

Foreign Investment and Environmental Protection: The Liability of Private Enterprises under International Environmental Law

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Abstract

Foreign investment and environmental protection entertain both synergistic and conflicting relations. On the one hand, multinational corporations (MNCs) can harness the resources (financial and technological) to promote environmental protection through various channels (e.g. Clean Development Mechanism, socially responsible investing and private environmental finance). On the other hand, foreign investment may adversely affect the environment of host State. The BP's Deepwater Horizon tragedy in the Gulf of Mexico in 2010, which caused the largest ever accidental marine oil spill, was a stark reminder of the environmental risks posed by the transnational economic operator.

However, traditionally, only States have legal subjectivity in international law. Due to the increasing global environmental challenges, calls for stronger obligations of MNCs under international law are not likely to subside. This paper therefore first aims to discuss the extent to which international environmental law can be directly applied to multinational corporations by analysing the status of MNCs under international law. Then the failure of public international law to achieve a global consensus on liability standards for environmental harm. It attributes this failure in part to the fact that public international law focuses on relations between states when most environmental harm is caused by the actions of private actors such as multinational corporations. After an overview of the recent progress of regulatory reforms at both domestic and international, this paper captures the emergence of two major 'informal' regulations – corporate self-regulation and 'civil regulation' – and argues that these 'bottom-up' approaches can help MNCs make contributions to international law making.

Keywords: foreign investment, environmental protection, Multinational Corporation, applicability, international environmental law

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1. Introduction - multinational enterprises and environmental protection

Multinational corporations (MNCs) wield increasing economic and social power. The most recent four decades have seen an emotional ascent of globalized business exchanges. Today, an estimated 100,000 MNCs represent around a fourth of the global gross domestic product (GDP)¹ and create a turnover which exceeds the public budget of many states².

The private sector wields considerable extensive financial and social power and even progressively expands into traditionally state-run sectors, satisfying (quasi-)governmental functions by providing infrastructure, housing, and health services or other social policies.

In fact, environmental protection can barely be accomplished without the participation or even the activity of the private sector, as has been recognised previously, in particular at the 2002 Johannesburg Summit. The contribution of the private sector is particularly important in connection with (i) project financing, (ii) technology transfer and also (iii) environmental governance³.

From one perspective, MNCs may be seen as the main repositories of modern, environmentally friendly, technology, and as the most advanced experts on environmentally sound management practices⁴.

Then again, MNCs can likewise hurt human rights, harm the earth, or commit crimes. For example, the BP's Deepwater Horizon tragedy in the Gulf of Mexico in 2010, which caused the largest ever accidental marine oil spill, was a stark reminder of the environmental risks posed by the transnational economic operator.

The challenge, therefore, is not just to steer private interest in pro-environment projects, additionally to present certain checks on the activities of the private sector (such as corporate social responsibility codes or accountability mechanisms). An ideal legal framework seeks to prevent environmental harm from arising out of the activities of MNCs, but also how MNCs might be encouraged to use the best technologies and managerial practices that will enhance the ability of host countries to develop their economies and societies in an environmentally friendly manner.

This paper therefore first aims to analyse the status of multinational corporations under international law, focusing in particular on international environmental law (2). Then the failure of public international law to achieve a global consensus on liability standards for environmental harm. It attributes this failure in part to the fact that

¹ UNCTAD, 'World Investment Report: Non-Equity Modes of International Production and Development' (2011) UN Doc UNCTAD/WIR/2011, 24 and web table 34, <http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf> accessed 5 December 2015.

² See John Mikler, 'Global Companies as Actors in Global Policy and Governance' in John Mikler (ed), *The Handbook of Global Companies* (Wiley-Blackwell 2013) 1, 4 ff.

³ Dupuy, P.-M., & Vinuales, J. E. (2015). *International Environmental Law*. Cambridge: Cambridge University Press.

⁴ Francioni, F. (2013). The private sector and the challenge of implementation. In P.-M. Dupuy & J. Vinuales (Eds.), *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards*. Cambridge: Cambridge University Press.

public international law focuses on relations between states when most environmental harm is caused by the actions of private actors such as multinational corporations (3). After an overview of the progress of regulatory reforms at both domestic and international, this paper turns to capture the emergence of two major informal regulations and argues that these bottom-up approaches can help MNCs make contributions to international law making (4).

The focus will lie on discuss the extent to which international environmental law can be directly applied to multinational corporations, which helps to clarify the responsibility/liability of the economic operator for internationally wrongful acts in an environmental context.

2. International legal personality?

The central debate on MNCs in international law focuses on the question of whether or not they are subjects of international law, that is, whether they are ‘capable of possessing international rights and duties, and [have] capacity to maintain [their] rights by bringing international claims’⁵.

Personality is a requirement to bring legal claims in the various international enforcement tribunals. This means this international person would be a subject of international law defined by Brownlie (2008:57) as: 'an entity of the type recognized by customary law as capable of having these capacities (rights duties and powers to bring a legal claim) is a legal person.'⁶ This is a crucial concept in public international law, as institutions and groups need it to operate within the international law arena. This can be contrasted with entities that are objects of the law; these are entities that might have legal rules to protect them (such as rules protecting animals and young children) but they do not in themselves have the legal rights and duties to enforce these rights in a court system.

Traditionally, international law was perceived as governing only the “mutual transactions between sovereigns”. The classic position was that states were the principal (and sometimes argued to be only) subjects of public international law.

O'Connell (1970) argued that legal personality is only shorthand for the proposition that an entity is endowed by international law with legal capacity⁷. Jennings and Watts (1992) introduce the concept of international person as one who possesses legal personality in international law and enjoys rights, duties, or powers as established in international law and has the capacity to act on the international plane either directly or indirectly⁸.

The classic view was that only states had international legal personality in international law, but that view radically changed in the twentieth century with the advent of international organizations and international criminal law which included international governmental organizations and individuals as international legal

⁵ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

⁶ Brownlie, I. (2008). *Principles of Public International Law* (7th ed.). Oxford: Oxford University Press.

⁷ O'Connell, D. O. (1970). *International Law* (2nd ed.). London: Stevens & Sons.

⁸ Jennings, R., & Watts, A. (1992). *Oppenheim's International Law* (9th ed.). London: Longman.

persons⁹. A few international legal scholars, on the other hand, have recognised MNCs as subjects of international law. Some have adopted a de facto approach based on their significant participation at the level of international law¹⁰ and on the growing privatisation of international law as evidenced by investment law and arbitration¹¹.

Adhering to these formal prerequisites, the large majority of international legal scholars hold that MNCs do not possess international legal personality¹². It is argued that they have not been granted rights or obligations under international law and that although companies benefit from a range of international law provisions, they do not necessarily enjoy corresponding rights¹³.

It cannot be argued that corporations have international legal personality, as such, as they are subject to the particular national jurisdiction in which they are incorporated. There is a movement within human rights to bring corporations within international legal responsibility by the draft norms of corporate social responsibility, but they have been adopted by neither the Human Rights Council nor any sovereign states. Corporations have been brought into the international arena only voluntarily within such mechanisms as the global compact but it cannot be argued that they have full international legal personality.

Within the international law on foreign investment, there is clear indication that multinational corporations possess both rights and duties. There is a clear tendency to hold them responsible for certain types of conduct, though at the moment this is done largely through domestic law. Yet, the recognition of the multi-national corporation as a single entity and the recognition of its responsibility for violating international norms is slowly emerging. Though the draft Code on Transnational Corporations, which sought to achieve this, never progressed beyond its status as a draft, the principles it contains may well come to be recognised in the course of time.

Despite this enormous power both for good and for harm, the multi-national corporation has hardly been recognised as an entity capable of bearing rights and duties in positivist international law. Obviously, this position may have to change, given the reality that it is as dominant an actor on the international economic scene as the state.

⁹ Ibid

¹⁰ See David Adedayo Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana 1978) 244 f; Dominique Carreau and Fabrizio Marrella, *Droit international* (11th ed, Pedone 2012) 66.

¹¹ Tévar, Z. N. (2012). 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 Cuadernos de Derecho Transnacional 398, 400..

¹² Nowrot (n 23) 372 with further extensive references; Cassese (n 22) 103; Malanczuk (n 24) 100; Kay Hailbronner, 'Der Staat und der Einzelne als Völkerrechtssubjekte' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (4th edn, De Gruyter 2007) 178; Muchlinski, 'Corporations in International Law' (n 15); Eric De Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 *Human Rights and International Legal Discourse* 66, 80; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 122.

¹³ See Malanczuk (n 24) 100: 'The fact that individuals or companies are the beneficiaries of many rules of international law does not mean that these rules create rights for the individual or companies, in much the same way as laws prohibiting cruelty to animals do not create rights for animals'.

As Gatto has observed, MNCs have ‘no coherent existence as a legal entity [but are] a political and economic reality which articulates itself in a confusing variety of legal forms and devices.’¹⁴ It is therefore more helpful to focus on the characteristics that distinguish MNCs from their national counterparts. Other than domestic businesses – even those that operate production facilities abroad, or export goods and know-how – MNCs have the capacity to flexibly move places of production and assets between countries. They structure management units independently of national borders and lose every tie to a nation state except for the formal nexus of incorporation. This operational fluidity and the ensuing detachedness from domestic bounds are one of the main reasons why national legislators fail to put adequate checks on the power of MNCs, and why MNCs have moved into the focus of international law.

Instead of taking a position in this discussion, the present contribution will follow Alvarez’ advice and focus on ‘addressing which international rules apply to corporations rather than whether corporations are or are not subjects of international law’¹⁵.

3. Formal environmental regulation of MNCs: recent developments

This section deals with the detail of environmental regulation as applied to MNCs in particular. In this light it may be said that two main regulatory goals inform this area: first, to control any environmental harm caused by MNC operations, and to render such firms accountable for it and, secondly, to encourage MNCs to act as conduits for improved transnational environmental management practices and technology transfer.

‘Formal’ (or ‘official’) regulations undertaken by governmental (whether at the national or sub-national level) or inter-governmental authorities (whether at the regional or multilateral levels)¹⁶. Such regulation involves traditional ‘command and control’ techniques that are based on laws, regulations and administrative or judicial decisions and which ascribe responsibilities and liabilities upon firms directly. It can also be conducted through cooperative methods, in partnership with business groups, individual firms, and/or civil society groups and/or environmental NGOs, which may be based on mandatory obligations contained in contracts or on voluntary compliance mechanisms.

3.1 National law

Domestic law has proven to be insufficient to promote the positive effects of business by safeguarding a stable and reliable economic environment, and to curb the negative effects by ensuring accountability¹⁷.

¹⁴ Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Elgar 2011) 4.

¹⁵ Wouters, J., & Chane, A.-L. (2013). Multinational corporations in international law; José E. Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 *Santa Clara Journal of International Law* 1, 31.

¹⁶ Muchlinski, P. (2007). *Multinational enterprises and the law*. Oxford: Oxford University Press.

¹⁷ Percival, R. V. (2010). Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

National legislation is often unable to create a stable regulatory environment in which MNCs can operate, as well as to exercise control over the harmful acts of entities which fragment their activities globally, operate in decentralised network structures, and flexibly relocate operations and profits. In addition, economically weaker states depend on the investments of MNCs and may be unwilling to enact and enforce demanding human rights and environmental standards in order to enhance their attractiveness to foreign investors¹⁸.

MNCs defy concepts of nationality and elude the grip of the – unwilling or unable – national legislator. The perceived inadequacy of domestic legislation to effectively regulate the activities of MNCs has moved the focus to the level of international law.

3.2 International law

For centuries legal systems around the world have sought to vindicate the principle that those who cause significant, foreseeable harm to others can be held liable for the damage their actions cause. Now widely known as the “*sic utere*” principle, this concept also has been incorporated into public international environmental law. It is recognized in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration. These declarations acknowledge that nations have the duty “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁹ Thus, both private parties and sovereign nations have a duty to avoid causing harm to others.

Multilateral Environmental Agreements (MEAs) are addressed primarily at states and have at most indirect regulatory implications for MNCs. In accordance with the fundamental ‘polluter pays’ principle, a few specialised agreements establish civil liability rules for private actors which have the potential to cause particularly grave environmental damage, such as oil spills or nuclear leakages. All of these instruments rely on domestic implementation, and require the contracting parties to establish the necessary enforcement mechanisms²⁰.

Treaties regulating the liability of the economic operator (public or private) must be understood as what in private international law is often called ‘uniform law’ (‘*droit uniforme*’), namely substantive law common to several States and established by treaty. 99 Indeed, the use of international law in this area is primarily intended to establish some parameters for the harmonised or at least equivalent operation of laws relating to compensation for certain damages resulting from regulated activities.

The first treaties or treaty systems were adopted in respect of damages resulting from the production of nuclear energy and oil pollution damage. As regards nuclear energy, two separate but related systems have been developed, one among OECD States and the other under the aegis of the International Atomic Energy Agency (‘IAEA’). These systems are linked via a common protocol adopted in 1988, which seeks to harmonise

¹⁸ Sornarajah, M. (2010). *The International Law on Foreign Investment* (Second ed.): Cambridge University Press.

¹⁹ Percival, R. V. (2010). Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

²⁰ Wouters, J., & Chane, A.-L. (2013). *Multinational corporations in international law*.

the situation of persons affected by the effects of a nuclear accident governed by one of the two systems²¹.

Several treaties have provisions that incorporate the *sic utere* principle, but there is little or no consensus concerning precisely how it should be applied. More than a dozen multilateral agreements have been adopted to address transboundary pollution problems, but only five of these have entered into force. The inadequacy of public international law on liability for transboundary environmental harm is powerfully demonstrated by the fact that no nation asserted any liability claims for the Chernobyl nuclear accident, the worst nuclear accident in history.

Despite several incidents of severe transboundary pollution, including the April 1986 Chernobyl nuclear accident, little progress has been made in developing liability standards under public international law²². Nations have been less than enthusiastic about creating liability for themselves when companies subject to their jurisdiction cause transboundary harm. As Lakshman Guruswamy notes, “thus far it does not appear that states are willing to engage in the delicate process of defining the conditions and scope of international responsibility for environmental damage.” The Third Restatement of Foreign Relations describes state responsibility for environmental harm as a concept “rooted in customary international law,” but scant progress has been made in implementing it in practice²³.

Despite the promise of a “more determined” effort to develop global liability standards, little progress has been made since the Stockholm Conference 1992²⁴. Since 1978 the International Law Commission (ILC) has been working to develop principles of “International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law.” In 2001 it adopted a preamble and set of 19 articles on “Prevention of Transboundary Harm from Hazardous Activities” and in 2004 it released for comment eight draft principles on “The Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities.” The ILC’s approach has been to focus liability on the operator of the activity causing the harm rather than on the state in which it originates and to rely on states to develop their own procedures for compensating victims of environmental harm. While this initiative and other efforts may point the way for future progress, they fall considerably short of establishing effective global liability standards for environmental harm.

3.3 Environmental litigation

Private litigation seeking to hold polluters liable for harm has faced considerable obstacles²⁵. Private plaintiffs occasionally have been able to recover damages when large, single sources of pollution caused visible harm (e.g, early 20th century smelter litigation, large oil spills) or where particular toxic substances (e.g., asbestos) have

²¹ Dupuy, P.-M., & Vinuales, J. E. (2015). *International Environmental Law*. Cambridge: Cambridge University Press.

²² Percival, R. V. (2010). Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Percival, R. V. (2010). Liability for environmental harm and emerging global environmental law, *Maryland journal of international law*, 25(37).

caused unique “signature” injuries. However, the difficulty of proving individual causation has rendered private law a poor vehicle for preventing the kind of harm now caused by multiple pollutants from multiple sources. While most countries now rely on public law to prevent environmental harm through comprehensive regulatory programs to regulate pollution, these programs usually do not provide compensation to the victims of such harm. When harm is caused by pollution originating in another country, it is even more difficult to hold polluters accountable because public international law has yet to create an effective global regime of liability for transboundary pollution despite commitments in both the Stockholm and Rio declarations to do so.

Despite the absence of an agreed-upon global liability regime, remarkable developments are occurring in several countries to make it easier to hold polluters accountable for the harm their emissions cause²⁶. Some nations are modifying their laws to make it easier for private plaintiffs to overcome obstacles to recovering for harm caused by pollution. Public law also is being modified to enable governments to recoup damages for environmental harm. In the absence of an effective global liability regime, domestic legal systems are now entertaining more private transnational environmental litigation.

There is a duty on the part of all states to ensure compliance with standards that are prescribed either in international treaties or in customary international law relating to environmental protection. Home states of multinational corporations have the power of control over these corporations to ensure that they conduct themselves in accordance with the standards in the international law on the environment²⁷.

As in the case of human rights, there has also been an increase in the litigation before the domestic courts of home states alleging violation of environmental standards. The Bhopal litigation was unsuccessful because of the stringent application of the *forum non conveniens* doctrine. But, with new trends resulting in a more liberal application of the doctrine in various jurisdictions, it has become possible to contemplate the imposition of liability on parent corporations for environmental harm that had been caused in host states. These trends will accelerate, giving rise to the establishment of firm principles of liability of parent corporations for environmental harm caused by their subsidiaries²⁸.

4. The emergence of informal regulations: ‘corporate self-regulation’ and ‘civil regulation’

Due to the limitations of formal regulation discussed above, this section covers in more detail the forms of environmental self-regulation undertaken by firms alone, or in partnership with environmental NGOs through methods of co-regulation.

4.1 Corporate self-regulation

²⁶ Muchlinski, P. (2007). *Multinational enterprises and the law*. Oxford: Oxford University Press.

²⁷ Sornarajah, M. (2010). *The International Law on Foreign Investment* (Second ed.): Cambridge University Press.

²⁸ *Ibid.*

The rationale for self-regulation in this field was given in 1992 by Stephan Schmidheiny: global business had a responsibility to further sustainable development and that the best method for doing so was a combination of regulatory standards to direct performance and voluntary initiatives by the private sector. In particular, environmental harm was seen as a form of market failure that could be corrected through economic instruments that would offer incentives to firms to act in a more ecologically efficient way. The power of business to improve the environment was stressed as part of what has been termed ‘eco-modernism’: the faith that technology could be used to ameliorate the environmental harm caused by earlier generations of productive technologies. This approach amounted to a departure from earlier business perspectives on environmental issues, which saw environmental regulation as a barrier to the market and which sought to limit the effects of such regulation²⁹.

Of especial significance in relation to self-regulation has been the widespread adoption by MNCs of the International Standards Organization (ISO) 14000 series of environmental management standards³⁰. These represent a hybrid private-public regulatory regime. It is private in that firms follow standards drawn up by a non-governmental international organization that represents the 134 national standard setting bodies of its member countries. These national bodies are in part governmental departments and in part hybrid or fully private bodies. Decision-making is, however, dominated by national industry groups in that the various national bodies that work towards the formulation of ISO standards have a strong local industry membership. On the other hand, the ISO is also a public regime to the extent that its standards are adopted as benchmarks for national laws and for the purposes of inter-governmental organization activities.

Negotiations on ISO Standards started in 1993 as part of the programme for meeting the aims of Agenda 21. The first five of the new standards were adopted in 1996. The ISO 14000 series covers six main areas including environmental management systems, environmental auditing, environmental labelling, environmental performance, evaluation, life cycle assessment, and terms and definitions. Of the already adopted ISO 14000 series it is ISO 14001 Environmental Management Systems – Specification with Guidance for Use which allows for corporate certification. The other four standards are for guidance only. To obtain certification each individual facility of the firm must apply.

Indeed, effective self-regulation may depend on effective standard setting and enforcement through traditional command and control regulation by host countries. Without this ‘stick’ firms may not act in the correct way. However, increased ‘official’ regulation may itself cause problems. It may be overbearing, by requiring too much of firms, and may not be effective, especially in resource-limited host countries. Against this background there may be an alternative approach, based on partnership between firms and environmental NGOs, or firms and governmental bodies, or a combination of both.

²⁹ Segger, M.-C., & Weeramantry, C. G. (2004). Corporate social responsibility: international strategies and regimes. In M.-C. Segger & C. G. Weeramantry (Eds.), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (1st ed.): Brill - Nijhoff.

³⁰ Muchlinski, P. (2007). *Multinational enterprises and the law*. Oxford: Oxford University Press.

4.2 Civil regulation

The term ‘civil regulation’ has been coined to cover an emerging response to corporate environmental activity which is neither pure self-regulation by firms, nor formal ‘command and control’ regulation by states. It involves the active participation of environmental NGOs in the process of policy development, implementation, and compliance monitoring³¹.

The participation of civil society is important to counterbalance the influence of economic interest groups, whose environmental externalities are often insufficiently addressed by State intervention or consumer behaviour³². Organisations such as Greenpeace, the World Wildlife Fund (WWF) or the International Union for the Conservation of Nature (IUCN), are but a few prominent examples of a vast and thriving body of environmental NGOs active at both the national and international levels, who have devoted substantial efforts to raise public awareness regarding environmental degradation and to channel public pressure. Indeed, the main functions performed by these NGOs can be classified into three main categories: (i) the formulation of the interests of civil society, (ii) assistance in implementation, and (iii) channeling public pressure. Of course, the performance of these functions can follow very different approaches.

This has come about as a result of a perceived ‘regulatory gap’ between traditional legal regulation by the territorial state and the increasingly transnational character of environmentally sensitive business activities. This ‘gap’ can also be attributed to the increased pursuit, by states, of market based economic policies that stress liberalization, privatization, and deregulation. Thus states may have consciously retreated from their role as environmental ‘watchdogs’ leaving much to self-regulation by firms. Such regulatory self-limitation will be compounded in developing countries that have little or no experience as environmental regulators, and which have few resources to devote to such tasks, but which have espoused market-based approaches to corporate regulation. The ‘gap’ is then filled by various civil society groups, including the major environmental NGOs, to create a sense of accountability that may have been lost in the process of deregulation. Thus the role of NGOs could also be characterized as one of filling the ‘democratic deficit’ that increasing marketization, of public economic functions in particular, might be said to create³³.

According to Peter Newell, civil society groups will pursue a binary policy of ‘liberal’ and ‘critical’ governance strategies. ‘Liberal’ strategies involve a cooperative approach to business and may lead to joint standard setting and to NGO/civil society–business partnerships devoted to the pursuit of particular environmental policy goals and/or the realization of particular projects. ‘Critical’ strategies involve NGOs and other civil society groups in a more familiar role as monitors of corporate activity, as expositors of corporate malpractices, and as advocates of more stringent controls over corporate excesses.

³¹ Muchlinski, P. (2007). *Multinational enterprises and the law*. Oxford: Oxford University Press.

³² Dupuy, P.-M., & Vinuales, J. E. (2015). *International Environmental Law*. Cambridge: Cambridge University Press.

³³ Sornarajah, M. (2010). *The International Law on Foreign Investment (Second ed.)*: Cambridge University Press.

The 'liberal' cooperative approach is evident in numerous cases of NGO–business partnership, which have had varying degrees of success. Perhaps the best-known example is the Forest Stewardship Council (FSC)³⁴. Also, partnership arrangements have arisen in the context of industry privatizations that have environmental implications³⁵. Thus in the water industry, NGOs, MNCs, UN agencies and government bodies have formed such arrangements. A final, noteworthy, example of NGO–business partnership in this field arose out of concerns as to how insurers could use their risk assessment procedures to create insurance incentives for firms to act in an environmentally responsible manner³⁶.

The last point leads to the consideration of 'critical' governance strategies by NGOs. Critical strategies have tended to lead to the development of partnerships with business³⁷. For instance, the FSC is a direct result of protest against the rapid deforestation of Brazil undertaken by local groups and by Western NGOs during the 1980s and early 1990s. Also, the campaign against Shell concerning its operations in the Niger Delta, and their effect upon the Ogoni People, helped that firm to focus more critically on its environmental policy. The more powerful and respected NGOs have taken a dual liberal and critical approach to some firms. Thus, while it was mounting a hostile campaign against the Monsanto food company, for developing genetically modified food organisms, Greenpeace was also engaged in dialogue with that company about developing a PVC-free credit card for its supporters.

Ultimately, NGO monitoring and pressure will be of little avail without the commitment of government to set out benchmark standards that will result in legal sanctions if not followed. This will be the case not only in relation to the establishment of basic environmental standards in general regulatory statutes but also in relation to the provision of a legal framework for the conduct of business–NGO partnerships.

4.3 Contributions to international law making (bottom-up approach)

Although states are the primary creators of international law, MNCs have various avenues at their disposal to shape the law making process. They can contribute to the work of the ILO through the 'tripartism' mechanism and pursue their interests in international investment arbitration or (through WTO Members) WTO dispute settlement. Above all, they can use their political, social, and economic power to influence the legislative process by lobbying at the national level of the respective Member State, at the EU and international level, or by participating in dialogue and consultation. However, conflicting policy goals of states or international organisations as well as NGO activism can limit the clout of MNCs³⁸.

³⁴ Muchlinski, P. (2007). *Multinational enterprises and the law*. Oxford: Oxford University Press.

³⁵ *Ibid.*

³⁶ Dupuy, P.-M., & Vinuales, J. E. (2013). *Harnessing foreign investment to promote environmental protection: incentives and safeguards*. Cambridge: Cambridge University Press.

³⁷ Roberts, K. (2015). *Corporate liability and complicity in International Crimes*. In S. S. Jodoin, M.-C. (Ed.), *Sustainable Development, International Criminal Justice, and Treaty Implementation*. Cambridge: Cambridge University Press.

³⁸ Wouters, J., & Chane, A.-L. (2013). *Multinational corporations in international law*.

The impact of NGOs is a new phenomenon. The role that they could play on the international scene was dramatically revealed in their ability to coordinate an international campaign against the acceptance of the Multilateral Agreement on Investment³⁹. Their mobilising capabilities were repeatedly revealed in protests against the WTO at Seattle and Cancun, at successive World Bank meetings and whenever institutions regarded as being associated with neo-liberal notions met in Western capitals. Since their first rush onto the international scene was in connection with a foreign-investment-related issue – the scuttling of the MAI – they are likely to continue to play a leading role in determining such issues.

It is evident that NGOs will have a significant role to play in the future development of the international law on foreign investment. Their role has already helped to shift the law from the protection of multinational corporations to a consideration of their responsibility for misconduct. The view that is advanced by environmental and human rights groups is that a multilateral code on investments should be a balanced one conferring protection on foreign investment but also attributing responsibility when there are violations of environmental and human rights standards by these corporations.

For example, the adoption of the POP Convention was significantly facilitated by the momentum created by the publication of a report with support from WWF. Another example is the role of IUCN in the development of payment-for-ecosystem-services (PES) mechanisms, such as reservoirs of biodiversity and of greenhouse gas emissions. Finally, the intervention of NGOs can have significant influence on how a case is managed, as is evidenced by the famous Brent Spar case, where the intervention of Greenpeace prevented Shell from sinking an oil platform in the North Sea, by channeling public opinion against this form of decommissioning⁴⁰.

5. Conclusion

It has been seen in the proceeding discussions that, on the one hand, MNCs can contribute to economic and technological development, increasing the wealth and the living conditions of society. On the other hand, MNCs can severely impact human rights or the environment and even commit crimes for which they should be held accountable. Domestic law has proven to be insufficient to promote the positive effects of business by safeguarding a stable and reliable economic environment, and to curb the negative effects by ensuring accountability.

But the turn to international law has encountered difficulties as well. Lengthy debates about the international legal subjectivity of MNCs have precluded involvement with the substantive question of the rights and obligations of companies under international law. Subjectivity has been used as a threshold, awaiting the positive granting of rights and obligations by states. However, in light of the ever growing power of MNCs and considering ongoing reports about their involvement in human rights abuses and environmental harm, the calls for stronger obligations of MNCs under international law are not likely to subside.

³⁹ Sornarajah, M. (2010). *The International Law on Foreign Investment* (Second ed.): Cambridge University Press.

⁴⁰ Dupuy, P.-M., & Vinuales, J. E. (2015). *International Environmental Law*. Cambridge: Cambridge University Press.

Caution should be exercised, though, since a single-minded focus on MNCs risks distracting from the primary responsibility of states. Here, many instruments are readily available which might benefit from increased attention and achieve similar results. It cannot be doubted that increased regulation of MNC environmental strategies through a combination of self-regulation, co-regulation, and command and control methods (through) will continue to develop. Equally, it is likely that environmental litigation will continue to make a significant contribution to the development of standards in the field.

It is not proposed to advocate one method or approach over any other. Indeed, the better view is that, in practice, given the political constraints placed upon governments and firms by the assumptions of the globalizing market economy, an eclectic mix of policy sites and techniques of regulation is most likely to be used. Thus 'command and control' methods will be useful, especially in setting benchmark standards and liability rules, and informal regulation will be of value in allowing for firm-specific expertise to be applied in solving environmental problems. Equally, a mix of local, national, regional, and multilateral regulatory sites may be involved in dealing with particular issues.

Thus it is not a simple matter of condemning or complementing MNCs on their environmental performance. Accordingly, the main theme of this paper has been to expose the variety of approaches to regulation and how these interact with each other, while at the same time placing these matters into the wider context of the debates on globalization and the environment. In some respects, this is a most tentative area for corporate regulation and one in which many new approaches to regulation have been experimented with. How effective these various approaches have been, or are likely to be, remain areas of keen controversy.

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