

## **How to Get Beyond the Zero-Sum Game Mentality between State and Non-State Actors in International Environmental Governance**

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### **Abstract**

This paper examines one specific theme of the democracy-environment interface of environmental governance: the participation of stakeholders in environmental policy formulation and implementation. After a short discussion of environmental governance, its main functions and challenges, the paper addresses the issue of stakeholder participation and the claim of a “democratic deficit” in international environmental governance. It stresses that while stakeholder involvement does not increase the democratic legitimacy, it may nevertheless increase the quality and through this the legitimacy of environmental policy processes. It will then argue that certain international processes such as the UN Commission on Sustainable Development have reached an unsatisfactory Pareto Optimum of stakeholder participation where formalization and proceduralization have become an impediment for active interaction and input of specific expertise and competence from non-state actors into state-centric policy making. It will suggest several changes to get beyond this non-productive Pareto Optimum, including de-formalization of participation, exchange of generality by specificity, and perception of non-state actors as partners and not as competitors. It will conclude by arguing that neither the alleged lack of an authoritative, effective central institution addressing the main environmental problems, nor the so called “democratic deficit” are the main challenge to today's international environmental governance; but the lack of political will. Stakeholders, however, can be crucial in addressing this deficit.

### **Author's Note**

The international policy processes are often criticized for inadequate involvement of non-state actors such as NGOs. This is often referred to as a ‘democratic deficit’. My experiences in international processes in the field of the environment have however revealed that not all NGO-participation is as fruitful as often claimed. In some fora, NGO-participation has even become a formalized ritual that rather prevents than stimulates interaction. It seems to be difficult to overcome this situation as a certain kind of a Pareto Optimum of stakeholder participation has been reached. However,

the overarching goal of sustainable development can only be realized when the specific expertise and perspective of non-state actors stimulate and enrich the international policy making. This article therefore favors a de-formalization of non-state actor involvement and calls NGOs to re-focus their energy towards public awareness raising, influencing national negotiation positions, and triggering the political will and commitment that is needed.

#### **Acknowledgments**

My interest in this research topic is a combination of my studies in history, political science, and historic preservation practices. My focus throughout these areas has continuously been encompassed by my interest in international development. As I studied various techniques for development, I saw a growing need for historic preservation and regard to historical integrity. While many urban development projects have started using historic preservation practices, it has not yet become widespread criteria for community development agendas. My goal is to encourage the implementation of historic preservation practices in urban development nationwide. I hope to further my research from just the domestic use of historic preservation in community development to the potential of historic preservation in development practice internationally.

**Keywords:** International Environmental Governance, Non-Governmental Actors, NGOs, Stakeholder Participation, Legitimacy

## **Introduction**

Today, it is well recognized that threats to the environment undermine the resource base of human development and well-being. As UN Secretary-General Kofi Annan (2005) has held, “[o]ur efforts to defeat poverty and pursue sustainable development will be in vain if environmental degradation and natural resource depletion continue unabated.” In order to address the challenge of global environmental degradation and natural resource depletion, a complex and multi-layered international environmental governance structure has materialized over the past few decades with numerous parallel, sometimes overlapping, sometimes conflicting, sometimes cooperating and mutually supportive institutions, organizations, processes have emerged. To make things worse: this governmental environmental structure is complemented by a non-governmental structure of thousands of active organizations, initiatives and action groups. Environmental governance has become so complex, that even specialists have lost oversight.

This paper examines the participation of stakeholders in international environmental policy formulation and implementation. Thereby, it will use the term nongovernmental organizations (NGOs) for groups of persons or of societies which are freely created by private initiative, which represent and pursue a specific interest and which are not directly profit seeking. Thus, the term includes so-called “public interest NGOs” as well as industry and business associations. The term stakeholder will also include representatives of groups with a direct profit related self interest such as representatives of specific industries or businesses. The paper will focus on the international level of environmental governance and draw from experiences from international processes, such as the UNEP Cartagena process to strengthen International Environmental Governance (IEG), the World Summit on Sustainable Development (WSSD) process, the United Nations Commission on Sustainable Development (CSD), or the development of the Strategic Approach to International Chemicals Management SAICM).

After a short discussion of environmental governance, its actors and institutions, and its main functions and challenges (Section 2), the paper will address the issue of stakeholder participation and the claim of a “democratic deficit” in international environmental governance. It will stress that while stakeholder involvement does not directly increase the democratic legitimacy as such (Section 3), it may nevertheless increase the quality of environmental policy processes (Section 4). It will then argue that we have reached a Pareto Optimum of stakeholder participation. This is especially the case in processes like the CSD where stakeholder participation is confined by formalization and rituals of “multi-stakeholder segments”. On the other hand, there are processes such as the development of the Strategic Approach to International Chemicals Management which are characterized by strong, dynamic and direct stakeholder involvement. The paper will suggest that in the light of the important benefits of active stakeholder participation, changes in CSD-like Pareto optimum situations are desirable. It will conclude that stakeholder involvement may be less effective in general processes addressing broad issues. Similarly, NGOs with a very general background may have less impact on specialised political processes. On the other hand: the more specific an issue and the competence and expertise of NGOs

and stakeholders are, the more helpful is active NGO and stakeholder participation in policy making (Section 5). It will conclude by arguing that neither the alleged lack of an authoritative, effective central institution addressing the main environmental problems, nor the so called “democratic deficit” are the main challenge to today’s international environmental governance; but the lack of political will, respectively a political prioritization of other issues over the environment. Non-state actors such as NGOs, however, can be crucial in addressing this deficit.

## **Functions, Actors and Institutions of Environmental Governance**

### *Functions and Actors*

Environmental governance is the political and administrative system established to address environmental problems. It embraces institutions, principles, rules, procedures and instruments that regulate, manage, and implement the processes of environmental protection<sup>1</sup>. At the national level, there is normally a relatively clear political and administrative structure with a government equipped with overarching policy authority. On the other hand, the international level is characterized by the lack of such a central political authority with direct influence over processes, institutions and individual actors and by more complex political and administrative structures that involve numerous processes, institutions and actors with sometimes parallel, overlapping, competing or even conflicting competences and functions.

The function of environmental governance is to provide a comprehensive, coherent, effective and efficient framework for the protection and sustainable use of natural resources<sup>2</sup>. This includes numerous activities such as the identification of problems, the provision of adequate information on the identified problems, the provision of a forum for the formulation of policy advice and guidance, the coordination and promotion of cooperation between the different actors, and the establishment of concrete mechanisms for implementation of the formulated policies and the integration of environmental policies in the broader policy frameworks<sup>3</sup>.

Environmental governance stands always in the context of sustainable development. In this context, environmental governance should contribute to sustainable development and the well-being of humans through the protection of the environment as the natural-resource base for all economic and social development and human life<sup>4</sup>. At the international level, these functions of environmental governance have been recognized repeatedly in overarching policy statements of the world leaders such as the Rio Principles and Agenda 21 adopted in 1992, the political declaration and the Johannesburg Plan of Action, both adopted at the World Summit on Sustainable Development in 2002, and the 2005 World Summit Outcome.

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<sup>1</sup> Esty 2006, 1497-1499; Najam, Papa, and Taiyab 2006, 3.

<sup>2</sup> Perrez 2001; Roch and Perrez 2005.

<sup>3</sup> Esty and Ivanova 2002, 191-192 (clustering these activities into three functions: i) providing information, ii) providing a policy space, and iii) establishing an action mechanism for implementation).

<sup>4</sup> Perrez 2008, 268.

Traditionally, it is argued that the main pillars of an environmental institutional framework are government authorities, appointed and authorised by elected officials to carry out tasks at the national (federal) and sub-national (regional and lower) levels. This traditional model has been changing rapidly: Private actors are not any more seen only as an “object” of environmental policy, they have also become “subject” of environmental policy making. It is today a specific characteristic of environmental governance that non-state actors are fulfilling important roles: Non-state actors play an important role also as engines of international environmental policy-making through setting agendas, providing knowledge and scientific information and monitoring implementation and lobbying state actors. And, they are involved in partnership initiatives with governments, develop voluntary standards, and implement environment and development programs in many countries<sup>5</sup>. The establishment of private label schemes such as the Forest Stewardship Council is a prominent example of international environmental governance that is not dependent upon the intervening role for national government action<sup>6</sup>. Today, there is an increasing corpus of rules, principles and decisions having a direct impact on private actors that has not been negotiated in a traditional inter-state context, and rules made by international organizations, often with strong support from non-state expertise and direct participation of non-state actors, international partnerships between public and private entities, international code of conducts developed by private actors or private initiatives such as the Forest Stewardship Council have become important elements of international environmental governance. Thus, not only government authorities and states, but also international governmental organisations and non-state actors such as non-governmental organizations, corporations, other collectives and even individuals have become important actors of both national and international environmental governance<sup>7</sup>.

### *Institutions and Challenges*

The international environmental governance is relatively young and dynamic. Over time, a multi-layered regime has emerged, and a proliferation of instruments, processes, institutions and actors has evolved that bears the risk of duplication and even of conflict<sup>8</sup>. This evolution has also increasingly required a strengthening of international cooperation and over time established a duty to cooperate<sup>9</sup>.

As indicated, the involvement of non-governmental actors is a specific characteristic of the environmental governance institutions. The UN Commission on Sustainable Development (CSD) is said to have been a pioneer in engaging nongovernmental actors in its work by including in its annual meetings “multistakeholder dialogues” where representatives from diverse sectors convene and share their experience and forge common grounds. This has led to a significant

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<sup>5</sup> Najam, Papa, and Taiyab 2006, 62 and 65-73; Gemmill and Bamidele-Izu 2002, 89-95.

<sup>6</sup> Meidinger 2006.

<sup>7</sup> Kingsbury, Krisch, and Stewart 2005, 23-25; Sands 2003, 70-122.

<sup>8</sup> Roch and Perrez 2005, 3-6; Sands 2003, 25-69.

<sup>9</sup> Perrez 2000, 271-297.

increase of NGO representatives from around the world to attend CSD meetings<sup>10</sup>. Today, non-governmental organizations regularly participate as observers at meetings of international environmental institutions and processes and make effective use of their right to intervene and submit their views and proposals.

The United Nations' Environment Programme UNEP is one of the main institutions of today's international environmental governance. UNEP was established in the follow-up to the 1972 Stockholm Conference on the Human Environment. It has a broad mandate to i.a. review the world environment situation, promote scientific knowledge and information, promote international cooperation in the field of the environment, to provide broad policy guidance and advice, and to identify global environmental priorities<sup>11</sup>. However, UNEP is lacking resources, authority and support to fulfil its role as central pillar of the international environmental regime. In addition to UNEP, over 500 international environmental treaties and conventions have been concluded to address specific environmental concerns. Each convention establishes specific rules and obligations and creates its own "mini-institutional machinery", including annual meetings of the parties to the convention and a secretariat structure to serve these meetings and to oversee and support the implementation of the convention<sup>12</sup>.

In addition, while UNEP and the multilateral environmental agreements (MEAs) have the primary political-normative functions of international environmental governance, their work is complemented by specialized organizations and institutions such as the Food and Agriculture Organization, the International Maritime Organization, or the UN Commission on Sustainable Development. Today, many of the most important decisions affecting the environment occur in institutions and processes outside of the complex web of the core global environmental governance system, such as in the WTO, the multilateral development banks or in bilateral investment and free-trade agreements<sup>13</sup>. And, implementation and financing of environmental activities is often tasked to other institutions such as the United Nations Development Programme UNDP, the World Bank, the Global Environment Facility, the United Nations Institute for Training and Research UNITAR, or United Nations Industrial Development Organization UNIDO.

This proliferation of MEAs, international environmental rule setting bodies, and institutions engaged in environmental activities has led to a fragmentation within international environmental governance. Given the weak position of UNEP, there is a lack of cooperation and coordination among the different relevant international institutions and a lack of implementation and enforcement, and the too limited resources are not always used efficiently<sup>14</sup>. This institutional and structural weakness of the environmental governance system does not allow adequately mainstreaming and prioritizing environmental issues into policies and activities of other relevant actors.

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<sup>10</sup> French 2002, 195.

<sup>11</sup> UNGA Resolution Resolution 2997 1972; UNEP GC decision VII/1 2002.

<sup>12</sup> French 2002, 176-177.

<sup>13</sup> Najam, Papa, and Taiyab 2006, 57-62.

<sup>14</sup> Ivanova 2005; Najam, Papa, and Taiyab 2006, 14-16 and 36-56; UNEP 2001.

For example, a recent evaluation of UNDP's role in and contribution to managing environment and energy for sustainable development has concluded that UNDP's overall strategic priorities in environment and energy are unclear in practical terms, have little impact on the ground and illustrate a disconnect between headquarters and the field level; that mainstreaming of environmental considerations within UNDP is almost non-existent; that the environment and energy work of UNDP has been driven by and responded to the availability of GEF funding; and that UNDP so far seems to have been unable or unwilling to support environmental activities from its core funding<sup>15</sup>. These challenges or shortcomings of the international environmental regime can be structured into four groups or clusters: i) insufficient commitment to and prioritization of environmental considerations by states, ii) fragmentation of the regime, iii) limited authority and limited resources of UNEP, and iv) a structural and institutional imbalance between the environmental regime and other regimes<sup>16</sup>.

Over the past years, several efforts have been undertaken to strengthen international environmental governance<sup>17</sup>. The most recent initiative was taken at the 2005 UN World Summit: Recognizing the need for more efficient international environmental governance with enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, as well as better integration of environmental activities in the broader sustainable development framework at the operational level, the heads of state and government agreed to explore the possibility of a more coherent institutional framework to address this need<sup>18</sup>. Interestingly, there is no specific reference to the involvement and the general role of non-state actors. However, it is clear that non-state actors can play an important function in addressing several of the identified needs. It remains to be seen how successfully this initiative within the UN will address the shortcomings of the current international environmental governance and provide for effective remedies.

### **Stakeholder Involvement and the Claim of a “Democratic Deficit”**

The involvement of non-governmental actors in the international environmental policy regime is a characteristic of environmental governance. Nevertheless, this involvement is sometimes said for being insufficient and the international institutions and processes are criticized for suffering from a “democratic deficit.” Thereby, it is typically argued that non-governmental organizations are representing the global civil society and the public and that therefore, enhancing their role in international decision making would also enhance the democratic legitimacy of international institutions and processes.

The claim that NGO participation can enhance the democratic legitimacy of international governance is relying on the questionable assumption that the concept

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<sup>15</sup> UNDP 2008.

<sup>16</sup> Perrez 2001, 452-453; Roch and Perrez 2005, 15-17. See also: Perrez and Ziegerer 2008, section II.

<sup>17</sup> Perrez and Ziegerer 2008, section III.

<sup>18</sup> 2005 World Summit Outcome, § 169.

of democracy can as such be applied to international governance<sup>19</sup>. Since there is no global government and no global “people” (demos), international governance is difficult to associate with the act of democratic governing. And, it is argued that because of the fundamental absence of the premise of majority rule, the concept of democracy seems hardly applicable to international governance, and any attempt to bring international governance “into the laboratory of democracy will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two”<sup>20</sup>.

However, if the applicability of democratic principles to international governance would be accepted, the claim that NGO participation can correct a so-called democratic deficit of international governance would have to be rejected: NGOs are representing the views of a specific interest group – this does by no mean imply that NGOs represent the general public or a “global civil society”. Therefore, NGOs do not have a greater democratic legitimacy than governments and NGOs cannot justify their activist role on the claim that they represent the public<sup>21</sup>. The involvement of stakeholders in international governance may even pose democratic challenges: NGOs exert a profound influence on international rule making, they advance new issues to be regulated by international governance, they promote the creation of new international institutions and organizations and they monitor and support implementation of international commitments. Today, international environmental negotiations without active NGO participation would be seen as an abnormality. However, while governments are assumed to try to formulate and defend the interests of the states they represent and while government authorities typically are appointed and authorised by elected officials to carry out their tasks, NGOs and stakeholders exert their influence without such control by and accountability to the general public. Thus, the active NGO and stakeholder involvement in international environmental governance could raise concerns of accountability and democratic legitimacy.

This concern of accountability and democratic legitimacy becomes even more pressing if A New World order is accepted as proposed by Anne-Marie Slaughter<sup>22</sup>: Building on examples where international institutions function effectively when drawing significantly upon the existence of informal policy networks, Slaughter presents a world that is run in large by networks of elites who know each other. In her model, the individuals who make up these networks are persons such as regulators, bureaucrats, diplomats and judges, thus personalities with explicit mandates under public law and who are at least formally accountable to the people through elected governments and representative institutions at the domestic level. While Slaughter’s network conception seems to depend on the continuing viability of a clear boundary between public and private, there is a real risk that these networks operate in a way “whereby network ‘insiders,’ both governmental and non-governmental, cooperate in a manner that defies formal boundaries between public and private”<sup>23</sup>. But if global

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<sup>19</sup> Obregón 2006, 103-104.

<sup>20</sup> Weiler 2004, 549 and 552.

<sup>21</sup> Charnovitz 2006, 365.

<sup>22</sup> Slaughter 2004.

<sup>23</sup> Howse 2007, 232-233.

governance is run by networks which include governmental and non-governmental actors, then the selection of who should be a member of the network becomes complex and raises important questions of accountability and legitimacy.

### **The Benefits of NGO and Stakeholder Participation**

However, while the claim has to be rejected that because NGOs and stakeholders argue to represent the global civil society, the general public and the individual persons, strengthening their involvement in international institutions and processes would enhance the democratic legitimacy of international environmental governance, there are nevertheless other important benefits of non-state actor involvement in international environmental policy making and implementation. NGOs, as compared to state actors, have the benefit of being allowed to focus on one specific interest and they can express themselves more freely and are less bound by the general interest of a specific country. Moreover, NGOs have very specific expertise and knowledge. They enhance public support and assist in the domestic internalization and implementation of norms and commitments. And, [i]n being entrepreneurial, NGOs compete with other actors in a dynamic marketplace of ideas” and can be more creative in constructing and encouraging new norms, new forms, and new models of governance<sup>24</sup>.

Non-state actors can play important and very supportive roles in each step of the process of developing, implementing, and monitoring international environmental policies within international environmental governance<sup>25</sup>:

- i. By collecting, analyzing, and disseminating relevant information, drawing the attention to new and emerging issues that need international attention and by mobilizing public opinion through information campaigns and broad outreach activities, they can influence the agenda-setting of *international environmental governance*.
- ii. They can inspire and shape the *development of international norms and policies* by providing expert advice to state-centred international negotiations, formulating views and expressing interests that might be ignored by the state actors, by mobilizing public opinion at the national level to influence the position of the representatives, by lobbying and monitoring governmental delegations during negotiations. Several forms or channels for non-state actors involvement exist to influence the development of norms and policies by international governmental institutions: The most common form is non-state actor participation as observers in international meetings and negotiations. NGO representatives are also often included in national delegations. Moreover, some international institutions directly seek the expertise and the advice of NGOs on specific issues or include NGOs

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<sup>24</sup> Charnovitz 2006, 361-363.

<sup>25</sup> Charnovitz 1997, 271-274; Charnovitz 2006, 352-355; Esty 1998, 129; Gemmill and Bamidele-Izu 2002, 83-95.

- in technical committees or advisory groups. Finally, non-state actors can also strongly influence international policy development by formulating and applying themselves norms, standards, codes of conduct, or practices that influence governmental policy formulation.
- iii. They can contribute to the good *understanding of international norms and policies* by public information, engaging in interpretation of international rules and norms, and by contributing to international adjudication by making amicus curiae (friends-of-the-court) submissions.
  - iv. They can support the implementation of international environmental policies by advising state actors, supporting state implementation and by performing operational functions themselves.
  - v. And, they can support compliance with commitments and policies by monitoring state action, by drawing the public attention to implementation problems, sue institutions at the national level for non-action, and, in specific environmental regimes, by triggering compliance procedures.

These contributions of non-state actors to the process of developing, implementing, and monitoring international environmental policies are able to increase the quality of international regulations and policies. Through this, it can be argued, NGO and stakeholder involvement does increase the legitimacy of international decision making: Charnovitz, referring to Keohane and Nye, argues that legitimacy at the international level depends on the procedures followed (input) and the results obtained (output)<sup>26</sup>. NGOs and stakeholders further Input legitimacy by increasing transparency and promoting accountability through monitoring the positions expressed by government representatives. Moreover, they can help to assure that decision makers are aware of and take into account the views and interests of those affected by the decisions. And, NGOs and stakeholders contribute to output legitimacy by providing specialized expertise and knowledge and by broadening the information base for decision making. This can improve the quality of policy deliberations and choices.

Thus, it can be concluded that while claims that NGO and stakeholder participation is beneficial for international environmental governance because they represent the global society and thus “the people” governed by the international regime have to be rejected, NGOs and stakeholders nevertheless can enhance quality and legitimacy of international environmental governance by increasing transparency and facilitating accountability of government representatives, and by providing specialised expertise, broadening the information base for, and improving the quality of decision making. It is not the false claim of a higher democratic legitimacy that makes NGSO participation desirable, but the fact that they may provide additional views and proficiency and that they promote transparency and accountability. However, in order to ensure that such benefits of stakeholder and NGO participation

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<sup>26</sup> Charnovitz 2006, 366-367; Keohane and Nye 2001, 282-287. See also Bodansky 2007, 710-712 (distinguishing source-based, process-based, and outcome-based theories of legitimacy).

are possible, it is crucial that non-state actors do have specific expertise and actively accompany, monitor and support the governmental negotiations. And, it is important that the processes are organized in a manner which allows for real interaction between non-state and state actors. Experience shows that this is not always the case.

### **Getting Beyond the Pareto Optimum of Stakeholder Participation**

The CSD is sometimes praised for having been a pioneer in engaging nongovernmental actors, for organizing at each of its meetings rich and stimulating multi-stakeholder dialogues, and for the fact that NGO-representatives are included in many of the official government delegations. A critical analysis of the stakeholder and NGO participation of the CSD would come to less positive conclusions. And a cynical perspective would even conclude that the CSD stakeholder dialogues which are officially applauded politically correct as important, enlightening, thought provoking and crucial for quality and success of the CSD deliberations have evolved into formalized rituals where semi-professional official stakeholder representatives repeat each year more or less the same mantras which lack too often both specific insight and tangible and substantial link to the issues to be considered by the government delegates: The fact that the representative of the indigenous people is wearing a marvellous dress does not guarantee that his or her intervention is enlightening; the fact that the youth delegate is refreshing does not add value to the substance of her or his intervention; and the fact that the representative of the environmental community is deeply concerned does not ensure a critical analysis of the causes of a specific problem. The governmental delegations are often using the multi-stakeholder segment to work on their position or to consult and coordinate informally. In order to ensure that the seat is not empty in the plenary hall when the stakeholders speak, an intern, a junior member of the delegation or the NGO-representative in the government delegation is sent to attend the meeting. Later in the week, when the delegations exchange non-non papers and start to negotiate in small informal-informal contact groups the decisions, NGOs and stakeholder representatives are excluded. And in the final negotiation phase when delegates are working until late in the night, they don't have anymore the time to respond to questions or concrete and perhaps substantial proposals that NGOs try to circulate and bring to the attention of the state representatives. This description is obviously too cynical, exaggerating and not giving an adequate picture of the real CSD-dynamics. In fact, this author has several times benefited during the CSD negotiations from the exchange and discussion with NGO representatives and from the concrete proposals and suggestions on specific issues which they were sharing with the author. However, these positive interactions have not taken place in the formalize setting of the multi stakeholder dialogue but informally in the corridors. And, they have always involved NGO representatives with specific knowledge and expertise addressing very concrete issues under debate.

The formerly commended NGO and stakeholder participation at the CSD is no longer a showcase example of positive impact of proactive involvement of non-state actors, it does not guarantee that non-state input provides the expertise that the delegates need, and it does not provide for significant in-depth interaction. It seems that the formalization and proceduralization of stakeholder participation has not been

necessarily furthering its impact and value. By allocating specific time segments to NGOs and by formalizing their participation in the deliberations of governmental representatives, flexibility and dynamic got lost. However, in order to change the ritual, stakeholders would have to be ready to renounce to the time that is allocated to them in the formal stakeholder segment, delegates would have to invest time to attend the stakeholder consultations, or, space that is reserved for governmental only deliberations would have to be opened for stakeholder participation. However, stakeholders and NGOs are not ready to give up what they have gained over time, on the other hand, Government delegates are not ready to scarify even more of “their space” during a CSD meeting to NGOs. It seems that the formalization and proceduralization of NGO participation in the CSD – and in many other processes – has lead to a situation where the allocation of space and time to NGOs, to state actor and to “interaction” between the two cannot be changed anymore without making one party worse off. Such a situation, where no alternative allocation of goods can be reached without making any participant worse of is called a Pareto Optimum. Pareto optimal allocations re not necessarily socially desirable distribution of resources and may lead to unjust and inefficient inequities<sup>27</sup>. In short: Within the CSD, a Pareto Optimum of formalized stakeholder participation has been reached.

The example of the development of the Strategic Approach to International Chemicals Management (SAICM) indicates that more dynamic, more direct and more active stakeholder participation can be very productive and that the time used for interaction with non-state actors is not time lost but time gained as it provides insights helpful for the solution of the challenges under consideration<sup>28</sup>. The decision to develop SAICM was taken in 2004. The need for a strong and direct involvement of all relevant stakeholders in the process was accepted since the beginning of the process, and it was agreed that NGOs could participate fully in the work of the SAICM Preparatory Committee. As a consequence, more than 60 NGOs from the agriculture, development, environment, health, industry, and labour sectors participated actively in the negotiations of SAICM with the full right to take the floor, express their views and make concrete proposals. This opportunity was used in a very active and constructive manner throughout the process. NGO participation became a specific characteristic of the SAICM process, NGOs brought in very specific expertise and knowledge, they coordinated among themselves to make sure that NGOs from each regions were able to attend the meetings, and many of their ideas and proposals were taken up<sup>29</sup>. The adoption of SAICM was attended by over 140 governments, 60 specialized NGOs and 20 intergovernmental organizations from the agriculture, development, environment, health, industry and labour sector. Both industry and environmental and social NGOs immediately welcomed and supported the adoption of SAICM<sup>30</sup>. Several reasons made this participatory approach so productive: NGO participation was not restricted by formalized procedures or a constraint stakeholder segment; they invested a lot in their SAICM participation; they were well prepared, did not repeat generalities but made concrete and specific proposals; NGOs coordinated

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<sup>27</sup> Barr 2004.

<sup>28</sup> Perrez 2006.

<sup>29</sup> Gubb and Younes 2006; Perrez 2006, 247-249.

<sup>30</sup> Perrez 2006, 245-246.

among themselves and with governments throughout the process; and they were clearly not perceived as competitors to the states but as active partners with specific knowledge. One could even argue that within the SAICM-setting, it has been possible to leave the traditional interstate paradigm and to move towards a collective concern or community interest approach<sup>31</sup>.

Thus, there seem to be at least six fundamental differences between a CSD-like Pareto Optimum and the more dynamic SAICM model:

- i. while the participation of non-state actors within the CSD is focused on a formalized and proceduralized stakeholder dialogue, NGO and stakeholder participation in the SAICM process is not limited to such a formalized and proceduralized segment;
- ii. while the CSD is perceived as a process dealing with the broad overarching theme of sustainable development at a general level, SAICM was seen as a specific process addressing a specific issue;
- iii. while the CSD seems to have attracted non-state representatives with a less focused background, less specialized expertise and little commitment to focus on the very details of the ongoing discussions between the government delegates, SAICM has attracted NGOs with specific competence, expertise and knowledge;
- iv. while the non-state actors often formulate general and broad views not directly linked to the issues under debate at the CSD, they provided very specific and concrete comments and proposals during the SAICM process;
- v. while non-state actors are sometimes perceived as competitors for time in the CSD-process, they were seen as competent partners bringing in needed expertise and information in the SAICM-process; and vi) while governments too often primarily focus on the defence of interests against changes within the CSD, they also searched for common solutions of the pressing common challenges in the SAICM context.

As it seems that the gradual formalization and proceduralization of interaction with non-state actors, the very broad agenda and general debate, and the generality of non-state input have all contributed to the emergence of a non-productive Pareto Optimum situation of stakeholder involvement in the CSD, a move beyond this situation towards more dynamic and more direct participation would probably require several changes:

- *De-formalization of participation*: formalization and proceduralization by allocating preset and thus limited segments to stakeholders excludes them from other parts of the debate. It makes it easy to government representatives to escape interaction with non-state actors. And, formalization and proceduralization seems to attract non-state actors with less specific expertise inclined to focus on the form of participation and not the substance of

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<sup>31</sup> Brunnée 2006, 307.

contribution. formalization and proceduralization should be replaced with more direct and more spontaneous interaction throughout the whole process.

- *Generality should be exchanged for specificity:* A key benefit of non-state involvement in policy deliberation is the specific expertise and information that they can provide and the fact that they may formulate interests and views that otherwise might have gone lost in a state-centric process. By broadening the information base, they can contribute to an improvement of the quality of decision making. Therefore, NGO must not repeat generalities but focus on making specific comments and concrete proposals on specific issues under debate.
- *Non-state actors as partners not as competitors:* state actors should perceive the non-state actors not as competitors for time or influence but as active partners providing for the specific insights and information needed. At the same time, it is crucial that these partners, focusing on their role to broaden the information base for good decision making, do not perceive government representatives as enemies of the public good and the global civil society defending a short-time interest of a small privileged elite. They must go beyond simple accusation and try to understand the concerns and challenges that the government actors face and contribute actively to a common search for the best solution.

## Conclusion

This paper has argued that formalization and proceduralization of stakeholder participation may lead – and has led in certain processes such as the CSD – to a non-productive Pareto Optimum situation: Stakeholder participation, when too much formalized and proceduralized, risks to become a ritual with standardized stakeholder segments rather than interactive and dynamic processes. Moreover, it risks that not those with the most needed expertise on the specific issue under debate will represent the non-state actors but those that know best forms and procedures. This will lead to Pareto optimum situations where neither NGOs nor Governments are willing to change the “allocation of time and resources”. Although all sides are not entirely satisfied with the situation, each side fears to lose more than to gain if the arrangement would be changed: NGOs would not be ready to lose what they have gained as platform; governments would not want to lose what they have kept as “government only” sphere of policy making; on both sides are afraid of “unknown territories” of state and non-state interaction.

Comparing the UN Commission for Sustainable Development – an example illustrating the Pareto Optimum situation of stakeholder participation – with the Strategic Approach to International Chemicals Management – an example with active and dynamic stakeholder involvement – it seems that NGO and stakeholder involvement is less effective in processes which are addressing broad issues at a general level and where NGO and stakeholder involvement is strongly formalized and institutionalized. Such processes will attract NGOs with a less focused background, less specialized expertise and little commitment to focus on the very details of the ongoing discussions between the government delegates. However, because of the

Pareto Optimum like situation, it is difficult to move from such a formalized and static situation towards a more dynamic and more interactive process. A move beyond a Pareto Optimum situation such as the one in the CSD would probably require: (i) de-formalization of participation: formalization and proceduralization by allocating preset and thus limited segments to stakeholders and excluding them from other parts of the debate should be replaced with interaction throughout the whole process; (ii) generality should be exchanged for specificity: NGOs should bring in specific expertise and they should make specific comments and concrete proposals on specific issues under debate; (iii) non-state actors as partners not as competitors: state actors should perceive the non-state actors not as competitors for time or influence but as partners bringing in specific insights and knowledge needed in the common search for the best solutions.

It seems that not the lack of a strong and authoritative central institution that addresses the main existing and new and emerging issues and provides overarching policy guidance is the key challenge to today's international environmental governance, nor a "democratic deficit" or insufficient NGO and stakeholder involvement, but the lack of political will, commitment and prioritization of environmental interests. This lack of political will and commitment and lack of political prioritization of environmental concerns, however, cannot be an excuse for inadequate environmental policy. While the strength of a certain regime and the effectiveness of policies are a reflection of political will and political prioritization, political will and prioritization are not a given fact that cannot be influenced. NGOs, by raising public attention to challenges and problems and by monitoring policy development and implementation could become a strong force to address precisely this most important deficit of environmental governance. However, therefore, they might need to focus more on their awareness rising and pressure role at the national level and outside of the formalized and institutionalized international processes and on their role as watchdog within these processes than on formalized participation in international negotiations in a phase of policy development when government representatives are already bound by mandates and instructions.

## References

- Annan, K. (2005). *In Larger Freedom – Towards Security, Development and Human Rights for All*. U.N. Document A/59/2005. New York: United Nations. Available at <<http://www.un.org/largerfreedom>>

- Barr, N. (2004). *Economics of the welfare state*. 4<sup>th</sup> ed. Oxford, Oxford University Press
- Bodansky, D. (2007). Legitimacy. In *Oxford Handbook of International Environmental Law*, eds Daniel Bodansky, Jutta Brunnee and Ellen Hey 704-723. Oxford: Oxford University Press
- Brunnée, J. (2006). International Environmental Law: Rising to the Challenge of Common Concern?. *ASIL Proceedings*, 100: 307-310
- Charnovitz, S. (1997). Two Centuries of Participation: NGOs and International Governance. *Michigan Journal of International Law* 18: 183-286
- Charnovitz, S. (2006). Nongovernmental Organizations and International Law. *American Journal of International Law*. 1000: 348-372
- Esty, D. C. (1998). Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion. *Journal of International Economic Law* 1(1): 123-148
- Esty, D. C. (2006). Good Governance and the Supranational Scale: Globalizing Administrative Law. *Yale law Journal* 115: 1490-1562
- Esty, D. C., and M. H. Ivanova, (2002). Revitalizing Global Environmental Governance: A Function-Driven Approach. In *Global Environmental Governance – Options & Opportunities*, eds. Daniel C. Esty and Maria H. Ivanova. 181 – 204. New Haven: Yale School of Forestry & Environmental Studies
- French, H. (2002). Reshaping Global Governance. In *State of the World 2002*, 174-206. New York: Norton
- Gemmill, B, and A. Bamidele-Izu (2002). The Role of NGOs and Civil Society in Global. In *Global Environmental Governance – Options & Opportunities*, eds. Daniel C. Esty and Maria H. Ivanova, 77 – 100. New Haven: Yale School of Forestry & Environmental Studies
- Gubb M. and M. Younes (2006). SAICM – a new global strategy for chemicals. *Environment House News*, 14: 6, available at <<http://www.environmenthouse.ch/docspublications/newsletters/6a7b1dcbfde.pdf>>
- Howse, R. (2007). Review of A New World Order. *American Journal of International Law* 101: 231-234.
- Ivanova, M. (2005). *Can the Anchor Hold? Rethinking the United Nations Environment Programme for the 21<sup>st</sup> Century*. New Haven: Yale School of Forestry & Environmental Studies
- Keohane, R. O., and J. S. Nye (2001). The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy. In *Efficiency, Equity, and Legitimacy: The*

- Multilateral Trading System at the Millennium*, eds. Roger B. Porter et al., 264-294.  
Washington DC: Brookings Institution Press
- Kingsbury, B., N. Krisch, and R. B. Stewart (2005). The Emergence of Global Administrative Law. *Law and Contemporary Problems*, 68: 15-62
- Meidinger, E. (2006). The Administrative Law of Global Private-Public Regulation: the Case of Forestry. *European Journal of International Law*, 17: 47-87
- Najam, A., M. Papa, and N. Taiyab (2006). *Global Environmental Governance: A Reform Agenda*, Winnipeg: International Institute for Sustainable Development (2006)
- Obregón, L. (2006). The Geological Strada of International law – Response to Professor Weiler’s ‘Geology of International Law’. *ASIL Proceedings*, 100: 103-107
- Perrez, F.X. (2000). *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*. The Hague: Kluwer Law International
- Perrez, F.X. (2001). Country-report: Switzerland’s International Environmental Policy in 2001. *Yearbook of International Environmental Law* 12: 451-459
- Perrez, F.X. (2006). The Strategic Approach to International Chemicals Management: Lost Opportunity or Foundation for a Brave New World?. *Review of European Community and International Environmental Law* 15: 245-257
- Perrez, F.X. (2008). Risk Regulation, Precaution and Trade. In *Genetic engineering and the World Trade System*, eds. Daniel Wüger and Thomas Cottier 246-284. Cambridge: Cambridge University Press.
- Perrez, F.X., and D. Ziegerer (2008). Global Environmental Goals: A Non-Institutional Proposal to Strengthen International Environmental Governance. *Environmental Policy and Law* 38/5 (forthcoming).
- Roch, Ph, and F.X. Perrez (2005). International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime. *Colorado Journal of International Environmental Law and Policy* 16: 1-25.
- Sands, Ph. (2003). *Principles of International Environmental Law*. Cambridge: Cambridge University Press
- Slaughter, A.-M. (2004). *A New World Order*. Princeton: Princeton University Press
- UNDP (2008). Evaluation of UNDP’s Role in and Contribution to Managing Environment and Energy for Sustainable Development (presentation of the report on file with the author, full report to be published in 2008).
- UNEP (2001). International Environmental Governance.  
<http://www.unep.org/IEG/WorkingDocuments.asp>.

Weiler, J. H.H. (2004). The Geology of International Law – Governance, Democracy and Legitimacy. *Germ. Y.B. Int'l L.*: 547