

Institutionalization of Cooperation Between Inter-Governmental Organisations and NGOs: The BSEC Experience

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Abstract. The paper addresses the issue of the establishment of formal relations between the inter-governmental Organisation of the Black Sea Economic Cooperation (BSEC) and NGOs. After a brief presentation of the objectives, functions and structure of the BSEC, the paper undertakes to situate the phenomenon of cooperation between inter-governmental organizations and NGOs in the broader framework of the role of non-state entities in the international community. The presentation continues by focusing on the discussion in the BSEC concerning the establishment of criteria for institutionalising the Organisations's relations with NGOs. This paper moreover analyses the BSEC – NGOs cooperation as it has evolved in practice, with the various forms that such interaction can take, and it reflects on the lessons learned and the prospects of such cooperation.

Keywords: Organisation of the Black Sea Economic Cooperation (BSEC), WTO, WHO, transparency, legitimacy

1. Introduction

The year 2002 marked the ten-year anniversary of the Black Sea Economic Cooperation (BSEC), an initiative taken in the aftermath of the end of the Cold War and the division of Europe by eleven States in the wider region around the Black Sea.¹ At the same time, this year marked the closing stage of the first two-year tentative period of institutionalised relations between the inter-governmental Organisation of the BSEC and a number of NGOs, which were granted a “sectoral dialogue partnership” status by the Council of Ministers of Foreign Affairs of the Organisation in April 2000.² Presently the second term of cooperation between the BSEC and NGOs is drawing to its close and the decision-making instances of the Organisation will have to deliberate on the continuation or not as well as the expansion or limitation of formal relations with NGOs that manifest interest in the BSEC activity. At this juncture, an evaluation of the so far interaction between BSEC and non-government actors as well as a discussion on the prospects of such interaction and on its impact on the functioning of these dissimilar agencies are in order.

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¹ Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russia, Turkey, Ukraine. In April 2004, Serbia and Montenegro adhered to the BSEC bringing to twelve the number of its members.

² COUNCIL OF MINISTERS OF FOREIGN AFFAIRS, Chisinau, 27 April 2000, REPORT OF THE SECOND MEETING, Doc. BS/FM/R(2000)1, Annex VII, Resolutions, para. 7, in BSEC HANDBOOK OF DOCUMENTS, vol. V 15, 17 (2002).

1.1. *A brief insight into the BSEC*

Before addressing the main issue of this paper, a short, general presentation of the Organisation of the BSEC is required in order to facilitate understanding the functioning of this inter-governmental institution as well as the scope and implications of its cooperation with non-governmental actors.

The BSEC was initiated in 1992 as an informal forum of dialogue and cooperation with the lofty aim to transform the wider Black Sea area into an area of peace stability and prosperity. This diplomatic initiative started its operation through periodic meetings at different levels of experts, senior officials and ministers. This web of encounters strengthened the cooperation spirit and led to the decision of the heads of state or government of the participating states to transform the BSEC initiative to an international organisation of regional cooperation upholding the initial aim of bringing peace, economic development and prosperity in the Black Sea region and affording a legally binding framework for realizing this objective. An international treaty, the Charter of the Organisation of the Black Sea Economic Cooperation, was negotiated and signed to this effect in Yalta, on 5 June 1998. The BSEC Charter was subsequently ratified by the parliaments of the signatory states and entered into force on 1 May 1999. The diplomatic dialogue forum was vested thus with international legal personality and the cooperation acquired a binding framework. The latter is composed by resolutions, which are approved by consensus and are mandatory for all the BSEC member states, and decisions, adopted by qualified majority and binding for the member states that have voted in favour of them.

The Organisation of the BSEC as emerged from its Charter is an inter-governmental mechanism of cooperation, encompassing principal and subsidiary organs. The structure is headed by the Council of Ministers of Foreign Affairs, which is the regular decision-making BSEC organ, adopting the resolutions and decisions. The Council meets regularly every six months and its sessions are prepared by the Committee of Senior Officials, which represents the Council and acts on its behalf. The Committee, which meets frequently, is the organ where all BSEC issues are discussed and the relevant recommendations are submitted to the Council for final approval. The top structure of the Organization is completed by the Chairman-in-Office, which rotates every six months, and is entrusted with the implementation of the resolutions and decisions adopted by the Council. The bulk of the groundwork of the BSEC is laid by the subsidiary organs, mainly Working Groups and Group of Experts. There are Working Groups for each area of cooperation provided for in the BSEC Charter. Expert Groups are constituted on an *ad hoc* basis whenever the need arises for studying specific issues. The subsidiary organs function in accordance with their mandate adopted by the Council, develop joint programmes and projects, submit recommendations and pursue their implementation following approval by the Council. The secretarial services for the BSEC are secured by the Permanent International Secretariat (PERMIS), which is the coordinating centre in the horizontal flow of information and for the work pursued in the BSEC process.

The inter-governmental structure of the BSEC is round off by four dimensions, i.e. a parliamentary, a business, a financial and an academic one. These dimensions are

qualified by the Charter as BSEC related bodies. The inter-parliamentary component of the BSEC is the Parliamentary Assembly of the Black Sea Economic Cooperation (PABSEC), a consultative body composed by MPs of the BSEC member states offering a pluralistic perspective to the Organisation. The BSEC Business Council representing the business circles of the BSEC member states, is a “non-governmental organisation”³ which has a role to act as a hub of interaction, incubating business opportunities within the BSEC process. The financial dimension of the BSEC, the Black Sea Trade and Development Bank, was established in 1995. The Bank operates in line with private banking principles and is expected to help to mobilize and channel financial resources within the BSEC, to finance bankable regional projects, to act as a catalyst in the development of ventures by banks, to encourage co-financing on the international plane and to contribute in stimulating flow of investments to the region. The BSEC academic pillar is the International Centre for Black Sea Studies, mandated with carrying out reliable scientific work, policy-oriented research and studies on topical issues of common concern which can contribute to the realisation of the BSEC objectives. In this way the ICBSS is the acknowledged think-tank of the BSEC. Furthermore the Centre promotes the academic cooperation within BSEC and between BSEC, EU and international scientists and researchers by fostering contacts among them and establishing structures of dialogue and cooperation in the field of science and technology.⁴

In charting the course of cooperation, BSEC has set a number of priorities, mainly economic. These priority sectors of cooperation have been identified in the BSEC Charter (article 4) and further developed, together with specific implementation mechanisms, in the BSEC Economic Agenda for the Future, adopted in 2001. The priority areas include trade and economic development, banking and finance, communications, energy, transportation, agriculture, environmental protection, tourism as well as science and technology. The principal economic agenda of the organisation is round out by cooperation in other fields of common interest for the member states, that are the struggle against organised crime and terrorism as well as emergency assistance.

In pursuing its objectives, BSEC adopts in its relations on the international stage open stance. The Organisation is open to membership to any state abiding by the principles of the Charter. Serbia and Montenegro has already acceded to the BSEC, while three applications for membership are currently under consideration.⁵ Furthermore it welcomes observer states⁶ and international organizations⁷ and maintains contractual or working relations with numerous international institutions.⁸

³ Described as such by the BSEC Charter, art. 21.

⁴ E.g. the Council of the Presidents of the National Academies of Sciences of the BSEC Member States.

⁵ Islamic Republic of Iran, Former Yugoslav Republic of Macedonia and Republic of Uzbekistan.

⁶ There are currently nine observer states (Austria, Egypt, France, Germany, Israel, Italy, Poland, Slovak Republic and Tunisia) while ten other states have applied for this status (Belarus, Bosnia-Herzegovina, Croatia, Cyprus, Czech Republic, Hungary, Jordan, Kazakhstan, Lithuania, Slovenia).

⁷ Energy Charter Conference, Commission on the Protection of the Black Sea Against Pollution.

⁸ Among others UN Industrial Development Organisation, UN Economic Commission for Europe, UN Environmental Programme, UN Development Programme, Council of Europe, OECD, World Trade Organisation, World Tourism Organisation.

In this spirit of openness, the involvement of business communities and civil society at large was one of the main aims of the launch of the BSEC initiative since its inception in 1992. BSEC was actually conceived as a common effort to build bridges and to establish synergies in the place where for nearly fifty years there was mainly confrontation and barbed wires. In this endeavor the initiating States provided in their Summit Declaration of 25 June 1992 establishing the Black Sea Economic Cooperation for a place and role of other participants than States in the new process.⁹ This early manifested interest for involving non-state actors in the BSEC development is consistent with the belief that in the political and economic conditions that emerged after the end of the Cold War, the main goal of the BSEC, i.e. economic development of the region and of the participating States could no longer be regarded as the responsibility of governments alone; it required a genuine partnership of governments with the social partners, the private sector, labor and non-governmental organisations. It was believed (or hoped) that such an innovative approach could contribute to the continued interaction between the societies of the participating States and broaden the network of contacts in the Black Sea region. For these reasons the BSEC founding fathers provided for an open organisation, an organisation which welcomes the interaction with other international organizations, inter-governmental and non-governmental (articles 8 and 9 BSEC Charter).

The present paper focuses on the internal discussion and developments concerning the relationship between the BSEC and NGOs since the inception of the former. It presents moreover the cooperation between the two as it has evolved in the practice and it reflects on the prospects of such cooperation within the BSEC framework. But before dwelling on these core subjects of the discussion, the paper undertakes to situate these developments in the broader framework of the new role of the non-state entities in the international community, in particular in the field of relations between inter-governmental (IGOs)¹⁰ and non-governmental organisations (NGOs).

2. The Emergence of New Actors in the Province of International Law

Over the past two decades, international society has undergone a profound transformation in many respects. One of the most important structural changes experienced is the erosion of the omnipresence and particularly the omnipotence of the State, dominating the traditional outlook of international society and its law. The parameters and consequences of this new¹¹ trend need further analysis and understanding. There is speculation that this evolution tends to an overall repudiation of state-based founda-

⁹ SUMMIT DECLARATION ON BLACK SEA ECONOMIC COOPERATION, Istanbul, 25 June 1992, in BSEC HANDBOOK OF DOCUMENTS, paras. 11, 18, vol. I 3, 4, 6 (1995).

¹⁰ Another term is “public international organizations”, see Statute of the International Court of Justice, art. 34, paras. 2 and 3.

¹¹ However, until and during the modern nation-state formative period, the papacy, churches and monastic orders, maritime companies administering the newly discovered territories, and other private initiatives were having an active role in the international relations.

tions from international relations. On the other hand, more cautious predictions point toward the creation of a cooperative scheme between new and traditional elements of the international system, a development that would forestall the latter from undergoing a full-scale revision. Yet as the process is ongoing, no definite conclusions can be drawn at present. It is however already evident that new actors have already surfaced in the international arena. The XXth century saw the development of inter-governmental organisations. These organisations played a central role in a vast array of developments, especially during the second half of the century. Composed of mainly, if not exclusively, sovereign States these institutions brought about new elements in international law, but qualitatively remain, more or less, part of the classical, Grotian, paradigm of international law, with sovereignty as its unavoidable keystone and constitutive element.¹²

The new actors that emerged in the last quarter of the past century do not share this fundamental characteristic of international law, i.e. sovereignty as an exclusive domain of power. In this category one can include individuals, transnational corporations, various types of NGOs, interest groups, religious organisations, the media, etc. Taking into account the developments so far, it would not be a wild guess to assume that the already rising influence of these entities in international relations will further expand in various fields of national and international interest.

There are already strong indications, if not proof, that display the intensification of the involvement in international affairs on the part of agents that do not directly or indirectly emanate from States.¹³ These non-state entities are becoming more and more visible in a wide range of international issues. Starting with an example from the economic field, phenomena such as the globalization of markets, the deregulation, privatization and liberalization of economic and social affairs or the growing importance of information and communication technologies are printing their stamp on the current developments, both domestic and international, through the expanding influence of transnational corporations and multilevel regulation of international business. Activities such as communications, transportation, energy and space applications, to give only the most obvious examples, are progressively being transferred from the public to the private domain. In this respect, private enterprises are increasingly bound to become accountable for international obligations assumed by the States in fields like the international protection of human rights, environmental and labor standards, etc.¹⁴ Even the possible privatization of peace-keeping operations, whether or not under Chapter VII of the UN Charter, ceased being a taboo issue,¹⁵ while the unprecedented

¹² Cf. Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BYBIL 65, 83 (1999), where inter-State organisations are qualified as “surrogates or forums for State activity”.

¹³ For a thorough discussion of the issue, see Emmanuel Roucouas, *Facteurs privés et droit international public*, 299 RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL 23ss (2002).

¹⁴ Cf. European Court of Human Rights, *Costello-Roberts v. UK*, A Series, no. 247-C, 57–58, par. 26–27 (1993, March 25).

¹⁵ See J. Schulhofer-Wohl (Research Fellow of the *T.M.C. Asser Instituut*), *Peacekeeping in Sierra Leone Could Be Privatized*, INTERNATIONAL HERALD TRIBUNE, 15 May 2000, p. 8. Three years later, it was established that private corporations have penetrated modern warfare so deeply that they were the second biggest contributor to the coalition forces in Irak, after the U.S. military, Ian Traynor, *The privatization*

scale of the terrorist attacks of September 2001 leads to a phenomenon of “privatization” of the war itself.

Moreover, non-state entities play a critical role in international decision-shaping and treaty-making by initiating and facilitating campaigns aiming at introducing international binding texts.¹⁶ One of the most striking illustrations of such decisive involvement is the negotiation and conclusion of the 1997 Convention banning anti-personnel landmines.¹⁷ The signing of this Convention is the result of a major campaign instigated by a motivated and well-organized number of NGOs, eventually supported by some States with similar concerns, and matured into formal negotiations, which were kept outside the UN Disarmament Conference.¹⁸ The role played by the International Campaign to Ban Landmines (an association of interested NGOs), together with the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies has been of vital importance in the process of the negotiation of this Convention and adoption of the final text. The International Campaign to Ban Landmines was therefore awarded the Nobel Peace Prize for the cooperation between NGOs and governments that led to a “convincing example of an effective policy for peace”.¹⁹ The process of establishment of the International Criminal Court provides another eloquent example of this tendency.

Even *fora* that used to be *ex definitione* inaccessible to the private sector become porous to activities of NGOs. The most eye-catching example is, of course, the ICJ, which has experienced in the past decade intense involvement on the part of various NGOs, despite the fact that the private sector has no status whatsoever (art. 34 ICJ Statute). NGOs have exercised a significant role in the process of submitting to the ICJ the requests for advisory opinions on the legality of threat or the use of nuclear weapons, by both the UN General Assembly and the World Health Assembly.²⁰ They have also been active during the procedures that have followed this move, albeit indirectly.²¹

of war, THE GUARDIAN, 10 Dec. 2003. More generally, Kim Richard Nossal, *Global Governance and National Interests: Regulating Transnational Security Corporations in the Post-Cold War Era*, 2 MELBOURNE JOURNAL OF INTERNATIONAL LAW 459 (2001). On traditional forms of non-state actors' involvement in peacekeeping see Carsten Stahn, *NGOs and International Peacekeeping – Issues, Prospects and Lessons Learned*, 61 ZAORV 379 (2001).

¹⁶ D. Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs shaped a New Humanitarian Agenda*, 23 HUMAN RIGHTS QUARTERLY, 678 (2001).

¹⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 36 ILM 1507 (1997).

¹⁸ Some ninety States fully participated in the negotiations, while thirty States, the UN, the ICRC, the International Federation of Red Cross and Red Crescent Societies and the International Campaign to Ban Landmines attended as observers.

¹⁹ Press Release by the Norwegian Nobel Committee, 10 Oct. 1997, p. 1.

²⁰ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Adv. op., Diss. op. Oda, ICJ REP. 88, 96, par. 16 (1996, June 8); Legality of the Threat or Use of Nuclear Weapons, Adv. op., Diss. op. Oda, ICJ REP. 330, 335–336, par. 8 (1996, June 8).

²¹ It is no secret that some states participating in the proceedings have benefited from the know-how of NGOs active in the fields of environmental protection, scientific research or pacifism. More generally, see Julie Mertus, *Human Rights and the Promise of Transnational Civil Society, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 433, 450–451 (B.H. Weston & S.P. Marks eds. 1999). For previous exam-

Another example is that of the Dispute Settlement Body (DSB) of the WTO, which found that information provided by NGOs on their own initiative should not be considered inadmissible by the panels and, hence, disregarded from the outset.²² Two years later the Appellate Body reiterated the possibility of NGOs to “participate” in its proceedings.²³ By these moves, the Appellate Body opened the way toward potentially extensive participation on the part of NGOs in the proceedings on world trade issues.

The acknowledgment of an active role for NGOs has triggered caution or open criticism with respect to the opportunity of non-state actors to be involved in international trade litigation in terms sometimes perceived as being more favorable than those applicable to the States themselves.²⁴ Skepticism on the growing role of NGOs in international legal proceedings has also been expressed by Judge Guillaume of the ICJ, in his Separate Opinion to the Court’s Advisory Opinion in the case of the *Legality of the Threat or Use of Nuclear Weapons*. The intense implication of private actors for submitting to the ICJ two requests for an Advisory Opinion on the legality of use or threat of use of nuclear weapons, instigated the reaction of Judge Guillaume who “wondered whether, in such circumstances, the request for opinions [from the ICJ] could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible.”²⁵ Judge Guillaume continued in disapproving terms for the interference of NGOs in international affairs by declaring “I dare to hope that Governments and inter-governmental

ples cf. Dinah Shelton, *The Participation Of Nongovernmental Organisations In International Judicial Proceedings*, 88 AJIL 611 (1994).

²² US – Import Prohibition on Certain Shrimp and Shrimp Products, AB Report, WT/DS58/AB/R par. 108, 107 (1998, Oct., 12). The AB has thus quashed the more restrictive interpretation of the Panel in the same case: US – Import Prohibition on Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R, par. 7.8 (1998, May 15).

²³ See Additional Procedure Adopted Under Rule 16 (1) of the Working Procedures for Appellate Review, Communication concerning additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or a third party to the dispute “EC – Measures Affecting Asbestos and Asbestos-Containing Products”, WT/DS135/9, 8 November 2000.

²⁴ Following the interpretation of the Dispute Settlement Understanding (DSU) by the AB which allows NGOs to submit briefs in cases under review by the DSB of the WTO, several WTO Members considered their situation with respect to the possibility to intervene in procedures before the panels less advantageous than that recognized to NGOs. Actually, in accordance with the Article 10 DSU, only a WTO Member “having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel”, while the interpretation of Article 13 DSU given by the AB made it possible for NGOs to participate virtually in any matter they wished. Therefore WTO Members were placed, with respect to the participation to panels’ procedures, in a more onerous position than non members, in that they had to prove a substantial interest in the proceedings and to notify it to the DSB. Cf. WTO Doc. WT/GC/M/60 (Jan. 23, 2001); Josh Robbins, *False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hot-Rolled Lead/Asbestos Doctrine*, 44 HARV. INT’L L.J. 317 (Winter 2003); PETROS C. MAVROIDIS, *AMICUS CURIAE BRIEFS BEFORE THE WTO: MUCH ADO ABOUT NOTHING 2–9* (2001, Harvard Jean Monnet Working Paper 02/01); IOANNIS STRIBIS, *LA MANIFESTATION DES LACUNES EN DROIT INTERNATIONAL PUBLIC 515–518* (2001).

²⁵ *Legality of the Threat or Use of Nuclear Weapons*, Adv. op., Sep. op. Guillaume, ICJ REP. 287, 287–288, par. 2 (1996, June 8).

institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media."²⁶ In general terms, NGOs have been all the more often the target of critics who support that in terms of representation, legitimacy, transparency and accountability they do not score by definition better than the national governments of particular states. Others have warned against the risk of "ideological" NGOs, which aspire to becoming international political parties and try to develop diplomacy, parallel to that of governments, although without legitimacy, democratic basis or control.²⁷

One cannot, however, ignore the widespread and ever growing aspiration of the international public opinion for representation, transparency, and legitimacy. In spite of the not always positive or satisfactory record of NGOs in these fields, with comparison to national governments or other state agencies, the former can contribute to the fulfillment of the aforementioned aspirations. To quote a former Secretary General of the BSEC Permanent International Secretariat, "As SMEs are the backbone of market economy, civil society is the backbone of democracy."²⁸ This general statement calls for qualification, but the main idea expressed therein has a large echo and seems unchallenged in the present state of international affairs. It is legitimate for example to assume that the purpose of the Appellate Body of the WTO in the cases referred to here above (*Shrimps, Asbestos*) to facilitate the involvement of NGOs in the proceedings was also to instill to the WTO – an organisation very often blamed of being cut off from average daily concerns – some elements of democracy and openness.

In any case it must be kept in mind that there is no irrefutable presumption that NGOs may serve the causes of transparency, legitimacy and good governance more effectively than other actors on the international scene; it is however beyond doubt that the cooperation between all of them can be instrumental to the attainment of the afore-mentioned goals. For some international actors, the participation of NGOs in international relations is not only useful but also necessary. Such was the attitude of the regional or sub-regional initiatives and organisations, established in the wider European area during the early nineties: regional cooperation of NGOs and other civil society organisations is considered an essential means for developing pluralistic, open societies and for forming regional (or sub-regional) solidarities, which transcend the national borders and contribute to the realization of the objectives pursued by the relevant initiatives.²⁹ This vision emerges from the belief (and expectation) that NGOs can

²⁶ *Ibid.*, 288, par. 2.

²⁷ These issues rank among the most important inquiries in the debate concerning NGOs. See, among many others, Serge Sur, *Vers une Cour pénale internationale: la Convention de Rome entre les ONG et le Conseil de sécurité*, 103 RGDIP 29, 36 (1999); Julie Mertus, *Human Rights and the Promise of Transnational Civil Society*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 433, 452–455 (B.H. Weston & S.P. Marks eds. 1999); Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BYBIL 65, 96 (1999). Comp. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society*, 11 EJIL 91 (2000).

²⁸ PROGRESS REPORT (October 1999–April 2000), Doc. BS/FM/R(00)1, Annex VII, Attachment 4, in BSEC HANDBOOK OF DOCUMENTS, vol. V 54, 62 (2002).

²⁹ See ACTION PROGRAM FOR THE BALTIC SEA STATES CO-OPERATION, Fifth Ministerial

play a supportive role in the attainment of the common goals set forth by governments and their agencies³⁰ and therefore they can contribute to the promotion and implementation of the objectives of inter-governmental initiatives and organisations.

Having as our point of departure the above general findings on the role of NGOs in the international affairs and its usefulness, as testified by the traditional international actors, with the present article we seek to examine the concrete course and method followed by the Black Sea Economic Cooperation (BSEC) in establishing working relations with NGOs and in institutionalizing these relations. In so doing, the paper will start by discussing the drafting process and its implications for the legal standing of NGOs in the BSEC cooperation framework and the modalities of NGOs' participation in the latter. The internal BSEC deliberations on these issues reveal interesting aspects of the general discussion of the interaction between IGOs and NGOs.

3. NGOs in the BSEC – The Search for Criteria

3.1. *The period before the adoption of the BSEC Charter*

The positive stance towards the engagement of NGOs in its work was shared by the BSEC since its very beginning by the Summit Declaration of 25 June 1992. The newly established regional economic forum manifested its interest in cooperating with NGOs already at the First Meeting of the Ministers of Foreign Affairs of the BSEC Participating States (MMFA), held in Antalya on 10 December 1992, merely six months after the launch of the BSEC. The MMFA instructed “the Working Group on Organisational Matters to define the relations between the BSEC and Non-Governmental Organisations, recognized as such by the United Nations.”³¹ Significantly, equally swift was the interest of NGOs to cooperate with the new regional initiative:

Session, Kalmar (Sweden), 2–3 July 1996, para. 1.3, “Independent civil organisations are an *indispensable* element of democratic societies. An adequate role for these organisations in public life, in keeping with the priorities, which they themselves set, must be ensured. Regional co-operation between NGOs will further strengthen them, and such co-operation is an end in itself.” (emphasis added).

³⁰ See H.H. Koh (Assistant Secretary of State for Democracy, Human Rights and Labor/ Clinton Administration), *Complementarity between International Organisation on Human Rights/ The Rise of Transnational Networks as the Third Globalization*, 21 HUMAN RIGHTS LAW JOURNAL 307, 310 (2000): “in every area of our policy regarding democracy, human rights, and labor, the work of the US Government is increasingly being done not in isolation, but in partnership: not just with other public entities, such as governments and intergovernmental organisations and international financial institutions, but with private entities, such as human rights and humanitarian NGOs; the media; labor unions; religious organisations; and corporations and commercial entities.” Compare PRESIDENT OF THE U.S., NATIONAL SECURITY STRATEGY 22 (2002); SECRETAIRE D’ETAT AUX AFFAIRES ETRANGERES (FRANCE), *Audition devant la Commission des affaires étrangères de l’Assemblée nationale*, <<http://diplomatie.gouv.fr/actu/bulletin.asp?liste=20031114.html#Chapitre8>>.

³¹ MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Antalya, 10 Dec. 1992, REPORT, Doc. BS/FM/R(92)1, Annex IV, Resolution, para. 14, in BSEC HANDBOOK OF DOCUMENTS, vol. I 27, 29 (1995).

an impressive score of 26 had approached BSEC in its first six months with the wish of cooperation.³²

At that point the exact configuration of the relationship between the BSEC and NGOs was not pre-empted. The reference to the UN may have implied the kind of interaction existing in this framework, i.e. consultative status (see *infra*). Be that as it may, it is beyond doubt that at that early stage of this issue's consideration in the BSEC, the UN model was of crucial significance. The Working Group on Organisational Matters (WGOM), at its first meeting in February 1993, considered the matter without reaching any conclusions and therefore decided to return to the issue. However the discussions brought to the surface the question of establishing *criteria* that needed to be elaborated in order to specify what type of NGOs would be permitted to collaborate with the BSEC.³³ It is assumed that such a move was motivated by the lack of broadly accepted authoritative documents concerning the participation and role of NGOs in the work of inter-governmental organisations.³⁴ Thus the need for a set of criteria appeared for the first time in the deliberations in the BSEC context with respect to the interaction with NGOs. The second novel element that emerged from the debate was the skepticism *vis-à-vis* the necessity of establishing relations exclusively with NGOs "recognized as such by the United Nations". Putting aside the inadequacy of the language used, in that there is no UN procedure by which entities are "recognized" as NGOs apart from ascribing them with "consultative status", it was questioned whether the BSEC should disregard *ab initio* the NGOs which are not recognized as such by the UN, but which are active in the BSEC region.³⁵

The issue of the relations between the BSEC and NGOs was dealt with, to a significant extent, at the highest level by the 2nd MMFA (Istanbul, 17 June 1993), while adopting the Rules of Procedure (RP) of the BSEC. Article 24, para. 1 RP provided that any state, international or regional organisation which desired to obtain the *observer status* in the BSEC could submit their *application* to this effect to the BSEC Chairman-in-Office.³⁶ This provision was applicable to NGOs in accordance with Article 1 RP, defining the term "international organisation" as "an international organisation with universal character as well as a regional organisation covering a limited number of countries, *whether governmentally or non-governmentally established*".³⁷ In this way the RP were defining the *form* (at least one) of the relationship between the BSEC and NGOs: *observer status*, which is the same status provided for states and

³² See list in WORKING PAPER ON RELATIONS BETWEEN THE BSEC AND NGOs, Doc. BS/OM/WG(93)11, Annex 1-3 (1993, Sept. 17).

³³ WGOM, Istanbul, 23-24 February 1993, REPORT, Doc. BS/OM/WG/R(93)1, in HANDBOOK OF DOCUMENTS, vol. I 331, 333 (1995).

³⁴ Cf. Marcel Merle, *A legal tangle: the 'status' of non-governmental organisations*, 47 TRANS-NATIONAL ASSOCIATIONS 324 (1995).

³⁵ WGOM, Istanbul, 23-24 February 1993, REPORT, Doc. BS/OM/WG/R(93)1, in HANDBOOK OF DOCUMENTS, vol. I 331, 333 (1995).

³⁶ 2nd MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Istanbul, 17 June 1993, REPORT, Doc. BS/FM/R(93)1, Annex IV, Attach. 1, in BSEC HANDBOOK OF DOCUMENTS, vol. I 515, 528 (1995).

³⁷ *Id.*, at 517.

inter-governmental organizations; from this point of view NGOs were placed on equal footing with the traditional subjects of international law.³⁸ The same provision of the RP determined also the question of the *method* for establishing the relations between the BSEC and NGOs: *application* by the interested NGOs.

Having these main issues resolved, the WGOM that followed (26–27 October 1993) took up the question again with the emphasis put on elaborating criteria that an interested NGO should meet in order to establish relations with the BSEC. In order to facilitate the deliberations of the WGOM, the BSEC Secretariat³⁹ submitted a *Working Paper on Relations between the BSEC and NGOs* containing a nucleus of three criteria: 1) the objectives and activities of the NGO must be in consonance with those of the BSEC, 2) the NGO should be based or operational in one or more of the BSEC participating states, and 3) the NGO should be a non-for-profit and a non-political organisation.⁴⁰ The WGOM elaborated and expanded the proposed list and drew up the following five “Criteria for Establishing Relations with the Non-Governmental Organisations”⁴¹ which were adopted by the 3rd MMFA (Sofia, 9 December 1993):⁴²

- a) The NGO should agree with and abide by the principles and provisions embodied in the Summit Declaration on the BSEC signed by the Participating States on 25 June 1992 in Istanbul.
- b) The NGO should be in a position and willing to contribute to the fulfillment of the objectives and activities of the BSEC.
- c) The NGO should be based or operational in one or more of the BSEC Participating States.
- d) The NGO should make an official statement that it will not misuse its relations with the BSEC to seek financial gain and that it will not get involved in any political activity whatsoever against the interests of any Participating State.
- e) The NGO should be non-political.”

It is worthy to note that the criteria adopted do not refer to the observer status, as it could be expected in compliance with Article 24, para. 1 RP, but aim at “establishing relations”, that remain unspecified in the resolution, between the BSEC and NGOs. This language implies that in the mind of the BSEC participating states the issue of the form of the relationship BSEC and NGOs remained open and that other types of interaction were envisaged besides observer status; Article 24, para. 1 RP had thus not exhausted this item and one should anticipate that the participating states would return to that particular question at another juncture.

³⁸ In the international practice the observer status is provided also for national liberation movements as well as individuals and private companies, see HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* §§ 182–184, 123–126, §§ 196–197, 133–134 (3d ed. 1995).

³⁹ Until early 1994, when the Permanent International Secretariat (PERMIS) was established, the secretarial services were assured by rotation by the ministry of foreign affairs of the member state chairing the initiative.

⁴⁰ WORKING PAPER ON RELATIONS BETWEEN THE BSEC AND NGOS, Doc. BS/OM/WG(93) 11, 5 (1993, Sept. 17).

⁴¹ WGOM, Ankara, 26–27 October 1993, REPORT, Doc. BS/OM/WG/R(93)3, Annex III, p. 1.

⁴² “Criteria and Method of Establishing Relations with the Non-Governmental Organisations” (hereinafter Resolution on the Criteria), BS/FM/R(93)2, Annex VII, Attachment 1, HANDBOOK OF DOCUMENTS, vol. I 65 (1995).

In addition, the Resolution on the Criteria was resolving the early controversy on the necessity of some kind of “recognition” of NGOs as such by the UN as a prerequisite for establishing relations with the BSEC. Such condition was no longer necessary; the Resolution requires that NGOs wishing to establish relations with the BSEC “should be based or operational in one or more of the BSEC Participating States.” The international character of the applicant is not required in that a NGO active in just one BSEC participating state (national NGO) could establish relations with the BSEC, provided it fulfilled the remaining criteria.

The Resolution on the Criteria deliberately omits the requirement that the NGOs interested in establishing relations with the BSEC be non-for-profit. This criterion made it on the short list of the afore-mentioned *Working Paper on Relations between the BSEC and NGOs* together with the non-political character of the applicant.⁴³ The WGOM retained the prohibition of political activities as a condition for establishing relations with NGOs but dropped the requirement that the applicant NGO should not be a profit-making institution. Instead the resolution stipulates as a criterion that “the NGO should make an official statement that it will not misuse its relations with the BSEC to seek financial gain.” *A contrario* a NGO having institutional relations with the BSEC could be a profit-making body (company, corporation, etc.) as long as there was no misuse of its status in the BSEC initiative for lucrative purposes. The word “misuse” employed in the resolution, however, seems to be narrower than the intention of the participating states and has to be construed in the wider sense prohibiting thus also the *use* of the relations with BSEC for making profit. The meaning of this provision, rightly understood, is that any use of the relations of NGOs with the BSEC with the aim of obtaining financial advantage should be renounced by official statement of the applying NGO before the establishment of relations with the BSEC. *De lege lata* this requirement is laid down in an inadequate way and hence is something that interpretation should remedy: what appears as a criterion for establishing relations between the BSEC and an NGO is merely a formal, procedural condition. From a material point of view, *litt. d* of the Resolution on the Criteria stipulates a reason for suspension or termination, in accordance with article 24, para. 12 RP, of an already established relationship. *De lege ferenda* the exclusion of the criterion of the non-for-profit character of the NGOs seeking to cooperate in an institutional framework with the BSEC raises a score of questions on its expediency as well as on the intention of the drafters of the Resolution on the Criteria. The motives are not substantiated and the subsequent practice has not shed any light on them. In any case the cooperation of an inter-governmental initiative with profit making non-state actors follows a different pattern than the relations with non-for-profit NGOs and the legal texts have to reflect this different type of legal relationship.

Be that as it may, the possibility opened up by the provisions of the RP on granting observer status also to NGOs has been used immediately after their approval: at the same 3rd Meeting, which adopted the RP and the Resolution on the Criteria, the

⁴³ See *supra*, WORKING PAPER ON RELATIONS BETWEEN THE BSEC AND NGOs, Doc. BS/OM/WG(93)11, 5 (1993, Sept. 17).

Ministers of Foreign Affairs of the BSEC participating states granted observer status to the International Black Sea Club (IBSC).^{44,45} The relevant resolution of the Sofia Meeting was the first application of Article 24, para. 1 RP and concerned, along with the IBSC, the Arab Republic of Egypt, the State of Israel and the Slovak Republic.⁴⁶ Before the adoption of the RP, at the 1st MMFA, observer status had been granted (along with Poland⁴⁷) to a non-state actor, the BSEC Council.⁴⁸ For the role and importance attached to the cooperation with non-state actors, it is worth noting that in the first two instances of granting observer status in the BSEC, non-state actors figure along states (BSEC [Business] Council – Poland, IBSC – Egypt, Israel, Slovakia).

The resolution of 1993 to grant observer status to the IBSC after the enactment of the RP was not an *ad hoc* measure intended just to accommodate one NGO; it was on the contrary inscribed in the already mentioned larger strategy to involve civil society actors in the BSEC process. However the criteria adopted the same year at the 3rd MMFA have not been applied, for no application has been considered by the Ministers of Foreign Affairs of the BSEC Participating States after their adoption.⁴⁹ One may assume that the initial enthusiasm gave place to some caution and second thoughts among the BSEC participating states with respect to the opening of their initiative to non-state actors.⁵⁰

The new spirit of cautiousness towards the implication of NGOs in the BSEC work explains also the decision of the WGOM (7–9 May 1994) to postpone the consideration of the applications of NGOs that had been received by then on the grounds that the observer status was one of various types of relationship of the BSEC with non-state institutions.⁵¹ The WG however fell short from specifying which the other

⁴⁴ 3rd MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Sofia, 9 Dec. 1993, REPORT, Doc. BS/FM/R(93)2, Annex VII, para. 10, in HANDBOOK OF DOCUMENTS, vol. I 59, 61 (1995).

⁴⁵ The IBSC is a non-governmental organisation of local authorities of twelve cities from six BSEC member states (in 1993, currently twenty cities from six member and one observer – Italy – states), established in 1992 and registered as legal entity under Bulgarian legislation in 1993.

⁴⁶ 3rd MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Sofia, 9 Dec. 1993, REPORT, Doc. BS/FM/R(93)2, Annex VII Resolutions, para. 10, in HANDBOOK OF DOCUMENTS, vol. I 59, 61 (1995).

⁴⁷ MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Antalya, 10 Dec. 1992, REPORT, Doc. BS/FM/R(92)1, in HANDBOOK OF DOCUMENTS, vol. I, 24 (1995).

⁴⁸ *Ibid.*, in HANDBOOK OF DOCUMENTS, vol. I, 31 (1995). The BSEC Council is an informal grouping of businesspeople from the BSEC member states. The status of the latter, whose title became in the meantime *BSEC Business Council*, was upgraded in the BSEC Charter which recognized it as a BSEC Related Body (art. 21).

⁴⁹ It is even doubtful if the decision to grant observer status to the IBSC was preceded by an assessment of the compatibility of its statute and activities with the adopted criteria.

⁵⁰ Note however that the following, 4th MMFA (Tbilisi, 30 June 1994) instructed the WGOM to “discuss at its next session the requests of a number of organisations, to work out the recommendations for granting observer status and elaborate the principles and guidelines to encourage the introduction of NGOs in the BSEC.”, 4th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Tbilisi, 30 June 1994, REPORT, Doc. BS/FM/R(94)1 Annex VI Recommendations, para. 24, in HANDBOOK OF DOCUMENTS, vol. I 95 (1995).

⁵¹ WGOM, Istanbul, 7–9 May 1994, REPORT, Doc. BS/OM/WG/R(94)1, in HANDBOOK OF DOCUMENTS, vol. I 351, 354 (1995).

possibilities hinted at were, depriving thus their “feeling”⁵² from practical results. For this reason the request (by the WG) to the BSEC Secretariat “to explain to the applicant institutions that there were various forms of establishing relations with the BSEC” and the invitation to the applicant NGOs “to make their choice among these various types of relations”⁵³ had no practical use and was not followed by any concrete action by either the BSEC Secretariat or the interested NGOs.

Conscious of the peculiar situation created by the failure to spell out what other types of relations could be established with NGOs that would not be granted observer status in the BSEC, the WGOM returned to the issue at its next meeting (21–22 September 1994) with a recommendation, endorsed by the 5th MMFA,⁵⁴ concluding, firstly, that at that stage observer status could not be granted to NGOs, and, secondly, that it would be desirable to encourage a kind of cooperation with interested NGOs either by inviting them to various meetings of the BSEC subsidiary bodies or by exchanging relevant information through the PERMIS channels.⁵⁵ This arrangement, contained in a recommendation, could not supersede the explicit provision of the RP (article 24, para. 1) and consequently the interested NGOs continued to submit applications for observer status,⁵⁶ which was the only possibility anchored in the normative BSEC texts. Therefore the issue could not have been avoided any longer.⁵⁷ The institutional maturity of the BSEC initiative and its transformation into an international organisation with

⁵² *Ibid.*, “The WG felt that the door should be kept open for all types of relations between the BSEC and the applicant institutions, including the status of observer.”

⁵³ *Ibid.*

⁵⁴ 5th MMETING OF THE MINISTERS OF FOREIGN AFFAIRS, Athens, 14 April 1995, REPORT, Doc. BS/FM/R(95)1, Annex VI Recommendations, para. 59, in HANDBOOK OF DOCUMENTS, vol. I 113, 124 (1995).

⁵⁵ WGOM, Athens, 21–22 Sept. 1994, REPORT, Doc. BS/OM/WG(94)2, in HANDBOOK OF DOCUMENTS, vol. I 359, 362 (1995).

⁵⁶ Fifteen applications of NGOs were filed with the PERMIS, all of them before the entry into force of the Charter: in chronological order: “Future” Foundation (Chisinau), Black Sea Plus (Tbilisi), Romanian Danube-Black Sea Foundation (Bucharest), Black Sea Region Association of Shipbuilders and Shiprepairers (Varna), Balkan Centre of Cooperation for SMEs (Bucharest), BSEC Foundation (Tampa, Florida), Russian Foreign Policy Foundation (Moscow), Turkish Marine Environment Protection Association (Istanbul), Black Sea International Shipowners Association (Odessa), Forum of Architects of the Black Sea Region (Tbilisi), The Regional Working Group for the Cooperation in the Field of Energy Among the Black Sea Region and Central Asian Countries (REWG) (Ankara), Black Sea University Foundation (Bucharest), The Black Sea Universities Network (Constantza), State Institute Russian Maritime Register of Shipping (St. Petersburg), Euro-Mediterranean Trade, Distribution and Services Initiative (Rome).

After the 13th MMFA the Secretariat contacted the applicants asking them to provide the Organisation with their Statutes or other founding documents in order to be considered by the Council of Ministers of Foreign Affairs in due course. Seven applicants have sent the required documents, renewing thus their willingness to be granted the status of observer: “Future” Foundation (Chisinau), Black Sea Region Association of Shipbuilders and Shiprepairers (Varna), Forum of Architects of the Black Sea Region (Tbilisi), The Regional Working Group for the Cooperation in the Field of Energy Among the Black Sea Region and Central Asian Countries (REWG) (Ankara), Black Sea University Foundation (Bucharest), The Black Sea Universities Network (Constantza), State Institute Russian Maritime Register of Shipping (St. Petersburg).

⁵⁷ The WGOM had decided to “reconsider the issue in the light of the responses to be received from” the interested NGOs, REPORT, Doc. BS/OM/WG/R(94)1, in HANDBOOK OF DOCUMENTS, vol. I 351, 354 (1995).

the entry into force of the Charter (1 May 1999) gave a fresh opportunity for considering the issue again.⁵⁸

3.2. *The period after the entry into force of the BSEC Charter*

At the 13th MMFA (Tbilisi, 30 April 1999), the Ministers of Foreign Affairs of the BSEC participating states agreed, with regard to the applications of the NGOs for Observer Status in the BSEC, “to refer to the practice of other related international organisations in order to elaborate, *inter alia*, the definition of the international non-governmental organisations in the framework of the BSEC at a Meeting of the WG on Organisational Matters.”⁵⁹ This move has made clear that the BSEC Member States were considering the list of criteria adopted before in 1993 incomplete or even obsolete, due to the entry into force of the BSEC Charter that contained specific, new provisions on this score (articles 8 and 9), and that they were ready to consider the issue anew. In accordance with this mandate, a session of the WGOM was held (29–30 June 1999) with an item on its agenda titled “Applications of NGOs for Observer Status” with the following two sub-items “a) Definition of the international NGOs in the framework of the BSEC; b) Required criteria for Observer Status”.⁶⁰

It is interesting to note that the relevant item of the agenda refers explicitly to “observer status” putting again this concept at the center stage of the relevant discussion in the BSEC. The split however of the task of the WGOM into the elaboration of a definition and of criteria gave rise to an argument on the necessity of establishing criteria for observer status. According to one view the only task of the WGOM should be the elaboration of the definition of NGOs for BSEC purposes.⁶¹ This view was based on a rather narrow understanding of the task assigned by the Ministers to the WGOM; the latter consisted in “elaborat[ing], *inter alia*, the definition of the international non-governmental organisations in the framework of the BSEC . . .”⁶² The language clearly indicates that drafting a definition was not the exclusive assignment of the WG.

If there had been doubts about the task assigned to the WGOM, these would have borne on the contrary to the issue of definition. Generally speaking definition is a matter of science, not legislation. In this case however it would have been a case of a legislative definition, that is a *genuine* one, in the sense that the definition can be used in

⁵⁸ Cf. the decision of the 9th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Istanbul, 30 April 1997, REPORT, Doc. BS/FM/R(97)1, Annex V, Resolution, para. 40, *in* BSEC HANDBOOK OF DOCUMENTS, vol. III 37, 47 (1998), “to further consider the issue of the relationship between the BSEC and the NGOs in the work of the Drafting Group of the BSEC Charter and prepare relevant recommendations on this subject.”

⁵⁹ 13th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Tbilisi, 30 April 1999, REPORT, Doc. BS/FM/R(99)1, Annex V, Resolution, para. 16, *in* BSEC HANDBOOK OF DOCUMENTS, vol. IV 89 (2000).

⁶⁰ Note of the Ministry of Foreign Affairs of the Hellenic Republic No. AS.222 of 28 May 1999.

⁶¹ Note of the Ministry of Foreign Affairs of the Republic of Turkey No. ÇEGY-III/300–340/631 of 1 June 1999.

⁶² 13th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Tbilisi, 30 April 1999, REPORT, Doc. BS/FM/R(99)1, Annex V, Resolution, para. 16, *in* BSEC HANDBOOK OF DOCUMENTS, vol. IV 89 (2000).

the place of the defined notion without impairing the accuracy of any proposition in a given discipline.⁶³ This condition would have been fulfilled by the definition expected by the WGOM. It is however doubtful whether the conditions in order to reach such a formal – and rigid – definition of international NGOs were fulfilled in the case at hand. The presence and function of NGOs on the international plane is “a rather fragmented phenomenon.”⁶⁴ The European Commission has underlined in clear terms the difficulty of defining such phenomenon: “The NGO-sector has often been described as extremely diverse, heterogeneous and populated by organisations with hugely varied goals, structure and motivations. It is therefore not an easy task to find a common definition of the term ‘non-governmental organisation’. It cannot be based on a legal definition given the wide variations in laws relating to NGO activities, according to which an NGO may have, for instance, the legal status of a charity, non-profit association or foundation.”⁶⁵

Putting aside the extreme complexity of reaching a legislative (genuine) definition of NGOs, the usefulness of it, is the real question. By its inherent focus on the essentials a definitional approach does not contribute to sharpen the inquiry on issues that have multiple facets and lack sufficient theoretical elaboration like the cooperation between intergovernmental and non-governmental organisations. It would not be therefore excessive to assert that NGO is a concept better described (and discussed) than defined. Under these terms a discussion on the required criteria for the involvement of NGOs in the work of an inter-governmental institution would be more productive and provide a realistic and useful framework for such interaction. For both doctrinal and practical reasons the issue of criteria should logically precede the consideration of a definition.

3.2.1. *Search for criteria in the BSEC normative texts*

The reference to the “practice of other international organisations” for the elaboration of the criteria could not exclude the consideration of the BSEC statutory provisions in the search for criteria for establishing relations with NGOs in the BSEC framework. Though if the relevant provisions may seem *prima facie* too broad or all-encompassing for providing specific workable criteria one has to admit that they have direct implications for the matter at hand and are fundamental in setting the general framework, within which the concrete questions should be answered. The relevant statutory documents are the Charter of the Organisation of the Black Sea Economic Cooperation (Yalta, 5 June 1998) and the Rules of Procedure, revised on 22 October 1997.⁶⁶

⁶³ See WALTER DUBISLAV, *DIE DEFINITION* 28–39 (3rd ed. 1931).

⁶⁴ Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 *BYBIL* 65, 96 (1999).

⁶⁵ THE COMMISSION AND NON-GOVERNMENTAL ORGANISATIONS: BUILDING A STRONGER PARTNERSHIP, Commission Discussion Paper presented by President Prodi and Vice-President Kinnock, COM (2000) 11 final, OJ L 002 65, 67 (Jan. 5, 2000).

⁶⁶ Revised in order to be brought in line with the Charter and the new situation of the BSEC as an international legal person; for this reason it was agreed that the revised RP would become operational at the date of the entry into force of the Charter, 10th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Kyiv, 22 October 1997, Doc. BS/FM/R(97)3, Annex VI, Resolutions, Attachment 2, para. 3, in *HANDBOOK OF DOCUMENTS*, vol. III 64 (1998).

The BSEC Charter contains a reference to “international non-governmental organisation” in describing the BSEC Business Council. As already said this group of the business communities of the BSEC member states used to have observer status in the BSEC but during the elaboration of the Charter its status was defined as BSEC related body (category established by the Charter, giving the organisations concerned direct implication in the proceedings within the Organisation). This is the only NGO to have been given this status. Turning to the specific issue of the observer status for NGOs, article 8, para. 1 of the Charter reads as follows: “Observer status in the BSEC shall be open, upon request, to any State or international organisation which expresses its readiness to make practical and valuable contribution to the work of the BSEC.” Following the pattern of the 1993 RP, the term “international organisation” includes, for BSEC purposes, both inter-governmental and non-governmental international organisations (article 2, *litt.* (d) Charter). This understanding implies an initial criterion for granting observer status to NGOs, that of the *non-governmental character of the applicant institution*. This seems to be tautological, it entails however some more detailed conditions, which are necessary for an NGO’s obtaining observer status in the BSEC: the concerned organisation must not be a state run institution, nor composed by state administrations, nor being under state direction whatsoever and not receiving guidelines from any government. *Independence from states and governments is a necessary element of every definition of NGOs* and consequently a *sine qua non* criterion for observer status in the BSEC. This condition should also apply to the so-called GONGOs (governmentally-controlled non-governmental organisations), which constitute a growing phenomenon distorting the overall picture of non-state actors in international law. This issue has not been addressed in the BSEC practice. It is however submitted that GONGOs should not qualify for observer status or other institutionalised relations with the BSEC.

Related to the non-governmental character is also the requirement of the *non-political character* of the applicant NGO. This condition risks of being construed in a rigid way, aiming at preventing numerous NGOs from being granted observer status. In order to avoid potential abuse inherent in such broad formulation, a precise and detailed description of activities, which should bar NGOs from establishing formal relations with inter-governmental organisations, is necessary. Consequently in order to qualify for observer status or other type of institutionalised partnership with inter-governmental institutions NGOs i) should not endanger the relations between the member states of the organisation, nor international peace and security, ii) should not get involved in any political activity against the interests of any member state, iii) should not resort to the use of violence, nor condone the use of violence, terrorism, racial, religious or ethnic hatred, and iv) should not endanger the national security of a member state, nor infringe its public safety, the public order and prevention of crime, health and morality protection, as well as the rights and liberties of others.

The general provision of article 8 Charter, from which the observations here above stem, is complemented by the more detailed article 21 RP.⁶⁷ In accordance with the

⁶⁷ Cf. art. 8, para. 2 Charter: “Observer status may be granted, suspended or terminated by the Council in accordance with the Rules of Procedure.”

para. 2 of this article “Applications [for observer status] shall be examined on a case by case basis, on an equal level, in view of the readiness of the applicants to make practical and valuable contribution to the work of the BSEC.” The principal requirement, common in the Charter and the RP, is the *readiness of the applicants to make practical and valuable contribution to the work of the BSEC*. This must be the overall consideration and the BSEC member states shall, reasonably and in good faith,⁶⁸ ascertain whether every individual applicant fulfils this general criterion.⁶⁹

3.2.2. *The practice of other international organisations*

The instructions given by the Tbilisi Ministerial Meeting with regard to the involvement of NGOs in the BSEC contained, as seen, a reference to the international practice. This reference covers the UN of course, referred to in this context since the beginning of the BSEC process,⁷⁰ but also the UN family as well as regional organisations of similar type or membership as the BSEC.

Before looking into the practice of few inter-governmental organisations, that have elaborated comprehensive approaches with regard to NGOs, it should be recalled that establishing working relations with NGOs is a rather widespread phenomenon in the practice of inter-governmental organisations. On universal (U.N. and specialized agencies) as well as on regional level the association between inter-governmental and non-governmental international organisations is modeled by and large on the pattern of article 71 of the U.N. Charter, which reads as follows: “The Economic and Social Council may make suitable arrangements for *consultation*⁷¹ with non-governmental organisations which are concerned with matters within its competence.” This provision instituted a “*consultative status*”. This status is also recognized to NGOs by other (than ECOSOC) U.N. organs, by the specialized agencies and most other regional inter-governmental organisations.⁷² Other organisations refer to observer status of NGOs or affiliate membership.⁷³ The terminology may vary but the common feature

⁶⁸ The Member States should not abuse the discretionary power bestowed upon them by the Charter in the evaluation of this requirement; cf. International Court of Justice, *Conditions of admission to the U.N.*, Adv. op., ICJ REP.56, 63 (1948, May 28).

⁶⁹ Art. 21, para. 2 RP adds two further considerations: on the one hand “applications shall be examined on a case by case basis”, meaning that all the individual features of the applicant NGO shall be taken into account in order to accept or reject the application. On the other hand the provision states that “applications shall be examined . . . , on an equal level.” This condition appears for the first time in the revised 1997 RP. It supplements the individual examination (which could lead to an arbitrary decision) by the requirement of the appreciation of applications according to general conditions, of equal validity for all applicants.

⁷⁰ See *supra*, MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Antalya, 10 Dec. 1992, REPORT, Doc. BS/FM/R(92)1, Annex IV, Resolution, para. 14, in BSEC HANDBOOK OF DOCUMENTS, vol. I 29 (1995).

⁷¹ Emphasis added.

⁷² See, Marcel Merle, *Art. 71, in LA CHARTE DES NATIONS UNIES. COMMENTAIRE ARTICLE PAR ARTICLE 1047–1059* (Jean-Pierre Cot & Alain Pellet eds, 2nd ed. 1991); Rainer Lagoni, *Art. 71, in THE CHARTER OF THE UNITED NATIONS 902–915* (Bruno Simma ed., 1994).

⁷³ Cf. art. 7 of the Constitution of the World Tourism Organisation. In the sense of this provision, affiliate membership for non-state actors (comprising a wide range of organisations and companies working directly in travel, tourism and related sectors, including: airlines and other transport, hotels and restaurants, tour operators and travel agents, banking institutions, insurance companies, travel assistance, publishing groups, etc.) is akin to the UN consultative status and not to membership in its traditional acception.

is that the participation of NGOs is limited, especially the latter do not partake directly to the decision-making process and do not control the resources affected by the decisions of the organisation concerned. The practice, which will be reviewed further on, does not limit itself to any particular status, but surveys the criteria applicable to the multifarious forms, short of membership (not envisaged by the BSEC normative texts for NGOs), that the cooperation between inter-governmental and non-governmental international organisations can take. They provide precious indications, very useful in handling this matter in the BSEC framework.

As previously said, non-governmental organisations may be admitted into a working relationship with the U.N. by attaining consultative status with the ECOSOC (article 71 U.N. Charter). The conditions and modalities of this cooperation are set out in the ECOSOC Resolution 1996/31.⁷⁴ In the terms of this Resolution, in order to qualify for consultative, NGOs must: a) be non-governmental and non-for-profit organisations, b) have activities relevant to the work of ECOSOC, c) have a democratic decision-making mechanism, d) be in existence for at least two years before applying for consultative status (this requirement must be proved by official registration documents or other evidence of establishment acceptable to the ECOSOC of the country where the organisation is incorporated/holds tax exemption status and/or non-for-profit status), and e) have their basic resources derived in the main part from contributions of the national affiliates or other components or from individual members (the application must include very detailed and specific financial information as well as the last completed year's financial statement of the applicant NGO). The module under *litt.* d) implies the additional requirement of the legal personality of the applicant NGO. The necessity of official registration, incorporation, tax exemption or non-for-profit status serves also for ascertaining this purpose.

The study of the issue of relations between inter-governmental and non-governmental organisations could not overlook the situation in UNESCO, a pioneer in the field of involvement of NGOs, which constitutes the specialized agency, in the wider U.N. family, entertaining relations probably with the larger score of NGOs. The conditions under which the interested NGOs can obtain consultation status within this organisation have been set up as early as 1962 (11th session of the General Assembly), and, though amended in some occasions, they continue to constitute the basis of the relations between UNESCO and NGOs.⁷⁵

The conditions provided for are that the NGOs in order to be eligible shall: a) be willing and able to contribute to the achievement of aims of the UNESCO, b) develop activities in the fields of competence and interest of UNESCO, c) have an international character concerning composition (nationality of the participants and executive board) and activities (localization of the participants and action), d) be composed by an important proportion of individuals or groups interested in one or more UNESCO activities, and e) have a permanent executive organ of international

⁷⁴ This Resolution adopted in 1996 superseded ECOSOC Resolution 1296 (XLIV) of 23 May 1968.

⁷⁵ UNESCO, Sexennial Report of the Executive Board on the Relations UNESCO-NGOs, 18 Aug. 1989, Doc. 25 C/37, p. 2.

composition, authorized representatives as well as methods and means allowing regular communication with its members in different countries.

Another specialized U.N. agency, which has elaborated an interesting approach with respect to the criteria required for the establishment of institutionalised relationship with NGOs, is the World Health Organisation (WHO).⁷⁶ In 1987 the Fortieth World Health Assembly specified the “Criteria for the admission of NGOs into official relations with WHO”⁷⁷ (Resolution WHA 40.25). These criteria are: a) the aims and activities of the NGO shall be in conformity with the spirit, purposes and principles of the WHO Constitution, b) the main area of competence of the NGO shall fall within the purview of WHO, c) the NGO shall normally be international in its structure and/or scope, and shall represent a substantial proportion of the persons globally organized, d) the NGO shall have a constitution or similar basic document, a directing or governing body, and authority to speak for its members. In addition, the members shall exercise voting rights in relation to its policies or action, and e) the NGO shall have had at least two years of successfully completed working relations with the WHO.

Turning from the universal to the regional (European) organisations, that have overlapping membership with the BSEC, it is in the Council of Europe that also a comprehensive approach of elaborating criteria for NGOs eligible for formal relations, has been adopted. This approach amounted to the adoption of the European Convention on the recognition of juridical personality of NGOs (Strasbourg, 24 April 1986, hereafter CEC).

Article 1 of this Convention contains the following criteria for the definition of international NGOs: a) to be non-for-profit organisations, b) to pursue objectives of international utility, c) to have been created/registered under the domestic law of one of the parties to the Convention, d) to have their statutory seat within the territory of one party and the effective seat in the territory of this party or another party to the Convention, and e) to have actual activity in at least two States.

In addition, Article 4 of the same Convention provides for negative criteria, conditions that should not be met in order to be recognized as international NGO eligible for interaction with the Council of Europe and its member states that have ratified the CEC. According to these negative criteria NGOs: a) shall not endanger the national security of a party, nor infringe its public safety, the public order and prevention of crime, health and morality protection, as well as the protection of rights and liberties of others, and b) shall not endanger the relations between the parties, nor international peace and security.

Other international organizations adopt a less formal approach regarding the participation or involvement of NGOs as well as with respect to the criteria that should be fulfilled for establishing cooperation with these organisations. Typical of such approach is the European Union. The European Commission in its Discussion Paper on the relations between it and NGOs notes that

⁷⁶ Art. 71 WHO Constitution provides that the Organisation may make suitable arrangements for consultation and cooperation with NGOs in carrying out its international health work.

⁷⁷ WHO recognizes only one category of formal relations with NGOs, the “*official relations*”. All other contacts are considered to be of an informal character.

“The term ‘NGO’ can be used as shorthand to refer to a range of organisations that normally share the following characteristics:

- NGOs are not created to generate personal profit. Although they may have paid employees and engage in revenue-generating activities they do not distribute profits or surpluses to members or management;
- NGOs are voluntary. This means that they are formed voluntarily and that there is usually an element of voluntary participation in the organisation;
- NGOs are distinguished from informal or ad hoc groups by having some degree of formal or institutional existence. Usually, NGOs have formal statutes or other governing document setting out their mission, objectives and scope. They are accountable to their members and donors;
- NGOs are independent, in particular of government and other public authorities and of political parties or commercial organisations;
- NGOs are not self-serving in aims and related values. Their aim is to act in the public arena at large, on concerns and issues related to the well being of people, specific groups of people or society as a whole. They are not pursuing the commercial or professional interests of their members.”⁷⁸

Instead of criteria the Commission refers to “characteristics”, a term implying a less formal attitude towards NGOs and a cooperation based on a mainly pragmatic basis, based nevertheless on accepted principles.⁷⁹ The OSCE or the Baltic Sea States Council provide further examples of less formalized way of collaboration between inter-governmental and non-governmental organisations.⁸⁰ In such cases there is no set of

⁷⁸ THE COMMISSION AND NON-GOVERNMENTAL ORGANISATIONS: BUILDING A STRONGER PARTNERSHIP, Commission Discussion Paper presented by President Prodi and Vice-President Kinnock, COM (2000) 11 final, OJ L 002, (Jan. 5, 2000), 65, 67. Comp. the list of common features of voluntary organisations proposed by the Commission in its Communication of June 1997 “PROMOTING THE ROLE OF VOLUNTARY ORGANISATIONS AND FOUNDATIONS IN EUROPE”, COM/97/0241 final, OJ L 40, (Febr. 11, 1997), 11–13.

⁷⁹ See however the discussion in the EU with respect to the so-called “third pillar” of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (signed June 25, 1998 by 15 EU Member States and the European Commission). Under art. 230 EC Treaty NGOs do not have *locus standi* in the EU jurisdictional organs, unless they are addressees of the attacked EU act or if they are directly and individually concerned, EUROPEAN COURT OF JUSTICE, *Greenpeace* case, C-321/95P, 2.4.1998, ECR [1998] I-1651. Due to these limitations, the European Commission, when signing the Aarhus Convention, emitted the declaration that it would consider making a reservation upon ratification for certain issues, such as access before the European Court of Justice. In this framework a discussion has opened in the EU whether it would be advisable to amend art. 230 providing for example for “*locus standi* being created for environmental – and possibly health and consumer protection – NGOs fulfilling certain objective and qualitative criteria to be established at the EC level.” George Kremlis, *European Perspectives on Access to Justice in Environmental Matters*, in BIOPOLITICS, vol. VIII, 111, 113 (Agni Vlavianou-Arvanitis ed., 2001). For a recent discussion of the participatory rights of civil society in the European Union in view also of the art. 46 draft Constitutional Treaty (The principle of participatory democracy) see FRANCESCA BIGNAMI, THREE GENERATION OF PARTICIPATION RIGHTS IN EUROPEAN ADMINISTRATIVE PROCEEDINGS 15–32 (2003, Jean Monnet Working Paper 11/03).

⁸⁰ Cf. CSCE, Charter of Paris for a New Europe, 21 Nov. 1990.

formal criteria for NGOs. Nevertheless, even in case of informal relation, NGOs are bound to fulfill some minimum requirements, such as not resorting to the use of violence or publicly condoning terrorism or the use of violence.⁸¹ Moreover NGOs have to abide by the formalities and regulations prescribed by law and are necessary in a democratic society.⁸² This language refers directly to the European Convention on Human Rights and Fundamental Freedoms (Rome 1950) and the respect of the (domestic) law by the NGOs is a requirement also of the CEC (art. 1, *litt.* b).

3.2.3. *Applicability to the BSEC case/ Proposal of the BSEC PERMIS*

The preceding presentation of the criteria found in the practice of other inter-governmental organisations taken together with these drawn from the BSEC relevant provisions are complementary and, at least, to some extent overlap. The issue then of how to apply the afore mentioned findings into the BSEC practice and reach workable conclusions acquires great importance. This task was entrusted by the Ministers of Foreign Affairs of the BSEC member states to the PERMIS. From the bulk of texts and requirements referred to here above, the latter dressed a list of criteria that NGOs should fulfill in order to qualify for observer status in the BSEC:

“NGOs shall,

- be independent from states and governments (they must not be state run institutions, nor composed by state administrations, nor being under state direction whatsoever and not receiving guidelines from any government);
- be willing and able to make practical and valuable contribution to the work of BSEC;
- have international character (founders and administrators must be under the jurisdiction of two or more BSEC Member States, be operational in at least two BSEC Member States, have their statutory and real seat in one BSEC Member or Observer State);
- do not have political character (NGOs shall not endanger the relations between the parties, nor international peace and security, shall not get involved in any political activity against the interests of any Member State, shall not resort to the use of violence, nor condone the use of violence, terrorism, racial, religious or ethnic hatred, and shall not endanger the national security of a party, nor infringe its public safety, the public order and prevention of crime, health and morality protection, as well as the rights and liberties of others);
- be non-profit making institutions.”⁸³

The above list is an encompassing text containing the core elements of the notion of NGO, which describe the non-governmental, non-for-profit, independent segment of

⁸¹ CSCE, Helsinki Summit 1992, Helsinki Decisions, 10 June 1992, Ch. IV – Relations with International Organisations, Relations with Non-Participating States, Role of Non-Governmental Organisations (NGOs), § 16.

⁸² Action Program for the Baltic Sea States Co-operation, Fifth Ministerial Session, Kalmar (Sweden), 2–3 July 1996, § 1.3.

⁸³ BACKGROUND PAPER PREPARED BY THE PERMIS, Doc. BS/OM/WG/AA(99)2, p. 6 (1999, June 17).

society, together with the more specific elements required for the institutionalised interaction with the BSEC.

With regard to the non-for-profit character of the applicant organisations, the proposal rightly omits the earlier formal requirement (1993 Resolution on the Criteria, § 1, *litt.* (d), first member) of an official statement of the candidate NGO that it will not misuse its relations with the BSEC to seek financial gain. As observed *supra* this requirement could not replace the clear enunciation of non-eligibility of non-state profit making organisations (fifth criterion).

Concerning the international character of the applicant NGO (third criterion), the practice reviewed *supra* was inconclusive. The CEC, for example, provides that the international character of NGOs should be asserted when, both, they have their statutory and/or real seat in a State party and are operational in two or more parties (art. 1, *litt.* c, d). Furthermore, according to this agreement NGOs must have been created/registered by a legal act of the domestic law of one of the parties (art. 1, *litt.* b, art. 3). UNESCO Guidelines stress the necessity of the international character of NGOs, concerning both composition and activities, in order to qualify for cooperation. In the ECOSOC practice, it is important to demonstrate how representative the membership of the applicant NGO is of the various regions of the world and of various countries.⁸⁴ On the other hand, following the 1993 Resolution on the Criteria (§ 1, *litt.* c), it was sufficient for the NGO to “be based or operational in *one* ore more of the BSEC Participating States.”

In this respect it is important to bear in mind that the Charter expressly opens observer status “to any State or *international* organisation” (art. 8). Following the wording of the Charter, the relevant resolution of the 13th MMFA (Tbilisi, 30 April 1999) instructed the WGOM to elaborate “the definition of the *international* non-governmental organisations”. An element of “internationality” is, therefore, absolutely necessary for granting observer status to NGOs in the BSEC framework. That means that the founders and administrators of the candidate NGOs must be under the jurisdiction of two or more BSEC Member States. Furthermore it is also necessary for affirming the international character of an NGO that the latter must be operational in at least two BSEC Member States.

As to the issue of the seat of the applicants NGOs, the question whether it should be necessary for NGOs to be based (statutory and/or real seat) in the territory of one BSEC member state in order to qualify for observer status is addressed by the PERMIS list by a middle of the road proposal of opening the observer status also to NGOs based also in BSEC observer states when they have activities in two or more BSEC member states. This is a workable “compromise” that may widen the circle of NGOs eligible for observer status in the BSEC.

The draft list of criteria contains the requirements, which are closely related to the overall consideration of the “*readiness to make practical and valuable contribution to the work of the BSEC.*” (second criterion). In a rather succinct formulation, the draft list addresses both the objective (“able”) and the subjective (“willing”) component of this requirement. The “readiness to make practical and valuable contribution to the

⁸⁴ There is a particular part of the application questionnaire concerning “Geographical membership”.

work of the BSEC” supposes first that the interested NGO agree with and abide by the relevant BSEC texts and that it is in a position (objectively and subjectively) to contribute in a practical and valuable way to the work of the BSEC. The latter requirement implies that NGOs shall have organisational structure and lasting character, guaranteeing their ability to contribute to the achievement of BSEC aims. However the concise language of the PERMIS proposal was not explicit in these matters and it may have been advisable to specify in more details concrete implications of the readiness of the applicant NGO to contribute in a practical and valuable way to the BSEC proceedings.

4. Adoption of Definition and Criteria for Observer Status of NGOs in the BSEC

The draft list of criteria for granting observer status to NGOs submitted by the PERMIS was presented to the BSEC member states for comments and eventual approval by the BSEC Council. Following that communication, the Greek Ministry of Foreign Affairs submitted a proposal which substantially reproduced the draft list of the PERMIS, though in a different order and with a different language and style, more narrative instead of prescriptive, as it might have been expected for a text purported to become an international legally binding instrument. Be that as it may, the Council of Ministers of Foreign Affairs of the BSEC Member States (Thessaloniki, 27 October 1999) adopted the here below “Criteria for Granting Observer Status to NGOs”⁸⁵:

- “a) Observer Status shall only be granted to NGOs, which are truly international.
An organisation shall be deemed international (regional or sub-regional) if it has its statutory and real seat in one of the BSEC Member or Observer State, its administrators are under the jurisdiction of two or more BSEC Member States, and it is operational in at least two BSEC Member States.
It is without saying that the applicant NGO must have a permanent headquarters and an internal organisational structure.
- b) The purposes of the applicant must be directly related to the purposes of the BSEC and fully in harmony with the spirit and functions of it as defined in the relevant articles of the BSEC Charter.
- c) The applicant NGO has to be of a non-political character. This means that it shall not endanger the relations between the Member States, nor international peace and security, it shall not get involved in any political activity against the interests of any Member State, it shall not resort to the use of violence, or condone the use of violence, terrorism, racial religious or ethnic hatred, and shall not endanger the national security of a Member State, nor infringe its public safety, the public order and prevention of crime, health and morality protection as well as the rights and liberties of others.

⁸⁵ 1st MEETING OF THE CMFA, Thessaloniki, 25 October 1999, REPORT, BS/FM/R(99)2, Annex V, Attachment 1, in HANDBOOK OF DOCUMENTS, vol. IV 129, 138 (2000). At the same Meeting, the Council adopted also the following definition: “NGOs eligible for Observer Status in the BSEC, shall be international organisations of non-political, non-profit character, independent from States and Governments, willing and able to make practical and valuable contribution to the work of the BSEC and of a recognized standing in their field of activities.”, *ibid.* 129, 132–133 (2000). This definition is a mere juxtaposition of the main elements of the adopted criteria providing thus a further justification of the opinion exposed *supra* that a definition of NGO was not necessary for the conceptual elaboration of the issue of criteria. In any case this definition has not been used neither by the BSEC organs nor by NGOs; they all focus to the criteria, which have a clear practical value and use.

- d) The applicant NGO has to be independent from states and governments. It must not be a state run institution, nor composed by state administrations, nor being under state direction and not receiving guidelines from any government.
- e) The applicant NGO must be non profit-making institutions, financially independent and should not use the observer status for economic or financial purposes.
- f) The applicant NGO shall be of a recognized standing in its field of activities.”

These criteria were adopted by resolution of the BSEC Council and therefore they are binding for the Organisation of the BSEC as well as for its member states. They set the normative framework for granting observer status to NGOs in the BSEC. They have to be fulfilled by NGOs that apply for this status and in this sense they have mandatory value for these actors also, despite the fact that they have been enacted by unilateral act of the Organisation. Initial or subsequent non-compliance with these criteria by a NGO prevents or disrupts its observer status. From that point of view the inter-governmental organisation maintains a prevailing position over NGOs: it is the former that sets the binding framework for the interaction with NGOs; the latter have to abide by it, if they wish to cooperate. Moreover, in adopting the above list of criteria, the BSEC organs have not sought the opinion of civil society. It may be different for subsequent amendment of this list, because NGOs are now represented in the BSEC proceedings. However, taking the previous experience and the stance of the BSEC member states on this issue, NGOs’ involvement in any amendment of the rules relating to the BSEC – NGOs relations would be marginal.

5. Other Types of BSEC – NGO Relations

The main type of relationship between the BSEC and NGOs that has been studied so far was the observer status. However, as already said, other types of relations, looser or more flexible, were looked for by the BSEC since 1993. The possibility of other than observer status, type of cooperation with NGOs, was envisaged from the early stages of the consideration of the issue in the BSEC: the WGOM which elaborated the first list of criteria for establishing relations with NGOs in 1993 had also provided for the possibility for the MMFA to “decide, on a case by case basis, on the form of relationship with an NGO which does not ask for observer status.”⁸⁶ A start of specification of the general principle that there were other than the observer status means for BSEC –

⁸⁶ WGOM, Ankara, 26–27 October 1993, REPORT, Doc. BS/OM/WG/R(93)3, Annex III 2. The quest for alternative to the observer status form of BSEC-NGO relationship was clearly manifested at the, previously referred to, meeting of the WGOM (7–9 May 1994). At that meeting “the WG felt that the door should be kept open for all types of relations between the BSEC and the applicant institutions, including the status of observer”, WGOM, Istanbul, 7–9 May 1994, REPORT, Doc. BS/OM/WG/R(94)1, *in HANDBOOK OF DOCUMENTS*, vol. I 351, 354 (1995). The language used indicates a wish of the participants to institute other types of relationship than a *lex lata* which could be resorted to at that moment. This “feeling” or wish explains also the lack of indication of the other possibilities, but the observer status, and the decision to postpone the consideration of all pending applications from NGOs. The *de lege ferenda* viewpoint of the participants to the WGOM is further attested by their “belie[f] that it would be more appropriate to start with a loose type of relationship with a view to upgrading it in the future when the circumstances warrant it.”

NGOs cooperation was done by the WGOM the following year, when, after concluding that at that stage observer status could not be granted to NGOs, the participants suggested that it would be desirable to encourage a kind of cooperation with interested NGOs either by inviting them to various meetings of the BSEC subsidiary bodies or by exchanging relevant information through the PERMIS channels.⁸⁷ This recommendation was endorsed by the 5th MMFA,⁸⁸ offering thus some type of alternative to the observer status, provided in the RP, in the form of working relations (attendance of BSEC meetings, exchange of information of mutual interest) with the NGOs, whose applications for observer status were turned down.⁸⁹

It was not before 1997 that the afore-mentioned options for BSEC – NGOs cooperation were integrated in a more coherent normative framework. This framework was set up by the so-called “sectorial approach” introduced by the 9th MMFA. The reasoning for this system was “that since the majority of the applicant NGOs [were] specialized organisations, a sectorial approach would be advisable, by indicating those concrete fields of cooperation with the BSEC in which the respective NGOs are involved.”⁹⁰ This approach would be appropriate in order to address the growing scores of applications of NGOs, whose scope of activities were limited to some, most often to one, areas of cooperation of the BSEC. It is therefore legitimate to assume that the *rationale* of the new approach was to allow the interaction BSEC – NGOs in limited fields (relating to the cross-cutting interest of the parties) and with restricted participatory rights (attendance of meetings of common interest, exchange of information). The aim was not to resolve the issue immediately but to streamline the action of the BSEC in this field in anticipation of a solution that would be given by the BSEC Charter, which was under elaboration at that time and expected to be adopted in a relatively short span of time.⁹¹

5.1. *Article 9 of the BSEC Charter*

The BSEC Charter did actually address the issue as anticipated. It contains a specific article entitled “Relations with Third Parties” (article 9), that comes immediately after article 8 (observer status), and envisages other modalities of cooperation *inter alia* with non-governmental organisations:

⁸⁷ WGOM, Athens, 21–22 Sept. 1994, REPORT, Doc. BS/OM/WG/R(94)2, in HANDBOOK OF DOCUMENTS, vol. I 359, 362 (1995).

⁸⁸ 5th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, 14 April 1995, REPORT, Doc. BS/FM/R(95)1, Annex VI, Recommendations, para. 59, in HANDBOOK OF DOCUMENTS, vol. I 113, 124 (1995).

⁸⁹ This recommendation seems to apply in case an NGO does seek observer status; it is however clear, for the identity of reason, that the Ministers could have resorted to other type of relationship for objective reasons, would they have deemed it appropriate.

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⁹¹ This objective is explicitly admitted by the decision of the 9th MMFA “to further consider the issue of the relationship between the BSEC and the NGOs in the work of the Drafting Group of the BSEC Charter and prepare relevant recommendations on this subject.”, 9th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Istanbul, 30 April 1997, REPORT, Doc. BS/FM/R(97)1, Annex V, Resolution, in BSEC HANDBOOK OF DOCUMENTS, vol. III 37, 47 (1998).

“The BSEC shall promote a relationship with third parties (states, international organisations and institutions) interested to cooperate on various matters of mutual concern through:

- a) dialogue partnership, within a frame of periodic exchanges and consultations;
- b) sectoral dialogue partnership; possibility of attending meetings on specific subjects;
- c) invitation of guests; possibility of attending sessions of the BSEC upon the invitation of the Chairman-in-office and with the consent of all the Member States.

Dialogue partnership and sectoral dialogue partnership may be granted following the resolution of the Council.”

The “sectorial approach” takes thus a more concrete shape and the legal possibility for institutionalised relations with NGOs, other than observer status, is for the first time formally available to the competent BSEC organ. This type of relations with third parties concerns primarily the sectoral dialogue partnership and the dialogue partnership; the other possibilities (invitation of guests, attendance of BSEC sessions) do not have permanent character. Consequently the following remarks are relevant to the sectoral dialogue and/or the dialogue partnerships. With regard to this statuses, article 9 of the Charter leaves open the significant question concerning the conditions under which BSEC can resort to the options provided therein.

The first indicator in this respect is to be found in the comparison of articles 8 and 9 governing the cooperation of the BSEC with non-members. Whereas article 8 relating to the observer status requires the intention and the ability of the interested third party (including NGOs) “to make practical and valuable *contribution* to the work of the BSEC”, article 9 aims at third parties (including NGOs) “interested to *cooperate* on various matters of mutual concern”. There is a gradation of the intensity of the desired relationship, contribution or cooperation, which is not easy to establish *in abstracto*. The term contribution implies active participation of the interested third party to the BSEC work, while cooperation may be construed as more distant or passive involvement in the BSEC affairs. In practice however such a distinction cannot be helpful to the BSEC Council of Ministers when deliberating on an actual application of an NGO (or for that matter of any third party). Decisive in this respect remains the stance adopted by the candidate NGO, the intention it expresses. In case the applicant third party applies for one of the modalities provided for in article 9, it is reasonable that the BSEC Council limits its consideration to one of them. The same should apply when the application contains language or other elements that clearly indicate that the aim of the candidate NGO is (simple) cooperation and not active contribution. The choice therefore of one of the possibilities of article 9 depends primarily on the applicant than on the decision-making organ of the BSEC. Nevertheless, in practical terms there are few NGOs that apply straightforwardly for one of the options provided for in article 9 of the Charter,⁹² a circumstance that makes the distinction between “cooperation” and “contribution” more difficult in terms of its application in concrete cases.

⁹² Up to now only one NGO, the Black Sea Cruising Association (BSCA) has applied for sectoral dialogue partnership, see COMMITTEE OF SENIOR OFFICIALS, Yerevan, 16–17 April 2003, ANNOTATED AGENDA, Doc. BS/SOM/AA(2003)3, para. 38, p. 6 (2003, April 2).

A second consideration for the interpretation of article 9 is to be found in the origin of this provision, in particular in the afore-mentioned “sectorial approach”, with regard to the relationship with NGOs, as envisaged by the 9th MMFA (“since the majority of the applicant NGOs are specialized organisations, a sectorial approach would be advisable, *by indicating those concrete fields of cooperation with the BSEC in which the respective NGOs are involved.*”⁹³) This approach would justify the application of article 9 with respect to NGOs whose activities are less wide than the areas of cooperation of the BSEC. This was the understanding that the BSEC PERMIS gave to the said provision in its opinion on the application for sectoral dialogue partnership of an inter-governmental body, the Coordination Transport Conference of the Member States of the Commonwealth of Independent States (CTC CIS). Appreciating the merits of the afore-mentioned application, the PERMIS noted that “the mandate of the CTC CIS, as it is described in its Regulations, covers one of the BSEC areas of cooperation, namely transport, and it is limited to that sector. The sectoral dialogue partnership status is precisely designed to foster this type of cooperation between the BSEC (which has a larger mandate) and third parties *interested in some aspects* of the BSEC activities.”⁹⁴

This construction, consistent with the letter of the Charter, is however restrictive with respect to NGOs in that it places almost all these organisations outside the scope of article 8 of the Charter (observer status). It is hardly possible that a non-governmental organisation has a scope of activities comparable with the competency of the BSEC as described in article 4 of the Charter. For that reason the practice may lead to mellowing the strict letter of the Charter and admitting the possibility for granting observer status to an NGO, despite the limited scope of its activities, especially when it is acknowledged that the concerned NGO could “make practical and valuable contribution to the work of the BSEC” (art. 8). Such development is in full compliance with the para. 6 of article 21 RP stating that “Observer status granted to third States or to international organisations may be valid for all or *only selected activities of the BSEC* to be determined by the Council.”⁹⁵ This provision introduces thus a sectorial approach with respect to the observer status as well. Granting observer status for “selected activities of the BSEC” is a possibility that, although not used up to the moment this paper was completed, can be a practical compromise between the limited scope of activities of an NGO and its readiness to “make practical and valuable contribution to the work of the BSEC.” It is therefore submitted that the BSEC organs should pay more attention to this possibility and resort to it, especially when dealing with NGOs’ applications for observer status.

The interpretation has to reconcile in practical terms the application of articles 8 and 9 of the BSEC Charter wherever the conditions for their application concur. The

⁹³ 9th MEETING OF THE MINISTERS OF FOREIGN AFFAIRS, Istanbul, 30 April 1997, REPORT, Doc. BS/FM/R(97)1, Annex V, Resolution, *in* BSEC HANDBOOK OF DOCUMENTS, vol. III 37, 46 (1998), emphasis added.

⁹⁴ Opinion on the application of the Coordination Transport Conference of the Member States of the Commonwealth of Independent States (CTC CIS) for sectoral dialogue partnership in the BSEC (by the BSEC PERMIS), para. 6 (emphasis in the text).

⁹⁵ Emphasis added.

Charter does not reserve the possibilities of article 9 just to NGOs neither exclude the latter from the scope of its article 8. The belief that the sectoral dialogue partnership status befits the specific characteristics of NGOs as organisations with limited field of interests, compared to these of the BSEC, and the ensuing inference that this status is appropriate for NGOs in general is oversimplifying. It seems however that the practice of the Organisation of the BSEC lends some support to such idea. The two inter-governmental organisations that have been granted observer status in the BSEC, the Energy Charter Conference and the Commission on the Protection of the Black Sea Against Pollution, meet exactly the terms of the sectorial approach, because of their respective scope of competencies (energy and environmental protection respectively). Nevertheless the option of sectoral dialogue partnership, albeit considered in the BSEC *fora*, has been excluded for these organisations on the grounds that they were inter-governmental institutions.

There is however nothing disparaging or depreciative in the possibilities provided for in article 9, which can be, and actually *are* envisaged explicitly for states or international organisations, that, irrespective of their scope of competencies, “are interested to cooperate on various matters of mutual concern” with the BSEC. The practice provides the instance of the Coordination Transport Conference of the Member States of the Commonwealth of Independent States (CTC CIS), which is an inter-governmental institution⁹⁶ that applied for sectoral dialogue partnership. This choice by the applicant institution was motivated by the scope of the CTC CIS which embraces only one BSEC area of cooperation, transportation, and it demonstrates that the sectoral dialogue partnership is not confined to NGOs, nor that interaction with NGOs should be limited to such status.

Last but not least the argument that article 9 of the Charter should not be read and construed solely under the perspective of the “sectorial approach” is corroborated by the provision for a dialogue partnership (article 9, *litt. a*) as a means of relations with third parties. This status that has not been granted so far, does not obey to the “sectorial approach” and can be envisaged as an alternative to the observer status for states and international organisations that do not seek observer status but desire “to cooperate on various matters of mutual concern” with the BSEC.

Another approach towards resorting to the possibilities of article 9 Charter could be to consider these options as the first stage of cooperation between the BSEC and third parties, including NGOs. In case such a stance is accepted the term of sectoral dialogue partnership (or of the other options of article 9 – dialogue partnership, invitation, possibility of attending BSEC sessions) would be a sort of “probationary” period, during which the BSEC and the concerned NGO would test their interest for further, closer cooperation and consequently decide whether the status should evolve into observer status or remain the same, if it provides the appropriate framework for the desired interaction. Although this explanation has not been explicitly supported by the BSEC

⁹⁶ The CTC CIS Regulations (art. 1) describe the Conference as the “common body of inter-governmental regulation of transport activities on the territory of the CIS established in compliance with the Agreement on principles and conditions of relations in the field of transport dated December 30, 1991.”

practice, it cannot be excluded as a possible course of action, especially taking into account its practicality.⁹⁷

The decision to resort to the possibilities of article 9 of the BSEC Charter for establishing institutionalised relations with, *inter alia*, NGOs, raises the question of the requirements for the modes of cooperation provided therein, in particular for the sectoral dialogue partnership. One has to consider whether such cooperation could be established irrespective of criteria? And if not which criteria should fulfill an organisation seeking to establish relations with the BSEC under article 9 of the Charter?

In the first occurrence that the sectoral dialogue partnership was established between the BSEC and four NGOs⁹⁸ (April 2000), the Council of Ministers of Foreign Affairs examined whether the applicants were fulfilling criteria for observer status in order to grant them sectoral dialogue partnership.⁹⁹ At this first instance the Council checked the fulfillment of the criteria for observer status, giving thus the message that the requirements for establishing sectoral dialogue partnership with NGOs were identical with the criteria for granting observer status to NGOs. The Charter itself contains two requirements for the application of article 9: the international character of the interested organisation as well as the existence of matters of mutual concern between the BSEC and the interested NGO. These two requirements are reflected in the two first criteria for granting observer status to NGOs. The remaining criteria that relate to the necessary elements for an institution being an NGO (criteria (c) to (e)) are also minimum requirements that the BSEC Council rightfully expects from NGOs that wish to have institutionalized relationship with the Organisation. For these reasons the practice according to which NGOs shall fulfill the same criteria for being granted observer or sectoral dialogue partnership status has been followed since then. Some uncertainty existed with respect to the requirement of the legal personality of the applicant NGO. One organisation, the Union of International Road Transport Association in the BSEC Region (BSEC-URTA) did not have legal personality at the time it was admitted to sectoral dialogue partnership.¹⁰⁰ However this case is to be considered as an exception which has not been repeated. On the contrary the possession of legal personality is

⁹⁷ When the CMFA at its 2nd Meeting (Chisinau, 27 April 2000) granted to the NGOs (that were applying for observer status) sectoral dialogue partnership, some delegations expressed the understanding that this type of relations should be the initial stage of interaction between the BSEC and NGOs, eventually to reach the observer status. However at the expiration of the first two-year period of the sectoral dialogue partnership, the Council renewed the same status for the three NGOs that have requested to continue their interaction with the Organisation, without considering – or even envisaging – the possibility of granting them observer status, REPORT OF THE 6th MEETING OF THE CMFA, Kiev, 25 April 2002, Doc. BS/FM/R(2002)1, Annex V, Resolutions, para. 24, p. 156 (2002).

⁹⁸ These NGOs were: Black Sea Region Association of Shipbuilders and Ship Repairers (BRASS), Black Sea International Ship Owners Association (BINSO), Regional Working Group for the Cooperation in the Field of Energy among the Black Sea Region and Central Asia Countries (RWEG), Black Sea Universities Network (BSUN). They had all applied for observer status.

⁹⁹ 2nd MEETING OF THE CMFA, Chisinau, 27 April 2000, REPORT, Doc. BS/FM/R(2000)1, Annex VII, Resolutions, para. 7, in HANDBOOK OF DOCUMENTS, vol. V 15, 17 (2000), “these NGOs were selected in accordance with the definition and criteria approved by the First Meeting of the Council, and are granted the sectoral dialogue partnership . . .” (emphasis added).

¹⁰⁰ REPORT OF THE 5th MEETING OF THE CMFA, Antalya, 25 Oct. 2001, REPORT, Doc. BS/FM/R(2001)2, Annex, Resolutions, para. 11, p. 142 (2001).

affirmed as a *sine qua non* condition for establishing relations under article 9 of the Charter.¹⁰¹

5.2. *Question of national NGOs*

No national NGO may benefit from the cooperation schemes provided for in articles 8 or 9 of the Charter. Both are reserved to international NGOs. This is a formal requirement of the Charter and as such has overriding power. For this reason BSEC PERMIS has not even submitted to the competent BSEC organs the application for sectoral dialogue partnership of the Turkish National Committee of the World Energy Council. However, the issue of national NGOs that wish to cooperate with the BSEC could not be considered close at least *de lege ferenda*. The openness of inter-governmental *fora* to citizens' concerns requires further consideration of the issue also in the BSEC context. National NGOs can be also helpful in allowing civil society expression and may as well contribute to addressing major issues of interest.¹⁰² That is why it is submitted that practical arrangements could and should be found in order to associate NGOs to the BSEC activities. Such arrangements will not contravene the Charter and shall take the form of working relations, including consultations with BSEC organs, in particular PERMIS, as well as invitations to specific BSEC events of mutual interest, with the consent of the member states. In such cases the principle *expressio unius est exclusio alterius* could not be invoked in order to rule out any involvement whatsoever of national NGOs in the BSEC activities. What the Charter prohibits, in its present form, is granting observer status and sectoral dialogue partnership to national NGOs. The extension of such limitation to other forms of interaction is not warranted and disregards policy considerations for openness to all non-state actors, though through other means of cooperation. The BSEC practice provides one instance of such alternative ways of allowing national NGOs to have a say in the BSEC process: a national association of maritime industry of Ukraine, UKRUSUDPROM, submitted jointly with two international NGOs, sectoral dialogue partners of the BSEC (Black Sea Region Association of Shipbuilders and Ship Repairers and Black Sea International Ship Owners Association) a proposal on "General Directions of Governmental Policy of the BSEC countries in the sphere of shipbuilding, marine fleet and shiprepair".¹⁰³ BSEC did not deny considering the joint proposal, despite the fact that it has been submitted also by a national NGO with no standing in the BSEC. Such

¹⁰¹ In 2003 an applicant organisation, the Black Sea Cruising Association (BSCA), was asked to submit all necessary documents proving its legal personality before the Council considered its application for sectoral dialogue partnership, REPORT OF THE 8th MEETING OF THE CMFA, Yerevan, 18 April 2003, REPORT, Doc. BS/FM/R(2003)1, Annex V, Resolutions, para. 36, p. 93 (2003). At the same meeting the sectoral dialogue partnership of the Black Sea Universities Network was not renewed for failing to produce proof about its legal personality.

¹⁰² For an interesting case study of the impact of a national NGO in inter-governmental institutions see Liza D. Fallon and Lorne K. Kriwoken, *International Influence of an Australian Nongovernmental Organization in the Protection of Patagonian Toothfish*, 35 OCEAN DEVELOPMENT & INTERNATIONAL LAW 221–266 (2004).

¹⁰³ Joint letter of BRASS, BINSAs and UKRUSUDPROM dated Febr. 9, 2001.

kind of arrangement could be a precedent for involving national NGOs in BSEC activities.

6. Consequences of Institutionalised BSEC – NGO Relations

Under this heading the paper addresses mainly the question of rights and obligations that entail for all implicated actors the establishment of one of the types of institutionalised relations between BSEC and NGOs (observer status, sectoral dialogue partnership or dialogue partnership). As it has been already pointed out in this paper, the BSEC – NGOs relationship is governed by the BSEC Charter and in more detail by normative texts enacted by the competent BSEC organ. These unilateral acts of the Organisation set the legal framework in which the interaction with NGOs exists. In the first place there are texts of general application for all NGOs wishing to establish institutionalised relations with the BSEC, such as the Rules of Procedure and the Resolution on the Criteria for Granting Observer Status to NGOs. These are resolutions binding upon the Organisation and its member states. The legal framework is completed by the individual resolutions by which the BSEC Council grants observer status, sectoral dialogue partnership or dialogue partnership to applicant NGOs. The Charter and the Rules of Procedure provide that the three afore-mentioned types of relationship with NGOs require a resolution of the Council. This requirement entails firstly that the consensus of the member states is needed for granting these statuses to interested NGOs and secondly that the relevant acts are legally binding for the Organisation and its member states; as explained *supra* they are binding also for the concerned NGOs in the sense that if they do not respect the otherwise unilateral BSEC resolutions, their relations with the BSEC would be severed. They can be binding for NGOs from another point of view: the Council of Ministers of Foreign Affairs of the BSEC may attach at its resolution granting observer status or sectoral dialogue partnership to a NGO clauses or conditions specific to the concerned organisation (for example limiting the observer status to selected BSEC activities or requiring specific conduct from the beneficiary NGO). Such particular provisions have also to be respected by the addressee NGOs. From the practical point of view the cooperation of the BSEC with partners and observer NGOs is entrusted with the PERMIS; there is no specific organ, like in the UN and the Secretariat serves for the transmission of information between the BSEC organs and NGOs.

Notwithstanding the possibility of enunciating specific provisions for individual NGOs, the rights and obligations of the BSEC and NGOs with institutionalised relations with the former are set out in general terms in the BSEC Rules of Procedure with respect to the observer status. Concerning the sectoral dialogue partnership the only relevant provision is to be found in the Charter providing that sectoral dialogue partners have the “possibility of attending meetings on specific subjects” (article 9, *litt.* b). Observers, on the other hand, may attend BSEC meetings without limitation (article 21, para. 8). They may even “attend, with special permission of the Chairman-in-Office, a meeting of restricted nature or part of a meeting during which an item of restricted nature is being discussed” (article 21, para. 7). Moreover, when attending

meetings observers may be authorized by the Chairman-in-Office “a) to address the meeting; b) to participate in the discussions of technical or expert level meetings; c) to receive official BSEC documents; d) to submit written statements on particular items of the agenda” (art. 21, para. 8). The sheer comparison of the rights conferred to observers to that attached, by the texts, to the sectoral dialogue partnership demonstrates the statutory distinction between these two modes of BSEC – NGOs relations as well as the difference between participation and consultation. Nonetheless, filling in thus the gap in enunciating rights and obligations for this type of relationship, the practice has assimilated for all practical purposes the sectoral dialogue partnership with observer status. In practice, NGOs sectoral dialogue partners of the BSEC receive full information on the BSEC proceedings, are invited in all BSEC events, including the meetings of the Council of Ministers of Foreign Affairs, have the right to address the BSEC meetings and submit oral or written proposals. Hence the BSEC practice has provided for a kind of “compensation” for the less formal status that is granted to non-state actors by conferring to this mode of cooperation the rights attached to the observer status.

The last development of the practice leads further to the conclusion that whichever status are applying for or are granted by the competent BSEC organ, non-state entities are not simply objects of legal regulation, but contribute actively to policy shaping and development in the BSEC process. There are numerous examples of this active interaction between BSEC and NGOs enjoying sectoral dialogue partnership with the former. The inclusion into the program of work of the BSEC of the issue of facilitation or simplification of issuance of entry visas for particular categories of economic actors nationals of the BSEC member states (businessmen engaged in export, import or investment activities in the BSEC member states,¹⁰⁴ track drivers engaged in international road transport of goods in the BSEC region¹⁰⁵) is the result of the initiative of the BSEC Business Council, for the first category of persons, and of the Union of International Road Transport Association in the BSEC Region (BSEC-URTA), for the lorry drivers. BSEC-URTA has also submitted a proposal to conclude an Agreement among the BSEC Member States on Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualification for Road Vantage Operators and Road Passenger Transport Operator,¹⁰⁶ which is under initial consideration by the BSEC Working Group on Transport. The same WG has on its agenda a vast proposal on maritime transportation, submitted by two interested NGOs (Black Sea Region Association of Shipbuilders and Ship Repairers and Black Sea International Ship Owners Association). NGOs with sectoral dialogue partnership status are given also the

¹⁰⁴ Draft Agreement on Simplification of Visa Procedures for the Businessmen Nationals of the BSEC Member States, AD HOC EXPERT GROUP ON VISA SIMPLIFICATION PROCEDURES, Istanbul, 29–30 Jan. 2003, REPORT, Annex III, Doc. BS/SVPBLD/GE/R(2003)1, still under consideration.

¹⁰⁵ Draft Agreement on Simplification of Visa Procedures for Professional Drivers Nationals of the BSEC Members, AD HOC EXPERT GROUP ON VISA FACILITATION FOR LORRY DRIVERS, Istanbul, 22–23 Jan. 2004, REPORT, Annex III, Doc. BS/SVPBLD/GE/R(2004)1, finalised.

¹⁰⁶ See MEETING OF THE WORKING GROUP ON TRANSPORT, Istanbul, 19–20 Febr. 2004, ANNOTATED AGENDA, Doc. BS/TR/WG/AA(2004), p. 3 (2004, Febr. 2).

possibility to be associated in the management of concrete projects in the field of their activities and even to submit proposals for projects to be financed through the BSEC Project Development Fund.¹⁰⁷

Despite all the afore-mentioned participatory rights the NGOs with institutionalised relations with the BSEC remain third parties. The most important implication is that they do not affect formally the decision-making process in the Organisation. Their lobbying activities may occasionally have some effect, but not on a regular or formal basis. Another result of the position of NGOs in the BSEC is that their status in the Organisation does not have an impact on their standing in the domestic legal orders of the BSEC member states. Their interaction is limited to the BSEC organs and they are not entitled to claim any other participation in governmental processes at the level of individual states.

7. Lessons Learned and Reflections for the Future

Concluding this paper on the institutionalisation of relations of the BSEC with NGOs, some general conclusions on the main features of this relationship may be drawn. First, it is important to underline the readiness of the BSEC, expressed since its early times, to cooperate with non-state actors, which translates a clear positive evaluation of the role of NGOs in the international process. Concerning the format of the desired BSEC – NGOs relations the BSEC Charter provides for two options: the observer status (article 8) and for less intense modes of cooperation, the most important in this connection being the sectoral dialogue partnership (article 9). The observer status has not been granted to NGOs; the sole exception of the International Black Sea Club, whose observer status dates back at the formative period of the BSEC (1993) and long before the adoption of the BSEC Charter, confirms this negative practice. This is all the more curious taking into account that one of the first institutional measures that the BSEC member states have approved immediately after the entry into force was the enactment of “Criteria for Granting Observer Status to NGOs”. Instead this set of criteria has been applied in order to establish sectoral dialogue partnership with NGOs applying for observer status. At the time this paper is completed three NGOs are sectoral dialogue partners of the BSEC¹⁰⁸ while another two have applied for this status.¹⁰⁹ Although there is no correlation between NGOs and sectoral dialogue status in the Charter, one has the impression that states and inter-governmental organisations are entitled to

¹⁰⁷ See the proposal submitted by the BSEC-URTA for the project “Development of Distant Professional Learning Software for the International Road Transportation Industry” aimed at developing a sophisticated professional competency training software for the international road transport as well as implementing and monitoring a harmonised and sustainable distance-learning programme with the intention of delivering the Certificate of Professional Competence (CPC) training for international freight transport operators in the BSEC region, WORKING GROUP ON TRANSPORT, Baku, 1–2 Oct. 2003, REPORT, Doc. BS/TR/WG/R(2003)1, para. 15, p. 3 (2003, Oct. 2).

¹⁰⁸ Black Sea International Shipowners Association, Union of International Road Transport Association in the BSEC Region, Black and Azov Seas Ports Association.

¹⁰⁹ Black Sea Region Association of Shipbuilders and Shiprepairers and Black Sea Cruising Association.

observer status while NGOs shall cooperate with the BSEC through the modes provided for in article 9 of the Charter, in particular sectoral dialogue partnership. Taking into account the practical identity of the rights and obligations attached to the two categories of relations, it is not far-fetched to submit that the difference between them has become one of the beneficiaries of the respective status and not one of substance.

Another feature that emerges from the number and character of NGOs that have received or applied for institutionalised relations with the BSEC is the fact that most of the non-state actors that have sought and entertain institutionalised relations with the BSEC are professional or lobbying groups. This situation calls for some balancing. It is undoubtful that BSEC as an economic organisation fostering cooperation in the field of economic development constitutes a forum where the professional associations of its member states seek to table their proposals and eventually influence in their favour the decision-making process on a regional level. Nonetheless the overall aim of sustainable development can benefit from the implication in the BSEC work of a wider range of non-state actors, including civil society, environmental, human development, labour, cultural, etc. NGOs. There is therefore a real advantage, if not need, for the BSEC to be attractive to such type of organisations as well and to be open to them whenever they manifest their desire to cooperate with the Organisation.

In that way the BSEC would become more open to the citizens' concerns; this is also expected from the interaction with NGOs. However it is not wise to have maximalistic expectations from such cooperation. It can be even counter-productive as it was shown by the handling of a proposal submitted for consideration to the competent organs of the BSEC jointly by the sectoral dialogue partners NGOs Black Sea Region Association of Shipbuilders and Ship Repairers and Black Sea International Ship Owners Association (together with the Ukrainian national association UKRUSUD-PROM). The joint proposal, with the ambitious title "General Directions of Governmental Policy of the BSEC countries in the sphere of shipbuilding, marine fleet and shiprepair",¹¹⁰ contained a vast program of *desiderata* for the entire vertical organization of the maritime sector from building vessels, operating them, developing merchant shipping and ensuring its safety to contributing to fully proficient carriage of goods, promoting the efficiency of ports and harbors as well as providing the frame for inter-modal system within the Black Sea region and beyond it. The submission included even proposals relating to credit policy and taxation issues, which were not covered by the BSEC mandate. The overall contents of the proposal was met with extreme caution by the member states and actually rejected, although in veiled terms.¹¹¹

From the procedural point of view some streamlining is necessary in order to enhance the level of BSEC – NGOs interaction and avoid uncertainty. The first observation in this respect relates to the need to establish as a rule the periodic evaluation of the cooperation between the Organisation and NGOs enjoying institutionalized relations with the former, in order to decide whether to maintain such relations or to discontinue them. It is exact that the Rules of Procedure provide that "observer status may

¹¹⁰ Joint letter of BRASS, BINSAs and UKRUSUDPROM dated Febr. 9, 2001.

¹¹¹ 3rd MEETING OF THE CMFA, Bucharest, 20 Oct. 2000, REPORT, BS/FM/R(2000)2, Annex V, Recommendations, para. 62, in HANDBOOK OF DOCUMENTS, vol. V, 70 (2002).

be granted to international organisations for an unlimited period” (article 21, para. 5). The critical word is “may”, which does not impair the right of the BSEC Council of Ministers of Foreign Affairs to grant observer status for a renewable definite period. The adoption in practice of such limitation is advisable and would be beneficial for the quality of the BSEC – NGOs interaction, that might become, in the opposite case, void of any practical content.¹¹² It is important in this respect to underline that for the sectoral dialogue partnership, with respect of which the normative texts do not contain any indication about the duration of the term, the Council has consistently granted this status for a renewable period of two years, by analogy to the provision relating to the observer status of states (article 21, para. 4 RP¹¹³). This practice has been unswerving and without exception so that it can be assumed that there is an *opinio iuris* according to which this limitation to renewable two-year terms is a legal obligation binding upon the Organisation. Therefore it would not cause perplexity to admit that a relevant custom *praeter chartam* has been generated. There is no legal reason why what is valid for observer status for states and by analogy for sectoral dialogue partnership for NGOs cannot apply to international, inter-governmental or non-governmental, organisations. On the contrary, as convenience and result-oriented action require and the law does not impede, the same practice can and should be followed with respect to the observer status granted to international organisations. Such course of action should also be coupled with an obligation for the NGOs with institutionalised relations with the BSEC to submit periodically a report of their activities, with particular emphasis to the contribution to the BSEC work. Such report should be submitted in particular together with the application for extension, even in the case the Council has not requested it in order to consider applications for renewal.

It has been pointed out that the practice has given to the NGOs that cooperate with the BSEC as sectoral dialogue partners vast “participatory” rights, assimilating for every practical reason these rights with the entitlements attached to the observer status. In this respect it is important to note that such practice, considered by some member states too generous, may backfire. The danger is that judging the present system too liberal *vis-à-vis* NGOs, member states tend to adopt a more restrictive approach towards admitting them in the BSEC framework. If this tendency gains further ground, the advantages of the implication of NGOs in the BSEC process would shrink with negative results with regard to the openness of the Organisation to civil society and other private actors. It is therefore submitted that some rights, presently attached to the sectoral dialogue partnership status, such as the unrestricted participation of NGOs in the meetings of the Council of Ministers of Foreign Affairs, of the Committee of Senior Officials or in some other events should be reviewed in order not to hamper the expansion of this cooperation. In particular the Council of Ministers of Foreign Affairs is, and should, not be transformed into a general discussion forum; its character as the decision-making organ needs to remain intact. Sectoral dialogue partners, as well as observers admitted for selected activities (article 21, para. 6 RP), can contribute in a

¹¹² An evaluation for example of the observer status granted in 1993 to the International Black Sea Club is necessary in the light of the “practical and valuable contribution” rule.

¹¹³ “Observer status shall be granted to a State for a renewable period of 2 years.”

meaningful and effective way to the BSEC work by participating in the meetings of the subsidiary bodies that deal with the sectors concerned; it is in these organs, composed by experts from the member states, that the decisions are actually shaped in order to be presented to the politically responsible decision-making instances of the BSEC. Moreover, when need arises, NGOs may be invited to intervene in meetings of the Council (or the Committee of Senior Officials). The BSEC should consequently elaborate and communicate to the NGOs interested in cooperation with it, a guidebook containing the rights and obligations of these organisations deriving from such cooperation. Moreover the necessary arrangements could be done in order to introduce in the BSEC practice a periodic conference of NGOs that have institutionalised relations with the BSEC (observers, sectoral dialogue and dialogue partners). Such conference may be convened once a year or every second year, preferably at the sidelines of an event where all the NGOs would be invited. This event could be a meeting with the Committee of Senior Officials, during which a specific agenda item concerning the review of the cooperation with NGOs would be included. The previous suggestions aim at rendering the BSEC – NGOs relations transparent and without misunderstandings as well as at contributing to establishing a wide-ranging and future-oriented mutually beneficial cooperative partnership, which is of great value for the attainment of the Organisation's objectives.