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## **Part VI Actors and Institutions, Ch.35 Business**

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(p. 808) BUSINESS is a central actor in international environmental law. Industry, far more than states, engages directly in environmental degradation as well as the prevention and remediation of its harms. Two conclusions follow, which are both obvious to even a casual observer of environmental policy. First, business will aggressively seek to influence the content and application of environmental law and, second, environmental law will be effective only to the extent that it controls the behaviour of business. Yet the state-centric paradigm of traditional international law continues to skew the analysis of international environmental regimes away from this reality. Both treaties and treatises regard private economic actors as secondary players, and see states as the overwhelmingly dominant targets and prescribers of environmental law. The result is a paradox. Proponents of international environmental law see it as a cutting-edge subject of international law—one that shows the law responding to dynamic collective action problems—yet the field is trapped as much as, if not more than, other areas of international law in a doctrinal straitjacket that gives lopsided attention to states.

This chapter seeks to expose some of the divergences between doctrine and reality, and to suggest ways of understanding the field that take proper account of business. It does so first by examining the roles and goals of business entities with respect to international environmental law. It then examines how international law has accommodated the place of business in environmental policy with respect to two key issues: (1) corporations as the target of legal obligations; and (2) corporations as participants in the process of

international environmental law, particularly with respect to law-making and implementation. I conclude with some thoughts regarding a reconceptualization of the doctrine.

Before beginning, it is necessary to clarify that the scope of actors under the term 'business', as used in this chapter, is large. In particular, it is not confined to large, transnational corporations (TNCs) but, instead, includes small and large businesses operating in one state alone. Moreover, it extends to business-initiated non-governmental organizations (BINGOs), both those composed of, or representing, businesses within one state as well as those with a more international profile.

## **1 Business and Environmental Regulation**

### **1.1 Two Visions of International Business**

The relationship between business and international environmental law can be seen from two distinct perspectives. First, domestic and international businesses create a need for international environmental protection through their capacity to disturb (p. 809) the ecosystem without regard to interstate borders. Pollutants emitted as part of business activity can harm common spaces or move across state boundaries, as with the case of oil released from tankers or ozone-depleting substances. Products produced by business may be inherently hazardous and create extraterritorial harm, as with radioactive materials, pesticides, or persistent organic pollutants (POPs).<sup>1</sup> And business activity can disturb, without actually polluting, disparate geographical areas or common spaces, as with fishing, logging, or bio-prospecting.

However, the transboundary environmental impact of companies is not sufficient in explaining the need for international regulation, for, in principle, many of these manifestations could be handled through strong domestic laws. Yet, the control of business through domestic law faces systemic obstacles. On the one hand, the home government (that is, the state of incorporation or residence) of a TNC that causes pollution elsewhere may have little interest in regulating harmful activity that takes place beyond its borders. On the other hand, if the state hosting the TNC's operations is in the developing world, it may lack the technical expertise and human resources required for effective regulation. Equally significant, it may also lack the desire to do so in the face of economic pressure to welcome foreign business with as few restrictions as possible. (Domestic regulation of purely local companies in the developing world faces these two obstacles for the same reasons.) And, in the case of transboundary pollution, the country in which the damage occurs may lack effective jurisdiction over a company operating in another country.

This vision of the corporation as a threat to the environment, which requires international regulation, competes with a second vision, one initiated by business itself, that sees the corporation as an instrument of environmental improvement. According to this view, corporations can pay attention to the environmental impact of their products and processes. Indeed, businesses can enhance the ecosystem through involvement in remediation. It also emphasizes that governments cannot act alone. Thus, large TNCs can ratchet up a developing state's environmental performance by establishing environmentally sensitive operations where the local law does not require them. Or they can serve as a source of knowledge and training for their affiliates (and governmental officials) in developing countries that exceeds the training that governments offer through official development assistance. Chapter 30 of Agenda 21 represents the first major UN recognition of this role for business.

These two views of the corporation are also part of a larger debate between North and South about foreign investment. For many years, governments of less developed capital-importing countries saw corporations through the first lens, and proposed international norms allowing states to control the conduct and profits of foreign entities. Defending their economic interests, corporations, supported by Western governments, fought fierce ideological, political, and legal battles from the 1960s (p. 810) through the 1980s over, for instance, the ability of host states to expropriate without full compensation. By the 1990s, the beginnings of an accommodation could be seen, as developing countries desperate for foreign investment created legal regimes that were favourable to capital inflows, and some TNCs saw the advantages of accepting various codes (often non-binding) on their conduct abroad.

Yet, as noted, the very need of developing countries for investment has also limited their incentives to regulate foreign-based TNCs operating in their territory. Seeing themselves as lacking the leverage, expertise, and bureaucracy to control corporate environmental conduct, poor host states have sought to transfer some of the regulatory onus to richer home states. Prominent examples of this burden-shifting are the conventions on the transboundary movement of potentially hazardous items, including the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) (regarding pesticides), the 2000 Cartagena Protocol on Biosafety (Cartagena Protocol) (on genetically modified organisms), and the 2001 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention). The result is a more effective constraint on TNC activity than developing states can muster.

## **1.2 A Diversity of Corporate Attitudes**

John Drahos and Peter Braithwaite identify two basic approaches of business to international environmental regulation. Many businesses are still dominated by the economic dynamic of the race to the bottom. In this case, the corporation seeks to lower costs and bolster profits by operating in the least restrictive legal environment. States seeking to attract companies for their economic benefits will lower their standards to accommodate them. Home states, seeking maximum tax revenue, will be reluctant to regulate companies' extraterritorial conduct. A second perspective sees no contradiction between economics and environmentalism. Businesses adopting this view emphasize how corporations profit by following or developing the 'best available technology' or the 'world's best practice'. Consumers will respond to environmentally friendly companies, and those in the lead—practising 'eco-efficiency'—will gain a competitive advantage over others.<sup>2</sup>

Yet business attitudes cannot be grouped simply into anti-regulation and pro-regulation. For one thing, nearly all businesses, large and small, domestic and international, seek certainty in legal regimes above all, whether with regard to the environment, taxation, or employment. A new, but permanent, regulation will prove (p. 811) much more attractive than uncertainty, even if the new rule imposes additional costs. Moreover, corporations divide up along many other lines, with much debate about whether these differences correspond to attitudes about regulation. Will companies that cause only domestic impacts approach regulation differently from TNCs? The former may oppose international regulation if they are unable to influence it (because they are small economic actors) or fear the higher standards resulting from it; they may favour it if it results in overall lower standards; or they may be agnostic if it does not have an effect on their operations at all. What about regional differences? While European companies have lately shown greater interest than US companies in the best available technology model, and tend to be leaders in the various BINGOs promoting the broad notion of corporate social responsibility (CSR), they were laggards in the 1980s with respect to the development of the ozone regime. What about large companies versus small ones? Small companies will usually have to bow to the

wishes of major players in a particular industry, but this does not translate into either an anti-regulatory attitude or a preference for a particular form of regulation. This difficulty in mapping corporate attitudes has made cross-sectoral analysis of international environmental regimes difficult, and, as a result, most academic treatments have dealt with each industry or pollution problem independently.

## **2 Business as the Target of International Environmental Law Duties**

### **2.1 The Limits of Orthodoxy**

International law doctrine has resisted the concept that companies themselves have legal duties. That doctrine views corporations as fundamentally different from states, with only states enjoying the full range of legal rights and duties and the capacity to make claims for violations of rights. This characterization repeatedly appears in the deliberations of the International Law Commission (ILC) and the Institut de Droit International and academic treatments (including other chapters in this *Handbook*). This posture remains even though the law has long accepted rights for non-state actors, for example, in treaties letting individuals sue states in regional courts or letting foreign investors sue states in the International Centre for the Settlement of Investment Disputes, or imposed duties upon them, as in the corpus of international criminal law.<sup>3</sup> Yet the penumbra of legal personality casts a shadow over attempts to (p. 812) evaluate the normative role for non-state actors. As stated in a major treatise, private persons cannot, in general, be liable under international law because the state is a ‘screen’ between them and international law.<sup>4</sup>

The pull of the orthodoxy is seen in a terminological splitting of hairs between ‘responsibility’ and ‘liability’ (see Chapter 44 ‘International Responsibility and Liability’). Thus, scholars have argued a variety of propositions: (1) only states can be ‘responsible’ for violations of international law because of their unique personality, and corporations can only be ‘liable’ under domestic law (‘civilly liable’ under private domestic law, though the possibility remains for criminal liability);<sup>5</sup> and (2) only states can be responsible for violations for the same reasons, but corporations can be liable under international (and not merely domestic) law.<sup>6</sup> Some scholars focus on the acts triggering liability or responsibility rather than the state/corporate distinction. Thus, (3) ‘liability’ arises only for acts not prohibited by international law, so that a state (or conceivably a corporation) may be liable for certain harmful consequences of its acts even if the state is not legally responsible because those acts—typically, some kind of pollution—are not prohibited under international law;<sup>7</sup> and (4) a state is responsible for breaches of international law but liable for (and only for) the consequences of those breaches.<sup>8</sup> For non-lawyers, the use of the term ‘responsibility’ clouds matters even more, since legal responsibility, whatever it is, is certainly narrower than the responsibility envisaged in the concept of CSR.

The doctrine also at times distinguishes between international law that directly regulates corporate activity, and that which allocates jurisdictional competence of states to regulate corporate activity.<sup>9</sup> Under the former approach, international law sets uniform standards for the behaviour of corporations, while, under the latter (an ‘allocation regime’), it decides which state will regulate the activities of corporations under its domestic law.<sup>10</sup> A pure allocation regime enables governments to apply diverse national standards without having to agree on an international standard.

(p. 813) The problem with these two sets of distinctions—between responsibility and liability and between direct regulation and the allocation of jurisdiction—is that the practice

of actors in the international environmental process is so pragmatic, and catholic, as to render them without much utility as a way of understanding the field.

## **2.2 Treaties**

### **2.2.1 Civil Liability Conventions**

The strongest examples of international duties that apply directly to corporations are found in the civil liability conventions. These treaties implement the polluter pays principle, which reflects a policy preference among many states that corporations are legally responsible for their pollution and its consequences. Consider three such treaties:

- The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy states directly that the ‘operator of a nuclear installation shall be liable’ for damage to or loss of life or property (Article 3) and that the liability is strict liability, with exceptions only for armed conflict and grave and exceptional natural disasters (Article 9). It goes on to specify the maximum amount of damages. Moreover, it contains a jurisdictional allocation clause providing that jurisdiction over suits against operators normally rests with the territorial state, with judgments enforceable in other states parties.
- The International Convention on Civil Liability for Oil Pollution Damage (1969, amended in 1984 and 1992) makes the ‘the owner of a ship at the time of an incident ... liable for any pollution damage caused by the ship as a result of the incident,’ with liability again strict and subject to some (indeed a longer list of) exceptions (Article III). It also contains a cap on damages, though it does not allocate jurisdiction to one state alone, allowing suits in any state where pollution or preventive measures take place; and, again, judgments are enforceable in any other state party.
- The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Substances (Basel Convention) (along with its 1999 protocol) engages in a two-pronged approach. The original convention declares that ‘[i]llegal traffic in hazardous wastes or other wastes is criminal’ and requires all parties to punish exports inconsistent with the convention, though it does not contain a jurisdictional allocation structure in the event that more than one state chooses to prosecute. The 1999 protocol provides a civil liability regime in case of incidents involving the transboundary movement of such substances, whether legal or illegal. The generator or exporter assumes liability—which is strict and subject to some exceptions—until the disposer takes control of them. The 1999 protocol (p. 814) also allocates jurisdiction, giving a right of action in the state where the damage or incident occurred or the defendant has his or her principal place of residence or business (Article 17), again providing for mutual recognition of judgments.

In essence, these treaties combine substantive duties on companies with jurisdictional allocation provisions. It is frankly difficult to see what is left of either the distinction between responsibility and liability or between direct regulation and jurisdictional allocation. Plainly stated, the treaties place duties on businesses not to cause pollution. What varies is simply the scope of the duty (due diligence, strict liability), the penalties (civil fines versus criminal penalties), and the enforcement architecture (shared versus unique jurisdiction to hear private claims).

### **2.2.2 Other Conventions**

Beyond the relatively small arena of liability conventions lies the rest of the universe of international environmental treaties, which formally place obligations only on states. Yet, even these accords clearly set specific rules, of which corporations must at a minimum be aware and, depending on the ratification patterns, with which they must comply. The 2001 Stockholm Convention prohibits or severely limits the production, use, import, and export of

POPs. Like other treaties, it sets international standards for industry conduct and prescribes conduct for—or allocates various responsibilities to—different states (for example, producers, exporters, and importers) to enforce the standards. Similarly, the International Convention for the Prevention of Pollution from Ships (MARPOL Convention) sets forth very specific standards for the construction, design, and equipment of oil tankers, which builders, owners, and operators of oil tankers must take account of, even though the standards apply to tankers only through the intermediation of national law. These more typical environmental law treaties do not use the language of direct corporate liability, and, thus, a distinction could be made between the two types of treaties. For the liability conventions, the treaty (once it enters into force) creates the corporate duty, but victims of the prohibited activity will be able to make corporations accountable for a failure to carry out the duty only by suing in the courts of the relevant state party, whereas for the typical environmental treaty, the treaty itself does not speak of a corporate obligation, and corporations need only follow its strictures when they engage in the prohibited activity vis-à-vis a state party that has mandated compliance under domestic law.

I admit that there is a distinction between the liability conventions and the other treaties. Indeed, I have put special emphasis on liability regimes to show that the law creates duties on companies that even an orthodox international lawyer should accept. However, in the end, the practical convergence of the two sets of treaties from the perspective of business entities seems far more important than the lawyer's distinctions between them. In both cases, (1) the treaty sets international standards for the activity; (2) business needs to be aware of these standards; (3) business faces its greatest exposure for failure to comply with these standards when they carry out (p. 815) activities within the jurisdiction of states parties, because the treaty requires states parties to take certain enforcement actions; and (4) less-than-universal ratification of the treaty creates gaps in the effectiveness of the regime and opportunities for business to exploit these gaps.<sup>11</sup>

Of course, treaties that include some allocation of jurisdiction will vary in terms of which states have jurisdiction to regulate, and certain regimes will be easier than others for corporations to evade. It is far simpler for a company, faced with a treaty giving flag states jurisdiction to enforce an international standard, to reflag its vessel to that of a non-party than it is for a company, faced with a treaty giving exporting states jurisdiction to enforce an international standard, to change the location of its exports to a non-party. This allocation mechanism is the key to the success of the Basel Convention and other regimes. However, in both situations, states have effectively created standards on corporations, and these corporations will consider the possibilities of adjusting their business depending on their willingness to comply with them.

### **2.3 Soft Regulation**

Soft international instruments have already recognized the critical role of business entities in environmental degradation and protection. Numerous non-binding regulatory instruments emanating from international organizations are targeted at—and phrase their commitments as directed towards—business. For example, the Food and Agriculture Organization's (FAO) International Code of Conduct on the Distribution and Use of Pesticides is divided roughly equally between commitments for governments and commitments for industry. The Bonn Guidelines on Access to Genetic Resources provide not only standards for governments to regulate bio-prospecting, but responsibilities for commercial users of bio-resources and recommendations for private agreements between users and providers of these resources. The hesitancy of governments to use the language of direct obligations on corporations in treaties is clearly less manifest with respect to soft law instruments (though the non-binding documents from the World Summit on Sustainable Development (WSSD) were deliberately worded to avoid such expressions).<sup>12</sup> Yet, if one believes that soft law is really a form of international law, these (p. 816) commitments are



further proof of the anachronistic nature of the view that only states can be the subject of duties.

### **3 Corporations as Prescribers of Norms**

The stakes for corporations in the content of international environmental law are so great that business is actively involved in its prescription. The standards/allocation distinction, while not particularly useful from a legal point, does highlight different policy preferences of business. In some cases, industry will push for uniform international standards. Mitchell has suggested that corporations will generally prefer these to be low, and will seek to eliminate competitive disadvantages for companies governed by stricter regulations.<sup>13</sup> Moreover, large TNCs would find global standards easier to administer. Global standards nonetheless can improve environmental protection by placing more stringent controls on corporations than domestic standards, in particular, in developing countries. In other situations, companies will seek allocation regimes (without any international standards) to take advantage of situations of lower standards in some states.<sup>14</sup> Yet even pure allocation regimes could improve environmental quality if the state with the higher standards, rather than the one with the lower standards (typically the place of incorporation over the place of operation), had mandatory jurisdiction to regulate the company. The same company may take a different position on different issues.

Corporations participate in the prescription of international environmental norms in three distinct ways: interaction with individual governments; independent participation in international law-making fora; and the prescription of industry codes of behaviour.

#### **3.1 Interaction with Governments**

The corporation's most obvious target of influence is government. Business entities are continually lobbying governments to incorporate their views in official positions. At one extreme, a business may seek influence, only to find itself shut out of discussions. At the other, the company may be so powerful that it captures the government, which then becomes its advocate in interstate negotiations. In the middle lie a range of possibilities, as business and government discuss the latter's positions to be taken (p. 817) at international venues, with government mediating among business, consumer, environmental, labour, and other interests.

Numerous case studies have documented this process. In the case of acid rain, automobile manufacturers in Europe heavily influenced their governments' positions, with British, French, and Italian opposition to decreases in nitrogen oxide emissions determined by the positions of their car makers, and Germany's position in favour determined by the ability of German car makers to incorporate catalytic converters more easily.<sup>15</sup> Food and drug companies based in the United States, Canada, Australia, Argentina, Chile, and Uruguay that export genetically modified organisms (GMOs) (and their BINGO, the Global Industry Coalition) influenced the position of these states on trade in GMOs in the negotiations over the 2000 Cartagena Protocol and succeeded in limiting the protocol's scope.<sup>16</sup> Much, but not all, US industry has lobbied the US administration and Congress—quite successfully—against binding standards on greenhouse gases.

As part of, or in addition to, lobbying, industry can provide critical (and often one-sided) information to governments, especially those too poor to conduct scientific studies. In some cases, industry representatives serve on governmental delegations as members or advisers. The line between advising and lobbying is often thin. Japan's government-chosen commissioner on the International Whaling Commission has traditionally been the head of Japan's domestic whaling BINGO. Veterans of, or those sympathetic to, the shipping industry long controlled most of the committee work of the International Maritime

Consultative Organization (IMCO, which is now the IMO).<sup>17</sup> Indeed, such participation effectively crosses the line to the second category of corporate involvement.

### **3.2 Independent Participation in International Venues**

Corporate involvement through governmental delegations represents no challenge to a state-centric view of international law. Indeed, it reinforces it by suggesting that corporations can be successful only if they can first convince states to endorse their positions. Yet direct involvement by corporations in international organizations, conferences of states parties to treaties, and other intergovernmental meetings suggests a weakening of the paradigm (see Chapter 29 'Public Participation'). For many (p. 818) years, intergovernmental institutions have allowed individual businesses or BINGOs to participate in their norm-setting agenda. Business is more than happy to oblige. Business might have a consultative status that merely allows it to attend meetings, but it must lobby governments to achieve its goals so that the basic model discussed earlier in this chapter is preserved, but in a setting more efficient for influencing multiple governments. Consultative status may allow BINGOs or individual business to table papers at intergovernmental meetings. Some 700 companies sent representatives to the 2002 Johannesburg Summit, and the International Chamber of Commerce and the World Business Council on Sustainable Development (WBCSD) jointly set up a new BINGO—the Business Action for Sustainable Development—to represent business interests. One result of their work was the watering down of the Johannesburg Plan of Implementation's references to corporate responsibility as well as the lack of any efforts to draft a convention on business duties.<sup>18</sup>

Business participation can be still more direct. Representatives of the pesticide and chemical industries have served on groups of experts of the FAO and the UN Environment Programme (UNEP) that determined the substances subject to the prior informed consent (PIC) regime in soft law instruments and treaties. European and US BINGOs provided technical expertise and lobbied to protect their interests. The Montreal Protocol on Substances That Deplete the Ozone Layer has a Technology and Economic Assessment Panel (TEAP) to provide technical advice to the parties on implementing their obligations; TEAP and its working groups consist of both governmental and industry representatives.<sup>19</sup> More recently, the Conference of the Parties to the Convention on Biological Diversity created a panel of experts and an ad hoc open-ended working group to address access to, and the benefit sharing of, genetic resources—both contain representatives of industry who have been nominated by governments. The two groups worked closely with the Swiss government on a proposal that it had prepared with Swiss companies, resulting in the 2002 Bonn Guidelines, which were a key step to a regime on bio-prospecting. The conference that prepared the Stockholm Convention appointed an expert group that included representatives of various chemical industry BINGOs.

International law has, at this stage, no norms governing participation by non-state actors in international organizations, and each international organization or conference has developed its own procedures. As a theoretical matter, vast participatory rights are possible, including voting, membership in decision-making organs, and budgetary contributions, similar to the structure of the International Labour (p. 819) Organization (see the discussion of the World Bank's prototype carbon fund later in this chapter).

### **3.3 Prescription through Private Codes**

As discussed further in other chapters in this *Handbook*, industry has developed its own codes in numerous areas of the environment—in some cases, accompanied by enforcement mechanisms (see Chapter 21 'Private and Quasi-Private Standard Setting'). Some are merely pledges by individual companies to conduct operations according to vague principles—a sort of politically correct window-dressing for their public persona. Others are industry-wide standards monitored by impartial third parties with sanctions for non-compliance. In some situations, businesses are trying to take the initiative away from the

mandatory regulation by states or international organizations by addressing an issue on its own terms. In others, they may be trying to influence the content of an expected mandatory regime. For example, with respect to oil pollution, during the negotiations on compensation for oil pollution damage, the major tank owners created the Tanker Owners Voluntary Agreement on Liability for Oil Pollution. Eventually, joined by nearly all privately owned tanker owners, the agreement required members to take out insurance sufficient to compensate states for preventive and cleanup costs associated with crude oil spills. The agreement filled an important gap in remediation law until the 1992 expansion of the compensation regime under the International Oil Pollution Prevention Fund.<sup>20</sup> Similarly, the 1994 Code of Ethics on International Trade in Chemicals was drafted by UNEP in consultation with industry and eventually endorsed by a broad range of chemical companies and BINGOs. It represented a heightened set of expectations for business, beyond those in previous soft law instruments prepared by the FAO and UNEP, and formed a critical stepping stone to the PIC Convention.<sup>21</sup>

Today, the coverage of private codes is enormous. The International Organization of Standardization (ISO) is perhaps at the apex of sophistication with its series 14000 standards. Other codes are industry-specific, such as those of Responsible Care in the chemical industry, which contains a set of general principles and encourages national associations to adopt detailed codes of conduct to carry out the principles.

The use of the term ‘codes’ or ‘private codes’ rather than ‘norms’ or ‘law’ reflects the orthodoxy’s insistence that only states can make international environmental law—even soft law. Yet international standards represent yet another challenge to the orthodoxy, for many of them have the key hallmarks of law: (1) prescription by (p. 820) authoritative bodies, namely broadly representative industry groups with detailed expertise in environmental issues as well as in the technical areas of a certain sector; (2) actual compliance by critical actors; and (3) effective mechanisms for inducing compliance, such as auditing with the public exposure of results, and the use by other private actors (for example, purchasers and insurance companies) of linkages to the benefits they provide. Indeed, industry leaders and some scholars have suggested that these codes are far more important to the environmental conduct of industry than anything promulgated by governments.<sup>22</sup>

If codes can exhibit these core indicia of law, is there, then, any added value in the appraisal of the international environmental law landscape to distinguishing between law (treaty, custom, and soft) and private code? I would suggest that the law/private code distinction remains a useful analytic construct because the former offers two potential advantages compared to the latter. First, although corporate codes may be authoritative among corporations, instruments resulting from the prescriptive process of states have a greater potential for legitimacy among all interested actors in the international environmental process. State-prescribed norms probably have a better chance of reflecting non-business interests—such as those of environmental NGOs, labour unions, human rights, and individuals—than do business codes. The output of state-dominated processes may not, in fact, be any more protective of the environment—in that states have numerous other interests beyond such protection—but, at least, it comes closer to incorporating the views of a multitude of relevant viewpoints (in UN jargon, ‘stakeholders’). Even joint business-NGO initiatives can suffer a legitimacy deficit on this account, as each is prone to capture by the other.

Second, although corporate codes may be effectively enforced through private mechanisms, norms issued by states have a greater likelihood of enforcement through the coercive power of the state, including its courts and regulatory bodies. These public bodies will be more receptive to norms that governments have endorsed than to those from business alone. Governments will be reluctant or even legally unable to enforce business-initiated codes, however salutary they may be, until those norms have been re-issued through governmental channels. If an international convention endorses a certain standard on emissions and

industry endorses a higher standard, only the former will be enforced by governments. At the same time, in the absence of norms created by treaty or of decisions of an international organization, governments may enforce non-binding codes (as some base their procurement decisions on a product's compliance with ISO standards). The World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures, while giving special status to codes developed by three international organizations, allows governments to rely upon private codes as a scientific basis for controlling the importation of products (if the organizations producing them are open to all WTO (p. 821) members). Moreover, even binding codes risk under-enforcement in states whose regulatory structures are weak.

## **4 Business Roles in the Implementation of International Environmental Law**

Environmental law demonstrates the possibilities, as well as the hazards, of extensive business involvement in the implementation and enforcement of international law. Business has begun to engage in the sort of roles previously seen as the province of governments.

### **4.1 Cooperative Projects**

Many business entities, in particular, large TNCs or BINGOs, have access to significant resources to promote compliance with international environmental law. One option is simple technical training. For example, the WBCSD produces guides for companies to operate in more environmentally sensitive ways. Business can also assist governments, particularly by funding conferences and other programmes in developing countries. The world's leading pesticide BINGO has sponsored educational programmes, training, and the transfer of equipment to some developing countries to improve pesticide management.<sup>23</sup>

Beyond training, companies participate actively in projects, particularly in the developing world, with the stated goal of meeting various hard or soft environmental commitments. At the Johannesburg Summit, governments gave their formal stamp of approval to a prominent role for business in carrying out the (non-treaty) commitments of Agenda 21, Rio+5, and the Johannesburg Plan of Implementation itself. They endorsed and announced the formation of 200 so-called Type II partnerships of governments, business, NGOs, and local communities to supplement governmental undertakings. The WSSD Prepcom, the UN General Assembly (in Resolution 56/76 of 2002), and the UN Commission on Sustainable Development (CSD) produced guidelines on these partnerships that emphasize transparency, (p. 822) accountability, and close involvement with governments in implementing projects. Of the 319 partnerships registered with the CSD as of early 2006, 43 per cent had business and industry partners.<sup>24</sup> Yet many scholars and NGOs have criticized the Type II partnerships as more of a publicity stunt than a coherent part of the WSSD process. Beyond concerns that the partnerships will become an excuse for governments to ignore their own commitments, they note that the various UN guidelines are too vague and give the CSD no authority to ensure that the partnerships will actually advance the specific priorities in the Johannesburg Plan of Implementation or include the relevant stakeholders. Reporting by corporations is voluntary, and the commission's role is merely to foster dialogue on the success of these programs.<sup>25</sup>

Outside the WSSD process, the World Bank has created a prototype carbon fund (PCF), which is funded by six governments and 17 companies, including BP/Amoco, Deutsche Bank, Mitsubishi, and Statoil. The PCF funds projects in developing countries that reduce or contain carbon emissions, allowing the participating governments to purchase emission reduction units that lower their cost of compliance with the Kyoto Protocol to the UN Framework Convention on Climate Change. And business has undertaken a particularly innovative role regarding bio-prospecting. While governments and industry have worked to produce guidelines on the environmental and intellectual property issues associated with the process (with the goal of a legally binding regime), a number of businesses, principally

in the pharmaceutical area, have concluded agreements directly with developing world governments or NGOs. In these contracts, the company is allowed to harvest certain plants, insects, or other specimens for research in exchange for certain benefits to the local actors. The first, a 1991 contract between US-based Merck and a Costa Rican scientific NGO, gave the latter funding, equipment, and a share in the future earnings from any drugs marketed using the specimens. Another biotechnology company, Diversa, has concluded agreements with institutions in Kenya, Ghana, and elsewhere that similarly combine royalties with scientific training and support for research. Other companies are partnering with academic institutions under the auspices of several US government agencies to engage in bio-prospecting in ten states in Asia, Latin America, and Africa.

## **4.2 Monitoring and Enforcement of Business Behaviour**

Businesses also monitor company compliance with rules or standards. The resulting audits may be consumed internally or seized upon by outside actors, such as (p. 823) consumer, labour, and environmental NGOs, to mobilize shame against companies. Among the most successful and best regarded monitors is the Swiss company SGS. The executive board of the clean development mechanism (CDM) under the Kyoto Protocol has accredited SGS and 15 other companies to validate proposed CDM projects, monitor their emissions, and certify their emission reductions. At the same time, global accounting firms have faced accusations from NGOs of inadequate monitoring and capture by their clients.

Industry is also capable of inducing compliance through more significant carrots and sticks. The major studies of oil pollution by Michael M'Gonigle, Mark Zacher, and Ronald Mitchell give a picture of the range of inducements and sanctions.<sup>26</sup> After the adoption by IMCO in 1969 of amendments to the MARPOL Convention, which required ships to use the load-on-top system (LOT) and to limit intentional discharges of oil residues in empty tankers, most large oil companies agreed to compensate independent tank owners for the additional costs associated with LOT, thereby encouraging its use. When amendments in 1973 and 1978 required more effective oil pollution prevention measures, such as the installation of segregated ballast tanks, classification societies—that is, large corporations that measure numerous characteristics of a ship and classify them— withheld certification from ships that did not meet the MARPOL Convention rules. Insurance companies provided insurance only if the standards were met. In the years before the Stockholm Convention, the world's leading pesticide BINGO required its members to comply with the FAO's non-binding Code of Conduct on the Distribution and Use of Pesticides as a condition for membership.<sup>27</sup>

Business efforts at enforcement have potential advantages compared to state or interstate enforcement. States might not agree upon certain standards at all on a certain issue, in which case industry's efforts to enforce its own standards may represent the only form of environmental protection. States may also agree upon standards but not upon an enforcement strategy, which industry might develop for self-interested reasons. In addition, states might agree upon a strategy, but some might be economically unable to carry out their enforcement obligations or simply not be parties to the relevant treaties. The cooperative attitude by many large companies towards elements of the export control regimes in the PIC Convention, the Stockholm Convention, and the Cartagena Protocol—for example, making the necessary notifications even if their home state is not a party—helps overcome structural shortcomings in the developing world. In this sense, private enforcement fills gaps in the public enforcement regime.

Second, from an economic perspective, industry may impose greater costs upon non-complying companies than can government. The denial of certification to a product, the public revelation of an audit revealing unsound practices, or the denial (p. 824) of membership in a leading BINGO could prove more devastating to a firm's reputation than any fine. Third, and also from an economic perspective, industry enforcement may be cheaper and more efficient than enforcement through regulation or liability regimes.

Enforcement entities may be cheaper to run and less corrupt, and the targets might more easily internalize compliance costs when those imposing the costs are business partners working alongside them during their operations.

Finally, enforcement by industry, whether of its own standards or of those developed by governments, can take place in a club-like atmosphere of repeat players with a stake in maintaining their reputation within an industry. And when businesses work together with NGOs, international organizations, or other groups in the enforcement process—as occurs in the case of the Fair Labor Association with respect to worker rights—the advantages of the club can be combined with the advantages of outside perspectives. Nonetheless, most such partnerships—for example, the Global Reporting Initiative or the WBCSD—limit their role principally to encouraging businesses to adopt favourable policies rather than the more assertive forms of enforcement.

On the negative side, businesses face incentives to downplay or ignore violations. At the most basic level, if the major players, or enough minor players, in an industry see environmental regulation as limiting profits, then the prospects for enforcement by individual businesses or BINGOs are constrained. Industry codes can have free riders; the club-like atmosphere within an industry can just as easily translate into modest costs for violators; all parties may have an incentive to keep violations hidden from the public; and auditors are typically paid by those they are auditing. As much as business portrays itself as progressive environmentally, the enforcement role of governments, international organizations, non-business NGOs, and individual victims of pollution (through civil liability) remains critical.<sup>28</sup> Most empirical studies offer a decidedly mixed picture of company monitoring, emphasizing the need for both public and private enforcement.

### 4.3 Litigation

Litigation in international and domestic venues represents a more adversarial mode of business participation, one oriented towards resisting the implementation of environmental controls. In the WTO, businesses have prodded and litigated alongside states in order to perpetuate environmentally sensitive or damaging activities by asserting that another state's environmental policies were inconsistent with the (p. 825) General Agreement on Tariffs and Trade. Mexico, on behalf of its tuna fleet, challenged the United States in the early 1990s, and four Asian states acted to protect their fishing fleets against US legislation in the *United States—Prohibition of Shrimps and Certain Shrimp Products* proceedings in the mid-1990s.<sup>29</sup> Indeed, if the United States did impose the measures to protect its domestic fishing fleets, as the claimants alleged, then corporations were shadow players on the respondent's side too.

The European Court of Justice (ECJ) has also heard cases involving business interests in cases referred from national courts. In the 1982 case of *Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others v. Groupement d'Intérêt Economique 'Inter-Huiles' and Others*,<sup>30</sup> the plaintiff, which had been granted sole authority to collect waste oils under a French law implementing an European Community (EC) directive, sued a competitor for unapproved collections and exportations to other EC states. The court upheld the competitor's claim that France's prohibition on exportation by unauthorized collectors was inconsistent with the free movement of goods. It held that environmental protection could be assured as long as the oils were exported to an authorized disposal entity in another state. In *Etablissements Armand Mondiet v. Armement Islais* (1992),<sup>31</sup> the plaintiff manufacturer of driftnets sued the defendant tuna fisher after the latter cancelled its contract for nets following a new EC regulation banning the use of certain nets. When the French courts found the cancellation justified based on *force majeure*, assuming the regulation was valid, the ECJ upheld the regulation as within the EC's competence. *Mondiet*

and subsequent cases have explicitly incorporated principles of international environmental law in construing Community law.

In arbitrations under the North American Free Trade Agreement (NAFTA), US companies have challenged Mexican and Canadian environmental measures under the treaty's investment protection provisions. Tribunals have upheld domestic regulatory actions on the environment against most claims, although in *Metalclad v. Mexico*, a NAFTA panel found that a Mexican state's efforts to regulate a toxic waste dump constituted an expropriation,<sup>32</sup> and in *S.D. Myers v. Canada*, a panel found that Canada's ban on polychlorinated biphenyl (PCB) exports violated NAFTA's minimum standard of treatment.<sup>33</sup> As with the WTO and ECJ proceedings, the claimants in these cases, in part, alleged that the respondent's actions were motivated by a protectionist desire on behalf of its domestic companies.

Corporations have also been involved in domestic litigation. In a few cases, domestic courts have entertained suits by states against businesses under the civil liability (p. 826) terms of environmental conventions. Domestic courts have found that certain damage was covered by the insurance scheme created under the treaty (in particular, the International Convention on Civil Liability for Oil Pollution Damage).<sup>34</sup> Cases by alleged victims of environmental harm against companies under the US Alien Tort Claims Act, which seek to rely on international environmental norms, have not resulted in any successes for plaintiffs. In other cases, domestic courts have decided cases against corporations for environmental damage based on the forum state's environmental law that is itself based on the polluter pays principle or its general tort law. On the other hand, cases dealing with overseas environmental damage brought in the United States, Canada, the Netherlands, Australia, and the United Kingdom (for example, the claim against Union Carbide in the United States for the Bhopal disaster) have often been dismissed on the basis of *forum non conveniens*. Yet in *Thor Chemicals* and *Cape PLC*, concerning operations by UK subsidiaries in South Africa that created hazards for workers and residents, the British courts rejected defenses of *forum non conveniens*, causing both companies to settle for fairly large amounts.<sup>35</sup>

## 5 Exiting the Doctrinal Thicket

From a reading of treaties, inter-state arbitrations such as *Trail Smelter*, and treatises, one would get the impression that the onus for both prevention of pollution and reparation for harm is on states and their governments, when states are neither the principal polluters nor the principal remediators. The participation of corporations as critical targets, prescribers, and enforcers of norms stands as an almost parallel universe to the doctrine that places states in a unique position. International relations scholars have tended not to fall prey to this blindness. They examine the behaviour of states at international negotiations but have few illusions about why states adopt the positions they do, who else is participating in these negotiations, and what happens in terms of compliance mechanisms and patterns. They perceive states as unique actors in some sense—the ability to enter into treaties—but ultimately as one of many in the international environmental law process—in Drahos and Braithwaite's words, as just another 'loci of legitimacy and power waiting to be captured, networked and used as vehicles for the regulatory models of individual model mongers.'<sup>36</sup>

Rather than incorrectly describing reality to fit the doctrine, it is time for doctrine to modernize itself. One solution is to return to first principles of jurisprudence—(p. 827) rights and duties—and to ask, directly and without preconceived doctrinal categories—who has them under international environmental law? One might start with rights (of states and non-state actors alike) and construct duties from these rights. As Joseph Raz has stated, 'there is no closed list of duties which correspond to the right ... A change of circumstances may lead to the creation of new duties based on the old right.'<sup>37</sup> The field of international human rights is obviously organized around the latter paradigm—rights first, though scholarly treatments now consider more carefully who bears the corresponding duties.<sup>38</sup> International environmental law has been more nuanced—for example, in the tension

between the two parts of the transboundary harm principle (the right to exploit resources and the duty not to cause damage to other states). Although the idea of a human right to a clean environment is gaining acceptance among states, this notion, as well as the rest of international environmental law, still focuses on the corresponding duties of states and ignores Raz's admonition about the range of dutyholders. Alternatively, one may construct a legal system as Kant did, based on duties, and ask which duties each international actor possesses regarding environmental protection.

Reconceptualizing international environmental law in terms of duties means asking these fundamental questions: Who bears the duties? What are their scope? How normatively grounded are they in terms of our views of appropriate prescriptive processes? How are they enforced—by whom and in what venues? Where does the system need new duties and new dutyholders? From this perspective, the companies fit in alongside states, international organizations, and non-state entities such as NGOs. Treaties, state practice, and case law will be reappraised for the extent to which they create duties. Corporate standards and strategies must not be relegated to a separate narrative but integrated into the discussion of every environmental law issue. States will not drop out of the picture. To the extent that they control access to venues and membership in intergovernmental organizations, they will always occupy a special place in our consideration of duties—but this place will be less dominant than suggested by the International Law Commission, the Institut de Droit International, or keepers of the orthodoxy. I suspect most practising international environmental lawyers are already asking these sorts of questions. It is time for doctrine to catch up with them.

### **(p. 828) Recommended Reading**

- P. Barrios, 'The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?' (2004) 16 *Geo. Int'l Env't'l L. Rev.* 679.
- J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).
- A. Daniel, 'Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?' (2003) 12 *R.E.C.I.E.L.* 225.
- R.J. Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Env't'l L.* 1.
- A. Gupta, 'Advanced Informed Agreement: A Shared Basis for Governing Trade in Genetically Modified Organisms?' (2001) 9 *Indiana J. Global Leg. Stud.* 265.
- R.B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (Cambridge, MA: MIT Press, 1994).
- Organisation for Economic Cooperation and Development, *Corporate Responsibility: Private Initiatives and Public Goals* (Paris: OECD, 2001).
- S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale L.J.* 443.
- S. Tully, 'The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing' (2003) 12 *R.E.C.I.E.L.* 84.
- D.G. Victor, ' "Learning by Doing" in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides,' in D.G. Victor, K. Raustiala, and E.B. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, MA: MIT Press, 1998) 221.

### **Footnotes:**

- 1** See R.J. Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Env't'l L.* 1 at 8-10.



- 2** J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 267–70 and 279.
- 3** 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
- 4** See, e.g., Nguyen Quoc Dinh, *Droit International Public*, edited by P. Daillier and A. Pellet, 7th edition (Paris: LGDJ, 2002) at 649.
- 5** See, e.g., P. Sands, *Principles of International Environmental Law*, 2nd edition (Cambridge: Cambridge University Press, 2003) at 869–70 and 873.
- 6** See Resolution of the Institut de Droit International, *Responsibility and Liability under International Law for Environmental Damage*, 1997, Strasbourg, Article 1.
- 7** See International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001) 370, Article 1.
- 8** See A. Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 Int'l & Comp. L.Q. 1.
- 9** See Fowler, note 1 above at 19.
- 10** A similar distinction has been adopted in international criminal law between treaties establishing international crimes (such as genocide) and those giving some or all states jurisdiction to prosecute offences (such as torture). See B. Simma and A.L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View,' in S.R. Ratner and A.M. Slaughter, eds., *The Methods of International Law* (Washington, DC: American Society of International Law, 2004) 23 at 32.
- 11** States could create pure allocation regimes without any international standards, in which case one cannot speak of an international duty on a company. Examples include the 1974 OECD Principles of Transfrontier Pollution, which call for non-discrimination in application of domestic law but announce no international standards, and the UN Convention on the Law of the Sea's grant to flag states of jurisdiction over environmental aspects of shipping that are not regulated by international standards. But these do not typify environmental treaties.
- 12** E. Morgera, 'From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?' (2004) 13 R.E.C.I.E.L. 214.
- 13** R.B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (Cambridge, MA: MIT Press, 1994) at 110.
- 14** Braithwaite and Drahos, see note 2 above at 285.
- 15** M.A. Levy, 'European Acid Rain: The Power of Tote-Board Diplomacy,' in P.M. Haas et al., eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, MA: MIT Press, 1993) 75 at 95.
- 16** A. Gupta, 'Advanced Informed Agreement: A Shared Basis for Governing Trade in Genetically Modified Organisms?' (2001) 9 Indiana J. Global Leg. Stud. 265; see also State Department Fact Sheet on Cartagena Protocol on Biosafety, 8 March 2004.
- 17** R.M. M'Gonigle and M.W. Zacher, *Pollution, Politics and International Law: Tankers at Sea* (Berkeley, CA: University of California Press, 1979) at 277.

- 18** See World Summit on Sustainable Development, Johannesburg Plan of Implementation, in *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August–4 September 2002, UN Doc. A/CONF.199/20 (2002) at para. 49.
- 19** J.H. Knox, 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission' (2001) 28 Ecology L.Q. 1 at 49–50. The involvement of business in the PIC and ozone regimes can also be seen as an example of corporate roles in implementing international environmental law, discussed further in section 4 below.
- 20** S. Bloodworth, 'Death on the High Seas: The Demise of TOVALOP and CRISTAL' (1998) 13 J. Land Use & Env't'l L. 443.
- 21** W.B. Chambers, 'WSSD and an International Regime on Access and Benefit Sharing: Is a Protocol the Appropriate Legal Instrument?' (2003) 12 R.E.C.I.E.L. 310 at 317.
- 22** See, e.g., Braithwaite and Drahos, note 2 above at 615–16.
- 23** D.G. Victor, '“Learning by Doing” in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides,' in D.G. Victor, K. Raustiala, and E.B. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, MA: MIT Press, 1998) 221 at 254–5.
- 24** UN Economic and Social Council, *Partnerships for Sustainable Development—Report of the Secretary General*, prepared for fourteenth session of the Commission on Sustainable Development, UN Doc. E/CN.17/2006/6 (11–22 April 2005).
- 25** See, e.g., C. Bruch and J. Pendergrass, 'The Road from Johannesburg: Type II Partnerships, International Law, and the Commons' (2003) 15 Geo. Int'l Env't'l L. Rev. 855.
- 26** See Mitchell, note 13 above; and M'Gonigle and Zacher, note 17 above.
- 27** Victor, see note 23 above at 255.
- 28** See, e.g., N. Gunningham and D. Sinclair, *Voluntary Approaches to Environmental Protection: Lessons from the Mining and Forestry Sectors*, paper for OECD Global Forum on International Investment, Conference on Foreign Direct Investment and the Environment, 7–8 February 2002.
- 29** *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted WTO Dispute Settlement Body, 6 November 1998, WTO Appellate Body Report, Doc. WT/DS58/AB/R (1998).
- 30** *Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others v. Groupement d'Intérêt Economique 'Inter-Huiles' and Others*, Case 172/82, [1983] E.C.R. 555.
- 31** *Etablissements Armand Mondiet v. Armement Islais*, Case C-405/92, [1993] E.C.R.I-6133.
- 32** *Metalclad Corporation v. United Mexican States*, ICSID Case no. Arb(AF)/97/1; 40 I.L.M. 35 (2001).
- 33** *S.D. Myers v. Government of Canada*, 40 I.L.M. 1408 (2001).
- 34** See the discussion in Sands, note 5 above at 918–22.
- 35** These are discussed in H. Ward, 'Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape PLC Cases' (2001) 12 Y.B. Int'l Env't'l L. 105.
- 36** Braithwaite and Drahos, see note 2 above at 275.

**37** J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 171.

**38** See, e.g., S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale L.J. 443.