CHAPTER ELEVEN

CO-REGULATION AND THE ROLE OF TRANSNATIONAL CORPORATIONS AS SUBJECTS IN IMPLEMENTING INTERNATIONAL ENVIRONMENTAL LAW

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I. Introduction

With revenues that exceed the gross national product of many countries and corporate networks that engage in more global governance activities than many States, transnational corporations (‘TNCs’) have become the most influential socioeconomic force within the phenomenon of globalization. In a world of collapsing physical boundaries and expanding markets, the largest economic actors have become more and more integrated in their governance activities, while political actors have become more fractious. Yet, our current international legal order where the political State is the dominant international actor remains detached from the new social reality of TNCs as the primary natural resource extractors. This chapter argues that the classical legal notion that international legal personality is exclusive to States and some international organizations is nothing more than a fiction based on outdated theories about legal personality.

In the context of international environmental law, maintaining the fiction that international authority is exclusive to State actors is particularly dangerous. In 2008, the world’s top 3,000 public companies were responsible for one-third of all global environmental damage.1 Five industry sectors accounted for the bulk of these impacts: oil and gas production, electricity, mining, food production, and construction materials.2 With

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1 United Nations Environmental Programme Financial Initiative and the Principles for Responsible Investment, Universal Ownership: Why Environmental Externalities Matter to Institutional Investors (Report, UNEP, 2010) 3. The UNEP report measured environmental damage in relation to industry’s contribution to global greenhouse gas emissions, water resources, air pollution, waste generation, exploitation of natural resources, and other ecosystem services.

2 Ibid 7.
unmitigated global warming and crashing fish stocks being some of the most pressing transboundary issues of our times, international lawyers need to abandon the rigidity of classical Westphalian international law canons and propose instead new concepts of law to bridge the gulf between legal fictions and operational realities. Because so many of the global environmental impacts are not the result of State action but rather the product of non-State actors engaged in customary business practices, there is an urgent need to recognise the role that non-State actors should be playing in fashioning and implementing international environmental law.

We need to focus greater international attention on incorporating non-State international actors into process of international policymaking and implementation particularly where those actors’ decisions already de facto influence international practices. This is already occurring in areas of international economic law. With the encouragement of TNCs, States have willingly drafted relatively uniform international investment and trade laws to facilitate global economic exchange.3 Arbitrator Karl-Heinz Böckstiegel has observed that ‘The traditional scenario of states as the only subjects of international law and the only ones having the capacity to raise international claims against other states in legal proceedings has gone. Private enterprises in international trade and investment no longer depend on the discretion of their homes states in the context of diplomatic protection as to whether a claim should be raised against another state.’4 TNCs have distinctive public rights to pursue economic remedies against sovereign States.

Yet, rights and responsibilities are not ordinarily divisible when legal personality is at issue. In an equitable international legal system, should TNCs have the benefit of their investments being safeguarded without the international burden of addressing corporate impacts on environmental systems? While TNCs have access to arbitration panels, there is no equivalent institutional framework for States on behalf of their citizens or citizens on behalf of their States to bring action regarding corporate environmental performance. Should TNCs be legally obligated to implement internationally negotiated minimum standards for environmental protection in their transboundary economic activities? After all there is