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State Responsibility in Promoting Environmental Corporate Accountability

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STATE RESPONSIBILITY IN PROMOTING ENVIRONMENTAL CORPORATE ACCOUNTABILITY

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INTRODUCTION

The rules and principles of “state responsibility” in “public international law” offer only a narrow window for using adjudication and litigation to promote environmental accountability by corporate actors. This is primarily because state responsibility arises only where a state commits an international “wrong.” A “wrong” is committed, where an action attributable to a state constitutes a breach of treaty or customary law. As we shall see in Section I it is very difficult, nigh impossible, to attribute the conduct of a transnational corporation (“TNC”) to a state.

The opportunities for expanding corporate accountability are significantly more encouraging in a relatively new but growing dimension of public international law: Civil Liability (“CL”). The international community of nations has been moving, albeit hesitantly and slowly, to create a set of rules and regimes based on CL that channel responsibility for an environmental wrong on the polluter rather than the state. CL regimes are usually established by treaty and place only secondary or indirect duties (which could give rise to state responsibility) upon states. These regimes of CL have the potential to be expanded into more effective vehicles of environmental protection over TNCs than those based on state responsibility.

Section I will start by defining the essential attributes of state responsibility, based on the work of the International Law Commission (“ILC”). The ILC was created by the UN General

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Assembly in 1947 to help the progressive development and codification of international law,¹ and is comprised of eminent jurists from various countries.² Section II then discusses the formidable difficulties of successfully holding states accountable for the actions of TNCs. Section III will move to a different public international law basis for attaching accountability based on CL. It will briefly survey treaties that have established regimes of CL, and discuss the advantages of CL over state responsibility. The ILC *Draft Principles on Harm* appear to open up new opportunities for corporate accountability, as a source of law.³ Section IV will canvas the flaws of the ILC *Harm Principles* that negate their authority as a source of public international law. The advantages of CL over state responsibility are evident, but depend nonetheless, on treaties establishing such regimes. The challenges of creating and implementing CL regimes are put in context by Section V.

I. STATE RESPONSIBILITY

The core characteristics or attributes of state responsibility bear mention. First, state responsibility is a term of art and refers to the putative system of tort law in public international law. State responsibility does not appertain to transnational litigation arising from jurisdiction assumed by national tribunals or courts, as for

1. Statute of the International Law Commission, G.A. Res. 174 (II), art. 1, U.N. Doc. A/519 (Nov. 21, 1947) available at http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf, amended by G.A. Res. 485 (V) (Dec. 12, 1950), G.A. Res. 984 (X) (Dec. 3, 1955), G.A. Res. 985 (X) (Dec. 3, 1955), G.A. Res. 36/39, U.N. Doc. A/RES/36/39 (Nov. 18, 1981). Article 15 of the I.L.C. Statute defines “codification” to mean the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine. G.A. Res. 174, *supra*, art. 15. “Progressive development” is defined as “the preparation of draft conventions on subjects which have not yet been regulated by international law or . . . not yet been sufficiently developed in the practice of states.” *Id.*

2. See G.A. Res. 174, *supra* note 1, art. 2.

3. *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, in *Report of the International Law Commission*, 61 U.N. GAOR Supp. (No. 10) ¶ 66, U.N. Doc. A/61/10 (2006); see also Statute of the International Court of Justice, art. 38(d), June 26, 1945, 59 Stat. 1031, 1060, 3 Bevens 1153 [hereinafter I.C.J. Statute] (the ILC may be regarded as “highly qualified publicists”).

example by the U.S. under the Alien Torts Claims Act. State responsibility arises only if there is a breach of a “primary” rule of international law found in a treaty or in customary international law. The breach of a primary rule of public international law is an international wrong. In order to establish state responsibility there needs to be: (a) an international wrong, (b) that is attributable to a state and (c) exhaustion of local remedies.

Second, state responsibility functions within an embryonic system of public international law that is not possessed of a law making authority, a law executing agency or courts with compulsory jurisdiction. The ILC shouldered the burden of codifying the law dealing with accountability for transboundary harms in 1955. The first of their three volumes of work, the *Articles on Responsibility of States for Internationally Wrongful Acts*⁴ (“*Final State Responsibility Articles*”), was finalized in 2001,⁵ and it laid the conceptual foundations and provided an authoritative re-statement of state responsibility. This first work was followed by the ILC’s draft articles: *Prevention of Transboundary Harm from Hazardous Activities* also completed in 2001,⁶ and their *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, completed in 2006.⁷ These two volumes are of

4. *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

5. This final draft was submitted to the U.N. General Assembly, which commended it on numerous occasions, and decided in 2007 to consider the question of a convention on the basis of the articles at its sixty-fifth session in 2010. G.A. Res. 62/61, U.N. Doc. A/RES/62/61 (Dec. 6, 2007); Int’l Law Comm’n, State Responsibility http://untreaty.un.org/ilc/guide/9_6.htm (last updated Aug. 20, 2009).

6. *Prevention of Transboundary Harm from Hazardous Activities*, [2001] 2 Y.B. Int’l L. Comm’n 146, U.N. Doc. A/CN.4/SER.A/2001/Add.1. Although the ILC recommended to the General Assembly that its draft articles should form the basis of a treaty, the General Assembly, after considering this request, decided in 2007 only to consider the draft articles at its sixty-fifth session. G.A. Res. 62/68, U.N. Doc. A/RES/62/68 (Jan. 8, 2008); Int’l Law Comm’n, *Prevention of Transboundary Harm from Hazardous Activities*, http://untreaty.un.org/ilc/guide/9_7.htm (last updated Jan. 23, 2008).

7. *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, *supra* note 3. Although the I.L.C. recommended to the General Assembly that its draft articles should form the basis of a treaty, the General Assembly, after considering this request, decided in 2007

variable content and have not received the international consensus commanded by the first. The General Assembly of the UN, to which the ILC is required to report its concluded work, confirmed the greater standing of the *Final State Responsibility Articles*. It decided in 2007 that the question of drafting a treaty based on the draft articles should be confined only to the *Final State Responsibility Articles* and not the others.⁸

Third, the considerable theoretical attention given to the concept of state responsibility stands in stark contrast to its conspicuous absence in environmental treaties. The existence of a court or tribunal with compulsory jurisdiction is a pre-requisite for invoking state responsibility in an adjudicatory context.⁹ Public international law, with a few exceptions, does not encompass courts possessed of global and compulsory jurisdiction. The stubborn fact is that the legal machinery enabling compensation for the breach of international environmental wrongs has generally been deliberately neglected or omitted. Cases where compensation is obtained are the exceptions, not the rule, and the reluctance among states to develop adjudicatory regimes for implementing state responsibility, is yet another reason why judicial enforcement can prove elusive.

Fourth, while states painfully and slowly struggle to set up rules of compensation under state responsibility, or prevention of transboundary harm under the rubric of public international law,¹⁰

only to consider the draft articles in the provisional agenda at its sixty-fifth session. G.A. Res. 62/68, *supra* note 6; Int'l Law Comm'n, *supra* note 6.

8. Compare G.A. Res. 62/61, *supra* note 5, and Int'l Law Comm'n, *supra* note 5 (“[The General Assembly] [d]ecided to include in the provisional agenda of its sixty-fifth session (2010) the item entitled ‘Responsibility of States for Internationally Wrongful Acts’ and to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles”), with G.A. Res. 62/68, *supra* note 6, and Int'l Law Comm'n, *supra* note 6 (“[The General Assembly] [d]ecided to include in the provisional agenda of its sixty-fifth session the item entitled ‘Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm’.”).

9. F. V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 81 (1974).

10. The ILC began by dealing with this subject under the heading “State Responsibility,” but have now divided the original subject into three segments: one dealing with responsibility for harms resulting from violations of international law;

they have followed a parallel path with the objective of offering compensation to injured parties based, not on the responsibility of the state, but of the operator. This will be dealt with in Section III.

II. STATE RESPONSIBILITY FOR ACTIONS OF TNCs

This analysis will be based on the *Final State Responsibility Articles* which will be treated as a codification of existing customary international law. While they have not yet been adopted as a treaty they command the most respect among the three works of the ILC dealing with this subject. The standing of the *Final State Responsibility Articles* was confirmed by the International Court of Justice (“ICJ”) in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (“Bosnia case”)*.¹¹ State responsibility could arise under Article 4 & 5 and 8 of the *Final State Responsibility Articles*. Article 8 is the most relevant.

A. Article 8

Article 8 of the draft articles states that the conduct of a group or persons shall be considered an act of state under public international law only if they are in fact acting under the direction or control of the state in carrying out the impugned conduct.¹² Proving attribution under Article 8 is very difficult because it involves demonstrating a direct agency relationship. It must also be shown that the state gave specific directions, or exercised explicit control over a corporation. In their commentaries to the *Final State Responsibility Articles*, the ILC concluded that as a general rule the conduct of private persons and corporations is not attributable to the state under public

a second with the prevention of and international liability for harms not involving violations of international law; and a third with allocation of loss in the case of transboundary harm arising out of hazardous activities. Int’l Law Comm’n, *supra* note 5; Int’l Law Comm’n, *supra* note 6.

11. See 46 I.L.M. 188, 233-35 (Feb. 26, 2007). The ICJ found that articles 4 and 8 were a codification of customary international law. *Id.* at 283-84, 287.

12. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 4, art. 8.

international law.¹³ In dealing with Article 8, the ILC considered the example of a state owned and controlled enterprise. They concluded that prima facie the conduct of even such an enterprise is not attributable to the state.¹⁴ Given the opinion of the ILC, it is going to be substantially more difficult to attribute the conduct of a private corporation to a state. In sum, this means that the actions of a private corporation can only be attributed to a state under Article 8 in very exceptional circumstances. Such circumstances should demonstrate explicit control and direction exercised by the state over the impugned actions of the TNC.

This strict interpretation of Article 8 was confirmed by the ICJ in the *Bosnia case*.¹⁵ In that case, Serbia and Montenegro alleged that the former Yugoslavia (now Bosnia and Herzegovina) was responsible for committing genocide.¹⁶ The Court discussed the question of whether, although not organs of Serbia in general, the perpetrators were acting under Serbian “direction and control” “in carrying out the conduct” under Article 8.¹⁷ The decision of the ICJ, followed the reasoning, and “effective control” test it used in the earlier case of the *Military and Paramilitary Activities (Nicar. v. U.S.)*, (“*Nicaragua case*”).¹⁸ In the *Bosnia case* the court concluded that the state will be responsible for non-state actors to the extent that “they acted in accordance with that [s]tate’s instructions or under its effective control.”¹⁹ This responsibility requires direction or control by Serbia over specific, identifiable events of the genocide. General control over the direction of operations is inadequate; there must have been specific control over the international wrongful act. The Court

13. Draft Articles on Responsibility of States for Internationally Wrongful Acts: General Commentary, [2001] 2 Y.B. Int’l L. Comm’n 31, 48, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

14. *Id.* (Specifically, the conduct is only prima facie and not attributable to the state if they are not exercising elements of governmental authority within the meaning of article 5.).

15. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 46 I.L.M. 188 (Feb. 26, 2007).

16. *Id.*

17. *Id.* at 286.

18. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 110 (June 27).

19. *Bosn. & Herz.*, 46 I.L.M. at 287.

explained that, “[i]t must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”²⁰

B. Articles 4 & 5

It has been suggested by some commentators, seeking to invoke state responsibility for the violation of human rights by TNCs, that this could be done under Articles 4 and or 5 of the *Final State Responsibility Articles*.²¹ Under these articles state responsibility could arise for the conduct of a state organ exercising legislative, executive, judicial or any other functions,²² or the conduct of a person or entity, which is not an organ of state but is empowered by the state to exercise elements of government authority.²³ The argument in brief is that where a state has accepted human rights obligations, it is necessary for their government agencies to ensure that they are not violated. The failure of their agencies to do so leads to state responsibility.

This argument depends on the primary rule creating state responsibility. If indeed there are primary rules created by bilateral or multilateral treaties, or customary public international law holding home states responsible for the actions of their TNCs, then the breach of those rules can invoke state responsibility. The foundational principle of state responsibility, as of tort law, is the concept of an internationally “wrongful” act. A state commits an internationally wrongful act when it violates or acts in breach of an existing international obligation, found in treaty or customary law. In theory, all obligations, whether general or specific, contained in treaties as well as in customary law, have the potential to give rise to state responsibility. It all depends on the specificity and extent to which the norms being invoked create obligations of effect. An obligation

20. *Id.*

21. Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 601 (2007).

22. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 4.

23. *Id.* art. 5.

may be very general and fail to specify exactly what a state should do. On the other hand, some obligations are very specific, such as those relating to time-tables for reduction of ozone-damaging chemicals, and monitoring or reporting of ozone levels, which could also give rise to state responsibility.²⁴ Unfortunately, there are very few in any such primary rules of this kind applicable to TNCs in the environmental context.

The ICJ in dealing with this issue in the *Bosnia case* delineated the practical difficulties of attributing the conduct of TNC to a state under Article 4 and 5. It stated that Serbia would still be responsible if it could be established that “the physical acts constitutive of genocide that have been committed by organs or persons other than the [S]tate’s own agents were carried out, wholly or in part, *on the instructions or directions of the [S]tate, or under its effective control.*”²⁵

In conclusion, the control exercise by a state over TNCs whether under Articles 4, 5 or 8 of the *Final State Responsibility Articles* has to be so specific and strict, as to make it almost impossible to prove. The result is that state responsibility is rendered almost useless where it is sought to make a state responsible for the actions of a TNC.

C. *Trail Smelter Arbitration and Judicial Remedies*

The *Trail Smelter Arbitration*, a well-known public international law case dealing with transboundary pollution, is invariably cited in any discussion of state responsibility.²⁶ In the *Trail Smelter Arbitration*, sulphur dioxide fumes from a Canadian smelter were causing damage in the State of Washington in the U.S.²⁷ Farmers in the U.S. who suffered damage were prevented from bringing an action in U.S. courts because they would have encountered jurisdictional difficulties.²⁸ The first of these jurisdictional problems arose from the fact that the company owning the smelters had its

24. *See State Responsibility*, [1980] 2 Y.B. Int’l L. Comm’n 26, 32, U.N. Doc. A/35/10.

25. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. & Herz. v. Serb. & Mont.*), 46 I.L.M. 188, 287 (Feb. 2007) (emphasis added).

26. *U.S. v. Can.*, 3 R.I.A.A. 1938 (1949).

27. *Id.*

28. *Id.*

place of business and was registered in Canada.²⁹ A second jurisdictional problem arose from the *locus delicti* or the fact that the act that initiated the damage, and therefore the tort, occurred in Canada.³⁰

Even if the plaintiffs had been able to overcome this difficulty and persuade a U.S. court to assume jurisdiction on the basis that the harm inflicted or damage suffered was in the U.S., they still faced other difficulties. Another problem was the proper law to be applied by the court. Should it be Canadian or U.S. law? If the applicable law were Canadian, to what extent did Canadian law permit recovery of damages in cases where the harm suffered was in a jurisdiction different from that in which it originated? The doctrine of *forum non conveniens*, or the appropriate forum for an action, raised another question. Were U.S. courts an appropriate forum for deciding a case such as this?

These were some of the reasons why it was necessary for the U.S. to espouse and advocate the claims of the Washington farmers and negotiate a treaty known as the *Convention for the Settlement of Difficulties Arising from Operations of Smelter at Trail, B.C.* (“*Convention*”) in which Canada accepted responsibility for provable damage.³¹ An arbitral tribunal was created under that treaty to find a solution that was just to all parties.³² The principles articulated by that arbitral tribunal in deciding this case have become one of the pillars of state responsibility. The arbitrators determined that:

[U]nder the principles of international law, . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another, or properties or persons therein when the case is of

29. *Id.* at 1912.

30. *Id.* at 1915.

31. *Id.* at 1940; Convention Between the United States of America and the Dominion of Canada Relative to the Establishment of a Tribunal to Decide Questions of Indemnity and Future Regime Arising from the Operation of Smelter at Trail, British Columbia, U.S.-Can., Apr. 15, 1935, 49 Stat. 3245.

32. *U.S.*, 3 R.I.A.A. at 1940.

serious consequence and the injury is established by clear and convincing evidence.³³

It went on to conclude that the:

Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.³⁴

What is most important in this context is that the arbitral tribunal did not attribute the conduct of the Trail Smelter to Canada. The *Convention* did so.³⁵ Canada accepted responsibility for provable damage and all the arbitral tribunal did was to determine provable damage. Where the order refers to the “undertakings in the convention” it is more plausibly interpreted as referring to undertaking related to the payment of certain sums of money and the obligation to implement the order of the arbitral tribunal.

The use grievance-remedial principles of “state responsibility” or international tort law that enables one state to demand *ex post* compensation and other relief for harm caused to it by another state is a very inefficient and ineffective. Typically, adjudication arising under international laws governing such questions is handled by international courts, tribunals, and arbiters, and not national courts or institutions.

If a state decides to take the traditional grievance-remedial judicial route, it can demand reparations from the wrongdoing state, and ask for a termination of the specific harmful conduct. However, this kind of *ex post* judicial remedy is a flawed way of dealing with an endemic problem for a number of reasons. Judicial remedies can only be granted by a judicial forum, and international judicial bodies suffer from an underlying constitutional infirmity: lack of compulsory jurisdiction. The lack of jurisdiction becomes evident when dealing

33. *Id.* at 1965.

34. *Id.* at 1965-1966.

35. *Id.*

with the more serious problems of the global commons like climate change, ozone depletion, or biological diversity. These problems require concerted and coordinated action by all relevant state actors, and judicial supervision must extend to all affected parties. Unfortunately, some states will not consent to being brought within the compulsory and binding jurisdiction of courts or tribunals established under the treaties addressing these problems.

The settlement of disputes by way of compulsory and binding judicial proceedings is optional under the *United Nations Framework Convention on Climate Change*,³⁶ the *Convention on Biological Diversity*,³⁷ and the *Vienna Convention for the Protection of the Ozone Layer*.³⁸ The *United Nations Convention on the Law of the Sea* (“UNCLOS”),³⁹ on the other hand, does establish a system of compulsory dispute settlement,⁴⁰ but it remains to be seen how vigorously it will be used. The ICJ also possesses some level of compulsory jurisdiction, but as of 2010 only sixty-six states had signed (and not withdrawn) the so-called “optional clause,”⁴¹ giving the court general jurisdiction.⁴² Even where they have signed the optional clause, 75% of those doing so have entered reservations.⁴³ Several are self-judging, which allows a state to decline jurisdiction where it determines that a case involves questions of domestic

36. United Nations Conference on Environment and Development: Framework Convention on Climate Change art. 14, May 29, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849.

37. Convention on Biological Diversity art. 26, June 5, 1992, 31 I.L.M. 818.

38. Vienna Convention for the Protection of the Ozone Layer art. 11(3), Mar. 22, 1985, 26 I.L.M. 1529.

39. The United Nations Convention on the Law of the Sea art. 279-299, Dec. 10, 1982, 21 I.L.M. 1261.

40. *Id.*

41. Judge Hisashi Owada, President of International Court of Justice, Speech to the Sixth Committee of the General Assembly, (Oct. 30, 2009), available at <http://www.icj-cij.org/presscom/files/4/15744.pdf?PHPSESSID=6b7efe1d03db32ad587e2b0696380de1>.

42. International Court of Justice, Jurisdiction, Declarations Recognizing the Jurisdiction of the Court as Compulsory, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Apr. 14, 2010).

43. *See id.*

jurisdiction or national defense.⁴⁴ Jurisdiction can prove to be a difficult obstacle.

Even if there is no jurisdictional challenge to a case, judicial remedies addressing non-compliance suffer from other defects. Judicial remedies are confined to the facts of a specific dispute, and cannot deal with the whole or look at an individual case as part of a broader environmental problem. Furthermore, there is no mechanism for enforcing or systematically monitoring the implementation of the order of an international court. This is particularly unsatisfactory because most environmental problems occur on a continuous or recurrent basis. Finally, typical judicial decisions are restricted to containing damage after the fact rather than preventing it from happening in the first place.

III. CIVIL LIABILITY OF TNCs

The relevance and importance of civil liability is placed in context by considering the extent and manner in which the farmers in the *Trail Smelter* case could have been compensated through other legal procedures.⁴⁵ For example, the U.S. and Canada could have entered into a treaty in which their respective courts were granted jurisdiction to hear cases where damage occurred outside their ordinary jurisdiction. This approach might follow the recommendations of the Organization for Economic Co-operation and Development ("OECD") calling for access to domestic courts and remedies for national and foreign entities on a non-discriminatory basis.⁴⁶ Such a treaty could also have ensured that an order by a court vested with jurisdiction under the treaty could be enforced in either country. As discussed below this principle of non-discrimination has now been incorporated into the *Convention on the Law of the Non-Navigational Uses of International Watercourses*.⁴⁷

44. *See id.*

45. *See generally* U.S. v. Can., 3 R.I.A.A. 1938 (1949)

46. Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council for the Implementation of a Regime of Equal Access and Non-discrimination in Relation to Transfrontier Pollution*, 15 I.L.M. 1218 (May 11, 1976).

47. *Convention on the Law of the Non-Navigational Uses of International Watercourses*, May 21, 1997, 36 I.L.M. 700, 713 (1997).

Where CL regimes are created, the primary responsibility for environmental harm is usually placed on the polluter and not the state. UNCLOS, which is emerging as a "constitution" for the oceans, requires states to "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction."⁴⁸ CL remedies against private and corporate entities are also underscored by a number of other treaties.

The *Convention on the Law of the Non-Navigational Uses of International Watercourses*, following the OECD recommendation, expressed the principle that domestic or national courts can and should grant environmental relief and compensation as one of "Non-discrimination."⁴⁹ According to Article 32, where a person suffers or is under a serious threat of suffering significant transboundary harm the State in which the harm originated should grant the injured person "in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief."⁵⁰

The same principle is embodied in a cluster of other treaties dealing with a range of activities including the peaceful use of nuclear energy;⁵¹ the operation of nuclear ships; maritime carriage of nuclear materials;⁵² oil pollution; the carriage of dangerous goods by road, rail and inland navigation vessels;⁵³ North American free trade;⁵⁴ and protection of the Antarctic.⁵⁵ The legal regimes

48. United Nations Convention on the Law of the Sea, *supra* note 39, art. 235(2).

49. Convention on the Law of the Non-Navigational Uses of International Watercourses, *supra* note 49, 36 I.L.M. at 713.

50. *Id.*

51. See *infra* notes 58-61 and accompanying text.

52. Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255.

53. Bjorn Sandvik & Satu Suikkari, *Harm and Reparation in International Treaty Regimes: An Overview*, in HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES 57, 57-58 (Peter Wetterstein ed., 1997).

54. See North American Agreement on Environmental Cooperation, Sept. 9, 1993, 32 I.L.M. 1480, 1483 [hereinafter NAAEC].

55. Convention on the Regulation of Antarctic Mineral Resource Activities, June 2, 1988, 27 I.L.M. 868.

addressing the peaceful use of nuclear energy, and oil pollution, are illustrative of this seam of law.

The treaties dealing with the peaceful use of nuclear energy include the 1960 *Paris Convention on Third Party Liability in the Field of Nuclear Energy*,⁵⁶ the 1963 *Vienna Convention on Civil Liability for Nuclear Damage*,⁵⁷ the 1997 *Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage*⁵⁸ and the 1997 *Convention on Supplementary Compensation for Nuclear Damage*.⁵⁹ What is important about these treaties is that they place primary liability not on the state, but on the operator of the nuclear installation. In the event of the state being the operator, CL will, of course, attach to the state but not on the basis of state responsibility. These treaties only place residual or ancillary duties on the state which could give rise to state responsibility.

For example, the *Vienna Nuclear Civil Liability Convention* places liability on the operator of the nuclear installation alone,⁶⁰ and restricts jurisdiction solely to the courts of the state where the accident occurred.⁶¹ Rather than being held responsible for the actions of the operator according to the principles of state responsibility, the state is under a more limited duty to ensure that any claims against the operator are satisfied through the availability of funds and the necessary security.⁶² Failure to fulfill this limited duty, however, could give rise to state responsibility.

The field of oil pollution is governed by a cluster of treaties, including the *International Convention on Civil Liability for Oil Pollution Damage*,⁶³ and the *International Convention on the Establishment of an International Fund for Compensation for Oil*

56. See Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 26, 1960, 956 U.N.T.S. 264.

57. Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 [hereinafter 1963 Vienna Convention].

58. Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, Sept. 12, 1997, 2241 U.N.T.S. 302.

59. Convention on Supplementary Compensation for Nuclear Damage, Sept. 12, 1997, 36 I.L.M. 1454.

60. 1963 Vienna Convention, *supra* note 59, art. II(5).

61. *Id.* art. XI.

62. *Id.* art. VIII.

63. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 14097 U.N.T.S. 4.

*Pollution Damage.*⁶⁴ Like the treaties dealing with civil nuclear power, these oil pollution treaties place liability for oil pollution damage on the owner of the oil or other individuals or corporations involved in the enterprise of the carriage of oil from one location to another.⁶⁵ Again, these treaties do not establish a regime of state responsibility under public international law.

The *North American Agreement on Environmental Cooperation* (“NAAEC”), also provides national remedies of a more limited nature.⁶⁶ This environmental side agreement to NAFTA obligates each party to ensure that judicial, quasi-judicial and administrative proceedings are available under its laws to sanction or remedy violations of its environmental laws.⁶⁷ It grants access to and empowers interested private persons to seek relief by way of damages or injunctions in the courts of that state party, where the laws of that party have been broken.⁶⁸ While NAAEC opens the door to persons other than those within the jurisdiction of the state party concerned, the cause of action is limited to the breach of the laws of that party.⁶⁹ Unlike the regimes dealing with civil nuclear power or oil pollution, the agreement does not create a new regime of environmental laws that can be vindicated in the national courts of any of the state parties.⁷⁰

IV. PROBLEMS WITH THE ILC HARM PRINCIPLES

Article 4 (1) and (2) of the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities* (“*Draft Harm Principles*”), prescribes that states should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or

64. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 17146 U.N.T.S. 58.

65. GOTTHARD GAUCI, OIL POLLUTION AT SEA: CIVIL LIABILITY AND COMPENSATION FOR DAMAGE 89–119 (1997).

66. See NAAEC, *supra* note 56.

67. *Id.* art. 5(2).

68. *Id.* art. 6(2)-(3).

69. *Id.* art. 6(3)(a).

70. See *id.* art. 6.

otherwise under its jurisdiction or control.⁷¹ It continues that these measures should include the imposition of liability on the operator. For our purposes this could include a TNC.

These *Draft Harm Principles* appear to hold TNCs accountable for their actions. Unfortunately, it is not possible to rely on the *Draft Harm Principles* because they are substantively flawed and present significant conceptual problems. The gist of this difficulty relates to the fact that these draft articles relate to actions that do not amount to an international wrong and do not give rise to state responsibility. As Principle 1 of the draft articles states: “The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.”⁷² It is clear that the ILC was dealing with actions that do not amount to a wrong and do not, therefore, give rise to state responsibility.

In dealing with actions that do not amount to wrongs, the *Draft Harm Principles* are tied up inextricably to the earlier articles on prevention. Referring to these articles, the ILC stated that the activities coming within the scope of the harm principles are the same as those that are subject to the requirement of prior authorization under the draft articles on prevention.⁷³

The historical evolution of the work of the ILC provides context to this problem. The ILC’s state responsibility regime limits the application of state responsibility to wrongful acts (i.e., those cases where a state causes injury through an act prohibited by treaty or custom).⁷⁴ In reality, however, the conduct of one state can give rise to injury within the territory of other states without violating any such rule of treaty or customary law. Responding to this challenge, the ILC pursued a set of draft articles aimed at defining a state’s liability for damages caused by acts that are not violations of international law. This regime may be called international liability. It should be

71. Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, *supra* note 3, art. 4(1)-(2).

72. *Id.* art. 1.

73. See U.N. Int’l L. Comm’n, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities)*, *Comments and Observations Received from Governments*, at 2-3, U.N. Doc. A/CN.4/562/Add.1 (Apr. 12, 2006).

74. See *Responsibility of States for Internationally Wrongful Acts*, *supra* note 4.

noted from the outset that international liability deals primarily with “non-wrongful” acts,⁷⁵ and that the liability they sought to attach to such actions was not based on state responsibility. But herein lies the problem. The ILC, while admitting they are not wrong, nonetheless claim that the violation of procedural or secondary rules relating to prevention, give rise to state responsibility. They do not explain how an act that is not wrongful can give rise to state responsibility.

Critics have argued that the division between state responsibility and international liability creates unnecessary complications, and rests on a weak conceptual basis.⁷⁶ However, the twin objectives of the ILC in undertaking the codification of international liability for non-wrongful acts was to provide compensation to injured states and their citizens (liability) as well as to deter or prevent putatively liable states from undertaking the actions in question, or at least take adequate measures to minimize the risk of potential harms (prevention).⁷⁷ Moreover, by their separate treatment of wrongful and non-wrongful acts the ILC affirmed the wrongful character of primary rules of international law, and the non-wrongful character of those norms that are not primary rules of obligation. While state responsibility could only attach to the breach of primary obligations that were wrongful under international law, there is nothing to prevent states and citizens obtaining compensation under a scheme of CL which uses national courts.

As between liability and prevention, the ILC first focused on the prevention objective, reasoning that “pride of place would be given to the duty to avoid or minimize injury, rather than to the substituted duty to provide reparation for injury caused.”⁷⁸ Impelled by the force of this logic, the ILC further divided international liability into two

75. The terms wrongful and non-wrongful can be deceptive because their usage typically invokes a moral component. But, non-wrongful means only that the act in question does not happen to violate an existing rule of international law. The more difficult and largely unresolved task lies in defining the non-wrongful acts to which international liability attaches.

76. See, e.g., Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences Not Prohibited by International Law: A Necessary Distinction?*, 39 INT’L & COMP. L.Q. 1 (1990).

77. See *id.*

78. *International Liability for the Consequences Arising Out of Acts Not Prohibited by International Law*, [1982] 2 Y.B. Int’l L. Comm’n 83, 86, U.N. Doc. A/CN.4/SER.A/1982/Add.1.

topics: prevention and liability, and have dealt with them in that sequence.⁷⁹ Pursuant to this decision, the ILC's work on prevention has led to a set of draft articles on the *Prevention of Transboundary Harm from Hazardous Activities* ("Draft Prevention Articles").⁸⁰

Under the current *Draft Prevention Articles*, the ILC has come up with a procedure by which a state must notify, consult, arbitrate, and negotiate with potentially affected states before engaging in non-wrongful acts "which involve a risk of causing significant transboundary harm."⁸¹ So far, the ILC has not compiled a more specific list of acts falling under the scope of their prevention articles. The ILC submitted the current *Draft Prevention Articles* to the General Assembly at the Assembly's fifty-sixth session in 2001, with the recommendation that a convention be held to produce a treaty concerning them.⁸² The General Assembly has not yet done so.

In their *Draft Harm Principles*, however, and with no satisfactory explanation, they illogically and untenably purport to transplant state responsibility into those draft rules. Now, it may be possible to show that state responsibility attaches to the prevention of an act that is not wrongful under international liability. But, the barriers to doing so are very high. If such a task be attempted it needs to be demonstrated that while the act in question does not give rise to state responsibility, a failure to prevent it does so. This is plainly illogical and amounts to a repudiation of the well-established foundations of the work of the ILC. The ILC has drawn a bright line between the primary rules of law, and secondary rules of responsibility. The difference between the primary rules of substantive international law as found in treaties or custom, and the secondary rules of state responsibility are indisputably established by the ILC in their commentaries to the *Final State Responsibility Articles*:

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their

79. See Boyle, *supra* note 78.

80. *Prevention of Transboundary Harm from Hazardous Activities*, *supra* note 6.

81. *Id.* art. 1.

82. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 4.

internationally wrongful acts. The emphasis is on the secondary rules of State responsibility. *The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.*⁸³

Confusingly, the ILC very clearly acknowledged, in their commentaries to the *Draft Prevention Articles*, that those articles were part of the law dealing with liability not state responsibility.⁸⁴ They contrasted state responsibility with liability and stated that: “in view of the entirely different basis of liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, the Commission decided to address the two subjects separately.”⁸⁵

If the ILC thought they were engaged in drafting primary rules of law they would need to demonstrate why and how the *Draft Prevention Articles* had transformed themselves from secondary rules to prevention to primary rules of international law. But, this would have necessitated a new mandate from the General Assembly of the UN. The ILC were not mandated to create primary rules of substantive law. All they were doing was to creating liability rules in the hope that they could be used instead of rules of state responsibility. Second, for any primary rules drafted by them to be treated as codifications of primary rules of customary law, they would need to be based on state practice and *opinio juris*.⁸⁶ Neither the *Draft Prevention Articles* or the commentary of the ILC, systematically demonstrate that the rules drafted by them codified

83. *Draft Articles on Responsibility of States for Internationally Wrongful Acts: General Commentary*, *supra* note 13, at 31.

84. *Prevention of Transboundary Harm from Hazardous Activities: General Commentary*, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 377, U.N. Doc. A/56/10 (2001).

85. *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities: General Commentary*, in *Report of the International Law Commission*, 61 U.N. GAOR Supp. (No. 10) ¶ 67, U.N. Doc. A/61/10 (2006).

86. G.A. Res. 174 (II), *supra* note 1, art. 15.

existing primary rules of law, and that these primary rules were based on practice and *opinio juris*.

Instead, the ILC offers just one isolated sentence and one orphaned footnote in their commentaries dealing with their expansive claim that *Draft Prevention Articles* were in fact primary rules of obligation that gave rise to state responsibility.⁸⁷ The very brief text accompanying this footnote states that “non-fulfilment of the duty of prevention . . . would not give rise to the implication that the activity itself is a prohibited activity. . . . Equally . . . [s]tate responsibility could be engaged to implement the obligatio[n].”⁸⁸ To begin, this is a clear *non sequitur*. If the duty of prevention applies to actions that are not prohibited and are therefore not international liability wrongs, then state responsibility cannot be invoked. How then could the ILC conclude that state responsibility can be engaged to implement the obligation to prevent something that is not a wrong?

Relying upon this isolated, unsubstantiated, and clearly illogical comment in the *Draft Prevention Articles* the ILC make a startling claim in their commentary to the *Draft Harm Principles*. They state that “the present draft principles, like the draft articles on prevention, are concerned with primary rules. Accordingly, the non-fulfillment of the duty of prevention prescribed by the draft articles on prevention could engage state responsibility without necessarily giving rise to the implication that the activity itself is prohibited.”⁸⁹ For the reasons set out above this claims made by the ILC for their *Draft Harm Principles* is difficult to justify.

However, this does not mean that they are also off base when dealing with specific aspects of CL. When dealing with CL they building on established foundations of public international law, the *Draft Harm Principles*, consistent with other treaties dealing with operator liability, envisage the definition of “operator” in functional terms based on a factual determination as to who has use, control, and

87. See *Prevention of Transboundary Harm from Hazardous Activities: General Commentary*, *supra* note 86, at 150 & nn. 866-67 (showing how the notes and accompanying text shed no light on how or why they make this hop, skip and jump).

88. *Id.*

89. *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities: General Commentary*, *supra* note 87, at 182.

direction of the object at the relevant time.⁹⁰ Such a definition is generally in conformity with notions of CL. More generally, while no basic definition of the operator has been developed, recognition has been gained for the notion that operator means one in actual, legal or economic control of the polluting activity.

V. ADVANTAGES OF CIVIL LIABILITY

Claims based on CL enjoy substantial advantages over those originating in state responsibility. To begin with, an individual victim of environmental damage has direct access to justice (whether by courts or administrative agencies) and does not have to await espousal or adoption by his/her country. As we have seen, decisions to prosecute claims based on state responsibility are taken only in rare circumstances and victims are often held hostage to the politics of their own country. Second, even where states premise their case on state responsibility, the time taken in doing so often is inordinately long because the machinery of states is notoriously slow. Third, in state responsibility, the victim is forced to rely upon the state (and not an advocate or attorney of his/her choosing) to present and argue the case. Fourth, the absence of a liability regime in state responsibility makes recovery of damages very difficult. Admittedly, a victim who files an action in a foreign state faces some obstacles arising from the differences of legal systems, language, procedure and execution. But the constitutive treaty establishing a CL regime can address these difficulties. The constitutive treaty could place duties on the contracting parties relating to non-discrimination, access to justice, and security for payment of damages, and thereby remove or ameliorate these difficulties.

A. *Civil Society and Civil Liability*

It is almost obvious that international law needs to develop innovative means of overcoming the deficiencies of a

90. See *Draft Harm Principles*, *supra* note 7, princ. 2(g); see also United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, art. 1, Apr. 19, 1991, 30 I.L.M. 1503, available at http://www.uncitral.org/pdf/english/texts/transport/ott/ott_e.pdf (providing another example of a functional definition of “operator”).

sovereignty-based system of international governance. Global environmental problems have to be solved within a consensual legal system of sovereign states that alone are empowered to make legal and political decisions about them. Legal or economic theories support the plain fact that nation states act in their own best interests and not that of the global community. While they might act to save the global commons where their own self-interest is affected, their actions are premised on individual, not community needs. Not surprisingly, there are many situations in which the cries for legal measures to arrest or avert environmental perils are left unanswered.

The emergence of new international laws based on CL breaks out from the inherited system of IL dominated by states, that gave rise to state responsibility. We live in a world in which national and international laws and regulations governing corporations and individuals, in matters of trade, commerce, health, communications, and the environment are in many respects more important than those controlling states. This necessarily means that state responsibility and international liability will lose their primacy as the principal legal instruments for governing environmental protection. CL opens the door to NGOs and other private parties to use the legal system to protect the environment from actions of TNCs in a way not permitted by state responsibility or international law.

Adjudication can play a supportive role in creating corporate accountability, and adjudication using CL holds greater promise than state responsibility. The speed and manner at which it develops will depend on the pressure brought on governments by civil societies across the globe. World actors are changing from state actors to others, such as NGOs, businesses, and other nongovernmental entities. While the 1648 *Treaty of Westphalia* ushered in the nation-state, which then became the sole subject of international law and policy, we now perceive a return to a pre-Westphalian world centered around civil society. The concept of civil society has a long political genealogy. It originated in the works of Thomas Paine and George Hegel in the late eighteenth century. After lying dormant for almost 200 years, the Marxist theorist Antonio Gramsci resuscitated the concept in the post World War II era.⁹¹

91. See Thomas Carothers, *Civil Society*, FOREIGN POL'Y, Winter 1999–2000, at 18-19.

In essence, civil society is a domain parallel to, but separate from, the state in which citizen actors associate and coalesce according to their own interests and needs.⁹² It encompasses political parties and interest groups that include both for-profit as well as not-for-profit groups. Civil society thus encompasses labor unions, professional associations, chambers of commerce, ethical and religious groups, and environmental NGOs.

Domestically and internationally, NGOs work at gaining considerable expertise on a topic, then urge governments and businesses to act on the basis of their findings and conclusions. Their efforts sometimes result in “soft law” or political declarations, as opposed to treaties and agreements. Environmental NGOs, have built up a record of aggressively trying to keep governments and TNCs accountable through protest and debate.

Despite attempts to re-conceptualize international legal society along different lines, there is little evidence to support a fundamental change of the present sovereignty-based legal system. Treaties establishing CL are based on state sovereignty, and have been incremental and functional in nature, premised on what appears possible. Even so, it is perfectly feasible for the present sovereignty based system to give better status and delegate more functions to NGOs who could better pursue TNC accountability.

NGOs are a fact of international life and they have long played an active role in international law. As such, it does not take a big leap to institutionalize them as actors entitled to contribute in the law-making and implementing processes. This has already been done by the International Labor Organization (“ILO”),⁹³ and it is achievable for the various international organizations to take measures to accord NGOs a similar status in their deliberations. There will, of course, be some problems concerning selection and accountability, but these are not insurmountable obstacles, and could be resolved along the same lines as the ILO. The Commission on

92. *Id.*

93. See Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L. J. 748, 778 n.74 (1983) (acknowledging the “genuine participation of nongovernmental business and labor representatives”).

Sustainable Development (“CSD”) entertains reports from NGOs.⁹⁴ Since such a move was based on consensus, it is well within reach to hope that other organizations created by treaty will do likewise. The infusion of people power into the law-making and implementing process will help to reduce the “democratic deficit” in international law-making and implementation. NGOs, citizen groups, churches and trade unions around the world appear to want more corporate responsibility and could bring pressure on their governments to create better regimes of CL.

B. The Challenges Facing Treaty Regimes

It must be noted, however, that CL systems are creatures of treaties, and their utility and effectiveness will depend on the extent to which those treaties are adopted, ratified, and implemented by nation states. Treaties creating CL regimes are not comprehensive and are limited primarily to a few areas of TNC activity primarily relating to oil pollution from vessels and civil nuclear power.

Since success and failure may be predicated on differing and perhaps contradictory criteria, it may be useful to delineate the core indicia for judging treaties. The first relates to the correct identification and *diagnosis* of the problem or issue that an international environmental treaty purports to address. Over the last fifty years, international law has become a dynamic instrumentalist social force addressing a wide range of socioeconomic, sociopolitical, and biophysical challenges through bilateral, regional, and global treaties. Many treaties are functional, instrumentalist social forces, and contemporary international law now includes a formidable corpus of treaties dealing, for example, with labor, human rights, health, intellectual property, taxation, the environment, and energy. These treaties establish articulated and implied goals and objectives, and some of them create new institutions. The first criterion used in my selection will be the degree to which the full extent of the problem, in all its complexity, is accurately identified. When dealing with a complex challenge, the diagnostic dimension of a treaty should recognize and not gloss over the panoply of difficulties presented by

94. See Kenneth W. Abbott, “Economic” Issues and Political Participation: *The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV 971, 1004 (1996).

it. This is an essential starting point for confronting and addressing those problems.

Second, following upon the correct diagnosis, treaties should embody *prescriptions* aimed at the core of the problem, and deal with the sources of the malady. They should not skirt around the challenge or be directed to symptoms rather than the cause. Prescriptive remedies should accurately target the sources and the substantial remedies they prescribe should include methods of implementation and compliance. Where behavioral changes are necessary, the treaty should be directed toward eliciting behavioral changes among offending states. In order to secure behavioral change functional, goal-oriented treaties should be able to command and induce compliance through compliance securing architecture, and methods that both effectively and beneficially impact the problems addressed by them.⁹⁵

Third, the remedies and methods employed by a treaty should have a demonstrably beneficial impact on the problem and help move the treaty toward the practical attainment of its goals and objectives. In the environmental and energy arena, even the hitherto limited inquires about compliance with international treaties addressing complex problems have been theoretical. They have been confined to two questions. First, has international law been *implemented*? Meaning, has it been incorporated into domestic law through legislative, judicial, or executive action. This will hereinafter be referred to as formal implementation. Second, to what extent have countries *complied* with a treaty? Meaning, have they adhered to its provisions, and deployed the formal implementing machinery established by it.⁹⁶ This will be referred to as formal compliance.

The real success of a treaty, however, depends on more than the formal acceptance of legal obligations; it lies in its *effective implementation* (“*effectiveness*”).⁹⁷ *Effectiveness* refers both to the costs, as well as the extent to and manner in which a treaty has

95. See Jose B. Alvarez, *Why Nations Behave*, 19 MICH. J. INT’L L. 303, 305 (1998).

96. See EDITH BROWN WEISS & HAROLD JACOBSON, *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH ENVIRONMENTAL ACCORDS* (1998); DINAH SHELTON, *COMMITMENT AND COMPLIANCE* (2000).

97. See M. A. Fitzmaurice & C. Redgwell, *Environmental Non-Compliance Procedures and International Law*, 31 NETH. Y.B. INT’L L. 35 (2000).

achieved its goals. A treaty that aims low and achieves little could nonetheless be effectively implemented. While a treaty containing demanding prescriptive remedies may be adjudged more favorably than one that does not, effectiveness for the purposes of this essay is not confined to the former category of treaties. The effectiveness of a treaty, therefore, is not based on the depth of its commitments or the extent to which it addresses the problem that called for legal remediation. For example, some unfavorably judged treaties may contain shallow commitments or inadequate goals, or fail to address tough issues.⁹⁸ They do not have a significant impact on the problem or do not result in behavioral changes. It is possible that such treaties reiterate what states would have done anyway, or require only minimal changes that do not significantly affect the underlying problem. Nonetheless, once they are negotiated, agreed to and come into force, they become part of the corpus of international law even if they flunk the test of good prescription. They could be implemented effectively despite their very limited or modest goals.

This brings up the *impact* of a treaty on the underlying issue.⁹⁹ This is perhaps the most important criteria for determining the success or failure of a treaty. By impact, it is meant the extent to which a treaty has solved or made significant steps toward solving the problem it confronted. The extent of its beneficial impact will depend on the degree to which a treaty institutionalizes tough and serious objectives, as distinct from shallow, inadequate, or inconsequential objectives. Furthermore, it should embody compliance-eliciting methods and measures that are directed toward changing state behavior. Consequently, the impact of a treaty will depend on the nature of its goals or objectives, its methods, and the extent to which it succeeds in changing state behavior. It is

98. See George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996).

99. Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 393–94 (2000). Although Raustiala conflates the two concepts, this article draws a distinction between effectiveness and impact. It is possible that while a treaty might have a negligible impact on the underlying problem, it is nonetheless part of a broader response to the problem that, when considered in its entirety, exerts a far more meaningful impact. To the extent this is the case, the treaty should, in the evaluative rubric set forth here, be self-identified as part of this larger and ostensibly coordinated response.

important, therefore, to understand a treaty not only in terms of its *effectiveness* in achieving stated goals, but also in terms of its *impact* as a satisfactory response to the challenge addressed and the degree to which it changes state behavior.

When dealing with *effectiveness* and *impacts* it is important to identify the goals of a treaty and to compare such goals with the results produced. It is also necessary to inquire about the depth of these goals and the extent to which they did or did not remedy the problem being addressed. Where the results, garnered from empirical data and evidence, do not match goals, or point to the inadequacy of those goals, questions may arise as to the reasons for such shortfalls. For as noted above, it is possible for shallow commitments and modest goals to reflect what countries are already doing rather than what is needed to address the problem at hand. Such an inquiry must traverse institutions, compliance methods, enforcement, as well as the socioeconomic, political, or cultural context that might explain the gaps between the goals of a treaty and the inability to meet them, or the meagerness of the goals and the ease with which they were met.

There is a substantial body of literature on “effectiveness.”¹⁰⁰ However, these otherwise theoretically illuminating contributions do not include any authoritative conclusions based on comprehensive empirical examination of compliance, effectiveness, or impact of energy and environmental agreements.¹⁰¹ For example, the impressive study by Weiss and Jacobson was based on five treaties,¹⁰² not five hundred. This is primarily because of the absence of comprehensive and organized empirical evidence or data.

In judging the success or failure of a treaty, the importance of empirical evidence backing any such claims cannot be

100. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); Downs et al., *supra* note 100; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997); Oran R. Young et al., *Regime Effectiveness: Taking Stock*, in *THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES* 249 (Oran R. Young ed., 1999).

101. *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE*, at ix (David G. Victor et al. eds., 1998).

102. See WEISS & JACOBSON, *supra* note 98.

overemphasized. The absence of such data renders any judgment more impressionistic than objective. There is little empirical data on which to judge the real impact of existing CL regimes. Even on the formal level the present state of ratification of the nuclear liability treaties is patchy. The *Vienna Convention* has by far the widest participation, with thirty-six Parties,¹⁰³ compared to the *Paris Convention's* fifteen Parties, with no ratifications of the 2004 Protocol.¹⁰⁴ Again, only four states ratified the *Convention on Supplementary Compensation for Nuclear Damage*.¹⁰⁵ In addition to the U.S., Argentina, Morocco and Romania have ratified the CSC; seventeen states have ratified or become parties to the *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*.¹⁰⁶

CONCLUSION

What our brief survey reveals, first, is that states still remain the most important players even where CL is concerned. They have not chosen to replace the antiquated and in many ways obsolescent system of state responsibility with a modern and ubiquitous system of CL. International law remains a primitive system of law that does not give rise to revolutionary developments, and CL does not sound the death knell of state responsibility. As we have seen, many CL regimes are established by treaties that place subsidiary (but

103. Int'l Atomic Energy Agency, *Vienna Convention on Civil Liability for Nuclear Damage*, http://www.iaea.org/Publications/Documents/Conventions/liability_status.pdf (last visited Mar. 25, 2010).

104. Nuclear Energy Agency, *Paris Convention on Nuclear Third Party Liability*, <http://www.nea.fr/law/paris-convention-ratification.html> (last visited Mar. 25, 2010).

105. Int'l Atomic Energy Agency, *Convention on Supplementary Compensation for Nuclear Damage*, http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf (last visited Apr. 20, 2010).

106. Int'l Atomic Energy Agency Staff, *U.S. Ratification of Nuclear Liability Treaty Sets "New Dynamic"*, IAEA.ORG, May 23, 2008, <http://www.iaea.org/NewsCenter/News/2008/liabilitytreaty.html>; COMITE MARITIME INTERNATIONAL, *YEARBOOK ANNUAIRE 510 (2009)*, available at http://www.comitemaritime.org/year/2009/pdffiles/YBK_2009.pdf.

nonetheless important) duties on states. A state that does not provide for the financial security required by a treaty will be violating an obligation that may be actionable under state responsibility. State responsibility and international law can assume new significance and vitality when used as interlocking remedies in conjunction with civil liability. Second, adjudication is not the primary instrument for creating more corporate responsibility. Voluntary codes and regulations with some kind of implementing and enforcing agencies are far more effective in establishing guidelines and rules for corporate conduct, than adjudication, which is scarcely employed in inter-state conduct.

