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Introduction

Protecting the Third Pole is the third in a trilogy of works on international environmental law in Asia by the same author. The book considers international treaties, customary international law, regional and sub-regional arrangements as well as institutional frameworks that are applicable currently and those that could potentially apply for governance of 'energy-environment conflicts' in the Third Pole. In particular, regimes discussed are those relating to national parks and other protected areas, species protection, transboundary environmental impact assessment, transboundary water governance and protection of trans frontier mountains. Connecting all these themes and at the heart of this book is the comparative law doctrine or theory of 'international legal transplants' analysed in *Chapter 2: International Legal Transplants*. Marsden suggests potential legal transplants from other geographic regions, including the 'two poles', for the 'Third Pole', an interesting concept in itself. The 'Third Pole' has been defined as "Asia's cryosphere, it contains more snow and ice than anywhere outside the [north and south] polar regions. It is 'high altitude' compared with the Arctic (the 'First Pole') and Antarctic (the 'Second Pole') which are 'high latitude'; unlike both, and just north of the Tropic of Cancer, it also contains significant biodiversity" (pp. 11–12). Like definitions of the Arctic which state that it consists of individual states surrounding an ocean, the Third Pole "consists wholly or partly of the territory of individual states (Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, India, Nepal, Bhutan and China)" (p. 13). In this Marsden states "the Third Pole has more in common with the Arctic than the Antarctic as many people are present, including Indigenous and minority groups" (p. 12). He however also notes the difference, "the Arctic situation is very different from the Third Pole because above all it is comprised of the Arctic Ocean, and the effects upon the marine environment are the greatest concern" (p. 155). There are also international rivers in the Third Pole, many transboundary, and thus involving interests and of significance to downstream states (Kazakhstan, Uzbekistan, Bangladesh, Myanmar, Laos, Thailand, Cambodia and Vietnam) (p. 13). The research question explored in the book is "what international legal frameworks can potentially guide the development of a comprehensive regime to protect the Third Pole environment?" (p. 30). Marsden partly answers the question in suggesting "in order to answer this question it is necessary to analyse to what extent these frameworks address

principally the energy – environment conflicts in the Third Pole, particularly large dams.”

Chapters

Chapter 1: Introduction sets the context for the book, in continuity from the other two works in the trilogy (for instance the first book states the importance of the UNECE Agreements for water and EIA governance in the Third Pole and the second talks about the role of China in Third Pole governance) but also the geographical context and the research question and issues, particularly outlining the environment-energy conflicts to be addressed in the book.

Chapter 2: International Legal Transplants discusses the comparative law theory of legal transplants and quotes from Watson's seminal work *Legal Transplants* (p. 39) “law does not reflect totally the society in which it operates. Instead, much of it is borrowed from other systems.” Drawing from Watson's work on this basic theory of transplants ‘of or via legal systems’ and works of other scholars such as Patrick Glenn, Marsden considers civil law, Islamic law examples but mainly common law and in particular the way in which the common law spread to other countries of the Commonwealth. Elements of common law – case law and the theory of precedent, leading to their utilisation in other jurisdictions, at a similar level of courts; other examples of transplants across common law countries are federal constitutional structures through a study of comparative constitutional law. (As a bit of an anecdote, the author of this review coming from a common law country, India, also studied comparative constitutions with federal structures while studying Indian constitutional law; as well as English and American case law on torts and contracts. In this sense might I dare to say there is indeed a ‘process’ of transplantation that takes place across legal systems). Marsden also reviews legal transplants in the context of EU law, and the European Union federal structure where EU law has primacy over national law (the principle of subsidiarity) in areas such as transboundary pollution. Further he considers examples of successful legal transplants in Third Pole countries India, Bangladesh and then South-East Asia. He quotes Harding: “In broad terms the Watsonian thesis that the idea of a law can be readily transplanted is, in relation to South-East Asia, clearly made out this is not the same as saying that all ‘repotting’ of legal ideas will result in instant blooms. South East Asia shows that, under conditions of legal pluralism, absorption of legal ideas, even imposed ones, takes place over time, slowly and even painfully. The evidence of successful legal transplants of almost every conceivable kind is powerful” (p. 45).

Marsden also notes opposing views to legal transplants, for instance he quotes Legrand who states legal transplants are 'impossible' because they cannot be separated from their 'context'; Kahn – Freud states “use of a pattern of law outside the environment of its origin continues to entail a risk of rejection ... its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a ‘legalistic spirit’ which ignores the context of the law.” Surely for legal transplants for governance of transboundary energy- environmental conflicts in a region as diverse as the Third Pole, with several upstream and downstream states and varied cultures, considering the social and political context is important. Marsden keeps returning to ‘context’ in all the chapters of the book.

Marsden also notes the Critical Legal Studies Movement and mentions ‘leftist viewpoints for law making.’ To the extent that I understand correctly the premise of this argument, I agree with the critique in that law making should not only be a top-down approach but a grass roots collaborative effort that is participative, consultation based and drawing from inputs of stakeholders. Also, as Third Pole states also have Indigenous cultures, considering their inputs is important. While suggesting potential legal transplants to deal with the different conflicts, Marsden also utilises such an approach, as public participation (the legal transplant of the *Public Participation Convention* is suggested in *Chapter 2: International Legal Transplants*), access to information and transparency are recurring themes in all the chapters (He notes for instance in *Chapter 3: Global Protected Areas* “values that Indigenous rights-holders can bring to all aspects of the principle of wise-use” under the Wetlands Convention). After considering transplants via and across legal systems, Marsden considers transplantation of international law.

Marsden also considers other notions to legal transplants, ‘legal borrowing’, ‘norm diffusion,’ or even interdisciplinary approaches. He notes:

whatever the expression used there are many opportunities to learn from one legal system and from different laws. There is potential also to import ideas from international law downwards to domestic law – and from the more typical domestic system to another domestic system – there is furthermore potential to also transplant international law from a regional or subregional context to another regional or subregional context, which is the focus of most of the – particularly European – transplants analysed in the book. (p. 48)

He also discusses ‘compatibility of context with content’ and takes the example of the ‘transplant’ of the Public Participation Convention in Australia (successful) and China (difficulties). This is important to consider, as he also notes, for transplants of international, regional and sub-regional arrangements to the Third Pole.

In the chapter Marsden also considers the legal transplant of ‘institutions’, i.e., of ‘their approach to governance’ and compares the Arctic Council (AC) and the SAARC. He notes “the AC observer status of a number of Asian states of relevance to the Third Pole suggests that learning from the AC in terms of prioritising collaborative knowledge exchange (via the Arctic Science Agreement), and environmental protection (via the EIA Guidelines) may provide substantive benefits for protective governance of the Third Pole” (p. 61). He notes there is potential for a version of the Arctic Science Agreement to apply between the States of the Third Pole. On the nature of international agreements/ arrangements that could apply, he notes “the mix of soft and hard law arrangements that the AC has generated demonstrates that there may be no single approach to best protect the Third Pole. However, through international cooperation, measures of various kinds can be brought to bear on the issues of greatest concern to the environment” (p. 61). I partly agree but would note the importance of ‘context’ and prevailing political scenario in the Third Pole.

Chapter 3: Global Protected Areas discusses different concepts and instruments for ‘area protection’, an emphasis in the book for adoption in the Third Pole region. As introduced in the first chapter of the book, a Third Pole National Park has been proposed and this chapter takes up ‘national parks’ – an American innovation and a potential transplant globally. As Marsden notes, there are many kinds of national parks and some of these may evade clear categorisation. This chapter considers these and other protected categories under the IUCN (national parks precede these categories (p. 71)). Marsden also discusses global conventions that already apply to the Third Pole: The Wetlands Convention (and the ‘wide use’ principle), the World Heritage Convention (WHC) (‘Outstanding Universal Value’ (OUV)) and a potential legal transplant, this regional treaty The European Landscapes Convention (‘landscape planning, management and protection’). This is open to membership by Third Pole States and could strengthen existing provisions of instruments that already apply.

Chapter 4: Connecting Areas and Species Protection first discusses specific instruments for species protection: The Convention on International Trade in Endangered Species (CITES), the Convention on Migratory Species (CMS) and “the comprehensive Convention on Biological Diversity (CBD) which links with all other conservation conventions” (p. 93) The CBD contains concepts of both

area and species protection and the chapter analyses two of its approaches for connecting area and species protection and relevant for the Third Pole: the ecosystem approach (EA) and the mountain biodiversity and landscape protection programme. As potential legal transplants, Marsden discusses the European Nature Convention (but not open for signature from UN member states) and the Antarctic Environment Protocol.

Chapter 5: Transboundary Environmental Impact Assessment deals with Environmental Impact Assessments (EIA) under customary international law, treaty law (Convention on Environmental Impact Assessment in a Transboundary Context (Espoo/EIA Convention)) and through its practical application i.e. via lending practices of multilateral development banks and then examples of EIA practices in the two polar regions: *Arctic EIA Guidelines* and EIA under the *Antarctic Environmental Protocol*.

On customary international law on EIA, Marsden considers ICJ jurisprudence, the joined Costa Rica/Nicaragua cases (*Joined C-R/N cases*) and *Pulp Mills. Joined C-R/N cases* are particularly complex as the approach on EIA and standard applied by the ICJ is different for both Costa Rica and Nicaragua. For the former a detailed consideration of facts and evidence was undertaken and Costa Rica was found in breach of its obligation to conduct an EIA, “the same fact-finding approach and reasoning was not applied to Nicaragua” (p. 126) and the significant harm threshold was considered to not have been met. The majority opinion doesn’t provide much clarity on this significance ‘threshold.’ Marsden simplifies this latest ICJ pronouncement on EIA, which one might note, has left a generation of scholars utterly confused. His analysis distills for the reader points to take away from the majority opinion as well as loopholes, and note the contribution of Separate Opinions of Judges Bhandari, Dugard and Donoghue to aid this understanding.

Marsden then excellently links the ICJ judgement to the EIA Convention (its level of participation notwithstanding), how the latter provides clarity on ‘loopholes’ left unresolved by the ICJ. To address the threshold of ‘Significant harm’ for instance the EIA Convention has Appendix I – List of Activities requiring an EIA and Appendix III – Guidance on deciding whether an activity falls within the ‘list’ (*Analysis of Justice Bhandari’s Separate Opinion*, p. 130).

Next the EIA Convention is considered as a potential legal transplant for the Third Pole, as it is open for membership for UN member states. On the EIA Convention Marsden quotes Timo Koivurova:

On balance, there do seem to be good prospects for the Espoo Convention to spread as obstacles are lifted by the States Parties. This is very much related to the design of the Espoo regime, which builds on sub-regional

bottom-up practical cooperation but also on the treaty community being able to address issues related to capacity building and financial support, which are of vast importance to the developing world. (p. 141)

Marsden notes the potential of the EIA Convention especially for hydroelectric development in the Third Pole and how it could supplement existing treaty obligations in the subregion for instance the Indus Waters Treaty. Marsden also discusses a related instrument, the SEA Protocol, that could potentially apply for ensuring “upstream effects from policies, plans and programmes are subject to rigorous appraisal prior to individual development proposals being reviewed” (p. 160).

Next, he discusses EIA (and SEA) in the context of lending policies of banks and the relevance of the EIA Convention as customary international law (and if ratified, treaty law) for the safeguards policy of the Asian Infrastructure Investment Bank (AIIB), of particular relevance to the Third Pole.

As potential legal transplants from Polar EIA, Marsden discusses first the *Arctic EIA Guidelines* as contextualised arrangements relating to the EIA Convention and suggests something similar for the Third Pole taking into account the local context. While discussing the *Antarctic Environment Protocol*, Marsden observes a lack of effectiveness and dominance of national policy objectives yet notes that lessons could be learnt from its EIA measures relevant to scientific activity and tourism.

Chapter 6: Protection of International Rivers first starts with the geographical context. There are nine transboundary rivers in the Third Pole region, with numerous upstream and downstream states. This is followed by issues arising between these states regarding sharing of these transboundary waters. Upstream states want to utilise the hydropower potential of these rivers while downstream states are interested in water flow and use of the water for agriculture and other livelihood uses. There is also the imperative of environmental protection of the river and to ensure its ‘sustainable development.’

There is thus an ‘environment – energy conflict’, the core of the issues that Marsden attempts to resolve through the legal transplants suggested in the book. Sustainable development of water resources is an underlying theme of the chapter. Whether the customary international law of watercourses or treaty law is able to provide an effective framework that could supplement and strengthen existing frameworks (like the Mekong Agreement) or to develop new ones are questions to ponder for researchers (if not Third Pole states). In whatever solutions are developed, I would argue there is also an imperative to bring them in conformity (somewhat) with international water law.

In this chapter he analyses the customary international law of watercourses – the UN Watercourses Convention (UNWC) and a landmark ICJ judgment, the *Danube Dams* case. This is followed by discussion of a sub-regional treaty on transboundary water governance, the Mekong Agreement (MA). Despite its inadequacies, it was ahead of its times and a forerunner in transboundary water cooperation, and thus could be a potential legal transplant to manage other transboundary rivers in the Third Pole. A second potential transplant is the UNECE Water Convention.

On customary international law of watercourses, Marsden discusses the Watercourses Convention (its main principles are the due diligence or no harm rule, principle of reasonable and equitable utilisation). Marsden also discusses the landmark *Danube Dams* case, a dispute between Hungary and Slovakia. While ‘equitable sharing of resources’, cooperation in the use of shared water resources and ‘principles of ecological necessity’ are discussed, ‘politics’ also prevailed in this case: public sentiment in Hungary reigned against dam construction and this led Hungary to abandon the dam project, Slovakia went ahead and implemented a provisional solution. Similar issues or politics in transboundary water issues between upstream and downstream riparian states could also arise between Third Pole states. Marsden notes: “although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the river Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties ...” (p. 178). Marsden then goes on to discuss the importance of environmental protection and the objective of sustainable development for resolving transboundary water disputes, both considered in the case.

A sub-regional water governance arrangement is discussed in the chapter, the Mekong Agreement (MA), which despite its inadequacies relating to good governance (lack of public participation, consultation, lack of information, lack of impacts study) is still a potential legal transplant for the Third Pole as it is a great example for addressing the most prevailing energy – environment conflict in the region, and it involves several downstream states of the Mekong and China as a dialogue partner (even if that means a limited role or for that matter legal obligations). As noted throughout the book, the role of China in any Third Pole governance structure cannot be understated. The MA is still a good model to consider, for resolving issues between multiple upstream and downstream states, or at least to bring them on the table.

A second potential legal transplant discussed in the chapter is that of the UNECE Convention, which is gaining wider participation by the day. Its

operational and legal and compliance arrangements are discussed. Compliance remains the main issue in this Convention and similar instruments, and because of the politics in the Third Pole region might present a hurdle. Also, there is a subtle comparison in the chapter between the UNWC and the UNECE. Marsden seems to favour the latter (my personal vote would be for the UNWC as it codifies international watercourse law) but leaves the reader to consider the pros and cons of both for a 'transplant' to the Third Pole region.

Chapter 7: Protection of Trans Frontier Mountains contains a survey of 'precedents' or mountain regimes and arrangements that are relevant for governance of the environment – energy conflict of high mountain terrains. While Marsden mainly discusses the Alpine and Carpathian Conventions being "the only two international agreements with a special focus on trans frontier mountain ranges" (p. 210), he also considers loose arrangements from Central Asia (mainly the *Framework Convention for the Protection for Sustainable Development in Central Asia*) and Andean arrangements. While the former apply to the northwestern part of the Third Pole already, the latter are considered as 'potential' transplants. These are important to consider as they also concern similar 'developing country contexts.' It is noted in the context of Andean arrangements "The Andes constitute perhaps the most comparable transboundary mountain subregion to the Third Pole, given the large number of mostly developing states present and the high-altitude nature of the terrain, which is also exploited for its energy resources ... in common with the Third Pole international rivers situation there is also a relationship between the Andes and the Amazon" (p. 208). Marsden does not consider Andean arrangements in much detail and discusses the more substantive and specifically "sustainable development focused" (p. 209) Alpine and Carpathian Conventions, which are in the nature of Framework Conventions with Protocols relating to different substantive areas. On their potential as transplants, he notes "while the European context is completely different from the Asian situation – suggesting caution in relation to legal transplants – it is nonetheless important to outline and analyse their content to understand what any Third Pole arrangements could contain and how the various matters relate to each other" (p. 209). On development of a regime for the Third Pole, this Framework Convention – Protocol approach is suggested, and it might also be worthwhile to follow up on Marsden's introduction to the Andean arrangements, to see if there could be any lessons for the Third Pole. These are perhaps useful to consider as they also concern similar 'developing country contexts.'

Conclusion and Suggestions

In conclusion, despite the practical matter of context, the author must be commended for suggesting solutions and a way forward to the myriad problems arising from energy development through the theory of international legal transplants. Whether and how far these may be transplanted remains to be seen, as Marsden notes, “whether transplanting international law may assist the developing governance of the Third Pole is a question that relates to both existing governance – which may have been or be failing – and new arrangements” (p. 5). The author notes the current participation in and existing integration with some of these ‘transplants’ and ways to look forward about the others. Public participation and consultation, implementation and compliance are some of the issues to be tackled in the Third Pole, as also noted by the author.

The author also suggests other themes worth exploring, like wild law (he notes in *Chapter 7: Protection of Trans Frontier Mountains*: “development of wild law in the Andes, particularly the constitutional recognition of rights for nature” (p. 209). Marsden also mentions as an underlying theme in several chapters ‘Indigenous rights’ and ‘Indigenous rights-holders’, these could be taken up in a future volume (if there is one) or in other formats, especially as there are multiple Indigenous knowledge systems in the Third Pole. While noting the difficult political context because of the sheer number of states in the Third Pole, might the Arctic provide some inspiration or potential transplants to the Third Pole? A last (given the word limit) ‘extra’ theme that I found interesting and interspersed throughout the book was that of ‘sustainable development’. This is mentioned as an underlying theme to ‘address energy-environment conflicts in the Third Pole’ and directly for instance in *Chapter 6: Protection of International Rivers* or in *Chapter 5: Transboundary Environmental Impact Assessment* in the context of lending policies of banks, particularly the AIIB. The United Nations Sustainable Development Goals (SDGs) are also mentioned, a thought is whether elements of SDGs could be added as a layer for discussion of all the themes relevant to the Third Pole (even if that could be the subject matter of a whole new book: Third Pole and SDGs!), considering there are by now several best practices and case studies on SDGs and their implementation. Might there be more institutional support for their operationalisation in the Third Pole, might these (and international diplomatic pressure) not ‘push’ Third Pole governments to take governance of the energy – environment conflicts more seriously? After all, countries are required to report

on SDG compliance. Perhaps this might enhance this 'transplantation' project as well?

Overall, this book is a must read for anyone interesting in exploring the high-altitude 'Third Pole'. The author must be commended for suggesting solutions instead of just diagnosing problems.

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