1. Introduction and editorial preface

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1 PROBLEM DEFINITION AND REASONS FOR THIS BOOK

One of the unpleasant side-effects of globalization, economic development and growth is that not only do benefits cross national borders, but also problems like environmental pollution. This phenomenon has been studied from various disciplines and more particularly in international law. By the 1930s cases between states determined the extent to which polluting states could be held under international law to compensate for damage caused to the victim state. Recent disputes (e.g. between Argentina and Uruguay) show that although international environmental law has gone through a long development, there are still many uncertainties that need to be clarified.

In addition, transboundary environmental legal disputes are not only remedied through instruments of international law. Increasingly, victims in national states also seek to apply their domestic legislation to transboundary environmental pollution cases. This raises a number of interesting questions, *inter alia* with respect to the competent forum, but also with respect to the applicable liability rule and the available remedies.

To date the literature on international law and private law has to a large extent developed into separate doctrines, with international lawyers attempting to identify the scope of state responsibility under international law and private lawyers attempting to explain to what extent victims could get compensation for transboundary pollution using the techniques of private law. However, it is becoming clear that these two domains are not totally separate. We increasingly notice that in domestic cases dealing with transboundary issues the question also arises to what extent treaties or other international norms could furnish a source of liability. Moreover, in some specific cases treaties explicitly establish liability rules (e.g. in the case of nuclear liability or oil pollution). The first goal of this book is to therefore examine the remedies available for transboundary environmental pollution in an integrated manner. Thereby we will not only focus on remedies available in international law (conventions, customary international law), but we will integrate these in remedies available at the domestic level. The latter not

only concern remedies of private law, but also of administrative and eventually criminal law. Indeed, the importance for potential victims of, for example, a new transboundary industrial project having to possibly intervene in the administrative procedure in a neighbouring country will be determined by national administrative law and should therefore be included in the discussion. Moreover, some prosecutors in victim states may wish to apply their national criminal law to pollution cases even if the origin of the pollution is from a foreign state, but the consequences are felt in the victim state. One goal of this book is to address the variety of all of these legal remedies available to transboundary environmental pollution in an integrated manner.

In addition to addressing these legal remedies for transboundary pollution, an important goal is moreover (as our main title suggests) to analyse how all of these legal rules can apply to the specific case of China. The reason for focusing on China may be obvious. Increasingly, both scholars and politicians are aware of the fact that the spectacular economic development of China comes at a high cost as far as environmental pollution is concerned. Such concerns are gradually becoming more prominent at the Chinese domestic level. However, it is also obvious that pollution caused as a result of industrial activities within China has consequences which are unfortunately not confined within the Chinese borders. One result of this economic development may therefore be that China can increasingly be confronted with neighbouring states arguing that they suffer harm as a result of environmental pollution coming from China. Recently it was even held that atmospheric pollution taking place in the state of California in the United States could allegedly have its source in industrial activities in China. In all of these cases the same questions arise, more particularly, whether either China or individual polluters within China can be held liable for this type of transboundary pollution. It is interesting to focus on this specific case of China since it is well known that the Chinese industry and economy have developed at a higher speed than environmental protection. Domestic environmental law in China still needs to be developed to be able to follow the rapid evolutions of economic development. The question therefore arises as to what extent some limitations of domestic environmental law in China may also have their consequences when transboundary environmental pollution occurs. A recent highly debated case also showed that this question is far from hypothetical. As a result of an incident in the north of China a large part of the Songhua River was polluted, leading to a potential pollution in Russia. This case has been taken as a test for many scholars to examine to what extent Chinese law is able to deal adequately with such a case of transboundary pollution, though our three Chinese colleagues may not necessarily agree with each other on whether it has caused serious transboundary water pollution to Russia.

In summary, this book aims, on the one hand, to provide an integrated approach to the legal remedies available for transboundary pollution and, on the other hand, to examine the relevance of this transboundary environmental liability for the specific case of China.

2 HISTORY AND ORIGINS OF THIS BOOK

This book originates from a long-standing cooperation between various Chinese and European institutions that led to the realization of a research project which was at the origin of this book. Within the framework of the EU-China European Studies Centres Programme (ESCP), the European Studies Center of Peking University (PKU) cooperates with several universities in Europe (Dublin, Erlangen, London School of Economics and Maastricht).

As part of this project, an international conference took place in Beijing on 19–21 May 2007 under the title ‘Europe: from nation states to a state of nations’. One panel within this conference was specifically devoted to environmental issues and was coordinated by the editors of this book, who also have a long-standing relationship of cooperation. During the conference many papers were presented by various academics and some practitioners. This book is therefore largely the result of this cooperation between Peking University and, more particularly, Maastricht University as far as the area of environmental law is concerned.

3 METHODOLOGY

As we have already indicated above, various approaches have been followed in the different chapters in this book. We believe that these various approaches are also necessary to answer the complicated questions related to transboundary environmental pollution.

3.1 Legal multi-disciplinary

A legal multi-disciplinary approach has been followed by many authors since the problem of providing legal remedies to transboundary pollution is so important that various legal disciplines should be used to provide a full picture. We already indicated that we see one of the goals of this book is to provide an integrated approach, using various disciplines to identify how transboundary environmental pollution can be remedied from various angles. The following insights and legal disciplines have therefore been used, combined and integrated:

- Human Rights: as is made clear in various contributions to this book, in some cases it is argued that transboundary environmental pollution violates fundamental human rights which is the responsibility of the violating state. Hence the question arises to what extent the human rights approach to environmental pollution can also remedy transboundary environmental pollution.
- International law: clearly the first type of remedy one could think of in the case of transboundary pollution is the application of principles of international law, potentially leading to state responsibility. In this respect attention should not only be based on general principles of transboundary liability, but also on the importance of customary international law and, of course, on the role of treaties.
- Administrative law: in some cases (national) administrative law can be applied usefully by victims against transboundary environmental pollution. This may be the case when victims can intervene in administrative procedures abroad leading, for example, to the licensing of a harmful activity. Also the requirement of an environmental impact assessment can substantially improve the rights of victims of transboundary pollution.
- Private law: a crucial issue is of course to what extent (national) private law can be applied in a transboundary pollution context. Specific questions in this respect not only arise as far as the application of liability rules is concerned (the applicable standard, causation issues etc), but, more particularly, relating to the applicable law and the issue of jurisdiction. The question in this respect arises, more particularly, on whether victims have the right to bring a suit against foreign polluters in their home state.
- Criminal law: criminal law may in some cases be applied to transboundary environmental pollution which comes from a neighbouring country. In that respect the question arises on whether the criminal law merely punishes a harmful emission (which took place abroad) or also the harmful result (pollution) which may take place in the home state. When the wrongful emission is criminalized the question also arises on whether following the foreign licence could be an excuse in criminal law.

3.2 Comparative approach

This book places much emphasis on legal comparison. We have clearly indicated that relevant international conventions will be examined, but also all of the above-mentioned aspects will be approached from a comparative perspective. The comparative perspective consists not only of looking at all

different aspects of legal remedies (international law, public environmental law) but also by comparing solutions by entirely different legal systems (Israel, various European states, the European Union, the United States and China).

3.3 Multi-disciplinary

Even though the main focus of this book is on how the law can be shaped in order to provide optimal remedies for transboundary pollution, various other disciplines can also be useful in contributing to answer that question. For example economists have indicated that transboundary environmental pollution can be considered as an 'externality' (external effect). Thus some chapters in this book will use economic analysis to answer the question whether (international) legal remedies can be considered an effective instrument to internalize the externality caused by transboundary pollution. In addition, it may be clear that transboundary pollution sometimes involves stronger polluter states inflicting harm upon weaker victim states. Thus some insights from political science will also be used, for example to predict under what circumstances bargaining between states or between the parties involved may result in fruitful solutions.

4 TOPICS

The topics chosen in this book all relate to the central question, being how legal remedies can remedy transboundary environmental pollution. The book thus consists of a series of chapters that each in its own way tries to answer that question. However, since a difference can be made between remedies at the international level and at the national level, the chapters have been arranged in three parts.

The first set of chapters (Part I) deals with the role of international environmental law and, more particularly, conventions in remedying transboundary environmental law. The contributions in this part on the one hand discuss the relevance of applicable bilateral and multilateral conventions, but also discuss principles of customary international law and their application to transboundary environmental pollution.

The second set of chapters (Part II) deals with the application of national law to transboundary pollution. This concerns on the one hand the application of national private (liability) law whereby specific questions are addressed relating *inter alia* to the applicable law that the judge will use in a transboundary pollution case and to the question whether NGOs could also bring a suit. In addition, attention is also paid to the application

of environmental impact assessments in a transboundary way and to the transboundary application of the criminal law.

Part III deals with some highly interesting case studies, more particularly discussing a pollution incident that occurred in the Songhua River in the north of China in 2005. Three Chinese authors discuss, each from their specific expertise (Chinese environmental law, private law and international law) the consequences of this spectacular case from a Chinese legal perspective. They not only critically discuss whether current Chinese law could provide efficient remedies for the pollution caused to the Songhua River to victims in Russia, but they also indicate some deficiencies and formulate proposals for legislative reforms.

5 FRAMEWORK OF THE PROJECT

The project which inspired this book was based on cooperation between the Maastricht European Institute for Transnational Legal Research (METRO), the research institute of the Faculty of Law of Maastricht University and the Centre for European Studies of Peking University. Many of the European researchers engaged in the project participate within the Ius Commune Research School. The Ius Commune Research School is a collaboration between the Universities of Amsterdam, Leuven, Maastricht and Utrecht and focuses on law in integration processes.

The chapters contained in this book are a selection of the papers that were presented at the China-Europe conference which was held in May 2007 in Beijing. Afterwards some authors were invited to deal with specific issues as separate contributions to the book.

6 STRUCTURE OF THIS BOOK

It has already been stated above that the book is divided into three main parts. Part I deals with international law and conventions. It contains a contribution by André Nollkaemper on cluster litigation in cases of transboundary environmental harm (Chapter 2). The third chapter is by James Harrison and deals with 'the role of international conventions in solving transboundary pollution disputes'. The fourth chapter is by Wang Hui dealing with 'transboundary vessel-source marine pollution – the international legal framework and its application to China'. Chapter 5 by Gou Haibo deals with the 'ILC proposal on the role of origin state in transboundary damage'.

Part II deals with the application of national environmental law in a transboundary legal context. Chapter 6, written by Michael Faure and Gerrit Betlem, deals with the application of national liability law to transboundary pollution and addresses some lessons from Europe and the United States. Chapter 7 written by Marjan Peeters deals with the joint governance of transboundary river basins. Chapter 8, by Jack Jacobs addresses 'a new look at environmental impact assessments: using customary law to prevent domestic and transboundary environmental damage'. Thomas Richter addresses 'transboundary environmental crimes – an analysis of Chinese and European law' in chapter 9.

Part III contains contributions dealing with the Songhua Jiang River pollution case. Chapter 10 by Wang Jin, Huang Chiachen and Yan Houfu deals with 'reflections from the transboundary pollution of the Songhua River' thereby mainly addressing the incident from the perspective of environmental law. Chapter 11 by Wang Canfa, Yu Wenxuan, Li Dan and Li Junhong discusses the incidents of the Songhua River pollution from the perspective of private law, and in Chapter 12 Song Ying analyses the same incident from the perspective of international law.

Part IV consisting solely of Chapter 13 contains a set of comparative and concluding remarks by the editors.

7 CONTRIBUTORS

The contributors to this book come, as was made clear, from various universities in Europe, the United States and China. Michael Faure and Marjan Peeters are from Maastricht University. Wang Hui works at the Catholic University of Leuven. James Harrison is affiliated to the University of Edinburgh. Gerrit Betlem works at the University of Southampton. André Nollkaemper is from the University of Amsterdam. Thomas Richter is a lawyer and an independent consultant from Freiburg in Breisgau (Germany) on matters of Chinese law and policy. Jack Jacobs works for the Arava Institute for Environmental Studies in Israel.

The Chinese contributors are from Peking University (Song Ying, Wang Jin, Huang Chiachen and Yan Houfu) and from the Chinese University of Political Science and Law (Wang Canfa, Yu Wenxuan, Li Dan and Li Junhong). Gou Haibo is affiliated with the Ministry of Foreign Affairs in Beijing.

A complete list of the contributors and their affiliation is provided in the list of contributors on p. ix.

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The texts were finalized in October 2007, and for that reason developments after that date have not been included in this book.

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