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# 国际环境法律与政策

## INTERNATIONAL ENVIRONMENTAL LAW AND POLICY

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## 国际环境法律与政策

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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。

这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的原版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。



# **International Environmental Law and Policy**

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To Chuck, Tamara, and Jed  
—*EBW*

To Susan, Kevin, Brooke, Darren, and Amanda  
—*SCM*

To Sean, Caitlin, Kendra, Kim, and Cindy [Lucinda],  
and Dan and Jean Magraw  
—*DBM*

To Frances and our daughters, Catherine Dibble and Ree Brennin  
—*PCS*

To my children, Ryan and Erin, that they may live in  
a sustainably developed world, and to my deceased  
parents, Robert and Claire Lutz, for the many  
environmental lessons they taught me.  
—*REL*



## *Preface*

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.

### Organization of the Materials

The material in the book is organized in four parts. Part I sets forth an analytical framework that can be applied to any international environmental legal problem. It provides an introduction to the environmental and social/political systems in the context of sustainable development (Chapter 1). Chapter 2 addresses the underlying philosophical issues of our relations with present and future generations and with nature. Chapter 3 examines the relevance of economic analysis to international environmental legal issues and explores the economic implications of international legal rules. Chapter 4 explores the principles and measures for addressing risk and scientific uncertainty. Chapter 5 provides a basic introduction to international law and organization and draws attention to issues of compliance with international law. The materials include both basic analytical pieces and specific case studies and examples. The authors intend to provide students with material that can be drawn upon throughout the other parts of the casebook. Students and teachers will recognize that this—or any single—course book cannot cover these issues in depth, but the materials should enable the reader to become acquainted with fundamental concepts and approaches.

The remainder of the book addresses specific international environmental problems and related issues. Part II examines the many-faceted and difficult subject of pollution, as it is broadly defined. General and specific norms concerning this problem are treated in Chapters 6-9. Chapter 6 is devoted to explicating the four major cases that have been most influential in the field, beginning with the *Trail Smelter* arbitration. Our experience as teachers, scholars, and practicing lawyers is that, for whatever reasons,

discussion of these cases often occurs without a full appreciation of their factual contexts and actual legal holdings; it is our hope that this chapter will enable students to avoid that pitfall. Thereafter we examine general norms of prevention (including both substantive and procedural norms and international human rights law) (Chapter 7), the norms applicable to environmental disasters such as Bhopal and Chernobyl (Chapter 8), and traditional and innovative measures to promote accountability and compliance (Chapter 9). Part II also considers the legal and policy issues of specific pollution related problems: regional transboundary air and water pollution (Chapter 10), stratospheric ozone depletion (Chapter 11), global climate change (Chapter 12), marine environmental degradation (Chapter 13), hazardous substances (Chapter 14), and environmental harms related to military activities (Chapter 15).

Part III explores issues relating to the management of Earth's natural resources. It examines norms of allocation and use of fresh water (Chapter 16), and it considers legal issues related to the international protection of national sites such as world heritage sites and wetlands (Chapter 17), the conservation of biological diversity (Chapter 18), and the protection of endangered species (Chapter 19).

The book concludes with material devoted to issues of trade and finance (Part IV). The two chapters in this part address, respectively, the interface between promoting trade liberalization and protecting health and the environment (Chapter 20), and the financing of environmental protection (Chapter 21). The materials in Chapter 20 on environment and trade cover efforts in the private sector to development transnational codes of behavior as well as public and private initiatives on ecolabeling.

In addition to the foregoing, we have included three appendices to provide readers with in-depth background material for the course. Appendix I provides material on conducting research in the field of international environmental law. Appendix II contains information on international organizations that supplements the material on that subject contained in Chapter 5. And Appendix III describes the general steps that are followed in formulating multilateral agreements, to give the student a fuller appreciation of the treaty-making process.

Finally, we would like to welcome you to what is not only one of the most challenging and important areas of the law, but also one of the most fascinating. Developments in international environmental law have already had important effects on the development of international law generally. We look forward to learning with you in the years to come.

Edith Brown Weiss (Washington, DC)  
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