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*Second  
Edition*



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Law & Business

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# **International Environmental Law and Policy**

*Second Edition*

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To Louis and Betty Sohn

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## *Preface to the Second Edition*

In the eight years since the preparation of the first edition, the structure of international environmental law has remained relatively unchanged. The threats to the planet's environment have not, however, remained unchanged. Several threats have become worse in the intervening years. The spate of international convention making in the 1980s and early 1990s has slowed but not stopped. The major developments are just below the surface of the law. Without a doubt, the most important development in the twenty-first century is the almost universal consensus that global climate change is well underway and that the international community must undertake heroic measures to attempt to mitigate the most serious adverse impacts. However, debates about the causes and long-term effects continue within the scientific community. Issues surrounding the appropriate response to this consensus are suffused throughout the second edition. The WTO's trade discrimination jurisprudence relevant to environmental protection has also developed considerably since 1998. In addition, transnational codes have become more important as some are binding under domestic law by virtue of their inclusion in contracts with commercial entities.

There have also been changes in the authorship of the second edition. To our great regret, one of the original co-authors and leaders in the field of international law, Paul C. Szasz, died on April 30, 2003. Professor Robert E. Lutz decided to continue his distinguished international law career by concentrating on other projects. Professors Brown Weiss, McCaffrey, and Magraw are pleased that Professor A. Dan Tarlock of the Chicago-Kent College of Law was able to join the casebook. The aims of the first edition remain. We have kept the basic structure of the first edition with considerable tightening, consolidation, and modification.



## Organization of Materials

The material is organized in four parts. Part I sets forth the basic policy and legal analytical frameworks that can be applied to any international environmental legal problem. Chapter 1, *The Nature of Environmental Legal Issues*, places the basic social and political issues in the context of sustainable development. Chapter 2, *The Philosophical Framework*, addresses the underlying philosophical issues of our relations with nature and present and future generations. Chapter 3, *Rational Decisionmaking and Its Constraints: Economics, Risk and Uncertainty*, sets out the basic principles of welfare economics, risk analysis, and decisionmaking under extreme scientific and economic uncertainty which are relevant to international environmental law rules and principles. It combines the previous chapters 3 and 4. Chapter 4, *The International Legal System and Environmental Protection*, provides the students with a basic introduction to international law and organization, dispute settlement, and compliance. Chapter 5, *Accountability and Compliance*, is new and applies the previous chapter to most important environmental problems such as state responsibility, innovative compliance processes, and international criminal responsibility. It concludes basic cases such as *Lake Lanoux and Southern Blue Fin Tuna*. Chapter 6, *General Norms of Prevention*, is an extended coverage of the basic substantive and procedural pollution and damage prevention obligations that have developed in the past decades. This chapter is followed by Chapter 7, *Environmental Disasters*, and Chapter 8, *Human Rights and the Environment*. Part II examines the many-faceted and difficult problems of pollution. We start with Chapter 9, *Regional Transboundary Pollution*, which focuses on acid rain and the pollution of international watercourses. Chapter 10, *Controlling Ozone Pollution*, sets out the model stratospheric ozone depletion mitigation regime. Chapter 11, *Global Climate Change*, tackles the problem of this century: the mitigation of and adaptation to global climate change, building on the material in Chapters 2 and 3. Chapter 12, *protection of the Marine Environment*, explores this partially successful early and evolving regime. Chapter 13, *Hazardous Substances: Wastes, Toxic Chemicals, Heavy Metals*, takes up the continuing problem of the use of developing countries as sites for the disposal of hazardous wastes and other dangerous substances such as heavy metals and toxic chemicals. Chapter 14 examines the sadly growing law of environmental responsibility that flow from acts of war.

Part III explores the issues relating to the Management of the Earth's natural resources. Chapter 15, *Norms of Allocation of Use: Fresh Water*, focuses on the incorporation of environmental norms into international water allocation law and the growing efforts to conserve and restore degraded aquatic ecosystems. Chapter 16, *Biological Diversity*, combines the previous chapters 17-19 and covers preservation of endangered species, conservation of biodiversity, protection of forests and ecosystems, and the protection of heritage sites and wetlands (material regarding the latter two topics is in Appendix IV). A new Chapter 17, *Biosafety Regulation*, examines the growing concern over the introduction of genetically modified organisms into the world's diet and the environment. The book concludes with Part IV, which is devoted to issues of trade and finance. Chapter 18 examines the interface between trade liberalization and environmental protection through both traditional state regulation and the adoption of international codes by nongovernmental organizations. Chapter 19 takes up the problem of financing sustainable development in the developing world.

The book includes four appendices to provide students with in-depth background material for the course. Appendix I introduces the student to both the hard and electronic world of research in this field. It contains an extensive guide to the vast array of relevant materials available through the Internet. Appendix II supplements Chapter 4 by providing the student with information on international organizations. Appendix III sets out the general steps that are followed in negotiation and ratification of multilateral agreements so that the student will have a fuller understanding of the treaty-making process. Appendix IV supplements Chapter 16 by providing materials on the international protection of national sites, as exemplified by the World Heritage Convention and the Wetlands Convention.

Finally, we welcome you to this fascinating, maddeningly complex, sometimes gossamer, and challenging area of law. We hope that you will share our deep professional commitment to and passion for this important field of law which has already had important effects on the development of international law generally and which is so vital to the future of this planet. We look forward to learning with you in the years to come.

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December 2006



## *Preface to the First Edition*

Since 1970 international environmental issues have increasingly seized local, national, and international attention. In 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, states confirmed that environmental protection and economic development are integrally linked and called for “sustainable development” worldwide. Governments, international organizations, and nongovernmental organizations have stepped up their efforts to address the rapidly increasing threats to the quality of air, water, soil, and the oceans; to the existence of countless species; and to human, plant, and animal health. Major multinational enterprises, from Exxon and Unilever to Dow Chemical, as well as local industries, deal with environmental issues on a daily basis. The World Bank and other multilateral development banks have set up offices to examine the environmental implications of Bank-funded projects. Still, the threats continue.

International law plays a key role in addressing environmental problems. As of 1998 there are over a thousand international legal instruments (bilateral and multilateral agreements and important nonbinding instruments) concerned with environmental protection. Every country has at least one piece of environmental legislation; most have far more. In addition, there are other relevant sources of law: customary international law, general principles of law, decisions and actions of international organizations, and nonbinding legal instruments negotiated by governments or developed transnationally in the private sector. Environmental protection is also treated in other areas of international law, such as trade and human rights.

Thus, there is now a substantial and significant body of international environmental law and practice. As countries and societies become more interdependent and globalized, law schools and universities increasingly need to address international legal issues. This book is intended to provide a basis for studying one field of international law: international environmental law.

## **The Field of International Environmental Law**

The field of international environmental law has several components: public international law as reflected in international agreements and other sources of international law, domestic environmental and natural resource protection law, and transnational private law. It is foremost, however, a field of international law.

While the field of international environmental law is “new” or “emerging” as a field of international law, it is also ancient. The field is new in the sense that most international agreements concerned with protecting the environment (and most domestic environmental laws) have been developed since 1970. At the turn of the twentieth century, there were few multilateral or bilateral international environmental agreements. Those agreements that existed concerned primarily boundary waters, navigation, fishing rights along shared waterways, and the protection of commercially valuable species. Global environmental problems, such as marine protection, ozone depletion, and climate change, were not addressed until the latter half of this century. At the same time, international environmental law has ancient roots in international law and in the diplomatic exchanges and international agreements developed for centuries to handle local resource problems. Moreover, some of the most important legal precedents in the field, such as the Trail Smelter arbitration, date from the first half of the twentieth century.

The field of international environmental law should be understood as encompassing both international law and national environmental laws that relate to international environmental problems. Routinely, national legislation and regulations implement international agreements. Some national statutes contain provisions addressing transfrontier pollution problems or other international environmental issues for which international agreements do not yet exist. Sometimes national legislation provides the impetus for international lawmaking. Moreover, occasionally subfederal governmental units take actions directed at international environmental problems based on their local laws.

Nongovernmental organizations and the private sector are increasingly developing transnational codes of behavior and practice that are technically nongovernmental, nonbinding international legal instruments. They are, however, relevant to understanding the development and implementation of international environmental law.

## **Approach to the Materials**

Our approach to the course book has been informed by our accumulated experience in the field. This experience suggests the tools that are needed to function effectively in this complex and rapidly growing area. Various of us have served, or are serving, as teachers, scholars, officials of national government agencies and international organizations, members of national and international expert bodies, international arbitrators, and counsel to governments in international environmental disputes. We are also informed by our scholarly and professional experience in other areas of international law and in domestic environmental and natural resources law. We have all gained from our experiences in teaching international environmental law for more than a dozen years using versions of the materials included here.

*International Environmental Law and Policy* provides an overview of the field. It combines analytical materials with in-depth treatment of real life issues. The course book reflects a recognition that the international system today consists of many different relevant actors: states, subnational governmental units, international organizations, nongovernmental organizations, corporate entities, ad hoc transnational groupings, and individuals. The materials emphasize the links between international and domestic law in developing and implementing international law, the merging of public and private international law in certain cases, and the relevance of social and natural sciences to understanding the development and implementation of international environmental law. Several chapters explicitly address the links between environmental issues and other areas of international law: trade, human rights, and national security.

This book is designed to provide students with basic materials on the wide range of knowledge and perspectives needed to be an effective, "three-dimensional" international environmental lawyer. Mastering this field requires not only expertise in specific international environmental regimes but also knowledge of public international law, institutions, and processes more generally, and an understanding of domestic legal approaches to environmental protection. An effective international environmental lawyer must also be able to appreciate the complexity and interrelationships of our natural environment, the role of scientific uncertainty and risk assessment in protecting health and the environment, and even the nature of the scientific process. Similarly, he or she must be sensitive to the ethical and cultural dimensions of environmental protection, familiar with the basic economic concepts frequently encountered in this area, and aware of how poverty, differences in levels of economic development among various countries, and political considerations relate to environmental degradation and attempts to remedy it. For these reasons, the principles related to sustainable development and stewardship of the planet figure prominently in our approach to the course.

International environmental law functions within the context of the more general field of public international law. Since many students taking this course will not have studied international law, we believe some introduction should be provided. The challenge is to determine how much time should be devoted to this task: A lengthy treatment would leave little room for the examination of international environmental problems; yet too little attention would leave the student ill-equipped to function in the field of international environmental law. We have decided on what we hope is a *via media*: succinct, textual coverage of the international legal system, including coverage of public international law and institutions, written especially for this book (Chapter 5). The material is designed both to allow the teacher who does not wish to consume class time on the subject to assign the chapter as outside or background reading and to facilitate class discussion of the materials.

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