



Universiteit
Leiden
The Netherlands

International law and the sustainable governance of shared natural resources: A principled approach

Sánchez Castillo, N.N.A.

Citation

Sánchez Castillo, N. N. A. (2020, October 1). *International law and the sustainable governance of shared natural resources: A principled approach*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/136858>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/136858>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/136858> holds various files of this Leiden University dissertation.

Author: Sánchez Castillo, N.N.A.

Title: International law and the sustainable governance of shared natural resources: A principled approach

Issue date: 2020-10-01

International Law and the Sustainable Governance of Shared Natural Resources

International Law and the Sustainable Governance of Shared Natural Resources

A Principled Approach

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 1 oktober 2020
klokke 10.00 uur

door

Nadia Noelia de los Angeles Sánchez Castillo

geboren te Combarbalá, Chile

in 1978

Promotores: prof. dr. N.J. Schrijver
prof. dr. E.C.P.D.C. De Brabandere

Promotiecommissie: prof. dr. M.L.P. Loenen
prof. dr. D. French (University of Lincoln, UK)
prof. dr. M.M.T.A. Brus (Rijksuniversiteit Groningen)
prof. dr. X.C. Fuentes (University of Chile, Santiago, Chile)
dr. D.A. Dam-de Jong

Omslagontwerp: Primo!Studio, Delft
Opmaak binnenwerk: Anne-Marie Krens – Tekstbeeld – Oegstgeest

© 2020 N.N.A. Sánchez Castillo-Winckels

ISBN 978 94 0282 145 1

Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voor zover het maken van reprografische verveelvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichting-pro.nl).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

To my family

Acknowledgments

It has been a privilege undertaking this doctoral research at Universiteit Leiden, an institution whose motto *Libertatis Praesidium* (Bastion of Freedom) inspires me to exercise my own freedom of spirit, thought and speech.

I am indebted to my principal supervisor Professor Nico Schrijver for encouraging me to pursue PhD studies and guiding me throughout until this dissertation was completed. Thank you for your support, advice and engagement with my doctoral research and for your flexibility and open-mindedness. It has been an honour completing my PhD under your supervision and being inspired by you.

I am grateful to my supervisor Professor Eric de Brabandere. Thank you for the time generously dedicated to help me pursue this work, for the thorough reading of my chapters, for the meticulous and constructive feedback. It has been a privilege being able to learn from your experience.

I have been fortunate to work with many outstanding individuals and organizations during my studies. My gratitude extends to the International Law Commission's Special Rapporteur on the Protection of the Atmosphere Professor Shinya Murase for welcoming me as his research assistant at the United Nations Office at Geneva. To the Chilean Ambassador to the Netherlands Professor María Teresa Infante Caffi for facilitating my participation as independent researcher part of the Chilean delegation to the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 22) in Marrakech. To esteemed scholars and legal practitioners, who have shared their knowledge and inspired me through their work. Particularly, Professor Duncan French, Professor Louis Kotzé, Professor Yongmin Bian, Dr Marcos Orellana, Dr Aline Jaeckel and Dr Linlin Sun. To the organizers of the conferences and seminars I contributed to in Nicosia, Glasgow, Rio de Janeiro and Leuven.

I would not have been able to complete my doctoral studies if not for my family's love and encouragement. I am deeply grateful to my husband Tom Winckels and our son Matthias Winckels. You are fundamental pillars of support to me. Thank you for your love, understanding and companionship during my PhD years. To my parents, Patricia Castillo and Juan Carlos Sánchez, for lifting me up during my studies providing encouragement and practical help whenever necessary. Muchas gracias por el amor y apoyo incondicional que siempre me han entregado. To my brother, Sebastián Sánchez Castillo, and his family for their love and support during this period both

virtually and in person. Muchas gracias por estar siempre conmigo. To my Dutch family, de familie Winckels, for making my PhD life in the Netherlands *gezellig*. Ik ben enorm dankbaar voor jullie liefde en steun. To my extended, family in Chile for their support and curiosity about my work. To all of them, I dedicate this dissertation.

Nadia Sánchez Castillo-Winckels
Leiden, 2020

Table of contents

LIST OF ABBREVIATIONS	XIII
INTRODUCTION	1
1 Research background and context	3
2 Problem statement	6
3 Research questions	9
4 Methodology	10
5 Outline and methodological approach per chapter	12
6 Summary table	21
7 Publication status per chapter	23
1 DIFFERENTIATING BETWEEN SOVEREIGNTY OVER EXCLUSIVE AND SHARED RESOURCES IN THE LIGHT OF FUTURE DISCUSSIONS ON THE LAW OF TRANSBOUNDARY AQUIFERS	25
1 Introduction	26
2 Sovereignty over shared resources: a controversial issue	28
2.1 Academic discussion	28
2.2 Discussions within UN organs	30
3 Sovereignty over exclusive and shared resources: different concepts	35
3.1 The nature of the resource determines applicable concept of sovereignty	35
3.1.1 Sovereignty over exclusive resources	35
3.1.2 Sovereignty over shared resources	36
3.2 Sovereignty over exclusive and shared resources has different purposes	38
3.2.1 PSNR: Strengthening political and economic self-determination	38
3.2.2 SSNR: Regulating benefit sharing and environmental protection	41
3.3 Distinguishing rights and duties regarding exclusive and shared resources	44
3.3.1 The right to freely dispose of exclusive resources	44
3.3.2 The duty to cooperate in managing shared resources	45
4 Conclusion	48
2 COMMUNITY OF INTERESTS: FURTHERING THE ECOSYSTEMS APPROACH AND THE RIGHTS OF RIPARIAN POPULATIONS	51
1 Introduction	51
2 Evolution of the principle of community of interests	56
2.1 Initial conceptualization	56

2.2 Subsequent evolution	57
3 Elements of community of interests	63
3.1 The foundation: unity of the basin	63
3.2 Common rights and duties	66
3.2.1 Right to an equitable and reasonable share	66
3.2.2 Duty to cooperate	66
3.2.3 Duty of environmental protection	68
3.3 Community of law	69
4 Community of interests furthers the ecosystems approach and the rights of riparian populations	72
4.1 From the no-harm rule to the ecosystems approach	72
4.2 Rights and duties of the basin populations	73
4.3 The interests of non-riparian states	75
5 Conclusion	76
3 WHY 'COMMON CONCERN OF HUMANKIND' SHOULD RETURN TO THE WORK OF THE INTERNATIONAL LAW COMMISSION ON THE ATMOSPHERE	79
1 Introduction	79
2 The concept of common concern of humankind	82
3 Linkage between certain air pollutants and climate change shows that atmospheric degradation is a common concern of humankind	84
4 Atmospheric degradation shares key characteristics with acknowledged issues of common concern of humankind	89
4.1 Common concern of humankind in international instruments	89
4.1.1 Issues of common concern in treaties	89
4.1.2 Issues of common concern in other international instruments	92
4.2 Key characteristics shared by issues of common concern	96
4.3 Atmospheric degradation shares the key characteristics	97
5 Conclusion	99
4 OBSERVER PARTICIPATION IN INTERNATIONAL CLIMATE CHANGE DECISION MAKING: A COMPLEMENTARY ROLE FOR HUMAN RIGHTS?	101
1 Introduction	102
2 The human rights obligation to ensure effective participation	105
2.1 The obligation to adopt measures that ensure effective opportunities to participate	106
2.2 The right to participate in public affairs encompasses international decision making	111
3 Observer participation in international UNFCCC processes	114
4 Acknowledgement that parties should comply with human rights obligations	120
5 Conclusion: possible complementary role for human rights	123

5	HOW THE SUSTAINABLE DEVELOPMENT GOALS PROMOTE A NEW CONCEPTION OF OCEAN COMMONS GOVERNANCE	125
1	Introduction	126
2	Non-binding, yet influential	129
3	Public participation	131
4	Ocean commons and sustainable development goal 14	134
4.1	Ocean Commons	134
4.2	Sustainable Development Goal 14	137
5	Public participation in ocean commons governance	138
5.1	Public Participation in Regional Fisheries Management Organizations	139
5.1.1	Role of RFMOs in governance of high seas fisheries	139
5.1.2	Public participation in RFMOs in the light of the SDGs	141
5.2	Public Participation in the International Seabed Authority	144
5.2.1	Role of the ISA in the governance of seabed minerals in the Area	144
5.2.2	Public participation in the ISA in the light of the SDGs	147
6	Conclusion	150
	CONCLUSION: PRINCIPLES FOR THE SUSTAINABLE GOVERNANCE OF SHARED NATURAL RESOURCES	153
1	Sovereignty	154
2	Community of interests	156
3	Common concern of humankind	160
4	Public participation	166
5	Sustainable development	170
6	Overarching conclusions	176
7	Concluding remarks	180
	SAMENVATTING – DUTCH SUMMARY	185
	LIST OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS	195
	LIST OF CASES	201
	SELECTED BIBLIOGRAPHY	203
	CURRICULUM VITAE	213

List of abbreviations

ABNJ	Areas beyond national jurisdiction
ACHPR	African Court on Human and People's Rights
ACHR	American Convention on Human Rights
APA	Ad Hoc Working Group on the Paris Agreement
BINGOs	Business and industry NGOs
CARU	Comisión Administradora del Río Uruguay
CBD	Convention on Biological Diversity
CCAC	Climate and Clean Air Coalition
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CCZ	Clarion-Clipperton Zone
CERDS	Charter of Economic Rights and Duties of States
CICH	Convention for the Safeguarding of the Intangible Cultural Heritage
COP	Conference of the Parties
ENGOs	Environmental NGOs
ESIA	Environmental and social impact assessments
ETF	Enhanced transparency framework
FAO	Food and Agriculture Organization of the United Nations
FMCP	Facilitative multilateral consideration of progress
FSA	Fish Stocks Agreement
GOC	Global Ocean Commission
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IAR	International assessment and review process
ICA	International consultation and analysis process
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGOs	Intergovernmental organizations
IHRL	International human rights law
ILA	International Law Association
ILC	International Law Commission
INDCs	Intended Nationally Determined Contributions
IPOs	Indigenous peoples' organizations
ISA	International Seabed Authority
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IUCN	International Union for Conservation of Nature
LGMA	Local governments and municipal authorities

LTC	Legal and Technical Commission
LTC	Legal and Technical Commission
MPGs	Modalities, procedures and guidelines
MRV	Measurement, reporting and verification framework
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NBA	Niger Basin Authority
NDC	Nationally determined contribution
NGOs	Non-governmental organizations
OHCHR	Office of the High Commissioner for Human Rights
ORASECOM	Orange-Senqu River Commission
OWG	Open Working Group
PCIJ	Permanent Court of International Justice
PM	Particulate matter
PSNR	Permanent sovereignty over natural resources
RFMOs	Regional fisheries management organizations
RINGOs	Research and independent NGOs
SADC	Southern African development community
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SDG 14	Sustainable Development Goal 14
SDGs	Sustainable Development Goals
SLCPs	Short-lived climate pollutants
SSNR	Sovereignty over shared natural resources
TER	Technical expert review
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TUNGOs	Trade union NGOs
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	UN Economic Commission for Europe
UNEP	UN Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGA	United Nations General Assembly
UNWC	Convention on the Law of Non-navigational Uses of International Watercourses
WGC	Women and gender constituency
WHO	World Health Organization
WTO	World Trade Organization
YOUNGOs	Youth NGOs