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Environmental Law and Sustainability after Rio

The IUCN Academy of Environmental Law Series

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Contents

List of contributors vii
Acknowledgements xiii

1. Introduction: environmental law and sustainability after Rio 1
Jamie Benidickson, Ben Boer, Antonio Herman Benjamin and Karen Morrow

PART ONE HISTORY, PRINCIPLES AND CONCEPTS OF SUSTAINABILITY

2. Reflecting on Rio: environmental law in the coming decades 9
Nicholas A. Robinson
3. Capacity building in environmental law in African universities 31
Charles Odidi Okidi
4. Local Agenda 21: a rights-based approach to local environmental governance 47
Anél du Plessis
5. Brazilian 'socioambientalismo' and environmental justice 66
Fernanda de Salles Cavedon and Ricardo Stanziola Vieira
6. Risk society and the precautionary principle 84
Miriam Alfie Cohen and Adrián de Garay Sánchez
7. Measuring the environment through public procurement 101
Nicola Lugaresi

PART TWO ENVIRONMENTAL RIGHTS, ACCESS TO JUSTICE AND LIABILITY ISSUES

8. A sustainable and equitable legal order 119
Werner Scholtz
9. The courts and public participation in environmental decision-making 138
Karen Morrow
10. Enhanced access to environmental justice in Kenya 158
Robert Kibugi

11. Towards a new theory of environmental liability without proof of damage 178
José Juan González
12. Diffuse damages in environmental torts in Brazil 196
Arlindo Daibert

PART THREE NATURAL RESOURCES AND SUSTAINABILITY

13. Transboundary aquifers: towards substantive and process reform in treaty-making 217
Joseph W. Dellapenna and Flavia Rocha Loures
14. Achieving sustainability: plant breeders' and farmers' rights 235
Mekete Bekele Tekle

PART FOUR ENERGY, CLIMATE CHANGE AND SUSTAINABILITY

15. International law and sustainable energy: a portrait of failure 257
David Hodas
16. Cross-border gas pipelines and sustainability in southern Africa 279
Willemien du Plessis
17. Is EU climate change policy legally robust? 297
Javier de Cendra de Larragán
18. Combating climate change in Uganda 318
Emmanuel Kasimbazi

PART FIVE NATURE CONSERVATION AND SUSTAINABILITY

19. Contractual tools for implementing the CBD in South Africa 341
Alexander Paterson
20. Mangrove swamps and sustainability 367
Marcelo Nogueira Camargos and Solange Teles da Silva
21. The Amazonian Treaty and harmonisation of environmental legislation 377
José Augusto Fontoura Costa, Solange Teles da Silva and Fernanda Sola

Index 395

1. Introduction: environmental law and sustainability after Rio

Jamie Benidickson, Ben Boer, Antonio Herman Benjamin and Karen Morrow

The fields of environmental and sustainability law, despite strong historical roots and antecedents, are by no means fully elaborated and mature fields of scholarship and professional practice. It is possible, nonetheless, to identify landmarks or milestones in their development and to reflect upon the significance of what has been put in place. The 1992 United Nations Conference on Environment and Development in Rio de Janeiro, commonly referred to as the Earth Summit, and the adoption of Agenda 21 and the Rio Declaration on Environment and Development clearly represent one such landmark.

It is appropriate, particularly in the field of environmental law, both to commemorate past achievements as well as to take a realistic view of their shortcomings. In recognising achievements, we are able to celebrate and express appreciation for the very significant accomplishments of an earlier generation of researchers, advocates, negotiators and practitioners. The success of their efforts to safeguard the environment gives us hope, an outlook that is not always in good supply. On the other hand, the process of assessment necessarily invites reflection on the shortcomings and limitations of our current situation and encourages a salutary reminder that much remains to be done to secure the foundations of environmental protection and sustainability on a global, national and local basis.

The fifteenth anniversary in 2007 of the Rio conference provided a sufficient temporal perspective to attempt the undertaking of an assessment of progress in environmental law in the realm of sustainability. The Brazilian organisers of the Fifth Annual Colloquium of the IUCN Academy of Environmental Law thus invited participants from the Academy's member institutions as well as the broader global university community to convene in Rio de Janeiro and in the heritage town of Parati for presentations and debates under the general theme 'Rio + 15: A Legal Critique of Ecologically Sustainable Development'. This book contains selected papers from that

significant colloquium, and forms part of the continuing series of IUCN Academy of Environmental Law colloquium proceedings. Each of the contributions has been updated by their authors where necessary to take account of subsequent developments. We have chosen to name the book *Environmental Law and Sustainability after Rio*, to urge the more expansive notion of 'sustainability' that has become prevalent after the 2002 Johannesburg World Summit on Sustainable Development, encompassing the three pillars of environmental, economic and social development, as well as Goal 7 of the United Nations Millennium Development Goals, which is directed to ensuring environmental sustainability.

While a great deal has been achieved in the field of environmental law since the 1990s, the extraordinary environmental crises facing humanity in the 21st century indicate a continuing urgent need for the generation of robust policies and frameworks concerning ecological, social/cultural and economic sustainability. This book identifies a variety of ways in which such sustainability can be progressed and implemented at global, national and local levels through appropriately innovative legal mechanisms.

The volume is divided into five sub-themes. In the first part, the history, principles and concepts associated with sustainability are canvassed. Nicholas Robinson of Pace University School of Law, who presented the colloquium's distinguished lectures, is one of the pioneers of environmental law in the United States and globally. He dedicates his colloquium contribution to Professor Oleg Stepanovich Kolbasov of Russia (1927–2000). In doing so, he celebrates their joint contributions to the development of environmental law over many difficult years of the Cold War, and emphasises how international collaboration in passionate and applied scholarship contributes to the vitality of the discipline. Professor Robinson's broad-ranging historical analysis and contemporary diagnosis concludes that 'the realization of environmental norms is found in the context of compliance procedures and decisions, as well as the recognition that a community's environmental rights are as important as an individual's human rights', and that 'environmental law can induce or force design of new technologies, and can save us from our proclivity to excess'. His inspired essay emphasises the important responsibility that environmental lawyers have to build a more robust and resilient environmental law.

Charles Okidi's review of capacity building in environmental law in African universities traces the evolution of the field of environmental law over a 40-year period, emphasising the significant role of universities, particularly in terms of expanding the range of environmental law subjects, the publication of specialised journals and the formation and role of the Association of Environmental Law Lecturers of African Universities.

Anél du Plessis canvasses an important theme of the Rio Conference, analysing developments in relation to Local Agenda 21s. She argues that the use of a rights-based approach by municipalities to local environmental governance may contribute to a more enforceable and hence more effective Local Agenda 21 regime. She concludes that the domestic implementation of international environmental soft law deserves greater attention, and that encouraging local government compliance with these norms will contribute to more sustainable human environments at the local level.

The Brazilian experience with the innovative 'socioambientalismo' concept and its significance for sustainability law is the subject of analysis in the chapter by Fernando de Salles Cavedon and Ricardo Stanziola Vieira. They urge the use of this concept as a paradigm for constructing and consolidating a body of domestic and international environmental law capable of promoting harmonisation between socio-economic issues, environmental protection and ethnic and cultural diversity.

A sociologically oriented chapter by Miriam Alfie Cohen and Adrián de Garay Sánchez promotes the concept of the 'risk society', in which they identify the precautionary principle as the spearhead of political change at the local and global level. They argue that the idea of the risk society, taken together with the precautionary principle, should form the new basis for environmental law. They conclude that with the environmental risks that the world now faces, 'the implementation of this new environmental management paradigm cannot be delayed'.

Nicola Lugaresi's study of environmental economics in the context of public procurement decisions considers practice in this field in the European Union. He argues that '[W]hile economic analysis cannot be neglected, public powers should have the capacity to resist regulation and management derived exclusively from prevailing economic considerations'. His conclusion proposes that Principle 16 of the Rio Declaration, on the internalisation of environmental costs and the use of economic instruments, should be interpreted broadly, or rewritten, to take into account also the 'externalization of environmental advantages, in order to address environmental, economic, ethical and equity expectations'.

Part Two of the volume is devoted to philosophical and practical aspects of environmental rights, access to justice and liability issues in the context of sustainability. Werner Scholtz examines the development of the New International Economic Order first put forward in the 1970s, and argues for a 'southern' perspective on the concept of intergenerational equity. He calls for a 'continuous commitment of all states, rich and poor, to pursue a New International Sustainable Development Order which addresses the needs of the poor without depleting the means of future peoples'.

Karen Morrow focuses on issues of public participation in environmental decision-making within the courts in the United Kingdom, in the light of developments in this field in Europe. One of her main conclusions is that the third pillar of the Aarhus Convention, access to justice, is effectively rationed in the United Kingdom because of the costs of legal representation and the potential liability for unsuccessful defendants, which can lead to profound cynicism of the value of public participation.

Robert Kibugi takes a broader approach in exploring the conceptual nature of access to justice and how it is achieved through judicial institutions and in particular the Kenyan National Environment Tribunal, canvassing the expansion of locus standi through judicial and legislative action, and the use of the *suo moto* jurisdiction.

José Juan González examines recent trends in environmental liability in a number of Latin American jurisdictions and suggests an alternative approach, involving imposition of liability without proof of damage. He identifies a variety of barriers to this new paradigm, and concludes that more legislative development is required to ensure adequate restoration of the environment.

The chapter by Arlindo Daibert looks at another aspect of liability, concerning environmental torts, with Brazilian developments as his main focus. He explores the ideas of diffuse societal environmental rights and material and moral diffuse damages, arguing that these concepts require 'extending standing to sue in order to facilitate stronger societal control of actions interfering with the environment and the maintenance of sustainability'.

Part Three focuses on particular aspects of natural resources law and sustainability. Joseph Dellapenna and Flavia Loures examine treaty-making processes and reform in the context of the final shape, scope and text of the Draft Articles on the Law of Transboundary Aquifers and Aquifer Systems, in the light of the provisions of Agenda 21 and the Rio Declaration on Environment and Development. Their analysis reveals some serious faults with the Draft Articles, for which they recommend some specific practical remedies.

The rights of farmers and plant breeders are the subject of the chapter by Mekete Tekle, specifically looking at the agricultural sector in Ethiopia in the light of sustainability issues. He concludes that Ethiopia can claim to have 'a national law that balances and protects the respective rights of the communities, farmers and breeders in line with most of the international treaties and soft laws of both international and regional nature', the like of which is yet to be seen in other countries.

Part Four contains several chapters concerning energy, climate change and sustainability. David Hodas critically assesses the contribution of international law on sustainable energy in the context of the work of the

Commission on Sustainable Development, arguing that 'we must make the law sustainable-energy friendly; build the right policies in law, and sustainable energy investments will follow'. His postscript notes that '[T]ragically, as UNFCCC meetings avoid concrete discussion about how to shift to a more sustainable, low carbon world economy, international talks increasingly become disconnected from real-world policy, science and law'.

Willemien du Plessis examines the challenges of regulating cross-border gas pipelines in the context of the Rio Declaration, Agenda 21 and the 2002 Johannesburg Plan of Implementation. She questions whether in this context, the goals of the Rio Declaration, the Energy Charter, and other relevant instruments can be effectively achieved.

Javier de Cendra de Larragán incisively examines the legal foundations of climate policy in the European Union, concluding that the concept of burden sharing of liability within the Union has increased its degree of consistency with the relevant legal principles of the Union's climate change regime, and has thus contributed to its legal robustness.

Emmanuel Kasimbazi usefully surveys initiatives to combat climate change from the perspective of the developing world, using Uganda as a case study. He looks in particular at the barriers to implementing, inter alia, Clean Development Mechanism obligations under the Kyoto Protocol, concluding that Uganda's efforts under Kyoto are constrained by a number of factors, most of which are outside the legal framework.

Part Five concludes the volume, focusing on the fundamental area of nature conservation and sustainability. Alexander Paterson analyses the innovations introduced in recent years in South Africa concerning the role of contract in implementing elements of the Convention on Biological Diversity through comprehensive legislative mechanisms. He observes that 'Laws are living instruments subject to constant change' and concludes that 'a little tinkering with the formulation of the current contractual mechanisms should see them achieving the lofty ideal of co-opting the public as the future stewards of biodiversity regulation in South Africa'.

The nature of legal protection afforded to mangrove swamps and their contribution to Brazilian sustainability is the subject of detailed scrutiny by Marcelo Nogueira Camargos and Solange Teles da Silva. They set out the vital role that mangroves play in the Brazilian coastal environment and use this as a springboard for a discussion of the legal issues, as well as the importance of the Brazilian Constitution with respect to mangrove protection. They observe that land use planning and environmental zoning are important instruments for conserving mangroves, but conclude that for these provisions to be effective, the participation of all stakeholders, including traditional populations, must be ensured.

In the last chapter, José Augusto Fontoura Costa, Solange Teles da Silva and Fernanda Sola critically discuss the contribution of the Amazonian Cooperation Treaty to the harmonisation of environmental law on a regional basis. They provide an overview of Amazonian geography, highlighting the relationship between socio-diversity and biodiversity in the region. They canvass the need for a more international treatment of environmental problems in the Amazon using international regime theory. They conclude that since the present regional regime does not include dispute resolution or delegation rules, domestic law is still the main driver of environmental regulation, and that consequently the diffusion or educational role of the Treaty and its function as a political forum are its most important attributes.

In addition to the essays included in this volume, numerous papers from the 2007 colloquium have been published elsewhere, and for that reason do not appear here. As editors, we thank those authors for their contribution to the colloquium and congratulate them for their success in making the results of their scholarship more widely available through legal periodicals, books, and on-line journals.

Insofar as the Academy's Annual Colloquium provides an opportunity for the organisation's various committees to conduct business, this introduction allows us to mention several other significant achievements. An extensive discussion of a draft curriculum on Enforcement and Compliance of Multinational Environmental Agreements was held during the colloquium. This session, effectively a multilateral seminar on the challenges and opportunities of teaching international environmental law, was conducted in connection with a project carried out by the Academy in close collaboration with the United Nations Environment Programme. Special acknowledgement should be given to Carl Bruch of the Environmental Law Institute in Washington who served as lead consultant, and to principal authors Jorge Caillaux of Peru and Loretta Feris from South Africa. The resulting materials are available through UNEP and the IUCN Academy for instructional use around the world.

In addition, during the colloquium, the Academy's Research Committee confirmed the direction of another recently completed programme of legal research on climate change and developing countries. The chief result of that work is *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy*, published by Edward Elgar in 2009 under the editorship of Ben Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray and Stepan Wood.

PART ONE

History, principles and concepts of sustainability

2. Reflecting on Rio: environmental law in the coming decades

Nicholas A. Robinson*

1. INTRODUCTION

Environmental law has matured greatly since the 1972 Stockholm Conference on the Human Environment. It was given a tremendous boost by the 1992 Rio de Janeiro UN Conference on Environment and Development (UNCED, or the 'Earth Summit'). Nevertheless, the persistence of excessive natural resources exploitation and pollution underscores a sobering fact: environmental law worldwide remains unable to attain its remedial objectives. Environmental law success stories have occasionally demonstrated that the legal norms, rules and procedures can work effectively, but to be globally successful on a continuing basis these legal regimes will need to be scaled up enormously.

All nations at UNCED agreed upon Agenda 21, an action plan to promote sustainable development.[1] The urgent need for universal cooperation to formulate the recommendations of Agenda 21 had been articulated in 1987 in *Our Common Future*, the report of the UN World Commission on Environment and Development (1987). The principles of the 1992 Rio Declaration on Environment and Development[2] were reaffirmed in Johannesburg in 2002 at the UN World Summit on Sustainable Development, adding important recommendations on energy efficiency and on the alleviation of poverty.[3]

In 1987, *Our Common Future* recommended the robust elaboration of environmental law, and proposed relevant legal principles in its Annex 1. Yet even five years later, when Chapter 8 of Agenda 21 called on each nation to build up its national laws for environment and development, and in Chapters 28 and 29 called for all nations to enhance international law and organisation, Agenda 21's drafters were tepid in their support of 'environmental law' as such. In order to find consensus for the adoption of Agenda 21, the term environmental law was dropped from discussion, in deference to 'the law of environment and development', with the occasional alternative reference to

'sustainable development law', the precise meaning of which was not elaborated.[4] The financial commitments needed to build the capacity for providing a legal foundation for sustainable development were stripped from the text of Agenda 21.[5] Even when the nations met in Monterrey, Mexico,[6] to pledge the funding for implementing Agenda 21, the commitments turned out to be mostly symbolic.

In addition to Agenda 21 and the Rio Declaration, the nations that met in Rio de Janeiro in 1992 signed the UN Framework Convention on Climate Change[7] and the UN Convention on Biological Diversity,[8] both landmark multilateral environmental agreements which embraced new global environmental norms, structured the system for their legal implementation and incorporated recommendations from *Our Common Future*. It took another two years to complete negotiations for the UN Convention to Combat Desertification,[9] now referred to as one of the 'Rio Conventions'.

Notwithstanding the aspirations for realising sustainable development, the UN system is still plagued with doubts and even resistance to environmental law. Despite the work of such bodies as the Business Council for Sustainable Development (Schmidheiny, 1992) and the World Environment Center,[10] there remain governmental and business interests who oppose environmental law reforms on the supposition that they will harm or retard economic development. These perspectives have prevented the agreement of any international legally binding agreement on the stewardship of the Earth's remaining forests, or their reforestation and afforestation.[11] The United Nations Forum on Forests, convened annually each northern spring under the auspices of the UN General Assembly, has made scant progress.[12] Separate efforts to address indigenous issues and oceans policy have also fallen short. In due course, treaties will be needed to strengthen world-wide forest policy and to enlist the nations of indigenous peoples as full partners in the General Assembly in stewardship of the Earth's terrestrial and marine environment.

Similarly, although the United Nations General Assembly established the Commission on Sustainable Development (CSD) to continue the deliberations of the Rio Earth Summit and oversee the implementation of Agenda 21, states have not supported use of the CSD as the strategic body to shape concrete measures for sustainable development. Rather, the CSD has remained a place to exchange views, educate diplomats and their governments about issues, and occasionally advance some dimension of international cooperation associated with sustainable development. The CSD has not yet produced significant new agreements to advance each of the chapters of Agenda 21.

Despite the lukewarm embrace of environmental law by some governments, both national and international environmental law have continued to develop. The United Nations Environment Programme (UNEP)

has served as the catalyst for a number of important multilateral environmental agreements (Tolba and Rummel-Bulska, 2008), and has supported the national and international elaboration of environmental law systematically through its Montevideo programmes.[13] UNEP has also been engaged in capacity building for environmental lawyers through its global environmental law training programmes, and the preparation of comprehensive training manuals.[14] Despite many past positive efforts, since 2004 UNEP has been reducing its focus on the progressive development of environmental law, and has been criticised for not adequately realising synergies among the MEAs and integrating environmental programmes.[15]

At this point after the Earth Summit, we should have sufficient perspective to critically appraise what UNCED did to advance environmental law. How did it shape legal concepts of sustainability and promote the consolidation of the norms of sustainability within the paradigm of environmental law? What legal doctrines and methods need to be refined and enhanced in the coming decades if environmental law is to help all nations attain sustainability in all its aspects?

In retrospect, and on the positive side, the accomplishments of the Earth Summit itself are truly extraordinary. Agenda 21 represents a global consensus. The Earth Summit's products are concrete evidence that states can coalesce to find policy agreement in the face of serious environmental threats. They also offer lessons about the shortcomings that states encounter on follow-through and implementation.

We take the concept of 'sustainable development' for granted today, but we cannot over-estimate how difficult it was in 1987 to move nations to adopt it. The Brundtland Commission gave the idea worldwide popularity. In the lead-up to the Earth Summit, nations turned to Ambassador Tommy Koh, who had chaired the UN Conference on the Law of the Sea, to chair the preparatory committee for UNCED and the UNCED deliberations in Rio de Janeiro (Koh, 1993). His leadership was exemplary.

Agenda 21 remains a remarkable blueprint for the reforms that governments are called upon to realise through environmental law and policy. The Earth Summit was a crucial station on the way to the development of a global set of norms to inform environmental law. From the 1980s, the IUCN Environmental Law Programme had provided the leadership for adoption of the UN World Charter for Nature, and many of these concepts were embodied in the Rio Declaration, the Climate Change Convention, the Convention on Biological Diversity and other multi-lateral agreements thereafter. From the 'soft law' principles embodied in the 1972 Stockholm Declaration on the Human Environment, reflected in various provisions of the Rio Declaration on Environment and Development, a body of 'hard law' has begun to emerge internationally. The Convention on

Biological Diversity embodies as norms the conservation and sustainable use of nature, and inter-state cooperation 'for the conservation and sustainable use of biological diversity' (Arts 5 and 6). The 1992 UNFCCC embodies the duty to protect the climate system in national actions through international cooperation (Arts 3(5) and 5) and to use the precautionary principle (Art 3). The elements embodied in Rio Declaration Principle 10 on access to information, public participation and access to justice, and Principle 17 on environmental impact assessment were incorporated into the Aarhus Convention.[16] The 1994 Convention to Combat Desertification embodies norms to give priority to securing people from the deleterious impacts of desertification and drought, and to cooperate internationally (Arts 2 and 3). The 2002 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[17] and the 2001 Stockholm Convention on Persistent Organic Pollutants[18] establish the norms that states shall not expose their citizens or those in other states to hazardous chemicals without adequate protective precautions in place. Thus, over these years, the doctrine of binding international environmental law norms has become clearer. Many nations have now amended their national constitutions to establish a right to the environment as a foundation for their national environmental rules and procedures.

In addition to the increasing congruence of domestic legal norms that was encouraged by international environmental law developments, many nations adopted their own national versions of Agenda 21, to guide domestic law reforms to build sustainable development practices. Results include New Zealand's 1991 Resource Management Act, which codified much of its land use and natural resource regime around the paradigm of sustainable development,[19] and Australia's federal legislation, the Environment Protection and Biodiversity Conservation Act 1999, which incorporated the concept of ecologically sustainable development and associated principles as foundations for decision-making. Legal regimes for environmental impact assessment have been enacted throughout the world. Legal frameworks for environmental management systems exist throughout the European Union, North America and other regions. Companies worldwide have promulgated policies and practices for corporate social responsibility towards the environment, and for health and safety compliance. Many nations now have laws to curb pollution and conserve flora and fauna, although some are still in rudimentary form. Dedicated administrative systems have become standard, with environmental protection agencies functioning within the vast majority of nations.