EDITED BY YANN KERBRAT AND SANDRINE MALJEAN-DUBOIS

The Transformation of International Environmental Law

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THE TRANSFORMATION OF INTERNATIONAL ENVIRONMENTAL LAW

Edited by

Yann Kerbrat and Sandrine Maljean-Dubois

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FOREWORD

Faced with environmental challenges which, as scientific advances show, are getting more and more serious, urgent, and global, international law has emerged as an essential instrument for state cooperation, as well as a factor of harmonization and revitalization of domestic laws. In response to these challenges, international law had to adapt. Innovative ways to make law emerged. Original implementation means were created. Thus, over the last thirty years, international environmental law has been experiencing very significant both normative and institutional developments.

The authors of the present book set out to emphasize these developments. Their analyses show how environmental challenges shake or transform the core categories and concepts of international law. Thus, more than a book on environmental law, the present publication gives keys to a better understanding of changes the international protection of the environment entails as regards general international law. It also shows the long way still to go so that international law could really play the role it should play.

This book is the fruit of a longstanding collective thinking carried out at the Centre for International and European Studies and Research (CERIC). The publication in May 2010 of the French version of the proceedings of an international symposium held under the aegis of the French Society for International Law in Aix-en-Provence in June 2009 drew the first conclusions (*Le droit face aux enjeux environnementaux*, Paris: Pedone, 2010, 490 p.). The present book takes them up partly and extends the lessons learned, this time in English.

Yann KERBRAT and Sandrine MALJEAN-DUBOIS

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INTRODUCTION

FEATURES AND TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW

Laurence BOISSON DE CHAZOURNES

Environmental norms have assumed their rightful place within international law, which has, over time, come to encompass environmental considerations. The International Court of Justice has even gone so far as to consider that environmental protection is among the essential interests of States.[1] This respect for environmental protection is under scrutiny by many.

The rules relating to international environmental protection reveal specific characteristics that also allow us to grasp trends which are taking place within the international order. My observations will underline the way in which environmentals norms reveal certain characteristics of contemporary international law. They will cover four salient axes: the shifting legal boundaries of environmental norms (I); the different kinds of responsibility in which environmental damage plays an important role (II); necessary yet self-interested alliances between environmental norms and other norms (III); and I will finally refer to the sword and scales (IV) in my discussion about the role of dispute settlement procedures.

I. AN ENVIRONMENTAL NORM WITH SHIFTING BOUNDARIES

Environmental norms are characterized by shifting legal boundaries that break away from, or attempt to depart from, classical interpretations of the theory of sources, and which require us to go beyond certain received ideas, notably forged around Article 38 of the Statute of the International Court of Justice.

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[1] "The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission". *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Rec. 1997, para.53, p.41.

Thus, there are numerous requests for an approach that goes beyond the hard law/soft law dichotomy. It is, effectively, necessary to adopt a less formal approach, an approach less focused on how binding a norm is[2], by granting more importance to the notion of process and the perspective of temporal continuity. The plurality of functions played by environmental norms must also be taken into account.[3] Discussing these will help us grasp why the hard law/soft law dichotomy is often pushed into the background. Indeed, in the field of the environment, the law takes on new roles unconcerned with the opposition mentioned above: it incites, accompanies and guides expected behavioral changes; it legitimizes new situations, and contributes to the elaboration of a politically accepted language. All normative means are useful to this end, whether they be declarations of principles, codes of conduct, action plans or framework conventions. In this respect, the prolific nature of international environmental law is being put to good use. Its range of functions reveals that, in the field of environmental protection, the law still makes very few prescriptions but mainly accompanies changes in behavior. The law becomes part of a temporal framework by setting objectives to be met and by guiding the steps of those to whom the norms are directed.

The role of standards can be invoked in this context. The notion of a standard refers to the category of norms which use the idea of a "threshold" to be reached, or a "model" to which one needs to conform and with which a situation or a type of behavior must be compared.[4] Standards are adopted in response to specific social needs, whether to take into account the evolution of scientific knowledge in a particular field, to leave room for scientific uncertainties which will later disappear, or the necessity to reach compromises between parties of differing status. Numerous actors are involved in the law-making process. The edges of the extent of the normative power of States are softened. They are non-classical instruments, which allow for normative interaction between the State and other players. They cause the latter to commit themselves to attain objectives defined at an international level. Thus, for example, the ISO 26000 norms, the normative effects of which could be important, cannot find their place in the classical structure of the sources of international law.[5]

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[2] See in this book the introductory chapter of S. Maljean-Dubois, "The Making of International Law Challenging Environmental Protection".

[3] See in this book, M. Kamto's report, "Normative Uncertainties".

[4] Salmon J. (dir.), *Dictionnaire de droit international public,* 1049 (Bruxelles: Bruylant, 2001). See Boisson de Chazournes L., "Standards et normes techniques dans l'ordre juridique contemporain: quelques réflexions", in *International Law and the Quest for its Implementation/Le droit international et la quête de sa mise en œuvre – Liber Amicorum Vera Gowland-Debbas* (Boisson de Chazournes L. &. Kohen M.G eds.), 351-376

[5] See Mahiou A., "De quelques incertitudes institutionnelles et normatives en matière

Environmental norms therefore require us to go beyond positivist presuppositions. Furthermore, in this context we must emphasize the role of principles: principles play a part in the foundations of institutional and normative frameworks developed in the field of the environment and they guide the interpretation of commitments. States can foster legitimate expectations by relying on these principles, even though, very often, their legal status cannot be clearly identified.

Environmental norms also call upon us to find room for the management of collective interests. Indeed, numerous aspects of environmental law relate to the protection of common and, frequently, vital interests. This characteristic raises the problem of managing collective interests alongside the principle of the relative effect of treaties. In the case of treaties which aim to protect those interests common to all States, such as the Kyoto Protocol, wouldn't it be possible to consider that their effects will not collide with the *res inter alios acta* principle, if most States are party to it? Insofar as the reduction of greenhouse gases is necessary for the protection of the world's climate, it should be possible to posit that a State, even if not party to a treaty, should not oppose the implementation of this treaty?[6] This could have an impact on the applicable law in the context of a dispute opposing a State party to a multilateral environmental agreement and a State not party to it. The participating State should be allowed to fulfill its obligations without the non-participating State denying it this prerogative purely because the latter State has chosen not to be constrained by these commitments.[7]

Another message sent by environmental norms is to go beyond the law or "pure law", to use a notion dear to a famous author. In this particular field, law intersects with many other fields such as physics, geology, biology and social sciences and it must cooperate with them. Social sciences, for example, help forge the role of experts and evaluate the extent of public participation. We speak of open-textured norms and refer to their inter-normative nature.[8] In the field of environmental protection, law, science and social sciences are interrelated. Science influences law, just as law can

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d'environnement", in *Le droit international face aux enjeux environnementaux* (SFDI, Paris: Pedone, 2000), 85-100.

[6] See the thoughts of C. Tomuschat on the notion of "world order treaties", even if his conclusions do not concord completely with the perspectives of the present study, *in* Tomuschat C., "Obligations Arising for States Without or Against their Will", 241 *Collected Courses of The Hague Academy of International Law* 68-274 (1993).

[7] Boisson de Chazournes L. &. Mbengue M. M., "A propos du principe du soutien mutuel – Les relations entre le Protocole de Cartagena et les Accords de l'OMC", *Revue Générale de Droit International Public* 829-862 (2007). See also Van Asselt H., Sindico F. & Mehling M. A., "Global Climate Change and the Fragmentation of International Law", 30 *Law & Policy* 437-438 (2008).

[8] See Boisson de Chazournes L., "New Technologies, the Precautionary Principle, and Public Participation", in *New Technologies and Human Rights*, 161-194 (Murphy Th. ed., Oxford: Oxford University Press, 2009).

influence science and social sciences help understand the role and content of the law.

We have often wondered whether the application of an environmental norm with shifting boundaries could survive the test of reality or effectiveness, or at least of a certain reality or effectiveness – that of the judge when he evaluates the consequences and the potential of the norm. If this legal test is to be encouraged, it must not be forgotten, however, that there are other techniques used to evaluate the efficiency of a norm.

The permutations of individual and collective sanctions are numerous. The practice of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) constitutes a stimulating example of a regime which has experienced progressive institutionalization while also experiencing a normative densification, the legality of which is not always built on well-established foundations. Nevertheless, measures such as the use of embargos have been applied to sanction the failure to respect the prescriptions deriving from this regime. We can see that the non-respect of a norm with shifting boundaries can be sanctioned, and that this sanction can reap certain rewards.[9]

II. DAMAGES AND THEIR ROLE IN THE DIFFERENT KINDS OF RESPONSIBILITY

First of all, we would like to mention a paradox. In the field of the environment, reference to damage is omnipresent whatever the type of the responsibility engaged. In its work on Responsibility of States for Internationally Wrongful Acts, the International Law Commission (ILC) had put aside the concept of damage as a constitutive element of an illegal act and this had been considered a victory for R. Ago.[10] Nevertheless, as it concerns responsibility for violating a norm pertaining to international environmental law, the existence of damage largely conditions outcomes as to whether there is a legal interest to act.

In other ILC draft articles on responsibility, damage is both an axis of consideration and a matrix for action. Damage occupies a central place in the

[9] See in this book the report of P. Sand, "The Role of Environmental Agreements' Conferences of the Parties".

[10] In 1970, Robert Ago, then Special Rapporteur, suggested to the Commission members that the requirement of damage be excluded from the "origin" of the responsibility, asking, in a questionnaire circulated to his colleagues «Does the Commission agree to exclude the need for a third element (next to the violation of an obligation and the attribution) constitutive of the illicit act, particularly the damage?" Quoted by Pellet A., "Remarques sur une révolution inachevée, le projet d'articles de la Commission du Droit international sur la responsabilité des Etats", 42 *AFDI* 12 (1996).