Introductory observations

PIERRE-MARIE DUPUY AND JORGE E. VIÑUALES

It no longer seems controversial to state that the private sector has a very significant role to play in protecting the environment. Yet, as both the main producer (hence the main polluter) and the main holder of financial and technology resources, the role of the private sector is ambiguous. The purpose of this volume is to explore one central aspect of this role, namely the possibility of harnessing foreign direct investment to promote environmental protection. Foreign investment is a key vector of both financial and technology transfers to countries that are particularly exposed to environmental challenges. This is all the more so in an era of economic crisis where public budgets can hardly meet – whether for economic or political reasons – the increasing demand for development aid and environmental protection measures. In this context, the editors of this book considered that it would be useful to ask a selected number of academics and practitioners working on the legal, economic and political aspects of environmental protection to share their views on the question of how to channel foreign investment into pro-environment projects. With this purpose in mind, a conference was convened in May 2011 at the Graduate Institute, Geneva, where the role of the private sector in protecting the environment was analysed in detail. The present volume gathers most of the papers presented at that meeting as well as other chapters that were specifically commissioned afterwards to cover questions not addressed during the meeting. The book is structured in three parts.

The first part situates the specific question addressed in the book within the broader context of global environmental governance. In Chapter 1, Pierre-Marie Dupuy provides a macro-level view of the last four decades of global efforts to curb environmental degradation highlighting the three main trends that characterise the process, namely a gradual expansion of the geographical and substantive scope of international environmental law, the increasing complexity entailed by such expansion, and the persistence of the initial tensions, particularly

between environmental protection and economic growth/development. One can gather from this initial chapter that the main challenge facing international environmental law today is one of implementation. In Chapter 2, Francesco Francioni dissects the different dimensions of this challenge and offers three distinct but interrelated perspectives for improving implementation. First, from a normative perspective, Francioni argues that the concept of sovereignty should be reconceptualised in functional terms, so as to redefine the powers of the state over its natural resources. Second, from a judicial perspective, he investigates the extent to which existing international courts and tribunals could be used to advance environmental protection. Third, from an institutional perspective, he explores ways to enhance global environmental governance and oversight mechanisms. Francioni highlights the need to engage with the private sector in order for these three transformations to be achieved. The remaining three chapters of the first part focus on questions of political, legal and economic 'infrastructure'. In Chapter 3, Urs Luterbacher analyses the fundamental political constraints within which global environmental negotiations take place. Luterbacher examines the cooperation, coordination and enforcement problems that must be overcome by international legal regimes dealing with environmental concerns. Using the example of climate change, he advocates for a system of 'transfers' from developed to developing countries that could make both groups better off under some specific conditions. In Chapter 4, Sandrine Maljean-Dubois and Vanessa Richard explore a fundamental legal question, namely the extent to which international environmental law can be directly applied to multinational corporations. They argue that although international environmental law may not apply 'directly' to corporations it does apply 'indirectly' through a variety of means, including internationally induced domestic law, human-rights-based approaches to environmental protection, soft law instruments stemming from both international and private institutions and the practice of a variety of oversight and compliance bodies. In Chapter 5, Shaun Larcom and Timothy Swanson explore the economic rationale that may incite governments to intervene into their economies to shift investment towards green industries. As shown by Larcom and Swanson by reference to the cases of Japan and Denmark, the main reason why it may pay to be a leader in technologies and industries that are more environmentally friendly is that technology leadership provides a first-mover advantage in terms of competitiveness. Overall, the five perspectives offered in this first part of the book are intended to provide a broad picture of how we

got here (Dupuy), what to do next (Francioni) and what are the main political (Luterbacher), legal (Maljean-Dubois and Richard) and economic constraints (Larcom and Swanson) affecting efforts to move forward. It is in this context that a more detailed analysis of incentive mechanisms and safeguards can be conducted.

The second part of the book devotes five chapters to the analysis of the main avenues that can be explored to channel financial and technology resources into pro-environment projects. In Chapter 6, Magnus Jesko Langer provides a panoramic view of the complex field of environmental finance, focusing on the role of private funds, project-finance mechanisms and market mechanisms. Langer's chapter provides a general account of how these different financial tools can play a role in channelling much-needed resources towards pro-environment projects. The following four chapters discuss more specific sets of techniques to achieve this end. In Chapter 7, Daniel M. Firger analyses the operation and future potential of the market mechanisms developed within the context of the climate change regime, namely emissions trading, the joint-implementation mechanism, the clean development mechanism and the so-called REDD-plus mechanism, which focuses on financial incentives to avoid deforestation. Based on his analysis of the climate change policies, he advocates for the use of international law as a 'catalyst' for private investment in low-carbon growth. In Chapter 8, Riccardo Pavoni examines two main mechanisms used to promote the conservation of biodiversity, namely access-and-benefit-sharing agreements and payments-for-ecosystem-services schemes. He highlights that although both mechanisms may serve to channel investment into environmental protection initiatives their legal bases are profoundly different. Whereas ABS agreements are the expression of a fundamental principle of the Convention on Biological Diversity, now fully spelled out in the 2010 Nagoya Protocol, PES schemes have no clear legal or institutional basis. Pavoni calls for this lacuna to be filled, particularly because the potential of PES schemes to mobilise investment into conservation seems superior to that of ABS agreements. In Chapter 9, Swenja Surminski engages with a key financial instrument that has received little attention in environmental law and policy circles, namely insurance schemes. Taking climate change as an example, Surminski identifies three potential roles for insurance schemes: compensating victims and funding clean-up processes; incentivising risk-reduction efforts; and fostering environmental investments by transferring some of the investment risks. However, Surminski acknowledges that this is a relatively new area and that an

overall assessment of the effectiveness of insurance schemes in this connection has yet to be conducted. The final chapter (Chapter 10) of the second part, by Konstantina Athanasakou, takes a different angle and explores the potential of the current negotiations on environmental goods and services as a trade-related incentive mechanism to diffuse, among others, environmental technologies. Athanasakou argues that a shift in the focus on these negotiations towards the question of technologies could create significant incentives for investing in pro-environment technology. Overall, the second part of the book provides both a panoramic view (Langer) and a specific analysis of four key sets of techniques (Firger, Pavoni, Surminski, Athanasakou) that could be used to channel investment into pro-environment projects.

The third part of the book looks at the other side of the 'investment/environment' coin by analysing the 'safeguards' available to ensure that the pro-environment nature of the investments thus channelled is not jeopardised. Indeed, foreign investment has sometimes been seen not only as a vector of technology and financial transfers but also as a source of social and environmental problems. The five chapters of the third part examine different techniques to subject the activities of foreign investors to adequate environmental protection standards. In Chapter 11, Jorge E. Viñuales analyses the impact of bilateral investment treaties on the ability of states to regulate the activities of foreign investors. He argues that international environmental law is playing a growing role in legitimising environmental regulation and that investment tribunals are gradually carving out some room for such regulation in their interpretation of investment disciplines. The subsequent chapters analyse four techniques to exercise some control over the activities of foreign investors. In Chapter 12, Elisa Morgera maps the evolution of the instruments used to define the corporate social responsibility of multinationals from voluntary codes to increasingly strong accountability mechanisms with a significant institutional component. She shows that the risks arising from the proliferation of different standards and accountability mechanisms are significantly mitigated by the substantive convergence of the standards used to guide and assess the conduct of private companies. In Chapter 13, Natasha Affolder advocates for a different level of analysis, namely the study of investment projects and their contractual arrangements. She provides a typology of the environmental contracts used to manage the social and environmental aspects of certain investment schemes, particularly in the extractive industries, as an illustration of a broader trend towards the contractualisation of

environmental governance in foreign investment projects. In Chapter 14, Benjamin J. Richardson looks at another technique for subjecting the activities of companies to certain environmental standards, namely the role of voluntary codes applicable to financial intermediaries. As noted by Richardson, in recent years, the longstanding movement for 'sustainable and responsible investment' or 'socially responsible investing' (SRI) has become increasingly sensitive to environmental questions. Companies are now being encouraged to comply with certain social and environmental standards in order to attract financial resources from SRI sources. Finally, in Chapter 15, Zachary Douglas assesses the prospects for enforcing environmental norms in investment treaty arbitration both through the medium of a claim by the claimant investor and a counterclaim by the respondent host state. Drawing an analogy between investment proceedings and the Alien Torts Statute in the USA, he explores the possibility that investment tribunals might be able to operationalise international environmental norms as actionable standards for counterclaims against foreign investors. Overall, the 'safeguards' examined in these five chapters suggest that despite differences in their scope and effectiveness there are several avenues to keep the activities of foreign investors within reasonable bounds.

Taken together, the essays gathered in this volume are an attempt at providing a unified and coherent view of ways to harness foreign investment to promote environmental protection. It is intended for both practitioners and academics engaged in the formulation and/or the analysis of pro-environment policies. A detailed analysis of the most salient legal issues arising from the policies discussed in this volume is provided in a companion book published by the same publisher.[1] For those readers interested in exploring further the policy dimensions of the topics covered in the present volume, we have asked contributors to provide a list of bibliographic suggestions, which can be found at the end of each chapter. We hope that this collection of essays will help clarify the important synergies that could be achieved between foreign investment and the protection of the environment.

[1] See J. E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012).

I

Protecting the environment in the twenty-first century: the role of the private sector

1

International environmental law: looking at the past to shape the future

PIERRE-MARIE DUPUY

INTRODUCTION

Barely half a century ago, there were already discussions on the 'preservation of nature', but not yet on the 'protection of the environment'. Retrospectively, one may wonder if the substitution of the former by the latter in the UN 1972 Stockholm Declaration necessarily represents a step forward even if one must acknowledge that the Declaration recognises that 'Man is both creature and moulder of his environment'.[1] Not only has 'Nature' an existence of its own, but it also existed prior to the arrival of human beings and their culture. The environment, by contrast, cannot be conceived without reference to the human being, as it is the latter, with his needs and perceptions, which entirely defines the former. Hence, the paradox: in the 1970s, environmental law began to emerge, based on a rather ambiguous assertion found in the Stockholm Declaration, which had been adopted under the auspices of the United Nations: Nature was per se entirely dependent on humans.[2] Such a concept seems to have acknowledged one of the last avatars of the foundations of modern technocratic and consumerist western philosophy: the human being must establish itself as the 'master and owner' of the world, instead of accepting its dependence upon it.[3]

[1] A. Kiss, 'The International Protection of the Environment', in R. St J. Macdonald and D. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983), 1069.

[2] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, part I, para. 1: 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights'. See also A. Kiss and J. Sicault, 'La Conférence des Nations Unies sur l'Environnement' (1972) 18 *Annuaire français de droit international* 603.

[3] Symbolically, the origins of this view are often associated with the Cartesian method. See R. Descartes, *Discours de la méthode* (Paris: Flammarion, 1966 [1637]), 84.

Such an assumption, which may appear to some extent realistic but which also potentially represents a great threat, is intensively challenged by many organisations of the international civil society. Nonetheless, it is still a prevailing concept in the mentality of the majority of the world's government officials, from both the North and the South, whose political culture clearly stands in the way of a fundamental truth: the survival of people must take precedence over state sovereignty. This is also the main reason why the environment still remains, first and foremost, subject to the territorial jurisdiction of the state.

However, the increasingly catastrophic consequences of such a concept show that, unlike Protagoras' famous saying, the human being is no longer 'the measure of all things'.[4] The accelerated melting of glaciers and poles, the increasing drying of the Sahelian area, the acidification of the oceans and perhaps in the near future the disruption of their currents, are numerous natural examples, which bring to mind another figure of Greek mythology: global Chaos, which the idea of national territory – and its derisory insignificance – is tragically incapable of resisting.

Moreover, what has become apparent in the last forty years is that environmental problems are by their very essence global. Ecology is by definition the science of interdependence.[5] Likewise, international environmental law is no longer defined by the approximate laying out, or interaction, of state sovereignties on a planet that has become too small and cramped. More than a right of joint ownership, international environmental law has become the responsibility of the whole. As the Belgian legal philosopher François Ost puts it: 'holism has replaced individualism'.[6]

If one tries to assess the evolution of international environmental law over the last four decades in order better to understand the topic of this book, three fundamental trends can be identified: first, a gradual expansion of its scope (1.1); second, a higher level of complexity due to this expansion (1.2); and third, the persistence of the initial tensions, which have shaped international environmental law from its inception (1.3).

[4] See the last edition of the Club of Rome's outlook on the potential scenarios for the next forty years: J. Randers, *2052: A Global Forecast for the Next Forty Years* (Rotterdam: The Club of Rome, 2012).
[5] See R. Carson, *Silent Spring* (Boston, Mass.: Mariner Books, 2002), 189. See also F. Ost, *La Nature hors la loi, l'écologie à l'épreuve du droit* (Paris: Editions La Découverte, 1995), 91–3.
[6] Ost, *La Nature hors la loi*, 13.