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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 environmental 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.

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 uninterested with the opposition mentioned above: it incites, accompanies and guides expected behavioral changes; it legitimates 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.\(^5\)

\(^2\) 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”.


\(^5\) 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? 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.5 In the field of environmental protection, law, science and social sciences are interrelated. Science influences law, just as law can
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 États”, 42 AFDI 12 (1996).
work of the ILC concerning state responsibility and liability for injurious consequences arising out of acts not prohibited by international law, in terms of preventive measures as well as with respect to the consequences of its occurrence.11

So far as it concerns the responsible actors, we find not only the State, but also other agents. The State can be responsible, although in practice, the engagement of its responsibility is rare. The law pierces the veil of sovereignty to apprehend both public and private operators. However, for the time being, it is principally a pre-identified operator which we are dealing with. Such is the case in the field of oil or nuclear facilities. Various international instruments have been elaborated in these areas, both at a global and a regional level12. Private international law interferes with the designation of the competent jurisdiction and also the recognition of decisions resulting from the application of these regimes of responsibility13.

Conventional regimes provide for an objective, channelled responsibility, offering guarantees within the limit of specified amounts. However, the conventional character of these regimes of responsibility fragments the regime of responsibility and leaves holes in the law. Moreover, these regimes do not include all States: indeed, a large number of States have not yet ratified or implemented the relevant instruments. Customary international law is still absent, not yet developed, and thus cannot remedy these shortcomings. The role of domestic law in this context must be underlined, as well as the need to harmonize national legislation and practice by means other than the adoption of treaties. The shortcomings due to the absence of any ratification of a convention, or to the fact that numerous fields are not covered by a treaty, could be remedied by a strengthening and development of national laws. In the case of violations, multinational companies could then be brought to justice more successfully through legal action under national jurisdiction.14

Flowing from “the due diligence that is required of a State in its territory”,15 could it not also be considered that States are bound by an
obligation of prevention\textsuperscript{16} which forces them to implement mechanisms of civil or even criminal responsibility through treaties or national laws in order to meet the objective of a reasonable level of environmental protection? The State would then have the duty to ensure that victims are compensated. We find here one of the preoccupations arising in other fields. This is the case for example for victims of violations under international criminal law.\textsuperscript{17} The individual is progressively acquiring, at an international level, the right to claim the status of “victim”, entitling him to seek compensation, without the intermediary of the State to the jurisdiction of which he belongs.

Reflections on responsibility for damage are accompanied by reflections on the emergence of a trend in international law in favor of anticipating damage. The various characteristics of damage are numerous. Damage can be present or future, actual or potential, or even probable. Anticipating damage thus requires certain actions and behavior in order to prevent damage from occurring, based on the notion of risk. Normative prevention and anticipation strategies impose, in fact, a focus on the risk rather than the damage.

We witness, then, that another form of responsibility is developing: one which is not simply being answerable for one’s own actions. It is a form of responsibility, perceived as an obligation to adopt new behavior. Certain risks are triggering new behavior, warning us of and anticipating the occurrence of damage. We are thus faced with a new type of responsibility, a responsibility linked to risk management practices. This is, for the time being, still uncharted territory although some instances have arisen in the fields of health and environment.\textsuperscript{18}

\textbf{III. NECESSARY AND SELF-INTERESTED ALLIANCES BETWEEN ENVIRONMENTAL NORMS AND OTHER BODIES OF NORMS}

Because of their pervasive nature, norms, rules and principles aimed at environmental protection find many ways of penetrating other bodies of norms, whether by inserting specific norms on environmental protection into other bodies of norms, or through techniques of interpretation or, even by resorting to rules defining the relationships between the different bodies of norms. Environmental norms are accepted, sometimes with enthusiasm and warmth, if those terms can be used here, and sometimes without.

\textsuperscript{16} Also identified in the case related to the \textit{Gabčíkovo-Nagymaros Project (Hungary/Slovakia)}, \textit{judgment, op.cit.}, para. 140, p. 77.
\textsuperscript{17} See for example D. L. Shelton, “Reparations to Victims at the International Criminal Court”, http://www.cic.nyu.edu/archive/pdf/Reparations\%20_to_Victims.pdf.
Thus, the Law of Armed Conflict, through Articles 35 and 55 of the Additional Protocol I to the Geneva Conventions of 1949, imposes a threshold of seriousness which is difficult to meet in terms of environmental damage. The concepts of collective security and, particularly, of threat to peace are not particularly amenable either, and this even if we take ‘environment’ in its largest interpretation as comprising access to and management of natural resources. The mechanisms of certification such as the Kimberley Process are not all measures for environmental protection. However, they are all of interest as a means of control which could be used to protect the environment better.

The environment continues to have a marginal place in refugee law and it is true that the concept of environment is misleading in this field. The environment cares little for the dividing lines of sovereignty, unlike the people relocating because of environmental problems. In addition, these people claim a status, which does not include the right to return because this is so often not an option. This status remains to be created.

In the economic field, environmental considerations were first included as exceptions (EU, GATT). Their status has now changed. At the European level, the environment has acquired the status of horizontal policy, the prescriptions of which must be integrated into all other policies. At the WTO and in numerous regional agreements, the right of States to choose their level of environmental protection is proclaimed, but States must still meet the conditions, which follow the logic of free trade, in other terms, the very soul of these agreements.

Other legal techniques permit essential alliances between different bodies of norms. Techniques other than the lex specialis derogat legi generali rule must be applied because the latter cannot be applied in relation to international human rights law, humanitarian law or international trade law. These areas all contain specific rules. The other legal techniques include techniques of interpretation or conformity. Basing itself on Article 31 paragraph 3c) of the Vienna Convention on the Law of Treaties, the arbitral award in the “Iron Rhine” case considered that treaties must be interpreted

20 See in this book the report of M. Tignino, “The Legal Regime of Natural Resources in Times of Armed Conflict and its Weaknesses”.
22 See in this book the report of Gherari H., “Regional Trade Agreements and Environmental Protection”.
whilst considering "any relevant rules of international law applicable in the relations between the parties". This statement provides an opportunity to take a major step forward, offering a sort of modernization of treaties through an interpretation, which takes contemporary environmental requirements into account.

The rules of interpretation, particularly those of Article 31 of the Vienna Convention on the Law of Treaties, should also provide an opportunity to underline that many of the norms in question derive from a similar context. The principle of mutual supportiveness highlights this possibility. The common objective of many international instruments is sustainable development through its three main components: environmental, economical and social. Its implementation should lead to mutual, normative and institutional, adaptations from each relevant corpus of norms. They can be achieved through ex ante and ex post actions. These relations are not of a hierarchical nature, but are relationships of deference and mutual adjustments.

We have talked about essential alliances but we must also talk in terms of self-interested alliances. Environmental protection could benefit from integration into other bodies of norms. The WTO Dispute Settlement Procedures or those for Human Rights constitute an attractive solution for settling environmental disputes. In this context, we could also mention the progressive integration of environmental protection within the law of bilateral and multilateral development assistance. Mechanisms of conditionality and accountability, such as the World Bank Inspection Panel, are beneficial in this field for ensuring that environmental considerations are taken into account in projects financed through development assistance.

The seductive song of a mermaid can lead to many a shipwreck. With this metaphor, we would like to raise the problem of the central role given to the market economy within the tools of environmental protection, whether it be the purchase and exchange of units for the emission of greenhouse gases,

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or the rules of intellectual property law. These economic mechanisms have their own logic and I am not convinced that the logic of comparative advantages or the criteria of profitability always meets the public interest objective of environmental protection. Thus, in the field of climate change, are the eradication of poverty and sustainable development the real and ultimate objectives of the market mechanisms put in place? Is the choice of the duality of norms in favor of developing countries not defeated by the interplay of flexible mechanisms? 26 Indeed, only certain States benefit from the clean development mechanism (CDM) implemented by the Kyoto Protocol on climate change. 27 The same consideration can be reached with regards to the regime of intellectual property rights when faced with issues of biological diversity. Is the need to have access to resources and investment in terms of research and development compatible with the notions of traditional knowledge protection and of the equitable sharing of benefits? Are there not seeds of fragmentation within the regimes of climate change itself or of biological diversity because of an economic logic which is becoming autonomous within an environmental regime and which does not follow the objectives promoted by an environmental agreement?

IV. THE SWORD AND THE SCALES

Ensuring compliance through judicial mechanisms is often presented as a gauge of the effectiveness of the environmental norm. This is undeniable. At the same time, it must be noted that the judge plays a particular role in the environmental field both by participating in the legal formulation of principles and rules and by implementing them, and thus contributing to their effectiveness. The judge is no longer just the guardian of the temple but is also its architect. Indeed he plays a composite role, with enough power to establish the opposability of some principles, but not others, with regards to the parties to a dispute, and so to rule on the legal status of these principles. Hence, while sustainable development has been admitted by courts and tribunals, the precautionary principle has not yet been fully admitted. 28

The judge must face the complexity of the law applicable in matters of environmental protection. He is confronted in particular with the concept of

26 See infra in this book the report of Lanfranchi M.-P., "The Status of Developing Countries in the Climate Regime: The Principle of the Duality of Norms Revisited?".
scientific truth. The question of the relationships between judges and experts is thus raised here.\textsuperscript{29} Can the judge settle a dispute without first searching for the scientific truth behind it? He must face the evidence issue, the question of the choice of experts and the limitations of their contributions with regards to scientific and environmental uncertainties, and also the problems of the divergence of opinion between experts. The problem is, then, that of an objectification of truth or that of a degree of certainty, and determination of the consequences derived from it.

The accumulation of judicial decisions and awards plays a role in consolidating environmental law. It allows emulation by the different international jurisdictions, regional and domestic. National supreme and constitutional courts play an important role. The supreme courts of India, the Philippines and Colombia have indeed rendered important decisions.\textsuperscript{30} We also witness examples of emulation and recurrence. Dialogue among judges, which is an activity, supported by UNEP or EU programs and initiatives, should introduce a "cross-border" dimension to allow the representatives of the various jurisdictions, domestic, regional and universal, to communicate with each other.

We have talked of the sword and would like now, to speak of the scales.

A trend is emerging: the judge increasingly has to arbitrate on contradictory interests and to pronounce him or herself on the balance the interests of those involved in a dispute. The judge can be proactive. He is proactive in the area of Human Rights while respecting the States’ margin for appreciation.\textsuperscript{31} Could we then, and should we, in this respect, talk about a specific margin for appreciation in matters of environment protection? The WTO Dispute Settlement bodies are also proactive, for example, in their use of the notion of weighing of interests in the test of necessity pursuant to Article XX of the GATT.\textsuperscript{32} This has not yet been done by the arbitrators in

\textsuperscript{29} See in this book the report of Truilhé-Marengo E., «Scientific Expertise in International Disputes: The Case of the WTO».

\textsuperscript{30} See for example the application of the principle of intergenerational equity by the Philippine Supreme Court in the case \textit{Minors Oposa} c. Secretary of the Department of Environment and Natural Resources, judgement of 30\textsuperscript{th} July 1993, reprinted in \textit{33 International Legal Materials} 173-206 (1994).

\textsuperscript{31} See for example the European Court of Human Rights, 5\textsuperscript{th} section, \textit{Greenpeace E.V and others v. Germany}, application n°18215/06, 12\textsuperscript{th} May 2009. In this case, the application concerned German authorities’ refusal to take specific measures to curb respirable dust emissions of diesel vehicles, in particular making it compulsory for all diesel cars to be equipped with particulate filter. The Court referring the choice of means as to how to deal with environmental issues being a matter falling within the Contracting State’s margin of appreciation in environmental matters, found that the applicants have not shown that the Contracting State, when it refused to take the specific measures requested by the applicants, exceeded its discretionary power by failing to strike a fair balance between the interests of the individual and of the community as a whole.

\textsuperscript{32} \textit{European Communities – Measures affecting Asbestos and Products Containing Asbestos}, Appellate Body Report, 12\textsuperscript{th} March 2001, WT/DS135/AB/R, para. 172.
the field of investments: it is true that they perform their duty in a specific context which forces together international commitments, national legislations and contractual commitments. The weights of the scales would appear to differ.

There are other methods for the judiciary to deal with the regulation of environmental disputes. The judiciary can, in fact, decide to leave the settlement to the parties themselves while setting out the principles to be followed in the resolution.³³ By way of example, we can cite the protective measures ordered by the Court of the Law of the Sea which has frequently urged the parties to cooperate in order to settle disputes caused by conflicting interests.³⁴ It is interesting to note that parties are often keen to ask the judiciary to set down guidelines for a common regime. They have done so in several cases, recognizing that collective action is best suited to guaranteeing environmental protection.³⁵

To conclude, let us note that the different trends emphasized here, although representative of those in the field of environmental protection, are not specific to this area of law. They reveal key elements in the development of the international legal order as a whole. This order is undergoing a burgeoning normativity. While Article 38 of the Statute of the International Court of Justice remains a focal point, the emergence of other methods of apprehending the normative phenomenon cannot be denied. The interests of the individual are increasingly relevant in numerous legal regimes. The right to compensation for victims is particularly illustrative of the way in which the interests of individuals are taken into account by international law. Access to compensation mechanisms forged by international law is now directly available to them. The combination of unity/fragmentation as an illustration of the relationships between the bodies of norms is present in numerous aspects and in numerous fields. Bodies of norms cannot exist independently from one another. Conflicts are likely to arise but, in most cases, interpretation and techniques of conformity or new rules of

³³ See the judgment of the ICJ in the Gabčíkovo-Nagymaros project, op.cit.
³⁴ The Court found, for example, that in the case of land reclamation that “prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned”. Order of the Tribunal of the Law of the Sea in the case concerning land reclamation by Singapore in and around the straits of Johor (Malaysia v. Singapore), 8th October 2003, para. 99. The Order is available at: http://www.itlos.org/start2_fr.html. See also The Order of the Tribunal for the Law of the Sea in the Mox Plant Case (Ireland v the United Kingdom), 3rd December 2001. The Order is available at [http://www.itlos.org/case_documents/2001/document_fr_197.pdf].
articulation can help to reduce them. Lastly, we can only note the increase in significance of the role of the judge in domestic orders and at the international level. His composite function is highly sought after in the context of a strong political will to achieve compromise and to seek solutions very often from a short-term perspective. If environmental law is a real locus for experimentation, it also bears witness to practices that are extending into the international legal order as a whole.

PART 1.
The Sources and Norms of International Environmental Law