

INTERNATIONAL ENVIRONMENTAL LAW AND POLICY

THIRD EDITION

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FOUNDATION PRESS

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FOUNDATION PRESS

2007

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395 Hudson Street
New York, NY 10014
Phone Toll Free 1-877-888-1330
Fax (212) 367-6799
foundation-press.com

Printed in the United States of America

ISBN 978-1-59941-041-8



TEXT IS PRINTED ON 10% POST
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To Margaret, Dana and Sandy
D.H.

To Lisa and the Beans
J.S.

To Barbara, Cassidy and Hannah
D.Z.

*

INTRODUCTION

International environmental law and policy have come of age in the past two decades, riveting the public's attention with news of ozone holes, climate change, and species extinctions. Now a mature and dynamic field, international environmental law's importance cannot be underestimated for it involves, quite literally, the fate of future generations and that of the earth.

There are three basic reasons we wrote this book. First, all of us have practiced international environmental law and policy "in the field"—in government, business, and non-governmental organizations. While a theoretical foundation is essential in understanding international environmental law, so, too, is a sense of what really happens on the ground. We seek to impart a sophisticated understanding of the law as it is and, perhaps more important, as it could be.

Second, teaching materials in the field often present the field as a two-person play—focusing on the role of State actors (national governments) and international institutions to the exclusion of other key actors. In exploring the dynamics of the lawmaking process and implementation, we intentionally move *beyond* the traditional focus on State actors to assess the increasingly critical roles of transnational actors—citizens, nongovernmental organizations, scientists and business.

Finally, we believe that international environmental law and policy deserves treatment as an independent field, not as a subset of environmental law or public international law. To be sure, there are many areas of overlap; but international environmental law is fundamentally different in key respects.

The study of international environmental law is, initially, the study of facts, wild facts, that reflect our growing global environmental problems. These include climate change, ozone destruction, wildlife extinction and loss of biological diversity, and the contamination of air, land, and water throughout the world. These facts are the challenge international environmental lawyers—and ultimately our whole society—must address with a new and more powerful international environmental law. Any student who fully understands these facts should be motivated to learn what role the law can play in moving us toward a more sustainable future.

International environmental law also requires the study of human activity that lies at the root of each environmental problem, and how that activity has expanded due to our expanding population and consumption. Today, human economic activity threatens to surpass the ecological limits of

the biosphere (if it has not already done so in certain instances). This is the challenge of discovering the limits of the biosphere through science, and determining the “scale” of economic activity that can be sustained within these limits—that is, what level of “development” is “sustainable.”

International environmental law is the study of how we can and do use law to address the environmental challenges caused by our current level of economic development. This starts with the study of the *process* of making international law, including the study of a system described by one scholar/practitioner of the profession as “post-feudal society set in amber,” a medieval system where only nation States can participate, and where citizens, industry, and environmental organizations have historically been excluded. The generally weak and exclusionary international system contrasts starkly with the robust and inclusive nature of many national law systems, and presents another challenge to international environmental lawyers.

Next is the study of the institutions that participate in the making, implementation and enforcement of international environmental law. In addition to nation States, this includes various United Nations organizations as well as other international and regional organizations. The role played by the corporate sector is critically important, especially the larger multinational corporations, as is the growing role played by the non-governmental sector, including such groups as Greenpeace, World Wildlife Fund, Earth Justice, World Conservation Union and the Center for International Environmental Law.

International environmental law is also the study of relevant principles of law that may build upon traditional international law principles yet also are influenced by science, ethics, and political pragmatism. Principles such as the precautionary principle, the polluter pays principle, the principle of common but differentiated responsibilities, and the principle of subsidiarity all help provide an emerging framework for the development of international environmental law. They provide guidance for the negotiation and implementation of international environmental instruments and for resolving environmental disputes.

In sum, the study of international environmental law requires an understanding of the problems of environmental degradation and their causes, of the legal *process* for addressing the problems, including the process of law-making, compliance monitoring and dispute resolution, of the *players* who cause the problems and those who make the law to address the problems, and of the legal *principles* that form the foundation for the treaty law that now dominates the field. This comprises the first part of the book.

The second part of the book examines specific international environmental problems and the treaties and other legal mechanisms created in response. We begin with pollution of the air and atmosphere, including the specific regimes that address ozone depletion, climate change, and transboundary air pollution. We then examine oceans, rivers and lakes, chemicals and hazardous wastes, wildlife, biodiversity, and the conservation of living natural resources and their habitats. These specific subjects are pre-

sented in the context of sustainable development. Cross-cutting themes include:

- the relation of our scientific understanding of the problem to the legal response;
- the relation of the problem to the global economy, e.g. fossil fuel emissions and oil;
- the evolution of the lawmaking process including the use of soft law, framework agreements, binding obligations, enforcement, and amendment procedures;
- the role of concepts and principles of international environmental law in the development of the field;
- the role of non-State actors, especially business and NGOs;
- the dynamic between the relatively rich and industrialized countries and the relatively poor and developing countries;
- the role of technology transfer, financial mechanisms and other steps for facilitating broad acceptance and implementation of international environmental commitments;
- the domestic implementation and enforcement of international agreements.

We apply the knowledge learned in the first part on a problem-by-problem, and treaty-by-treaty basis, to learn what ecological constraints are being tested, and what the specific legal response has been. We also examine which factors were significant in building the consensus needed for States to agree to a specific treaty, including the role non-governmental organizations and corporations played, and the impacts on economic and technological development. We consider how the current response measures up to what the world could be doing.

The third part of the book examines the intersection of international environmental law with other fields, such as trade and international investment agreements, the law of war, human rights, and corporate codes of conduct. Since powerful protection of the international environment is provided by national laws, we also examine the extraterritorial application of domestic law. To a large extent the success of this integration process will determine our overall success in moving toward sustainable development.

This book is not intended to be taught from cover-to-cover in a one semester course. Rather, we encourage students and professors to select from among the subjects addressed, to tailor their courses to suit interests and concerns. The text's breadth of coverage is also intended to serve as a starting point for research seminars and specialty courses within the field, such as trade and environment or oceans law. The *Teacher's Manual* provides a number of syllabi and specific suggestions on teaching the material.

Beyond revisions reflecting developments in the field, our third edition of this book has been guided by comments from teachers over the last ten years. In particular, we have completely revised Chapter 7 (Making International Environmental Law Work) and Chapter 18 (Human Rights and the Environment). To reflect its growing importance, we also now devote an entirely separate and expanded chapter to climate change (Chapter 11).

Such an undertaking would not have been possible without the assistance of many people. For the first edition, we thank our CIEL Law Fellows Carroll Muffett and Matthew Stilwell, CIEL Visiting Attorneys Vincenzo Franco, Eli Hillman, and Claudio Torres Nachon as well as our Dean's Fellows and other assistants at American University and CIEL, who worked under perpetual deadline pressures: Natalie Bridgeman, Dr. Axel Bree, Ingrid Busson, Jackie Duobinis, Stephanie Feingold, James Freeman, Kris Genovese, Carolina Gonzalez, Nienke Grossman, Tiffany Gurnee, Eli Hillman, Tisha Illingworth, Matthew Lapin, Meredith McLean, Mark Noethen, Valeska Populoh, Marcos Pullman, Amy Rejent, Sarah Sung and Emily Yozell. Invaluable administrative support was provided by Mark Williams, Mike Hsu, Elma Gates and Svetlana Zhekova. Additional background information was provided by David Caron, John Dernbach, Jeff Dunoff, Dan Esty, Tom Kane, Dr. Greg Maggio, Kenny Markowitz, Adil Najam, Chris Wold, Mike Walls and David Wirth.

For the second edition, we also thank Jamie Abrams, Mary Stevens, Kathryn Walter, Emilie Thenard, Aaron Selverston, Jenifer Federico, Tom Higdon, Ana Maria Kleymeyer, Chris Bostic, Eric Siever, Bella Sewall, Romina Picolotti, J. Daniel Taillant, Matthew Stilwell, Steve Charnovitz, Nathalie Bernasconi John Dernbach, Rick Herz, Merideth Reeves, Nienke Grossman, and Steve Charnovitz.

For the third edition, we additionally thank the following for their excellent research assistance, and in some cases, much more: Katherine Armstrong, Sungho "Danny" Choi, Thomas Higdon, Eriade Hunter, Athena Kennedy, Daniel McCabe, Megan Mead, Kelcey Patrick-Ferree, Sean Roberts, Alexander Sarac, Cari Shiffman, Scott Stone, Thankham "Tara" Varghese, Alexandra Viets, Anne-Marie Wall, Erin Webreck, Lucy Wiggins, and David Wright. We also benefited greatly from the time and talent of the following people who reviewed and commented on portions of the manuscript: Stephen O. Andersen, Margaret Bowman, Steve Charnovitz, Danielle Grabiell, Paul E. Hagen, Jennifer Haverkamp, Donald Kaniaru, Ken Markowitz, Constanza Martinez, Dave Newman, Meredith Reeves, Kathryn Redford, Erwin Rose, Peter H. Sand, K. Madhava Sarma, Dinah Shelton, Matthew Stilwell, Dionysia - Theodora Avgerinopoulou, Kristen Taddonio, Jon Van Dyke, Oran Young, Lawrence Watson, David Wirth, Dan Worth, and Chris Wold. As with all previous editions, all errors in the text remain solely our own. Finally, we would like to thank Dean Claudio Grossman of the American University's Washington College of Law for generously supporting our research.

Our students over the past decade directly contributed to this book, as well. They are working all over the world — creating environmental law organizations in Mexico, Ecuador, the Middle East, Portugal, and Brazil, bringing the very first environmental cases before the World Bank's Inspection Panel and NAFTA's Environmental Commission, and serving in government positions ranging from the UN and World Bank to South Africa and Chile. Most of all, though, we thank the support and patience of our wives: Margaret, Lisa and Barbara.

We welcome comments on the casebook, on both its strengths and areas for improvement. They may be sent to David Hunter (dhunter@wcl.american.edu), Jim Salzman (salzman@law.duke.edu), or Durwood Zaelke (zaelke@inece.org).

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NOTE ON THE INTERNET AND TREATY SUPPLEMENT

The Internet's global reach and depth of data make it ideal for research and communication in the field. The casebook also has its own site on the World Wide Web at:

<<http://www.wcl.american.edu/environment/IEL>>

The site includes recent developments (essential in this fast-changing field) as well as hypertext links to treaty secretariats, relevant government, industry and NGO sites, and the agreements themselves.

While incorporating materials from the Internet for use in the book offers important advantages, it also has one serious disadvantage: the material or even the site containing the material may cease to exist after this book is published, making further reference impossible. While cognizant of this potential problem, we have decided to include Internet materials and references where particularly relevant. As of October, 2006, all the cited Internet material was present on the Web. Should readers come across a referenced site that no longer exists, it would be most helpful if they could contact us. We will post the news on the book web site and offer an alternative site.

The casebook contains relevant excerpts of all the international agreements covered, so it may be used as a stand-alone text. For those professors who wish students to refer to the full text of the agreements, an accompanying Treaty Supplement is also available from Foundation Press.

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ACKNOWLEDGMENTS

The authors gratefully acknowledge the permissions granted to reproduce the following materials.

50 Years is Enough: US Network for Global Economic Justice, www.50years.org.

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