1988

The Work of the International Law Commission Relating to Transfrontier Environmental Harm

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INTRODUCTION

The International Law Commission of the United Nations ("Commission" or "ILC") is a group of 34 experts who serve in their individual capacities and who are charged with the codification and progressive development of international law. The Commission was established in 1947 by the General Assembly to carry out article 13, paragraph 1 of the U.N. Charter, which provides that the Assembly "shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification. . . ."

Two of the topics on which the Commission is currently working implicate issues relating to the subject of this Symposium, development and the environment. These are "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" and "The Law of the Non-Navigational Uses of International Water-courses." This paper will review the background and current status of the Commission's work on the former topic and will examine some of the issues it raises concerning development and the environment.

THE COMMISSION'S WORK ON INTERNATIONAL LIABILITY

The International Law Commission has, for years, been
attempting to codify the law of State Responsibility. From the outset of its work on that subject, it has agreed that the topic of State Responsibility should deal only with internationally wrongful acts of States. At the same time, the Commission recognized that a State could engage in activities that are not prohibited by international law — such as those involving space objects and nuclear reactors — but which might, through no fault of that State, give rise to injurious consequences in other States. Accordingly the Commission, at the invitation of the General Assembly, singled out for separate study the topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (hereinafter referred to as the “Liability” topic). The need for the distinction between the two topics was explained in the following terms:

The Commission fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligations to make good any harmful consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks . . . . [T]he latter category of questions cannot be treated jointly with the former.2

The category of issues to be dealt with in the context of the Liability topic had earlier been described by the Special Rapporteur for State Responsibility as “questions relating to responsibility arising out of the performance of certain lawful activities — such as spatial and nuclear activities . . . [o]wing to the entirely different basis of the so-called responsibility for risk.”3

Work on the Liability topic commenced in 1978. The fact that after ten years the topic is still in the embryonic stages of development testifies to its complexity and delicacy.4 A perusal of the summary of the Commission’s discus-

4. For a description of the current status of the Commission’s work on the topic see Report of the International Law Commission on the Work of its
sion of the topic at its 1987 session reveals that members of the ILC still do not agree upon the basic question of whether general international law recognizes a principle of strict liability for the injurious consequences of the kinds of activities in question. Furthermore, and perhaps even more fundamentally, there seems to be no clear understanding of exactly what kinds of activities are involved. Some members would confine the topic to what might be termed “ultrahazardous” activities, while others would include within its ambit any activity having adverse transfrontier environmental consequences.

In his 1987 Report to the Commission, the Special Rapporteur for the Liability topic, Ambassador Julio Barboza, submitted for the Commission’s preliminary consideration a set of 6 introductory articles. For present purposes, articles 1 and 4 are most pertinent:

**Article 1**

*Scope of the present articles*

The present articles shall apply with respect to activities or situations which occur within the territory or control of a State and which do or may give rise to a physical consequence adversely affecting persons or objects and the use or enjoyment of areas within the territory or control of another State.

**Article 4**

*Liability*

The State of origin shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that the activity in question is carried out within its territory or in areas within its control and that it creates an appreciable risk of causing transboundary injury.

These two articles as well as the remaining four raise a host of interesting and complex issues. The facts of the disaster which occurred at Bhopal, India, almost exactly three

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5. Id.
years ago today (during the night of 2-3 December, 1984), will be used for the purpose of illustrating some of them. As is now well known, the plant involved in the Bhopal disaster was owned and operated by Union Carbide India Ltd. (UCIL), a company incorporated under Indian law and 50.9 per cent of whose stock is owned by the Union Carbide Corporation (Carbide). The latter company is incorporated under the laws of New York and headquartered in Connecticut.

1. International Liability for Transfrontier Consequences

The Liability topic, at least as originally conceived, would deal principally with the issue of whether and to what extent India would be liable to other states for any transfrontier consequences of the Bhopal disaster. There were in fact no known injurious transfrontier consequences of the Bhopal incident, because the poisonous gas that leaked from the UCIL plant never left the territory of India. Assuming, however, that there had been such consequences, India's liability could hinge in part upon whether the standard of liability applied was strict, or fault-based. Article 4 as proposed by the Special Rapporteur in 1987 appears to envision making the state of origin strictly liable provided the two conditions set forth in the article are satisfied: the state must know or have means of knowing (1) "that the activity in question is carried out within its territory or in areas within its control;" and (2) that the activity "creates an appreciable risk of causing transboundary injury."

Admittedly, the effect of article 4 is still uncertain, since it only provides that, even if the two conditions are satisfied, the state of origin "shall have the obligations imposed on it by the present articles." What those obligations will be remains to be seen. Assuming they include an obligation to make good losses suffered in the other state(s), however, the

8. 1987 ILC report, supra note 4, at 91 (emphasis added). For a brief summary of the Special Rapporteur's explanation of the "appreciable risk" requirement, see id. at 95.
9. Id.
article would, to that extent, provide for strict liability. At least in terms of the way in which the Commission has organized its work, this would seem appropriate: the State Responsibility topic covers internationally wrongful acts, while the Liability topic covers the question of liability without fault for injurious transfrontier consequences of inherently dangerous but lawful activities.

Even if strict liability is the applicable standard, however, the question arises whether the injurious activity must not only be located in the territory of the state of origin, but must also be under the effective control (as opposed to "control" in the sense of "legal authority") of that state in order for that state to be liable. As drafted, article 4 would seem to lay down no such requirement. This is evident from the use of the expression "territory or . . . control" rather than "territory and control." This possible lacuna was noticed by at least one member of the Commission, Chief Justice Razafindrakotra of Madagascar:

[T]he concept of control had to be defined more clearly as far as private activities were concerned. . . . That question had arisen in the case of the activities of multinational corporations, in which it was often difficult to identify the authority that was actually in control. He had in mind, for example, the disaster which had occurred at a Union Carbide factory in Bhopal. The mere fact that a multinational corporation which exported investments and technology was located in the territory of a State was not enough automatically to entail the responsibility of that State, which actually had to be in control of the local subsidiary. He was therefore of the opinion that provision had to be made for the two-fold requirement of territory and control.

This passage, while somewhat ambiguous, seems to express

10. *Id.; See also id.* art. 1. As used in the proposed articles, the term "control" is evidently intended to cover situations in which the activity in question is not situated within the territory of the state of origin but is within its control by virtue of its being within the jurisdiction of that state. Examples are activities in maritime areas under the jurisdiction of the state, and ships flying the flag of the state, or space objects registered in the state. Article 2(2)(a) and (b), 1987 ILC Report, supra note 4, at 91.

11. Provisional Summary Record of the 2019th Meeting of the Interna-
the view that a state in the position of India would only be liable for the transfrontier consequences of a Bhopal-like disaster if it had effective control of the local subsidiary whose plant emitted the noxious gas. Indeed, generally accepted norms of state responsibility would, in effect, hold a state responsible for the injurious consequences of private conduct only if the activity involved was or should have been under the effective control of that state.12 Such a requirement would seem no less appropriate in the context of the Liability topic since if such control is not required, a state's mere knowledge of an activity within its territory or jurisdiction (e.g., the dumping of hazardous wastes) could engage its liability for injurious transfrontier consequences — even if the state were unable to control the activity.

If the Commission decides that effective control is a precondition to liability, the meaning of that requirement in a case such as Bhopal, as well as the effect of lack of compliance therewith, will have to be examined. It seems clear that this kind of control presupposes, among other things, knowledge of the risks posed by the activity (as required by article 4) and the means to regulate or manage such risks effectively. It would probably not be realistic to presume that a developing country, such as India, would have this knowledge and capability in every case involving imported high technology. This point was emphasized by several members

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12. See, e.g., P.M. Dupuy, International Liability of States for Damage Caused by Transfrontier Pollution, in OECD, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 345, 354 (1977). Professor Dupuy observes that “it has to be established whether the private person's action completely eluded the controls which the State authorities might be expected to maintain, or whether, on the contrary, it meant that those authorities maintained insufficient control of polluting activity (or whether the country's legislation was unsuitable).” Id. A country's legislation could be found to be “unsuitable”, according to Professor Dupuy, if it “proved to be at variance with the criteria normally adopted by the other States or ignored the standards defined jointly by countries co-operating in international organizations.” Id. at 354, n.2.

of the Commission, whose concerns are succinctly summarized in the Commission's 1987 Report as follows:

Other members stated that multinational corporations were at the forefront of the development and utilization of science and complex technology. These corporations often operated, beyond State control, as the result of financial power and the sole custody of knowledge on advanced science and technology. The developing countries were in a particularly disadvantageous position. They needed the multinational corporations to operate within their territory in order to generate some economic development; at the same time, they lacked the expertise to appreciate the magnitude of risk that the work of these corporations could cause and the power to compel the companies to disclose such risks. In this context, these developing countries were also victims. Their legitimate interest should therefore be taken into account.\(^\text{13}\)

These considerations in turn raise the issue of “prior informed consent” and its variants (such as prior notification and impact assessment), discussed in the first panel of this symposium.\(^\text{14}\)

If, however, it were established that India knew or should have known of the risk involved in the operation of

\(^{13}\) 1987 ILC Report, supra note 4, at 101, para. 151.

\(^{14}\) See Walls, Chemical Exports and the Age of Consent: The High Cost of International Export Control Proposals, 20 N.Y.U. J. Int'l L. & Pol. 753 (elsewhere in this issue). The environment ministers of the European Community recently rejected prior informed consent as the basis for regulations concerning the import and export of dangerous chemicals. The ministers decided instead on a regime of prior notification. 10 ENV'TL. REP. (No. 12) 639 (Dec. 9, 1987). But cf. articles V and VI of the 1986 Agreement of Cooperation between the United Mexican States and The United States of America regarding the Transboundary Shipment of Hazardous Wastes and Hazardous Substances (Annex III to the Agreement between Mexico and The United States on Cooperation for the Protection and Improvement of the Environment in the Border Area). Article V provides that the designated authority of the other Party shall be notified when a Party bans or severely restricts a pesticide or chemical. Under article VI, the designated authority of one country is to notify that of the other if it "becomes aware that an export of a hazardous substance [to the latter] is occurring. ..."
the UCIL plant, and had the capability (in terms of expertise and infrastructure) of regulating it but failed to do so adequately, India could be found to have breached an obligation to other states to exercise due diligence in regulating or controlling the plant. If found in breach of this obligation, India would have committed an internationally wrongful act and would be liable for the losses occasioned thereby. Such a situation, however, would fall not within the International Liability topic, but within the State Responsibility topic which, as already noted, deals precisely with internationally wrongful acts.

To summarize, if the Bhopal disaster had entailed injurious transfrontier consequences and if the accident could be shown to be the result of India's breach of its obligation to exercise due diligence in regulating or controlling the plant to assure its safe operation, India could be found to be responsible for the injurious transfrontier consequences under rules of state responsibility. The more difficult question is whether India would be liable for those consequences even if it had not breached an obligation of due diligence (i.e., even if it had done all it could reasonably be expected to do to assure that the plant was operated safely and that the risk of transfrontier injury was properly minimized). This question lies at the heart of the Liability topic. It essentially asks whether states will be strictly liable for the injurious transfrontier consequences of certain kinds of activities, such as nuclear power plants and certain chemical plants, which,

15. On the requirement of due diligence see Dupuy, *Due Diligence in the International Law of Liability*, OECD Doc. ENV/TFP/76.11, reprinted in OECD, *Legal Aspects of Transfrontier Pollution* 369 (1977); and see Handl, *supra* note 12, at 540, citing the resolution of the Institute of International Law on The Pollution of Rivers and Lakes and International Law, arts. II and III(1), adopted at the Athens session of the Institute, 4-13 Sept. 1979. See also *supra* note 12.

16. As already discussed, the determination of whether India had breached this obligation could properly take into account India's ability to foresee risks and to regulate them. This would seem to be implicit in the notion of "due diligence", which may be taken to refer not only to the amount of care required under the circumstances, but also to the characteristics and capabilities of the state involved. If India had no means of knowing of the risk, or if it had done all that it could reasonably have been expected to do under the circumstances, it would presumably not be found in breach of this duty.
even when stringently regulated, pose a risk, albeit a very slight one, of causing disastrous consequences.\textsuperscript{17}

2. \textit{Liability of the Home State for Accidents in the Host State}

Of particular interest for present purposes is the suggestion made by one member of the Commission at its 1987 session that the ILC's Liability draft should provide that a state, such as the United States, would be liable for disasters such as Bhopal. The proposition advanced is, in essence, that a state in which a multinational corporation (MNC) is incorporated or headquartered or from which hazardous technology is exported (the "home" or "exporting" state), should be liable for injurious consequences in another state (the "host" or "importing" state) caused by the operation there of a plant by a subsidiary of the MNC, or by the imported technology. In this scenario the "transfrontier" element would consist not of pollution crossing a border, but of the export of hazardous substances or technology. This argument was based in part upon the premise that developing countries lack the "means of knowing" whether activities exported from developed countries by MNCs entail "an appreciable risk of causing transboundary harm," as required by article 4. The argument is that "the State of nationality of the corporation \[the home state\], which did have the means of knowing the risk\[,] should be held liable for the damage caused . . ."\textsuperscript{18}

As indicated above, several members of the Commission were indeed concerned about the ability of developing countries to exercise effective control over imported hazardous substances and technology.\textsuperscript{19} The question is whether this means that, in a Bhopal-like situation, the ILC's rules on International Liability should provide that the home or exporting state would be liable for a disaster's wholly domestic in-

\textsuperscript{17} See 1987 ILC Report, supra note 4, at 111-113. The Commission has not yet resolved this question and, since it raises no special issues for developing countries beyond those that are treated in connection with other topics in this paper, it will not be discussed further here.


\textsuperscript{19} See supra text accompanying note 13.
jurious consequences. This is another way of asking whether the United States or India should be considered the “state of origin” under draft article 4 in a case such as Bhopal. A second question, which will be addressed later, is whether the rules on Liability should require the private entity involved (e.g., the parent company or exporter of hazardous technology) to provide compensation.

If the question were whether the United States could be found liable under contemporary international law for the injuries resulting from the Bhopal disaster, the short answer, in my view, would be no. While an internationally-sanctioned regime may be necessary to regulate the transfer of hazardous technology, it seems far-fetched and even undesirable to suggest that general international law obligates an MNC’s home state to decide what kinds of technology may be exported to developing countries, such as India, and to determine the conditions under which it will allow such export. The paternalistic overtones of such an approach would not be welcomed by developing countries.

Of course, whether the rules being elaborated by the Commission in its work on the Liability topic should provide for the liability of technology-exporting countries under


21. This is not intended to suggest that states have no responsibilities whatsoever concerning the export of hazardous materials, products or processes. The Trail Smelter (U.S. v. Can.), 3 R. Int’l Arb. Awards 1905 (1965) and Principle 21 of the Stockholm Declaration on the Human Environment, Report of the Stockholm Conference, supra note 12 suggest that a state may, under some circumstances at least, be obligated to inform the importing country of known risks associated with the exported items. The exact contours of this duty, and the relative burdens on the exporting and importing states, are less clear. See generally the discussion of “prior informed consent” by the first panel in this symposium, and supra note 14.

22. This is the main problem with the “high road” approach to the problem of exportation of hazardous technology described by Thomas McGarity. McGarity, supra note 20, at 335. Under this approach, all operations of multinational corporations would be subjected to the standards applicable in the state of origin (e.g., in the Bhopal case, the U.S.). Professor McGarity observes that “[p]roponents of the ‘high road’ . . . are subject to the charge of ‘economic imperialism,’ ” since this approach would have the effect, inter alia, of discouraging the export of jobs. Id.
these circumstances is a completely separate question. It is clear that the Commission did not have this question in mind when it originally framed the Liability topic.\textsuperscript{23} Instead, the topic was conceived as “regulating liability for the dangers inherent in certain major fields of activity made possible by modern technology.”\textsuperscript{24} The Liability draft was, thus, originally intended to cover such situations as the Chernobyl disaster, assuming the Soviet Union did not in that case commit an internationally wrongful act by, for example, failing to regulate adequately the nuclear plant. It is doubtful that significant world order values would be served by extending the topic to cover situations such as Bhopal. Several points seem worthy of consideration in this connection.

First, a regime that would make the home state of the exporter liable in cases, such as Bhopal, would most likely be unacceptable to any technology-exporting country including developing countries, such as India, that export technology. This would do little to advance the rule of law in this field.

Second, there would be economic and social consequences of extending the topic. For example, imposing liability upon the state from which hazardous technology is exported would tend to discourage that state from allowing such exports, or, at least, would lead to an imposition of much stricter controls upon the kinds of technology that could be exported and upon the operation of the MNC in the developing country to which the technology is exported. This would make it more expensive for multinationals to operate in the Third World and, thus, would result in shifting jobs (and other wealth-producing activities) from the developing South back to the industrialized North. This would hardly seem to represent a net gain in efficiency of resource allocation or to advance the world order values of development and self-determination.

The problem that the Commission must confront (and with which it is best equipped to deal) is how to allocate the


\textsuperscript{24} Working Group Report, supra note 23, at 151.
loss when an activity in one state, which is lawful and properly regulated, nevertheless goes awry, producing injurious transfrontier consequences of a physical nature in another state. The latter state, which is entirely "innocent" or blameless, should not be left to bear its loss alone. The alternative solutions to this problem range from imposing strict liability solely upon the state of origin to some form of cost-sharing, perhaps in pursuance of a pre-arranged regime. However, the Commission should limit its discussions to the original conception of the liability topic, which was determined by the Commission at the outset of its work.

3. Private Remedies

A second issue raised in the Commission's discussion of International Liability in 1987 is whether the draft should provide for the liability of multinational corporations. The following summary of a statement made by a member of the Commission of Indian nationality, Dr. S. Rao, provides important perspectives on this question:

[T]he events at Bhopal had clearly shown that multinational corporations controlled almost all aspects of scientific and technological development.

The role of multinational corporations with regard to science and technology had been the subject of much criticism and, indeed, called for a separate analysis. For instance, if one such corporation produced a dangerous chemical substance under unacceptable conditions, the adverse effects were known only to the corporation in question. Profit was the primary consideration for those companies, which refused to co-operate when adverse events did occur. The situation was of the type which called for application of the principle, formulated by the Special Rapporteur, to the effect that an innocent victim should not be left to bear his loss. The victim in that case was the State itself, millions of whose inhabitants were affected by the catastrophe. . . .

Another policy question had been raised by Mr.

Barsegov [a member of the Commission from the Soviet Union], namely, the need to encourage innovation and enterprise in moving into new areas of science and technology. In that regard, a balance had to be struck between experimentation and reasonableness. Undeniably, certain beneficial activities had to be encouraged. At the same time, there was invariably a time-lag from experiment to industrial application; the magnitude of the risk had also to be kept in mind.

... [M]ultinational corporations ... were agents of profit. The main focus of the State, however, was not on profit. Hence, it was clear that the State must not be regarded as the only agent to be considered in connection with liability.26

The Commission's Report summarizes the arguments for MNC liability as follows:

A few members, while they did not oppose the Special Rapporteur's conclusion of attribution of primary liability to the State, hoped that the Special Rapporteur, in an appropriate place in the topic, would indicate that in the final analysis compensation should be paid by the actual entity which caused the injury. Such recognition, in accordance with this view, was necessary to enable the liable developing State to seek compensation from the operator.27

Treaty-law approaches to the problem of hazardous activities often employ what might be termed a private law approach.28 These approaches channel liability to the operator of the activity or instrumentality in question. Examples are the 1963 Vienna Convention on Civil Liability for Nuclear

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27. 1987 ILC Report, supra note 4, at 11.
Damage and the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships. However, it is questionable whether the Commission’s draft should take this approach. First, as noted at the outset of this paper, the Commission’s mandate is “the progressive development of international law and its codification.” While private entities today are significant actors on the international scene, “they are not international legal persons in the technical sense.” Thus, “international law does not deal directly with multi-national corporations, conglomerates, or other companies.” It is probably for this reason that all of the Commission’s drafts except one have dealt only with the rights and obligations of states. The one exception is the Draft Code of Offenses against the Peace and Security of Mankind, a project that stemmed originally from the Nuremberg trials and is probably sufficiently sui generis in character that it does not provide a basis for addressing rules in other fields to individuals. Indeed, the Draft Code itself is controversial enough. It is doubtful that contemporary general international law recognizes liability of an individual to a state for transborder harm that does not rise to the level of an “offense against the

34. Id. at xxix.
35. For the background of the Draft Code and its present status, see 1987 ILC Report, supra note 4, at 6.
peace and security of mankind" (if indeed such harm could).\textsuperscript{36}

Whether international law should recognize such private liability as a matter of "progressive development" is another question. The Special Rapporteur for the Liability topic seems to have answered this question, for the time being at least, in the negative:

[H]e was not persuaded that these private law remedies were sufficient to exonerate State liability in the absence of any [treaty] regime. In his view, private law remedies, while useful in giving various choices to the parties, failed to guarantee prompt and effective compensation to innocent victims who, after suffering such serious injuries, would have to pursue foreign entities in courts of other States. In addition, private law remedies by themselves would not encourage a State to take preventive measures in relation to activities conducted within its territory with a potential for injurious transboundary consequences.\textsuperscript{37}

While public law remedies are not swift, the Bhopal case has demonstrated that private law machinery can also be unconscionably sluggish.\textsuperscript{38} It may well be that a greater degree of

\begin{itemize}
  \item \textsuperscript{36} In 1984 the Commission held a brief, preliminary discussion of the question whether serious damage to the environment might, under some circumstances, qualify as a crime against humanity under the Code. The Commission's Report summarizes its tentative conclusions as follows:
  
  [T]he Commission considered that, although just any damage to the environment could not constitute a crime against humanity, the development of technology and the considerable harm it sometimes did — for example, to the atmosphere and to water — might lead to certain kinds of damage to the human environment being regarded as crimes against humanity. \ldots This applies in particular to the treaties prohibiting nuclear weapons in the atmosphere, outer space, on the sea-bed and the ocean floor and in the subsoil thereof.
  
  
  \textsuperscript{37} 1987 ILC Report, supra note 4, at 111.
  
  \textsuperscript{38} For a discussion of the factors contributing to the torpidity of private law remedies in such cases, as well as proposals for reform, see McCaffrey, Expediting the Provision of Compensation to Accident Victims, in G. Handl
involvement by the American and Indian governments would have brought compensation more promptly to victims.\textsuperscript{59}

Of course, none of this suggests that the Commission should not propose model rules on private liability that could be annexed to the International Liability draft and agreed to by States in bilateral or multilateral treaties. Nor does it purport to question the efficacy of the existing conventional regimes referred to above.\textsuperscript{40} But it should not be forgotten that the particular province of the International Law Commission is, in the first instance at least, to formulate rules concerning the international obligations of states. For this reason, as well as the others mentioned above, the Commission should not become preoccupied with private law approaches to the liability problem.

\textbf{Conclusion}

The current work of the International Law Commission on the Liability topic has raised several interesting issues relating to the broad field of development and the environment. The Commission’s drafts on this subject will undoubtedly take into consideration in some manner the position of developing countries. As is true of the International Watercourses topic, however, an actual dispute could involve two developing states as easily as one developed state and one developing state. For this reason, the problems peculiar to developing countries would probably be better addressed more directly (e.g. through an internationally agreed regime, measures undertaken in technology exporting countries or, perhaps even more appropriately, by multilateral development banks).\textsuperscript{41} The need for bold remedial action is mani-


\textsuperscript{39} See Magraw, \textit{The Bhopal Disaster: Structuring a Solution}, 57 U. Colo. L. Rev. 835 (1986), proposing the establishment in India by the two governments of a claims settlement tribunal.

\textsuperscript{40} See supra notes 29 and 30, and accompanying text.

\textsuperscript{41} See generally Ashford & Ayers, \textit{Policy Issues for Consideration in Transferring Technology to Developing Countries}, 12 Ecology L.Q. 871 (1985). With regard to roles that are being and could be played by the multilateral development banks, see McGarity, supra note 20, at 336-37; Rich, \textit{The Multi-
fest, but, as is so often the case, the real question is whether states have the political will to take it.