Corporations and International Lawmaking

by

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ABSTRACT

Public international lawmaking is a multipartite process of communication wherein only States as authoritative decision-makers produce international law. However, commercial entities have long been active within the international legal order and employ international law to curtail the right of States to regulate at national levels. Evidence suggests that the international legal personality of corporations is undergoing further qualitative transformations. Corporations influence the State practice constitutive of custom and affirm, add detail to or challenge prevailing normative rules. The corporate role in filling lacunae where States are unable or unwilling to discharge their regulatory responsibility is apparent in the context of intergovernmental codes of conduct and private voluntary initiatives. Although the procedural law common to Conferences of the Parties indicates that a 'right of participation' is yet to emerge, ECOSOC-accredited non-State actors enjoy a legitimate expectation of admission. Furthermore, the modalities for their participation include the formal opportunity to make oral and written statements and to undertake informal activity. Corporations occupy an important role in subsequent treaty implementation as illustrated by the legal regime for climate change. Finally, corporations develop procedural law and substantive norms through selective resort to different enforcement models including national courts, diplomatic protection (including the WTO) and direct arbitral action (including NAFTA). The challenges of business engagement include identifying majority opinion, discerning commercial intent and managing confrontations with developing States or other non-State actors. Diversity and

evolution characterise the practice of UN secretariats and a one-size-fits-all approach is not currently feasible or desirable. Acknowledging commercial contributions more accurately reflects the negotiating process inherent in lawmaking and the role of States in mediating contested policy questions. Corporate contributions through, in parallel with or collaboratively with States can be consistent with democratic theory by enriching intergovernmental deliberations. However, they can only ever augment the underlying basis of international law: State consent.

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ABBREVIATIONS

ACC	American Chemical Council
ACCI	Australian Chamber of Commerce and Industry
ACP States	African Caribbean and Pacific States
AI	Amnesty International
AIG	Australian Industries Group
AIP	Apparel Industry Partnership
ANCOM	Andean Common Market
APELL	Awareness and Preparedness for Emergencies at the Local Level
API	American Petroleum Institute
APPI	Association for the Promotion and Protection of Foreign Investment
ASEAN	Association of South East Asian Nations
ATCA	Alien Tort Claims Act
BASD	Business Action for Sustainable Development
BCA	Business Council of Australia
BCIU	Business Council for International Understanding
BCNI	Business Council on National Issues
BCSE	Business Council for a Sustainable Energy
BCUN	Business Council for the United Nations
BGMEA	Bangladesh Garment Manufacturers and Exporters Association
BHF	Business Humanitarian Forum
BIA	Business Interest Associations
BIAC	Business and Industry Advisory Committee
BINGO	Business and Industry NGO
BIT	Bilateral Investment Treaties
BSA	Business Software Alliance
BSR	Business for Social Responsibility
CAER	Community Awareness and Emergency Response
CBD	Convention on Biological Diversity
CBI	Confederation of British Industry
CDM	Clean Development Mechanism
CEFIC	European Chemical Industry Council
CEN	Comite Europeen de la Normalisation
CENELEC	Comite Europeen de la Normalisation Electrotechnique
CEO	Corporate Europe Observatory
CEPAA	Council on Economic Priorities Accreditation Agency
CER	Corporate Environmental Reporting
CERES	Coalition for Environmentally Responsible Economies
CFC	Chloroflurocarbon
CIIME	Committee on International Investment and Multinational Enterprises
CMA	Chemical Manufacturers Association
COP	Conference of the Parties
CRT	Caux Roundtable
CSR	Corporate Social Responsibility
CWC	Chemical Weapons Convention
Doc	Document Number

DSU	Dispute Settlement Understanding
E & P Forum	Oil Industry International Exploration and Production Forum
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council of the UN
ECR	European Court Reporter
EEC	European Economic Community
EEEI	European Eco-Efficiency Initiative
EIA	Environmental Impact Assessment
EIAJ	Electronic Industry Association of Japan
EMAS	Eco-Management and Audit Scheme
EMS	Environmental Management System
EPZ	Export Processing Zones
ERT	European Roundtable of Industrialists
ESTRI	Electronic Standards for the Transfer of Regulatory Information
ETI	Ethical Trade Initiative
ETS	*European Treaty Series*
ETSI	European Telecommunications Standards Institute
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FIDIC	International Federation of Consulting Engineers
FSC	Forest Stewardship Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environmental Facility
Ghg	Protocol Greenhouse gas Protocol
GIIC	Global Information Infrastructure Commission
GRI	Global Reporting Initiative
GSDF	Global Sustainable Development Facility
HNS	Hazardous and Noxious Substances
IAEA	International Atomic Energy Association
IAF	International Accreditation Forum
IASC	International Accounting Standards Committee
IATA	International Air Transport Association
IBFAN	Infant Baby Food Action Network
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce
ICCA	International Council of Chemical Associations
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICIFI	International Council of Infant Formula Industries
ICME	International Council on Mining and the Environment
ICMM	International Council on Miming and Metals
ICOLP	Industry Cooperative for Ozone Layer Protection
ICS	International Chamber of Shipping

ICSID	International Convention for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IEC	International Electrotechnical Commission
IFC	International Finance Corporation
IFCS	Intergovernmental Forum on Chemical Safety
IFPMA	International Federation of Pharmaceutical Manufacturers Association
IIPA	International Intellectual Property Alliance
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
IMT	International Military Tribunal
Incoterms	International Commercial Terms
INPO	Institute of Nuclear Power Operators
Intertanko	International Association of Independent Tanker Owners
INTUG	International Telecommunications Users Group
IOE	International Organisation of Employers
IPC	Intellectual Property Committee
IPCC	Intergovernmental Panel on Climate Change
IPCS	International Programme on Chemical Safety
IPIECA	International Petroleum Industry Environmental Conservation Association
Iran US CTR	*Iran-United States Claims Tribunal Reports*
ISBA	International Seabed Authority
ISF	International Shipowners Federation
ITU	International Telecommunications Union
JI	Joint Implementation
Keidanren	Japan Federation of Economic Organisations
MAI	Multilateral Agreement on Investment
MIGA	Multilateral Investment Guarantee Agency
MSV	Management Systems Verification
NAFTA	North American Free Trade Agreement
TBT	Technical Barriers to Trade
NAM	National Association of Manufacturers
NBI	National Business Initiative
NCP	National Contact Point
NGO	Non-governmental organisation
NIEO	New International Economic Order
OAS	Organisation of American States
OCIMF	Oil Companies International Maritime Forum
OECD	Organisation for Economic Cooperation and Development
OFII	Organisation for International Investment
OHCHR	Office of the High Commissioner for Human Rights
OJEC	Official Journal of the European Community
PCIJ	Permanent Court of International Justice

PhRMA	Pharmaceutical Research and Manufacturers of America
PIC	Prior Informed Consent
PMC	Private Military Companies
POP's	Persistent Organic Pollutants
PPM	Process and Production Methods
PSI	Pre-shipment Inspection Agencies
PWBLF	Prince of Wales Business Leaders Forum
SAGE	Strategic Advisory Group on the Environment
SC	Security Council
SCCI	Sialkot Chamber of Commerce and Industry
SFI	Sustainable Forestry Initiative
SIA	Semi-conductor Industry Association
SME	Small and Medium Sized Enterprises
TABD	Transatlantic Business Dialogue
TBR	Trade Barriers Regulation
TED's	Turtle Excluder Devices
TRIPs	Trade-Related Aspects of Intellectual Property Rights
TUAC	Trade Union Advisory Committee
UCP	Uniform Customs and Practice for Documentary Credits
UCSI	US Coalition of Service Industries
UN	United Nations
UN DPI	UN Department of Public Information
UN DTCI	UN Division on Transnational Corporations and Investment
UNCCGC	UN Compensation Commission Governing Council
UNCED	UN Conference and Environment and Development
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
UNCSD	UN Commission on Sustainable Development
UNCTAD	UN Conference on Trade and Development
UNCTC	UN Centre on Transnational Corporations
UNDP	UN Development Programme
UNECE	UN Economic Commission for Europe
UNEP	UN Environment Programme
UNESCO	UN Educational Scientific and Cultural Organisation
UNFCCC	UN Framework Convention on Climate Change
UNFIP	UN Fund for International Partnership
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNHRC	UN Human Rights Committee
UNICE	Union of Industrial and Employers Confederations of Europe
UNICEF	UN International Children's Fund
UNIDO	UN International Development Organisation
UNTCMD	UN Transnational Corporations and Management Division
UNTS	*UN Treaty Series*
US BRT	US Business Roundtable
USCIB	US Council for International Business
USCIT	US Court of International Trade
USTR	US Trade Representative
WANO	World Association of Nuclear Operators
WBCSD	World Business Council for Sustainable Development

WCO	World Customs Organisation
WEF	World Economic Forum
WFSGI	World Federation of Sporting Goods Industry
WHO	World Health Organisation
WICE	World Industry Council for the Environment
WIPO	World Intellectual Property Organisation
WITSA	World Information Technology and Services Alliance
WRI	World Resources Institute
WSC	World Semiconductor Council
WSSN	World Standards Services Network
WTO	World Trade Organisation
WWF	World Wildlife Fund

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Introduction

This thesis argues that transnational corporations participate within various international legal processes which become binding upon States as international law. For a considerable period corporations acting individually and collectively have contributed to the creation, implementation and enforcement of orthodox as well as novel sources of international law. Corporations act through, in joint collaboration with, in parallel, competitively and entirely independently of intergovernmental mediums. The sources of international law examined in this thesis are not assessed by reference to their principal author: States. The principal concern of the thesis lies with the procedural issues associated with the participatory claims of corporations rather than questions of corporate responsibility or the substantive content of international law. Corporations encourage regulatory competition between States since the particularity of national law can provide a competitive advantage within the international marketplace. They also encourage harmonisation of different national legal systems to facilitate cross-border exchange, thereby furthering international law's claim to universality. The thesis examines whether there has been a qualitative transformation of the corporate role within the international legal order and in what ways the methods, motivations and regulatory demands of corporations augments the notion of State consent as the underlying foundation of international law. This Chapter first outlines the content and methodology of the thesis and clarifies the use of terminology. It then situates the thesis within a broader theoretical landscape and identifies the principal themes highlighted by this work.

1. Structure and Methodology of the Thesis

This thesis examines commercial contributions to international lawmaking. Lawmaking is a bargaining process involving communication between several parties. 'Lawmakers' are particular actors possessing universally recognisable authority and competence who formulate in accordance with pre-determined procedures a body of rules which are enforceable against all. 'Law' is the product of dynamic feedback loops where multiple and simultaneous interactions individually and collectively modify conditions for further interaction.[1] The process-orientated approach utilised by this thesis principally focuses upon the procedures (both formal and informal) for producing international law, the identity of interested actors and their specific motivations. To avoid oversimplifying a complex and interactive process, the role and influence of other non-State actors will be noted where relevant.

The Introduction contextualises corporate participation within several interrelated theoretical paradigms: economics, regulation and international law. It considers the implications of corporate contributions to international lawmaking for the subject-object distinction and the position of corporations within the international legal order. The legal personality of corporations at the national and international level already contemplates the performance of activities which have legal consequences for others. Furthermore, contemporary efforts to improve European regulation may herald changes for

[1] Teubner, G., Law as an Autopoietic System, Blackwell Publishers, Oxford, 1993.

the international lawmaking process. Examples familiar to international law illustrate how firms invoke international law to circumscribe the right of States to regulate at the national level. Although regulation ordinarily conflicts with market approaches, politically-organised business groups argue that one responsibility of States is to establish an enabling framework which facilitates market operations.

Chapter One presents an historical account of the corporate position within the international legal order. Particular reference is made to the role of chartered trading companies in the seventeenth and eighteenth centuries and the evolutionary relationship between corporations and the United Nations system, the latter by resort to official UN documents. The Chapter draws upon the opinions of those seven secretariat officials from the UN, Specialised Agencies and other treaty-based institutions (66 officials solicited) who responded to a questionnaire or were interviewed by telephone (see Annex 8). These individuals were the designated NGO focal points, public relations officers or officials responsible for private sector relations and are particularly well-placed to observe the secretariat practices which have emerged as a consequence of engagement with the private sector. The organisational rules of procedure for intergovernmental organisations including the UN General Assembly, the Security Council, the Specialised Agencies and several human rights institutions are also examined (extracted in part in Annex 1).

Chapter Two examines the extent to which corporations influence the State practice constitutive of customary international law. It also considers the

corporate role in the formulation, implementation and monitoring of intergovernmental codes of conduct and asks whether voluntary corporate initiatives represent novel sources of international law. Reference is made to the intentions of individual firms who participated in the Energy and Biodiversity Initiative to influence both regulatory development and market conditions. This material draws upon responses to a questionnaire which have been discussed by this author in previously published work.

Chapter Three analyses the impacts of commercial interests upon the formation and implementation of treaties. A case study examines international regulation with respect to ozone layer depletion and climate change. This subject matter illustrates the diversity of business interests, the evolution in commercial strategies and the respective merits of different modalities for corporate participation. Empirical data derives from the author's attendance over a two-week period at the Ninth Conference of the Parties to the UN Framework Convention on Climate Change in Milan during December 2003. Interviews and discussions were conducted with corporate officers from individual firms, politically-organised business groups and trade associations (see Annex 7). Modalities for corporate participation during plenary meetings of the Conference of the whole and meetings of two subsidiary bodies (the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation) were observed and contact groups, roundtables, panel discussions, 'side-events', BINGO meetings and secretariat briefings attended. The Chapter also considers the extent to which NGOs shape the terms of their participation at international conferences convened under UN

auspices, World Summits and Special Sessions of the General Assembly and the relevant criteria for accreditation (see Annex 2). The possible existence and scope of an emergent right of NGO participation is discussed in light of the procedural law common to several illustrative Conferences of the Parties. The analysis includes both primary rules (the enabling treaty provision which contemplates a Conference of the Parties) and secondary rules (the procedural rules adopted by States and decisions of governing bodies with respect to NGO participation at the conference) (see Annexes 3 & 4).

Chapter Four evaluates the corporate role in enforcing international law against States and other firms within the context of different models including resort to national courts, diplomatic protection before the International Court of Justice and the operational framework of an international organisation. Two dispute settlement mechanisms are of particular interest. The North American Free Trade Agreement illustrates resort to the direct arbitral model at the regional level and commercial impacts upon the substantive content of international law. This is contrasted with the modalities for corporate participation before the World Trade Organisation including the submission of amicus curiae briefs. Empirical information derives from the expressed intentions of a trade association, the observations of a secretariat official who responded to a questionnaire, the response of States as expressed in official documents and academic commentary.

The Concluding Chapter assesses commercial contributions to international lawmaking, considers the implications for regulatory theory and the sources of

international law and considers whether there has been a qualitative transformation of the corporate role within the international legal order. It analyses the nature of the participatory right asserted by NGOs and how commercial contributions to international lawmaking may evidence greater participatory democracy within the international system. Contemporary developments at the European level may herald changes to our appreciation of how corporate contributions augment the notion of State consent as the foundation for international law.

2. Use of Terminology and Additional Sources.

Corporations together with public interest groups, trade unions, consumer groups and others collectively comprise 'non-State actors' and members of 'transnational civil society'. More commonly they are classified as non-governmental organisations (NGOs). International law offers no settled definition of 'NGO' or indeed of 'corporation'. NGOs may be defined as groups of individuals representing elements of public opinion, established under national law, having a permanent organisational or governance structure (ideally democratic and transparent) and possessing specialist expertise or competence.[2] Their most important attribute is that they are neither affiliated with nor under the direction of any State notwithstanding that they are established under national law and therefore subject to the jurisdiction of their home State. Corporations are typically distinguished from NGOs on account of their profit-making nature.

[2] Eg Princen T. & Finger M. (Eds), Environmental NGOs in World Politics, Routledge Publishers, London, 1994, 6. ECOSOC Resolution 1996/31 also identifies the attributes of NGOs.

The 'private sector' includes individual, for-profit commercial enterprises (including small and medium sized enterprises and transnational corporations), business associations and coalitions (chambers of commerce, employers organisations, trade and industry associations), business-led groups promoting corporate citizenship and corporate philanthropic foundations.[3] To this list may be added corporate-funded research foundations, consultants, corporate law or accounting firms, bar associations and lobbying agencies. A 'transnational' or 'multinational' corporation may be defined as 'a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common management strategy'.[4] Subsidiaries are located within several host States subject to the direction of a parent enterprise located within a home State.[5] Transnational corporations are not international or intergovernmental organisations whose proper law is international.[6] To emphasize distinctions between commercial decision-making, lawmaking and governance, this thesis adopts the definition of corporations as decision-making centres located within one State and having operations in one or more others.[7]

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[3] UN Secretary-General, Cooperation between the UN and all relevant partners, in particular the private sector, UN Doc A/56/323 (2001), para 6 & Annex 1.
[4] Joseph S., 'Taming the Leviathan: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands Int L R* 171, 172.
[5] Doremus P.N. et al, The Myth of the Global Corporation, Princeton University Press, Princeton, 1998.
[6] Higgins R., 'A Multinational Corporation or an International Organisation' in Morgan R. et al (Eds), New Diplomacy in the Post-Cold War World: Essays for Susan Strange, Macmillan Press, London, 1993, 182, 187.
[7] Institute de Droit International, Resolution 3: Multinational Enterprises, para 1, (1978) 57(2) *Annuaire de L'Institut de Droit International Session d'Oslo 1977*, 339.

This thesis uses the terms 'firm', 'corporation', 'enterprise', 'business' and 'industry' interchangeably. 'NGO' is generally used in contradistinction to corporations to refer to public interest advocacy organisations unless the specific context indicates that the topic under consideration (particularly Chapter Three) applies to all non-State entities.

A distinction is made between formal sources of international law and other evidentiary materials of a historical or explanatory value only.[8] This point is relevant since the latter can emanate from a variety of authors irrespective of their formal status but are essential ingredients for the international lawmaking process. Contributions by non-State actors are indirect since they need final legitimation by States before becoming international law.[9] Corporate documents, for example statements, position papers, legal submissions and press releases must be treated with scepticism as primary materials since they state officially agreed positions and may not reflect minority opinions within the business community. Their content is also directed at a specific audience: statements to shareholders for example will differ from those distributed at intergovernmental workshops. They are therefore corroborated or contradicted with personal opinions, intergovernmental documents, NGO perspectives and academic commentary where possible. Such materials usefully state best commercial practice or the regulatory conditions preferred by firms. They are accordingly part of the cumulative process which may result in international law.

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[8] Eg Fitzmaurice G., 'Some Problems Regarding the Formal Sources of International Law' (1958) *Symbolae Verzijl* 153.

[9] Van Hoof G.J.H., Rethinking the Sources of International Law, Kluwer Law and Taxation Publishers, Deventer 1983, 63, 283.

3. States, Non-State Actors and International Lawmaking.

Law classically derives from the will and command of sovereigns as implemented through the institution of government.[10] Similarly, 'the rules of law binding upon States...emanates from their own free will'.[11] The classic departure point for a positivist approach to the sources of international law is Article 38(1) of the Statute of the International Court of Justice. International conventions or treaties are expressly recognised by States, general practice is created and accepted as customary international law by them and general principles of law are those recognised by civilised nations. Article 38(1) says little about the actual process for creating international law: it could be a non-exhaustive list of international legal sources or a filtering mechanism through which any material must pass before it constitutes a source of international law. Recognition by two States that certain rules are legally binding is insufficient for those rules to constitute general international law[12] which is telling given that bilateral treaties are the very basis for foreign direct investment law. The United Nations Charter as the closest approximation to a constitutional instrument[13] also assumes State-centrality in lawmaking and non-State actors only enjoy consultative status in the economic and social field.[14]

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[10] Austin J., The Province of Jurisprudence Determined, Weidenfeld & Nicolson, London, 1965, 133-4.
[11] *SS Lotus (France v Turkey)* (1927) *PCIJ Ser A* No 10, 18.
[12] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (1986) *ICJ Rep* 14, 97.
[13] Kelsen H., Principles of International Law, Rinehart Publishers, Colorado, 2nd Ed, 1966, 437.
[14] Art 71, UN Charter.

International legal theory similarly isolates State activity and ignores the contributions of other actors. Corporations in particular are 'invisible'.[15] This need not be surprising: corporations are by definition creatures of national law, their commercial operations are territorially focused and formulating international policy is strictly beyond their profit-making remit. Furthermore, the permissibility and form by which capitalist actors transact with States turns upon the latter's particular ideological position: the absence of intergovernmental consensus is therefore an obstacle to the full development of corporate legal personality at the international level. However, the de jure status of corporations sits uneasily with their significant de facto impact. Corporations make many positive contributions such as improving living standards but also have malign impacts in terms of abusing market position, environmental pollution and undermining labour interests.[16]

As a State-centric discipline international law displays a 'self-protecting myopia' which keeps other entities at the periphery and risks obsolescence.[17] Continued exclusion renders international law 'amorphous and unhelpful'.[18] International law may become the 'guardian of a museum which only a few will enter while the mainstream of life flows past outside its windows'.[19] At

[15] Johns F., 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 *Melb Uni LR* 893, 902, 922.
[16] The Economist, 'The World's View of Multinationals', 29 Jan–4 Feb 2000, 21.
[17] Strange S., 'Big Business and the State' in Eden L. & Potter E.H. (Eds), Multinationals in the Global Political Economy, MacMillan Press Ltd, London, 1993, 101, 102-3; Alston P., 'The Myopia of the Handmaidens: International Lawyers and Globalisation' (1997) 8 *EJIL* 435.
[18] Jenks C.W., 'Multinational Entities in the Law of Nations' in Friedmann W., Henkin L. & Lissitzyn O. (Eds), Transnational Law in a Changing Society: Essays in Honour of Phillip C. Jessup, Columbia University Press, New York, 1972, 70, 76, 82.
[19] Lachs M., 'Law in the World of Today' in Bos A. & Siblesz H. (Eds), Realism in Law-making: Essays on International Law in Honour of Willem Riphagen, Martinus Nijhoff Publishers, Dordrecht, 1986, 101, 110.

worst, international law will become ineffective and inconsequential[20], potentially substituted by a 'transnational law' which is more receptive to commercial interests.[21] 'International' could therefore describe interactions between States whereas 'transnational' refers to cross-border transactions also involving non-State actors.[22] The more social policy-orientated New Haven school accepts that corporations are independently powerful actors but considers that they lack the competence to make international law.[23] Contemporary adherents are prepared to expand the category of 'authoritative decision-makers' such that the demands of other participants may be legally 'influential'.[24] International liberal theory, which posits individuals and transnational groups as primary actors within an international system composed of disaggregated States, limits the impact of non-State actors to that of 'explanatory relevance'.[25]

Several calls have been made for international law to abandon sacrosanct rules rooted in the past and adapt itself to newly emergent social conditions.[26] The number of non-State actors has grown exponentially to outnumber States: the 41 NGOs granted consultative status with the UN in 1948 grew to 377 by 1968 and to 2088 by 2001. Of these approximately 200 were business, trade,

[20] McDougal M.S., 'International Law, Power and Policy: A Contemporary Conception (1953-I) 82 *Hague Recueil* 137, 162.
[21] Jessup P.C., Transnational Law, Yale University Press, New Haven, 1956, 2, 106.
[22] Risse-Kappen T., 'Introduction' in Risse-Kappen T. (Ed), Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions, Cambridge University Press, Cambridge, 1995, 3.
[23] McDougal M., Lasswell H. & Reisman M., 'The World Constitutive Process of Authoritative Decision' (1966) 19 *J of Legal Education* 253; Higgins R., Problems and Process: International Law and How We Use It, Clarendon Press, Oxford, 1994, 2, 4, 50.
[24] Reisman M., 'Designing and Managing the Future of the State' (1997) 8 *EJIL* 409.
[25] Slaughter A.-M., Tulumello A.S., & Wood S., 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) *AJIL* 367, 383.
[26] Eg *South West Africa Cases* (1966) *ICJ Rep* 6, para 49; *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* (1970) *ICJ Rep* 3, 37.

professional or industry- related associations. Commercial activity from above the State and the emergence of transnational forces from below may create a restructured international legal order.[27] Acknowledging that NGOs play a 'vital role in the shaping and implementation of participatory democracy', Agenda 21 called upon intergovernmental institutions to establish procedures for including NGOs 'at all levels from policy-making and decision-making to implementation'.[28] Several States have moreover agreed to promote access to information, public participation in decision-making and access to justice in the context of international environmental decision-making.[29] In short, States have indicated a willingness to open up intergovernmental process to participation by non-State actors in recognition of their distinctive contributions.

A possible re-conceptualisation of international society warrants a more accurate account of international lawmaking. Privatisation enables companies to execute formerly public functions such as peace-keeping, jail administration, refugee processing, immigration control, deportation, police enforcement, health care and education. Is it somehow relevant that State officials sign agreements in their capacity as directors of State enterprises ?[30] What significance is to be ascribed to the fact that the nuclear and insurance industries participated in intergovernmental symposia or that private law firms,

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[27] Falk R., 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 *Trans'l L & Contemp Prob* 333.

[28] Chapter 27.1 & 27.6, Agenda 21, Report on UN Conference on Environment and Development, UN Doc A/CONF.151/26 (1992), Vol 3.

[29] Art 3(7), 1999 UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters (the Aarhus Convention) 38 *ILM* 517.

[30] Cassese A. & Weiler J.H.H. (Eds), Change and Stability in International Law-Making, Walter de Gruyter, Berlin, 1988, 15, 24.

corporations and financial institutions are ranked among the most frequent users of the UN Treaty Series ?[31]

4. 'Better Lawmaking' within Europe.

The panalopy of issues relevant to this thesis is usefully illustrated in current attempts to improve the quality, effectiveness and legitmacy of rule-making within the European Community (EC). Lawmaking is becoming more transparent to interested parties.[32] The European Commission seeks a more accessible, reliable and user-friendly body of legislation.[33] It has become evident that 'poor-quality regulation is hindering economic development and undermining the quest for full employment by imposing unnecesary compliance burdens on business, and especially small businesses'.[34] The Commission therefore hopes to ensure legal certainty and reduce compliance costs for companies and pubic authorities alike.[35] Economic impact assessments will measure effects upon economic growth and competitveness.[36]

The EC acknowledges the right of citizens to form associations for pursuing common purposes.[37] The EC has a long tradition of consulting with outside interests when formulating policy and has identified the desired attributes of

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[31] UN Secretary-General, United Nations Decade of International Law, UN Doc A/54/362 (1999), paras 80, 148, 209, 277 & fn 16.
[32] EC Report to the European Council, Better Lawmaking 2001, COM(2001) 728 Final, 11.
[33] EC Communication, Updating and simplifying the Community acquis, COM(2003) 71 Final, 11.
[34] European Economic and Social Committee, Opinion on Simplification, CES 398/2003, para 3.1.
[35] EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.
[36] EC Communication on Impact Assessment, COM(2002) 276 Final, 15.
[37] Art 12, EU Charter of Fundamental Rights of the European Union (2000) OJEC 364, 8.

so-called 'civil society organisations'.[38] Although it has ostensibly rejected an accreditation system [39], organisations wishing to contribute to policy development must be representative, transparent and accountable. Additional considerations include their structure, membership and track record of prior participation.[40] The EC has also developed eligibility criteria for organisations wishing to engage in 'civil dialogue'.[41]

Significantly, Articles 138 and 139 of the EC Treaty already require the Commission to consult management and labour in preparing proposals within the social policy field. Employers and workers organisations have a recognised right to conclude collective agreements which may subsequently be adopted as legislation.[42] This negotiating process has been equated to participation by the European Parliament in other forms of Community lawmaking.[43] Delegating law-making authority to representatives of directly affected parties is one means of solving the 'democratic deficit' problems associated with public institutions.[44] However, States are under a duty to verify that management and labour representatives are sufficiently representative. The European Court of Justice has also relaxed its locus standi

[38] EC Communication, Promoting the Role of Voluntary Organisations and Foundations in Europe, COM/97/0241 (1997).
[39] EC Communication, An open and structured dialogue between the Commission and Special Interest Groups, (1993) OJEC C63.
[40] Commission Discussion Paper, The Commission and NGOs: Building a Stronger Partnership, COM(2000) 11 Final, 3, 24.
[41] European Economic and Social Committee, Opinion on European Governance-A White Paper, CES 357/2002.
[42] Art 28, EU Charter of Fundamental Rights of the European Union (2000) OJEC 364, 8.
[43] Case T-135/96 *UEAPME v Council* [1998] *ECR* II-2335, para 89.
[44] Scott J. & Trubek D.M., 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8(1) *European LJ* 1, 8.

requirements where these social partners have participated in processes leading to the adoption of the contested decision.[45]

NGOs initiated efforts by the EC to render consultative processes more consistent.[46] The EC recognised the need for a coherent approach which maintains and builds upon existing good practice.[47] It wishes to reduce the risk that policy-makers listen to only one side of the argument or that particular groups gain privileged access.[48] Administrative measures will also be introduced to process complaints where States fail to correctly transpose Community law into national legislation.[49]

As for the final product, the Commission will choose between a range of regulatory devices including directives, coregulation, self-regulation and voluntary sectoral agreements.[50] Several will not be available where fundamental rights or important political options are at issue or where rules must be uniformly applied within all States.[51] The Commission considers it preferable not to make a legislative proposal where voluntary industry agreements already exist but does not rule out the prospect where they prove insufficient or inefficient. This is comparable to regulatory techniques in the US which include review-and-comment, regulatory notification, regulatory

[45] Case T-122/96 *FEDEROLIO v Commission* [1997] *ECR* II-1559.
[46] EC Communication, Consultation Document. Towards a reinforced culture of consultation and dialogue-proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 277 Final, 2-3.
[47] EC Communication, European Governance: Better Lawmaking, COM(2002) 275 Final, 3.
[48] EC Commission, European Governance-A White Paper, COM(2001) 428 Final, 17, 27.
[49] EC Communication, Relations with the Complainant in respect of Infringements of Community Law, COM(2002) 141 Final.
[50] EC Communication, Action Plan 'Simplifying and improving the Regulatory Environment', COM (2002) 278 Final, 7, 11.
[51] EU Council, Legislative Acts and Other Instruments: Interinstitutional Agreement on Better Lawmaking, 12175/03, para 17.

negotiation and citizens advisory boards.[52] For example, regulatory negotiation envisages States resolving compliance issues through negotiation with affected parties.[53] In light of regulatory developments at the regional level, one may wonder why the international lawmaking process continues to exclude non-State actors.

5. Arguments for Continued Exclusion and its Consequences.

Under international law States remain the principal actors in the international legal order. The international legal personality of corporations is derivative, limited and dependent upon acceptance in contrast to States which have original and objective legal personality. Acceptance by States is a precondition for non-State action on the international plane.[54] States enjoy the full array of rights inherent in Statehood including the capacity to regulate inferior objects. Private actors are the consumers of law and States the sole producers.[55] This may be true within the vertically-structured State where governments are the most authoritative actors. However, within the horizontally-structured international legal order States are just one among a plurality of autonomous entities. Indeed, non-State actors are noteworthy on the international plane for linking transborder interests which are constitutive of States. The subjects of international law need not be identical with respect to the nature of their rights

[52] EC Secretariat, Public Consultation by Agencies : The American Experience, SG/AS D(2000).
[53] *Negotiated Rule Making Act* 5 USC 561 (Supp IV 1992).
[54] EC, Convention on the Recognition of the Legal Personality of International NGOs (1986) *ETS* No 124.
[55] Bos M., 'The Recognised Manifestations of International law: A New Theory of 'Sources'' (1977) 20 *GYIL* 9, 11-3.

or extent of their duties.[56] Indeed, continued adherence to the subject-object distinction prevents international society from further self-ordering and actualising its own possibilities.[57] Corporate contributions to international law make the subject-object distinction less valid and important.[58] Any pretensions to sovereign supremacy must also be abandoned.[59]

Admitting non-State actors into international lawmaking and elevating their status to that of subjects of international law would be subversive of the traditional international legal order. One could go further and challenge the credentials of corporations to participate in political processes such as lawmaking. For example, it could be argued that corporate participation lacks legitimacy. The democratic or liberal political model requires representation by salient constituents within open, transparent and consensus-based processes.[60] The democratic notion of governance with the consent of the governed is not wholly reflected in commercial decision-making given the separation of ownership from control. However corporations have other sources of legitimacy.[61] This is assessable in terms of origin (established under national law), function (produce goods and services to satisfy market demand) or purpose (reward for effort). Legitimacy may be self-validating

[56] ICJ, *Advisory Opinion concerning Certain Expenses of the UN* (1962) *ICJ Rep* 151, 168.
[57] Allot P., Eunomia: New Order for a New World, Oxford University Press, Oxford, 1990, paras 16.6 & 17.78.
[58] Voitovich S.A., International Economic Organisations in the International Legal Process, Martinus Nijhoff Publishers, Dordrecht, 1995, 4-5; Angelo H.G., 'Multinational Corporate Enterprises: Some Legal and Policy Aspects of a Modern Socio-Economic Phenomenon' (1968-III) 125 *Recueil des Cours* 443, 481, 524.
[59] Spiro P.J., 'Globalisation, International Law and the Academy' (2000) 32 *Int Law and Politics* 567, 573-5.
[60] Eisenberg M.A., 'Corporate Legitimacy, Conduct and Governance–Two Models of the Corporation' (1983) 17 *Creighton LR* 1.
[61] Buxbaum R.M., 'Corporate Legitimacy, Economic Theory and Legal Doctrine' (1984) 45 *Ohio State LJ* 514, 520-5; Schweitz M.L., 'NGO Participation in International Governance: The Question of Legitimacy' (1995) 89 *ASIL Proceed* 415.

(self-contained contractual regimes) or derived by association with common values (the sanctity of private property or entrepreneurial freedom) or popular and cultural perceptions. Finally, corporate legitimacy may be organisational (representing and accountable to a particular constituency) or operational (efficiently adding value to raw materials).

An additional concern is that if others were able to produce it, the normative power of international law would lose its special binding force and cease to function as an ordering device.[62] Rules enjoy authority because they are recognised as such.[63] Authority can also be derived from inherent rule characteristics: determinacy, clarity, specificity and universal application. Private associations which do not possess any formal lawmaking powers however may formulate instruments which are formally 'non-binding' for the purposes of plugging legal gaps which are not opposable against other actors.[64] States exert behavioural control by denying admission to the formal lawmaking process, although outsiders are not precluded from informal attempts to influence decision-making. Lawmakers are 'captured' when they adopt policies which would not otherwise be chosen by an informed polity free from organisational costs.[65] It is doubly detrimental for the authority of law if non-State entities are able to produce it (albeit acting through the medium of States) and are unaccountable for that influence. Special interest manipulation

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[62] Danilenko G.M., Law-making in the International Community, Martinus Nijhoff Publishers, Dordrecht, 1993, 5, 16-7.
[63] Franck T.M., 'Legitimacy in the International System' (1988) 82(4) *AJIL* 705, 759.
[64] Cp Institut de Droit International: Sands P., 'Treaty, Custom and the Cross-Fertilisation of International Law' (1998) 88(1) *Yale HR & Dev LJ* 85, 96.
[65] Levine M. & Forrence J., 'Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis' (1990) 6 *J L Econ & Org'n* 167, 178.

can be addressed by imposing greater discipline upon lawmakers, increasing decision-making transparency or providing access on specified terms.

Indeed, the classical trichotomy of the international legal order – international law, national law and conflicts of laws principles – cannot wholly control corporate behaviour.[66] The dualist doctrine suggests that the national and international legal systems are separate and distinct.[67] However, corporations operate in multiple legal sub-systems conveniently labelled public (the national laws of the home and host States and international law) and private (contractual law, internal organisational law and industry practices). Transnational commercial operations are not territorially limited. Unilateral attempts to apply national law extraterritorially[68] may encounter resistance by other States in the form of 'blocking' legislation to nullify its impact.[69] Competing jurisdictional authority between home and host States calls into question the legitimacy of national regulatory competence. Corporations react by ensuring de facto compliance with national law in all jurisdictions or by initiating whatever processes are available to them for resolving public policy conflicts.[70] Since multilateral regimes constrain freedom of action for national governments harmonising legal and policy differences has become the second-

[66] Jenks C.W., Law in the World Community, Longmans Publishers, London, 1967, 49-50.
[67] Eg Art 27, Vienna Convention on the Law of Treaties (1969) 1155 *UNTS* 331.
[68] Cp *Hartford Fire Insurance Co & Ors v California & Ors* 125 *L Ed* 2d 612 (SC 1993) (antitrust); *Environmental Defense Fund v Massey* 32 *ILM* 505 (1993) (CA DC) (environmental impact statements); *EEOC v Arabian American Oil Co* 499 *US* 244 (1991) (labour legislation).
[69] Eg EC, Council Regulation 2271/96 Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country 36 *ILM* 125 (1997).
[70] OECD, Minimising Conflicting Requirements: Approaches of 'Moderation and Restraint', Paris, 1987, 9-12.

best solution.[71] The contemporary patchwork of national legal systems imposes different and conflicting legal requirements upon corporations which they are free to circumvent or exploit to their own advantage.[72]

Corporations are strategically-situated actors who can choose to adapt their behaviour to existing patterns of authority or to reconfigure those structures.[73] By establishing parallel rules, institutions and enforcement mechanisms, private authority can complement, conflict with or substitute for State authority.[74] For example, the 'closed circuits' of private contracting can interact with or bypass an organised public order.[75] Alternatively, States and corporations undertake parallel activities to regulate transactions subject to private international law.[76] Commercial responses to regulation tend towards either inertia (minimising impacts by circumventing or avoiding its application) or dynamism (identifying novel market opportunities such as deriving benefits from regulatory arbitrage).[77] States become stronger or weaker depending upon whether they remain principal actors or mere

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[71] Bondzi-Simpson P.E., Legal Relationships between Transnational Corporations and Host States, Quorum Books, Connecticut, 1990, 118.
[72] Preston L.E. & Windsor D., The Rules of the Game in the Global Economy: Policy Regimes for International Business, Kluwer Academic Publishers, Boston, 2nd Ed, 1997.
[73] Cerny P.G., 'Reconstructing the Political in a Globalising World: States, Institutions, Actors and Governance' in Buelens F. (Ed), Globalisation and the Nation State, Edward Elgar Publishing Ltd, Cheltenham, 1999, 89, 118.
[74] Cutler A.C., Haufler V. & Porter T. (Eds), Private Authority and International Affairs, SUNY Press, New York, 1999.
[75] Teubner G., ''Global Bukowina': Legal Pluralism in the World Society' in Teubner G. (Ed), Global Law without a State, Dartmouth Publishing Co Ltd, Aldershot, 1997, 3, 16-17.
[76] Cp ICC, The ICC Model International Sales Contract, Paris, 1997 & UN Convention on Contracts for the International Sale of Goods 19 *ILM* 668 (1980); ICC, Uniform Customs and Practices on Documentary Credits, ICC Pub No 500, Paris, 1994 & UN Convention on Independent Guarantees and Stand-by Letters of Credit 35 *ILM* 735 (1996).
[77] Matthews D. & Pickering J.F., 'Business strategy and evolving rules in the Single European Market' in Higgott R.A., Underhill G.R.D. & Bieler A., Non-State Actors and Authority in the Global System, Routledge, London, 2000, 107, 107-8.

corporate agents.[78] For example, international legal rules on corporate nationality are circumvented or rendered inaccurate by international production networks, joint venture arrangements and inter-corporate strategic alliances.[79] Abandoning the rule in recognition of reality would entail denationalising or detaching transnational corporations from any one particular State.[80]

Corporations express industry opinions free from any national sentiment by forming business NGOs (BINGOs). Corporate contributions to international lawmaking are frequently channelled through various international industry or trade organisations, corporate coalitions or business interest associations (BIAs).[81] Politically-organised business groups could be characterised as the institutional expression of corporate legal personality at the international level. Their principal functions are information gathering and dissemination, informing members of developments and identifying common industry perspectives. Although not the topic of this thesis, it may be observed that politically organised business groups also contribute to developing private international law.[82] BINGOs may be permanent or ad hoc, informal or institutionalised, national, regional or international, single-issue, multi-issue or cross-sectoral, broadly or narrowly representative and involved in routine government activity or limited to long-term strategic planning. Their methodology includes lobbying, technical assistance to legislators or firms,

[78] Kingsbury B., 'Whose International Law? Sovereignty and Non-State Groups' (1994) *ASIL Proceed* 88.
[79] UN Conference on Trade and Development (UNCTAD), World Investment Report: Transnational Corporations and Integrated International Production, New York, 1993.
[80] Eg EC, Regulation No 2137/85 (1985) on European Economic Interest Groupings; EC, Regulation No 2157/2001 on the Statute of a European Company (2001) *OJEC* IL 291/1.
[81] Greenwood J. & Jacek H.,(Eds), Organised Business and the New Global Order, MacMillan Press Ltd, Hampshire, 2000.
[82] USCIB, Letter to Hague Delegates Regarding the Draft Convention on Jurisdiction and the Enforcement of Foreign Judgments, New York, 2001.

personnel exchange with governments, commenting on proposed measures within position papers, generating ideas, agenda-setting, contributing to public debates and initiating legal proceedings.

BINGOs may be interlinked with other business groups and through them to intergovernmental organisations. For example, the US Council for International Business is the American affiliate to the International Chamber of Commerce (ICC) which enjoys consultative status with the United Nations (UN), to the Business and Industry Advisory Committee which is affiliated to the Organisation for Economic Cooperation and Development and to the International Organisation of Employers which co-ordinates employers groups within the International Labour Organisation. Business alliances with slightly different configurations and interests are formed and dissolved with little effort. For example, the World Business Council for Sustainable Development was the product of a merger between the ICC's World Industry Council for the Environment and the Business Council for Sustainable Development in anticipation of the 1992 UN Conference on Environment and Development. The TransAtlantic Business Dialogue is an informal business network composed of corporate officers from US and European corporations and the Caux Roundtable is the equivalent but with Japanese membership.

The credibility of BINGOs derives from the collective expression of business opinion and the technical expertise of its membership. They must accordingly be appropriately mandated and the need for consensus may hamper the articulation of a coherent or strong commercial voice. BINGOs are convenient

vehicles for small and medium-sized enterprises although they can preserve anonymity for dominant market players. Corporations are not bound by the positions espoused by an industry association and can co-operate with other like-minded firms through a multiplicity of organisations on distinct legal issues. Notwithstanding the emergence of BINGOs and their claims to representivity it still remains to be seen in what ways corporations contribute to international lawmaking.

6. The Right of States to Regulate and Attributes of Corporate Legal Personality.

International lawmaking is a sovereign attribute par excellence. It has been suggested that it is not legal personality per se which renders a particular function 'international' but rather the nature of the function which confers international legal personality.[83] However, States are not the only actors which 'make' international law. Intergovernmental organisations as State constructs can independently espouse international claims against non-Member States.[84] Furthermore, the exercise of lawmaking power is not preconditioned by full legal personality.[85] Notwithstanding their lawmaking capacity, international organisations 'do not, unlike States, possess a general competence'.[86] Non-governmental organisations (NGOs) perform the functions of standard-

[83] Lador-Lederer J.J., International Non-governmental Organisations and Economic Entities: A Study in Autonomous Organisation and Jus Gentium, A.W. Sythoff Publishers, Leyden, 1963, 380.
[84] Higgins R., The Development of International Law through the Political Organs of the United Nations, Oxford University Press, London, 1963; ICJ, *Advisory Opinion on Reparations for Injuries suffered in the Service of the United Nations* (1949) ICJ Rep 174, 178.
[85] Friedmann W., The Changing Structure of International Law, Columbia University Press, New York, 1964, 223, 375.
[86] ICJ, *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996) *ICJ Rep* 66, para 25.

setting[87], implementing[88] and enforcing international law.[89] The modalities for their participation include rights of intervention, engaging in dispute resolution procedures and providing input into decision-making processes.[90] Finally, individuals contribute to international law as 'highly qualified publicists' under Article 38(1).

The functional attributes of corporations and whether they can engage in lawmaking are questions of corporate legal personality. This issue is in turn dependent upon the reactions of States. Corporate personality is ordinarily acquired under national law provided the formalities of incorporation and registration have been satisfied. However, other States may impose additional criteria including the existence of a genuine and continuing connection.[91] Within the European Community there is an obligation upon Member States to recognise a company validly incorporated under the laws of another.[92] By virtue of their constituent instruments corporations engage in activity which produces legal effects binding upon others. These include shareholder or

[87] Eg Chinkin C., 'The Role of Non-Governmental Organisations in Standard Setting, Monitoring and Implementation of Human Rights' in Norton J.J., Andenas M. & Footer M. (Eds), The Changing World of International Law in the Twenty-First Century: A Tribute to the late Kenneth R. Simmonds, Kluwer Law International, The Hague, 1998, 45, 51; Cohen C.P., 'The Role of Non-governmental Organisations in the Drafting of the Covenant of the Rights of the Child' (1990) 12 *HRQ* 137.

[88] Eg Tolbert D., 'Global Climate Change and the Role of International Non-governmental Organisations' in Churchill R. & Freestone D. (Eds), International Law and Global Climate Change, 1991, Graham & Trotman, London, 95-108.

[89] Eg Sands P. & Bedecarre A., 'The Convention on International Trade in Endangered Species: The Role of Public Interest Non-governmental Organisations in Ensuring the Effective Enforcement of the Ivory Trade Ban' (1990) 17 *BC Envtl Aff LR* 799; Shelton D., 'The Participation of Non-governmental Organisations in International Judicial Proceedings' (1994) 88 *AJIL* 611.

[90] Cullen H. & Morrow K., 'International civil society in international law: the growth of NGO participation' (2001) 1 *Non-State Actors & Int L* 7, 15.

[91] Art 1, European Convention on Establishment of Companies 1966 *ETS* No 57.

[92] Micheler E., 'Recognition of Companies Incorporated in Other EU Member States' (2003) 52 *ICLQ* 521.

director resolutions and the capacity to initiate litigation even when the international legal personality of their home State may be questionable.[93]

International legal doctrine already accepts that corporations can conclude contracts with States and enjoy standing within arbitral or judicial fora.[94] This is not lawmaking per se since corporations are dependent upon States to create the enabling framework and the essential element of State consent is evident in both instances. That said, corporations can employ international law to confine the national regulatory competence of States. For example, concomitant with the exercise of permanent sovereignty over natural resources, States possess the inalienable right to expropriate.[95] International law preconditions the exercise of that right[96] in the interests of protecting private property rights.

Similarly, corporations can nominate international law as the lex contractus in their contractual relationships with States.[97] Contractual breaches by governments engage State responsibility.[98] The good faith principle which compels contractual adherence overrides the argument that States cannot fetter their regulatory powers.[99] Corporations can enforce contracts against States irrespective of political relations at the inter-State level.[100] The decision is

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[93] Sec 1, *Foreign Corporations Act* 1991 (UK).
[94] Ijalaye D.A., The Extension of Corporate Personality in International Law, Oceana Publications Inc, New York, 1978, Chapter 5.
[95] UN General Assembly (UNGA) Resolution 1803 (1962) on Permanent Sovereignty over Natural Resources, para 4.
[96] Eg *Amoco International Finance Corp v Iran* (1987) 15 Iran-US CTR 189, para 140-2.
[97] Eg *Texaco v Libya* (1977) 53 *ILR* 389, paras 42-5.
[98] *BP v Libya* (1977) 53 *ILR* 297, 347-8; *LIAMCO v Libya* (1982) 62 *ILR* 140, 198.
[99] *North & South American Construction Co (US) v Chile* (1898) 3 *Moore Int Arbitrations* 2318; *Kuwait v American Independent Oil Co (Aminoil)* 21 *ILM* 976 (1982), para 90.
[100] Eg *Tinoco Arbitration (Great Britain v Costa Rica)* 1 *UNRIAA* 369 (1923).

therefore left with the firm whether or not commercial dealings should reflect the foreign policies of their home State.[101] However, commercial rights and corporate legal personality are circumscribed by the contract and are not opposable to other actors.[102] Finally, entrepreneurs bear the risks of economic disruption incidental to foreign direct investment.[103] Corporations may insert 'stabilisation clauses' to limit the discretionary exercise of regulatory power by States and ensure contractual stability.[104] However, in the event of fundamental change of circumstances 'special advantages' may be conferred upon States and give rise to an expectation to re-negotiate.[105]

These examples illustrate corporate resort to international law as a means of curtailing the regulatory competence of States at national levels. Corporations derive their existence from the fact of incorporation under national law.[106] They are therefore nominally subservient to States within the national sphere. Whatever the positive contributions of corporations may be to economic development, States have primary responsibility for creating the national and international legal framework conducive to that objective.[107] Each State has the right 'to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and

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[101] *Sierra Leone Telecommunications Co Ltd v Barclays Bank PLC* [1998] 2 *All ER* 821.
[102] *Texaco v Libya supra n*97, para 47.
[103] *Starrett Housing Corp v Iran (Interlocutory Award)* (1983) 4 *Iran-US CTR* 122, 156.
[104] Eg *Texaco v Libya supra n*97, 481-2.
[105] *Aminoil supra n*99, paras 97-8.
[106] Art 1(1), European Convention on Establishment of Companies, *supra n*91.
[107] UN Centre on Transnational Corporations (UNCTC), Transnational Corporations in World Development: Trends and Prospects, New York, 1988.

social policies.'[108] States shall co-operate with others in exercising this right to prevent unwarranted extraterritorial applications. This proposition says nothing about the responsibility of States to regulate or whether non-State actors can participate in formulating national law. An obligation to regulate may arise in the nature of indirect State responsibility to ensure a particular result, for example, adequate enforcement so that private actors do not transgress legal standards. To compel States to regulate pre-empts their discretion under the free choice of means principle for implementing international law.

Exclusive commercial ownership of production processes, industrial mobility, extensive capital resources and global distribution networks counterbalance the sovereign discretion to allow territorial admission and access to the natural resources of the State. The 'triangular diplomacy' model suggests that corporations bargain with States in competition for control over limited natural resources.[109] States can become dependent upon foreign direct investment as the principal external source of economic development and employment.[110] Similar principles apply to the bargaining characteristic of lawmaking where economic information, technical expertise and management experience in the possession of corporations counterpoise the sovereign right to regulate. Whereas States offer regulatory incentives and threaten increased competition commercial decision-making limits the range of policy choices available to

[108] Art 2(2)(b), UNGA Resolution 3281 (1974) on the Charter of Economic Rights and Duties of States.
[109] Stopford J.M. & Strange S., Rival States, Rival Firms: Competition for World Market Shares, Cambridge University Press, Cambridge, 1991, 19-23.
[110] Blomstrom M. and Lipsey R., 'The Competitiveness of Counties and their Multinational Firms' in Eden L. and Potter E.H. (Eds), Multinationals in the Global Political Economy, MacMillan Press Ltd, London, 1993, 129, 141.

States. [111] Moreover, integrating commercial strategies into one State's bargaining position creates tensions in its relations with other States with respect inter alia to employment, ownership, indigenous industries and technology transfer. If these are some of the commercial impacts upon a State's right to regulate, has their regulatory responsibility changed in any way ?

7. The Regulatory Responsibility of States: from Command and Control to Enhancing Competitiveness.

Lawmaking seeks to regulate or control commercial behaviour. However, externally imposed requirements hinder the free operation of market forces, influences commercial decision-making to criteria other than efficiency and allocates market share. Regulatory intervention within the marketplace is classically justified to correct for externalities, preserve public interests, enhance social welfare and ensure order and stability to cyclical economic fluctuations. Orthodox command and control techniques are not the only means for directing market behaviour.[112] Classical economics suggests that self-interested consumers and producers will be guided by the 'invisible hand' of self-regulation. [113] The 'laws' of the marketplace include supply and demand, specialisation (fragmenting functions in the interests of economic efficiency), commodification (bundling resources into tradable commodities)

[111] Studer-Noguez I., Ford and the Global Strategies of Multinationals: The North American Auto Industry, Routledge Publishers, London, 2002, 224, 227.
[112] Organisation for Economic Cooperation and Development (OECD), Alternatives to Traditional Regulation: A Preliminary List, Paris, 1994.
[113] Smith A., An Inquiry into the Nature and Causes of the Wealth of Nations, Mathuen & Co Ltd, London, 5th Ed, 1930, 6.

and compliance on the basis of economic necessity. Markets can also undermine the rule of positive law since greater profit is the reward for assuming higher risk within illegal ('black') markets. The contemporary regulatory trend is to include market incentives which produce allocationally efficient outcomes within the parameters of publicly-defined objectives.[114] Regulation encourages the pursuit of particular commercial ventures ('signposted enterprise') by incorporating advantageous provisions, decreasing uncertainty and establishing secure property rights.[115]

The economic theory of comparative advantage suggests that all States benefit where they specialise in manufacturing those goods and services which they are most efficient at producing.[116] Strategic trade theory proposes that States may actively assist national industry by shaping the contours of the regulatory environment.[117] By providing stable regulatory environments which provide investor confidence States reinforce their international reputations for supporting the rule of law. Furthermore, national law can stimulate economic activity and push it in desired directions. National regulatory conditions can create favourable investment climates and competitive advantages for local firms within the international marketplace. For example, mandatory local performance requirements can coincide with the exporting ambitions of

[114] OECD, Public-Private Alternatives to Traditional Regulation: Business Experiences in OECD Countries, Working Paper Vol 5, Paris, 1997.
[115] Eg 'An Act to encourage the search for petroleum in Australia by subsidizing stratigraphic drilling' 1957 (Aus).
[116] Ricardo D., The Principles of Political Economy and Taxation, J.M. Dent & Sons Ltd, London, 1973, 81-2.
[117] Porter M.E., The Competitive Advantage of Nations, Macmillan Press Ltd, London, 1990, 19.

national industry.[118] Furthermore, adopting national legal models at the international level increases regulatory compliance burdens for rivals, poses minimal adaptation costs for national firms and embeds their competitive position within the international framework.[119] An appreciation that the law can favourably shape the market encourages corporations to contribute to regulatory development. However, the creation of regulatory conditions benefiting one economic sector may engender offsetting activity by others.

Regulatory measures may be politically arbitrary, constitute unjustifiable discrimination or amount to a disguised restriction on trade.[120] National regulation should not be more trade restrictive than necessary to fulfil policy objectives.[121] States may voluntarily submit to international regimes which confine the extent of their regulatory discretion.[122] For example, universal labour standards seek to remove any commercial benefits arising from the violation of basic workers rights.[123] States are then subject to a general duty to bring national law into conformity with international standards. National law is expected to be no less effective than international rules or regulations and States are permitted to implement more stringent measures. Hence, international standards can be employed for protectionist purposes to deny the

[118] UNCTC/UNCTD, The Impact of Trade-Related Investment Measures on Trade and Development, UN Doc ST/CTC/120 (1991), 50.
[119] Cp *Telecommunications Act 1996* (US) 110 Stat 56 & WTO, Agreement on Telecommunications Services 36 *ILM* 354 (1997).
[120] Eg Principle 12, Declaration on Environment and Development, UN Conference on Environment and Development (UNCED), UN Doc A/CONF.151/5 (1992).
[121] Eg WTO, *US–Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R (1998), para 9.1; C-67/97 *Ditlev Bluhme* [1998] 1 ECR 8053, para 35.
[122] Eg Art 20, General Agreement on Tariffs and Trade (GATT) 55 *UNTS* 187 (1947).
[123] UNCTAD, World Investment Report 1994: Transnational Corporations, Employment and the Workplace, Geneva, UN Doc UNCTAD/DTCI/10 (1994), 355.

fact that other States enjoy cheaper labour access.[124] Regulatory discretion cannot be wholly curtailed from outside the State through international disciplines, particularly if national producers have influenced national standards from the inside. The focal point then shifts to the causal factor such that corporations themselves come under pressure to respect labour standards wherever they operate.[125]

There are further illustrations of a cross-pollination of ideas and objectives between the 'private' and 'public' spheres. International law as an underdeveloped legal system draws upon concepts such as separate legal personality, the corporate veil and limited shareholder liability.[126] States engaging in entrepreneurial activity establish corporate vehicles through conventional instruments.[127] However, international law will deny to firms what it accepts for States, particularly as far as the sources of international law are concerned. Thus investment contracts do not attain the solemnity of treaty instruments even when negotiated under intergovernmental auspices or listed within the UN Treaty Series.[128] Whereas States and corporations can both assert a fundamental change of circumstances to terminate contracts,

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[124] Preamble & para 5, ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, 86th Sess, Geneva, 37 *ILM* 1233 (1998).
[125] Office of the High Commissioner for Human Rights, Sub-Commission Resolution 1998/12 (1998) on Human Rights as the Primary Objective of Trade, Investment and Financial Policy.
[126] *Barcelona Traction supra n26*, paras 41-42, 50 & 58.
[127] Eg Franco-Ethiopian Djibouti-Addis Ababa Railway Company (1959) 381 *UNTS* 45; International Telecommunications Satellite Consortium (INTELSAT), Agreement Establishing the Interim Arrangements for a Global Commercial Communications Satellite System and Special Agreement (1964) 514 *UNTS* 48.
[128] *The Serbian Loans Case* (1929) PCIJ Ser A No 20, 41; *Anglo-Iranian Oil Company Case (UK v Iran)* (1952) ICJ Rep 93, 112; *The Saudi Arabia and Arabian American Oil Company (ARAMCO) Case* (1963) 27 *ILR* 117; 1954 Austria-Yugoslavia Treaty 227 *UNTS* 112.

corporations may be unable to invoke that doctrine in relation to a treaty when their home States continue to assert its validity.[129]

Substantive and procedural questions of international law are linked with matters of direct commercial interest. For example, expropriation raises questions concerning the regulatory competence of States and the nationality attributes of corporations.[130] Corporate nationality can in turn influence the credibility of decision-making by States within intergovernmental organisations.[131] Public international legal questions pertaining to Statehood, recognition or treaties touch upon contractual rights and prospective corporate liability.[132] These issues are invoked by corporations to frustrate litigation initiated by commercial rivals within national courts.[133] Such precedents constitute the visible but volcanic products of interest to international lawyers. However, the titanic ideological debates and procedural interactions between States and corporations are hidden further underground. The first step will be to trace their historical origins.

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[129] Cp *Transworld Airlines Inc v Franklin Mint Corporation & Ors* 466 *US* 243, 253 (1984) & *Questech Inc v Ministry of National Defence of Iran* (1985) *AWD* 191-59-1.
[130] Seidl-Hohenveldern I., Corporations in and Under International Law, Grotius Publications Ltd, Cambridge, 1987, Ch 3.
[131] ICJ, *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation* (1960) *ICJ Rep* 150.
[132] Eg *Mingtai Fire & Marine Insurance Co Ltd v United Parcel Service* 177 *F.3d* 1142 (9th Cir 1999).
[133] Eg *Buttes Gas and Oil Co & Anor v Hammer & Anor* [1982] *AC* 888.

Chapter One

An Historical Overview of Corporate Participation within the International Legal Order

This Chapter presents a chronological overview of commercial activity within the international legal order since first recorded history until the contemporary era. The corporate role in the prevailing legal system is bound up with the dominant political actor of the period, the regulatory powers of governing elites and the evolving nature and form of the corporation. A range of non-State actors have been active participants within international legal processes for some two hundred years.[134] Institutions created for the purpose of making profit, albeit not strictly incorporated as presently understood, have been active for as long as commercial activity has existed. Indeed, commercial activity long predates the emergence of the pre-eminence of the nation State commonly marked by the Treaty for the Peace of Westphalia in 1648. The symbiotic relationship between business and the ruling elite is evident in the construction of early empires, the merchant guilds and trade fairs of the medieval period, the exercise of governmental authority in the pursuit of exclusive trading privileges by chartered trading companies during the colonial period and the influence of American multinationals in world affairs. The International Chamber of Commerce paralleled moves from bilateralism to multilaterialism as politically-organised business groups began to situate themselves within the framework of newly-emergent intergovernmental institutions. Corporations began to be affected as these institutions assumed greater regulatory roles and

[134] Charnovitz S., 'Two centuries of participation: NGOs and international governance' (1997) 18 *Michigan JIL* 183.

firms in turn sought to influence the outcome of their deliberative processes. The purpose of the Chapter is to assess whether there is currently a new phase in the evolution of the corporate role within the international legal order or if there is simply a return to the actors and influences of earlier times.

1. Early Commercial Activity and the Emergence of the Nation State.

The truism that the flag follows commerce is observable in lawmaking. '[I]n trading history, if enterprise is the theme, regulation is the counterpoint' and moreover 'in all the great matters relating to commerce, legislators have copied, not dictated'. [135] Entrepreneurial activity precedes regulation before established authority intervenes to levy taxation and finance the military resources with which to protect and extend the interests of traders. Regulation also arises whenever foreign trade threatens the stability of local industry. Codifying commercial transactions as was done by Hammurabi around 2000 BC extends governmental power even when administered by respected traders and reinforces existing merchant practices.

Governing bodies have always enjoyed an administrative role in commerce even when supervision by religious authorities has declined and familial or royalty bonds become less important.[136] Egyptian royalty encouraged trade and the commercial and imperial focus for the Kingdom of Mesopotamia was also acquiring resources unavailable to it. Ebla created a common market and

[135] Condliffe J.B., The Commerce of Nations, WW Norton & Co, New York, 1950, 27, 33.
[136] Moore K. & Lewis D., Foundations of Corporate Empire: Is History Repeating Itself?, Pearson Education Ltd, London, 2000, 291.

protected commercial routes with bilateral trade agreements.[137] During the Bronze Age providing capital and organisational skill for the export trade devolved from crown functionaries and temple officials to self-employed merchant princes. The karu ('harbour') was a semi-official institution empowered to exercise the commercial, legal and administrative responsibilities which the public sector could not afford. The military expeditions of the Assyrian empire (c745 BC) furthered the transfer of control to private merchant associations willing to take risks and reap the profits of a free enterprise international trading system. The Phoenician aristocracy, navy and business formed an interlocking system of managed commerce supervised by priests in which traders enjoyed high political status based on ties of kinship and trade, defence and imperial influence that were interwoven into an overall geopolitical military strategy defined by treaty law.[138] Maritime commerce grew on account of their superior ship building and improved navigation techniques.

During the fifth century BC tribal kingdoms gave ground to the Greek city-state (polis). Athens and Rhodes secured freedom of trade around the Mediterranean, supported collaborative effort between bankers, shipowners and traders, established a code of mercantile law and developed principles of commercial association. The Pax Romana was characterized by expansionist militarism in which extended family structures pursued government contracts for military procurement, collected taxes, delivered mail and completing

[137] Pettinato G., The Archives of Ebla: An Empire inscribed in Clay, Double Day & Co, New York, 1981, 226.
[138] Aubet M.E., The Phoenicians and the West: Politics, Colonies and Trade, Cambridge University Press, Cambridge, 1996, 29-32.

official accounts. Heavier taxes and a shrinking economic base caused a decline in business confidence. While Europe entered the medieval Dark Ages, international economic activity shifted east. The Abbasid empire around Baghdad involved public and private monopolies trading alongside smaller partnerships built upon familial or religious ties. Merchants profited from the war economy of the Italian crusades. To consolidate governmental control an Italian Charter of 1082 discriminated between families for trading rights and by 1300 Venetian merchants wishing to trade were compelled to join 'Flanders galleys'. Entrepreneurial capitalism also flourished under the Song, Yuan and Ming dynasties of China (10^{th}-16^{th} Centuries). Commercial transactions were enforceable through family or partnership-based alliances rather than formal legal codes and the Office of the Monopoly of Trade established in 971 issued permits to foreign traders travelling along the Silk Route.

During the Medieval period merchants formed caravans to enhance security from robbers and feudal lords imposed tolls on persons and products to construct transportation infrastructure and raise revenue. The caravan trade across the Sahara was also characterized by transit and protection costs imposed by various kingdoms and tribes.[139] Political or military turbulence and the unpredictability of transportation disrupted commercial networks and contributed to the trade's decline in the fourteenth century.

The marketplace emerged during the twelfth and thirteenth centuries, a government-designated area where most transactions were conducted.

[139] Steensgaard N., The Asian Trade Revolution of the Seventeenth Century: The East India Companies and the Decline of the Caravan Trade, Chicago, 1973.

Households were self-sufficient and transportation costs confined trade to a small radius. However, specialists skilled in particular crafts organized themselves into guilds (gilda mercatoria) to regulate their profession. The monopoly was protected from inter-city rivals through trade restrictions, tariffs and duties. Although the European gild system, like its Japanese counterpart of the time, limited economic liberty, restricted production and artificially inflated prices, it received official recognition and was gradually integrated into town government as a means of promoting trade. Indeed, the Hanseatic League of several cities dominated by merchant interests engaged in diplomacy and warfare to maintain monopolistic privileges and resist the emerging German State until 1870. European trade fairs attracted international wholesalers and enjoyed military protection. Merchants established tribunals ('PiePowder Courts') to settle disputes and enforce standards of fair dealing according to commercial practices. This was a significant development because it illustrated that merchants were competent to oversee transnational regulatory mechanisms which served their own purposes and functioned independently of official political processes. It was not until the nation State was consolidated that this committee of respected traders was replaced by a public agent commissioned to protect trading interests. Wealthy cities and the recruitment of mercenaries contributed to feudalism's decline.

Merchants supported the emergence of unified national government under the Crown, particularly in England and France, to centralize the power of granting and enforcing freedom of trade and transit within the realm. National governments furthered commerce by suppressing disorder and establishing

legal systems and courts to resolve commercial disputes. Government postal riders could carry private mail from 1635 and private mail delivery systems operated alongside government services until the State declared the function a public monopoly. Although concerned by increased administrative costs, particularly to finance warfare, commercial actors concluded that aspiring nation States could support trading opportunities within the newly discovered, expanding world. By appealing to reasons of patriotism (military strength, national welfare, economic growth, full employment and the public interest), merchants secured a privileged economic position within a regulatory strategy which stimulated local industrial growth and protected it from foreign competition.

State-building was furthered through colonization to secure raw materials, develop external markets for national manufacturers and assure a monopoly for colonial exports within local markets. Regulating trade also raised government revenue for undermining the competitive advantage of rival powers. For example, the English Navigation Acts of 1651 and 1660 challenged Dutch shipping and warehousing by requiring that European goods be brought to England in English ships or in ships the same nationality as the commodity. Predictably, abolishing these arrangements in 1854 was bitterly resisted by adherents who prophesized doom to the shipping industry. When French privateers with governmental support sought to destroy English commerce, an 1807 Order in Council required any neutral trading with Europe to halt at British stations, thereby bolstering the English merchant marine and locating international commerce within England. An Anglo-French treaty of 1860 was

replicated in an extensive network of commercial treaties across Europe and provided for most favoured nation treatment, reduced tariffs and legal rights for foreign traders before protectionist tendencies revived in 1880. However, the international legal order of the seventeenth and eighteenth centuries was more noteworthy for the role of chartered trading companies.

2. The Chartered Trading Companies and the Extension of Colonial Empire.

Distant commerce was exposed to the threat of attack, the perils of sea and the novelty of the trade. Private individuals pooling their contributions rather than the State were better positioned to assume the risk. However, companies sought and were assigned monopolies by the State since merchants who invested capital should not be deprived of rewards by newcomers who risked nothing and contributed little to the orderly development of the trade. The chartered trading companies derived their mandates from individual acts of Parliament. Royal charters were subject to renewal with additional conditions including advancing capital to government revenue or revocation upon six months notice. A 'regulated' trading company possessed the power to regulate individual members operating within that particular economic sector. A 'joint stock' company managed by a smaller number of individuals enjoyed a permanent capital base whose shares were traded in stock exchanges. Their regulatory authority included the power to make ordinances consistent with the laws of the realm or treaties with foreign States, to confiscate the property of traders who defied the privileges of the charter (with proceeds partly allocated to the Crown), to assume possession on behalf of the sovereign any territory

discovered by them or their agents and to exercise exclusive jurisdiction over their employees in foreign territory.[140] Monopolistic trading privileges were granted to hold and advance trade for a particular period within a specific geographical location. For example, the Fellowship of the Merchant Adventurers or Hamburg Company (1505-1807) enjoyed exclusive trade with Dordrecht and Hamburg whereas the Merchants of the Levant (1581-1825) traded to Venice and Turkey. Similarly, an Act of 1689 providing for free trade in wool reserved a monopoly for the Eastland Company (1579- 1764) which engaged in trade to the Baltic.

Royal charters were accompanied by prohibitions which prevented rivals from the same State competing in the trade without corporate permission. Companies acted in concert with local customs authorities to confiscate the property of unlicensed or free traders ('interlopers') and establish special courts outside English territorial jurisdiction for their trial. For example, 'the mysterie and companie of the Merchants Adventurers for the discoverie of regions, dominions, islands and places unknown' – the Muscovy Company (c1555-1891) – concluded commercial treaties on behalf of the UK government with the Czar of Russia. The Company acquired the use of the Russian criminal justice system to punish interlopers and rebellious corporate agents. Although the fortunes of such companies fluctuated, one successful voyage could be extremely profitable. Other merchants petitioned politicians to declare the trade free. Competition also arose between the Russia Company, the Scottish East India Company and the Greenland Company which all

[140] Scott W.R., The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720, Vol 2: Companies for Foreign Trade, Colonisation, Fishing and Mining, Cambridge University Press, London, 1910, 10.

enjoyed privileges with respect to whale fishing. The pressure for free trade was such that a second East India company (1698-1709) was established by a rival merchant group until its amalgamation as the United East India Company.

There was both a harmony of purpose between the chartered trading companies and the State as well as ongoing tensions as each sought to use the other for their own ends. The nation State was dependent upon corporate revenues for expanding its international influence but also sought to control commercial behaviour. For example, the UK government periodically investigated corporate affairs in response to allegations of abusing their monopolistic position, exhorbitant pricing, maladministration, incompetence, falsifying accounts, corruption, racketeering and poor production practices. The ebb and flow between free trade and protectionism further impacted upon this relationship.

2.1 Exercising Governmental Powers and Establishing States.

To discharge their mixed commercial and official mandates, the chartered trading companies were empowered to exercise governmental authority. The Falkland Islands Company (1851-current) was expected to establish postal communication services and the British North Borneo Company (1882-1946) principally exercised administrative functions as a precursor to colonization. To control commerce along the Niger river, the National African or Royal Niger Company (1886-1920) concluded treaties with local rulers, imposed customs duties, issued proclamations, administered justice, maintained law and

order and employed armed forces to suppress smuggling or local dissent. The ampler military resources and authority of government was necessary to protect treaty-guaranteed commercial interests against predatory Great Powers and maintain the permanent subjugation of local populations. The Royal Niger Company was relieved of its administrative powers and duties and compelled to assign its treaty, territorial and mineral rights when the UK government established a protectorate.[141]

Similarly, the English East India Company (1600-1858) enjoyed exclusive rights in the spice trade to East India as well as powers to appoint governors, wage war with any non-Christian nation under the company flag, conclude agreements with local rulers, administer justice, acquire territories and seize property. Corporate officers possessed military rank, commanded military forces and enjoyed mandates to protect shipping routes from piracy, recapture towns lost to rival powers and recover lost corporate rights and privileges. Indeed, 'the control and commercial exploitation of India became the prerogative of an English joint stock company' with the demise of the Moghul empire.[142] The East India Company exercised governmental administration over Bengal, Behar and Orissa, appointed a corporate officer as Governor-General and trained the civil service. Given an unwieldy bureaucracy, the *Regulating Act 1773* (UK), the India Bill of 1784 and the 1858 *Act 'for the better government of India'* eventually transferred power to the UK government.

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[141] Robert R., Chartered Companies and their Role in the Development of Overseas Trade, G. Bell & Sons Ltd, London, 1969, 141-154, 166-187.
[142] *Ibid*, 82.

The economic history of the chartered trading companies is self-evidently bound to the history of colonialism and the political establishment of States. The Virginia Company (1606-c1620) transported settlers including prospective brides, surveyed territory and introduced negro slave-labour into tobacco plantations. The Company of Adventurers of England trading into Hudson's Bay (1670-) concluded a deed of surrender with the UK government whereupon territories discovered by the firm reverted upon compensation to the Crown for subsequent transfer to the emerging Canadian State. The Hudson's Bay Company was entrusted to resolve political disputes, develop transportation infrastructure, procure military provisions during World War One and attack enemy submarines. Finally, the British South Africa Company (1889-1965) was formed to establish British influence around the Cape, develop local resources and raise living standards. It bore the risks, costs and administrative burdens of development projects (railway and telegraph construction) with minimal oversight from the Colonial Office (only reprimanded for military incursions into friendly neighbouring States) until Southern Rhodesia became part of the British Empire.

The chartered trading companies proved at least as influential as States in shaping the modern world. On the other hand, they were initially organized with State aid which hardened into monopolistic regulation. Commercial activity was intimately associated with extending national political interests, developing maritime industries, military defence (fortified trading posts or local factories), revenue raising, colonization, exploration and discovering novel trading routes. In short, with processes of lawmaking and regulating

matters of international concern in the interests of the European colonial powers. Their territorial acquisitions were recognised as establishing a legally valid title where the trading company exercised governmental authority or the home State asserted jurisdiction through them.[143] This effectively rendered corporations complicit with the industrialised States in establishing an international legal order which upheld territorial acquisitions and colonial exploitation. In turn this would set the scene for subsequent conflict in the decolonization era as developing States sought to assert the existence of a New International Economic Order (considered further below).[144] Interestingly, corporations continue to facilitate territorial administration as State instrumentalities.[145]

Companies transported raw commodities and, consistent with mercantilist economic policy, bullion, jewels and other precious metals. Particularly noteworthy was how the chartered trading companies first shaped the institution of slavery and then became active participants in prohibiting the practice, including efforts in the contemporary era through the International Labour Organisation. Between 1440 and 1860 slavery was a complex international trade interlinked with other Atlantic industries and involving the transfer of some 90,000 Africans per annum in two to three hundred ships by every major maritime power in Western Europe. The commercial prospects and goodwill earned by the Company of Royal Adventurers into Africa (1660-1821) were detrimentally affected by English slave traders until the company

[143] *The Island des Palmas Case* (1928) 2 UNRIAA 829, 858; *Anglo-Norwegian Fisheries Case (UK v Norway)* (1951) ICJ Rep 116, 184 Per Judge McNair.
[144] See generally Anghie A., 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40(1) *Harvard JIL* 1.
[145] *DeMauro Construction Corporation v US* 568 F.2d 1322 (1978).

itself entered the trade. Indicative of struggles between NGOs and corporations in the contemporary era, abolitionist humanitarian organisations entered the fray. However, long before naval blockades the English South Seas Company anticipated that English plantations could not compete against French, Spanish or Brazilian ones and relinquished the contract for supplying slaves under a commercial treaty of 1750.[146] Companies also petitioned home States to suppress acts of piracy which were in fact the trading ventures of rival companies. For example, the Dutch West India Company derived its income from attacking Spanish silver fleets around the Caribbean between 1620 and 1680 and opposed peace between the Netherlands and Spain.[147] Portugal created the General Company of the Trade of Brazil in 1648 entrusted solely with protecting vessels from privateers.

The chartered trading companies complemented the strategic ambitions of empire. The Royal Guipuzcoan Company of Caracas (established 1728) traded from Venezuela and the Royal Company of Havana (established 1740) developed trade and agriculture in Cuba. Both were licensed by the Casa de Contratacion (House of Trade) which collected tributes and taxes for the Spanish Crown and settled commercial disputes.[148] The expanding Spanish empire was primarily driven by conquest rather than trade with private enterprise working under State protection and supervision. English companies competed with rivals from Holland, France (which also established an East India Company), Germany, Portugal and Spain who disputed and refused to

[146] Anstey R., The Atlantic Slave Trade and British Abolition, MacMillan, London, 1975.
[147] Rankin H.F., The Golden Age of Piracy, Rhinehart and Winston, New York, 1969.
[148] Phillips C.R., 'The Growth and Composition of Trade in the Iberian Empires 1450-1750' in Tracy J.D. (Ed), The Rise of Merchant Empires: Long-Distance Trade in the Early Modern World 1350-1750, Cambridge University Press, Cambridge, 1990, 34 at 77, 97.

recognise the validity of each other's territorial claims, jurisdictional control, monopolistic market privileges or treaty rights. Rivalry occasionally erupted as armed conflict with civilian casualties. Marines from the Dutch East India Company (1602-1796) invaded Moluccas in 1605, Java in 1606 and offered military protection to the newly-subjugated political system in return for a monopoly over the spice trade.

Clashing trading interests necessitated formal boundary delimitations or political resolutions at the intergovernmental level. England initiated a practice of securing commercial advantages such as trading privileges alongside territorial acquisitions when negotiating treaties, particularly in the aftermath of armed conflict.[149] The South Sea Company (1711-1854) acquired rights under the England-Spain Assiento Pact of 1713 to engage in slavery and whalefishing in South America. However, it also uniquely functioned as a debt-absorbing agency for the UK government. That Company's history illustrated how entrepreneurial syndicates officially commissioned to identify commercial opportunities, exploit natural resources overseas and develop lucrative European markets could degenerate into overly-promoted and highly speculative ventures with artificially high stock values. The South Sea Company supported legislative measures protecting it and the public from fraudulent schemes notwithstanding allegations of bribery. The scandal of the South Sea bubble and public calls for greater regulatory control prompted the government towards lawmaking and the so-called *Bubble Act 1719* (UK) prohibited the formation of joint stock companies except by royal charter or act

[149] Day C., A History of Commerce, Longmans Green & Co, New York, 1922, 224.

of parliament. Only after additional regulatory measures did English companies acquire the freedom to incorporate as well as limited liability, [150] two rights also sought within the United States.

3. Corporate Consolidation and the Emergence of American Multinationals.

Colonial corporations within the US were engaged to improve property for social purposes (improving drainage, deepening river channels, constructing canals and building bridges) and the American Revolution evidenced how firms fulfilled government contracts for supplies and war munitions.[151] The first profit-seeking corporation organized under legislative charter was the New London Society United for Trade and Commerce of Connecticut in 1732. Corporate officers lobbied government officials and attended constitutional conventions so that holding company statutes could be combined into a single uniform law of incorporation. This initiated a 'race to the bottom' between regional States which accorded corporations, directors and shareholders wide-ranging rights with few responsibilities.[152] Business was directly involved in defining federal laws regulating commercial behaviour and many of the largest firms were established between 1888 and 1905. The trajectory of industrial consolidation towards monopolization was steered to oligopoly with the passage of the *Sherman Act 1890* (antitrust) and the *Clayton Act 1914* (corporate financing).

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[150] The *Joint Stock Companies Act 1844*, the *Limited Liability Act 1855* and the *Companies Act 1862* (UK).

[151] Baldwin S.E., 'American Business Corporations before 1789' (1903) 8(3) *American Historical Review* 449, 451-2, 463.

[152] Prechel H., Big Business and the State: Historical Transitions and Corporate Transformation 1880s-1990s, State University of New York Press, Albany, 2000, 34, 41, 67.

The emergence of trade associations during the 1890s marked abandoning free competition in favour of fair competition with government support. The Japanese Chamber of Commerce communicated with the Japanese government through an advisory economic recovery committee formed after the Sino-Japanese War (1894-95).[153] Within Europe 'in every case producers instigated the governing legislation and controlled the administrative devices set up to implement it'.[154] Producers spurned State participation when strong enough to do so; official support was only desirable for taxpayer support or to coerce a recalcitrant minority.

The economic balance of power shifted from Europe to the US after 1918 and governmental functions were centralized at the international level through the League of Nations to promote peace. Multilateral approaches to the provision of essential public services had also commenced: for example, the Universal Postal Union was established in 1874 to support commercial activity through inexpensive and secure postal services. More prominently, half of all delegates to the International Labour Organisation (ILO, established 1919) represented employer and worker organisations. Although the Covenant of the League of Nations did not envisage consultative relationships with NGOs, it observed that 'the manufacture by private enterprise of munitions and implements of war is open to grave objections', prohibited 'abuses such as the slave trade, the arms traffic and the liquor traffic', sought 'equitable treatment for the

[153] Miyamoto M., 'The Development of Business Associations in Prewar Japan' in Yamazaki H. & Miyamoto M. (Eds), Trade Associations in Business History, University of Tokyo Press, Tokyo, 1988, 1, 16.
[154] Condliffe, *supra n*135, 464.

commerce of all Members' and encouraged State cooperation with national Red Cross organisations.[155]

3.1 The Emergence of the International Chamber of Commerce and Intergovernmental Organisations.

The International Chamber of Commerce (ICC) was established in Paris in 1920 to coordinate business contributions to intergovernmental organisations. Notwithstanding that the essential nature of commercial activity is constructed around competition, the emergence of politically organized business groups such as the ICC responds to demand from both States and firms. That said, a permanent consultative body advising government officials was not established until 1945. ICC policy is formulated at Congress level to synthesize divergent industry opinion with authority delegated to an Executive Committee and ICC programmes are supported by secretariats and working groups. The ICC networks of national and specialist technical committees parallel and rival those of intergovernmental organisations. Economic information and commercial expertise is the basis for inclusion in intergovernmental committees.[156] It is simpler for business associations to lobby concentrated government forums where individual States compete between themselves. Influential States may be targeted and their national legal models promoted. Intergovernmental adoption of ICC proposals is also likely where ICC national committees lobby at national levels and limit the freedom of choice for States.

[155] Arts 8, 22, 23(5), 25, Covenant of the League of Nations, 1919.
[156] Eg League of Nations, World Economic Survey 1933.

Firms are informed of political developments through the information gathering function of intergovernmental organisations.

The ICC identifies 'palliatives for an archaic world order' to ensure predictable and secure international trade.[157] It has harmonized divergent national law with respect to finance, communications, transport, investment, intellectual property rights, taxation and trade.[158] The ICC takes up legal questions unaddressed by States and offer solutions which are not dependent upon legal authority for their effectiveness. The codification of best commercial practice within model contracts and standardised terms are voluntarily adopted by firms to reduce transaction costs and facilitate exchange. International commercial terms ('incoterms') are abbreviated descriptions of sale conditions delimiting contractual liability in advance.[159] Standby letters of credit have also been standardised.[160] ICC committees exercise oversight by interpreting such instruments. States may adopt them as national law or indirectly through bodies such as the UN Commission on International Trade Law (UNCITRAL). National courts have regard to such sources in resolving commercial disputes. Business recommendations carrying the authority of universal corporate opinion require only limited State participation to accord formal legal status to conventions drafted by industry. ICC participation at diplomatic conferences has included terms of full equality (voting and signing conventions),

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[157] Turner L., Invisible Empires: Multinational Companies and the Modern World, Harcourt Brace Jovanovich, New York, 1970, 190.
[158] Ridgeway G.L., Merchants of Peace: Twenty Years of Business Diplomacy Through the International Chamber of Commerce: 1919-1938, Columbia University Press, New York, 1938.
[159] ICC, Incoterms 2000, ICC Pub No 560, Paris, 2000; ICC, Guide to Incoterms 2000, ICC Pub No 620, Paris, 2000.
[160] ICC, Uniform Customs and Practice for Documentary Credits (UCP 500), ICC Pub No 500/2, Paris, 1994.

membership of national delegations and appointment to economic consultative committees.

The interwar period tended towards oligopolistic industrial concentration. Producer groups participated in State cartels through institutions such as the International Wheat Council to manage production pursuant to international commodity agreements. The Dawes (1924) and Young Plans (1929) were formulated at conferences presided over by American businessmen. Commercial solutions were offered to the question of German reparations under the post-WW1 peace settlement. Business diplomacy at the 1927 World Economic Conference was that private economic agreements negotiated in parallel with States would create global prosperity and peace. However, political activity by business on the international plane subsided with the Great Depression and commercial activity re-focused upon national productive capacity with the advent of World War Two (see for example the experience of the US considered further below). A report of the ICC's Committee on Trade Barriers became the principal negotiating document and was subsequently incorporated via the US delegation into the draft agreement for an International Trade Organisation. [161] The 1948 Havana Charter did not impose any obligations upon business but contemplated a complaints procedure with respect to restrictive business practices initiated by States.

[161] ICC, World Trade and Employment, Paris, 1945.

3.2 Extending US Hegemony and Domestic Concern for Corporate Power.

The overlapping and occasionally contradictory objectives which characterized relations between the chartered trading companies and the colonial powers of the eighteenth century are also evident in the relationship between US firms and their home State. Business leaders became partners in national economic recovery when the Great Depression permitted US President Hoover to create a consultative Business Council. World War Two created an informal partnership between the US government and American business consisting of a domestically-focused military-industrial complex and a subtle globally-orientated corporate strategy supported by federal agencies.[162] *The Strategic Materials Act 1939* (US) mandated the stockpiling of war-related material through several commercial cartels (the Metals Reserve Company, the Rubber Reserve Company, the Defence Plant Corporation and the Defence Supplies Corporation). The State Department provided financial and diplomatic support to expand US business control over critical natural resources within Latin America.[163] Corporate executives were appointed to key government posts but with simultaneous congressional inquiries and anti-trust litigation their authority was hedged.

During World War Two American business perfected mass production techniques nurtured by national security, defence contracts and Lend Lease. Industrial conflicts inspired by the rise of socialism between organised labour

[162] Reardon J.J., America and the Multinational Corporation: The History of a Troubled Partnership, Praeger, Connecticut, 1992, 35.
[163] Wilkins M., The Maturing of Multinational Enterprise: American Business Abroad from 1914-1970, Harvard University Press, Cambridge, 1974, 256-7.

and management in the West necessitated collective bargaining under government auspices. The *Employment Act 1946* (US) enabled firms to contribute policy suggestions via a Council of Economic Advisers. The State undertook to provide public services, created public bodies to regulate specific economic activities and legislated for preferential treatment to local firms. The US government was the principal client of the military-industrial complex during the Cold War. The Committee for Economic Development, composed of corporate executives, bankers, lawyers and academics, encouraged the US to counter communist expansion within Europe by expanding international trade, implementing the Marshall Plan and creating international infrastructure. The responsibility of the International Bank for Reconstruction and Development, for example, to reconstruct shattered economies also facilitates business opportunities. Banks, financial institutions and investors continue to be catalysts for foreign direct investment.

Corporations in the form of State trading monopolies enjoyed a more formalised relationship with government in the Soviet block. The USSR concluded trade agreements with Romania, Hungary and Bulgaria which created bi-national companies who shared capital and management over particular industrial sectors. Corporations furthered government control within centrally planned economies and constituted a counter-ideology to capitalism until the fall of the Berlin Wall.

The 1954 Randall Commission, presided over by the-then Chairman of the Inland Steel Corporation, urged greater US foreign direct investment as a

substitute for government aid. US corporations were deterred by political instability, the risk of expropriation, discriminatory regulation and rapid inflation. The 1961 Hickenlooper Amendment suspended government assistance where discriminatory taxes or restrictive operating conditions had the effect of expropriation. Corporations argued that 'it is desirable to enact legislation authorizing guarantees to private capital against certain risks peculiar to foreign investment and to continue efforts to negotiate investment treaties'.[164] *The Mutual Security Act 1953* (US) encouraged recipient States to foster private incentives, promote competition and accept American private investment. However, rather than wait for the executive to negotiate reciprocal trade agreements, US businesses established manufacturing and marketing points within the European Common Market created by the 1957 Treaty of Rome. In addition to investment guarantees US firms requested reduced taxation on overseas business income and public funding to identify foreign direct investment opportunities.[165] The Advisory Committee on Private Enterprise in Foreign Aid, authorized by the *Foreign Assistance Act 1963* (US) and headed by the Chairman of IBM, identified the limits of using foreign aid programmes as leverage for private investment.

In 1967-8 the US government encountered aggressive protectionist lobbying from several industries (steel, cotton, chemicals and agriculture) seeking to neutralize the tariff cuts envisaged by the *Trade Expansion Act 1962* (US) and

[164] 'The Annual Economic Review, January, 1951: A Report to the President by the Council of Economic Advisers' in Economic Report of the President Transmitted to the Congress, GPO, Washington, 1951, 121.
[165] Gaston J.F., Obstacles to Direct Foreign Investment: Report prepared for the President's Committee for Financing Foreign Trade, National Industrial Conference Board, New York, 1951.

agreed to in the Kennedy round of trade negotiations.[166] On the other hand, business support for political initiatives such as the Organisation for Economic Cooperation and Development (OECD) seeking the removal of trade barriers was channelled through the US Chamber of Commerce. The US textile, electronics, automobile, computer and semiconductor manufacturing industries would ultimately be captured by Japanese businesses with the support of their Ministry of International Trade and Industry, patent licensing and technological breakthroughs.

Dialogues between firms and governments on measures to promote foreign direct investment were replicated internationally. The Business Council for the United Nations (UN) was established in 1958 to support the objectives of the Organisation. The UN established a Special Fund in the 1960s to identify the technical and economic feasibility of investing within developing States and to design attractive legal frameworks.[167] The petroleum industry for example evaluates host State law in light of offers by other States and alternative industries where capital could be invested.[168] Having collaborated in their design, implementation of these programmes ultimately served the interests of private enterprise for example through subsequent contracting.

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[166] US Congress, Joint Economic Committee SubCommittee on Foreign Economic Policy, A Foreign Economic Policy for the 1970s, Part 4: The Multinational Corporation and International Investment, GPO, Washington, 1970.

[167] Schwob M., 'Pre-Investment Activities of the UN in the Mineral Field' in Bonini W.E., Hedberg H.D. & Kalliokoski J., The Role of National Governments in Exploration for Mineral Resources, The Littoral Press, New Jersey, 1964, 185, 189.

[168] Newlin R.S., 'A View from the Mining Industry' & Taitt G.S., 'Collaborating for Expansion' in Bonini, *ibid*, 195 & 205.

Several congressional investigations illustrated emergent criticism of multinational corporations from trade unions during the 1970s. Little was known about their detrimental economic impacts within either home or host States. The cliché that what was good for General Motors was also true for the US came under scrutiny. The Commission on International Trade and Investment Policy, composed of business leaders, labour representatives and academics, considered that corporations 'are a major force in expanding both world trade and America's role in the world economy' and 'an integral part of our technological and managerial expertise'.[169] However, their domestic political influence was considerable. For example, rather than attempting to influence legislation by lobbying congress through an industry association, the steel industry filed anti-dumping complaints against foreign producers pursuant to the *Trade Act 1974* (US). This strategy legitimated protectionist arguments, initiated intergovernmental dispute settlement and resulted in the formation of a Steel Tripartite Advisory Committee. This episode importantly redefined the parameters of formal State authority at the national level and suggested industry's ability to extract favourable concessions from the executive.[170]

The pervasive corporate influence in the national sphere was also becoming evident at the bilateral and multilateral levels. Trade unions expressed concern for the detrimental impacts of outsourcing production upon local employment, capital exports and technology transfer and recommended regulatory

[169] US Congress, Commission on International Trade and Investment Policy, The US in a Changing World Economy, GPO, Washington DC, 1971.
[170] Prechel, *supra n*152, 163-5, 171-2.

solutions.[171] The disproportionate commercial influence upon US foreign policy was exemplified by the International Telephone and Telegraph Company who urged the State Department to intervene within the internal affairs of Chile.[172] Commercial participation in the coup which precipitated the fall of Allende is just one illustration of how firms are heavily entrenched in hotly contested political issues productive of malign long term economic impacts. Other corporations adopted similar strategies to deter States such as Peru and Guatemala from adopting measures of nationalization. [173] Corporations countered that their political activity was insubstantial, ineffective and amounted to information gathering.[174] However, investigative committees concluded that firms were manipulating the right of diplomatic protection.[175] The political activities within host States of US corporations enjoying the protection of their home government led to a number of initiatives in the decolonization era (see further below) and engages the norm prohibiting intervention in the internal affairs of States (see further Chapter Two).

The oil industry together with the State Department fashioned the parameters of US-Libyan relations to consolidate their market position and maintain US

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[171] US Congress, Senate Finance Committee SubCommittee on International Trade, Implications of Multinational Firms for World Trade and Investment and for US Trade and Labour, GPO, Washington DC, 1973.

[172] US Congress, Senate Committee on Foreign Relations, Subcommittee on Multinational Corporations, The International Telephone and Telegraph Company and Chile, GPO, Washington DC, 1973, 1-20; Chile, *Decree Authorising Intervention in ITT Subsidiary* 10 *ILM* 1234 (1971).

[173] Feld W.J. 'UN Supervision over Multinational Corporations: Realistic Expectation or Exercise in Futility' (1976) 19(4) *Orbis J of World Affairs* 1499, 1506.

[174] *Eg International Telephone and Telegraph Corporation Sud America v Overseas Private Investment Corporation* 13 *ILM* 1307 (1974), para 51.

[175] US Congress, Senate Foreign Relations Committee SubCommittee on Multinational Corporations, Multinational Corporations and US Foreign Policy, GPO, Washington, 1973.

oil supplies.[176] The Organisation of Petroleum Exporting Countries warned major oil companies that they must urge their home governments to abandon support for Israel or face restricted supplies.[177] The US and UK governments supported an oil industry cartel notwithstanding antitrust concerns and the US position as a proponent of competition. Investigations also considered the extent to which US business practices perpetuated South African apartheid.[178] Corporate officers submitted position papers providing a favourable account of their commercial operations and suggested that trade policy should continue to develop multinational commercial structures. US businesses also admitted bribing foreign government officials but suggested that this activity created markets and facilitated business.[179] Moreover, imminent American regulations would have to be internationalised to prevent foreign firms acquiring an unfair competitive advantage[180], a development addressed in Chapter Three. Finally, the investigations revealed commercial activity occurring without political oversight and the institutionalized weaknesses of federal governments.[181]

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[176] *Ibid*, Multinational Petroleum Companies and Foreign Policy, GPO, Washington DC, 1974.
[177] Sampson A., The Seven Sisters: The Great Oil Companies and the World They Shaped, Bantam Books, New York, 1982, 297-300.
[178] US Congress, House Committee on Foreign Affairs SubCommittee on Africa, US Business Involvement in Southern Africa, GPO, Washington DC, 1971.
[179] US Congress, Senate Committee on Foreign Relations SubCommittee on Multinational Corporations, Multinational Corporations and US Foreign Policy: Political Contributions to Foreign Governments, GPO, Washington DC, 1976.
[180] *Foreign Corrupt Practices Act 1977* (US).
[181] US Congress, House Committee on International Relations SubCommittee on International Economic Policy, Activities of American Multinational Corporations Abroad, GPO, Washington DC, 1975.

3.3. Observations on the Historical Relationship between Commercial and Political Actors within the International Legal Order.

To summarise the historical overview thus far, international commercial activity is a product of and directed towards domestic influences. The economic fate of commercial enterprises within the international marketplace is directly tied to the political and military strength of the principal political authority to which they are subject. Governing elites shift the speculative economic risk of developing trade upon the corporate instrumentality and enterprises prefer to avoid the administrative burden associated with governmental responsibilities. However, business competes with government as much as collaborates: ambitious political objectives interrupt commercial networks and taxation deters industrial expansion. Corporate revenues underwrite the administrative bureaucracy and defence capability of States, thereby affording the basis for further territorial acquisitions, novel market opportunities and the safe transit of goods and individuals. The military, economic and political interests of States are bound together: joint effort between firms and political actors determines the most dominant national entity within the international legal order. Furthermore, commercial agendas are amplified with strategic support from governmental bodies. Although the identity and respective roles of political and economic actors mutates over time, the contribution of interconnected economic activity to the exploitation of unavailable natural resources and the global movement of finished products remains constant. Economic development, military expansion and national

security demand a favourable geographical location, open trade routes, a strong navy, a preferred currency and technological advances.

Functional exchange between the private and public sectors depending upon resources, capability and interest is such that the corporate form evolves in tandem with government constructs. Regulation follows the trails blazed by business. Firms expect governments to establish an enabling regulatory environment consistent with commercial practices which maintains order, facilitates trade and ensures diplomatic and military security. Competitive struggles - attempts by rivals to undermine privileged positions and resort by incumbents to wealth-preserving action - are reflected in law. Regulation furthers commercial activity or entrenches protective measures for particular industries in response to prevailing economic conditions. Such trends are institutionally expressed through the creation of consultative mechanisms whereby commercial actors contribute to regulatory and policy design. However, inclusion inevitably reduces the regulatory distance, impeding the ability of States to prevent anti-competitive behaviour or bribery and promote the social welfare. Although the territorial limitations of State jurisdiction suggest international legal solutions it remains to be seen whether the process of designing international legal regimes suffers from similar defects. This Chapter now considers whether these conclusions also characterize commercial relationships with international organisations.

4. Corporate Confrontation and Collaboration within the United Nations.

NGOs and business associations participated in the San Francisco Conference of 1945. The term 'NGO' should henceforth be understood generically to include corporations and other non-State actors. Subsuming corporations within the category of NGO suppresses the fact that these two actors frequently espouse opposing positions: a choice therefore lies between differential access and treatment to exploit specialization or equality with a view to counterbalancing their perspectives. Be that as it may, several States wished to admit NGOs in an 'advisory capacity'. Accordingly, the Economic and Social Council (ECOSOC) 'should, as soon as possible, adopt suitable arrangements enabling...international NGOs whose experience the ECOSOC will find necessary to use, to collaborate for purposes of consultation'. [182] The 'arrangements should not be such as to overburden the Council or transform it from a body for coordination of policy and action, as contemplated in the Charter, into a general forum for discussion'. [183] However, NGOs were regarded with suspicion as communist fronts and corporations as capitalist instruments of the West, thereby preventing effective cooperation during the Cold War. An ICC consultative body established in 1969 to liaise with the economic agencies of the UN became obsolete due to commercial disinterest. Only in response to greater commercial activity was that relationship renewed.[184]

[182] UN General Assembly (UNGA) Resolution (1) (1946).
[183] ECOSOC Resolution 2/3 (1946).
[184] Oechslin J.-J., 'Toward Greater International Co-operation', ICC, Paris, 1977.

4.1 Intergovernmental Attempts at Regulation and the UN Code of Conduct on Transnational Corporations.

In the 1970s newly-independent States asserted the existence of a New International Economic Order.[185] Notwithstanding the departure of the former colonial powers transnational corporations sought to maintain their commercial privileges. The huge ideological and economic confrontations between the developed and developing States of the decolonization era are rather blandly reflected in the resulting international legal jurisprudence with respect to expropriation. In particular, nationalisation and compensation became two highly contested provisions of the Charter of Economic Rights and Duties of States.

Exercising permanent sovereignty over natural resources also entailed enhancing regulatory capacity over corporate behaviour through the UN and reducing economic dependency upon foreign direct investment.[186] As instruments of colonialism corporations were perceived as capable of subverting the political independence of host States.[187] However, successive US administrations sought to prevent such adversarial postures towards US corporate multinationalism.[188] As a consequence of competing values between States the UN lacked coherent policies or effective institutional arrangements

[185] UNGA Resolution 3201 (1974), Declaration on the Establishment of a New International Economic Order.
[186] UNCTC, Progress Made Towards the Establishment of the New International Economic Order: the Role of TNCs, UN Docs E/C.10/74 & E/1980/40.
[187] UN Department of Economic and Social Affairs, Multinational Corporations in World Development, New York, 1973, 46.
[188] Grieco J.M., 'American Multinationals and International Order' in Thompson K.W. (Ed), Institutions for Projecting American Values Abroad, University Press of America, Lanham, 1983, 7-13.

for addressing commercial behaviour.[189] The relationship with business was ad hoc and burdened by a legacy of mutual mistrust.[190] Public and private sector representatives were appointed to consider the corporate role within the international legal order.[191] The Group of Eminent Persons heard testimony from inter alia corporations and business associations.[192]

The Commission on Transnational Corporations was subsequently established with the Centre on Transnational Corporations (UNCTC) as secretariat.[193] Corporations became concerned by the General Assembly's apparent lack of neutrality.[194] This development was to be expected: developing States used their numerical superiority to further their interests by resorting to soft legal instruments such as recommendations where legally binding agreements could not be concluded with developed States. Enhancing the relative bargaining power of host States drew the UN into re-negotiating concession contracts, conducting economic feasibility studies and training developing country personnel.

The interplay between the competing economic interests of the former colonial powers with developing States began to become evident through its impact

[189] ECOSOC, World Economic Survey, UN Doc E/5144 (1971), 10.
[190] Schollhammer H., 'Business-Government Relations in an International Context: An Assessment' in Boarman P.M & Schollhammer H. (Eds), Multinational Corporations and Governments: Business-Government Relations in an International Context, Praeger Publishers, New York, 1975, 217, 218-9.
[191] ECOSOC Resolution 1721 (1972); UN Dept of Economic and Social Affairs, Group of Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations, New York, UN Doc E/5500/Rev.1 (1974).
[192] UN, Summary of the Hearings before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, New York, 1974, 290-2.
[193] ECOSOC Resolutions 1913 (1974) & 1908 (1974).
[194] UNCTC, Resumed Second and Third Session of the Commission on TNCs, UN Doc E/5986/E/C.10/32 (1977), 13.

upon international lawmaking. For example, States differed along predictable lines on whether corporate participation in the Commission's programme of work was permissible.[195] The eventual compromise was government-appointed experts who consulted with business. Delegates from the ICC and the US Chamber of Commerce participated on these terms at its initial sessions.[196] Following an allegedly biased investigation of the pharmaceutical industry by the UNCTC, commercial representatives were subsequently permitted to review draft reports, make oral submissions and nominate experts.[197] Political distrust, prejudices against the free market ideology from socialist States and antagonistic relations with developing ones continued to ostracise corporations from the UN.[198]

The Commission's principal regulatory objective was to formulate a UN Code of Conduct on Transnational Corporations.[199] Comparative national legal analysis was undertaken for this purpose [200] to identify issues for consideration.[201] The envisaged instrument would apply to all enterprises operating across national boundaries and in any field irrespective of ownership.[202] Several States were concerned that equality of status would be acknowledged if corporations were direct addressees of the Code. Whereas

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[195] UNCTC, Second Session of the Commission on TNCs, ECOSOC OR 61st Sess Supp No 5 (1976).
[196] UNCTC, First Session of the Commission on TNCs, UN Doc E/5665/E/C.10/6 (1975).
[197] Dell S., The UN and International Business, Duke University Press, North Carolina, 1990, 115.
[198] Tesner S. & Kell G., The UN and Business: A Partnership Recovered, St Martins Press, New York, 2000, 13.
[199] UNCTC, TNCs: Codes of Conduct, Formulations by the Chairman, UN Doc E/C.10 2/8 (1978); UNCTC, Draft Code of Conduct on TNCs, UN Docs E/1983/17/Rev1, E/1988/39/Add1 & E/1990/94.
[200] UNCTC, National Legislation and Regulations relating to TNCs, UN Doc E/C.10/8 (1976).
[201] Asante S.K.B., 'UN: International Regulation of TNCs' (1979) 13 *J World Trade L* 55, 57-8.
[202] UNCTC, Report of the Thirteenth Session, UN Doc E/1987/22, para 139.

States were 'sovereign entities, full subjects and makers of international law', corporations were 'qualitatively different participants' in the international legal order subject primarily to national law.[203]

Although excluded from intergovernmental deliberations and unable to address delegates, the ICC and the International Organisation of Employers (IOE) submitted proposals, engaged informally and exploited home State contacts. They successfully argued through their home governments that the Code should additionally identify relevant obligations outlining permissible State behaviour. Political negotiations stagnated since the regulatory flexibility of States would be significantly curtailed. Outstanding topics of disagreement included defining corporations, applying international norms, investment treatment standards and jurisdiction.[204] Particularly controversial was the participation of developing States in the relevant international legal sources for discerning the standard of compensation for expropriated property.[205] Differing political ideologies prevented a common position on prospective corporate regulation: corporations were alternately perceived as communist instrumentalities to facilitate State planning, neo-imperialists or self-regulating agents within a laissez-faire environment. Continuing business support was in jeopardy when the ICC expressed lost confidence.

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[203] ECOSOC, TNCs: Issues Involved in the Formulation of a Code of Conduct, UN Doc E/C.10/17 (1976), para 42.
[204] UNCTC, Secretariat Report on the Outstanding Issues in the Draft Code of Conduct on TNCs, UN Doc E/C.10/1984/S/5 (1984).
[205] Cp Robinson P., The Question of a Reference to International Law in the UN Code of Conduct on TNCs, UN Doc ST/CTC/Ser.A/1 (1986), 6 & Vagts D.F., The Question of a Reference to International Obligations on the UN Code of Conduct on TNCs: A Different View, UN Doc ST/CTC/Ser.A/2 (1986), 12-3

The legal quality of the Code and the prospects for corporate compliance were also uncertain. It was doubtful whether the recommendatory powers of the General Assembly under the Charter afforded that organ sufficient authority over corporations.[206] Business argued for a voluntary instrument since reputable companies would not fail to observe the international origins of the Code.[207] In 1973 the Business Roundtable of US, European and Japanese companies had been established to address growing corporate hostility including a code of conduct formulated by the International Confederation of Free Trade Unions in 1975. States were also aware of proliferating intergovernmental codes having overlapping subject matters and institutionally-separate supervisory bodies.[208] The Code was ultimately promoted by States as an instrument of moral persuasion strengthened by UN authority and supported by public opinion. The attempt to exercise regulatory control over corporations proved to be overly ambitious, particularly when the legitimacy of State conduct was also questioned.[209] The Code was eventually shelved[210] with the emergence of a new economic development paradigm: while the goal of redirecting foreign investment towards developing countries remains, the economic self-determination of States expressed by the New International Economic Order was replaced by an ever-expanding network of bilateral investment treaties. In 1992 UNCTC was renamed the Division on

[206] Bergman M.S., 'The Norm-creating Effect of a General Assembly Resolution on TNCs' in Snyder F.E. & Surakiart S. (Eds), Third World Attitudes Toward International Law: An Introduction, Martinus Nijhoff Publishers, Dordrecht, 1987, 231, 245-7; Feld W.J., Multinational Corporations and UN Politics: The Quest for Codes of Conduct, Pergamon Press, New York, 1980, 99-104.

[207] Weisglas M., 'International Business and the UN Code' in UNCTC (1982) 12 *The CTC Reporter* 16, 18.

[208] UNCTC, TNCs: Aspects of Possible Relationships between the Work on a Code of Conduct and Related Work in UNCTAD and ILO, UN Doc E/C.10/AC.2/5 (1978).

[209] ECOSOC, Work on the Formulation of the UN Code of Conduct on TNCs, UN Doc E/C.10/1985/S/2, para 11.

[210] UNCTC, The New Code Environment, UN Doc ST/CTC/Ser.A/16 (1990), 20, 30 fn22.

Transnational Corporations and Investment (DTCI) and relocated to the UN Conference on Trade and Development (UNCTAD).[211]

4.2. NGO Inclusion in Intergovernmental Decision-making and Agenda 21.

Although the prevailing political ideology during the late 1980s was towards greater acceptance of free market virtues, the 1992 Rio Earth Summit is a useful illustration of where commercial and NGO interests differed. Tightening regulatory control was an objective shared by NGOs and several States at the UN Conference on Environment and Development (UNCED). States were called upon to include all NGOs within national and regional preparatory processes.[212] Agenda 21 ultimately acknowledged business's positive contributions to economic development, promoted self-regulation and called for business consultation when States formulated national regulatory instruments.[213] Agenda 21 provided that 'relevant NGOs...should be given opportunities to make their contributions and establish appropriate relationships with the UN system'.[214] States were also called upon to develop appropriate mechanisms through which the private sector could contribute to policy formation, decision-making and implementation within the UN.

The Commission on Sustainable Development (CSD) was subsequently established with a mandate to permit NGOs 'including those related to major groups as well as to industry and the scientific and business communities, to

[211] UNGA Resolution 47/212B (1993).
[212] UNGA Resolution 44/228 (1989).
[213] Agenda 21, *supra n*28, Chapters 30, 38, 23.
[214] *Ibid*, Agenda 21, para 38.42.

participate effectively in its work and contribute within their areas of competence to its deliberations'.[215] Since its rules and procedures only permitted observer status but Agenda 21 contemplated inclusion in decision-making[216], designing effective modes of participation which directly informed deliberations was the eventual compromise approved by States.[217] The CSD's programme of work includes exchanging experiences and formulating common policy approaches in conjunction with the nine 'major groups' (women, children/youth, indigenous people, NGOs, local authorities, trade unions, business and industry, farmers and the scientific and technical community) under the overall direction of the major groups Coordinator.[218] Major groups also participate in a two-day NGO forum held prior to Governing Council meetings.[219]

Business and industry formulate joint undertakings of a quasi-legal character with States and commit themselves to specific sustainable development targets (Sustainable Development Partnerships), thereby de-linking implementation from negotiated political agreements. Multi-stakeholder dialogue sessions allow major groups to interact on an equal footing with States and dialogue papers become official documents. The private sector seeks to 'contribute case studies and inputs to the Secretary-General's reports' and participate in 'major group activities such as interactive dialogues designed to contribute to policy

[215] UNGA Resolution 47/191 (1992), Institutional Arrangements to Follow-up the UNCED, para 7(b).
[216] Agenda 21, *supra n*28, Chapter 27.
[217] ECOSOC Decision 1993/215; UN Secretary-General Note, Representation of and Consultation with NGOs in the CSD, UN Doc E/1993/65.
[218] ECOSOC Resolution 1997/63.
[219] UNEP, Secretariat Note, Report of the Civil Society Consultations on International Environmental Governance, Nairobi, 2001.

discussions and help shape decisions made by the Commission'.[220] However, non-State actor participation is programme-specific and limited to ad hoc inclusion within decision-making.[221] Similarly, Local Agenda 21's and National Councils for Sustainable Development composed of the private sector, trade unions and NGOs have been unevenly implemented at national levels.[222]

The prominence of non-State actors at UNCED prompted ECOSOC to review its consultative arrangements with NGOs with a view to introducing coherent rules regulating their participation in future conferences.[223] NGOs supported expanding the relationship provided that the review did not result in any downwards revision of existing mechanisms.[224] Whereas several States supported greater NGO participation, particularly NGOs from developing countries enabled by financial assistance to facilitate a more equitable geographical distribution, other governments sought to preserve their ability to exclude NGOs.[225] Attempts by the secretariat to strengthen NGO relationships in recognition of their indispensability[226] may encounter hostility from States who are the targets of NGO criticism. Such circumstances consequently impede the development of international participatory democracy.[227]

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[220] Ms Federica Pietracci, Major Groups Programme Coordinator, UN Division for Sustainable Development, Response to Questionnaire, 9 August 2004.
[221] CSD, Review of Trends in Progress achieved in implementing Agenda 21: Report on Major Groups, New York, 1994, 3; UNTCMD, TNCs and Sustainable Development: A Review of Agenda 21, New York, 1992.
[222] UN Secretary-General, Implementing Agenda 21, UN Doc E/CN.17/2002/PC.2/7 (2001).
[223] ECOSOC Resolutions 1993/80 & 1993/214.
[224] UN, General Review of Arrangements for Consultations with NGOs, UN Doc E/AC.70/1994/NGO/1-11.
[225] UN, Report of the Open-ended Working Group on the Review of Arrangements for Consultation with NGOs, UN Doc A/49/215 (1994), paras 55-7, 66-73.
[226] UN Secretary-General, General Review of Arrangements for Consultations with NGOs, UN Doc E/AC.70/1994/5.
[227] Otto D., 'NGOs in the UN system: the emerging role of international civil society' (1996) 18(1) *HRQ* 107.

In 1996 the UN again examined NGO participation 'in all areas of work'.[228] Developing country governments considered that NGO access had already outstripped the scope of existing procedural provisions, Northern countries wanted the study limited to the General Assembly and the Group of 77 insisted that 'all areas' also embraced the Security Council and Bretton Woods institutions. A report was requested concerning inter alia the legal implications of modifying current arrangements to enhance NGO participation.[229] Although the resulting resolution (considered further below) permits access for national as well as international NGOs, it also specified additional NGO attributes and introduced new mechanisms of State control.

The General Assembly's Special Session to review and appraise the implementation of Agenda 21 after five years concluded inter alia that small and medium-sized enterprises particularly from developing countries were yet to be engaged.[230] The World Business Council for Sustainable Development (WBCSD) and the ICC, permitted to address the General Assembly, called for more innovative consultative mechanisms to enable greater industry inclusion.[231] States undertook to render national decision-making processes more effective, efficient, transparent, participatory and democratic.[232] The

[228] ECOSOC Decision 1996/297.
[229] UNGA Resolution 52/453 (1997).
[230] CSD, Dialogue Sessions with Major Groups: Summary Report of the Dialogue Session with Business and Industry, UN Doc E/CN.17/1997/L.10, 5; CSD, Role and Contribution of Major Groups, UN Doc E/CN.17/1997/2/Add.22, para 83.
[231] WBCSD, 'Sustainability: A Shared Responsibility', Address to the UNGA Special Session, New York, 1997, 3; ICC, Address to the Plenary of the Nineteenth Special Session of the UNGA to Review and Appraise the Implementation of Agenda 21, New York, 1997, 2.
[232] UNGA Resolution S/19-2 (1997) Programme for the further Implementation of Agenda 21, paras 28, 79, 88.

practice of channelling commercial perspectives through the CSD was to continue.[233]

NGO engagement has paralleled greater transparency and system-wide capacity-building within the UN. Business groups are not disinterested in international public sector reform.[234] Organisational reform includes proposals to formalize business relationships.[235] However, States resist challenges to their entrenched positions and firms prefer managerial autonomy. The expense of additional institutional infrastructure was avoided through a UN-business website. The UN Office for Project Services was created in 1995 and the Business Consultative Group co-ordinates ventures with the private sector. Most notably, the UN Foundation, responsible for administering the UN Fund for International Partnerships (UNFIP) and financed through a corporate donation, concluded a relationship agreement which rendered it on a par with UN Specialised Agencies.

4.3. Novel Forms of Global Governance and the Global Compact.

1998 heralded a further 'fundamental shift' in the UN's attitude to the private sector.[236] The UN Secretary-General proposed a 'Global Compact of shared values and principles' with respect to human rights, labour standards and

[233] CSD, ICC/WBCSD Submission, Corporate Management Tools for Sustainable Development, Background Paper No 5, Sixth Session, 1998.
[234] USCIB, Letter to US Government concerning the Reform of the International Telecommunications Union, New York, 2000.
[235] UN Secretary-General, Renewing the UN: A Programme for Reform, UN Doc A/51/950 (1997), Action 17(c), (d).
[236] UN, 'Unite Power of Markets with Authority of Universal Values, Secretary-General urges at World Economic Form', Press Release SG/SM/6448, 1998; UN, 'Secretary General, in address to World Economic Forum, stresses strengthened partnership between the UN, Private Sector', Press Release SG/SM/6153, 1997.

environmental protection.[237] Firms were encouraged to acknowledge corporate social responsibility, safeguard market access, enhance employee welfare and constructively counter criticism.[238] The ICC accepted the challenge conditioned by the economic responsibility 'incumbent' upon companies to customers, employees and shareholders.[239] Although business should not be called upon to meet demands 'properly the preserve of governments', perfecting the regulatory environment includes securing 'the help and advice of business'. On this basis the Global Compact received corporate endorsement.[240] An original forty corporate adherents have since increased to around 1,500 in 2004 and combating corruption has been added as a principle under the Compact. Corporations submit annually examples of concrete actions undertaken to apply at least one of the principles. Since the UN lacks the mandate, resources and intention to monitor corporate compliance, the ICC champions the Compact as a self-regulatory exercise.[241] NGOs are skeptical of commercial engagement and critique the Compact for its anonymous membership and unrepresentative samples of implementation. UNDP's Global Sustainable Development Facility was terminated following sustained NGO criticism.[242] Nonetheless, four multi-stakeholder policy dialogues have since occurred. The Global Compact could offer a novel governance model in the nature of a partnership[243] and not merely constitute a

[237] UN, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment', Address to World Economic Forum, 1999, Davos, Press Release SG/SM/6881/Rev 1.
[238] UN Secretary-General, Address to Svenska Dagblates Executive Club, Stockholm, 1999, Press Release SG/SM/7004, 1.
[239] ICC, 'Business takes up Kofi Annan's challenge', Press Release, Paris, 1999; ICC, 'World Business Responds to Kofi Annan's Challenge on Shared Goals with UN', Press Release, Geneva, 1999.
[240] Fifth Asia-Pacific High-Level Employers Conference, 'Asia-Pacific Employers Conference Endorses the Global Compact', Singapore, 2000, para 10.
[241] ICC, 'The Global Compact: Business and the UN', *International Herald Tribune*, 25th January 2001.
[242] Karliner J., 'Co-opting the UN' (1999) 29(5) *The Ecologist* 318.

nature of a partnership[243] and not merely constitute a 'soft' international legal instrument such as those considered in Chapter 2. The UN's Partnership Office will bring under one umbrella the Global Compact Office and UNFIP.

The Secretary-General may be attempting to marshal the corporate influence to the UN's advantage.[244] Institutional competition with the World Trade Organisation (WTO) as the most influential forum for international standard-setting encounters its relatively more robust rule-making and greater wealth. Moreover, the US Chamber of Commerce advocated for continuing North American financial contributions to the International Monetary Fund in 1998. US firms urged the US government to pay its UN arrears on the basis that a strong UN was good for business in terms of potential procurement earnings, to discourage cross-border taxation and to assist emerging economies.[245] Provided that trading regimes were left unaffected, industry also supported the Secretary-General's call for greater authority to be delegated to the UN.[246] However, as the range of available international fora increase, the possibilities for non-State actors to manipulate the context in which they negotiate policy also grow.[247] During the ICC's 1998 Geneva Business Dialogue, the Secretary-General called for business contributions to the economic decision-making processes of UN Specialised Agencies as a way of satisfying industry demands for an effective regulatory framework. The Secretary-General also

[243] Kell G., 'Toward Universal Business Principles', Paper delivered at the LSE, London, 2001, 6.
[244] UN Secretary-General, 'Address to Telecom '99', Eighth World Telecommunications Exhibition and Forum, Geneva, 1999, 3.
[245] US Chamber of Commerce/The National Association of Manufacturers/US BRT, Letter to President Clinton and Members of Congress, 1999.
[246] UN, 'Business calls for strengthened UN', Press Release ECO/15 PI/1219, 2000.
[247] Zito A.R., 'Comparing environmental policy-making in transnational institutions' (1998) 5(4) *J European Public Policy* 671.

undertook to exclude human rights and environmental considerations from multilateral trade regimes provided progress was made by firms in satisfying social objectives.[248]

4.4. Public-Private Partnerships and the 2002 World Summit on Sustainable Development.

The corporate-UN relationship has evolved from one of actively seeking regulatory control to courting foreign direct investment and more recently towards co-operative partnerships for sustainable development. [249] Corporations are prominently positioned at the core of economic development.[250] Sustainable development has been further tailored into 'eco-efficiency'.[251] Development is a legitimate business objective since it entails market security and long term corporate viability.[252] A 'strong relationship' exists with shareholder value and an 'entrepreneurial culture' should be promoted within developing States.[253]

For example, States requested the active participation of all major groups in preparation for the 2002 World Summit on Sustainable Development in

[248] UN Secretary-General, Message to the Workshop 'Today and Tomorrow: Outlook for Corporate Strategies', UN Economic Commission for Europe, Italy, 1999.
[249] PWBLF/UNDP/IBRD, Business as Partners in Development: Creating Wealth for Countries, Companies and Communities, London, 1996; PWBLF, Building Partnerships-Cooperation between the UN and the Business Community, London, 2002.
[250] UN Secretary-General, TNCs in the New World Economy: Issues and Policy Implications, UN Doc E/C.10/1992/5, paras 4, 15-17.
[251] Desimone L.D. & Popoff F., Eco-Efficiency: The Business Link to Sustainable Development, MIT Press, Massachusetts, 2000.
[252] ICC, Multinational Enterprises: Their Contribution to Economic Growth and Development, Paris, 1985; CSD, Report of the Sixth Session concerning the Relationship between Industry and Sustainable Development, UN Doc E/CN.17/1998/4.
[253] UNDP, Human Development Report, Oxford University Press, New York, 1998, 30.

Johannesburg.[254] The ICC commenced UN consultation during 2001.[255] The ICC, World Energy Council and WBCSD formed Business Action for Sustainable Development (BASD).[256] The ICC updated its sustainable development code of conduct in conjunction with other business groups and the UN Environmental Programme (UNEP).[257] Organised business and UN Specialised Agencies prepared economic forecasts for industry and policymakers.[258] UNEP also solicited 22 global sustainability reports from industry.[259] Industry associations were free to determine the drafting process with NGO consultation as desired.[260] UNEP concluded inter alia that formal regulatory frameworks needed to be better integrated with corporate voluntary initiatives.[261]

The CSD as the Preparatory Committee also called for contributory input.[262] Based upon prior CSD practice, major groups were permitted to address the Plenary and its subsidiary bodies.[263] The ICC observed that little progress had

[254] UNGA Resolution 55/199 (2001) on the Ten-Year Review of Progress Achieved in the Implementation of the Outcome of the UN Conference on Environment and Development, paras 12, 15.
[255] Business Action for Sustainable Development (BASD), *Business, UN meet to set sustainability agenda*, Press Release, Paris, 2001.
[256] ICC, 'Business gears up for Earth Summit with launch of new initiative', Press Release, New York, 2001.
[257] ICC, ICC Commitment to Sustainable Development, Paris, 1997, 3; ICC, Business Charter for Sustainable Development, Paris, 1991; UNEP/WBCSD Joint Advisory Panel on the Business Charter for Sustainable Development.
[258] World Resources Institute (WRI)/UNEP/WBCSD, Tomorrow's Markets: Global Trends and Their Implications for Business, Washington DC, 2002.
[259] UNEP, Guidelines for Industry Sector Reports for the WSSD 2002, Paris, 2001, 3.
[260] UNEP, Meeting Report: Workshop on Preparing Industry Sector Reports for the WSSD 2002, Paris, 2001.
[261] UNEP, Industry as a Partner for Sustainable Development, 10 Years After Rio: The UNEP Assessment, Paris, 2002, 20-21.
[262] CSD, Decision 1 para 11 at the Organisational Session, New York, 2001.
[263] UN Secretary-General, Report on Suggested Arrangements for Involving NGOs and other Major Groups in the Summit and its Preparatory Process, UN Doc E/CN.17/2001/-.

been made since 1992.[264] It argued inter alia for market supportive regulatory frameworks encouraging foreign direct investment.[265] It also sought to extend business participation within the UN system.[266] Partnerships with States and others were also promoted.[267] Written submissions by seventy business organisations under the auspices of the ICC, the WBCSD and the World Energy Council were to similar effect.[268] Discussion papers were also submitted.[269] Multi-stakeholder panels occurred during the first PrepCom with two-day dialogue segments arranged for the second and fourth. The WBCSD, the World Wildlife Fund and Greenpeace International called for strong political resolve.[270]

At the Summit itself designated representatives of accredited major groups were permitted access to Plenary meetings as observers and to circulate written documents.[271] Oral statements were permissible only upon invitation and written submissions where the organisation possessed special competence.[272] A half-day multi-stakeholder dialogue segment followed the general debate. Four informal roundtables enabled the major groups to interact directly with

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[264] UN Secretary-General, Note on Multi-Stakeholder dialogue segment of the Second Session of the CSD acting as the Preparatory Committee for the WSSD, Dialogue Paper by Business and Industry, UN Doc E/CN.17/2002/PC.2/6/Add.7, para 14.
[265] ICC, *Energy for Sustainable Development: Business Recommendations and Roles*, Paper Presented to the Fourth Meeting of the CSD Preparatory Committee, 2002.
[266] ICC, *Sustainable Development: A Vision for Partnership*, ICC Doc 213/4 (2002).
[267] Whelan J., ICC, *Statement by Business and Industry to the 10th Session of the UN CSD*, 2001.
[268] ICC, CSD-9 Multi-Stakeholder Dialogue Session: Consolidation of Business Interventions, New York, 2001, 3, 5.
[269] CSD, Secretary-General Note, Multi-stakeholder Dialogue on Sustainable Energy and Transport: Discussion Paper contributed by Business/Industry, UN Doc E/CN.17/2001/6/Add.1, para 7.
[270] WBCSD, *Summit Focus*, WBCSD World Summit Newsletter, No 3, 2002.
[271] WSSD, Information for Participants, UN Doc A/CONF.199/INF/1 (2002), paras 30, 59, 62.
[272] UN Secretariat, Note on Provisional Rules of Procedure, UN Doc A/CONF.199/2 (2002), Rules 60, 64, 66.

State officials.[273] The roundtables concluded that the private sector could be a positive agent for change provided its social and environmental efforts were credible, trustworthy and responsible.[274] Experimental partnership plenary sessions were also conducted in parallel.[275] The eventual Political Declaration called inter alia for a broad-based inclusive process of participation in policy formulation, decision-making and implementation involving all major groups.[276] The Plan of Implementation included 'Type 2 outcomes' – voluntary targets and agreements between industry, States and NGOs – to complement the agreed political commitments by States ('Type 1 outcomes'). ICC and UNEP also jointly announced several World Summit Business Awards, an event indicative of contemporary relationships within the UN organisation.

5. Contemporary Modalities for Corporate Participation within the UN System.

Corporate participation within the UN system is circumscribed by the UN Charter, the constituent instrument of the Specialised Agency concerned, organisational rules of procedure, decisions of governing bodies and the practice of the relevant secretariat. Although preferential treatment may be perceived, corporations formally participate on the same terms as other

[273] UNGA, Matters related to the Organisation of Work during the WSSD, UN Doc A/CONF.199/PC/L.7 (2002).
[274] WSSD, Chairperson's Summaries of the Roundtables, UN Doc A/CONF.199/17/Add.1 (2002), 2, 12, 16.
[275] WSSD, Secretariat Note, Chairperson's Summary of the Partnership Plenary Discussion on Water and Sanitation, Energy, Health, Agriculture and Biodiversity, UN Doc A/CONF.199/16/Add.2 (2002), 2, 3.
[276] WSSD, The Johannesburg Declaration on Sustainable Development, UN Doc A/CONF.199/L.6/Rev.2 (2002), paras 23, 29 & Plan of Implementation.

NGOs.[277] Article 71 of the UN Charter empowers ECOSOC to conclude suitable consultative arrangements with NGOs. Indeed, that Article was included at the insistence of NGOs including businesspersons since NGO engagement in the economic and social field had been the 'usual practice' of the League of Nations.[278] Although Article 71 formalised this practice, it also limited participation to consultation and moreover only to matters within ECOSOC's competence.

Arrangements between ECOSOC and NGOs have since grown in detail and the contemporary criteria appear in ECOSOC Resolution 1996/31.[279] This resolution states inter alia the required attributes for NGOs seeking consultative status, the process by which they are accredited to attend UN conferences and the terms of their participation thereat (extracts of the lastmentioned are reproduced in Annex 1). Particularly noteworthy are the criteria for accreditation (paragraph 44), the presumption to attend future sessions of preparatory committees (49), the denial of any negotiating role (50), that oral statements are subject to State discretion (51) and the opportunity to distribute written submissions as unofficial documents (52).

Accreditation requires a letter of intent from an NGO and completion of a questionnaire.[280] Consultative status is differentiated by category: NGOs in

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[277] Cp 'We, the peoples of the United Nations': Preamble, UN Charter.
[278] Simma B. (Ed), The Charter of the UN: A Commentary, Oxford University Press, Oxford, 2002, 1070.
[279] ECOSOC Resolutions 3(II) (1946); 288B(X) (1950), 'Review of Consultative Arrangements with NGOs'; 1296(XLIV) (1968), 'Arrangements for Consultation with NGOs'; 1996/31, 'Consultative Relationships between the UN and NGOs'.
[280] UN Department of Economic and Social Affairs, Guidelines concerning Association between the UN and NGOs, 2004, 5.

'General' consultative status are concerned with 'most' of the activities of the ECOSOC Governing Council and its subsidiary bodies, those in 'Special' consultative status are those NGOs with 'a special competence in, and are concerned specifically with, only a few of the fields of activity covered' by ECOSOC whereas NGOs on 'Roster' status are those that 'can make occasional and useful contributions' to ECOSOC's work. NGOs with General or Special consultative status must submit four-page quadrennial reports providing basic factual information and accounting for their participation in and contribution to UN work.[281] ECOSOC's Committee on NGOs composed of States reviews NGO applications for consultative status and liaises with NGOs through the Conference of NGOs in Consultative Relationship with the United Nations. Consultative status enables access to public areas frequented by government delegates and affords opportunities for informal lobbying.

General consultative status is enjoyed by the ICC (since 1946) and the IOE. This entitles them to propose agenda items for ECOSOC's consideration, make limited oral statements and written submissions to its meetings, transmit communications on proscribed terms to ECOSOC Committees or Commissions and attend public meetings of the General Assembly. The ICC has utlised its right of initiative to organise study groups, collaborate with the International Law Association and prepare drafts for example with respect to bills of lading or international sales contracts.[282] The ICC accordingly occupies a catalytical role within the international legal process for producing

[281] UN, Guidelines for Submission of Quadrennial Reports for NGOs in General and Special Consultative Status with ECOSOC, 2004.
[282] Eisemann F., 'ICC's Stake in the Law of International Trade' (1968) 2(1) *J World Trade L* 1.

instruments which are ultimately adopted as treaties imposing obligations upon States. Treaty negotiations may be characterised by competition between ICC drafts sponsored by developed States and counterproposals from developing countries.[283]

5.1. NGO Relations with the Organs and Specialised Agencies of the UN.

NGOs in consultative status are confined to the public balcony of the General Assembly, must use designated entrances and their freedom of movement is restricted within the building.[284] As indicated in its organisational rules of procedure (reproduced in part in Annex 1), experts from the private sector may be members of national delegations, appointed to subcommittees, submit written statements to the secretariat and be invited to make oral statements during the general debate at the discretion of the chairperson. The Assembly resolved to give greater opportunities to the private sector, NGOs and civil society in contribution to the realization of the UN's goals and programmes.[285] This extended to concluding arrangements of co-operation and partnership.[286] The General Assembly has also recalled 'with satisfaction' the active collaboration between the UN and private sector associations.[287] The General Assembly has recognized that 'increasing prosperity, a major goal of the development process, is contributed primarily by the activities of business and industry'. In its view, peace and development are 'mutually supportive' of

[283] Ju W.J., 'UN Multimodal Transport Convention' (1981) 15(4) *J of World Trade L* 283, 284.
[284] UN Office of Central Support Services, Information for Members of Accredited NGOs, 1999.
[285] UNGA Resolution 55/2 (2001), Millennium Declaration.
[286] UNGA Resolution 55/162 (2000), para 14.
[287] UNGA Resolution 48/180 (1993), Entrepreneurship and Privatisation for Economic Growth and Sustainable Development.

commercial objectives such as wealth creation.[288] Others suggest that the UN's social agenda is incompatible with the singular profit-making mandate of business.[289] States were nonetheless encouraged to enact 'business-friendly' legislation which supported entrepreneurship and facilitated privatization.[290]

On at least three occasions NGOs have informally briefed the Security Council outside its regular room and not forming part of its scheduled meetings (the Arria formula). Although these NGOs have to date been limited to human rights NGOs, there is nothing under the procedural rules (partly reproduced in Annex 1) which precludes business organisations from resorting to this process. The extent of NGO participation is left to the discretion of individual Members.

The Specialised Agencies of the UN enter into consultative arrangements with NGOs as defined by their constituent instrument. For example, Article 71 of the Constitution of the World Health Organisation (WHO) enables WHO in executing its mandate to conclude suitable arrangements with NGO's. Official relations cannot be established with NGOs pursuing 'concerns which are primarily of a commercial or profit-making nature'[291]. Thus there is a distinction drawn and the term NGO is not used generically. That said, private sector interests are represented through trade associations such as the International Federation of Pharmaceutical Manufacturers Associations (IFPMA) who enjoy the right to appoint representatives, make oral statements,

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[288] UNGA Resolution 51/240 (1996), An Agenda for Development.
[289] UNICEF Executive Director Carol Bellamy, Statement to the Harvard International Development Conference, 'Sharing Responsibilities: Public, Private and Civil Society', Cambridge, Massachusetts, 1999, 2-4.
[290] UNGA Resolution 50/106 (1996), Business and Development, para 3.
[291] Principle 3.1, WHO Resolution 40.25 (1987) on Principles Governing Relations Between the WHO and NGOs.

secure access to non-confidential documents, circulate memoranda and propose agenda items. WHO's hitherto informal practices of information exchange and technical standard-setting with industry are now relatively more 'open and constructive'.[292] Additional features include the WHO/Chief Executive Officer Roundtable Process, first drafts prepared by industry for the International Program on Chemical Safety and working groups on specialist topics.[293] These positive interactions contrast with corporate efforts to undermine negotiations on a framework convention on tobacco control.[294]

NGOs may be formally accorded membership rights within Specialised Agencies. For example, the World Tourism Organisation differentiates between States as 'full members' and NGOs as 'affiliate members'.[295] Affiliate membership within the World Meteorological Organisation enables NGOs to participate in technical bodies of a non-policy making nature.[296] Finally, the membership of the International Telecommunication Union (ITU) includes States and some 570 'Sector members' representing all aspects of the telecommunications industry. 'Sector members' contribute to its expenses, participate in study groups, access documentation and have the right to participate in and submit written contributions to ITU conferences, assemblies and meetings. This may be contrasted with the Task Force established by ECOSOC's High-Level Group of Advisers on Information and

[292] WHO, 'WHO/Private Sector Talks', Press Release No 64, 1998.
[293] Eg WHO, Counterfeit Drugs: Report of a Joint WHO/IFPMA Workshop, Geneva, 1992.
[294] WHO, Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organisation: Report of the Committee of Experts on Tobacco Industry Documents, Geneva, 2000.
[295] Gilmour D.R., 'The World Tourism Organisation: International Constitutional Law with a Difference' (1971) 18 *Netherlands Int LR* 275.
[296] WMO and the Private Sector, Report submitted by the Secretary-General to the Executive Council Working Group on Long-Term Planning, WMO Doc WGLTPP-III/Doc.6 (1998).

Communications Technology where there is equality of participation between States, the private sector and other stakeholders. Although not a Specialised Agency, it is also noteworthy that four NGOs presently enjoy the rights and duties associated with the status of International Partner Organisation to the Ramsar Convention on wetlands.

The UN Department of Public Information courts NGOs among its principal clients.[297] Provided NGOs share the UN's ideals and disseminate information about its work to their constituencies, 'association' with the DPI provides access to buildings and meeting rooms. The DPI conducts annual conferences, organizes weekly briefings, publishes directories and maintains a Resource Centre for the NGO community. The UN Non-Governmental Liaison Service undertakes information, liaison and networking activities on an informal basis but has no procedures for the official registration or recognition of NGOs within the UN system.

The private sector has collaborated with the Food and Agriculture Organisation (FAO) since at least the 1970s.[298] The FAO considers that 'its leadership and credibility in food security will be enhanced as it demonstrates overtime that it has brokered increased private investment'.[299] Executives from forest products companies and industry associations participate in its Advisory Committee on Paper and Wood Products. The FAOs assessment procedure is 'pretty strict to

[297] UNGA Resolution 13(1) (1946).
[298] Simons W.W., 'Government-Industry Partnership in the Third World: A UN Experiment Begins to Pay Off' (1975) 10(3) *Colum J of World Bus* 36.
[299] FAO Programme and Policy Advisory Board, A Strategy for FAO/Private Sector Partnership to help achieve Food Security, 1997.

avoid problems' such as 'image risk' and conflicts of interest.[300] It has a committee composed of auditor, lawyers, public procurement and technical cooperation officers to screen all potential partners including NGOs composed of private sector members.

The World Intellectual Property Organisation (WIPO) may 'make suitable arrangements for consultation and cooperation with international NGOs and, with the consent of the governments concerned, with national organisations, governmental or non-governmental'.[301] Each WIPO body may decide which NGOs to invite to their meetings as observers.[302] NGO experts act as consultants and may participate through the Policy Advisory Commission or the Industry Advisory Commission. Appointments generally favour industry bodies interested in intellectual property protection. Observers to WIPO meetings participate in debates at the invitation of the Chairperson but cannot submit proposals, amendments or motions.[303] Eighty-four percent of its income is derived from fees paid by the private sector for the international registration of patents, trademarks and industrial designs.

Members States of the ILO 'undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries'.[304] Furthermore, the ILO may

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[300] Ms Aysen Tanyeri-Abur, Senior Officer (Private Sector), Resources and Strategic Partnerships Unit, FAO, Response to Questionnaire, 24 September 2004.
[301] Art 13, Convention establishing the WIPO.
[302] WIPO General Rules of Procedure, WIPO Doc 399 (FE) Rev 3, Geneva, 1998, Rules 8 , 48.
[303] *Ibid*, Rules 24, 39.
[304] Art 3(5), ILO Constitution.

'make suitable arrangements for such consultation as it may think desirable with recognized non-governmental international organisations, including international organisations of employers, workers, agriculturalists and co-operators'.[305] Employer and worker delegations vote upon instruction from their respective organisations including against the government representatives of their national delegations. Employers are represented through the IOE who is generally able to ensure voting cohesion.[306] The IOE has initiated constitutional amendments and participates in drafting international labour standards which are subsequently adopted by States. ILO Conventions commonly envisage further consultation with employer and worker organisations when formulating national implementing legislation.[307]

For example, the IOE recently undertook to eliminate child labour.[308] The practice affords an unfair commercial advantage which appropriates market share from firms who cannot employ this cost-reducing production method. Voluntary corporate initiatives include codes of conduct, certification schemes and alliances with other actors.[309] The IOE encouraged States to ratify and implement the relevant Convention to compel enforcement action against deviant firms.[310] The US Council for International Business conceded that US

[305] *Ibid*, para 3.
[306] Kruglak G., 'Tripartitism and the ILO' in Forsythe D.P., The UN in the World Political Economy: Essays in Honour of Leon Gordenker, Macmillan Press Ltd, London, 1989, 179, 183.
[307] ILO Tripartite Consultation (International Labour Standards) Convention No 144 (1976); ILO Tripartite Consultation (Activities of the International Labour Organisation) Recommendation No 152 (1976).
[308] IOE, Resolution on Child Labour, 73rd Session, Geneva, 1996, para (f).
[309] IOE/ILO, Employer's Handbook on Child Labour: A Guide for Taking Action, Geneva, 1998, 32-66, 69-71.
[310] IOE/ILO, An Employers' Initiative for Ratification of the Worst Forms of Child Labour Convention 1999 (No 182), Geneva, c1999, 4.

law and practice would be unaffected.[311] To deter resort to the WTO, the IOE also proposed an ILO Declaration by which States re-committed themselves to observing fundamental principles and rights at work.[312] Once again American law and practice is largely unaffected.[313] Employer organisations did not submit comments during the first review of that instrument.[314] To enhance the credibility of international labour standards the IOE seeks to improve ILO standard-setting with pre-discussions, surveys, simplified procedures and targeted revision methods.[315] The US Council for International Business has also committed itself to strengthening the ILO as an alternative to imposing trade measures in response to labour rights violations.[316] Workers and employers organisations also participate in the ILO's Tripartism and Social Dialogue in Action programme.

The UN Conference on Trade and Development (UNCTAD) also permits NGO contributions to international legal processes. General consultative status is extended to organisations exercising functions and having basic interests in most of the Trade and Development Board's activities and special consultative status is reserved to those having a special competence or

[311] USCIB, USCIB Plays a Major Role in Convention on Worst Forms of Child Labor, Geneva, 1999; USCIB, The US Business Community's Letter to the Senate Foreign Relations Committee: US Ratification of the ILO Convention on the Worst Forms of Child Labor, New York, 1999, 1.
[312] IOE, The ILO Declaration on Fundamental Principles and Rights at Work: A Guide for Employers, Geneva, c1998, 4.
[313] USCIB, ILO Declaration on Fundamental Principles and Rights at Work, New York, 1998.
[314] ILO, Review of Annual Reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, ILO Doc GB.277/3/1 (2000), Pt 1, paras 56, 86-7.
[315] IOE, ILO Standards, Position Paper, Geneva, 2000.
[316] US Council for International Business (USCIB), Letter to Congress: Trade and Labor Linkage, New York, 1999.

concerned with specific activities.[317] Both enable observer status at public meetings, the circulation of written submissions, making oral statements and proposing agenda items. Information technology companies developed UNCTAD's Automated System for Customs Data which presently constitutes the de facto standard for automated customs procedures. The ICC and UNCTAD also formulated interim rules pending the entry into force of the UN Convention on the International Multimodal Transport of Goods. [318] Professional accounting firms participated in UNCTAD's Group of Experts on International Standards of Accounting to measure environmental impacts.[319] This parallels the efforts of the WBCSD in measuring greenhouse gas emissions for prospective inclusion in an emissions trading regime.[320] The International Accounting Standards Committee, composed of financial institutions, corporations, stock exchange authorities and central bankers, also formulated International Accounting Standard 37 to quantify environmental liability. Accounting standards have also been applied to human rights.[321] Corporate leaders also participate in panel discussions under its auspices.[322] Notwithstanding consultation with businesses, States, NGOs and trade unions, UNCTAD has been unable to progress the corporate responsibility agenda.[323]

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[317] Art XV, UNCTAD Constitution; Rule 77, Rules of Procedure; Decision 43 (VII) (1968) of the Trade and Development Board, 'Arrangements for the Participation of NGOs in the Activities of UNCTAD'.
[318] UNCTAD/ICC, Rules for Multimodal Transport, ICC Pub No 481, Paris, 1990.
[319] UNDESD/Transnational Corporations and Management Division (TCMD), Report of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) at its Tenth Session, UN Doc E/C.10/1992/12.
[320] WRI/WBCSD Greenhouse Gas Protocol Initiative (GhgProtocol).
[321] The Institute of Social and Ethical Accountability (AccountAbility), The AccountAbility 1000 Standard (AA1000), London, 1999.
[322] UN Press Release GA/EF/2833 (1998).
[323] Muchlinski P.T., 'Attempts to Extend the Accountability of TNCs: The Role of UNCTAD' in Kamminga M. & Zia-Zarifi S. (Eds), Liability of Multinational Corporations under International Law, Kluwer Law International, The Hague, 2000, 97, 116.

The Director-General of the UN Industrial Development Organisation (UNIDO) may establish appropriate relations with NGOs.[324] UNIDO's International Business Advisory Council coordinates cooperation agreements with firms and business associations. Private sector development is the objective of most of the agency's technical co-operation within developing countries. The Executive Board of the UN Population Fund may similarly invite when appropriate intergovernmental organisations and those NGOs enjoying consultative status with ECOSOC to participate in its deliberations on questions relate to their activities. More specifically, the UN Children's Fund (UNICEF) was called upon to 'obtain from...NGOs having a special interest in child and family welfare the advice and technical assistance which it may require for the implementation of its programmes'.[325]

States invited 'those NGOs that have an interest in the field of the environment to lend their full support and collaboration to the UN with a view to achieving the largest possible degree of co-operation'.[326] The desired attribute of NGOs – 'having an interest in the field of the environment' – was construed to include business organisations such as the ICC. UNEP was called upon to collaborate with these NGOs as well as other actors.[327] NGOs may designate representatives to observe public meetings of the Governing Council and its subsidiary organs.[328] The secretariat circulates the written statements of

[324] Art 19, Constitution of the UNIDO.
[325] UNGA Resolution 417 (1950).
[326] UNGA Resolution 2997 (1972), para IV(5).
[327] Agenda 21, Chapter 38, para 22(g).
[328] UNEP Rules of Procedure, Rule 69; UNEP Governing Council Decisions 21/19 (2001) on the Role of Civil Society, 18/4 (1995) on the role of NGOs in UNEP & 16/7 (1991) on Volunteers for the Environment.

observers where related to specific agenda items.[329] NGO participation is coordinated by UNEP's Civil Society and NGOs Unit. The Global Environment Facility also contemplates arrangements with NGOs, private sector entities and academic institutions for project preparation and execution. [330] Business contributes information to the clearing house mechanism of the International Cleaner Production Information Centre. The International Council on Mining and Minerals (ICMM) co-sponsors seminars, publishes case studies and develops operational guidelines for industrial use.[331] UNEP workshops bring together mineral resource managers and national regulatory authorities. Government officials are drawn away by the ICMM to formulate its corporate social responsibility statement in conjunction with trade unions and NGOs.[332] For this purpose ICMM argued that it was inappropriate to refer to international conventions or provide intergovernmental organisations with oversight responsibility. [333] It moreover suggests that business and civil society should not undertake the task of building the public sector's regulatory capacity. [334] However, firms may provide technical assistance on a case-by-case basis as dictated by national law and practice.

Although the International Law Commission possesses a general power to 'consult with any international or national organisations, official or non-

[329] UNEP, Rules of Procedure, Rule 69(2).
[330] Instrument for the Establishment of the Restructured GEF, 1994, para 28.
[331] ICMM, The Mining and Metals Industries: Progress in Contributing to Sustainable Development, Working Paper, London, 2002, 60, 62, 67, 69, 117; UNEP/ICMM, Environmental Protection Working Group, Case Studies on Tailings Management, London, 1998.
[332] ICMM, Toronto Declaration, 2002.
[333] ICMM, Charter on Sustainable Development, London, 1998.
[334] ICMM, Response to the Draft Report of the Mining, Minerals and Sustainable Development Project, London, 2002.

official', it has not generally been predisposed towards NGO consultation.[335] It encourages States to solicit input from chambers of commerce and has considered including business representatives as experts and certifying international legal points upon private sector request.[336] Commercial interest in the UN Commission on International Trade Law (UNCITRAL) is more apparent since national legislation frequently draws upon its model laws.[337]

Commercial influences are frequently located in obscure technical committees. Some three hundred companies participate within the International Telegraph and Telephone Consultative Committee and the International Radio Consultative Committee of the International Telecommunications Union (ITU). The International Shipowners Federation, the International Chamber of Shipping and the Oil Companies International Maritime Forum contribute significantly to the regulatory work of the International Maritime Organisation with respect to maritime safety and environmental protection. Commercial airliners acting through the International Air Transport Association establish international fares at traffic conferences and contribute technical information to regulations formulated by the International Civil Aviation Organisation.[338]

Firms and organised business groups limit participation to areas of interest and gravitate to those intergovernmental institutions with distinctly commercial mandates. Efforts are made to channel corporate contributions. The UN

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[335] Article 26(1), Statute of the International Law Commission.
[336] UN, Making Better International Law: The International Law Commission at 50, New York, 1998, 31, paras 22, 55, 94, 113-4 , 116.
[337] Eg UNGA Resolution 47/34 (1992) on the UNCITRAL Model Law on International Credit Transfers.
[338] Heller P.P., 'International Regulation of Air Transport' (1973) 7(3) *J World Trade L* 301.

Office for Project Services held a conference in 2000 inviting the private sector 'to move beyond a commercial relationship with the UN and become a partner in reducing poverty, promoting environmentally sustainable growth and extending the benefits of globalization to the poorest countries'. The UN High Commissioner for Refugees considers that firms should voluntarily provide humanitarian assistance since market stability is a prerequisite for economic activity.[339] The Office for the Coordinator for Humanitarian Affairs meets with the Business Humanitarian Forum and the ICC to match humanitarian needs with voluntary private sector contributions.[340] Technical assistance includes commercial banks collecting donations, information technology firms generating refugee registration cards and financial institutions formulating 'catastrophe' bonds in the event of natural disasters. Non-State entities concerned with disaster mitigation and humanitarian relief such as telecommunications firms have a right to provide assistance and requesting States are expected to afford the necessary operational privileges and immunities including removing regulatory barriers to the transfer of equipment and personnel.[341]

These numerous examples support several conclusions. First, corporate participation in many areas of the UN system has been occurring for a considerable period. Engagement may occur with individual firms although channeling commercial contributions through trade associations is more common. Second, each UN institution must be assessed on a case by case

[339] Ogata S., UNHCR, 'Can Business Help? Partnership and Responsibilities in Humanitarian Work', Meeting of the Business Humanitarian Forum, Washington DC, 1999, 2.
[340] UN Secretary-General, Message to the Business Humanitarian Forum, Geneva, 1999.
[341] Arts 4(6), 9, 11, Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere Convention) 1998.

basis. The degree of participation varies with the mandate of the organisation and its historical development. The terms of participation typically contemplate observer status although occasionally it entails an advisory role and more rarely membership. Third, UN practice is highly fluid: a decision of the governing body initiates corporate participation and the precise details of that arrangement are then resolved by the relevant secretariat. That said, States retain formal control over decision-making and only in the ILO do employers organisations exercise the right to vote.

5.2. NGO Relations with International Economic Institutions.

Many of the international economic institutions by contrast do not extend privileges to NGOs to participate directly in their formal decision-making processes. This appears to be somewhat paradoxical, particularly for corporations, given the proximity of commercial objectives with their organisational mandates. For example, the General Council of the WTO may conclude appropriate arrangements of consultation and co-operation with NGOs concerned with matters related to those of the WTO.[342] However, a broadly-held government view considers that NGOs cannot be directly involved in WTO activities and resort to national processes is preferable.[343] Such a view has been repeated by the WTO secretariat.[344] Since it 'has a limited mandate to deal with NGOs and has no right of initiative or

[342] Art V(2), Agreement Establishing the WTO, General Agreement on Tariffs and Trade (GATT) Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Doc MTN/FA.
[343]WTO, Guidelines for Arrangements on Relations with NGOs, WTO Doc WT/L/162 (1996), paras 4, 6.
[344] WTO, 'The System Shields Governments from Narrow Interests', 2001.

independent decision-making powers', there is no attempt made by firms to influence the conditions of their participation 'at the level of the WTO Secretariat'.[345] In 1996, the WTO affirmed that 'closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where primary responsibility lies for taking into account the different elements of public interest which are brought to bear on trade policy-making.'[346] This position reflects the perceived unfairness of well-resourced NGOs lobbying their national governments and again at the WTO. Governments also fear that the trade-offs inherent in trade negotiations for increasing global welfare will be difficult to secure if open to scrutiny by the particularized interests of inefficient industries opposed to removing protectionist barriers.[347] Developing counties in particular resist any deeper NGO involvement[348] whereas other States are prepared to enhance external transparency.[349]

The International Trade Organisation similarly contemplated the conclusion of 'suitable arrangements for consultation and co-operation with NGOs concerned with matters within the scope of this Charter'.[350] It was envisaged that NGOs, particularly business and industry associations, would be afforded

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[345] Mr Bernard Kuiten, Counsellor, External Relations Division, WTO Secretariat, Response to Questionnaire, 11 August 2004.
[346] WTO, Report of the Committee on Trade and Environment, WTO Doc WT/CTE/W/40 (1996).
[347] Esty D.C., 'NGOs at the WTO: Cooperation, Competition or Exclusion' (1998) 1 *J Int Economic Law* 123, 138-9.
[348] 'Developing Counties resist expansion of environment role for World Trade body' (1999) 22 *Int Env* Rep 225, 226.
[349] Cp WTO, General Council Informal Consultations on External Transparency, Communication from Hong Kong WTO Doc WT/GC/W/418 (2000); Informal Paper by Canada WTO Doc WT/GC/W/145 (2000); Submission from the US WTO Doc WT/GC/W/413/Rev.1 (2000).
[350] Article 87(2), Havana Charter of the International Trade Organisation.

consultative status, entitled to observe annual conferences, given access to documentation, allowed to propose agenda items, invited to address specific meetings and permitted to establish an advisory committee.[351]

Although the WTO may represent an evolutionary step backwards[352], many of these entitlements have been achieved incrementally. NGOs were permitted to 'attend' rather than 'observe' plenary sessions of the 1996 Singapore Ministerial and an NGO Centre organized meetings and workshops. [353] Companies and law firms were informed that to qualify for accreditation they had to register through their respective industry association or professional organisation. [354] NGOs were regularly briefed by the secretariat on the progress of informal working sessions at the Geneva Ministerial. The preparatory process for the Seattle Ministerial included individual proposals for agenda items, access to unrestricted documents, a prior symposium on trade issues and daily briefings by the NGO Centre. The secretariat also received information which NGOs sought to make available to interested delegations, responded to information requests and provided issue-specific briefings. Corporations, industry associations and NGOs also attended symposia organized by the secretariat with respect to trade and the environment (1994, 1997 and 1999) and trade facilitation (1998). However, accredited NGOs are not permitted to observe the councils, committees and bodies which constitute the daily deliberations of the WTO. Although

[351] Executive Committee of the Interim Commission for the International Trade Organisation, Doc ICITO/EC.2/SC.3/5 (1948); Charnovitz S. & Wickham J., 'NGOs and the Original International Trade Regime' (1995) 29 *J World Trade* 111, 113.
[352] Loy F., 'Public participation in the WTO', http://www.unu.edu/news/wto/ch06.pdf (2000).
[353] WTO Doc WT/GC/M/13 (1996).
[354] Marceau G. & Pedersen P.N., 'Is the WTO Open and Transparent?' (1999) 33(1) *J World Trade* 5.

expanding NGO activity increases the prospects for special interest manipulation, it is likely that national producer interests are already well-served.[355] For example, the Australian government circulated two statements from international agricultural associations in support of its position.[356] The ICC occasionally participated in GATT organs.[357] In 1997 it requested official dialogue with the WTO.[358] The Business Roundtable also proposed that the WTO convene an annual meeting of business and other NGOs to improve communication channels.[359] The Director-General currently meets with civil society representatives for this purpose.

The instruments establishing the International Bank for Reconstruction and Development and the International Monetary Fund (IMF) do not contain provisions permitting formal NGO participation within their decision-making processes. This original position has subsequently been modified over time, particularly during the 1990s at the urging of NGOs for greater decision-making transparency. Although these intergovernmental organisations previously enjoyed close informal working relationships with, for example, financial institutions, corporations also stand to benefit from the inroads made by NGOs. Thus the IMF presently conducts annual consultations with academics, business and NGOs.[360] Private individuals based in host States 'who believe that they or their interests have been or could be directly harmed

[355] Charnovitz S., 'Opening the WTO to Non-governmental Interests' (2000) 24 *Fordham ILJ* 173.
[356] Communications from Australia WTO Doc WT/L/367 (2000) & WT/L/368 (2000).
[357] Jackson J.H., World Trade and the Law of GATT, Bobbs-Merrill Company, Indianapolis 1969, 453, 457.
[358] Barnard B., 'Business Group wants special role in WTO' (1997) *J Com Market* 5, 3A.
[359] The Business Roundtable, Preparing for New WTO Trade Negotiations to Boost the Economy, 1999, 3.
[360] Chauhan S. & Gurtner B., 'NGO Participation in Article IV Consultations of the IMF' (1996) 9 *Swiss Coalition News* 2.

by a project financed by the World Bank' can make an application for inspection by the World Bank Inspection Panel to assess whether projects are being implemented consistently with the Bank's operational policies.[361] The NGO Working Group on the World Bank communicates NGO concerns to the secretariat through the NGO-World Bank Committee. NGO participation within the IMF is limited to consultations with States when formulating poverty reduction strategy papers or initiating IMF surveillance procedures.

Noteworthy at the regional level, the OECD may establish relations with and address communications to non-member States or organisations and invite them to participate in OECD activities upon such terms as the Council may determine.[362] International NGOs may be consulted where they have wide responsibility in general economic matters or specific economic sectors, have affiliated bodies belonging to all or most of the Member States and substantially represent non-governmental interests in the field or sector in question.[363] The consultative status enjoyed by the Business and Industry Advisory Committee and the Trade Union Advisory Committee enables them to follow the work of OECD committees, express oral views or submit memorandums and be consulted prior to Ministerial meetings.

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[361] See generally Shihata I., The World Bank Inspection Panel in Practice, Oxford University Press, Washington DC, 2000..
[362] Art 12, Convention on the OECD.
[363] OECD, Decision of the Council on Relations with International NGOs, OECD Doc C(62)45 (1962), para 2.

5.3. The Character of Corporate Relationships with the UN: Standard-setting, Programme Implementation and Public Procurement.

The 'quieter side' of UN activity is technical standard-setting to design the 'soft infrastructure' of the global economy.[364] The ICC considers that the UN's function is to promote the conditions conducive to economic activity including developing technical and legal norms to facilitate cross-border exchange.[365] It expressed its 'strong interest in multilateral co-operation, including standard-setting through the UN and other intergovernmental institutions'.[366] Commercial participation is also observable in emergent fields such as electronic commerce.[367] Attempts to influence regulatory development necessitates extending model laws, harmonising conflicting national law and allocating risk and prospective liability between market participants.[368] Similar efforts are undertaken by the Business and Industry Advisory Committee to the OECD.[369] Jointly-developed products targeted at industry enable leading firms to influence market conditions.[370] For example, the ICC and the International Council of Chemical Associations in conjunction with UNEP and the IOE under the auspices of the ILO have formulated proposals applicable to specific industries with respect to managing chemical

[364] UN, Address by Secretary-General Kofi Annan to the US Chamber of Commerce, Washington DC, Press Release SG/SM/7022, 1999, 1.
[365] ICC, 'World Business Message for the UN Millennium Assembly on the Role of the UN in the 21st Century', Press Release, Paris, 2000.
[366] UN, 'Joint Statement on Common Interests by UN Secretary-General and ICC', Press Release SG/2043 (1998).
[367] UNGA Resolution 51/162 (1996) adopting the UNCITRAL Model Law on Electronic Commerce.
[368] ICC, General Usage for Internationally Digitally Ensured Commerce, Paris, 1997.
[369] BIAC, The Global Action Plan for Electronic Commerce, Paris, 1998.
[370] UNEP/ICC/International Federation of Consulting Engineers (FIDIC), Environmental Management System Training Resource Kit.

accidents.[371] Such parallel lawmaking processes may give rise to cross-pollination or competition between different fora but increase the prospects for commercially-orientated solutions. The ICC maintains routine communication channels with UN Agencies and coordinates business contributions to periodic intergovernmental meetings.[372]

Firms or industry associations typically contribute resources and technical expertise to pilot projects under Agency auspices.[373] Private sector participation has 'constantly increased' over time for the UN Educational, Scientific and Cultural Organisation and changed 'from a pure fund-raising rationale ('we do-they fund') towards a partnership rationale ('they do-we help')'.[374] It is 'sound practice' for UN bodies to resort to competent outside expertise in support of their mandated programmes when operational resources are not available in-house.[375] Management consulting firms enjoy an action-orientated image, perceived impartiality and provide additional credibility to UN reform. For example, private consulting firms restructured peacekeeping programmes in 1992 possibly in preparation for employing private military companies in UN peace enforcement operations (see further Chapter Two). Management consulting arrangements transfer skills and knowledge and

[371] UNEP Industry and Environment Programme, Awareness and Preparedness for Emergencies at the Local Level (APELL): A Process for Responding to Technological Accidents, Paris, 1988; ILO Convention 174 (1993), Recommendation 181 & the 1991 Code of Practice concerning the Prevention of Major Industrial Accidents.
[372] ICC, 'Working with the UN: Current Joint Projects with the UN and its Agencies', Paris, 1999.
[373] UN Department of Public Information (DPI), The UN and Business: New Dimensions in Cooperation: Case Studies from the UN System, New York, 1998.
[374] Mr Philipp Muller-Wirth, Specialist for Cooperation with the Private Sector, Sector for External Relations and Cooperation, UNESCO, Response to Questionnaire, 9 August 2004.
[375] Secretary-General Note, Report of the Joint Inspection Unit on policies and practices in the use of the services of private management consulting firms in the organisations of the UN system, UN Doc A/54/702 (1999), JIU/REP/99/7.

produce the lowest technically acceptable offer by rotating firms and advertising bids internationally. The public procurement requirements of the UN are a lucrative market.[376] However, the delegation of UN authority to privatized bodies or recruiting personnel from non-State sources for action under UN auspices raises concerns for their level of commitment, accountability in the event of misconduct and deterring prospective regulation: in an era where State intrusion into the marketplace is resisted, multinational intrusion will be more objectionable.

The UN has formulated guidelines, procedures and checklists when corporate contractors are employed.[377] Although use of the UN name and emblem are ordinarily limited to official purposes, business entities can be authorised on a non-exclusive commercial basis.[378] Bureaucratic procedures, duplication and Agency competition create delay, increase transaction costs and impede private sector engagement.[379] Since firms profit from their association with the UN through improved name recognition or image, there is a need to avoid conflicts of interest and prevent unauthorized commercial agreements between UN staff and companies.[380] Furthermore, the immunity enjoyed by international organisations before national courts may preclude contractual enforcement.[381] Conversely, control by that organisation does not make a contractor an

[376] Inter-Agency Procurement Services Office, UN System: General Business Guide for Potential Suppliers of Goods and Services, New York, 2000.
[377] Joint Inspection Unit report on outsourcing UN Doc A/52/338 (1997); Secretary-General's Bulletin ST/SGB/177 (1992); Administrative Instruction ST/AI/327 (1985).
[378] UNGA Resolution 92(1) (1946).
[379] ECE, Committee for Trade, Industry and Enterprise Development, ECE Doc TRADE/1999/12.
[380] UN Secretary-General, Report on the work of the organisation, UN Doc A/54/1 (2000), para 342; Investigation into allegations concerning an electronic commerce project at UNCTAD, UN Doc A/54/413 (2000).
[381] *Atkinson v Inter-American Development Bank* 156 F 3d 1335 (DC Cir 1998).

instrument thereof entitling it to derivative immunity.[382] Subcontractors may be unable to access development assistance specifically intended for them when States have debts under public works contracts.[383]

Direct contractual dealings are one means of enticing voluntary corporate compliance with international legal standards.[384] Corporations are rendered ineligible for business partnerships in certain circumstances.[385] However, this is not true accountability since there is no declaration or other consequence of impermissible activity. The financial sector has committed itself to environmental protection.[386] States, corporations and chambers of commerce may conclude similar arrangements with industry representatives appointed to steering committees.[387] Such instruments become a platform from which firms may address national regulators.[388] The execution of Agency programmes by the private sector necessitates novel partnership agreements and Memoranda of Understanding. These agreements may entitle business to be consulted by national authorities on proposed regulations or regulatory amendments.[389]

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[382] *IBRD v District of Columbia* 171 F 3d 687 (DC Cir 1999).
[383] *ForAfrique Burkinabe SA v Commission of the EC* [1993] 1 ECR 2161, paras 23-4.
[384] ECOSOC Resolution 1991/55 Sec 2, para 2 (c)(i).
[385] UN, Guidelines for Cooperation between the UN and the Business Community, 2000, Section 3.
[386] UNEP, Statement by Banks on the Environment and Sustainable Development, 1992; UNEP, Statement by the Insurance Sector on the Environment and Sustainable Development, 1995; UNEP, Statement of Environmental Commitment by the Insurance Industry, 1995.
[387] UNEP, International Cleaner Production Declaration & Draft Implementation Guidelines for Companies and Governments, Nairobi, 1998.
[388] UNEP, Report of UNEP Advisory Group Meeting on Commercial Banks and the Environment, Geneva, 1995, 2.
[389] World Customs Organisation (WCO)/ICC, The Co-operation Agreement between the WCO and the ICC to Promote and Support Efficiency in Customs Control and Facilitation, Hong Kong, 1996; ICC Position Paper, ICC International Customs Guidelines, ICC Doc 103/190, Paris, 1996.

Commercial engagement also encourages greater inter-Agency co-ordination.[390]

5.4. Efforts to Harmonise Secretariat Practice in its Operational Dealings with the Private Sector.

As observed above, international organisations may conclude arrangements of co-operation and consultation with NGOs. Furthermore, UN secretariats pursue a diverse range of practices in their operational dealings with NGOs. NGOs enjoying consultative status may be represented as observers at meetings of the governing body, executive committee or subsidiary bodies, to make oral and written submissions and to participate in expert meetings and technical conferences. NGO liaison officers, focal points or external affairs officers have been appointed and civil society programmes or NGO advisory committees established. Entry points have also been designated to facilitate corporate partnerships.[391] Secretariats conclude memoranda of understanding and co-operation agreements as required, conduct annual consultations and communicate through websites. For example, the Financing for Development Office interacts 'with a group of business interlocutors whom we have appointed (comprising major business associations from around the world) and liaise with them as to the appropriate business entity to invite to speak on a

[390] FAO/ILO/OECD/UNEP/UNIDO/WHO, Memorandum of Understanding concerning the Establishment of the Inter-Organisation Programme for the Sound Management of Chemicals 34 *ILM* 1311 (1995).
[391] UNDP's Division for Business Partnerships; WHO's Private Partnership Unit; UNESCO's Programme for New Partnerships; the International Fund for Agricultural Development's Private Sector/Capital Markets Unit.

particular issue.' Moreover, '[w]hom we invite to a particular meeting depends upon the issue being discussed in that meeting.'[392]

There is no commonly accepted definition of 'NGO' and Specialised Agencies are left to identify organisations for cooperation.[393] Accreditation applications typically require a description of the NGOs activities and its relevance to the work of the institution before being assessed in the first instance by the secretariat. Each of the Specialised Agencies has formulated their own guidelines for private sector interaction.[394] This is also true of other intergovernmental agencies. For example, the UN Office on Drugs and Crime had to develop in-house guidelines for engagement with the private sector modeled upon instructions issued from the UN Secretary General. Although corporations had provided ad hoc funding or in-kind contributions for particular small-scale projects at the local field level, there was almost no private sector contact at headquarter level.[395]

There is an inevitable trend to formalize these informal practices notwithstanding that 'formal relations are rarely a prerequisite for cooperation'.[396] UNEP for example reviewed the procedural rules to allow for

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[392] Mr Krishnan Sharma, Designated Focal Point for Private Sector Engagement, Financing for Development Office, Response to Questionnaire, 23 September 2004.
[393] UN Secretary-General, Working with NGOs: Operational Activities for Development of the UN system with NGOs and Governments at the Grass-Roots and National Levels, UN Doc A/49/122 (1994), para 15.
[394] WHO Guidelines on interaction with commercial enterprises, 1999; FAO, Principles and Guidelines for FAO Cooperation with the Private Sector; UNESCO, Guidelines for Mobilising Private Funds and Criteria for Selecting Potential Partners, 1999.
[395] Mrs Gillian Murray, Officer in Charge, Co-Financing Section, Public Affairs and Inter-Agency Branch, UN Office on Drugs and Crime, Telephone Interview, 17 August 2004 (Notes held on file).
[396] Secretary-General, Report on arrangements and practices for the interaction of NGOs in all activities of the UN system, UN Doc A/53/170 (1998), para 32.

more active NGO participation in the nature of oral and written statements during debates.[397] Several States consider that no single legal framework could serve as a model whereas others suggested that procedures should be standardized throughout the UN system.[398] NGO interaction with secretariats and necessitated by operational requirements frequently exceeded in practice what was stipulated in the constituent instrument, enabling resolution or organisational rules of procedure. Considering that NGO participation could give rise to 'significant distortions' and undermine sovereign equality, several States believed that to preserve the intergovernmental character of the UN States should be able to call upon NGOs as and when necessary. NGOs argued that best practice in NGO access and participation should be formalized as minimum standards throughout the UN since the present informal practices only benefited well-established NGOs.[399] Whether relations are centralized or decentralized, NGO insistence upon information disclosure enhances institutional transparency and accountability. States are prepared to allow participation but are determined to retain control. NGO participation is largely discretional and dependant upon issue area and prevailing political current. These irregularities 'and the lack of coherent, across the board, guidelines are one of the leading causes of frustration among non-State actors seeking access to the processes of international environmental governance'.[400] Closer

[397] UNEP Governing Council Decision SS.VII/5 (2001) on enhancing civil society engagement in the work of UNEP, UN Doc UNEP/GCSS.VII/6 (2001); UNEP Draft Strategy on Enhancing the Engagement of Civil Society in the work of UNEP, UN Doc UNEP/GCSS.VII/4/Add.1 (2001).

[398] Secretary-General Report, View of Member States, members of the Specialised Agencies, observers, intergovernmental and non-governmental organisations from all regions on the report of the Secretary-General on arrangements and practices for the interaction of NGOs in all activities of the UN system, UN Doc A/54/329 (1999), paras 7, 13, 15-17.

[399] *Ibid*, para 57.

[400] UN University/Institute of Advanced Studies, International Sustainable Development Governance: The Question of Reform-Key Issues and Proposals, Tokyo, 2002, 35.

proximity to intergovernmental deliberations need not translate into substantive change, particularly where States seek to streamline NGO participation but retain the benefits of NGO experiences and views.[401]

Attempts have been made to formulate system-wide procedures and policies governing NGO relations.[402] The overall picture 'is one of concurring basic principles but somewhat diverging practices, in particular as regards the selection of partners, the recognition of contributions and the avoidance of conflicts of interests.'[403] The private sector 'has also become a fully-fledged participant in the international decision-making process in technical or scientific fields, such as telecommunications, while in others such as the environment, meteorological services or intellectual property, it is brought into consultations at an early stage.' The Joint Inspection Unit

> 'wish to underline, however, that sharing information and harmonizing policies and procedures should not necessarily lead to the adoption of one single set of standard guidelines for the whole UN system. In fact, many agencies caution that the diversity on their mandates and activities would probably not allow them to agree on anything but very general principles, and that excessively rigid procedures must be avoided at all costs. Others, however, stress the need for some common point of reference...'

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[401] UN, UN System and Civil Society-An Inventory and Analysis of Practices, Background Paper for the Secretary-General's Panel of Eminent Persons on UN Relations with Civil Society, 2003, 20-1.
[402] Secretary-General Bulletin ST/SGB/209 (1984).
[403] Secretary-General Note, Report of the Joint Inspection Unit on private sector involvement and cooperation with the UN System, UN Doc A/54/700 (2000), JIU/REP/99/6, paras 51, 62, 86.

The Administrative Committee on Coordination (ACC) confirmed that 'there is at present considerable diversity' in respect of the regulations and practices that govern cooperation with the private sector.[404] It recommended drafting guidelines 'of a generic nature' aiming to promote coherence and accompanying the 'more specific internal guidance' of each UN Agency. Furthermore, the ACC recommended that 'suitable mechanisms for the sharing of information and best practices with regard to relations with the private sector should be established...to ensure consistency of policy and harmonization of relevant procedures throughout the UN system'.

Relationships between the UN and the private sector assume many different forms: policy dialogue (formal and informal participation in intergovernmental deliberations, standard-setting, governance), mobilizing philanthropic funds or investment capital, operational partnerships (project design, implementation and delivery with contributions of financial, in-kind, technical or managerial resources, staff secondment and training [405]), country-level cooperation, advocacy (awareness raising, outreach, social marketing), information sharing and dissemination (joint research on technical and scientific issues) and public procurement. The private sector participates through consultative or observer status, participation in working groups, advisory bodies or committees, associate status with the Department of Public Information, accreditation for specific conferences and events and as members of national delegations.

[404] UN, Comments by the Administrative Committee on Coordination on the report of the Joint Inspection Unit entitled 'Private sector involvement and cooperation with the UN system', UN Doc A/54/700/Add.1 (2000), paras 5, 10, 14.
[405] UNFPA, Partnership with Civil Society, Technical Report No 46, 1999.

An additional determining factor is that private sector participation is topic-specific. Indeed, the selective interests of business are 'possibly...the only limiting factor in their participation' within the secretariat of the Convention on Biological Diversity:

> 'The fairly limited contacts between the private sector and the secretariat seem to revolve around the following: (a) requesting information, in particular on policy trends; (b) requesting clarification on decisions already taken; (c) attempting to participate in policymaking; (d) attempting to avoid decisions that may have adverse impacts on the operations of the private sector.'[406]

The Secretary-General concluded that 'the diversity of relationships between the UN and non-State actors is such that it is not possible to adopt a 'one-size-fits-all' institutional approach for dealing with all types of cooperation at all levels of the system.'[407] Similarly, there is 'no single model for successful partnerships' between the UN and non-State actors and there has 'of necessity, been much experimentation leading to different experiences, both good and bad'.[408] Corporations partner UN Agencies for build images, safeguard long-term investments, construct future markets, improve supplier quality and contribute to stable and predictable business environments. Diversity reflects

[406] Mr Arthur Nogueira, Principal Officer, Implementation and Outreach Programme, CBD Secretariat, Response to Questionnaire, 30 August 2004.
[407] UN Secretary-General, Cooperation between the UN and all relevant partners, in particular the private sector, UN Doc A/56/323 (2001), paras 8, 19, 45, 116.
[408] UN Secretary-General, Enhanced cooperation between the UN and all relevant partners, in particular the private sector, UN Doc A/58/227 (2003), paras 64-5.

the different mandates and modus operandi of UN entities, the varied scope and nature of issues to be addressed, the unique themes of intergovernmental events, the diversity of non-State actors and finally the different impacts, challenges and contributions made by different business enterprises.

States recognize the potential benefits of private sector cooperation including a richer and more informed policy debate (enhanced quality of decision-making, joint problem solving, greater operational efficiency). Corporations are attracted to new market opportunities, reputation and image enhancement, better risk management, access to development expertise and better government links. However, the strategic risks and challenges include reputational risk, conflicts of interest, implied endorsement, over-expectations, over-reliance upon Northern multinationals, operational failure and prohibitively high transaction costs. Proposals to regulate NGO participation become appealing.[409] The challenge is to maintain UN independence, impartiality and integrity and preserve the flexibility to encourage successful innovation without undermining attempts at international regulation. These factors suggest the necessity for basic common operational procedures and modalities which are adaptable to specific needs and situations. The Guidelines for Cooperation between the UN and the Business Community finalized in 2000 constitutes the basic framework and seeks to replicate good practice throughout the UN system.

[409] Sybesma-Knol N., Non-State Actors in International Organisations: An Attempt at Classification, SIM Special 19, Utrecht, undated, 43.

5.5 Observations on the UN's relationships with the Private Sector.

The UN's confrontational relationship with corporations has evolved into one of collaboration. Mutating intergovernmental attitudes are evident from the change within UN parlance from 'transnational corporation' through to 'business and industry' as one of the 'major' groups and currently 'the private sector'. Although corporate participation has formally developed in parallel with the UN's uneasy relationship with other NGOs, significant differences exist, not least of which are attempts to regulate commercial behaviour during the 1970's. Intergovernmental processes benefit from management practice, good governance, capacity-building, novel legal agreements and improved programme implementation but encounters greater institutional competition. Private sector collaboration with intergovernmental organisations also has limits: administrative bureaucracy, political decision-making, corruption, lack of resources and a reluctance to relinquish resort to diplomatic protection from home States. Pigeonholing particular aspects of commercial behaviour – for example, institutionalizing concern for workers rights within the ILO – fragments any focus upon corporate accountability between several institutions and arguably makes prospective regulation less likely and weaker. Bilateral relationships between States and corporations remain important. National law influences corporate behaviour not least because it governs the question of incorporation and recognition of the corporate form. The bilateralism which has historically characterized corporate-State relationships is by no means displaced by the multilateralism of the twentieth century.

The private sector has always been committed to economic development and trade. States benefit from commercial perspectives on increasing the level and quality of foreign direct investment and raising business awareness of commercial opportunities. As evidenced through international instruments, attempts to regulate (the Code of Conduct for Transnational Corporations) have been substituted by inclusion in policy formation and implementation (Agenda 21) rising to the level of partnership and heralding novel forms of governance (the Global Compact). Attempts to regulate illegal cross-border activity (illicit diamonds, arms or drugs trafficking, people smuggling, trade in endangered species) will prompt calls by legitimate commercial operators for prior consultation. To preserve their ostensible regulatory authority Member States control the terms of participation and reserve final decision-making, even if exercising the right to vote may be perfunctory. Multilateral attempts to deter undesirable business practices by resorting to 'soft' legal instruments (Chapter Two) or treaties (Chapter Three) are a significant feature of commercial relations with the UN and further evidence international lawmaking by States in response to corporate conduct.

Conclusions

The 'critical weakness of the received historiography' of international law is that it is written from a Statist perspective: corporations are mere instruments of mercantilism within a 'terrain of political and ideological struggle'.[410] As much as the act of State doctrine for example masks underlying commercial

[410] Rajagopal B., International Law from Below: Development, Social Movements and Third World Resistance, Cambridge University Press, Cambridge, 2003, 89, 187, 295.

interventions[411], corporate activity manifests the flavour of Western-dominated capitalist ideology which currently characterizes international law. A 'history from below' considers that invisible and autonomous non-State actors have important roles (for example, in exploiting the Third World under colonialism and shaping the applicable international legal regime) which have the effect of shaping the normative framework (concerning sovereignty and property). Although the contemporary phenomenon of globalization accentuates the corporate role, commercial activity at the global level (however institutionally manifested) has always been a pervasive feature of the international legal order. However, the mutating character and function of commercial enterprises and their relationship with existing political authority of the period make it quantitatively difficult to assess whether corporate participation within the international legal order has increased since time immemorial. Of the 100 largest economic entities, 51 are presently corporations of which the largest overshadow all but a dozen States.[412] Contemporary corporate behaviour is a continuation of historical practices: the chartered trading model of firms actively extending national political interests or the neo-medievalism[413] of corporate side-events at diplomatic conferences. Increasing participation of corporations in the modern sense of that term was marked at national levels with the freedom to incorporate conferred by States.

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[411] Eg *Banco Nacional de Cuba v Sabatino* 376 *US* 398 (1964)

[412] Miller A.S., The Modern Corporate State: private governments and the American constitution, Greenwood Press, London, 1976, 233.

[413] Kobrin S.J., 'Back to the future: neomedievalism and the postmodern digital world economy' in Prakash A. & Hart J.A. (Eds), Globalisation and Governance, Routledge, London, 1999, 165, 168.

Several qualitative changes merit observation. First, commercial activity now serves multiple national economic constituencies such that novel structural forms and strategic alliances detach corporations from any one nation State ('stateless'). International trade is largely confined to three regional groupings (ASEAN, NAFTA and the EC) and one third of crossborder trade consists of inter-corporate exchange.[414] Second, corporate consolidation is mirrored in the public sphere inasmuch as intergovernmental organisations concentrate international policymakers. Business has long contributed to international lawmaking as a consequence of tensions and conflicts with other actors including employees, commercial rivals and States. Formal business input into international policy-making in the absence of any counter ideology is now conveniently channeled through trade organisations and the ICC who espouse commercial perspectives independent of national considerations. Emergent models of transgovernmental regulatory cooperation involving professional networks with a minimum of legal and institutional infrastructure do not preclude private actors from a 'vast array of opportunities for participation in rule-making'.[415] Third, corporate participation within the contemporary international legal order has stepped backwards and become more focused, particularly in comparison to the wide-ranging administrative powers exercised by chartered trading companies. The unique tripartite structure of the ILO predates the UN, policymaking arenas are now fragmented and highly specialized, accreditation hurdles are increasingly detailed and terms of participation strictly curtailed. Constitutional instruments envisage observer

[414] UNCTAD, World Investment Report: Transnational Corporations, Market Structure and Competition Policy, Geneva, 1997, 18.
[415] Slaughter A.-M., 'Governing the Global Economy through Government Networks' in Byers M., The Role of Law in International Politics: Essays in International Relations and International Law, Oxford University Press, Oxford, 2000, 177, 180.

status only and secretariats retain considerable discretion as to whom and how they conclude arrangements of consultation and co-operation. Only rarely are firms the direct addressees of resolutions from intergovernmental organisations.[416] Notwithstanding the plethora of non-State actors and their diverse activities, the reign of the transformative State continues.

[416] Eg Art 4, EC Decision 83/671 concerning a Proceeding under Article 85 of the EEC Treaty (1983) *OJEC* L376, 30.

Chapter Two

Corporate Contributions to Customary International Law And 'Soft' International Law

This Chapter identifies commercial contributions to the formation, implementation and enforcement of customary international law and 'soft' international law. Part One re-visits the norm generation process and examines the State practice which is classically constitutive of custom. Non-State actors also undertake normative interpretation which influences the subsequent implementation of custom. States raise or lower regulatory standards at corporate insistence and transborder commercial operations horizontally transmit standards between States. Corporations can reaffirm and strengthen normative rules, accrete details to rules applicable to States, affirm national lawmaking, enable persistently-objecting States to resist the application of customary rules and potentially overturn normative constraints which ensure international legal stability. These arguments will be illustrated with reference to the good faith implementation of agreements, non-intervention within the internal affairs of States, implementing human rights, apartheid and the prohibition on the use of force.

Part Two considers 'soft' legal instruments in the nature of guidelines, declarations and codes of conduct. Such instruments may be intergovernmental, national, industry-specific, firm-specific or issue-specific and can be differentiated by reference to their author, addressee, purpose, content, mechanism for implementation and verification process. Corporate

participation in the formulation, implementation and interpretation of intergovernmental codes may be formalised whereas corporate standard-setting activity and other voluntary initiatives may occur independently of States. This Part also considers the position of corporate voluntary initiatives under international law. Finally, the case study of the Energy and Biodiversity Initiative explains corporate perceptions when engaged in creative processes targeted towards States and other firms. The Chapter affirms the regulatory role of States: corporations exaggerate the economic elements of State practice to indirectly contribute to customary law and States remain indispensable actors for ensuring the universal effectiveness of 'soft' international legal instruments.

1. The Corporate Role in Customary International Law.

Customary international law is classically defined as 'evidence of a general practice accepted as law'.[417] State practice must be 'extensive and virtually uniform' and accompanied by the requisite *opinio juris*.[418] Of the two, State practice is relatively more important.[419] Custom develops through iterative processes of claim and counterclaim. It is also constructed upon patterns of continual behaviour which engender legitimate expectations of continued adherence. Conduct as a source of legal obligation is not monopolised by States. Constant trade usage creates principles of law opposable against

[417] Art 38, Statute of the International Court of Justice.
[418] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Netherlands)* (1969) ICJ Rep 3, para 74.
[419] International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, London, 2000, 32-4. Per contra *Nicaragua supra n*12, para 183.

commercial actors (lex mercatoria).[420] Although transactions with other actors are ordinarily governed by contract, the influence of normative rules guiding operational behaviour at the boundaries of the firm is evident for corporate law.[421] The impact of non-State actors upon customary international law remains relatively 'undertheorized'.[422] This Part considers the corporate role in generating, implementing and potentially overturning customary law rules.

1.1 Normative Creation

Non-State actor participation is legally irrelevant for discerning customary legal rules. Classical analysis of the formation of custom confines itself to one aspect of corporate-government interaction (for example, State practice concerning 'internationalised' contracts) or to intergovernmental relationships (asserting diplomatic protection on behalf of an injured national firm). The essential factual prerequisites which prompt governmental responses in the public sphere - the other contractual party or the corporate decision to exhaust effective local remedies – are left aside. For example, the norms generated from investment contracts are not opposable against other non-party States.[423] Only where private activity is imputable to States does commercial activity formally 'count' towards the formation of international custom. Hence, NGO interpretations of international law to initiate consumer boycotts and effect changes in corporate policy are irrelevant for the formation of custom,

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[420] Goode R., 'Usage and its Reception in International Commercial Arbitration (1997) 46 *ICLQ* 1.
[421] Rock E. & Wachter M., 'Islands of Conscious Power: Law, Norms and the Self-governing Corporation' (2001) 149 *U Pa L Rev* 1619.
[422] Roberts A.E., 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95(4) *AJIL* 757, 775.
[423] *Aminoil (Kuwait v American Independent Oil Co)* (1982) 21 *ILM* 976, para 157.

particularly when the views of States have been sidelined.[424] Similarly, States may become inert when, for example, caught in the cross-fire of competing commercial interests represented by whalers and tourism operators.[425] Finally, it has been argued that custom as an international legal source is less influential in a contemporary world characterised by networks of bilateral investment treaties and self-organising commercial exchange.[426]

In short, State practice is proactive and reactive. Firms induce the desired governmental behaviour by offering investment and threatening industrial migration. Consistent or diverse corporate behaviour influences the degree of 'extensive and virtually uniform' State practice and accelerates or obstructs the evolution of custom. As independent actors impacting upon intergovernmental relationships in a disparate manner, the corporate catalyst clouds the development of custom. Commercial activity which provokes inconsistent State practice renders more difficult identifying the precise content of customary rules whereas the continuous and harmonious practice of both helps to shape pertinent legal norms. On the other hand, such sporadic and idiosyncratic interactions may preclude precedents of sufficient stability and comparability from emerging.[427]

The historical account of the formation of custom is therefore incomplete. The advocacy activities of non-State actors 'set in motion' processes which may

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[424] Jordan G., 'Indirect Causes and Effects in Policy Change: The Brent Spar Case' (1998) 76 *Public Administration* 713, 624, 627.
[425] International Fund for Animal Welfare, 'Iceland Private Business Group Votes Against Whaling', Press Release, 2003.
[426] Kelly, J. P., 'The twilight of customary international law' (2000) 40(2) *Virginia JIL* 449.
[427] Vagts D.F., 'The Multinational Enterprise: A New Challenge for Transnational Law' (1970) 83 *Harv L R* 739, 743-4.

ripen into conventions and their views cannot be 'completely discounted' when identifying the requisite governmental intent.[428] Non-State actors indirectly affect the development of custom by lobbying for particular State behaviour, contributing drafts to treaties or resolutions, articulating emerging norms and monitoring State compliance.[429] Consequently, WTO rules for example 'reflect an agenda that serves only to promote dominant corporatist interests that already monopolise the arena of international trade'.[430] Alternatively, corporate lobbying combined with technical legal critiques contributed to the demise of proposed labour standards.[431] Corporations are part of the chain of causation creating the evidentiary material cited in support of customary legal rules. National (and indeed international) judicial decisions resolve private disputes, legislation may be introduced, amended or repealed at corporate insistence and government statements drafted by firms. The formation of custom is deliberative rather than spontaneous: States consult commercial opinion before undertaking mining or fishing on the continental shelf, which itself generates practice. State practice is also reflected by omission, particularly governmental failure to correct non-compliance by private actors within areas under its jurisdiction or control.

Continued exclusion is justified by reference to the difficulty of identifying authoritative actors and the prospect of generating weaker norms. Resistance

[428] International Court of Justice, *The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 2002, Dissenting Opinion of Judge Van Den Wyngaert, para 27.
[429] Nowrot K., 'Legal Consequences of Globalisation: The Status of Non-Governmental Organisations under International Law' (1999) 6 *Ind J Global Legal Stud* 579, 595.
[430] UN Human Rights Commission (UNHRC), The Realisation of Economic, Social and Cultural Rights: Globalisation and its impact on the full enjoyment of human rights, UN Doc E/CN.4/Sub.2/2000/13, para 14.
[431] DeVos T., Multinational Corporations in Democratic Host Countries: US Multinationals and the Vredeling Proposal, Dartmouth Publishing Co, Hants, 1989.

by non-State actors could equally weaken the international legal order.[432] It has therefore been suggested that non-State actors be permitted a direct role in the formation of custom.[433] Such a proposal must be accompanied by proper accountability.[434] However, a positivist conception of international law cannot hold corporations to peremptory norms accepted and recognised by a community of States. On the other hand, national legal prohibitions can be easily circumvented.[435] Corporations will respond within this regulatory space without being formally bound. Legal prohibitions create profitable 'black' markets for less reputable, more expensive and less efficient commercial operators willing to incur greater risk. Other firms will seek to enforce that prohibition and remove sources of unfair competition unavailable to them. For example, in the view of States and firms, particularly in the ILO context, slavery, slavery-like practices and forced labour are impermissible.[436] National courts have sought to apply the prohibition against slavery against firms pursuant to custom.[437] Treaties also seek to prohibit trafficking in persons.[438] Piracy, the crime par excellence under custom for which there is universal jurisdiction, similarly constitutes a threat to commercial security. To preserve their market position firms engage in enforcement activity[439], thereby

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[432] Charney J.I.., 'Transnational Corporations and Developing Public International Law' (1983) *Duke LJ* 748, 749.
[433] Gunning I.R., 'Modernising Customary International Law: The Challenge of Human Rights' (1991) 31 *Va J Int'l L* 211, 227-34.
[434] Spiro P.J., 'New Global Potentates: Nongovernmental Organisations and the 'Unregulated' Marketplace' (1996) 18 *Cardozo LR* 957, 962-7.
[435] UNCTC, Transnational Corporations in the Pharmaceutical Industry of Developing Countries, Geneva, 1984, 31, 33.
[436] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 226 *UNTS* 3 (1957); ILO Convention No 105 concerning the Abolition of Forced Labour 1957.
[437] *Burger-Fischer v Degussa AG* 65 F Supp 2d 248, 255, 285 (DNJ 1999).
[438] Eg 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children & Protocol against the Smuggling of Migrants by Land, Air and Sea, both supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/45/49 (Vol I) (2001).

their market position firms engage in enforcement activity[439], thereby strengthening customary norms.

1.1.1. Normative Affirmation: Principles of Contracting.

Several customary norms are applicable to and by corporations and States without controversy. For example, the legally binding force of freely-concluded agreements and the privity thereof applies to contracts and treaties.[440] Equally noteworthy is the obligation of good faith for their negotiation and subsequent implementation.[441] Private associations are also free to propose general principles of law.[442] Corporations nominate or draw upon 'general principles of law recognised by civilised nations' as a source of legal obligation and to resolve contractual disputes.[443] Since those principles are predominantly drawn from the national legal systems of industrialised States, they may be inherently biased towards commercial concerns and are therefore likely to be favoured by companies.

[439] *Andean Regional Contractor Accountability Act* HR 1591 (US 2001).
[440] *Texaco Overseas Petroleum Co & California Asiatic Oil Co v Libya* 17 *ILM* 1 (1978) para 51; Art 26, Vienna Convention on the Law of Treaties, *supra n*67.
[441] Eg *The Lena Goldfields Arbitration* (1929-30) *Annual Digest of Public Int L Cases* 258.
[442] Simma B. & Alston P., 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 *AYBIL* 82, 104.
[443] Eg *Abu Dhabi Arbitration* (1952) 1 *ICLQ* 247.

1.1.2. Accretions to Existing Rules of Custom: Corporate Non-intervention in the Internal Affairs of States.

Non-State actors add detail to the content of custom through their behaviour.[444] Transnational corporations act as a bridge between consumer and producer States.[445] For example, non-intervention in the internal affairs of States is a rule applicable to States and firms.[446] The significant corporate role in the economic development of host States is equated with undue political influence. Corporate political activity may be incidental to democratic participation. Their freedom of speech encompasses expenditure on and participation within political referendums.[447] However, the improper use of corporate funds may extend to illegal political campaign contributions.[448] Taxation revenue can perpetuate the dominance of the existing political elite and grant them economic legitimacy. Large-scale development projects can also create conditions for internal displacement.[449] Commercial interests coincide with the host State interest in suppressing politically organised labour. The inefficiency associated with being sheltered from competition and conflicts of interest are the costs for longer term market security. On the other hand, local commercial alliances improve the position of particular social groups,

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[444] Mertus J., 'Considering Non-State Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application' (2000) 32(2) *New York Uni J Int'l L & Pol* 537, 545, 554, 562.

[445] US, Final Report: An Evaluation of the Options of the US Government in its Relationship to US Firms in International Petroleum Affairs 14 *ILM* 1037, 1039 (1975).

[446] Art 2(7) UN Charter; UN Draft Code of Conduct on Transnational Corporations, UN Doc E/1990/94, paras 16, 17. See eg ITT's actions in Chile or United Fruit's activities in Guatemala: Schlesinger S. & Kinzer S., Bitter Fruit: The Untold Story of the American Coup in Guatemala, Doubleday, New York, 1982.

[447] *First National Bank of Boston v Bellotti* 435 US 765 (1978).

[448] *SEC v Dresser Indus Inc* 628 F.2d 1368 (DC Cir 1979).

[449] Human Rights Commission, Human Rights, Mass Exoduses and Displaced Persons, Addendum to Report of Mr Francis M. Deng, Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add 2, Principles 2, 5, 6, 25.

redistribute economic power and stimulate political change.[450] Indeed, corporations are tempted to contract with rebel groups enjoying effective territorial control.[451]

Home States may employ the less-overt corporate vehicle as an instrument to avoid normative prohibitions applicable to them.[452] Firms become conduits for their home States's foreign policy objectives. Unilateral legislation may contemplate subsidiaries acting in violation of foreign national law.[453] Such a measure has been used to promote human rights.[454] The exercise of competing territorial jurisdiction over parent and subsidiary firms accordingly gives rise to political disputes between home and host States.[455] On the one hand, corporations should not engage in practices within host States which are contrary to the standards of the home State. On the other, foreign direct investment should not be fettered by the extraterritorial application of national law. Failing to regulate multinational activity is equated with tacit support given the assumed control of home States over parent enterprises. Corporations call for constructive engagement and further economic

[450] UNCTC, Transnational Corporations in World Development: A Re-examination, New York, 1978, 75-6.
[451] *Ontario Ltd v Crispus Kiyonga & Ors* (1992) 11 *Kampala LR* 14, 20-21.
[452] Eg *Cuban Liberty and Democratic Solidarity (Libertad) Act (the 'Helms-Burton Act')* 35 *ILM* 357 (1996).
[453] USCIB, Letter to Congress: China Human Rights and Democracy Act 1997 and Codes of Conduct, New York, 1997; *Prohibition Against Foreign Assistance to Gross Violators of Human Rights* 22 *USC* 2151 (1990).
[454] Orentlicher D. & Gelatt T., 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China' (1992) 14 *NW J Int'l L & Bus* 66.
[455] *Fruehauf Corporation v Massardy* 5 *ILM* 476 (1966).

integration when their opinions are solicited by home States when formulating foreign policy.[456]

Within this milieu NGOs call upon firms to effect the necessary change or voluntarily divest.[457] Unilateral economic disengagement may weaken an authoritarian regime and encourage a transition to democratic rule or produce a siege mentality for a self-sufficient government with resulting detriment to the local population. Products can still reach prohibited markets via intermediaries with resulting detriment to corporate reputations. Relinquishing the benefits of long term investment activity also entails anti-competitive consequences with takeover opportunities for local businesses.

1.2 The Implementation and Application of Customary Norms

The interpretation of international normative standards by corporations is evidenced through implementation. The UN Code of Conduct for Transnational Corporations considered in Chapter One presumed that well-accepted intergovernmental norms may be applied by firms as good business practice. However, such norms are not applied in an identical manner by firms given the influence of market forces. Furthermore, States tailor international law to local conditions before firms in turn apply such standards through a pragmatic economic prism. Within unregulated space where State power is weak or non-existent, corporations outsource in the interests of productive

[456] Report of the Special Joint Committee Reviewing Canadian Foreign Policy, Canada's Foreign Policy: Principles and Priorities for the Future, Parliamentary Publications Directorate, Ottawa, 1994, 6.
[457] Amnesty International/Pax Christi, Multinational Enterprises and Human Rights, Utrecht, 1998, 53.

efficiency and allocate resources through price. Non-legal factors become determinative where norms compete for application.[458] Some norms are rendered relatively more significant whereas others experience a diluted application.[459] These processes largely escape the attention of international law. Transnational administrative processes such as the activities of customs officers similarly fail to register as far as implementation is concerned.[460]

1.2.1 Foreign Direct Investment as an Inducement to National Standard-setting.

Corporations exert pressure upon State practice at the point of entry and exit. Competition for and dependency upon foreign direct investment promotes a 'race to the top' or 'bottom' in regulatory standards. The former hypothesizes that higher national standards are a source of competitive advantage within the international marketplace in terms of technological innovation, efficiency and consumer demand. The latter hypothesizes that less-innovative businesses threaten industrial migration and scout for cheaper factors of production. Capital mobility enables transnational firms to escape the 'burden' of unilaterally-imposed higher national standards. Host States are reluctant to assert their right to regulate on account of their weak bargaining position when firms nominate particular conditions as investment prerequisites.[461] Direct

[458] Lowe V., 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing' in Byers M., The Role of Law in International Politics: Essays in International Relations and International Law, Oxford University Press, New York, 2000, 207, 219, 225.
[459] Weil P., 'Towards Relative Normativity in International Law?' (1983) 77(3) *AJIL* 413, 415.
[460] Sand P.H., 'Commodity or Taboo? International Regulation of Trade in Endangered Species' in Bergesen H.O. & Parmann G. (Eds), Green Globe Yearbook, Oxford University Press, Oxford, 1997.
[461] UNHRC, The realisation of economic, social and cultural rights: the relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and

corporate lobbying for less stringent regulation generates downwards pressure upon labour, consumer and/or environmental standards. Hence, 'by playing governments off against one another in efforts to receive the most advantageous investment package, TNC's intentionally weaken the capacity of governments to promote social welfare'.[462] On the other hand, denying international standards within export processing zones is a source of mutual commercial benefit in terms of employment and revenue.[463]

The empirical evidence supporting a 'race to the top' or 'bottom' is equivocal. It is unclear whether corporations either actively seek States with less stringent regulations or merely adjust existing production standards downwards in light of host State conditions.[464] It has been observed that corporations regularly employ lower environmental standards within developing countries relative to operations within developed States.[465] Following the adoption of NAFTA, US employers reputedly staved off demands for higher wages by indicating the possibility of moving production offshore.[466] States claim to have introduced lower labour standards in response to corporate demands.[467] As was evident in the case of South African apartheid considered further below, it is difficult to

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the working methods and activities of transnational corporations, Background document prepared by the Secretary General, UN Doc E/CN.4/Sub.2/1995/11, paras 53, 102, 108.

[462] Kolodner E., Transnational Corporations: Impediments or Catalysts of Social Development?, Occasional Paper 5, UNRISD, 1994, 22.

[463] ILO, Labour and Social Issues Relating to Export Processing Zones, Geneva, 1998; ILO/UNCTC, Economic and Social Effects of Multinational Enterprises in Export Processing Zones, Geneva, 1988.

[464] UNCTC, Climate Change and Transnational Corporations: Analysis and Trends, New York, UN Doc ST/CTC/112, 1992, 26.

[465] UNCTC/ESCAP, Environmental Aspects of Transnational Corporation Activities in Pollution-Intensive Industries in Selected Asian and Pacific Developing Countries, Ser B No 15, New York, 1990, 61.

[466] UN, World Survey on the Role of Women in Development: Globalisation, Gender and Work, New York, 1999, 15-6.

[467] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Third Report, Pt 4A, International Labour Conference, 76th Sess, Geneva, 1989, 209.

prevent firm exploiting lower standards and in extremis dislodging them at the point of exit (divesting) from States. However, a systematic relationship between labour standards and competitive advantage is not yet established.[468] Profit is alternatively derived from downplayed labour rights or higher productivity through worker participation.[469] Long term commercial profit depends upon increasing productivity through technology, developing skills and education.[470]

States are responsible for regulatory laxity as much as corporations for fostering substandard practices. The degree of State discretion can be reduced by increasing decision-making transparency. [471] Universally applicable standards and a level playing field for firms are ensured by a minimum regulatory floor established by States. However, it is uncertain whether inter-State regulatory competition or harmonised national approaches produce the optimal outcome.[472] It has been suggested that non-homogeneity is desirable irrespective of the subject-matter. [473] Corporations may be indifferent to divergent national legal systems provided the outcome matches their investment preferences.[474] Environmental regulation tends to be ratcheted

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[468] Martin W. & Maskus K.E., Core Labour Standards and Competitiveness: Implications for Global Trade Policy, IBRD, Geneva, 1999.
[469] Johnson J.L., 'Public-Private-Public Convergence: How the Private Actor can shape Public International Labour Standards' (1998) 24(1) *Brook J Int'l L* 291, 338.
[470] OECD, Trade, Employment and Labour Standards: A Study of Core Worker's Rights and International Trade, Paris, 1996.
[471] Oman C.P., Policy Competition and Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI, OECD, Paris, 1999, 5-6.
[472] Esty D.D.G., 'Regulatory Co-opetition' (2000) 3(2) *J Int Eco Law* 235.
[473] Sykes A., 'Regulatory competition or regulatory harmonisation? A silly question?' (2000) 3(2) *J Int Eco Law* 257.
[474] Perry A.J., 'Multinational enterprises, international economic organisations and convergence among legal systems' (2002) 2 *Non-State Actors and Int L* 23, 39.

upwards whereas labour standards tend to move downward.[475] Conventions may also expressly deter States from relaxing national health or safety or standards.[476] Although the jury is undecided on the precise processes at work, corporate mobility has a discernable influence upon the national regulatory autonomy of States.

1.2.2 Corporations as Conduits for National Standards.

Corporations are also horizontal conduits for the standards of one State into the territory of another. The legislative role of host States is conceivably diminished. Having echoes of colonial imperialism, corporations become transmission agents alleged to impose home State values upon their multiple hosts notwithstanding the primacy of local law. Multinational firms create a 'spillover' of best commercial practice into local firms.[477] More favourable working conditions are then concretised by States as national standards. Multinational firms internalise legal and economic values as corporate policy at headquarters, utilise homogenous production, distribution and marketing techniques and efficiently operationalise standard management practice throughout the corporate network.[478]

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[475] Braithwaite J. & Drahos P., Global Business Regulation, Cambridge University Press, Cambridge, 2000, 522.
[476] Art 1114, North American Free Trade Agreement (NAFTA) (1993) 32 *ILM* 605.
[477] USCIB, Co-operative Efforts of the US and Mexican Business Communities to Address Labour and Environment Issues in the NAFTA, New York, 1992.
[478] Sauvant K.P., 'The Potential of Multinational Enterprises as Vehicles for the Transmission of Business Culture' in Sauvant K.P & Lavipour F.G., (Eds), Controlling Multinational Enterprises: Problems, Strategies, Counterstrategies, Westview Press, Boulder, 1976.

Subcontracting eliminates the potential for such spillover effects. Furthermore, corporations economically value differing regulatory conditions shielded by State responsibility for establishing the socio-economic agenda. Transnational corporations suffer a local (and possibly international) competitive disadvantage where they voluntarily exceed standards practised by their competitors. Transnational firms enjoy national treatment in addition to the privilege of appealing to international law for investment protection opportunities unavailable to local enterprises. Whereas States owe a minimum standard of treatment to firms, corporations do not owe a legal duty to respect international standards wherever they operate. For example, intergovernmental effort to transfer technology to developing States includes resort to codes of conduct.[479] The best available technology becomes the industry norm sought to be replicated by rivals. However, corporations argue that they are not established for the purpose of transferring production techniques or skills between States.[480] They recoup their investment cost by demanding appropriate intellectual property protection. Hence, pharmaceutical companies tend not to invest in States with weak legal regimes.[481] That said, the regulatory environment is just one factor for investment siting decision-making and competitiveness, efficiency and access to the means of production are equally influential.[482] In sum, the commercial practices of transnational corporations respond to the national legal standards of home States and may or

[479] UN, Seminar on the Mobilisation of the Private Sector in Order to Encourage Foreign Investment in Information Technology towards Developing Countries, New York, 2000; UNCTAD, Draft Code of Conduct for the Transfer of Technology UN Doc TD/CodeTOT/25 (1980).
[480] ICC, The International Corporation and the Transfer of Technology, Paris, 1972, 5.
[481] International Federation of Pharmaceutical Manufacturers Associations, Intellectual Property: Patents and Pharmaceuticals, Geneva, 1997, 3.
[482] Rao P.M., 'Intellectual Property Protection and Foreign Direct Investment: A Global Pharmaceutical Industry Perspective' in Rao C.P., Globalization, Privatization and Free Market Economy, Quorum Books, Connecticut, 1998, 232, 243.

may not (as adjudged by them) influence commercial operations employed by subsidiaries within host States. This could in turn prompt a regulatory reaction from host States, encouraging either a harmonisation of national standards or opportunities for exploitation through regulatory diversity.

1.2.3. The Corporate Role in Implementing Human Rights and the Regulatory Responsibilities of States.

Human rights are classically treaty-based sources of law for States requiring national implementation before obligations arise for non-State actors. The manner by which corporations implement human rights raises a series of relevant questions. What are the regulatory consequences for States where corporations implement human rights standards in their transborder operations on account of economically-efficient labour relationships or standardised management practices ? Are the processes of treaty ratification and national lawmaking obviated ? Would commercial practices as a feature of national conditions further entrench human rights standards into custom binding upon States 'from below' and reciprocally justify the application of customary human rights norms upon firms ? Does the notion of corporate voluntariness equate with imperialism if these practices have been perfected as a result of legal obligations within industrialised home States ? This section examines the corporate role in applying customary international law in light of the regulatory responsibilities of States.

One commentator has identified a fundamental affinity between business objectives and human rights.[483] Corporate respect for human rights norms contributes to favourable social and political conditions, economic stability, reliable workforces, consumer loyalty and long-term operational viability.[484] Corporations support human rights such as water or food insofar as they provide the necessary infrastructure for their realisation and can reap monetary reward from their provision. Corporations it may be argued need do little since respect for human rights is incidental to economic development. Economic growth may enhance those conditions conducive to human rights.[485] However, liberalisation policies contemplating user fees may qualify as de facto discrimination against marginalised social groups such as the poor. Governments cannot abdicate their right and duty to regulate if universal access to essential services is to be ensured.[486] More proactive commercial practices can realise fundamental rights and freedoms.[487] Consider, for example, the role of the media with respect to children's rights.[488]

Corporations are considered incapable of enjoying human rights on account of their incorporeal nature. Furthermore, by their nature several human rights such as freedom from torture and the right to life are incapable of being

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[483] D'Amato A., 'Are Human Rights Good for International Business?' (1979) 1 *Northwestern J of Int'l L & Bus* 22, 32.
[484]Office of the High Commissioner for Human Rights, 'Giving a Human Face to the Global Market-The Business Case for Human Rights', Statement by Mary Robinson, Interlaken, 1999, 4.
[485] Meyer W.H., 'Human Rights and MNC's: Theory versus Quantitative Analysis' (1996) 18(2) *Human Rights Qtly* 368.
[486] UNHRC, Economic, social and cultural rights: liberalisation of trade in services and human rights, UN Doc E/CN.4/Sub.2/2002/9, para 44-5, 70.
[487] Art 18(3), UNGA Res 53/144 (1999) Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.
[488] Arts 4, 17, 32, UNGA Res 44/25 (1989) UN Convention on the Rights of the Child.

enjoyed by corporations. However, firms do not possess nor exercise the full range of rights. The human rights of particular concern to business include legal equality, non-arbitrary arrest of employees, private property (including intellectual property protection and proper compensation in the event of compulsory acquisition[489], particularly where it is discriminatory[490]), non-discrimination and freedom of movement. Courts have accordingly adjudged corporations as possessing the rights to property, fair trial and privacy.[491] For example, neither the legal nature of a body corporate, its commercial activity nor the intrinsic character of the right prevents firms from exercising freedom of expression.[492] Of course, exercising that right may be limited to protect the reputation of others including rival firms.[493] Corporations are liable for commercial and not protected political speech.[494] Furthermore, concentrated media ownership can militate against an individual's rights to information and freedom of expression.[495]

Where an entity benefits from human rights protection the proposition is stronger that it bears a concomitant duty to observe them. Firms enjoy national treatment within trade agreements just as they must not unfairly discriminate

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[489] *Retimag SA v Federal Republic of Germany* (1961) 4 Yearbook ECHR 384.
[490] UN Human Rights Committee, *Simunek, Tuzilova & Prochazka v Czech Republic*, UN Doc CCPR/C/54/D/516/1992 para 11.3.
[491] Addo M., 'The Corporation as victim of human rights violations' in Addo M. (Ed), Human Rights Standards and the Responsibility of Transnational Corporations, Kluwer Law International, The Hague, 1999, 187.
[492] *Autronic AG v Switzerland* (1990) ECHR Ser A Vol 178 para 47.
[493] *Jersild v Denmark* [1986] ECHR Ser A Vol 298, 23; *Markt Intern Verlag GmBH & Klaus Beerman Case* [1989] ECHR Ser A Vol 165.
[494] Cp *Association of National Advertisers Inc v Lungren* 44 F.3d 726 (9th Cir); *Kasky v Nike Inc*, Case No A086142 (1st App Dist Cal CA 2000).
[495] UNHRC, Secretary-General Report, The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter, UN Doc E/CN.4/Sub.2/1996/12 (1996), para 59.

against employees.[496] Bilateral investment treaties do not abrogate applicable anti-discrimination law.[497] Human rights standards are applicable to all members of the international community.[498] Nothing within them can be interpreted as implying for any group any right to engage in any activity or perform any act aimed at their destruction.[499] For example, a corporation 'would be seriously disadvantaged as against its competitors' if it were obliged to employ individuals with HIV/AIDS.[500] However, legitimate commercial requirements cannot condemn those individuals to 'certain economic death'.[501] Corporations can promote anti-discrimination legislation and pursue non-discriminatory employment practices[502] notwithstanding that such voluntary initiatives are driven by the legal consequences of non-compliance.[503]

Commercial practices have a positive and detrimental impact upon human rights standards where manifested as customary international law. Economic rights are affected as much as social and cultural ones.[504] Marketing practices create appeal for Western lifestyles or emphasise local values (the right to

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[496] Eg Art 3, General Agreement on Tariffs and Trade (GATT) (1947) 55 *UNTS* 187; Irish National Caucus, The MacBride Principles, Washington, 1984 (amplified 1986); Art 2, UNGA Res 1904 (1963) UN Declaration on the Elimination of All Forms of Racial Discrimination; Arts 2(e), 4(c), UNGA Res 34/180 (1981) Convention on the Elimination of All Forms of Discrimination Against Women.

[497] *Wickes v Olympic Airways* 745 F 2d 363, 368 (CA 1984).

[498] UNGA Res 2627 (XXV) (1970).

[499] Art 30, UNGA Res 217 (1948) Universal Declaration of Human Rights (UDHR); Art 5, International Covenant on Civil and Political Rights (ICCPR) (1966) 999 *UNTS* 171; Art 5, International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) 993 *UNTS* 3.

[500] South African High Court, *Hoffmann v South African Airways* (2000) 2 *SA* 628 (W), paras 26-8.

[501] Constitutional Court of South Africa, *Hoffmann v South African Airways*, [2000] *ICHRL* 69, paras 33-4, 38.

[502] Joint UN Programme on HIV/AIDS (UNAIDS)/The Prince of Wales Business Leaders Forum/The Global Business Council on HIV & AIDS, The Business Response to HIV/AIDS: Impact and Lessons Learned, Geneva, 2000, 21-2.

[503] The Conference Board, Corporate Response to HIV/AIDS, New York, 1997.

[504] Final Report of Special Rapporteur Danilo Turk, The Realisation of Economic, Social and Cultural Rights, UN Doc E/CN.4/Sub.2/1992/16, 27 para 98.

culture), employment-displacing technology shifts workforces into other productive sectors (the right to work) and genetic modification can realise or threaten the right to food. Developing States are particularly susceptible.[505] Human rights violations could be committed on a massive and systematic scale, particularly within the economic, social and cultural sphere, and not appear by design or default on the radar of customary international law.

Corporate implementation of human rights is best evidenced within the workplace.[506] Corporate strategies can adversely affect labour standards.[507] Employing externally-sourced labour accentuates ethnic plurality, achieves productivity advantages and minimises the likelihood of unionisation.[508] Businesses are reluctant to incorporate the rights to freedom of association and collective bargaining within their codes of conduct.[509] Firms also perpetuate the sexual division of labour when the proportion of women within management is low whereas female employment within labour intensive assembly industries remains high. The undervaluation of their true productive capability has consequences for financial empowerment, labour mobility and family units. Enterprises have been requested to ensure gender equality, equal opportunity, non-discrimination and the prevention of violence against

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[505] Eg UNGA Res 42/115.
[506] UNCTAD, Transnational Corporations and Employment, UN Doc E/C.10/1994/3.
[507] UN Secretary-General, The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations, UN Doc E/CN.4/Sub.2/1995/11, (1995), paras 17-8.
[508] Enloe C., 'Multinational Corporations in the Making and Unmaking of Ethnic Groups' in Grant R.M. and Wellhofer E.S., Ethno-nationalism, Multinational Corporations and the Modern State, Monograph Series in World Affairs Vol 15(4), University of Denver Press, 1979, 10.
[509] Forcese C., Human Rights and Corporate Codes of Conduct: Commerce with Conscience, International Centre for Human Rights and Democratic Development, Montreal, 1997.

women.[510] However, 'socially responsible' employment practices may simply mask staffing flexibility.[511]

It is the failure of States to demonstrate leadership as discerned through national legal directives which forces management into complex decision-making.[512] Within this unregulated space or where a conflict between rights arises then firms naturally have regard to cost and competitiveness implications which inevitably infuses or extenuates the underlying economic tenor of human rights. Notwithstanding their indivisible, interdependent and interrelated nature, human rights norms are likely to be fragmented, differently applied and relativised. It is only in recognition of contemporary reality that corporations have been suggested to bear ancillary duties for implementation, for example, with respect to the right to development.[513] Over the past decade net private sector investment flows to developing States has grown whereas official development assistance has declined.[514] However, firms resist the de facto transfer of governmental functions to the private sector.[515] Ensuring human rights remains the first responsibility of States.[516] Corporations express their public commitment to respect human rights conditioned by the legitimate

[510] Copenhagen Declaration on Social Development and Programme of Action, World Summit for Social Development, Copenhagen, UN Doc A/CONF.166/9 (1995), para 45; UN, Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20 (1995), paras 125, 126.
[511] UNCTC/ILO, Women Workers in Multinational Enterprises in Developing Countries, Geneva, 1985.
[512] Harvard Law School/Lawyers Committee for Human Rights, Business and Human Rights, Harvard, 1999, 52-69.
[513] Arts 2(2), 3(1), UNGA Res 41/128 (1986) UN Declaration on the Right to Development; UN Secretary-General, The Regional and National Dimensions of the Right to Development, UN Doc E/CN.4/1421 (1980).
[514] International Bank for Reconstruction and Development (IBRD), Global Development Finance, Washington DC, 2001.
[515] Special Rapporteur Danilo Turk, The Realisation of Economic, Social and Cultural Rights: Second Progress Report, UN Doc E/CN.4/Sub.2/1991/17, para 186.
[516] Paras 1, 5, Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc A/CONF.157/24 Pt 1, Ch 3 (1993).

role of business. However, every social organ is entrusted with promoting respect for human rights.[517] The private sector can realise the right to adequate food by pursuing their activities within the framework of a code of conduct agreed upon jointly with States and NGOs.[518] Firms may also voluntarily adopt international human rights standards within corporate strategy and contracting.[519]

Appeals to corporate roles may enable States to avoid responsibility for instituting an effective regulatory framework. However, exclusive State responsibility bestows a relative immunity upon non-State actors.[520] Efforts are therefore made to define the appropriate corporate role.[521] Businesses are only expected to respect and promote human rights within their 'sphere of influence'. [522] A corporate duty to condemn widespread human rights violations is accordingly unlikely.[523] A corporate role does not displace the State-centric model. Human rights norms must typically be reformulated with the legislative addition of detail before they are capable of corporate implementation.[524] Ideally corporations operationalise human rights subject to governmental oversight. Human rights provisions can be included in contracts

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[517] Preamble, UDHR *supra n*499.
[518] Committee on Economic, Social and Cultural Rights, General Comment No 12 (1999) on the Right to Adequate Food (Art 11), UN Doc E/C.12/1999/5 (1999), paras 20, 27.
[519] Amnesty International/The Prince of Wales Business Leaders Forum, Human Rights: is it any of your business? London, 2000.
[520] Jochnick C., 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21(1) *Human Rights Qtly* 56, 59, 79.
[521] The Confederation of Danish Industries/The Danish Centre for Human Rights/The Industrialization Fund for Developing Countries, Defining the Scope of Business Responsibility for Human Rights Abuses Abroad, Copenhagen, c1999, 6.
[522] Robinson M., 'The Business Case for Human Rights', Visions of Ethical Business, Geneva, undated, 1.
[523] Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1996) 19 *Fordham Int'l L J* 1963, 1983.
[524] Dubin L., 'The Direct Application of Human Rights Standards to, and by, Transnational Corporations' (1999) 61 *Int'l Commission of Jurists-The Review* 35, 41.

with host States.[525] Alternatively, human rights impact assessments may precede investment projects.[526] Until that point, the voluntary assumption of human rights obligations remains firmly entrenched within the context of a corporate social role rather than a legal responsibility.[527] Contemporary corporate measures include management primers, employee training, internal compliance units and social auditing.[528]

Andrew Clapham has suggested that multinationals as repositories of power commit violations independently of States such that human rights obligations ought to apply directly to them.[529] Although the appropriate remedies 'may have to be carried over to the private sphere', private actors are 'not obliged' to introduce measures such as implementing legislation to prevent or punish human rights violations.[530] Firms are only bound to obey the law and it is for States to regulate.

His thesis may be usefully refined in several respects. One reason for extending human rights 'into the private sphere' is precisely because the positive obligation upon States to legislate is unfulfilled or ineffective. The national lawmaking role of States becomes obsolete where human rights

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[525] UNHRC, Working document on the impact of the activities of transnational corporations on the realisation of economic, social and cultural rights pursuant to Sub-Commission Resolution 1997/11, UN Doc E/CN.4/Sub.2/1998/6 (1998).
[526] The Confederation of Danish Industries/The Danish Centre for Human Rights/The Industrialization Fund for Developing Countries, Human Rights and Business, Copenhagen, c1999.
[527] UNCTAD, The social responsibility of transnational corporations, New York, 1999.
[528] Office of the High Commissioner for Human Rights, Business and Human Rights: A Progress Report, Geneva, 2000, 23-9.
[529] Clapham A., Human Rights in the Private Sphere, Clarendon Press, Oxford, 1993, 137-8, 343, 354-5.
[530] *Ibid*, 205-6, 344, 348.

standards operate horizontally between private actors.[531] This thesis argues firstly that within regulatory vacuums corporations become de facto standard-setters. Secondly, although the failure of States to fulfil their regulatory responsibilities could be expected to shift the onus to firms, the limits to self-regulation affirm the lawmaking role of States.

Both these points are illustrated with reference to corporate codes of conduct which reflect a set of business values and do not enjoy a formal legal status. However, such instruments create minimum expectations to observe the standards contained therein.[532] Corporations can be held legally accountable under self-proclaimed codes of conduct for failure to satisfy industry standards, failure to exercise reasonable care or due diligence, breach of contract or misrepresentation.[533] As will become evident in Part Two below, the process of lawmaking contemplates 'soft' law such as codes of conduct hardening into positive legal obligations through implementation in practice. It may be somewhat illogical to hold corporations to account and yet deny to codes the status of law during their formulative period. It is more so when the transition from non-law to law is made without State participation. Corporations are evidently willing to voluntarily adopt measures intended to prevent human rights violations which may have legal impacts akin if not comparable to implementing legislation.

[531] Eg *Walrove & Koch v Association Union Cycliste Internationale* [1974] ECR 1405.
[532] Muchlinski P., 'Human Rights and multinationals: is there a problem?' (2001) 77(1) *International Affairs* 31, 37.
[533] Muchlinski P., 'Human rights, social responsibility and the regulation of international business: the development of international standards by intergovernmental organisations' (2003) 3 *Non-State Actors and International Law* 123, 130, 143.

The effectiveness of self-delimiting commercial responsibilities is a separate question. Codes of conduct adopted by individual firms or industry associations are not opposable against other actors including non-members. Human rights standards as a uniform basis of competition are only effective where States mandate and enforce a minimum regulatory floor. In other words, the limits of voluntarism affirm the lawmaking role of States. Indeed, soft legal instruments may be embraced within legislation.[534] State practice in the implementation of human rights is essential. Corporate codes of conduct can therefore be an important but limited step towards the further implementation of pre-existing customary norms. Organised business groups call upon States to develop regulatory standards with respect to human rights but minimise trade barriers.[535] Is the corporate role any different when national law violates international human rights standards ?

1.2.4. Resisting Prohibitions of Customary International Law: The Example of South African Apartheid.

South African apartheid illustrates the influence of corporate opinion upon national lawmaking (and thus State practice) in the context of implementing human rights. It also evidences the extent to which a commercial presence can insulate a persistently objecting State, thereby enabling it to resist the application of a customary law prohibition. The example also demonstrates the mechanics of how States and firms implement or resist Security Council Resolutions, a topic to be addressed in greater detail in Chapter Four.

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[534] Eg *Corporate Code of Conduct Bill 2000* (Aus).

[535] USCIB, An Open and Efficient Global Food System, 1998, New York, 3.

In calling for non-discrimination and equal pay under the apartheid regime, the UN appreciated that corporations subject to South African jurisdiction would be acting contrary to national law.[536] Notwithstanding that corporations should not intervene within internal political affairs, businesses as part of their social responsibility could not ignore universally-accepted human rights of a non-derogable character. Organised business groups made written and oral submissions before UN public hearings.[537] Although acknowledging that apartheid was morally indefensible, economically counterproductive and fundamentally irreconcilable with free enterprise, the ICC advocated in favour of continued deference to national law. By contrast, South African business organisations supported continued international engagement and publicly committed themselves to accelerating politico-legal change. Individual firms having South African affiliates publicly urged legislative reform.

The UN determined that firms had sustained the illegal occupation of Namibia and linked effective governmental administration with the validity of property rights.[538] The General Assembly had previously terminated the mandate of

[536] UNCTC, Transnational Corporations in South Africa and Namibia: United Nations Public Hearings, Vol 1, Reports of the Panel of Eminent Persons and of the Secretary-General, UN Doc ST/CTC/68 (1986), 5, 16.

[537] Cp UNCTC, Transnational Corporations in South Africa and Namibia: United Nations Public Hearings, Vol 2: Verbatim Records, New York, UN Doc ST/CTC/68, 1986, 52-62 (ICC); 147-163 (the Association of Chambers of Commerce of South Africa and the South African Federated Chamber of Industries); UNCTC, Transnational Corporations in South Africa and Namibia: United Nations Public Hearings, Vol 3, Statements and Submissions, UN Doc ST/CTC/68, 1986, 40-1 (ICC); 44-7 (the Association of Chambers of Commerce for South Africa, the National African Federation of Chambers of Commerce, the South African Federated Chamber of Industries & the Urban Federation of South Africa); 61-105 (individual firms).

[538] Report of the Secretary-General, Activities and Operations of Transnational Corporations in Namibia, with particular emphasis on their exploitation of Namibian resources and their contribution to and support of South Africa's illegal occupation of Namibia, UN Doc E/C.10/AC.4/1985/6, 16-7.

administration exercised by South Africa.[539] The UN Council for Namibia subsequently declared null and void concessions or licences granted by the South African government and called upon States to ensure that titles or contracts were not entitled to diplomatic protection against claims by a future lawful Namibian government.[540] That said, litigation by the UN against corporations before national courts was hampered by several questions of international law.[541] The UN also called upon corporations to cease their commercial dealings with South Africa.[542] Several intergovernmental resolutions condemned corporate collaboration with the apartheid regime and called for the termination of investment.[543] Various legislative measures were accordingly adopted by States.[544] However, several States justified inaction on the basis of non-binding resolutions and the extraterritorial application of national law.[545] Others were not so restrained.[546] However, sanctions regimes were routinely circumvented by corporations with the collusion of their home States.[547]

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[539] UNGA Resolution 2145 (1966).
[540] SC Res 301 (1971) para 12; UN Council for Namibia Decree No 1 for the Protection of the Natural Resources of Namibia, 27 September 1974, UNGAOR 35th Sess Supp No 24 (A/35/24) Vol 1 Annex 2 as affirmed by eg UNGA Res 39/50A (1984), para 57.
[541] Report of the UN Commissioner for Namibia, 'Implementation of Decree No 1 for the Protection of the Natural Resources: Study of the Possibility of Instituting Legal Proceedings in the Domestic Courts of States' (1986) 80(2) *AJIL* 442.
[542] Eg UNGA Res 31/6 H (1976); UNGA Res 40/64A (1985) para 10; SC Res 283 (1970) para 4.
[543] Eg UNGA Res 37/233 A (1982); ECOSOC Res 1985/72 (1985), para 6.
[544] UNCTC, Transnational Corporations in South Africa and Namibia: United Nations Public Hearings, Vol 4, Policy Instruments and Statements, UN Doc ST/CTC/68, 1986, Pt 2.
[545] UNCTC, Activities of Transnational Corporations in South Africa and Namibia and the Responsibilities of Home Countries with Respect to their Operations in this Area, UN Doc ST/CTC/84, New York, 1986, 31.
[546] Eg *The Comprehensive Anti-Apartheid Act* 22 USC s5001-5116 (1988).
[547] UNCTC, Transnational Corporations in South Africa: Second United Nations Public Hearings, 1989, Vol 1: Report of the Panel of Eminent Persons & Background Documentation, New York, 1990, UN Doc ST/CTC/102, 7, 31.

International business resisted compliance with UN resolutions on the basis that corporate responses required legislative guidance by their home States. In their view, the UN was attempting to use the corporate vehicle to effect political change within a State without the benefits of diplomatic protection. Moreover, unilateral initiatives would penalise national businesses without removing apartheid. Corporate codes of conduct were advocated as sufficient alternatives.[548] Conditional public procurement and shareholder initiatives were largely ineffectual. However, defensive appeals by firms to the primacy of national law in authoritatively determining the permissibility of corporate behaviour are not without limit. South African firms emphasised their law reform initiatives including contributions to legislative proposals, advocating for the repeal of discriminatory labour laws, waiving applicable legal provisions in labour disputes and providing legal assistance to employees.[549] Their incidental objective was to remove unfavourable barriers to labour market flexibility. Local enterprises lacking the option to divest have the greatest incentive to cajole States into rectifying national law notwithstanding that they may have contributed to the design of the legal regime, were complicit in its implementation and economically benefited from its application.

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[548] *Export Administration Amendments Act* 1983 (US) HR 3231, 98th Congress Vol 129 No 137; The Sullivan Statement of Principles for US Corporations Operating in South Africa (Fourth Amplification) 24 *ILM* 1486 (1985); Code of Conduct concerning the Employment Practices of Canadian Companies Operating in South Africa 24 *ILM* 1464 (1985); European Community Code of Conduct for Enterprises having Affiliates, Subsidiaries or Agencies in South Africa (1977) 9 *EC Bulletin* 2.2.4.

[549] UNCTC, Transnational Corporations in South Africa, Second United Nations Public Hearings, 1989, Vol 2: Statements and Submissions, UN Doc ST/CTC/102, New York, 1990, 150, 152, 155, 164, 170, 175.

The eventual withdrawal of international business was attributed to a weakened economy and an uncertain political situation: although initially enjoying higher profits suspected to derive from the denial of labour standards, South Africa became a high risk investment on account of rising worker militancy, poor productivity and import dependency. Voluntary withdrawal was also warranted to preserve the corporate reputation. The account illustrates that transnational corporations can assist target States resist the application of customary legal prohibitions. They are reluctant to relinquish the global competitive advantage their subsidiaries derive from national law and may collude with home States to that end. By contrast local firms will explicitly urge national legal reform and seek to influence State practice from within. Conformity with international law is incidental to alleviating sanctions regimes, opening trade routes, removing labour market constraints and ultimately occupying the market positions of departing firms. Overall, the ability for corporations to influence State practice is most apparent where States fail to regulate (giving rise to an expectation to self-regulate) or where national law is inconsistent with international law (an expectation to ensure conformity).

1.3 Overturning Normative Constraints which Maintain International Legal Stability: The Prohibition on the Use of Force.

Having considered firstly the corporate role in the creation of custom and secondly the implementation of pre-exiting normative rules, it remains to consider the extent to which commercial participation in the application of

customary rules can challenge the international legal order. This section examines the corporate influence upon the prohibition on the use of force. The legal concepts of 'armed attack' and 'self-defence' may apply to non-State action.[550] It is uncertain whether States can employ force against non-State actors when exercising their right to self-defence.[551] International peace and security is conducive to unhindered resource exploitation, unimpeded communication and trade networks and the protection of employees, customers and assets.[552] The international economic order and market stability are left affected. Armed conflict challenges the rule of law with resulting commercial insecurity. Forcible territorial annexation extinguishes property rights acquired under previous regimes.[553] National courts may refuse to recognise foreign laws which purport to transfer property.[554] Peacefully resolving disputes is a task is 'too important to be entrusted to States alone'.[555] Corporations can diffuse inter-State conflicts as intermediaries building closer economic relationships, refraining from corruption and curtailing resource competition.[556] On the other hand, reducing workplace tension requires institutionalising participatory structures which considerably alter contemporary models of corporate governance. Finally, inter-commercial disputes can be resolved peacefully through resort to arbitration.[557] Such a

[550] *Nicaragua, supra n12,* para 195; SC Res 1368 (2001) (terrorism).
[551] Cp *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 2004, para 139 & Declaration of Judge Buergenthal, para 6.
[552] Clausen A.W., 'The Internationalised Corporation : An Executive's View' (1972) 403 *The Annals* 21.
[553] *Gosalia v Agarwal & Ors* (1981) *AIR SC* 1946, paras 28-9.
[554] *Kuwait Airways Corp v Iraqi Airways Company and the Republic of Iraq* (2000) 116 *ILR* 534, 587-95.
[555] UN Department of Public Information, Statement by the UN Secretary-General Boutros-Ghali at the Forty-Seventh Annual Conference of Non-Governmental Organisations, 1994, 2.
[556] Fort T.L. & Schipani C.A., 'The Role of the Corporation in Fostering Sustainable Peace' (2002) 35 *Vanderbilt J Transnational L* 389, 409.
[557] ICC, Rules of Arbitration, ICC Pub No 581, Paris, 1998.

technique has been endorsed by the Security Council to also resolve disputes between firms and States.[558]

Corporations derive some protection under international humanitarian law. Civilian objects (installations containing dangerous forces, hospitals, scientific and educational buildings and undefended structures) are protected and employees are not to be targeted as combatants. Occupying powers may not be liable under international humanitarian law for failure to maintain law and order when local businesses are looted.[559] However, States are subject to a due diligence obligation to adopt precautionary measures when conducting military operations.[560] Corporations may be able to obtain compensation for property damage from States pursuant to bilateral investment treaties.[561] Individuals can also recover the costs associated with the non-consensual use of privately-owned premises by UN peacekeeping forces before specially-instituted claims tribunals.[562] The legal character of hostilities is also relevant for insurance which is reflected in a body of jurisprudence and therefore State practice.[563]

Corporations are also concerned by prospective corporate liability. Only States are liable for serious violations of the laws of warfare.[564] The Rome Statute of the International Criminal Court does not contemplate corporate

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[558] SC Res 118 (1956) (Suez Canal Company & Egypt).
[559] *Industria Panificadora SA v US* 957 *F 2d* 886 (1992); *Goldstar (Panama) SA v US* 967 *F 2d* 965 (1992).
[560] ICSID, *Asian Agricultural Products Ltd v Republic of Sri Lanka* (1997) 106 *ILR* 416, 451-64.
[561] ICSID, *American Manufacturing & Trading Inc v Republic of Zaire*, Case ARB/93/1 (1997).
[562] UN Secretary-General, Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations, UN Doc A/51/389 (1996), para 46.
[563] Eg *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484.
[564] Common Art 3, 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 *UNTS* 287.

criminal responsibility.[565] However, declarations of corporate criminality were observed following World War Two.[566] Industry is integrated into the State apparatus for a concerted war effort. For example, IG Farben collaborated with the German government in acquiring chemical facilities across occupied Europe.[567] Other firms were less opportunistic given the long-term insecurity of foreign acquisitions.[568] However, the penalty for IG Farben was dispersing its ownership rather than extinguishing its juristic personality.[569] Corporations also utilised concentration camp interns, prisoners of war and civilians as forced labour. Individual criminal responsibility derived from voluntary membership of an organisation and knowledge of its criminal purposes. Knowledge could be inferred from profit levels within the firm.[570] Corporate officers were accordingly convicted of crimes against humanity, war crimes and violations of the laws and customs of warfare.[571] Corporations have more recently settled claims made against them arising from their forced labour practices. Claimants had been unable to recover compensation from States, particularly where legislation impermissibly interferes with the conduct of foreign policy by the executive.[572] Furthermore, litigation against firms had

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[565] Art 25(1), Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998).
[566] Arts 9, 10, Charter of the International Military Tribunal (IMT), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) 82 *UNTS* 280; *IMT Judgment* (1947) 41(1) *AJIL* 172, 249-72.
[567] Borkin J., The Crime and Punishment of IG Farben, Andre Deutsch Ltd, London, 1979.
[568] Overy R.J., 'German Multinationals and the Nazi State in Occupied Europe' in Teichova A., Levy-Leboyer M. & Nussbaum H., Multinational Enterprise in Historical Perspective, Cambridge University Press, Cambridge, 1986, 306.
[569] Allied High Commission Law No 35 (1950) 'Dispersion of Assets of IG'.
[570] *US v Oswald Pohl et al* 5 *Trials of War Criminals Before the Nuremberg Military Tribunals* 1055; *Mauthausen Concentration Camp Trial (Trial of Hans Alfuldisch and Six Others)* 11 *War Crimes LR* 15; *Trial of Burn Tesch and Two Others (Zyklon B Case)* (1946) 13 *ILR* 250, 252.
[571] *In re Flick & Ors* (1947) 14 *ILR* 266; *In re Krupp & Ors* (1948) 15 *ILR* 620; *In re Krauch & Ors (IG Farben Trial)* (1948) 15 *ILR* 668.
[572] *Hirsch v State of Israel and State of Germany* 962 F Supp 377, 382-3 (DC NY 1997); *American Insurance Association et al v Garamendi* (2003) *US SC.*

proved unsuccessful since prior reparations agreements between States foreclosed individual claims.[573] However, firms settled these lawsuits to preserve their reputation, avoid government sanctions and provide an exclusive remedy. A compensation fund and claims resolution panel was subsequently established in Switzerland.[574] A similar process was established in Austria.[575] Corporations may therefore become liable for collaborating with States in violating the prohibition on the use of force.

Commercial decision-making can have a catalytic effect in initiating confrontation and indirectly prolong conflict.[576] Natural resource extraction provides revenue for States and access to remote areas, thereby contributing to spiralling cycles of violence.[577] Business ordinarily relies upon the State security apparatus to protect personnel and property. Engaging military activity may incur prospective corporate liability. The provision of support and direction to law enforcement officers in a common mission is sufficient to establish joint action.[578] Purchasing firearms, paying allowances, training

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[573] *Iwanowa v Ford Motor Co* 67 F Supp 2d 424 (DNJ 1999); Sec 354.6 *California Code of Civil Procedure relating to World War Two Slave and Forced Labour Victims* 39 *ILM* 231 (2000) declared unconstitutional in *Deutsch v Turner Corporation* US CA 9th Cir 2003; *In Re World War II Era Japanese Forced Labour Litigation* MDL-1347 (ND Cal 2000); *In re Austrian and German Bank Holocaust Litigation* 80 F Supp 2d 164 (SDNY 2000); *Watman v Deutsche Bank* (2nd Cir 2001); *In re Holocaust Victim Assets Litigation: Polish American Defence Committee v Swiss Bankers Association* 96 Civ 4849 (DC NY 2000 & 2nd Cir 2000); *Bodner & Banque Paribus* No CV 97-7433 (ED NY 1997); *Benisti v Banque Paribus* No CV 98-7851 (ED NY 1998).

[574] Swiss Federal Banking Commission/Independent Committee of Eminent Persons/Swiss Bankers Association, Statement on Comprehensive Claims Resolution Process for Dormant Accounts in Swiss Banks dating from prior to the end of World War Two and Announcement of the Claims Resolution Process 36 *ILM* 1379 (1997).

[575] US-Austria, Joint Statement and Exchange of Notes concerning the establishment of the General Settlement Fund for Nazi-Era and World War Two Claims 40 *ILM* 565 (2001).

[576] Anderson M.B. & Zandvliet L., Corporate Options for Breaking Cycles of Conflict, Collaborative for Development Action Inc, Massachusetts, 2001.

[577] Canadian Department of Foreign Affairs and International Trade, Human Security in Sudan: The Report of a Canadian Assessment Mission, Ottawa, 2000, 64.

[578] *United Steelworkers of America v Phelps Dodge Corporation* 865 F 2d 1539, 1545 (9th Cir 1989).

security personnel and transporting troops contributes to military operations. Corporations can therefore be complicit in human rights violations.[579] At a minimum business should pursue socially responsible practices.[580] Codes of conduct and contracts with security providers can be benchmarked against international standards.[581] These arrangements invoke the concepts of proportionality, distinguishing targets and command responsibility [582] Formulating such instruments can involve the participation of States, corporations, trade unions and NGOs.[583]

There is also a commercial interest in resort to armed force. The post-conflict corporate role includes profitable reconstruction opportunities (for corporate contractors, security consultants, engineering companies or essential utility services) and creating market-orientated legal regimes.[584] The arms trade is an identifiable source of conflict.[585] The industrial military sector includes arms manufacturers and traders but also aerospace, transport, electronics, communications and research and development. The defence industry has a market-preserving interest in ensuring that States prevent illicit arms transfers

[579] Pegg S., 'The Cost of Doing Business: Transnational Corporations and Violence in Nigeria' (1999) 30(4) *Security Dialogue* 473, 475.
[580] Office for the High Commissioner for Human Rights, 'Global Compact Dialogue on the Role of the Private Sector in Zones of Conflict', Palais Wilson, 2001.
[581] International Alert/Council on Economic Priorities/Prince of Wales Business Leaders Forum, The Business of Peace: The Private Sector as a Partner in Conflict Prevention and Resolution, London, 2000.
[582] UN, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990.
[583] US & UK Governments, Voluntary Principles on Security and Human Rights, 2000; US Department of State, Voluntary Principles on Security and Human Rights, Washington, 2000.
[584] Davies R., 'Business: why do private companies have a role in conflict prevention ?' Paper presented at Wilton Park Conference on Humanitarian Principles and Non-State Actors, PWBLF, 2000, 5.
[585] Secretary-General Report, The causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc S/1998/318 (1998), para 14.

by 'illegitimate' traders lacking government approval.[586] The normative prohibition on the use of force extends to arming, equipping, supporting and assisting military activity but does not distinguish between public and private manufacturers.[587] The ability of shareholders to review military contracts for compliance with international law is narrowly circumscribed.[588] States accordingly attempt to control the monopoly over military resources by preventing the illicit trade.[589] However, international legal controls are only emerging.[590] Technological development by arms manufacturers will be affected by prohibitions on a particular means of conducting warfare.[591] Finally, other non-State actors such as terrorists and organised criminals employ the corporate organisational form as instruments of war or for illicit purposes such as money laundering.[592] Distinctions between firms are warranted when considering the different markets constructed on the peripheries of the legal regime on the use of force.

The evolution of international law with respect to prohibiting the use of mercenaries illustrates the reaction of States to a specific commercial interest in armed conflict.[593] Mercenaries threaten the political independence and

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[586] UNGA Res 46/36 (1992) on International Arms Transfers.
[587] *Nicaragua supra* n12, para 292.
[588] *SA Avions Morcel Dassault Breguet Aviation v Association Europeenne Droit Contre Raison D'Etat* (1997) 106 *ILR* 216.
[589] Eg OAS, Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials 37 *ILM* 143 (1998).
[590] UN, Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 54/54 (1999) entitled Small Arms, UN Doc A/CONF.192/2 (2001) paras 18-30.
[591] Eg UN, Anti-Personnel Mines Convention 36 *ILM* 1507 (1997).
[592] Orts E.W., 'War and the Business Corporation' (2002) 35 *Vanderbilt J Transnational L* 549, 561.
[593] Zarate J.C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder' (1998) 34 *Stanford J Int'l L* 75.

territorial integrity of States.[594] Contracts for the control of natural resources impair the right of self-determination.[595] However, States continue to resort to their services. The nature of mercenary activity has also evolved.[596] Private military companies (PMCs) have further commodified military services for the benefit of States, international organisations and corporate clients from the energy or minerals sector.[597] The paradoxical suggestion has been made that PMCs be deployed for UN peace enforcement operations.[598] However, their military efficiency may derive from failure to observe human rights obligations and the laws and customs of warfare. Although States are reluctant to condone mercenary activity, informal technical co-operation is not improper and PMCs are entitled to diplomatic protection.[599] International law does not prevent PMCs from enforcing military contracts against States.[600] Indeed, the Human Rights Committee recommended international regulation to enhance their positive contributions.[601] National legislation which provides for licensing legitimates an infant industry and marginalises disreputable operators.[602] The

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[594] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 29 *ILM* 90 (1990).
[595] UNHRC, Report made pursuant to Commission Resolution 1998/6, UN Doc E/CN.4/1999/11 (1999), para 75.
[596] UNHRC, The Right of Peoples to Self-determination and its Application to Peoples under Colonial or Alien Domination of Foreign Occupation, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur, UN Doc E/CN.4/1998/31 (1998), paras 69, 112.
[597] Ballesteros E.B., 'International and Regional Instruments' in International Alert, The Privatisation of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda, London, 2001, 48, 50.
[598] UN, 'Secretary-General Reflects on 'Intervention', 35th Annual Ditchley Foundation Lecture, Press Release SG/SM/6613, 1998, 5.
[599] Legg T. & Ibbs R., Report of the Sierra Leone Arms Investigation, HMSO, London, 1998, para 11.9.
[600] *In the Matter of an International Arbitration under the UNCITRAL Rules between Sandline International Inc and the Independent State of Papua New Guinea* (2000) 117 *ILR* 551, para 11.1.
[601] UNHRC, Report pursuant to Commission Resolution 1999/3, UN Doc E/CN.4/2000/14 (2000), paras 71-2.
[602] Eg *Arms Export Control Act* 22 USC (1968) & *International Traffic in Arms Regulations* 22 Fed Reg 120-30 (1998); *Regulation of Foreign Military Assistance Act*, 15 of 1998 (Sth

fundamental tensions created by PMC's (such as preserving or disturbing the peace, protecting or violating human rights, enabling or hindering economic development, bolstering or destabilising States) as well as preferred responses (private efficiency or public accountability and regulation or free enterprise) are yet to be wholly reconciled.

To conclude thus far, this Part has categorised various aspects of the State-corporate relationship in terms of its impact upon normative rules. Normative rules such as good faith are operationalised by firms in a manner identical to States and are likely to be strengthened within the international system. However, inter-corporate competition injects tension into the observance of normative rules such as the prohibition on intervention in the internal affairs of States and the use of force. Normatively malleable rules such as respect for human rights when implemented by firms emphasise their underlying economic imperatives and promote property interests over individuals concerns. A continuing State role is necessary to maintain normative alignment. Is this conclusion also warranted where States exercise less than their full regulatory capacity in the nature of 'soft' international law and corporate roles are formalised ?

2. Corporate Participation in Developing 'Soft' Legal instruments.

'Soft' law is defined as those instruments which ostensibly are not formally binding but have a definite albeit indeterminate legal effect. Such expectations

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Africa); UK House of Commons, Private Military Companies: Options for Regulation, HC 577, HMSO, London, 2002.

of future conduct may make the transition to 'hard' law.[603] Soft law can be used in a variety of ways to serve different interests. It constructs mutual confidence, encourages transparency and ensures predictable behaviour. States resort to this tool when consensus for legally-binding agreements is lacking: for example, attempts by developing States to regulate corporate activity through the General Assembly on account of their numerical majority and inability to conclude treaties with the industrialised States. Soft law can also disperse the burden of administration or monitoring to other actors. Corporations are not precluded from participating in the formulation, implementation and enforcement of these instruments. Intergovernmental codes serve a legitimising function for corporate behaviour, thereby affirming the positive contributions made by industry. They are moreover a relatively costless technique for reinforcing State compliance.[604]

2.1 Corporate Participation in Intergovernmental Codes of Conduct.

The origins of intergovernmental codes follow identifiable patterns. Undesirable commercial practices lead to public pressures for a regulatory response. Corporate officers participate as experts or industry representatives to formulate effective proposals. Drafts are circulated to States and the business community to solicit comment. The final product may be formally adopted by States as law, adopted as a formally non-binding instrument or recognised by firms as indicative of best commercial practice. For example, the International Code of Marketing of Breastmilk Substitutes of the World

[603] Eg Colloquium, 'A Hard Look at Soft Law' (1988) 82 *ASIL Proc* 371.
[604] Kline J.M., 'Entrapment or Opportunity: Structuring a Corporate Response to International Codes of Conduct' (1980) 15(2) *Columbia J World Bus* 6, 11-2.

Health Organisation (WHO) emerged in response to criticism of commercial marketing practices within developing States during the 1970's.[605] Following national court proceedings and consumer boycotts the International Council of Infant Formula Industries formulated a Code on Infant Food Marketing. This effort led to subsequent collaboration with the WHO to design the Breastmilk Code.[606] The industry association called for further tailoring of that instrument to national conditions.[607] Responsibility for implementation falls upon States and NGOs may report violations. Few States have fully implemented the Code: the instrument has cascaded into further sources of soft law with many States preferring voluntary agreements with industry.

2.1.1 The Interpretative Function and Institutional Oversight Responsibility.

Institutions composed of States, trade unions, NGOs and firms are typically established with oversight responsibility. Companies alleged to have breached intergovernmental codes participate in complaints proceedings individually or through business associations. Given their non-judicial character and the voluntary nature of the instrument sanctions rarely rise to censure. Complaints are considered with reference to a general survey of experiences. The process refrains from specific conclusions on the propriety of conduct by individual firms. Although co-opting criticism, the framework is noteworthy for

[605] UNCTC, 'The International Code of Marketing Breast-Milk Substitutes' (1982) 11 *The CTC Reporter* 29.
[606] WHO/UNICEF, Meeting on Infant and Young Child Feeding, Statement, Recommendations, Participants, Geneva, 1979; WHO Res WHA34.22 (1981) on an International Code of Marketing of Breastmilk Substitutes.
[607] The International Council of Infant Formula Industries, 'Infant Formula Marketing in the Third World' (1981) *National Journal* 854.

continuing dialogue between interested actors and encouraging continuous improvement.

For example, the International Labour Organisation's (ILO's) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy enjoys the authority of adoption by States, trade unions and employers organisations.[608] First adopted in 1977, it was amended in 1987 and 1995.[609] In 2000 it was updated to include the 1998 Fundamental Rights at Work Declaration and ILO Conventions concerning child labour.[610] Employers organisations consider that the Declaration contains standards which they expect their members to apply.[611] Indeed, adherence is conducive to long-term commercial interests in developing markets.[612] The ILO Governing Body requested States to periodically report on the effect given to the Declaration after appropriate consultation with employers and workers organisations. The first survey indicated substantial acceptance although differences of opinion arose between employer and worker groups.[613] The survey also demonstrated 'on the whole, a good degree of acceptance' by industry.[614] More recent studies confirm 'a fairly wide degree of observance' by employers including

[608] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 17 *ILM* 423 (1978).
[609] ILO, Updating of references annexed to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO Doc GB.277/MNE/3 (2000).
[610] ILO, Report of the Subcommittee on Multinational Enterprises, ILO Doc GB.279/12 (2000).
[611] Coates J.A.G., 'ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy' in Confederation of British Industry, International Codes of Conduct, London, 1981, 19.
[612] Morawetz, R., 'Recent Foreign Direct Investment in Eastern Europe: Towards a possible role for the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy', ILO Working Paper 71, Geneva, 1991, 58-60.
[613] ILO, Report of the Committee to Consider Reports on the Effect Given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO Doc GB/214/6/3 (1980), 22-6.
[614] Gunter H., 'The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: History, Contents, Follow-up and relationship with relevant instruments of other organisations', ILO Working Paper 18, Geneva, 1981, 12.

further standard-setting by them with respect to occupational health and safety.[615] Employers were satisfied that positive observations outweighed adverse criticisms in the sixth survey.[616] However, they also argue that NGOs should be excluded from a process intended for ILO constituent bodies.[617]

The tripartite SubCommittee on Multinational Enterprises interprets provisions to resolve disagreements on their meaning arising from actual situations between parties to whom the Declaration is commended.[618] The SubCommittee construes the Declaration broadly in light of the interests to be safeguarded.[619] Although some twenty-three requests for an interpretation have been received, very few have passed the test of 'receivability'. States may request interpretations notwithstanding declarations of corporate compliance with national law by its national courts or settlement agreements between that firm and its employees.[620] The SubCommittee consults the trade union, corporation and home State directly concerned in addition to employer and worker organisations and business associations. Interpretations are first drafted by trade unions and management before submission for endorsement by the ILO Governing Body.[621] Consensus thus prevents authoritative

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[615] Romero A.T., 'The ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: An Introductory Essay', Philippine Roundtable on Labour and Social Issues Arising out of the Activities of Multinational Enterprises and Foreign Direct Investment, ILO, Geneva, 1997, para 5.2.
[616] ILO, Follow-up and Promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Report of the Subcommittee on Multinational Enterprises, ILO Doc GB.268/9 (1997), para 5.
[617] ILO, Report of the Subcommittee on Multinational Enterprises, ILO Doc GB.277/12 (2000), para 9.
[618] Arts 1, 2, Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions (1986) *ILO Official Bulletin* Vol 69 Ser A No 3, 196.
[619] ILO, Report of the Subcommittee on Multinational Enterprises, ILO Doc GB.239/14/24 (1988).
[620] *Ibid*, ILO Doc GB.270/18 (1998).
[621] *Ibid*, ILO Doc GB.229/13/13 (1985).

interpretations where conflicting opinions arise between employer and worker groups.[622] Moreover, the process cannot be instituted in anticipation of corporate decision-making or where trade unions lack a mandate from their representative national affiliate (notwithstanding that freedom of association may not be respected within that State).[623] To the extent that the Tripartite Declaration reflects customary international law (and the implementation procedures strengthen this argument), employer and worker organisations are also contributing to further interaction between formally soft law instruments with substantive custom.

2.1.2 Maintaining Corporate Adherence by Updating Intergovernmental Codes.

Firms also participate in the amendment of intergovernmental codes. For example, the Guidelines for Multinational Enterprises adopted in 1976 by the Organisation for Economic Development and Cooperation (OECD) carry the weight of a multilateral recommendation by States on expected corporate behaviour.[624] It was introduced in part to deter efforts to render the UN Code of Conduct legally binding.[625] Harmonising national law and promoting OECD policy were equally important objectives.[626] Corporations would observe the Guidelines if the instrument was kept under continuous review.[627]

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[622] *Ibid*, ILO Doc GB.264/MNE/2 (1995).
[623] *Ibid*, ILO Doc GB.254/MNE/4/6 (1992).
[624]OECD, The OECD Guidelines for Multinational Enterprises 40 *ILM* 236 (2001).
[625] Tapiola K., 'The Importance of Standards and Corporate Responsibilities–The Role of Voluntary Corporate Codes of Conduct', OECD Conference on the Role of International Investment, Paris, 1999, 2.
[626] (1975) 74 *The OECD Observer* 14 -5.
[627] (1976) 82 *The OECD Observer* 13.

Notwithstanding business calls for stability, the Guidelines have been reviewed on four occasions, subjected to a mid-term assessment and updated to include environmental protection and human rights provisions.[628] The Guidelines are also addressed to the public as much as employees, shareholders and investment institutions.[629]

The Business and Industry Advisory Committee (BIAC) ensures that reviews reflect contemporary industrial opinion.[630] BIAC encouraged corporate adherence to the Guidelines as 'reasonable standards of good management practice' which 'served to demonstrate that the voluntary approach – viewed against strong international pressures to introduce mandatory codes of conduct – is a viable and credible one'.[631] Enterprises will respect the Guidelines provided they are treated fairly and consistently with international law and contractual obligations.[632] Textual revisions are acceptable provided they result from consensus and the instrument remains voluntary.[633] BIAC recommends corporate declarations of support within annual reports, executive statements, press releases and intra-corporate communications.[634] Although the initial take-up in 1978 involved nearly one hundred prominent enterprises,

[628] Tully S., 'The 2000 Review of the OECD Guidelines for Multinational Enterprises' (2001) 50 *ICLQ* 394.
[629] Coolidge P., Spina G. & Wallace D. (Eds), The OECD Guidelines for Multinational Enterprises: A Business Appraisal, Washington DC, 1977, 56.
[630] BIAC, 'Report of Activities 1982-1983' in Blanpain R., The OECD Guidelines for Multinational Enterprises and Labour Relations 1982-1984: Experience and Review, Kluwer Publishers, Deventer, 1985, 13.
[631] BIAC, Brochure on the OECD Guidelines for Multinational Enterprises, Paris, 1983, 4-5.
[632] Coates J., 'Multinational Enterprises, Industrial Relations and Codes of Conduct: The Employers Point of View' (1979) 10 *Bulletin for Comp Rel'ns* 125.
[633] OECD, 'Labour and Employment Practices in Today's Global Economy: Implications for the OECD Guidelines on Multinational Enterprises', Working Paper Vol 7 No 40, Paris, 1999, 12.
[634] BIAC, A Report for Business on the OECD Guidelines for Multinational Enterprises, Paris, 1980, 19-20.

by 1984 corporate interest had dissipated. Only in rare instances do annual reports expressly indicate consideration of the Guidelines.[635]

Responsibility for clarifying the Guidelines is entrusted to the OECD's Committee on International Investment and Multinational Enterprises (CIIME). CIIME invites BIAC and the Trade Union Advisory Committee (TUAC) to express views which are then considered by the OECD Council. OECD Member States also concluded a legally-binding decision which entitles individual firms to make submissions on matters affecting its interests.[636] TUAC and BIAC have a substantial impact upon CIIME deliberations; in effect States merely approve the compromises identified by management and trade unions.[637] This interpretative process has spawned a form of jurisprudence, particularly for the normative principles of the industrial relations chapter. An alternative solution is rectifying the government measure which gave rise to the disputed application of the Guidelines. The first clarification demonstrated the extent to which industry could pressure individual firms and limit accountability to the OECD forum.[638] Although the principal impetus for clarifications has historically been TUAC, it has become disillusioned by the lack of political commitment and questionable corporate compliance.[639] The evolution of the Guidelines is attributable to the

[635] OECD, 'Disclosure of Information by Multinational Enterprises: Survey of the Application of the OECD Guidelines', Working Document No 3, Paris, 1987, 8, 27.
[636]OECD, Council Decision C(76)117 (1976) on Intergovernmental Consultation Procedures on Guidelines for Multinational Enterprises as revised by Decision C(79)143 (1979).
[637] Blanpain R., The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979: Experience and Review, Kluwer Publishers, Deventer, 1979, 268 para 232.
[638] Blanpain R., The Badger Case and the OECD Guidelines for Multinational Enterprises, Kluwer Publishers, Deventer, 1977, 128.
[639] Blanpain R., The OECD Guidelines for Multinational Enterprises and Labour Relations 1979-1982: Experience and Mid-term Report, Kluwer Publishers, Deventer, 1983, 66-7.

concurrence of opinion between States and corporations.[640] It is uncertain whether NGO admission into the process will reinvigorate implementation.[641] Unfortunately, NGOs have already experienced the territorial limitations to the Guidelines.[642]

2.1.3 The Impact of Intergovernmental Codes on Corporate Behaviour: Towards Human Rights Principles for Business.

Use of soft law forms allows States to employ less than their full regulatory capacity. Statements of principle will leave national legal obligations unaffected.[643] Governmental codes improve the extraterritorial reputation of national firms without overburdening them. States thereby compete in formulating codes for prospective adoption by national industry. For example, the UK government's Ethical Trade Initiative (ETI) seeks to apply international labour standards throughout supply chains.[644] Transposing the ETI Base Code into national-specific standards encounters difficulty where collective bargaining is prohibited within host States.[645] Hence non-compliance with the Code relates principally to freedom of association and working conditions.[646] The US equivalent, the Apparel Industry Partnership,

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[640] Blanpain R., 'Guidelines for Multinational Enterprises, for Ever? The OECD Guidelines 20 Years Later' (1998) *Int'l J of Comp Labour L & Indust Rel'ns* 337, 345.
[641] OECD, National Contact Points, Procedural Guidance, DAFFE/IME/WPG/(2000)9.
[642] Bashir S. & Mabey N., 'Can the OECD MNE Guidelines Promote Responsible Corporate Behaviour? An Analysis of P & O's Proposed Port in Dahanu, India', World Wildlife Fund (UK), 1998, 8.
[643] US Department of Commerce, Model Business Principles, Washington DC, 1995.
[644] UK, Ethical Trading Initiative (ETI), 'Eliminating World Poverty: A Challenge for the 21st Century', White Paper, Cmnd 3789 (1997), 64.
[645] ETI, Pilot Interim Review, London, 1999, 5.
[646] ETI, Annual Report, London, 1999/2000, 4.

has an identical objective.[647] However, once again the code has a limited extraterritorial effect.

Opinions differ on whether intergovernmental codes constitute sources of positive law for corporations.[648] On one view, codes only assume a legally-binding character when formally adopted by those within the orthodox lawmaking process. However, codes may also have 'unknown and possibly legal implications'.[649] National courts have taken into consideration voluntary endorsement of intergovernmental codes when determining corporate liability.[650] Corporations expect to be adjudged against national law.[651] Conduct undertaken pursuant to an intergovernmental code does become legal when it is contrary to national law.[652] Such codes can become binding upon States as customary international law provided the elements of custom are satisfied and thereafter upon firms when that source is automatically incorporated into national law. In this manner corporate adherence to intergovernmental codes influences pertinent State practice to become circuitously binding upon firms. Where States and corporations are addressees of the same instrument, why should a legal impact be accepted for States but denied for firms, particularly where corporations may thereby derive rights and

[647] Apparel Industry Partnership, Workplace Code of Conduct and Principles of Monitoring, Washington, 1997.
[648] Cp Brownlie I., 'Legal Effects of Codes of Conduct for Multinational Enterprises: Commentary' & Vogelaar T.W., 'The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review' in Horn N. (Ed), Legal Problems of Codes of Conduct for Multinational Enterprises, Kluwer Publishers, Deventer, 1980, 39, 41, 127, 136.
[649] Slayton P., 'The OECD: 'Soft Law' for Transnational Business Transactions' (1985) 14 *Canadian Council on Int L Proc* 219, 220-1.
[650] Economic Chamber of the Higher Court in Amsterdam, *Nederlandse Jurisprudentie* 1980/71.
[651] Guertin D.L. and Blair J., 'A Business View on the Implementation of Codes of Conduct' in Horn N. (Ed), Legal Problems, *supra n*648, 295, 311.
[652] *New York City Employees Retirement System v American Brands* 634 F Supp 1382 (SDNY 1986).

benefits which they may call upon States to observe under international law? Intergovernmental codes are analogous to workplace agreements where the solutions reached by employer and worker organisations are merely legitimated by States. The exclusive competence of States to provide an authoritative stamp which adopts non-law as law is partly diluted by the multipartite nature of participation. Where firms participate in the formulation, interpretation or implementation of an intergovernmental code the argument for holding them to account thereunder must be stronger.

The legal status of the instrument is less important where management draws upon intergovernmental codes in their routine commercial decision-making. Corporate commitments are not territorially-bounded. Firms 'go beyond' strict legal requirements when compliance with intergovernmental codes exceeds national legal requirements.[653] The difficulty for the firm of extricating itself from intergovernmental processes is counterbalanced by further opportunities to influence State policy and binding regulation. Intergovernmental codes conveniently centralise transnational regulatory functions, for example, with respect to the distribution and use of pesticides.[654] States can also permit equality of participation by other non-State actors such as NGOs and trade unions to enhance the instrument's effectiveness. Although models for prospective national regulation, intergovernmental codes can pull down more stringent national law and encourage a less deferential attitude to legally-binding agreements.

[653] Vogelaar T., 'The Guidelines in Practice' (1977) 86 *OECD Observer* 7, 8.
[654] Arts 3, 6.2.3, 7.2, Food and Agriculture Organisation, Conference Res 10/85 (1985) & UNGA Res 39/248 (1985) on International Code of Conduct on the Distribution and Use of Pesticides.

The legal impact of corporate behaviour, most explicitly evidenced by permitting corporate representatives to participate in the formulation of intergovernmental guidelines, also illustrates the extent to which firms influence the legal development of normative standards such as human rights. In 1998 the Sub-Commission on the Promotion and Protection of Human Rights initiated several studies on the impact of transnational corporations upon human rights.[655] Many human rights such as access to food, health, work and freedom of expression as well as the right of permanent sovereignty over natural resources are affected by commercial practices with respect to technology transfer, restrictive business practices and intellectual property rights. A Special Rapporteur recommended that 'it would be appropriate to examine all these questions in a broader framework'. [656] Particularly noteworthy were trends towards a 'new comprehensive set of rules' representing expected standards of corporate conduct. [657] All interested constituencies including business were invited to participate in developing a code of conduct for corporations.[658] Differences of opinion emerged with respect to defining its scope of application, legal nature, title, purpose and

[655] Weissbrodt D., 'The Beginning of a Sessional Working Group on Transnational Corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' in Kamminga M.T. & Zia-Zarifi S. (Eds), Liability of Multinational Corporations under International Law, Kluwer Law International, The Hague, 2000, 119.
[656] UNHRC, The realisation of economic, social and cultural rights: the question of transnational corporations, UN Doc E/CN.4/Sub.2/1998/6, para 28.
[657] UNHRC, The Realisation of Economic, Social and Cultural Rights: The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject matter, UN Doc E/CN.4/Sub.2/1996/12, para 74.
[658] UNHRC, The realisation of economic, social and cultural rights: the question of transnational corporations, UN Doc E/CN.4/Sub.2/1999/9, paras 5, 37.

manner of implementation.[659] Whereas one business representative considered that corporate participation was deficient another challenged the competence of the Human Rights Commission to establish a working group on the topic.[660] However, the Working Group also observed the failure of States to regulate effectively.[661]

The resulting Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises of 2002 are noteworthy for several reasons.[662] First, corporations participated in international lawmaking, albeit that where adopted by States the effort was ultimately self-regulatory. As stated in the Preamble, the Human Rights Principles 'contribute to the making and development of international law'. Individual firms, corporate coalitions and organised business groups contributed to an authoritative set of principles to 'establish a level playing field for business competition'.[663] Second, 'States possess the principal responsibility to assure the implementation of human rights and businesses should not be asked to take over the primary role of States'.[664] States retain indirect legal responsibility in the event of corporate violations given their regulatory authority to adopt the

[659] Report of the Seminar to discuss the Draft United Nations Human Rights Guidelines for Companies, UN Doc E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3 (2001).
[660] UNHRC, Economic, social and cultural rights: report of the sessional working group on the working methods and activities of transnational corporations on its fourth session, UN Doc E/CN.4/Sub.2/2002/13, para 31.
[661] *Ibid*, paras 12, 18.
[662] UNHRC, Economic, social and cultural rights: Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4/Sub.2/2002/WG.2/WP.1. See also the Commentary on the Principles, UN Doc E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2.
[663] UNHRC, Economic, social and cultural rights: Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1, paras 16, 60.
[664] *Ibid*, para 17.

necessary measures of protection or prevention.[665] Corporations are only obliged to respect and prevent human rights abuses as 'recognised in international as well as national law'. Furthermore, paragraph 10 of the Principles states that corporations shall recognise and respect applicable norms of international law, national law, administrative practices and the rule of law. This is notwithstanding the admission that the Principles will be most effective when internalised as corporate policy or practice and enforced through self-assessment; in other words, through measures which obviate the regulatory role of States. Third, industry or commodity group initiatives, framework agreements between multinationals and workers' organisations, self-imposed company codes and NGO or trade union model guidelines are quoted as relevant sources on a par with ILO Conventions, human rights treaties and intergovernmental guidelines.[666]

The ICC and IOE took the view that the Principles 'would do more harm than good' and affirmed their primary obligation to act in accordance with host State law.[667] Human rights obligations apply to States not corporations, the Norms impose vague duties, the Sub-Commission has exceeded its authority, the principles of transparency and accountability have not been respected and businesses are now a target for vilification.[668] The Commission on Human Rights affirmed that the Principles have no legal standing and noted that the

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[665] *Lopez Ostra v Spain* (1994) *ECHR Rep Ser A* No 303-C, para 51; *Guerra & Ors v Italy ECHR Rep* 1998-I, No 64, para 58; Scott C., 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights' in Eide A. et al. (Eds), Economic, Social and Cultural Rights: A Textbook, Kluwer, The Hague, 2nd Ed, 2001.

[666] Background Paper on Source Materials for the Draft Universal Human Rights Guidelines for Companies, UN Doc E/CN.4/Sub.2/2001/WG.2/WP.1/Add.2 (2001).

[667] Commission on Human Rights, Joint Written Statement submitted by the ICC and IOE, UN Doc E/CN.4/Sub.2/2003/NGO/44 (2003), 2.

[668] ICC/IOE, Joint views on the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, Paris, 2004.

Sub-Commission does not perform any monitoring function.[669] The norm generating effect of the Principles remains to be seen: they could either constitute a major building block which crystallises State practice around corporate social responsibility or be disregarded as a mere statement of aspiration. Further consultation with relevant stakeholders including business to guide future developments in this field could usefully consider the virtues of independent corporate initiatives.

2.2 Corporate Standard-Setting Activity.

Corporations engage in technical standard-setting of a self-regulatory nature with respect to products or processes to facilitate trade and transfer technology. Standardisation may be defined as the process of establishing provisions for common and repeated use to achieve an optimal order in a given context with respect to actual and potential problems.[670] Homogenous technical rules reflective of best commercial practice enable firms to avoid the expense of developing their own product specifications. International product standards are more important than national and regional ones.[671] National standards must be justified where they appreciably depart from international ones.[672] Furthermore, trade agreements such as those with respect to sanitary, phytosanitary or standards-related measures contemplate non-governmental

[669] Commission on Human Rights, Report to ECOSOC on the Sixtieth Session of the Commission, UN Doc E/CN.4/2004/L.11/Add.7, Decision 2004/116 on the responsibilities of transnational corporations and related business enterprises with regard to human rights.
[670] ISO/IEC, Guide 2, General terms and their definitions concerning standardisation and related activities, Geneva, 1991.
[671] De Vries H., Standards for the Nation: Analysis of National Standardization Organisations, Kluwer Academic Publishers, Dordrecht, 1999, 48, 222.
[672] WTO, *EC-Measures concerning Meat and Meat Products (Hormones)*, WT/DS48/R/CAN (1997), paras 8.76, 8.90.

participation.[673] However, national product standards constitute technical barriers to trade where they favour the production specifications of local firms or are required for industry membership. Private bodies need not comply with intergovernmental agreements binding upon States. National entities responsible for standardisation are encouraged to accept the World Trade Organisation's (WTO's) Technical Barriers to Trade Code of Good Practice for the Preparation, Adoption and Application of Standards.[674] Standardising bodies shall use international standards where they exist or their completion is imminent unless they are ineffective or inappropriate.[675]

2.2.1 The International Organisation for Standardisation.

International standards presumed to be WTO-consistent include those emanating from the Codex Alimentarius Commission and the International Organisation for Standardisation (ISO). With respect to the former, the private sector enjoys a prominent role on account of its technical expertise and possession of information. Codex standards are the product of government-appointed experts consulting with industry associations, circulating drafts to States and industry for comment and recommending adoption by States as national law.[676] Corporate representatives participate in national delegations to Codex Committees and chair technical groups. Business associations such as

[673] Eg Arts 712, 718, 904-10, NAFTA *supra n*476.
[674] WTO, Table of Standardising Bodies having Notified Acceptance of the WTO Technical Barriers to Trade Code of Good Practice for the Preparation, Adoption and Application of Standards, Geneva, 2001.
[675] Paras E & F, WTO/ISO Code of Good Practice for the Preparation, Adoption and Application of Standards, Annex 3 to Agreement on Technical Barriers to Trade, GATT Secretariat, *supra* n342, Annex 1(A) Pt 6.
[676] Wassermann U., 'Codex Alimentarius' (1969) 3(6) *J World Trade L* 702.

the US Grocery Manufacturers Association, US Food Processor Association, their European counterparts and the International Council of Grocery Manufacturers Associations undertake lobbying activity.

The ISO was originally established to influence national law.[677] Contemporary objectives include removing trade barriers, assuring product quality to regulators and consumers and devising the technical basis for international regulation.[678] The ISO enjoys UN consultative status and co-operates with its Specialized Agencies and the WTO.[679] The ISO formulated product standards and management systems applicable to environmental protection at the 1992 Rio Earth Summit.[680] Since ISO standards are voluntary the ISO relies upon accuracy, acceptability and impartiality for its authority. Their formulation involves consensus building between industry, research institutes, States and intergovernmental organisations. The process is dominated by firms given the lack of resources of consumer groups and developing country governments.[681] The ISO considers that the institutions responsible for certification should be distinct from those responsible for developing the standard.[682] Conformity assessment is undertaken by other specialist private sector organisations such as inspection bodies, accreditation agencies, testing laboratories and end users.

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[677] Latimer J., Friendship Among Equals, ISO, Geneva, 1997, 25-6, 60.
[678] ISO, Raising Standards for the World: ISO's long-range strategies 1999-2001, Geneva, 1999. See eg Preamble & Annex 1, para 5, EC/Canada/Russian Federation, Agreement on Humane Trapping Standards 37 *ILM* 542 (1998).
[679] WTO, Ministerial Decision 5(a) on Proposed Understanding on WTO-ISO Standards Information System, GATT Secretariat, Uruguay Round Final Act, *supra* n342.
[680]ISO/IEC Strategic Advisory Group on the Environment, 'Standardisation of Environmental Management Systems-A model for discussion', Geneva, 1993.
[681] Consumers International, 'Consumer Protection in the Global Marketplace-from a Consumer Perspective', Kyoto, 2000.
[682] ISO/IEC, Technical Report 17010: General Requirements for Bodies providing accreditation of inspection bodies, Geneva, 1998, para 4.2.1.

The appeal of ISO standards is attributable to including the ultimate end users in the formulative process.[683] Standard-setting levels the playing field for production specifications, grants automatic rights of market access and harmonises differing national requirements. Moreover, product standards preserve managerial autonomy and are outcome-orientated: they do not mandate technological choices or specify production processes. Corporate standard-setting activity obviates law's authority where the implementation if not the formulation of standards are a market prerequisite or technically necessary. Indeed, constantly-evolving processes quickly render formal technologically-forcing regulation obsolete. Standard-setting lowers transactional costs, stimulates price competition, enables corporate interoperability and outsourcing, reduces risk through common production specifications, satisfies consumer expectations and provides a reputation for reliability. In short, business opportunities are created.

Furthermore, States become technologically dependent upon firms since it simpler to adopt as national law standards which have been vindicated in commercial practice. Critical technical decisions are made without governmental input and become prohibitively expensive to reverse. The EC, for example, collaborates with the Comite Europeen de la Normalisation, the Comite Europeen de la Normalisation Electrotechnique and the European Telecommunications Standards Institute. Indeed, the International Conference on Harmonisation, for whom the International Federation of Pharmaceutical Manufacturers Association is secretariat, rivalled the World Health

[683]Roht-Arriaza N., ''Soft Law' in a 'Hybrid' Organisation: The International Organisation for Standardisation' in Shelton D.(Ed), Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, Oxford University Press, New York, 2000, 263, 279.

Organisation as the principal forum for harmonising health standards.[684] European, Japanese and American regulatory authorities collaborate with pharmaceutical industry associations to refine medicinal product registration procedures.[685] Government authorities electronically exchange regulatory and product information with industry to reduce research and development expenditure and eliminate delay in getting novel medicines to the market.[686]

However, standard-setting is time and resource intensive. It also encounters those obstacles bedevilling lawmaking by States: incremental advances, obsolescence, organising relationships, acquiring technical information and engendering competitive lobbying.[687] National standards provide national corporations with advantages which other firms will seek to emulate or eliminate. Businesses espouse national legal models as appropriate for international adoption to realise globally their competitive advantage and increasing regulatory burdens for their rivals less familiar with them. National standard-setting bodies lobby for their standards to be internationally recognised for member benefit.[688] Product or production standards also have a strategic value where patents are included. Since precise rules are more likely

[684] Jordan D.W., 'International Regulatory Harmonization: A New Era in Prescription Drug Approval' (1992) 25 *Vanderbilt J Transnational L* 471.
[685] IFPMA, International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), The Value and Benefits of ICH to Industry, Geneva, 2000.
[686] US Food and Drug Administration, Electronic Standards for the Transfer of Regulatory Information, Rockville, 1994.
[687] Schwartz A. & Scott R.E., 'The Political Economy of Private Legislatures' (1995) 143(3) *Uni of Pennsylvania LR* 595, 609-10.
[688] Roht-Arriaza N., 'Shifting the Point of Regulation: The International Organisation for Standardisation and Global Lawmaking on Trade and the Environment' (1995) 22(3) *Ecology L Qtly* 479, 500.

to inefficiently allocate resources [689], securing consensus and ensuring sensitivity to national conditions or existing trading relationships will produce broadly formulated standards. Benefits are limited to well-established firms where implementation or certification costs are prohibitively high. Finally, consumer organisations and NGOs may press for greater transparency, access and participation. Non-commercial stakeholders having interests in technical standard-setting are yet to be offered the open participatory processes demanded by firms for regulatory design within intergovernmental fora. Claims by NGOs to participate in processes having distinctly public international impacts may turn upon the legal status of the resulting instruments.

2.2.2 The Position of Voluntary Corporate Initiatives under International Law.

The failure of States to regulate leaves space for other actors.[690] Firms may make unilateral commitments to achieve specific objectives to enhance their reputations. The proliferating voluntary corporate initiatives include codes of conduct, declarations, environmental reporting, social auditing, standard-setting and eco-labelling activity.[691] Drafting a code of conduct or declaration does not require formal lawmaking authority. However, States may establish

[689] Ehrlich I. & Posner R.A., 'An Economic Analysis of Legal Rulemaking' (1974) 3 *J Legal Stud* 257, 268.
[690] Kearney N., 'Corporate Codes of Conduct: the Privatised Application of Labour Standards' in Piccioto S. & Mayne R. (Eds), Regulating International Business: Beyond Liberalisation, Macmillan Press Ltd, London, 1999, 205, 208-9.
[691] Eg World Industry Conference on Environmental Management, Declaration, Official Report, Rotterdam, 1991; International Organisation for Standardisation (ISO), ISO 14000-Meet the Whole Family!, Geneva, 1998.

the enabling framework within which such initiatives arise.[692] Voluntary corporate initiatives are addressed to various parties who may be internal to the firm (shareholders, employees or managers) or external (consumers, NGO's, States, subcontractors and other firms such as insurance companies). Corporate compliance can forestall regulation when addressed to States. Although receptive to corporate codes, the UN Development Programme for example also seeks to improve their implementation.[693] States can legally embed the industry's own expectation of acceptable corporate behaviour. Voluntary initiatives can yield a competitive edge and act as a de facto barrier to market entry when addressed to rivals. Voluntary corporate initiatives evidence good corporate citizenship which distinguishes between products and extends market share. Such initiatives enrich staff morale and improve productivity. Although voluntary initiatives may increase corporate vulnerability to NGO criticism, codes can also deter litigation or decrease sanctions arising under formal regulation.

Corporate codes of conduct are also formulated by umbrella business organisations. For example, the ICC has drafted several environmental commitments which draw upon national regulation and promote self-regulation.[694] Competing values such as corporate freedom of expression

[692] EEC, Council Regulation No 1836/93 (1993) allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme (EMAS) (1993) ECOJ L168 Vol 36; EEC, Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM (96) 561 Final, Brussels, 1996.

[693] UNDP, Human Development Report: Human Development and Human Rights, Oxford University Press, New York, 2000, 125.

[694] ICC, Environmental Guidelines for World Industry, Publication No 435, Paris, 1974 ; ICC, Business Charter *supra n*257.

against a consumer's right to privacy are sought to be balanced.[695] The standards codify contemporary commercial practices to ensure their acceptability to firms and rely upon economic necessity for prospective adherence.[696] Codes of conduct are also formulated by industry trade associations.[697] For example, the American Chemistry Council (ACC) obligates member companies to participate in the Responsible Care program.[698] Responsible Care promotes efficiency, minimises prospective liability, reduces insurance costs and improves regulatory compliance by transposing national regulation into environmental management systems. Implementation is highest at the initial commitment stage and lowest during verification.[699] The codes are also a platform for corporate legal activity: to encourage national legal reform, incorporated into agreements with States, integrated into regulatory programs and advocated to deter litigation.[700] For example, the ACC's Community Awareness and Emergency Response Code, introduced shortly after the Bhopal incident, is reflected under US law (the Superfund Amendment and Reauthorisation Act) and UN standards (UNEP's Awareness and Preparedness for Emergencies at the Local Level programme). The ICC presented the first Responsible Care status report to States at the UN Intergovernmental Forum on Chemical Safety (IFCS) during 1997 and showcased it at the UN General Assembly's Special Session on Rio + 5.[701]

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[695] Eg ICC, International Code of Direct Selling, Paris, 1999.
[696] ICC, Incoterms, London, 1990; ICC, Uniform Customs and Practice for Documentary Credits, Paris, 1993.
[697] Eg World Federation of the Sporting Goods Industry (WFSGI), Code of Best Practice concerning Child Labour, Verbier, 1995.
[698] ACC, Responsible Care Progress Report 2000, Virginia, 2000, 5, 28.
[699] CEFIC, Improved Global Health Safety and Environment through Chemical Industry's Responsible Care, Brussels/Washington, 1999.
[700] ICCA, Responsible Care Status Report 2000, Geneva, 2000, 7-9, 13-4.
[701] Chemical Manufacturers Association (CMA), Responsible Care Progress Report 1997: Meeting Expectations and Achieving Goals, Virginia, 1997, 15.

The second report (timed for release at an ILO Conference) and the third (for the third IFCS meeting in 2000) described how Responsible Care formed the basis for memorandums of understanding with intergovernmental organisations.[702]

It would be easier to draw conclusions about the status of voluntary corporate initiatives under international law if it were possible to generalise about the state of contemporary commercial practices purported to be reflected by them. The instruments formulated by prominent corporations are limited to the best practice of those firms.[703] The terminology of corporate commitments is variable and industry, firm and site-specific factors create further diversity. However, corporate consensus has reputedly crystallised around consumer protection, bribery and environmental protection.[704] Furthermore, the majority of corporate codes address employees, refer to labour standards, are monitored by independent auditors and terminating business relationships is the measure of last resort.[705] Virtually all codes contain a commitment to observe national law in all jurisdictions where the subscribing entity operates. International standards are cited in only eighteen per cent of corporate codes.[706]

Corporate voluntary initiatives cannot be pigeonholed within orthodox legal categories. Their legal character is comparable to lex mercatoria insofar as

[702] CEFIC, Responsible Care Status Report 2000, Brussels, 2001.
[703] Compa L. & Hinchliffe-Darricarrere T., 'Enforcing International Labour Rights through Corporate Codes of Conduct' (1995) 33 *Columbia J Trans'l L* 663, 675-85.
[704] OECD, Deciphering Codes of Corporate Conduct: A Review of their Contents, Working Paper No 99/2, Paris, 2000, 7, 13, 16, 28-9.
[705] OECD, Codes of Corporate Conduct: An Inventory, Paris, OECD Doc TD/TC/WP(98)74/FINAL (1999).
[706] *Ibid*, 16, 20.

they reflect best commercial practice.[707] Companies welcome baselines which measure and manage corporate performance. The unilateral manifestation of corporate intent could be analogised to *opinio juris* giving rise to an expectation upon which others can rely. However, corporate monitoring is typically self-conducted through voluntary disclosure which protects confidential information. External assurance can be provided by independent verifiers such as NGO's, trade unions, States and professional auditing firms. Ongoing oversight sustains corporate momentum towards adherence and continuous improvement irrespective of the formal legal status of the instrument. One business group responded that calls for legally binding and enforceable rules in the context of the Global Compact (considered in Chapter One) put 'the clock back to a bygone era'.[708] Voluntary corporate initiatives do not command recognition beyond the individual firm or industry. However, trade associations may enforce codes against non-members by referring the matter to national regulatory authorities.[709] Other techniques include refusing business relationships, selective contracting and informal pressure. The critical question is not the legal status of the instrument but whether it effectively influences the decision-maker to apply the proscribed standard. [710] Effectiveness requires user-friendly stand-alone instruments which are concise, clear and pragmatic, institutionalising review processes within corporate structures and demonstrating operational compliance. Deviation therefrom

[707] Horn N., 'Codes of Conduct for MNE's and Transnational Lex Mercatoria: An International Process of Learning and Law Making' in Horn N. (Ed), Legal Problems, *supra* nXXX, 45, 81.
[708] ICC Secretary-General Maria Cattaui, 'Code of Conduct will Turn Clock Back', Financial Times, 21 July 1999.
[709] Eg IFPMA, Complaints Procedure to the Code of Pharmaceutical Marketing Practices, Geneva, 1981 & 1994.
[710] UNCTC, The United Nations Code of Conduct on Transnational Corporations, New York, UN Doc ST/CTC/Ser.A/4 (1986), 27.

will damage corporate reputations in a competitive market environment. Codes can also be rendered de facto enforceable through labelling.[711]

Corporations reject the 'one size fits all' approach of universally-applicable codes and defer to speciality, site-specific conditions and individual organisational capacity. Universal rules, as noted above, are desirable only in technical fields. Effective guidelines accommodate unique project needs, particular management styles and distinct business personalities.[712] Firms or industry sectors seek to define their own responsibilities.[713] Codes delineate the self-perceived corporate role and State responsibilities.[714] As a public relations tool codes can deflect responsibility to other institutions or actors. Firms pursue a singular mandate to observe national law: it is not their responsibility to pre-empt governmental discretion concerning implementation and comply with international law if the host State elects not to. However, the reality is that unilaterally appropriating international standards for commercial practice obviates national lawmaking. Since their commitment and manner of implementation emanate from their own free will[715], corporations are, like States, the creators, addressees and subjects of voluntarily assumed obligations. Corporate voluntary initiatives also encourage trends away from command and control regulatory approaches.

[711] USCIB, 'Statement on Codes of Conduct: Old Solutions to New Problems', New York, 1997; USCIB, 'USCIB Position Paper on Codes of Conduct', New York, 1998, 3-4.
[712] OECD, 'Multinational Enterprises and Environmental Protection: Implications for the OECD Guidelines on Multinational Enterprises', Working Paper Vol 7 No 46, Paris, 1999, paras 9-11, 13-4.
[713] ICC, 'Responsible Business Conduct: An ICC Approach', 2000, 3.
[714] CRT, Principles for Business, 1995.
[715] *The Lotus Case supra n11.*

The free choice of means principle in this context entails the most efficient production process in light of commercial conditions. Voluntary corporate initiatives are auto-interpreting and self-validating means for assessing corporate performance. However, poorly-performing firms do not possess self-regulatory capacity. Moreover, the authority of the standard from which the code draws its substantive content may be weakened. Finally, selectively invoking international standards, self-identified prioritisation, variable definitions and inconsistent application carries the potential for fragmented applications. Embracing the normative legitimacy of international standards is an accessible route to universal respectability without the burden of institutional oversight. For example, the ILO is concerned by self-definition in preference to national or international standards, the piecemeal implementation of fundamental labour rights, the lack of employee participation and the difficulty of drawing accurate comparisons.[716] Corporate codes were useful where States had not ratified the relevant Convention.[717] The International Organisation of Employers (IOE) considers that codes complement national regulation where they are competition neutral and the functions of formulation and verification are left to companies. Invoking the theory of third parties, ILO Conventions are not appropriate for inclusion within corporate codes since they are addressed to States and drafted as legislative guidance where they attain final binding form.[718] For similar reasons corporations do not consider themselves bound to the ILO Fundamental Rights at Work Declaration notwithstanding that employers groups are part of the ILO's tripartite

[716] ILO, Overview of Global Developments and Office Activities concerning Codes of Conduct, Social Labeling and other Private Sector Initiatives addressing Labour Issues, ILO Doc GB.273/WP/SDL/1 (1998), paras 49, 50 59, 112.
[717] *Ibid*, paras 120, 122, 124.
[718] IOE, Codes of Conduct, Geneva, 1999, 12.

structure.[719] ILO Conventions and Recommendations referred to by the Tripartite Declaration retain a separate application for States party to them.[720] The IOE instead undertook to research the viability of corporate codes in conjunction with the ILO.[721]

Although considering non-binding instruments to be ineffective, several NGOs are willing to enforce corporate voluntary initiatives. NGOs evaluate commercial practices against a firm's own stated benchmarks.[722] NGOs, trade unions and consumer groups also formulate their own codes to define standards of expected corporate behaviour.[723] International labour standards are emphasised by trade unions and consumer organisations promote respect for competition law and advertising regulation.[724] Such codes compete for recognition and adoption by firms. For example, the Forest Stewardship Council and the American Forest and Paper Association's Sustainable Forestry Initiative both offer templates on timber management and harvesting practices.

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[719] USCIB, Position Paper 1998 *supra n*711, 3.
[720] ILO, References to Conventions and Recommendations in the Tripartite Declaration (1988) *Official Bulletin* Vol 71 Ser A No 1, 50.
[721] IOE, Resolution on Codes of Conduct, Geneva, 1999.
[722] The Inter-Faith Centre on Corporate Responsibility/Ecumenical Council for Corporate Responsibility/Taskforce on the Churches and Corporate Responsibility, Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance, Ontario, 1995 & 1998.
[723] Eg Coalition for Justice in the Maquiladoras, The Maquiladora Standards of Conduct, San Antonio, 1991.
[724] International Confederation of Free Trade Unions (ICFTU), The ICFTU/ITS Basic Code of Labor Practice, Brussels, 1997; Consumers International, A Consumer Charter for Global Business, London, 1997.

2.2.3 Corporate Voluntary Initiatives as Platforms for Influencing Regulation.

NGOs and firms share the intention of influencing government policy and industry opinion. This need not be for the same purposes or in the same direction. For example, the Energy and Biodiversity Initiative (EBI) involved collaboration between five environmental NGOs and four energy firms with a view to formulating biodiversity conservation standards for oil and gas operations (see further Annex 9). ChrevronTexaco, 'made a judgment that it would be better to participate in order to help shape the discussion and products that we expect would set standards for industry behaviour and performance'. [725] Although operational guidelines for environmental management have hitherto been developed unilaterally by energy companies or NGOs, collaborative action 'puts the stamp of approval by five highly recognised, international NGOs on the products' and provides 'another layer of legitimacy'. ChevronTexaco moreover considered that valuable perspectives could be solicited from individuals 'who could effectively represent government views and practices'. Indeed, Shell would have conducted more consultative workshops with 'selected government departments'.[726]

The EBI products will be employed as part of permit negotiations with States.[727] They are also a platform for intergovernmental negotiations since they constitute guidelines on what should be expected from companies' operations and what policy standards should be with respect to environmental

[725] Written response to questionnaire by Ms Kit Armstrong & Mr Patrick O'Brien, ChevronTexaco, 8th August 2003.
[726] Written response to questionnaire by Mr Sachin Kapila, Shell, 18th August 2003.
[727] Tully S., 'Corporate-NGO Partnerships, Biodiversity Conservation and Protected Areas: Lessons from the Energy and Biodiversity Initiative' (2004) 1 NZYIL 59.

protection. However, one needs to be 'cautious drawing conclusions about the overall EBI effort from an industry perspective'. [728] ChevronTexaco anticipates that the EBI guidelines will 'produce incremental improvements in how we focus on biodiversity in some specific relevant areas above our already good practice.' It added that:

> 'Anything that gets done by individual companies in the field will be voluntary with each company having different needs and priorities as well as organisational structures and philosophies (central control/decentralised authority and decision-making). The word 'enforce' implies a legal compliance obligation, which doesn't exist.'

Shell observed that 'each organisation is very well-known in its own field and is in itself accountable either to its members or shareholders'. Furthermore, 'from the industry's standpoint, to have agreed working documents that might influence the industry with the aid of conservation organisations was a very powerful mechanism.'

The EBI illustrates that corporations can consult with States when formulating industry codes. Such initiatives in turn form the basis for influencing regulatory development and market conditions. On the other hand, their practical impact upon market leaders may be negligible insofar as they already implement best commercial practice and voluntariness poses obstacles to

[728] Correspondence with Kit Armstrong, ChevronTexaco, 20 December 2003.

accountability. The expense and effort is justified provided subsequent regulation follows the path set down by commercial practice.

Codes are a 'springboard for legally creative action' in other ways.[729] The commercial response to the ILO Tripartite Declaration – novel corporate guidelines, labour regulation lobbying and collaborating with governments for legislative amendments - prompted the ILO to affirm State responsibility for lawmaking.[730] Similarly, the UN Code on Transnational Corporations was a model for over two hundred company-specific instruments.[731] Corporate voluntary initiatives are a platform enabling participation in other processes. Indeed, codes explicitly declare a corporate intent to influence national regulation and collaborate with States in the lawmaking process.[732] Codes 'lead the way' in regulatory development since what is attainable voluntarily can subsequently become mandatory. Such instruments are a significant evolutionary step in lawmaking or a gap-filler within regulatory vacuums which capture the field with a first-draft advantage. Adoption by States as law increases regulatory compliance burdens for rivals, requires little adaptation effort and shifts enforcement responsibility onto government.

However, it is equally plausible that codes preserve the legal status quo and commercial practices are unaffected. Corporate voluntary initiatives 'chill'

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[729] UNCTC, Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature, UN Doc E/C.10/AC.2/9 (1978), 8.
[730] ILO, Subcommittee on Multinational Enterprises, Report of the Working Group entrusted with analysing the reports submitted by governments and by employers' and workers' organisations, Doc GB.268/MNE/1/2, Geneva, 1997, para 207.
[731] UNCTC, 'Corporate Guidelines' (1978) 1(5) *CTC Reporter* 16.
[732] American Petroleum Institute, Environmental Health and Safety Guiding Principles, Washington DC, 1999.

regulatory development where firms can resist demands for binding regulation. [733] Weak terminology and vaguely-formulated aspirational principles do not meaningfully inform corporations of how to respond to specific circumstances. Their frequent internal contradiction - mandating national legal compliance and respecting international standards – does not suggest which enjoys supremacy. [734] Employers are expected to develop parallel means of implementation where national labour rights are restricted.[735] Finally, codes shield corporations from divestment pressure and provide operational legitimacy.

Corporate voluntary initiatives paradoxically affirm lawmaking by States. Codes and standards require an appropriate institutional setting: a homogenous industry of few players or an industry association possessing enforcement powers.[736] Codes are at best a partial solution to policy questions.[737] By themselves they do not eliminate unconscionable labour practices.[738] Codes require legislative support to be truly effective.[739] Legally enforceable rules ensure a minimum regulatory floor universally applicable to all market actors.

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[733] Mayne R., 'Regulating TNC's: The Role of Voluntary and Governmental Approaches' in Piccioto, Regulating International Business, *supra n*690, 235, 246-7.
[734] Japanese Federation of Economic Organisations (Keidanren), Charter for Good Corporate Behaviour, Tokyo, 1991 & 1996.
[735] WFSGI, Committee on Ethics and Fair Trade, Model Code of Conduct, Verbier, 1997.
[736] ECOTECH/World Business Council for Sustainable Development/USCIB/Keidanren/WWF/UNEP, Business Voluntary Initiatives to Address Climate Change, Final Report, Brussels, 1999, 15, 57.
[737] US Department of Labour, The Apparel Industry and Codes of Conduct: A Solution to the International Child Labour Problem?, Washington DC, 1996, Chapter 4.
[738] Krug N.J., 'Exploiting Child Labour: Corporate Responsibility and the Role of Corporate Codes of Conduct' (1998) 14 *NYL Sch J Hum Rts* 651, 675.
[739] Eg *Slepak Principles Act* HR 2366 101st Cong 1st Sess (1989); *Miller Principles Act* HR 3489 102nd Cong s401-05 (1991); US House of Representatives, *A Bill to require nationals of the United States that employ more than twenty persons in a foreign country to implement a Corporate Code of Conduct with respect to employment of those persons and for other purposes*, Washington DC, 6 April 2000; European Parliament, Resolution A4-0508/98 (1998) on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct.

Voluntary corporate initiatives complement regulation: outcomes have a sense of ownership, are participatory in design and delivery, build partnerships and generate renewed commitments.[740] States bear the responsibility to construct appropriate enabling regulatory frameworks if multi-stakeholder participation is sought to be achieved.[741] Codes of conduct may be juxtaposed with formal regulatory tools.[742] However, the corporate willingness to adopt voluntary codes of conduct on account of their non-binding character can deter resort to command and control by States. Business may persuade governments that legislation is uncertain, unnecessary or unworkable.[743] Corporate concerns include the extraterritorial application of national law and adverse impacts upon commercial activity.[744] Nonetheless, self-regulatory corporate codes of conduct, corporate participation within intergovernmental codes, national law and interactions between these tools are options for States in fulfilling their regulatory responsibility.

Conclusions

The development of custom is complicated by dynamic processes involving cross-cutting economic pressures, sporadic interactions between multiple actors and sui generic factual conditions. The extent of corporate participation

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[740] Commission on Sustainable Development (CSD), Voluntary Initiatives and Agreements, Secretary-General Report, UN Doc E/CN.17/1999/12 (1999), paras 18-9; CSD, Draft Resolution on Voluntary Initiatives and Agreements, para 1.

[741] CSD, Multi-stakeholder Consultative Meeting on Voluntary Initiatives and Agreements, Toronto, 1999, Chairman's Summary, para 12.

[742] Eg Convention on a Code of Conduct for Liner Conferences 13 *ILM* 912 (1974); *Broadcasting Services Amendment (Online Services) Act* 1999 (Aus).

[743] Australian Parliament, Report on the Corporate Code of Conduct Bill 2000, Canberra, 2001, para 4.53.

[744] Australian Chamber of Commerce and Industry, Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities Inquiry into the provisions of the Corporate Code of Conduct Bill, Canberra, 2001, 6.

within this amorphous norm generation and implementation process is difficult to identify. Corporations prompt reactions by States, engender competitive regulatory behaviour and act as conduits for national standards. Investment offers induce lower national standards at the point of entry into a State and deter voluntary corporate divestment at the point of exit. 'Widespread and consistent' State practice is consequently more or less difficult to discern. Rather than perpetuating a State-centric appreciation of custom where commercial influences are hidden, unaccounted for but legally irrelevant, it is preferable to acknowledge that corporate influence and determine what weight to properly attach to it.

The multiple influences exerted by non-State actors upon State practice are reflected by the expanding sources of international law. Novel processes which contemplate formal participation by non-State actors produce outcomes that cannot be addressed in conventional legal terms, nor readily dismissed as non-law. Intergovernmental codes initiate the communicative processes inherent in law design between interested actors where formal status is irrelevant. Mutually-agreed solutions are identified and subsequently adopted by States. Denying the legal effects of codes of conduct for firms but recognising intergovernmental codes as a potential source of law for States suggests a doctrinal double-standard. Furthermore, corporate voluntary initiatives and technical standard-setting are the functional equivalent of and potentially substitutable for law. Their lack of legal authority is immaterial if behavioural changes are otherwise effected and enforcement procedures are unnecessary for prospective adherence. However, voluntary corporate

initiatives complement the regulatory role of States. Prominent market actors may lead regulatory development but regulatory floors are required to meet minimum social objectives and provide a uniform basis of competition within industry.

Chapter Three

Treaty Formation and Implementation

Classical international law posits that only States possess the legal capacity to conclude treaties and that only heads of government, diplomats and other accredited representatives can express the consent of that State to be bound.[745] However, the negotiation and implementation of treaties is an elongated and dynamic process involving multiple entities interacting within various fora. Indeed, the techniques commonly employed by non-State actors blur the boundaries between creating, applying and enforcing international law.[746] The distinctive contribution of corporations to treaty negotiations is observable in the context of several multilateral legal regimes described in Part One. In particular, the evolving regimes with respect to ozone layer depletion and climate change usefully illustrate the full range of modalities for corporate participation as well as their respective merits. These topics constitute the case study considered in Part Two. Part Three examines intergovernmental efforts to enrich deliberations by soliciting contributions from non-State actors including corporations such as proposals which define the participatory conditions for their inclusion. The possibility that the accreditation criteria and procedural rules applicable to Conferences of the Parties support an emergent right of participation for non-State actors generally is discussed in Part Four. This question is significant since these matters determine access to conference venues, define the formal entitlement of non-State actors to submit written

[745] Arts 6, 7, Vienna Convention on Treaties *supra* nXXX.
[746] Sands P., 'The Role of NGOs in Enforcing International Environmental Law' in Butler W.E. (Ed), Control over Compliance with International Law, Martinus Nijhoff Publishers, Dordrecht, 1991, 61, 65.

statements or make oral interventions and provide platforms upon which additional informal activities can be undertaken. Part Five evaluates commercial influences upon the substantive outcome of treaty negotiations and Part Six the corporate role during subsequent implementation. It is evident that commercial objectives are espoused through States, in conjunction with intergovernmental organisations and independently. More challenging are the difficulties for business engagement where fluid informal practices are likely to exceed procedural rules and inter-firm differences preclude the identification of a common industry perspective.

1. Illustrations of Corporate Participation in Treaty Negotiations.

This Part selects several treaty topics, illustrates commercial contributions to negotiations, foreshadows the techniques employed and identifies several generalisable lessons. The treaties concern the exploitation of natural resources (the law of the sea, biological diversity), chemical weapons, international trade, investment protection and finally regulatory attempts to address adverse corporate behaviour (bribing government officials, anti-competitive behaviour and tobacco advertising).

It is important to first note that corporations seek to influence the State's position prior to negotiations. The degree to which corporations are institutionally embedded within governmental decision-making varies between States. National legal processes range from ad hoc communication channels between the public and private sectors to corporate participation within

advisory standing committees. [747] Corporations can exert a 'pervasive influence' on national political processes.[748] Their lobbying efforts include a range of activities such as study groups, disseminating reports and economic analysis, conducting surveys and interviews, contributing to parliamentary inquiries, organising speeches and seminars and recruiting public relations firms, consultants or law firms. States solicit and corporations submit business perspectives on proposed regimes. Corporations possess technical information relevant to the economic and resource implications of contemplated legal obligations. Industry submissions reduce the information-gathering burden for States, informing them of what they can commit to and deliver, and business objectives and points of concession contribute to national negotiating positions. Several examples will serve to illustrate the impact of commercial influences on the international plane.

1.1. The Law of the Sea.

Corporations have long contributed to the law of the sea including developing the notion of freedom on the high seas.[749] The UK's attempts to prevent smuggling during the eighteenth century led to the definition of contiguous zones beyond the territorial sea.[750] Accounts have been provided elsewhere of how Western mining consortia influenced their home States to secure

[747] *US President's Advisory Committee for Trade Policy and Negotiations* 19 *USC* 2155 (1976).
[748] UNCTC, TNCs in World Development: A Re-evaluation, New York, 1978, 131.
[749] Hugo Grotius's Mare Liberum (1633) was a legal opinion for the Dutch East India Company.
[750] *Hovering Acts* 1736-1876 (UK).

preparatory investment protection[751] during initial negotiations of the UN Convention on the Law of the Sea concerning prospective commercial exploitation of the deep seabed.[752] Contractors and companies may submit disputes to the International Tribunal for the Law of the Sea.[753] A seabed mining code also provides for the protection of commercially sensitive information and limited security of tenure.[754] Other treaties touching upon maritime activity such as species conservation similarly seek to maximise optimum sustainable yield but maintain orderly industrial development.[755]

The *Torrey Canyon* and *Exxon Valdez* disasters drew attention to the environmental and economic costs associated with maritime oil pollution. Oil companies and the shipping industry initially sought to forestall regulation by adopting voluntary contractual principles, additional compensation mechanisms and codes of conduct.[756] These voluntary initiatives facilitated the transition to a conventional agreement.[757] States delineated financial burdens such that where shipowners are insolvent the compensation will

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[751] Deepsea Ventures Inc, Notice of Discovery and Claim of Exclusive Mining Rights and Request for Diplomatic Protection and Protection of Investment 14 *ILM* 51 (1975) & Reply of the UK Government 14 *ILM* 796 (1975).

[752] Dubow M., 'UNCLOS: Questions of Equity for American Business' (1982) 4 *Northwestern J Int'l L & Bus* 172, 186; Brown E.D., 'UNCLOS 1982: The British Government's Dilemma' (1984) 37 *Current Leg Prob* 259, 281-3.

[753] Arts 186-7, 288(2), UN Convention on the Law of the Sea, UN Doc A/CONF.62/122 (1982).

[754] UN, 'Seabed Council Receives Mining Code Draft', Press Release SEA/1578, 1998.

[755] Eg Art 6, UN Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 34 *ILM* 1542 (1995).

[756] Eg The Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution 8 *ILM* 497 (1969).

[757] The International Chamber of Shipping, the Oil Companies International Marine Forum, the Oil Industry International Exploration and Production Forum and the International Association of Independent Tanker Owners participated during the negotiations of the International Convention on Oil Pollution Preparedness, Response and Co-operation 30 *ILM* 733 (1991).

emanate from oil companies.[758] Shipowners had unsuccessfully challenged a comparable scheme before national courts.[759] More recent instruments have established the joint, several and limited liability of shipowners.[760] Reducing oil discharges is attributed to a regulatory structure which exploited the different preferences and capacities of tanker operators.[761]

1.2. The Convention on Biological Diversity.

The Convention on Biological Diversity (CBD) seeks to fairly and equitably share the benefits of genetic resources and ensure technology transfer upon agreed terms.[762] The biotechnology industry favoured regulation to ensure continued access to medicinal, agricultural and pharmaceutical materials.[763] During negotiations the ICC was concerned by the excessive costs of acquiring genetic resources and the risk that intellectual property protection may be undermined.[764] The ICC utilised orthodox principles of treaty interpretation to assert that the CBD and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) were compatible but in the event of conflict the latter prevailed.[765] The US Council for International Business

[758] Preamble, Brussels International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 11 *ILM* 284 (1972).
[759] *International Association of Independent Tanker Owners v Locke* 148 *F.3d* 1053 (1990).
[760] Arts 5, 7(1), 8, Brussels International Convention on Civil Liability for Oil Pollution Damage 9 *ILM* 45 (1970); Art 4, 1992 London Amending Protocol IMO Doc LEG/CONF.9/15 (1992).
[761] Mitchell R.B., 'Heterogeneities at Two Levels: States, Non-State Actors and Intentional Oil Pollution' (1994) 6(4) *J Theoretical Politics* 625.
[762] Arts 1, 19(2), Convention on Biological Diversity (CBD) 31 *ILM* 818 (1992).
[763] WBCSD/World Conservation Union (IUCN), Business and Biodiversity: A Guide for the Private Sector, Geneva, 1997.
[764] ICC, Comments on the UN Convention on the Protection of Biodiversity, Paris, 1992.
[765] ICC, 'TRIPS and the Biodiversity Convention: What Conflict?', Paris, 1999; International Council of Chemical Associations (ICCA), Position on TRIPs and the Environment, Virginia, 1999, 3.

sought the adoption of the least trade restrictive measures.[766] The chemical industry supported protecting indigenous knowledge and to avoid weakening TRIPs advocated for the creation of a sui generis right under WIPO auspices prior to transferral to the WTO.[767] Business groups acknowledged that the environmental credibility of the CBD had to be enhanced if trade regime integrity was to be maintained.[768] Such perspectives were espoused by the US government.[769] Other States acknowledged the slim prospects of yielding commercial benefits and the lengthy investment cycles required to develop pharmaceutical products.[770] Voluntary corporate codes and novel contractual arrangements had emerged between pharmaceutical companies and NGOs in defining 'fair and equitable' access to genetic resources.[771] However, legislation was necessary to support material transfer agreements, facilitate environmental impact assessments and enable the acquisition of any necessary consent.[772] The private sector participated in preparing guidelines which elucidated respective roles and responsibilities in the interim.[773]

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[766] USCIB, Business Statement on the Biosafety Protocol, New York, 1992, 2.
[767] CEFIC, The Chemical Industry Comments on the Legal Protection of Traditional Knowledge and Access to Genetic Resources-Patenting, Brussels, 2000.
[768] US BRT, Blueprint 2001: Drafting Environmental Policy for the Future, Washington DC, 2001, 10-13.
[769] US, Declaration made at the UNEP Conference for the Adoption of the Agreed Text of the CBD 31 *ILM* 848 (1992).
[770] CBD, Fair and Equitable Sharing of Benefits arising from the Use of Genetic Resources, UN Doc UNEP/CBD/COP/3/Inf.53 (1996), 5, 13.
[771] Goldman K.A., 'Compensation for Use of Biological Resources under the CBD: Compatibility of Conservation Measures and Competitiveness of the Biotechnology Industry' (1994) 25(2) *Law & Policy in Int'l Bus* 695, 720.
[772] World Resources Institute (WRI), Biological Diversity, Washington DC, 1997, 4.
[773] Tully S., 'The Bonn Guidelines on Access to Genetic Resources and Benefit-Sharing' (2003) 12(1) *RECIEL* 84.

1.3. Chemical Weapons.

The concerns of the chemical industry during negotiations for the Chemical Weapons Convention included intellectual property rights, intrusive inspections, monitoring costs and onerous reporting obligations.[774] The chemical industry pointed to the complex nature of multi-purpose operational facilities and to deter strict command and control regulations offered to open all production sites for inspections.[775] Chemical manufacturing associations provided technical advice to devise an independent verification system which balanced the commercial interest in avoiding operational disruptions with the State interest in securing effective compliance.[776] It also offered to assist eliminating the illegitimate chemical trade and to harmonise national customs procedures.[777] States incorporated these concerns within their deliberations and agreed to adopt measures prohibiting legal persons from undertaking chemical weapons-related activity.[778] Corporations complemented these commitments by adopting 'soft' legal instruments which were compatible with the further implementation of the Convention.[779]

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[774] Zeftel L., Weinberg P. & Schroy J., 'Approaches to the Use of Instruments in Monitoring the Production of Chemical Weapons and Precursor Chemicals' in Lundin S.J. (Ed), Non-Production by Industry of Chemical-Warfare Agents: Technical Verification under a Chemical Weapons Convention, Oxford University Press, New York, 1988, 136.
[775] CEFIC/Chemical Manufacturers Association (CMA), Position on Chemical Weapons Issues Affecting the Chemical Industry, Brussels, 1991.
[776] Trapp R., Verification under the Chemical Weapons Convention: On-Site Inspection in Chemical Industry Facilities, Oxford University Press, New York, 1993, 90.
[777] ICCA, Memorandum of Understanding between the International Council of Chemical Associations (ICCA) and the World Customs Organisation, 1994.
[778] Art 7, UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 32 *ILM* 800 (1993).
[779] UNEP, Code of Ethics on the International Trade in Chemicals, Nairobi, 1994.

1.4. International Trade Agreements.

Firms from industrialised States enjoying the advantages of pre-establishment (prior experience, expertise and financial strength) are better positioned than small and medium-sized enterprises, particularly those in developing States, to exploit trade liberalisation.[780] Business groups customarily issue position statements before each round of trade negotiations, assess the outcome and inform members.[781] The US Council for International Business promotes the extent of its influence over trade negotiations as a means of attracting members.[782] It perceives little merit in forging a consensus with trade unions or NGOs and argues that constituencies should be consulted separately.[783] During the Uruguay Round business NGOs and corporations worked through governments to influence negotiations but other NGOs did not enjoy equivalent access.[784] Indeed, the objectives of the American chemical industry were more often achieved than their Canadian counterparts during the Tokyo Round: the former enjoyed legislatively-entrenched processes for directly engaging with government officials whereas the latter was excluded from

[780] Woolfson P., 'The WTO Financial Services Agreement and Its Impact on Insurers–A European Perspective' (1998) 6 *Int'l Insur LR* 189, 193.
[781] Eg CRT, Trade Policy Position Statement, Caux, 1993 & 1994; ICC, The GATT Negotiations: A Business Guide to the Results of the Uruguay Round, ICC Pub No 533, Paris, 1994.
[782] USCIB, USCIB Applauds WTO Decision on the Basic Telecommunications Agreement, New York, 1998.
[783] USCIB, Civil Society and Trade Negotiations: A Business Perspective, New York, 1998.
[784] Sell S.K., 'Multinational Corporations as Agents of Change: The Globalisation of Intellectual Property Rights' in Cutler A.C. et al (Eds), Private Authority and International Affairs, SUNY Press, New York 1999, 169.

national delegations and trade associations lacked an effective and co-ordinated advisory capacity.[785]

The North American Free Trade Agreement (NAFTA) resulted inter alia from collaborative effort by the Canadian Business Council on National Issues, the US BRT and the Mexican Council of Businessmen.[786] Redrafting the rules of origin provide an opportunity to remedy legal uncertainty.[787] Mexican firms channelled commercial opinion through a single business entity, established cross-border alliances, conducted sectoral studies through working groups to identify market access objectives and assisted the national delegation with simultaneous feedback during negotiations.[788] US business coalitions filed an amicus brief supporting the US government's view that NGO's lacked the right to compel environmental impact assessments prior to NAFTA ratification.[789]

Industry has been particularly active in bringing matters within the remit of the World Trade Organisation during treaty negotiation rounds. For example, US pharmaceutical and entertainment firms sought to extend the US legal model of restrictive patent law to other States. The Intellectual Property Committee

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[785] Denis J.-E. & Poirier R., 'The North American Chemical Industry in the Tokyo Round: Participation of Canadian and American Firms in the GATT Negotiation Process' (1985) 19(4) *J World Trade L* 315, 319, 328-9, 342.
[786] Jacek H.J., 'The Role of Organised Business in the Formation and Implementation of Regional Trade Agreements in North America' in Greenwood J. & Jacek H. (Eds), Organised Business and the New Global Order, MacMillan Press Ltd, Hampshire, 2000, 39, 39-40.
[787] Cantin F.P. & Lowenfeld A.F., 'Rules of Origin, The Canada-US FTA and the Honda Case' (1993) 87(3) *AJIL* 375, 385-7.
[788] Lara de Sterlini M., 'The Participation of the Private Sector in International Trade Negotiations: The Mexican Experience with NAFTA', (http://www.intracen.org/worldtradenet/docs/information/referencemat/roomnextdoor.pdf) (accessed 25 September 2004).
[789] *Public Citizen v US Trade Representative* 5 *F.3d* 549 (1993).

proposed a draft text and argued that intellectual property protection was a commercial right, pointed to revenue lost to illegitimate producers and suggested that patent protection contributed to economic development.[790] It claimed credit for contributing to the negotiating position of the US and the interests of the semiconductor industry were specifically recognised within Article 31 of the resulting TRIPs Agreement.[791] Similarly, financial services are subject to diverse regulatory requirements and transnational firms are at a competitive disadvantage if they are not transparently applied.[792] The US Coalition of Service Industries played an instrumental role in shaping the General Agreement on Trade in Services. The US Business Roundtable has proposed a Transparency of Government Policies Agreement for the WTO which contemplates the publication of rules, notification of intended regulatory changes and the adoption of procedures which enable private sector input into rulemaking.[793]

1.5. Investment Protection Agreements.

Business has sought to protect private property from host State interference through investment protection agreements since the 1930's. ICC proposals to minimise sovereign risk including codes of conduct pre-date intergovernmental

[790] IPC/Keidanren/UNICE, Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and US Business Communities, Brussels, 1988.
[791] Weissman R., 'A Long, Strange TRIPs: The Pharmaceutical Industry Drive to Harmonise Global Intellectual Property Rules and the Remaining WTO Legal Alternatives Available to Third World Countries' (1996) 17(4) *U Pa J Int'l Econ L* 1069, 1084.
[792] UNCTC, TNCs, Services and the Uruguay Round, UN Doc ST/CTC/103 (1990), 111.
[793] US BRT, Preparing for New WTO Trade Negotiations to Boost the Economy, Washington DC, 1999, 9, 15.

efforts.[794] Bilateral investment treaties (BITs) confer upon firms incorporated within one State Party treatment no less favourable than that accorded to national firms within another. BITs are modelled upon the Abs-Shawcross Draft Convention first proposed by the Association for the Promotion and Protection of Foreign Investment, an entity composed of lawyers and businesspersons, and introduced to the OECD through the ICC.[795]

Negotiations to conclude a universal investor protection agreement most recently include the OECD's Multilateral Agreement on Investment (MAI).[796] Controversies arose in relation to the strict disciplines imposed upon the regulatory competence of States including 'measures having the equivalent effect' of expropriation. Indigenous groups and NGOs had asserted before national courts that licenses were merely privileges subject to modification and revocation in the ordinary exercise of regulatory authority and not property rights.[797] Although negotiators proposed a 'right to regulate' clause States would have to justify decisions as complying with 'normal governmental activity'. Notwithstanding business resistance a 'non-lowering of standards' clause was proposed to protect labour and environmental concerns.[798] The Australian Chamber of Commerce and Industry, the Business Council of Australia and the Australian Industries Group for example became dissatisfied with the secretive nature of intergovernmental negotiations and selective

[794] ICC, International Code of Fair Treatment for Foreign Investments, ICC Pub No 129, Paris, 1949; ICC, Guidelines for International Investment, ICC Pub No 272, Paris, 1972.
[795] UNCTC/ICC, Bilateral Investment Treaties 1959-1991, UN Doc ST/CTC/136 (1992), 2; ICC, Bilateral Treaties for International Private Investment, Paris, 1976.
[796] OECD, Draft Multilateral Agreement on Investment, OECD Doc DAFFE/MAI/NM(98)2 (1998) & REV1 (1998).
[797] *Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR)* 33 *ILM* 173 (1994).
[798] BIAC/ICC, Letter to the Editor, *The Financial Times*, 15 January 1998.

consultation processes.[799] NGO criticism and numerous derogations by States ultimately contributed to the temporary deferral of an international investment agreement. Corporations can be expected to continue to address the circumstance that the rights they acquire under bilateral investment agreements are sui generis and do not evidence customary norms for commercial benefit.[800]

1.6. Bribing Foreign Government Officials.

Allegations of bribing foreign government officials arose prominently for US corporations during the 1970s. Bilateral agreements were concluded between States to facilitate information exchange with a view to prosecution.[801] Illicit payments (but not their tax deductibility) were criminalised under US law.[802] US corporations argued that unilateral legislation held them to higher standards than competitors and with the support of their home government sought to extent the prohibition universally.[803] The ICC also called for stringent national regulation supported by a multilateral treaty.[804] It adopted a code of conduct to stimulate self-regulatory action.[805] The resulting instruments include an intergovernmental code of conduct for public officials, a General Assembly

[799] Australian Parliament Joint Standing Committee on Treaties, Multilateral Agreement on Investment, Report No 18, Canberra, 1999, paras 7.28-7.31, 8.16.
[800] *Barcelona Traction supra n26*, 40.
[801] Japan-US, Agreement on Procedures for Mutual Assistance in Administration of Justice in the Lockheed Matter 15 *ILM* 278 (1976).
[802] *Foreign Corrupt Practices Act* 1977 (US) 17 *ILM* 214 (1978) & 28 *ILM* 455 (1989).
[803] US, Statement of Deputy Secretary of State on Corrupt Practices including US Multinationals Abroad 15 *ILM* 469 (1976).
[804] ICC, Report of the Commission on Ethical Practices, Extortion and Bribery in Business Transactions, ICC Pub No 315, Paris, 1977, Pt 2.
[805] ICC, Rules of Conduct on Extortion and Bribery in International Business Transactions, Paris, 1978, revised 1996 & 1999.

declaration and several regional agreements.[806] The ICC and the International Organisation of Employers also observed sessions of ECOSOC's intergovernmental working group which formulated a draft Convention.[807] The General Assembly called upon companies to observe national law and ethical standards.[808] Commercial practices to eliminate the practice include corporate voluntary initiatives, record-keeping, whistle-blowing and internal compliance mechanisms.[809] Businesses have also called for independent monitoring and systematic auditing[810] as a precursor to an eventual international instrument.

1.7. Anti-competitive Behaviour.

Anti-competitive behaviour or restrictive business practices has given rise to bilateral and regional measures of co-operation and information exchange.[811] States may request others to adopt enforcement measures and defer or suspend their own.[812] States and corporate experts have formulated a restrictive business practices code under the auspices of UN Conference on Trade and

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[806] Eg UNGA Resolution 3514 (1975); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Doc DAFF/IME/BR(97)16/FINAL (1997).
[807] ECOSOC, Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices in International Commercial Transactions, UN Doc E/6006 (1977), Part A.
[808] UNGA Resolutions 51/59 (1996), para 10 & 51/191 (1996), para 6.
[809] OECD, Bribery and Codes of Corporate Conduct: An Analysis, Paris, 2000, 2, 9; The Conference Board, Global Corporate Ethics Practices: A Developing Consensus, Report No 1243-99-RR, Washington DC, 1999.
[810] Eg Caux Roundtable (CRT), Anti-Corruption Measures, Singapore, 2000.
[811] Eg US-Federal Republic of Germany, Agreement relating to Mutual Cooperation regarding Restrictive Business Practices 15 *ILM* 1282 (1976); OECD, Council Recommendation concerning co-operation between member countries on anti-competitive practices affecting international trade, OECD Doc C(95)130/FINAL (1995).
[812] Arts 4, 5, US-EC Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws 37 *ILM* 1070 (1998).

Development.[813] The seeds for a prospective multilateral agreement within the ambit of the WTO [814] include jurisdictional conflicts and industrial concentration eluding national law. The US Council for International Business supports the transparent and non-discriminatory application of competition law.[815] Firms are concerned that confidential business information may be jeopardised.[816] The ICC has initiated efforts to harmonise national competition regimes by formulating guidelines for prospective adoption by States.[817]

1.8. Tobacco Advertising.

An interesting counter-example concerns negotiations for a framework convention with respect to the pricing, taxation, packaging, labelling and advertising of tobacco products. The tobacco industry was excluded to prevent inappropriate lobbying and in light of the health nature of the initiative. The decision of the Intergovernmental Negotiating Body concerning NGO participation (and hence tobacco industry exclusion) also applied to subsequently-established intergovernmental working groups. [818] The framework convention requires States to protect efforts to adopt and implement effective national legislation on tobacco control from commercial

[813] UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc TD/RBP/CONF/10 (1980).
[814] WTO, Singapore Ministerial Declaration, WTO Doc WT/MIN(96)/DEC (1996).
[815] USCIB, Position on the Work Program for the WTO Working Group on the Interaction between Trade and Competition Policy, New York, 1997; ICC, Statement on International Cooperation Between Antitrust Authorities, ICC Pub No 225/450 Rev 3, Paris, 1996.
[816] BIAC/ICC, Questions from Business regarding the Protection of Confidential Information in the Context of International Antitrust Cooperation, Paris, undated.
[817] ICC, Recommended Code of Practice for Competition Authorities on Searches and Subpoenas of Computer Records, ICC Pub No 225/507 Rev, Paris, 1998.
[818] WHO Secretariat, Framework Convention on Tobacco Control, WHO Doc A56/8 Rev.1 (2003), para 9.

and other vested interests of the tobacco industry.[819] British American Tobacco supported combating illegal trade and under-age smoking, expressed concern at higher taxation and committed itself to offering governments 'proposals and solutions for real and workable tobacco regulation' at national levels.[820] In 2004 the EU and Philip Morris International concluded an agreement to combat contraband and counterfeit cigarettes.

1.9. Observations.

Commercial participation extenuates the common or disparate economic interests of States. As illustrated by conventions with respect to exploiting natural resources (the deep seabed, genetic resources), intergovernmental negotiators can be readily distracted by inflated profit expectations. In this context private actors are in effect the ultimate beneficiaries of treaties which confer rights to States and authoritatively define the extent of State jurisdiction.[821] Within this process significant policy questions arise such as the respective merits of controlled exploitation over free enterprise. Fisheries management for example employs market-based regulation alongside co-management approaches.[822] International legal issues also emerge such as conflicts between treaty provisions or the right to self-determination of peoples.[823] Developing or socialist States advance competing theories on the

[819] Art 5(3), Framework Convention on Tobacco Control, WHO Doc A/FCTC/INB6/5 (2003).
[820] British American Tobacco, Response to adoption of WHO Tobacco Treaty, 21 May 2003.
[821] Williams S.M., 'International Law and the Exploration of Outer Space: A New Market for Private Enterprise?' in Snyder F.E. & Sathirathai S. (Eds), Third World Attitudes toward International Law, Martinus Nijhoff Publishers, Dordrecht, 1987, 787.
[822] Dubbink W. & van Vliet M., 'Market regulation versus co-management? Two perspectives on regulating fisheries compared' (1996) 20(6) Marine Policy 499.
[823] *Portugal v Australia (the East Timor case)* 1995 *ICJ Rep* 90, Application, para 2.09-2.10.

appropriate corporate role and NGOs may challenge the subsequent implementing legislation upon which the conferral of concessions or licenses to firms depends.[824] The opportunity for firms to articulate concerns to sympathetic States therefore poses challenges for the orderly development of international legal regimes. The possibility of unilateral action outside the agreed multilateral framework (as was the case with negotiations for the law of the sea, outer space and the Antarctic) has detrimental implications for treaty integrity and the prospects for universal participation by States.

Corporate participation in treaty negotiations can be a strategic business opportunity, a proposition most apparent with respect to international trade agreements. National measures for pollution control also establish lucrative industries such as waste disposal.[825] Treaties constitute regulatory drivers which create new markets, identify profitable applications of novel technology and permit natural resource extraction. The TRIPs negotiations illustrate that national models may be promoted for adoption as the appropriate international legal regime since it entails less adaptation costs, increases regulatory burdens for rivals and promotes international commercial activity. On the other hand, commercial contributions can be seen as attempts to re-level the competitive playing field or reverse unfavourable legal precedents at the national level. Unilateral measures prohibiting undesirable corporate behaviour (anticompetitive behaviour, bribery) or pursuing particular public policy objectives (pollution or tobacco control) can disrupt international competitiveness for local firms.

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[824] *Horta v Commonwealth* (1994) 181 *CLR* 183.
[825] International Finance Corporation, Investing in the Environment: Business Opportunities in Developing Countries, Washington DC, 1992, 1-3.

Finally, industry participates through the ICC, ad hoc alliances or trade associations to formulate regimes which circumscribe their prospective liability. States allocate liability between commercial operators within particular industries [826] and under national law. [827] Corporate voluntary initiatives in the nature of codes of conduct can parallel, precipitate or forestall intergovernmental agreement. The necessary investment of time and resources in formulating such instruments as well as staying abreast of lengthy treaty negotiations evidences industry's commitment to the topic under consideration. The participation of the chemical industry enabled States to perfect regimes which balanced public policy objectives (regulating chemical weapons) with commercial requirements (minimal disruption and preserving confidentiality). A more detailed case study will further detail the particular techniques and processes at work.

2. Corporate Contributions to Protecting the Ozone Layer and Preventing Climate Change.

This Part considers the role of corporations in the evolving international legal regime with respect to protecting the ozone layer[828] and preventing climate change. The case study is noteworthy since it usefully illustrates the full range of contemporary modalities for corporate participation. Industry participation

[826] Eg Art 7, 1963 Vienna Convention on Civil Liability for Nuclear Damage 1063 *UNTS* 265.
[827] Cp *Merlin v British Nuclear Fuels Ltd* [1990] 3 *All ER* 711; *Blue Circle Industries PLC v Ministry of Defence* [1998] 3 *All ER* 385.
[828] Vienna Convention for the Protection of the Ozone Layer 26 *ILM* 1516 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer 26 *ILM* 1541 (1987); London Adjustments and Amendments 30 *ILM* 537 (1990).

predates NGO interest and first arose as a transatlantic commercial dispute. The commercial response is conditioned by pressures arising from the marketplace, regulation, consumers, environmental NGOs, the media and scientific opinion. Two issues are of particular interest: first, the corporate role in transferring technology to developing States and second, commercial attempts to influence the terms of their participation within negotiations. The patterns of corporate behaviour identified in Part One are also discernable here: corporations continue to lobby States, frame issues in economic terms, submit proposals, distribute position papers, organize side-events and raise issues for decision-making.[829] Additional commercial techniques include access to meetings, oral interventions, participating in workshops, summits or roundtables, conducting constituency meetings, information gathering and dissemination, shaping the contours of regulatory regimes, verifying compliance and supporting international secretariats.

The author attended the two week session of the Ninth Conference of the Parties (COP) of the UN Framework Convention on Climate Change in Milan during December 2003 as an observer. Interviews and discussions were conducted with corporate officers from individual firms, politically-organised business groups and trade associations (see the list of individuals in Annex 7). The author observed plenary meetings of the Conference of the whole and meetings of its two subsidiary bodies: the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation. The author also attended contact group meetings, roundtables, panel discussions,

[829] Giorgetti C., 'From Rio to Kyoto: A Study of the Involvement of NGOs in the Negotiations on Climate Change' (1999) 7 *NYU Environmental LJ* 201, 220-33.

'side-events', BINGO meetings and secretariat briefings. The following account assesses the respective merits of each modality of engagement in light of earlier COPs.[830] A COP is not merely an administrative or review conference: the boundary between negotiation and implementation is particularly blurred in the context of climate change and the decisions adopted by States contribute to ongoing lawmaking in this area.

2.1 Transatlantic Commercial Disputes.

Regulation for the prevention of climate change originates with the introduction of an aerosol ban in the US during 1978 following an initial period of scientific study and research.[831] European manufacturers had blocked meaningful EC regulations and secured a competitive advantage through the adoption of weak EC directives and voluntary agreements with States.[832] NGOs initiated litigation in the US seeking the introduction of tighter environmental controls.[833] US firms cautioned against unilateral regulatory action which was not binding upon other CFC-producing States and called for a level playing field. Pressure for regulatory controls to prevent depletion of the ozone layer increased with the rise in CFC production.[834] The chemical industry initially denied any connection between damage to the ozone layer and CFC use and sought to cast doubt upon scientific evidence.

[830] For an account of NGO participation prior to 1997, see UNFCCC Executive Secretary Note, Mechanisms for Consultations with NGOs, Addendum, The Participation of NGOs in the Convention Process, UN Doc FCCC/SBI/1997/14/Add.1.
[831] *Toxic Substances Control Act* 15 USC s2605 (1978).
[832] Eg EC Council Decisions 80/372/EEC (1980) & 82/795/EEC (1982).
[833] Eg *Natural Resources Defence Counsel v Thomas* 824 *F.2d* 1211 (DC Cir 1987).
[834] Chemical Manufacturers Association, Production, Sales and Calculated Release of CFC-11 and CFC-12 through 1987, Washington DC, 1988.

However, a Du Pont executive had promised that 'if credible scientific data...show that any chlorofluorocarbons cannot be used without a threat to health, Du Pont will stop production of these compounds'.[835]

The commercial strategy of US firms altered when an intergovernmental scientific assessment cautiously concluded in 1986 that human activity had contributed to climate change.[836] The Alliance for Responsible CFC Policy, a coalition of 500 producer and user companies, declared their support for international CFC regulation provided sufficient time was permitted for developing alternatives.[837] Although differences of business opinion precluded specific recommendations, the Alliance proposed additional research, conservation in CFC end-use and production cuts.[838] European companies suspected that US firms were endorsing regulatory controls to capture profitable export markets from them through product substitution.[839] The EC echoed industry views with respect to scientific uncertainty, the uneconomic feasibility of substitutes and adverse effects on living standards.[840]

Three industry associations, the ICC and two European federations observed the 1985 Vienna conference on account of concerns for prospective corporate

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[835] Testimony of McCarthy R.L., US Government, Fluorocarbons: Impact on Health and Environment, GPO, Washington DC, 1974, 381.
[836] World Meteorological Organisation, Atmosphere Ozone 1985: Assessment of Our Understanding of the Processes controlling its Present Distribution and Change, Geneva, 1986.
[837] World Meteorological Organisation, Atmospheric Ozone 1985: Assessment of our understanding of the Processes Controlling its Present Distribution and Change, Geneva, 1986.
[838] Alliance for Responsible CFC Policy, The Montreal Protocol: A Briefing Book, Virginia, 1987.
[839] Diprose G. & Reddy D.W., 'An Industry Perspective on the Chlorofluoromethane/Ozone Issue' in Council of Europe, Prohibition of the Use of Chlorofluorocarbons and Other Measures to Preserve the Ozone Layer, Strasbourg, 1980, 37.
[840] Jachtenfuchs M., 'The European Community and the Protection of the Ozone Layer' J (1980) 28(3) *Common Market Studies* 263, 275.

liability.[841] North American firms supported universal ratification of the Vienna Convention which also bound their foreign competitors as an alternative to draconian regulation confined to the US. Du Pont proposed voluntarily phasing-out CFC production before States did so after initially resisting CFC emission reductions.[842] European chemical companies remained intransigent.[843] Du Pont observed that 'neither the marketplace nor regulatory policy...has provided the needed incentives' to justify the necessary investment for developing substitutes.[844] On the other hand, it was dawning upon EC exporters that treaty obligations could reinforce their monopoly over existing foreign markets provided CFC-importing States could not acquire supplies from other producers or construct their own CFC-production capacity.

The adoption of the Montreal Protocol concluded attempts by the European chemical industry to block international regulation.[845] Imperial Chemical Industries sought to strengthen the instrument whereas the French firm Atochem had not lifted its opposition.[846] The Alliance for Responsible CFC Policy described the treaty as 'an unprecedented step to protect the global environment'.[847] However, the reduction schedule attempted 'to go too far, too fast and far beyond that which is necessary based on current scientific

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[841] Eg UNEP, Report of the UNEP Meeting of Experts Designated by Governments, Intergovernmental and NGOs on the Ozone Layer, UN Doc UNEP/WG/7/25/Rev.1 (1987).
[842] Glaberson W, 'Behind Du Pont's Shift on Loss of Ozone Layer' New York Times, 27 March 1988.
[843] Imperial Chemical Industries (ICI), Chlorofluorocarbons and the Ozone Layer, Cheshire, 1986.
[844] Du Pont Position Statement on the Chlorofluorocarbon/Ozone/Greenhouse Issue (1986) 13(4) *Environmental Conservation* 363-4.
[845] Lammers J.G., 'Efforts to Develop a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer' (1988) 1 *Hague YBIL* 244.
[846] ICI, Press Release, Cheshire, 1988.
[847] Alliance for Responsible CFC Policy, The Montreal Protocol: A Briefing Book, Virginia, 1987.

understanding'. One UK firm warned of unemployment if there were 'any rash further restrictions...beyond the prudent measures embodied in the UN agreement'.[848] The company was officially reprimanded for resorting to discredited language.[849] The House of Lords recommended a mandatory EC-wide ban as 'the quickest and easiest way to produce a significant reduction' of CFC's in response to mounting consumer concerns.[850] One European industry association conceded that phasing-out CFC use is 'both feasible and desirable' with 'minimal anti-competitive or socio-economic disruption to the Community' since 'European industry is in the fortunate position of being able to introduce the alternative techniques developed [in America] without suffering the same degree of hardship'.[851]

European chemical manufacturers opposed the inclusion of HCFC's within the Montreal Protocol. ICI observed that 'if HCFC's are designated as controlled substances in the revised Protocol...the chemical industry will have no incentive to invest in production of these products'.[852] US industry viewed HCFC's as only a transitional chemical and called for regulatory incentives for investing in alternatives.[853] However, industry also required time to adapt. Phase-out schedules should reflect normal product and equipment lifetimes since an overly strict timetable would impose costly second transition periods

[848] ISC Chemicals, 'Chlorofluorocarbons and the Ozone Layer: The Facts and the Fiction', Bristol, 1987.
[849] UK House of Lords, Hansard 500, 20 October 1988, col 1310.
[850] UK House of Lords, Select Committee on the European Communities, Seventeenth Report, 1988, 12 in UK Government, The Ozone Layer: Implementing the Montreal Protocol, HMSO, London, 1988.
[851] Comments of Eurimpact to the Commission of the EC on Implementation of the Montreal Protocol, Brussels, 1987, 30, 37.
[852] ICI, 'HCFC's- The Low ODP Solution' in ICI, The Ozone Issue and Regulation, Cheshire, 1990.
[853] Alliance for Responsible CFC Policy, Realistic Policies on HCFC's Needed in Order to Meet Global Ozone Protection Goals, Washington DC, 1990.

before the full value of earlier investments had been realized.[854] Indeed, the EPA requested Du Pont to reverse its declared intention to cease CFC production altogether and to satisfy permissible production quotas to ensure sufficient stockpiles at reasonable prices for servicing older equipment.

As a regulatory driver the Montreal Protocol pushed industry in directions hitherto considered impossible. Technology-forcing regulation encourages commercial innovation and the emergence of new service sectors. Industries responded to the inevitability of regulation and sought to quickly develop and commercialise alternative products and processes. Particularly noteworthy is that European firms forged transatlantic commercial links with technologically-superior US firms rather than obstruct regulation.[855] Corporate consortiums such as the Programme for Alternative Fluorocarbon Toxicity Testing enabled the chemical industry to share the costs of co-operative research and testing.[856] It is also noteworthy that whereas corporations originally intended to delay regulation, environmental NGOs were more concerned by the long-term adverse effects and pressed States for accelerated adjustments.

2.2 The UN Framework Convention on Climate Change and its Kyoto Protocol.

Notwithstanding overlapping subject-matters between ozone layer depletion and climate change, their respective legal regimes are distinct and States

[854] Alliance for Responsible Atmospheric Policy, Potential Worldwide Impact of a reduction of the HCFC Consumption Cap, Washington DC, 1995.
[855] Eg International CFC and Halon Alternatives Conference, Washington DC, 1992.
[856] 'CFC Producers from Seven Nations Plan to Pool Knowledge, Jointly Conduct Tests' (1988) 11(2) *International Environment Reporter* 110.

adopted the Framework Convention/Protocol model to address the question of global warming. The UN Framework Convention on Climate Change (UNFCCC) was adopted in 1992.[857] In 1995 the Intergovernmental Panel on Climate Change stated that the balance of evidence suggests that there is a discernable human influence upon the global climate.[858] In 1997 BP broke ranks with other industry bodies by adopting precautionary measures to manage the risks associated with climate change. This was partly in response to consumer concerns but also as a deliberate measure to enhance its prestige as a progressive market leader. The World Business Council for Sustainable Development similarly acknowledged that 'it is prudent for business to play its part by looking for ways to reduce emissions of those gases'.[859] Although environmental NGOs distrusted industry's motivations, the issues of availability, safety and effectiveness of substitutes could not be dismissed. NGOs collaborated with small firms to produce environmentally safe and energy efficient technologies. Indeed, 'hydrocarbons have made a remarkable penetration in the domestic refrigeration market, partly because of their support and promotion by NGOs'.[860]

Industry also participated in negotiations for the Kyoto Protocol.[861] The Kyoto Protocol provides three 'market-based' mechanisms by which State Parties satisfy their obligations. First, international emissions trading under Article 17 allows Annex I Parties (developed States) to buy or sell assigned emission amounts with other Annex I Parties. Second, Annex 1 Parties may acquire

[857] UN Framework Convention on Climate Change (UNFCCC) 31 *ILM* 849 (1992).
[858] IPCC, Second Assessment Report: Climate Change, Geneva, 1995.
[859] WBCSD, Climate and Energy, London, 1999.
[860] UNEP, Report of the TEAP, 1994, 95-110.
[861] Kyoto Protocol to the UNFCCC 37 *ILM* 22 (1998).

carbon credits (credits for emissions avoided or emission reduction units) by investing in projects within Annex 1 States (joint implementation under Articles 3, 4 and 6). Third, Annex 1 Parties may acquire certified emissions reductions which lead to 'real, measurable and long-term' greenhouse gas reductions by investing within non-Annex 1 Parties (developing States) through the clean development mechanism or CDM under Article 12. Twenty to fifty percent of investment within developing States is estimated to be directed towards 'pollution intensive industries'.[862] As will be observed further below, the Kyoto Protocol explicitly contemplates a private sector role within these 'flexibility mechanisms'.

The ICC was represented by a 100 member delegation[863] and its statements were endorsed by trade associations, national chambers of commerce and individual firms.[864] Detailed accounts of State positions were prepared to inform members of developments[865] and enable informed lobbying.[866] It proposed a transparent and non-discriminatory regulatory framework posing no trade or investment barriers.[867] Although legal predictability was a precondition to investment firms should be free to introduce cost-effective market-orientated solutions.[868] To avoid inequitable compliance costs it

[862] UNTCMD, World Investment Report 1992:TNCs as Engines of Growth, New York, 1992, Annex.
[863] ICC, Climate, Business and Society: elements for success at COP-6, Paris, 2000.
[864] ICC, 'Climate change conference should encourage innovative technologies', Press Release, The Hague, 2000.
[865] Cp ICC, Note to Members and National Committees on the UNFCCC, Paris, 2003.
[866] ICC, A Compilation of Summary Business Reports, COP5-SB12, Paris, 2000.
[867] ICC, Monitoring, compliance, enforcement and liability under the Kyoto Protocol: an international perspective, Paris, 1999.
[868] ICC, ICC Statement at the conclusion of COP-3 to the UNFCCC, Kyoto, 1997, 1; ICC, 'Business disappointed at Hague Setback', Press Release, The Hague, 2000.

proposed resort to voluntary corporate initiatives.[869] ICC representatives attended intergovernmental workshops to promote these messages.[870] The Business Council for Sustainable Energy also convened roundtables composed of corporations, NGOs, States and the UNFCCC Secretariat.[871] The US government was urged to consult with business prior to ratifying the Kyoto Protocol.[872] Market solutions were suggested to be more effective than national law.[873] Several industry groups orchestrated a USD$13 million media campaign in 1997 to strengthen US opposition.[874] The US Business Roundtable endorsed the US government's decision not to ratify the Kyoto Protocol. Nonetheless the ICC foresaw continued business participation particularly by European firms within the international framework[875], thereby attempting to diminish the political significance of non-ratification.

2.3. Technology Transfer and the Position of Developing Countries.

Industry's relationship with developing countries in the context of climate change revolves around participation, technology transfer and financial assistance. A global market necessitates universal participation by all States to prevent competitors operating outside the regime from undermining the

[869] ICCA, Statement on Global Climate Change Post COP-5, Virginia, 2000.
[870] ICC, UNFCCC Technology Transfer Workshop, Summary Report, El Salvador, 2000.
[871] Business Council for Sustainable Energy (BCSE), Summary of the Industry Roundtable on Risk Management for Greenhouse Gas Emission Reductions, Washington DC, 2000; BCSE, Industry Roundtable on the Draft Negotiating Text on Mechanisms, Washington DC, 2000.
[872] USCIB, Unresolved Issues in the Kyoto Protocol and US Implementation of its Commitments, New York, undated.
[873] European Roundtable (ERT), Climate Change: How Governments and Industry Can Work Together, Brussels, 2000.
[874] Oberthür S. & Ott H.E., The Kyoto Protocol: International Climate Policy for the 21st Century, Springer, Berlin, 1999, 72.
[875] ICC, 'Business will persevere with climate change remedies', Press Release, Paris, 2001.

market.[876] For example, the ICC and the US Business Roundtable called upon States to recognize as valid all credits and allowances acquired by companies under emissions trading without imposing selective criteria based on their national origin.[877] The latter warned that energy-intensive industries might migrate to low-cost havens within developing States.[878] The corporate relationship with developing countries is therefore a further factor for consideration during intergovernmental deliberations: although the commercial presence typically tilts the balance in favour of developed States, firms will explore the prospects of relocating operations and developing countries will evaluate the available technological opportunities.

Developing country participation within the climate change regime depended in part upon resolving the technology transfer issue. Developing countries sought independence from foreign patent holders and access to affordable technologies. They did not wish to forgo the economic benefits of CFC applications or to pay for substitutes produced by the very chemical industries which created ozone layer depletion in the first place. Firms argued that multilateral choices between positive and negative technology 'winners and losers' should be avoided and technology decisions should be left to host States in consultation with industry.[879]

Industry argued that technological development into substitutes required the legitimate prospect of recouping a reasonable return on investment. Enabling

[876] US BRT, Principles for the Design of an Emissions-Credit Trading System for Greenhouse Gases: Issues and Implications for Public Policy, Washington DC, 1999, 5-11.
[877] US BRT, The Kyoto Protocol: A Gap Analysis, Washington DC, 1998, 26.
[878] US BRT, Trade and Industry Impacts of the Kyoto Protocol, Washington DC, 1999, 36.
[879] Sir Charles Nicholson, Senior Adviser, British Petroleum, 8 December 2003.

frameworks for technology transfer require intellectual property protection, transparent and equitable legal structure and strong contractual arrangements.[880] Intellectual property protection is such that States can only persuade firms to transfer technology on non-commercial terms.[881] Firms suggested that technical transfer is most effective between industry through joint ventures and licensing arrangements.[882] Industrialized States also appreciated that commercial rivals in developing countries could capture markets using technology which they had not worked to develop.[883] Novel arrangements of cooperation between industry, States and intergovernmental organisations were an additional outcome. For example, UNEP facilitated the transfer of non-proprietary information to developing countries.[884] The Industry Cooperative for Ozone Layer Protection, composed of the electronics, communications and aerospace industries, worked with UNEP to pool research and development, organize workshops, publish technical papers and promote information exchange.[885]

Industry also called for a multilateral fund to assist developing States reduce production of ozone depleting substances, particularly since a consumption surcharge within the US would raise considerable revenue for the US government. Investment assistance for capital conversion ultimately benefited small and medium-sized national enterprises facing uncertain CFC supplies,

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[880] ICC, Enabling Environments for Technology Transfer, Discussion Paper, Paris, undated.
[881] UNEP, Report of the Open-Ended Working Group (OEWG) of the Parties to the Montreal Protocol, UN Doc UNEP/OzL.Pro.WG.II(2)/7 (1990), 3.
[882] ICC (1990) 23 Newsletter.
[883] Vallette J., Deadly Complacency: US CFC Production, the Black Market and Ozone Depletion, Ozone Action, Washington DC, 1995, 12.
[884] UNEP, Summary Report of the Informal Consultative Meeting with Industry, Paris, 1990.
[885] O'Connor D.C., 'Solvent Cleaning in the Asian Electronics Industry: The Search for Alternatives to CFC-113 and Methyl Chloroform', UNEP Industry and Environment, 1991.

higher prices and technological obsolescence. However, Southern businesses preferred to bypass State intermediaries on account of bureaucracy and corruption. Competition and collaboration within the marketplace was such that 'substantial efforts to transfer technologies to developing countries are now being undertaken under existing bilateral and multilateral arrangements'. [886] Nonetheless the Montreal Protocol Multilateral Fund finances the incremental costs of using ozone-safe technology for developing countries.

2.4 Commercial Contributions to the Ninth Conference of the Parties (COP-9) to the UNFCCC.

The participation of non-State actors in Conferences of the Parties (COPs) is circumscribed by treaty provisions, procedural rules and decisions of governing bodies. The UNFCCC provides that the Conference of the Parties shall, at its first session, adopt its own procedural rules and those of subsidiary bodies established by the Convention. [887] COP-1 was unable to adopt procedural rules and draft rules have since been applied. The participation of non-State actors as observers to the COP springs from Article 7(6) of the UNFCCC, these provisionally applied draft rules and Decision 18/CP.4 (see Annex 5). Their participation is also influenced by the practice of States, the UNFCCC secretariat and non-State actors themselves.

[886] UNEP, Sixth Meeting of the OEWG, UNEP Doc UNEP/OzL.Pro/WG.1/6/2 (1991), 4.
[887] Arts 7(2)(k), (3), UNFCCC 1771 *UNTS* 107 (1992).

Having invited 168 non-State actors 'to play an active role in the Convention process', the COP at its Eighth Session observed the opportunity for cooperation with the private sector through the Clean Development Mechanism, noted that seven applications for operational entities had been received and heard several statements from business and industry.[888] Private sector investment was necessary to develop innovative technologies and the desirability of industry dialogue to exchange information concerning ozone-depleting substances was recognised.[889]

COP-9 was attended by some 6000 individuals of which approximately 750 to 800 were businesspersons. The principal actors were predominantly the ICC, corporate coalitions and trade associations although several individual firms also attended. Business and industry NGOs (BINGOs) divided into those threatened by the Kyoto Protocol regime (for example, fossil fuel extractors, energy intensive industries, automobile producers) and those seeking novel business opportunities (renewable energy technologies, the forest and nuclear industries and service providers including certifiers, verifiers and brokers). The former have been involved in the UNFCCC process since its inception whereas the latter are more recent entrants. Business opinion has also evolved since COP-1: whereas competition between firms and trade associations peaked in 1994, the factions are now more settled.

[888] UNFCCC, Report of COP-8, UN Doc FCCC/CP/2002/7 (2003), paras 4, 29, 119, 133, 137-8, 140.
[889] *Ibid*, UN Doc FCCC/CP/2002/7/Add.1 (2003); Decisions 1/CP.8 (2002), para (h), 11/CP.8 (2002), para 4, 12/CP.8 (2002), para 4 & 12/CP.8 (2002).

The business concerns at COP-9 centred around two issues. First, what are the consequences if the Kyoto Protocol does not enter into force and in particular, does the CDM Executive Board cease to function? Second, what are the specifics of national and regional emissions trading as precursors to a global regime: how do they interact, is there mutual recognition of credits and what are the transaction costs such as taxation? The following account of the principal actors and activities at COP-9 is the manner and form of regular practice under the UNFCCC and is assessed in light of earlier COPs and developments in other fora.

2.4.1. Principal Actors.

i) The International Chamber of Commerce.

The ICC's self-perceived role is to accurately portray the views of its member federations to national delegates. Although it remains hamstrung by the need to secure member consensus for its activities, its contemporary service function is to enable its membership to undertake 'more informed and effective interventions'.[890] This compares with the US Council for International Business which perceives its objective as ensuring consistent State positions within different UN fora and in accordance with national decisions. Environmental issues 'do not stay in a box' and national delegations need reminding of positions espoused elsewhere.[891] The ICC seeks to co-ordinate

[890] Mr Nick Campbell, Chairman, Task Force on Climate Change, International Chamber of Commerce Environment and Energy Commission, 10 December 2003.
[891] Ms Norine Kennedy, Vice President, Environmental Affairs, USCIB, 3 December 2003.

various actors to reinforce identical business messages across a range of issues. The challenge is to get 'tuned in and willing business supporters'.

The ICC represents 'mainstream' industry which in practice is the interests of transnational companies. The ICC supports the UNFCCC process provided that business is recognized as part of the solution.[892] Non-discriminatory treatment, freedom of trade, access to information and encouraging foreign direct investment are its principal concerns.[893] The ICC wants companies affiliated to multinational firms to be eligible to participate in Kyoto mechanisms to the same extent as national companies irrespective of ratification by the State where the parent corporation resides. Internal transfers between affiliated companies should not be subject to taxes or quotas but can be utilized to satisfy national obligations where they operate, be bankable for future use or exchanged through emissions trading.

ii) Trade Associations.

Firms are 'plugged-in' to several organisations such as special interest, national or trade-specific industry associations representing slightly different interest configurations.[894] Trade associations have several functions: recruiting members, reporting (monitoring political developments for its membership), education (expressing industry issues to national delegates, providing scientific or policy advice to small businesses and informing interested actors of best commercial practice) and marketing (promoting voluntary environmental

[892] ICC, Climate Change: The Business View, Paris, 2003.
[893] ICC, The Role of Companies in Kyoto Mechanisms, Paris, 2003.
[894] Mr Neil Cohn, Senior Director, Natsource LLC, 5 December 2003.

efforts of industry or advertising upcoming trade fairs).[895] Trade associations enjoyed a close working relationship with national delegations at COP-9 on account of their routine national-level engagement. For example, the Australian Industry Greenhouse Network, representing inter alia fossil fuel producers, acted as industry adviser to the Australian delegation. The latter briefed the Network's representative on political deliberations daily which were reported back to BINGO meetings subject to confidentiality obligations.[896]

Trade associations complete interim and final reports summarising each COP for distribution to members and formulate position statements and responses. Trade associations may create 'noise' around a particular issue to demonstrate activity but when pressed by States are unable to assume a position without prior consultation with its members. Furthermore, anti-competition law also prevents information exchange and complete cooperation between members. Promoting voluntary measures of mitigation by industry is easier than expressing a universal opinion from its members on any given issue.[897] The mandate of trade associations at a COP must reflect both progressive and conservative elements: some members may encourage participation whereas others avoid it. For example, the Australian Coal Institute did not establish a side exhibit given uncertainty as to how business messages would be communicated and received.

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[895] Mr Eli Turk, Vice President, Government Relations, Canadian Electricity Association, 5 December 2003.
[896] Ms Robyn Priddle, Executive Director, Australian Industry Greenhouse Network, 8 December 2003.
[897] Mr Tim Stileman, International Petroleum Industry Environmental Conservation Association, 11 December 2003.

iii) Corporate Coalitions.

Politically organised business groups may be ad hoc or permanent coalitions, represent one or several economic sectors and promote single or multiple issues. Corporate coalitions are established to communicate corporate environmental responsibility, voluntary private initiatives and contemporary technological developments to States and other firms.[898] One coalition awards an annual 'Climate is Business e-ward' for these purposes.[899] Another coalition - Responding to Climate Change - has been active since COP-6 and is composed of individual firms, NGOs and States.[900] Individual firms contribute donations to purchase time slots in promotional side-events where voluntary corporate initiatives for tackling emissions may alternatively be characterized as showcasing research and development or reducing costs.[901]

2.4.2. Principal Activities.

i) Access to Meetings.

All NGOs can attend open meetings of COP plenary sessions, the Subsidiary Body for Scientific and Technological Advice (SBSTA, responsible for technological advice and methodological issues), the Subsidiary Body for

[898] Ms Marian Hopkins, The US Business Roundtable, 9 December 2003.
[899] Mr Julio Lambing, European Business Council for a Sustainable Energy Future (e5), 11 December 2003.
[900] Adam Bumpus, Programme Coordinator, Responding to Climate Change, 9 December 2003.
[901] Mr Masayuki Sasanouchi, Project General Manager-Environment, Toyota, 10 December 2003.

Implementation (SBI, responsible for implementation issues including assessing national communications) and informal contact groups. The terms of NGO participation are left to the discretion of individual chairpersons. All NGOs always sit at the rear and lack access to microphones. Attendance may be unproductive and uninformative given diplomatic posturing, limited time and the public nature of proceedings. Real decision-making occurs elsewhere including confidential sessions formally closed to NGOs, within other intergovernmental fora or in national capitals. Such arrangements preserve authority and credibility for States and render non-State actor influences less apparent.

Observers may attend ministerial roundtables concerning particular themes intended to produce constructive and interactive dialogues between delegation heads. Press briefings by observer organisations are typically open to all. For example, the International Emissions Trading Association promoted a report on the greenhouse gas market through this means.[902] The International Hydropower Association and the World Economic Forum by contrast strictly reserved briefings to accredited media to control information delivery and exclude critics. Other meetings closed to observers include press briefings by national delegations, constituent group meetings and daily briefings between national delegations and national industry associations. Observers are denied access to meetings of intergovernmental groups other than convention bodies ostensibly because they do not have any negotiating role. These meetings involve national delegates imparting information on political developments to

[902] International Emissions Trading Association (IETA) Report, GHG Market 2003- Emerging but Fragmented, Geneva, 2003.

business (much of which is already familiar) and industry pressing for greater clarity such as further implementation details or raising issues for negotiation. The US met with national industry four times over two weeks and hosted a bilateral event with Italy and Italian firms.

ii) Assisting Oral Interventions by States.

Commercial interests can assist States to prepare the content of their oral interventions. Oral interventions by States may be formal prepared statements delivered during plenary sessions or spontaneous statements during debates. These interventions are incorporated into official records such that true sources are obscured. The ability of firms to employ this technique is determined by access to delegates, knowledge, procedural expertise, effective co-ordination with other interested groups and identifying sympathetic States for constructing strategic alliances.

iii) Oral Interventions by NGOs at the Conclusion of Plenary Sessions.

NGOs typically address the COP just before closure of the final plenary session. Speakers follow the self-organising 'constituency' system recognized by the UNFCCC. Research and independent NGOs (RINGOs), business and industry NGOs (BINGOs), environmental NGOs (ENGOs), local NGOs, indigenous peoples organisations (IPOs), local government and municipal authorities (LGMA), islanders, trade unions and faith-based groups were each permitted to make three minute oral presentations. NGOs select the groups

and individuals to speak on their behalf. Participation in a constituency is the choice of individuals or organisations, is not official or binding and does not preclude direct secretariat communication. The designated constituency focal point does not posses 'sovereignty' over the constituency. They are conduits ensuring effective NGO participation by undertaking information exchange, providing logistical support to the secretariat, co-ordinating interaction with States and identifying attendance demand or qualified individuals.

NGOs do not perceive oral interventions to be useful or effective although the opportunity to do so is jealously safeguarded. Five minute interventions after decisions have been effectively taken do not provide opportunities for meaningful dialogue with States. Nevertheless, NGOs welcome inclusion in the UNFCCC process and call for greater engagement.

iv) Membership of and Advice to National Delegations.

NGO representatives may be appointed by States to national delegations either in a general advisory capacity or to act as negotiators on specific points. States enjoy the widest possible freedom when appointing delegates particularly where specialised matters of a highly technical character require enlisting experts with the necessary training and experience.[903] Reliance upon NGOs increases with the number and complexity of issues to be addressed.[904] This

[903] International Law Commission, Fifth Report on Relations between States and International Organisations (1970) *YBILC* Vol 2, 19; Arts 43, 45 Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character, UN Doc A/CONF.67/16 (1975) (not in force).

[904] Yamin F., 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10(2) *RECIEL* 149, 158-9.

includes representatives of the private sector in an advisory role as experts or consultants and exceptionally as head of delegation.[905] Private sector representatives may not speak on behalf of the US government to other States but may explain technical or factual details if they are the most competent to promote national objectives.[906] Membership constrains NGO perspectives to official State positions, lobbying is prohibited and obligations of confidentiality are assumed. However, NGO representatives may secure access to closed sessions, thereby raising conflict of interest concerns.

BINGOs in their advisory capacity can exert a pervasive influence over the negotiating position of States. Most notoriously, Saudi Arabia, Kuwait and Russia collaborated with Western oil and coal interests to obstruct progress during earlier COPs. The Global Climate Coalition, led by Don Pearlman, a US lawyer, instructed delegations in private session on techniques to stall deliberations and additional issues to raise for consideration. Indeed, the Kuwaiti delegation submitted proposals written in Pearlman's handwriting weakening the language of intergovernmental scientific reports[907] The Coalition employed different arguments in public than in negotiations, recruited scientists, think tanks and public relations firms to refute the scientific consensus, proposed further research, emphasized the opportunity costs of implementation and highlighted disparities between developed and developing States. Its obstructionist role was most evident during negotiations

[905]Economic Commission for Europe (ECE), Cooperation between the ECE and the Business Community, ECE Doc E/ECE/1360 (1998).
[906] US, *Final Guidelines on Participation of Private Sector Representatives on US Delegations*, 44 Fed Reg 17846, 17848 (1979).
[907] Leggett J., The Carbon War: Dispatches for the End of the Oil Century, Penguin, London, 1999.

at Kyoto[908] where it continued to assert that 'existing scientific evidence does not support actions aimed solely at reducing or stabilizing greenhouse gas emissions'.[909] It predicted increased energy costs, unemployment and lower living standards.[910] The Coalition has gradually lost credibility and influence over the outcome of subsequent COPs, particularly when pressure on the US government proved counterproductive and several corporate members withdrew. Nonetheless, the Global Climate Coalition 'will continue offering assistance to international policymakers'.[911]

v) BINGO Meetings.

The ICC acts as focal point for the business and industry constituency. It conducts daily briefings for BINGOs for one hour to review the previous day's developments, identify State positions and like-minded delegations, assess the progress of negotiations and highlight forthcoming events. The meetings facilitated invitations by States to meet privately with national firms or particular industrial sectors. The ICC coordinated contributions from other BINGOs to formulate common business messages for upcoming meetings with governmental and intergovernmental representatives. There is equality of opportunity to participate for individuals within BINGO meetings but those most experienced with the UNFCCC process assume the greatest workload. BINGO meetings were mostly attended by industry groups and trade associations from Japan, North America and Europe and very rarely from

[908] Pearce F., Playing Dirty in Kyoto, *New Scientist*, 17 January 1998, 48.
[909] Global Climate Coalition (GCC), GCC's Position on the Climate Issue, Washington DC, 1999.
[910] GCC, The Impacts of the Kyoto Protocol, Washington DC, 2000.
[911] GCC, 21st Century Climate Action Agenda, Washington DC, 2000.

developing countries. The ICC argues firstly that business organisations represent companies which are headquartered, sited or have operations within developing countries and secondly that business representatives from OECD States should not be discouraged from attending since they will largely assume the burden for implementation.[912]

vi) Roundtables.

Roundtables are an informal means for States to collect information concerning the capacities, mandate, expectations, experiences and constraints of other actors. For example, three individual firms and two industry associations participated in a technology transfer roundtable during COP-9. However, roundtables may constitute missed opportunities since oral interventions are limited to three minutes should the Chairperson call upon speakers. Although the technique offers participation closer to conditions of equality, there need not be any meaningful dialogue or sense of progress.

vii) Information Gathering.

BINGOs attend COPs as observers: to gather information useful for assessing cost implications, understanding regulatory mechanisms, establishing relationships, building internal capacity and formulating corporate strategy.[913] BINGOs are generally interested in prospective transaction costs, trading opportunities, decision-making time-frames, compliance procedures and

[912] UNFCCC, Mechanisms for Consultation with NGOs: Compilation of Submissions, UN Doc FCCC/SBI/1997/MISC.7, Submission by the ICC, 5-7.
[913] Mr Stephen Dahl, Environmental Planner, Norske Skog, 2 December 2003.

details of implementation. Transnational firms can acquire advantages over national ones who are unaware of likely policy developments by exploiting time lags prior to national implementation and minimizing disruption to commercial operations. Scientific organisations also collect information in anticipation of eventual regulation.[914] They return to later COPs to encourage the adoption of climate change indicators as tools for more informed and effective commercial decision-making.[915]

NGOs enjoy access to all official documentation. The Subsidiary Body for Implementation encouraged 'the secretariat to proceed with...activities, within the available resources' for 'improving the availability of documentation and information to NGOs'.[916] Ordinarily there is only a presumption that documentation will be made public unless the relevant body decides otherwise. However, observers to the UNFCCC including NGOs enjoy a formal right of access to official documents[917], final conclusions, preliminary reports and draft COP decisions.

BINGOs are already well-informed and seek to become better informed. For example, a question and answer session was conducted with the UNFCCC Executive Secretary concerning budgetary arrangements for the secretariat and anticipated decision-making time-frames. BINGOs were concerned that the CDM Executive Board would be unable to procure the necessary resources to competently assess investment eligibility or evaluate methodologies if the

[914] Mr Justin Portelli, Director, Carbon Management Group, CSIRO, 3 December 2003.
[915] Mr Kevin Baumert, World Resources Institute, 5 December 2003.
[916] UNFCCC, Report of the Subsidiary Body for Implementation on its Eighth Session, Involvement of NGOs, UN Doc FCCC/SBI/1998/6, 23.
[917] UNFCCC Decisions 16/CP.7, Annex, para 16 & 24/CP.7, para 7(6).

Kyoto Protocol did not enter into force. BINGOs also sought to insert business representatives within intergovernmental decision-making processes to monitor developments, contribute expertise and ensure an accurate understanding of commercial perspectives. The principal obstacles are not the competency criteria for experts but rather the difficulty of attracting industry interest: USD$400 per day was insufficient to attract well-remunerated executives.[918]

viii) Information Dissemination.

The ICC seeks 'the opportunity to contribute to rule making by providing information and views'.[919] BINGOs engage in information dissemination by educating uninformed government officials or articulating selected issues of business concern and pressing for their resolution. Business performs a 'corrective function' by signalling the acceptability of proposals to States from a commercial perspective. It is the 'role and responsibility' of industry to identify market impacts and deter States from adopting regimes which unfairly accord preferential treatment.[920] BINGOs also identify points within decision-making systems susceptible to outside manipulation or political arbitrariness.

Although ENGOs outnumber BINGOs the business message carries greater weight in several respects. BINGOs forecast likely implementation impacts, provide economic analysis, formulate work programmes and share commercial

[918] Andrei Marcu, President and CEO, IETA, 4 December 2003
[919] ICC, Perspectives on the need for discussion now of issues affecting business and society in addressing long-term climate change risks, Paris, 2003.
[920] Dr Brian Flannery, Manager, Science, Strategy and Programs (Safety, Health and the Environment), Exxon Mobil Corporation, 10 December 2003.

experiences through case studies, technical reports and position papers. The World Business Council for Sustainable Development (WBCSD) continued the practice of the Johannesburg World Summit on Sustainable Development of co-chairing information sessions, this time with the UNFCCC secretariat.[921] The Alliance for Responsible Atmospheric Policy partners national regulatory authorities and intergovernmental organisations.[922] The influence of ENGOs may be marginalized as States and businesses match legal obligations with technical issues requiring familiarity with financial or securities markets and risk management.

Corporations are voluntarily contributing information and it is not apparent how that collection effort is rewarded. It is a costless way for States to acquire information and can be expected to be tailored to commercial perspectives. The EU encouraged other States to draw upon the case studies and technical papers developed by 'stakeholders'.[923] States and firms are engaged in mutual learning to smooth transition periods towards legally-binding targets and minimize political and commercial disruption. For national delegations to understand industrial techniques within compressed decision-making time-frames necessitates assuming the accuracy of business information in good faith. The acceptability to States of real-time analysis and advice depends upon specialised expertise, well-established relationships of trust, commonality of interests and sufficient resources. States cannot alienate business goodwill

[921] Mr Bjorn Stigson, President, World Business Council for Sustainable Development, 9 December 2003.
[922] US Environmental Protection Agency/Japan Ministry of Economy, Trade and Industry/UNEP/Alliance for Responsible Atmospheric Policy, Responsible Use Principles for HFC's, 2003.
[923] IISD (2003) 12(222) *Earth Negotiations Bulletin* 2.

if policy objectives are to be realized, particularly where markets are sought to be constructed around regulatory regimes. Corporations may seek to formulate regulatory frameworks around existing market conditions, maintain the status quo and deter directive action by States. Firms accordingly downplay the extent to which States rely upon their technical expertise or scientific information and characterise their role as advisory rather than participatory.

Information-sharing by business is incomplete: business proprietary information such as trade secrets is excluded and full disclosure is unrealistic given competitive relationships with State enterprises and other firms. Furthermore, BINGOs only cooperate on matters of mutual interest, if interaction is precedential or where technical advantages are enjoyed. BINGOs are wary of tokenistic consultation, assuming commitments which are properly a State responsibility and volunteering information which may be ignored, filtered or misused. Workshops, meetings and panel discussions may merely provide the appearance of collaboration and a presumption that practical technical and economic information has been identified. It is left to State discretion whether or not to solicit NGO information. Business can only respond to information requests (principally technology transfer questions) but has also identified policy issues where input could usefully be provided.

Information exchange also has a flavour of artificiality. Several State delegations had previously observed trade association presentations at pre-sessional meetings which were simply repeated at COP-9. National delegations attended commercial side-events not to acquire information but to

demonstrate solidarity with national industry.[924] Indeed, lobbying becomes superfluous where senior government officials promote novel climate change technologies.[925] Joint collaboration satisfies legal obligations for States and enables firms to secure an international competitive advantage.[926] For example, energy service companies promote their technology transfer role as a means of implementing Kyoto Protocol obligations.[927]

ix) Influencing Decision-making under the Clean Development Mechanism (CDM).

Participation within the CDM, including acquiring certified emissions reductions, may involve private and/or public entities and is subject to guidance from the Executive Board.[928] The Board has to date approved approximately 100 projects and several different methodologies. However, its lethargic decision-making procedures with respect to acceptable project design templates and accredited methodologies are creating market uncertainty. Private sector participation is principally speculative trading hindered by transaction risks such as approval by host States.[929] Several firms had previously developed candidate CDM projects to evaluate investment project

[924] Mr Manabu Kubota, Federation of Electric Power Companies, 10 December 2003.
[925] Eg US, Climate Vision: Voluntary Innovative Sector Initiatives, Statement made at COP-9, Milan, 2003.
[926] Eg CFC Action Programme: Cooperation between Government and Industry, The Hague, 1993.
[927] Korea Energy Management Corporation, Role of Energy Service Companies (ESCOs) in Reducing Greenhouse Gas Emissions and a Potential Financing Mechanism for International ESCO Projects, Yongin, 2003, 2.
[928] Article 12(9), Kyoto Protocol, *supra n*861.
[929] IETA/ADB, Private sector demand for CDM Projects, Toronto/Geneva, 2003.

feasibility and distributed the resulting data to States.[930] To push the regulatory process further firms are designing draft standards which facilitate market growth. For example, the WBCSD attended COP-9 to promote a revised Greenhouse Gas Protocol Corporate Accounting and Reporting Standard for prospective adoption by firms as a risk management tool[931] and by States as a basis for national regulation.[932] Including several intergovernmental organisations across a single issue is one technique for first 'road testing' these standards. The process entails an assessment of the Executive Board's methodology and further refining the attractiveness of such products to industry.[933]

BINGOs analyse recent Executive Board decision-making on baselines and methodologies to assess commercial prospects and identify investment project eligibility.[934] The International Emissions Trading Association (IETA) has studied the Board's accreditation methodology, its temporal and financial limitations and available expertise.[935] The Association promotes its familiarity with the Executive Board's decision-making processes and its ability to provide input thereto as the basis for its expertise and appeal to industry.[936] Since IETA represents traders and brokers it may inflate expectations of business opportunities to attract clients and derive more commissions.

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[930] IPIECA, Opportunities, Issues and Barriers to the Practical Application of the Kyoto Mechanisms, London, 2000, 45.
[931] Cp International Association of Oil and Gas Producers/IPIECA/API, Petroleum Industry Guidelines for Reporting Greenhouse Gas Emissions, 2003.
[932] Mr Simon Schmitz, World Business Council for Sustainable Development, 9 December 2003; WBCSD/WRI, Voluntary Corporate GhG Targets: Draft Guidance Chapter for GhG Protocol Corporate Accounting and Reporting Standard, Revised Edition, Geneva, 2004.
[933] Mr Machua Acharya, WBCSD, 5 December 2003.
[934] Ms Lisa Jacobson, Business Council for Sustainable Energy, 3 December 2003.
[935] IETA, Summary of Discussions at the 12th Meeting of the CDM Executive Board, Bonn, 2003.
[936] Mr Robert Dornau, IETA, 5 December 2003.

x) Furthering Emissions Trading.

To implement their Kyoto Protocol obligations State Parties may authorize legal entities to participate in actions leading to the generation, transfer or acquisition of emission reduction units.[937] Market participants (particularly brokers) wish to mould the characteristics of a robust and credible market around the regulatory regime. Firms seek recognition of their accounting methodologies by States to ensure security of tenure for techniques over which they enjoy intellectual property rights. For example, IETA has the opportunity to direct the growth of an emergent market as well as influence regulatory design. It drafted a standard form contract to streamline commercial negotiations, reduce transaction costs and facilitate emissions transactions in anticipation of the EU Emissions Trading Scheme.[938]

Emission reduction units are assets of value to firms which may be taxed and possibly expropriated by host States. Lawyers formulate standard terms for inclusion in emissions reductions trading contracts.[939] Their efforts are constrained by regulatory uncertainty such as whether emissions reduction units are legislatively-entrenched property rights or whether national courts are sufficiently familiar with the technical issues to provide cost-effective dispute resolution.[940]

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[937] Art 6(3), Kyoto Protocol, *supra n*861.
[938] IETA, EU Allowances Emissions Trading Master Agreement, Version 1.0, Toronto/Geneva, 2003.
[939] Ms Laura Campbell, President, Climate Change Legal Foundation, 11 December 2003.
[940] IETA, Carbon Contracts Cornerstones: Drafting Contracts for the Sale of Project Based Emission Reductions, Discussion Paper No 02-01, Toronto/Geneva, 2001, 5.

Regional, national or intra-national emissions trading regimes are promoted at COP side-events by States in conjunction with national industry experts.[941] States are appealing to foreign firms to buy into government-backed schemes having commercial credibility. Although offering opportunities for regulatory arbitrage, different participatory conditions frequently confer exclusive advantages on local industry. Industry groups analyze the merits of each emissions trading scheme and call for further refinement.[942] States and firms share a mutual interest in understanding the business opportunities and acquiring experience with emissions trading as a form of environmental regulation before the Kyoto Protocol becomes operative.[943] BP and Shell have developed intra-corporate emissions reductions schemes and the Chicago Climate Exchange also illustrates voluntary experimentalism by industry.[944] To increase market size IETA is advocating for the merger of emissions trading within the EU such that credits under the CDM can be converted into allowances acquired under joint implementation. The design issues of linking emissions trading regimes trade environmental integrity for efficiency.[945]

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[941] EC Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (2003) *OJEC* L; UK Department for Environment, Food and Rural Affairs, The UK Emissions Trading Scheme: Framework Document and Reporting Guidelines, London, 2001.

[942] Confederation of Norwegian Business and Industry, Meeting the Kyoto Protocol Commitments Summary–Domestic Emissions Trading Schemes, Oslo, 2000; Jacobson L. & Schumacher A., Emissions Trading: Issues and Options for Domestic and International Markets, Business Council for Sustainable Energy, Washington DC, 2000.

[943] Mr David Feldner, Chief Accounting Executive, Emissions Marketing Association, 8 December 2003.

[944] BP, Greenhouse Gas Emissions Trading in BP, London, 2001; Shell International, The Shell Tradable Emission Permit System: An Overview, London, 2000.

[945] IETA/International Energy Agency/EPRI, Linking Greenhouse Gas Emissions Trading Systems, Discussion Paper, Toronto/Geneva, 2002.

xi) Continuing the Technology Transfer Debate.

A continuing theme of the historiography of climate change outlined above is the impact of scientific evidence upon corporate behaviour. Those firms which accept scientific opinion argue that applying or adapting existing technology is sufficient to mitigate climate change since it is proven in the field, less risky and presently available. Developing novel, practical and commercially-viable technology requires time and expenditure. Firms seek to maximise the value and shelf life of products, recoup a reasonable profit and defer or defray the huge investment costs associated with new technology.

The technical expertise of firms and the personnel marshalled by trade associations enables industry representatives to participate in the technological assessment panels underpinning negotiations such as the Expert Group on Technology Transfer. The International Petroleum Industry Environmental Conservation Association (IPIECA) attends plenary sessions of the Intergovernmental Panel on Climate Change (IPCC), participates in expert workshops, publishes reports jointly with UNEP and organizes intergovernmental symposia.[946] IPIECA has sought to recruit corporate officers in response to the IPCC's call for a stronger industry presence including contributions to IPCC technical reports.[947] NGOs are admitted as observers and allowed to intervene as experts on matters of direct relevance to agenda items.

[946] IPIECA, Buenos Aires and Beyond: A Guide to the Climate Change Negotiations, London, 1999, 15-7.
[947] IPIECA, A Guide to the Intergovernmental Panel on Climate Change, London, 2nd Ed, 2000, 6.

The substantive decision-making power of the Conference of the Parties has to be balanced against the procedural agenda-forcing power of expert groups.[948] For example, several members of the US Crop Protection Coalition participated in the Methyl Bromide Technical Options Committee of the Technology and Economic Assessment Panel (TEAP). The Coalition criticized TEAP's research findings and methodology.[949] TEAP countered that 'persistent criticism of the science...by advocates of continued methyl bromide use discourages investment in alternatives'.[950] Informed criticism by industry alternated with allegations of improper influence. Sweden proposed tightening State control over the appointment and dismissal of industry experts. Other States resisted reforms on account of potential political influence over scientific and economic deliberations. States affirmed that the Panel 'presents technical and economic information relevant to policy' but 'does not recommend policy'.[951] The independence and impartiality of experts is ensured through an informal advisory group of States.[952]

xii) Providing Assurances of Compliance.

The compliance procedure of the Kyoto Protocol is triggered where 'competent' NGOs submit information to the Compliance Committee

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[948] Parson E., 'Protecting the Ozone Layer' in Haas P.M., Keohane R.O. & Levy M.A. (Eds), Institutions for the Earth: Sources of Effective International Environmental Protection, MIT Press, Cambridge, 1993, 67.
[949] UNEP, Report of the Methyl Bromide Technical Options Committee, Nairobi, 1994.
[950] UNEP, Report of the Technology and Economic Assessment Panel (TEAP), Nairobi, 1994, 2.
[951] UNEP, Draft Report of the Preparatory Meeting for the Eighth Meeting of the Parties, UNEP Doc UNEP/OzL.Pro/Prep/L.1 (1996), 30-40.
[952] UNEP, Report of TEAP, Nairobi, 1996, 136-49.

concerning an existing case.[953] The private sector may submit relevant factual and technical information where a question of implementation is raised.[954] Interestingly, non-State actor participation under the non-compliance procedures of other environmental agreements has been rejected on account of the non-confrontational character of the process and the perception that their concerns could be effectively channelled through other means. [955] Standardization and verification firms compete with other applicant entities under the Kyoto Protocol for approval by the CDM Executive Board so that they may offer officially-sanctioned assurance services to industry. Accounting firms also provide management systems or audit emissions reductions. One brokering firm provides renewable energy certificates to assure the quality of emissions transactions.[956]

Industry has previously contributed to monitoring the subsequent implementation of the ozone treaties. For example, the US chemical industry identified a black market in the production and use of ozone-depleting substances. UNEP confirmed that assessment.[957] The illegal CFC trade penalized firms who complied with phase-out schedules and reduced industry's incentive to introduce substitutes.[958] Producers of CFC-substitutes encouraged greater enforcement effort by States. [959] The Alliance for

[953] UNFCCC, Decision 24/CP.7 (2001).
[954] UNFCCC Secretariat, A Guide to the Climate Change Convention and its Kyoto Protocol, Bonn, 2002.
[955] Redgwell C. & Fitzmaurice M., 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands YBIL* 35.
[956] Mr Christiaan Vrolijk, IT Power, 2 December 2003.
[957] UNEP, Illegal Trade in Ozone Depleting Substances: is there a hole in the Montreal Protocol?, Paris, 2001.
[958] Brack D., International Trade and the Montreal Protocol, Royal Institute of International Affairs, London, 1996, 105-14.
[959] IPIECA, COP5 Summary Report, Bonn, 1999, 5.

Responsible Atmospheric Policy provided instruments for detecting counterfeit CFC products at border entry points, publicized the legal and technical risks of using CFC's of dubious origin and established a committee of industry representatives to assist government investigators.[960]

xiii) Supporting the UNFCCC Secretariat.

The UNFCCC secretariat deals routinely with NGOs. It has formulated guidelines concerning observer participation within the UNFCCC process 'reflecting current practice' and 'in line with those governing NGO participation at sessions of other bodies in the UN system'.[961] Each constituency is briefed separately by the Executive Secretary, given meeting rooms and assigned office space for the duration of the COP. The secretariat liaises with constituency groups without direct governmental oversight to arrange meetings with senior delegates. Although the constituency system usefully structures NGO participation it inaccurately pools distinctive groups, ignores political fractures and obfuscates overlapping membership. This informal arrangement leaves the accreditation process unaffected: the Subsidiary Body for Implementation concluded that 'the current arrangements for the accreditation of NGOs were satisfactory, and that no change in the accreditation procedures was required'.[962]

[960] Alliance for Responsible Atmospheric Policy, Background on Illegal Imports of CFC's, Press Release, Vienna, 1995.
[961] UNFCCC Secretariat, Guidelines for the participation of representatives of NGOs at meetings of the bodies of the UNFCCC, Bonn, 2003.
[962] UNFCCC, Report of the Subsidiary Body for Implementation on its Eighth Session, Involvement of NGOs, UN Doc FCCC/SBI/1998/6, paras 81-3.

BINGOs can be relatively more organized, knowledgeable and professional than ENGOs. They contribute business logic of economics, practicality, effectiveness, financing, operational and technical issues, risk management and capacity building to secretariat operations. Close working relationships tend to be developed with well-established business groups such as the ICC who promise greater stability. The secretariat is continually trying to draw business into its work programme. Corporate experts may occupy temporary positions to share experiences or information and acquire familiarity with institutional performance. However, senior corporate executives may be disinterested in participating within roundtable sessions given their daily business demands, particularly where only two-minute comments are possible. The secretariat is pressuring States to adopt innovative formats and 'more impromptu events' which produce 'open and spontaneous discussions'.[963]

xiv) Organising Side Events.

Formally all NGOs enjoy equal privileges at COPs. However, the de facto influence of BINGOs is likely to be relatively greater given the financial resources devoted to promotional publicity or sponsorship and the interest of States in courting prospective market participants. These factors are most evident in the multiple activities occurring alongside meetings of the COP, subsidiary bodies or contact groups. For example, UNFCCC secretariat officials and the Expert Group on Technology Transfer convened an event on enabling environments for technology transfer where participation was limited

[963] Ms Barbara Black, NGO Liaison Officer, UNFCCC Secretariat, 2 December 2003.

to States and BINGOs. The expense of organising side-events includes hiring Conference facilities, providing refreshments and staff attendance at exhibits. Exhibits are only available to accredited organisations upon allocation by the secretariat. Although the secretariat does not screen messages businesses are only permitted to promote products in a trade fair organized nearby. Documents can also be displayed at designated locations around the Conference venue provided a sample is deposited with the secretariat, thereby equalising opportunities between NGOs.

Off-site side events ('side-bars') organized outside Conference venues and located in local hotels are advertised within the daily programme of activities. Industry-specific presentations and workshops establish links with invited government delegates and secretariat officials. BINGOs organised more side events than ENGOs at COP-9. For example, IETA conducted fifteen side events involving sixty-five speakers. BINGO presentations tended to be conducted jointly with States or secretariat officials whereas other NGOs, several governments and academic institutions preferred to conduct individual briefings. Several BINGO presentations were explicitly directed at developing States.[964]

Side events assume greater significance when political negotiations stagnate and the focal point for debate shifts to non-State actors.[965] States become observers of contemporary business practices, opinions and ideas.

[964] Eg Consortium for North-South Dialogue/Partnership for Climate Change/Business Council for Sustainable Energy, 'Walking the Talk', 8 December 2003.
[965] Mr Jack Whelan, Secretary, Task Force on Climate Change, International Chamber of Commerce Environment and Energy Commission and designated BINGO contact person at COP 9, 2 December 2003.

Corporations control the agenda and the content of BINGO presentations. These efforts are a source of competitiveness by increasing corporate knowledge, improving operational efficiency, facilitating product development, enhancing reputations and evidencing good corporate citizenship. [966] Presentations were also conducted jointly by the ICC, USCIB and Keidanren. Corporate voluntary initiatives include products developed jointly with ENGOs.[967]

xv) Informal Activities.

Opportunities for informal lobbying arise at social functions, arranged meetings, within common areas or corridors, following the conclusion of plenary meetings and between meetings. BINGOs, ENGOs, national delegations and secretariat officials are well-acquainted with each other's position from prior professional contact. Whereas ENGOs readily resort to the media, BINGOs prefer a subdued approach involving personal meetings away from Conference venues including 'over dinner' encounters. Informal activities can be more rewarding than some of the more formal but less effective activities (eg official statements at the conclusion of plenary debates) but are difficult to accurately assess on account of their nature. It is also probable that greater lobbying activity is directed at national arenas.

[966] Eg Shell, Meeting the Energy Challenge, The Hague, 2002.
[967] Mr Oliver Haugen, World Economic Forum, 9 December 2003.

2.5 Corporate Attempts to Influence the Conditions of Participation.

It was apparent at COP-9 that BINGOs were concerned to maintain the effectiveness of their participation irrespective of the individual merits of each technique outlined above. They offered proposals for improving the process and communicated with the Secretariat to that end. The designated BINGO contact person at COP-9 remarked that BINGOs generally prefer less formal presentations and less structured panel sessions which enable audience participation and greater opportunity for free form dialogue.[968] Other oft-repeated proposals include swifter document dissemination, improved access to the floor during plenary sessions and informal meetings, the opportunity for oral interventions during discussion of specific agenda items or soliciting NGO views through the secretariat and greater expert participation. BINGOs suggested a Policy Dialogue Forum open to all States, NGOs and intergovernmental organisations for a frank exchange of all optimum policy options in a transparent and depoliticized forum. Business also proposed the opportunity to comment on issues whenever States were invited to do so and to circulate comments via a miscellaneous document. Although the secretariat is receptive to these suggestions, States are careful not to establish precedents and are guided by their requirements on particular occasions.

The process of achieving privileges from the secretariat is incremental: once secured they must be safeguarded and can be withdrawn without notice upon discretion or where abused. The principle of parity requires that advances

[968] Mr Jack Whelan, *supra n965.*

made by one constituency group be extended to all others. For example, business proposed that States and accredited BINGOs wishing to participate should have regularly scheduled open meetings at each subsidiary body session which other NGOs may observe. Several BINGOs have adversely affected the terms of NGO participation. For example, suggestions were made by States to filter out NGOs who espoused interests at odds with the Convention's objectives after several business coalitions inaccurately derided the scientific consensus underpinning negotiations. NGOs are prohibited from approaching national delegations during plenary debates on account of one BINGO prompting a co-ordinated series of interventions. Indeed, the CDM Executive Board closed its first meeting to observers to prevent inappropriate corporate lobbying.

States have attempted to formalise communication channels with NGOs within the UNFCCC process. For example, New Zealand expressed a willingness to receive perspective and counsel directly from business in the mid-1990s. The COP conducted a workshop concerning NGO inputs into the UNFCCC process and on the desirability of NGO advisory committees.[969] Business supported a more structured process for expanding its role, effectively communicating business views and assisting deliberations. Industry representatives argued that business participation is critical for selecting, developing and implementing economically-sound policies and programmes. Moreover, businesses are significant stakeholders having impacts upon economic growth, employment, competitiveness, environmental protection and social

[969] UNFCCC, COP Decision 6/CP.1 (1995).

development. Their inclusion 'provides an assurance that practical technical and economic information will be used'. Business argued that creating a new and additional communication channel was appropriate since no other arrangement currently fulfilled the needs of either industry or government. A single mechanism involving different constituencies was neither feasible nor desirable.[970]

As noted above, the discretion of States and chairpersons is critical to NGO participation within UNFCCC practice. The majority of NGOs consider that current mechanisms for soliciting NGO input require strengthening.[971] The Subsidiary Body for Implementation undertook a comparative study of NGO entitlements associated with consultative status within various UN Agencies.[972] It concluded that the UNFCCC secretariat 'tended to generosity' where State Parties required consultation or technical input and secretariat practices were frequently improvised but never codified.[973] Systematically soliciting NGO perspectives would add a 'new dimension': it is uncertain whether States wish to routinely obtain NGO perspectives and whether NGOs are entitled to be heard.[974] Additional questions include how to address different opinions within the same constituency, whether States should be encouraged to engage with lobby groups at national levels so that interaction between NGOs and the Convention process reflects international interests and

[970] UNFCCC, Workshop on Consultative Mechanisms for NGO Inputs to the UNFCCC, Views of NGOs, UN Doc FCCC/SBSTA/1996/MISC.2 (1996), 2-6.
[971] UNFCCC, Mechanisms for Consultations with NGOs, UN Doc FCCC/SBI/1997/MISC.6, 4-9, 14.
[972] UNFCCC, Involvement of NGOs: Mechanisms for Consultation, UN Doc FCCC/SBI/1998/5.
[973] UNFCCC, Mechanisms for Consultations with NGOs, Addendum, The Participation of NGOs in the Convention Process, FCCC/SBI/1997/14/Add.1, paras 7-8.
[974] UNFCCC, Mechanisms for Consultations with NGOs, UN Doc FCCC/SBI/1997/14, paras 29-30.

whether States should have direct access to the unfiltered views of individual corporations.

Three constituencies participated in the workshop convened by the COP: BINGOs, ENGOs and municipal leaders or local authorities. BINGOs proposed the adoption of a business consultative mechanism (BCM, see Annex 6). It would not form part of the UNFCCC structure and its framework, activities and internal processes would be decided by participating BINGOs.[975] Achieving a consensus perspective would not be required since the full range of business opinion informs the process and demonstrates the complexity of issues requiring resolution by States. Furthermore, the BCM was not a process for negotiating commitments from business which can only be made at national or regional levels. In industry's view, NGOs 'cannot and should not' be negotiating parties who assume commitments on behalf of national constituencies. It is for States not NGOs to decide first what is environmentally necessary based on credible scientific assessment and second what is practically achievable given credible technical and economic assessments.

Other NGOs rejected the proposal since mechanisms for NGO input must be open and available to all. A business consultative mechanism would provide industry with privileged access, enable the submission of unreviewed material and kerb the numerical superiority of other NGOs. Commercial recommendations have a self-interested flavour and NGOs are wary of

[975] UNFCCC, Mechanisms for NGO Consultations: Workshop on Consultative Mechanisms for NGO inputs to the UNFCCC, UN Doc FCCC/SBSTA/1996/11, 9- 21.

potential conflicts of interest that purveyors of particular technologies possess. Consensus on consultative mechanisms between NGOs participating at the workshop could not be identified. The Subsidiary Body for Scientific and Technological Advice accordingly proposed that for the time being existing consultative processes would be improved.[976]

Notwithstanding all the above, the UNFCCC reports for COP 9 emphasized State-centricity in decision-making and only recognized the efforts of non-State actors en passant. The Conference of the Parties had welcomed newly-admitted NGOs and 'invited them to play an active role', observed that several companies were accredited as operational entities under the CDM and noted the fact that statements had been made by organised business groups. The report of the roundtable session on technology transfer identified the 'catalytic role governments play' whereas the 'importance of the private sector was acknowledged'.[977] The Subsidiary Body for Scientific and Technological Advice welcomed the exchange of views with industry during pre-sessional consultations, invited business to continue cooperation with the Expert Group on Technology Transfer and envisaged industry participation in sector-specific workshops.[978] The Subsidiary Body for Implementation foreshadowed concluding arrangements with the private insurance sector for developing alternative risk transfer mechanisms.[979] The next Part continues this theme –

[976] UNFCCC, Report of the Subsidiary Body for Scientific and Technological Advice on the Work of its Third Session, UN Doc UNFCCC/SBSTA/1996/13, para 50(c).
[977] UNFCCC, Report of COP-9, UN Doc FCCC/CP/2003/6 (2004), paras 29-30, 114, 116, 129, 130, 135.
[978] UNFCCC, Report of the Subsidiary Body for Scientific and Technological Advice on its Nineteenth Session, UN Doc FCCC/SBSTA/2003/15 (2004), paras 11, 34, Annex 1.
[979] UNFCCC, Report of the Subsidiary Body for Implementation on its Nineteenth Session, UN Doc FCCC/SBI/2003/19 (2004), Annex 1.

corporate attempts to influence their participatory terms and the substantive impacts this may have – but broadens the scope of study.

3. The NGO Role in defining the Modalities for their Participation.

Part Three considers the role of non-State actors in developing the applicable procedural rules governing their attendance and conditions of participation within other intergovernmental fora. The term NGO will apply generally to include corporations and references will be made to international conferences convened under UN auspices, World Summits and Special Sessions of the General Assembly. Heightened NGO demand for access to intergovernmental deliberations brought these fora to the forefront during the 1990s. During the 1970s States had recognized the significance of NGO education and publicity for implementing international policy decisions.[980] Attempts by NGOs to become involved in intergovernmental deliberations initially encountered resistance from States and only since the 1990s are the substantive contributions of non-State actors being recognized.[981] For example, Agenda 21 seeks to enhance or establish formal participatory procedures 'for the involvement of [NGOs] at all levels from policy-making and decision-making to implementation'.[982] Unique features of the modalities for NGO participation will be identified in the fields of environmental protection and sustainable development before being contrasted with that of human rights.

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[980] Clark A.M., Friedman E.J. & Hochstetler K., 'The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights and Women' (1998) 51(1) *World Politics* 1, 10.

[981] For accounts of NGO activity within various institutional settings of the UN from the 1970s up until the 1990s, see Willetts P. (Ed), 'The Conscience of the World': The Influence of NGOs in the UN System, Hurst & Co, London, 1996, 86-92, 120-141, 149-173, 218-230.

[982] Agenda 21, Chapter 27, *supra n*28.

Procedural rules are typically provisionally drafted by a Preparatory Committee (PrepCom) before endorsement by the UN General Assembly and final adoption by States at the event itself. The General Assembly invites NGOs to participate in PrepCom organisational sessions where they provide their views on the content, scope and objectives of the event. Organisational arrangements are finally approved taking into account NGO proposals on the terms of their participation. The importance of NGO participation during the preparatory process and the event itself is recognized by States in all procedural rules. The impact of NGOs on the outcome of the Conference is therefore a product of NGO interest in ensuring their participation in response to invitations and of the receptiveness of States to their contributions.

This Part presents the arrangements for NGO participation first for international conferences convened under UN auspices and World Summits and second with respect to Special Sessions of the General Assembly. The former compares the role of corporations and NGOs across the fields of environmental protection and sustainable development with that of human rights where the commercial presence is much less apparent. The objective is to determine whether the nature of the topic or the character of the NGO makes any difference to the conditions for participation. Although these samples illustrate the range of possible characteristics they also evidence two continuing themes: first, the emergence of the private sector as a distinct group given the topic of the meeting and second, that the conditions of non-State

actor participation are tightly controlled by States notwithstanding efforts by them to include NGOs.

3.1 International Conferences and World Summits.

i) Environmental Protection and Sustainable Development.

In preparing for the UN Conference on Environment and Development (UNCED) of 1992, the Secretary-General was requested to solicit NGO views on the objectives, content and scope of the Conference with the assistance of NGOs then in consultative status with ECOSOC. [983] Effective NGO participation within the Preparatory Committee and the Conference was encouraged to enrich deliberations, disseminate results and mobilize public support. [984] A variety of forums were proposed to facilitate productive interaction between States and NGOs including national and international briefings, NGO Conferences and national arrangements. [985] NGOs could contribute information and counsel on matters of special relevance through papers, presentations and speeches as well as a half-day informal dialogue.[986] The Preparatory Committee decided that its 'policy should be to encourage an equitable representation of NGOs from developed and developing countries and from all regions and also to ensure a fair balance between NGOs with an environment focus and those with a development focus.' Appointing NGOs to

[983] UNGA Resolutions 43/196 (1988) & 44/228 (1989), para 12.
[984] Report of the Secretary-General, UN Doc A/CONF.151/PC/2, para 33.
[985] UNCED Preparatory Committee, Suggested guidelines for the contribution of relevant NGOs to UNCED, First Organisational Session, UN Doc A/CONF.151/PC/CRP.5.
[986] UNCED Preparatory Committee, Report of the Secretary-General to UNCED, First Organisational Session, UN Doc A/CONF.151/PC/9 (1990), paras 11-14.

official delegations was encouraged.[987] NGOs 'shall not have any negotiating role' in the preparatory process nor in the Conference itself. Oral interventions would 'in accordance with normal UN practice' be at the discretion of Chairpersons and require the consent of the relevant body.[988] These arrangements were subsequently approved by the General Assembly.[989]

In anticipation of UNCED the ICC formulated a code of conduct at the Second World Industry Conference on Environmental Management in 1991 and the World Business Council for Sustainable Development (WBCSD) was established to promote self-regulation.[990] Over a thousand individual firms participated in the Summit with around forty involved in a broad range of activity.[991] The ICC responded positively to Agenda 21.[992] The WBCSD considered that it had successfully recast business as an efficient economic change agent which promoted sustainable development rather than the principal source of environmental pollution.[993]

For the 1994 International Conference on Population and Development ECOSOC was requested to adopt modalities ensuring NGO participation 'taking into account the procedures followed in the UNCED process and the experience gained in this regard during previous UN population

[987] UNCED Preparatory Committee, 'The Role of NGOs in the preparatory process for the UN Conference on Environment and Development', First Organisational Session, UN Doc A/45/46 (1990), Annex I, Decision 1/1, paras 1, 3; UNGA Resolution 45/211 (1990), para 13.
[988] UNCED, Report of the Preparatory Committee for UNCED, UN Doc A/45/46, Annex I, Decision 1/1, para 4; UNGA Resolution 45/211 (1990), para 13.
[989] UNGA Resolution 46/168 (1991), para 9(f).
[990] WBCSD, Changing Course: A Global Business Perspective on Development and the Environment, MIT Press, Massachusetts, 1992, Chapters 11-17.
[991] UNTCMD, Follow-up to UNCED as Related to TNCs, UN Doc E/C.10/1993/13.
[992] Willums J.-O. & Goluke U., From Ideas to Action: Business and Sustainable Development, ICC, Norway, 1992, 20-1.
[993] WBCSD, Annual Review 1996, Atar Roto Presse SA, Geneva, 3.

Conferences.'[994] Once again NGOs would have no negotiating role 'in recognition of the intergovernmental nature' of the Conference.[995] As was the case at UNCED, relevant NGOs could 'briefly' address the Preparatory Committee, any oral interventions 'should, in accordance with normal UN practice, be made at the discretion of the Chairman' and any written submissions 'will not be issued as official documents except in accordance with UN rules of procedure.'

By the late 1990s the General Assembly began to differentiate between NGOs in recognition of their diversity and more importantly terms such as 'stakeholder', 'civil society' and 'the private sector' begin to appear. For example, the Secretary-General of the Third UN Conference on the Least Developed Countries held in 2001 was requested 'to make arrangements, on the basis of consultations with Member States, to facilitate the involvement of civil society, including NGOs and the private sector, in the preparatory process and the Conference'.[996] Accrediting 'interested civil society actors, in particular NGOs and the business sector' was a matter for the Bureau of the Preparatory Committee.[997] States make a special effort to attract private sector interest where the subject matter of the Conference would usefully benefit from commercial perspectives. Particularly noteworthy were preparations for

[994] UNGA Resolution 47/176 (1992), paras 12, 13.
[995] ECOSOC Resolution 1993/4, Annex containing the Guidelines for the Participation of NGOs in the International Conference on Population and Development and its Preparatory Process, paras 9, 10, 11; UNGA Resolution 48/186 (1993), para 8.
[996] UNGA Resolution 53/182 (1998), para 9.
[997] UNGA Resolution 55/214 (2000), para 8; Preparatory Committee to the Third UN Conference on the Least Developed Countries, Report of the Second Organisational Session, UN Doc A/CONF.191/3 (2001), Annex 1: Decision on Accreditation on Civil Society Actors.

the 2002 International Conference on the Financing for Development.[998] The Ad Hoc Open-ended Working Group recommended that the preparatory process and final event should involve interactive and other innovative modalities enabling participation by all relevant stakeholders.[999] The General Assembly moreover encouraged flexible consultation.[1000] The Secretary-General observed that each stakeholder community had different traditions and practices regarding UN engagement, potentially different contributions to make and different priorities given the scope and agenda of the Conference.[1001] Matching NGO diversity with particular intergovernmental requirements accordingly lent itself to tailoring NGO participation rather than transplanting templates from elsewhere.

The Bureau was requested to consider 'possible proposals and recommendations for additional modalities for the participation of the private sector'.[1002] It differentiated between several distinct private sector stakeholders on account of the specific functions they performed: private banks, institutional investors, other market institutions, non-financial corporations and business associations. Efforts were made to identify the 'leading' institution within each category as well as adequate representation from business entities in developing countries.[1003] The Bureau envisaged three modalities for their

[998] UNGA, Report of the Second Committee at the resumed Fifty-Second Session, UN Doc A/52/840 (1998).
[999] Report of the Ad Hoc Open-ended Working Group, UN Doc A/54/28, Ch IV, para 20 (c).
[1000] UNGA Resolution 54/196 (1999), paras 6, 10.
[1001] UN Secretary-General, Consultations on the potential modalities of the participation of all relevant stakeholders in both the substantive preparatory process and the high-level intergovernmental event on financing for development, UN Doc A/AC.257/1 (2000), para 20.
[1002] UNGA Resolution 54/279 (1999), para 4.
[1003] Report of the Bureau to the resumed organisational session of the Preparatory Committee for the International Conference on the Financing for Development, UN Doc A/AC.257/8 (2000), para 13.

participation: written statements to and attendance at meetings of the Preparatory Committee and intergovernmental event; hearings and panel sessions on selected topics; and 'web-based consultations' soliciting comments on policy proposals. NGOs including business were welcome to organize information sessions in which members of the Preparatory Committee could participate.[1004] A two-day set of panel discussions was conducted with business representatives and side activities held in parallel to the final event were encouraged.[1005] Focused and interactive roundtables and workshops where other NGOs could present contrary opinions was the preferred modality for engaging with the business community.

The Business Hearings involved short presentations by participants, reactions from appointed commentators and an 'interactive dialogue' before outcomes were recorded in summary reports and distributed to national delegations for use in deliberations. Seventeen businesspersons made the point that firms look for growth potential, satisfactory rates of return and the ability to spread risk.[1006] They argued that States should not abdicate their responsibility to establish an enabling regulatory environment and over rely upon self-regulation. A civil society hearing was also organised.[1007]

[1004] UNGA, Preparatory Committee for the International Conference on the Financing for Development, Modalities of the participation of all relevant stakeholders in the substantive preparatory process and the high-level intergovernmental event on financing for development, UN Doc A/AC.257/6 (2000), paras 14-20.

[1005] Report of the Bureau to the resumed organisational session of the Preparatory Committee for the International Conference on the Financing for Development, UN Doc A/AC.257/9, paras 12-14.

[1006] Preparatory Committee for the International Conference on Financing for Development, Financing for Development: Hearings with the business community, Summary of panel presentations and discussion, UN Doc A/AC.257/19 (2000), para 34, 39, 85, 104, 108.

[1007] Resumed Organisational Session of the Preparatory Committee to the International Conference on the Financing for Development, Conference Room Paper One, UN Doc A/AC.257/CRP.1 (2000).

In light of these hearings the Bureau was requested to 'explore ways and means to deepen the efforts of all relevant stakeholders' including the business sector.[1008] It was noted that the business sector is heterogeneous and identifying representatives was difficult. The Preparatory Committee concluded that it would be useful to appoint appropriate interlocutors representing different segments of the business community.[1009] The ICC, trade associations and corporate coalitions were encouraged to use internal processes to generate written contributions on substantive issues and surveys on business opinion. Business sector representatives would be selected by reference to their business interests, likely investment in developing States, geographical distribution and gender perspective. They need not be corporate chairpersons but should possess professional hands-on expertise, be sufficiently influential and competent to provide innovative input. The General Assembly approved these informal discussions with business, authorized other forms of input and encouraged additional initiatives which involved business at national and regional levels.[1010] The preparatory process for the International Conference on Financing for Development is particularly noteworthy for its sophistication and the diverse range of practices which can be utilized.

[1008] Report of the Second Organisational Session of the Preparatory Committee to the International Conference on the Financing for Development, UN Doc A/55/L.77 (2001), para 7.
[1009] UNGA, Preparatory Committee for the International Conference on Financing for Development, Third Report of the Bureau, UN Doc A/AC.257/22 (2001), paras 18-27 & Addendum 1, Report of the Task Force established by the Bureau to consider modalities for engaging the business community in the financing for development process, paras 18-27.
[1010] UNGA Resolution 56/445 (2001), para 9.

ii) The International Protection of Human Rights.

States have also attempted to include human rights NGOs within intergovernmental deliberations. For example, all NGOs were requested to undertake reviews and submit recommendations by way of assisting the Preparatory Committee for the 1993 World Conference on Human Rights and to participate actively therein.[1011] The Preparatory Committee successfully recommended that participation be extended to those NGOs in consultative status with ECOSOC who are also active in the development field.[1012]

Although not a human rights conference per se, the Fourth World Conference on Women during 1995 considered inter alia the role of human rights for empowering women. The Commission on the Status on Women acted as the preparatory body. It requested consultative status for those NGOs concerned with the advancement of women and recommended that ECOSOC Resolution 1296 (1968) be reviewed to make consultative status more accessible.[1013] ECOSOC extended the application period for accreditation when States excluded NGOs from the Preparatory Committee's fourth organisational session.[1014] The Commission also invited States 'to include, whenever possible, NGOs in their delegations' and that 'the proper functioning of the Conference and the efficient participation of NGOs' required that the number

[1011] UNGA Resolution 45/155 (1990), para 10.
[1012] UN Doc A/CONF.157/PC/54 (1992), Annex II; UNGA Resolution 47/122 (1992).
[1013] Commission on Status on Women acting as the Preparatory Body, Decision 36/8 'Preparations for the Fourth World Conference on Women: Action for Equality, Development and Peace' UN Doc E/CN.6/1992/13, paras 3, 4.
[1014] *Ibid*, Acting as the Preparatory Body, Draft decision on the accreditation of NGOs to the Fourth World Conference on Women and its preparatory process, UN Doc E/CN.6/1995/L.20 (1995).

of NGOs not be excessive.[1015] The importance of 'close proximity' including 'some concurrence in time' between the Conference and the NGO Forum was emphasized. [1016] The Beijing Conference marked the largest recorded assembly of NGOs and fifty-one NGO statements were made before the plenary. However, NGOs were not permitted to address the Main Committee and the result of the NGO Forum was not part of the Final Report. Thus although the Conference targeted particular NGOs the modalities for their participation did not approach the degree of sophistication undertaken for the International Conference on Financing for Development considered above.

The emergence of a distinctive 'private sector' within a broader 'civil society' during the 1990s as noted above is evident not only in the strictly commercial sphere. For example, NGOs particularly from developing States were invited to participate in the 1996 UN Conference on Human Settlements with the participatory arrangements expected to follow that of UNCED. [1017] The General Assembly called 'upon all States to encourage the broad-based participation of local authorities and all relevant actors, including the scientific community, industry, trade unions, NGOs and the private sector, in the national, regional and international preparatory process and to encourage a wide exchange of information and experience in this respect'.[1018] Moreover, 'every effort should be made to involve the greatest representation of interested

[1015] Commission on the Status of Women, Resolution 37/7 (1993), paras 1, 3.
[1016] Commission on the Status of Women acting as the Preparatory Body, Decision 36/8 (1992).
[1017] UNGA Resolution 47/180 (1992), para 6.
[1018] UNGA Resolution 49/109 (1994), para 16.

groups' including the private sector to formulate credible action plans.[1019] Meaningful NGO participation including that of 'industry, commerce, finance and services' was sought 'with a view to attaining representation of the broadest possible spectrum of views and contributions'. Illustrative of general trends elsewhere, Habitat II also 'needs to become a Conference of partnerships'. However, since it was observed that 'Member States have the sole and final responsibility in the decision-making process'[1020], it is apparent that the conditions of NGO participation are circumscribed by States.

NGO participation in World Summits generally occurs on similar terms as those of international Conferences. For example, NGOs in consultative status with ECOSOC were invited 'to contribute in accordance with established practice' to the 1995 World Summit for Social Development as well as its preparatory process.[1021] The General Assembly called upon NGOs 'to contribute fully to the work of the Preparatory Committee and to the Summit'.[1022] The Preparatory Committee also adopted special measures to facilitate the participation of NGOs from developing countries.[1023] At the 2002 World Summit on Sustainable Development NGOs could access official

[1019] Report of the Secretary-General to the First Organisational Session of the Preparatory Committee to the UN Conference on Human Settlements, UN Doc A/CONF.165/PC/2 (1993) para 24 & Annex 1.
[1020] Report of the Third Organisational Session of the Preparatory Committee to the UN Conference on Human Settlements, UN Doc A/CONF.165/PC/3/7 (1996), Decision II/3, Annex, paras 2 & 3.
[1021] UNGA Resolution 47/92 (1992), para 17.
[1022] UNGA Resolution 48/100 (1993), para 9.
[1023] World Summit on Sustainable Development, Preparatory Committee for the World Summit for Social Development at its organizational session, UN Doc A/48/24 (1993), Annex II, Decision 4.

documentation, distribute written statements through the secretariat, were briefed by it and were allocated office space for the duration.[1024]

3.2 Special Sessions of the UN General Assembly.

NGO participation in specially-convened Sessions of the General Assembly is somewhat different. NGOs may participate where they have been accredited to ECOSOC by virtue of Resolution 1996/31 (1996), have previously been accredited by the Preparatory Committee which organized the earlier Conference or have a collaborative relationship or partnership with the intergovernmental organisation entrusted with conducting the follow-up Session.

The procedural rules of the General Assembly may apply to Special Sessions.[1025] For example, the Commission on the Status of Women was nominated as the preparatory committee for the 2000 Special Session on Women ('Beijing + 5'). Participation was open to States, specialized Agencies and observers in accordance with the practice of the General Assembly.[1026] Active NGO involvement was encouraged.[1027] Those NGOs in consultative status with ECOSOC made statements during the plenary debate and before

[1024] WSSD, Information for Participants, UN Doc A/CONF.199/INF/1 (2002), paras 29-30, 60-61.
[1025] UNGA Rules of Procedure, UN Doc UNGAOR/Rules*/Rev.15/1984.
[1026] UNGA Resolution 52/100 (1997), para 46.
[1027] UNGA Resolution 54/142 (1999), para 15.

the Ad Hoc Committee of the Whole.[1028] However limited space restricted more effective participation.

Alternatively, Special Sessions may adopt the procedural rules of the earlier Conferences from which they spring. For example, accreditation and preparatory processes for the Special Session for an Overall Review and Appraisal of the Implementation of the Outcome of the UN Conference on Human Settlements (Istanbul + 5) during 2001 followed the procedural rules adopted at the UN Conference on Human Settlements (Habitat II).[1029] States were encouraged to establish participatory mechanisms involving all civil society actors including the private sector to assess and review the Habitat Agenda[1030] Financial assistance for NGO attendance was also contemplated: all Member States 'in a position to do so [were invited] to provide financial resources...to enable least developed countries and their national civil-society partners to prepare adequately for, and be fully involved in, the preparatory process and the special session itself.'[1031]

The General Assembly has upon occasion specified the desired attributes of NGO participants. For example, 'associations of people living with HIV/AIDS, NGOs and the business sector, including pharmaceutical companies' were invited to participate in the preparatory process and Special Session for the

[1028] Commission on the Status of Women acting as the Preparatory Committee, UN Doc A/S-23/2 (2000), Chapter V, Section B, Decision II, para 16.
[1029] Report of the Commission on Human Settlements acting as the Preparatory Committee at its First Organisational Session, UN Doc HS/C/PC.OS/4 (1999), paras 2, 3.
[1030] UNGA Resolution 51/177 (1996), paras 8. 10.
[1031] UNGA Resolutions 54/209 (1999), para 5 & 55/195 (2000), para 11 ('voluntary financial contributions').

Review of the Problem of HIV/AIDS in All its Aspects in 2001.[1032] Relevant NGO qualifications included evidence of recognized work in the area of HIV/AIDS and previous experience in regional and/or international events. NGOs were also allowed to attend two open-ended informal consultations of the plenary and panel discussions were established. Summary outcomes would constitute informal input into the preparatory process and the Special Session itself.[1033]

To summarise thus far, PrepComs have encouraged States to solicit the maximum possible input from non-State actors in preparatory processes at international, regional and national levels. This has been occurring since at least preparations for the UN Conference on the Human Environment during the late 1960s. However, there is no assurance that NGO contributions will be rewarded or acknowledged in the final product. Preparatory Committees typically encourage broadly representative NGO participation with an appropriate and equitable geographical balance and possessing a relevant orientation and organisational competence. However, the NGOs which actually participate are predominantly from Northern industrialized States. Hence financial assistance may be provided to encourage the participation of NGOs from developing States. NGO observers are also expected to be represented at senior levels. Developments since the 1990s suggest that distinctions are increasingly being made between non-State actors not for the purposes of differential treatment but by way of recognizing diversity between

[1032] UNGA Resolutions 55/13 (2000), paras 13-14 & 55/242 (2000), para 8.
[1033] UNGA, Conference Room Paper of the President on the modalities for civil society involvement in the Special Session of the UNGA on Review of the Problem of HIV/AIDS in All its Aspects, UN Doc HIV/AIDS/CRP.1 (2000), paras 18, 23, 34, 47, 50, 51, 53.

non-State actors. The 'private sector' is frequently a pseudonym for business and industry but need not be so interpreted. Trends also indicate that the modalities for NGO participation evolve by accretion based upon experimentation and prior experience. Innovative techniques suggested by NGOs such as roundtables and panel discussions which encourage greater interaction with States may be adopted and utilised elsewhere. NGO forums or side events conducted in parallel to intergovernmental proceedings are encouraged.

The procedural characteristics of Conferences, summits or special sessions suggest that NGOs are intended to assist deliberations rather than participate in decision-making. Although problems of causality make it difficult to assess actual impacts any instances of apparent NGO influence only arise with the concurrence of States. State practice in the environmental, human rights and developmental contexts illustrated above indicates that NGO participation is tightly controlled, sometimes contested and occasionally resisted by States. In light of NGO participation in defining the terms of their participation and the procedural rules with respect to accreditation, it remains to be considered what entitlement States are prepared to grant them for the purposes of enriching deliberations.

4. The Procedural Rules applicable to UN Conferences.

The importance of NGO participation at COPs was discussed in the specific context of the case study presented in Part Two (the UN Framework

Convention on Climate Change). Part Three above considered NGO participation within ad hoc international conferences, global summits and five-yearly implementation reviews organised by the UN General Assembly. This Part undertakes a comparative analysis of the criteria for accreditation and modalities for NGO participation. Once again NGO refers to all non-State actors including corporations. The objective of this Part is to discern whether there could be an emergent right to participate under common international procedural law or whether NGO participation remains reliant on a case by case basis. If the former, what is the content and scope of this emergent right, particularly as currently circumscribed under international environmental law? In answering this question reference will be made to procedural rules drawn principally from COPs in the environmental field with useful comparisons made to the modalities for NGO participation within the monitoring mechanism of human rights institutions.

The arrangements for NGO participation consist of two components: the process of prior accreditation and the modalities for participation at the Conference itself. As considered above, the latter seek effective NGO participation and information exchange between States and NGOs. Procedural mechanisms seek to mobilize outside talent, expertise and experience and channel ideas and proposals into deliberations, thereby enhancing the accuracy and effectiveness of intergovernmental outcomes. NGO participation at COPs is circumscribed by a primary enabling provision located within the text of the Convention, secondary rules of procedure for the COP itself, any relevant decisions of the governing bodies and finally the practice of States, the relevant

secretariat and non-State actors. Host States also influence matters, for example, by expediting visas, timetabling convenient schedules and situating proceedings in accessible locations. Annex 5 reproduces the relevant treaty provision, procedural rules and governing body decisions in the context of the UNFCCC. This Part considers first the criteria and process of accreditation and second the secondary rules of procedure for a COP.

4.1 Prior Accreditation Procedures.

NGOs must first pass the procedure for accreditation to attend a COP. The Conference secretariat or bureau is responsible for evaluating applications and admission is without prejudice to subsequent decisions by the COP. The criteria for accreditation are first formulated by Preparatory Committees during organisational sessions and then endorsed by the General Assembly. NGOs seeking admission as observers must provide official documents describing their mandate, scope and governing structure, evidence of non-profit status, activities suggesting competence, affiliation details, funding sources, publications and designated contact points.

NGOs in consultative status with ECOSOC or the relevant UN Commission are accredited to participate in the preparatory process and the Conference itself without further screening after expressing their interest to the secretariat. Other NGOs must apply to the secretariat and include information on their relevance and special competence. 'Relevance' is determined by their background and involvement in the issues to be considered at the Conference.

Conferences may have particular agendas and NGOs may be requested to confirm their interest in the objectives of the event.[1034] The procedure for the ad-hoc accreditation of business associations is the same as for NGOs not accredited to ECOSOC.

The Secretariat recommends NGOs for accreditation to the Preparatory Committee at least one week before the beginning of each organisational session. Accreditation is therefore a continuous process.[1035] Where unable to recommend NGOs the secretariat has to provide reasons. The Committee decides on accreditation by consensus within twenty-four hours. Final decisions are taken by the Preparatory Committee if a State expresses concerns. Where unable to decide interim accreditation shall be granted until a final decision is taken. Hence, NGOs may not receive accreditation where a State raises objections but the question is ultimately decided by vote or consensus within the Committee. Only exceptionally are NGOs refused accreditation.

NGOs must be 'qualified in matters covered by the Convention' for attendance at a COP. They must be relevantly competent or represent a broad constituency interested in the particular issue. Furthermore, there must not be any objection from State Parties. NGOs do not possess a recognized right of entry to a COP and the ultimate decision lies with States. For example,

[1034] Cp ECOSOC Resolution 1993/4, Annex containing the Guidelines for the Participation of NGOs in the International Conference on Population and Development and its Preparatory Process; UNGA Resolution 48/186 (1993), para 8.

[1035] 177 admitted at the first session (UNFCCC, Admission of Organisations as Observers, UN Doc FCCC/CP/1995/3 (1995)), 36 for the second (UN Doc FCCC/CP/1996/3), 157 for the third (UN Doc FCCC/CP/1997/4), 66 for the fourth (UN Doc FCCC/CP/1998/14 & Add. 1), 36 for the fifth (UN Doc FCCC/CP/1999/4 & Add.1), 23 for the sixth (UN Doc FCCC/CP/2000/2/Add.1 & FCCC/CP/2001/4), 19 for the seventh (UN Doc FCCC/CP/2001/7), 34 for the eighth (UN Doc FCCC/CP/2002/5) and 60 NGOs were newly admitted for COP-9 (UN Doc FCCC/CP/2003/4).

'technically qualified' bodies or agencies 'shall' be admitted and 'shall have the right to participate but not to vote' in meetings under the Convention on International Trade in Endangered Species (CITES) provided that they 'have been approved for this purpose by the State in which they are located'.[1036] To similar effect, qualified NGOs 'shall be entitled to participate' under the Aarhus Convention 'unless at least one third of the Parties present in the meeting raise objections'.[1037] At most there is only a presumption of admission given the possibility of objection by States. The word 'shall' indicates an entitlement to participate and NGOs already accredited to ECOSOC have at least a legitimate expectation of admission. Representatives from organisations and other entities having a standing invitation from the General Assembly have a greater prospect of admission. Furthermore, accreditation also carries over from earlier COPs or where NGOs have already been accredited by the relevant UN Agency. Duly accredited NGOs receive notification of impeding COPs and the proposed agenda items.[1038] Conversely, accreditation to a Conference may facilitate accreditation to a UN Agency or commission. For example, NGOs accredited to UNCED were automatically given the right of accreditation to the Commission on Sustainable Development.

Annex 2 and the tabular summary contained overleaf illustrates the accreditation criteria with respect to international conferences convened under UN auspices, World Summits and Special Sessions of the General Assembly

[1036] Art 11(7), 1973 Washington Convention on International Trade in Endangered Species, 993 *UNTS* 243.
[1037] Art 10(5) Aarhus Convention, *supra n*29.
[1038] Eg UNFCCC Secretariat, Notification, UN Doc ICA/OBS/COP9/03 (2003).

since the early 1990s. Several conclusions may be made. First, the information required as a precondition for accreditation has grown by accretion, continues to do so and has become increasingly specific. The required information was codified by ECOSOC Resolution 1996/31. Since that date States have specified additional requirements such as possessing a 'special interest', NGO roles during the implementation phase and the desirability of equitable participation. There is therefore a risk that entry hurdles could be raised still higher. For example, NGO participation could be preconditioned with greater information disclosure (reporting, financial accounting), transparency or accountability (democratic decision-making, oversight by independent ombudsman or panels). On the other hand, it is noteworthy that the non-profit criterion is partly irrelevant: individual businesses were invited to attend the International Conference on Financing for Development and a legitimate purpose of trade associations is to defend and advance the interests of enterprises they represent.

Second, accreditation remains the 'prerogative of Member States'. That said, NGOs already accredited to ECOSOC 'shall as a rule be accredited' to attend the conference. Those seeking ad hoc accreditation have to apply to the secretariat as outlined above. These NGOs are entitled to an 'opportunity to respond' to objections from States and reasons for decisions where refused accreditation by the secretariat. Hence, ECOSOC-accredited NGOs possess at least a legitimate expectation of attendance whereas other NGOs attend on the basis of a privilege conferred by States. The underlying rationale of soliciting

NGO contributions would encourage States to admit NGOs through the gateway and only occasionally refuse accreditation.

Comparative Table of Information required for Accreditation

Information Required	UNCED Rio (1992)	WSSD Copenhagen (1995)	Copenhagen + 5 (2000)	Special Session On Women (2000)	Habitat 2 (Istanbul + 5) (2001)	WSSD Johannesburg (2002)
NGO Name						√
Contact Information						√
Purpose	√	√	√	√	√	√
Programmes & Activities	√	√	√	√	√	√
Location of Activities	√	√	√	√	√	√
Confirmation of Activities		√	√	√	√	√
Annual Reports	√	√	√	√	√	√
Financial Statements	√	√	√	√	√	√
Financial contributors including government			√	√	√	√
Members of Governing Body	√	√	√	√	√	√
Nationality of members of governing body	√	√	√	√	√	√
Description of membership	√	√	√	√	√	√
Number of members	√	√	√	√	√	√
Names of Organisational Members			√	√	√	√
Geographical Distribution of members	√	√	√	√	√	√
Constitution or by-laws			√	√	√	√
Completed Registration form						√

4.2 The Rules of Procedure.

Organised business groups such as the ICC and trade associations formally participate on the same procedural terms as other NGOs: as observers. There are several preliminary provisions common to all procedural rules which are noteworthy. First, State Parties retain full procedural capacity including the right to vote. In this respect NGOs have not called for voting rights since this entails responsibility for decisions taken. Second, Parties are represented by national delegations consisting of a head and such other accredited representatives, alternate representatives and advisers as required. Third, COP procedural rules typically apply mutatis mutandis to proceedings of subsidiary bodies. All meetings of the COP and subsidiary bodies are held in public unless decided otherwise. However, some procedural rules provide that subsidiary body meetings are conducted privately as a general rule. Fourth, Presidents are responsible for the conduct of COP proceedings including calling speakers to order and imposing time limitations. Finally, NGO participatory entitlements are always listed last in the pecking order of observers behind Specialised Agencies and intergovernmental organisations.

By way of illustration Annex 3 reproduces the modalities for NGO participation within several COPs. The standard formula in the first operative paragraph is that 'any body or agency whether national or international, governmental or nongovernmental' 'qualified' in relevant fields and informing the secretariat of its wish to be represented at a meeting of the COP as an

observer 'may be admitted unless at least one-third of the Parties present object'. The procedural rules moreover provide that secretariats shall notify these relevant bodies and agencies of upcoming COP meetings. Registration with the secretariat confers the legitimate expectation (but not the right) to observe COP meetings and meetings of subsidiary bodies.

Several observations may be made. First, the standard formula is subject to considerable variation. Significant modifications include omitting 'whether national and international' and extending NGO participation to 'any meeting'. Most importantly NGOs must be qualified in the subject covered by the convention and in one instance 'have special qualifications'. The procedural rules for CITES are the most detailed and contemplate seating arrangements, a right to speak, the submission of 'informative documents', exhibitions, a complaints procedure and observer participation in working groups.

Second, inconsistencies exist between institutions without apparent reason. For example, the procedural rules for meetings of the COP to the Convention on the Transboundary Effects of Industrial Accident permit observer attendance at private meetings and the right to make decisions is explicitly excluded. In contrast, the procedural rules for COPs to the Ramsar Convention acknowledge the contributions of NGOs to decision-making but also contemplate restricting their attendance on account of space limitations. Third, the procedural rules applicable to the micro-level of a Committee, for example, the CITES Plants Committee, illustrates that control remains firmly with States and secretariats possess considerable discretion in defining working

relationships. Finally, the identity of NGOs may vary since their qualifications are defined by reference to 'matters covered by the Convention' or the topic under consideration.

NGO participation at COPs is authorized either explicitly through procedural rules or implicitly via established and evolving practice. The former are limited in scope or detail and are usually permissive rather than restrictive. NGO participation beyond them depends upon the practice of States, secretariat officials and the efforts of NGOs themselves. NGO participation relies upon the discretion of the Chairperson and the consent of the relevant body. Secretariat practices are fluid and include NGO briefings, information sessions outlining the substantive issues for negotiation, allocating office space and permitting side-events.[1039] Treaty secretariats establish close working relations with NGOs to facilitate the COP including commissioning work or expertise, exchanging information, arranging meetings with senior officials and identifying suitable individuals to participate in panel discussions.

Contemporary NGO practice includes disseminating information, information gathering, advocacy activity with States through formal channels or interactive sessions, participation in negotiations, providing counsel or advice, supporting international secretariats and informal contact. Account was taken of the activities of the major groups when formulating the modalities for NGO participation at the Special Session for the Overall Review and Appraisal of

[1039] Reference document on the participation of civil society in UN Conferences and Special Sessions of the General Assembly during the 1990s, 2001, (http://www.un.org/ga/president/55/speech/civilsociety1.htm) (accessed 25 September 2004).

Agenda 21 (Earth Summit + 5) in 1997.[1040] Major group representatives participated in the plenary debate and addressed the Ad Hoc Committee of the Whole.[1041] That said, procedural rules make specific provision for oral and written statements by NGOs.

i) Oral Statements.

The conditions for observer participation at 'open' meetings are determined by States. Their discretion extends to oral interventions by NGOs during debates in plenary session.[1042] Annex 4 reproduces the procedural rules applicable to several illustrative UN Conferences, World Summits and Special Sessions with the oldest being the Third UN Conference on the Law of the Sea of 1974. Oral statements by NGOs are made upon the invitation of presiding officers or at the discretion of Chairpersons with the approval of the body concerned. State practice regarding oral interventions varies in light of time constraints, personalities, substantive issues under consideration, the identity of the NGO and the wishes of national delegations. NGOs in consultative status with ECOSOC and other NGOs may be requested to first organise themselves into constituencies and make oral statements through spokespersons where the number of requests is high (see for example the rules for the World Food Summit). The Special Session for the Review and Appraisal of the Implementation of the Programme of Action for the Sustainable Development

[1040] UNGA Resolution 51/181 (1996), para 10.
[1041] UNGA Resolution 51/864 (1997).
[1042] Rule 32, Rules of Procedure (ROP), UNFCCC; Rule 31, ROP, CBD; Rule 38, ROP, UN Convention to Combat Desertification (UNCCD); Rule 31, ROP, Vienna Convention for the Protection of the Ozone Layer; Rule 31, ROP for Meetings of the COP to the Ramsar Convention.

of Small Island Developing States in 1999 also permitted the participation of 'NGOs designated by their constituencies'.[1043] Once again variation is the theme: the Vienna World Conference on Human Rights identified specific meetings, the Rome Conference for the International Criminal Court detailed the specific terms of NGO participation and Habitat II specifically requested particular attendees.

Decisions of governing bodies may further clarify and regularize such practices. Under UNEP Conventions NGOs may intervene freely from the floor to make textual suggestions on individual agenda items and orally intervene within contact group meetings.[1044] Although priority is extended to States there is no attempt to balance NGO statements. In UN practice informal meetings such as open-ended (open to all States) contact groups are ordinarily closed to accredited observers. However, the UNFCCC has departed from this practice through a decision taken at COP-4 (see Annex 5),

ii) Written Statements.

As indicated in Annex 4, NGOs may produce at their own expense written statements (reports, position and issue papers) at each of these conferences in the languages of the UN. These are distributed by the secretariat and do not constitute official UN documents. Secretariats may also issue official

[1043] Report of the Commission on Sustainable Development acting as the Preparatory Committee at its First Organisational Session, UN Doc A/S-22/2 (1999), Chapter V, Section A, Decision II, paras 16, 18.
[1044] Yamin F. and Wasserstein T., 'NGO Participation in the UNFCCC', Paper presented at the Concluding Workshop for the Project to Enhance Policy-Making Capacity under the UNFCCC and the Kyoto Protocol, London, Foundation for International Environmental Law and Development (FIELD), 1999, 9, 16.

documents containing information submitted by NGOs.[1045] The provision of 'objective' information which increases the knowledge base for States is also a lobbying technique of NGOs. The submission of written statements by NGOs is discretional: there is no right or expectation to submit statements. More importantly, there is no attendant obligation upon States to consider their content since they are merely assistance for deliberations.

4.3 An Emergent Right of NGO Participation in UN Conferences of the Parties.

As observed above, the practice of COPs in the environmental sphere is to create a legitimate expectation upon NGOs that they be allowed to participate. The procedural rules do not confer any right of participation potentially enforceable against States. [1046] CITES exceptionally provides for an unconditional right for NGOs to participate where there has been prior approval by the home State. Most multilateral environmental agreements contemplate the possibility of objection by a third of States and the Vienna Convention for the Protection of the Ozone Layer provides for objection by a simple majority.[1047] None contemplate the possibility that one State acting alone can prevent the admission of a given NGO (although the People's Republic of China in fact achieved this at the 1995 World Conference on Women). The potential for objection by States - however infrequently

[1045] Eg Art 16(1)(b), Basel Convention; UNCCD, COP Decision 11/COP.1 (1997).
[1046] Institute for International and European Environmental Policy (Ecologic)/FIELD, The Participation of NGOs in International Environmental Governance: Legal Basis and Practical Experience, Final Report, 2002, 206, 208, 210.
[1047] See Annex 4.

exercised[1048] - points to the possibility of arbitrary exclusion and must militate against a right of NGO participation. Furthermore, informal contact group meetings or bodies dealing with politically sensitive matters (particularly implementation review and compliance, dispute settlement or financing) are generally closed to NGO observers.

It is too early to conclude that these are merely procedural refinements purporting to be more or whether the international lawmaking process is in fact becoming more inclusive. The accreditation procedures and modalities for NGO participation suggest at best a presumption that NGOs may attend and participate at COPs. NGO participation is subject to State consent and chairpersons control the orderly conduct of proceedings. It is the element of State discretion that NGOs are refused any formal entitlement to participate. [1049] Reasons for restricting NGO participation include confidentiality (national security or business proprietary information), to avoid politicization, encourage frank intergovernmental exchange, logistical considerations (space limitations or time constraints) and more effective functioning. Different institutional structures, Conference topics and the requirements of Parties account for the diversity of State practice. NGO input may be structured through constituency systems or advisory bodies. Indeed, BINGOs lead this development by organising coalitions. Although this encourages simpler decision-making for States and adds the weight of numbers to proponents it may also silence important minority opinions.

[1048] Cp three accreditation applications were rejected for Rio, one for Copenhagen and two for Johannesburg.

[1049] UN, Review of the Multilateral Treaty-Making Process, UN Doc ST/LEG/SER.B/21 (1985).

Procedural rules provide an important platform of legitimacy and facilitate formal access. However, several NGO techniques such as lobbying, providing advice, information gathering and information dissemination do not depend upon procedural rules for their effectiveness. Treaty secretariats enjoy fields of co-operation with NGOs beyond the confines of the COP. NGO participation is dependent upon establishing credible reputations for balanced, rational proposals possessing intrinsic merit above author self-interest. Corporations who present unreliable technical data, make exaggerated claims or misjudge public opinion undermine their influence. Informal activities such as lobbying, organising side events and supporting international secretariats favour the well-resourced and experienced NGOs who can secure influential positions within the existing system. Uniformly applied procedural entitlements would ensure formal parity between NGOs. The next question is the terms of that participation.

i) The Scope and Content of an Emergent Right of Participation.

Annex 4 illustrates the two formal modalities for NGO participation – oral and written statements – as formulated in the procedural rules of several COPs. Their terms range in sophistication and the analysis suggests an evolution over time. However, there is a clearly identifiable common core with respect to the permissibility, scope and content of oral interventions and written statements. Observer representatives upon invitation and subject to State consent 'may' make oral statements on questions in which they possess special competence.

Written statements 'shall' be distributed by the secretariat to national delegations in the quantities and language provided to it at the Conference venue where such statements relate to the work of the Conference and the NGO has a special competence. Although accreditation criteria may have expanded, particularly in 1996, the conditions of NGO oral and written interventions have remained relatively static. They may be analogized to privileges conferred by States: it is left to NGOs to avail themselves of the opportunity to make oral and written statements and even when an obligation of distribution arises for secretariats the content of the message may be rejected for irrelevancy or where the NGO lacks competence. Minor variations if they exist are located in the practice of secretariats and the informal activities of NGOs.

States may be concerned that overt displays of NGO influence undermine the authority and credibility of intergovernmental processes. It is easier for States to rein in unruly NGO behaviour or abuse. The logistics of managing many participants may create NGO dissatisfaction and render any 'right to participate' practically ineffective. Since States retain control over the terms of NGO participation in COP, any disproportionate NGO influence will originate elsewhere (for example, membership of national delegations or appointment as experts). Informal NGO activities and secretariat interactions with NGOs clearly exceed these procedural rules. Annex 4 reproduces the existing terms for novel processes such as roundtables and multistakeholder dialogue sessions, distributing materials outside the conference venue, thematic presentations and side events. It also illustrates the extent to which

oral statements by NGOs during plenary debates and membership of national delegations are currently regulated. It is clear that guidance for the conduct of these modalities is yet to be reflected in the formal procedural rules for COPs. The organisational sessions of different Preparatory Committees repeat the process of creating procedural law and defining the terms of NGO participation. The constancy of variation prevents procedural law from becoming too settled and innovative NGO entitlements from crystallising.

Procedural rules are frequently accompanied by a disclaimer that accreditation criteria and the modalities for NGO participation do not establish precedents for future sessions. However, procedural rules may be copied from earlier Conferences. This is particularly true of Special Sessions of General Assembly. For example, NGO participation at the Special Session on the International Conference on Population and Development (ICPD + 5) in 1999 took into account 'the practice and experience gained' at ICPD.[1050] A limited number of NGOs made statements during the plenary debate and before the Ad Hoc Committee of the Whole.[1051] Similarly, negotiations concerning persistent organic pollutants adopted the UNCED approach of encouraging an equitable representation of NGOs including a 'fair balance' between environmental and development ones.[1052] The Preparatory Committee also adopted the tests for determining the competence and relevance of NGOs.[1053]

[1050] UNGA Resolution 52/188 (1997), para 11. See to identical effect UNGA Resolution 53/189 (1998), para 8 (the practice and experience of an earlier Global Conference on the Sustainable Development of Small Island Developing States) & UNGA Resolution 53/180 (1998), para 7 ('the practice and experience gained at the Habitat II Conference').

[1051] Commission on Population and Development acting as the Preparatory Committee, Report of the First Organisational Session, UN Doc A/S-21/2 (1999), Chapter V, Section A, Decision II, paras 16, 18.

[1052] UNEP, Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants

Further codification of the rules governing NGO participation and their eventual harmonization is considered desirable with respect to international environmental governance.[1054] Useful comparisons may be made with the modalities for NGO participation within the monitoring mechanisms of human rights institutions similarly established by treaty (see Annex 1). The International Committee on Economic, Social and Cultural Rights 'may' receive written submissions from NGOs and time 'will' be made available for oral statements. Information has to focus on the Covenant, be relevant to matters under consideration, reliable and not abusive. The Committee on the Elimination of Discrimination against Women may also decide receive information from NGOs and 'shall decide the form and manner in which such additional information will be obtained'. The Committee against Torture is similarly empowered but draws distinctions between information, written statements and documentation and contemplates answers to questions. In short, the modalities for NGO participation within UN human rights institutions as specified by their procedural rules are variable, conditional, unspecific and discretional. Interestingly, the procedural rules for the consultative Conference cited in Annex 1 identifies particular groups and distinguishes between participants and attendees. General debates are characterised by equality of participation between States and NGOs where the President controls proceedings and the secretariat arranges oral speakers.

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adopting Decision 1/1 (1990) of the Preparatory Committee for UNCED on the role of NGOs in the preparatory process, UN Doc UNEP/POPS/INC.1/INF/1 (1998).

[1053] *Ibid*, adopting Decision 2/1 (1991) of the Preparatory Committee for UNCED, UN Doc UNEP/POPS/INC.1/INF/1 (1998).

[1054] Ecologic Report, *supra n*1046, p225ff.

The appeal of one size fitting all must be balanced against more tailored participation. Business supports standard procedural rules for treaty negotiations.[1055] Formalization in writing could produce more restrictive rules which discourage NGO participation where States backtrack on progressive measures employed by secretariats. The currently informal practices may be eroded without first being safeguarded. Informality provides for flexibility and accommodates differences in institutional structures, cultures, history, memberships and legal circumstances. On the other hand, formalization provides greater precision about the applicable rules, constitutes an insurance against further weakening and promotes best practice to wherever NGO participation is deficient. Accountability, fairness and equality could be promoted but rules would have to be constantly updated to reflect current practices. Harmonisation increases efficiency and system coherence, enhances synergies between institutions and may ultimately lead to their integration. Guidelines may be preferred to legally-binding solutions such as amending treaties, revising procedural rules or governing body decisions. Innovative techniques may be stalled for a short period before these minimum standards are again exceeded in practice through further experimentation.

Overall, entry benchmarks have increased, the formally-recognised core privileges remain static, novel participatory processes have emerged which contemplate greater parity between States and NGOs (roundtables, panel discussions) and finally informal activities (lobbying, side events, exhibits, information sessions) favour well-resourced NGOs. The scope and content of

[1055] Susskind L.E., 'New Corporate Roles in Global Environmental Treaty-Making' (1992) 27 *Colum J World Bus* 63, 66-8.

an emergent right for NGOs to participate within international policy-making should ensure equality of treatment between NGOs within each institution. Standardising participatory entitlements across all institutions may not be possible: different NGOs have different contributions to make which should be channeled where most effective according to the matter under consideration and the needs of States. In short, procedural rules should be tailored to particular institutional requirements and not to NGO characteristics. Equal opportunities for NGOs to make oral and written submissions whatever their orientation should continue to be procedurally embedded. The identification of a distinct 'private sector' within the NGO community is worthwhile for States and NGOs alike but has not yet led to the emergence of different participatory conditions. Solutions to remedy unequal informal activity include capacity-building and financial assistance for NGOs from developing states. Even if well-resourced NGOs such as business continue to enjoy relatively privileged positions in practice, does this in fact equate with a significant influence upon substantive outcomes ?

5. The Corporate Impact upon the Negotiation of Treaties.

An account of efforts to protect the ozone layer 'clearly demonstrates the crucial role played by industry in developing and implementing international environmental policy.[1056] The 'new diplomacy' is reputedly characterized by novel multilateral negotiation procedures[1057] involving corporations driven by

[1056] Benedick R.E., Ozone Diplomacy: New Directions in Safeguarding the Planet, Harvard University Press, Massachusetts, 1998, 309.
[1057] Benedick R.E., 'Behind the Diplomatic Curtain: Inner Workings of the New Global Negotiations' (1992) 26 (3) & (4) *Columbia J World Business*.

competitive considerations.[1058] Treaty-making and implementation is an elongated process characterized by many venues peripheral to the PrepComs, diplomatic conferences and subsequent Conferences of the Parties: fact-finding, workshops, roundtables, conferences, consultations, expert panels, working groups and seminars.[1059] States, intergovernmental organisations and non-State actors attend pre-sessional workshops.[1060] Additional activities include the decisions of international secretariats, the meetings of executive bodies and government officials attending industry-convened conferences.[1061] They are vehicles for informal information exchange or advice and opportunities for consensus-building outside intergovernmental negotiations. The convenor determines the procedural rules, whether observers are permitted and the terms of their participation. Technical decision-making is shifted further behind the scenes to less transparent fora where only the well-resourced non-State actors such as politically organised business groups can monitor developments and participate.

Inter-firm competition has been injected into the intergovernmental bargaining process that characterises treaty negotiations. States ordinarily promote national economic interests during negotiations. For example, the US Environmental Protection Agency provides US firms with recognition for their environmental responsibility and technical assistance for completing

[1058] Boczar B.A., 'Avenues for Direct Participation of TNCs in International Environmental Negotiations' (1994) 3 *NYU Env L J* 1, 15.
[1059] International Institute for Sustainable Development (IISD) (2003) 12(221) *Earth Negotiations Bulletin* 2.
[1060] IISD (2003) 12(220) *Earth Negotiations Bulletin* 1.
[1061] Eg Participants to the 15th Annual Earth Technologies Forum and Mobile Air Conditioning Summit, Washington DC, 2004 include the US EPA, Japanese Ministry of Economy, Trade and Industry, UNDP, UNEP, WBCSD and IETA.

greenhouse gas inventories.[1062] States are also identifying inter-sectoral gains and losses having national consequences. Industries compete for participation and influence since legal frameworks will direct the basis for competition, appropriate market share, secure easier capital sources and allocate adaptation costs. Corporate responses to environmental regulation oscillate between reactive and obstructionist strategies to proactive and constructive approaches.[1063] Environmental matters have been elevated from a technical production process issue with corporate liability implications to a strategic objective offering competitive advantages. Embedding the best commercial practice of Western multinationals within the regulatory regime eliminates uncompetitive rivals and encourages consolidation.

5.1 Motivations for Corporate Participation.

Intergovernmental meetings are more than marketplaces for ideas. COPs are strategic business opportunities to test ideas and products or to network, developing peer and customer contacts with companies and States. Although contracts are concluded by firms and States, business opportunities are not the principal reason for attendance. One publisher secured at least one publication for each intergovernmental Conference and hence justified the costs of attendance.[1064]

[1062] US Environmental Protection Agency, The Climate Leaders Partnership, 2003.
[1063] UN Secretary-General, TNCs and Issues Relating to the Environment, UN Doc E/C.10/1990/10.
[1064] Mr James Ramsey, Managing Director, Entico Corporation Limited, 2 December 2003.

COPs are opportunities for firms to promote their particular industry (fossil fuels, nuclear, hydropower, wind, solar) as policy solutions in preference to other economic sectors. For example, the International Gas Union promoted natural gas as a readily-available alternative fuel to coal, wood and oil with potential to reduce carbon emissions.[1065] Its strategy was to attach this proposal to the transportation theme of COP-9.[1066] Renewable energy firms are promoting their technology for prospective sale to States and approval within regulatory regimes. Strategic positioning may be the precursor to political recognition and international legal backing which propels the market. Raising industry's profile can be achieved by convening panels with Ministerial delegates.[1067] For example, the British Standards Institute had a 'long history' of involvement with the UNFCCC process, was consulted on the development of the EU's emissions registry system and made itself available at COP-9 to advise States on compliance monitoring and standards implementation.[1068]

Business momentum may encourage treaty ratification. Corporations encourage universal participation by States to increase the geographical scope and liquidity of markets, reduce regulatory compliance costs and simplify cross-border procedures. Commercial practice will lead regulatory development but only to a point since a legal framework will be required to underpin market transactions. Whether or not the Kyoto Protocol enters into force or is implemented nationally, firms have anticipated the inevitable

[1065] International Gas Union, Seven Decades with IGU, Denmark, 2003.
[1066] Mr Peter Storm, International Gas Union, 6 December 2003.
[1067] Mr Richard Taylor, International Hydropower Association, 8 December 2003.
[1068] Mr Nick Marshall, Global Product Manager, British Standards Institute, 2 December 2003.

direction of intergovernmental policy. It is a case of industry incorporating climate change policy into investment decision-making rather than States redirecting commercial operations towards environmental protection. Production processes will be adapted and disruption to commercial operations minimised. Firms will merely keep pace with governmental decision-making for the purposes of legal compliance: pioneers 'can also get scalped'. [1069] Moreover, non-State actors will be 'frustrated' if they attend COPs with the ambition of influencing policy. Prudence dictates a 'wait-and-see' approach before commercial decisions are made according to orthodox business criteria in light of what States decide. Importantly, firms owe duties to shareholders who do not wish managing directors to engage in overly-speculative investment activity on account of weak political commitments which cannot be enforced.

Firms participate in COPs with domestic conditions in mind to assess whether operational and sovereign factors are conducive to investment. Participation at the international level is cost-effective provided implementation is uniform across all States and obviates the necessity to lobby for identical results within each national jurisdiction.[1070] National lobbying may have proven ineffective and undesirable national legislation or judicial opinion can be reversed. The 'real action' occurs at national levels during implementation where 'powerful forces' are at work. [1071] Observer participation enables timely access to intergovernmental policy and assists national lobbying. Moreover, political

[1069] Dr Brian Flannery, *supra n*920.
[1070] American Petroleum Institute (API) Press Release, 'API Statement', Washington DC, 1993.
[1071] Mr David Stirpe, Executive Director, The Alliance for Responsible Atmospheric Policy, 2 December 2003.

recognition secured at intergovernmental levels can be usefully directed towards domestic audiences. For example, the coal and oil industry dominates business opinion within Australia and the government is resistant to the Kyoto Protocol. The Australian renewable energy industry financed ministerial attendance at COP-9 where opinion is favourably disposed to renewable energy sources. Australian firms hoped to signal through the national media a possible expression of government support.[1072] The industry also organized roundtable sessions with national delegates to bolster its message.[1073]

5.2 Procedural Challenges for Engaging with Business.

Attempts are made by States, the UNFCCC secretariat and BINGOs to counter industry disinterest. BINGOs highlight the business case for voluntary initiatives and raise industry awareness. Firms may possess projects which qualify under the UNFCCC regime (and will be promoted for public relations purposes) but lack the incentive to formally participate: 'the CDM will make profitable activities more profitable and not unprofitable activities profitable'.[1074]

To simplify regime design States prefer to deal with organized groups representing mainstream opinion. However, it is difficult to identify which interlocutor reflects dominant business opinion, carries sufficient authority to make commitments and may act 'on behalf of industry'. Organised business

[1072] Mr Alex Beckitt, Executive Officer, Renewable Energy Generators Australia Ltd, 5 December 2003.
[1073] Dr Syd Shea, Chairman and Managing Director, The Oil Mallee Company of Australia Ltd, 8 December 2003.
[1074] Dr Brian Flannery, *supra n*920.

groups require prior approval from their membership for official statements which must be sufficiently broad to encompass divergent opinions. At general levels the business community expresses homogenous perspectives with respect to market-supportive regulatory frameworks and applying best commercial practice. Firms seek to prevent States from 'picking winners' by conferring a legally-embedded competitive advantage to a particular technology or production process. Industry is mistakenly assumed to possess a coherent voice: 'scratch the surface and change the scenarios and differences begin to emerge'[1075] as dictated by organisational attributes and operational specialisation. It is also easier to organize firms around particular themes since producers, suppliers, distributors and marketers within the same sector have disparate interests.

It may be feared that intergovernmental decision-making may be overwhelmed by complexity or a tendency to inertia given the infusion of commercial perspectives. For example, in contrast to North American firms, Korean industry is resolutely opposed to the Kyoto Protocol and has been sending delegates to the UNFCCC since 1997.[1076] Differences also exist between progressive companies and firms which continue to discredit the scientific basis for climate change.[1077] The diversity of industrial sectors represented at negotiations makes it difficult to discern any single business position. For example, renewable energy firms (cogeneration, natural gas and energy efficient technologies) compete against energy intensive industries (coal and

[1075] *Ibid.*
[1076] Korea Chamber of Commerce and Industry, A Guide to Climate Change Activities of Korean Industry, Seoul, 2003, 3.
[1077] Lord Oxburgh, Shell Chairman quoted in The Guardian, 17 June 2004, 1.

oil). The chemical sector is represented by the International Climate Change Partnership and the American Petroleum Institute represents US oil companies.[1078] Insurance and re-insurance firms also participate in expectation of a greater number of claims resulting from global warming.[1079] Although actively courted by NGOs the industry has been unable to counterbalance the influence of energy corporations.[1080] Companies may also be members of more than one group: oil companies for example have renewable energy divisions with modest research budgets. Moreover, firms may manipulate decision-making by obfuscating issues with detail and temper unfavourable outcomes by introducing more moderate States. New actors may seek to obtain exemptions or favourable treatment as negotiations expand to include other substances. For example, pharmaceutical companies and health professionals lobbied for a metered dose inhaler exemption on account of its safety, effectiveness and affordability in treating asthma and related diseases.[1081]

Common industry positions exist at the level of generality. These include the ability to enforce State compliance, developing country participation subject to binding commitments, the details of prospective national implementation and the terms of corporate participation.[1082] Corporations seek to insulate

[1078] API, Recommended Actions to Address Greenhouse Gas Emissions, 1998.
[1079] UNEP, Financial Sector Responding to Climate Change-Impatient with Pace of Political Progress, Press Release, Bonn, 2001.
[1080] Paterson M., 'Global Finance and Environmental Politics: The Insurance Industry and Climate Change' (1999) 30(3) *IDS Bulletin* 25, 26.
[1081] UNEP, Report of the Eighth Meeting of the Parties to the Montreal Protocol, UNEP Doc OzL.Pro8/12 (1996) & COP Decision VIII/8 (1996).
[1082] ICC/USCIB, The Kyoto Mechanisms: A Business Perspective, Paris, 1999; ICC, A business perspective for SB12, Paris, 2000; International Petroleum Industry Environmental Conservation Agency (IPIECA), Practical Application of the Kyoto Mechanisms, Milan, 2000, 5.

commercial decision-making and investment planning from policy and regulatory uncertainty created by States. Most notable is a preference for market-supportive instruments which facilitate market transactions rather than command and control measures. Firms promote the ability to trade, respect for property rights, free competition and non-discrimination. Stable regulatory environments require government transparency, access to information, non-arbitrary decision-making, minimal transaction costs such as taxation, intellectual property protection and contractual certainty. Non-compliance by States should not prejudice trading values and greenhouse gas emission credits having economic and competitive values should be protected from expropriation. Intergovernmental organisations repeat the call for States to establish stable regulatory conditions which send the right market signals to investors and enable accurate risk assessment.[1083]

The strategies employed within negotiations are also reasonably predictable. For example, coal and oil companies, vehicles manufacturers and energy intensive industries, more likely to be affected by emissions reductions, are likely to undertake cost-benefit analysis, propose further research and caution against the assumption of legal commitments. Regulatory action is discouraged by appealing to the strategic (military) importance of industry, domestic energy requirements, detrimental employment impacts, lower economic growth, loss of business competitiveness, high investment cost, modest environmental impacts and imminent improved technology. The renewable energy sector by contrast will push for stricter timetables and targets

[1083] International Energy Agency, Integrating Energy and Environmental Goals: Investment Needs and Technology Options, Paris, 2003, 20, 26.

whereby national regulation boosts sales, enhances technology exports and captures market share from energy intensive industries. Industrial sectors should be disaggregated and their position evaluated separately.

5.3 Assessing Commercial Influences on Substantive Outcomes.

The extent to which non-State actors have influenced international lawmaking and substantive policy outcomes cannot be measured by reference to their procedural entitlements, number of oral interventions or access to official documents. It has been suggested that their role can be assessed in terms of process influence (such as access to decision-makers or extent to which their proposals are injected into negotiations) or product influence (the degree to which such proposals are adopted or blocked).[1084] Informality hampers an accurate assessment of the former. As for the latter, non-State actors are not influential simply because they share the same opinion as States and even rejected proposals constitute contributions to deliberative processes.

BINGOs query their effectiveness in getting business messages across: selected information is experimentally submitted and reactions are observed. Although firms raise issues for consideration, channel agendas in particular directions and push States towards a resolution, final outcomes can be unpredictable and decisions may be deferred. Experienced participants are uncertain as to whether deliberate strategies succeeded or States were merely

[1084] Arts B., The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions, International Books, Utrecht, 1998, 59.

receptive at the time: in short 'whatever it was, it worked'.[1085] That said, corporate executives are reluctant to disclose the nature and extent of relationships with States. BINGOs seek to continuously improve the effectiveness of business messages: meetings are conducted during each COP to informally identify issues around which business opinion has coalesced, discern where differences remain, correct misinformation, share information and discuss topics of common interest.

Environmental regulation spurs industrial performance and creates novel markets but can equally stifle innovation and impede economic growth.[1086] For example, the control of transboundary hazardous waste enhances the economic viability of recycling.[1087] On one view, regulation[1088] and contracts with State agencies[1089] should establish minimum standards. Regulatory effectiveness can be enhanced by embracing market incentives. The environmental protection objectives of the UNFCCC are enveloped within an economic development agenda intended to divert foreign direct investment to developing states and encourage growth in the carbon emissions market.[1090] Allowing firms to determine the most cost-effective solution may amount to what is most technologically convenient for firms, most conducive to long-term investment planning and imposing the least economic disruption upon industry. Firms want States to recognize the lead times necessary for adjusting

[1085] Mr Leonard Bernstein, The Global Climate Coalition, 2 December 2003.
[1086] OECD, The Global Environmental Goods and Services Industry, Paris, 1996, 24.
[1087] International Council on Mining and the Environment, Implementing and Assuring a Practical Approach for the Environmentally Sound Management of Hazardous Metal Recyclables, London, 2001.
[1088] UNICE, European Industry's Views on EU Environmental Policy-Making for Sustainable Development, Brussels, 2001, 6, 8.
[1089] UNICE, Climate-Change-Related Long-term Agreements: A Practical Complement to Regulation, Brussels, 2001.
[1090] Mr Daniel Chartier, President, Emissions Marketing Association, 3 December 2003.

to new regulatory conditions. Meaningful regulatory controls may be necessary to overcome initial inertia or pre-occupation with short-term profits and give a competitive boost to those firms inclined to innovate.

In particular, legal uncertainty has been identified as a barrier to business participation.[1091] For example, Shell supports practical regulations which give companies the confidence to make long-term investments which reduce greenhouse gas emissions.[1092] The lack of information on intended long-term commitments by States is unsettling business with respect to the investment decisions made today to secure energy supplies required for the future.[1093] The future cost, quality and availability of energy supplies requires decisions on technology, siting, permitting, access and infrastructure. These operational requirements have lifetimes and cost-recovery considerations extending beyond the first commitment period for States (2008-2012). Although the Kyoto Protocol calls for subsequent commitments by Annex 1 Parties to be considered no later than 2005, it does not proscribe their nature, commencement or duration nor does the Protocol specify the obligations of Non-Annex 1 Parties. Firms have a legitimate interest in limiting commercial risks or transactions costs and identify business opportunities and threats. However, it is unreasonable to require too much regulatory predictability from States. How justifiable are commercial demands for secure investment planning ?

[1091] ICC, Business: Part of the Solution, UNFCCC COP-6, Bonn, 2001.
[1092] Mr David Hone, Vice President Climate Change, Shell, 8 December 2003.
[1093] ICC, Statement to the UNFCCC COP 9 Plenary, 10 December 2003.

6. The Corporate Role in Treaty Implementation.

Corporations argue that their important implementing role entitles them to prior participation in treaty negotiation. This carries the implicit threat that exclusion will render subsequently implementation more difficult given likely non-compliance and regulatory avoidance. States and corporations 'to the extent they are able' have been called upon for example to jointly implement the applicable international legal provisions for environmental protection.[1094] Businesses press States for the further implementation in good faith of internationally-agreed commitments and offers suggestions to align national law and practice. This is particularly true with respect to trade agreements where industry has invested considerable effort during negotiations.[1095] ILO conventions formulated with contributions from national employer and worker organisations notably contemplate further consultation by States to determine the details of national implementation. Interestingly, the US Council for International Business argues that ILO Conventions should not benefit from the same speedy implementation procedures as enjoyed by trade agreements.[1096]

Implementation allows corporations to influence the conceptual evolution of principles and concepts identified in treaties. Treaty interpretation considers how the instrument has been subsequently implemented in the practice of

[1094] UNGA Resolution 37/7 (1982) on a World Charter for Nature, para 21.
[1095] IFPMA, WTO Millennium Round, Geneva, c1999; CEFIC, The Chemical Industry Comments on the Possible Millennium Round and Trips, Brussels, 1999; CEFIC, The chemical industry comments on a possible new round and TRIPs, Brussels, 2001; USCIB, Statement on the GATS Financial Services Agreement, New York, 1997.
[1096] USCIB, Statement on the Administration's Proposal on Fast Track, New York, undated.

States.[1097] Terms and principles find their practical expression in commercial practices such as commercial airliners under air services agreements.[1098] A clearer example is where treaty provisions explicitly provide platforms for commercial participation within intergovernmental institutions. [1099] Conventional obligations may contemplate channels which enable industry to provide information to end users including States, consumers and other firms.[1100]

For example, the precautionary principle is being incorporated with greater frequency as a standard term within environmental agreements. [1101] The precautionary principle provides that lack of full scientific certainty should not justify postponing the adoption of cost-effective preventative measures where threats of serious and irreversible environmental damage exist. Business argues that intergovernmental consensus is lacking given the variety of national specific obligations. It is unclear whether the principle has attained the status of a rule of customary international law and may not be directly applicable at national levels.[1102] The principle should only be located within

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[1097] Art 31(3)(b), VCLT, *supra n*67.
[1098] *Case concerning the Air Services Agreement of 27 March 1946 (US v France)* (1979) 54 *ILR* 303, paras 69, 83.
[1099] Arts 2, 11, Paris Agreement Establishing the European Bank for Reconstruction and Development 29 *ILM* 1077 (1990).
[1100] Preamble, Art 10, Stockholm Convention on Persistent Organic Pollutants, UNEP Doc UNEP/POPS/CONF/2 (2001).
[1101] Eg Art 3(3), UNFCCC, *supra n*857.
[1102] Cp WTO, *EC-Measures concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R (1998); *Hungary v Slovakia (the Gabcikovo Case)* (1997) *ICJ Rep* 1 *per* Weeramantry J; *R v Secretary of State for Trade and Industry ex parte Duddridge and Others* (1994) *Enviro LR* 151.

preambular paragraphs since inclusion within operational provisions introduces novel and ambiguous obligations for States.[1103]

Business supports the precautionary principle insofar as it engages routine environmental management techniques such as scientifically-evaluated risk and developing ameliorating strategies.[1104] Compliance provides reputational assurances and enforcement eliminates uninnovative rivals. The European chemical industry association has called for a reasonable, balanced, proportionate and non-arbitrary interpretation of this principle. [1105] Precautionary measures must be urgent, provisional, scientifically-justified, transparent, communicated to affected parties and subject to legal review.[1106] The burden for implementing the principle is shifted upon industry to institute environmentally sound practices and employ the best available technology. The US Council for International Business advocates science as the basis for regulatory design.[1107] Science is perceived to be objective, accurate, subject to peer review and free from political arbitrariness.[1108] Scientifically-derived standards do not require any lawmaking capacity and technology is predominantly owned by corporations. Risk assessment and cost-benefit

[1103] ICCA, UNEP Global POPs Treaty-INC5: Statement on Key Issues, Virginia, 2000, 2; CEFIC/Euro Chlor, Comments on Persistent Organic Pollutants (POPs), Brussels, 2000; American Chemistry Council, 'Bush Administration Support of POPs Treaty', Virginia, 2001.
[1104] ICC, A Precautionary Approach: An ICC Business Perspective, Policy Statement, Paris, 1997, 1.
[1105] CEFIC, The Precautionary Principle, Industry and Law-making, Brussels, 1995; CEFIC, Views on the Precautionary Principle, Brussels, 2000.
[1106] CEFIC, Comments on the Commission Communication on the Precautionary Principle of 2 February 2000, Brussels, 2000; ICCA, Comments on the Application of the Precautionary Principle in Regulatory Decision-making, Virginia, 2000.
[1107] USCIB, Science, Risk, Precaution and Business: USCIB Recommendations for International Policymakers, New York, 2000, 3.
[1108] USCIB, 'OECD Conference Reaffirms Role of Science in Biotechnology Debate', Press Release, Edinburgh, 2000.

analysis – tools commonly employed by firms - provide additional alternatives to command and control regulation.[1109]

Corporations are one of the ultimate targets of international regulation. However, industries which originally caused environmental damage also possess the technical solutions for rectification. The polluter pays principle provides that polluters bear the costs of prevention and environmental restoration. [1110] Businesses operationalise that principle by internalising environmental costs and passing them to consumers. Multilateral environmental agreements may define corporate liability without the need to establish fault.[1111] The European Chemical Industry Council supports strict liability and promotes the principles of operational control, proportionality and limited liability.[1112] However, it is unclear in the event of insolvency whether obligations remain with the corporate entity or are transferable to creditors and shareholders.[1113] States ensure that operators participate in financial security schemes[1114] and seek to remove the inequalities arising from overlapping

[1109] ACC, The Precautionary Principle: An Industry Perspective on Domestic and International Developments in Precaution, Virginia, 2001.
[1110] Principle 16, Declaration on Environment and Development, *supra n*120.
[1111] UNTCMD, International Environmental Law: Emerging Trends and Implications for TNCs, UN Doc ST/CTC/137 (1993), 7.
[1112]CEFIC, Consideration of a Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Brussels, 1995; CEFIC, Consideration of a Draft International Convention on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Brussels, 1997 & 1998.
[1113] *Official Receiver as Liquidator of Celtic Extraction Ltd and Bluestone Chemicals Ltd v Environmental Agency* [1999] 1 *All ER* 746; *Re Wilmott Trading Ltd (in liquidation) (Nos 1 & 2)* [1999] 2 *BCLC* 541.
[1114] Cp Arts 7, 9, 12, 37, International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Doc LEG/CONF.10/8/2 (1996).

liability regimes.[1115] States may also provide financial assistance to stimulate experimentation with novel technology or permit temporary derogation in the event of disproportionate costs.[1116] Treaty negotiations occur in light of pre-exiting economic constraints and the obligations envisaged for States have to also be evaluated in light of their likely market impact for firms.

Environmental treaties accordingly draw upon familiar commercial tools. The obligations upon States to conduct environmental impact assessments or undertake risk analysis[1117] permits cooperation with firms possessing the necessary capability and information exchange for mutual benefit. For example, corporations possess financial management expertise of interest to the Global Environmental Facility (GEF).[1118] The secretariat co-operates with the private sector to efficiently and cost-effectively execute GEF projects.[1119] North American and European firms supported by the World Bank construct operational capacity for newly-privatised firms consistent with the development priorities of host States.[1120] However, commercial interest is deterred by bureaucratic inertia and information disclosure. Thus the private sector role to date has been limited to public procurement and advisory responsibilities.[1121]

[1115] International Maritime Organisation, Resolution on the Relationship between the HNS Convention and a prospective regime on liability for damage in connection with the transboundary movement of hazardous wastes 35 *ILM* 1438 (1996).
[1116] Eg OECD Council Recommendation on the Implementation of the Polluter-Pays Principle, OECD Doc C(74)223 (1974), para 2(3).
[1117] Art 2, Convention on Environmental Impact Assessment in a Transboundary Context 30 *ILM* 800 (1991); WTO, *Australia–Measures Affecting Importation of Salmon* WT/DS18/AB/R (1998), para 129.
[1118] Global Environmental Facility (GEF), The Pilot Phase and Beyond, 1992, paras 2.06, 2.33.
[1119] Art 28, Instrument Establishing the GEF 33 *ILM* 1273 (1994).
[1120] GEF, Operational Strategy, Washington DC, 1995.
[1121] GEF, Engaging the Private Sector in GEF Activities, GEF Doc GEF/C.13/Inf.5 (1999), paras 10-11, 15-16, 18.

The corporate role as a medium through which States implement their treaty obligations is formally preconditioned by incorporating international law into national legislation. Implementation affords a further opportunity for corporate lobbying to realise commercial objectives not achieved during treaty negotiation.[1122] Moreover, corporations can be conduits for international standards within non-signatory States or States which have yet to pass the requisite legislation. For example, airlines voluntarily applied the standards of the Warsaw Convention within States who had not yet ratified the agreement.[1123] The economic benefits of uniform carriage rules outweighed the advantages afforded by different national regimes. Such a circumstance obviates the expression of State consent and processes of national lawmaking. Furthermore, 'fishing entities' can bind themselves in writing to fulfil conventional obligations and fishing vessel operators can choose to comply with the instructions of intergovernmental institutions.[1124] An alternative arrangement is where individual corporations and trade unions conclude labour agreements applicable throughout the firm's global operations which do not contemplate any State role.[1125]

States may be pushed towards adherence 'from below' as governments follow commercial practices. For example, the International Air Transport

[1122] Colloquium, 'A Private Sector View of International Trade Negotiations' (1997) 91 *ASIL Proceed* 89, 91.
[1123] Tombs L.C., International Organisation in European Air Transport, Columbia University Press, New York, 1936, 131.
[1124] Annexes 1, 3, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 40 *ILM* 278 (2001).
[1125] The International Union of Food and Agricultural Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations (IUF)/Danone (BSN), Joint Declaration on Trade Union Rights, 1994.

Association abolished liability limits in 1995 and with it trade subsidies for rival carriers. To encourage global uniformity the ICC supported EC regulation in 1998 and endorsed a draft Convention of the International Civil Aviation Organisation.[1126] Similarly, the Caux Roundtable called upon corporations to voluntarily apply the OECD Bribery Convention in their commercial practices to induce States towards ratification.[1127] Although the qualitative corporate role for treaty implementation is highly significant the paramount State role is not displaced.

Conclusions

Treaties are a prolonged evolving regulatory process involving interacting national and international processes, numerous actors and taking place in multiple fora. Distinctions between preparation, negotiation, drafting, ratification, implementation and enforcement become blurred. Corporations can exert positive and negative influences throughout the treaty-making process. Treaty-negotiations are competitive exercises: inter-commercial, between NGOs and inter-State. Furthermore, the prevailing opinion within industry is also subject to change: emitters attempted to block regulatory developments within the UNFCCC process until COP-3, the nuclear and renewable energy sectors then became active and the influence of oil and coal industries remains strong but is declining. Market leaders with establishment advantages can establish economic conditions for the remainder of industry by embedding their perspective within treaty obligations. Individual firms also

[1126] ICC, ICAO's Revision to the Warsaw Liability System, Paris, 1999.
[1127] CRT, Press Release, Caux, 1999.

bolster the negotiating position of States by submitting proposals and contributing resources.

Reflecting the truism that knowledge is power, States may be dependent for their decision-making upon the economic data and technical solutions held by firms. This is moreover the case where one negotiating objective is to build markets around regulation. Trade associations and organised business groups can be relied upon as interlocutors espousing common industry perspectives relatively unhindered by national sentiment. The proposed Business Consultation Mechanism is an attempt by business to enhance communication channels. Notwithstanding the obvious merits of unfiltered input States are wary of relying exclusively upon business opinion and other NGOs can perform a useful moderating influence during interactive panel sessions. Although BINGOs may pursue more favourable terms of participation they readily deny responsibility by affirming that treaties bind States only.

Observer status reflects a compromise between full participation and exclusion. The opportunity provides firms with a valuable lead time with which to anticipate the direction of international policy, adjust to likely regulatory conditions at the national level and minimise disruption to commercial operations. In this respect commercial practices lead regulatory developments. Since investment planning depends upon regulatory certainty, States will only identify what is capable of being achieved. Corporate participation affirms the importance of national processes: formulating the negotiating position of

States, operational adaptation, implementation and the susceptibility of governments to local pressures.

Non-State actors are invited to make submissions on potential modalities for their participation in preparatory processes as well as the eventual conference. Their efforts contribute to the growth of common international procedural law by accretion. However, State consent is evident with respect to who may participate in negotiations, the terms of their participation and the legal status of the final outcome. The accreditation criteria as applied by secretariats and the possibility of objection by States would preclude the existence of a right for non-State actors to participate in international policy-making. The relevance and competence of non-State actors are tied to the objectives and subject-matter of the particular conference. The attendance of non-State actors and the modalities for their participation can be a major area of contention and are decided afresh by the designated Preparatory Committee. There is a strong likelihood that cross-pollination between events will simply result in these rules being replicated. Once admitted non-State actors have a legitimate expectation under prevailing State practice that the conditions of their participation include a core component involving oral and written statements.

Moving forward from UNCED would suggest expanding the role of non-State actors. Although there is a considerable degree of informal activity which favours the well-resourced non-State actors, opportunities for oral interventions and written submissions have remained constant. Modest procedural refinements need not translate into any substantive impact upon

deliberations but can alleviate pressure to make lawmaking more inclusive. Whether proposals by non-State actors on agenda items are accepted depends upon States. Non-State actors can only contribute to intergovernmental deliberations since procedural and substantive decision-making remains reserved to States. Business messages expressed through these formal channels involve predictable commercial concerns irrespective of the subject-matter, thereby suggesting that industry must constantly draw economic considerations to the attention of States. Managed well, commercial contributions enrich intergovernmental deliberations. Managed poorly, States will be confronted with implementation failure, regulatory capture or avoidance and the adversarialism associated with greater enforcement, a subject to which I now turn.

Chapter Four

Corporations and International Dispute Settlement

Enforced compliance with treaty commitments such as those outlined in the previous Chapter is an important aspect of treaty implementation. Non-State actors may wish to petition international bodies to determine whether regulatory measures adopted by States conform to international law. Corporate enforcement is selective insofar as relevant considerations include competitor behaviour, preserving market share and asserting property rights. States through lawmaking create mechanisms which indicate the robustness (or otherwise) of their voluntarily assumed commitments. International dispute settlement should be subject to the rule of law and characterized by transparency, reasonable predictability, prompt and effective remedies and competent and impartial tribunals. The various models include resort to national courts, diplomatic protection on behalf of corporate nationals and arbitral procedures permitting direct corporate access. In resolving their disputes with commercial rivals and States, corporations are contributing to the corpus of international law. However, the conclusion will be made that corporations remain dependent upon States creating the necessary enabling framework for them to exercise an enforcement function. The World Trade Organisation illustrates how corporations contribute resources and expertise for the conduct of intergovernmental dispute settlement at the international level. Direct corporate access to the dispute settlement mechanisms attached to regional bodies will be illustrated by reference to the North American Free Trade Agreement. This Chapter also considers corporate participation within

the operational framework of international organisations and market-based techniques which seemingly lack a State role for enforcing 'soft' legal obligations. The contemporary proliferation of international tribunals raises the prospect of corporate forum shopping and curtailing governmental regulatory flexibility.

1. The Corporate Enforcement Role: Self-interested and Selective.

States ordinarily enforce international law against other States and non-State actors. The effective application of conventional obligations typically includes adopting appropriate enforcement measures. Compliance by non-State actors is ensured through the nationality and territoriality connections with States. However, States also possess authority to waive national law enforcement and suspend private rights of action even where this may breach international law.[1128] Of present concern is the related issue of corporate actors inducing (or not inducing) State compliance. Non-compliance with international law by States can be a source of commercial benefit for firms through lower compliance costs. Ineffective or under-enforcement constitutes an indirect subsidy for local corporations. States may be reluctant to enforce law against their corporate nationals from whom they derive economic benefits including taxation. Competing jurisdictional claims between States or the obstacles to establishing a consensual basis for international dispute settlement may mean that no State assumes enforcement responsibility.

[1128] *Eg* EU-US, Memorandum of Understanding concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act 36 *ILM* 529 (1997).

The resulting void may be occupied by other actors.[1129] A useful distinction to be made is between corporations having resort to enforcement mechanisms (including through State mediums) as dictated by self-interest and commercial attempts to resist the enforcement of standards against them (including using States as shields). Both have lawmaking impacts: the former principally evidenced by procedural mechanisms created at corporate insistence and the latter of a more substantive nature, particularly with respect to developing corporate legal responsibility. Rival competitors seeking to remove unfair sources of competitive advantage or capture markets may initiate legal action either individually or collectively through national courts. Intergovernmental disputes can result from and parallel inter-corporate efforts to establish competitive conditions.

For example, maritime vessel registration is determined by home States and regional organisations at most possess a limited supervisory role.[1130] 'Flag' States assume responsibility for the conduct of maritime corporations registered within their jurisdiction.[1131] Such 'open' registries are conducive to efficiency.[1132] 'Flags of convenience' vessels enjoy lower operating costs suspected to derive from non-observance of international labour standards. The phenomenon engages a mix of private and pubic international legal issues. States and trade unions seeking to protect national shipping industries have

[1129] Grabosky P., 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527.
[1130] *Commission of the EC v Council of the EC* [1996] 1 ECR 1469, para 50.
[1131] Preamble & Art 3(1)(a), FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 33 *ILM* 968 (1994).
[1132] UNCTAD, Report of the Ad Hoc Intergovernmental Working Group on the Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flag of Registry, UN Doc TD/B/784 (1980).

resorted to international standard-setting and national litigation to remedy this problem.[1133] Maritime industries within 'flag of convenience' States pushed host governments into implementing more rigorous inspection regimes as the private classification societies upon which they were dependent lost their reputation for reliability and integrity. Improved compliance is being accomplished by responsible port States and the reactive or parallel efforts of industry leaders protecting their market share.[1134]

The function of enforcing international law has to some extent been privatised. NGOs monitor State practice and corporations experience the practical impacts of administrative decision-making in their routine operations at the coalface of international law. Through their transnational networks firms are more informed than home States of national legal differences and discriminatory practices in favour of local enterprises. Whereas NGOs may altruistically protect individual or public interests, firms undertake enforcement action where they are directly and financially affected by State non-compliance. As one tool of commercial decision-making enforcement activity is selectively self-interested to secure or protect market share. It can pry open markets protected by recalcitrant States at the behest of vulnerable competitors, prompt State action against rivals through the home and host governmental medium, clarify the legal contours of permissible corporate behaviour and establish favourable precedents which can usefully increase bargaining power in private contracting with States. Symptomatic of collective action problems and

[1133] ILO Convention No 147 The Merchant Shipping (Minimum Standards) Convention; *NWL Ltd v Woods & Nelson* (1979) ICR 867.
[1134] Vorbach J., 'The vital role of non-flag State actors in the pursuit of safer shipping' (2001) 32(1) *Ocean Development and International Law* 27.

encouraging reciprocated non-interference, the remedial benefits of eliminating objectionable practices are universal whereas the financial and reputational costs are borne by complainants.

2. The Range of Dispute Resolution Models available to Corporations.

Non-State actors are dependent upon States to establish the necessary enabling framework (substantive law, procedures, institutions and trained personnel) in which their enforcement role is exercised at national, regional and international levels. States are expected to establish non-discriminatory, timely, transparent and effective procedures through which corporations can challenge government decision-making with respect to national public procurement.[1135] States delimit the degree of non-State actor activity by defining national, regional and international terms of access. Moreover, corporate action through governmental mediums enjoys greater authority, is unavoidable where direct action is unavailable or local remedies are futile and outweighs the costs of achieving equivalent outcomes within multiple national fora.

The diverse range of dispute resolution models which corporations may employ include resort to national courts, diplomatic protection, direct arbitral action, the operational framework of international organisations and market solutions. This section examines each in turn and analyses their respective merits as a modality for corporate participation within the international lawmaking process. This is not to suggest that each model is an independent

[1135] Art XX, Agreement on Government Procurement, Uruguay Round Final Act, *supra n*342, Annex 1A.

subsystem: indeed, the interplay between national and international mechanisms is a principal theme and will be noted where pertinent.

(a) Recourse to National Courts: The South African Pharmaceutical Litigation.

Firms seek remedies for damage caused by other private actors by initiating litigation within national courts. Such machinery is utilised as and when necessary to enforce socio-economic transactions and requires only government oversight. Corporations engage international legal questions such as jurisdiction, State recognition or sovereign immunity[1136] for offensive or defensive purposes. The resulting national judicial decisions are cited as evidentiary material potentially binding upon States as customary international law.

Corporations engage in litigation through trade associations for issues affecting industry such as property rights. For example, the International Federation of Pharmaceutical Manufacturers Associations (IFPMA) challenged within South African courts proposed amendments to national law which contemplated abrogating patents upon ministerial discretion.[1137] IFPMA is not opposed to competition from quality generic products but objects to government measures which unfairly favour imitators over innovators. [1138] Pharmaceutical companies had similarly lobbied Kenya against proposed legislative

[1136] Eg *Patrickson v Dole Food Co* 251 *F 3d* 795 (9th Cir 2001).
[1137] *Medicine and Related Substances Control (Amendment) Act No 90 (1997)* (Sth Africa) Government Gazette 18505; IFPMA, 'Disputed South African Law will not improve access to medicines', Geneva, 2001; *Pharmaceutical Manufacturers Association (SA) & Anor In re: ex parte application of the President of the Republic of South Africa & Ors* (2000) (2) SA 674 (CC).
[1138] IFPMA, The Role of Generics, Geneva, 1997, 2.

amendments.[1139] The US and South African governments had previously reaffirmed intellectual property protection for public health issues.[1140] The IFPMA promotes the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement and opposes price controls, compulsory licensing and parallel importing.[1141] However, the TRIPs Agreement may impede cheaper medicinal access for developing countries[1142] and proceedings commenced by them against pharmaceutical companies to enforce anti-trust law may prove unsuccessful.[1143]

The IFPMA sought to establish a legal precedent deterring other States from weakening national patent protection but framed the litigation in terms of a human rights conflict. This action coincided with proceedings brought by the Pharmaceutical Research and Manufacturers of America (PhRMA) against India through the US before the World Trade Organisation (WTO).[1144] Although the IFPMA threatened similar measures this might not have been possible as an international federation. Inter-State mechanisms would entail diminishing the authority of the complainant to an individual firm or national association and risking their reputation. Litigation by trade associations before national courts brings the weight of international industry to bear against

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[1139] Kimani D., 'Politics derails HIV generic drugs bill', (2001) *The East African* 32.
[1140] US Trade Representative, Annual Report of the President of the US on the Trade Agreements Program, Washington DC, 1999, 291.
[1141] IFPMA, 'TRIP's, Pharmaceuticals and Developing Countries: Implications for Health Care Access, Drug Quality and Drug Development', Geneva, 2000, 17-20; IFPMA, 'Increasing Access to Health Care in Developing Countries: The Need for Public-Private Partnership', Geneva, 2000; IFPMA, 'Parallel Trade: A Recipe for Reducing Patients' Access to Innovative and Good Quality Medicines', Geneva, 2000.
[1142] UNDP, Human Development Report, Oxford University Press, New York, 1999, 68.
[1143] *Pfizer v Lord et al* 14 *ILM* 1409 (1975) (8th Cir 1975).
[1144] Letter dated 2 May 1997 to the USTR by PhRMA, Annex 3, WTO, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS50/R (1997).

individual States, retains control of proceedings in commercial hands and narrows objectives to industry concerns. National courts are also mindful of relationships with their executive branch. Recourse to intergovernmental dispute settlement such as the WTO by contrast requires enlisting the support of home States and must be brought within the scope of international trade agreements but enjoys the receptivity of its tribunals to trade liberalisation. The US government provided tacit support whereas the UK remained silent, thus 'illustrating in bold relief the nexus between corporate and State interests in the arena of international trade'.[1145] However, concerns emanated from diverse sources: an NGO amicus brief detailed local pricing structures and a European Parliament resolution called upon industry to desist. [1146] Pharmaceutical companies responded to the former by creating more favourable publicity explaining their perspective and to the latter by concluding understandings with the EU.

The Federation tactically abandoned the litigation. The national pharmaceutical association secured a role in formulating a mutually-acceptable regulatory framework with the South African government.[1147] WTO Member States reaffirmed that TRIPs does not prevent the adoption of protective public health measures.[1148] To discourage amendment of that Agreement one firm voluntarily relinquished its patent rights over a particular HIV drug. As a

[1145] Commission on Human Rights, Economic, Social and Cultural Rights: Globalisation and its impact on the full enjoyment of human rights, UN Doc E/CN.4/Sub.2/2001/10, paras 26, 27.
[1146] du Plessis E., 'The TRIPs Agreement and South African Legislation: the case of the parallel importation of medicines' (1999) 3(1) *Law, Democracy and Development* 62.
[1147] Pharmaceutical Manufacturers' Association of South Africa/Republic of South Africa, 'Joint Statement of Understanding between the Republic of South Africa and the Applicants', 2001; IFPMA, 'Patients are the winners through partnership-Industry welcomes today's settlement of the South African court case', Geneva, 2001.
[1148] WTO, Declaration on the TRIPs Agreement and Public Health, Attachment to Fourth Ministerial Declaration, Qatar, WT/MIN(01)/DEC/2 (2001).

result of the proceedings the UK was also identified as an attractive investment location with a supportive regulatory framework. The UK government and the national pharmaceutical association subsequently institutionalised dialogue mechanisms and shifted intellectual property protection to a 'strategic' level with a view to jointly promoting further TRIPs implementation.[1149] By initiating national judicial proceedings the industry achieved a platform into national regulatory design, exposed States as potential allies or adversaries, demonstrated their commitment to TRIPs above national law but misjudged the extent of opposition from NGOs and others.

Recourse to national courts to enforce international law against host States is not unlimited. In many States customary international law is automatically incorporated into national law such that prior legislative or judicial pronouncements are unnecessary before its application by national courts. However, customary rules must possess an identifiable content, scope and legal quality before they are sufficient to overcome contrary precedent.[1150]

In the absence of implementing legislation, judicial deference to the executive means that treaties can form the basis for litigation within dualist State Parties only where their provisions are self-executing (US parlance) or capable of direct effect (the European equivalent). Notwithstanding that the capacities of non-State actors 'may be different from and less in number and substance than' those of States, international agreements may intend to confer individual rights

[1149] UK Department of Health/Association of the British Pharmaceutical Industry, Final Report of the Pharmaceutical Industry Competitiveness Task Force, London, 2001, Section 9.
[1150] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 578.

which are enforceable by national courts.[1151] Although States follow different approaches, the UN Charter, the General Agreement on Tariffs and Trade (GATT) and TRIPs are several treaties which have been denied direct effect.[1152] A relevant consideration is reciprocity: whether foreign competitors can invoke the treaty within local courts against local firms and local firms possess that same right against foreign firms within their national legal systems. The treaty terms may expressly or impliedly provide a private right of action.[1153] Analogous to the difficulty of enforcing foreign judgments before local courts, GATT Panel decisions may be unenforceable against host States.[1154] It follows that foreign corporations may be unable to institute proceedings before the national courts of competitors who enjoy unfair competitive advantages arising from that State's non-compliance with international law. One alternative is challenging disputed government measures 'from above' by resort to diplomatic protection at the intergovernmental level.

(b) The Diplomatic Protection Model.

This section compares commercial contributions to two ostensibly intergovernmental means of dispute settlement. Commercial interest in proceedings of the International Court of Justice (ICJ) is informal, sporadic and limited to circumstances where, for example, resolving territorial disputes

[1151] Permanent Court of International Justice, *Advisory Opinion on the Jurisdiction of the Courts of Danzig (the Danzig Railway Officials case)* (1928) PCIJ *Ser B* No 15, 17.
[1152] *Sei Fuji v California* 19 *ILR* 312 (1952); C-280/93 *Germany v Council* [1994] ECR 1-4973 para 106; C-53/96 *Hermes International v FHT Marketing Choice BV* [1998] 1 ECR 3603.
[1153] *Tel-Oren v Libyan Arab Republic* 726 F 2d 774, 808 (DC Cir 1984).
[1154] *Footwear Distributors and Retailers of America v US* 852 F Supp 1078, 1096 (USCIT 1994).

authoritatively establishes State jurisdiction and recognisable security for property rights. The corporate role within the WTO is more advanced given relatively greater enforcement prospects and their specific interest in resolving inherently commercial disputes. Corporate participation includes prior national proceedings, private counsel, technical expertise as Panel members or advisers, submitting amicus briefs and resort to confidential business information.

(b)(i) Authoritatively establishing Property Rights through the International Court of Justice.

Only States can be parties to contentious proceedings before the ICJ.[1155] This does not preclude them from consulting with companies at the core of disputes and their home States to secure negotiated outcomes.[1156] Corporations occupy a behind-the-scenes role when States espouse diplomatic protection on their behalf. The right to exercise diplomatic protection is limited to the State of incorporation or where the company has its registered office or seat of management.[1157] Although illustrating the fiction of formal national allegiance, this rule's technical simplicity avoids competing diplomatic claims arising from cross-territorial share exchange and resulting insecurity in international economic relations. However, evidence of a real and substantial connection may be a relevant consideration for States.[1158] Only exceptionally, such as upon the firm's legal demise or where the State of incorporation is also the

[1155] Art 34 Statute of the International Court of Justice.
[1156] *Electricite de Beyrouth Company Case (France v Lebanon)* (1954) *ICJ Rep* 107.
[1157] *Barcelona Traction, supra n26*, paras 70, 96.
[1158] UK Foreign and Commonwealth Office, Rule IV, Rules regarding International Claims (1988) 37 *ICLQ* 1006.

respondent State, can the State of nationality of the shareholders espouse a secondary right of diplomatic protection. The ICJ has indicated a willingness to relax the rules of diplomatic protection and afford foreign investors greater protection, particularly where corporate insolvency blurs the causal link between alleged expropriatory measures and corporate injuries.[1159] However, there is little support by States for direct corporate participation within the ICJ such as appeals by foreign investors from national judicial decisions.[1160]

Contentious proceedings before the ICJ are of indirect commercial interest. The territorial claims of States and the authoritative exercise of national jurisdiction are preconditions for the prospective commercial exploitation of natural resources, the validity of property titles and universally recognised security of tenure. The origins of intergovernmental disputes are traceable to contested activity including petroleum exploration, ownership of natural resources and fishing rights.[1161] Competing mineral concessions and licenses granted by States give rise to inter-commercial disputes, spark protests between neighbouring governments contesting the claims of the other and are finally shoehorned into an exclusively intergovernmental mould where State-centric perspectives are paramount.[1162] The commercial practices of national fishing industries bolster a State's argumentative position.[1163] However, private acts are rarely equated to exercising sovereign authority sufficient to

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[1159] *Case concerning Electtronica Sicula SpA (ELSI) (US v Italy)* (1989) *ICJ Rep* 15, paras 101, 119.
[1160] Bowett D.W. et al, The International Court of Justice: Process, Practice and Procedure, The British Institute of International and Comparative Law, London, 1997, 68, para 84.
[1161] *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (1984) *ICJ Rep* 246, paras 60-78.
[1162] Eg *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (2002) *ICJ Rep* 303, paras 282-3, 303-4.
[1163] *Fisheries Jurisdiction Cases (Federal Republic of Germany, UK v Iceland)* (1974) *ICJ Rep* 3.

establish valid territorial titles for States: they are 'without any relevance in the eyes of international law'.[1164] That said, government licenses and commercial infrastructure may be material evidence of sovereign authority.[1165] States may be put upon notice from corporate reports such that subsequent maritime delimitations consider concession contracts.[1166] Overlapping petroleum concessions are generally irrelevant for delimiting the continental shelf between two States but alignment thereof may be taken into account for maritime delimitations since a de facto agreement between States is suggested.[1167]

The ICJ is willing to receive written and oral submissions from States or international organizations when responding to requests for advisory opinions.[1168] 'International organisation' is evidently construed differently for procedural purposes since the ICJ's predecessor, the Permanent Court of International Justice, invited submissions from the International Organisation of Industrial Employers and its trade union counterpart.[1169] The offer of the International League of the Rights of Man to make statements was accepted by the ICJ during the 1950 *South-West Africa* case but no documents were eventually submitted. The same NGO was refused permission during the 1950 *Asylum Case* (contentious proceedings) but also in the 1971 *South-West Africa*

[1164] Eg *Case concerning Kasikili/Sedudu Islands (Botswana v Namibia)* (1999) *ICJ Rep* 1045, para 96.
[1165] Permanent Court of Arbitration, *Eritrea-Yemen Arbitration, (First Stage)* 40 *ILM* 900 (2001), paras 315, 341, 419, 502.
[1166] *Ibid,* paras 400, 433-4 & *(Second Stage)* 40 *ILM* 983 (2001) paras 72, 83.
[1167] Meese R., 'The relevance of the granting of oil concessions in a maritime delimitation: the jurisprudence of the International Court of Justice' (2004) 1(1) *Transnational Dispute Management.*
[1168] Art 66(2) Statute of the International Court of Justice.
[1169] *Competence of the International Labour Organisation to Regulate the Personal Work of Employers Case* (1926) *PCIJ Ser B* No 13, 6; *Advisory Opinion No 1 on the Workers Netherlands Case* (1922) *PCIJ Ser B* No 1, 9.

advisory opinion.[1170] Judges Oda and Weeramantry in their separate and dissenting opinions have referred to comments made by the International Physicians for the Prevention of Nuclear War.[1171] Most recently, Palestine was permitted to submit a written statement for the *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory* given its observer status with the General Assembly and co-sponsor of the request. The prospect of participation by reputable business organisations such as the ICC cannot be discounted if the Court is gradually becoming more receptive to receiving written submissions from at least some non-State actors during advisory proceedings. Enriching judicial deliberations would be a welcome development but raises concerns (considered further below) analogous to the receipt of amicus submissions by the WTO.

(b)(ii) Removing Impediments to Trade through the World Trade Organisation.

State compliance with their international trade obligations is bound up with denying market opportunities for national exporters. Formal systems at the national level process corporate claims and ultimately trigger WTO dispute settlement. For example, the EC Trade Barriers Regulation enables firms or industries to lodge complaints alleging violations of WTO Agreements by other States.[1172] The largest complaints category concerns the effects of

[1170] Shelton D., 'The Participation of NGOs in International Judicial Proceedings' (1994) 88 *AJIL* 611, 623-4.
[1171] ICJ, *Advisory Opinion on the Legality of the Use of Nuclear Weapons* (1996) *ICJ Rep* 66, per Oda J, para 8 & Weeramentry J, Part 6.
[1172] Council Regulation 3286/94 OJEC L349, 71 (1994) as amended by Council Regulation 356/95 OJEC L41, 3 (1995).

existing or proposed legislation upon third country markets.[1173] Petitions are similarly filed with the US Trade Representative by interested persons on industry's behalf demonstrating a denial of US rights under trade agreements or that the acts or practices of another State are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce.[1174] Intellectual property rights are targeted as well as trade barriers which affect US exports having the greatest growth potential. An assurance has been given that such procedures will be applied consistently with WTO dispute settlement obligations.[1175] An administrative apparatus has been established within designated US agencies to attract relevant business information.[1176]

Recourse to the WTO dispute settlement mechanism may follow resort to legislatively-supported national processes. First, direct civil actions between private parties and applicable penalties are assessable against GATT standards.[1177] Foreign corporations enjoy identical procedural advantages as local enterprises within national tribunals such as the US Court of International Trade.[1178] Second, investigations made by or on behalf of national industry prompt government authorities to scrutinise the commercial practices of rivals.[1179] Natural or legal persons and associations acting on behalf of

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[1173] Van Eeckhaute J.C., 'Private Complaints against Foreign Unfair Trade Practices: The EC's Trade Barriers Regulation' (1999) 33(6) *J of World Trade* 199, 203, 205.
[1174] Sec 301 *Trade Act (1974)* 19 USC s2411-2416. Protectionist relief can also be provided: sec 201.
[1175] WTO, *US–Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (1999).
[1176] USTR, Annual Report of the President of the US on the Trade Agreements Program, Washington DC, 2000.
[1177] WTO, *US-Anti-Dumping Act of 1916*, WT/DS136/AB/R & WT/DS162/AB/R (2000), para 90.
[1178] WTO, *US-Section 337 Tariff Act, WTO Doc L/6439 (1989)*, para 5.18.
[1179] *The Omnibus Trade and Competitiveness Act (1988)* 19 USC 2411 (Sec 1337 reviews for telecommunications agreements and Title VII for the WTO Government Procurement Agreement).

Community industries may initiate anti-dumping proceedings within the EC.[1180] Financial incentives encouraging national producers to initiate or support these investigations are permissible provided there is widespread industry concern.[1181] Third, trade agreements may require States to institute national administrative or judicial procedures providing for direct access by corporate complainants.[1182]

Private bodies may be entrusted with administering enforcement procedures. For example, the Preshipment Inspection Agreement contemplates the WTO, ICC and the International Federation of Inspection Agencies (representing private pre-shipment organisations) establishing an 'Independent Entity' to oversee binding arbitration in disputes between inspection agencies and exporters.[1183] The WTO Working Party on Preshipment Inspection held informal meetings with the Federation and the ICC falling outside the ambit of ordinary WTO-NGO relations.[1184] Alternatively, corporations or consultants may be employed to administer local customs procedures or recruited to undertake investigative functions.[1185] Although their objectivity may be queried, using industry representatives for customs clearance does not per se

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[1180] Art 5, Council Regulation 2423/88 OJEC L209, 1 (1988).
[1181] WTO, *US-Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/AB/R & WT/DS234/AB/R (2003).
[1182] Arts 2-6, Subsidies Code & Arts 2-6 Anti-dumping Code, GATT, The Texts of the Tokyo Round Agreements, Geneva, 1986, 51, 127; Art 51, Agreement on Trade-Related Aspects of Intellectual Property Rights, GATT Secretariat, Uruguay Round Final Act, *supra n*342, Annex 1C.
[1183] Art 4, Agreement of Preshipment Inspection, GATT Secretariat, Uruguay Round Final Act, *supra n*342, Annex 1(A) Part 10.
[1184] WTO, Draft Final Report of the Working Party on Preshipment Inspection, WTO Doc G/PSI/WP/W/24 (1999).
[1185] WTO, *Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R (1998), para 8.6.

constitute an export restriction.[1186] Enforcement activities may entitle corporations to immunity under national law as an organ of State.[1187]

Consistent with the diplomatic protection model only Member States party to disputes or having third party interests enjoy a legal right to participate in Panel or Appellate Body proceedings.[1188] States are advocates for corporate claims within the intergovernmental WTO context. Corporations provide resources to national governments for conducting litigation including drafting consultation requests, preparing delegation statements, legal analysis and drafting written and oral submissions.[1189] Industry is the best-placed to comment upon factual determinations. For example, the EU adopted estimates of economic loss provided by a pharmaceutical industry association in support of its claim against Canada.[1190]

Legal counsel from private firms are employed by States to appear on their behalf. Nothing under the relevant trade agreements, customary international law or the prevailing practice of international courts and tribunals prevents WTO Members from determining the composition of national delegations.[1191] States may nominate private lawyers as representatives provided they act

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[1186] WTO, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (2000), para 11.55.
[1187] *Walker et al v Bank of New York Inc* (1994) 111 DLR (4th) 186, 189-91.
[1188] Arts 2, 10, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU Agreement), Annex 2, GATT Secretariat, Uruguay Round Final Act, *supra n*342.
[1189] Bello J.H., 'Some Practical Observations about WTO Settlement of Intellectual Property Disputes' (1997) 35 *Va J Int'l L* 357, 360-1.
[1190] WTO, *Canada–Patent Protection of Pharmaceutical Products*, WT/DS114/R (2000), para 4.7.
[1191] WTO, *EC–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997), paras 10, 12.

consistently with WTO procedural rules.[1192] Although appropriately qualified counsel can enhance participation by WTO Members, such expertise may be unaffordable for developing States. The conditions of private participation include membership of official delegations, respect for confidentiality and State responsibility for their conduct.[1193] One proposal is to grant firms a right to their own legal representation independent of States.[1194]

Corporate officers can participate in WTO proceedings as Panel members given the expertise they contribute.[1195] Conflicts of interest are sought to be prevented through self-disclosure and respect for the confidentiality of proceedings. Continuing commercial interests and prior association with ICC Committees does not disqualify individuals from participation.[1196]

Commercial Perspectives and the Amicus Brief Controversy.

Non-State actors do not possess the right to initiate proceedings or intervene as third parties. One mechanism for expressing their perspectives is submitting unsolicited amicus curiae briefs as 'friends of the court'. Receiving amicus briefs is not explicitly contemplated by the Dispute Settlement Understanding

[1192] WTO, *Indonesia–Certain Measures affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (1998), para 14.1.
[1193] WTO, *Korea-Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (1998), para 10.31.
[1194] Agora, 'Is the WTO Dispute Settlement Mechanism Responsive to the Needs of Traders? Would a System of Direct Action by Private Parties Yield Better Results?' (1998) 32(2) *J World Trade L* 147, 159.
[1195] Art 8, DSU Agreement, *supra n*1188; WTO, *US -Section 211 Omnibus Appropriations Act*, WT/DS176/1 (1999).
[1196] Arts 5, 7, WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc WT/DSB/RC/1 (1996); WTO, *US–The Cuban Liberty and Democratic Solidarity Act (the Helms-Burton Act)*, WT/DS38 (1996); ICC Commission on International Trade and Investment Policy, ICC Statement on the Helms-Burton Act, Paris, 1996.

(DSU) and may not be compatible with the character of intergovernmental dispute settlement. WTO Panels enjoy the 'right to seek information and technical advice from any individual or body which it deems appropriate.'[1197] Panels may 'seek' information from relevant sources and consult experts including corporate officers. [1198] Ordinarily the Panel must inform States before contacting bodies within their jurisdiction but cannot be prevented from receiving information.

The Panel in *US-Import Prohibition of Shrimp and Shrimp Products* (hereinafter *Shrimp Turtle*) held that it only has the initiative to request information and that unsolicited material must be disregarded. However, the Appellate Body stated that the authority to seek information does not equate to a prohibition on accepting unsolicited information.[1199] In exercising discretion Panels could grant permission for an amicus to file written statements subject to such conditions deemed appropriate and if it did not unduly delay the process. Panels must consider the need for information and determine what weight to ascribe to it. Attaching an amicus brief to the submission of a State party to proceedings renders that material at least prima facie an integral part of that State's position.[1200]

In *US-Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK* (hereinafter *British*

[1197] Art 13(2), DSU *supra n*1188.
[1198] *Ibid,* Art 13 DSU; WTO, *Australia-Measures affecting Importation of Salmon,* WT/DS18/R (1998), para 6.6.
[1199] *US–Import Prohibition of Shrimp and Shrimp Products,* WTO Doc WT/DS58/AB/R (1998), paras 104, 108-10.
[1200] *Ibid,* para 89.

Steel), the Appellate Body confirmed that individuals and organizations not Members of the WTO have no right to make submissions or be heard. Although there is no duty to accept or consider unsolicited briefs submitted by such actors, the Appellate Body has legal authority under the DSU to do so where 'we find it pertinent and useful'.[1201] The briefs submitted by the American Iron and Steel Institute and the Specialty Steel Industry of North America were refused by the Panel since they were untimely and by the Appellate Body since it was unnecessary to take them into account. The Panel also observed that although observers could not be admitted States could forego confidentiality through public disclosure.

The Appellate Body went further than its prior practice of accepting amicus briefs when attached to parties' submissions or where unsolicited in *EC-Measures affecting Asbestos and Asbestos-Containing Products* (hereinafter *Asbestos*). To facilitate an orderly process 'for the purposes of this appeal only', it publicly invited briefs from NGOs registered with the WTO and issued rules on how it would process submissions.[1202] An application for leave to submit amicus briefs must, inter alia, disclose the entity's nature, its interest in the case, whether it is financed or supported by the parties and how the submission would assist by going beyond arguments the parties were expected to make.[1203] The purported legal authority for the Special Procedure stemmed

[1201] *US–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, WTO Docs WT/DS138/R (1999), paras 6.2-6.3 & WT/DS138/AB/R (2000), paras 39, 42.
[1202] *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001), paras 50, 55-7.
[1203] Communication from the Appellate Body, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review, WTO Doc WT/DS135/9 (2000).

from Article 16(1) of the Working Procedures for Appellate Review which state that in the interests of fairness and the orderly conduct of appeals a Division may adopt appropriate procedures for dealing with procedural questions provided that this is consistent with the DSU, other covered agreements and working procedures. In its view, the Working Procedures contemplate applications for receiving amicus briefs from identifiable natural or legal persons which enclose a statement of interests indicating how their brief will contribute to resolving disputes without repeating existing material. Once approved, such persons may submit a short written brief limited to legal issues and served upon parties and third parties to the dispute.

WTO Members had criticised *Shrimp Turtle* and *British Steel* on these points for lack of conformity with the WTO Agreements and referred to the intergovernmental nature of proceedings.[1204] After *Asbestos* the WTO General Council convened a special session at Egypt's request.[1205] All States except one criticized the Appellate Body's actions. They were concerned that i) the Appellate Body did not posses authority for adopting procedural rules governing amicus participation; ii) the participation of non-State actors within the WTO is a matter for States Parties to determine, not its tribunals[1206]; iii) admitting amicus briefs would alter the intergovernmental nature of the dispute settlement system; iv) non-State actors not party to proceedings would enjoy more rights than States, it being possible for the former to submit briefs during

[1204] Dispute Settlement Body, Minutes of Meeting, WTO Doc WT/DSB/M/50 (1998); Pruzin D., 'WTO Members make unfriendly noises on 'friends of the court' dispute briefs', BNA Daily Report for Executives, 9 August 2000, C1.
[1205] WTO, Minutes of WTO General Council Meeting, WTO Doc WT/GC/M/60 (22 Nov 2000).
[1206] Art V(2), WTO Agreement *supra n*342.

appellate proceedings whereas States had to first act as third parties before corresponding Panels; v) dispute settlement would be subject to greater political pressures; and vi) the workload for all would be disproportionately increased. Developing countries were concerned that NGO participation would diminish their sovereignty.[1207] Notwithstanding that NGO arguments may support the position of developing States, their environmental agenda may counter the latter's development goals. Similarly, the singular pursuit of profit by corporations may prompt them to eliminate trade barriers intended to shelter infant industries within developing countries. Whatever their predisposition, relatively more capable non-State actors principally from industrialized States could exert extraordinary influence over Panel deliberations.

Only the US expressed the view that the Appellate Body enjoyed authority under the DSU to allow amicus participation including adopting procedures governing such participation. Moreover, the US, New Zealand and Japan supported the Appellate Body's earlier acceptance of amicus briefs. The EC observed the tendency of tribunals to fill gaps where legislatures fell short and acknowledged the need for further rule-making. The Chairperson of the Governing Council accordingly instructed the Appellate Body to 'exercise extreme caution in future cases until Members had considered what rules were needed.' In subsequently rejecting all seventeen applications for lack of compliance with the guidelines, in the *Asbestos Case* the Appellate Body appeared to submit to political pressure and lose judicial independence.

[1207] Charnovitz S., 'Opening the WTO to NonGovernmental Interests' (2000) 24 *Fordham Int'l LJ* 173, 210–11.

The EC subsequently proposed formal procedures to apply 'in potentially all cases'.[1208] Amicus briefs from non-parties to WTO proceedings should be 'directly relevant to the factual and legal issues under consideration by the Panel or the legal issues raised in the appeal'. These proposals were similar to the Special Procedure proposed by the Appellate Body. It is possible that current negotiations for the DSU review will codify that tribunal's practice with respect to amicus submissions. However, the EC proposal met with resistance from several developing countries. Furthermore, the US does not consider formal DSU amendment necessary and that guidelines are sufficient.[1209] Such developments arise within the context of efforts to enhance transparency and access to information.[1210] In the interim, the Appellate Body in *EC-Trade Description of Sardines* affirmed that it had authority to accept amicus briefs and would consider them on a case-by-case basis where pertinent and useful for the fair, prompt and effective resolution of disputes.[1211] It also observed that third party intervention procedures should not treat Members less favourably than non-Members. WTO Members and non-Members may also participate as amicus curiae. On the other hand, it decided that the briefs from Morocco and private individuals although admissible were not of assistance.

[1208] Contribution of the EC and its Member States to the Improvement of the WTO Dispute Settlement Understanding, WTO Doc TN/DS/W/1 (2002), 7, 11-12.
[1209] Further Contribution of the US to the Improvement of the Dispute Settlement Understanding of the WTO related to Transparency, WTO Doc TN/DS/W/46 (2003), 3.
[1210] Cp WTO, Procedures for the Circulation and Derestriction of WTO Documents, Revised Decision adopted by the General Council, 1996, WTO Doc WT/L/160/Rev.1.
[1211] *EC-Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (2002).

On one view, WTO dispute settlement remains a Members-driven intergovernmental organisation.[1212] Private parties do not enjoy substantive rights and access is limited to submitting amicus briefs which may be disregarded. The status of amici precludes them from enjoying the full range of rights enjoyed by States party to proceedings. Amici do not enjoy comprehensive access to information such as relevant documentation (evidentiary materials, written submissions), the opportunity to make oral submissions or possess a right of appeal. Since working procedures provide that proceedings are conducted in closed session and open only to disputing Parties, observer participation is inconsistent with the confidential nature of WTO dispute settlement.[1213] However, departure from this rule is possible with the consent of parties. For the foreseeable future, NGO participation is discretional: WTO Appellate Bodies and Panels possess the right, but not the duty, to receive unsolicited information from them. There is no right to have briefs considered by these tribunals and they are only accepted where helpful. WTO Panels have accepted briefs from trade associations but reportedly not taken them into consideration in rendering final decisions.[1214] It is uncertain whether amicus briefs have decisive impacts upon the final decisions of national, regional or international tribunals.

[1212] Howse R., 'Membership and its Privileges: the WTO, Civil Society and the Amicus Brief Controversy' (2003) 9(4) *European LJ* 496; Schneider A.K., 'Unfriendly Actions: The Amicus Brief Battle at the WTO' (2001) 7 *Widener L. Symp. J* 87, 95–101.

[1213] Decision concerning the US Request for Participation by Observers, *US-Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products originating in the UK*, WTO Doc WT/DS138/R (2000), para 6.2.

[1214] *EC-Antidumping Duties on Imports of Cotton-type Bed Linen from India*, WTO Doc WT/DS141/R (2000), para 6.1.

Particularly noteworthy is that States are prepared to re-assert their authority in specific cases to determine who may participate in dispute settlement. State positions may depend upon whether amicus briefs support their litigation strategy. State consent is preserved inasmuch as private sector participation may be tacitly authorized by applicable procedural rules or subsequently amended to restrict or prohibit such activity. Applications from non-State actors may be rejected if not filed in a timely manner or duplicate existing information.

It could be argued that the principal objection of States was not to NGO participation per se but that a judicial body had formulated the applicable rules. International tribunals look to their constitutive instruments, applicable procedural rules and inherent judicial powers to determine whether they possess explicit or implicit authority to enable private participation. WTO Panels and Appellate Bodies have differing legal authorities for doing so. Panels, under Article 13 of the DSU, may accept unsolicited briefs and consult with parties to proceedings. Appellate bodies may receive unsolicited submissions under Article 16(1) of its Working Procedures.[1215] Tribunals enjoy inherent powers to control proceedings in an orderly manner provided due process and procedural fairness are respected. Since Article 13 of the DSU is intended to enable Panels to look for information beyond the pleadings,

[1215] Cp Working Procedures for Appellate Review drawn up pursuant to Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc WT/AB/WP/3 (1997).

WTO Panels should be able to invite amicus submissions provided that disputing Parties have the opportunity to respond.[1216]

Amicus briefs provide WTO Panels with additional expertise, insight and experience, afford an opportunity for other actors to present their perspectives, particularly where outcomes affect their interests, and access factual or legal issues within the amici's knowledge. The current two-stage process – applying for leave and subsequently making a submission – may warrant reconsideration. Since it is difficult for Panels to accept or reject amicus briefs without first considering their content, the amici may have already succeeded since any information cannot readily be disregarded. Judges retain access even where briefs are rejected. Receiving amicus briefs becomes a question of procedure or formality. However, amicus briefs may have substantive impacts where ideas affect outcomes. It could therefore be argued that panels should address only those arguments raised by parties since to counter additional ones which may attract the Panel's attention increases the burden for disputants. Developing countries are concerned that they may be deluged with submissions from northern-based NGOs. Since amicus briefs exaggerate one particular interest over another, developing countries do not possess the resources to counterbalance commercial arguments which favour developed States. Amici are unable to control the use of the information, are unaccountable for inaccuracies and are not bound by the outcome. Corporations may prefer less transparent and informal methods for expressing their perspectives insofar as amicus briefs become public documents.

[1216] Mavroidis P.C., 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', Jean Monnet Working Paper No. 2/01, 2001.

Comparative State practice with respect to amicus participation varies. Amicus curiae participation is explicitly contemplated for international human rights[1217] and international criminal tribunals.[1218] Persons wishing to intervene in proceedings of the European Court of Justice through oral and written statements, submitting relevant evidence and obtain access to disputing party's submissions must demonstrate a direct, specific and economic interest in the outcome.[1219] Parties are also afforded a right of reply. The relevant rules for amici tend to be general whereas those for standing are relatively detailed: some tribunals provide for significant rights, particularly human rights ones, whereas others are minimal or non-existent. The varying involvement of amicus curiae reflects historical evolution, the rights and obligations adjudicated upon, evidence availability, legal customs and demand. Considerations for NGO participation within the WTO include organisational attributes (degree of representivity, accountability to membership, demonstrable expertise), objective information, avoiding undue delay, political sensitivities, socio-economic importance or public interest in the case as well as various procedural criteria (timing of submissions, length, format and

[1217] Art 25(2), 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III); Art 44(1), Inter-American Court of Human Rights, Rules of Procedure, Annual Report of the Inter-American Court of Human Rights, 1991, OAS Doc.OEA/Ser.L/V/III.25 doc.7 (1992), 18; Arts 34, 36(2), 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 *UNTS* 222 & Rule 61, Rules of the Court, ECHR, 1998.

[1218] Rules 74, Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, UN Doc ITR/3/REV.1 (1995) & the International Criminal Tribunal for the former Yugoslavia, UN Doc IT/32/Rev.7 (1996); Rule 103, Rules of Evidence and Procedure of the International Criminal Court, UN Doc PCNICC/2000/1/Add.1 (2000).

[1219] Art 37, Statute of the European Court of Justice.

notification to the parties).[1220] The institutional legitimacy of WTO dispute settlement requires maintaining the confidence of States without ostracising NGOs. Noteworthy for present purposes is that persistent effort by individuals, NGOs and corporations has led to emerging legal procedures governing amicus submissions. Since the developments to date have largely arisen on an ad hoc basis, a 'considered and principled approach' would be preferable.[1221]

An Assessment of Corporate Participation within the WTO.

Firms retain significant decision-making power as illustrated by the use and protection of confidential business information. Self-proclaimed confidential business information is owned by non-Parties to the WTO, ex parte communications are prohibited and trade agreements may impose confidentiality obligations upon States. National corporations of complainant States, subjected to local investigation by defendant States at the insistence of local competitors, have to waive confidentiality before information may be used by those defendants.[1222] The WTO dispute settlement system may be unable to function optimally if Panels can only request information from States. Protecting information and litigation strategy must be balanced against reasonable access, due process and procedural fairness. Working procedures have been adopted to address these circumstances.[1223] States are also free to

[1220] Marceau G. & Stilwell M., 'Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies' (2001) *J Int Economic L* 155, 178-183.
[1221] Cp Chinkin C. & Mackenzie R., 'Intergovernmental Organisations as 'Friends of the Court'' in Boisson de Chazournes L. et al (Eds), International Organisations and International Dispute Settlement: Trends and Prospects, Transnational Publishers, New York, 2002, 135 at 162.
[1222] WTO, *Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (2000).
[1223] Arts 12(1), 18 DSU *supra n*1188.

propose protective measures. [1224] Relevant procedures include holding information within the WTO Secretariat and Geneva diplomatic premises of opposing Parties and excluding corporate employees or their agents from access.[1225]

WTO proceedings are properly understood as 'sophisticated, multi-track political and economic battles between economic competitors over specific markets than as international legal disputes between sovereign nations'.[1226] Their origins may also be traced to national regulatory or judicial arenas such as the International Trade Commission or the Court of International Trade within the US. For example, a State enterprise from Venezuela lobbied the US Environmental Protection Agency to reconsider legislative amendments which differentiated between domestic and foreign refiners. [1227] After a local competitor opposing the proposed measures successfully lobbied Congress and blocked the revisions, the State concerned initiated proceedings.[1228] Similarly, in conjunction with a media campaign Kodak filed petitions with the US Trade Representative seeking greater access to the Japanese market. Fuji discussed the matter with the Japanese government who refused to react. Both firms sent legal advisers to Geneva (the US partly adopted Kodak's legal strategy), provided information and prepared oral arguments.[1229] Significantly, State

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[1224]WTO, *US-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (2000), Attachment 4.
[1225] WTO, *Canada-Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (1999), para 9.59, Annexes 1 & 2 approved in WT/DS70/AB/R (1999).
[1226] Dunoff J.L., 'The misguided debate over NGO participation at the WTO' (1998) 1 *J Int Economic L* 433, 451.
[1227] *Clean Air Act Amendments of 1990*, Pub L No 101-549, Sec 219, 104 Stat 2399, 2492-2500.
[1228] *US-Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (1996).
[1229] *Japan-Measures affecting consumer photographic film and paper*, WTO Doc WT/DS44/R (1995).

participation was critical: 'the participation of the two companies was made possible only by the readiness of their governments to admit them informally to the proceedings'.[1230] An ostensibly intergovernmental dispute resolution forum is a route by which competitors redistribute market control and acquire concessions from States. However, the WTO indirectly protects the rights of traders: 'the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix'.[1231] A private right of directly initiating WTO proceedings has been proposed to make the system respond to its ultimate beneficiaries as much as its users.[1232] However, NGO participation should be extended alongside corporate rights and frivolous or vexatious claims discouraged.

(b)(iii) Limitations of the Diplomatic Protection Model.

Customary international law provides that exhausting local remedies by firms against host States is a prerequisite to exercising diplomatic protection by their State of nationality. Although vindicating international legal claims through this route depends upon State discretion, in the absence of direct State injury the decision to pursue diplomatic protection lies initially with firms, thereby turning the rule of diplomatic protection on its head. Contractual terms

[1230] Reinisch A. & Irgel C., 'The Participation of NGOs in the WTO dispute settlement system' (2001) 1 *Non-State Actors & International L* 127, 138-9.
[1231] WTO, *US-Sections 301–310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (2000), para 7.73.
[1232] Lukas M., 'The Role of Private Parties in the Enforcement of the Uruguay Round Agreements' (1995) 29 *J World Trade* 181, 206.

purporting to exclude international remedies (so-called 'Calvo Clauses') can be rendered ineffectual.[1233] By exercising diplomatic protection States are presumed to be asserting their own rights including respect for international legal rules.[1234] For a considerable period the real objective has been to secure reparation for private claimants.[1235] Although States are responsible for apportioning compensation, private claimants enjoy pecuniary rights over those funds and are entitled to a fair distribution.[1236]

Diplomatic protection is a problematic remedy for corporations. First, it has to access and persuade competent national authorities to pursue claims - an extremely time and resource consuming process lacking transparency and certainty - before control is relinquished to the State. 'Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.'[1237] Commercial perspectives at variance from home States positions warrant independent espousal. Second, diplomatic protection offers partial solutions inasmuch as it is only available to local corporations in respect of local products. Action against the home State is impermissible. Identifying nationality links with one State for multinational enterprises with transborder commercial operations is arbitrary, inaccurate and burdensome. Diplomatic protection is inappropriate for common industry issues: industry associations such as the International Federation of Pharmaceutical Manufacturers Associations have members located in several States. Third, exercising locus standi privileges is assessed against political

[1233] *El Oro Mining and Railway Case (Great Britain v Mexico)* (1931) 5 *UNRIAA* 191.
[1234] *Mavrommatis Concessions Case* [1924] PCIJ Ser A No 2, 12.
[1235] *Administrative Decision No V (US v Germany)* (1924) 7 UN RIAA 119.
[1236] *Beaumartin v France* [1994] *ECHR Ser A* Vol 296, 60-1.
[1237] *Mavrommatis Concessions Case supra n*1234.

factors extraneous to the economic concerns of the firm. States will be reluctant to espouse arguments which bind them in subsequent proceedings, undermine political negotiations or render them liable locally. The filtering mechanism of diplomatic protection tends towards the underenforcement of international law. However, diplomatic protection enables corporate anonymity, masks underlying economic objectives and maintains State responsibility. Presently noteworthy is that at direct NGO insistence the procedural law associated with intergovernmental dispute settlement has expanded to enable a degree of non-State actor participation.

It could be argued that the classical diplomatic protection model underlying WTO dispute settlement has since grown by accretion to represent a novel mode of international dispute settlement. Reference has been made above to encouraging resort to private legal counsel, corporate officers participating as Panel members or appointed as experts and formalising procedures for receiving amicus submissions. Proposals to refine WTO dispute settlement include creating a role for national courts by making Panel rulings justiciable.[1238] The further step for non-State actors would be the right to directly initiate proceedings.

(c) Direct Arbitral Action against States to Protect Property Rights.

Arbitration illustrates first that exercising jurisdiction to resolve disputes does not require any sovereign attributes and secondly that consent underpins

[1238] Petersmann E.-U., 'The Negotiations on Improvements of the WTO Dispute Settlement System' (2003) 6(1) *J Int Eco L* 237, 241, 244.

submission thereto by States and firms alike. Historically arbitration has been a prominent dispute settlement tool for States which developed international law.[1239] However, when corporations resort to this 'private' method to directly enforce international law against States they are promoting commercial interests but having public effects. Arbitration is one means of enforcing the international minimum standard of treatment owed by States to foreign nationals and challenging regulatory measures which amount to expropriating private property rights. 'Delocalising' disputes promotes investor confidence by avoiding the deficiencies of diplomatic protection and securing outcomes free from parochial national law and the perceived partiality of its courts.

Inter-corporate disputes are resolved through privately-conducted arbitration.[1240] Concession contracts between States and corporations which contemplate arbitration under ICC auspices invoke its reputation for impartiality, confidentiality and expertise.[1241] However, by acting outside official settings claimants forego the authority of government-sponsored adjudicatory bodies and cannot compel witness testimony or evidence production.[1242] State agencies which submit to ICC arbitration impliedly waive sovereign immunity during subsequent enforcement proceedings.[1243] Business groups have attempted to harmonise national arbitration laws within

[1239] Caron D.D., 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94(1) *AJIL* 4.
[1240] ICC, Collection of ICC Arbitral Awards Vol 1 (1974-1985) ICC Pub No 433, Vol 2 (1986-1990) ICC Pub No 514 & Vol 3 (1991-1995) ICC Pub No 553, Paris.
[1241] *China-Radio Corporation of America* (1960) 54 *AJIL* 933.
[1242] *National Broadcasting Company v Bear Stearns & Co* 165 F 3d 184 (2nd Cir 1999).
[1243] *Seetransport Viking Trader Schiffarhtsgesellschaft MBH & Co, Kommanditgesellschaft v Novimpex Centralia Novala* 989 F 2d 572, 578-9 (CA 2nd Cir 1993).

intergovernmental fora.[1244] For example, by virtue of consultative status the ICC employed its right of initiative within ECOSOC and the resulting convention provides for the recognition of arbitral awards by national courts.[1245]

Ad hoc arbitral tribunals established by conventional agreement may be specifically charged with examining the legitimacy of governmental action. For example, the Iran-US Claims Tribunal, a hybrid model of diplomatic protection which examines systematic patterns of expropriation arising from a specific context, has generated a considerable body of jurisprudence.[1246] Commercial law firms were retained to represent corporations in proceedings against Iran and the US.[1247]

(c)(i) Bilateral Investment Treaties and ICSID.

Bilateral investment treaties (BITs) frequently provide for arbitration in disputes between Contracting State Parties and corporations. A multitude of legal subsystems each containing a similar language and form are overseen by potentially hundreds of ad hoc arbitral tribunals. By this means the corpus of international law grows by sporadic accretion.[1248] However, rotating memberships, different legal counsel and fact-specific scenarios are not

[1244] UN Commission on International Trade Law, Model Law on International Commercial Arbitration UN Doc A/40/17 (1985) Ch 2, 5.
[1245] UN, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 *UNTS* No 4739, 3 (the 'New York Convention').
[1246] Art II, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the USA and the Government of the Islamic Republic of Iran (1981) 20 *ILM* 230.
[1247] Newman L.W., 'A Personal History of Claims Arising out of the Iranian Revolution' (1995) 27(3) *New York Uni J Int L & Pol* 631.
[1248] Eg UNCTC/ICC, Bilateral Investment Treaties 1959-1991, UN Doc ST/CTC/136 (1992).

conducive to greater legal certainty and thus it is not always clear that arbitration is for commercial benefit.

Particularly noteworthy is the International Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[1249] ICSID awards are enforced through national courts on a par with foreign national law or other national judicial decisions provided they are consistent inter alia with local public policy.[1250] ICSID Tribunals possess jurisdiction over 'legal disputes arising directly out of an investment' between Contracting States and nationals of other Contracting States provided there is written consent. They apply host State law and international law modified to the extent necessary to include non-State actors.[1251] 'Property', 'investment' and 'expropriation' have been construed broadly and market access constitutes a property interest entitled to protection.[1252]

ICSID proceedings raise interesting questions of the relationship between private contracts and public treaties as the disputants contest the proper location for dispute resolution. Article 26 of the Convention reverses the classical formulation by providing that States may require the exhaustion of local remedies as a precondition to their consent to international arbitration. The forum selection provisions of concession contracts can similarly compel

[1249] Arts 25(1) & 42(1), 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 *UNTS* 159 (the 'ICSID Convention').
[1250] *Ibid*, Art 54.
[1251] IBRD, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington DC, 1965, para 40.
[1252] ICSID, *Fedax NV v Venezuela (Jurisdiction)* Case ARB/96/3 (1997) paras 31-43.

exclusive resort to national courts.[1253] However, host States may make a 'generic offer' accepted at any time to foreign investors to submit disputes to ICSID arbitration which cannot be unilaterally withdrawn.[1254] Most favored nation treatment clauses apply such that investors can utilise the dispute settlement provisions of a BIT under which they are not a national provided this does not amount to 'disruptive treaty shopping'.[1255] Corporations may attempt to elevate contractual breaches by a State into breaches of a BIT under the 'umbrella clause' of that treaty. ICSID Tribunals have power to stay proceedings pending the determination by some other competent tribunal where that determination is a 'factual or legal predicate' to their own decision.[1256] Competent forums include national courts and arbitral tribunals established pursuant to trade agreements. ICSID Tribunals consider how 'justice would be best served'.[1257]

To summarise thus far, the diplomatic protection model which does not contemplate any direct rights of access will come under pressure to open up to greater private participation. Legal developments in fora such as the WTO will be largely of a procedural character. Albeit an international agreement binding upon States, the ICSID Convention is noteworthy for shifting disputes between States and corporations away from traditional intergovernmental dispute settlement. Locus standi is relatively less contested within the direct arbitral model. The North American Free Trade Agreement (NAFTA) is a useful

[1253] ICSID, *Compania de Aguas del Aconquija SA & Compagnie Generale des Eaux v Argentine Republic*, Case No ARB/97/3 (2001), para 81.
[1254] ICSID, *Lanco International Inc v Argentine Republic (Jurisdiction)* Case No ARB/97/6 (2001), para 32.
[1255] ICSID, *Emilio Agustin Maffezini v Spain (Jurisdiction)* Case No ARB/97/7 (2000), para 56.
[1256] ICSID, *SGS v Pakistan*, ICSID Case No ARB/01/13 (2003), para 186.
[1257] ICSID, *SGS v Philippines*, ICSID Case No ARB/02/6 (2004), para 175.

illustration of direct corporate access to arbitral tribunals at the regional level.[1258] NAFTA demonstrates that the impact of corporate participation on the evolution of substantive international legal norms will be more self-evident.

(c)(ii) The North American Free Trade Agreement.

The principal dispute settlement mechanisms under NAFTA are:

Chapter 11 (investor-State dispute settlement concerning property rights).

Chapter 11 may be invoked by investors of NAFTA parties who made investments within the territory of another and who incurred loss or damage resulting from measures adopted or maintained by that State in violation of that Chapter.[1259] Investments are broadly defined to include minority interests, portfolio investment and real property. Although locus standi is limited to federal governments, States are also accountable for conduct by their state or provincial governments as well as State enterprises or monopolies. Chapter 11 contains provisions with respect to national treatment (Article 1102), most favoured nation status (1103), minimum standards of treatment under international law (1105), performance requirements (1106) and compensation in the event of expropriation (1110). The last-mentioned provides that host States cannot expropriate foreign investments directly or indirectly unless explicitly done in a non-discriminatory fashion, in accordance with law, for a public purpose and accompanied by fair compensation or adopt measures

[1258] NAFTA *supra n*476.
[1259] Chapter 11 procedures also apply to Arts 1502(2) and 1502(3)(a) (State enterprises, monopolies and their exercise of regulatory, administrative or other governmental authority).

'tantamount to nationalization or expropriation'. It does not apply retroactively.[1260] Many claims allege violations of Articles 1102 and 1105 with 'regulatory takings' under Article 1110 the third most frequently cited breach.

There are several conditions precedent to access by private parties.[1261] Complaining investors must be located within a NAFTA State other than the respondent. However, they may initiate claims on their own behalf or on behalf of enterprises controlled or owned by them, directly or indirectly, in another NAFTA State. In short, NAFTA contemplates a departure from the traditional rule of diplomatic protection considered above. Locus standi is extended to firms incorporated in (and formally nationals of) the respondent State and also where they are incorporated in a third NAFTA State but have suffered damage from NAFTA violations by the respondent. On the other hand, firms cannot initiate claims against their State of incorporation. Most significantly, there is no provision compelling exhaustion of local remedies: investors choose between resort to the national courts and administrative tribunals of host States or Chapter 11 arbitral tribunals.[1262] If the latter investors must consent in writing and waive their right to commence or continue proceedings in respect of the same claim before any administrative tribunal or court of any NAFTA country or under any other dispute settlement mechanism.[1263]

[1260] ICSID, *Feldman v Mexico (Jurisdiction)* Case No ARB(AF)/99/1 (2001).
[1261] Arts 1116 & 1117, NAFTA, *supra n*476.
[1262] *Ibid*, Art 1120.
[1263] *Ibid*, Art 1121.

NAFTA dispute settlement under Chapter 11 is unique in additional respects. Investors select those procedural aspects not already predetermined by Chapter 11 or determined jointly. Investors choose the applicable procedural rules from the World Bank's International Centre for the Settlement of Investment Disputes, the ICSID Additional Facility Rules or the rules of the UN Commission for International Trade Law (the UNCITRAL Arbitration Rules).[1264] However, the ICSID Convention only applies where both the respondent State and the NAFTA State of which the investor is a national are Parties. Each disputant appoints one arbitrator and the third and presiding one is appointed by agreement. Finally, NAFTA States undertake to comply with and enforce final awards within national courts. Failure to do so amounts to breaching NAFTA obligations for which Chapter 20 measures may be initiated and trade benefits suspended.

However, States retain several privileges under Chapter 11. NAFTA States may request the Free Trade Commission to determine whether that country's measure, allegedly violating the NAFTA, falls within the scope of a reservation or exception.[1265] Interpretations of NAFTA provisions by the Commission are binding upon arbitral tribunals. Second, Chapter 11 arbitration does not preclude resort to Chapter 20 procedures in respect of the same alleged violations and which are available to NAFTA States only.

[1264] *Ibid*, Art 1120.
[1265] *Ibid*, Art 1132.

Amicus Curiae Submissions under Chapter 11.

Arbitral tribunals with the consent of disputants may appoint experts to advise on environmental, health, safety or other scientific matters. Moreover, NAFTA Chapter 11 tribunals have concluded that they possess implied authority to accept amicus briefs provided that the rights of disputants are unaffected.[1266] Article 1120, which enable recourse to the UNCITRAL Arbitration Rules, authorizes NAFTA Tribunals to 'conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting his case'.[1267]

Particularly noteworthy is the *Methanex* decision where a Chapter 11 arbitral tribunal accepted amicus briefs from an NGO during an investor-State arbitration. Methanex as complainant opposed the NGO petition for reasons of confidentiality, that only NAFTA parties can participate, that recognising amici would add another party to proceedings and that protecting public interests was already envisaged by the right of NAFTA parties to intervene where they saw fit. The US argued that the flexible procedural rules permitted receiving amicus submissions and Canada sought greater openness and transparency to the arbitral process in response to domestic pressures. Mexico however argued that the amicus concept was not recognised under national law and amici would enjoy greater rights than NAFTA parties. It is noteworthy

[1266] *Methanex Corporation v USA*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae, 2001; *United Parcel Services of America Inc. v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae, 2001, para 73.
[1267] Art 15(1) UNCITRAL Arbitration Rules.

that by defending environmental protection laws and public health regulations the NGO was supporting the US position.[1268]

The tribunal rejected the danger of establishing an adverse precedent.[1269] The Iran-US Claims Tribunal had previously received written submissions from financial institutions as non-party third persons in proceedings between States and non-State actors.[1270] The discretion to accept amicus submissions fell within the procedural powers of Chapter 11 tribunals for the orderly conduct of arbitrations.[1271] There was no risk of unfair and unequal treatment since Methanex would receive all due procedural protections. That said, the tribunal rejected the petitioner's request to attend oral hearings and receive copies of materials generated by them. The NAFTA Free Trade Commission subsequently formulated procedures such that Tribunals may accept submissions contributing relevant and unique perspectives from non-disputing parties having a significant presence within NAFTA States, significant interest in the proceedings and the arbitration raises public interest issues.[1272]

[1268] Dumberry P., 'The Admissibility of amicus curiae briefs by NGOs in investors-States arbitration: the precedent set by the *Methanex Case* in the context of NAFTA Chapter 11 proceedings' (2002) 1 *Non-State Actors & International L* 201, 213.
[1269] *Methanex, supra n1266*, paras 30, 49.
[1270] Iran-US Claims Tribunal, *Case A/15* 2 *Iran-US CTR* 40, 43, para 32.
[1271] Art 35, Additional Facility Rules & Art 44, ICSID Convention provide that procedural questions not covered by the rules or agreed to by Parties shall be decided by Tribunals.
[1272] NAFTA Free Trade Commission Statement, 7 October 2003, Part B, Submissions from Non-disputing Parties as applied in *Methanex Corp v US*, Procedural Decision of 30 December 2003.

Chapter 19 (review of final antidumping and countervailing duty determinations).

Chapter 19 does not impose a common template but permits States to apply their own national trade remedy laws. Industries may establish bi-national Panels to review the final determinations of national investigating authorities in antidumping and countervailing duty cases by way of alternative to judicial review by national courts.[1273] Employing the standard of judicial review of the State where the determination was made, Chapter 19 Panels examine administrative records to determine whether relevant agencies applied national law correctly. In binding decisions Panels may uphold final determinations or remand them for reconsideration.

Chapter 19 dispute settlement is designed to shield States from domestic pressure groups for politically sensitive matters. Investors do not formally enjoy any role in establishing Panels and selecting arbitrators. NAFTA States may initiate an extraordinary challenge procedure before a Committee to safeguard the integrity of the review process. Furthermore, only States may participate in Panel reviews with respect to statutory amendments.[1274] Panel reviews may be challenged where outcomes are materially affected by conflicts of interest, departure from fundamental procedural rules or exceeded authority.[1275] State Parties may also argue that applying another Party's national law interferes with the proper functioning of the Panel system.[1276]

[1273] Art 1904, NAFTA, *supra n*476.
[1274] *Ibid*, Art 1903.
[1275] *Ibid*, Art 1904 (13).
[1276] *Ibid*, Art 1905.

Chapter 20 (intergovernmental dispute settlement).

NAFTA additionally reserves particular matters to States where corporate participation is formally excluded, non-adversarial processes are first employed and outcomes need not be 'hard' legally-binding decisions. Chapter 20 concerns the interpretation or application of the NAFTA, national measures which may be inconsistent with it and the 'nullification or impairment' of benefits arising thereunder.[1277] Dispute resolution enjoys a variety of means. Following initial ministerial consultations, Parties request a meeting of the NAFTA Free-Trade Commission which results in nonbinding recommendations on a public or confidential basis. Ultimate recourse may be had to a Panel of independent experts and referral to national courts or arbitral Panels. Panels determine whether State measures are consistent with obligations under the Agreement or nullifies or impairs benefits that complaining States could reasonably have expected. Panels offer recommendations only. However, they may seek information or technical advice from any person or body deemed appropriate subject to conditions determined by the disputants.[1278] This includes appointing review boards to report on factual questions concerning environmental, health, safety or other scientific issues.

[1277] *Ibid*, Art 2012. Arts 1412-1415 (financial services disputes) are resolved under Chapter 20.
[1278] *Ibid*, Art 2014.

The Environmental and Labor Cooperation Side Agreements.

Two side agreements were negotiated to prevent firms from gaining unfair competitive advantages by re-locating to NAFTA areas where environmental and labor standards (and compliance costs) were lower, flooding the US market with cheap products and causing unemployment. Environmental protection embraces international environmental legal standards whereas greater deference is given to State sovereignty and national regulation for labor protection. The North American Agreement on Environmental Cooperation (the Environmental Side Agreement) establishes a Commission for Environmental Co-operation composed of a Council, secretariat and Joint Public Advisory Committee. The last-mentioned consists of fifteen individuals advising the Council on any matter within the scope of that Agreement. State Parties may establish national advisory committees composed of NGOs and individuals providing advice on implementation.[1279]

Citizens or organisations may indirectly trigger inquiries through the secretariat alleging failure by a NAFTA State Party to effectively enforce its environmental laws.[1280] Submitting entities must reside within a NAFTA State, be clearly identifiable, provide information sufficient to enable a review, inform the targeted NAFTA State in its own language, explain efforts to resolve the situation with the relevant government and aim at 'promoting

[1279] Art 17, North American Agreement on Environmental Cooperation 32 *ILM* 1480 (1993)..
[1280] *Ibid*, Art 14.

enforcement rather than at harassing industry'.[1281] Other considerations include whether harm is alleged, local remedies pursued, issues are relevant to the Agreement's objectives and the media is the source of allegations. Submissions must focus upon the acts or omissions of State Parties and not non-compliance by particular companies, particularly where submitting entities are competitors which may benefit. Where the Council by two-thirds vote so determines, factual records are prepared and private parties may contribute information. Upon a further two-thirds vote, NAFTA States may comment before such records are published.

Non-State actors can prompt greater enforcement effort against firms through governmental mediums. However, the side Agreements do not constitute a dispute resolution procedure and there are no formal participatory rights. There is only a common commitment by States to afford protection. Of the twenty-eight matters submitted by NGOs by 2001, none originated from corporations and forty percent had been terminated by the secretariat according to its appreciation of a State's 'failure to enforce environmental law'.[1282] Although there is greater transparency in environmental decision-making, the principal outcome – a factual record which does not reach legal determinations – suggests the ineffectiveness of civil participation in this particular model and subject to the above restraints. Furthermore, double standards exist insofar as firms alleging expropriation can compel States to binding arbitration whereas NGOs under the Environmental Side Agreement must obtain prior

[1281] Commission for Environmental Cooperation, Resolution 99-06 (1999) Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.
[1282] Fitzmaurice M., 'Public Participation in the North American Agreement on Environmental Cooperation' (2003) 52 *ICLQ* 333, 349-61.

intergovernmental approval. Although the North American Agreement on Labor Cooperation establishes a similar trilateral institutional framework, private parties do not enjoy any right to make submissions.[1283]

Observations on the Corporate Role under NAFTA.

Although firms appear to exert considerable influence over the process, even within Chapter 11 there are significant points where States retain control. Corporations lobby for more favourable participatory conditions. The NAFTA business community supports greater transparency and limited third party intervention in the nature of amicus briefs provided that confidential business information is protected.[1284] On the other hand, industry associations also protest against 'judicial activism' when NAFTA Chapter 19 Panels have regard to sources other than national law and prejudicial to their concerns.[1285]

Direct corporate participation is a means of expanding the content of substantive international law with respect to most favoured nation status, fair and equitable treatment and protection against direct or indirect property expropriation. For example, annulling concession contracts for waste collection and disposal is not wrongful where conducted in accordance with national law and without denial of justice or unlawful purpose.[1286] However, enforcing an ecological decree may constitute an act tantamount to

[1283] Cp Art 4 North American Agreement on Labour Cooperation 32 *ILM* 1499 (1993).
[1284] USCIB, Joint Business Coalition Letter on Investment Dispute Settlement, 2001; USCIB, Statement by representatives of US, Canadian and Mexican business on NAFTA investment dispute resolution, 2003.
[1285] 'Coalition Letter on NAFTA Dispute Settlement', *Inside US Trade*, May 1995.
[1286] ICSID, *Robert Azinian & Ors v United Mexican States*, Case No ARB(AF)/97/2.

expropriation after a permit to construct a waste treatment facility had been issued by the federal government.[1287] NGOs protested that the *Metalclad* decision unnecessarily broadened the definition of an expropriatory 'taking' and could curtail the regulatory functions of States. Although satisfying international environmental obligations constitutes a legitimate public purpose, the character of expropriation remains unaffected.[1288] For example, nominating territory for world heritage listing does not by itself justify expropriatory measures nor preclude claims for compensation.[1289] Such precedents could be employed by firms in bilateral negotiations to 'chill' the capacity of States to make laws promoting the public welfare. Indeed, environmental legislation has been successfully challenged under NAFTA before its enactment.[1290] The range of protected investors has been enlarged to include permanent residents and time periods are construed generously.[1291] Secret notices of intent, confidential proceedings and lobbying enable private interests to influence States subject to little public scrutiny.[1292]

Corporate participation could be benevolently characterised as responding to environmental protectionism rather than dismantling or deterring environmental regulation.[1293] Canada breached the national treatment obligation to protect its waste disposal industry from US competitors

[1287] ICSID, *Metalclad Corp v United Mexican States*, Case No ARB(AF)/97/1 (2000), paras 70, 103 & 111.
[1288] ICSID, *Compania del Desarrollo de Santa Elena SA v Republic of Costa Rica*, Case No ARB/96/1 (2000), para 71.
[1289] ICSID, *Southern Pacific Properties (Middle East) Ltd v Egypt* Case No ARB/84/3 (1993), para 154.
[1290] NAFTA, *Ethyl Corporation v Canada (Jurisdiction)* 38 *ILM* 708 (1999).
[1291] ICSID, *Karpa v Mexico (Jurisdiction)* Case No ARB(AF)/99/1 (2000), paras 35, 47.
[1292] Mann H., 'Private Rights, Public Problems: A Guide to NAFTA's Chapter on Investor Rights', International Institute for Sustainable Development, Winnipeg, 2001.
[1293] Rugman A., Kirton J & Soloway J, Environmental Regulations and Corporate Strategy, Oxford University Press, Oxford, 1999.

notwithstanding arguing that environmental legislation was necessary to implement a multilateral agreement concerning trade in toxic waste.[1294] Similar circumstances arose in *Methanex* where the firm challenged a Californian ban first through the NAFTA Commission for Environmental Cooperation and then through Chapter 11. The NAFTA business community was disappointed when 'fair and equitable' treatment was redefined by States. This resulted from the controversial decision in *Pope & Talbot* where Canada's method for verifying its softwood lumber quota was adjudged to be unreasonable.[1295] Henceforth, a 'determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)'.[1296] In short, the directive lawmaking role of States was affirmed.

(d) Enforcement within the Operational Framework of International Organisations.

Corporate enforcement also includes indirectly implementing Security Council resolutions, recourse to the UN Compensation Commission to obtain compensation for unlawful acts and reviewing State compliance with ratified labour conventions. As observed above, NGOs may make submissions to secretariats of international organisations, trigger public reviews, obtain information and prompt improved implementation of applicable legal regimes. NGOs or groups of individuals may also request Inspection Panels to

[1294] *S.D. Myers Inc v Canada* (2002) 121 *ILR* 72.
[1295] NAFTA, *Pope & Talbot Inc v Canada*, Interim Award, 2000, paras 11, 96, 98, 101.
[1296] NAFTA Free Trade Commission, Interpretative Note concerning Article 1105(1) of 31 July 2001. See further ICSID, *Mondev International Ltd v US*, Case No ARB(AF)/99/2 (2002).

investigate acts or omissions of the World Bank[1297] or other development banks. However, claims of injury must result from failure to follow stated operational policies or procedures with respect to the design, appraisal or implementation of its projects.[1298] Moreover, investigations are subject to approval by the Bank's Board of Directors and the Panel's conclusions are only advisory.

Private parties at the regional level can seek judicial review of EC decision-making.[1299] The European Court of Justice (ECJ) may review the acts of EC institutions for lack of competence, infringing essential procedural requirements, violating the EC Treaty, any rules relating to the application of that Treaty, misuse of powers and failure to act. However, direct access is limited to annulling 'acts of the Community' of direct and individual concern to plaintiffs.[1300] Corporations may request references from national courts to the ECJ to determine national legal consistency with the EC Treaty. Competitive disadvantages arise where Member States incorrectly implement EC law and favour local enterprises. However, individuals or groups affected by violations of EC law by Member States can only request the EC Commission to initiate infringement actions.[1301] The Commission enjoys considerable discretion in this regard.[1302] The non-contractual liability of

[1297] IBRD, Operational Directive 14.70 on Involving NGOs in Bank-Supported Activities, IBRD Doc GP14.70 (2000); IBRD, Resolution No 93-10 on Inspection Panel Operating Procedures 34 *ILM* 510 (1995); International Development Agency Resolution No 93-6.
[1298] Carmody C., 'Beyond the Proposals: Public Participation in International Economic Law' (2000) 15 *Am. U. Int'l L. Rev.* 1321, 1329.
[1299] Arts 173, 175, 177, 178, 184, 215 & 230, Consolidated Version of the Treaty Establishing the European Community (2002) *OJEC* C325.
[1300] Case T-585/93 *Greenpeace & Ors v Commission* [1995] *ECR II*-2205.
[1301] Arts 226, 227 EC Treaty *supra n*1299.
[1302] Hartley T.C., The Foundations of European Community Law, Oxford University Press, Oxford, 4th Ed, 1998, 302.

States for serious breaches is established where Directives confer individual rights, have an identifiable content and causal links exist between implementation failure and consequential damage.[1303]

(d)(i) Enforcing Unilateral and Multilateral Economic Sanctions.

Corporations are conduits through which States unilaterally implement economic sanctions.[1304] National legislation providing for rights of action against other private parties for their extraterritorial behaviour shifts the execution of foreign policy upon non-State actors.[1305] Corporate coalitions such as USA Engage lobby in favour of commercial engagement as alternatives to prohibiting market access and unilateral sanctions can be lifted in light of their protests. The US Council for International Business also points to the conflicting requirements imposed upon US businesses from unilateral extraterritorial measures.[1306] US corporations prefer economic sanctions where necessary be imposed multilaterally given the profits lost to foreign competition from product substitution.[1307] Such calls are echoed by the UN General Assembly which is concerned by the legitimate commercial interests detrimentally affected by coercive economic measures.[1308]

[1303] Eg *Brasserie du Pecheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport ex parte Factortame Ltd & Ors* [1996] 1 *ECR* 1131.
[1304] Eg *The Iran and Libya Sanctions Act (the 'D'Amato Act') 35 ILM 1273 (1996).*
[1305] Eg *The Helms-Burton Act supra n*452.
[1306] USCIB, Statement of the USCIB on Unilateral Economic Sanctions, New York, 1989.
[1307] Colloqium, 'Country Sanctions and the International Business Community' (1997) 91 *ASIL Proceed* 333, 336, 339.
[1308] UNGA Resolutions 48/16 (1993), 50/10 (1995) & 53/10 (1998).

Corporations such as commercial airlines are the targets of multilateral sanctions regimes imposed by the UN Security Council as well as the principal agents for implementation. These objectives are achieved when States undertake national lawmaking. For example, States are expected to adopt measures ensuring that corporations especially arms manufacturers do not engage in commercial relationships with parties to armed conflict.[1309] Security Council resolutions are typically implemented by firms through the nationality and territoriality links with States although direct effect may be indicated by their terms. [1310] The prospects for sanctions are hamstrung by State recalcitrance and non-adhering corporations.[1311] Furthermore, implementation is uneven where resolutions have an uncertain scope and do not encompass dual-use commodities possessing both military and civilian applications.[1312] Less reputable and more costly firms enjoying the tacit support of home States are also likely to exploit commercial opportunities, particularly when prohibiting access creates higher profits. Sanctions-avoidance practices include manipulating information and camouflaging trade within unrelated industries.

Corporations bear the commercial risks of a disrupted international legal order. Armed conflict, State dissolution and Security Council intervention radically transform obligations for States and permit the unilateral suspension of trade

[1309] Eg SC Resolution 1379 (2001).
[1310] *Iraq v Dumez* (1997) 106 *ILR* 284, 289-90; *Smith & Hudson v Socialist Peoples Libyan Arab Jamahiriya* 886 *F Supp* 306, 310-12 (Dist Ct NY 1995) affirmed 101 *F 3d* 239 (CA 2nd Cir 1996); SC Resolution 748 (1992) para 4, 5.
[1311] SC Resolution 1408 (2002) paras 7, 18.
[1312] Case C-70/94 *Werner Industrie-Ausrushungen v Germany* [1995] 1 *ECR* 3189.

agreements.[1313] Maintaining international peace and security also enables States to exert greater control over trade in strategic goods.[1314] Proportionate measures may be applied to aircraft owned by commercial enterprises of targeted States even if operated under independent control.[1315] Similarly, commercial traffic entering the territorial seas of targeted States and those within international waters suspected to be on course thereto may be intercepted without distinction as to flag or ownership.[1316] Attempts to micromanage industries such as banking and finance to prevent the money laundering which finances terrorism can be intrusive.[1317] However, States cannot prohibit export payments which have been previously approved by UN Sanctions Committees and authorised by other States.[1318]

Although the Security Council seeks a more effective application of its sanctions regimes to maintain international peace and security, it is not insensitive to commercial considerations. For example, the defence of force majeure may be unavailable to firms to avoid contractual liability.[1319] The Security Council is willing to extend immunity from attachment to corporations against claims for contractual non-performance by States.[1320] Financial institutions employ these decisions in national courts to shield them

[1313] *A Racke GMBH & Co v Hauptzollamt Mainz* [1998] 1 *ECR* 3655, para 56.
[1314] *Wilton Feyenoord BV v Minister for Economic Affairs* (1985) 16 *NYIL* 528, para 4.7.
[1315] *Bosphorus Hava Yollari Turizm Ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland and the Attorney-General* [1996] 1 *ECR* 3953, paras 12, 21, 26.
[1316] *Ebony Maritime SA and Loten Navigation Co Ltd v Prefetto della Provincia di Brindisi & Ors* [1997] 1 *ECR* 1111, paras 17, 22-7.
[1317] SC Resolution 1373 (2001), para 1.
[1318] *Regina v HM Treasury and the Bank of England ex parte Cento-Com SRL* [1997] 1 *ECR* 81, paras 19-53.
[1319] *Trinh v Citibank* NA 850 *F 2d* 1164, 1169-70 (6th Cir 1988).
[1320] SC Resolution 712 (1991) para 5; SC Resolution 883 (1993) para 8.

from an avalanche of claims after sanctions are lifted.[1321] The avenues available to firms for recovering economic losses arising from State compliance with Security Council resolutions are limited. Regional organisations escape liability in the absence of disproportionate impacts upon particular economic operators or where the damage falls within a sector's inherent economic risks.[1322] However, States seeking to circumvent UN sanctions with fraudulent certificates may be contractually liable.[1323]

Recent sanctions regimes contemplate a more explicit corporate role. Recognising the link between illicit trades in natural resources and continuing armed conflict, the Security Council prohibited trade in diamonds originating from Angola and Sierra Leone.[1324] Complying firms may supply information on violations by other firms.[1325] States were urged to co-operate with the International Diamond Manufacturers Association to avoid impairing the diamond industry's legitimate contribution to economic development. The Antwerp World Diamond Congress in parallel resolved in 2000 to create an International Diamond Council composed of producers, manufacturers, traders, States and intergovernmental organisations. One objective was to formulate industry standards. The resulting certificate of origin scheme may become a model for national law, inspire industry reform and enable the diamond

[1321] SC Resolution 687 (1991), para 29; EEC Regulation No 3541/92 prohibiting to honour Iraqi claims with regard to contracts and transactions affected by Resolution 661(1990); *Shanning International Ltd & Ors v Rasheed Bank & Ors* [2001] *UKHL* 31, paras 8, 18, 26.
[1322] *Dorsch Consult Ingenieurgesellschaft MBH v Council of the European Union and Commission of the EC* [1998] 2 *ECR* 667, paras 70-89.
[1323] *Consarc Corp v Iraqi Ministry* 27 *F 3d* 695.
[1324] UNGA Resolution 55/56 (2001); SC Resolution 1171 (1998) , 1173 (1998), 1176 (1998) & 1306 (2000).
[1325] SC Resolution 1343 (2001), paras 16, 24.

industry to participate in regulatory development.[1326] For example, the Diamond Council and NGOs were consulted prior to US legislation.[1327] To be truly effective the certification regime must apply internationally, extend to all firms (diamond businesses, private security firms, arms merchants, State-owned enterprises and transportation companies) engaged in 'sanctions busting' and identify the 'conflict' diamonds feeding into legitimate trade.[1328]

Corporations will increasingly resort to existing procedures (quoted in Annex 1) to communicate their concerns during the formulation of Security Council resolutions.[1329] This is particularly the case where the Council assumes a more prominent role in the post-conflict reconstruction of States. This represents a commercial opportunity to apply the relatively high foreign direct investment protection standards of industrialised States.[1330]

(d)(ii) Initiating Claims before the UN Compensation Commission.

Following armed conflict the nationals of victor States have historically been permitted to initiate claims within mixed arbitral tribunals and compensation commissions against vanquished States for damage to their property rights and interests.[1331] Although the relevant instrument never entered into force, neutral

[1326] Security Council, Letter dated 1 December 2000 from the Chairman of the Security Council Committee established pursuant to Resolution 1132 (1997) concerning Sierra Leone addressed to the President of the Security Council, UN Doc S/2000/1150, 6-7, 13, 16.
[1327] 'US Legislation in Support of Diamond Controls' (2002) 96(2) *AJIL* 485.
[1328] Security Council, Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000) para 19 in relation to Sierra Leone, UN Doc S/2000/1195, 21.
[1329] Security Council, Provisional Procedure for Dealing with Communications from Private Individuals and Non-Governmental Bodies, Appendix, UN Doc S/96/Rev.6 (1974).
[1330] SC Resolution 1483 (year); Coalition Provisional Authority, Foreign Investment Order 39 & 46 (2003).
[1331] Eg Arts 296, 297, 304, 305, Peace Treaty of Versailles.

individuals enjoyed the right to bring claims against States before an International Prize Court subject to home State approval.[1332] More recently the Security Council established a Compensation Commission, Governing Council and Fund in respect of the loss, damage and injury occasioned by Iraq's illegal occupation of Kuwait. [1333] The regime is monitored by commercial mechanisms, standard industry practices and inspection and commission agents to minimise the burden upon commercial operations.[1334] Corporate officers act as UN mission experts and approve Iraqi oil contracts for compliance with humanitarian requirements.[1335] Representatives from the accounting, finance, engineering and petroleum industries participate in Commission proceedings as experts. Category E claims submitted by corporations, other private legal entities and public sector enterprises involve claims for economic loss arising from construction contracts, non-payment of goods and services, destroyed or seized assets and lost profits. Commercial claims are submitted through home States although direct access is exceptionally permitted for unusually large or complex matters.[1336] Claims may be consolidated in light of national procedures or practices.[1337]

By pursuing compensation claims corporations are contributing legal developments to this field. Economic losses arising from the trade embargo,

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[1332] Arts 4, 5, Hague Convention XII of 1907.
[1333] SC Resolutions 674 (1990) & 692 (1991).
[1334] UN Compensation Commission Governing Council (UNCCGC), Decision 6: Arrangements for Ensuring Payments to the Compensation Fund, UN Doc S/AC.26/1991/6 paras 14, 16.
[1335] Secretary-General Report pursuant to paragraph 5 of SC Resolution 706 (1991), UN Doc S/23006 (1991), para 26.
[1336] UNCCGC, Arts 5 & 38, Rules of Procedure, Decision 10: Provisional Rules for Claims Procedures, UN Doc S/AC.26/1992/10.
[1337] Report of the Secretary-General pursuant to Paragraph 19 of Security Council Resolution 687 (1991), UN Doc S/22559 (1991), para 21.

related measures and the economic situation are not compensated. [1338] However, losses with parallel causes receive full compensation.[1339] Although 'direct loss' is loss suffered in consequence of Iraqi occupation, the chain of causation is unbroken if damage has occurred from military action by the Allied Coalition forces.[1340] The Commission has given the trade embargo full effect irrespective of whether States had implemented it into national law. This conclusion avoids considering the direct effect of Security Council resolutions. The Commission also determined that complete or partial claims for contractual performance giving rise to debts or obligations more than three months prior to 2 August 1990 are beyond its mandate.[1341] Interest is awarded from the date the loss arose until date of payment at rates sufficient to compensate claimants for lost use of principal amounts. [1342] However, compensation is reduced for amounts recovered elsewhere in respect of the same loss.[1343] Special arbitral mechanisms were created to more equitably allocate compensation for overlapping claims such as those between corporations and their shareholders.[1344] By doing so the Governing Council

[1338] UNCCGC, Decision 9: Propositions and Conclusions on Compensation for Business Losses: Types of Damages and their Valuation, UN Doc S/AC.26/1992/9, para 6.
[1339] UNCCGC, Decision 15: Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures were also a Cause, UN Doc S/AC.26/1992/15, para 9.
[1340] UNCCGC, Report and Recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim, UN Doc S/AC.26/1996/5/Annex, para 86; UNCCGC, Decision 40 concerning the Well Blowout Claim, UN Doc S/AC.26/Dec.40 (1996).
[1341] UNCCGC, Report and Recommendations made by the Panel of Commissioners concerning the First Installment of E2 Claims, UN Doc S/AC.26/1998, paras 90, 172.
[1342] UNCCGC, Decision 16: Awards of Interest, UN Doc S/AC.26/1992/16.
[1343] UNCCGC, Decision by the Governing Council not to accept further corporate and government claims after 1 January 1996, UN Doc S/AC.26/Dec.30 (1995); UNCCGC, Decision 13, Further Measures to Avoid Multiple Recovery of Compensation by Claimants, UN Doc S/AC.26/1992/13, para 3(b).
[1344] UNCCGC, Decision concerning claims filed by individuals seeking compensation for direct losses sustained by Kuwaiti companies, UN Doc S/AC.26/Dec.123 (2001).

elucidated its understanding of concepts such as separate corporate legal personality, partnership and shareholder.[1345]

(d)(iii) Enforcing Labour and Environmental Standards.

The tenacity with which corporations enforce property rights and investment obligations against States contrasts with efforts in other areas. An economic interest in violating labour or environmental standards may deter firms from enforcement. Alternative explanations include preferring informal bargaining with States, collectively expressing business opinion, the perceived propriety of corporate roles, duplicating NGO activity and corporate sensitivity political interference allegations. However, enforcement activity is warranted against rival firms who enjoy unfair (unavailable) sources of competitive advantage and against States to preserve corporate reputations. Nonetheless, a challenge remains to harness the unrealised advocacy capacity of corporations.

Corporations can access procedural mechanisms for protecting and enforcing human rights. Corporations are not excluded from employing the institutional mechanisms available to persons, NGOs or groups of individuals who suffer human rights violations or acting on their behalf.[1346] It would be 'illogical' if procedural mechanisms for protecting constitutionally-guaranteed human rights for the benefit of 'persons' were limited to natural and not legal

[1345] UNCCGC, Decision 4: Business Losses of Individuals Eligible for Consideration under the Expedited Procedures UN Doc S/AC.26/1991/4.

[1346] Arts 1, 2, 5, 1966 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 302; Art 44, Inter-American Convention on Human Rights 9 *ILM* 673 (1970); Art 34, 1994 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS No 155; Sec 7(7) *Human Rights Act 1998* (UK).

entities.[1347] State measures which infringe the ability of firms to impart business information have been challenged for violating freedom of expression.[1348] The prospect of corporate law firms acting for contingency fees is likely where monetary awards result. Denying a judicial remedy when enforcing a security interest may infringe a creditor's right to a fair trial.[1349] However, the remedies for human rights violations are typically minimal and for the reasons suggested above it would be inappropriate for firms to resort to human rights enforcement mechanisms.

As noted in Chapter One, the International Labour Organisation (ILO) is the oldest illustration of specifically incorporating employer interests within intergovernmental organisations. The International Organisation of Employers (IOE) contributes to monitoring State compliance with ratified labour conventions within the ILO's formal complaints process. The IOE reviews the implementation of labour standards as a Member of the tripartite ILO Conference Committee on the Application of Conventions and Recommendations. Employer organisations suspecting inadequate State implementation may refer matters to Expert Committees.[1350] Such a process influenced the design of human rights enforcement mechanisms.

For example, employee delegates alleged that the Myanmar government authorised or condoned forced labour. Analogous to South African apartheid, the controversy concerned a national legal system operating contrary to a

[1347] *Attorney-General & Anor v Antigua Times Ltd* [1976] AC 16, 27-9.
[1348] UN Human Rights Commission, *Singer v Canada* UN Doc CCPR/C/51/D/455/1991, para 11.2.
[1349] *Wilson v First Country Trust Ltd (No 2)* [2001] *EWCA Civ* 633.
[1350] Art 24, 1948 International Labour Organisation Constitution 15 *UNTS* 35.

peremptory norm of international law and commercial interests in its perpetuation. Employer organisations were invited to provide information. Individual firms made oral and written submissions arguing that States bore responsibility for project security or labour relations and referred to codes of conduct and NGO reports in support.[1351] The Commission of Inquiry determined that the State had failed to effectively observe ILO Convention No 29 (1930) concerning Forced Labour in law and practice. However, evidence of corporate complicity was lacking. Myanmar's subsequent attempts to correct national law were adjudged inadequate.[1352] National employer organisations encouraged members to voluntarily comply with an ILO resolution on abstention from economic cooperation and the IOE called upon members not to perpetuate forced labour.[1353] ILO reports have become evidentiary materials in litigation before national courts against individual firms.[1354] Shareholder resolutions proposing a code of conduct, tying executive compensation to social performance and forcing the Myanmar project to be abandoned were defeated.

[1351] ILO, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention 1930 (No 29), ILO Doc GB.273; ILO OB Vol 81 (1998) Ser B Spec Supp, paras 53-4, 75-6, 504-10.

[1352] ILO, Second Report of the Director-General to the members of the Governing Body on measures taken by the Government of Myanmar following the recommendations of the Commission of Inquiry established to examine its observance of the Forced Labour Convention 1930 (No 29), ILO Doc GB.277/6 (2000).

[1353] ILO, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention 1930 (No 29), ILO Doc GB.280/6 (2001), paras 22-31.

[1354] *National Coalition Gov't of the Union of Burma v Unocal Inc* 176 FRD 329 (CD Cal 1997); *John Doe I v Unocal Corp* 963 F. Supp 880 (D.C. Cal 1997) & 248 F 3d 915 (9th Cir 2001).

Legal mechanisms for enforcing environmental standards against States continue to emerge.[1355] However, only rarely do foreign nationals enjoy standing within national courts to challenge host State compliance with international environmental law.[1356] One alternative is direct access for individuals and corporations to international dispute settlement mechanisms where contemplated in related fields.[1357]

(e) The Prospects for Enforcement within the Private Sphere.

Chapter Two observed that 'soft' international legal instruments entailed equally 'soft' enforcement mechanisms such as non-adversarial proceedings, jointly-drafted interpretations of disputed provisions and recommended adherence. Options falling short of securing a binding legal judgment such as the threat of litigation may be sufficient to induce State compliance. Does the marketplace offer any possibilities for firms to resolve their inter-commercial disputes without recourse to State participation ?

Verifying corporate compliance with pre-defined standards can be attained through self-assessment or internal review systems. However, these tools entail increased business cost and are questionable for their veracity. The impartiality of independent third parties regulating commercial practices (auditors, accountants and certification companies) may be doubted where investigative subjects are also clients. Resort to accreditation agencies may

[1355] Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, 41 *ILM* 202 (2002).
[1356] Art 3 Nordic Convention on the Protection of the Environment 1092 *UNTS* 279.
[1357] The Energy Charter Treaty 34 *ILM* 373 (1995).

substitute for direct State oversight. For example, NGOs such as Social Accountability International accredits organisations including other NGOs against specified criteria to verify corporate compliance with human rights and labour standards.[1358] Joint effort by corporations and NGOs (for example, within the International Accreditation Forum) seeks the mutual recognition of different certification schemes and management systems. Supply-side pressures emanate from insurance companies who decline coverage and financial institutions refusing investment capital. For example, following the Three Mile Island incident, US insurance firms now only cover nuclear power plants that are members of the national (Institute of Nuclear Power Operators) or international (World Association of Nuclear Operators) self-regulating industry bodies.

Trade associations assume enforcement functions to prevent market undercutting through unfair competitive advantage, maintain long-term industry viability, protect the reputation of economic sectors and dissuade unfavourable regulation. Tools for exercising collective business pressure include moral suasion, disciplinary methods associated with membership (fines, penalties or suspension), surveys, referral to State agencies and expulsion. However, the capacity for trade associations to exercise oversight is also limited: exclusion is ineffective where noncompliant corporations enjoy market power and conflicting member opinions hamper the further implementation of codes of conduct.

[1358] Social Accountability International (SAI), Social Accountability 8000 (SA8000), New York, 1997.

Enforcement mechanisms within the marketplace and lacking significant State participation intend to improve corporate governance. Managerial performance is influenced by sharemarkets, commodity markets, capital markets and corporate control markets (takeovers and mergers). Additional tools include denying benefits, contractual clauses within purchase orders or letters of credit and ultimately market exclusion. Enforcement against downstream suppliers or subcontractors is viable through contractual conditionality where compliance with code of conducts is a precondition for continuing business relationships. However, refusing to trade presupposes commercial decision-making freedom, security of tenure and industry immobility. Enterprises cannot influence entirely independent operations outside their sphere of influence. Small and medium-sized enterprises are amenable to the horizontal compliance pull exerted by larger ones but lack capacity as enforcers. Moreover, surprise audits and on-site inspections override managerial autonomy and encourage allegations of improper market concentration and anti-competitive behaviour.

The privatisation of enforcement includes a role for individuals. Demand-side pressures are manifested through shareholder activism, consumer boycotts, eco-labelling and portfolio divestment. However, individuals are subject to disincentives (such as vested self-interests including short-term profit and high living standards) and imperfect information (such that less visible firms are less amenable to public pressure). The enforcement strategies of NGOs and trade unions involve exercising external oversight (monitoring corporate compliance) or are orientated towards internal engagement (such as

partnerships).[1359] The former employs adverse publicity, is dependent upon resources and limited to firms with high brand recognition. The latter is criticised for enhancing corporate images, sacrificing NGO credibility and conferring legitimacy upon commercial operations. If responsibility for enforcement falls upon NGOs then consideration must be given to appropriate financial support.[1360] On the other hand, the European Chemical Industry Council objected to EC proposals conferring locus standi upon NGO's where States failed to initiate enforcement procedures.[1361]

It remains true that enforcement is more effective when undertaken in conjunction with States. States are presumed to possess greater coercive authority to assert effective control over the private realm.[1362] The ICC cooperates with State enforcement authorities via its Commercial Crime Service to address economic crimes and through the International Maritime Bureau to counter piracy.[1363] Pharmaceutical companies through the Pharmaceutical Security Institute interact with police, regulators, customs authorities and the WHO to improve intellectual property protection, establish private seizure rights and deter medical product counterfeiting.[1364] Finally, self-regulatory market behaviour informs regulatory development.

[1359] Fabig H. & Boele R., 'The Changing Nature of NGO Activity in a Globalising World: Pushing the Corporate Responsibility Agenda' (1999) 30(3) *IDS Bulletin* 58.
[1360] Heyes A.G., 'Environmental Regulation by Private Contest' (1997) 63(3) *J of Public Economics* 407.
[1361] EC Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste (1989) OJEC 251, 3 as amended (1991) OJEC 192; CEFIC, CEFIC Comments on the Amended Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, Brussels, 1991.
[1362] *Case of Plattform Arzte fur das Leben* (1988) *ECHR* Ser A Vol 139, para 32.
[1363] ICC International Maritime Bureau, 'Piracy and Armed Robbery against Ships', Paris, 1999.
[1364] IFPMA, 'Counterfeiting of Medicinal Products', Geneva, 1997, 3.

3. Corporate Forum Shopping and the Proliferation of International Tribunals.

Corporations seek cheap, impartial and expeditious third party adjudication which protects confidential information and whose outcomes are credibly backed by the necessary authority. Just as firms are attracted to the greater enforcement prospects of the WTO, they do not wish it to be a magnet for other actors and issues. Transnational enterprises also enjoy access to fora including other national courts unavailable to local competitors. Resort by private litigants to intergovernmental dispute settlement is comparatively expensive, need not be cost-effective and is subject to delay. WTO remedies also legitimate cross-retaliation against unrelated industries and award compensation to non-injured ones.[1365] Intergovernmental mechanisms are attractive when informal lobbying has failed, local remedies are exhausted or the industry is uniformly affected. The litigious disposition of firms is also influential: Japanese manufacturers for example highly regard stable trading relationships and there is little demand for formal mechanisms for expressing grievances to government.[1366] As outlined above firms can resort to non-legal methods for protecting their interests. Informal methods such as controlled negotiations enable the unhindered operation of bargaining power disparities free from external scrutiny. Threats of strictly asserting legal rights can be sufficient to induce the desired changes in State behaviour. Simultaneously there are counter pressures for example from NGOs to publicise privately-resolved public controversies.

[1365] Kessie E., 'Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO' (2000) 34(6) *J World Trade* 1, 17.
[1366] Yamane H., 'The WTO Dispute Settlement Mechanism and Japanese Traders' (1998) 1 *J of Int'l Eco L* 683, 694.

Corporate forum shopping is less of an ogre than may be imagined. States enjoy the free choice of means principle in resolving their disputes. All actors share an interest in orderly and predictable dispute resolution within an international judicial order free from undue institutional competition and notwithstanding overlapping subject matters. Consent to jurisdiction remains paramount. Unilateral attempts to drag disputes towards parallel compulsory dispute settlement provisions within framework conventions may prove unsuccessful.[1367] This is akin to the position at the national level which requires identifying the 'natural' forum for dispute resolution when, for example, businesses apply for an anti-suit injunction restraining claimants from commencing proceedings within other States.[1368] ICSID tribunals as observed above are mindful of eliminating forum shopping and compelling firms to nominate their preference. Attempts to lift national legal questions to international tribunals to recover contractual debts may be rejected.[1369] NAFTA tribunals lack jurisdiction where enterprises ineffectively waive their right to initiate local proceedings or discontinue existing ones.[1370] They may also defer to national court determinations of contractual invalidity and void dispute settlement provisions.[1371]

Corporations are dependant upon States to create the requisite enabling mechanisms through which international law is enforced against governments.

[1367] UNCLOS Arbitral Tribunal, *Southern Bluefin Tuna Case (Australia & New Zealand v Japan) (Jurisdiction)* 39 *ILM* 1359 (2000), para 63.
[1368] *Airbus Industries GIE v Patel et al* 37 *ILM* 1076 (1998) (UK House of Lords).
[1369] *Case of Certain Norwegian Loans (France v Norway)* (1957) *ICJ Rep* 9.
[1370] ICSID, *Waste Management Inc v United Mexican States*, Case No ARB(AF)/98/2 (2000).
[1371] ICSID, *Azinian v United Mexican States*, Case No ARB(AF)/97/2 (2000), para 100.

The process is ultimately self-regulatory for States. States consent to future determinations by international tribunals that their regulatory measures do or do not serve legitimate objectives consistent with legal commitments and international values. Firms use and abuse the procedural mechanisms available to them as springboards for further legal activity and create legal precedents binding upon States. However, for corporations to construct a body of international legal precedents which merely vindicate market ambitions may also impair orderly economic or political management. The magnitude of the commercial matter at issue frequently does not square with the procedural constraints of the forum: TRIPs disputes were channelled through South African national courts and Unocal's complicity with Myanmar would only ever be ineffectively scrutinised through ILO monitoring procedures. Corporations raise interacting questions of public and private international law such as the expropriatory effects of regulatory measures and contractual validity in the context of Security Council sanctions.[1372] The interaction between national, regional and international dispute settlement mechanisms is appreciated and exploited.

The international legal order has long been deficient in terms of lacking compulsory dispute settlement, self-certified State compliance and non-specific obligations for national implementation. The chosen forum and applicable law for balancing fundamental issues of public international law against legitimate commercial aims should not be left to commercial expediency. For example, international trade Panels are mandated to identify

[1372] Burdeau G., 'Les effets juridiques des Resolutions du Conseil de Securite sur les contrats prives' in Gowlland-Debbas V. (Ed), UN Sanctions and International Law, Kluwer Law International, The Hague, 2001, 268.

disguised protectionist agendas underlying national legislative intent.[1373] Their natural inclination is to preserve the integrity of trade regimes, possibly at the expense of environmental or labour concerns which are more sensitively addressed elsewhere. A disparity has been observed whereby firms enjoy a high degree of investment protection on both substantive and procedural grounds whereas trade remains under stricter State control with fewer substantive rights conferred and limited access to dispute settlement.[1374] Since the proliferation of international courts and tribunals has not led to any 'serious' doctrinal fragmentation, ad hoc resolutions will suffice until 'a few spectacular controversies...mobilise political demands for rationalisation'.[1375] In the interim it is left to international tribunals to exchange information and fashion responses by reference to familiar but unsatisfactory notions as judicial deference to the separation of powers, judicial comity, the interests of justice and common legal principles.[1376]

4. Characterising Corporate Roles: legislative dismantling, constraining national regulatory capacity or incidental to regulatory evolution ?

Commercial motivations for undertaking enforcement activity are firm and situation-specific. For example, Nestle, the 'owners of a claim against the Ethiopian government', sought compensation for expropriation as a 'question

[1373] WTO, *US–Measures Affecting Alcoholic and Malt Beverages* BISD 39S/206 (1992), 276-77.
[1374] Bruno R., Access of Private Parties to International Dispute Settlement: A Comparative Analysis, Jean Monnet Working Paper No 13/97 (1997).
[1375] Kingsbury B., 'Is the Proliferation of International Courts and Tribunals a Systematic Problem?' (1999) 31 *NYU J Int L & Pol* 679, 684.
[1376] Shany Y., The Competing Jurisdictions of International Courts and Tribunals, Oxford University Press, Oxford, 2003, 213-226.

of principle' notwithstanding NGO concerns that funds could be redirected to securing food supplies.[1377] The corporate concern to avoid adverse precedents does not preclude adopting positions which approach double standards. For example, Methanex opposed the receipt of an NGO amicus brief in proceedings in which it was the complainant and yet the broader NAFTA business community supports greater procedural transparency including the opportunity to make such submissions where desired. The decision whether to initiate enforcement action is also institution-specific and involves consideration of locus standi requirements, procedural rules, cost, available remedies, receptivity to commercial interests and protection afforded to confidential business information. In addition to the shortfalls of diplomatic protection noted above, resort to this modality is contingent upon support from home States.

The factors which influence the extent of private sector participation within the WTO include 'the way in which multilateral trade negotiations and subsequent deals, as well as the existing WTO rules and obligations, affect international trade opportunities.'[1378] For example, the submission of an amicus brief to the WTO by the American Iron and Steel Institute referred to above 'while quite parallel to that of the US government, adds additional perspective and expertise'.[1379] The Institute 'has developed considerable expertise in the area of international steel trade, the rules with which it must comply, and the

[1377] The Guardian, 'Nestle Claims $3.7m from famine-hit Ethiopia', 19 December 2002.
[1378] Mr Bernard Kuiten, Counsellor, External Relations Division, WTO Secretariat, Response to Questionnaire, 11 August 2004.
[1379] American Iron and Steel Institute, Letter to Appellate Body Secretariat, 7 February 2000.

enforcement of those rules'. NGO strategies are also to foster the creation of international law favourable to their interests.[1380]

Corporate enforcement activity may be differently characterised. First, corporations are holding States to their voluntarily-agreed international commitments. State measures which depart from previous undertakings disrupt commercial certainty associated with, for example, customs administration. [1381] However, the uniform application of international agreements tends towards a level competitive playing field and identical legal conditions for local and foreign firms. National regulatory measures to promote trade may confer commercial advantages upon local rivals. For example, compulsory export prices which lower purchase costs for local manufacturers to below world market levels are a subsidy when public accounts are charged.[1382] Corporations may be able to judicially review such practices for consistency with a State's international commitments in some jurisdictions.[1383] However, as observed above treaties may not be justiciable if they have not been nationally implemented. [1384] Inter-corporate disputes originating from questions of State compliance are appropriately transferred to intergovernmental levels to ensure respect for international legal rules.

[1380] Robertson D., 'Civil Society and the WTO' (2000) 23 *World Econ* 1119, 1127.
[1381] WTO, *EC–Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R (1998).
[1382] *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority & Anor* (1995) 129 ALR 401, 414-6.
[1383] *R v Minister of Agriculture, Fisheries and Food ex parte S.P. Anastasiou (Pissouri) Ltd & Ors* [1994] 1 *ECR* 3087, para 66.
[1384] *R v Secretary of State for Transport ex parte Iberia Lineas Aereas de Espana* (1997) 107 *ILR* 481, 484-8.

Corporate roles could be alternatively perceived as dismantling protectionist national law. Enforcing pre-existing or newly-emergent international obligations may create windows of economic opportunity for dominant firms where they also remove regulatory barriers to competition. However, temporary legal uncertainty detracts from commercial predictability. Legal certainty requires precise legislative drafting, a foreseeable application, appropriate publication and an ascertainable entry into force.[1385] Legislative reforms ordinarily incidental to regulatory evolution reflect changes to underlying economic conditions and the predatory ambitions or protectionist instincts of national producers. Firms actively dismantle intergovernmental agreements intended to benefit rival commercial interests. For example, in 1984 the US-based Semiconductor Industry Association (SIA) petitioned the US government for greater access to Japanese markets. In 1986 the two States concluded a Semiconductor Trade Agreement. The SIA and the Electronic Industry Association of Japan then managed bilateral industry trade between them through the World Semiconductor Council which eventually grew to become an umbrella organisation for other national electronic industry associations. However, the Japanese administrative structure was successfully challenged by the EC as WTO-inconsistent.[1386] The market access objectives of Japanese and American semiconductor firms are now realised through working groups composed of producers, users and government officers and subject to oversight by accounting firms.[1387]

[1385] *Opel Austria GMBH v Council of the EU* [1997] 2 *ECR* 39.
[1386] WTO, *Japan-Semiconductors* BISD 35S/116 (1988).
[1387] Japan-US, Arrangement concerning Trade in Semiconductor Products 25 *ILM* 1408 (1986) & 31 *ILM* 1074 (1992), paras 5, 9.

To similar effect persistent corporate effort produced a declaration of GATT inconsistency for an agreement between EC, African, Caribbean and Pacific States intended to benefit small businesses.[1388] EC regulatory changes occasioned by implementation of the Lome Convention disrupted the competitive conditions for US corporations supplying Latin American bananas to European markets through German distributorships. Germany unsuccessfully alleged discriminatory treatment before the ECJ.[1389] The US corporation concerned, having facilities outside the US and employing a largely non-American workforce, independently instituted ECJ proceedings.[1390] The Lome Convention was successfully challenged by Latin American States through the WTO.[1391] The US firm and the Hawaii Banana Industry Association also filed petitions with the US Trade Representative. Retaliatory duties imposed by the US upon EU producers encouraged the latter to lobby against the Convention within the EU. Although the US firm presently benefits from reformulated EC regulations and a redrafted Lome Convention, small Latin American firms suffer competitive disadvantages.

Corporations are not the only actors to prompt States towards greater enforcement. NGOs also participate in such dynamic regulatory situations.[1392] NGO perspectives may coincide or conflict with commercial interests. For example, NGOs successfully extended the prohibition upon importing shrimp

[1388] Fourth African Caribbean Pacific (ACP)/EEC Convention (the 'Lome Convention') 1989 *ETS* 96 (1990).
[1389] EEC Regulation No 404/93 (1993) on the common organisation of the market in bananas (1993) OJEC L47, 1; C-280/93 *Germany v Council of the EU* [1994] 1 ECR 4973.
[1390] C-233/90 & C-353/90 *Chiquita Italia SpA v Italian Ministry of Finance* [1992] *ECR* 1-3713, para 29; C-276/93 *Chiquita Banana Co BV v Council of the EC* [1993] *ECR* 1-3345, para 13; C-469/93 *Italian Ministry of Finance v Chiquita Italia SpA* [1995] *ECR* 1-4533, paras 29, 35.
[1391] WTO, Bananas *supra n*1191; EC Commission Reg No 2362/98 (1998) OJEC L293.
[1392] *Humane Society of the US v Brown* 920 *F Supp* 178 (USCIT 1996).

or shrimp products wherever harvested without the use of commercial fishing technology protecting sea turtles.[1393] The US unsuccessfully defended this embargo within the WTO against States who had not adopted or enforced national law requiring turtle excluder devices (TEDs). [1394] Acting simultaneously the US and the National Fisheries Institute successfully challenged the enforcement jurisdiction of the US Court of International Trade. [1395] The US shrimp industry was originally concerned by the competitive implications of locally-mandated technology requirements. It subsequently promoted TEDs as an environmental protection standard and assisted the technology transfer efforts of the US government since they enjoyed the advantages of prior establishment.[1396] NGOs in turn successfully challenged US government measures allowing shrimp imports without prior certification.[1397]

This pattern of retaliatory litigation alternating between national and international fora was repeated with respect to dolphin-safe fishing practices. US tuna processing companies enjoyed a similar role in national lawmaking, WTO dispute settlement and prompting the negotiation of conventional agreements to maintain access to South Pacific fishing grounds.[1398] States are receptive to the protectionist pressures of powerful national constituencies,

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[1393] *Earth Island Institute v Christopher* 19 CIT 1461, 1479 (1995).
[1394] WTO, *US-Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R (1998), para 7.502 & WT/DS58/AB/R, para 187 (1998).
[1395] *Earth Island Institute v Albright* 147 *F 3d* 1352 (Fed Cir 1998); *Earth Island Institute v Christopher* 948 *F Supp* 1062 (CIT 1996).
[1396] Inter-American Convention for the Protection for the Protection and Conservation of Sea Turtles 37 *ILM* 1246 (1998).
[1397] *Earth Island Institute v Daley*, unreported USCIT 1999 Per Aquilino J Slip Op 99-32, 38.
[1398] *International Dolphin Conservation Act 1992* (US) 32 *ILM* 539 (1993); *WTO, US-Restrictions on Imports of Tuna (Tuna 1)* 30 *ILM* 1594 (1991); Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean 33 *ILM* 936 (1994).

particularly domestic producers, whose commercial arguments are fused with national sovereignty and economic development. Corporations derive specific advantages from regulatory conditions formulated in conjunction with home States. Multilaterally-negotiated solutions to environmental conservation issues secure State participation and dilute the influence of national industries. It is more palatable for States to point to legal compliance with international conventions or decisions of international tribunals when implementing outcomes having unfavourable national consequences for specific interest groups.

NGOs in particular are concerned that firms can potentially limit the regulatory competence of States or impair democratic lawmaking processes. For example, Parliamentary dissolution and the consequential lapse of the requisite implementing legislation constituted a breach by India of the TRIPs transitional arrangements.[1399] Government procurement laws with respect to Myanmar have been successfully challenged by firms within the US as impermissibly encroaching upon the exercise of foreign policy by the executive.[1400] Human rights conditions within government contracts were deployed against South African apartheid. The North American legislation was also challenged by Japan and the EC within the WTO.[1401]

[1399] WTO, *India–Patent Protection supra n*1144.
[1400] *Massachusetts State Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar)* Mass Gen Laws Ch 7 s22G-22M (1996); *National Foreign Trade Council v Baker* 26 *F Supp* 2d 287 (D Mass 1998); *National Foreign Trade Council v Natsios* 38 *ILM* 1237 (1999) (US CA 1st Cir) ; *Crosby v National Foreign Trade Council* 120 *S Ct* 2228 (2000).
[1401] WTO, *US-Measure affecting Government Procurement*, WT/DS88/3 & WT/DS95/3 (1998).

In aspiring to universalism, international law restricts the regulatory autonomy of States. [1402] Regulatory measures having ostensibly meritorious environmental objectives can impermissibly benefit local companies or afford unfavourable treatment to foreign enterprises.[1403] States remain free to adopt whatever policy measures they wish provided they are consistent with the covered WTO Agreements to which they are Party. [1404] National law is ordinarily amended or repealed to direct desired commercial behaviour.[1405] The ability of firms to challenge national law 'from above' through overly-rigid adherence to internationally-agreed trade-orientated regimes can unduly confine the regulatory discretion of States. Although the WTO suggests an apparent imbalance between corporate freedoms and State constraints, governments must first agree to initiate proceedings. Prominent examples where corporations apparently circumscribe the national regulatory competence of States are properly appreciated as ordinarily incidental to further regulatory refinement in response to underlying economic conditions. Regulatory evolution also becomes a complex process of multiple actors operating at national and international levels. States are understandably reluctant to permit greater corporate access to intergovernmental dispute settlement, particularly where legal outcomes nominally bind them only.

[1402] WTO, Disciplines on Domestic Regulation in the Accountancy Sector 38 *ILM* 499 (1999).
[1403] WTO, *USA–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1996).
[1404] WTO, *US-Tax Treatment of 'Foreign Sales Corporations'*, WT/DS108/AB/R (2000) para 179.
[1405] *IBRD & IMF v All America Cables & Radio Inc and Other Cable Companies* (1955) 22 *ILR* 705.

Conclusions

Corporate enforcement activity is self-interestedly selective: competitive implications for commercial rivals are as influential as strict legal compliance by States. The multivariate tracks include resort to home States (the diplomatic protection model), direct action independent of home State participation to protect property rights (resort to national courts, arbitration and inter-corporate techniques) and furthering the implementation of operational policies and procedures within the framework of international organisations. In the negotiation of treaties States may insert dispute resolution provisions which enable corporate access to render their commitments more credible.

The origins of inter-State disputes are not limited to inter-commercial rivalries. Corporations are actively contributing to normative standards which circumscribe the permissible boundaries of State regulation and in that sense are 'making' international law. However, commercial resort to the procedural mechanisms at their disposal for enforcing international legal obligations is only part of a complex synergy of influences within processes productive of international law. In particular, transnational corporations and industry associations are driving greater interaction between national and international fora. That said, State consent remains evident throughout: judges are government-appointed agents, tribunals are State institutions and the contested law is distinctly 'national'. Although their profile may be significant, firms only participate with the acquiescence, support or permission of States. Their conditions of participation and status (party to proceedings, third party

intervener, amicus, observer or expert adviser) are left to be determined by States.

Conclusions

Only States 'make' international law. Non-state actors are participating in legal processes in a manner qualitatively and quantitatively less than States. The contributions made by corporations to international lawmaking through commercial practice and politically organised activity have benign and malign impacts. This Chapter draws together the principal themes of earlier ones. It first assesses corporate contributions to international lawmaking and outlines the commercial motivations for doing so. It then considers whether these developments evidence a qualitative transformation of the corporate role within the international legal order. This raises the prospect of an asserted participatory right for non-State actors derived from the existing 'rules of engagement'. If corporate influence is indeed increasing other questions arise such as the democratic deficit of non-State actors, the implications for sovereignty, particularly for developing States, and the potential for greater democratisation of international decision-making. Finally, this Chapter examines the appropriate corporate role when States fail to exercise their right and responsibility to regulate. Although an explanation of the lawmaking process is by no means straightforward and depends upon the particular actor, arena and claim being made, there is a general evolutionary movement which validates non-State actor contributions that traditional accounts discount.

1 An Assessment of Corporate Contributions to International Lawmaking.

International lawmaking is a more dynamic and complex interaction than the classical intergovernmental model suggests. Recognising corporate contributions to lawmaking does not subvert State authority. International legal doctrine already accepts that corporations can conclude contracts with States and initiate enforcement proceedings against them. Commercial contributions to lawmaking do not require the possession of full international legal personality. Contractual relationships are confined bilaterally and the creation of precedents enforceable against others remains consistent with State consent as expressed through State organs. Enforcing international arbitral awards is preconditioned by compatibility with national public policy.

The ICC acknowledges that States and intergovernmental organisations are the principal rule-setters.[1406] However, business reserves the right to respond to and influence regulation either directly or through industry associations.[1407] One self-appointed corporate function is to urge reform where regulatory constraints threaten competitive employment.[1408] This constitutes only half the picture. Corporations can bypass State structures altogether through resort to market techniques. The ICC independently codifies best commercial practice for the benefit of its members with a view to facilitating exchange. Firms also choose to establish processes and institutions which parallel intergovernmental ones. By this means corporations avoid the institutional accountability

[1406] ICC, The Geneva Business Declaration: Statement at the Conclusion of the Geneva Business Dialogue, Paris, 1998.
[1407] World Economic Forum/PWBLF, Global Corporate Citizenship: The Leadership Challenge for CEO's and Boards, Geneva, 2002, 6, 10.
[1408] CRT, The Critical Role of the Corporation in a Global Society, Caux, 1997.

associated with direct participation and can reject outcomes which deviate from preferences.

International lawmaking as a process also warrants further clarification. Regulation may be used in a generic sense but regulatory objectives can vary: for example, law can be reactive (to adverse corporate behaviour), directive (guiding commercial practices towards desirable results) or facilitative (creating a supportive environment for market operations). So too can corporate contributions to lawmaking be 'law destroying' or 'law creating'. The former includes the circumstance where national law is dismantled from inside or outside the State (for example, through resort to national courts or international tribunals) or where legislative proposals are abandoned on account of corporate influence. The latter includes attempts to render national legal models universally applicable (for example, by extending the Foreign Corrupt Practices Act internationally or applying the strict intellectual property protection of US law through TRIPs).

States have acknowledged the substantive contributions made by non-State actors to international law: the procedural rules explicitly permit NGO and corporate participation to enrich deliberations and provide potentially useful information. States may also become dependent upon their expertise or subsequent implementing role to make admission to intergovernmental proceedings inevitable. The impact made by non-State actors depends upon reputations for reliability free from parochial concerns, reasonable demands, flexible compromise and credible empirical evidence. A cacophony of voices

from equipotent but diametrically-opposed non-State actors could create a tendency to regulatory inertia. However, corporate participation is guided by self-interest and not uniformly observable across all issue areas. NGO participation is similarly topic-specific. Non-State actor contributions to improving the international lawmaking process strengthen the participatory claims of others and NGOs and firms take advantage of each others breakthroughs. Indeed the Energy and Biodiversity Initiative of Chapter Two illustrated that corporations and NGOs may act collaboratively through partnerships to influence regulatory development, market conditions and commercial practices. If these are several conclusions to be drawn from the thesis, how far should corporate participation extend ?

1.1 Refining the Arguments for and Against Corporate Inclusion.

From the perspective of States, corporate contributions can enhance regulatory effectiveness and minimise unintended consequences. Corporations offer financial resources, technical expertise, management experience and information concerning the production process in return for access to intergovernmental fora. Regulation which is unable to keep abreast of technological changes or market conditions (regulatory lag) risks obsolescence. Inclusion of commercial actors and proposals may lead to stronger commitments, accurate and economically-viable solutions, a greater sense of ownership and less expensive enforcement effort. Regulatory processes benefit from the information-gathering resources of non-State actors and the ease of dealing with fewer parties. Corporations are in a position to suggest

economic prerequisites to cost-effective implementation. Corporations promote themselves as the most direct and disciplined route into the marketplace.[1409] Information exchange minimises the likelihood of corporate-State conflicts or the adversarial postures associated with unilateral decision-making. Deliberations are enriched through divergent opinions and experiences. Trade associations for example can provide States with a straightforward means of recruiting experts.[1410] Consensus-building is one means for bridging gaps between regulation and commercial practices.[1411] Inclusion could eliminate informal attempts to influence the lawmaking process which currently occur without proper accountability.

On the other hand, several arguments may be marshalled from the perspective of States to justify continued exclusion. Participation can confuse choices, hamper the search for common ground, over-crowd agendas or fora and distract attention. Legal activity by one industrial sector engenders offsetting effort by others.[1412] Intergovernmental decision-making could become protracted, delayed or distorted. Potential breaches of confidentiality could inhibit the frankness of intergovernmental exchange and erode the privacy required for sensitive decision-making. From the commercial perspective, the transaction costs of participation including collecting information could be prohibitive, the reward may not justify the effort and informal bargaining with States may offer more confidentiality. An industry consensus may be difficult

[1409] BIAC, Civil Society: Striking a Balance, Paris, 1999.
[1410] IFPMA, Registration of Medicines and Harmonisation, Geneva, 1997, 3.
[1411] Wagner G.A., 'Likes and Dislikes in International Law: The Company' (1986) 33 *NILR* 227, 228.
[1412] Cohen S.D., The Making of United States International Economic Policy: Principles, Problems and Proposals for Reform, Praeger Publishers, Connecticut, 5th Ed, 2000, 132-4.

to identify and trade organisations can limit the scope for expressing alternative commercial opinions. Consultation which amounts to window-dressing improves the economic credentials of a political decision-making process in which firms may have no substantive influence. It is more difficult for firms to distance themselves where they have participated in regulatory design.

Lawmaking could become an extenuated competitive exercise which aggravates the responsibility of States to balance disparate interests. Lawmaking serves an important mediating function between the different proposals offered by corporations for prospective adoption as law. Corporations espouse a narrow, self-interested vision of law. They seek supportive frameworks which further their market position but disadvantages rivals and stimulates commercial activity but preserves market privileges. States are expected to introduce only such regulatory controls as necessary to protect national welfare (including national industry) and corporations will not object to discriminatory treatment when they benefit from it. A State's regulatory responsibilities include administering legislation in a fair, uniform and non-discriminatory manner. Lawmaking as a bargaining process means that some sought-after elements will be granted and others rejected as States spread gains and losses between different sectors. States will attempt to formulate regulatory frameworks which are beneficial (or at least not unduly disadvantageous) for all business enterprises.

1.2 Commercial Practices and International Regulatory Development.

The commercial operations of transnational corporations affirm international law's claim to universality. National standards are harmonised and regulatory discretion restrained in the elimination of transaction costs and trade barriers. Corporations also affirm the specificity of national law: national law may be the source of competitive advantage within the international marketplace or a protectionist shelter. Firms have constructed competitive advantages in light of environmental circumstances and national regulation. For example, strict Japanese air pollution regulation positioned Japanese firms as the global market leaders in this domain and the US industry's competitiveness in hazardous waste is also attributed to US toxic regulations.[1413] On a grander scale international legal regimes such as emissions trading replicate the national legal systems of developed States. On the other hand, regulation is a technical barrier to trade where States employ national law to match the strengths of local producers. The ICC has accordingly proposed collaborative arrangements in designing international trade regimes to avoid protectionist policies.[1414]

Regulation is linked with commercial practices in several ways. First, States exercise their right to regulate in response to commercial behaviour. Corporations are catalysts which spark chains of causation which culminate in

[1413] WTO Council for Trade in Services, Secretariat Note on Environmental Services, WTO Doc S/C/W/46 (1998), paras 19, 25, 39.

[1414] ICC, 'Business and the Global Economy', Statement on behalf of World Business to the Heads of State and Governments Attending the Birmingham Summit, Paris, 1998; ICC, 'World Business Priorities for a New Round of Multilateral Trade Negotiations', Policy Statement for Submission to the Third Ministerial Conference of the World Trade Organisation, Paris, 1999.

international law. Treaties can be the result of adverse activity such as anticompetitive behaviour. The State practice constitutive of custom is influenced by foreign direct investment, industry mobility and threatened withdrawal. States offer effective territorial control over natural resources and their regulatory authority to adjust labour, environmental or investment protection standards at the point of entry. Conversely, South African apartheid illustrated the difficulties of dislodging corporations at the point of exit from the State when national regulatory conditions offer an international competitive advantage, notwithstanding the violation of international human rights law.

Second, States may adopt field-tested industry standards as law. In this respect commercial practice leads regulatory development. Embedding the practice of market leaders within regulation and subsequent enforcement thereof against inefficient rivals contributes to corporate consolidation. This has been illustrated with respect to technical product standards formulated by the ISO and the production of alternatives to ozone-depleting substances. Increasing environmental regulation is moreover associated with greater merger activity within the waste disposal industry either as a target or acquiring firm.[1415] Third, corporations act as are normative bridges between States. Firms can be conduits for national standards originating within home States, internalised as corporate policy and transmitted through global operations. This process of normative decomposition, reassembling and redistribution is driven by economic efficiency and encounters allegations of neo-imperialism. Although such a 'spill-over' effect is evident with respect to management practices,

[1415] Cooke A.W.C., 'Merger activity in the waste diposal industry: the impact and the implications of the Environmental Protection Act' (2000) 32(6) *Applied Economics* 749.

accounting techniques or marketing, labour practices and possibly technology transfer are contrary examples where transnational corporations are prepared to exploit regulatory differences between States.

The eventual outcome is that production inputs (labour and natural resources) tend to be subject to national law whereas outputs (trade in finished goods and services, investment protection standards) are subject to international law. For example, the Union of Industrial and Employer's Confederations of Europe (UNICE) suggests that European industrial relations regulation should promote best practice rather than compel harmonisation. [1416] Corporations also emphasise that the choice of appropriate technology (for example, to combat climate change) is a matter for national governments to determine. Commercial technology can be a regulatory driver (for example, mining the deep seabed, climate change or genetically modified organisms[1417]) as much as regulation can be an engine to innovative product development (for example, encouraging alternatives to ozone-depleting substances).

1.3 Evidence of the Corporate Consciousness and International Lawmaking.

Industry calls upon States to establish the necessary enabling regulatory framework to support efficient commercial operations. The norms which underpin market transactions include contractual integrity (good faith adherence to commitments freely entered into), market contestability (freedom

[1416] UNICE, Releasing Europe's Employment Potential: Companies' Views on European Social Policy Beyond 2000, Brussels, 2000, 6, 8, 9, 10, 12, 14.
[1417] Nelkin D., Sands P. & Stewart R.B., 'The International Challenge of Genetically Modified Organism Regulation' (2000) 8 *NYU Environmental LJ* 523, 527-8.

of entry and exit, the ability to trade freely) and legal certainty (adequate property rights protection). Intergovernmental organisations envisage legal systems which facilitate commercial activity by lowering transaction costs, reducing commercial risks and combating corruption.[1418] States are expected to develop in consultation with industry a mix of economic instruments including market incentives.[1419] Furthermore, market solutions apply beyond the point of regulation. Regulation should not proscribe a particular production process and technological transfer cannot be compelled. State intervention into the marketplace should be transparent, objective, reversible, non-discriminatory, proportional, flexible and technologically neutral.

Most prominent are repeated calls for a 'level competitive playing field' whereby competitive differentials between firms are limited to efficiency criteria. Firms advocate against 'improper' market practices so that no single firm has an opportunity to realise 'unfair' sources of competitive advantage which are denied to others operating within the same industry. Chapter One for example examined how the International Organisation of Employers encouraged States to ratify and implement the ILO Convention on the Worst Forms of Child Labour. The level playing field concept can drag market leaders back to a common standard as much as lift market laggers. It can also mask de facto asymmetries enjoyed by well-established firms and enable further consolidation. Applied to lawmaking a level playing field implies equality of opportunity for all firms to influence regulatory development.

[1418] IBRD, From Plan to Market: World Development Report, Washington DC, 1996, 86.
[1419] UN Commission on Sustainable Development (UNCSD), ICC/WBCSD Submission, Responsible Entrepreneurship, Background Paper No 1, Sixth Session, 1998.

A typology of corporate motivations for contributing to international lawmaking derived from the research would be as follows. First, firms seek to create international business opportunities. For example, the case study on climate change illustrated how corporations were shaping the legal regime to favour their unique specialisation. Petroleum companies were attempting to prolong resort to fossil fuels, the renewable energy and nuclear industries were encouraging alternative energy sources, the forest industry was promoting the virtues of carbon sinks and IETA was driving the market for emissions trading. Regional and international trade regimes facilitate cross border exchange and negotiations for the law of the sea, outer space and biological diversity illustrated commercial interest in exploiting novel sources of natural resources. Second, firms seek to constrain the national regulatory competence of States by encouraging their submission to multilateral disciplines. Trade agreements for example may require regulatory administration in a uniform, impartial and reasonable manner, prior notification of legislative changes and refraining from enforcement until publication.[1420] Concession contracts, the multilateral agreement on investment or developing the law with respect to regulatory takings which qualify as expropriation illustrate attempts to protect investments and property rights. Third, corporations wish to minimise regulatory developments which would hold them more accountable.[1421] Firms seek to circumscribe prospective international policy concerning corporate legal responsibility with respect to environmental pollution (for example, the question of liability and compensation for damage resulting from

[1420] Art X, GATT, *supra n*342.
[1421] Dobbin M., The Myth of the Good Citizen: Democracy under the Rule of Big Business, Stoddart Publishers, Toronto, 1998, 43.

transboundary movements of hazardous waste) which may constitute a precursor to national regulation.

International action is ultimately directed at influencing national regulation and market conditions. Commercial contributions are directed at domestic audiences since peculiarly national interests are relatively diffuse at the international level. Firms are more familiar with the applicable national processes and operational constraints such as access to resources.[1422] Chapter Three observed that trade associations wish to enhance their prestige and recruit new members by promoting the extent of their influence over international trade negotiations. Participation provides greater assurances of a reasonably predictable outcome, increased certainty with respect to corporate rights and obligations at the national level and the business confidence to undertake investment activity. Legal stability need not be absolute since greater reward is the benefit of assuming greater risk. However, firms are subject to fiduciary responsibilities to avoid speculative investment. Borders are taken seriously since they can be subject to different jurisdictional controls and political risks.

Commercial enterprises choose whether, when and where to contribute to international lawmaking. Compliance-orientated firms seek to influence national regulation, strategic management firms participate in national policymaking and so-called sustainable development managers participate in

[1422] Schmidheiny S./WBCSD, Changing Course: A Global Business Perspective on Development and the Environment, MIT Press, Massachusetts, 1992, 24.

international standard-setting.[1423] Firms participate where States are clients, engaged in trade, have a long-term commercial vision or are the likely targets of regulatory measures. Firms can free-ride upon the contributions of others and refer to precedents established elsewhere in direct negotiations with States. Small and medium sized enterprises are more likely to coordinate action through a trade association. On the other hand, it is anomalous that trade associations should be permitted to make legal contributions given that one of their stated objectives is to deter unfavourable regulation.

Different techniques have also been used with varying success. The different modalities for corporate participation at Conferences of the Parties were discussed in Chapter Three. Many of these only enable the expression of official positions within a compressed time frame. Supporting secretariats enables access to those most informed about international regimes but their decision-making capacity may be extremely limited. Membership of or advice to national delegations depends on the degree of support from States: ongoing professional relationships at the national level and a coincidence of interests become relevant. Lobbying is not subject to procedural rules or transparency requirements. Observer status suggests the likely direction of government policy, ensures prior notification of intended regulatory measures and provides a sufficient lead-time to adjust commercial operations or undertake lobbying.

Economic information is the principal platform upon which corporations assert an entitlement to be included within intergovernmental decision-making.

[1423] UNCTAD, Environmental Management in Transnational Corporations: Report on the Benchmark Corporate Environmental Survey, UN Doc ST/CTC/149 (1993), 167-77.

While the 'technological intelligentsia' are assumed to inject rational scientific production methods they also effectively delineate the technical boundaries to legal agendas.[1424] As observers firms can secure some national information which may be deployed during contractual negotiations or enforcement proceedings and regulatory weaknesses may be exploited in commercial operations. Firms also lose control over information voluntarily shared with States and which may be used against them by State enterprises or to perfect regulatory regimes. Information exchange will therefore be imperfect since firms will adopt measures to protect confidential business information including withholding its disclosure.

Of the different modalities for corporate participation the firm-specific factors include corporate strategy, operational specialisation, resource commitment, degree of control over the process, predictability of outcome, cost of alternatives, litigious disposition and reputational implications. Corporations can also choose the battleground. Institution-specific factors include conditions of access, participatory entitlements, transparency, receptivity of incumbents, time-frame for decision-making, opportunities for political arbitrariness, effectiveness, enforcement prospects and potential liability. The OECD for example is relatively corporate-friendly: the Business and Industry Advisory Committee enjoys advisory status, there is an obligation upon the Council to take into account business submissions and the membership consists of industrialised States. Relative to other international organisations the OECD has been a reasonably effective platform for corporate contributions

[1424] Slouka Z.J., 'International Law-Making: A View from Technology' in Onuf N.G. (Ed), Law-Making in the Global Community, Carolina Academic Press, Durham, 1982, 131, 168-9.

to international lawmaking. On the one hand the OECD Guidelines for Multinational Enterprises partly deterred the need for the UN Code of Conduct for Transnational Corporations and the OECD readily espouses the merits of private voluntary initiatives as an alternative to formal regulation. On the other hand the OECD could not immunise the Multilateral Agreement on Investment from criticism and eventual failure. The receptivity of incumbents to commercial considerations also explains why there is relatively less corporate lobbying of institutions such as the IMF or World Bank.

The ability of corporations to influence international legal outcomes varies for several reasons. First, the relationship between firms and States is context-specific and evolves over time. Regulation inevitably evolves through feedback loops which reflect underlying economic cycles notwithstanding attempts by States to maintain an acceptable degree of order and stability. Second, firm-specific factors influence the extent of corporate success. Each corporation has distinct capabilities which are manifested by different power positions within different markets. The relatively chaotic and sporadic business impact results from inter-corporate competition. Corporations threaten competitors and respond to threats. This competition may be elevated into intergovernmental conflicts for resolution by international tribunals. Questions of public and private international law are woven together: for example, authoritative determinations of territorial control are preconditions to the validity and recognition of fishing or petroleum concessions. It is inevitable in view of the international judicial infrastructure that fundamental issues of international law such as economic self-determination are driven by

commercial agendas and left to be resolved in an ad hoc fashion. Legal precedents under international economic law are accordingly the product of attempts by firms to realise market ambitions and expropriate market share from rivals. Third, success depends upon unpredictable external factors (political willingness, public opinion and the reactions of NGOs and the media) such that there is no single causal factor and corporations may be uncertain whether strategies succeeded. For example, attempts to introduce the Multilateral Agreement on Investment failed at the peak of an economic cycle and the chlorofluorocarbon industry was content to challenge scientific opinion but not consumer perceptions.

Heterogeneity explains the difficulty of identifying a uniform business opinion. The closest approximation to a centralised coordinator is the ICC but since its abilities can be hamstrung by national committees it is left to ensure that commercial perspectives are espoused at a level of generality. For example, the ICC invokes the public-private distinction to protect confidential information, maintain control over production processes, preserve property rights and ensure contractual privity. It also argues that designing regulation in consultation with firms enables industry to adapt to market changes and minimise disruption to employment, competitiveness and economic growth. Finally, uncertain governmental decision-making today can unsettle long-term investment planning. Changes of government can herald different political agendas which international law may be able to confine.

2. The Position of Corporations in the International Legal Order.

Commercial actors act through, collaboratively and in competition with political ones. Commercial activities undermine the classical conception of the State, extenuate economic disparities between them or benefit from the dominant politico-economic order.[1425] Chapter One illustrated that new forms of trading have consistently disturbed established political orders and novel political power can similarly destroy old economic orders. It also illustrated that commercial entities enhance the resource and knowledge base of political ones.

Commercial contributions to international law in the contemporary era are a continuation of historical developments. States continue to conclude treaties which provide commercial rights to corporations and firms continue to implement treaty provisions de facto. States have always been concerned to protect national industry from being undermined by rivals who have not invested the same effort in building the market and have no interest in orderly trade management. This rationale partly explains why colonial trading companies were afforded a monopoly and why developed States are reluctant to compel the transfer of technology to developing States. Legitimate firms rely upon States to eliminate illegitimate operators (formerly market 'interlopers') and firms which are merely fronts for improper purposes (such as criminal activity including terrorism or smuggling in pharmaceuticals or ozone-depleting substances). The increasing international regulation of

[1425] Gilpin R., 'The Political Economy of the Multinational Corporation: Three Contrasting Perspectives' (1976) 70(1) *Am Pol Sci R* 184.

transnational organised crime such as the 2000 Convention and its associated Protocols as well as continuing initiatives to combat corruption are part of such efforts.

The colonial trading companies exercised extensive lawmaking power to facilitate the expansion of empire. The history of the East India Company illustrates that firms wish to offload unduly burdensome administrative responsibilities to States when bureaucratic decision-making diverts resources away from the pursuit of profit. Public functions also entail additional liabilities. The State was also prepared to assume control when corporate policies could not prevent corruption or disorderly conduct. Historical trends since the eighteenth century also suggest that private participation has drawn backwards and the role of the State, far from receding in an era of 'globalisation', continues to be asserted. This is particularly true given the growth of intergovernmental organisations where potential corporate impacts could be expected to be magnified. However, private sector activity is fragmented between multiple specialist fora and subject to detailed procedural rules or proliferating informal practices. Individual firms concentrate their efforts under the overall coordination of umbrella groups such as the ICC. As observed in Chapter One, the clearest example of corporate contributions to lawmaking – the ILO – is also the oldest. Furthermore, the International Trade Organisation contemplated greater corporate participation than the WTO (although arguably the same result has been achieved progressively) and on account of political differences between States the UN has taken half a century

to reach a level comparable to non-State actor participation at the League of Nations.

Agenda 21 observed that business and industry, including transnational corporations and their representative organisations, should be full participants in the implementation and evaluation of activities related to it.[1426] However, corporations are too wedded to national legal systems to which they owe their existence to be 'full participants' within the international legal order and are yet to demonstrate a solidarity transcending nationalism and corporatism. The ICC attempts to create an international commercial perspective but as noted above can be hamstrung by national committees. National corporate champions continue to collaborate with the prevailing political elite within home States. Corporate sincerity can be questionable and behavioural modifications cosmetic. In particular, corporations do not accept standards for themselves which they seek from States. Participation in lawmaking is a narrower facet of public participation in governmental decision-making whose characteristic attributes include transparency, openness, disclosure, compromise and procedural fairness.

Nevertheless, the increasing 'muscle flexing' of non-State actors is challenging basic assumptions of the international legal order including the degree of State control over international lawmaking. It is increasingly difficult to justify exclusion from the lawmaking process simply because an entity is not a

[1426] Agenda 21, para 30(1), Report of UNECD, *supra n*28.

State.[1427] This is especially the case where instruments such as the Kyoto Protocol contemplate a 'privatisation of implementation', such as private entities participating under the clean development mechanism. Other evidence from Chapter Four suggests that the corporate role has undergone a qualitative transformation. For example, the definition of expropriation was widened at corporate insistence in the *Metalclad* decision and NAFTA dispenses with the requirement to exhaust local remedies. Chapter One noted the recognition of business and industry as a 'major group' alongside other NGOs within the Commission on Sustainable Development and Chapter Three observed the increasing frequency with which General Assembly resolutions referred to the private sector during the preparatory processes for international conferences. Industry is also more willing to self-organise at the international level through politically organised business groups, trade associations and ad hoc corporate coalitions rather than individual firms passively channelling contributions through State mechanisms.

These developments are insufficient to qualify corporations as full subjects of international law. Corporations clearly have a degree of international legal personality which encompasses for example locus standi before ICSID Tribunals and the opportunity to submit amicus briefs to WTO Panels. NAFTA illustrates that even a limited procedural capacity including the right to independently initiate dispute settlement mechanisms can have a profound impact upon the substantive content of international law. On the other hand commercial rights continue to emanate from bilateral not multilateral legal

[1427] Sands P., 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *Int L & Politics* 527, 541-2, 547, 555.

instruments. Corporations remain dependent upon legal mechanisms conferred by the will and agreement of States notwithstanding their prominence in international affairs. By contributing to international law the nominally subservient corporate legal personality of the national sphere is not aspiring to equality with States on the international plane.[1428] Commercial contributions could equally be characterised as ultimately self-regulatory. If non-State actors are assumed to be the ultimate beneficiaries of international law then they are simply contributing to legal standards which they themselves expect to apply through governmental mediums. Alternatively, corporate contributions could be perceived as ultimately benefiting States. Procedural mechanisms which contemplate non-State actor participation are springboards for enforcing international law against States. Such a mechanism promotes the further implementation of conventions and moreover enables States to implement decisions unfavourable to industry shielded by the decisions of international tribunals.

A transformation of the corporate position within the international legal order is also contingent upon the assumption of proper accountability. States have excluded the topic of non-State actor responsibility from the International Law Commission's long term programme of work on the basis of classical definitions of international organisation. [1429] The International Law Association has similarly confined its study of international organisational accountability to the entitlements of third parties including corporations:

[1428] Cp Hofmann R. & Geissler N. (Eds), Non-State Actors as New Subjects of International Law, Duncker und Humblot, Berlin, 1999.
[1429] International Law Commission, First Report on Responsibility of International Organisations, UN Doc A/CN.4/532 (2003), paras 21-2; ILC, Report of the 55th Session, UN Doc A/58/10 (2003), 38-45.

participation in decision-making, procedural fairness, access to information or remedies and dispute settlement for non-State actors are several of its principal concerns.[1430] It may be presumed that formally acknowledging corporate participation in international lawmaking would enhance corporate accountability. This has not been validated within the context of intergovernmental institutions.[1431] For example, a corporate presence within the ILO encourages States to take implementation more seriously but attempts to shift the focus to employers are prevented by reference to organisational mandates. Corporations also deny the extent of their influence, characterise their role as advisory and point to the permissive terms of their participation.

2.1 The Terms of Non-State Actor Participation in International Lawmaking.

The Introductory Chapter referred to contemporary developments within Europe seeking to improve lawmaking processes. The General Principles and Minimum Standards for Consultation of Interested Parties with the EC are a political commitment to undertake best efforts at cooperation with non-State actors. They are constructed on the premise that formalising participatory conditions is desirable. The objective was to politically recognise NGO roles but not establish procedural rights.[1432] The EC was concerned that a 'right' implies an entitlement that can be enforced. Recognising a *droit*

[1430] International Law Association, Final Report on Accountability of International Organisations, Berlin, 2004.
[1431] Obradovic D., 'Accountability of Interest Groups in the Union Lawmaking Process' in Craig P. & Harlow C., Lawmaking in the European Union, Kluwer Law International, London, 1998, 354, 383.
[1432] White Paper on European Governance, Handling the Process of Producing and Implementing Community Rules, Report of Working Group on Consultation and Participation of Civil Society, 2001, 5, 12-13, 17.

participatif could open the door to judicial review in the event that the right had not been fulfilled or intergovernemntal responses were considered unsatisfactory. The Commission should consult widely before proposing legislation and wherever appropriate publish consultation documents. [1433] 'Relevant' parties must have the opportunity to express their opinions[1434] and 'interested parties' the opportunity to interact with experts.[1435] The European Parliament observed that consultative mechanims could only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy.[1436]

Politically organised buisness groups and individual firms contributed to the formulation of these standards. The American Chamber of Commerce supported greater transparency in consultative processes. [1437] The Confederation of British Industry called for an unambiguous commitment to use regulation as a last resort.[1438] UNICE urged the Commission to consult differently depending on the subject-matter and observed that industry requires time to consult with members to produce consolidated contributions.[1439]

[1433] Art 9, Protocol No 7 to the EC Treaty on the application of the principles of subsidiarity and proportionality.
[1434] EC Communication, Towards a reinforced culture of consultation and dialogue-general principles and minimum standards for consultation of interested parties by the Commission, COM(2002), 704 Final, 17, 19.
[1435] EC Communication, The collection and use of expertise by the Commission: Principles and Guidelines for improving the knowledge base for better policies, COM(2002) 713 Final, 4.
[1436] European Parliament Resolution on the White Paper on Governance, A5-0399/2001.
[1437] The EU Committee of the American Chamber of Commerce, Response to the European Commission Communication Consultation Document, Brussels, 2002, 1.
[1438] Confederation of British Industry, Response to Commission Consultation Towards a Reinforced Culture of Consultation and Dialogue, 2002, para 9.
[1439] UNICE, Comments on Towards a Reinforced Culture of Consultation and Dialogue, 2002, paras 5, 9, 16.

With these developments in mind, how should the modalities for non-State actor participation be formulated at the international level ? Do they lead to any entitlement in terms of interaction, co-operation, consultation or merely attendance ? Participation may be defined as opportunities to shape decision-making in accordance with democractic principles whereas consultation enables those affected by decision-making to express their opinions at the earliest possible stage but with no guarantee that account will be taken of the views expressed.[1440] Should the exercise of a participatory entitlement be preconditioned in any way ?

The precise nature of the participatory claim sought to be asserted by non-State actors and accepted by States can be elusive. For example, trade agreements envisage opportunities for comment, access to remedies and inclusion within national advisory committees.[1441] Alternatively they may contemplate consultation with private experts at national levels.[1442] The status of non-State actors may be consultative (ad hoc or permanent and either general or differentiated), advisory or observer. Permanent observer status could involve relatively greater recognition than consultative status. Various entitlements attaching to observer status include attendance at formal and occasionally informal meetings, making oral interventions or written submissions upon invitation and accessing unrestricted documentation. A right to be consulted

[1440] European Economic and Social Committee, Opinion on Organised Civil Society and European Governance: the Committee's contribution to the drafting of the White Paper, CES 535/2001, 5.
[1441] Eg Arts 1, 4, 6, 17, 38 Canada-Chile Agreement on Environmental Co-operation 36 *ILM* 1193 (1997); Arts 3, 6, 15, 40 Canada-Chile Agreement on Labour Co-operation 36 *ILM* 1213 (1997).
[1442] Art 11(2), Application of Sanitary and Phytosanitary Measures & Art 14, Annex 2, Agreement on Technical Barriers to Trade, *supra n*342.

prior to decision-making is very different to merely observing decision-making as it occurs. On the other hand, the obligations for non-State actors include confidentiality (associated with appointment to national delegations) or submitting quadrennial reports to ECOSOC. These conditions may be subject to 'soft' enforcement by States: the risk of withdrawing opportunities for access in the event of bad faith is one means of keeping corporations in line.

It may be concluded that the terms of non-State actor participation in international lawmaking are formulated in several ways. First, the possibility of delivering opinions and receiving answers without calling into question decision-making powers is effectively a right to freedom of expression. For example, the European Parliament has emphasized 'the importance of a general principle...proclaiming the right of every citizen and every representative organisation to draw up and promote their opinions and to receive replies directly or indirectly, without that right implying direct participation in decision-making'.[1443] Second, a 'right to participate' could in practice be a right to consultation prior to decision-making. This would require identifying who is entitled to be consulated and in what manner. Third, the participatory right may amount to procedural fairness: an opportunity to submit views, have concerns taken into consideration or to obtain reasons for decisions.[1444] A procedural fairness foundation entails that other entities should enjoy opportunities to respond to the opinions of others. The Aarhus Convention for example contemplates a notice-and-comment procedure.

[1443] European Parliament, Resolution adopted on the basis of the report on participation of citizens and social players in the European Union's institutional system, A4-0338/96.
[1444] De Schutter O., 'Europe in Search of its Civil Society' (2002) 8(2) *European L J* 198, 208, 211.

States Parties 'shall' 'to the extent possible' 'a) publish in advance any such measure that it proposes to adopt; and b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.'[1445]

Chapter Three concluded that the privileges currently enjoyed by non-State actors at Conferences of the Parties as specified within the applicable procedural rules falls short of a right to participate per se. They also fall short of a right to be consulted on proposed international regimes. States continue to dominate procedural and substantive decision-making. Non-State actors are invited to participate within intergovernmental fora where as a matter of form they merely enjoy the opportunity to provide input into deliberations. The risk is that non-State actors become disillusioned and lose interest where the marrow of their contributions is extracted and their efforts are left unrecognised.

The obstacles to an emergent right involve firstly questions of admission or access and secondly the conditions for participation. The former includes the criteria for accreditation which specify desired non-State actor attributes (particularly the questions of relevance and competence), the fact that they 'may' participate 'as observers' and the possibility of objection by States. That said, non-State actors duly accredited with ECOSOC or through attendance at previous intergovernmental conferences could be said to possess a legitimate expectation of ongoing admission. Once admitted the formal conditions of participation are relatively well-settled. The opportunity for non-

[1445] Art 4(2), Aarhus Convention, *supra n*29.

State actors to make oral and written statements at Conferences of the Parties and the terms thereof was found to be common to the procedural rules analysed in Chapter Three. The enabling framework established by States is permissive: it is left to non-State actors whether to resort to it. For example, corporations do not utilise human rights enforcement procedures although there is nothing which legally precludes them from doing so. Furthermore, the prospects for a participatory right must be diminished since there is no correlative duty upon States to take the suggestions of non-State actors into account.

This is not to say that non-State actors do not seek to influence the conditions of their participation. Non-State actors have contributed during preparatory processes to the formulation of procedural rules with respect to their participation and attendance at Special Sessions of the General Assembly, World Summits and international conferences. Their efforts have also encouraged interest in regulating the receipt of amicus submissions before the WTO. At the same time corporations do not agitate for change when the present system serves commercial interests. The limited opportunities for formal contributions to Conferences of the Parties encourage resort to informal methods (side events, exhibits, receptions) where resource disparities and familiarity with the system come into play. They can also prompt international dispute settlement without being bound by the outcome.

The procedural rules reflect the entirety of what States are formally prepared to grant non-State actors. However, as an essential platform for legitimate participation procedural rules are frequently exceeded in practice. Non-State

actor participation is heavily dependent upon the discretion of States or State agents. This applies to decisions of secretariats for accreditation purposes, WTO Panels for the receipt of amicus briefs or the chairpersons of subsidiary bodies at treaty conferences. Informal and innovative processes such as panel discussions and roundtable sessions are inherently volatile and there is concern that these participatory mechanisms are reversible.[1446]

Structural revision should not simply afford de jure recognition to de facto situations. Participatory conditions are unlikely to replicate the ILO model of equality between States and non-State actors. The remaining approaches include observer status, consultation and the creation of expert groups or advisory committees. The modalities for non-State actor participation have to balance efficiency, effectiveness and transparency. Openness and accountability are also linked: a formal transparent framework could bring out into the open informal activities such as lobbying and increase organisational accountability. Effective decision-making is influenced by practical logistical considerations and managing a cumbersome number of participants. Additional questions requiring resolution include elite capture, corruption, information disclosure, impartial data, conflicts of interests, expenditure limits and budgetary independence.

Inter-institutional comparisons of mechanisms for engaging with non-State actors demonstrate a wide degree of diversity. Comparisons across the human rights monitoring committees, trade fora and environmental institutions

[1446] International Centre for Trade and Sustainable Development, Public Participation in the International Trading System: Accreditation Schemes and Other Arrangements for Public Participation in International Fora, Geneva, 1999, 5.

confirm that analysis of non-State actor contributions should proceed on a case-by-case basis. The modalities for participation vary significantly in each fora. For example, the WTO actively encourages resort to national processes, the UNFCCC permits access to open-ended contact groups and CITES contemplates the most sophisticated procedures. Furthermore, non-State actors have been permitted to make oral interventions in relation to specific agenda items in meetings of the UNFCCC subsidiary bodies but not during plenary debates of the Conference of the Parties. Diversity also characterises the practice of UN secretariats and those of the Specialised Agencies.

A one-size-fits-all approach which first codifies the terms of non-State actor participation and then applies these modalities uniformly across a range of institutions is not appropriate or desirable. Indeed, such a prospect may be impossible given the necessity for treaty amendment. First, non-State actors possess different competencies or specialities and their interests are topic-specific. The nature of their participation ranges from policy development to project implementation. Participatory mechanisms would have to reflect their mutating nature and changing numbers of active participants as well as respect their wish to retain room for manoeuvre. Second, intergovernmental organisations have undergone different historical trajectories, utilise different traditions and employ variable operational requirements. The World Bank, for example, engages with 'development NGOs', a pseudonym for the private sector but potentially also a means of distinguishing between firms. The fragmented architecture and complex nature of the international system ensures that no single interest can routinely dominate decision-making. The

compromise between standardising procedures across all institutions or tailoring them to particular organisations is to provide a basic common entitlement (such as opportunities for written and oral submissions) and systematically sharing information or experiences and promoting best practice. Third, once procedures are formalised they are difficult to rescind and pressure builds to grant additional concessions. A participatory entitlement may provide a position of legitimacy from which inclusion within related processes could be asserted. Alternatively, expanding access by simplifying accreditation criteria for non-State actors may inspire reduced participatory privileges. That said, procedural rules evolve by accretion such that an emergent right may eventually crystallise.

2.2 The Implications of Non-State Actor Contributions for Democratic Theory.

States are assumed to be a more democratically accountable repository of power than that wielded by non-State actors. Non-State actor participation in international decision-making is 'dramatically troubling for democratic theory because it posits interests (whether NGOs or businesses) as legitimate actors along with popularly-elected governments'.[1447] In discharging governance functions States have responsibility to balance competing public interests at the national level. The claims and demands of various interest groups are filtered in light of mandated policy objectives. This exercise is democratic even though the State retains the necessary control. These unitary positions are then reconciled with those other States. The 'one voice' of States is vulnerable to

[1447] Bolton J.R., 'Should we take Global Governance seriously?' (2000) 1 *Chi J Intl L* 205, 217-8.

being unravelled during this period of intergovernmental bargaining. Non-State actors enjoy 'two bites of the apple' or 'double dip' if they are able to lobby at both national and international levels. There is less incentive for States to reach an acceptable position in conjunction with national constituencies. It is also embarrassing for States to have their positions contradicted by domestic constituencies they are assumed to represent. The real difficulties arise if corporations bypassed States in making international law or where States acceded to commercial demands in a non-transparent manner without independently exercising their own judgement.

It may be queried whether the developments in the lawmaking process analysed by this thesis are symptomatic of a more general 'participatory revolution' in international law.[1448] Participation in political processes such as lawmaking could be considered incidental to democratic participation.[1449] The ability of important elements of public opinion to express their opinions is not limited to the ballot box.[1450] Non-State actors including NGOs and business associations are entitled to participate in the economic and political life of democratic States.[1451] Non-State actors may be unable to rely upon States to accurately communicate their perspective. Furthermore, they may reflect distinctly transnational interests which are unlikely to be wholly represented by any one State.

[1448] Raustiala K., 'The 'Participatory Revolution' in International Environmental Law (1997) 21 *Harvard Env LR* 537.
[1449] Steiner H.J., 'Political Participation as a Human Right' (1988) *Harvard HR Yrbk* 77.
[1450] Pateman C., Participation and Democratic Theory, Cambridge University Press, Cambridge, 1970.
[1451] Warsaw Declaration: Towards a Community of Democracies 39 *ILM* 1306 (2000).

The 'democratic deficit' of non-State actors may be something of a red-herring. States need not be democratic and the notion of civic participation is weak within the international legal order. To the extent that non-State perspectives are intrinsically meritorious their lack of representivity or electoral unaccountability is irrelevant. If submissions are inherently attractive then irrespective of the status or motivations of the author they can be adopted as law. Democracy can be partly ensured through representivity: the capacity of organisations to speak for a sufficiently broad constituency in terms of membership and mandate. Non-State actors provide 'intellectual competition' with States by informing deliberations and generating solutions.[1452] One theme of this thesis is that 'intellectual competition' also arises between non-State actors. The protests of Seattle for example illustrate the degree of contestation between corporations and NGOs. States through lawmaking occupy an important mediating role between these competing interests and are in a position to respond authoritatively to popular perceptions of unaccountable corporate power wielded within intergovernmental institutions. The efforts of special interest groups should accordingly be channelled as productive counterweights rather than blocked, particularly where the locus of decision-making shifts to international fora.[1453]

Of greater concern is that easier access to intergovernmental institutions can magnify the voice of obscure, unrepresentative organisations whose exaggerated views have already been rejected at national levels. Only minority interests repeat their messages since domestic constituencies whose views are

[1452] Esty D.C. & Geradin D., 'Regulatory Co-opetition' (2000) 3 *J Int Eco L* 235, 253-4.
[1453] Raustiala K., 'Sovereignty and Multilateralism' (2000) 1 *Chi J Int L* 401, 416.

already being advocated by their national government have little incentive to participate. International action may be limited to well-resourced entities with large but docile memberships who exercise political power out of all proportion to their economic weight within the community. Producer groups are tempted to appeal for special treatment on the basis of military security or nationalism. A State's productive capacity should not be organized according to the degree of political power mobilized by particular groups. Nor should lawmaking processes be limited to contributions from inefficient industries. States seek to insulate themselves from special interest manipulation by entities whose national influence may be pervasive. The economic power of corporations is countered by a political system constructed upon the principles of sovereignty and sovereign equality. WTO policymakers in particular should be able to negotiate global welfare solutions free from protectionist pressure. Excluding non-State actors does not directly address the danger but shifts the locus of decision-making further behind the scenes. Formal rules and transparent processes are one means of limiting the potential for capture.

Intergovernmental organisations need to address the extent to which they will foster greater participatory democracy.[1454] The effective implementation of governmental policy at the international and national levels requires decentralised and participatory processes.[1455] International policy programmes and operational activities are 'legitimised by democratic decision-making

[1454] Commission on Human Rights, Human Rights as the primary objective of international trade, investment and finance policy and practice, UN Doc E/CN.4/Sub.2/1999/11, paras 38, 49.
[1455] UNCSD, Secretary-General Report, Overall progress achieved since UNCED, UN Doc E/CN.17/1997/2, paras 82, 132.

procedures'.[1456] For example, States are to provide interested parties including industry with opportunities to participate in developing, implementing and planning natural forest policy with a view to facilitating the forest products trade.[1457] Environmental issues 'are best handled with the participation of all concerned citizens, at the relevant level'.[1458]

States seek to preserve their membership privileges since non-State actor participation could lead to a transformation in current arrangements. Non-State actor participation could inspire novel forms of governance. [1459] Multilateral trade negotiations have been characterised as an exclusive 'club' where incumbents are hostile to outside involvement.[1460] Only in rare cases does non-State actor participation involve collaborative planning and 'there is little evidence that [the emergence of 'transnational civil society'] has affected decision-making or accountability'. [1461] The presence of unelected representatives in decision-making (participatory democracy) does not challenge the legitmacy of elected ones (representative democracy). Increasing accessibility for non-State actors enhances mutual

[1456] Rittberger V., 'Democracy and International Organisation', Paper presented at second meeting of the UN University Advisory Team on Peace and Global Governance, 1994, 9.
[1457] UNCED, Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, UN Doc A/CONF.151/6/Rev.1 (1992), paras 2(d), 13, 14.
[1458] Principle 10, Rio Declaration, *supra n*120.
[1459] Commission on Global Governance, Our Global Neighbourhood, Oxford University Press, New York, 1995, 256.
[1460] Keohane R.O. & Nye J.S., 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' in Porter R. et al (Eds), Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium, Brookings Institution, 2001, 264.
[1461] UNDP, Human Development Report 2001: making new technologies work for human development, Oxford University Press, New York, 2001, 108-9.

accountability.[1462] Furthermore, a 'right to participate' becomes less important if decision-making processes are ordinarily open and transparent.

2.3 Corporate Relationships with NGOs and Developing States.

The participation of NGOs within international legal processes has been extensively considered in the literature. BINGO contributions are less well-documented but follow similar patterns. The principle of parity requires that identical participatory conditions apply to all non-State actors irrespective of orientation. Corporations and NGOs formally enjoy equality of treatment under the procedural rules. Use of the descriptor 'non-governmental organisation' does not exclude politically organised business groups and 'the private sector' label found in intergovernmental resolutions is yet to be reflected by the applicable procedural rules. Organisational specialisation suggests the merit of separate consultative streams and BINGOs have made proposals along those lines such as the Business Consultative Mechanism. Channels for input are partially distinct (eg separate documents, different briefing sessions with the secretariat) but the resulting information should be treated even-handedly. States prefer to engage with BINGOs in panel discussions where commercial opinions are 'filtered' by external critique. Informal practices such as side events and lobbying are more fluid and benefit the well-resourced. Greater parity can be addressed through capacity building, financial assistance and the use of appropriate interlocutors.

[1462] Taylor C.R., 'The Right of Participation in Development Projects' (1994) 13 *Dickenson J Int L* 69.

The activities of non-State actors are most influential at the periphery of lawmaking by initiating processes or implementing final decisions. The medium of the State approves drafts, distinguishes non-law from law and converts international into national law. Although NGOs have a prominent role in generating favourable publicity for the final outcome, corporations also mobilise support within the business community to facilitate regulatory acceptance.

Corporate participation is also distinguishable from that of NGOs. Corporations satisfy the non-profit criterion by acting collectively through business coalitions or trade associations. On the other hand, individual firms were permitted to participate at the International Conference on Financing for Development, thereby discrediting the necessity for non-profit status. Industry associations are also vehicles for initiating litigation before national courts, pooling the weight of industry opinion for treaty conferences and shielding the identity of dominant market participants. Corporate opinions carry relatively greater authority on economic matters. Corporations have better prospects than NGOs of influencing regulatory developments with respect to economic development, military security and financing. That said, corporations are still excluded from crucial meetings and drafting committees.

The relationship between corporations and developing States is a very particular one. Developing States are ostensibly concerned that non-State actor participation will diminish their sovereignty. Political entities participate on the international plane once they have fulfilled the criteria for statehood. It

would be an anathema to admit non-State actors to participate on terms of equality once they have fulfilled the formalities for incorporation or registration. The nominal subservience of non-State actors within the national sphere should at least be transposed into the international realm. For example, Arabic and Asian States have objected to the admission of NGOs in the human rights field and developing States raised concerns to the submission of amicus briefs by NGOs and corporations within the WTO.

Non-State actors principally under the formal control of industrialised countries may further marginalise developing countries within intergovernmental fora. The environmental or economic perspectives of non-State actors may demonstrate political partisanship with home States and need not coincide with the agenda of developing States. Non-State actors from the developed world also tend to be better organised, more experienced and better resourced. Corporations enjoy access to advanced technology and possess the commercial acumen to exploit that fact. Whereas corporations may be motivated to establish a level playing field as between themselves, admitting corporations into intergovernmental decision-making processes makes the playing field between developed and developing States more uneven. Developing country concerns are justifiable insofar as participation tends to be limited to corporations from industrialised States who enjoy access to and familiarity with the international legal system and use it to their own best advantage. The International Chamber of Commerce and Industry of the Group of 77 should facilitate greater participation by firms from developing States. The ICC could also enhance the role of national business committees

from developing States. Sovereign equality in lawmaking becomes more theoretical than real, particularly when developing States are unable to attend conferences of the parties or contact group meetings as a result of lack of resources including qualified experts and other reasons.

3. Corporate Roles and Regulatory Lacunae.

Lawmaking is a quintessential government function. However, the inability or unwillingness of States to regulate multinational behaviour has been the topic of considerable literature. State regulation may be non-existent, weak or ineffective on account of political differences, lack of resources, conflict of interest or corruption. The task for present purposes is identifying the derivative corporate roles and responsibilities in the regulatory field given the regulatory responsibility of States.

Regulation has shifted from a State-driven system to a market-led one. States are attempting to construct markets around regulatory regimes. For example, emissions trading is a market-orientated solution to the public externality of pollution. Greater reliance on the private sector to achieve public objectives is reflected in a partial 'privatisation' of lawmaking. Within developed States regulation is tending towards a shared albeit understated effort between government and industry. Corporations urge prior consultation because they will subsequently be called upon to implement final decisions. The underlying threat is operational accommodation, regulatory avoidance and policy failure. Furthermore, international legal topics are not hermetically sealed and the

distinctions between developing, applying and enforcing international law are not clear-cut.[1463] Corporations serve an important corrective function by reminding States of positions assumed in other fora. Collaboration ensures economic stability and continued labour availability whereas State leadership is only necessary for broader social objectives.[1464]

States may shirk their regulatory responsibilities and over-rely upon self-regulatory methods such as voluntary industry agreements. A one-size-fits-all regulatory approach is gradually being rejected in favour of tailoring obligations to organisational attributes and capacity.[1465] Such twin-track regulatory strategies consider whether individual firms are willing to undertake self-regulation.[1466] Developed States have greater resort to economic tools as complements or substitutes to formal regulation.[1467] Command and control regulation is also being substituted by the notion of 'responsible entrepreneurship'.[1468]

When measures designed to stimulate the private sector are instituted, 'what often occurs is the de facto relinquishment of what were previously State

[1463] Sands P., 'The Role of NGOs in Enforcing International Environmental Law' in Butler W.E. (Ed), Control over Compliance with International Law, Martinus Nijhoff Publishers, Dordrecht, 1991, 61, 65.
[1464] The Conference Board, The New Role of Business in Society: A Global CEO Survey, New York, 2002.
[1465] UNCSD, Decision 6/2 on Industry and Sustainable Development, Report of the 6th Sess, New York, 22 December 1997 & 20 April-1 May 1998, paras 7, 15; UNCSD, Report of the Inter-Sessional Ad Hoc Working Group on Industry and Sustainable Development, New York, 2-6 March 1998, paras 13, 24, 36.
[1466] Gunningham N., 'Environmental Management Systems and Community Participation: Rethinking Chemical Industry Regulation' (1998) 16 *J of Env'l L* 319, 417.
[1467] OECD, Council Recommendation C(90)177 on the Uses of Economic Instruments in Environmental Policy, OECD Doc C(90)177/Final (1991), para 1.
[1468] UNCSD, UNEP Submission, Responsible Entrepreneurship, Background Paper No 4, Sixth Session, 20 April-1 May 1998.

responsibilities'. [1469] Business cannot be expected to author their own regulation since 'this is the job of good governance'.[1470] States which fail to map out long-term policy objectives will ultimately implement de facto market-orientated ones. In this way commercial practices 'bind' non-Parties to treaties and shape State practice 'from below'. Corporations influence the law 'from above' by preparing draft conventions or pursuing commercial practices which are prohibitively expensive to reverse, thereby narrowing the range of choice for States.

Corporations respond to regulatory lacunae by either attempting to fill the gap or exploiting it. Codes of conduct as an illustration of the former are commercial attempts to delimit self-perceived corporate roles from State responsibilities. Such voluntary corporate initiatives do not depend upon legal authority for their effectiveness. Technical standard-setting can also elicit behavioural alterations without formal recognition as law by influencing market conditions and the terms of participation for other participants. Corporations emphasise their voluntary nature and do not intend to incur legal obligations. However, declarations giving rise to expectations of future commercial conduct do not eliminate accountability. Corporate codes may encourage the transition to State regulation since it is difficult for corporations to enforce voluntarily assumed standards. NGOs and trade unions are sceptical of voluntary corporate initiatives and call for stronger regulation.[1471] The

[1469] Commission on Human Rights, Second progress report prepared by Mr Danilo Turk, Special Rapporteur, UN Doc E/CN.4/Sub.2/1991/17, para 186.
[1470] UN Research Institute for Social Development, States of Disarray: The Social Effects of Globalization, Geneva, 1995, 19.
[1471] UNCSD, NGO Steering Committee, Responsible Entrepreneurship: NGO Perspectives and Recommendations, Background Paper No 3, Sixth Session, 20 April-1 May 1998, para 37.

coercive authority of States is ultimately required for the effectiveness of codes of conduct.[1472] At best voluntary corporate initiatives complement rather than replace government measures and suggest consultation between State and industry.

Where States do not provide legislative guidance or direction then firms enjoy greater freedom of action. Within unregulated space or when confronted by normative conflicts corporations will refer to economic and efficiency criteria. Rational corporate decision-making weighs the likelihood of enforcement by States (efficient compliance) against the commercial reasons for deliberate violation (efficient breach).[1473] For example, the growth in international trade in hazardous waste began with the introduction of stricter waste laws within North America and Europe. Corporations found it cheaper to transfer waste to Latin America or Africa where environmental law was lax or absent until an international treaty was concluded on the topic. Corporations also draw upon norms such as non-intervention in the internal affairs of States to justify corporate complacency and absolve themselves of responsibility. Corporations argue that their only duty is to follow national law and policy as determined by States. National law is presumed to reflect local community expectations and thresholds for acceptable commercial practices. Supererogatory behaviour or acting 'beyond legal compliance' is undertaken on an uncertain footing and entails the voluntary assumption of liability in isolation from local firms.

[1472] UNCSD, Chairman's summary of the Multistakeholder dialogue segment on Industry at CSD-6, 6th Session, New York, 21-22 April 1998, para 12.
[1473] Williams C.A., 'Corporate Compliance with the Law in the Era of Efficiency' (1998) 76(4) *North Carolina LR* 1265.

Indeed, corporations potentially obviate national lawmaking in vertical and horizontal ways. Through codes of conduct corporations draw down international standards ordinarily applicable to States, tailor them to their particular specialisation or operational capacity and implement the resulting standards in commercial operations. As conduits for transnational standards corporations can make territorially-defined State less important. Occasionally home States seek to apply national law extraterritorially through corporate vehicles and effect political change within host States. On the other hand, national law classically remains the dominant source of authority for corporations. The legality of the acts of subsidiaries are ordinarily assessable against the standards of the host State.[1474] However, transnational corporations are increasingly being adjudged against international standards as a result of regulatory lacunae at national levels. Corporations are called upon to defer to national law while also observing relevant international standards. [1475] Corporations were tacitly encouraged to defy national law where it was employed as an instrument of repression amounting to a contravention of a peremptory norm of international law (for example, South African apartheid considered in Chapter Two and Myanmar's forced labour in Chapter Four).

An alternative for States when unable to make international law is resort to non-legally binding instruments. The emergence of guidelines and intergovernmental codes of conduct is also noteworthy for enabling participation by non-State actors. Such instruments permit explicit contributions from entities which do not possess any formal lawmaking

[1474] *American Banana Co v United Fruit Co* 213 US 347 (1909).
[1475] Para 12(e), Copenhagen Declaration on Social Development *supra n*510.

authority. The emphasis upon 'soft' rather than 'hard' techniques suggests a potential weakening of international law's authority. The consequences for firms include voluntariness rather than compulsion, social rather than legal responsibility and 'ineligibility' for partnership rather than public censure. Legal compliance becomes 'continuous improvement' and agreed interpretations substituted for declared breaches. That said, the constant threat of regulation encourages corporate adherence.

States are also free to delegate their right to regulate. Entities may be empowered to exercise governmental authority[1476] and act under 'colour of law'.[1477] There is nothing which precludes States from expressly granting functional responsibility for lawmaking to private actors.[1478] Legislatively defined objectives can be entrusted to parties having recognised competence in their field. Corporations are familiar with standard-setting techniques of a dry, technical nature such as product standards and performance management benchmarks. So-called 'industry corporations' can act pursuant to delegated authority to regulate particular fields.[1479] They are governmental instrumentalities notwithstanding that they enjoy independent decision-making and pursue private marketing objectives.[1480] Similarly, codes of conduct overseen by industry councils who receive administrative guidance from the

[1476] Art 5, UNGA Resolution 56/83 (2001) on the Draft Articles on responsibility of States for internationally wrongful acts.
[1477] *George v Pacific-CSC Work Furlough* 91 *F.3d* 1227, 1230 (9th Cir 1996).
[1478] Allott P., 'The Concept of International Law' in Byers M. (Ed), The Role of Law in International Politics: Essays in International Relations and International Law, Oxford University Press, New York, 2000, 69, paras 38, 39.
[1479] WTO, *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R (1999), para 7.78 & WT/DS103/AB/R, WT/DS113/AB/R (1999), paras 100-1.
[1480] Cp *In re Air Crash Disaster near Roselawn Ind* 96 *F 3d* 932, 939-41 (7th Cir 1996); *Gates & Ors v Victor Fine Foods & Ors* 54 *F 3d* 1457, 1460-63 (9th Cir 1995).

State may amount to deputising private actors as enforcement surrogates.[1481] When corporations assist enforcement authorities they are entitled to immunity as an organ of State.[1482] Significantly, the exercise of public power (including lawmaking) remains attributable to the State.[1483]

States are prepared to affirm their regulatory authority where considered desirable. For example, the preamble to the General Agreement on Trade in Services recognises 'the right of Members to regulate and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives.' Developing States have also reaffirmed their sovereign right to draft and implement national law with respect to natural resources.[1484] Chapter Four detailed how the Doha Ministerial Declaration affirmed the right to adopt protective public health measures following the South African pharmaceutical litigation, the interpretative note of the NAFTA Free Trade Commission refined investment treatment standards following *Pope & Talbot* and States responded to the receipt of amicus curiae briefs by WTO Panels.

Final Remarks

State consent is affirmed as the underlying basis for international law. States are at liberty to determine its mode of creation: they are free to adopt or reject

[1481] WTO, *Japan–Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages* BISD 34S/83 (1987), para 2.7; WTO, *Japan–Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (1998), para 10.299.
[1482] *Walker v Bank of New York supra n1187*, 189-91.
[1483] *Petrolane Inc v Government of the Islamic Republic of Iran* (1991) 27 *Iran-US CTR* 64.
[1484] Preamble, Yaounde Declaration, Summit of Central African Heads of State on the Conservation and Sustainable Management of Tropical Forests 38 *ILM* 783 (1999).

proposals or delegate functional responsibility for lawmaking to other entities. More importantly, States calculate where their interests lie. Opinions differ for example on the influence exerted by the European Roundtable of Industrialists in creating the European single market.[1485] The prospect also enjoyed government support and would have eventuated if States had been left to their own devices. However, it is simplistic to credit States for making international law if they merely sign-off on proposals prepared by others.

The corporate role is more than of mere explanatory value accounting for the historical origins of international law. The regulatory demands made by corporations can be overbearing. States are to afford opportunities for corporate input, craft national law in the commercial interest, assume responsibility for decision-making and provide mechanisms for challenging the final outcome. Engaging with business also proves challenging: corporations do not share homogenous views, possess different organisational capacity and are reluctant to disclose the nature of relationships with States. Not all corporations wish to participate: profit-making rather than lawmaking remains their raison d'etre. Those which do need not express majority business opinion: inefficient industries seeking exemptions, the targets of proposed regulatory measures or Western corporations seeking further business opportunities. The current solution involves resort to commercial interlocutors although they are only mandated to express majority business opinion. States must be able to weigh up competing public interests and freely exercise their right to regulate in achieving social welfare objectives. It is the prospect that

[1485] Cp Greenwood J., Interest Representation in the European Union, Palgrave MacMillan, Basingstoke, 2003; Cowles M.G., 'Setting the agenda for a new Europe: the ERT and EC 1992' (1995) 33(4) *J Common Market Stud* 501.

States can perform important filtering functions which justifies the State-centric fiction of international lawmaking.

Annex 1

Rules of Procedure
For Intergovernmental Organizations established by Treaty[1486]

United Nations Organs.

1.1 ECOSOC Resolution 1996/31 (25 July 1996) on consultative relationship between the UN and NGOs, Part VII: Participation of Non-governmental Organisations in International Conferences convened by the United Nations and their Preparatory Process (extracts).

41. Where non-governmental organizations have been invited to participate in an international conference convened by the United Nations, their accreditation is the prerogative of Member States, exercised through the respective preparatory committee...
42. Non-governmental organizations in general consultative status, special consultative status and on the Roster, that express their wish to attend the relevant international conferences convened by the United Nations and the meetings of the preparatory bodies of the said conferences shall as a rule be accredited for participation. Other non-governmental organizations wishing to be accredited may apply to the secretariat of the conference for this purpose in accordance with the following requirements.
45. In the evaluation of the relevance of applications of non-governmental organizations for accreditation to the conference and its preparatory process, it is agreed that a determination shall be made based on their background and involvement in the subject areas of the conference.
46...Member States may submit comments on any of the applications on the list 14 days from receipt of the above-mentioned list by Member States. The comments of Member States shall be communicated to the non-governmental organization concerned, which shall have the opportunity to respond.
47...In cases where the secretariat does not recommend the granting of accreditation, it shall make available to the preparatory committee its reasons for not doing so...The secretariat must notify such applicants of the reasons for non-recommendation and provide an opportunity to respond to objections and furnish additional information as may be required.
49. A non-governmental organization that has been granted accreditation to attend a session of the preparatory committee, including related preparatory meetings of regional commissions, may attend all its future sessions, as well as the conference itself.
50. In recognition of the intergovernmental nature of the conference and its preparatory process, active participation of non-governmental organizations therein, while welcome, does not entail a negotiating role.
51. The non-governmental organizations accredited to the international conference may be given, in accordance with established United Nations practice and at the discretion of the chairperson and the consent of the body concerned, an opportunity to briefly address the preparatory committee and the conference in plenary meetings and their subsidiary bodies.

[1486] The procedural rules applicable to UN Specialised Agencies are omitted – see text infra.

52. Non-governmental organizations accredited to the conference may make written presentations during the preparatory process in the official languages of the United Nations as they deem appropriate. Those written presentations shall not be issued as official documents except in accordance with United Nations rules of procedure.
53...Recognizing the importance of the participation of non-governmental organizations that attend a conference in the follow-up process, the Committee on Non-Governmental Organizations, in considering their application, shall draw upon the documents already submitted by that organization for accreditation to the conference and any additional information submitted by the non-governmental organization supporting its interest, relevance and capacity to contribute to the implementation phase...

1.2 Rules of Procedure of the General Assembly, UN Doc A/520/Rev.15 (1985).

Rule 25: Composition [of Delegations].
The delegation of a Member shall consist of not more than five representatives and five alternate representatives and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation.

Rule 60: General Principles [for public and private meetings of the General Assembly, its Committees and its SubCommittees].
The meetings of the General Assembly and its Main Committees shall be held in public unless the organ concerned decides that exceptional circumstances require that the meeting be held in private. Meetings of other committees and subcommittees shall also be held in public unless the organ concerned decides otherwise.

Rule 100: Representation of Members [on Committees of the General Assembly].
Each Member may be represented by one person on each main Committee and on any other committee that may be established upon which all Members have the right to be represented. It may also assign to these committees advisers, technical advisers, experts or persons of similar status.

Rule 101.
Upon designation by the chairman of the delegation, advisers, technical advisers, experts or persons of similar status may act as members of committees. Persons of this status shall not, however, unless designated as alternate representatives, be eligible for election as Chairmen, Vice-Chairmen or Rapporteurs of committees or for seats in the General Assembly.

1.3 Provisional Rules of Procedure of the Security Council, UN Doc S/96/Rev.7 (1983).

Rule 39.
The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.

Appendix: Provisional Procedure for Dealing with Communications from Private Individuals and Non-governmental Bodies.
A. A list of all communications from private individuals and non-governmental bodies relating to matters of which the Security Council is seized shall be circulated to all representatives on the Security Council.
B. A copy of any communication on the list shall be given by the Secretariat to any representative on the Security Council at his request.

1.4 Rules of Procedure for UN Human Rights Institutions.

i) The Committee on Economic, Social and Cultural Rights.

Rule 69: Submission of information, documentation and written statements.
1. Non-governmental organisations in consultative status with the Council may submit to the Committee written statements that might contribute to full and universal recognition and realization of the rights contained in the Covenant.
2. In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the Committee's pre-sessional working group to provide NGOs with an opportunity to submit relevant oral information to the members of the working group.
3. Furthermore, the Committee will set aside part of the first part of the first afternoon at each of its sessions to enable it to receive oral information provided by NGOs. Such information should: a) focus specifically on the provisions of the Covenant on Economic, Social and Cultural Rights; b) be of direct relevance to matters under consideration by the Committee ; c) be reliable and d) not be abusive. The relevant meeting will be open and will be provided with interpretation services, but will not be covered by summary records.

ii) The Committee on the Elimination of Discrimination against Women.

Rule 47: Non-governmental Organisations.
Representatives of non-governmental organisations may be invited by the Committee to make oral or written statements and to provide information or documentation relevant to the Committee's activities under the Convention to meetings of the Committee or to its pre-sessional working group.

Rule 83: Examination of information.
2. The Committee shall take into account any observations that may have been submitted by the State party concerned, as well as any other relevant information.
3. The Committee may decide to obtain additional information from the following:
(c) Non-governmental organisations;
(d) Individuals.
4. The Committee shall decide the form and manner in which such additional information will be obtained.

iii) The Committee against Torture.

Rule 62: Submission of information, documentation and written statements.
1. The Committee may invite specialized agencies, United Nations bodies concerned, regional intergovernmental organisations and non-governmental organisations in consultative status with the Economic and Social Council to submit to it information, documentation and written statements, as appropriate, relevant to the Committee's activities under the Convention.
2. The Committee shall determine the form and the manner in which such information, documentation and written statements may be made available to members of the Committee.

Rule 76: Examination of the information.
4. The Committee may decide, if it deems it appropriate, to obtain from the representatives of the State party concerned, governmental and non-governmental organisations, as well as individuals, additional information or answers to questions relating to the information under examination.
5. The Committee shall decide, on its initiative and on the basis of its rules of procedure, the form and manner in which such additional information may be obtained.
UN Secretariat, Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/3/Rev.1 (2003).

1.5 Illustration of a Consultative Conference under the auspices of a Human Rights Body conducting a General Debate.

Rule 10.
1. Representatives of non-governmental organisations as well as experts whose field of activity relates to the aim and objective of the Conference may be invited to participate in the Conference.

Rule 18.
Written statements submitted in advance to the Secretariat by the participants shall be distributed to all participants in the language and number of copies in which the statements are made available to it at the site of the conference, provided that the statements submitted are related to, and compatible with, the aim and objective of the Conference.

Rule 21: Conduct of Debates.
1. The Conference shall devote the first part of its work to a general debate on school education and the promotion of tolerance and non-discrimination based on religion or belief...
2...

Rule 22.
1. With the consent of the Conference, the Bureau may limit the time allowed for speakers, the number of times participants may speak on a question and establish the list of speakers.
2. The President shall ensure the smooth proceeding of the debates and a good use of time.

Rules of Procedure, UN Commission on Human Rights, International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination, Madrid, 2001.

Annex 2

Accreditation Procedures to UN Conferences

NGOs in consultative status with the Economic and Social Council, accredited to previous events or accredited to the intergovernmental organization concerned that express the wish to attend UN Conferences, Summits or Special Sessions of the UN General Assembly will be accredited for participation when they register. Others not in consultative status but wishing to participate must first apply to the secretariat responsible for the receipt and preliminary evaluation of NGO requests. The guidelines for their accreditation and modalities for their participation within the preparatory process and the Conference/Summit itself, as decided by the Preparatory Committee, typically provide that:

2. All such applications must be accompanied by information on the organization's competence and relevance to the work of the Preparatory Committee, indicating the particular areas of the Conference preparations which such competence and relevance pertains and which could include, inter alia, the following information:
(a) The purposes of the organization;
(b) Information as to the programmes and activities of the organization in areas relevant to the Conference and its preparatory process, and in which country(ies) they are carried out;
(c) Copies of its annual reports with financial statements, and a listing of governing body members and their country nationality;
(d) In respect of membership organizations, a description of its membership, indicating total numbers and their geographical distribution;
(e) Non-governmental organizations in consultative status with the Economic and Social Council shall be deemed to have satisfied these requirements to the extent that they have already provided such information to the United Nations.
3. In cases where the Conference secretariat believes, on the basis of the information provided in accordance with paragraph 2 above, that the organization has established its competence and relevance to the work of the Preparatory Committee, it will recommend to the Preparatory Committee that the organization be accredited. In cases where the Conference secretariat does not recommend the granting of accreditation, it will make available to the Preparatory Committee the reasons for not doing so. The Conference secretariat should make its recommendations available to the Preparatory Committee at the start of the session.
4. The Preparatory Committee will decide on all cases within 24 hours of the Conference secretariat's recommendations having been made available to its members. In the event of a decision not being taken within this time-frame, interim accreditations shall be accorded until such time as a decision is taken.

- Procedure for determining non-governmental organizations' competence and relevance to the work of the Preparatory Committee to UN Conference on Environment and Development (UNCED), Second Organisational Session, UN Doc A/46/48 (1991), Annex I, Decision 2/1.

Additional Accreditation Information

As indicated in the table included within the text, paragraph 2 has since grown by accretion. The formulation has subsequently been added to or modified as follows:

Include, inter alia, the following information:
Confirmation of its activities at the national and/or the international level;

- 1995 Copenhagen World Summit for Social Development at its organizational session, UN Doc A/48/24 (1993), Annex II, Preparatory Committee Decision 2 concerning the participation of non-governmental organizations in the World Summit for Social Development and its preparatory process.

This was again further added to or modified as follows:

Include, inter alia, the following information:
Copies of annual or other reports of the organization, with financial statements and a list of financial sources and contributions, including governmental contributions;
A description of the membership of the organization, indicating the total number of members, the names of organizations that are members and their geographical distribution;
A copy of the constitution and/or by-laws of the organization;

- Special Session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century', Commission on the Status of Women acting as the Preparatory Committee at its Third Organisational Session, UN Doc A/S-23/2 (2000), Chapter V, Section A, Draft Decision 2 on Arrangements regarding accreditation of NGOs;
- Special Session of the General Assembly on the implementation of the outcome of the World Summit for Social Development and Further Initiatives, Commission for Social Development acting as the Preparatory Committee at its resumed first organisational session, UN Doc A/54/45/Add.1 (1999), Chapter II, Section B, Decision 5 on the accreditation of NGOs;
- Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Outcome of the UN Conference on Human Settlements (Istanbul + 5), New York, 2001, General Assembly Resolution 55/194 (2000) on Arrangements regarding accreditation of Habitat Agenda partners.
- Note that these arrangements were codified by ECOSOC Resolution 1996/31 on consultative relationship between the UN and NGOs, para 44.

This was again further added to as follows:

Include, inter alia, the following information:
Name of the organization and pertinent contact information, including address and main contact;
A completed pre-registration form prepared by the World Summit secretariat.

- 2002 Johannesburg World Summit on Sustainable Development, CSD Decision 2001/PC/3 on Arrangements for accreditation and participation in the preparatory process and in the World Summit on Sustainable Development of relevant non-governmental organizations and other major groups, UNGAOR 56th Session, Supp No 19, UN Doc A/56/19, Chap 8, Sect B;
- 2002 International Conference for the Financing for Development, Report of the Bureau, UN Doc A/AC.257/6 (2000).

Additional Details for Processing NGO Requests

Paragraphs 3-4 of the template above have subsequently been modified with the following illustrative formulations:

i) Confirming an interest in the Summit.

(c) In the evaluation of the relevance of non-governmental organizations applying for accreditation to the Summit and its preparatory process, it is agreed that the background of those organizations and their involvement in social development issues, including core issues as defined in paragraph 6 of General Assembly resolution 47/92 of 16 December 1992, will determine such relevance;
(d) Non-governmental organizations seeking accreditation will be asked to confirm their interest in the goals and objectives of the Summit;

- 1995 Copenhagen World Summit for Social Development at its organizational session, UN Doc A/48/24 (1993), Annex II, Preparatory Committee Decision 2 concerning the participation of non-governmental organizations in the World Summit for Social Development and its preparatory process;
- 1995 Copenhagen Fourth World Conference on Women: UN General Assembly Resolution 48/108 (1993), para 30 & Annex;
- 1996 UN Conference on Human Settlements: Report of the First Organisational Session of the Preparatory Committee, UN Doc A/48/37 (1994), para 13 & Annex;

Note that paragraph (c) above varied with the topic under consideration.

ii) NGOs possessing a 'special interest'.

(b) Also decides that, in addition, other non-governmental organizations that are not accredited either to the Economic and Social Council or to UNICEF but that have a collaborative relationship and partnership with UNICEF pursuant to its mandate to obtain from non-governmental organizations having a special interest in child and family welfare the advice and technical assistance which it may require for the implementation of its programmes, will also be invited to participate in the meetings of the Preparatory Committee...

- Special Session of the General Assembly on Children, New York, 2001, Report of the Open-Ended Preparatory Committee at its organisational session, UN Doc A/55/43 (2000), Part One, Decision 2 on the Participation of NGOs.

iii) The Equitable Participation of NGOs and their implementation role.

3. The secretariat, with support from United Nations Nongovernmental Liaison Service and relevant others, as appropriate, will review the relevance of the work of the applicants on the basis of their background and involvement in sustainable development issues, particularly in the follow-up process to the United Nations Conference on Environment and Development.

- 2002 Johannesburg World Summit on Sustainable Development, CSD Decision 2001/PC/3 on Arrangements for accreditation and participation in the preparatory process and in the World Summit on Sustainable Development of relevant non-governmental organizations and other major groups, UNGAOR 56th Session, Supp No 19, UN Doc A/56/19, Chap 8, Sect B.

(c) Decides that those non-governmental organizations whose application for consultative status with the Economic and Social Council was rejected or whose consultative status with the Council was withdrawn or suspended shall not be accredited to the special session;
(d) Urges, in recognition of the importance of equitable geographical participation of non-governmental organizations in the special session, relevant United Nations bodies to assist those non-governmental organizations that do not have resources, in particular non-governmental organizations from developing countries and countries with economies in transition, in participating in the special session;
(f) Decides that the above arrangements concerning accreditation of non-governmental organizations to the special session of the General Assembly will in no way create a precedent for other special sessions of the Assembly.

- Special Session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century', Commission on the Status of Women acting as the Preparatory Committee at its Third Organisational Session, UN Doc A/S-23/2 (2000), Chapter V, Section A, Draft Decision 2 on Arrangements regarding accreditation of NGOs.

Annex 3

Procedural Rules for Conferences of the Parties (COP)
And Other Governing Bodies for International Environmental Treaties

1. Basic Template.

1. [The Secretariat shall notify] Any body or agency, [whether national or international], governmental or non-governmental, which is qualified in [matters covered by the Convention/fields relating to the...] and which has informed the [Permanent] Secretariat of its wish to be represented [at a session/of meetings] of the Conference of the Parties [so that they may be represented] as [an] observer[s] [may be so admitted] unless at least one third of the Parties present at the [session/meeting] object.
2. Such observers may, upon invitation of the President, participate without the right to vote in the proceedings of any [session/meeting] in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the [session/meeting] object.

This basic formulation (with minor modifications as indicated) appears in:

- Rule 7(2), Rules of Procedure of the COP, UN Convention to Combat Desertification in Countries experiencing serious drought and/or desertification, particularly in Africa, UN Doc ICCD/COP(1)/11/Add.1 (1997) adopted at COP-1, Rome, Decision 1. See also Decision 18/COP-1 (1997) on procedures for the establishment and maintenance of a roster of independent experts, Decision 26/COP-1 (1997) accreditation of non-governmental and intergovernmental organisations and Decision 27/COP-1 (1997) on inclusion of activities of NGOs within the official programme of work of future sessions of the Conference of the Parties.
  [Primary enabling treaty provision: Art 22(7), 1994 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa]
- Rule 2(2), Rules of Procedure of the COP, Convention on International Trade in Endangered Species on Wild Fauna and Flora (CITES), CITES Doc.11.1 (Rev.1), Strategic and Administrative Matters, 2000.
  [Primary enabling treaty provision: Art 11, Convention on International Trade in Endangered Species on Wild Fauna and Flora (1974) 993 *UNTS* 243]
- Rule 7, Rules of Procedure for the Conference of Plenipotentiaries, Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, UNEP/FAO/RC/COP.1/2 (2004).
  [Primary enabling treaty provision: Art 18, Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) 38 *ILM* 1]
- *'qualified in fields relating to the conservation and sustainable use of biological diversity'*
  Rule 7(2), Rules of Procedure for Meetings of the COP, Convention on Biological Diversity, Decision I/1, UNEP/CBD/COP/1/2 (1994).

[Primary enabling treaty provision: Art 23(5), 1992 Convention on Biological Diversity]

- *'qualified in fields relating to the transboundary movement of hazardous wastes as well as their management and disposal'*
  'subject to the condition that their admission to the meeting is not objected to by at least one third of the Parties present at the meeting'
  Rule 7(2), Rules of Procedure for Meetings of the COP, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted at COP-1, UN Doc UNEP/CHW.1/24 (1992), Annex 3.
  [Primary enabling treaty provision: Art 15(6), 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal]
- *'qualified in fields relating to the protection of the ozone layer'*
  Rule 7(2), Rules of Procedure for Meetings of the COP, Vienna Convention for the Protection of the Ozone Layer, UNEP/OzL.Conv.1/5 (1989) & Rule 7(2), Rules of Procedure for Meetings of the Parties, Montreal Protocol on Substances that Deplete the Ozone Layer, UN Doc UNEP/OzL.Pro.1/3 (1989).
  [Primary enabling treaty provisions: Art 6(5), 1985 Vienna Convention for the Protection of the Ozone Layer & Art 11(5), 1987 Montreal Protocol on Substances that Deplete the Ozone Layer]

2. Procedural Rules which reflect this basic template but with minor variations include:

Rule 18: Participation of Observers.
5. Non-governmental organisations recognised by the Economic and Social Council whose fields of competence are relevant to the law of the sea and other non-governmental organisations invited by the Meeting of States Parties which have demonstrated their interest in matters under the consideration of the Meeting may also participate as observers.
8. Observers referred to in paragraphs 4 and 5 of this rule may designate representatives to sit at public meetings of the Meetings of States Parties and, upon invitation by the President and subject to the approval by the Meeting, may make oral statements and submit written statements on questions within the scope of their activities.
Rules of Procedure for Meetings of States Parties, UN Convention on the Law of the Sea, UN Doc SPLOS/2/Rev.3 (1995).

3. Illustrative procedural rules which reflect this template but add further details include:

i) NGOs with Special Qualifications.

Rule 7.
1. The Secretariat shall notify international non-governmental organisations that have special qualifications with regard to matters relating to the Convention and have informed the secretariat of their wish to participate of any meeting held in public, so that they may be represented as observers.

2. The Conference of the Parties may approve the admission of representatives of international non-governmental organisations that have special qualifications with regard to matters relating to the Convention as observers to its meetings held in private. It may similarly terminate any such approval.
Rule 8.
Such observers may participate in the meetings without the right to make decisions or to vote.
Rules of Procedure for the Meetings of the COP, Convention on the Transboundary Effects of Industrial Accidents adopted at COP-1 (2000), Brussels, Economic Commission for Europe ECE/CP.TEIA/3 (2001).

ii) NGO Proposals and Logistical Considerations.

1. Any body or agency, national or international, whether governmental or non-governmental, qualified in fields relating to the conservation and sustainable use of wetlands, which has informed the Bureau of its wish...
2. Bodies or agencies desiring to be represented at the meeting by observers shall submit the names of these observers to the Convention bureau at least one month prior to the opening of the meeting.
3. Such observers may, upon the invitation of the President, participate without the right to vote in the proceedings of any meeting unless at least one third of the Parties present at the meeting object.
4. Proposals made by observers may be put to the vote if sponsored by a Party.
5. Seating limitations may require that no more than two observers from any State not a Party, body or agency be present at a meeting. The Bureau shall notify those concerned of any such limitations in advance of the meeting.
Rule 7, Rules of Procedure for Meetings of the COP, Convention on Wetlands of International Importance especially as Waterfowl Habitat adopted at COP-7, San Jose, 1999.

4. The Rules of Procedure for the Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES Doc. 11.1 (Rev. 1) (2000) partly extracted below provide the most detailed provisions.

Rule 2 – Observers
2. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora which is either:
a) an international agency or body, either governmental or non-governmental, or a national governmental agency or body; or
b) a national non-governmental agency or body which has been approved for this purpose by the State in which it is located; and which has informed the Secretariat of the Convention of its desire to be represented at the meeting by observers, shall be permitted to be so represented in the plenary sessions and sessions of Committees I and II and the Budget Committee unless one-third of the Representatives present and voting object. Once admitted, these observers shall have the right to participate but not to vote.

Rule 11 – Seating

4. Observers shall be seated in one or more designated areas within the meeting room. They may enter an area designated for delegations only when invited to do so by a delegate.

Rule 17 – Right to speak
1. The Presiding Officer shall call upon speakers in the order in which they signify their desire to speak and shall give precedence to the delegates. Amongst observers, precedence shall be given to non-Party States, intergovernmental organizations and non-governmental organizations, in this order.
2. A delegate or observer shall speak only if called upon by the Presiding Officer, who may call a speaker to order if his/her remarks are not relevant to the subject under discussion...

Rule 28 – Submission of informative documents and exhibitions
1. Informative documents on the conservation and utilization of natural resources may be submitted for the attention of the participants to the meeting by:
b) any observer representing any other organization.
2. Such documents shall clearly identify the delegation or observer presenting them.
3. Where such documents are to be distributed by the Secretariat, they shall be provided in sufficient numbers for distribution. Documents from organizations referred to in paragraph 1b) of this Rule shall be subject to approval by the Secretariat, in consultation with the Bureau if necessary, before distribution.
4. Where such documents are not to be distributed by the Secretariat, they shall not be subject to prior approval. However, any Representative may complain to the Bureau if a document is considered offensive.
5. Apart from an exhibition from the host country, where applicable, to show how it conserves nature and implements the Convention, no exhibition is authorized in the immediate vicinity of meeting rooms. Exhibitions set up in a specific exhibition area, at the cost of the exhibitors, may be subject to the approval of the Bureau, which may withdraw such permission at any time.

Rule 29 – Complaints
1. A complaint may be addressed to the Bureau pursuant to Rule 28, paragraph 4, or by any participant who has been subject to abuse by another.
2. When it receives a complaint, the Bureau shall obtain information necessary to consider the validity of the complaint, bearing in mind that legitimate differences of opinion may exist.
3. In the case of a complaint received pursuant to Rule 28, paragraph 4, it shall consider whether the document concerned abuses or vilifies a Party, or brings the Convention into disrepute.
4. The Bureau shall decide on appropriate action, which may, as a last resort, include withdrawal of the right of admission of an organization to the meeting, or a formal complaint to a Party.

Decisions of the Conference of the Parties to CITES in effect after the 12th meeting:
Registration of observers at meetings of the Conference of the Parties

11.125
Any body or agency that informs the Secretariat of its desire to be represented at a meeting of the Conference of the Parties and that wishes to be considered as an international agency or body in accordance with Article XI, paragraph 7 (a), should be registered by the Secretariat only if it demonstrates, to the satisfaction of the Secretariat that it is:
a) qualified in protection, conservation or management of wild fauna and flora: and
b) an organization in its own right, with a legal persona and an international character, remit and programme of activities.

Contributions by observers at meetings of the Conference of the Parties
11.14
In selecting venues for future meetings of the Conference of the Parties, the Parties should make every effort to ensure that the venues selected have space for observers on the floors of the halls for the plenary sessions, Committee I and Committee II.
11.70
The Presiding Officers at plenary sessions, and sessions of Committee I and Committee II2 should make every effort to allow observers time in the sessions to speak on issues (make interventions).
11.71
Recognizing that conservation of time, in order to complete the agenda for a meeting of the Conference of the Parties in the two-week period, is a valid concern, Presiding Officers should give observers a time limit for speaking if necessary and encourage observers not to be redundant in speaking on a particular issue.
11.73
When possible, Presiding Officers should invite knowledgeable observers to participate in working groups of Committee I and Committee II.
11.127
The Secretariat and the host country of each meeting of the Conference of the Parties should make every effort to ensure that each approved observer is provided with at least one seat on the floor in the meeting rooms of the plenary sessions, Committee I and Committee II, unless one-third of the Party representatives present and voting object.
11.128
The Secretariat should make every effort to ensure that informative documents on the conservation and utilization of natural resources, prepared by observers for distribution at a meeting of the Conference of the Parties and approved by the Secretariat, are distributed to the participants in the meeting.

5. Illustration of Procedural Rules for a CITES Committee.

Rule 6.
The Chairman may invite any other person or a representative of any country or organisation to participate in meetings of the Committee as an observer without the right to vote.

Rule 16.

Non-governmental organisations may provide documents through the CITES Authorities of the Party where they are located. However, international non-governmental organisations, as recognised under the provisions as applied at the meeting of the Conference of the Parties, may send documents to the CITES Secretariat. In both cases the decision to distribute these documents shall be taken by the Secretariat in consultation with the Chairman. These documents shall also be submitted to the Chairman and the Regional Representative(s) of the Party concerned where applicable.

Rules of Procedure for Meetings of the Plants Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora adopted at the 12th meeting, Leiden, 2002.

Annex 4

Comparative Rules of Procedure defining the Modalities for NGO Participation at UN Conferences, World Summits and UN General Assembly Special Sessions

1. Participation and Oral Statements

Representatives of non-governmental organizations:
1. Non-governmental organizations [invited/accredited] [to participate in/to] the Conference may designate representatives to sit as observers at public meetings of the Conference and[its/ the] Main Committee[s].
2. Upon the invitation of the [presiding officer/President/chairman] of the [conference] body concerned and subject to the approval of that body, such observers may make oral statements on questions in which they have special competence.

This formulation appears in:

- Rule 63, Rules of Procedure, Third UN Conference on the Law of the Sea, UN Doc A/CONF.62/30 (1974) but with the substitution of *'may make oral statements on questions within the scope of their activities'*. Rule 59, Rules of Procedure, Second UN Conference on the Law of the Sea, UN Doc A/CONF.19/7 (1960) did not envisage NGO participation: only Specialized Agencies and intergovernmental bodies could participate in deliberations as observers without the right to vote and to submit written statements.
- Rule 65, Rules of Procedure, UN Conference on Environment and Development (UNCED/Earth Summit), Rio de Janeiro, 1992, UN Doc A/CONF.151/2 (1992);
- Rule 67, Rules of Procedure, Global Conference on the Sustainable Development of Small Island Developing States, Barbados, 1994, UN Doc A/CONF.167/2 (1994).

This formulation is repeated in the following rules of procedure but modified as indicated:

- *'...to sit as observers at public meetings of the Conference and its Committee of the Whole'*
  Rule 64, Rules of Procedure, Third UN Conference on the Least Developed Countries, Brussels, 2001, UN Doc A/CONF.191/IPC/L.2 (2001).

The principal template above is repeated in the following procedural rules with the addition to paragraph 2 of:
'If the number of requests to speak is too large, the non-governmental organizations shall be requested to form themselves into constituencies, such constituencies to speak through spokespersons.'

- Rule 65, Rules of Procedure, International Conference on Population and Development, Cairo, 1994, UN Doc A/CONF.171/2 (1994);
- Rule 62, Rules of Procedure, World Summit for Social Development, Copenhagen, 1995, UN Doc A/CONF.166/2 (1995);

- Rule 65, Rules of Procedure, Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 1995, UN Doc A/CONF.177/22 (1995);
- Rule 63, Rules of Procedure, UN Conference on Human Settlements (Habitat II), Istanbul, 1996, UN Doc A/CONF.165/2 (1996);
- Rule 62, Rules of Procedure, UN Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Outcome of the UN Conference on Human Settlements, (Istanbul + 5), New York, 2001, UN Doc HS/C/PC.OS/2 (2001).

This expanded formulation is repeated in the following rules of procedure but further modified as indicated:

- *'...designate representatives to participate as observers in the Conference, any Committee and any committee or working group on questions within the scope of their activities.'*
  Rule 66, Rules of Procedure, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001, UN Doc A/CONF.189/PC.1/21 (2001).
- *'1. invited to the Summit...on questions within the scope of their activities.*
  2. The Chairman shall invite such non-governmental organisations to form themselves into a limited number of constituencies. Upon the invitation of the Chairman, and subject to its approval, such constituencies may, through spokespersons, make oral statements on questions within the scope of their activities.'
  Rule 53, Rules of Procedure, World Food Summit, FAO Doc WFS 96/2 (1996).
- *'It is recalled that paragraph 23.3 of Agenda 21 provides that 'any policies, definitions or rules affecting access to and participation by non-governmental organizations in the work of the United Nations institutions or agencies associated with the implementation of Agenda 21 must apply equally to all major groups'. Agenda 21 defines major groups as comprising women, children and youth, indigenous people, non-governmental organizations, local authorities, workers and their trade unions, business and industry, the scientific and technological community and farmers. Therefore, based on Agenda 21, rule 64 shall apply equally to non-governmental organizations and other major groups.'*
  Footnote to Rule 64, Rules of Procedure, World Summit on Sustainable Development, Johannesburg, 2002, UN Doc A/CONF.199/2 (2002).

Unique procedural rules concerning participation include:

i) Identifying Specific Meetings.

- *Non-governmental organizations in consultative status with the Economic and Social Council and with competence in the field of human rights, and other non-governmental organizations which participated in the work of the Preparatory Committee (or the regional meetings) may designate representatives properly accredited by them*

to participate as observers in the Conference, its Main Committees and, as appropriate, any of the committees or working groups, on questions within the scope of their activities.
Rule 66, Rules of Procedure, World Conference on Human Rights, Vienna, 1993, UN Doc A/CONF.157/PC/1/Add.1 (1992).

ii) Specific Terms of Participation.

- *Representatives of non-governmental organisations.*
  Non-governmental organisations invited to the Conference may participate in the Conference through their designated representatives as follows:
  a) By attending plenary meetings of the Conference and, unless otherwise decided by the Conference in specific situations, formal meetings of the Committee of the whole and of subsidiary bodies established under rule 50;
  b) by receiving copies of official documents;
  c) upon the invitation of the President and subject to the approval of the Conference, by making, through a limited number of their representatives, oral statements to the opening and closing sessions of the Conference, as appropriate.
  Rule 63, Rules of Procedure, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee, UN Doc A/CONF.183/2/Add.2 (1998).

1.1 Specifically-requested Attendees

Rules of Procedure may identify particular groups and specifically provide for their participation. For example:

Representatives of local authorities.
Representatives of local authorities, designated by accredited international associations of local authorities in consultation with national associations of local authorities, invited to the Conference may participate, without the right to vote, in the deliberations of the Conference, its Main Committees and, as appropriate, any other committee or working group, on questions within the scope of their activities. Every effort shall be made to make the representation of local authorities balanced in terms of region, size and type of local authorities.

- Rule 62, Rules of Procedure, UN Conference on Human Settlements (Habitat II), Istanbul, 1996, UN Doc A/CONF.165/2 (1996);
- Rule 61, Rules of Procedure, UN Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Outcome of the UN Conference on Human Settlements, (Istanbul + 5), New York, 2001, UN Doc HS/C/PC.OS/2 (2001).

Representatives of national human rights institutions.
Representatives designated by national institutions for the protection and promotion of human rights may participate as observers in the deliberations of

the Conference, any [Main] Committee and, as appropriate, any other committee or working group on questions within the scope of their activities.

- Rule 64, Rules of Procedure, World Conference on Human Rights, Vienna, 1993, UN Doc A/CONF.157/PC/1/Add.1 (1992).
- Rule 65, Rules of Procedure, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001, UN Doc A/CONF.189/PC.1/21 (2001) removes *'as appropriate'* and adds a further paragraph where States do not have national human rights institutions.

2. Written Statements

Written statements submitted by the designated representatives referred to in rules .. to .. shall be distributed by the secretariat to all delegations in the quantities and in the language in which the statements are made available to it at the site of the [Conference/Summit], provided that a statement submitted on behalf of a non-governmental organization is related to the work of the Conference and is on a subject in which the organization has a special competence.

This formulation appears in:

- Rule 63, Rules of Procedure, Third UN Conference on the Law of the Sea, UN Doc A/CONF.62/30 (1974) (albeit reordered);
- Rule 66, Rules of Procedure, UN Conference on Environment and Development (UNCED/Earth Summit), Rio de Janeiro, 1992, UN Doc A/CONF.151/2 (1992);
- Rule 67, Rules of Procedure, World Conference on Human Rights, Vienna, 1993, UN Doc A/CONF.157/PC/1/Add.1 (1992);
- Rule 68, Rules of Procedure, Global Conference on the Sustainable Development of Small Island Developing States, Barbados, 1994, UN Doc A/CONF.167/2 (1994);
- Rule 67, Rules of Procedure, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001, UN Doc A/CONF.189/PC.1/21 (2001);
- Rule 66, Rules of Procedure, World Summit on Sustainable Development, Johannesburg, 2002, UN Doc A/CONF.199/2 (2002).

This formulation is repeated in the following rules of procedure but modified as indicated:

- *'...statements are made available to the secretariat for distribution, provided that a statement...'*

Rule 65, Rules of Procedure, Third UN Conference on the Least Developed Countries, Brussels, 2001, UN Doc A/CONF.191/IPC/L.2 (2001).

- *'shall be made available by the Secretariat'* (and two specified conditions in reverse order).

Rule 54(2), Rules of Procedure, World Food Summit, FAO Doc WFS 96/2 (1996).

The principal template above is repeated in the following procedural rules with the addition of:
' Written statements shall not be [made/issued] at United Nations expense and shall not be issued as official documents.'

- Rule 66, Rules of Procedure, International Conference on Population and Development, Cairo, 1994, UN Doc A/CONF.171/2 (1994);
- Rule 63, Rules of Procedure, World Summit for Social Development, Copenhagen, 1995, UN Doc A/CONF.166/2 (1995);

- Rule 66, Rules of Procedure, Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 1995, UN Doc A/CONF.177/22 (1995);
- Rule 64, Rules of Procedure, UN Conference on Human Settlements (Habitat II), Istanbul, 1996, UN Doc A/CONF.165/2 (1996);
- Rule 63, Rules of Procedure, UN Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Outcome of the UN Conference on Human Settlements, (Istanbul + 5), New York, 2001, UN Doc HS/C/PC.OS/2 (2001);
- Rule 64, Rules of Procedure, UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, 2001, UN Doc A/CONF.192/L.1 (2001);
- Rule 64, Rules of Procedure, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee, UN Doc A/CONF.183/2/Add.2 (1998).

3. Other Participatory Arrangements

UN Conferences and Special Sessions of the General Assembly contemplate additional opportunities for NGOs to participate, particularly on an oral basis. All of the following provide that:

Arrangements concerning the [accreditation and attendance/participation] of non-governmental organizations [at the Preparatory Committee and the Conference/in the special session] [will/shall] in no way create a precedent for other [United Nations conferences/special sessions of the General Assembly].

3.1 Attendance at Meetings and the Distribution of Documents at the Conference.

The Preparatory Committee for the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects decides that, with respect to the attendance of non-governmental organizations at the Preparatory Committee and the Conference, attendance will be open to:
(c) Non-governmental organizations accredited through the process specified above may attend meetings of the Preparatory Committee and the Conference, other than those designated as closed;
(d) Representatives of accredited non-governmental organizations will be allowed to address the Preparatory Committee and the Conference during one meeting specifically allocated for this purpose. These meetings will not coincide with other meetings of the Preparatory Committee and the Conference;
(e) Accredited non-governmental organizations will be provided, upon request, with documents related to the Preparatory Committee and to the Conference, and they may, at their own expense, provide material to the delegations, outside the conference room, in the area of the Preparatory Committee and the Conference;
UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, 2001, UN Doc A/CONF.192/L.1 (2001).

3.2 NGO Statements during Plenary Debates.

The General Assembly:
(a) Decides that representatives from non-governmental organizations may make statements in the Ad Hoc Committee of the Whole of the special session;
(b) Decides that given the availability of time, a limited number of non-governmental organizations in consultative status with the Economic and Social Council may also make statements in the debate in the plenary of the special session. The President of the General Assembly is requested to present the list of selected non-governmental organizations to the Member States in a timely manner for approval. The President of the General Assembly is also requested to ensure that such selection is made on an equal and transparent basis, taking into account the geographical representation and diversity of non-governmental organizations;

This formulation appears in:

- Special Session of the General Assembly World Summit for Social Development and Beyond: Achieving Social Development for all in a Globalising World, New York, 2000, UN Doc A/54/45/Add.1 (2000), Chapter II, Section A;
- Special Session of the General Assembly on Children, New York, 2001, UN Doc A/S-27/2 (2001), chapter VI, section A;
- Commission on the Status of Women acting as the Preparatory Committee at its Third Organisational Session, Arrangements regarding participation of NGOs at the Special Session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century', UN Doc A/S-23/2 (2000), Chapter V, Draft decision I but modified as follows:

'(b) ...make statements in the debate in the plenary of the special session provided neither that their application for consultative status with the Council has been rejected nor that their consultative status with the Council has been withdrawn or suspended, and that non-governmental organizations should be requested to select spokespersons among themselves and provide the list thereof to the President of the General Assembly through the Secretariat;...'

3.3 Thematic Presentations.

7. Agrees that the special session should concentrate, among other matters, on presentations, including thematic presentations, on the implementation of the Habitat Agenda by a range of Habitat partners, including representatives of local authorities, civil society, the private sector as well as the United Nations, the Bretton Woods organizations and other multilateral organizations, focusing on experiences and lessons learned since Istanbul;
Commission on Human Settlements acting as the Preparatory Committee at its first session, UN Doc A/55/212 (2000), Decision 2 on the structure of the Special Session of the General Assembly for an overall review and appraisal of the implementation of the Habitat Agenda, New York, 2001.

3.4 NGO Statements in Thematic Committees.

1. Decides that representatives of local authorities, non-governmental organizations and other Habitat Agenda partners may make statements in the Ad Hoc Committee of the Whole and in the thematic committee of the special session for an overall review and appraisal of the implementation of the outcome of the United Nations Conference on Human Settlements (Habitat II);
General Assembly Resolution 55/194 (2000) on arrangements regarding participation of Habitat Agenda partners and observers in the Special Session of the General Assembly for an overall review and appraisal of the implementation of the Habitat Agenda, New York, 2001.

3.5 Roundtable Sessions.

16. Given the availability of time, a limited number of accredited civil society actors may make statements in the debate in plenary. The President of the General Assembly is requested, following the appropriate consultation with Member States, to present a list of selected accredited civil society actors to Member States for consideration on the non-objection basis for the final decision by the Assembly. The President is also requested that such selection is made on an equal and transparent basis, taking into account the equitable geographical representation, relevant expertise and wide variety of perspectives.
20. The round tables shall be open to Member States, observers, as well as entities of the United Nations system and accredited civil society actors.
21. In order to ensure interactive and substantive discussions of high quality, participation in each round table shall be limited to a maximum of 65 participants, of which at least 48 will be representatives of Member States. In addition, each round table shall include a maximum of 17 participants, representing observers, entities of the United Nations system and accredited civil society actors.
30. Accredited civil society actors with specific expertise in areas related to the themes of the round tables will also be invited to the round tables. The President of the General Assembly is requested to conduct appropriate consultations with Member States, and also with accredited civil society actors, before representing a list of selected accredited civil society actors that may participate in each round table to Member States, in the last week of May 2001, for consideration on the non-objection basis for the final decision by General Assembly. When selecting civil society actors, due consideration shall be given to the principles of equitable geographical representation and gender, as well as an adequate mix of national, regional and international civil society actors, and to the need to ensure that a variety of perspectives are represented.
Special Session of the General Assembly on Review of the Problem of HIV/AIDS in All its Aspects, New York, 2001, General Assembly Resolution 55/242 (2001).

3.6 Multistakeholder Dialogue Sessions, Side Events, Partnership Events and Funding for NGOs.

6. Based on the practices of the Commission on Sustainable Development, a number of multi-stakeholder dialogue segments will be organized as part of

the preparatory committee meetings. Dialogue starter papers from major groups will be requested in the form of reviews of progress and future action necessary under the relevant major group chapters of Agenda 21. The planned multi-stakeholder dialogues include:

(a) In the early part of the second preparatory committee meeting, a two-day multi stakeholder dialogue with representatives from all nine major groups will be organized. The focus of the dialogue will be aligned with the issues on the agenda of the preparatory meeting, that is, a comprehensive review and assessment of progress achieved in implementation of Agenda 21 and the Programme for the Further Implementation of Agenda 21. The purpose of the dialogue will be to provide an opportunity to representatives of major groups to share their views on the progress achieved. The outcome of this dialogue will be a Chair's summary, which will be submitted to the preparatory committee and incorporated into its records;

(b) In the early part of the fourth meeting of the preparatory committee, a two-day multi-stakeholder dialogue with representatives from all nine major groups will be organized. The focus of this dialogue will be aligned with the issues that are on the agenda of this meeting, that is,.... The purpose of this second dialogue will be to provide opportunities to representatives of major groups to contribute their views on future actions and priorities. The outcome of this dialogue will be a Chair's summary, which will be submitted to the preparatory committee and incorporated into its records.

7. As in the meetings of the Commission, major group organizations will have an opportunity to organize various informal side events and briefings to exchange views with Governments. The Secretariat will facilitate and coordinate these activities under the guidance of the Bureau of the preparatory committee.

9. Recognizing the limited time available, a small but representative number of individuals from accredited non-governmental organizations and other major groups will be invited to address the plenary part of the Summit after the statements made by governmental representatives. The individual speakers will be identified through the self-organized mechanisms of the major groups, in coordination with the President of the Summit, through the Secretariat.

10. A short multi-stakeholder event is planned for the World Summit. This event will be designed to involve the highest level of representation from both major groups and Governments. Selection of the participants in the multi-stakeholder event other than the governmental representatives should be from the non-governmental organizations and other major groups accredited to the Summit. The focus would be for Governments and major groups to exchange and publicly announce the specific commitments they have made for the next phase of work in the field of sustainable development. In the case of major groups, commitments and targets are expected to emerge from national, regional and international consultations of major group organizations. A record of the commitments announced and shared would be made and released as part of the Summit outcome.

11. In addition, plenary sessions during the first week of the World Summit will be organized as a series of partnership events with accredited non-governmental organizations and other major groups. These could be in the form of dialogues and may include those of a multi-stakeholder nature. The

details and topics of these dialogues will be recommended by the Bureau of the preparatory committee.
12. Other stakeholder events and activities are also expected to take place such as informal round tables with major groups and Governments on specific issues, parallel events and various side events.
13. The secretariat of the World Summit will facilitate the funding of participants from major groups from developing countries and countries with economies in transition in the multi-stakeholder dialogues during the preparatory meetings and the Summit.
14. Interested donor Governments and other donors are encouraged to provide voluntary contributions to the Trust Fund in support of this process.
CSD Decision 2001/PC/3 on Arrangements for accreditation and participation in the preparatory process and in the World Summit on Sustainable Development of relevant non-governmental organizations and other major groups, UNGAOR 56th Session, Supp No 19, UN Doc A/56/19, Chap 8, Sect B.

3.7 Membership of National Delegations

(d) Encourages Governments to include representatives of civil society in their national preparatory process, as well as in their delegations to the Preparatory Committee and the special session;
Commission for Social Development acting as the Preparatory Committee at its first organisational session, UN Doc A/53/45 (1998), Chapter VI, Section B, Decision 7 on the participation of NGOs at the Special Session of the General Assembly World Summit for Social Development and Beyond: Achieving Social Development for all in a Globalizing World, New York, 2000.

Annex 5

Modalities for NGO Participation in the
UN Framework Convention on Climate Change

1) Primary Enabling Treaty Provision

Article 7: Conference of the Parties.
(2) The Conference of the Parties, as the supreme body of this Convention, shall...
(l) seek and utilise, where appropriate, the services and co-operation of, and information provided by, competent international organisations and intergovernmental and non-governmental bodies; and...
(6) The UN, its specialized Agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one-third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.
UN Framework Convention on Climate Change 31 ILM 848 (1992).

2) Relevant Rules of Procedure

Rule 7:
1. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer may be so admitted unless at least one third of the Parties present at the session object.
2. Such observers may, upon invitation of the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object.

Rule 8:
The Secretariat shall notify these entitled to be observers pursuant to Rules 6 and 7 above of the date and venue of any session scheduled by the Conference of the Parties so that they may be represented by observers.

Rule 17:
Each Party participating in a session shall be represented by a delegation consisting of a head of delegation and such other accredited representatives, alternate representatives and advisers as it may require.

Rule 18:

An alternate representative or an adviser may act as a representative upon designation by the head of delegation.

Rule 27:
1. These rules shall apply mutatis mutandis to the proceedings of the subsidiary bodies.
2...

Rule 30:
1. Meetings of the Conference of the Parties shall be held in public, unless the Conference of the Parties decides otherwise.
2. Meetings of the subsidiary bodies shall be held in private unless the Conference of the Parties decides otherwise.
A footnote to Rule 30 provides that:
Paragraph 106(c) of the Report of the Committee on its eighth session (A/AC.237/41) states: 'Consistent with the Rules of Procedure of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, upon which the draft rules were largely based, Rule 30 of the draft rules of procedure would be interpreted as permitting duly accredited observers to participate in 'private' meetings.'

Rule 32:
1. No one may speak at a meeting of the Conference of the Parties without having previously obtained the permission of the President...

Rule 36:
Proposals and amendments to proposals shall normally be introduced in writing by the Parties and handed to the Secretariat, which shall circulate copies to delegations...
The Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies to the UN Framework Convention on Climate Change, UN Doc FCCC/CP/1996/2.

3) Decisions of the Conference of the Parties

The Conference of the Parties,
...
Affirming that negotiations under the Convention are a matter for the Parties,
...
1. Decides that the presiding officers of Convention bodies may invite representatives of intergovernmental and non-governmental organisations to attend as observers any open-ended contact group established under the Convention process, unless at least one third of the Parties present at the session of the Convention body setting up that contact group object, and on the understanding that the presiding officers of such contact groups may determine at any time during their proceedings that they should be closed to intergovernmental and non-governmental organisations.
2. Invites the presiding officers of Convention bodies, at the time of their establishment of such a contact group, to ascertain if there are objections from Parties to attendance by intergovernmental and non-governmental

organisations at that contact group under the conditions set out in paragraph 1 above.

Report of the Conference of the Parties on its Fourth Session, Buenos Aires, 1998, Addendum: Action taken by the Conference of the Parties at its Fourth Session, UN Doc FCCC/CP/1998/16/Add.1 (1999), Decision 18/CP.4 (1998) on the attendance of intergovernmental and non-governmental organisations at contact groups.

Annex 6

Proposal by business for a Business Consultative Mechanism

A business consultative mechanism should:

1. *Provide business with a convenient, direct and effective additional channel of communication.*
2. *Further enable business to both volunteer information to, and respond to questions from all of the bodies established under the Framework Convention on Climate Change in a timely manner.*
3. *Further enable business to provide information to all of the parties and to the intergovernmental organisations participating in the FCCC process.*
4. *Further enable business to provide its views on the full range (policy, socio-economic, technological etc) of issues being addressed under the FCCC.*
5. *Be open to all business NGOs accredited by the FCCC process who wish to participate.*
6. *Be able to convey the full range of business positions on an unfiltered basis.*
7. *Not be a process for negotiation of commitments from business or for the selection of technology 'winners and losers'.*
8. *Be an addition to, not a replacement for, existing or new business consultation at the national and international level.*
9. *Be treated by the FCCC process in a manner comparable to other NGO consultative mechanisms in terms of access and administrative support, including funding for participants from developing nations.*
10. *Be subject to and consistent with national and regional anti-trust and competition laws and regulations.*

Principles of Business Consultation with the Bodies established under the Framework Convention on Climate Change, Bernstein L.S on behalf of the Business Groups participating in the Workshop on Consultative Mechanisms for NGO Inputs into the Framework Convention on Climate Change, Geneva, 1996, extracted in UNFCCC Subsidiary Body for Implementation, Secretariat Note, Mechanisms for Consultation with NGOs, Compilation of Submissions, UN Doc FCCC/SBI/1997/MISC.7, 11.

Annex 7

List of Individuals Contributing to the Case Study on the UN Framework Convention on Climate Change

Chapter Three draws upon statements made during presentations, informal discussions and formal interviews with the individuals listed below as a result of attendance at the two-week session of the Ninth Conference of the Parties to the UNFCCC in Milan, Italy, 1–12 December 2003 (see further the methodology section in the Introduction). Permission has been granted for quotation and errors or omissions remain those of the author. Records of conversations are retained on file.

1) Corporate officers, trade association representatives, corporate coalition members and other individuals:

Mr Machua Acharya, World Business Council for Sustainable Development.
Mr Kevin Baumert, World Resources Institute.
Mr Alex Beckitt, Executive Officer, Renewable Energy Generators Australia Ltd.
Mr Leonard Bernstein, The Global Climate Coalition.
Adam Bumpus, Programme Coordinator, Responding to Climate Change.
Mr Nick Campbell, Chairman, Task Force on Climate Change, International Chamber of Commerce Environment and Energy Commission.
Mr Daniel Chartier, President, Emissions Marketing Association.
Mr Neil Cohn, Senior Director, Natsource LLC.
Mr Stephen Dahl, Environmental Planner, Norske Skog.
Mr Robert Dornau, International Emissions Trading Association.
Mr David Feldner, Chief Accounting Executive, Emissions Marketing Association.
Dr Brian Flannery, Manager, Science, Strategy and Programs (Safety, Health and the Environment), Exxon Mobil Corporation.
Mr Oliver Haugen, World Economic Forum.
Mr David Hone, Vice President Climate Change, Shell.
Ms Marian Hopkins, The Business Roundtable.
Ms Lisa Jacobson, Business Council for Sustainable Energy.
Ms Norine Kennedy, Vice President, Environmental Affairs, United States Council for International Business.
Mr Manabu Kubota, Federation of Electric Power Companies.
Mr Julio Lambing, European Business Council for a Sustainable Energy Future (e5).
Andrei Marcu, President and CEO, International Emissions Trading Association.
Nick Marshall, Global Product Manager, British Standards Institute.
Mr Charles Nicholson, Senior Adviser, British Petroleum.
Ms Robyn Priddle, Executive Director, Australian Industry Greenhouse Network.
Mr James Ramsey, Managing Director, Entico Corporation Limited.
Mr Masayuki Sasanouchi, Project General Manager-Environment, Toyota.
Mr Simon Schmitz, World Business Council for Sustainable Development.

Dr Syd Shea, Chairman and Managing Director, The Oil Mallee Company of Australia Ltd.
Mr Bjorn Stigson, President, World Business Council for Sustainable Development.
Mr Tim Stileman, International Petroleum Industry Environmental Conservation Association.
Mr David Stirpe, Executive Director, The Alliance for Responsible Atmospheric Policy.
Mr Peter Storm, International Gas Union.
Mr Richard Taylor, International Hydropower Association.
Mr Eli Turk, Vice President, Government Relations, Canadian Electricity Association.
Mr Christiaan Vrolijk, IT Power.
Mr Jack Whelan, Secretary, Task Force on Climate Change, International Chamber of Commerce Environment and Energy Commission and designated BINGO contact person at COP 9.

2) Other Individuals.

Ms Barbara Black, NGO Liaison Officer, UNFCCC Secretariat.
Ms Laura Campbell, President, Climate Change Legal Foundation.
Mr Justin Portelli, Director, Carbon Management Group, CSIRO.

Annex 8
UN Secretariat Questionnaire

Chapter One draws upon the opinions of several secretariat officials to examine the contemporary practice of the UN's engagement with the private sector. These individuals are the designated NGO focal points, public relations officers or officers responsible for private sector relations within the UN secretariat, UN Agencies or UN Programmes. Their responses to the questionnaire are reproduced in full below.

- Mr Bernard Kuiten, Counsellor, External Relations Division, **WTO** Secretariat.
- Mr Philipp Muller-Wirth, Specialist for Cooperation with the Private Sector, Sector for External Relations and Cooperation, **UNESCO.**
- Mr Arthur H. V. Nogueira, Principal Officer, Implementation and Outreach Programme, Secretariat of the Convention on Biological Diversity (**CBD**).
- Ms Federica Pietracci, Major Groups Programme Coordinator, UN Division for Sustainable Development (**DivSusDev**)
- Ms Aysen Tanyeri-Abur, Senior Officer (Private Sector), Resources and Strategic Partnerships Unit, **FAO**.
- Mr Krishnan Sharma, Designated Focal Point for Private Sector Engagement, Financing for Development Office (**FinDevOffice**).

One secretariat official was also interviewed over the telephone and her comments appear in Chapter One (notes held on file).

- Mrs Gillian Murray, Officer in Charge, Co-Financing Section, Public Affairs and Inter-Agency Branch, UN Office on Drugs and Crime.

A) The Private Sector and Non-governmental Organizations (NGOs).

1. How does the secretariat generally assess
a) the competence ; and
b) the relevance
of an NGO to participate in activities organized by the secretariat ?

SCBD: the Secretariat has no accreditation procedure or selection criteria for identifying and discriminating among NGOs. The Convention's activities are chiefly meetings among Parties or among experts appointed by the Parties. The former are open, public meetings, and any individual or organization may join after filling the appropriate application form; the latter are mostly closed meetings for Government appointees only. The Secretariat does not have implementation programmes to which an NGO could be a partner. For these reasons, the Secretariat does not assess competence nor relevance of NGOs.

DivSusDev: The competence and relevance of an NGO wishing to participate in the CSD process are both assessed when the NGO applies for accreditation. All NGOs must be accredited in order to participate in official CSD activities. Detailed information on accreditation can be found on our website at: http://www.un.org/esa/sustdev/mgroups/csd_12/qa_registration.htm

FAO: For private sector (PS) (including NGO's composed of PS members, there is a screening committee (composed of audit, legal and procurement, and technical cooperation senior officers) in house that screens all potential partners. To assess the competence (if needed) the relevant technical division provides an assessement. .

FinDevOffice: We interact with a group of business interlocutors whom we have appointed (comprising major business associations from around the world) and liaise with them as to the appropriate business entity to invite to speak on a particular issue.

UNESCO: UNESCO has a long tradition of relations with NGOs. These relations are intense at both the policy and operational levels. At policy level, a large number of NGOs are formally affiliated with UNESCO and take part, through permanent liaison with governing bodies, in the Organization's policy & programme definition and monitoring. At operational level, programme sectors and field offices select, on an ad hoc basis, various NGOs (international, national and local) for the implementation of their projects.

WTO: Due to the absence of a permanent or institutionalized registration or accreditation mechanism for NGOs at WTO, no detailed assessment procedure exists. Only at WTO Ministerial Conferences, which take place every two years, NGOs can be formally accredited for the duration of the Conference. Whether or not a NGO requesting registration would qualify depends on:
- it's not-for-profit and non-governmental nature;
- the fulfillment of the criteria as described in WTO art. V:2, i.e. NGOs that are "concerned with matters related to those of the WTO".
During all other WTO events which are open to public and therefore NGO participation, no specific assessment is applied or required.

2. In your dealings with NGOs, is a distinction made between the private sector and other NGOs ? If so, how (eg constituency system, adoption of the 'major groups' concept from the Commission on Sustainable Development) ?

SCBD: no. Both types participate as observers at the Convention's meetings.

DivSusDev: The private sector is included in the major group known as *the business and industry group*. We make no distinction between this and other major groups.

FAO: Yes, NGO's that are composed of PS members are treated as PS.

FinDevOffice: We have different people dealing with private sector and NGOs.

UNESCO: Private sector groups (with the exception of a few corporate foundations) are not (yet) involved in policy decisions / governing bodies. Whereas UNESCO's relations with NGOs are traditionally governed by detailed guidelines, procedures and structures, relations with private sector

partners take, so far, place in the framework of general guidelines and specific contractual arrangements.

WTO: The WTO does not make a distinction between private and "public" sector NGOs. Please note that when referring to private sector NGOs, what is meant are business associations etc. and not individual companies. This also applies to the answers given below, except when indicated otherwise.
Please also note that the WTO Secretariat has a limited mandate to deal with NGOs and has no right of initiative or independent decision-making powers.

3. Is the private sector treated any differently from other NGOs in its dealings with the secretariat ? If so, in what ways ?

SCBD: no. The Secretariat has no standard procedures for dealing with NGOs in particular, nor with the private sector in particular.

DivSusDev: The private sector is treated differently from other NGOs in its eligibility for funding its participants. The business and industry major group does not receive any financial support from the Secretariat.

FAO: Yes, with much more caution to avoid image risk and conflicts of interest.

FinDevOffice: The private sector and NGOS are treated the same.

UNESCO: Within UNESCO's Secretariat (Sector for External Relations, Headquarters), relations with NGOs and with the private sector are handled by two different divisions. At national levels, National Commissions for UNESCO (national entities established in each of UNESCO's 190 Member States) are responsible for both mobilizing civil society partners (including NGOs *and* the private sector) and for facilitating / monitoring the Secretariat's relations with these partners in Member States. Contractual arrangements with private sector partners tend to be more detailed with respect to provisions for the use of UNESCO's name and emblem. Often relations with NGOs have a more specific substantive focus on one of UNESCO's programme sectors, whereas relations with international private sector partners often concern different programme sectors.

WTO: See answer 2; no distinction is made.

B) Characteristics of the Private Sector.

4. What are the typical characteristics of organizations from the private sector which contact the secretariat (eg the geographical origins/nature of business/size etc of firms, trade associations, business groups) ?

SCBD: Given the scope of the Convention and the mandate of the Secretariat, the SCBD usually deals with two groups of NGOs: (a) the large, general purpose, well-known NGOs (Greenpeace, WWF, IUCN, Nature Conservancy etc.); and (b) a number of specific NGOs more closely related with the

activities being undertaken under the Convention, such as organizations promoting indigenous issues, or the interests of the oil and mining industry, pharmaceutical companies and the agricultural sector.

DivSusDev: Generally, the private sector contacts us through representative organizations such as the International Chamber of Commerce or the World Business Council for Sustainable Development. Occasionally, businesses involved in some aspect of sustainable development will contact us directly to inquire about how they can participate. We then refer them to the appropriate representative organization, as the United Nations does not grant accreditation status to private companies.

FAO: Mostly multinationals, and local (Italian) PS

FinDevOffice: We interact with private sector companies and associations across all major sectors and around the world. Whom we invite to a particular meeting depends upon the issue being discussed in that meeting.

UNESCO:

- rather from developed countries (North America, Europe, Japan)
- increasingly from "emerging" countries (eg. India, Brazil)
- rather large, transnational corporations
- increasingly intn'l business federations and associations (ICC, WBCSD, WEF, Rotary etc.)

WTO: The majority of the contacts are with major international business groups and associations from around the world and to a lesser extent with national associations or national Chambers of Commerce. The latter nevertheless depends on the size of the country or economy. Due to the wide coverage of the WTO agreements in terms of goods and services, it is impossible to indicate the nature of business.

C) Private Sector Participation in Secretariat Activities.

5. What are the motivations and/or needs of the private sector (or your perception of those commercial intentions) for initially contacting the secretariat (eg requesting information, information sharing, seeking access to officials, attempting to participate in policy or decision-making) ?

SCBD: The private sector has not been a close partner in the workings of the Convention so far, although nothing would prevent them for doing so in the future. Actually a number of decisions from the Conference of the Parties, the central legislative body of the Convention, recommend closer and more constructive relationship with the private sector. The fairly limited contacts between the private sector and the Secretariat seem to revolve around the following: (a) requesting information, in particular on policy trends; (b) requesting clarification on decisions already taken; (c) attempting to participate in policy making; (d) attempting to avoid decisions that may have adverse impacts on the operations of a particular sector.

DivSusDev: We are contacted by private sector representatives who are motivated to contribute to the implementation of sustainable development as outlined in Agenda 21 and the Johannesburg Plan of Implementation. They generally inquire about participating in CSD meetings or request information on partnership initiatives.

FAO: [No response]

FinDevOffice: They would like to liaise with policy makers and make proposals on issues relevant to their business operations.

UNESCO:

- Interest in specific opportunities of cooperation
- Access to governmental decision maker in emerging countries
- Access to local communities
- Policy orientation with respect to certain development issues
- Legitimacy of social investments

WTO: Private sector groups contact the WTO Secretariat for information purposes only.

6. What kinds of activities organized by the secretariat does the private sector wish to become involved in ?
For example,
- Information gathering (eg attendance at conference of the Parties) ;
- Information distribution (eg management consultancy) ;
- Participation in decision-making (eg appointment of corporate representatives to a roster of experts, membership of technical committees) ;
- Operational delivery (eg programme design and implementation) ;
- Partnerships (eg joint research, training or education on scientific issues) ;
- Promotional activity (advocacy, outreach, awareness raising/education).

SCBD: As explained above, by its nature, the Secretariat does not prepare or deliver implementation projects. This is the privilege of the Parties. In their relationship with the Secretariat, therefore, the private sector may only wish to attend the public meetings of the Convention, which they are free to do. Consultancy contracts are very specific, limited in scope and more often than not require a high degree of expertise. As a result, such needs are usually fulfilled by an individual with an academic background.

DivSusDev: -Participation in CSD sessions, particularly major groups activities such as interactive dialogues designed to contribute to policy discussions and help shape decisions made by the Commission.
-Partnership initiatives.
-Information distribution on various sustainable development issues (e.g. to contribute case studies and inputs to the Secretary-General's reports).

FAO: - Information gathering (eg attendance at conference of the Parties) ; yes
- Information distribution (eg management consultancy) ; yes

- Participation in decision-making (eg appointment of corporate representatives to a roster of experts, membership of technical committees) ; yes
- Operational delivery (eg programme design and implementation) ; no - Partnerships (eg joint research, training or education on scientific issues) ; somewhat
- Promotional activity (advocacy, outreach, awareness raising/education) yes.

FinDevOffice: They participate in our meetings and present proposals and projects on issues relevant to the private sector. The purpose would be to then discuss further with relevant policy makers in governments and multilateral organizations the implementation of their proposals and projects.

UNESCO:
- Information gathering (eg attendance at conference of the Parties) ++;
- Information distribution (eg management consultancy) +;
- Participation in decision-making (eg appointment of corporate representatives to a roster of experts, membership of technical committees) +;
- Operational delivery (eg programme design and implementation) +;
- Partnerships (eg joint research, training or education on scientific issues) ++;
- Promotional activity (advocacy, outreach, awareness raising/education) ++.
(++: very relevant; +: relevant)

WTO:
- Information gathering (eg attendance at conference of the Parties) ; YES
- Information distribution (eg management consultancy) ; YES, but not in relation to consultancy or advisory functions
- Participation in decision-making (eg appointment of corporate representatives to a roster of experts, membership of technical committees) ; NO
- Operational delivery (eg programme design and implementation) ; NO
- Partnerships (eg joint research, training or education on scientific issues) ; NO
- Promotional activity (advocacy, outreach, awareness raising/education). NO

7. What is the most and least popular of the activities listed in your response to question 6 as evidenced by the degree of private sector participation ?

SCBD: The private sector usually participates in CBD meetings (most popular) and rarely, if ever, participates in promotional activities (least popular).

DivSusDev: They are listed above in order of popularity.

FAO: Least popular is the willingness to provide financial/technical support to projects. Most popular is to add the UN name and blessing to their projects or initiatives and for attendance in policy meetings.

FinDevOffice: [No response]

UNESCO: Most popular : partnerships + information gathering (the latter including access to governmental and non-governmental decision makers)

WTO: Not relevant

8. Through what mechanisms does the private sector participate in policy-formation or decision-making within the organization (eg workshops, roundtables, membership of technical committees, written submissions, observers of executive body meetings, independent or government-appointed experts) ?

SCBD: The CBD is an agreement among sovereign States, and governments' representatives are the only ones allowed to debate and eventually adopt legally-biding decisions. Observers such as international organizations, NGOs, individuals, academia etc. are invited to attend the public meetings and are usually allowed to express their views during plenary sessions. The same applies to the private sector. The plenary session of the Conference of the Parties (COP) and the meetings of the Subsidiary Body for Scientific, Technical and Technological Advice (SBSTTA), as well as the Meeting of the Parties to the Cartagena Protocol (COP-MOP) are the institutional mechanisms for participation by the private sector. Individual companies or their associations also seek to participate through the organization of side-events and workshops during, and at the margins of, the Convention's major meetings. Such activities are part of the official calendar of the meeting, are announced in the Secretariat's web site, and enjoy the free support of the SCBD staff as far as basic procurements are concerned: room, projectors, daily announcements, and other facilities. The private sector may wish, of course, to influence particular delegations in an informal way, and they may also be allowed to participate in policy building activities at the national level in preparation for an international meeting. However, these initiatives do not constitute a formal mechanism within the Convention.

DivSusDev: Interactive dialogues, roundtables, expert panel speakers, written inputs

FAO: Membership oof technical committees (eg. Codex) and also as observers in meetings

FinDevOffice: Workshops, roundtables and written submissions have been the main form of participation. However, the World Economic Forum will be organizing some multi-stakeholder consultations on some specific financing for development issues later in the year.

UNESCO: Foundations (see point 2 above) can be admitted to formal relations with UNESCO including participation in policy development. More recently, private sector representatives participated in several high level panels and advisory groups for specific programmes.

WTO: No direct involvement or participation in decision-making at WTO-level. Public workshops and seminars do show private sector participation but this is not considered as decision-making.

9. What factors influence the extent of private sector participation ?

SCBD: Possibly their specific interests are the only limiting factor in their participation.

DivSusDev: The extent of all major group participation is determined by decisions taken by the CSD Bureau and Secretariat on which formats should be used, and also by the time allocated to such formats.

FAO: [No response]

FinDevOffice: Attendance of relevant policy makers from governments and multilateral organizations is key.

UNESCO:

- Top level support within private sector company
- Medium/long term convergence of strategic objectives
- Resources made available by private sector partner for management of partnership within UNESCO
- Possibility of involving specific capacities of ps partner (know-how, equipment, staff, regional branch offices) in joint projects

WTO: The way in which multilateral trade negotiations and subsequent deals, as well as the existing WTO rules and obligations, affect international trade opportunities. In other words, what effect does WTO have on the trade interests of the business community.

10. What efforts are made by the private sector to influence the extent and/or the conditions of their participation ?

SCBD: The private sector is in no way different from other interest groups, such as NGOs, academia, IGOs etc., all of which are grouped under an observer status. Rules of procedure adopted by the UN, as well as the specific rules of procedure for meetings of the Conference of the Parties to the CBD adopted as an annex to decision I/1 and decision V/20 (rules 6 and 7) establish the modalities of participation for observers, who are expected to abide by them.

DivSusDev: Requests to the Secretariat from individual organizations.

FAO: [No response]

FinDevOffice: [No response]

UNESCO:

- Either: normal process of (contractual) negotiations with respect of respective constraints
- Or: Sponsoring rationale – emphasis on image / funding ratio

WTO: None at the level of the WTO Secretariat.

D) Secretariat Practice.

11. How frequent is contact between the secretariat and the private sector (eg sporadic, ad hoc, frequently, routine/daily) ?

SCBD: Ad hoc. The private sector, as well as other interest groups, usually takes the initiative to contact the Secretariat.

DivSusDev: We communicate on a regular basis with "organizing partners" of the private sector and other major groups, who represent their constituencies. We also frequently handle communications from other private sector entities.

FAO: ad hoc

FinDevOffice: Frequent.

UNESCO: Considering that a large number of about 2500 staff in over 50 field offices, 5 programme sectors and various central services increasingly consider the opportunities of private sector partnerships: routine/ daily

WTO: Between ad hoc and frequently, depending on the relevance of ongoing activities

12. Has the degree of private sector participation changed over time and if so, how ?

SCBD: There is no discernible pattern or evolution at this stage.

DivSusDev: Participation by the private sector, as well as by other major groups, has increased over time.

FAO: Not much except for more interest in the UN system

FinDevOffice: It has evolved and broadened.

UNESCO: It has constantly increased
Change from a pure fund-raising rationale ("we do, they fund") towards a partnership rationale ("they do – we help")

WTO: Not necessarily; see also answer to Q11

13. What initiatives if any have recently been adopted by the secretariat to increase private sector participation ?

SCBD: Articles 10(e) and 16(4) of the Convention and many decisions adopted by the Conference of the Parties refer either directly to the private sector, or to the private sector as a potential partner among others. Such involvement, however, has not taken place in any significant manner until this

date. It is expected that this situation should change in the coming years and be addressed in a more substantive way at COP VIII, in 2006.

DivSusDev: Partnership initiatives have recently provided a new way in which the private sector can contribute to sustainable development implementation.

FAO: None

FinDevOffice: Working closely with a group of business interlocutors who cover businesses from across sectors and geographical regions.

UNESCO:

- Various internal training sessions on private sector mobilization
- Establishment of advisory groups with ps participation (see point 8. above)
- Elaboration of strategies for flagship programmes (UN Decades of Education for Sustainable Development; for Literacy, for Water, Education for All, Global Alliance for Cultural Diversity; Management of Social Transformation, World Heritage, Intangible Heritage, etc.) which anticipate the involvement of the private sector
- Several research and strategy documents and publication were prepared in close co-operation with private sector partners
- Continuous liaison with UN structures and programmes in charge of private sector (UN Global Compact, UNFIP)
- Development of a specific web-site and data base

WTO: None.

14. What effort has been made if any to encourage greater participation by:
a) small and medium sized enterprises ; and
b) corporations from developing States ?

SCBD: Please see previous answer.

DivSusDev: None.

FAO: None additional effort made at secretarial level but FAO does work with local private sector through its projects- a survey to assess the extent of local private sector involvement and promotion of greater participation will be conducted in the next month or so.

FinDevOffice: Considerable effort – especially to involve corporations from developing countries (through working with our interlocutors).

UNESCO:

- Formal relations with the World Association of Small and Medium Enterprises (WASME)
- Regional training seminars for UNESCO National Commissions with participation of regional representatives (of international, regional and national) business groups

- Specific initiatives for regional/small scale partnerships (eg. Global Alliance for Cultural Diversity, UNESCO Co-Action programme)
- Conception of global partnerships which benefit developing countries and their non-governmental stakeholders

WTO: None specifically; here an important role exists for the WTO Member countries.

15. What advantages does participation by the private sector offer to the secretariat (eg additional resources (supplement in-house technical expertise, personnel secondment, additional funding), outsourcing (contracted or recruited for procurement), knowledge transfer (management systems design, building organizational capacity)) ?

SCBD: As of this date there is no experience resulting from private sector participation in the workings of the Secretariat. Modalities for such will have to be considered and proposed by the Secretariat, and approved by the Parties, if such is the wish of the latter. None of the above is excluded in the future.

DivSusDev: Their contributions often provide technical expertise and knowledge that enables more informed decision-making by the Commission

FAO: Additional resources, human and financial as well as exchange of information.

FinDevOffice: The purpose of involving the private sector is to hear their views and facilitate a discussion between them and policy makers on critical issues.

UNESCO:
All of the above
+ improved outreach to new target groups / visibility
+ enhanced advocacy for strategic and programmatic objectives
+ resource mobilization for decentralized networks (field offices, national commissions, world heritage sites, biospheres, chairs, associated schools, etc.)

WTO: Except for public conference, there are no specific arrangements which identify private sector participation. In any case, in order to safeguard the Secretariat's neutrality, it is not in a position to accept funds, resources or knowledge from private sector sources.

16. How does the secretariat select private sector organizations for admission as observers to Conferences of the Parties ?

SCBD: Please see answer to question # 1.

DivSusDev: We do not select organizations—they are welcome to participate if they are accredited.

FAO: The interested orgaqnization sends a request with its statutes – this is reviewed by legal office and assessed by the technical division. The organization needs to have international representation. (at least in 3 countries)

FinDevOffice: [No response]

UNESCO:
On an ad hoc basis, in close consultation with the partners
Increasingly in co-operation with international business networks (eg World Economic Forum)

WTO: Not applicable.

17. Does the secretariat assess the representatives nominated by the private sector for appointment as observers or experts ?

SCBD: Answer to question # 1 still applies.

DivSusDev: No. We generally rely on our organizing partners to assess their own nominees.

FAO: The most frequent case where this happens is for Codex in which case the decision is jointly made by WHO and FAO through a joint assessment

FinDevOffice: Yes we do carefully assess the suitability of private sector representatives participating in our meetings.

UNESCO: Ad-hoc, in close consultation with government authorities (National Commissions and Permanent Delegations)

WTO: Not applicable

18. What has been the impact if any of participation by the private sector upon the practices of the secretariat (eg need to streamline NGO participation, greater preference for organized business groups) ?

SCBD: Please see answer to question # 15.

DivSusDev: With increased overall participation by major groups, and given the current focus on implementation in the post-WSSD era, the Secretariat encourages private sector involvement in partnerships with other civil society organizations and Governments at the regional, national and local levels. We also recognize the need to compile and analyze data pertaining to participating organizations.

FAO: Not much

FinDevOffice: No impact. Interaction with private sector has evolved with improved understanding of their views.

UNESCO: On-going process including the two above indicated tendencies
Increased awareness of relevance of private sector to UNESCO's activities

WTO: None specifically, as we are already have relations with organized groups and not at individual companies.

19. What is the nature if any of problems or difficulties which the secretariat has encountered in its dealings with the private sector (eg potential conflicts of interest, opposition from States Parties, protection of commercial information) ?

SCBD: Please see answer to question # 15.

DivSusDev: General suspicion on the part of civil society that Governments will abdicate their responsibilities to the private sector, questions regarding the relevance of involvement by certain companies, opposing points of view than other NGOs on certain issues (i.e. water privatization).

FAO: Not much because the assessment procedure is pretty strict to avoid problems.

FinDevOffice: No problems.

UNESCO:

- Lack of proper resources to develop and implement partnerships
- Incompatibility of marketing and policy rationales (necessity of coherent framework vs. flexibility)
- Lack of strategic co-ordination of increasing number of joint activities with the private" sector

WTO: None specifically

20. Please provide any other comments or thoughts on the nature and/or extent of private sector participation in activities organized by the secretariat.

SCBD: None.

DivSusDev: You may also wish to look at:
UN System and Civil Society - An Inventory and Analysis of Practices Background Paper for the Secretary-General's Panel of Eminent Persons on United Nations Relations with Civil Society, (May 2003) available at: http://www.un.org/reform/pdfs/hlp9.htm
AND
Commission on the Private Sector and Development available at: http://www.undp.org/cpsd/

FAO: [No response]

FinDevOffice: [No response]

UNESCO: To the extend to which the interest of private sector partners in co-operating with UNESCO seems to be continuously increasing, the enhancement of the Organization's proper capacities for such co-operation will be increasingly important.

WTO: [No response]

Annex 9

Questionnaire for the Energy and Biodiversity Initiative

The Energy and Biodiversity Initiative (EBI) is a partnership between four energy corporations (ChevronTexaco, StatOil, Shell and BP) and five environmental NGOs seeking to integrate biodiversity considerations into oil and gas operations. Chapter Two draws upon the views of the following corporations who replied to a questionnaire and whose full responses are reproduced below:

Ms Kit Armstrong & Mr Patrick O'Brien, ChevronTexaco (**C**).
Mr Sachin Kapila, Shell (**S**).

1. How important were existing regulatory requirements/expectations as an original impetus to you joining the EBI partnership?

the most important consideration.
as important as other considerations.
C,S not important.

2. How important were existing regulatory requirements/expectations in formulating the EBI products?

the most important points of reference.
S as important as other considerations.
C not important.

3. Which regulatory requirements/expectations were important?

S UNESCO World Heritage Listing.
C,S Convention on Biological Diversity.
S RAMSAR protected wetlands.
Johannesburg Type 2 partnership initiatives.
C Environmental Impact Assessment regulation – national and/or EC.

S EC Habitats Directive and national implementation.
1998 Aarhus Convention on Access to Information and Public Participation in Decisionmaking.
1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.
S IUCN 2000 Amman Resolution on protected areas.
ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.
Prospective environmental liability under national law.
Other:

4. What core competencies (skills and knowledge) do you consider you contributed to the EBI?

C biodiversity science.
S social sciences.
S environmental management expertise.
S best commercial practice in oil/gas.
C knowledge of government (national, intergovernmental)
Other :

5. What was your original intent for joining the EBI partnership and what did you hope to get from your investment in the process?

C,S [improved] expanded relationships with firms/NGOs.
better understanding of biodiversity issues.
C,S formulate operational guidelines.
S update environmental management systems.
Other:

6. Were your objectives realized?

Fully.
C,S Partly.
Not at all.

7. Do you consider there to have been proper accountability of each of the partners to the group?

S Yes, because
No, because
Yes and No, because

S: each organization is very well known in its own field, and is in itself accountable either to its members or shareholders
C: We do not view accountability of partners as particularly relevant Each partner contributed to the effort

8. Were there any conflicts of interest or agenda?

C Yes; if so, how were they identified and resolved?
There were clearly diverging views both within and between the NGO/energy sectors about the significance of various issues – protected areas, secondary impacts. Probably the largest philosophical difference was that for the energy companies, biodiversity is one of suite of risk management issues that need attention for any new development or ongoing operation , while for the NGOs at the table, it is their central issue and primary area of focus. This fact gives rise to a natural difference in perspective on the significance of the biodiversity issue as it relates to energy operations.. The substantive issues, especially the question of operating in or near protected areas was resolved through much discussion, review of sequential draft documents and negotiation about what the various parties could live with.

S: Yes. When dealing with the subject of biodiversity (conservation, science, politics) and the extractive industry, ofcourse, there are going to some areas which cause increased tension/conflict. The single biggest and most crucial area for us to get right and to get consensus on as a group was that of site selection. All of the NGOs as part of EBI are members of IUCN and IUCN had in 2000, passed the Amman Recommendation – this was forefront of people's discussion – wanting to see at first, the establishment of industry no-go areas – the site selection decision-making framework was a breakthrough piece of work as it provided a rationale and logical approach to dealing with this contentious issue – and it was developed in such a way as to obtain agreement from all 9 organisations. The conflict was resolved through dialogue and debate.

9. Was there equality between the partners in terms of participating in discussion, formulating the EBI products and decision-making?

C,S Yes
No
S: although there were some more vocal organizations (individuals than others).

10. What were some of the difficulties encountered during the course of the partnership and how were they overcome?

C Sources of funding: energy companies kicked in a "surcharge" to compensate for loss of Enron

S Sources of Funding: Some of the NGOs wanted to be paid for their time but this was soon resolved by giving each NGO a stipend

C Trust: Initial barrier that broke down as people got to know one another. First two meetings were largely posturing with little accomplished.

C Impasse on key issues: agreed not to engage on the issue of relationship of biodiversity to climate change. Stated reason why WWF chose not to join the EBI

S Impasse on key issues: see above on issue related to site selection and no-go areas.

C Maintaining continuity/progress/commitment: lack of defined project manager at outset needed to be corrected because of lack of insurance that commitments were indeed commitments and lack of follow through

S Personalities: I wouldn't call this a difficulty but more of an interesting issue – something that had to be handled given that the team was about 20 in total.

C Information: Could have used more information and examples of where mitigation of secondary impacts was/was not successful

C Time Difficulties for all partners devoting time necessary to plan and produce EBI products in addition to other primary work obligations. Delays in producing products and quality of writing necessitated hiring consultants to do substantial amounts of writing

S Other: Equitable sharing of workload. There were some organisations working a lot harder than others – this issue was never really discussed but as an underlying issue for some

11. How were resource needs (financial, human) identified and met?

Self-identified and self-satisfied.
Self-identified and mutually satisfied.
Mutually identified and mutually satisfied.
S Mutually identified and self-satisfied.

C: Not sure any of the above choices apply. Companies and NGOs each committed two persons to the effort who attended most meetings. Companies each committed about $80m to support staffwork and NGO travel.

12. On the whole, were you satisfied with the following decision-making aspects of the partnership?

Transparency	**S, C** Yes		No
Disclosure of information	**S, C** Yes		No
Freedom to acquire information	**S, C** Yes		No
Frankness of exchange	**S, C** Yes	&	**C** No
Voting/Decision taking	**S, C** Yes		No

13. Was the absence of any identifiable party listed below an obstacle to progress and to the quality of the final products? If so, how did the group attempt to overcome this shortcoming?

S government: through trialing of EBI products during a second phase.
consumers
trade unions
S indigenous communities: through some local stakeholder consultation efforts during a trial second phase period.
S local NGO's: see above.
financial institutions
secretariat of an international convention
academic
public opinion
Other
C: Any of these interests could have added valuable perspective. The most lacking was local NGO representation, people who could effectively represent government views and practices, and a national oil company, which doesn't appear on the above list. We just decided to forge on without additional members after some initial effort to screen for interest/availability among additional groups. There was a general feeling, especially once trust started to build, that more members would have hindered progress in generating products

14. Was the partnership effective in building trust?

C, S Yes.
No.
Mixed success.

15. Were you satisfied with the level of commitment and contribution from the partners over the 2½ year period of the EBI?

C Yes.
S No.
S: I feel that some organizations/individuals worked a lot harder and put in much more effort than others.

16. In what ways did you benefit from the partnership?

C, S building constructive relationships for the future
S further developing environmental management systems
C enabling the completion of environmental impact statements
C, S information exchange
C, S understanding the motivations/behaviour of other organizations
capacity building
developing expertise
C reputational enhancement
Other
C: Participation helped keep the discussion focused on areas of interest to our company without letting it spin out of control. We made a judgment that it would be better to participate in order to help shape the discussion and products that we expect would set standards for industry behavior and performance.

17. Were the benefits of participating shared equally among the partners?

S Yes
No
C: Don't know – can't speak for them

18. In what ways were you disappointed with the partnership?

unresolved issues
S lack of time
lack of resources
unenviable compromises
one-way information flows
curtailed freedom of action
Other:
C: Concern that the products haven't pushed the boundaries around the issues as far as they might have been. Leads to some level of concern about their credibility among NGOs who weren't at the table.

19. *Are you satisfied with the monitoring arrangements established for Phase 2 (ie testing of the EBI products in the field by firms) in terms of 'enforcing' what was agreed during the partnership and independently verifying compliance?*

Yes.
Appropriately balanced.
S No.
C: The use of the words "enforce" and "compliance" misrepresents the intent of Phase 2 testing. Anything that gets done by individual companies in the field will be voluntary with each company having different needs and priorities as well as organizational structures and philosophies (central control/decentralized authority and decision making). The word "enforce" implies a legal compliance obligation, which doesn't exist. Each of the organizations has made voluntary commitments to undertake testing and use of the EBI products in ways most appropriate for them.

20. *Do you envisage using the EBI products in your subsequent relationships with any of the following parties and if so, how?*

C, S government: part of permit negotiations
consumers
trade unions
S indigenous communities
S: or local communities.
C, S local NGO's...part of permit negotiations and community engagement commitments.
C, S financial institutions...showing commitment to biodiversity values
secretariat of an international convention.
C academic...- seminars.
public opinion: Communication through corporate responsibility report and other communications mechanisms.
C Other: operating organizations within our own corporation.

21. *How likely is it that the practices of and relationships between each NGO and the corporate members of the EBI will change as a result of the EBI?*

Likely that all practices and relationships will change.
Improve Deteriorate
Likely that commercial practices will change.
Improve Deteriorate
C, S Likely that NGO-business relationships will change.
C Improve Deteriorate
C, S Unlikely that commercial practices will change.
Unlikely that NGO-business relationships will change.
Unlikely that anything will change

C: We're not clear what is meant by "commercial practices". If this means environmental management practices implemented for oil and gas projects, then we would expect use of EBI products will potentially produce incremental improvements in how we focus on biodiversity in some specific relevant areas above our already good practice.

22. In the past, operational guidelines for environmental management have been developed by companies or industry groups and NGOs acting unilaterally. What value did the EBI add in bringing NGOs and companies together to develop tools for integrating biodiversity into oil and gas development?

C: For the energy companies, it puts the stamp of approval by 5 highly recognized, international NGOs on the products. This gives them another layer of legitimacy.

S: The fact that each product produced by EBI has had the signature of 9 organisations. This gives whatever was produced some weight and credibility, albeit recognizing that if one was to work on these products one could possibly have progressed further. But from the industry's standpoint, to have agreed working documents that might influence the industry with the aide of conservation organizations was a very powerful mechanism.

23. Of the objectives and structure of the EBI partnership what changed over the two-year period and what did not change?

C: Enron dropped out. Objectives stayed the same, but vision of products changed.

S: The objective(s) never changed – we always remain focused on achieving our ultimate goal and in fact, quite a lot of work had to be done to 'educate' the NGOs about the need to really focus and deliver what we said we would deliver. The structure changed slightly from 10 to nine organizations which caused some in balance – we had 4 working groups each with 2 organisations – this left the business working group without a corporate partner when Enron fell out. This was slightly problematic and unfair.

24. Would you have done anything differently?

C: Project manager from the outset

S: Brought in an editor right from the start – it is one thing getting an initiative like this off the ground but quite another, having to do all the work ourselves. When we finally agreed to bring in a consultant, the quality of the products improved exponentially and he managed to really pull everything together. We also had an editor writing the high level summary document – again very valuable. Second, if we had more time and budget, I would have held more consultative working workshops with selected Government departments and other stakeholders (e.g. other NGOs, financial community etc)

25. Any additional comments/thoughts on your experience in the EBI to date?

C: Generally positive experience for all the reasons listed above

S: A very valuable experience – possibly a model for joint collaboration. I think the key thing is to be realistic about one's expectations – not to be too grand in one's vision. It is much better to go for small steps and achieve them really well, than to have grand visions and fail.

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