



International law and sustainable development
past achievements and future challenges

edited by Alan Boyle and David Freestone.

INTERNATIONAL LAW AND
SUSTAINABLE DEVELOPMENT

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ALAN BOYLE

and

DAVID FREESTONE

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This book has been written by friends and colleagues of Patricia Birnie in
appreciation of her contribution to the understanding and development of
international law relating to the protection of the environment and the
sustainable development of ocean resources.

Foreword

Pat Birnie commands respect and affection in equal measure. All who know her admire her extraordinary knowledge, as broad as it is deep, of the law of the sea and environmental law. And everyone who has ever worked with her, or been taught by her, has rapidly come to appreciate her capacity to inspire students and colleagues alike, her cheerful disposition and her ready willingness to assist in so many ways. Whether asked to launch new courses, take additional classes, mark papers, step in for absent colleagues, or assist struggling students, Pat Birnie has invariably said 'Yes'. The affection in which she is held is tinged with not a little gratitude for kindnesses rendered. She is the least pompous of international lawyers. Her anecdotes of events at conferences she has attended, or missions she has participated in, remind us that international law—and international lawyers—can sometimes be very strange.

For over a decade Pat Birnie and I were colleagues at the London School of Economics. During that time I taught an LL.M course on the International Law of Natural Resources, while Pat Birnie taught LL.M courses on the Law of the Sea and Environmental Law. Certain topics could have fallen into one course or the other. We decided that fish, though indeed a natural resource, should come within the Law of the Sea course; and that the environmental aspects of the seas should also fall within Pat Birnie's courses. But decommissioning of oil rigs—including the environmental aspects therefore—came within my Natural Resources course. And water as a natural resource fell also within my course, which thus encompassed the law of international watercourses. These were, of course, essentially arbitrary divisions, whose artificiality in the real world of international law scarcely requires notice.

Everyone contributing to this volume knows intimately the many qualities of Pat Birnie. We all hope this study will serve both as a personal expression of our appreciation to a friend and colleague and as a contribution to a field of law that she has herself done so much to develop and clarify.

ROSALYN HIGGINS
The Peace Palace
The Hague
28 April 1999

Preface

In a diminishing world, sustainable development is an obviously sensible concept. Like most such concepts, it is easier to extol its virtues than to define what it is. For the lawyer, this may be less significant than for the policy-maker or politician, but the implications of the concept are nevertheless extensive. In this volume, the contributors are all lawyers, some in practice as judges, international civil servants, or advocates, others as academic teachers of law. Written by friends and colleagues of Patricia Birnie in appreciation of her own influential and remarkable work over three decades, the essays collected here explore how the endorsement of sustainable development at the 1992 Rio Conference on Environment and Development has influenced and changed international law and the work of international institutions in the period since then, and whether the concept itself can be regarded in any useful sense as a legal principle. In most cases the contributors can speak on these questions with the authority of personal involvement. The first five chapters deal with the concept itself, its legal status and relationship to other aspects of international law, and its reception by courts and bodies charged with the codification and development of international law. The second part focuses specifically on how sustainable development has affected the law relating to marine resources and the marine environment, identifying in particular the revolution in international fisheries law as perhaps the most radical change to result from this new perspective. No other topic illustrates quite so well the reforming influence on *existing* law that sustainable development has already exercised. These essays are not a comprehensive treatment of the law relating to sustainable development in all its multifarious aspects, but the editors hope that their selection of topics will illuminate the emergence of a new concept and pose some of the more challenging questions to which international lawyers need answers.

The editors would like to thank Caroline Boyle and Cynthia Fairweather for their indispensable editorial assistance in preparing the manuscript and John Louth and Michael Belson at OUP for their support and encouragement. What began as a birthday present from the editors to a good friend would never have seen the light of day without the enthusiastic response of the contributors, and it is to them above all that we owe our thanks. As a birthday gift this one has been slow in delivery, but it has acquired much warmth on the way.

ALAN BOYLE
Edinburgh
21 March 1999

DAVID FREESTONE
Washington
21 March 1999

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1992	Vina del Mar Agreement on Port State Control in the Latin American Region	333, 336
1993	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas	165, 167, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 185, 186, 187, 188, 189, 190, 191, 195, 199, 203, 205, 221, 359, 360
1993	Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment	78
1993	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction	59, 333, 336
1993	Tokyo Memorandum of Understanding for the Asia-Pacific Area	333
1993	Ministerial Declaration on the Protection of the Black Sea .	139, 300
1993	Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights	11, 13, 42
1994	Agreement Establishing the World Trade Organization	44
1994	The Final Act and Agreement Establishing the World Trade Organization	52, 168, 170
1994	Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea	151, 157

1994	Convention to Combat Desertification	10, 359
1994	Instrument for the Establishment of a Restructured Global Environmental Facility	360, 361, 362
1994	International Topical Timber Agreement	9
1994	Nuclear Safety Convention	77
1995	Agreement for the Implementation of Provisions of the United Nations Convention on the Law of the Sea of 10 December 1992 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.	7, 8, 9, 120, 122, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 138, 142, 146, 149, 154, 155, 156, 157, 160, 161, 162, 163, 164, 165, 166, 167, 170, 172, 173, 174, 175, 176, 177, 178, 180, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 199, 200, 202, 205, 212, 213, 220, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 275, 338, 339, 340, 341, 342, 359, 360
1995	Code of Conduct for Responsible Fisheries.	165, 166, 168, 169, 170, 171, 174, 176, 177, 178, 195, 200, 201, 202, 341
1995	Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel	332, 336
1995	EC Directive 95/21 Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Preventive and Shipboard Living and Working Conditions (Port State Control).	293, 336
1995	Global Programme of Action for the Protection of the Marine Environment from Land-based Activities.	5, 275, 284, 285, 307, 308, 309, 310, 311, 313, 315, 323, 360
1995	Washington Declaration on the Protection of the Marine Environment from Land-based Activities	5, 10, 284, 307, 310
1995	World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures.	40, 41, 49, 57
1996	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area	226, 228, 230, 231, 244, 245, 246, 247, 248, 249, 250, 251, 252
1996	Barbados Memorandum of Understanding for the Caribbean States on Port State Control	333, 336

1996	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea	346, 353, 354, 355, 357
1996	International Convention on the Conservation of Atlantic Tuna	194, 221
1996	Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters	257, 289, 290, 310
1997	Convention on Non-Navigational Uses of International Watercourses	7, 9, 72, 80, 315, 333, 336
1997	Malta Memorandum of Understanding on Port State Control for the Mediterranean	333
1997	Kyoto Protocol to the United Nations Framework Convention on Climate Change	142, 222, 361, 363
1997	Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage	77
1998	Agreement on the International Dolphin Conservation Program	202
1998	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters	16, 79
1998	Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	359
1998	Declaration on Inter-regional Action to Eliminate Sub-standard Shipping	333
1998	Statute of the International Criminal Court	72

List of Abbreviations

Accobams	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area
AFDI	<i>Annuaire Français de Droit International</i>
AJIL	<i>American Journal of International Law</i>
Ann. Rev. Ecol. Syst.	<i>Annual Review of Ecological Systems</i>
Ascobans	Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas
AYbIL	<i>African Yearbook of International Law</i>
BCICLR	<i>Boston College International and Comparative Law Review</i>
BYbIL	<i>British Yearbook of International Law</i>
Canterbury LR	<i>Canterbury Law Review</i>
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CJIELP	<i>Colorado Journal of International Environmental Law and Policy</i>
CLB	<i>Commonwealth Law Bulletin</i>
CYbIL	<i>Canadian Yearbook of International Law</i>
dis. op.	Dissenting Opinion
DLR (AD)	<i>Dominion Law Reports (Appellate Division)</i>
ECHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRR	<i>European Human Rights Reports</i>
EJIL	<i>European Journal of International Law</i>
ELQ	<i>Ecology Law Quarterly</i>
EPL	<i>Environmental Policy and Law</i>
ERM	<i>Espaces et ressources maritimes</i>
FAO	Food and Agriculture Organization
GEF	Global Environmental Facility
GIELR	<i>Georgetown International Environmental Law Review</i>
GLR	<i>Georgia Law Review</i>
Harv. Human Rights Yb	<i>Harvard Human Rights Yearbook</i>
HILJ	<i>Harvard International Law Journal</i>
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
IDI	<i>Institut de Droit International</i>

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IJMCL	<i>International Journal of Marine and Coastal Law</i>
ILA	International Law Association
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
IUCN	International Union for Conservation of Nature
JAIL	<i>Japanese Annual of International Law</i>
JEL	<i>Journal of Environmental Law</i>
JILP	<i>Journal of International Law and Politics</i>
JMLC	<i>Journal of Maritime Law and Commerce</i>
KJIL	<i>Korean Journal of International Law</i>
LOSB	<i>Law of the Sea Bulletin</i>
MJIL	<i>Michigan Journal of International Law</i>
MPB	<i>Marine Pollution Bulletin</i>
MULR	<i>Melbourne University Law Review</i>
NRL	<i>Natural Resource Journal</i>
NSFR	<i>North Sea Forum Report</i>
NYbIL	<i>Netherlands Yearbook of International Law</i>
OCM	<i>Ocean and Coastal Management</i>
ODIL	<i>Ocean Development and International Law</i>
OJEC	<i>Official Journal of the European Communities</i>
PCIJ	Permanent Court of International Justice
Proc. ASIL	<i>Proceedings of the American Society of International Law</i>
Proc. LOSI	<i>Proceedings of the Law of the Sea Institute</i>
RDI	<i>Rivista di diritto internazionale</i>
REDI	<i>Revista española de derecho internacional</i>
Rept.	Report
Res.	Resolution
RGDIP	<i>Revue Générale de Droit International Publique</i>
SDLR	<i>San Diego Law Review</i>
sep. op.	Separate Opinion
UKTS	United Kingdom Treaty Series
ULR	<i>Uniform Law Review</i>
UMLR	<i>University of Miami Law Review</i>
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Commission
UNTS	<i>United Nations Treaty Series</i>
UTLR	<i>University of Tasmania Law Review</i>

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VJIL

Virginia Journal of International Law

WCED

World Commission on Environment and Development

WILJ

Wisconsin International Law Journal

WTO

World Trade Organization

YbIEL

Yearbook of International Environmental Law

YbILC

Yearbook of the ILC

YJHRD

Yale Journal of Human Rights and Development

ZAORV

Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht

1

Introduction

ALAN BOYLE AND DAVID FREESTONE

1. INTRODUCTION

Over the last quarter of a century two new and complementary themes have had considerable impact on the development of contemporary international law—environmental protection and sustainable development. Their significance is not simply phenomenological, although they are important in that respect. More fundamentally, they pose some of the most interesting challenges to international law-making, while also offering innovative solutions to some of the systemic problems of the international legal order. Many of these challenges and solutions are addressed in the chapters of this volume. They vary from the development of new concepts and new juridical principles, to the adaptation of traditional institutions and concepts to the needs of the twenty-first century.

As the UN General Assembly recognized in 1982 in the World Charter for Nature, terrestrial and marine ecosystems are quite literally 'life-support systems'.¹ The exploration of the celestial bodies as well as research on the history of climate changes reinforces the now obvious point that the very continuation of human life on the planet depends on the continued existence of its physical and biological systems within a relatively narrow range of parameters. These conditions include not only the maintenance of productive ecosystems but also the continued existence of the ozone layer and climate system. Others have pointed out that these global environmental concerns have changed our perceptions of the nature of sovereignty as much as they have changed our views of the vulnerability of our planet.² Rapid advances in science and technology may have given us the internal combustion engine, air-conditioning, and space travel, as well as unparalleled advances in medicine, but not without cost. The hole in the ozone layer, land degradation, marine pollution, and probably (or perhaps possibly) global climate change are the prices that we have paid and may still have to pay.

¹ This term was popularized by its use in the 1982 World Charter for Nature, UNGA Res. 37/7 (XXXVII), 22 *ILM* 455 (1983).

² Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *YbIEL* 3, at 32.