

International Environmental Law

Ulrich Beyerlin and Thilo Marauhn



Contents

<i>Preface</i>	v
<i>List of Abbreviations</i>	xvi
<i>Table of Treaties</i>	xxi
I Historical Development	1
1 From the Beginnings of International Environmental Law to the Stockholm Conference (1972)	3
1.1 Early Stages and the Interwar Period	3
1.2 From 1945 to 1972	4
2 From Stockholm to the Rio Conference (1992)	7
2.1 The Stockholm Conference	7
2.2 Impacts of the North–South Divide on International Environmental Law	8
2.3 International Treaty Practice since 1972	10
2.4 Other Activities	11
3 From Rio to the Johannesburg Conference (2002)	13
3.1 The Rio Conference	13
3.2 Rio Outcomes	14
3.2.1 The Concept of ‘Sustainable Development’	15
3.2.2 Legally Non-Binding Instruments	16
3.2.3 Multilateral Environmental Agreements (MEAs)	18
3.2.4 Institutional Innovations	18
3.2.5 Rio Evaluated	19
3.3 Post-Rio Process	19
4 Johannesburg and Beyond	23
4.1 The Johannesburg Summit	23
4.2 Johannesburg Outcomes	23
4.2.1 ‘Type 1 Outcome’: The Political Declaration and the Plan of Implementation	24
4.2.2 ‘Type 2 Outcome’: Partnership Initiatives	25
4.2.3 Johannesburg Evaluated	26
4.3 From Johannesburg to Copenhagen (2009)	27

II	Key Concepts in International Environmental Law	31
5	'Key Concepts': Meaning, Underlying Ideas and Classification	33
	5.1 'Key Concepts' of International Environmental Law: Meaning and Role	33
	5.2 Ethical Sources of International Environmental Law Key Concepts	35
	5.2.1 Solidarity	35
	5.2.2 Justice	36
	5.3 Classification of International Environmental Law Norms	37
6	'No Harm'	39
	6.1 Historical Development	39
	6.2 Function and Normative Quality	40
	6.3 Substantive Obligations	41
	6.3.1 Preventing Significant Transboundary Harm	41
	6.3.2 No Balancing of Interests	42
	6.3.3 Disregard of 'Due Diligence'	42
	6.3.4 Standard and Burden of Proof	43
	6.3.5 Status	44
	6.4 Procedural Obligations	44
	6.4.1 Contents and Scope	44
	6.4.2 Status	45
	6.5 Breach of the 'No Harm' Rule	45
7	Precautionary Action	47
	7.1 Historical Development	47
	7.2 References to Precautionary Action in International Environmental Practice	49
	7.2.1 Multilateral Environmental Agreements	49
	7.2.2 Decisions of International Courts	51
	7.3 Conception and Meaning	52
	7.4 Effects	54
	7.5 Normative Quality and Status	55
8	Polluter Pays	57
	8.1 Origin	57
	8.2 Applicability and Meaning	58
	8.3 Normative Quality and Status	59
9	Common but Differentiated Responsibilities	61
	9.1 Historical Development of CBDR	61
	9.2 Underlying Ideas and Conceptual Approach of CBDR	63
	9.3 Interpretation of CBDR	64
	9.4 CBDR in International Environmental Treaty Practice	66
	9.4.1 Reference to CBDR in Single MEAs	66

9.4.2 Conditionality of Environmental Protection and Compliance Assistance?	69
9.5 Normative Quality and Status	69
9.6 CBDR and Future North–South Co-operation	70
10 Sustainable Development	73
10.1 Historical Development	73
10.2 Meaning and Function	76
10.3 Normative Quality and Status	79
10.4 Sustainable Use—A Special Emanation of Sustainable Development	82
10.5 Sustainable Development—An Approach for Bridging the North–South Divide	83
III Key Issues in Current International Environmental Law	85
11 Freshwater Resources	87
11.1 Survey	87
11.2 Case Law	92
11.3 General Instruments	94
11.3.1 The UN Convention on the Law of the Non-Navigational Uses of International Watercourses	94
11.3.2 The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes	96
11.3.3 The 2008 Draft Articles on the Law of Transboundary Aquifers	98
11.4 Specific Instruments	99
11.4.1 Africa	99
11.4.2 America	102
11.4.3 Asia	105
11.4.4 Europe	107
11.4.5 Middle East	111
11.5 Conclusions	112
12 Oceans and Marine Resources	115
12.1 Survey	115
12.2 The Legal Framework: UNCLOS	118
12.3 Protection of the Marine Environment	121
12.3.1 State of the Marine Environment	121
12.3.2 All Types of Pollution	122
12.3.3 Pollution from Ships	126
12.3.4 Pollution by Dumping of Wastes	128
12.3.5 Pollution from Land-Based Sources and Atmospheric Pollution	129
12.3.6 Pollution from Sea-Bed Activities	130
12.3.7 Intervention in Case of Marine Pollution Incidents	132

12.4	Conservation and Management of Marine Living Resources	133
12.4.1	State of the Marine Living Resources	133
12.4.2	Fish	134
12.4.3	Mammals	138
12.5	Conclusions	140
13	Air, Ozone, Climate and Outer Space	145
13.1	Survey	145
13.2	Transboundary Air Pollution	149
13.2.1	LRTAP Convention and Related Protocols	149
13.2.2	Canada–US Air Quality Agreement	153
13.3	Ozone Layer Depletion	154
13.3.1	Ozone Convention	154
13.3.2	Montreal Protocol	155
13.4	Global Climate Change	159
13.4.1	Climate Change Convention	159
13.4.2	Kyoto Protocol	160
13.4.3	From Kyoto to Copenhagen: Building a Post-2012 Climate Protection Regime	164
13.5	Outer Space Activities and Environmental Protection	171
13.6	Conclusions	173
14	Flora, Fauna and Biological Diversity	177
14.1	Survey	177
14.2	Flora and Fauna	181
14.2.1	The Protection of Habitat	181
14.2.2	Regulating Trade in Endangered Species: CITES	184
14.2.3	Protecting Migratory Species	188
14.2.4	Other Instruments	190
14.3	Biological Diversity	192
14.3.1	The Biodiversity Convention	192
14.3.2	Access and Benefit-Sharing: Bonn Guidelines and Nagoya Protocol	196
14.3.3	The International Treaty on Plant Genetic Resources	198
14.3.4	Trading Genetic Material: The Biosafety Protocol	200
14.4	Forests	201
14.5	Soil	205
14.6	Conclusions	209
15	Wastes and Hazardous Substances	211
15.1	Survey	211
15.2	Control of Transboundary Movements of Wastes	215
15.2.1	The Basel Convention	215
15.2.2	The Bamako Convention	218

15.3	International Regulation of Hazardous Substances	219
15.3.1	The Rotterdam Convention	219
15.3.2	The Stockholm Convention	221
15.3.3	Conventions on Nuclear Materials	222
15.4	Conclusions	224
16	Procedural Environmental Obligations	227
16.1	Basic Observations	227
16.2	Information, Notification and Consultation in Interstate Relations	227
16.2.1	Situations of Likely Transboundary Environmental Harm	228
16.2.2	Situations of Transboundary Environmental Emergency	228
16.3	Environmental Impact Assessment (EIA)	230
16.4	Participatory Rights of Non-Governmental Actors	234
16.4.1	'Public Participation' in General	234
16.4.2	The Aarhus Convention	236
16.5	Conclusions	239
IV	International Environmental Governance I: 'Setting the Rules of the Game'	241
17	International Environmental Governance	243
17.1	Theoretical Premises and Policy Framework	243
17.2	Actors	245
17.2.1	States	247
17.2.2	International Organisations	249
17.2.3	Treaty Bodies	253
17.2.4	Private Actors	255
17.3	Forms of Action	256
17.3.1	Law-Making, Implementation and Ways to Ensure Compliance	256
17.3.2	Treaty-Based Legislative Environmental Governance	258
17.3.3	Treaty-Based Administrative Environmental Governance	259
17.4	Multilevel Governance	261
18	International Environmental Treaty-Making and Treaty Regime-Building	265
18.1	Treaty Negotiation and Treaty Conclusion in General	265
18.1.1	Procedural Aspects	265
18.1.2	Substantive Aspects	267
18.2	Levels of Treaty-Making	268
18.3	Regulatory Approaches to Treaty-Making	269
18.3.1	'Framework Convention and Protocol Approach'	270
18.3.2	'Convention and Annexes Approach'	272
18.4	Simplified Amendment Procedures Regarding Treaties, Protocols and Annexes	273

18.4.1 Amendments of Treaties and Protocols	273
18.4.2 Amendments and Adjustments of Annexes	274
18.4.3 COPs' Decision-Making Procedures	275
18.5 Conflicts between Different MEAs and Their Settlement	277
18.5.1 Parallel, Overlapping and Conflicting MEAs	277
18.5.2 Article 30 VCLT; <i>Lex Posterior</i> and <i>Lex Specialis</i> ; Harmonising Treaty Interpretation	278
18.5.3 Treaty Co-ordination by Means of Interinstitutional Co-operation	279
19 Customary International Environmental Law; Environmental <i>Jus Cogens</i> and Obligations <i>Erga Omnes</i>	281
19.1 Customary International Law in General	281
19.1.1 Meaning and Function of Customary International Law	281
19.1.2 Formation of Customary International Law	282
19.2 Customary International Environmental Law	283
19.2.1 The Dynamics of Customary International Environmental Law	283
19.2.2 Examples of Existing or Emerging Rules of Customary International Environmental Law	285
19.3 Environmental <i>Jus Cogens</i> and Obligations <i>Erga Omnes</i>	286
20 International Environmental 'Soft Law'	289
20.1 Theoretical Premises	289
20.2 Legally Non-Binding Agreements between States	291
20.3 Interinstitutional Non-Legal Arrangements	294
20.4 Recommendations of International Organisations	295
21 Private Environmental Governance	299
21.1 Introduction	299
21.2 Contribution of Private Actors to International Environmental Law-Making	299
21.2.1 NGO Involvement in Environmental Treaty-Making	300
21.2.2 Private Actor Contributions to the Development of Non-Treaty Norms	301
21.3 Environmental Standard-Setting	302
21.3.1 Distinguishing Environmental Standards from Environmental Law-Making	302
21.3.2 Categorising Standards	304
21.3.3 Ensuring Compliance with Private Standards	306
21.3.4 Inherent Limitations of Private Standard-Setting	307
21.4 International Environmental Partnerships	308
21.4.1 The Emergence of Partnerships in International Environmental Law	308
21.4.2 Partnerships in Practice	310

21.4.3 Assessing the Contribution of Partnerships to International Environmental Governance	313
V International Environmental Governance II: Ensuring Compliance	315
22 Compliance Control	317
22.1 Compliance Control and Assistance as ‘Active Treaty Management’	317
22.2 The Legal Basis of Compliance-Control Procedures	321
22.3 The Procedural Framework	325
22.3.1 Trigger Mechanisms	326
22.3.2 Verification	328
22.3.3 Evaluation	330
22.3.4 Measures in Response to Non-Compliance	332
22.3.5 Procedural Principles and Safeguards	333
22.4 Institutional Setting	336
22.5 Conclusions	339
23 Compliance Assistance	343
23.1 The Concept of Compliance Assistance	343
23.2 Typology	345
23.2.1 Capacity-Building	345
23.2.2 Transfer of Technology	346
23.2.3 Financial Mechanisms	348
23.3 Conditionality of Assistance	349
23.4 Institutional Setting	351
23.4.1 Tailor-Made Institutions	351
23.4.2 The Global Environment Facility	353
23.5 Conclusions	357
24 Responsibility and Liability	359
24.1 Introduction	359
24.2 State Responsibility	361
24.2.1 2001 ILC Draft Articles	361
24.2.2 Case Law	364
24.3 State Liability	366
24.4 Civil Liability	368
24.4.1 Oil Pollution and Other Hazardous Substances	369
24.4.2 Nuclear Energy	371
24.4.3 Wastes	373
24.4.4 The 1993 Liability Convention	373
24.5 Conclusions	374

25	Environmental Dispute Settlement	377
	25.1 Survey	377
	25.2 Non-Judicial Dispute Settlement	378
	25.3 Judicial Dispute Settlement	379
	25.3.1 The ICJ and Other Permanent International Courts	380
	25.3.2 International Arbitration	382
	25.3.3 Quasi-Judicial Dispute Settlement	383
	25.4 Dispute Settlement and Compliance Control	386
 VI Relationship between International Environmental Law and Other Areas of International Law		389
26	Environmental Protection and Human Rights	391
	26.1 Environmental Human Rights Protection in General	391
	26.2 Environmental Human Rights Protection in Practice	393
	26.2.1 United Nations	393
	26.2.2 Africa	395
	26.2.3 Americas	396
	26.2.4 Asia	398
	26.2.5 Europe	399
	26.3 Environmental Rights of Indigenous Peoples	402
	26.4 Rights of Environmental Migrants	405
27	Environmental Protection and International Peace and Security	411
	27.1 Peace, Security and the Environment: A Multifaceted Relationship	411
	27.2 The Law of Armed Conflict	412
	27.2.1 Treaty Law Applicable to International Armed Conflicts	413
	27.2.2 Customary Law Applicable to International Armed Conflicts	416
	27.2.3 The Law Applicable to Non-International Armed Conflicts	417
	27.3 The Applicability of MEAs in Times of Armed Conflict	417
	27.4 Environmental Impact of Arms Control and Disarmament Obligations	418
	27.5 Conclusions	419
28	Environmental Protection and International Economic Law	423
	28.1 Conflict or Complementarity?	423
	28.2 WTO Law	424
	28.2.1 The Development of WTO Law	424
	28.2.2 The GATT Treaty Framework	426
	28.2.3 Case Law Related to Article XX GATT	427
	28.2.4 The TBT and the SPS Agreements	430
	28.2.5 The WTO Committee on Trade and Environment	432
	28.2.6 The Relationship between WTO Agreements and MEAs	433
	28.3 Trade Issues beyond the WTO	435

28.4 International Financial Institutions	437
28.5 Conclusions	437
VII Perspectives	439
Current State of Global Environmental Co-operation	439
Reasons for Deficient Environmental Co-operation	440
North–South Dichotomy	440
Current Challenges and Trends in Global Environmental Co-operation	441
Ensuring More Effective Treaty Compliance	443
Ways and Means to Enhance International Environmental Law	444
<i>Index</i>	447