

## ARTICLE

## Non-Governmental Organisations and International Environmental Law: The Search for Legitimacy

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In order for a body of law to exert authority, it must possess a degree of legitimacy. The orthodox theory dictates that the legitimacy of International Public Law (IPL) is derived from the consent of state actors affected by the specific international law. International Environmental Law (IEL) raises questions regarding this assumption. Primarily, IEL principles often place obligations on private actors who do not possess the requisite legal personality to operate within IPL—thus, IEL cannot always be said to derive from consent of affected parties. This article questions the suggestion that greater involvement from Non-Governmental Organisations (NGOs) within IEL could address this democratic deficit. Analysing the manner and spheres in which Environmental NGOs influence IEL, an assessment is made as to the impact of these organisations on the legitimacy of IEL. The article concludes that the influence of Environmental NGOs is reserved to raising awareness that IEL is legitimate, rather than having an impact of substantive legitimacy by increasing representation. However, ultimately IEL must answer fundamental questions as to its objectives before an appropriate role for Environmental NGOs can be carved out in IEL.

### I Introduction

Today, global affairs are no longer the exclusive province of foreign ministries, nor are states the sole source of solutions for our small planet's many problems. Many diverse and increasingly influential non-state actors have joined with national decision-makers to improvise new forms of global governance.

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Non-Governmental Organisations (NGOs) play an increasingly important role within the international arena.<sup>1</sup> While it is true that these actors do not possess formal legal personality,<sup>2</sup> the influence which NGOs exert within international decision making processes has been an area of much academic interest.<sup>3</sup> International Environmental Law (IEL) particularly reflects this development with non-state actors often outnumbering state representatives at prominent negotiations.<sup>4</sup> Public International Law (IPL), of which IEL is a part, grounds itself on the assumption that states are the sole actors within the international arena. Further, the legitimising theory of IPL is based on this orthodox position. The involvement of NGOs cast doubt upon those foundations and lead to questions which, as one writer put it, “goes to the very fundamentals of how international law works, and who its actors and, in the end, its legal subject[s] are”.<sup>5</sup>

This article undertakes an inquiry into the impact which NGOs have upon the legitimacy of the regime. To provide the framework for such an examination, the first part of this article looks at the relationship between legitimacy and IEL; it identifies the traditional legitimising justification of state consent and explores how the developing field of IEL destabilises this understanding. The second part of the article highlights the extent to which NGOs partake in the development and operation of IEL. In analysing NGO participation within the context of different spheres of influence—national, international and ideological—this section attempts to identify the impact which NGOs have within the field of IEL. Bringing the first two sections together, the last part of this article will investigate how the influence that NGOs exert affects the legitimacy of IEL. This examination will be undertaken in the context of addressing the *democratic deficiency*. Although there are positive aspects that NGOs can bring to the IEL regime, it is questionable whether the involvement of NGOs boosts the legitimacy of IEL. This article concludes that ultimately a determination of the impact of NGOs cannot be made while the purpose and subjects of IEL remain unclear and calls for greater work to be undertaken on these jurisprudential aspects of IEL.

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- 1 Kerstin Martens “Examining the (Non-)Status of NGOs in International Law” (2003) 10(2) *Ind J Global Legal Stud* 1 at 1.
  - 2 Steve Charnovitz “Two Centuries of Participation: NGOs and International Governance” (1997) 18 *Mich J Intl L* 183 at 188.
  - 3 See for example Asher Alkoby “Non-State Actors and the legitimacy of international environmental law (2003) 3 *Non-State Actors and International Law* 23; Michele Betsill and Elisabeth Corell (eds) *NGO Diplomacy: The Influence of Nongovernmental Organisations in International Environmental Negotiations* (MIT Press, Cambridge (London), 2008); James Cameron “Future Directions in International Environmental Law: Precaution, Integration and Non-state Actors” (1996) 19 *Dal LJ* 122; Charnovitz, above n 2; Elizabeth Corell “Non-State Actor Influence in the Negotiations of the Convention to Combat Desertification” (1999) 4 *KLI International Negotiation* 197; Martens, above n 1; Marissa Pagnani “Environmental NGOs and the Fate of the Traditional Nation-State” (2003) 15 *Geo Intl Envtl L Rev* 791; Kal Raustiala “States, NGOs, and International Environmental Institutions” (1997) 41 *Int Stud Q* 719; and Farhana Yamin “NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities” (2001) 10 *RECIEL* 149.
  - 4 For example, 9,856 NGOs and Major Groups participated in the lead-up to and during Rio+20 as reported in Susana Camargo Vieira “Report on Participation at Rio+20” (22 June 2012) Rio+20 United Nations Conference on Sustainable Development <[www.sustainabledevelopment.un.org](http://www.sustainabledevelopment.un.org)>.
  - 5 JD Aston “The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House” (2001) 12 *EJIL* 943 at 962.

## II Clarifications and Definitions

The focus of this article is limited to the impact that NGOs have upon the legitimacy of *IEL*. As will be explored later in the article, the field is one which possesses a number of unique attributes. The nature of the issues that IEL is attempting to address and the subsequent implications on the formation, substance and operation of the law it produces can be distinguished from a number of other areas of public international law. In light of this, this article only wishes to speak in relation to NGOs within IEL; how these actors influence other areas of international law, or IPL in general, is beyond the scope of this article.

A main focus of this inquiry is the actions and influence of NGOs, and as such it is prudent to provide a definition of the term. However, such an undertaking is “not an exercise for the intellectually squeamish”.<sup>6</sup> The term is difficult to define, largely because it is determined by what it is not.<sup>7</sup> The *Encyclopedia of Public International Law* defines NGOs as “private organizations (associations, federations, unions, institutes, groups) not established by a government or by intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities”.<sup>8</sup> This wide definition allows for the inclusion of a range of international actors including “trade unions, voluntary associations, research institutes, public policy centres, private government agencies, business and trade associations, foundations, and charitable endeavours”.<sup>9</sup> Clearly the objectives, desires and audiences of each of these organisations are not always aligned,<sup>10</sup> and that an adoption of a broad definition would make the task of assessing the impact of such actors difficult. In light of this, for the purposes of this article, the definition of an NGO will be limited to private organisations involved in legal, political or sociological efforts with the aim of encouraging environmental protection or conservation (or ENGOs) upon IEL.

The concept of legitimacy is one which also requires defining. In the broadest sense of the word, legitimacy is the existence of justification for the imposition of authority.<sup>11</sup> A distinction can be made between *normative* legitimacy and *sociological* legitimacy. The existence of normative legitimacy is dependent upon the authority being administered through a proper, established process.<sup>12</sup> In contrast, an exercise of authority attracts sociological legitimacy if the subjects towards whom it is directed hold a belief that the imposition is justified.<sup>13</sup> The two concepts are interrelated, and in practice a degree of both must exist for the authority to hold true legitimacy.<sup>14</sup> Although IEL has been the subject of much criticism for its ineffectiveness,<sup>15</sup> for the purpose of this article the assumption is made that IEL holds some authority. Lastly, it must be noted that legitimacy is a matter of

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6 PJ Simmons “Learning to Live with NGOs” (1998) 112 *Foreign Pol’y* 82 at 83.

7 Alan Boyle and Christine Chinkin *The Making of International Law* (Oxford University Press, Oxford, 2007) at 52.

8 Peter Macalister-Smith (ed) *Encyclopedia of Public International Law* (Elsevier, Amsterdam, 1997) at 612.

9 Martens, above n 1, at 18.

10 Boyle and Chinkin, above n 7, at 53.

11 Allen Buchanan “The Legitimacy of International Law” in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 79 at 79.

12 Jonas Ebbesson “The Notion of Public Participation in International Environmental Law” (1997) 8 *Yb Intl Env L* 51 at 77.

13 Daniel Bodansky “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” (1999) 93 *AJIL* 596 at 601.

14 Alkoby, above n 3, at 92.

15 DA Wirth “Reexamining Decision-Making Processes in International Environmental Law” (1994) 79 *Iowa L Rev* 769 at 769.

degree; authority does not either attract legitimacy or not, it attracts more or less legitimacy.<sup>16</sup> In light of this, the appropriate assessment of the impact of ENGOs upon IEL is whether their involvement affects the degree of both sociological and normative legitimacy which the institution attracts.

### III Legitimacy in International Environmental Law

Modern theories of legitimacy generally find their foundations in the idea of consent of the governed. Traditionally, states were considered to be the only international actors, and thus the legitimacy of international law was premised upon the notion of state consent. Sovereignty, regarded as the cornerstone of the international system, reinforced this understanding.<sup>17</sup> Therefore, the orthodox logic held that an international principle was legitimate where a close nexus could be established between the rule and the consent of the state upon which it was being imposed. As a body of law, IEL arguably represents a shift away from this historical view; the purpose of IEL and the actors it affects raise serious questions about the adequacy of these traditional justifications of legitimacy.

State sovereignty, as represented by the Treaty of Westphalia of 1648, lies at the heart of the traditional justification for international law.<sup>18</sup> The Enlightenment project sought to cast aside theological justifications and replace them with the celebration of individual liberty.<sup>19</sup> Theories of international law, previously viewed as a collection of divine, universal principles, shifted to reflect this Enlightenment understanding of the world.<sup>20</sup> Based upon the proposition that individual autonomy is an inherent attribute of personhood, the corollary is that national autonomy is an inherent element of statehood.<sup>21</sup> In this way, sovereignty can be seen as the transposition of domestic theory on to the international sphere.<sup>22</sup> However, as far as a domestic analogy can be made, this is where the similarities end. Individuals form governments to ensure that their liberties and freedoms are protected: in contrast, “anarchy among states is tolerable to a degree to which among individuals it is not”.<sup>23</sup> The nation-state was better equipped than the individual to flourish, ensure personal security, survive and be self-sufficient<sup>24</sup>; states did not require a global government to enjoy the freedoms with which they were endowed. This led to sovereignty being understood as the acknowledgement of “only one political authority over a particular territory, and ... that authority as the final arbiter to solve problems within its borders”.<sup>25</sup> The lack of need for an international government and the position of the state

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16 Bodansky, above n 13, at 623.

17 FX Perrez *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, The Hague, 2000) at 13.

18 Pagnani, above n 3, at 794.

19 William Bristow “Enlightenment” (20 August 2010) The Stanford Encyclopedia of Philosophy <plato.stanford.edu>.

20 Malcolm Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 26.

21 Fernando Tesón *A Philosophy of International Law* (Westview Press, Boulder, 1998) at 39.

22 At 41.

23 Kai Alderson and Andrew Hurrell *Hedley Bull on International Society* (St. Martin's Press; Macmillan Press, London; New York, 2000) at 88.

24 Alkoby, above n 3, at 51.

25 MC Love “Beyond Sovereignty: The Rise of Transsovereign Problems” in Maryann Cusimano Love (ed) *Beyond Sovereignty: Issues for a Global Agenda* (2nd ed, Nelson Thomson Learning, Ontario, 2003) at 2.

as the final mediator of domestic affairs are the primary foundations upon which the traditional notion of legitimacy is based.

Professor Ian Brownlie states that “the sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having uniform legal personality”.<sup>26</sup> The importance placed upon these notions has a number of implications on the system of international law.<sup>27</sup> In regards to its legitimacy, there are two consequences of particular relevance. First, the equality of states and the respect for the control which states wield over their personal territory traditionally meant international law governed matters *between* states.<sup>28</sup> Despite the relative self-sufficiency of nation-states, the increasing interconnectedness between countries resulted in the desire to instil predictability within relations.<sup>29</sup> Greater predictability allowed states to more effectively exercise their sovereign freedom in an informed manner and coexist more peacefully within the global sphere.<sup>30</sup> Therefore, international law was historically concerned with ensuring peaceful cohabitation. The second implication derives directly from the first; as the sole subjects of international law, the consent of the state was considered the orthodox source of legitimacy.<sup>31</sup> Whether through explicit agreement through the establishment of a treaty, or the implicit consent through systematic action resulting in a customary principle, it was understood that a nexus must be formed between rule and state consent.<sup>32</sup> Furthermore, as there is no *world government*, the consent must be directed towards the principle rather than a general institution.<sup>33</sup> Within the historic global order this relatively simple framework was sufficient to instil principles with legal legitimacy.

As international law develops, however, the traditional justification for international law may no longer be sufficient. When the focus of the law was on creating an environment conducive to cohabitation, the self-interest of the negotiating states was arguably highly relevant.<sup>34</sup> The primary concern was with ensuring that no-one rocked the boat, rather than getting the vessel to shore. Popularly explained through the prisoner’s dilemma example, states have been seen to pursue their narrow self-interest in forming international law.<sup>35</sup> IEL is one area of international law which questions this approach. As a regime, it hopes to encourage cooperation in addressing a common and global concern—IEL is very much about getting the boat to shore.<sup>36</sup> The desire to combat transnational problems has led to IEL’s reach extending beyond the mere governance of relations between states; various private actors are directly impacted by IEL decisions.<sup>37</sup> In light of this, the traditional paradigm regarding the legitimacy of international law may not be sufficient to justify the imposition of IEL principles.

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26 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 289.

27 At 289.

28 Shaw, above n 20, at 197.

29 At 7.

30 Mattias Kumm “The Legitimacy of International Law: A Constitutionalist Framework of Analysis” (2004) 15 EJIL 907 at 919.

31 Boyle and Chinkin, above n 7, at 25.

32 Buchanan, above n 11, at 90.

33 Bodansky, above n 13, at 604.

34 Tesón, above n 21, at 73.

35 At 75.

36 *Rio Declaration on Environment and Development* A/CONF.151/26 (1992) at Principle 7.

37 Bodansky, above n 13, at 611.

Environmental issues are blind to political borders, and in a world comprised of arbitrary divisions, such issues provide unique challenges. IEL faces the need to tackle global concerns in a specialised manner.<sup>38</sup> However, such an objective is not conducive to the traditional state-centric understanding of the international system—especially because the impact of IEL reaches far beyond the state.<sup>39</sup> In regards to the characteristics of IEL which raise questions about legitimacy, three points in particular can be highlighted. First, the nature of environmental concerns requires states to look beyond their narrow self-interest and pursue initiatives in the interest of the world as a whole.<sup>40</sup> Transnational problems require global solutions; tackling climate change is a prime example of the need for all states to actively participate in order to bring about the desired result.<sup>41</sup> However, in a system premised on sovereign equality, concerns of legitimacy arise where a particular action, while being in the best interest of the world as a whole, may not be in the narrow interest of a state.<sup>42</sup> Environmental degradation will continue unless all states cooperate to prevent it; but is it legitimate to compel sovereign states to undertake this task? Furthermore, if the global interest is the concern of environmental law, who defines that interest? International law has long suffered criticism for its euro-centrality<sup>43</sup> and irrespective of the merit of environmental foci, if IEL principles are perceived as a form of western imperialism it is unlikely to attract sociological legitimacy from the third world. This may be further exacerbated through the inclusion of unrecognised actors, such as NGOs.

Secondly, the specialised nature of IEL raises concerns in relation to competence and domestic sovereignty. The orthodox understanding was that states are representative of their domestic constituents; their political control over a particular territory instils state actors with the authority to make policy decisions in the international sphere.<sup>44</sup> Setting questions of the validity of this assumption aside, the specialised knowledge that IEL formation requires raises questions about the competence of state delegates to deliberate on environmental matters. In formulating IEL principles, it is desirable that actors are able to address scientific and policy considerations simultaneously—a task which requires substantial specialised knowledge.<sup>45</sup> If actors do not possess, or are perceived not to possess, such knowledge, the law produced may not attract sociological legitimacy. Another implication of the specificity of IEL is the impact which it has on domestic law. Environmental conventions often dictate particular requirements in relation to matters such as restricted chemicals or the protection of endangered species.<sup>46</sup> This raises issues of procedural legitimacy where international principles are imposed in conflict with the desires of domestic populations. This is a concern which is of direct relevance to the third and final issue of representation and IEL.

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38 Shaw, above n 20, at 845.

39 Pagnani, above n 3, at 792.

40 Lorraine Elliott “Sovereignty and the Global Politics of the Environment: Beyond Westphalia?” in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (Routledge, Oxon, 2016) at 202.

41 *Protection of Global Climate for Present and Future Generations of Mankind* GA/Res/43/53, A/Res/43/53 (1988).

42 Perrez, above n 17, at 124.

43 Shaw, above n 20, at 39.

44 Tesón, above n 21, at 48.

45 Bodansky, above n 13, at 622.

46 Elliott, above n 40, at 204.

The last and most pressing concern that IEL raises in regards to legitimacy is the impact of principles upon a wide range of non-state actors. Partly arising out of the specificity, but also related to the global nature of the subject matter, states are no longer the only interested parties in the environmental legal framework.<sup>47</sup> This raises questions about the fundamental basis upon which international law derives its legitimacy—state consent. If the state is no longer the sole subject of international law, and legitimacy is premised upon the consent of the governed, the question IEL faces is whether, and to what extent, affected non-state actors should be able to participate in the regime.<sup>48</sup> The term “democracy gap” was coined to describe this issue within the international system.<sup>49</sup> Daniel Bodansky identifies that democracy has become the predominant method of instilling regimes with legitimacy in the modern world.<sup>50</sup> This is promulgated by a number of academics; for example, Jürgen Habermas argues that legal norms must involve public participation to enjoy legitimacy.<sup>51</sup> However, setting aside the supposed desirability of opening up IEL to allow for every interested party to participate, three issues of representation within the current framework are worth highlighting.

First, the premise that states are always representative of their domestic population is a questionable assumption. The nexus between government and the governed is arguably less pronounced in authoritarian regimes than within democratic states.<sup>52</sup> This has led some to argue that internal democracy should be a prerequisite for state participation within the international system.<sup>53</sup> Arguably this installs an undesirable standard of civilization and represents a rhetoric which is unhelpful in facilitating international cooperation.<sup>54</sup> Actors affected by international regimes who are inadequately represented by their governments remains an issue.

Secondly, even democratic regimes are unable to represent all of their citizens’ interests at the international level. Those who are particularly affected by an environmental issue or regime may be indigenous cultures, industries or other minorities who do not share the position of the majority within a country. A government is not always able to represent the diverse interests which exist within its borders at international negotiations.<sup>55</sup> Thus, even if states were all democratic, there will undoubtedly be affected individuals whose views are not properly represented.

Lastly, the issue of inter-generational equity is one which has attracted a great deal of academic attention,<sup>56</sup> but an issue that I will only briefly touch upon here.

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47 Bodansky, above n 13, at 606.

48 At 611.

49 Wirth, above n 15, at 802.

50 Bodansky, above n 13, at 599.

51 Ebbesson, above n 12.

52 Thomas Christiano “Democratic Legitimacy and International Institutions” in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) at 124.

53 Tesón, above n 21, at 3.

54 See generally, David Fidler “The Return of the Standard of Civilization” (2001) 2 *Chi J Intl L* 137.

55 Christiano, above n 52, at 125.

56 See for example, Malgosia Fitzmaurice *Contemporary Issues in International Environmental Law* (Edward Elgar Publishing Limited, Cheltenham, 2009) at ch 3; James Nickel and Daniel Magraw “Philosophical Issues in International Environmental Law” in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 453; and Roger Crisp “Ethics and International Environmental Law” in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 473.

Future generations would be greatly affected by the actions that we undertake to preserve, or fail to preserve, our environment. In light of this they are deeply vested in the IEL regimes that states install.<sup>57</sup> However, intergenerational equity raises both philosophical questions as to whether the unborn deserve representation and practical questions about who should provide such representation.<sup>58</sup>

The nature of IEL raises serious concerns about the adequacy of the traditional justifications for international law. In light of the problems of defining what constitutes the *global concern*, the issues raised by the specificity of environmental regulations and the lack of representation by affected parties, IEL can be said to suffer a major legitimacy deficit. This article hopes to identify whether ENGO participation adds to, or detracts from, the level of legitimacy that IEL regimes attract. In order to make such a determination, there must first be an understanding of the roles which these actors play within the IEL institution.

#### IV Environmental NGOs and International Environmental Law

I think, it is clear that there is a new diplomacy, where NGOs, peoples from across nations, international organizations, the Red Cross, and governments come together to pursue an objective. When we do ... this partnership ... is a powerful partnership for the future.

—UN Secretary-General Kofi Annan<sup>59</sup>

NGOs are heavily active in the field of IEL, with ENGOs making up around fifteen percent of all international and national NGOs.<sup>60</sup> Farhana Yamin highlights that there are four broad stages within the development of environmental regimes; agenda-setting, negotiation-bargaining, implementation and enforcement.<sup>61</sup> Examining the extent to which ENGOs are active at each of these stages allows us to infer that these actors are influential in the field of IEL.<sup>62</sup> Furthermore, analysing these actions within the context of different operational spheres—national, international and ideological—assists in the determination of the form which ENGO influence takes. Both an understanding of the role played by ENGOs and the type of influence that they wield are instrumental in determining the effect that these organisations have on the legitimacy of the IEL regime.

Through lobbying and their understanding of grass roots concerns, ENGOs are able to implicitly and directly determine the nature and scope of the issues discussed at international conferences. The role ENGOs play in the first stage of IEL formation, known as *agenda setting*, is represented well by their involvement in the ozone depletion

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57 Crisp, above n 56, at 475.

58 James Wood “Intergenerational Equity and Climate Change” (1996) 8 *Geo Intl Envtl L Rev* 293 at 302.

59 United Nations “Secretary-General Calls Partnership of NGOs, Private Sector, International Organisations and Governments Powerful Partnership for the Future” (press release SG/SM/6973, 29 April 1999) at 2.

60 Martens, above n 1, at 5.

61 Yamin, above n 3, at 153.

62 Peter Spiro *NGOs in International Environmental Lawmaking: Theoretical Models* (Temple University Beasley School of Law, Legal Studies Research Paper Series, 2006) at 7.



issue. ENGOs gathered existing scientific findings and translated them into popular campaigns, acting to frame the environmental problem.<sup>63</sup> Explaining the implications of existing scientific data and couching them in the form of issues for IEL to address is one way in which ENGOs determine the discussions at the negotiation table.<sup>64</sup> Where an issue is already recognised within the international arena, ENGOs often attempt to define the nature of those problems by bringing forward perspectives that might otherwise be ignored.<sup>65</sup> For example, in the case of the Convention to Combat Desertification ENGOs promoted the interests and concerns of local and indigenous peoples. The result of the promotion was a focus on “bottom-up” solutions to desertification issues adopted by the negotiators within the conference.<sup>66</sup>

ENGOs continue to play an important role in the second stage of IEL formation; the *negotiations* themselves. The roles that ENGOs adopt at this stage include, but are not limited to, negotiation reporting, knowledge dissemination, and forming part of a state delegation. At the 1972 Stockholm Environment Conference, ENGOs published daily reports about the details of the negotiation.<sup>67</sup> This assisted delegates to keep track of developments and ensured greater transparency in the conference. At the Kyoto Protocol negotiations ENGOs produced and provided technical information to state delegates about the impacts of climate change, cost-benefit analysis of strategies and critiques of analysis provided by different organisations.<sup>68</sup> Diplomats who are expected to be informed in a wide range of areas often rely on these publications,<sup>69</sup> which are also an effective way for ENGOs to lobby state delegates.<sup>70</sup> A modern development has been the inclusion of NGO representatives within state delegations; a position which gives ENGOs greater leverage to influence states.<sup>71</sup>

The third stage, *implementation*, involves states executing the agreements and the final stage, *enforcement*, is the process undertaken to ensure states comply with their obligations.<sup>72</sup> After the agreement of a treaty, ENGOs, rather than states, are often the most proactive in undertaking the obligations within the convention. At the negotiations on desertification, a Secretariat staff member identified at “at the end of the day, [the NGOs] will be implementing the Convention”.<sup>73</sup> As ENGOs lack international legal personality they are unable to formally enforce the conventions upon states, but these organisations still are active in persuading countries to comply. Most commonly,

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63 At 7.

64 Sheila Jasanoff “NGOs and the environment: From knowledge to action” (1997) 18 TWQ 579 at 580.

65 Ebbesson, above n 12, at 68.

66 Corell, above n 3, at 209.

67 Raustiala, above n 3, at 730.

68 Michele Betsill “Environmental NGOs and the Kyoto Protocol Negotiations 1995 to 1997” in Michele Betsill and Elisabeth Corell (eds) *NGO Diplomacy: The Influence of Nongovernmental Organisations in International Environmental Negotiations* (MIT Press, Cambridge (London), 2008) at 47.

69 Yamin, above n 3, at 157.

70 Raustiala, above n 3, at 728.

71 Spiro, above n 62, at 10.

72 Yamin, above n 3, at 153.

73 Corell, above n 3, at 209.

NGOs use shaming techniques, such as highlighting non-compliance<sup>74</sup> and publishing reports on the progress of member states in meeting their treaty obligations.<sup>75</sup>

Although it is difficult to empirically establish that NGOs impact upon the formation and adherence to IEL, the extent of their involvement highlights the probability that they wield some degree of influence. As the above examination of the different stages of IEL is a linear analysis of NGOs' involvement, "such analysis fails to isolate sources of NGO power and essential qualities of NGO participation".<sup>76</sup> In order to assess the nature of the influence NGOs exert, a different mode of analysis must be adopted. Modelled upon Peter Spiro's approach,<sup>77</sup> this section looks at three different spheres which NGOs participate in—national, international and ideological—in order to determine the actors they relate to and the implications of their actions upon their influence.

The first sphere that NGOs operate in is that of the national sphere. Apart from the obvious reference to the ability for domestic NGOs to lobby their own government, this head also refers to the trans-national networks formed by such organisations and the way in which they influence state actors in the international arena. This analysis is premised upon the presumption that states are the only actors who make IEL, and assesses the manner in which NGOs impact these actors. Traditionally the appropriate means by which NGOs were thought to have impact was through convincing their national government to take up an issue in the international sphere. Domestic state lobbying is still the main means by which NGOs, particularly small ones, attempt to advance their position.<sup>78</sup> But it is fallacious to say that this is the only manner through which NGOs are able to advocate their views. It is equally misguided to claim that this method ensures representation of all parties—governments do not always listen. One way in which NGOs attempt to influence governments who are not receptive to domestic pressures is to utilise their transnational networks. The Brazilian Rubber Tapper movement, arising to counter massive deforestation, is one such example. The transnational response saw a partnership between Northern NGOs and local groups successful in countering the Brazilian government's policy.<sup>79</sup>

The pressure that is applied does not necessarily have to emanate from a foreign government, but the trans-national framework in which NGOs operate allows them to utilise available external pressures.<sup>80</sup> This view, however, places NGOs in opposition to states—which is not always the case. As highlighted by the involvement of NGOs in the negotiation process, these organisations often undertake actions which in fact assist governments. At times NGOs are even able to form part of the state delegation.<sup>81</sup> This last example highlights how NGOs can greatly influence the actions of state actors—to the extent that they, themselves, are part of the rubric of the state.

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74 For example, Greenpeace's reporting of Japan's whaling: "Whaling on trial: Vindication!" (23 December 2009) Greenpeace International <[www.greenpeace.org](http://www.greenpeace.org)>.

75 Yamin, above n 3, at 160.

76 Spiro, above n 62, at 8.

77 At 8.

78 Yamin, above n 3, at 157.

79 Pagnani, above n 3, at 803.

80 The appeal of Ecuadorian people to the Inter-American Court of Human Rights is another example of the utilisation of available pressures, as reported in "Inter-American Court condemns Ecuador for violating rights of indigenous people of Sarayaku" (25 July 2012) Center for Justice and International Law <[cejil.org](http://cejil.org)>.

81 Corell, above n 3, at 213.

However, ENGO participation assessed under this head assumes that these actors require states to impact IEL outcomes. Viewed through this lens, ENGOs cannot be regarded as international actors in their own right—they merely partake in the environmental regime because states allow them to.

In contrast to the nation-centred approach, the international approach treats ENGOs as stakeholders within the global system. Through the abandonment of the premise that states are the only actors within the international system, this view is able to identify the manner in which ENGOs operate outside, and separate to, the state. Despite not holding formal legal personality, the above examination of ENGO participation in IEL formation highlights that these institutions are actors in their own right.<sup>82</sup> This view has been reinforced by the formal recognition of these actors in international treaties; for example, the Montreal Protocol on Substances That Deplete the Ozone Layer 1987 states:<sup>83</sup> “Any body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer ... may be admitted.” Many view the observer status awarded to ENGOs as a positive step towards the democratisation of IEL. The argument is that these groups are able to speak for unrepresented or under-represented groups at the international level.<sup>84</sup> Irrespective of the merit of this argument, it is likely that the success that ENGOs enjoy is partly due to their division from states and their specific focus on environmental concerns.<sup>85</sup>

The last area in which ENGOs operate is on the ideological level. As previously discussed these organisations are often instrumental in defining the nature and scope of international discussions on the environment. Although the way in which ENGOs undertake shaping environmental concerns has impact upon states, their primary audience is often individuals. ENGOs undertake campaigns to encourage individuals to call for change; from governments for international action, or from private actors.<sup>86</sup> This was illustrated when Greenpeace objected to Shell’s decision to dispose of an oil-storage platform by sinking it into the Atlantic Ocean. What is truly interesting about this example is how it illustrates the way in which ENGOs do not merely identify environmental issues; they *define* the morally correct action in light of environmental concerns. A number of experts claim that the tugging of the oil rig out to sea was the best environmental option. However, ENGOs appealed to the discomfort felt about tarnishing untouched environments to define what the morally right action was in this circumstance.<sup>87</sup> As previously identified, environmental issues are not purely scientific; they involve an assessment of the best policy option in light of the scientific data available.<sup>88</sup> ENGOs arguably play an important role in shaping this determination through promoting their conception of the *right* policy.

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82 Betsill and Corell, above n 3, at 3.

83 Montreal Protocol on Substances That Deplete the Ozone Layer 122 UNTS 3 (concluded 16 September 1987, entered into force 1 January 1989).

84 GR Shell “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization” (1995) 44 Duke L J 829 at 910–911.

85 Thomas Princen “NGOs: creating a niche in environmental diplomacy” in Thomas Princen and Matthias Finger (eds) *Environmental NGOs in World Politics: Linking the local and the global* (Routledge, New York, 1994) at 35.

86 Spiro, above n 62, at 16.

87 Yamin, above n 3, at 154.

88 Jasanoff, above n 64, at 582.

## V Environmental NGOs and Legitimacy

The claim is often made that ENGOs provide the IEL regime with legitimacy; such an argument is premised upon the notion that these actors increase the range of parties represented. Daniel Esty states that “[p]ermitt[ing] NGOs to participate would ... [allow for the input of] ... important voices which would otherwise be unrepresented or under-represented”.<sup>89</sup> However, when ENGO participation is analysed in light of their spheres of influence, some doubts are raised about this assumption. The analysis shows that, even with ENGO participation, there are likely to be affected parties who are not adequately represented. If ENGOs can be said to impact legitimacy, it is not on the normative level of aiding representation, but rather on the sociological level of promoting the perception of legitimacy.

An assessment of ENGO participation within the national sphere highlights that their involvement does not substantially alter the status quo. ENGOs may have a greater ability to bring the concerns of impacted groups before the state. However, such an action does not escape the critiques levelled against the current state-centric framework; primarily that the involvement of ENGOs is superfluous within an authoritarian regime and not necessarily effective within a democratic one. States have a wide range of interests to represent at the international level; an ENGO’s access to the government cannot guarantee the representation of interested parties.<sup>90</sup> Even where an organisation is able to utilise their international connections, such an action is often limited to impacting the domestic sphere. The ENGO’s impact on the international regime in these circumstances is limited at best. Although a group may have greater ability to voice their concerns where incorporated into a state’s conference delegation, adequate representation of all interest groups cannot be derived from this fact. Further, there is open admission that inclusion of radical ENGOs within a delegation is one method in which to subdue their voice. Where an ENGO is forced to toe the line, their representative abilities are diluted by the other considerations they are forced to adopt.<sup>91</sup> ENGOs undoubtedly have the power to influence a number of decisions through the state-focused rubric. However, such an approach is premised upon the same base assumptions as the orthodox theory of IPL legitimacy; in light of this, ENGO participation through states are susceptible to the same critiques.

The argument that ENGOs install IEL with greater legitimacy has more traction when analysed within the international context, but faults with the premise are still identifiable. A number of writers argue that ENGOs are able to voice the concerns of those to whom domestic mechanisms of advocacy are unavailable.<sup>92</sup> In essence, the argument is that ENGOs allow interested groups to skip the domestic sphere in favour of representation within the international arena. Further, it is posited that ENGOs are able to represent those who are unrepresentable such as future generations, endangered animals or even the environment itself.<sup>93</sup> Such an argument brings with it perceptions of a more equitable world order, making it an attractive proposition. However, the groundings of such an assumption are questionable on at least two grounds. First, it should be highlighted that

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89 Daniel Esty “Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion” (1998) 1 J Intl Econ L 123 at 131.

90 Charnovitz, above n 2, at 276.

91 Spiro, above n 62, at 14.

92 Esty, above n 89, at 132.

93 Charnovitz, above n 2, at 274.

the internal structure of ENGOs are not always democratic nor representative.<sup>94</sup> Inherent in the idea of representation is the existence of a form of connection between those which they claim to be advocating. Where no such nexus can be shown, the potency of the argument that ENGOs bring representative legitimacy to IEL is diminished. Even if the assumption can be made that ENGOs do, in fact, represent those they claim to, the degree of operative representation may be minimal. In order for ENGOs to exert influence within an environmental conference, they will often have to speak as one voice. This was the case in negotiations of the Convention to Combat Desertification. Elisabeth Corell argues that the success of ENGO participation at the conference was partly due to their ability to present a single, coherent statement of position to the negotiators.<sup>95</sup> Where there is a need to culminate the different opinions of various organisations into one coherent policy, it is often dominated by the larger Western ENGOs.<sup>96</sup> Such a process results in a reversion to the original issue; that of affected parties not being adequately represented. Although it may be desirable to view the increased participation of ENGOs within the IEL framework as indicative of greater representation, such an assumption is questionable.

Less frequently examined is the manner in which ENGOs' operation on the ideological level impacts upon the legitimacy of IEL. Such operation may play an important part in bringing sociological legitimacy to the institution. This position is evidenced by findings that where ENGOs participate in the formal system (such as conference negotiations), there seems to be less mobilization towards protest.<sup>97</sup> Indeed, Yamin indicates that ENGOs tend to be trusted by the public more than governments.<sup>98</sup> In fact, the mere fact that academics claim that ENGO participation installs greater legitimacy upon the field of IEL is indicative of the impact such organisations have upon perceived legitimacy. Although beyond the scope of this article, what is particularly fascinating is the manner in which ENGOs may *define* what is legitimate. As previously identified, ENGOs impact the ethical framework of environmental matters; whether through translating scientific data into desirable policy or implementing a smear campaign, ENGOs shape what is viewed as right and wrong in the environmental domain. Legitimacy necessitates the undertaking of the correct course of action, and if ENGOs shape what that action is they can be said to *define* what is legitimate in IEL.

## VI Conclusion

The above analysis of ENGO impact on IEL legitimacy with regards to the apparent democratic deficit must be viewed within the theory of consent. Primarily the assessment must take place with an understanding that legitimacy arises out of the consent of the governed. Within the domestic sphere, citizens consent to be governed in return for protection of their liberties. Under the orthodox IPL theory, states consented to be governed in order to create an environment conducive to cohabitation. However, there is growing uncertainty about whether states remain the sole subjects in relation to IEL.

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94 Boyle and Chinkin, above n 7, at 58.

95 Corell, above n 3, at 210.

96 Boyle and Chinkin, above n 7, at 59.

97 DR Fisher "Civil society protest and participation: Civic engagement within the multilateral governance regime" in Norichika Kanie and PM Haas (eds) *Emerging forces in environmental governance* (United Nations University Press, New York, 2004) at 195.

98 Yamin, above n 3, at 154.

Further, the purpose of IEL is also unclear; is its aim to achieve cooperation, environmental protection or environmental preservation? The answers to these issues will change the requisite elements to install legitimacy upon IEL.

NGOs play a prominent role in each of the stages of IEL development, as PJ Simmons highlights:<sup>99</sup>

[T]here is no real way to keep them out. Instead, the real challenge is figuring out how to incorporate NGOs into the international system in a way that takes account of their diversity and scope, their various strength and weaknesses, and their capacity to disrupt as well as create.

However, their increasing involvement in the international arena should not be confused with an improvement in representation. There are many reasons to question whether ENGO participation does, in fact, democratise the IEL regime. What is needed is a clear determination of what role we want ENGOS to play within the IEL process. Ultimately this requires greater dialogue and agreement about the purpose and objectives of IEL. Although it is clear that IEL wishes to go beyond merely maintaining peaceful relations between states, the nature and scope of their substantive objectives remains unclear. Answers to these fundamental questions will form the basis of determining what role ENGOS *should* play within the IEL system.

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99 Simmons, above n 6, at 83.