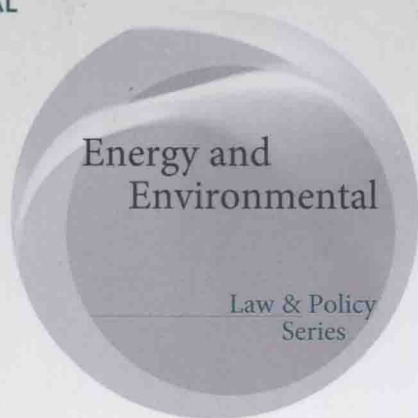


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The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements

Regulatory and Policy Aspects

by Tuula Honkonen



Wolters Kluwer
Law & Business

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**The Common but Differentiated Responsibility
Principle in Multilateral Environmental
Agreements**

Energy and Environmental Law & Policy Series
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The aim of the Editor and the Editorial Board of this series is to publish works of excellent quality that focus on the study of energy and environmental law and policy.

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- to increase the access to environmental and energy information for students, academics, non-governmental organizations, government institutions, and business;
- to facilitate cooperation between academic and non-academic communities in the field of energy and environmental law and policy throughout the world.

Preface

My interest in international environmental law dates from my first year as a law student. The introductory course to the subject opened a whole new world to me and has led me this far. One of the most attractive things about international environmental law is that it is not only about the creation and interpretation of legal rules but largely about state behaviour and the various motives behind the scenes. This also forms the great challenge for any international environmental law scholar.

The process of doing research and writing this book, which originally served as a doctoral thesis, has been a rewarding experience. It has been a rather solitary effort since, as an independent researcher and remote-worker, I have unfortunately not been able to benefit from the stimulating environment of like-minded colleagues while conducting my research. Consequently, discussions with and comments received from fellow researchers and other academics during various meetings, seminars and conferences have been really precious to me. The encouragement conveyed through these interactions strengthened my faith in that what I was doing is worthwhile.

On this occasion, I would like to thank the supervisors of my work, Professor and custos Tuomas Kuokkanen and Professor Tapio Määttä for their encouragement in the course of my research work, and for the ideas and comments received during the process. My colleagues at the University of Joensuu deserve many thanks as well for providing useful and thought-provoking comments along the way. I also want to thank the pre-examiners of my doctoral thesis, Professors Marc Pallemmaerts (who also kindly acted as an opponent) and Timo Koivurova for valuable comments at the final stage. The responsibility for remaining mistakes naturally rests on the author.

For financial support, I would like to thank the Finnish Cultural Foundation and Emil Aaltonen Foundation. I am grateful to Paul W. Harrison for checking my English.

Finally, my heartiest thanks go to my family: my husband Niko, my parents Martti and Inkeri and my sister Hanna. I am deeply grateful for their encouragement and continuous support. This book is dedicated to them.

Tuula Honkonen
Tampere, May 2009

Abbreviations

AOSIS	Alliance of Small Island States
CBD	Convention on Biological Diversity
CBDR	Common but Differentiated Responsibility
CDM	Clean Development Mechanism
CEIT	Country with Economy in Transition
CER	Certified Emission Reduction
CFC	Chlorofluorocarbon
CITES	Convention on International Trade of Endangered Species
CO ₂	Carbon Dioxide
CSD	(UN) Commission on Sustainable Development
EC	European Community
ERU	Emission Reduction Unit
ET	Emissions Trading
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
G77	Group of 77
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross National Product
GEF	Global Environment Facility
GHG	Greenhouse Gas
GSP	Generalized System of Preferences
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IFAD	International Fund for Agricultural Development
ILA	International Law Association
ILC	International Law Commission

ILM	International Legal Materials
ILO	International Labour Organization
INC	Inter-governmental Negotiation Committee
IPCC	International Panel on Climate Change
JI	Joint Implementation
LDC	Least-Developed Country
LDF	Least-Developed Countries Fund
LRTAP	Long-Range Transboundary Air Pollution
MEA	Multilateral Environmental Agreement
MFN	Most-Favoured-Nation
MLF	(Montreal Protocol) Multilateral Fund
NGO	Non-governmental Organization
NIC	Newly Industrialized Country
NIEO	New International Economic Order
ODS	Ozone-Depleting Substances
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal
OPEC	Organization of the Petroleum Exporting Countries
POP	Persistent Organic Pollutant
PPP	Polluter Pays Principle
R&D	Research and Development
RAF	Resource Allocation Framework
RIDC	Rapidly Industrializing Developing Country
SCCF	Special Climate Change Fund
SDT	Special and Preferential Treatment
SPS	(Agreement on) Sanitary and Phytosanitary Measures
TBT	(Agreement on) Technical Barriers to Trade
TOMA	Tropospheric Ozone Management Area
TRIMs	(Agreement on) Trade-Related Investment Measures
TRIPS	Treaty on Intellectual Property Rights
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UN-OHRLLS	United Nations Office of the High Representative for the Least-Developed Countries and Small Island Developing States
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series

US	United States
VOC	Volatile Organic Compound
WMO	World Meteorological Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

1. Stephen J. Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-makers towards the Environment*, 2009 (ISBN 978-90-411-2815-7).
2. Helle Tegner Anker, Birgitte Egelund Olsen & Anita Rønne (eds), *Legal Systems and Wind Energy: A Comparative Perspective*, 2009 (ISBN 978-90-411-2831-7).
3. David Langlet, *Prior Informed Consent and Hazardous Trade: Regulating Trade in Hazardous Goods at the Intersection of Sovereignty, Free Trade and Environmental Protection*, 2009 (ISBN 978-90-411-2821-8).
4. Louis J. Kotzé and Alexander R. Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, 2009 (ISBN 978-90-411-2708-2).
5. Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects*, 2009 (ISBN 978-90-411-3153-9).

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