

Institution: The University of Edinburgh

Unit of Assessment: 20 Law

Title of case study: Case Study 4: Shaping the development of international environmental law

1. Summary of the impact

A research programme led by Boyle in Edinburgh (with Birnie (LSE) and Redgwell (UCL)) pioneered the discipline of international environmental law. That work, in turn, informed the infrastructure for international environmental law in practice. Through Boyle's work as legal counsel in several high-profile international cases (2010-11), his proposed subject-paradigm has been translated from theory to legal framework. Crucially, it has been endorsed and applied by both the International Law Commission and relevant international courts, including the International Court of Justice.

2. Underpinning research

The construction of international environmental law is an exercise of modern law-making. Historically, few legal academics gave much thought to the problem of protecting the environment. Sceptics argued that the subject was 'soft' in character, lacking sufficiently widespread support to generate binding rules of general international law. They believed that relevant issues could be addressed by developing the law on responsibility for trans-boundary damage. This was also the perspective adopted by the United Nations International Law Commission (ILC) in its early work on international environmental law.

Through his collaboration with Patricia Birnie from LSE (and later, Catherine Redgwell at UCL), Boyle (appointed to Edinburgh in 1995) challenged these positions as, at best, a questionable exercise in reconceptualising an existing body of law, at worst, a retrograde step which might weaken international efforts to secure agreement on effective principles of international environmental law. Boyle was one of the primary architects of the international environmental law as it is now understood. The research was disseminated primarily through book chapters, journal articles, and three editions of a seminal book, *International Law and the Environment*. Boyle contributed 70% of all three editions of the core text, the later editions of which, in 2002 and 2009, framed the field as a legal discipline in its own right. The second edition (3.1) was significantly expanded with new research to deal with the surge of law-making in the field resulting from the major 1992 Rio Conference on Environment and Development. The third edition was published in 2009 (3.2). Chapters 3-5, in particular, were substantially rewritten to take account of burgeoning case law on trans-boundary environmental disputes and the scope of overlap with human rights law. All three chapters were written by Boyle.

Boyle's distinctive scholarship pushes the boundaries beyond existing law to ask how international environmental law actually *works* – and sometimes does not work. While other scholars proposed narrow theoretical frameworks for the development of international environmental law as a distinct subject area – for example, human rights approach, intergenerational approach, policy-oriented approach - Birnie and Boyle argued that:

1. None of these frameworks in isolation provides an adequate architecture for international environmental law, particularly against the proliferation of international environmental litigation in the last few decades.
2. International legal obligations in the environmental sphere stem from general principles of international law and not only from specific Treaty-set obligations.
3. Having started as a system of rules limited largely to liability for trans-boundary damage, resource allocation, and the resolution of conflicting uses of common spaces, international environmental law should take a preventive and precautionary approach to the protection of the environment.
4. Much greater emphasis should be placed on regulation and control of environmental nuisances by governments.

5. Less prominence should be given to liability for damage as law's main response to environmentally harmful activities.

3. References to the research

Publications

(3.1) P Birnie and A Boyle, *International Law and the Environment* (2nd edn, OUP 2002) [to be supplied by HEI on request]

(3.2) P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) [to be supplied by HEI on request]

(3.3) A Boyle 'The Role of International Human Rights Law in the Protection of the Environment' in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 43-65 [to be supplied by HEI on request]

3.4) A Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Re-visited' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Prospects* (OUP 1999) 61-86 [to be supplied by HEI on request]

(3.5) A Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3-26 [doi:[10.1093/envlaw/eqi001](https://doi.org/10.1093/envlaw/eqi001)]

4. Details of the impact

The background to impact began when the Rapporteur of the ILC enlisted Boyle's expertise on codifying elements of international environmental law. The ILC's work is generally regarded as highly authoritative by governments and international courts, and is used by lawyers and governments to influence judicial decisions. The second edition of Boyle's monograph was cited extensively in its Report of 58th session (2006) (GAOR A/61/10, pp.113ff). Critically, the ILC rethought its original findings. Its final codifications (2001 and 2006) fully reflected the paradigm advocated by Boyle's research.

As a result of Boyle's research being taken up by legal institutions his work has had an impact on law and practice during the REF2014 period because his analytical framework has been successfully channelled into the international court arena and, in turn, adopted as the paradigm for the evolving subject of international environmental law.

1. The International Court of Justice's (ICJ) judgment in *Pulp Mills* (2010) is the first decision of any international court to address the core concepts of international environmental law. It deals with the regulation of trans-boundary pollution and environmental impacts. Boyle was counsel for Uruguay and based his written pleadings and oral arguments mainly on material drawn from Chapter 3 of the (then forthcoming) 3rd edition of his book – embodying the above research findings. The ICJ judgment for Uruguay closely mirrors the analysis in that chapter. Moreover, the work is cited expressly in the separate opinion of Judge (Trindade): '...while a great part of that writing continues, somewhat hesitantly, to refer to sustainable development as a "concept", there are also those who seem today to display their preparedness and open-mindedness to admit that it has turned out to be a general principle of International Environmental Law'. [referencing Boyle and Birnie] (5.3)

2. The Advisory Opinion on the Responsibilities of States with respect to Activities in the Deep Seabed Area (International Tribunal on the Law of the Sea (ITLOS) 2011) (5.4), builds on the judgment given in the *Pulp Mills Case* (5.2), and again confirms the analysis advanced by Boyle in Chapter 3 of the 2009 edition of *International Law and the Environment*.

The key findings of each court that support both the general international law nature and preventative/precautionary themes of Boyle's analysis are:

i. The ICJ confirms explicitly in *Pulp Mills* that in international law governments must regulate and control trans-boundary pollution to the highest applicable international standards (para 187). See also ITLOS (para 111).

ii. *Pulp Mills* is the first occasion in which an international court has held that prior assessment of trans-boundary environmental impacts (EIA) is a requirement of general international law (para 204). It is also the first occasion when any international court has considered the specific requirements of an EIA.

iii. Both courts accept that governments must take a precautionary approach to environmental risk management, but this does not operate as a reversal of the burden of proof (*Pulp Mills* at para 164; ITLOS at para 131).

Confirming Boyle's pivotal role, Sir Michael Wood, Member of the International Law Commission, has said: 'The International Court of Justice in The Hague (which tends not to cite authors by name in its judgments) has largely adopted his pragmatic approach, including in its most recent judgment dealing with environmental matters, *Pulp Mills*... (2010). Likewise, Professor Boyle's writings were cited in 2009 by a number of the participants (including by me acting as Counsel for the United Kingdom) before International Tribunal for the Law of the Sea in Hamburg (established by the 1982 UN Law of the Sea Convention), in the proceedings leading up to its first ever Advisory Opinion (Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area). This seminal Advisory Opinion follows the *Pulp Mills* judgment, and thus we have the beginning of a solid case-law on the subjects such as environmental impact assessments and the precautionary principle/approach'. (5.5)

The impact is reflected in the following honour citation: 'The Jury has decided to award the 2011 Elizabeth Haub Prize for Environmental Law to Professor Alan Boyle in recognition of his exceptional accomplishments in international environmental law. In reaching its decision, the jury has noted that through his pioneering and outstanding scholarly works Professor Boyle has played an important role in structuring and theorizing this new field of international law. In addition to his great academic achievements, he has also influenced the development of international environmental law through his extensive practice as counsel in numerous significant international environmental disputes.' (5.1)

5. Sources to corroborate the impact

(5.1) Elizabeth Haub Prize Citation: <http://www.juridicum.su.se/ehp/news.html> or (<http://tinyurl.com/ombvrt8>). This confirms recognition of both the reach and significance of Boyle's research in developing international environmental law.

(5.2) *Pulp Mills* Case, *Argentina v Uruguay*, International Court of Justice (ICJ) [2010] ICJ Rep. 14 at 135 [to be supplied by HEI on request] This provides clear evidence of the adoption of the principles of the underpinning research.

(5.3) Judgment of Judge Trindade, *Pulp Mills* case: available at: <http://www.icj-cij.org/docket/files/141/16003.pdf> or (<http://tinyurl.com/qbxhctp>). Provides direct evidence of the uptake of the research within the International Court of Justice.

(5.4) The Advisory Opinion on the Responsibilities of States with respect to Activities in the Deep Seabed Area (International Tribunal on the Law of the Sea (ITLOS) (2011) 50 ILM 455: available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf or (<http://tinyurl.com/ojq5uoo>). This follows the *Pulp Mills* case and its endorsement of the principles found in the underpinning research.

(5.5) Testimonial from member of the International Law Commission of the United Nations [to be supplied by HEI on request]. Can corroborate the role of Boyle's research in influencing international institutions in developing and shaping an emerging area of international law.