

NonGovernmental Organizations in the International Arena

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Introduction.

Nongovernmental organizations (NGOs) have played a crucial role in international forums in the last three decades, helping to set the agenda for organizations, providing data that require countries to pay attention to issues they would prefer to ignore, and tabling proposals that frequently lead to action. This paper will explain the different roles that NGOs have played at the international level and illustrate some of the many ways they have been effective.

The Varieties of NGOs.

NGOs come in many different shapes and sizes.¹ More than 100 NGOs are involved in trying to protect the environment at the international level. "NGOs are now permanent players in the international arena as they are in the United States."² Some are primarily national organizations with international departments. Some focus on legal issues. Some focus on economic or scientific issues. Some are devoted almost exclusively to international issues.

¹ See David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy* 423 (1998).

² A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 Chi.-Kent L. Rev. 61, 63 (1992).

Some focus on one goal, while others try to assist in a number of areas.³ Some are federations of national organizations that band together to have an impact internationally. Some international organizations receive NGOs with open arms, while others are highly suspicious of them.

At one extreme would be Greenpeace International, which has always been an activist organization – sending boats to interfere with whaling missions, draping banners on Big Ben and Rockall to obtain publicity, following vessels carrying radioactive materials, trying to block the testing of Trident missiles by U.S. Submarines,⁴ interfering with driftnetters in the North Pacific, and occupying the offshore oil installation Brent Spar in 1995 to protest the plan to dispose of it at a deepwater site in the North Atlantic.⁵ Because they are traditionally and unrelentingly in the face of those they perceive as polluters and despoilers of the environment, Greenpeace is always viewed suspiciously by governments and industry. Nonetheless, Greenpeace International has worked hard to influence international organizations, and Greenpeace has definitely been effective in developing and enforcing new norms to protect the environment. It has had an observer status at the International Maritime Organization (IMO), for instance, for some time, and it has used that status effectively to promote attention to issues and to document

³ The single focus environmental groups can be effective because of their unrelenting commitment to their goal: “They need not trade-off environmental to other objectives because they are not bound by the need of political leaders, elected and non-elected, to avoid offending powerful constituencies.” *Id.* at 65.

⁴ See Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Seas*, 15 *Marine Policy* 147, 158-59 (May 1991).

⁵ This episode is explained in Hunter, Salzman & Zaelke, *supra* note 1, at 773-76. When the Oslo-Paris Commission Environment Ministers adopted a full ban on the dumping of steel oil installations at sea in July 1998, Greenpeace hailed the action as “a victory for the environment and for the people of Europe.” *Greenpeace Claims Historic Victory at Oskar Conference*, <http://www.greenpeace.org/pressreleases/oceandumping/1998jul23.html>.

environmental problems.

Also at an organization like the IMO, one finds NGOs like the Friends of the Earth, the Nuclear Control Institute, union representatives,⁶ and industry and trade groups. Obviously, the style of the group is linked to its purpose and goals. Sometimes NGOs have natural linkages with each other and with certain governmental delegations, sometimes they are antagonistic to each other. Sometimes they get in each others way, or undercut each other's efforts, even when they appear to have similar goals.

The Different Roles NGOs Play.

Participation in International Meetings. International organizations such as the IMO or the International Whaling Commission (IWC) provide obvious opportunities for NGOs to gather and try to influence national delegations and international bureaucrats.. These organizations have regular meetings and working groups, and NGOs can influence these meetings with agenda items, working papers presenting data, and proposals for action. Papers presenting specific, detailed scientifically-sound material can have an important impact in requiring countries to pay attention to environmental issues they would prefer to avoid. Papers with proposed amendments or draft resolutions may or may not be taken seriously, depending on the interests and goals of the national delegations, but they can provide starting points for discussions.

⁶ At, for instance, the IMO's March 1996 Special Consultative Meeting on transport of radioactive materials, the International Federation of Shipmasters' Association, the International Road Transport Union, and the International Confederation of Free Trade Unions had representatives (in addition to Greenpeace International).

Observer Status. Observer status is important because it enables NGOs to table papers, ask questions, make interventions, and have direct contact with the national delegations. Each international organization has its own rules regarding how to obtain observer status, and some are substantially more liberal than others. When the rules are rigid, those NGOs that obtain the favored status will sometimes help other NGOs, by incorporating representatives of the other organizations into their own delegations.

Sometimes the NGOs are more than mere observers, and become participants in international meetings almost at the same level as governments. The International Union for the Conservation of Nature (IUCN) and the World Wide Fund for Nature participate, for instance, with expert advice at the CITES Conferences of the Parties.⁷

Leading or Becoming Part of National Delegations. During the long struggle to ban the dumping of radioactive wastes into the ocean during the 1980s, the country of Nauru authorized Dr. W. Jackson Davis of the University of California at Santa Cruz and myself to serve as their delegation to the annual meetings of the London Dumping Convention (LDC) and to the intersessional meetings on the dumping of radioactive wastes (the intersessional meetings excluded NGOs from participation altogether, even as observers). On another occasion, I was a representative of the Association of Pacific Island Legislators (APIL) at the LDC annual meeting. Similarly, at the meetings of the International Whaling Commission (IWC), some of the delegations of the smaller countries have been staffed by NGO experts. The Foundation for International Environmental Law and Development (FIELD) represented Vanuatu and other island nations at climate change negotiations, and an attorney from the Center for International

⁷ Hunter, Salzman & Zaelke, *supra* note 1, at 1050.

Environmental Law (CIEL) represented the Marshall Islands at negotiations over land-based sources of pollution.⁸ The opportunity to be the leader of a national delegation obviously opens many doors, because national delegations can take initiatives and table proposals, and they can always participate in the important working groups, which frequently exclude the “observer” NGOs. It is still important, however, to be armed with well-documented scientific material and sound legal initiatives, because the larger countries quickly catch on to this technique and try to marginalize the NGO-dominated national delegations.

Some countries add NGO members as part of a larger delegation. New Zealand has frequently invited a Greenpeace campaigner to join its delegations at the IMO and at the LDC annual meetings. “[T]he U.S. delegation to international meetings now routinely includes both environmental NGO and industry representatives as unofficial observers.”⁹ Becoming a part of a delegation does not provide the same opportunity for input as leading a delegation, but it can still be valuable in gaining access to information and possibly influencing national stances.

Agenda Setting. By presenting data and focusing attention on issues that countries would prefer to ignore, NGOs can force international organizations to pay attention to these embarrassing or difficult issues. Once a topic is put on the agenda of an international organization, it takes on a life of its own and begins to require annual attention.

Data Collection. Presenting detailed, scientifically sound research is the most important contribution an NGO can provide to an international conference. Countries – especially the small and the developing countries – frequently do not have their own data and can benefit

⁸*Id.* at 427.

⁹ *Id.*

greatly by the assistance that conscientious NGOs can provide. The larger countries are then required to pay attention to issues they might prefer to avoid, and must at least answer the questions raised by the NGO data.

Monitoring and Enforcement. Sometimes data collection becomes more than just providing input and also includes formal monitoring of compliance, assisting with enforcement, and challenging violations of agreements. “For example, NGOs such as WWF and TRAFFIC provided well-publicized and important undercover operations that have helped to police CITES.”¹⁰ In a few cases, if an organization is inadequately funded, it may rely almost exclusively on NGOs to provide data regarding compliance.¹¹ To some extent, NGO activities at the international level are comparable to citizen-standing initiatives at the domestic level. Because of the primitive nature of many dispute-resolution mechanisms at the international level, NGOs have been able to carve out an enforcement niche for themselves.¹²

Alarm Function. Similarly, the NGOs can focus attention on issues by alerting or reminding or embarrassing governments about an issue they would prefer to avoid, such as global warming, ozone depletion, or rain forest destruction.¹³ One current example concerns the

¹⁰*Id.* at 429.

¹¹ *Id.* at 430 (explaining the role of the World Conservation Monitoring Centre, which has served as data manager for the CITES Secretariat, as well as for other environmental conventions and that of Traffic International, which has been instrumental in tracking illegal trade in wildlife), and 1048 (explaining Traffic’s Bad Ivory Database System to document illegal trade in elephant products). *See generally* <http://www.traffic.org/cop11>.

¹² Tarlock, *supra* note 2, at 73.

¹³ *See* Hunter, Salzman & Zaelke, *supra* note 1, at 430-31 (giving the example of the publication of T. Colborn, D. Dumanoski and J. Myers, *Our Stolen Future* (1995), alerting decisionmakers to the dangers of persistent organic pollutants).

overharvesting of sharks, which reproduce slowly and hence cannot easily recover from imprudent management and the dangerous practice of catching sharks solely for their fins. The Center for Marine Conservation, working with Traffic International, has documented the threat to the sharks, explained their important role in ocean ecosystems, and attempted to strengthen the international and regional regimes governing sharks.¹⁴ As a result of the Center's focus on the sharks, the United States has been developing a national shark plan, expected to be in place in 2001 that will ban the taking of sharks for their fins in U.S. waters.¹⁵

Using publicity and media outlets is important, and some NGOs have been very effective in utilizing the press. NGOs can also provide a steady stream of educational materials for students and teachers, to help everyone understand what is at stake in environmental disputes.

Impertinent Questions. Those NGOs that have observer status at an international conference can play an important role by posing challenging and embarrassing questions of the national delegations. At the March 1996 informational meeting of the IMO on the transport of radioactive materials, a question posed by Paul Leventhal of the Nuclear Control Institute forced the British and American scientists to reveal that current technology did not exist to retrieve a radioactive cargo if it sank into the deep ocean. Again, detailed scientific information is crucial if these questions are to be effective. Another example, in a different context, is provided by the World Court Project, a coalition of NGOs, which prodded the UN General Assembly to ask the

¹⁴ See, e.g., Michael L. Weber and Sonja V. Fordham, *Managing Shark Fisheries: Opportunities for International Conservation* (1997).

¹⁵ Jan TenBruggencate, *Shark Quota to Start in Fall*, Honolulu Advertiser, March 8, 2000, at B1, col.1. The Western Pacific Regional Fishery Management Council adopted a quota in early March 2000 to limit the annual number of sharks harvested by Hawai'i's longline fishery to 50,000, requiring the release of another 40,000 sharks that will be hooked by the fleet. *Id.*

International Court of Justice for an advisory opinion on the legality of nuclear weapons.

Diplomacy. Sometimes NGOs can step in where governments are reluctant to enter, by calling conferences, and bringing people together (including government officials coming in their personal capacity) to discuss issues that governments are not yet willing to tackle. By promoting discussion and preparing background papers and draft agreements, these initiatives can make it more likely that governments will eventually address and resolve festering problems.¹⁶

Occasionally, an NGO will prepare drafts of conventions, or outline the elements that should be in a convention, as a mechanism to promote governments to move more rapidly toward consensus on contentious issues. One NGO – the International Campaign to Ban Landmines – won the Nobel Peace Prize in 1997 because its initiatives prodded governments to negotiate a treaty banning land mines.

Examples of NGOs Making a Difference.

Many examples could be provided of the positive results of NGO action. “One of the major success stories of NGOs has been the role that they have played in the transformation of the World Bank’s mission, which is under continuing criticism for its support of projects with large adverse environmental and social consequences.”¹⁷ Others worthy of mention include:

Banning the Ocean Dumping of Radioactive Wastes and Transforming The London Dumping Convention. The transformation of the London Dumping Convention is certainly one

¹⁶ See Hunter, Salzman & Zaelke, *supra* note 1, at 427-28 for an example.

¹⁷ Tarlock, *supra* note 2, at 71; see generally Hunter, Salzman & Zaelke, *supra* note 1, at 1460-80.

of the most impressive success stories of the Nineties. This Convention was drafted shortly after the 1972 Stockholm meeting that launched international environmental consciousness.¹⁸ As originally written, it contained a “black list” of materials (such as high-level radioactive wastes) that could never be dumped into the ocean and a “grey list” of items (such as low-level radioactive wastes) that could be dumped in appropriate locations if proper governmental permits were obtained. This treaty was a step forward, but it still permitted a substantial amount of dumping, and efforts were made at its annual meetings to tighten its provisions, so that no radioactive materials whatsoever could be dumped¹⁹ and that the dumping of other hazardous materials would similarly be prohibited.

NGOs like Greenpeace International and Friends of the Earth International played a significant role at the annual meetings of the London Dumping convention held at the IMO Headquarters in London every fall. They came fully prepared with data and proposals, they formed alliances with small nations in the Pacific and Scandinavia in particular, providing information and ideas, and they were a major thorn in the side of the nuclear nations. Although the developed nations resisted restrictions on their ability to dump low-level radioactive wastes for a number of years,²⁰ after many debates and many preliminary meetings, a new Protocol was

¹⁸ The London Dumping Convention has the formal name of The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and is reprinted in 11 I.L.M. 129 (1973).

¹⁹ See, e.g., Jon M. Van Dyke, *Ocean Disposal of Nuclear Wastes*, 12 *Marine Policy* 82 (1988); W. Jackson Davis and Jon M. Van Dyke, *Dumping of Decommissioned Nuclear Submarines at Sea: a Technical and Legal Analysis*, 14 *Marine Policy* 467 (1990).

²⁰ During the Seventh Consultative Meeting, the contracting parties passed a resolution imposing a moratorium on the dumping of all low-level radioactive wastes, but the Soviet Union, China, Belgium, France, the United Kingdom, and the United States voted against the resolution

adopted in 1996²¹ that “virtually re-writes the London Convention.”²² In fact, the name of this treaty was even changed, because the contracting parties did not want the public to think that it authorized dumping, and now it is titled simply “London Convention, 1972.”

Under the new Protocol, the presumptions are reversed, and the dumping of all wastes are prohibited unless the item to be dumped is explicitly listed in Annex I.²³ Even these materials, which include dredged material, sewage sludge, vessels, and ocean platforms,²⁴ cannot be dumped without a permit.²⁵ Permits can be granted only after assessments are undertaken that evaluate options and describe the potential effects of the dumping.²⁶ Incineration at sea²⁷ and the dumping of industrial wastes are completely prohibited. This new Protocol is thus based on the precautionary approach²⁸ as well as the polluter-pays principle.²⁹ The burden has thus shifted

and a number of other industrialized nations abstained. The dissenting nations did not feel that they were bound by this resolution, and the British government sought to continue its dumping program. But the British unions refused to load the low-level wastes on the the British ship in 1985, and thus the British were forced to adhere to the moratorium by their own people. Van Dyke, *Ocean Disposal of Nuclear Wastes*, *id.* at 82.

²¹ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.

²² Hunter, Salzman & Zaelke, *supra* note 1, at 764.

²³ 1996 Protocol, *supra* note 21, art. 4(1).

²⁴ *Id.*, Annex I.

²⁵ *Id.*, art. 4(2).

²⁶ *Id.*, Annex II.

²⁷ *Id.*, art. 5.

²⁸ *Id.*, art 3(1):

In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter

“from (1) dumping unless it were proven harmful to (2) no dumping unless it is shown there are no alternatives.”³⁰ The Protocol also contains a number of provisions to assist developing countries in dealing with their wastes and to encourage them to become parties. It establishes a Technical Cooperation and Assistance Program to assist countries in relying upon the oceans for the dumping of wastes, and seven programs were established by the International Maritime Organization in 1997-98.³¹

This remarkable makeover of the London Convention illustrates the “greening” of the international community and the new spirit of shared responsibility for the common areas of the planet. As of June 1997, 76 countries had become contracting parties to the London Convention,³² and under Article 210(6) of the Law of the Sea Convention,³³ parties to the Law of the Sea Convention are bound by the requirements of the London Convention even if they are not

whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.

²⁹ *Id.*, art. 3(2):

Taking into account the approach that the polluter should, in principle, bear the cost of pollution, each Contracting Party shall endeavor to promote practices whereby those it has authorized to engage in dumping or incineration at sea bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest.

³⁰ Hunter, Salzman & Zaelke, *supra* note 1, at 765. The precautionary principle is discussed *infra* in text at notes 42-48.

³¹ *Id.* at 766-67.

³² Hunter, Salzman & Zaelke, *supra* note 1, at 772.

³³ United Nations Convention on the Law of the Sea, art. 210(6), U.N.Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982).

parties to that treaty.³⁴

Protecting Whales. Greenpeace, EarthTrust, and other environmental groups played an instrumental role in shifting the debate from sustainable use to species protection, in obtaining a ban on commercial whaling in 1982, and maintaining it in the following years.³⁵ They have achieved these goals through utilizing good scientific data and by challenging and successfully discrediting the scientific data put forward by the International Whaling Commission (IWC), which in turn was misled dramatically by some of the countries in reporting the number of whales they had been harvesting.³⁶ The NGOs were able to persuade a number of nonwhaling nations to join the IWC, and in some cases staff their delegations to the annual meetings, and thus to tilt the balance at the organization in favor of the moratorium.³⁷

Perhaps most significantly, the NGOs were successful in transforming the way many people view whales. For large sectors of the population, whales are no longer a product to be utilized, but rather are grand creatures to be enjoyed for their talent and beauty, studied so we can

³⁴ See Brennan van Dyke, *The London Convention, 1972*, in Housman *et al.*, *The Use of Trade Measures in Selected Multilateral Environmental Agreements* 256-57 (UNEP, 1995)(citing a communication to the contracting parties of the London Convention issued by the Division for Ocean Affairs of the United Nations Office of Legal Affairs).

³⁵ See Hunter, Salzman & Zaelke, *supra* note 1, at 1015-16. "In 1982, bowing to environmental group pressure, the IWC passed an indefinite moratorium (zero catch-limit) on all commercial whaling." Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 *Brook. J. Int'l L.* 303 (1996).

³⁶ "From 1948 to 1973, the Soviet Union officially reported killing 2,710 humpback whales while, in fact, it killed over 48,000." Hunter, Salzman & Zaelke, *supra* note 1, at 1024.

³⁷ See Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics in the Jurisprudence of Whaling Regulation*, 38 *Ocean & Coastal Management* 5, 14 (1998).

understand them better, protected so that future generations can also have them as co-inhabitants of the planet, and even communicated with, if possible, so that we can learn from them.³⁸ One commentator has identified the “Conservation becomes Protection” stage from 1945 to 1977, the “Protection Stage” from 1977 to 1982, the “Preservation Stage” from 1982 to 1990, and the “Emerging Entitlement Stage” from 1990 to the present.³⁹ During the last two stages, the idea has emerged strongly that “it is immoral to kill such magnificent creatures.”⁴⁰

The most recent example of the strength of NGO action concerning whales was the decision made by the Mexican government in early March 2000 to cancel its plans with the Mitsubishi Corporation to build a huge salt plant on the shores of a lagoon where gray whales come each winter to give birth.⁴¹ Led by the Natural Resources Defense Council, NGOs coordinated an effort that led to some 750,000 letters (mostly email) being written to Mitsubishi, ads showing breaching whales at Mexico City bus stops, and the beginning of a campaign to boycott Mitsubishi products in California. Although the precise impact of the plant on the

³⁸ Schiffman, *supra* note 35, at 326-27.

³⁹ *Id.* Schiffman describes 1945-77 as the “Conservation becomes Protection” stage, during which the environmental movement established “the idea that whales deserve protection as an important part of nature and not merely as a consumer product.” This effort produced “the first awareness of ecological concerns in IWC decisionmaking.” *Id.* at 327.

⁴⁰ *Id.* at 327 (citing Anthony D’Amato and Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am.J. Int’l L. 21, 140-48 (1991)). See also Scheiber, *supra* note 37, at 15-16. One commentator has compared the moral position of those who believe the lives of whales are sacred to that of “pro-life abortion opponents [who] believe in the sanctity of the pre-born.” Alma Soongi Beck, *The Makah’s Decision to Reinstate Whaling: When Conservationists Clash with Native Americans Over an Ancient Hunting Tradition*, 11 J. Env’tl. L. & Litig. 359, 404 (1996).

⁴¹ Julia Preston, *In Mexico, Nature Lovers Merit a Kiss from a Whale*, N.Y. Times, March 5, 2000, at 9, col.1 (nat’l ed.).

lagoon's waters was disputed, everyone agreed that its ecosystem might be altered in unpredictable ways. Following the "precautionary principle," which is discussed next, the proper decision was to protect the pristine waters of the unique lagoon.

The Precautionary Principle. Perhaps the most enduring impact of the environmental movement spearheaded by NGOs during the past three decades has been the almost universal acceptance of the "precautionary principle" and the "polluter-pays" principle. The precautionary principle has been somewhat controversial, because some commentators view it as being too vague,⁴² and others view it as unrealistic, but it is a major presence at all international negotiations now and it appears regularly in treaties and documents because it reflects the view that it is necessary to be extra vigilant in our stewardship of ocean resources, especially in light of the many mistakes we have made in recent years. In an earlier publication, I summarized the precautionary principle as follows:

It requires policymakers to be alert to risks of environmental damage, and the "greater the possible harm, the more rigorous the requirements of alertness, precaution and effort." It rejects the notion that the oceans have an infinite or even measurable ability to assimilate wastes, and it instead recognizes that our knowledge about the ocean's ecosystems may remain incomplete and that

⁴² See, e.g., Daniel Bodansky, *Scientific Uncertainty and the Precautionary Principle*, 33 *Environment* 4 (Sept. 1991) ("Although the precautionary principle provides a general approach to environmental issues, it is too vague to serve as a regulatory standard because it does not specify how much caution should be taken"). But see also Daniel Bodansky, *Remarks: New Developments in International Environmental Law*, 85 *Am. Soc'y Int'l L. Proc.* 413 (1991) ("Indeed, so frequent is its invocation that some commentators are even beginning to suggest that the precautionary principle is ripening into a norm of customary international law").

For commentary on the content of the precautionary principle, see James E. Hickey, Jr., and Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 *Va. Env't'l L.J.* 423 (1995); Gregory D. Fullem, Comment, *The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty*, 31 *Willamette L. Rev.* 495 (1995); John M. Macdonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 *Ocean Dev. & Int'l L.* 255 (1995).

policymakers must err on the side of protecting the environment. It certainly means that, at a minimum, a thorough evaluation of the environmental impacts must precede actions that may affect the marine environment. All agree that it requires a vigorous pursuit of a research agenda in order to overcome the uncertainties that exist.

Some commentators have explained the precautionary principle by emphasizing that it shifts the burden of proof: “[W]hen scientific information is in doubt, the party that wishes to develop a new project or change the existing system has the burden of demonstrating that the proposed changes will not produce unacceptable adverse impacts on existing resources and species.” Others have suggested that the principle has an even more dynamic element, namely, that it requires all users of the ocean commons to develop alternative nonpolluting technologies.⁴³

Some commentators and some diplomats have tried to draw a distinction between the “precautionary principle” and the “precautionary approach,” arguing that the latter is more acceptable as an international norm because it lays out a flexible perspective rather than a rigid rule.⁴⁴ However these disputes are resolved, it is now clear that a norm of precaution has emerged and that our collective stewardship of shared resources requires caution before we embark on new activities that will alter the marine environment. Certainly the inclusion of the precautionary standard in the 1996 Protocol to the London Convention, 1972,⁴⁵ and in the 1995

⁴³ Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 *Ocean Dev. & Int'l L.* 379, 380 (1996)(citations omitted).

⁴⁴ *See, e.g.*, Principle 15 of the 1992 Rio Declaration on Environment and Development: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *I.L.M.* 874 (1992).

⁴⁵ *See supra* text accompanying notes 18-34.

Straddling and Migratory Stocks Agreement⁴⁶ provides strong evidence that this approach is here to stay.⁴⁷

The Polluter-and-User-Pays Principle. Because of the relentless prodding of NGOs, the world community has adopted this common-sense approach, which is designed to internalize the real costs of a project, including the external environmental costs, and thus to allow decisionmakers to evaluate each activity in relationship to its alternatives. Nuclear power, for instance, has frequently been viewed as a cheap form of energy, because the costs of disposing of the nuclear wastes and decommissioning the power plant after its short life is over are frequently ignored. But these activities are incredibly costly and present difficult issues of intergenerational

⁴⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.164/37, 8 September 1995, 34 I.L.M. 1542 (1995). Article 5(c) lists the "precautionary approach" among the principles that govern conservation and management of shared fish stocks, and Article 6 elaborates on this requirement in some detail, focusing on data collection and monitoring. Then, in Annex II, the Agreement identifies a specific procedure that must be used to control exploitation and monitor the effects of the management plan. For each harvested species, a "conservation" or "limit" reference point as well as a "management" or "target" reference must be determined. If stock populations go below the agreed-upon conservation/limit reference point, then "conservation and management action should be initiated to facilitate stock recovery" (Annex II(5)). Overfished stocks must be managed to ensure that they can recover to the level at which they can produce the maximum sustainable yield (Annex II(7)). The continued use of the maximum sustainable yield approach indicates that the Agreement has not broken free from the approaches that have led to the rapid decline in the world's fisheries, but the hope is that the conservation/limit reference points will lead to early warnings of trouble that will be taken more seriously.

⁴⁷ Another example of the reliance on the precautionary approach is found in Western Pacific Regional Fishery Management Council, *A 20-Year Report* 26 (1998), which states proudly that the Council has established "a precautionary management approach to fishery conservation and management" as evidenced by its establishment of a moratorium and then a limited-entry program "in response to the rapid entry of longline vessels into the Hawaii-based fleet."

equity as well as extraordinarily difficult choices regarding which region should bear the burdens of pollution so that other areas can benefit. It is crucial to establish realistic liability and compensation regimes so that those who suffer can collect from those who benefit.⁴⁸

The polluter-pays principle may have the effect of establishing a regime of strict liability in many circumstances. This approach appears to have been recognized as a principle of international law in situations involving hazardous activities as recognized in the *Trail Smelter* arbitration⁴⁹ and the *Corfu Channel* case.⁵⁰ The country conducting the risk-creating activity must provide compensation to the victims for their resulting injuries

Conclusion.

International NGOs are a new type of participant in international decisionmaking. Many have written about the slow decay of the sovereign state system that has dominated international law and relations during the past half-millennium, and certainly international NGOs have played a significant role in breaking down that system, and in decentralizing and opening up decisionmaking. We are likely to see a greater variety of NGOs and an even greater role for them in coming years.

⁴⁸ See generally Hunter, Salzman & Zaelke, *supra* note 1, at 108-22 and 382-85.

⁴⁹ Trail Smelter Arbitration, 3 R. Int'l Arb. Awards 1905, 1938 (1941).

⁵⁰ Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. Rep. 4.