

New Players on the International Stage

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III THE NEW ACTORS

... What follows is a brief introduction to the most important non-state actors (NGOs, corporations, and subnational governments) and a concise description of the nature of their international presence and the legal status that is now accorded them.

1. Non-governmental organizations (NGOs).

NGOs are hardly new to the international scene. The Catholic Church is perhaps the original NGO, and the labor movement provides the other significant example of transnational non-governmental organizing from earlier eras. While both remain quintessential models today, they are now joined by a throng. An almost infinite variety of groupings has spawned institutional vehicles in the form of NGOs (defined as organizations of non-national definition and not-for-profit orientation). Among the more prominent NGO groupings are environmentalists, human rights advocates, women, children, gays, the elderly, consumers, and indigenous peoples, each of which has mobilized at the international level.

Many NGOs at least purport to represent memberships, and many act as advocates in and out of international institutional settings. Greenpeace and Amnesty International are perhaps the most prominent examples of the modern advocacy NGO. These advocacy NGOs are noteworthy in at least two important respects. First, they now act directly to influence international decision-making institutions and not only through the channel of home states. Thus, a Greenpeace or Amnesty International [organization] will not stop at having members or national sections lobby their own governments.... Rather, they will move into the international stream as transnational entities seeking leverage wherever available. For example, Greenpeace (with a largely North Atlantic membership) has had its positions voiced and advanced by delegations from small island states and lesser developed countries. In that fashion, advocacy NGOs become players outside the control of the states from which they nominally hale.

These NGOs have also been afforded a limited formal status in some international decisionmaking contexts.... [such as] participation at UN-sponsored world conferences in recent years, including at Rio (on the environment), Cairo (population), and Beijing (women). Conferences on multilateral pacts on climate change and endangered species have afforded NGOs a place as observers to treaty monitoring proceedings. But ... NGOs [have not] been formally extended a status even approaching parity with that of states. Nor have NGOs been afforded standing in international judicial forums, with prominent exceptions at the level of regional organizations.

In practice, NGO influence has far exceeded that indicated by their tentative formal

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standing in international institutions. NGOs have prompted states to undertake significant international legal initiatives, especially with respect to human rights and environmental protection. They have also been able to pursue global political agendas outside of institutions, either by shaming states (or other relevant actors, most notably corporations) through exposure and/or by mobilizing sympathetic consumer constituencies within the integrated global economy. The former is by now a well-honed tactic of the human rights movement through which objectives are secured by public relations mechanisms. The recent controversy surrounding Royal Dutch Shell's proposed scuttling of an oil rig [the Brent Spar] in the North Sea presents one recent example of the latter. Shell had received all appropriate domestic and international approvals to leave the Brent Spar rig on the ocean floor. Greenpeace objected and launched a campaign to boycott Shell gasoline. Within weeks, Shell's sales in Germany were down 30%, at which point the oil giant relented. Shell has since sought out Greenpeace for consultations in planning the decommissioning of other rigs. Similar tactics were deployed against France to protect its recent nuclear testing program in the South Pacific. Although the tests were completed as planned, the success of Greenpeace's consumer action campaign may have contributed to France's decision not to undertake more tests in the future.

Brent Spar-type tactics are effective in proportion to a corporation's or state's dependence on consumer trade.... There will also be episodes in which the possible costs of boycott efforts will not outweigh the benefits of the activity that the NGO seeks to halt. This may help to explain Shell's continued presence in Nigeria notwithstanding objections to the human rights practices of the current regime there [e.g., §10.5.B. *Unocal* case]. While NGO power is not absolute, it is significant and growing.

2. Corporations.

As with the case of NGOs, corporations have long enjoyed a presence at the international level. The Hudson's Bay and British East India Companies were effectively sovereign over their far-flung trading realms, engaging in such characteristically governmental activity as coining currency, concluding treaties, and making war. During the 1960s and 1970s, the activities of multinational corporations were subjected to international scrutiny in the face of lesser developed countries' claims of capitalist exploitation.

In the interwar era of the 1920s and 1930s, the International Chamber of Commerce [ICC] participated in a variety of League of Nations proceedings and even signed some League instruments as a party. Corporate alliances such as the ICC now participate in international contexts as NGOs, subject to the same requirements and enjoying the same rights as others under the consultative status system. Corporate interests have also organized themselves for the issues of the day, for example, by forming a highly effective Business Council on Sustainable Development to participate in multilateral forums relating to the international environment.

Corporations so grouped thus enjoy some formal status in international institutions. But, as with NGOs, the status is decidedly second class even as real-world corporate power grows. Except at the ILO [International Labor Organization], the corporate community does not enjoy a seat at the table, at least not in its own name. Corporations generally have no standing in public international judicial and dispute resolution bodies, even where they effectively may be the only real parties in interest. This may have been the case with the first decision handed down by the new World Trade Organization dispute resolution panel, which, though styled as a dispute between Brazil and the United States, was in fact more a dispute between two oil companies.

Excluding corporate actors from formal decision-making processes, as well as absolving them from ultimate accountability under international law, may have made sense in a world in which corporations had a clear national identity and could be adequately represented by and through particular states. Until recent years, this had held more and less true. Even during their vilification during the sixties and seventies, the so-called “multinationals” qualified as such by virtue of a mere presence in more than one country. The moniker “multinational” has not, at least until recently, implied true multi-nationality in the sense of being under the ultimate control of more than one nation, and thus in a sense being in the control of none. ...

Today such national identity and control is no longer so apparent. Some large corporations are becoming truly multinational in the sense that it is now almost meaningless to describe them as, say, American or British or Dutch. Even a corporation so intertwined with US foreign relations as Coca-Cola is now moving to shed its national roots. The increasingly cosmopolitan nature of international corporate giants is reflected in corporate structures that make them difficult to regulate from any single state.

Indeed, it is becoming increasingly difficult for states to regulate even those corporations that maintain a strong national identification. As global capital becomes more mobile and the global economy more competitive, state efforts to constrain corporations may be doomed to fail in some contexts. The United States, for example, would find it very difficult, at best, to impose its domestic minimum wage laws on a US corporation’s operations in Malaysia, for to do so would place the US corporation at a disadvantage against competitors from other nations not subject to the same regulation. In turn, a developing state like Malaysia could not itself impose a minimum wage so long as other countries did not do the same, for to do so would likely force the US corporation to relocate outside Malaysia. To the extent this description now reflects real-world conditions, the corporate community itself could become an ultimate repository of power.

No wonder that NGOs have moved on some issues to influence corporate behavior directly, rather than indirectly by winning state regulation to the same effect. Such has been the case with the Brent Spar incident and other boycott efforts. It has also characterized the shareholder responsibility movement, in which progressive interests enjoying large shareholding interests (most notably, US state and local pension funds as well as churches) pressure corporations through shareholder resolutions to adhere to environmental and human rights practices beyond those required by domestic or international law.

3. Subnational governments.

Subnational governments [like New York, Quebec, or Tijuana] are assuming an unprecedented role in global affairs. Subnational governments active at the international level include provinces, localities, and perhaps most notably the constitutive units of federative nation-states. The international profile of subnational governments has been most enhanced in recent years in the economic cultural spheres. Sister-city arrangements [in different countries] blossomed in the 1980s, and it is now routine for subnational officials to undertake international promotional campaigns (through trade delegations or permanent trade offices) to attract foreign investment into their jurisdictions. These activities have been facilitated by advances in global travel and communications, as well as by the global economic integration that makes transnational investment possible (and indeed necessary) to economic growth.

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