

The International Commission for the Protection of the Rhine and Other Stories: An Argument for the Mandatory Inclusion of Non-Governmental Organizations in International Agreements

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ABSTRACT

Though traditionally not parties to international agreements designed to protect watercourses or other natural resources, non-governmental organizations (“NGOs”) and other non-state actors can provide valuable assistance to such initiatives in multiple ways and should therefore be included as formal participants. Access to information is a critical factor in consistent progress in the management of international watercourses, and the presence of NGOs and their experts in the field can facilitate such access and are more likely to distribute it among multiple states. Further, political pressure is a powerful motivator for the completion and success of international initiatives. NGOs are uniquely effective in stirring up such pressures in a single state or across multiple. Finally, providing NGOs with a right to action under international watercourse agreements increases the likelihood that a violator will be held accountable. The International Commission for the Protection of the Rhine, as well as other international agreements to preserve and distribute water resources, have benefitted from the participation of NGOs in their regulatory scheme in one or multiple of the above ways. This Note draws primarily on the experience in the Rhine River, supplemented by experiences in other international water bodies, to argue that the participation of NGOs in international agreements should be the norm, as it will increase the chances of the scheme’s success.

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INTRODUCTION

The International Commission for the Protection of the Rhine (“ICPR”) is widely regarded as one of the most successful examples of international cooperation, especially in the context of water resource conservation.¹ As with most surface water protection initiatives, the ICPR was formed as the ultimate result of pressure from the downriver riparian nation, the Netherlands. Both Dutch concern about the water quality and the region’s growing awareness of the river’s inability to sustain its salmon populations led the riparian states to take action for the Rhine’s rehabilitation and protection. In the fifty years following the ICPR’s 1963 formalization, the ICPR has taken important steps to rehabilitate and preserve the Rhine.² Importantly, in 1987 the ICPR developed the Rhine Action Programme in response to the Sandoz chemical spill, which rendered portions of the river ecologically unviable. The Programme was intended to, and did, conclude in 2000, after which it was replaced by Rhine 2020, which is to be completed in 2020.³ The ICPR activity that is the focus of this paper, however, is the 1999 Convention on the Protection of the Rhine, for one core reason. Article 14 of the Convention states that the ICPR “shall cooperate with other intergovernmental organizations and may address recommendations to them.”⁴ Further, it states that the ICPR “shall exchange information with non-governmental organizations” and “shall in particular consult such organizations before discussing decisions liable to have an impact on them and shall inform them as soon as such decisions have been taken.”⁵

The ICPR is recognized as the beginning of a movement in international law towards the inclusion of non-governmental organizations (“NGOs”) in the language of international agreements and the practice of cooperating within such regimes.⁶ Today, NGOs are important participants in international environmental law, as they occupy roles central to formulation, implementation, and enforcement of the agreements’ conditions.⁷ NGOs’ relationship of trust with the public make them valuable assets for a number of reasons, and as states come to recognize this they become more willing to include them in international

1. See Ellen Pfeiffer & Jan Leentvaar, *Knowledge leads, policy follows? Two speeds of collaboration in river basin management*, 15 WATER POL’Y 282, 284 (2013).

2. See *id.*

3. Nathalie Plum & Anne Schulte-Wulver-Leidig, *From a sewer into a living river: The Rhine between Sandoz and Salmon*, 729 HYDROBIOLOGIA 95, 100 (2012).

4. Convention on the Protection of the Rhine art. 14, ¶ 1, Apr. 12, 1999.

5. *Id.* at art. 14, ¶ 3.

6. See generally Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 546–47 (1997).

7. *Id.* at 538.

environmental law.⁸ For example, in deciding to include NGOs in the drafting of its charter, the United Nations Conference on Environment and Development stated “the United Nations system, including international finance and development agencies, and all intergovernmental organizations and forums should, in consultation with NGOs, take measures to . . . enhance existing or, where they do not exist, establish mechanisms and procedures within each agency to draw on the expertise and views of NGOs in policy and programme design, implementation, and evaluation”⁹ NGOs such as the Environmental Defense Fund and the Nature Conservancy have gone beyond mere consultation and campaigning in the U.S.-Mexican Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, committing, along with other NGOs, to contributing a portion of the flow by acquiring water rights.¹⁰ Of course, the benefits of NGO participation are limited to certain subject matter areas. One would not, for example, consider the inclusion of an NGO in discussions related to war and national security due to the sensitive nature of those subjects.¹¹ Human rights-related issues, however, can benefit substantially from the perspectives of NGOs.¹²

In order to increase the success of international water agreements, parties should include NGOs as formal participants. Using both the ICPR and other success stories from around the world as examples, this Note first discusses the unique ability of NGOs to build support for new waterway regimes. Next, this Note proceeds to show that NGOs are well-positioned to provide international commissions with information and expertise at a low cost to the member states. Finally, this Note emphasizes the benefits of providing NGOs with a right of complaint under an international agreement.

I. BUILDING SUPPORT FOR A NEW STATUS QUO

Public and domestic political support for international environmental agreements is necessary at multiple stages of negotiation. First, it is key that the public support the new agreement if it is to be complied with under current and future elected officials. It is also necessary for current elected officials to support the agreement if it is to be ratified in the first place. NGOs are well-positioned and well-resourced to drum up this support and involving them in the negotiation process or providing them rights and remedies in the agreement will increase their motivation to assist in creating support. NGOs are able to catalyze public support

8. *See id.* at 565–66.

9. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 265 (1997).

10. William F. Stanger, *The Colorado River Delta and Minute 319: A Transboundary Water Law Analysis*, 37 ENVIRONS: ENVTL. L. & POL’Y J. 73, 93 (2013).

11. David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT’L ENVTL. L. & POL’Y 1, 4 (1996).

12. Raustiala, *supra* note 6, at 561.

by raising awareness about environmental issues affecting the state which create a sense of urgency.¹³ They are also able to spend time and money on publicity campaigns, and can serve as a channel for information from the negotiating table to the domestic public.¹⁴ Such transparency can bolster trust in the international institution because NGOs, depending on their size and scope, are often well-connected to communities affected by environmental degradation. As a result, they are able to focus their resources on the issue and, in some cases, provide direct assistance to such communities.¹⁵ Of course, NGO involvement can also cause public opinion to swing in disfavor of international decisions. For example, NGOs that were provided observer status in the Convention on International Trade in Endangered Species (“CITES”) alerted the media and the public about the United Kingdom and Ireland’s inclusion of a provision allowing Hong Kong to continue selling ivory from African Elephants for another six months after its prohibition in CITES.¹⁶ Because of their vast resources, the World Wildlife Fund was able to provide the public with specific information about how much ivory was unaccounted for in Hong Kong, creating a picture of how large this impact would be.¹⁷ Greenpeace also considered bringing legal challenges under United Kingdom law.¹⁸

The Rhine river basin is extensive and supports dense populations by providing drinking water for upwards of 30 million people and connecting European industrial centers.¹⁹ The concerns are area-focused and revolve around small-scale conservation issues, drinking water quality, and recreational uses, especially to the extent these contribute to tourism.²⁰ At the local level, this river basin is particularly interesting because it involves a significant amount of support for cleanup efforts from industry sources, including the water supply and chemical industries. Notably, these industry interests are well-aligned with those of the local residents.²¹ The ICPR provides non-members with a range of participation options, from observer status—which most of the NGOs and intergovernmental

13. See Sarah C. Schreck, *The Role of Nongovernmental Organizations in International Environmental Law*, 10 GONZ. J. INT’L L. 252, 261 (2006).

14. See David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT’L L. 497, 552–53 (1998).

15. Raustiala, *supra* note 6, at 559; see Schreck, *supra* note 13, at 262.

16. See Philippe J. Sands & Albert P. Bedecarre, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 B.C. ENVTL. AFF. L. REV. 799, 817 (1990).

17. See *id.*

18. *Id.* at 819.

19. See Pfeiffer & Leentvaar, *supra* note 1, at 283.

20. See generally Tun Myint, *Democracy in Global Environmental Governance: Issues, Interests, and Actors in the Mekong and the Rhine*, 10 INDIANA J. OF GLOBAL LEGAL STUD. 287, 300–306 (2003).

21. See Carel Dieperink, *Successful International Cooperation in the Rhine Catchment Area*, 25 WATER INTL. 347, 351 (2000).

organizations occupy—to a consultation role.²² NGO participation in this agreement enabled the creation of social awareness internationally and especially in states that are in violation of the conventions.²³ With the participation of NGOs at all levels of the interest ladder, the ICPR is well-equipped to consider a wide variety of concerns.²⁴

One of the main problems faced by the ICPR in reaching agreement in the process of determining the conditions and distribution of responsibilities for the ultimate convention lies in the lack of political support for environmental initiatives internationally.²⁵ The progress that was made with respect to pollution in the Rhine during the initial years was due to national pollution programs, and the efforts of each state individually to reduce discharges into the river.²⁶ Influence of NGOs was key to bringing the nations to the table because it raised the profile of pollution issues in the Rhine to the public.²⁷ The triggering incident for the Rhine Action Programme in 1987 was the Sandoz chemical spill, when a fire started in a chemical storage facility in Switzerland. Though the firefighters were able to extinguish the fire, the water from the hoses combined with the chemicals in the storage facility and flowed into the Rhine, causing several hundred miles of the river to become ecologically unviable.²⁸ The chemical concentrations were so dangerous that they completely eradicated a native eel species.²⁹ Although environmental issues were already at the forefront of political concern at this time, local activist groups were able to bring awareness to the Sandoz spill and ignite public concern about the seriousness of cleaning up the Rhine River.³⁰ This provided the Dutch government with another opportunity to push forward in ICPR negotiations.³¹

NGOs that were granted observer status in the ICPR were also able to ensure the public's representation in the decision-making process by keeping them informed on current matters before the ICPR and items of interest, and by gauging interest or support for developments, such as the basin management plans.³² NGOs are able to rally a much larger base for the benefit of the environment and water quality, and are able to project their message onto a much larger stage, increasing the pressure on the states to come to a beneficial agreement with each

22. MARCEL SZABO, PUBLIC PARTICIPATION – HUMAN RIGHT OR AN INSTRUMENT OF INTERNATIONAL ADMINISTRATIVE LAW 110 (2014).

23. *Id.*

24. See Dieperink, *supra* note 21.

25. See Myint, *supra* note 20, at 304.

26. See Marco Verweij, *The Remarkable Restoration of the Rhine: Plural Rationalities in Regional Water Politics*, 42 WATER INT'L 207, 210 (2017).

27. See Myint, *supra* note 20, at 304.

28. *Id.* at 309.

29. Dieperink, *supra* note 21, at 350.

30. Verweij, *supra* note 26, at 210.

31. See Myint, *supra* note 20, at 310; Dieperink, *supra* note 21, at 350.

32. See generally Plum & Schulte-Wulver-Leidig, *supra* note 3, at 104.

other. The reporting and dissemination of public information that NGOs facilitate when they are involved in an international initiative confirms to the public that the states are taking the process seriously and aid in the ICPR's development of legitimacy at home and abroad.³³ Further, allowing local groups to take part in the decision-making process and keeping them informed of issues can assuage potential hostilities towards the process or the result.³⁴

II. INFORMATION GATHERING AND EXPERTISE TO SUPPORT IMPLEMENTATION

NGOs can provide an important information and research-gathering function to supplement the knowledge base of the member states because they often have experts on diverse environmental issues on staff, are well funded, and are able to devote the entirety of their resources to the issue in which they specialize.³⁵ They have the capacity to conduct studies such as the mission the Society for Preservation of the Fauna of the Empire sent to Africa to research endangered species. This study was ultimately used in the creation of a new treaty by the International Congress for the Protection of Nature.³⁶ On the other hand, government resources are often stretched thin between the issue at hand in the negotiation and other international concerns that require their immediate attention.³⁷ Thus, the inclusion of NGOs in international environmental negotiations can drive a more informed, accurate, and efficacious decision-making process.³⁸ An example of such cooperation is the provision of technical expertise by NGOs to the Organization for Economic Co-Operation and Development's ("OECD") Chemicals Group, which oversees the exportation of pesticides and industrial chemicals, chemical testing, industrial accidents, and confidential business information.³⁹ NGOs participating in this international organization are coordinated by the World Wildlife Fund and are able to participate in and advise U.S. delegations to Group meetings.⁴⁰ This participation has both brought crucial information to the OECD and garnered increased support from the public through transparency and communication.

NGOs have also provided technical and legal expertise to CITES, widely regarded as the first large, multinational agreement that provides for active inclusion of NGOs in the decision-making process.⁴¹ NGOs have taken on a role as guardians of the CITES mission, and even take part in monitoring compliance

33. See Christopher L. Pallas & Johannes Urpelainen, *NGO monitoring and the legitimacy of international cooperation: A strategic analysis*, 7 REV. INTL. ORGAN. 1, 6 (2012).

34. See generally Plum & Schulte-Wulwer-Leidig, *supra* note 3, at 104; Ardia, *supra* note 14, at 551.

35. Raustiala, *supra* note 6, at 558–59.

36. Charnovitz, *supra* note 9, at 241.

37. See Raustiala, *supra* note 6, at 558–60.

38. Wirth, *supra* note 11, at 32.

39. *Id.* at 15, 33–34.

40. *Id.* at 15.

41. See Raustiala, *supra* note 6, at 547, 549; Sands & Bedecarre, *supra* note 16, at 800.

and enforcement practices.⁴² Though NGOs participate as observers without a vote in the ultimate outcome, they have taken action as influential as preparing a legal opinion for the consideration of all voting parties. The World Wildlife Fund, in response to the uplisting of the African Elephant from an Article III species to an Article I species, provided a written opinion to CITES regarding the legality of a resolution attempting to deal fairly with the ivory stockpiles that states had acquired during the species' listing in Article III.⁴³ Seeking out legal opinions from NGOs is not an uncommon practice among CITES members, as they can be useful by providing a mission-focused perspective on an issue to be decided. These opinions are unencumbered by international political relationships.⁴⁴

The ICPR is funded by all of the member states via a distribution key, but Germany, France, and the Netherlands each pay equal shares making up over 75% of the budget.⁴⁵ This budget, however, is often stretched thin between the many priorities the ICPR has enumerated. For example, it is required to (1) study the nature, volume, and origins of the Rhine pollution; (2) propose appropriate measures to control pollution to the governments of contracting parties; (3) undertake any other task jointly entrusted to it by the governments of contracting parties; and (4) draw up a yearly report on its activities.⁴⁶ The implementation of the resulting proposals can also be costly because they require the construction of treatment plant infrastructure, salmon habitat connections, flood prevention infrastructure, and continuous monitoring, among other things.⁴⁷ Though the Convention is signed only by the member states to the ICPR, it requires, per Article 14, the exchange of information and consultation with interested NGOs and cooperation with intergovernmental organizations.⁴⁸ These NGOs are primarily German, but they represent all of the member states and Belgium.⁴⁹ Local environmental groups, industry organizations, and international environmental groups all participate in the sharing of information and perspectives because they are equipped to obtain the relevant knowledge through their contacts and constituencies.⁵⁰

III. CITIZEN ENFORCEMENT MECHANISMS IN INTERNATIONAL AGREEMENTS

NGOs are an important and successful catalyst for enforcement of international environmental agreements. NGOs are able to use public pressure as an enforcement

42. Sands & Bedecarre, *supra* note 16, at 800.

43. *Id.* at 815.

44. *Id.* at 813.

45. Plum & Schulte-Wulver-Leidig, *supra* note 3, at 96.

46. See Myint, *supra* note 20, at 302–03.

47. ICPR: INTERNATIONAL COMMISSION FOR THE PROTECTION OF THE RHINE, <https://perma.cc/C9AB-EM5L>.

48. Convention on the Protection of the Rhine art. 14, ¶ 3, Apr. 12, 1999, https://www.iks.org/fileadmin/user_upload/DKDM/Dokumente/Rechtliche_Basis/EN/legal_En_1999.pdf.

49. ICPR: INTERNATIONAL COMMISSION FOR THE PROTECTION OF THE RHINE, *supra* note 47.

50. Dieperink, *supra* note 21, at 351.

measure by publicizing violations by member states and also have the resources to bring formal enforcement suits, either under domestic laws ratifying an international treaty or under the international agreement itself, if citizen enforcement is provided for in the agreement's language.⁵¹ NGOs are uniquely positioned to take these actions because they are often better informed of violations or issues because environmental monitoring is their priority.⁵² NGOs are also less burdened by political obligations or concerns about retaliation from other member states, allowing them to take steps towards enforcement unencumbered.⁵³ Knowledge of the NGO's freedom and likelihood to take action through public pressure or formal measures has both a deterrent and an enforcing effect on the member states.⁵⁴ The NGO's involvement can also facilitate trust between the member states, as monitoring by independent parties can help to assuage concerns about undetected defection by other states or free-ridership on the contributions of states.⁵⁵

In the early 1980's, the North Fork River, which runs along Glacier National Park in Montana near the Canadian border, was threatened by a Canadian mining company's plan to dig open-pit coal mines that would affect the River's water quality and biodiversity.⁵⁶ NGOs' attachment to this area and the public's passion for it, created such a drive that the Montana congressional delegation brought the matter to the State Department, requesting that the issue be adjudicated by the International Court of Justice as a violation of the Boundary Waters Treaty.⁵⁷ The coal proposal for this area died, but not without attempts by the Canadian government, and later the Montana state government on a different lease, to profit from it. Fortunately, because of local awareness of the issue and continual NGO efforts to find a way to protect the Boundary Waters area, no mining plan came to fruition.⁵⁸ Ultimately, NGOs, including the Nature Conservancy and its Canada branch, were able to buy out the Canadian mining leases by securing private funding.⁵⁹

Another case in which an NGO was instrumental in the protection of a water body at the core of an international agreement is Ukraine's attempt to build the Danube-Black Sea Canal without international consultation.⁶⁰ The Danube River and the states that make use of it are governed by a number of international

51. See Tanya D. Sobol, *An NGO's Fight to Save Ukraine's Danube Delta: The Case For Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 123, 124 (2006).

52. *Id.* at 149.

53. *Id.* at 130; see Ardia, *supra* note 14, at 560.

54. SZABO, *supra* note 22, at 105.

55. See Pallas & Urpelainen, *supra* note 33, at 3.

56. Jack Tulhoske & Mark Foster, *Solving Transboundary Pollution Disputes Locally: Success in the Crown of the Continent*, 92 OR. L. REV. 649, 690 (2014).

57. *Id.*

58. See *id.* at 686.

59. *Id.* at 709.

60. Sobol, *supra* note 51, at 125–26.

agreements that provide NGOs with an avenue for legal process.⁶¹ These agreements also provide that a state seeking to disrupt or develop the delta in any manner must provide notice and complete an environmental review prior to commencing the project. Ukraine chose instead to go ahead with the building of the canal without notice to the other delta states and without completing a full environmental assessment.⁶² However, a Ukrainian NGO, Ecopravo-Lviv (“EPL”), took notice of the project and immediately brought suit against its construction in front of multiple commissions overseeing the Danube delta.⁶³ It was important for EPL to have this avenue under the international agreements because of its lack of success in domestic courts and its lack of ability to sue in the International Court of Justice.⁶⁴ Because NGOs in Ukraine, though allowed to organize, are largely viewed as advancing Western interests, they are unsuccessful in their attempts to find justice in the court system.⁶⁵ Unfortunately, this sentiment is not unique to Ukraine, and such hostility can increase the challenge of formalizing public participation in an international agreement.⁶⁶

Appearing before the Implementation Committee of the Espoo Convention (“Committee”), EPL claimed that Ukraine had ignored its duty to complete an environmental impact assessment and provide the assessment to all potentially interested parties and affected states.⁶⁷ Despite bringing the issue first to the Espoo Secretariat, and the merits of the complaint itself, the Committee found that it was unable to act upon EPL’s complaint because an NGO did not have standing before it.⁶⁸ EPL also filed a complaint with the Compliance Committee of the Aarhus Convention on the grounds that Ukraine had violated the requirement to inform the public of the proposed construction and to provide access to a complete environmental impact assessment.⁶⁹ The Compliance Committee heard the complaint, found Ukraine in violation of the convention’s conditions, and, after a vote, ordered Ukraine to improve its domestic laws about public notice and participation so that they align with those required under the Danube conventions.⁷⁰ Though EPL was ultimately unable to prevent the construction of the canal due to Ukraine’s violation of the notice requirements, it was successful in drawing attention to both the importance of the preservation of the Danube and the failures of international tribunals in barring NGOs from bringing suit.

NGOs can be particularly useful in enforcing international treaties because of NGOs’ deep connection and interest in the issue. NGOs’ perseverance and drive

61. *Id.* at 125.

62. *Id.*

63. *Id.* at 126.

64. *Id.* at 128, 144.

65. *See id.* at 142.

66. SZABO, *supra* note 22, at 106.

67. *See* Sobol, *supra* note 51, at 151–52.

68. *Id.* at 153.

69. *Id.* at 154.

70. *Id.* at 155.

to use any tools available to them to achieve compliance, as demonstrated by the examples in Montana and Ukraine, should be attractive to states that already have a strong incentive to comply with the terms of the agreement, yet may be less trusting of their international partners. Formally including NGOs in international agreements could allow them to participate in procedures for complaints and adjudication, or at least provide them with more current and accurate information to disseminate to citizens and the press when conducting a pressure campaign.⁷¹

CONCLUSION

As evidenced by examples of active NGOs around the world, allowing NGO participation in international environmental agreements, and particularly water protection agreements, can aid in creating political support among both the public and domestic politicians, reduce the cost of research and the procurement of accurate and detailed information, and increase the likelihood that member states will be held to account for compliance with the convention. Therefore, in order to increase the success of international water agreements, NGOs should be included as formal participants able to engage in ways similar to member states.

The ICPR offers an interesting example for preservation of international waterways. The high level of awareness and activism within the basin states due to the significant public concern caused a lot of external political pressure that the states had to consider in their representations to the ICPR and their dealings with the other basin states. In the Rhine, the states struggled mostly internally, with rivaling industry groups and activist organizations, and even in their respective parliaments. The Convention's inclusion of any NGOs that do work related to the mission or goals of the ICPR was essential to its ability to collect and distribute accurate information and come to the most effective conclusions with regard to implementation of ICPR decisions. The Rhine river basin area is uniquely situated to open itself up to this kind of public participation because most of the member states are already receptive to public participation within their own governments. In many other parts of the world, NGOs and public participation are faced with much more hostility.

It is important to note that the presence of NGOs in the local or international political discussion of an international agreement does not actually hinge on their formal inclusion in the agreement, as observer parties or otherwise. NGOs will exist and will opine on the issue whether or not the member states have decided to include them in their processes. Therefore, it is in the best interest of the member states to include NGOs, to offer them an opportunity to make their voices heard, and to ensure that the information they are publicizing, whether to the benefit or detriment of the decision's popularity, is accurate.

71. See Pallas & Urpelainen, *supra* note 33, at 25.