Chapter 3

Evolution of the International Law on Biopollution

3.1. Introduction

This chapter reviews the development of the international legal framework regarding the prevention of pollution and biopollution of the marine environment and the impact of such corpus juris on the structure and teleology of the 2004 BWM Convention. This reflection comprises customary international law and treaties (in particular conventions referring to the transfer of alien species and pathogens from one ecosystem to another). Historically, both have been the main methods of creating binding international law.\(^1\) As noted by Dupuy and Vignes, both customary and treaty law are generally acknowledged formal sources of international law and their respective terms establish the ground rules of international law.\(^2\)

---

\(^1\) Birnie and Boyle, Chapter 2, supra note 48, 11–12.

\(^2\) René-Jean Dupuy and Daniel Vignes, A Handbook of the New Law of the Sea, Volume 1 (Dordrecht: Martinus Nijhoff, 1991), 29–30. In regard to the traditional formal sources of international law, the International Court of Justice Statute, Article 38, provides: ’1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions whether general or particular, establishing rules expressly recognized by contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto’. The referred Article 59 provides that ‘The decision of the Court has no binding force except between the parties and in respect of that particular case’. For further analyses on the issue see Michael Akehurst, A Modern Introduction to International Law, 2nd edition (London: G. Allen & Unwinn, 1987); Antonio Ramiro Brotóns, Formación de Normas y Obligaciones Internacionales, Lecciones de Derecho Internacional Público (Murcia: Belluga, 1981); Ian Brownlie, Principles of Public International Law, 4th edition (Oxford: Claredon Press, 1980); Antonio Cassese, International Law in a Divided World, 1st edition (Oxford: Clarendon Press, 1986); Paul Guggenheim, Traité de Droit International Public, 2nd edition, Volume I (Genève, 1967); L. Lucchini and M. Voelckel, Droit de la Mer, Volume 1 (Paris: Pedone, 1990); Celso Albuquerque Mello, Direito Internacional Público, 11th edition, Volume 1 (Rio de Janeiro: Renovar, 1997); V. G. Moncayo, Derecho Internacional Público, 2nd edition, Volume 1 (Zavalia, 1987); L. Oppenheim, International Law, 8th edition, edited by...
Chapter 3 reviews the application of rules and principles found in customary law that are relevant to the control and management of ships’ ballast water and sediments. They include the freedom of the high seas and the obligation to prevent transboundary pollution. Both of these principles are further addressed, *inter alia*, in UNCLOS and the Biodiversity Convention. The evolution of treaty law on the control and management of ships’ ballast water and sediments, from sanitary to maritime law and the further interconnections with the law of the sea and environmental law are also examined. The requirements and obligations in international conventions to prevent pollution or biopollution (particularly provisions on special control in certain areas, the obligation to promote technical cooperation and communication of information, and the adoption of reception facilities) and States’ jurisdiction to regulate vessel-source pollution are highlighted. Emerging norms of customary law may be observed in the precautionary principle and several treaties incorporate it. The evolution of this principle is examined in greater detail in Chapter 4 of this book in tandem with the analysis of the BWM Convention. Actually, the convention is the corollary of anticipatory measures to prevent biopollution of the marine environment from ships’ ballast water and sediments.

3.2. Customary International Law

The oldest source of international law is custom, also known as general international law, customary international law, unwritten international law, *jus non scriptum*, and usage. Certainly, custom was the essential, if not the exclusive,