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# International Courts and Environmental Protection

TIM STEPHENS



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## **International Courts and Environmental Protection**

International environmental law has come of age, yet the global environment continues to deteriorate. The challenge of the twenty-first century is to reverse this process by ensuring that governments comply fully with their obligations, and progressively assume stricter duties to preserve the environment. This book is the first comprehensive examination of international environmental litigation. Analysing the spectrum of adjudicative bodies that are engaged in the resolution of environmental disputes, it offers a reappraisal of their relevance in contemporary contexts. The book critiques the contribution that arbitral awards and judicial decisions have made to the development of environmental law, and considers the looming challenges for international litigation. With its unique combination of scholarly analysis and practical discussion, this work is especially relevant to an era in which environmental matters are increasingly being brought before international jurisdictions, and will be of great interest to students and scholars engaged with this vital field.

TIM STEPHENS is a Senior Lecturer at the Faculty of Law, University of Sydney. He specialises in international environmental law, dispute settlement, and the law of the sea. He holds a doctorate in law from the University of Sydney, and an M.Phil. in geography from the University of Cambridge.



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# Foreword

Modern legal regimes for the protection and management of the environment have developed rapidly over the past forty years. At the national level, with increasing pressures from development activity and population growth, environmental law became a major preoccupation for developed countries in the 1970s and 1980s and, in the past two decades, for developing countries and countries with economies in transition. Regionally and globally the generation of environmental legal instruments, addressing a vast array of environmental and natural resource issues, has been increasingly motivated by the imperative of environmental, social/cultural, and economic sustainability, with one of the high points being the 1992 United Nations Conference on Environment and Development, and two of its products, Agenda 21 and the Rio Declaration on Environment and Development. States have been encouraged, indeed obliged by necessity, to address by legal means the causes and effects of pollution, resource depletion, climate change, and protection of ecologically significant areas within their jurisdictions, across political boundaries, and beyond national jurisdictions. The increasing complexity of the area is reflected in the number and scope of multilateral environmental agreements and the establishment of associated governance regimes.

There has been an inevitable need to resolve disputes concerning the operation of the growing body of international environmental law and its supporting institutions. This book explores the rich state practice in this area, with a particular focus on the various judicial institutions, tribunals, and related bodies resolving environmental disputes at the international level, the best-known being the International Court of

Justice, the Permanent Court of Arbitration, and the International Tribunal for the Law of the Sea. The substantial case law being built by these tribunals is recorded, with developing principles analysed in considerable detail. While other writers have examined the decisions of these bodies discretely, this book represents the first comprehensive analysis of the jurisprudence through the lens of global environmental governance and the imperative of sustainable ecological development.

The fact that a book on international courts and environmental protection can now be written is an indication that international environmental law, though still fragmented and incomplete, has matured into a distinct and increasingly coherent area of law. It may also be noted that the higher level of litigation activity in recent years means that it is possible for a new generation of lawyers in the field to make the justifiable claim to be practitioners of international environmental law.

While this book brings together a remarkable range of learning in relation to new and established tribunals, it also examines the future of international environmental litigation, giving a realistic assessment of the parameters that hinder international courts from taking a more judicially active approach. It also canvasses the introduction of a broad-based and accessible International Court for the Environment, but leaves that development in the realm of tantalising potential.

Ultimately, the value of this book lies in drawing attention to the fundamental importance of judicial decision-making bodies and their work within the broad landscape of global environmental politics. In doing so, it also provides a challenge for future analysis: how structures for environmental governance can be further strengthened, such as through an overarching global environmental agreement consolidating and extending the current fragmented environmental treaty framework. Such an instrument could in turn form the basis for an international environmental institution to ensure that the obligations under that instrument, and all major multilateral environmental agreements, are complied with and provide a strong global voice for the environment.

A wide range of environmental issues and conflicts over natural resources is likely to arise in the future, as the world's ecosystems and its human communities are further affected by environmental degradation. This may well mean that there will be increasing pressure to establish flexible, approachable, accessible, and informal dispute resolution mechanisms on a regional and international basis (such as an environmental ombudsman). This is especially the case in relation to



climate change and innovative mechanisms for the reduction of greenhouse gas emissions, current and emerging conflicts over water allocation and use, and the pressure for larger and more connected protected areas in terrestrial and marine environments. Dealing with conflict in all of these fields is also in large measure a challenge of respecting human rights, especially the right to a clean and healthy environment, and the book makes clear that human rights courts and tribunals are increasingly at the forefront of international environmental dispute settlement.

By coherently bringing together the body of knowledge on the resolution of international disputes concerning environmental protection and the conservation and exploitation of natural resources, this work forms a solid basis for the contemplation and analysis of future dispute resolution possibilities. The work is likely to become a benchmark within this area, and to be a standard reference of use and interest to international legal practitioners, professors, and students of international environmental and natural resources law, legislators, and political advisers around the world.

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The decision to embark on this work was made in 2003 when I was a visiting fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge. Thanks are extended to Professor James Crawford and Dr Roger O'Keefe for encouraging my involvement in the life of the Centre. I am grateful also to Dr Alex Mills of the Faculty of Law at the University of Cambridge who later read and commented upon significant parts of the text. My visit to Cambridge would not have been possible without generous financial support from the University of Sydney, through the H. S. Carslaw Memorial Scholarship. When completing the manuscript I was fortunate to receive further support from the University of Sydney through a writing fellowship awarded by the

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The book draws upon a doctoral dissertation supervised by Professor Rothwell and Professor Shearer and examined by Professor David Freestone, Professor Philippe Sands, and Professor David VanderZwaag. My supervisors and examiners were exceptionally generous in providing detailed and constructive comments that were invaluable in finalising the manuscript for publication. It must also be acknowledged that parts of the book draw upon and develop material that has been published previously. Sections of chapter 4 appeared in Tim Stephens, 'The Limits of Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 *IJMCL* 173, parts of chapter 7 in Tim Stephens, 'A Paper Umbrella Which Dissolves in the Rain? Implications of the Southern Bluefin Tuna Case' (2001) 6 *APJEL* 297 and parts of chapter 10 in Tim Stephens, 'Multiple International Courts and the "Fragmentation" of International Environmental Law' (2006) 25 *AustYBIL* 227.

My immediate and extended family have provided immense assistance throughout every step of the research and writing process. My parents, Harry Stephens and Dr Tanya Stephens, first inspired in me a love and respect for the natural world and have extended every encouragement and support throughout my academic career. However, my greatest expression of gratitude is reserved for my wife Anna-Maria, without whom I could never have commenced or completed this book. The book is dedicated to our children, Edward and Matilda.

The law as stated in the text is current as at 1 December 2007.

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# Abbreviations

Aarhus Convention	1998 Convention on Access to Information Public Participation and Decision-Making and Access to Justice in Environmental Matters
ACHR	1969 American Convention on Human Rights
<i>AILJ</i>	<i>Australian International Law Journal</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>ALJ</i>	<i>Australian Law Journal</i>
<i>AnnFDDI</i>	<i>Annuaire Français de Droit International</i>
<i>AnnRevEnvRes</i>	<i>Annual Review of Environment and Resources</i>
<i>AnnSICL</i>	<i>Annual Survey of International and Comparative Law</i>
<i>APJEL</i>	<i>Asia Pacific Journal of Environmental Law</i>
ATS	Australian Treaties Series
<i>AustDRJ</i>	<i>Australian Dispute Resolution Journal</i>
<i>AustYBIL</i>	<i>Australian Year Book of International Law</i>
<i>BCICLR</i>	<i>Boston College International and Comparative Law Review</i>
Bevans	<i>Treaties and Other International Agreements of the United States of America (1776–1949)</i>
BULR	<i>Boston University Law Review</i>
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
CACJ	Central American Court of Justice
<i>CalLR</i>	<i>California Law Review</i>
CanTS	Canada Treaty Series
<i>CanYBIL</i>	<i>Canadian Year Book of International Law</i>

CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCSBT	1993 Convention for the Conservation of Southern Bluefin Tuna
C-CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CEC	Commission for Environmental Cooperation
CFI	Court of First Instance of the Court of Justice of the European Communities
<i>ChiJIL</i>	<i>Chicago Journal of International Law</i>
<i>ChineseJIL</i>	<i>Chinese Journal of International Law</i>
CITES	1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora
<i>ColoJIELP</i>	<i>Colorado Journal of International Environmental Law and Policy</i>
<i>ColumJEL</i>	<i>Columbia Journal of Environmental Law</i>
<i>ColumJTL</i>	<i>Columbia Journal of Transnational Law</i>
<i>Comp PolStud</i>	<i>Comparative Political Studies</i>
ConTS	Consolidated Treaty Series
<i>CornellILJ</i>	<i>Cornell International Law Journal</i>
CSD	Commission on Sustainable Development
CTE	Committee on Trade and Environment
CUS	Treaties and Agreements Affecting Canada in force between His Britannic Majesty and the United States of America (1814–1925)
<i>DenJILP</i>	<i>Denver Journal of International Law and Policy</i>
DSB	World Trade Organization Dispute Settlement Body
DSU	1994 Understanding on Rules and Procedures Governing the Settlement of Disputes in the World Trade Organization
<i>DukeLJ</i>	<i>Duke Law Journal</i>
EC	European Communities
ECHR	1950 Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
ECtHR	European Court of Human Rights
<i>EELR</i>	<i>European Environmental Law Review</i>
EEZ	exclusive economic zone

EFZ	exclusive fishing zone
EHRR	<i>European Human Rights Reports</i>
EIA	environmental impact assessment
EJIL	<i>European Journal of International Law</i>
ELQ	<i>Ecology Law Quarterly</i>
EnvLR	<i>Environmental Law Reporter</i>
EPL	<i>Environmental Policy and Law</i>
EPLJ	<i>Environmental and Planning Law Journal</i>
ETS	European Treaty Series
FAO	United Nations Food and Agriculture Organisation
FinnYBIL	<i>Finnish Year Book of International Law</i>
FordhamELJ	<i>Fordham Environmental Law Journal</i>
FordhamILJ	<i>Fordham International Law Journal</i>
GA	United Nations General Assembly
GaLR	<i>Georgia Law Review</i>
GAOR	United Nations General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GeolELR	<i>Georgetown International Environmental Law Review</i>
GeoWashJIL Econ	<i>George Washington Journal of International Law and Economics</i>
GEP	<i>Global Environmental Politics</i>
GerYBIL	<i>German Year Book of International Law</i>
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
GM	genetically modified
GMO	genetically modified organism
Hague Convention	1899 International Convention for the Pacific Settlement of International Disputes
HarvELR	<i>Harvard Environmental Law Review</i>
HarvILJ	<i>Harvard International Law Journal</i>
HastingsICLR	<i>Hastings International and Comparative Law Review</i>
HosfraLR	<i>Hosfra Law Review</i>
IAComHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	1966 International Covenant on Civil and Political Rights
ICE	International Court for the Environment (proposed)



ICEF	International Court for the Environment Foundation
ICJ	International Court of Justice
ICJ Pleadings	International Court of Justice Pleadings
ICJ Rep	International Court of Justice Reports
ICLQ	<i>International and Comparative Law Quarterly</i>
IELR	<i>International Environmental Law Reports</i>
IJC	International Joint Commission
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
<i>IndJGLS</i>	<i>Indiana Journal of Global Legal Studies</i>
<i>IntOrg</i>	<i>International Organization</i>
<i>IowaLR</i>	<i>Iowa Law Review</i>
<i>ItalYBIL</i>	<i>Italian Year Book of International Law</i>
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unregulated, and unreported
<i>JEL</i>	<i>Journal of Environmental Law</i>
<i>JIEconL</i>	<i>Journal of International Economic Law</i>
<i>JIWLP</i>	<i>Journal of International Wildlife Law and Policy</i>
<i>JLS</i>	<i>Journal of Legal Studies</i>
<i>LJIL</i>	<i>Leiden Journal of International Law</i>
LNTS	League of Nations Treaty Series
LOS Convention	1982 United Nations Convention on the Law of the Sea
LPICT	<i>The Law and Practice of International Courts and Tribunals</i>
<i>MaxPlanckYBUNL</i>	<i>Max Planck Year Book of United Nations Law</i>
Madrid Protocol	1991 Protocol on Environmental Protection to the Antarctic Treaty
<i>McGillLJ</i>	<i>McGill Law Journal</i>
<i>MichJIL</i>	<i>Michigan Journal of International Law</i>
<i>MinnJGT</i>	<i>Minnesota Journal of Global Trade</i>
<i>MJIL</i>	<i>Melbourne Journal of International Law</i>
MMPA	Marine Mammal Protection Act 1972
Moore	John Bassett Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> (1898) vols. I–VI
MULR	<i>Melbourne University Law Review</i>

NAAEC	1993 North American Agreement on Environmental Cooperation
NAFTA	1992 North American Free Trade Agreement
NatResJ	<i>Natural Resources Journal</i>
NCP	non-compliance procedure
NethYBIL	<i>Netherlands Year Book of International Law</i>
NGO	non-governmental organisation
NILR	<i>Netherlands International Law Review</i>
NordicJIL	<i>Nordic Journal of International Law</i>
NYUELJ	<i>New York University Environmental Law Journal</i>
NYUJILP	<i>New York University Journal of International Law and Politics</i>
NZJPIL	<i>New Zealand Journal of Public International Law</i>
OAS	Organisation of American States
OAS TS	Organisation of American States Treaty Series
OCM	<i>Ocean and Coastal Management</i>
OhioStJDR	<i>Ohio State Journal on Dispute Resolution</i>
OJ	Official Journal of the European Communities
OrLR	<i>Oregon Law Review</i>
OSPAR	1992 Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PITS	Pacific Islands Treaty Series
PLR	<i>Public Law Review</i>
ProcASIL	<i>Proceedings of the American Society of International Law</i>
Ramsar Convention	1971 Convention on Wetlands of International Importance, Especially as Waterfowl Habitat
RDC	<i>Recueil des Cours, Académie de droit international de la Haye</i>
RECIEL	<i>Review of European Community and International Environmental Law</i>
RevAPS	<i>Review of Asian and Pacific Studies</i>
RIAA	<i>United Nations Reports of International Arbitral Awards</i>
Rio Declaration	1992 United Nations Declaration on Environment and Development
SDL&P	<i>Sustainable Development Law and Policy</i>
SICA	Central American Integration System
SingYBIL	<i>Singapore Year Book of International Law</i>

SLR	<i>Sydney Law Review</i>
SPS Agreement	Sanitary and Phytosanitary Agreement
Stockholm Declaration	1972 Declaration of the United Nations Conference on the Human Environment
<i>SyracuseJIL&amp;Com</i>	<i>Syracuse Journal of International Law and Commerce</i>
TAC	total allowable catch
<i>TempleICLJ</i>	<i>Temple International and Comparative Law Journal</i>
<i>TexILJ</i>	<i>Texas International Law Journal</i>
TIAS	United States Treaties and Other International Acts Series
<i>TouroJTL</i>	<i>Touro Journal of Transnational Law</i>
<i>TransL&amp;CP</i>	<i>Transnational Law and Contemporary Problems</i>
<i>TulELJ</i>	<i>Tulane Environmental Law Journal</i>
UKTS	United Kingdom Treaty Series
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNSCEAR	United Nations Scientific Committee on the Effects of Atomic Radiation
UNSWLJ	University of New South Wales Law Journal
UNTS	United Nations Treaty Series
<i>UPaJIEcon</i>	<i>University of Pennsylvania Journal of International Economic Law</i>
<i>UPaLR</i>	<i>University of Pennsylvania Law Review</i>
<i>URichLR</i>	<i>University of Richmond Law Review</i>
UST	United States Treaties and Other International Agreements
<i>VaELJ</i>	<i>Virginia Environmental Law Journal</i>
<i>VaJIL</i>	<i>Virginia Journal of International Law</i>
<i>VandJTL</i>	<i>Vanderbilt Journal of Transnational Law</i>
VCLT	1969 Vienna Convention on the Law of Treaties
VUWLR	<i>Victoria University of Wellington Law Review</i>
WALR	<i>Western Australia Law Review</i>
WCED	World Commission on Environment and Development
<i>WisILJ</i>	<i>Wisconsin International Law Journal</i>
<i>WisLR</i>	<i>Wisconsin Law Review</i>
WTAM	<i>World Trade and Arbitration Materials</i>
WTO	World Trade Organization
WTR	<i>World Trade Review</i>

<i>YaleHR&amp;DevLJ</i>	<i>Yale Human Rights and Development Law Journal</i>
<i>YaleJIL</i>	<i>Yale Journal of International Law</i>
<i>YaleLJ</i>	<i>Yale Law Journal</i>
<i>YBEuroEL</i>	<i>Yearbook of European Environmental Law</i>
<i>YBEuroL</i>	<i>Yearbook of European Law</i>
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- 1892 Great Britain–United States Treaty Submitting to Arbitration the Questions Relating to Seal Fisheries in the Bering Sea, opened for signature 29 February 1892, 12 Bevans 220 (entered into force 7 May 1892)
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