

International Law and Sustainable Development. Past Achievements and Future Challenges

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Edited by Alan Boyle and David Freestone.
Oxford, Oxford University Press, 1999, 364 pp.

Alan Boyle and David Freestone's investigation is centered in a series of different approaches in relation to one main aspect: the recent and significant evolution of international law in the field of environment. The referred subject is presented by these authors through the selection of the views of various scholars, each one of them contributing with his own opinion on a specific approach, most of all in relation to the concept of sustainable development.

Although the concept of sustainable development has evolved and its importance is currently at its peak, the generation of a global awareness in relation to it has not been, as demonstrated in this book, an easy task. However, there is a feeling that States and organizations have acknowledged the importance and significance of the issue and have granted a great deal of cooperation in this matter.

Notwithstanding the latter, States still greatly resist interference from the global community in its own affairs. This is reflected in cases in which States have restricted the involvement of third States in the adoption of conservative measures over resources located in areas they consider part of their territory or that are decisive for the conservation of their national resources. For oth-

ers, this is an issue that concerns all States.

The abovementioned approach is presented by Dolliver Nelson in his article entitled “*The Development of the Legal Regime of High Fisheries*”. The main subject of his analysis is the policy of coastal States in the discussion that arose within the framework of the International Law Commission, with respect to State’s special interest in the conservation of living resources in the seas adjacent to its coast. At the time, this area was considered an area of high seas. In this respect, there a group of States that nationals of all States could freely fish in the high seas, thus prohibiting coastal States from adopting conservation measures in that area. On the other hand, the coastal States’ position of having exclusive control over the referred area finally prevailed, giving rise to the 200 mile maritime zone, and allowing coastal States to exercise conservationist measures without the involvement of third countries.

Dolliver Nelson provides a wide and detailed overlook of the discussion between States in connection with the one specifically for the carrying out of conservative measures regarding fishery stocks. However, his article does not go more deeply into one of the most recent developments of international environmental law: the precautionary approach. This approach has been extensively treated by some of the book’s authors and, owing to the globalization phenomenon, has become a tremendous breakthrough in the field of natural resources management.

Although a number of other elements involve the idea of prevention of damage (which anticipates the liability of States in the case of potential environmental damage), such as notification and consultation, differentiated responsibility etc., the precautionary approach has currently been the main focus of scholars, as presented in this book. The question remains as to whether we must consider this approach to constitute the latest innovation in international environmental law or whether the book’s authors implicitly confirm the effectiveness of other methods. Well, let us not get involved in this discussion and let us rather examine the main opinions expressed by the authors.

Alan Boyle in his “*Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisted*” deals with the development of international environmental law and its codification by the International

Law Commission. In that framework, he makes special reference to the issue of transboundary environmental harm. The author considers that the transboundary issue is included in the United Nations Conference on Environment and Development: 1992 Río Declaration on Environment and Development, as a restatement of existing customary law on transboundary matters. Xxx goes on to analyze the 1996 and 1998 International Law Commission's articles which advanced a meaning of the concept and the establishment of the liability of States when involved in actions that derive in environmental harm for other States and that do not arise from a breach of an international obligation. Boyle goes beyond the precautionary approach, providing an analysis of the establishment of a compensation to be assumed by a State that inflicts harm to a third State. The latter obligation is independent of the State's obligation, generally assumed in most environmental treaties and custom, to simply "regulate and control sources of potential transboundary harm, to notify and consult in case of proposed activities which foreseeably involve transboundary risk, to give warning to known hazards and generally to cooperate in the management of transboundary risks".

Finally, the author analyzes the possibility of States assuming an equitable burden in the event of transboundary harm, to the effect of not leaving the harmed State to assume it completely on its own. This is a most modern approach of this type of liability (no fault liability) which the author deals with satisfactorily (special reference is given to nuclear activities, as in the case of the Chernobyl accident).

A solid and practical approach of the precautionary principle is given by David Freestone's "*International Fisheries Law since Río: the Continued Rise of the Precautionary Principle*". In his article, the author concentrates in the precautionary principle as one of the most important and latest developments of international environmental law and analyzes it in the framework of international fisheries. An interesting conclusion of his work is the importance he attaches to the principle as originated in international customary law, based on the existence of a general practice of States in this regard. However, the highlight of his analysis is the manner in which the article is constructed, on the basis of a practical approximation (international fisheries). The precautionary principle

is seen as an “intrinsic part of the evolving corpus of International Environmental Law” and given its precise importance. The principle is used to limit States action, and thus, avoid damage in areas of global concern in which there is a community interest for example, high seas fisheries). The author reaffirms his analysis through an example of the principle. This example is contained in the International Convention for High Seas Fisheries of the North Pacific Ocean, which provides that the Commission may impose on one or two parties of the Convention an obligation of abstaining from fishing designated species for as long as the Commission way determine. The latter power is a clear reference to the importance given by certain treaties to the referred principle (the author also refers to other innovations in order to assert the importance of the principle, such as the incorporation of scientific evidence and a shift in the burden of proof).

An interesting subject, given the latest events in Galicia and Galapagos is Magnus Göransson’s *“Liability for Damage to the Marine Environment”*, which deals with the current threat to our seas originated in oil pollution. Göransson’s work is centered in giving a general scope of the evolution of the International Maritime Organization’s work (IMO) in harmonizing international law, specifically with respect to rules dealing with pollution caused by ships. Although one would miss the authors personal approach to the subject in question, which mainly represents a summary of the main events in this development, they do offer interesting references in connection with special mechanisms established by the referred treaties, that place the precautionary approach into a different perspective of implementation, for example the establishment of a Fund (1971 Fund Convention). The latter is addressed together with other measures, which ensure comprehensive compensation to the victims of oil pollution (such as introducing strict liability for the registered owner, doubling the limits of liability and insurance liability of the owner.) Although the referred Fund was already established in the 1970’s, and revised by the 1984/92 Protocols, its mechanism, which allows victims to be fully and adequately compensated although the party responsible for the spillage cannot fully compensate the victims, appears as an efficient mechanism for assuring the precautionary intention of States.

Finally, an important issue in the analysis is the one relat-

ing to the characteristics assigned to “sustainable development” within the scope of general international law. Vaughan Lowe, in his “*Sustainable Development and Unsustainable Arguments*” provides a detailed revision of conclusions reached by bodies of international law as well as his own in depth position. Referring to the Gabčíkovo–Nagymaros Dam (Hungary–Slovakia) case and the separate opinion of Judge Weeramantry, the author gives us an insight of the opinion of the Court in relation with the legal nature of the principle. On his part, Judge Weeramantry includes the concept of sustainable development as a part of modern international law, doing to its acceptance by the global community. The Judge assigns it “normative value”. On the basis of the Judge’s opinion, the author develops his own perception, by deconstructing the former’s and stating that the concept of sustainable development cannot be interpreted as a binding norm of international law, in the sense of the traditional article 38 of the Statute of the International Court of Justice, but grants to normative status sustainable development with status as an element of the process of judicial reasoning. It is in this sense that the author prescribes that the principle has normative force.

Moreover, Lowe examines the possibility of sustainable development being considered as soft law. In this regard, he opts for the negative, as he considers the nature of the concept developed by modern international law, and its differences with traditionally established laws (hard law). This norm-creating character of soft law is not binding, but responds to a need for flexibility in international legal relations. Regrettably, as strong as this concept has become, it is hardly dealt with in the book is almost inexistent.

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