance on climate change, water and sustainable development. These examples illustrate the different ways in which non-state actors are participating and changing governance dynamics in specific fields (see Part III). It then goes on to examine the special challenges emerging in the area of sustainability labeling and certification where non-state actors have in effect carved out an area of governance all for themselves and this has led to a series of legal questions in a number of areas of law (see Part IV). The paper concludes by drawing some

15. See Melinda L. Kimble, *Public-Private Partnerships: A Tool for Sustainable Development?*, 2003 A.L.I. – A.B.A. C.L.E. 121, 125-29.

16. See, e.g., Council Directive 2004/8/EC, 2004 O.J. (L 52) 50; Decision No. 1230/2003/EC of the European Parliament and of the Council, 2003 O.J. (L 176) 29; Council Decision No. 1999/170/EC, 1999 O.J. (L 64) 58; Opinion of the Committee of the Regions on the Communication on Towards a thematic strategy on the sustainable use of natural resources, 2004 O.J. (C 121) 47; Communication from the Commission to the Council and the European Parliament - The World Summit on Sustainable Development one year on: implementing our commitments SEC(2003) 14710E, COM(2003) 829 final; Communication from the Commission to the Council and the European Parliament - 2003 Environment Policy Review - Consolidating the environmental pillar of sustainable development, COM(2003) 745 final; Resolution on a new strategy for agriculture in arctic regions, 1999 O.J. (C 175) 27; Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Decision on the review of the European Community Programme of policy and action in relation to the environment and sustainable development 'Towards sustainability,' 1996 O.J. (C 212) 1.

17. See, e.g., Sumudu Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, 14 GEO. INT'L ENVTL. L. REV. 265, 280-81 (2001).

18. See, e.g., Dr. Raneet Khooshie Lal Panjabi, *From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law*, 21 DENV. J. INT'L L. & POL'Y 215, (1993).

19. INT'L LAW ASS'N., NEW DELHI DECLARATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT (2002) [hereinafter NEW DELHI DECLARATION]. The New Delhi Declaration was later brought to the attention of the United Nations at the World Summit on Sustainable Development held in Johannesburg, South Africa from August 26, 2002 to September 4, 2002. *World Summit on Sustainable Development*, UN Doc. A/CONF 199/8 (2002). A more detailed exploration of the concept was undertaken in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Nico Schrijver & Friedl Weiss eds., 2004).

conclusions about how non-state actors are shaping the new developments in international law.

II. NEW FORMS OF GOVERNANCE

A. Introduction

At the international level, we are now witnessing new forms of governance. There is a rise of new actors in the process of governance (see II.B), there is a shift in the locus of governance to new arenas (see section II.C), and existing rules in traditional governance arenas are changing (see II.D).

B. New Actors in Governance

Although realists tend to argue that only states are critical in determining policies at international level, liberal institutionalists argue that non-state actors have a decided influence in the international arena.²⁰ The participation of non-state actors in international governance is not new. The history can be traced back to about 200 years.²¹ What is new is the fast evolving way in which these actors are influencing the governance processes.

Environmental non-governmental organizations (ENGOS) and social movements have progressed from small-scale bodies to either grass-roots movements or global organizations focusing on protecting a specific environmental resource and representing the interests of their constituency. ENGOS can be federations of international and national organizations,²² or have universal/hybrid membership,²³ have intercontinental memberships,²⁴ have regional membership,²⁵ or be internationally-oriented national

20. See generally Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 147 (Robert J. Beck et al. eds., 1996).

21. See Steve Chamovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 190–91 (1997).

22. For example, this would include groups like Greenpeace (<http://www.greenpeace.org>), Friends of the Earth (<http://www.foei.org>), World Wide Fund for Nature (WWF) (<http://www.panda.org>), and the Environment Liaison Centre International (<http://www.elci.org>).

23. See, e.g., International Union for the Conservation of Nature, a/k/a The World Conservation Union, at <http://www.iucn.org> (last visited Mar. 14, 2005).

24. See, e.g., Birdlife International, at <http://www.birdlife.net> (last visited Mar. 14, 2005); Wetlands International, at <http://www.wetlands.org> (last visited Mar. 14, 2005).

25. See, e.g., African Wildlife Foundation, at <http://www.awf.org> (last visited Mar. 14, 2005); European Environmental Bureau, at <http://www.eeb.org> (last visited Mar. 14, 2005).

groups^{26,27} They have often worked in international networks such as the Pesticide Action Network (PAN), Basel Action Network (BAN), and the Climate Action Network (CAN). Ideologically, they may be conservative such as The World Conservation Union (IUCN) to extreme left wing groups such as Earth First. Their tools include neutral news bulletins,²⁸ position papers, regional assessments, support to national delegations by participating in them, or advising them, or by monitoring the implementation,²⁹ and by organizing demonstrations. Indirectly they influence global governance through writing books, publishing journals, participating in conferences, advertisements, and media coverage.³⁰ These bodies assess, assimilate, and synthesize the information generated and try to ensure transparency in the governance process. Some conventions even result from the pressure used by non-governmental organizations (NGOs).³¹ The literature reveals a difference between Northern and Southern NGOs in terms of issues (environment and development issues respectively), funding and techniques.³²

Another very influential actor in international governance is industry. The chlorofluorocarbon (CFC) producers prominently participated in the negotiations on the depletion of the ozone layer. The energy companies are major actors in the negotiations on climate change. In general, it is large industry or confederations of large industries that are present at negotiations. The electricity and pesticide industries were present at the negotiations on the long-range transboundary movement of atmospheric pollutants. Industry participates as observers in negotiations, but their primary route of influence is via lobbying and advocacy at the national level. They also publish advertisements and research. They mostly represent the interests of industry in the very rich countries.

26. See, e.g., Centre for Science and Environment, at <http://www.cseindia.org> (last visited Mar. 14, 2005); Sierra Club, at <http://www.sierraclub.org> (last visited Mar. 14, 2005).

27. See generally John McCormick, *The Role of Environmental NGOs in International Regimes*, in *THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW AND POLICY* 52 (Norman J. Vig & Regina S. Axelrod eds., 1999).

28. This includes the EARTH NEGOTIATIONS BULLETIN, <http://www.iisd.ca/enbvol/enb-background.htm> (last visited Mar. 19, 2005), published by the International Institute for Sustainable Development.

29. One such body is the wildlife trade monitoring network, Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC), <http://www.traffic.org>, which monitors the implementation of laws at the international level.

30. McCormick, *supra* note 27 at 65–68.

31. See, e.g., Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125 (entered into force May 5, 1992).

32. McCormick, *supra* note 27, at 58–61. See generally PRATAP CHATTERJEE & MATTHIAS FINGER, *THE EARTH BROKERS: POWER, POLITICS AND WORLD DEVELOPMENT* (1994).

A third influential actor is the scientific community. These communities are defined as professional networks that are organized around specific issues and are seen as authoritative sources of information. In the discussions on the Long-Range Transboundary Air Pollution (LRTAP) regime, 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 Sulfur Protocol.³³ In the climate negotiations, the Intergovernmental Panel on Climate Change plays a very important part in the negotiations.³⁴ In the ozone depletion regime, reports from the Global Ozone Research and Monitoring Project and from the Coordinating Committee of the Ozone Layer (CCOL), which was established by the United Nations Environment Programme (UNEP) in cooperation with The World Meteorological Organization (WMO) in the late 1970s played an important role.³⁵ The scientific communities influence the negotiations through their publications, the assessment reports and often have a direct line of communication to the negotiations as they are allowed to report on their findings.³⁶

I see five stages in the development of NGO influence in environmental treaty negotiations.³⁷ In the first stage, non-state actors were mostly consulted during the negotiation process, as was allowed by the United Nations Charter of 1945 and the Economic and Social Council's Resolution of 1968.³⁸ In the second stage beginning in the 1970s, non-state actors were mostly elite observers and behind the stage managers of international negotiations.³⁹ There were few prestigious organizations such as the IUCN and these bodies were influential in actually drafting text for the Convention on the International Trade in Endangered Species,⁴⁰ and the Convention

33. See generally Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Percent, July 8, 1985, 1480 U.N.T.S. 215.

34. See generally Intergovernmental Panel on Climate Change, available at <http://www.ipcc.ch/> (last visited July 19, 2005).

35. *Id.*

36. See generally Joyeeta Gupta, *Effectiveness of Air Pollution Treaties: The Role of Knowledge, Power and Participation*, 12 POL'Y STUD. REV. ANN. 145 (Matthijs Hisschemöller et al., eds 2001).

37. Joyeeta Gupta, *The Role of Non-State Actors in International Environmental Affairs*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 459, 462 (2003).

38. *Id.* at 462-63.

39. *Id.* at 463-64.

40. *Id.* at 463 (citing Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), Apr. 13, 1987, 27 U.S.T. 1087, 993 U.N.T.S. 243).

on Biological Diversity.⁴¹ In the third stage, the role of non-state actors increased considerably.⁴² They became protected by international agreements, empowered by them and also engaged by them to undertake activities. In the fourth stage, non-state actors were so active that they were possibly taking the law into their own hands and developing their own rules on managing environmental resources.⁴³ While a classical example of the latter is the International Standards Organization, in recent years, this has taken the form of sustainability labeling and certification schemes, among others. This is discussed further in Part IV. There is an explosion in the number of participants at international negotiations. This inevitably leads to competition between the various groups. This competition has led in some cases to the development of rules to identify who is eligible for participation and hence also leads to exclusion particularly of late comers to the field.⁴⁴ In the fifth stage, there is an effort to bypass the competition between non-state actors and state actors in the area of governance by making non-state actors partners in governance, especially through the opportunity of negotiating Type 2 Agreements under the World Summit on Sustainable Development (see Part III).⁴⁵

C. *Shifts in the Locus of Governance*

A second major feature of the new forms of governance is the shift in the locus of governance to other forums. These include the shift to national and international courts, to supranational levels, to the private sector and co-regulation, to other countries, to the river-basin level in the case of water, and to the local level through the principle of subsidiarity. These are briefly discussed below.

Governance is shifting from traditional arenas to the courts. This is especially the case in the European Union, where court based governance was not very common in the civil law countries. In the climate change issue, United States NGOs are also litigating against the United States government.⁴⁶ A relatively new and novel approach is the way the

41. *Id.* (citing Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 143 (entered into force Dec. 29, 1993)).

42. Gupta, *supra* note 37, at 464–69.

43. *Id.* at 469–71.

44. See Joyeeta Gupta, *Non-State Actors: Undermining or Increasing the Legitimacy and Transparency of International Environmental Law*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 297 (Ige F. Dekker & Wouter G. Werner eds., 2004) (detailing the role of non-state actors in the climate change field and the competition among these actors).

45. Gupta, *supra* note 37, at 472–77.

46. There are lawsuits being initiated by non-state actors and municipalities versus Banks and International investment corporations on behalf of members and citizens who may be victims of global

Palestinian government approached the International Court of Justice (ICJ) to discuss the legality of the wall being built by Israel. Not being an independent country, Palestine could not approach the court directly, and even if it could, it is unlikely that Israel would have agreed to the jurisdiction of the court. Instead, Palestine lobbied with the General Assembly and the General Assembly requested the ICJ for an Advisory Opinion on the issue. The ICJ brought out its advisory opinion on the wall recently.⁴⁷

There is also a shift to the supranational level. This is certainly the case for the European Union, where policymaking in a number of issue areas is moving to supranational level. Via the process of privatization of natural resources and basic services, governance is also shifting to the private sector. In the area of transport, energy and water management, key decision making processes are moving to the private sector. One can even argue that where implementation of international law is weak, some countries are seeking to ensure compliance in other countries through national regulations. An example is the Pelly Amendment in the United States and its impact on countries in Asia. In a slightly reverse situation, we see treaties that call on parties to allow foreign nationals the use of their domestic courts to seek redress.⁴⁸

In the area of water, we see a shift in the governance processes to the basin level. This is because of the scientific need for fresh water in international river basins to be managed as a whole. As a result, policy-making processes are shifting from national and international to the river basin level (fluvial level). At the same time, in order to guarantee the implementation of policies, we see a shift to the local level, via the principle of subsidiarity and empowerment of non-state actors through increased opportunities for participation in decision-making processes and through providing them opportunities for legal redress in domestic courts of other countries.

There are three key implications emerging from the discussion above. The first is that there are multiple forums developing simultaneously for problem solving. The second is that the multiple shifts work to empower the weak (as in the case of using the ICJ or foreign courts to seek redress) but they may also dis-empower the weak (if the other party indulges in forum shopping). The third is that some of these shifts may be mutually

warming. There is a lawsuit that has been initiated by the non-state actors against the United States Environment Protection Agency (EPA), including another case initiated by 11 states, territories, and NGOs versus the EPA.

47. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, I.C.J., 43 I.L.M. 1009 (July 9).

48. See, e.g., Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001); Southern African Development Community Revised Protocol on Shared Watercourses in the Southern African Development Community, Aug. 7, 2000, 40 I.L.M. 321.

incompatible. For example, a shift to local people via participation may not be compatible with a shift to privatization where power is transferred to the private sector. Similarly, a shift to policy making at the fluvial level may not be entirely compatible with empowering the local people to make decisions.

D. Changing Rules in Existing Governance

At the same time, the exogenous changes are also influencing the changes within the traditional rule making process at the international level. I would like to discuss four points here: the concept of interactional law making, the implicit suspension of rules of procedure to meet substantive deadlines, the challenges posed by new problems to the implicit and explicit assumptions of international law, and the rise of new economic oriented principles at the cost of more legal oriented principles.

Observing the way international laws are being developed, it is becoming increasingly clear that in complex environmental negotiations, decisions are being taken continuously. Or at least the process of developing the decision is a continuous one. In such a situation, it is no longer relevant for countries to think they are not bound by decisions of the Conference of the Parties, but only by those formal legal agreements that their countries have ratified, adhered to or accepted. Brunnée and Toopé refer to this as the notion of interactional law making.⁴⁹

Again, on the basis of observation of various negotiation processes, what becomes immediately obvious is that the formal rules of procedure are often suspended in order to be practical. This has led on numerous occasions to the organization of small working groups to discuss complex issues. Sometimes the number of working groups greatly exceeds the number of country representatives and most often, the language is English. Furthermore, meetings on occasion go far beyond normal working hours and often even beyond the formal ending time of the conference. All these imply in fact an implicit if not explicit suspension of the rules of procedure, which can have negative impacts on delegations with limited resources both financial and human.⁵⁰

Interviews with developing country negotiators have also led me to conclude that the developments, particularly in science and information generation, have been so rapid that these have implied that frequently those negotiating on behalf of the less wealthy countries often have not had the

49. See generally Jutta Brunée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000).

50. See Joyeeta Gupta, *North-South Aspects of the Climate Change Issue: Towards a Negotiating Theory and Strategy for Developing Countries*, 3 INT'L J. SUSTAINABLE DEV. 115 (2000).

preparations necessary to negotiate the issue in substantive terms.⁵¹ The implicit assumption of treaty law that countries will send prepared negotiators and that the negotiating process will be a balanced process is challenged by these findings.⁵² The participation of non-state actors as observers in these negotiations does not always serve to balance the North-South imbalance that emerges in such situations.⁵³ This is because the bulk of the scientists, industrialists and NGOs present at such negotiations primarily from Anglo-Saxon countries, are implicitly or explicitly influenced by such interests. At the same time, in designing solutions for the international negotiations, there are clear examples of countries competing with each other to ensure that their solutions become the chosen solutions. This ensures less regulatory change for them and hence lower implementation costs. While this is a subtle process, a more explicit process is that of using the best practices. This in fact encourages competition. While competition in theory leads to the best solutions, whether in fact these solutions are implementable in a vast variety of local and national contexts is disputable.⁵⁴

Finally, traditional law principles such as equity are giving way to the principle of cost-effectiveness. How can policies be addressed at lowest economic costs, rather than at lowest socio-political cost? This has led to the development of a number of market mechanisms to address global environmental problems. While many of these market mechanisms are self-enforcing in the sense that once the regulatory conditions are created, social actors will wish to participate in them, this often comes at the cost of traditional legal principles of human rights and justice. The use of market mechanisms within public international law agreements inevitably leads to contracts, which are governed by the private law of contracts and possibly bilateral investment treaties. The impact of the interface between public international law and commercial law is as yet unclear, but could lead to commercial norms being upheld at the cost of other legal norms.

51. See Joyeeta Gupta, *Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations, and Climate Change*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 482, 496–500 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (providing detailed exploration of the implicit and explicit assumptions of treaty law that are not always observed in fact).

52. *Id.*

53. *Id.* at 500.

54. See Joyeeta Gupta, *Regulatory Competition and Developing Countries and the Challenge for Compliance-Push and Pull Measures*, in *MULTILATERAL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE* (Gerd Winter ed., Cambridge Univ. Press, forthcoming 2005) (on file with the author) (elaborating this argument).

III. COMBINATIONS OF GOVERNANCE PATTERNS

A. *Introduction*

We are not only witnessing the rise of non-state actors, shift in decision making forums and changes in traditional decision making structures, but we are also seeing new hybrid governance patterns. Although the literature tends to differentiate only between horizontal and vertical governance, I tend to differentiate five types of governance patterns. I have used terms that can be portrayed graphically in order to be able to present the information in an easily communicable manner to both scientists and policymakers.

B. *Types of Governance*

There are five types of governance patterns. First, horizontal governance patterns which refer to relations between countries at the same level of hierarchy. In other words, it refers to how municipalities relate to each other, provinces to each other, and states to each other.

Second, vertical governance refers to the relationships between countries across different levels of hierarchy. This looks at relationships between municipalities, through provinces, states, supranational entities to the global governance level. The predominant focus on horizontal and vertical governance has been the subject of public international law.

Third, diagonal relationships examine the way in which state actors deal with non-state actors. I refer to this as diagonal because non-state actors are not organized in a comparable system of hierarchy. These relationships are increasingly becoming more and more important because with the shrinking state, responsibility for taking measures is increasingly shifting to these non-state actors. The literature refers to this type of governance as co-regulation.

Fourth, parallel relationships refer to the initiatives taken by the non-state actors themselves in the process of governance. This is undertaken sometimes as a public relations measure and sometimes to pre-empt government action. The literature refers to this as self-regulation.

Fifth, point governance refers to the increasing role of courts in influencing policies in countries. Within the European Union, the European Court has significant powers. But with the International Court of Justice's advisory opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, we are witnessing creative ways to access the Court, and the fact that the Court is willing to deal with highly charged political issues.⁵⁵ Similarly, in the area of investment law, there have been more than 100 arbitral proceedings in the

55. Advisory Opinion No. 131, *supra* note 47.

last decade and a new body of highly intrusive and often inconsistent law is being created.⁵⁶ Within a specific regime, hybrid systems of governance are emerging. This section briefly shows how different environmental regimes have adopted hybrid forms of governance.

C. *Case Study of Climate Change*

The climate change regime refers to the United Nations Framework Convention on Climate Change 1992, and the Kyoto Protocol of 1997s.⁵⁷ It also includes decisions of the ten Conferences of the Parties that have been held thus far. This regime has very strong horizontal relationships between countries by virtue of the treaties. These treaties elaborate on the quantitative and qualitative obligations of countries and the regularity with which the Conference of the Parties have to meet. This keeps the pressure on the system to incrementally develop the regime further. It has very strong vertical relationships with the national authorities by virtue of the commitments that have to be implemented at national and local level, the reporting requirements and the strong non-compliance mechanisms being developed. There are also multiple diagonal relationships with non-state actors. There are formal channels of communication to the epistemic communities to ensure that the process is informed by the best available science. Other non-state actors are also permitted to participate in the process of negotiation. Finally, non-state actors may participate in the market mechanisms being developed by the regime. Although non-state actors may contribute to the implementation, the non-compliance mechanism holds states accountable if goals are not met. And since that is the case, states are developing stringent mechanisms to control and monitor the participation of these actors in these schemes. However, clearly once contracts are drawn up between non-state actors and/or non-state actors and state actors, these will be governed by the principles of private international law and possibly by the bilateral investment treaties. One can conclude that from a design perspective the climate change regime has a strong hybrid system of horizontal, vertical and diagonal governance. This is not to deny that there are leaks in the system because of the low level of commitments and the scientific and reporting weaknesses in the regime. In addition, as men-

56. A look at the World Bank website shows that there are more than 150 arbitration proceedings that have taken place in the last few years. World Bank Group, at <http://www.worldbank.org/icsid/cases/main.htm> (last visited Mar. 14, 2005).

57. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 165; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, U.N. Doc. FCC/CP/1997/L.7/add.1. (1997). For more details on the bilateral agreements that the United States is entering into, see Francesco Sindico & Joyeeta Gupta, *Moving the Climate Change Regime Further Through a Hydrogen Protocol*, 13 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 175 (2004).

tioned earlier, there is some ongoing climate change related litigation in the United States and some new court cases are expected in the Inter-American Court of Human Rights.⁵⁸ These may set judicial precedents that may potentially influence processes in other countries and at the multilateral level. However, apart from noting that this is happening, it is too early to conclude what may happen with these. In addition, the climate change regime also has a large number of unrelated initiatives; including those of the local authorities who wish to reduce their greenhouse gas emissions and the bilateral agreements that the United States has been entering into with other countries on climate change and hydrogen.⁵⁹

D. Case Study of Water

In the case of water, it is difficult to speak of a water regime. There is one global treaty, the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses,⁶⁰ which is yet to enter into force. Thus, the global horizontal agreement is not in force. There are some 400 water treaties between large numbers of riparians that have been negotiated over the last two hundred years.⁶¹ Individually, each treaty is being implemented primarily by the riparian states parties to those agreements and the driving factor behind the effective implementation is the reciprocity embodied in these agreements and the international river basin commissions and organizations established by these agreements. This does not, however, mean that there are no legal and political conflicts in these regimes. There is thus strong horizontal and vertical governance in this field at the river basin level. Over the years, there have been a number of judicial decisions that have promoted various principles of law. There has been some court jurisprudence in the field, and this jurisprudence and state practice has provided the basis of the current law on water.

Most of the public international law agreements have not promoted the private sector's participation in decision-making. However, through the liberalization of markets, the private sector has increasingly become engaged in the water sector through public private partnerships. This has to some extent been promoted by international organizations and by international conferences on water, many of which have not been held under UN

58. See generally Inter-American Commission for Human Rights, available at <http://www.cidh.oas.org/DefaultE.htm> (last visited July 19, 2005).

59. Sindico & Gupta, *supra* note 57.

60. Convention on the Law of the Non-Navigational Uses of International Watercourses, 17 Dec. 1996, 36 I.L.M. 700, U.N. GAOR 6th Comm., 51st Sess., U.N. Doc. A/51/869 (1997).

61. UNITED NATIONS ENV'T PROGRAMME, ATLAS OF INTERNATIONAL FRESHWATER AGREEMENTS 2 (2002), available at <http://www.transboundarywaters.orst.edu/publications/atlas/#acrobat>.

auspices. This process of decision-making has actually followed a parallel track to the pure legal developments, and has been driven by a top down process of policy making on water.

With globalization, we are now witnessing a process by which many other legal systems may also influence water governance. The developments in trade and investment law will also influence the rights of governments to govern on water issues and will determine how disputes are to be addressed. Thus in the area of water law, we have many competing policy/legal processes that operate horizontally, vertically, diagonally as well as through adjudication.

E. Case Study of World Summit on Sustainable Development

In the area of sustainable development, the key global conference was the World Summit on Sustainable Development (WSSD) which concluded in 2002 with a policy document adopted by the participating countries (Type 1 agreement), and with a large number of Type 2 agreements between state and non-state actors.⁶² The policy agreement between countries is not a legally binding document. Although it runs into a large number of pages, the document does not specify who must do what and where. It is a very weak policy document, not reflecting the systematic nature of Agenda 21 adopted ten years previously.⁶³ The horizontal agreement is thus weak. This anticipated weakness led the organizers of the WSSD to seek new partnerships with non-state actors. This led to the adoption of Type 2 agreements, which allow social actors to make partnerships with each other to achieve the specific goals that they themselves wish to commit to. There are many of these diagonal agreements. However, there are no vertical agreements to verify compliance. Nor is there a clear relationship between the weak horizontal agreement and the enormously varying diagonal agreements except to the extent that in general the Type.2 initiatives are expected to contribute to the Type 1 goals.

The above case studies have shown three different roles for non-state actors in specific regimes. In the climate change regime, there is a clear central treaty and non-state actors are encouraged within the regime to undertake measures to reduce greenhouse gas emissions. There are specific links to the science produced by non-state actors and such actors are allowed to participate as observers in the regime. In water, the public international water law agreements essentially specified the role of state

62. See Ulrich Beyerlin & Martin Reichard, *The Johannesburg Summit: Outcome and Overall Assessment*, 63 HEIDELBERG J. INT'L L. 213 (2003) (providing for an assessment of the World Summit on Sustainable Development).

63. United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/PC/100/Add. 1 (1992).

actors. However, the international policy processes have promoted the role of private actors in the liberalization of water; this is being further elaborated upon within public international law developments within the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services.⁶⁴ In the WSSD regime, two types of agreements were encouraged one between states and one between state and non-state actors. While the latter ostensibly empowers non-state actors by allowing them to enter into agreements, the very voluntary nature of these agreements show that it is not a well designed system and that the increasing importance of non-state actors has come hand in hand with the decreasing political will of state actors to actually take serious policy measures to deal with global problems.

IV. EXAMINING SUSTAINABILITY LABELING

A. Introduction

Let us now turn to the issue of sustainability labeling and certification. Despite the huge and growing legislation on environmental, economic, social and human rights issues at the supranational, regional and international level, many social actors feel that this is not enough to achieve the goal of sustainable development. ENGOs are very actively engaged in demanding that industry "clean up its act" while, on the other hand, consumers too wish increasingly to access sustainable products. All this implies that there is a strong pull and push effect on industry and the latter is now developing internal or sectoral strategies to cope with the pressure. They are thus developing parallel initiatives focusing on "business strategies and activities that meet the needs of the enterprise and its stakeholders today while protecting, sustaining, and enhancing the human and natural resources that will be needed in the future."⁶⁵ Over the years, these initiatives have evolved from schemes that dealt with labor conditions and trade relations, through environmental schemes to 'sustainability' schemes and today there are multiple initiatives of various sorts. The purpose of such schemes is to influence the production process to such an extent that it becomes sustainable or at least is perceived as sustainable.

These questions remain: How sustainable are these schemes in meeting their goals? Are these schemes developed using the principles of good governance? To what extent do these schemes give rise to conflict

64. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (5), (6), 55 U.N.T.S. 194; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 44 (1994). Texts of all WTO agreements are available from the World Trade Organization's website at <http://www.wto.org>.

65. See generally INT'L INST. FOR SUSTAINABLE DEV., BUSINESS STRATEGY FOR SUSTAINABLE DEVELOPMENT: LEADERSHIP AND ACCOUNTABILITY FOR THE '90s, at 11 (1992).

with trade rules and/or are compatible with international environmental and social law? A project undertaken by the University of Barcelona in Spain, the University of Bologna in Italy and the *Vrije Universiteit* in Amsterdam focused on understanding the new developments in the field of sustainability labeling and certification schemes in the context of sustainable development. It aimed at providing a conceptual and theoretical elaboration of the key issues involved, including the challenges to international law and to facilitate the design of successful strategies to increase the positive impacts of these schemes.⁶⁶ The research focused on voluntary, not mandatory⁶⁷ labeling schemes, based on second and third party verified claims.⁶⁸ Following an elaboration of the concept of sustainable development, the research analyzed the legal, institutional and organizational framework within which such schemes operate. It then undertook an inventory of the different schemes and further elaborated on five case studies: jeans, capture fisheries, fruit and vegetables, forestry products, and eco-tourism. The case studies analyzed the sustainability labeling and certification schemes in terms of their sustainability content, compatibility with international law, market impacts, trade aspects, and good governance. The research concluded by analyzing and synthesizing the results. The rest of this section highlights some of the key results of the research and some of the case studies undertaken are further elaborated on in this volume.

Before going further, it might be useful to understand the key steps and terms in sustainability labeling and certification schemes. In these schemes, the first step is the setting of standards, which includes identification of principles underlying the scheme, and quantitative and/or qualitative standard setting. The process of setting standards includes the articulation of the definitions of the principles embedded in the scheme and the standards and criteria that the applicants⁶⁹ and licensees⁷⁰ need to comply with. Following this, the products, services and production processes are certified. Finally, the bodies that certify need to be accredited.

66. See SUSTAINABILITY LABELING AND CERTIFICATION (Mar Eritja Campins & Marcial Pons, eds., 2004) (publishing the research).

67. This includes for example, energy labeling schemes for electrical appliances of the European Union.

68. In contrast, first party claims are those made by the producer himself without independent verification.

69. An applicant is a legal entity applying for a label or certificate for a product or range of products.

70. A licensee is an applicant to which a label or certificate has been awarded.

B. Key Issues in Sustainability Labeling

For the purpose of the project we concluded that sustainability issues that were potentially relevant to sustainability labeling included ecological (which includes environmental and biodiversity related aspects), social (human health, human rights, labor conditions and animal welfare) and economic aspects (mostly trade related issues). We felt that in adopting such schemes it was important that parties paid attention to the principles of good governance, which include legitimacy, transparency, participation, accountability, effectiveness and coherence.⁷¹ Against these preliminary definitions, we examined if the emerging labeling and certification schemes can be seen as sustainable by producers and consumers, or against some universal standards, whether these schemes are compatible with international law or not, whether these schemes have a potential distorting impact on markets and may influence North-South relations, and the extent to which such schemes are developed on the basis of the principles of good governance.

In the inventory of such schemes, the research showed that state and non-state actors are actively engaged in developing multi-sector schemes (such as environmental schemes, fair trade schemes, organic schemes and integrated production schemes) as well as a range of sector specific schemes focusing on clothes, textiles and footwear, marine and fish life, food and beverages and tourism. The environmental schemes are mostly public or semi-public schemes and often undertaken within the context of a private international umbrella organization; the fair trade schemes are mostly fully private, the organic schemes are mainly private although the involvement of the public sector is increasing, while the integrated production schemes are mainly private. The sectoral schemes are mainly private although often there are relevant public international regulatory frameworks such as the Food and Agricultural Organization's initiatives on responsible fisheries and the UN Convention on the Law of the Sea.⁷² An attempt to score the sustainability of these different schemes shows that fair trade schemes and organic schemes score relatively high.⁷³ On the basis of the preliminary inventory, five sectors were chosen and within these sectors, specific schemes were selected (Fair trade schemes: Kuyuchi jeans; Fisheries-capture fisheries: Marine Stewardship Council; etc.). Of these schemes, the Kuyuchi jeans scheme scored very high in terms of its sustainability content, while the International Foundation for Organic

71. Joop De Boer et al., *The Conceptual Framework*, in SUSTAINABILITY LABELING AND CERTIFICATION, *supra* note 66, at 39–48.

72. Nicolien Van Der Grijp & Luke Brander, *Multi-Sector and Sector Specific Schemes*, in SUSTAINABILITY LABELING AND CERTIFICATION, *supra* note 66, at 86–87.

73. *Id.* at 88.

Agriculture Movements (IFOAM) scheme on fruits and vegetables and the Forest Stewardship Council scheme also scored fairly well.⁷⁴

In examining the international legal context, the project concluded that there are several international conventions on environmental and biodiversity related issues, on labor and human rights issues and on trade related issues and these conventions set the boundary conditions within which such schemes may be undertaken. Where the labeling and certification schemes adopt the standards incorporated in these negotiated agreements, in principle there should be no problems in terms of compatibility with international law. However, sometimes, it is the private sector standards that become so influential that they are later incorporated into international agreements. For example, the organic standards adopted by the IFOAM were later used in the guidelines developed by the Codex Alimentarius Commission and the European Union legislation on organic agriculture.⁷⁵ While these schemes may in general be seen as compatible with international law because of their voluntary nature, the existing trade rules do call for a balance between regulatory autonomy and social justice and for ensuring that such schemes do not become a disguised barrier to trade. Those schemes that only list product characteristics or product related PPMs (Process and Production Methods) can be seen as consistent with World Trade Organization rules. Voluntary schemes are likely to be more compatible with World Trade Organization (WTO) rules. More comprehensive schemes and schemes where public authorities play a role may conflict with WTO rules in the future.

The analysis reveals three types of controversies. The first is in relation to the adequacy of the standards being developed. The competing schemes use different standards developed through vastly different processes and the way the information is communicated to the consumer does not really allow for informed choices. Whether these standards really achieve the sustainable development goals embodied in them is also sometimes questionable. The second is the issue of market success. The rise of these schemes clearly indicates that there is a perceived demand and consumers are willing to buy these products. However, the research also indicates that for the moment these schemes remain niche schemes and have yet to become popular.

The third issue is the trade impacts on developing countries. Many of these schemes purport to protect social and environmental goals in these countries. For example, the development of such schemes may lead purchasers to move from producer to producer to find someone that meets their standards. However, many developing country producers are small-

74. Van Der Grijp & Brander, *supra* note 72, at 75.

75. *Id.* at 76.

scale operators that cannot easily either know or meet these standards. Fair trade schemes actually try to deal with this part of the problem by helping these producers meet the standards required. Other schemes help to enforce international law agreements and standards and thereby serve to reinforce international law as well as protect the local people and their environment. Some farmers in the developing countries are already extensively benefiting from their participation in, for example, certified organic food and vegetable production. In some Latin American countries garment producers are benefiting through their participation in the Kuyuchi jeans scheme.

However, there is a very real threat in terms of barriers to trade. In the global trading system, many developing countries are only allowed to sell a certain quota of products to some Western countries. The adoption of formal and informal certification and labeling schemes may further limit the opportunities for export. An indirect trade barrier arises when small producers without much access to capital or knowledge are unable to easily adapt to the changing standards in Western countries and (especially when there is a proliferation of such schemes) to the different standards adopted in different countries. Another problem is that most of these schemes are developed in the West with very little participation from developing country producers and/or developing country stakeholders. As such, these schemes rarely take into account the actual situation pertaining to the production process, and may run the risk of applying standards that do not serve to address the purported goal. All these may lead developing country producers to face new market access problems. “[L]abeling and certification schemes could thus give rise to trade barriers for the poorest countries where professionalisation of production is least developed and could lead to the further marginalization of the most vulnerable groups, the workers in the informal sector.”⁷⁶ The only way one can address this problem is by enhancing the legitimacy of these schemes by ensuring that they are developed through processes that are characterized by good governance. Through the application of such good governance principles, it may be possible to achieve balance between autonomy to market actors and social justice principles. At the same time, the case studies did not reveal an existing serious problem of diminished market access as a result of these schemes primarily because of their niche character.⁷⁷

76. *Id.* at 82 (citing Kuik and Van der Woerd).

77. When one looks at whether such schemes are compatible with trade law, one needs in particular to look at the provisions of the General Agreement on Tariffs and Trade and subsequently the World Trade Organization and the new Technical Barriers to Trade Agreement and its Code of Good Conduct. This is an issue that has many legal uncertainties. However, despite the uncertainties, one can argue that the sustainability labeling schemes may become subject to the provisions of the Technical Barriers to Trade Agreement.

V. CHALLENGES TO INTERNATIONAL LAW

This paper has argued that globalization has changed the processes by which governance is being exercised to address key global environmental and developmental problems. Globalization has not only revolutionized communication technology, both for the media and the civil society in such a way that knowledge and information (including disinformation) can travel all over the globe within a matter of seconds to all kinds of recipients, including, unintended recipients. This has empowered civil society to become both, a key actor in global governance and to push for measures worldwide to address perceived problems. Governance is no longer limited to those formally in power with a ticket to fly to a UN Conference. Governance has become open to those stakeholders who decide that they will harness the communication technology to influence global policy. The role of global civil society in stopping progression on the Multilateral Agreement on Investments is a case in point.

As a result there is a shift in the locus of power from state-centered decision making (except perhaps in cases of high politics) to supranational and lower governmental bodies, to courts, to the press and to civil society. Not only that, within the traditional sphere of liberal inter-governmentalism and intergovernmental negotiations, there are rapid developments taking place like the development of interactional law, which will catch many senior and conservative lawyers with surprise, while the rise of initiatives to involve the private sector in environmental treaties might lead to an uneasy marriage between public and private international law.

In the process, new governance interactions are visible. The case studies of water, climate change and the WSSD show the permutations and combinations of the interactions that are taking place. Against this background, the issue of sustainability labeling and certification schemes initiated by non-state actors has been discussed. This goes far beyond the traditional types of schemes and is a parallel form of governance that attempts to challenge traditional inter-governmentalism, justifying this attack on the grounds of purity of motive of protecting humans and the environment. The question is: Is this to be a short-lived trend that cannot hold up in a court of law if it turns out to conflict with existing trade law? Or, is this a sign of things to come?