Chapter 6

Markets as an Accountability Mechanism in International Law

Anne van Aaken

1 Introduction

International legal scholarship has mainly relied on legal accountability and coercive mechanisms to hold subjects of international law responsible. International affairs scholars have always been more skeptical of the effectiveness of this approach, and now also legal scholars have shifted their attention to developing alternative mechanisms not involving (only) legal responsibility. Although in public international law (PIL) relying on coercive mechanisms—such as adjudicatory mechanisms and enforcement of judicial decisions—is much more problematic than in a nation state,1 the dominant form of ‘accountability’ in PIL has traditionally been the mechanisms of (state) responsibility for wrongful acts2 as well as (state) liability for not necessarily unlawful acts; now extended to international organizations (IOs) as well.3 The ARS use a strictly legal and narrow concept for the notion of ‘responsibility’,

---

1 First because not all issue areas of PIL have adjudicatory mechanisms, and second because the system lacks a central enforcement mechanism.


excluding for instance, liability\textsuperscript{4} and “soft responsibility”\textsuperscript{5} thereby denying a broader notion of accountability. Whereas responsibility has a legal meaning in PIL, accountability, which is a fairly new term used in PIL, has many meanings and is used differently in the governance discourses,\textsuperscript{6} aptly described by Jutta Brunnée who noted that “notwithstanding its increasingly frequent invocation by international lawyers, the concept of ‘accountability’ has not acquired a clearly defined legal meaning.”\textsuperscript{7} Responsibility and liability (as legal accountability) are surely insufficient in capturing the gaps in legal accountability created in a multi-layered and multi-actor globalizing world.\textsuperscript{8} Although responsibility and liability are still needed for the purpose of compensation, here the focus is on the function of deterrence and prevention in order to effectuate PIL.\textsuperscript{9} An ever richer variety of accountability mechanisms is emerging which should be taken into account when discussing the effectuation of PIL: in this chapter the focus is on market mechanisms. I will use accountability as the general term which includes responsibility, liability, and various forms of legal control and compliance-monitoring,\textsuperscript{10} and additionally—in contrast to the other chapters in the book—extend it to (non-legal) market mechanisms which have been hitherto been neglected.

\textsuperscript{4} The obligation of damage payments, even if there was no international wrong, as, e.g. in the Convention on International Liability for Damage Caused by Space Objects, Convention on the International Liability for Damage Caused by Space Objects 961 UNTS 187 (Date signed: 29th March 1972) (Date enacted: 29th March 1972).


\textsuperscript{6} For details and a brilliant discussion and conceptualization, see Deirdre Curtin and André Nollkaemper, “Conceptualizing Accountability in International and European Law”, Netherlands Yearbook of International Law XXXVI (2005): 3, 4 et seq.


\textsuperscript{8} Deirdre Curtin & André Nollkaemper, supra note 6, at 6 and 11.

\textsuperscript{9} For a discussion on the goals of the ARS, see Anne van Aaken, “Shared Responsibilities in International Law: A Political Economy Analysis”, in Distribution of Responsibilities in International Law, André Nollkaemper and Dov Jacobs eds. (Cambridge: Cambridge University Press, 2015), forthcoming. In short, there are three main goals: 1) to compensate the injured parties, 2) to deter states from engaging in harmful actions in the future, and 3) to secure international cooperation (where PIL is violated in a common venture, e.g. peace-keeping missions).