

ELGAR ADVANCED INTRODUCTIONS

Advanced Introduction to

# INTERNATIONAL ENVIRONMENTAL LAW

Ellen Hey



Elgar

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# International Environmental Law

ELLEN HEY

*Erasmus School of Law, Erasmus University Rotterdam, the Netherlands*

Elgar Advanced Introductions



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## Preface

The book in your hands has the character of a long essay that attempts to illustrate and assess where international environmental law stands at the beginning of the twenty-first century. It focuses on themes that play a role in international environmental law discourse, instead of providing a systematic overview of international environmental regimes.

The text is indebted to the work of many of my colleagues who research and write in the area of international environmental law, even if this is not reflected in the text because it lacks references to their work. I thank my colleagues who work in the area of international environmental law for their many valuable publications and much cherished opportunities for discussion. I am particularly indebted to Jutta Brunnée, Jonas Ebbesson and Louis Kotzé who generously gave me their time by reading through the whole draft manuscript and offering their thoughts on how it could be improved. Alessandra Arcuri equally generously gave me her time and thoughts with regard to the parts of the text related to the relationship between international environmental law and international trade and investment law. Thanks a million Jutta, Jonas, Louis and Alessandra. Needless to say the usual disclaimer applies.

The exclusion of references from the text is related to the publisher's request to limit them. I have perhaps taken this request to the extreme by including references only to what I consider to be important texts, by non-lawyers or bodies, that have influenced how we think about the protection and conservation of the environment. The choice was also made to omit full references to relevant instruments and cases in the text. Instead, information about relevant instruments is found in the table of instruments, while documents that are more difficult to find, such as resolutions of international bodies, are parenthesized in the text. Moreover, acronyms for treaty instruments are included in the table of instruments, not the table of abbreviations. Full references to case citations are included in the table of cases.

I thank the Erasmus School of Law, of Erasmus University Rotterdam, for enabling me to take a number of sabbaticals and the Faculty of Law, of the University of New South Wales, for accommodating me during these sabbaticals. It was during two of these sabbaticals that most parts of this text were written.

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# Abbreviations

ACCC	Aarhus Convention Compliance Committee
ACHPR	African Commission on Human and People's Rights
ASEAN	Association of Southeast Asian Nations
BAT	best available technology
BEP	best environmental practices
BIT	bilateral investment treaty
CAO	Compliance Advisor/Ombudsman
CBNRM	community-based natural resource management
CDM	Clean Development Mechanism
CERs	certified emission reductions
CFCs	chlorofluorocarbons
CMP	conference of the parties acting as the meeting of the parties
CO <sub>2</sub>	carbon dioxide
COP	conference of the parties
CSD	Commission on Sustainable Development
DRC	Democratic Republic of Congo
EAF	Ecosystem Approach to Fisheries
EBRD	European Bank for Reconstruction and Development
ECOSOC	Economic and Social Council of the United Nations
ECtHR	European Court of Human Rights
EEZ	exclusive economic zone
EIA	environmental impact assessment
FAO	Food and Agriculture Organization of the United Nations
FIT	feed-in-tariff
FSC	Forest Stewardship Council
GEF	Global Environment Facility
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
GHG	greenhouse gas
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights



IADB	Inter-American Development Bank
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Agency
IDBs	international development banks
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
INDCs	intended nationally determined contributions
IPCC	Inter-governmental Panel on Climate Change
IPT	international peoples' tribunal
ISF	International Shipping Federation
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUPN	International Union for the Protection of Nature
IWC	International Whaling Commission
KAZA	Kavango Zambezi Transfrontier Conservation Area
LMOs	living modified organisms
MA	Millennium Ecosystem Assessment
MDGs	Millennium Development Goals
MEA	multilateral environmental agreement
MIGA	Multilateral Investment Guarantee Agency
MOP	meeting of the parties
MOU	memorandum of understanding
MPAs	marine protected areas
MRV	measurement, reporting and verification
MSC	Marine Stewardship Council
MSY	maximum sustainable yield
NGO	non-governmental organization
NIEO	New International Economic Order
OECD	Organisation for Economic Cooperation and Development
OP&Ps	Operational Policies and Procedures
PCA	Permanent Court of Arbitration
PCF	Prototype Carbon Fund
POPs	persistent organic pollutants

PVC	polyvinyl chloride
RFMO	regional fisheries management organization
Rio+20	Conference on Sustainable Development
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SEA	strategic environmental assessment
UNCED	United Nations Conference on Environment and Development/Rio Conference
UNCHE	United Nations Conference on the Human Environment/Stockholm Conference
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organization
USSR	Union of Soviet Socialist Republics
WBIP	World Bank Inspection Panel
WCED	World Commission on Environment and Development
WMO	World Meteorological Organization
WTO	World Trade Organization
WWF	World Wide Fund for Nature

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# 1 **Setting the scene**

## **1.1 Introduction**

This chapter sets the scene and its first section provides a rough sketch of the types of problems that contemporary international environmental law seeks to address and of the complex institutions that constitute it. Accordingly, this first section considers three questions: what does international environmental law deal with, who makes it and where do we find it? The remainder of the chapter considers issues of terminology, and sets out the aims and outline of the book.

## **1.2 The what, who and where of contemporary international environmental law**

### **1.2.1 What does international environmental law deal with?**

International environmental law aims to address the negative impacts that humans have on the environment with the objective of protecting and conserving the environment. Human impacts on the environment derive from the myriad of activities that we engage in, including the introduction of substances into the environment and the taking of elements from the environment for direct human use or for developing products that are useful to humans. Think of, respectively, the introduction of chemicals into the environment through the use of pesticides in agriculture or as a result of hydraulic fracturing (fracking) in the process of mining shale gas; the taking of fish or other wild animals for human consumption or as hunting trophies; and the use of timber as building material or minerals in industrial processes.

Human life depends on natural processes such as the pollination of plants by insects, the purification of water by wetlands and the protective shield that the ozone layer provides against an overdose of ultra-violet sunlight. While some of the benefits that nature offers can be

provided by technological developments, relevant technologies may not be affordable everywhere and may themselves give rise to new environmental problems. Waste water treatment technology provides an example. While primary treatment – to remove solids and grease by way of mechanical treatment – is relatively affordable, secondary treatment – to remove in particular organic material by way of microbial activity – and especially tertiary treatment – to remove among other things chemicals and nutrients by way of a variety of processes – are more expensive. Moreover, each of these phases of waste water treatment results in residues which need to be made fit for reuse or safely disposed of.

In addition to the human uses referred to above, humans also value the environment for its role in cultural and spiritual experiences. Think of, for example, the role nature plays in literature, movies and paintings as well as in our experience of the outdoors and the use of water in religious ceremonies. These experiences may prompt reflection on geological time and the fact that humans have only been around for a fraction of that time, even if human behaviour is impacting the Earth's systems, such as the climate system. Such ponderings may lead to the conclusion that the Earth's systems are worthy of protection in their own right. While thoughts of this nature may be on the minds of many who engage in the development and implementation of international environmental law, they find little explicit reflection in international environmental law. On the contrary, international environmental law reflects an anthropocentric approach to the protection and preservation of the environment, rather than an eco-centric approach. In other words, emphasis is on instrumental and human centric reasons for protecting and conserving the environment.

Perhaps the most striking element of contemporary international law is its focus on global interdependencies. This process has been fostered by our increased understanding of the Earth's systems, such as the climatic and oceanic systems, pointing to complex linkages within and among these systems and the linkages between these systems and human activities. A pertinent example of a set of interdependencies that international environmental law seeks to address is the following: greenhouse gas (GHG) emissions, resulting from a host of human activities, cause climate change which in turn causes sea level rise, excessive rain and flooding in some regions and extreme drought in other areas. The fact that our economic system spans the globe and creates interdependencies also has contributed to the emergence of international



environmental law. Think of the fact that tropical rainforests provide inputs for medicinal products appreciated across the globe, resulting in calls to protect these forests. Economic incentives, moreover, foster global trade in, for example, oil and coal, agricultural products, chemicals, waste and genetically modified organisms. The generation, transportation and use of these products may harm the environment. In addition, due to contemporary communication facilities individuals and groups across the globe are ever more interconnected and engaged with each other, leading to transnational movements of, for example, indigenous peoples or environmental groups. These groups, aware of global interdependencies, demand that their concerns be addressed by international environmental law. Global interdependencies thus point to the complex linkages between natural systems, between social systems and among social and natural systems.

Despite these global interdependencies a considerable amount of contemporary international environmental law is concerned with bilateral relationships or with issues that involve relatively smaller groups of states. Pertinent examples are treaties that deal with international rivers or transboundary nature conservation areas. In addition, it is important to realize that the consequences of environmental harm manifest themselves at the most local of levels. Think of the farmer who experiences drought, the population of small island states who may see their island flooded, or the members of a local community who due to irresponsible logging or dumping of hazardous wastes see their livelihood and sometimes lives endangered. Moreover, action to address environmental problems ultimately depends on the decisions of individuals and groups in local situations.

### 1.2.2 Who makes international environmental law?

International environmental law is not only developed and implemented by states, but also by international organizations, individuals and groups in society as well as the non-governmental organizations (NGOs) and private sector actors. Treaties, or agreements between states, and international customary law, are prominent sources of international environmental law, yet their content may be co-determined by non-state actors. In addition, principles, standards and rules also emanate from international organizations, private sector actors, NGOs, sub-state actors and cooperative initiatives involving these actors as well as states. Non-state actors, moreover, engage in the application of these principles, standards and rules in specific situations and