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International Judicial Control of Environmental Protection

Standard Setting, Compliance Control and the
Development of International Environmental Law
by the International Judiciary

By Yasuhiro Shigeta



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Law & Business

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AUSTIN

BOSTON

CHICAGO

NEW YORK

THE NETHERLANDS

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3151-5

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Printed in Great Britain.

Preface

This book is a modified and updated version of my doctoral thesis submitted to University College London (UCL) of University of London (UK), which awarded me the PhD title in July 2007. The idea of this study came from my ambition to theorize the effect of the international judiciary's practice on international environmental law, to which my UCL supervisor Professor Philippe Sands deeply committed as an advocate. This PhD study at UCL was enabled by generous support of Osaka Gakuin University (where I currently teach), which allowed me to stay in London during years 2000 and 2002 while giving me salary and a scholarship. I extend special gratitude to this institution.

Although most part of this study was carried out at University of London since the second millennium, the latter two sections (5.2 and 5.3) are originated in my master and doctor study at Graduate School of Law, Kyoto University (Japan), from 1989 to 1997. Therefore, this book is well said to be my half-life work. The information is updated as far as possible based on that available as at 30 November 2009. Article numbering of the EC and EU Treaties is untouched notwithstanding the Lisbon Treaty's entry into force at 1 December 2009, since all the quoted legal materials are those that had appeared before that date.

Many sections of this book have already been published in some journals. Chronologically, they are: 'Territorial Sovereignty and Transfrontier Pollution by a Nuclear Accident (1)(2): A Legal Analysis of the *Chernobyl*', *Kyoto Law Review* 131, no. 2 and 133, no. 2 (Faculty of Law, Kyoto University) 97 and 63 (1992 and 1993); 'Some Reflections on the Relationship Between the Principle of Equitable Utilization of International Watercourses and the Obligation Not to Cause Transfrontier Pollution Harm', *Asian Yearbook of International Law* 9 (2000): 147; 'Verification of "Soft" Nature of the Montreal Non-compliance Procedure: Evaluation through the Practice', *International Studies* 12, no. 1 (Faculty of International Studies, Osaka Gakuin University) 1 (2001); 'Toward Environmental

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Standard Setting as Conciliatory Law-Making: Lessons Learned from the ICJ Maritime Delimitation Cases', *International Studies* 13, no. 1 (2002): 1; 'Setting Environmental Standards for the Conservation of Marine Living Resources: Through the Practice of the ICJ, the ITLOS and Arbitral Tribunals', *International Studies* 13, no. 1 (2002): 39; 'Setting Environmental Standards for the Conservation of Marine Living Resources through the Practice of International Judiciary: An Examination from the Perspectives of Arbitration v. Judicial Settlement and Compromis Application v. Unilateral Application', *Non-State Actors and International Law* 2 (2002): 141; Setting Minimum and Vague Environmental Standards and More: The International Human Rights Judiciary's Challenge to State Sovereignty', *International Studies*, 18, no. 1 (2007): 33; 'The ECJ's "Hard" Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects', *International Community Law Review* 11 (2009): 251.

Although there still remain a lot of points to be added, updated or refined, this book is a certain milestone in my study life. I would be very happy if those who are interested in international environmental law problems – especially academics, practitioners and policy-makers – could find some useful information and insights from this book.

Yasuhiro Shigeta
29 April 2010, Kyoto, Japan

Foreword

Over the past two decades great strides have been made in the field of international law relating to the protection of the environment. There are now a multitude of treaties and other sources of obligation, and attention has increasingly turned to issues of implementation and enforcement. In that regard, the role of international courts and tribunals, as well as the judges who sit on these bodies, are likely to play a significant role. We need to understand, in particular, what is the proper role of these bodies in relation to three discrete but related areas: the setting of international standards, the control of compliance with those standards, and the development of the law.

It is a great credit to Dr Shigeta that he has dedicated himself to the ambitious task of unpicking these important matters, in a way that is comprehensive, accessible and thought-provoking. His work adds significantly to that of other distinguished commentators. Despite the enormity of the undertaking, and the great mass of material through which he has travelled, he has not shied away from developing a more general theory as to the role of the judiciary as an ‘international legal guardian’.

Indeed, last week I sat in the Great Hall of Justice at the Peace Palace, in The Hague, to hear International Court give its judgment in the dispute between Argentina and Uruguay in the case concerning the *Pulp Mills on the River Uruguay*. Listening to the Vice-President of the Court read the decision, which was streamed on the web to a global audience, I found great benefit in recalling Dr Shigeta’s framework for analysis. He has provided us with a valuable and penetrating lens through which one might seek to gain an understanding of how an international court perceives its role, and what an international court has – or has not – done for the development and application of international environmental law, as well as international law more generally.

Foreword

I commend Dr Shigeta for his great enterprise. It will undoubtedly be of service to all who are interested in these areas, contributing in its own way to the progressive development of our understanding of the law. He deserves a large readership, and I have no doubt he will gain it.

Professor Philippe Sands QC
University College London and Matrix Chambers

30 April 2010

Acknowledgement

There are so many people to be given special thanks. First of all, I wish to express my sincere appreciation to Professor Philippe Sands for his warm and pointed supervision. Without him, the idea of this study would not have come up, and this study would not have been completed. Although he has always been busy in defending client governments all over the world, he has managed to find time to discuss with me in his research room or his home. Being purely academic, I had a lot to learn from him about the practical sense of international litigation. Special thanks should also be given to my PhD examiners, Professor Pierre-Marie Dupuy and Professor Patricia Birnie. Especially Professor Dupuy's kind advice made this book much improved, I believe. I also have to deeply thank Professor Shigeru Kozai, Professor Emeritus at Kyoto University, for continuously supervising me since I entered Kyoto University. He warmly encouraged me to study international environmental law, which was quite a new field of international law and had rarely been studied at that time, and kindly suggested my choosing the Chernobyl accident as my first study subject. He invited me as a lecturer to Osaka Gakuin University where he taught after he retired from Kyoto University, and took on my classes while I was in London.

I have to mention many names of my colleagues of the Kyoto International Law Study Group for their valuable comments. However, here I mention just one name, Shigejiro Tabata, a late Professor Emeritus at Kyoto University and the founder of this study group. I solemnly dedicate this book to his memory.

I have to thank London friends for their kind mental support: Isabella, Shin, Elda, Stuart, Sameer and Miguel (the last person gave me English translation of a Spanish judgment). Without them, my London life would have been joyless and boring. Professor Akira Sakota, while he was in London, kindly made a lot of photocopies of documents in the library and sent them to me by airmail. I express sincere gratitude to him.

Acknowledgement

Librarian staff of Kyoto University, University of London and Osaka Gakuin University as well as Kluwer Law International's staff (especially Karel and Ms Gayathri) also merit special thanks. Without their kind help, my research and book publication could not have been possible.

Lastly, I would like to say thank you to my family members, father Ryoza, mother Miyoko, sister Yoshiko and brother Koichi, for their warm mental and material support. I sincerely believe that this book is a product of a family love. Thank you very much, Ryoza, Miyoko, Yoshiko and Koichi.

List of Abbreviations

AB	Appellate Body (WTO)
ADV	<i>Archiv des Völkerrechts</i>
AFDI	<i>Annuaire Français de Droit International</i>
Afr.Chart.H.P.R.	African Charter on Human and Peoples' Rights
AfrCmHPR	African Commission on Human and Peoples' Rights
AfrCtHPR	African Court on Human and Peoples' Rights
Am. J. Int'l L.	<i>American Journal of International Law</i>
All ELR	<i>All England Law Reports</i>
Am.Conv.H.R.	American Convention on Human Rights
Ann.Dig.	<i>Annual Digest of Public International Law Cases</i>
Annuaire	<i>Annuaire de l'Institut de Droit International</i>
ASDI	<i>Annuaire Swiss de Droit International</i>
ASIL Proceedings	<i>American Society of International Law Proceedings</i>
Austrian JPIL	<i>Austrian Journal of Public and International Law</i>
BFSP	<i>British Foreign and State Papers</i>
BISD	<i>Basic Instruments and Selected Documents (GATT)</i>
BYIL	<i>British Year Book of International Law</i>
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CFI	Court of First Instance of the European Communities
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMLR	<i>Common Market Law Review</i>
Colo. J. Int'l Envtl. L. & Pol'y	<i>Colorado Journal of International Environmental Law and Policy</i>
CPE	<i>Chronique de Politique Étrangère</i>

List of Abbreviations

CTE	Committee on Trade and Environment (WTO)
CTS	<i>Consolidated Treaty Series</i>
CYIL	<i>Canadian Yearbook of International Law</i>
<i>Denv. J. Int'l L. & Pol'y</i>	<i>Denver Journal of International Law and Policy</i>
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
D&R	<i>European Commission of Human Rights, Decisions and Reports</i>
EC	European Communities (or European Community)
ECJ	European Court of Justice (Court of Justice of the European Communities)
ECR	<i>European Court Reports</i>
ECSC	European Coal and Steel Community
EEC	European Economic Community
EELR	<i>European Environmental Law Review</i>
EFP	Experimental Fishing Programme
EHRR	<i>European Human Rights Report</i>
EJIL	<i>European Journal of International Law</i>
ELR	<i>Environmental Law Reports</i>
EU	European Union
ECmHR	European Commission of Human Rights
Euratom	European Atomic Energy Community
ECtHR	European Court of Human Rights
<i>Eur. Ct. H.R</i> (ser. A)	<i>Reports of the European Court of Human Rights, Series A</i>
FRG	Federal Republic of Germany
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GEF	Global Environment Facility
GYIL	<i>German Yearbook of International Law</i>
HRC	Human Rights Committee (ICCPR)
IAEA	International Atomic Energy Agency
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
<i>Int'l & Comp. L.Q.</i>	<i>International and Comparative Law Quarterly</i>
ICLR	<i>International Community Law Review</i>
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

IELR	<i>International Environmental Law Reports</i>
IJC	International Joint Commission (Canada/US)
ILA	International Law Association
ILC	International Law Commission (UN)
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
InterAmCmHR	Inter-American Commission on Human Rights
InterAmCtHR	Inter-American Court of Human Rights
Inter.Am.Ct.H.R. (Ser. C)	<i>Reports of the Inter-American Court of Human Rights, Series C</i>
ITLOS	International Tribunal for the Law of the Sea
JEL	<i>Journal of Environmental Law</i>
JWT	<i>Journal of World Trade</i>
Kyoto NCP	Kyoto Protocol Non-Compliance Procedure
MEA(s)	Multilateral Environmental Agreement(s)
Montreal NCP	Montreal Protocol Non-Compliance Procedure
NAFTA	North American Free Trade Agreement
NCP	Non-Compliance Procedure
NILR	<i>Netherlands International Law Review</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
NLB	<i>Nuclear Law Bulletin</i>
Nat. Resources J.	<i>Natural Resources Journal</i>
N.Y.U.J. Int'l L. & Pol'y.	<i>New York University Journal of International Law and Policy</i>
OECD	Organization for Economic Co-operation and Development
O.J. C	<i>Official Journal of the European Communities, Information and Notices</i>
O.J. L	<i>Official Journal of the European Communities, Legislation</i>
ÖJZ	<i>Österreichische Juristen-Zeitung</i>
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RCEP	Royal Commission on Environmental Pollution (UK)
RDC	<i>Recueil des Cours</i>
RGDIP	<i>Revue Général de Droit International Public</i>
RIAA	<i>Reports of International Arbitral Awards</i>
SAC	Special Area of Conservation
SPA	Special Protection Area
SPS	Sanitary and Phytosanitary
Stan. J. Int'l L.	<i>Stanford Journal of International Law</i>
Syracuse J. Int'l L. & Com.	<i>Syracuse Journal of International Law and Commerce</i>

List of Abbreviations

TREM(s)	Trade-Related Environmental Measure(s)
<i>Tulane J. of Int'l & Comp. Law</i>	<i>Tulane Journal of International and Comparative Law</i>
<i>UCLA L. Rev.</i>	<i>University of California Los Angeles Law Review</i>
UK	United Kingdom (of Great Britain and Northern Ireland)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
<i>UNTS</i>	<i>United Nations Treaty Series</i>
US(A)	United States (of America)
USSR	Union of Soviet Socialist Republic
WCED	World Commission on Environment and Development
<i>WLR</i>	<i>Weekly Law Reports</i>
WTO	World Trade Organization
<i>Yale J. Int'l L.</i>	<i>Yale Journal of International Law</i>
<i>YECHR</i>	<i>Yearbook of the European Convention on Human Rights</i>
<i>YIEL</i>	<i>Yearbook of International Environmental Law</i>
<i>YILC</i>	<i>Yearbook of the International Law Commission</i>
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

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