CHAPTER ELEVEN

NON-STATE ACTORS:
UNDERMINING OR INCREASING THE
LEGITIMACY AND TRANSPARENCY OF
INTERNATIONAL ENVIRONMENTAL LAW

Joyeeta Gupta*

1. Introduction

Legal positivists have limited the role of non-state actors to that of mere observers in international treaty making. Liberal institutionalists, on the other hand, have increasingly taken the view that non-state actors have a major role to play in influencing international treaties.¹ Thus clearly, the perception of the role of the non-state actor in treaty making depends on the perspective of the observer. However, is it possible that the perception is coloured by an inadequate grasp of the facts?

Charnovitz argues that contrary to what many people think, non-state actors have been actively influencing international negotiations for more than two centuries.² He presents a detailed history of the role of non-state actors in the last two centuries and argues that in

* Professor Joyeeta Gupta is Head of the Programme on International Environmental Governance at the Institute for Environmental Studies, Vrije Universiteit Amsterdam. (e-mail: joyeeta.gupta@ivm.vu.nl). The research for this chapter has been undertaken in the context of a Vrije Universiteit project on the Law of Sustainable Development and the project Inter-governmental and private environmental regimes and compatibility with good governance, financed by the Netherlands Scientific Organization (NNO). Comments of the participants of the Round Table and the independent reviewers are gratefully acknowledged.


2. They were however active in influencing policies at international level from the 18th century. See for example, S. Charnovitz, “Two Centuries of Participation, NGOs and International Governance”, 18 Michigan Journal of International Law, 1997, 183–286.

This implies that the rise of the non-state actor is not a new phenomenon; and that in the past non-state actors have actively influenced decision-making at international level. At the same time, it is also clear that since 1992 the explosive development in communication technology has multiplied the effectiveness of non-state actors, especially, in the area of international relations. Thus although the phenomenon is not new, the challenges it poses are quite new. This chapter, in particular, focuses on two challenges posed by non-state actors to the issue of international law – the challenges to the transparency and legitimacy of international law. In doing so, this chapter will discuss the issue in the context of sustainable development and the climate change regime.

1.1 Global environmental governance

The literature points out that decision-making and treaty negotiation at international level is anarchical in nature. The process of sustainable development management unfolds in an ad hoc manner, depending on the social and political forces that champion specific causes. In other words, there is no real parliamentary process of prioritizing and, if necessary, integrating global environmental problems and developmental issues in order to facilitate problem solving through international conferences and treaties at the international level. This implies that the international law tool is being used as and when social and political forces can gather the momentum to push a certain issue onto the international agenda. This further implies that, on the one hand, the power of these forces determines the international agenda.³ Putnam’s theory of the two-level game postulates that international agreements come into being because domestic actors push

³. This is a fundamental thesis of neo-institutionalism. Regime theorists argue that in common pool resource issues, where non-cooperation appears to be the only possible alternative, other forces may compensate for the lack of a hegemonic leader and lead to problem solving.