Non-State Actors and the legitimacy of international environmental law

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Abstract. This article addresses the paradox of non-state actors’ position in contemporary international environmental law. Non-state actors are visible; they are influential; and they are relevant, since they are directly affected by international regulation, but their formal status remains unclear: they have yet to be regarded as “subjects” of international law.

Keywords: Aarhus Convention, climate change, Compliance Committee, democratic liberalism, environment, Global Climate Coalition, internet, Stockholm Declaration, United Nations

I. Introduction

The traditional conception of international law is that of a system regulating the relations between sovereign states. The Peace of Westphalia established an international legal order based on independent, equal, and territorially defined states, which did not assign importance to entities within or outside the states.1 Persons, in corporate as well as in human form, had no formal status in international law.2 The focus of this article is the shift away from the state-centric paradigm, evidenced by the rise of global civil society in international environmental lawmaking processes among

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It is an attempt to better understand this phenomenon by discussing the complex questions it raises. What are the roles non-state actors currently play in international environmental lawmaking? How can their increased involvement in international environmental institutions be conceptualized? How might these developments change the nature and structure of the inter-national system?

The article begins to outline a conceptual framework for international lawmaking, one that allows for a full recognition of non-state actors as essential sources of influence on the lawmaking process. I will do so by critiquing the case liberal scholars make for non-state actor participation in the international legal system, and by drawing upon international relations (IR) theories and the legal approaches influenced by them to suggest an alternative framework. My aim is to question the validity of the conventional wisdom according to which the state is the only legitimate political unit in international lawmaking, and to show why opening up the processes of generation, interpretation and application of international norms to non-state entities would enhance the perceived legitimacy of international law. More specifically, I argue that international environmental norms will become more legitimate, and thus better complied with, if they will be generated in a continuous, mutually generative process of interaction between all relevant actors – both lawgivers and the subjects of the regulation – at the international level.

Anthony D’Amato made the following prediction over a decade ago:

[If] the nineteenth century was characterized by State v. State, and the twentieth century by individual v. State, the twenty-first century might see international law becoming addressed to the claims of individual v. individual. Transboundary international legal claims involving individuals only, but invoking public international law, might be the direction in which we are headed.4

By contrast, I argue that while the international political and economic system is indeed changing in the ways described by D’Amato, international law is

3 The term “global civil society” usually denotes interest groups, non-governmental organizations and other non-profit entities. See D. Otto, “Nongovernmental Organizations in United Nations System: The Emerging Role of International Civil Society”, Human Rights Q. 18 (1996), p. 107 [hereinafter “Civil Society”], at note 2. For the reasons that will be discussed throughout this article, I use a more inclusive definition, containing not only non-profit organizations but also to profit-seeking entities, including business associations (who promote the commercial interests of their constituencies) and multinational corporations. See below, section II.5 and text accompanying footnotes 371–373.