

GLOBAL ENVIRONMENTAL LAW

by
Ricardo Luis Lorenzetti
and
Pablo Lorenzetti

ENVIRONMENTAL LAW INSTITUTE
Washington, D.C.

Copyright © 2020 Environmental Law Institute
1730 M Street NW, Washington, DC 20036

Cover design by Evan Odoms.

Published April 2020.

Printed in the United States of America
ISBN 978-1-58576-223-1

Contents

About the Authors.....	xvii
Acknowledgements.....	xvii
Theme One: The Environmental Rule of Law.....	1
Chapter I: The Environmental Paradigm	1
Introduction—Utopian, Analytical, and Paradigmatic Phase	2
Part One—Nature as a Scarce Resource.....	3
I. Nature as Fragile and in Need of Protection	4
II. Nature as a Scarce Resource	4
III. Data on the Environmental Crisis	5
1. Homogeneity Makes Progress Over Diversity.....	5
2. Pollution Spreads	7
3. Imbalance Displaces Balance	10
4. Acceleration Displaces Foresight.....	11
Part Two—Conflict and False Dilemmas.....	13
I. Declaratory Consensus and Practical Dissent	13
II. Intergenerational Conflict	15
III. Intragenerational Conflict	17
IV. Equality vs. Environment.....	18
V. Development vs. Environment.....	19
VI. Irresolvable Conflicts and Polarisation.....	20
Part Three—The Environmental Paradigm.....	22
I. Need for an Environmental Paradigm.....	22
II. The Notion of System	23
III. The Notion of Collective Action	25
IV. The Anthropocentric and Geocentric Model.....	26
V. Communicability With the Principles of Nature.....	27
1. Resilience.....	28
2. Biophilia	29
3. Cooperation.....	30

- VI. Governance: Rigidity vs. Flexibility..... 30
- VII. Conflicts in the Intimate, Private, and Social Sphere..... 32
- VIII. The Economy 34
 - 1. Negative Externalities: The Company’s Relationship With Society..... 34
 - 2. Institutions: The Tragedy of the Common Goods..... 36
 - 3. Positive Externalities. New Economic Fields 38
- IX. Ethics and Values..... 39
 - 1. Values: Liberty, Equality, and Fraternity 39
 - 2. Fraternity vs. Individual Interests..... 40
- X. Conclusion..... 42
- Chapter II: The Environmental Rule of Law..... 45
 - I. Introduction: Two Facets 45
 - II. The Rule of Law Paradox 46
 - III. Fundamental Environmental Rights 47
 - IV. Access to Justice 48
 - V. Access to Information and Participation 49
 - 1. Access to Information 52
 - 2. Principle of Participation 54
 - VI. The Progressiveness of Fundamental Rights and the Regression of Environmental Law 55
 - VII. The Principle of Protection 55
 - VIII. Conclusion..... 56
- Theme Two: Environmental Law 57
- Chapter III: Legal Goods 57
 - Introduction 58
 - Part One—Environmental Legal Good 59
 - I. Collective Good Positioned in the Social Sphere 59
 - 1. Indivisibility of Benefits: The Good Cannot Be Divided Among Those Who Use It 59
 - 2. Sustainable Common Use: The Good May Be Used by All Citizens..... 59

3.	Non-Exclusion of Beneficiaries: All Individuals Have Usage Rights and Thus Cannot Be Excluded.....	60
4.	Regulatory Status: The Collective Good Is Legally Recognised.....	60
5.	Objective Classification: A Good Is Classified as Collective by a Regulatory Designation That Is Objective as Opposed to Subjective	60
6.	Diffuse or Collective Standing to Sue: These Goods Are Protected by a Broad Standing to Sue.....	61
7.	Precedence of Preventive Protection: To Protect These Goods, Prevention and Precaution Must Take Priority Over Reparation.....	61
8.	Compensation Through Patrimonies of Affectation: When There Is Redress, There Is No Compensation That Is Transferred to the Assets of an Individual, Even if They Have Locus Standi.....	62
9.	Position in the Social Sphere: These Goods Belong to the Social Protection Sphere.....	62
II.	Duties, Limits, and Typical Fundamental Rights.....	62
III.	Notion of Environment	64
Part Two—	The Environment and Actions	66
I.	Actions According to Conflicts	66
II.	The Legal Definition of Rights.....	69
1.	Outline	69
2.	Rights Over Individual Legal Goods.....	71
3.	Rights Over Common Legal Goods	72
4.	Rights Over Homogeneous Individual Interests	72
III.	Civil and Commercial Code of Argentina.....	73
Part Three—	Nature as a Subject.....	75
Chapter IV:	Principles and Directives.....	79
I.	Introduction.....	80
II.	Legal Definition of Principles and Values	80
1.	Principles	80
2.	Values	82

III.	Acceptance in Environmental Law	82
1.	International Sources	82
2.	Argentine Law	85
3.	Legal Effects	85
IV.	Description of Environmental Principles.....	86
1.	Principle of Consistency	87
a)	Enunciation and Effects	87
b)	Consistency in Terms of Procedural Rule.....	88
2.	Principle of Prevention	89
3.	Precautionary Principle	90
4.	Principle of Progressivity.....	91
5.	Principle of Responsibility	92
6.	Principle of Subsidiarity.....	93
7.	Principle of Sustainability	93
8.	Principle of Intergenerational Equity	95
9.	Principle of Solidarity.....	95
10.	Principle of Cooperation.....	96
11.	“In Dubio Pro Natura”	96
V.	Principle of Non-Regression.....	97
1.	The Regression of Environmental Law.....	97
2.	Principal Traits.....	98
3.	Principle of Progressivity.....	99
4.	Sustainable and Lasting Development	99
5.	Legal Effects	100
a)	Unjustifiably Regressive Law	101
b)	The Most Favourable Interpretation.....	101
c)	In Relation to Public Policy.....	102
Chapter V:	Principles of Prevention and Precaution	103
Introduction		104
I.	Emotional Consensus and Cognitive Dissent	107
II.	Interventionist, Preventive and Precautionary.....	109
III.	Precedents.....	110
IV.	Description	111

V. Questions.....	112
Part One—Legal Classification	113
I. Is It an Obligation or a Voluntary Option?	113
II. Are They Aimed at Civil Servants or do They Extend to Ordinary Citizens?.....	113
III. What Is Their Effect on Public Policy?.....	114
IV. What Is the Content of the Principle?.....	115
1. Constitutional Basis	115
2. Undetermined legal Description.....	115
3. Different Weighting Depending on the Goods Compromised	115
V. What Are the Premises for Application?	116
1. Threat of Serious or Irreversible Damage.....	116
2. Scientific Uncertainty.....	118
Part Two—Applying the Principle.....	120
I. It Is Case-Dependent.....	120
II. Reducing Uncertainty	121
III. Transferring the Risk of Doubt.....	121
IV. Transferring the Risk of Scientific Error. False Positives and False Negatives.....	122
V. Transferring the Risk in Delay.....	122
VI. Transferring Probative Risk.....	122
VII. Dynamic and Adaptive Application.....	123
VIII. Transferring Development Risk.....	123
IX. Equity and Non-Discrimination.....	124
Part Three—The Balance Between Risk And Benefit.....	125
I. Admissibility of the Risk-Benefit Balance.....	125
II. The Status of Non-Evaluative Procedural Technique	125
III. The Non-Emotional Analytical Method	125
IV. The Procedure	126
1. Identify Probability Margins	126
2. There Must Be an Evaluation of The Relative Benefits for the Relevant Parties	127

3.	There Must Be an Examination of the Comparative Costs of the Various Alternatives	127
4.	Previous Experiences Must Be Assessed to Ensure Consistency of Action	128
5.	Step-by-Step Experimentation	128
6.	Intra- and Intergenerational Comparisons	128
V.	Public Control	129
1.	The Process of Moral Deliberation	129
2.	The Crisis in Decision-Making Processes	130
3.	Intensive Democracy	130
VI.	Risk Control and Management	131
Part Four—	Paradigm Shifts	133
I.	Legal Security	134
II.	From Reparation to Anticipation	134
III.	The Anchor Paradigm	135
Chapter VI:	The Environmental Function	137
I.	Introduction	137
II.	Harmonisation Between Individual and Collective Rights	139
1.	Framing the Conflict	139
2.	Reconciliation Rules in the Argentine Civil and Commercial Code	141
III.	Private Property	143
1.	Original Ethos	143
2.	Some Branches	144
IV.	The Contract	145
1.	Protecting Free Will and Individual Freedoms	145
2.	Influence of Public Policy and the Theory of Fundamental Rights in Contract Law	147
3.	Environmental Function of the Contract	149
V.	Sustainable Consumption	151
1.	Framing the Conflict	151
2.	Some Declarations	153

Chapter VII: The Regulation of Water and the Landscape	157
Part One—The Regulation of Water	159
I. Introduction.....	159
II. What <i>Was</i> Water for the Law?	160
1. The Ownership and Anthropocentric Model.....	160
2. Thing Liable to Appropriation: Res Commercium ..	160
3. Limits to Appropriation	161
4. Desacralisation of Water	161
5. The Environmental Issue Focused on Human Public Health.....	162
6. Independent Public and Private Spheres.....	163
7. Protected Legal Good	163
8. Types of Norms: Predominance of the Subjective Right	163
9. Legal Sources	164
III. What <i>Is</i> Water for the Law?.....	164
1. Awareness That Water Is a Scarce Resource	164
2. The Focus Shifts to Usage	164
3. The Imposition of Limits on Industrial Development and the Ownership Model	166
4. Regulatory Sources.....	167
a) Constitution.....	167
b) Special Legislation.....	167
5. Type of Norms	168
6. Protected Legal Good	168
IV. What Will Happen?.....	168
1. Water as an Issue That Generates Legal Adjudication Models.....	168
2. Allocation Through the Market	170
a) Analogy Between Land and Water	170
b) Criticism of Socialism Over Land and Water....	170
3. The Water Ownership Rights Model	171
4. Individual Freedom and Ownership Must Be Respected.....	171

5. Criticism.....	172
6. Water as a Collective Good in the Social Sphere....	172
7. Water as a Good Belonging to the Social or Collective Sphere	172
8. Replacement of the Anthropocentric Model.....	173
9. Logical Hierarchy in the Clash of Rights.....	173
10. Environmental Function of Property Rights.....	174
11. Fundamental Right to Access Drinking Water	174
12. Protected Goods and Types of Norm.....	174
Part Two—The Atuel River Case.....	175
I. The Atuel River: An Introduction to the Case	175
II. The Claim Brought by La Pampa in 2014 That Gives Rise to This Ruling.....	177
III. The Absolute Jurisdiction of the Court	178
IV. Rejection of the Double Jeopardy Principle	178
V. The Human Right to Access Drinking Water	179
VI. The Fight Against Desertification in the Region.....	179
VII. The Holistic View of the River Basin.....	180
VIII. The Interprovincial Committee for the Lower Atuel (CIAI).....	180
IX. Conclusion.....	181
Part Three—Brasilia Declaration of Judges on Water Justice (Declaration Comprising 10 Principles).....	182
Part Four—The Landscape: A Challenge in the Legal Theory of Environmental Law	187
I. Reasons for Its Legal Relevance. Vulnerability of the Landscape.....	188
II. The First Regulatory Approaches	188
1. Neighbourly Relations.....	188
2. Preservation of Historical and Cultural Urban Heritage.....	189
III. Legal Definitions of Landscape.....	189
1. General Approximations.....	189
2. Natural and Cultural Good.....	190

3.	It Is an Environmental Sub-System of a Relational Nature	191
4.	Landscape, Environment, and Biodiversity	191
5.	Delimiting the Landscape: Spatial-Temporal Difficulties	191
6.	Landscape and Heritage	192
7.	Subjective and Objective Dimension: Social Concept of Landscape	193
8.	Conclusions	193
IV.	Case Law	194
1.	Aesthetic Values of a Park. Failure of the State to Provide Protection	194
2.	Construction of a Pelota Court That Blights the Neighbourhood	195
3.	Construction of a Tower That Affects the Appearance of a Historic Monument	196
4.	Works That Impact on Historical and Cultural Memory	196
5.	The Wall That Impedes the View of the Sea	197
6.	Work That Reduces the Value of Property by Affecting the View of the River	198
7.	Overhead Power Cables That Affect the Mountain Landscape	198
8.	From the Case Law of Oaxaca de Juárez, Mexico. Refusal of a Request for Permission to Build a Fast-Food Restaurant in a Historic Cultural Centre	199
9.	Demolition of a Historic House in the Flores District	206
10.	Provincial Superior Court of Justice (STJ) Judgements	207
	Theme Three: Implementing Environmental Law	211
	Chapter VIII: Voluntary Implementation	211
I.	Introduction	212
II.	Implementation Theory	212

- 1. Voluntary Compliance 212
- 2. Enforcement 213
- 3. Deterrence 214
- III. The Problem of Inefficacy 214
 - 1. Declaratory Legislation 215
 - 2. Collective Goods..... 216
- IV. Voluntary Compliance 217
 - 1. Institutional Context: Confidence and Transaction Costs 217
 - 2. Building Social Capital 219
 - 3. Principles of Good Governance..... 220
 - 4. Market Regulation 220
- V. Compliance Programmes..... 221
 - 1. Establishment of Intermediate and Final Objectives 222
 - 2. “Command-Control” Techniques..... 222
 - 3. Cultural Incentives..... 223
 - 4. Measuring Success..... 223
 - 5. Identification of Subjects Mandated by the Regulation 223
 - 6. Identification of Complementary Roles..... 223
 - 7. Compliance Monitoring by a Clearly Identified Authority 224
 - 8. Precise Definition of Powers for Applying Penalties..... 225
- VI. Conclusion..... 225
- Chapter IX: The Civil Liability System for Environmental Damage 227
 - I. Introduction..... 227
 - 1. New Frontiers in Civil Liability..... 228
 - 2. Multifunctionality of the System..... 229
 - II. Preventive Function 231
 - 1. General Duty to Prevent Damage 231
 - 2. Preventive Action 232

III.	Remedial Function.....	235
1.	Restoration. Remedying Environmental Damage.....	235
2.	Quantification of Collective Environmental Damage	236
IV.	Punitive Function or Dissuasive Pecuniary Penalty	239
1.	Purpose and Objectives of the Concept	239
2.	Assumptions and Admissibility Requirements.....	241
V.	Precautionary Function	243
1.	Bases.....	243
2.	Effects on the General Civil Liability System	245
Chapter X:	Civil Liability Assumptions	247
I.	Introduction.....	247
II.	Damage	248
1.	Concept and Type.....	248
2.	Specific Characteristics of Environmental Damage..	250
III.	Unlawfulness.....	251
1.	Expanding the Boundaries of Unlawfulness.....	251
2.	Restrictive Interpretation of Justification.....	254
IV.	Causal Link	257
1.	Notion and Specificities.....	257
2.	Proving a Causal Link	260
V.	Attribution Factors.....	262
1.	Concept and Specificities	262
2.	Restrictive Interpretation of Exemptions	263
3.	Cases of Joint and Several Liability	265
VI.	State Civil Liability for Environmental Damage	267
Chapter XI:	Environmental Class Actions.....	275
I.	Conflict and Proceedings	275
II.	Polycentric Proceedings	276
III.	Legal Standing	279
1.	The Notion of “Affected Party”	279
2.	Public Legal Standing: The Ombudsman and Prosecutors.....	282

- 3. Civil Society: Associations..... 283
- 4. The Notion of Collective Good in Relation to Legal Standing and Competence 284
- Chapter XII: The Judgement 289
- Part One—Characteristics of the Collective Judgement 289
- I. The Judgement on Individual Homogeneous Interests .. 291
- 1. Expansive Effects of the Judgement 291
- a) Judgement in favour of the claim 292
- b) Judgement rejecting the claim..... 292
- c) Judgement rejecting the claim due to lack of evidence..... 292
- d) Res judicata in environmental matters 292
- 2. Multiple Proceedings and Lis Pendens 293
- II. The Judgement on Collective Goods 296
- Part Two—Atypical Judgements 296
- I. Distinction Between a Declaratory Judgement and an Enforced Judgement..... 296
- 1. Declaratory Judgement..... 297
- 2. Enforced Judgement..... 298
- II. Exhortations..... 298
- III. Interim Mandatory Injunction and Interim Prohibitory Injunction 299
- IV. Mandates Directed at Government 300
- 1. Mandate Oriented Towards a Substantive Result..... 301
- 2. Mandate Oriented Towards the Mode of Implementation..... 301
- V. Mandates Directed at Congress..... 302
- VI. Issues With Implementing Atypical Judgements 302
- 1. The Issue of Time in Implementation 302
- 2. Implementation Guarantees. Creation of a Micro-Institutionality 305
- 3. Orders Organising Implementation 306
- Part Three—The Constitutional Problem..... 307

Appendix: Relevant Judgements In Comparative Law	309
Brazil	309
India	316
Netherlands	322
United Kingdom	326
Canada	327
Pakistan	328
Inter-American Court of Human Rights	329
Kenya	334
Thailand	334
Austria	335
Colombia	336
Germany	348
Portugal	349
Philippines	350
Belgium	351
Switzerland	353
New Zealand	354
Costa Rica	355
Jamaica	359
El Salvador	360
Mexico	363
Panama	369
Peru	373
China	389
United States	392
Argentina	396

About the Authors

Ricardo Luis Lorenzetti is Justice of the Supreme Court of Argentina, Organization of American States Goodwill Ambassador for Environmental Justice, Member of the Interim Governing Committee Global Judicial Institute on the Environment, Director of the Master on Environmental Law at the University of Buenos Aires, Member of the Advisory Committee of United Nations Environment Programme, and Member of the World Commission on Environmental Law of the International Union for the Conservation of Nature.

Pablo Lorenzetti is Professor of the Master on Environmental Law at the University of Buenos Aires and the author of various books about environmental law.

Acknowledgements

We are grateful to Justice Antonio Herman Benjamin for sharing numerous experiences as brothers on the defense of the environment for 30 years. We also thank Alejandra Rabassa for her very close collaboration and the Environmental Law Institute for giving us the chance to publish this book so that we may spread our ideas to a broader audience.