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Book review by Aðalheiður Jóhannsdóttir* International Miljøret. Fra rammerne til reglerne

Veit Koester

Published by Jurist- og økonomforbundets forlag 2016, 882 pages

Veit Koester's book provides comprehensive and up-to-date coverage of international environmental law (IEL). The book contains 19 rather large but well organised chapters, tables of treaties and cases, a list of abbreviations, an index, and, finally, 30 illuminating and personal notes made by the author. Not only do the personal notes provide further insight into the subject of international environmental law, they also reflect the author's personal experience as an active participant in the making of IEL.

The first of the book's 19 chapters opens with a traditional discussion of the author's motivations for writing the book, which is generally to explain the framework of IEL, international organisations, procedures, principles and rules.

Highlighting not only the most important treaties of IEL, but also important soft law instruments, including the Stockholm Declaration and the Rio Declaration, and action plans, including Agenda 21, Chapter 2 provides an overview of the history of IEL, which the author divides into three phases. The first emphasises the development that took place before the Stockholm Conferences of 1972. The second focuses on the years between 1972 and 1992, that is, between the Stockholm Conference and the Rio Conference. Finally, the third gives an account of the development from 1992 until 2012.

As IEL is one of the areas of Public International Law (PIL), some of the fundamentals of PIL are outlined in Chapter 3. The author discusses the traditional PIL sources, cf. Article 38 of the Statute of the International Court of Justice, highlighting some general principles of international law, including the no harm-principle and *pacta sunt servanda*, which are well-established principles of IEL. He then explains a few fundamental concepts, including sovereignty, territorial sovereignty, the territorial sea, the exclusive economic zone (EEZ), the continental shelf, the high seas, the legal status of the air space, outer space, and several aspects of state's jurisdiction, including jurisdiction over persons. Attention is given to the principles of state responsibility and the 2001 Draft Articles on Responsibility of States for International Wrongful Acts, and to the rules on the peaceful settlement of disputes.

Chapter 4 gives a brief account of the relation between PIL and Danish national law. Its point of departure is the fact that in line with the principles of the Vienna Convention on the Law of Treaties (VCLT), international obligations are binding upon the parties and need to be fulfilled by them. To prepare the reader for the rest of the chapter, Koester explains the basic differences between monist and dualist doctrines – Denmark being a “dualist” state. Koester then moves on to the Danish Constitution and explains its ratification principles and the Folketing's role when the Danish States takes on international obligations. Supported by several examples from interna-

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tional environmental treaties, Koester outlines, from a Danish point of view, what needs to be done nationally to fulfil international treaty obligations. He discusses two methods: by incorporation of the treaty language into national law or by national law referring to the obligation. Based on, *inter alia*, several examples drawn from Danish statutes and case law, and the environmental obligations stemming from the EU, Koester's assessment is that the fulfilment of international environmental obligations has not caused problems. At the same time, he is well aware that an in-depth analysis is needed.

Chapter 5 describes the connection between the laws of the EU and PIL, with an emphasis on international environmental obligations. The author commences by outlining a few of the changes that membership of the EU entails for its Member States (MS), the EU's role as an international actor in the environmental field, the EU's and the MS' competence in relation to international obligations, and the implementation of those obligations into EU law. Some 70% of the EU's environmental acts have their origin in IEL. Koester outlines, *inter alia*, the principle of shared competence in environmental matters, cf. Article 4 of the Treaty on the Functioning of the European Union (TFEU), and the legal foundation for EU's environmental policy. In accordance with Articles 191–193 of the TFEU, where the policy is outlined in more detail, EU environmental policy shall at the international level promote measures to deal with regional or worldwide environmental problems, and shall in particular combat climate change. Moreover, the EU and the MS are to cooperate with third countries and competent international organizations, and the EU's cooperative arrangements may be the subject of agreements between the EU and the third parties concerned. On the basis of settled EU-case law, Koester goes deeper into the relationship between international treaties and EU law.

He explains the pre-emption doctrine, which entails the primacy (supremacy) of EU law over the laws of the MS, and discusses the primacy in the environmental fields of international treaties concluded by the EU. With an emphasis on environmental treaties, the author explains some procedural issues and the role of the various EU bodies in relation to treaties where the competence is shared between the EU and the MS. He outlines some of the interesting case law of the Court of Justice of the European Union (CJEU) in the field, including Case C-459/03 (*Commission v. Ireland*, also known as the MOX case). Compared with other available textbooks on IEL, Koester's analysis on the EU and PIL/IEL is a welcome addition to the subject.

Chapter 6 deals with international environmental governance (IEG). Koester begins by pointing out how unclear the term IEG actually is. It encompasses international procedures and institutions which deal with undertaking (or entering into) and implementing international environmental obligations. The author discusses the origins of IEG in the Stockholm Conference and highlights some of its cornerstones, such as the furtherance of synergies and cooperation between international environmental regimes – which is far from being uncomplicated in the author's view. He also discusses procedures and the cooperation of states in solving environmental problems.

Chapter 7 addresses the topic of international environmental actors. Here, unsurprisingly, states play a decisive role, in line with the principles of PIL. Koester also highlights international organisations (IGOs), which are instrumental when it comes to IEL development and implementation, and the permanent secretariats, which have been established in line with particular IEL treaties. Although their function varies, these are usually responsible for the organising meetings and international cooperation between treaties,

etc. The author provides good descriptions of the legal foundation and the role of several important secretariats, including that of the Convention of Biological Diversity (CBD). Koester also outlines the importance for the environmental field of the United Nations (UN) and its organs, including the General Assembly (GA), regional organisations, including the United Nations Economic Commission (UNECE), and specialised organisations in the environmental field, such as the United Nations Environmental Programme (UNEP), the Food and Agricultural Organization (FAO), the International Maritime Organization (IMO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), etc. Koester also explains the role of regional organisations, which deal with environmental issues, including the Council of Europe and the Organization for Economic Cooperation and Development (OECD). Koester gives attention to both the Nordic Council and to the Nordic Council of Ministers, outlining the environmental cooperation of the Nordic states, which is now, *inter alia*, focused on the Arctic. The role of other influential international environmental organs or organisations, such as the International Union for the Conservation of Nature (IUCN) and finally international non-governmental organisations (NGO) and their importance as political actors in the environmental field is outlined.

Chapter 8, one of the largest chapters in Koester's book, gives an account of the Conference or the Meeting of the Parties (COP, CP or MOP etc.). The discussion begins by relating some historical facts to COPs, outlining how first environmental treaty to contain COP provisions, namely the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), shaped the development of other IEL treaties. The chapter explains the main arguments for establishing COPs – which are, *inter*

alia, to flesh out the very often framework obligations of multilateral environmental agreements (MEAs) – and to allow for further development of the MEAs and their obligations without having to change the operative text of the MEA each time. The tasks, powers and decision-making procedures of COPs vary, and depending mainly on the operative text of the MEA in question. As COPs may take decisions, many of which are meant to further the development of framework-like obligations, Koester points out the differences in the legal value of such COPs decisions, which *inter alia*, depend on how the operative text of the treaty is structured.

The MEAs, their making, entering into force, suspension and termination, are the subject of Chapter 9. MEAs, like any other international treaties, are subject to the VCLT's principles. Koester manages, however, to identify aspects, which are particular and common to MEAs. These include their aim to tackle changing environmental problems, their usually open-ended and framework-like provisions, which are sometimes addressed in further details in protocols to the MEA in question, the need for the necessary tools to enable to parties to change the MEA, its protocols and in some instances its annexes, and the prohibition of reservations.

The subject of Chapter 10 is the structure and general substance of MEAs. Through providing well-chosen examples from environmental treaties, the author highlights several common features of the post 1970 MEA. A preamble usually provides the treaty a particular political and legal context, including references to important conferences and environmental principles. Furthermore, most recent MEAs contain a provision stating the overall objective of the MEA in question; a provision defining the most important terms used in the treaty, and provisions on the MEA scope of application, typically present in MEAs relating to the sea. Moreover, some

MEAs outline particular principles relevant for the environmental field being regulated. Many MEAs contain provisions or chapters outlining the general obligations of the parties. Some of the provisions treat implementation in relatively general terms, whereas others provide more specific guidance to the parties on what needs to be done nationally. Many MEAs contain provisions on the co-operation of the parties, on transfers of technology to other parties, and on environmental monitoring. Koester draws attention to a group of MEAs that are, *inter alia*, meant to enhance public awareness and which contain, in some instances, procedural and rights-oriented provisions, including provisions on access to information and on public participation in environmental decision-making.

Chapter 11 concerns the regulatory methods and mechanisms of MEAs. By providing examples drawn from the relevant treaties, the author presents an overview of the different methods and approaches used to place obligations on the parties. This includes standards obliging the parties to take decisive actions to reach the desired result, for instance the elimination of pollution caused by dumping; the restriction of the production and usage of certain substances and chemicals; the setting of emissions standards for polluting substances; quality standards for environmental quality, e.g. for water; approaches such as best available techniques (BAT) and best environmental practice (BEP); prohibitions and restriction of the usage of dangerous goods, processes or activities, *inter alia*, dumping of hazardous waste; restrictions on import and exports, for example of hazardous waste; licensing of certain activities, for instance of the introduction of certain harmful substances into the environment; the usage of prior informed consent (PIC) and advance informed agreement (AIAs) in relation to international trade in chemicals and living modified organisms (LMOs); standards on plan-

ning and protected areas; procedural tools such as environmental impact assessment (EIA) and similar tools, which are present in several MEAs; the special tools of the climate regime, including emission trading with allowances, joint implementation and the clean development mechanisms; and finally, clauses on the settlement of disputes, for which purpose several MEAs have their own mechanisms.

Chapter 12 provides an overview of the character of MEAs obligations, apart from their subject matter, which resemble other international obligations. In this chapter, however, Koester brings out an interesting issue, characteristic of IEL, namely the fact that MEAs do not usually contain reciprocal obligations, so that any party could institute action against another party even though the former has not suffered any damage (*obligations erga omnes partes*).

In Chapter 13, the interpretation of MEAs is highlighted. The author by outlining the general rules of interpretation, cf. VCLT (Articles 31–33), analyses international case law, including *Tuna-Dolphin II–Mexico* (2012), *Chagos Marine Protection Area Arbitration* (2015), *Whaling in the Antarctic* (2014), *Pulp Mills on the River Uruguay* (2012), and other recent environmental cases, and draws attention to how the interpretation takes place. In addition, Koester gives several examples from settled case law, of the importance given by international courts and arbitral tribunals to typical principles of environmental law, such as the precautionary principle and EIA principles.

In Chapter 14, Koester addresses an interesting subject or IEL namely international custom. After outlining the standard requirements for establishing the existence of customary international law, he discusses several environmental principles (or rules), commenting on their status as customary laws. These include the *no-harm principle*, which is generally accepted as international customary law; the preventive principle,

which is closely connected to the no-harm principle; the precautionary principle, which may have achieved customary status; the duty to undertake an EIA for activities expected to have considerable environmental impact, which has evolved into a duty; and the polluters pay principle, which does not have a strong status in the international legal system. The chapter also addresses concepts (or principles) such as sustainable development and the different views on its content and status. Finally, the principles of common but differentiated responsibilities, common concern, and common heritage of mankind are explained and commented on.

Chapter 15 gives an account of soft-law, which is an important IEL tool, covering a variety of instruments including UN resolutions, declarations, action plans, guidelines, memoranda of understanding, COP decisions, etc. Even though soft-law has many definitions, it is fundamentally different from hard-law, and is not legally binding. The question as to why soft-law is used as a tool for environmental protection is addressed by the author. For many reasons it is usually easier for states to agree on a soft-law instrument, since as a rule these do not require the participation of the legislative assembly, nor do they need to be implemented into a legal system in the form of legislation. On the other hand, soft-law is not an alternative to hard-law, and is usually supplementary to environmental treaties. Koester addresses the value of soft-law and the fact that even though it is not legally speaking binding, many states feel bound by it. Furthermore, soft-law principles are sometimes further elaborated in MEAs, and transformed into hard-law rights and duties.

In Chapter 16 Koester addresses reporting duties, which are sophisticated and standardised in some MEAs, and other compliance control. In the background is Article 26 of the VCLT, or the principle of *pacta sunt servanda*. Most recent MEAs

require the parties to report on a periodic basis to the COP (CP, MOP, etc.), on their implementation efforts and, when relevant, on environmental conditions. Some MEAs permit NGOs to submit information and comments. The purpose of reporting is, *inter alia*, to evaluate the effectiveness of the relevant MEA and, if necessary, to take further environmental measures. As the author outlines, MEA compliance control mechanisms are usually “soft” and are usually non-judicial, non-confrontational, transparent, flexible and consultative, in line with the relevant provisions of the individual MEA. Some MEAs allow NGOs to submit complaints to compliance organs, which process them and comment on them, see, e.g., the role of the compliance committee established in line with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (the Aarhus Convention).

Chapter 17, on the international rules on the responsibility of states, provides and to the point coverage of the principles applicable to environmental damage and of the relevant case law. In addition, the author outlines the principal rules of the 2001 International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts and of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. The author then provides a short overview of the rules on liability and compensation applicable to particular activities.

International human rights and the environment are the subject of Chapter 18. Koester begins by highlighting the importance of environmental quality for human life. Like many other scholars tackling the subject, he then discusses global human rights treaties, which do not directly address the issue. On the other hand, a few regional human rights conventions do address the issue, as does some case law, which the author discusses. As he outlines, for the European

Convention for the Protection of Human Rights (ECHR), which lacks a provision connecting human rights to environmental quality, the European Court of Human Rights has accepted environmental arguments since 1990, and has developed a body of environmentally related case law containing both substantive and procedural rights based on ECHR Article 2, 6 and 8.

Finally, in Chapter 19, the author addresses a few aspects of IEL and international trade, *inter alia*, the World Trade Organization's (WTO) regime, including the principles of the General Agreement on Tariffs and Trade (GATT), as well as WTO case law.

Even though the book is written in Danish it does not, with a few exceptions, cover international environmental law from an exclusively

Danish perspective. Furthermore, seen in a Nordic context, it can be presumed that the book is accessible to speakers of other Nordic languages. Koester manages to highlight several issues, which are not covered by other authors in the field of IEL, including an in-depth analysis of the conference or the meeting of the parties, cf. Chapter 8, and the making of MEAs, as covered by Chapter 9. It is clear from Koester's approach, which is often very detailed and descriptive, but at the same time tied to the MEAs and the available case law, that he has in mind a broad range of readers, including non-lawyers. As a result, the book manages to provide professionals, law students and the public with solid foundation in IEL.