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**Toward a Recognition of the Rights of
Non-States in International
Environmental Law**

David Scott Rubinton*

Historically, international and state laws have presented obstacles which have resulted in precluding non-state actors from participation in litigation of international environmental disputes. In this article, the author traces the movement away from this traditional State-centered view of international environmental protection. He discusses the history of the non-state party in numerous international and domestic forums, including the International Court of Justice, and examines the recent changes which have increased the power of non-state interests. Although an absolute right does not exist for non-state actors to initiate environmental claims within an international forum, several states have acknowledged the importance of including non-state parties in the legislative as well as adjudicative stages of international environmental protection.

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I. Introduction: Non-States¹ Should Have Standing² in International Environmental Law³

Christopher Stone, in his argument for the creation of legal rights for natural objects, asserted that in American jurisprudence, "[t]he stream is legally voiceless."⁴ In international law, where the state is the primary actor, not only is the stream voiceless, but so are individuals, non-governmental organizations (NGOs), and multi-national corporations.

The global environmental impacts of local activities are readily apparent. While these impacts, such as global warming, ozone depletion, and the loss of biological diversity are felt by all of us, only a few of us are actively involved in meaningful international efforts to reduce the adverse impacts on the environment. In short, our leaders negotiate treaties and participate in conventions⁵ while the rest of us are left with little more than the ability to watch the continuing deterioration of our environment⁶ from the sidelines.

Talk of empowering non-state actors in a world in which "the State is the primary political unit of the international system"⁷ does not necessarily involve a cession of state sovereignty.⁸ There is, in fact, precedent for non-state actors to

1. As used herein, the term "non-states" shall mean individuals, corporations, and/or non-governmental organizations (NGOs) acting on their own behalf or as the guardians of natural objects.

2. As used herein, "standing" shall refer to the procedural right to participate in and/or to institute international environmental legal proceedings.

3. As used herein, "international environmental law" shall include the entire set of proceedings and conventions through which norms, protocols, treaties, and/or judicial or quasi-judicial decisions are reached that are of consequence to the solution of international environmental problems.

4. CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?* 31 (1975).

5. By one count, "[t]here are over 200 international agreements (treaties, conventions, protocols, etc.) dealing expressly with international environmental questions," DANIEL B. MAGRAW, *INTERNATIONAL LAW AND POLLUTION* 12 (1991).

6. See generally LESTER BROWN, ET AL., *WORLDWATCH INSTITUTE, STATE OF THE WORLD 1991: A REPORT ON PROGRESS TOWARDS A SUSTAINABLE SOCIETY* (1991).

7. ALLEN L. SPRINGER, *INTERNATIONAL LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES* 53 (1983); see also JAN SCHNEIDER, *WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION* 9 (1979).

8. *Developments in the Law-International Environmental Law* 104 HARV. L. REV. 1484, 1555 (1991) [hereinafter *Developments*].

have direct access to decision-makers on an international level. Historically, while states have been the primary actors in the international arena "[their] perceptions and policies . . . [have] . . . developed in conjunction with many other actors, both international and domestic, and in response to a host of political, economic, technical, and other factors at all other levels of interaction."⁹

There are currently several avenues of access available to non-state actors seeking to influence global environmental decision-makers. However, as this article will explore, these avenues are distinguished more by the obstacles they present than by their ability to provide access. For example, the United Nations (U.N.) provides observer status to representatives of NGOs who seek to influence the "perceptions" and "policies" of states regarding international environmental problems, but these observers have no right to vote on proposals or officially participate as members in U.N. proceedings.¹⁰ Thus, non-state actors must still rely on the ability of state delegates to represent their interests. Curiously, some who have participated as observers are themselves hard-pressed to measure the impact, if any, of their participation.¹¹ One NGO participant complained that at U.N. conferences, "[w]e've been confined to the NGO cage [a gallery above the U.N. negotiating floor where NGOs can watch the proceedings but not participate in them] like wild animals."¹² The jurisdiction of the International Court of Justice remains restricted to

9. SCHNEIDER, *supra* note 7, at 9.

10. See, e.g., Convention on International Trade In Endangered Species of Wild Fauna and Flora (CITES), art. XI(7) (1973), 27 U.S.T. 1087, 1105 (1976) (whereby NGOs can attend and participate in meetings but cannot vote). But see M.J. Bowman, *The Protection of Animals Under International Law*, 4 CONN. J. INT'L L. 487, 495 (1989). "[A] number of organizations with CITES observer status have found it necessary to form a contact group in order to forestall what they perceive as attempts to limit their participation at future CITES conferences." *Id.*

11. Interview with James Tripp, General Counsel, Environmental Defense Fund, March 19, 1991, and Eileen Nic, Lobbyist, International Organization of Consumer Unions, February 27, 1991.

12. Daniel R. Abbasi, *Door Opens For NGOs*, EARTH SUMMIT TIMES, Mar. 12, 1992, at 1 (quoting Rod Fujita of the Environmental Defense Fund).

states¹³ and only limited access to national tribunals is available to those non-state actors who seek redress for identifiable transfrontier pollution injuries.

Finally, the international system, in which states are the primary actors, has been criticized as being "unecological,"¹⁴ and unprepared to handle global environmental problems.¹⁵ The need to restructure international institutions to provide an effective response to global environmental problems has long been recognized¹⁶ and is still being championed today.¹⁷

There is a lag between global environmental problems and the ability of the existing international legal structure to address these problems.¹⁸ This article seeks to stimulate dia-

13. Statute of the International Court of Justice, Article 34; DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, 61 (Shabati Rosenne ed., 1979).

14. LYNTON K. CALDWELL, IN DEFENSE OF EARTH: INTERNATIONAL PROTECTION OF THE BIOSPHERE 105 (1972).

15. Jan Schneider, *New Perspectives on International Environmental Law*, 82 YALE L.J. 1659, 1671 (1973).

16. Emerging characteristics of the planet in need of attention include:

- 1) Global interdependence of significant and diverse variety
- 2) The disappearance of unused capacity in the oceans and atmosphere
- 3) An increasing variety of ultratoxic substances and ultrahazardous activities in the world environment
- 4) Growing areas of potential and actual incompatibility among various uses of oceans, and between land use and ocean quality.

These characteristics are producing a situation of great environmental vulnerability . . . [S]tructures and traditions of the state system, [including] existing processes for forming and implementing agreements in areas of diverse interest are very inadequate.

RICHARD A. FALK, A STUDY OF FUTURE WORLDS 109-10 (1975). See also CALDWELL, *supra* note 14, at 105.

17. Expressing the need to create a "new international 'Rule of Law'" to protect the environment and to "strengthen international mechanisms for the protection of the environment," New York State Governor Mario Cuomo called for greater public participation and asserted that "the ultimate political force is the consensus of the people clearly expressed." Governor Mario Cuomo, *The Earth Summit: A Universal Challenge*, Address Before the Trusteeship Council Chamber, United Nations, New York City, Mar. 12, 1992, printed in part in EARTH SUMMIT TIMES, Mar. 13, 1992. Restructuring the World Bank and international lending institutions to allow NGOs to actively participate in fact-finding and make recommendations at formal environmental impact hearings "would . . . create an additional accountability network that would encourage the development of environmental policy." *Developments*, *supra* note 8, at 1600.

18. See THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE: THE REPORT ON ENVIRONMENT AND DEVELOPMENT 21 (1987) [hereinafter

logue in the hope that it will lead to the provision of greater access to the world's decision-makers by those who are affected by their decisions.¹⁹ By ensuring greater access by non-state actors, the likelihood that global environmental decisions are well-informed is increased.²⁰ This can only serve to improve the quality of the world's response to its ecological problems.²¹

II. Existing Avenues of Relief/Participation

A. The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Article 34, paragraph 1, of the Statute of the ICJ provides that "[o]nly States may be parties in cases before the Court."²² Thus, private persons are not entitled to institute proceedings before the ICJ.

Philip C. Jessup, a former Judge of the ICJ, considered and then rejected the idea of the ICJ functioning as the tribunal for the adjudication of international environmental disputes.²³ Significantly, however, Jessup stressed the impor-

OUR COMMON FUTURE]: "Governments now need to fill major gaps in existing national and international law related to the environment, to find ways to recognize and protect the rights of present and future generations to an environment adequate for their health and well-being" *Id.*

19. "Human beings and not legal constructions, such as States, suffer from the degradation of the environment." E.W. Seabrook Hull & Albert W. Koers, *Law of the Sea Institute, Introduction to a Convention on the International Environmental Protection Agency IX* (Occasional Paper No. 12) (1971).

20. "[G]reater involvement of non-State actors can bring useful information to the decision making process and, thus, improve the scientific credibility and, in turn, the effectiveness of the resulting rules." *Developments, supra* note 8, at 1602.

21. *See, e.g., Developments, supra* note 8, at 1600 ("[t]o the extent that IGO [intergovernmental organization] decision making procedures provide affected parties with an opportunity to participate meaningfully, the procedures will be considered more legitimate and the standards they produce will have greater credibility, and thereby greater force."). *See also* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

22. *Rosenne, supra* note 13, at art. 34.

23. Philip C. Jessup, *Do New Problems Need New Courts?*, 65 AM. SOC'Y INT'L LAW PROCEEDINGS 261 (1971). Mr. Jessup was the Honorary President of the American Society of International Law.

tance of the need for such a tribunal to provide access to non-states:

It would be folly to provide for the settlement of disputes under environmental treaties without opening the tribunal or administrative body to those entities which will be as much concerned with enforcement of the new standards as will governments of states. But one cannot blink the fact that the old-fashioned dedication of the Court to states - which were the only acknowledged persons of international law when the Court was created - is embedded in its Statute which can be amended only with the approval of two-thirds of the members of the General Assembly, including the five permanent members of the Security Council. One of those members, the Soviet Union, has made it plain that it is afraid of amending the basic constitutional instrument.²⁴

Thus, while clearly supportive of the concept, Jessup was not optimistic that the Statute of the ICJ would be amended to extend its jurisdiction to non-state actors.²⁵

The amendment of the Statute of the ICJ to allow for private party standing has been debated and rejected.²⁶ This result was due, in part, to the strongly held notion of the state as the primary subject of international law and the reluctance of states to become defendants in a potential plethora of suits brought by non-states of various stripes, all claiming to represent the interests of humanity.²⁷

The possibility remains that suits can be brought by a government before the ICJ on behalf of the individual. This can be done by a state in the name of "diplomatic protec-

24. *Id.* at 265-66.

25. With the break-up of the Soviet Union there is a renewed possibility that the Court's charter could be amended, but as yet, there is no indication that this issue has been raised to date.

26. Marianne P. Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577, 595 (1982).

27. Ian Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701, 719 (1962).

tion."²⁸ Thus, standing would be obtained by operation of a legal fiction that maintains that injury to nationals is actually an injury to the state itself. Such an approach was used in the Nuclear Test cases²⁹ in which Australia and New Zealand brought suit against France to stop France from conducting nuclear tests in the South Pacific. New Zealand went a step further and asserted diplomatic protection on behalf of all private individuals in the region.³⁰ This case was not decided on the merits. Nevertheless, it demonstrates the ICJ's reluctance to hear a case of this sort unless it involves a right identified under a specific treaty.³¹ As yet, no such treaty exists.

The need for the establishment of some tribunal which can resolve international environmental disputes with the participation of non-state actors has been recognized³² and some hold out hope that the ICJ will serve as such a tribunal.³³ It was with this in mind that a promising new group was formed in 1989, called the "Center for International Environmental Law." Some members of the Center hope to bring environmental suits before the ICJ as legal representatives of governments.³⁴ On the other hand, there are those who believe that, "[o]verall, it is unlikely that the international problem of

28. *Id.* at 720.

29. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

30. Susan M. Garrett, *Resolving International Environmental Disputes Between Private Parties and States*, 1 EMORY J. INT'L DISP. RESOL. 81, 94-95 (1986); Ann V. Billingsley, *Private Party Protection Against Transnational Radiation Pollution Through Compulsory Arbitration: A Proposal*, 14 CASE W. RES. J. INT'L L. 339, 346-47 (1972); Timothy M. Gulden, *Transfrontier Pollution and the International Joint Commission: A Superior Means of Dispute Resolution*, 17 SW. U. L. REV. 43, 45-46 (1987).

31. Billingsley, *supra* note 30, at 346-47; Garrett, *supra* note 30, at 94-95; Gulden, *supra* note 30, at 45-46.

32. THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 67 (Leo Gross ed. 1976). "[Article 34 of the ICJ Statute] ignores the change which has occurred with respect to the subjects of international law, notably the recognition of the United Nations and other public inter-governmental organizations and conceivably of individuals as subjects of international law." *Id.*; see also NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 164 (1989).

33. OUR COMMON FUTURE, *supra* note 18, at 334.

34. Ann Kornhauser, *Pollution Suits Go International at New Center*, LEGAL TIMES, June 12, 1989, at 6.

transfrontier pollution will be resolved by the ICJ.”³⁵ In any event, it is clear that the ICJ has not served as the international tribunal for adjudicating environmental disputes to date.³⁶

B. Private Litigation

Private litigation, under theories of nuisance, trespass, and/or negligence, offers another avenue for dispute resolution for the victims of transfrontier pollution.³⁷ Unless there is a provision allowing foreigners to file environmental complaints under the law of the offending state,³⁸ a private suit will have to be brought in one's own country against a foreign state or citizen.

Private litigation has some advantages. For instance, national concerns such as sovereignty or policy do not prevent the initiation of the action, nor do they get in the way of the resolution of the dispute.³⁹ However, where suit is brought in the offending state, a plaintiff, unless he has local counsel, bears the burden and expense of obtaining counsel familiar with, or willing to learn, the laws and procedures of another jurisdiction.⁴⁰ There will also be the complex issues inherent in enforcing an extraterritorial judgment,⁴¹ as well as the problems of overcoming language barriers and differences in legal systems. Therefore, the suitability of this approach for achieving a resolution of a transfrontier dispute is questionable.⁴²

Where a person brings suit in his or her own country against a foreign state or citizen he is likely to have that for-

35. Gulden, *supra* note 30, at 49.

36. See *Developments*, *supra* note 8, at 1499, 1562.

37. See generally STEPHEN C. McCaffrey, *PRIVATE REMEDIES FOR TRANSFRONTIER ENVIRONMENTAL DISTURBANCES* (1975).

38. Billingsley, *supra* note 30, at 345; see also McCaffrey, *supra* note 37, at 2, 21.

39. Karen A. Mingst, *Evaluating Public and Private Approaches to International Environmental Disputes: Statist and Transnational Solutions to Acid Rain Pollution*, 22 NAT. RESOURCES J. 5, 16 (1982).

40. *Id.* at 15.

41. Billingsley, *supra* note 30, at 343.

42. Mingst, *supra* note 39, at 19.

eign state raise the claim of sovereign immunity⁴³ if it loses.⁴⁴ Further, a state is not likely to enforce a foreign court judgment against its own citizens unless the judgments have a basis in their own domestic laws.⁴⁵

C. Arbitration

Non-state actors seeking to enjoin environmentally hazardous activity or to recover damages for injuries incurred as a result of such activity by another state (or its nationals), might choose to institute some type of arbitration proceeding.⁴⁶ This approach is fraught with major problems at the outset, not the least of which is the reluctance of the non-initiating party to participate.

The rules of the Permanent Court of International Arbitration⁴⁷ provide for participation of non-state parties in their proceedings. For example, "in case of international disputes between two parties of which only one is a State, the International Bureau of the Permanent Court of Arbitration is authorized to place its premises and organization at the disposal of the parties desirous of having recourse."⁴⁸ Of course, parties

43. "Sovereign immunity" is a judicial doctrine which precludes suit against the government without its consent. See BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

44. But see Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1988). Some examples of when states lack immunity from the jurisdiction of foreign courts are: where commercial activities are involved and where the state is subject to an existing international agreement, or has implicitly or explicitly waived immunity, and where a suit in admiralty is brought to enforce a maritime lien against a vessel of cargo of the foreign state. *Id.* See generally 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1446 (1988) (district courts have original jurisdiction when the foreign state is not entitled to immunity).

45. McCaffrey, *supra* note 37, at 20-23.

46. An "arbitration" proceeding is an "arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary proceedings." BLACK'S LAW DICTIONARY 105 (6th ed. 1990).

47. DONALD C. BLAISDELL, INTERNATIONAL ORGANIZATION 283-84 (1966) ("the Permanent Court of Arbitration is not a court in continuous existence, but is a panel of persons who are competent in questions of international law"). These persons nominate candidates for election to the ICJ and facilitate arbitrations under contract with states who choose that route to settle a controversy. *Id.*

48. *Rules of Arbitration and Conciliation for Settlement of International Dis-*

are free to retain their own arbitral body, public or private, to resolve disputes.⁴⁹

One commentator went so far as to suggest that "the best method of private party protection against transnational radiation pollution would be [compulsory] international arbitration, conducted under the auspices of the International Atomic Energy Association."⁵⁰

The arbitration approach does hold out the promise that private parties can resolve disputes in a relatively inexpensive and direct manner. Again, however, the success of this approach shall depend on the willingness of the non-initiating party to participate and the ability of the parties to enforce the judgment of the arbitrator.

D. Advisory Proceedings

Non-state entities may, under certain circumstances, initiate advisory proceedings before the ICJ.⁵¹ Participation in these proceedings is, however, restricted to states and authorized public international organizations.⁵² Thus, private victims of pollution have virtually no influence over the proceedings.

Further, advisory opinions "may not lend themselves to the decisive resolution of environmental disputes between states and private citizens."⁵³ There exists the question of whether the ICJ may decide disputed issues of fact in the exercise of its advisory jurisdiction.⁵⁴ Such decisions might be inappropriate in non-contentious proceedings and would, therefore, create difficulties in the resolution of environmental disputes arising from the specific conduct of states.⁵⁵

putes Between Two Parties Only One of Which is a State, 57 AM. J. INT'L L. 500 (1963).

49. Some treaties even contain their own extensive dispute resolution language. See, e.g., *Law of the Sea: Convention on the High Seas*, Dec. 10, 1982, 13 U.S.T. 2312, 21 I.L.M. 1261, 1306-08.

50. Billingsley, *supra* note 30, at 355.

51. See Rosenne, *supra*, note 13 at art. 65.

52. See Rosenne, *supra*, note 13 at art. 65.

53. Garrett, *supra* note 30, at 92.

54. See, e.g., SHABATI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 917-19 (1965).

55. J.E.S. Fawcett, *General Course in Public International Law*, 1 Recueil des

Thus, the private actor in the international environmental arena is currently more a pawn than a player. However, a clear trend has developed over the past two decades that suggests the emergence of the non-state actor as a player with full rights of standing in international environmental proceedings.

E. Environmental Impact Review

The degree of participation afforded to non-state actors in the area of environmental impact review represents, perhaps, the most significant advance towards the full recognition of the rights of non-states in international environmental law. Various versions of national and local review statutes provide for varying degrees of input by the interested public.⁵⁶ They allow the public access to information concerning the environmental impacts of projects before they are built along with the right to comment on proposals. These statutes give non-state actors a relatively new opportunity to help shape the course of future environmental impacts.

At the moment, while it appears that most nations recognize that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level,"⁵⁷ the law of international environmental protection does not yet recognize that, increasingly, the relevant level is global.

III. Emerging Rights of the Non-State Actor in International Environmental Legal Proceedings

A. Stockholm Declaration

For some time there has been a movement away from the "State-centrist"⁵⁸ approach to solving international environ-

Cours d'Academie de Droit International [R.C.A.D.I.] 132, 533, 535 (1971).

56. See, e.g., Stephen L. Kass & Michael B. Gerard, *International Impact Assessment*, N.Y.L.J., Oct. 25, 1991, at 3.

57. *Draft of Environmental Rules: 'Global Partnership'*, N.Y. TIMES, Apr. 5, 1992, at 10 (Principle 10 of the draft text of a declaration of principles for encouraging environmentally responsible development, to be considered at the 1992 United Nations Conference on Environment and Development).

58. See Schneider, *supra* note 15, at 1680.

mental problems. A good starting point for examining this movement is the Stockholm Declaration of the United Nations Conference on the Human Environment, Principles 21 and 22.⁵⁹ Principle 21 provides that "[s]tates have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."⁶⁰ This Principle is historic for being the first international recognition of State responsibility with respect to the environment and for the acceptance of the concept of limits on the activities of a sovereign State as it affects the environment.⁶¹

Though less famous, Principle 22 is more relevant to the development of rights for non-state actors. Principle 22 provides that "[s]tates shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."⁶² Principle 22 speaks in terms of identifiable "victims" to be compensated, as opposed to the environment itself, and it suggests the imposition of a non-discretionary obligation (i.e., "States shall") on the signatories to develop law providing for the redress of international environmental injuries. By addressing the need to compensate the "victims" of state-caused pollution, Principle 22 represents a giant step toward the creation of rights for non-states to participate in international environmental adjudications. While such a body of international law has yet to be established, there has been a significant amount of academic activ-

59. *Stockholm Declaration of the U.N. Conference on the Human Environment*, U.N. Doc.A/Conf. 48/14 (1972), reprinted in I.L.M. 1416 (1972) [hereinafter *Stockholm*].

60. *Id.*

61. *Cf. Trail Smelter Arbitration* (United States v. Canada), 3 R.I.A.A. 1905 (1949) (the first articulation of the international legal principle that each state has a duty to prevent transboundary harm).

62. *Stockholm*, *supra* note 59, at 1420.

ity in this area.⁶³ Subsequent international agreements reflect an increasing acceptance of the role of non-state actors in international environmental proceedings.

B. Academic Debate

In 1971, John L. Hargrove, the former Director of Studies for the American Society of International Law, expressed his dissatisfaction with the capacity of the international legal structure to deal with environmental problems when he spoke of the two "laissez-faire principles" of traditional international law. These principles, "national sovereignty" and "freedom of the seas," permit a state "to degrade its own territory . . . [and] to inflict injury on areas of the planet outside national territory virtually without limit," subject only to fragmented and primitive rules of international responsibility.⁶⁴ Other authors have expressed similar opinions,⁶⁵ including one who recognized that "[f]ull opportunity must be given, prior to the framing of environmental policy and decision, for all sections of the world community to articulate their interests as users of the environment."⁶⁶

One suggested approach to solving international environmental problems is to move away from a "state-centered" formalistic stance; the basic ability of states to represent the

63. See *Summary of Discussions of the Conference of the Avoidance and Adjustment of Environmental Disputes*, AM. SOC'Y OF INT'L L., 14-15 (1974) [hereinafter *Environmental Disputes*]. See also *OUR COMMON FUTURE*, *supra* note 18, at 332.

64. John Lawrence Hargrove, *Post-Stockholm: Influencing National Environmental Law and Practice Through International Law and Policy*; 66 A.S.I.L. PROCEEDINGS 1, 9 (1972).

65. See ALLEN L. SPRINGER, *THE INTERNATIONAL LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES* (1983).

Scholars have questioned whether the present international legal system is sufficiently developed to resolve the disputes that arise over environmental issues and, more generally, to provide a constructive, forward looking framework for environmental protection. Reflecting the decentralized nature of the international political context, international law accords to the State a degree of control over human activity within its boundaries with the effective protection of the biosphere.

Id. at 31.

66. J. Eric Smith, *The Role of Special Purpose and Nongovernmental Organizations in the Environmental Crisis*, in *WORLD ECO-CRISIS* 135 (David A. Kay & Eagen B. Skolnikoff eds. 1972).

views of their citizens on the international level must be challenged.⁶⁷ Another calls for the provision of an "international ombudsman" charged with invoking processes or intervening in them as a representative of the common environment.⁶⁸ "Planetary Rights Commissioners" have been suggested to enforce planetary rights to provide for a healthy environment.⁶⁹

In addition to their endorsement of non-state centered problem-solving, these approaches also provide the opportunity for non-state actors to participate in the initial stages of decision-making. By involving non-state actors in early stages of the decision-making process, environmental damage can be prevented.

The Stockholm Conference is credited with accomplishing an official recognition of the environment as a subject of general international concern and the institutionalization of that concept in the United Nations Environment Programme (UNEP).⁷⁰ After Stockholm, UNEP encouraged dialogue on various principles of the convention, including Principle 22, which calls for the development of laws to redress trans-frontier environmental injuries. One such discussion, conducted by the American Society of International Law (ASIL), went as follows:

[1] One desirable and often practical means of avoiding or settling controversy [involving short distance trans-national air pollution] is to adopt national rules which allow residents of injured states . . . to participate in proceedings before administrative and judicial authorities of the polluting state

[2] Another means of avoiding or settling this kind of

67. Schneider, *supra* note 15, at 1680, see also *Developments*, *supra* note 8, at 1601.

68. Richard N. Gardner, *The Role of the U.N. in Environmental Problems*, 26 INT'L ORG. 237, 254 (1972).

69. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 113 (1989).

70. DAVID A. KAY AND HAROLD K. JACOBSON, ENVIRONMENTAL PROTECTION: THE INTERNATIONAL DIMENSION 11 (1983).

controversy would be for states to establish joint commissions for particular border areas. Residents and authorities of both states could come before such commissions, which would seek to establish agreed facts and conciliate the diverse interests and possibly coordinate such aspects of regional planning in frontier areas as may be of importance to avoid future environmental disputes. They could be entitled to recommend national legislation or inter-state agreements.⁷¹

The discussion goes on to suggest measures that would involve UNEP in the monitoring and development of this structure in the course of a cooperative relationship with states. Later, it suggests that, "[w]here domestic procedures of States provide for the participation of parties potentially affected, it would be desirable also to permit foreign interests that might be affected to participate in the proceedings."⁷² Thus, we see the emergence of the consideration of providing non-state actors access to the polluting state's courts as well as talk of joint inter-state commissions open to residents and designed to prevent future environmental disputes.⁷³

C. Nordic Convention

While the ASIL was debating non-state participation issues, Denmark, Finland, Norway and Sweden were finalizing "a model for transboundary cooperation for the protection of the environment"⁷⁴ and "a model for an international system whereby you have a development of uniform laws reciprocally between states and a relaxation of standing requirements."⁷⁵

71. *Environmental Disputes*, *supra* note 63, at 14-15.

72. *Environmental Disputes*, *supra* note 63, at 22, 23.

73. The idea of inter-state commissions open to residents is not a novel one. See *Developments*, *supra* note 8, at 1575 (discussion of the International Joint Commission established by the United States and Canada in 1909 by the Boundary Waters Treaty).

74. Charles Phillips, *Nordic Cooperation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation*, in *TRANSBOUNDARY AIR POLLUTION: INTERNATIONAL LEGAL ASPECTS OF THE CO-OPERATION OF STATES* 153 (Cees Flinterman et al. eds., 1986).

75. SCHNEIDER, *supra* note 7, at 131.

The Nordic Convention⁷⁶ was indeed a milestone in many respects. It ensured foreign pollution victims access to the offending state's tribunal ("equal access") so long as the offending country was Denmark, Norway, Sweden or Finland. It also ensured that the individual would be treated the same as if he were a national of the offending country ("non-discrimination").

One should also note the weaknesses of the Nordic convention. For one, the Nordic Convention demonstrates the limitations of a purely regional or bilateral reciprocal access, non-discrimination treaty. For example, Great Britain, France, Belgium, and the Federal Republic of Germany, the primary sources of acid rain in that region,⁷⁷ are not signatories to the convention.⁷⁸ Thus, nationals of the Nordic countries remain powerless under the Convention to petition for relief from one of the greatest transfrontier environmental threats they face.

Another defect to this type of convention is that it only provides a party with the same degree of protection offered by a state to its own nationals. No new substantive rights are created, which reaffirms the need for setting regional and/or in-

76. Convention on the protection of the Environment Between Denmark, Finland, Norway and Sweden (Feb. 19, 1974), 13 I.L.M. 591-97 (1974). The Nordic Convention provides in Article 3, that:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

[These] provisions . . . shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.

Id.

77. See GREGORY S. WETSTONE AND ARMIN ROSENCRAZ, ACID RAIN IN EUROPE AND NORTH AMERICA: NATIONAL RESPONSES TO AN INTERNATIONAL PROBLEM 52, 60 (1983).

78. Mingst, *supra* note 39, at 13.

ternational standards.

D. Global/Regional Equal Access - Non-Discrimination Conventions

In 1976, the Organization for Economic Cooperation and Development (OECD), an international, intergovernmental organization, issued to its member countries a Recommendation for the "Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution."⁷⁹ Acknowledging that the principles of equal access and non-discrimination have already been put into effect between member countries of the Nordic Convention, the Recommendation further spells out several specific rights of persons affected by transfrontier pollution.⁸⁰

The OECD Recommendation attempts to apply the Nordic Convention on an international level. This would have mitigated some of the limitations of the Nordic Convention (e.g., inability to address acid rain), but, to date, the Recommendation has not achieved much success.

Notably, in the United States, foreign citizens were provided with the opportunity to sue in United States' courts to

79. OECD, RECOMMENDATION OF THE COUNCIL FOR THE IMPLEMENTATION OF A REGIME OF EQUAL RIGHT OF ACCESS AND NON-DISCRIMINATION IN RELATION TO TRANSFRONTIER POLLUTION C(77)28 (Paris, May 23, 1977), *reprinted in* OECD, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 29 (1977) [hereinafter OECD RECOMMENDATION]. See also, DR. ALFRED REST, CONVENTION ON COMPENSATION FOR TRANSFRONTIER ENVIRONMENTAL INJURIES: DRAFT WITH EXPLANATORY NOTES (1976).

80. These rights include:

(a) The right *to be informed*, in an equivalent way to "nationals" of projects, of new activities or courses of conduct which may give rise to a significant risk of transfrontier pollution;

(b) The right to have *equal access to information* published or made accessible to concerned "nationals" by the authorities responsible for such questions;

(c) The right to *participate* in hearings and enquiries prior to the taking of a decision and to *make objections* in relation to proposed decisions by the public authorities which could directly or indirectly lead to transfrontier pollution, under the same conditions as those applicable to "nationals";

(d) The right to have *recourse* under equivalent conditions, in particular in matters of standing, as "nationals" to *administrative and judicial procedures* (including emergency procedures) to prevent transfrontier pollution or to obtain its abatement, with compensation for damage caused by such pollution.

See OECD RECOMMENDATION, *supra* note 79.

ensure that the government complied with the mandates of the United States' own environmental laws.⁸¹ Further, the Transboundary Pollution Reciprocal Access Act,⁸² between the United States and Canada, guarantees the victims of transboundary pollution equal access to courts or tribunals where the pollution originated, providing that the Act has been adopted in the respective jurisdiction.⁸³ Unfortunately, this Act has been ratified by only a handful of those jurisdictions in each country (in effect, states in the United States; provinces in Canada).⁸⁴

E. World Charter and Beyond

On October 28, 1982, the U.N. General Assembly adopted the World Charter for Nature.⁸⁵ Point 23 of the Charter directs that: "[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."⁸⁶ This provision is particularly encouraging because it is written in terms of damage to the environment, not just to an individual. It mandates that the doctrine of equal access be implemented and extended to non-adjudicatory tribunals. Unfortunately, the World Charter does not go far enough. It articulates major advances in international environmental thinking and consensus among nations, but does not impose any obligations on the member states.

UNEP's activities of the past few years are encouraging.⁸⁷

81. 42 U.S.C. § 7604 (1988).

82. A.B.A., C.B.A., *SETTLEMENTS OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE U.S.A.* at xiii (1979).

83. See Armin Rosencranz, *The Uniform Transboundary Pollution Reciprocal Access Act*, 15 ENV'TL POL'Y 105 (1985).

84. *Id.*

85. *Consideration and Adoption of the Revised World Charter for Nature*, U.N. GAOR, 37th Sess., 48th mtg., Agenda Item 21, at 48, U.N. Doc. A/371 (1982).

86. *Id.*

87. See, e.g., David Struthers, Comment, *The United Nations Environment Programme After A Decade: The Nairobi Session of A Special Character*, 12 DEN. J. INT'L L. & POL'Y 269, 278 (1983) ("by establishing direct links that bypass national

In negotiating the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),⁸⁸ "UNEP took care to involve not only environmental NGOs, but also industry groups. UNEP recognized that without industry support CFC [chloro-fluoro-carbon] production controls would be meaningless."⁸⁹ Apparently, UNEP has been in the practice of soliciting views of industry associations and NGOs since 1982.⁹⁰

Also encouraging is a proposal by the ABA Intersectional Group to prepare the American Bar Association's Resolutions Relating to the International Law of the Environment presented at the group's 1991 Annual Meeting.⁹¹ The intersectional group considered the adoption of a policy supporting, in part, the creation of an international environmental ombudsman and/or tribunal; "the problem of injuries to, and representative standing for, the commons areas might be overcome by special provision designating an international body or [NGO] as legal spokesperson for its environmental 'ward'."⁹² While this important language is only a small part of the proposal, it represents a recognition by the ABA, the world's largest bar association, that there is a need for independent international environmental spokespersons.

Finally, as the preparation for this year's highly-anticipated United Nations Conference on Environment and Development (UNCED) continued, it was reported that: "UNCED Secretary General Maurice Strong [was] trying to adopt a 'broad consensus' approach, incorporating the views of every-

foreign ministries (with permission from the relevant states), the United Nations Environment Program (UNEP) has achieved such success as the Mediterranean Pollution Monitoring and Research Programme. By fostering environmental communities, and by widely publicizing its activities, UNEP has contributed to the development of an environmental ethic.").

88. Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

89. Carol A. Petsonk, *The Role of the United Nations Environment Programme (UNEP) In the Development of International Environmental Law*, 5 AM. U. J. INT'L L. & POL'Y 351, 369 (1990).

90. *Id.* at 365-66.

91. A.B.A., RESOLUTIONS ON THE INTERNATIONAL LAW OF THE ENVIRONMENT (1991).

92. *Id.* at 12.

one from multinational corporations and governments to community NGOs."⁹³ Thus, the future seems promising for the non-State actor in International Environmental Law.

IV. Conclusion

Non-states do have a growing opportunity to participate in international environmental legal proceedings, but an absolute right of standing does not yet exist. Without such a right, the ability of decision makers to make informed decisions is compromised since all of the people and other natural objects affected by their decisions are not heard from. Until such a right exists, non-state actors will continue to suffer from their inability to fully participate in the course of events of which they are an integral part and over which they have little control. The health of our planet has deteriorated under a system of state guardianship. Perhaps with the participation of a greater portion of the planet's inhabitants, the global environment can be put back on a healthy course.

93. Don Hinricksen, *The Rocky Road to Rio*, 14 AMICUS J. 16 (1992).