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CORPORATE  
ACCOUNTABILITY  
IN INTERNATIONAL  
ENVIRONMENTAL  
LAW

*Elisa Morgera*

# Corporate Accountability in International Environmental Law

ELISA MORGERA

OXFORD  
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

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New Delhi Shanghai Taipei Toronto

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Argentina Austria Brazil Chile Czech Republic France Greece  
Guatemala Hungary Italy Japan Poland Portugal Singapore  
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Published in the United States  
by Oxford University Press Inc., New York

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First published 2009

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British Library Cataloguing in Publication Data  
Data available

Library of Congress Cataloging in Publication Data  
Data available

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India  
Printed in Great Britain  
on acid-free paper by  
the MPG Books Group

ISBN 978-0-19-955801-8

1 3 5 7 9 10 8 6 4 2

## *Foreword*

The following book originates from a doctoral thesis accomplished at the European University Institute in Florence, where the law department places a great emphasis on exploring the increasing reach as well as the limits of ever-evolving international law. Now, the specific topic of this remarkable work by Elisa Morgera serves to illustrate both the expansion and the limits of international law.

In a classical perspective, to which many scholars still remain faithfully attached, public international law does not deal with private corporations, neither does it deal with accountability. Classically, it remains only interested in States and in their responsibility. Some venture even to challenge the place of 'standards' as real norms of international law, which are not referred to in any respect at Article 38 of the Statute of the International Court of Justice (ICJ). For such classically-oriented scholars, standards are seen at best as empiric tools for the almost exclusive use by international judges and arbitrators in their efforts to accommodate the flexibility and vagueness of rules of conduct or guidelines, the legal status of which is often problematic. Last but not least, focusing part of the research on the impact of international organizations on the development of such a moving picture could probably worry some good minds traditionally oriented towards a vision of International Intergovernmental Organizations (IIOs) (not even to speak of International Non-governmental Organizations (NGOs)) as mere collective emanations of States rather as actual—and at least sometimes hyperactive—subjects of international law.

Seen from such a classical, if not necessarily archaic, perspective, a book dealing with 'corporate accountability in international environmental law' and exploring 'emerging standards' as well as the 'contribution of international organizations' to their creation would hardly be considered as legitimate, at least as far as public international law is concerned.

Indeed, the difficulties exist from a theoretical as well as from a methodological point of view; but one of the credits of this book is precisely to remain guided not by an idealistic approach, where authors take their wishful thinking as if they were a faithful description of the true reality. On the contrary, Elisa Morgera has been able to realistically construct in the most reliable way her patient review of current efforts: those made within and around international organizations for establishing a normative framework to orient the action of multinational corporations as well as for monitoring actual corporate conduct in order to make it more compatible with a sustainable management of the human environment.

In the interim, an increasing number of people understand the present limits of traditional inter-State solutions with respect to the negative environmental

impact of multilateral corporations. Against this background, the empirical elaboration of standards of conduct based on the growing expectations of the international community, identified with the help of international organizations, provides a useful model against which to judge the compatibility of the conduct of business with the promotion of sustainable development. In this context, the study undertaken by Elisa Morgera provides us also with a highly valuable contribution to evaluating the true meaning of prevention and precaution in terms of the efficient protection of the environment against some destructive activities by private international investors.

The author remains also realistic as she acknowledges the rather limited impact—until now—of international case law to the definition of sound and reasonable corporate behaviour. Morgera reviews the tools at the disposal of States and private economic actors for promoting the actual respect of the environmental standards defined at the national and international levels. She underlines in particular that the screening and monitoring of international financial institutions working with the private sector (like the International Finance Corporation (IFC)) are still not used as much as could be realistically expected. The same can be said for the potential direct or indirect monitoring role of a number of human rights bodies. Whatever the case may be, the author also recognizes the interest and concrete limits of UN–business partnerships. Much remains indeed to be done by most multinational corporations, in particular in terms of transparency of environmental management practices.

In a straightforward but substantial way, Elisa Morgera demonstrates that the inherent limits of the international public order to accommodate the concrete socio-economic necessity of sustainable development do not inevitably draw obstacles to enrich the concepts as well as the operational instruments of international law. The author has found an elegant and reliable way to reconcile the positive analysis of legal reality with the inspired vision of the goals and perspectives to be reached by States as well as by private investors, the former having as their duty to control that the latter do not operate only in terms of immediate profit.

Professor Pierre-Marie Dupuy  
University of Paris (Panthéon-Assas)  
European University Institute, Florence  
Graduate Institute of International and  
Developments Studies, Geneva

## Preface

This book aims to define the legal *contours* of the concept of corporate accountability in international environmental law (IEL).<sup>1</sup> It explores the current and future role of IEL in directing and controlling the conduct of business enterprises, in particular multinational corporations, through the identification of corporate accountability standards and their implementation by international organizations. The concept of corporate accountability is often related to the insistent calls by international Non-Governmental Organizations (NGOs)<sup>2</sup> and academics<sup>3</sup> to ensure some sort of international oversight over private companies, particularly multinationals, to avoid the most serious environmental harm caused by them. Corporate accountability is also equally relevant when considering the growing practice of international organizations to increasingly engage the private sector in attaining global goals for the protection of the environment.

Corporate accountability became a buzzword in early 2002, when the international community was gearing up to the World Summit on Sustainable Development (WSSD). At the time NGOs called for a binding convention on corporate accountability and liability.<sup>4</sup> This proposal was based on the continuing damage to the environment caused by private companies, the limits of national courts to provide redress to victims and recoup clean-up costs from polluters, and the perceived shortcomings of international law in addressing this issue,<sup>5</sup> while providing vigorous protection to foreign investment.

<sup>1</sup> The difficulty in ascertaining precisely what 'binds together' the disparate developments on global corporate accountability is affirmed by P. Muchlinski, 'Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organizations' (2003) 3 *Non-State Actors and International Law* 23, 130.

<sup>2</sup> Friends of the Earth (FOE), 'Towards Binding Corporate Accountability' (Position paper for the World Summit on Sustainable Development (WSSD), January 2002).

<sup>3</sup> P. Hansen and V. Aranda, 'An Emerging International Framework for Transnational Corporations' (1990) 14 *Fordham International Law Journal* 881; J. Bendell and D. Murphy, 'Towards Civil Regulation: NGOs and the Politics of Corporate Environmentalism', in P. Utting (ed), *The Greening of Business in Developing Countries* (London: Zed Books in association with UNRISD, 2002) 244, 264; The International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations for Companies* (Versoix: International Council on Human Rights Policy, 2002) 8; M. Mason, *The New Accountability: Environmental Responsibility Across Borders* (London: Earthscan, 2005) 15.

<sup>4</sup> FOE, 'Towards Binding Corporate Accountability' op. cit.

<sup>5</sup> As well as other results of increased transnationalism, which are 'testing the limits of the adequacy and effectiveness of international law', as described by C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des cours* 9, 42. On globalization and the competition between States and private subjects that more and more are free from State control, see also the reflections by P-M Dupuy, *L'unité de l'ordre juridique international* (Leiden: Martinus Nijhoff Publishers, 2003) 41.

While the NGO proposal did not succeed in gathering intergovernmental support, the WSSD enshrined the idea of corporate accountability in the international agenda on sustainable development,<sup>6</sup> leaving several questions unanswered as to its legal significance and expected impacts on the way in which States traditionally ensure an environmentally sound corporate conduct. In the aftermath, a growing interest of various international organizations in cooperating with the private sector and engaging business in the implementation of multi-lateral environmental agreements soon became standard practice.

Many of these attempts mushroomed without coordination, with little reflection on how to structure and maximize them to achieve global environmental objectives. A few, however, also attempted to draw some basic principles or benchmarks to guide business towards an environmentally sound and acceptable performance. The latter types of initiatives are analysed in this book. Since 2000, the UN Secretary-General and the UN Sub-Commission on Human Rights have developed specific initiatives to better define the minimum requirements that business must fulfil in order satisfactorily to respond to the expectations of the international community. Following the WSSD, a renewed interest in the Guidelines for Multinational Corporations of the Organization for Economic Cooperation and Development (OECD) also marked NGOs' work on corporate accountability. In 2006, the IFC reshaped its policies with a clear definition of performance standards for private companies based on IEL principles and objectives.

In the face of such multi-faceted—yet largely convergent—international practice, this book examines 'the tensions and tendency to change of law, and the repercussions of social change on legal changes'.<sup>7</sup> It provides a legal–political analysis focusing on the creation and evolution of law, the social forces and tensions that make law emerge and develop, and the reasons why law is such, at a certain point in time.<sup>8</sup> The progressive integration, or attempted integration, of the private sector in the implementation of IEL through the concept of corporate accountability has come to represent one of the aspects of the continuous and constant process of evolution of international law in general, and of IEL in particular. The continuous calls for increased corporate environmental accountability demonstrate that this can indeed be identified as one of the social values that are progressively emerging and becoming so important in the social conscience that they are increasingly expected to be formally sanctioned and protected by law.<sup>9</sup>

As a result of these tensions and widespread expectations, the fine line between positive law and law *in fieri* may not be clearly defined.<sup>10</sup> This book will therefore

<sup>6</sup> WSSD, Johannesburg Plan of Implementation, UN. Doc A/CONF.199/20, Resolution 2, Annex, 4 September 2002, paras. 18, 49 and 140(f).

<sup>7</sup> N. Bobbio, *Dalla struttura alla funzione: nuovi studi di teoria del diritto* (Milano: Edizioni di Comunità, 1977) 53.

<sup>8</sup> G. Abi-Saab, 'Cours general de droit international public' (1987) 207 *Recueil des cours* 9, 33.

<sup>9</sup> Paraphrasing Abi-Saab, *op. cit.* 204–5.

<sup>10</sup> *Ibid* 204–5 ('Le seuil du droit entre *lex lata* et *lex ferenda*').

try to explore the borderline between current IEL and developing IEL, which is represented by emerging international standards for corporate environmental accountability and their operationalization thanks to the initiative of international organizations. These standards will be considered as the current response to the calls for 'a new legal order that brings multinational actors within... the principle of accountability'.<sup>11</sup> These standards may be evolving into a sort of 'law of the future [that] will recognize as accountable to the international legal system'<sup>12</sup> important new international actors such as multinational corporations and other business entities.

The present study therefore aims to better define the concept of corporate accountability as the answerability of private companies to public expectations based on international environmental standards. These standards are considered as a fundamental, minimum normative benchmark, firmly rooted in IEL, according to which it is possible to critically appraise corporate conduct, even in the absence of national laws to this effect.

The first part of the book seeks to prove the need for corporate environmental accountability standards and their means of implementation at the international level, based both on the egregious cases of environmental damage and day-to-day negative impacts of the private sector, as well as on the desirability of the private sector's proactive contribution to the attainment of internationally agreed goals (Chapter 1). The increasing attention of the international community to corporate environmental accountability and responsibility—as reflected in the outcome of major global conferences—shows the emergence and strengthening of expectations related to transparency, prevention and answerability on the part of private companies (Chapter 2). This shift is motivated, on the one hand, by the shortcomings of traditional legal solutions to ensure the environmentally sound conduct of private companies: home and host State control, international State responsibility and international environmental regimes for civil liability. On the other hand, it is counterbalanced by the disproportionate protection offered by international law to multinational companies as foreign investors, in the absence of international legally binding obligations upon them (Chapter 3).

Against this background, the second part of the book points to the emergence of converging international environmental standards for corporate accountability in various initiatives undertaken by different international organizations on the basis of multistakeholder consultations, often in the absence of State involvement. Corporate accountability standards that have reached a significant level of detail and acceptance at the international level include: environmental integration through environmental impact assessments (EIAs) and environmental management systems (EMS); prevention, particularly in case of

<sup>11</sup> C. Weeramantry, 'Human Rights and the Global Marketplace' (1999) 25 *Brooklyn Journal of International Law*, 27.

<sup>12</sup> *Ibid* 49.



likely transboundary environmental harm or environmental harm with serious human rights consequences; precaution, disclosure of environmental information; public involvement; and the sustainable use of natural resources, particularly when part of an internationally protected site. Although these concepts may be considered at a glance akin to the general principles of IEL,<sup>13</sup> they have been significantly re-elaborated, translating inter-State obligations, to specifically target private companies. A theoretical discussion of the role of legal standards, as opposed to rules and principles, premises the second part of the book (Chapter 4).

The second part of the book is not only devoted to identifying emerging standards, but also the process through which international organizations define or choose these standards. Such identification is first based on an analysis and comparison of the instruments elaborated in the framework of the United Nations (UN) and the OECD, to assess whether a significant convergence in the choice of international environmental standards for private companies is occurring. Such assessment will also provide further historical and conceptual background to this research, in highlighting the different approaches adopted to ensure the responsible conduct of the private sector and the different processes and actors involved in the definition of these standards (Chapter 5). An analysis of the growing case law on the environmentally irresponsible conduct of private companies follows. It first concentrates on reviewing decisions by national courts facing claims of international environmental NGOs and victim groups calling for the direct application of international environmental rules upon private corporations. It then turns to the international level, to assess the extent and the basis upon which human rights monitoring bodies focus on the conduct of private companies, in addition to that of the State in which they operate, when human rights violations are concomitant with or caused by major environmental damage (Chapter 6). Furthermore, an assessment is made of the international environmental standards utilized by international financial institutions to review private companies' projects' eligibility for funding and to set conditions in loan agreements. Once again, the aim is to ascertain the extent to which the standards identified by these organizations are based on IEL, the extent to which the process for standard-setting involves different stakeholders, and the extent to which standards are expected to be taken into account directly by private companies (Chapter 7). The concluding chapter clarifies the level of detail and international acceptance of emerging international standards, also drawing upon recent developments in multilateral environmental agreements and in particular the Convention on Biological Diversity (CBD) (Chapter 8).

To show the practical impact of international standards for corporate accountability and the continued relevance of the work of international organizations in this respect, the third part of this book focuses on the existing and potential tools

<sup>13</sup> P. Sands, *Principles of International Environmental Law* (2nd edn, Cambridge: CUP, 2003).

for compliance that international organizations have at their disposal to ensure the actual respect of standards by private companies through information, communication, monitoring and stakeholder empowerment. First of all, the environmental performance standards utilized by international financial institutions working with the private sector are analysed, with a view to suggesting further means to strengthen their application and integration in contractual loan agreements. In addition, the role of international financial institutions' complaints mechanisms is considered as an avenue for victims of corporate environmental damage (Chapter 10). Second, the oversight role of human rights monitoring bodies, the UN and in particular the Security Council, and the OECD national contact points is assessed, and questions related to their increased cooperation are addressed (Chapter 11). Finally, the growing practice of establishing partnership between the UN and the private sector is analysed, together with the possibility of basing these initiatives on the emerging standards for corporate environmental accountability, of strengthening them by using contractual agreements, and possibly directing them to the further definition of these standards in specific industry sectors or circumstances, in a collaborative way (Chapter 12).

As this study tackles an ongoing development within IEL, many questions remain unanswered to which only continuous monitoring and analysis of international practice will in time provide adequate response.

E. M.

## *Acknowledgements*

I wish to express my gratitude to Prof. Pierre-Marie Dupuy, for sharing his views about legal standards, the social function of international lawyers and the critical importance of legal theory to substantiate empiric legal research among many other challenges of international law. Many sincere thanks are also owed to Prof. Francesco Francioni for his tireless assistance and his rigour in assessing legal research. It has been a privilege to receive the comments and suggestions of Prof. Alain Boyle and Tullio Scovazzi on the Ph.D. thesis upon which this book is based. I am also very grateful to Prof. Fabrizio Cafaggi and Prof. Marie-Ange Moreau for having engaged me in multidisciplinary debates on corporate accountability.

I am very thankful to the Italian granting authorities for having had the opportunity to undertake a Ph.D. programme at the European University Institute (EUI), an environment that prevents academic research from becoming a solitary endeavour and treats researchers with beauty and history. It has been a pleasure to be part of the EUI Environmental Law Working Group, and I wish to thank Patricia, Emanuela and the other members for having kept this forum alive.

I am also grateful to the friends and colleagues of the International Institute for Sustainable Development (IISD), with whom I assisted in and analysed inter-governmental negotiations—particularly those in the framework of the CBD—which have significantly contributed to the reflections in this book.

I also owe my gratitude for the stimulating exchanges of ideas on UN initiatives to Mr Peter Utting (United Nations Research Institute on Social Development), Mr Simon Walker (UN High Commissioner's Office for Human Rights), and Mr Khalil Hamdani and Ludger Odenthal (United Nations Conference on Trade and Development), whom I met during a mission to the UN Office in Geneva, Switzerland, in July 2004, funded by the EUI.

I wish to express my gratitude also to the Foundation for International Environmental Law and Development, where I first undertook research on corporate environmental accountability under the guidance of Alice Palmer. I am indebted to Prof. Philippe Sands at University College London (UCL), with whom I first explored the links between IEL, and the work of international organizations.

Finally, a million thanks to the friends I made while at the EUI—Graciela, Louisa, Alessandro, Tom and Clemens; at the UCL—Rika and Harry; and to my old friends Francesca and Lorraine, who have always been there for me and with whom distance does not make a difference. Finally, my lasting gratitude to my family, to whom this book is dedicated: mamma, papà, Franci, Andrea, and Riccardo.

## *List of Acronyms*

ADR	Alternative dispute resolution
ATCA	Alien Tort Claim Act
BITs	Bilateral investment treaties
CAO	Compliance Advisor/Ombudsman of the IFC
CBD	Convention on Biological Diversity
CIME	OECD Committee on International Investment and Multilateral Enterprises
CITES	Convention on International Trade in Endangered Species
CMS	Convention on Migratory Species
CoE	Council of Europe
COP	Conference of the Parties
CSD	Commission on Sustainable Development
EBRD	European Bank for Reconstruction and Development
ECHR	European Court of Human Rights
EIA	Environmental impact assessment
EMS	Environmental management systems
FDI	Foreign direct investment
FOE	Friends of the Earth
GATS	General Agreement on Trade and Services
GDP	Gross domestic product
G-77	Group of Developing Countries
HRC	Human Rights Council
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDB	Inter-American Development Bank
IEL	International environmental law
IFC	International Finance Corporation
IIOs	International Intergovernmental Organizations
ILC	International Law Commission
ILO	International Labour Organization
IPCC	International Panel on Climate Change
IPR	Intellectual property rights
ISO	International Standards Organization
IUCN	International Union for Conservation of Nature
MAI	Multilateral Agreement on Investment
MDGs	Millennium Development Goals
MEAs	Multilateral environmental agreements
MNCs	Multinational corporations/companies
MNEs	Multinational enterprises
NAFTA	North American Free Trade Agreement
NCPs	National contact points

NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
ODA	Official Development Assistance
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PPP	Polluter-pays principle
PRTRs	Pollution release and transfer registers
TNCs	Transnational corporations
TRIMS	Trade-Related Aspects of Investment Measures Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCHR	United Nations Commission on Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Commission on Transnational Corporations
UNDESA	United Nations Department of Economic and Social Affairs
UNECE	United Nations Economic Commission for Europe
UNECOSOC	United Nations Economic and Social Council
UNESCO	United Nations Education, Scientific and Culture Organization
UNESCR	UN Economic, Social and Cultural Rights Committee
UNGC	United Nations Global Compact
UNGA	United Nations General Assembly
UNRISD	United Nations Research Institute for Social Development
WHO	World Health Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WWF	World Wide Fund for Nature

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