# Book Reviews

Edited by

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## International Courts and Environmental Protection

*Tim Stephens*
(*Cambridge University Press,* 2009 i-xliii 1-410)

It is a truism that the contemporary field of international environmental law (sometimes known today as 'international law in the field of sustainable development'), was born in Stockholm at the 1972 United Nations Conference on the Human Environment (UNCHE).[1] The text under review makes this very point early on in its treatment of the development of international environmental law (p 3). As the fortieth anniversary of UNCHE approaches, and with still so much on the international environmental agenda, it is important to take stock of the growth of its legacy in order to see where we have been and where we might be headed.[2] The recent volume by Tim Stephens will greatly aid in an important part of this task.

1 This version of the genesis of international environmental law is not entirely accurate, however, and Tim Stephens recognises it in his book. Aspects of the natural environment have long been part and parcel of traditional subjects of international law. For instance, the topics of state responsibility, shared natural resources, transboundary air and water pollution, and the commonage beyond national jurisdiction all dealt with environmental issues well before UNCHE. See D K Anton, J I Charney, P Sands, T Schoenbaum and M K Young, *International Environmental Law* (2007) 1–2.

2 It has been reported that Brazil plans to call on the UN General Assembly to approve an 'Earth Summit' for 2012 to commemorate the 40th anniversary of UNCHE and the 20th anniversary of the United Nations Conference on Environment and Development: 'Brazil Proposes 2012 Meet[ing] to Monitor Progress Since Earth Summit' *Agence France-Presse* (25 September 2007) <afp.google.com/article/ALeqM5hz4GLVjDBCAtB2oC9_AkHqsP1rNQ>. See also the Stakeholder Forum website, '*earth summit2012'* <http://www.earthsummit2012.org/>.

In particular, Stephens' book will assist in the review of past, present, and possible future uses of international adjudication as a part of the effort to make international environmental law relevant and effective. It contains impressively deep and sapient assessments of the theory and practice behind international environmental adjudication. It splendidly succeeds in its major aim of providing an account of 'the historical and contemporary role of international courts and tribunals in resolving environmental disputes, promoting compliance with environmental commitments, and developing substantive rules and principles of environmental law' (p 2). Ben Boer is entirely accurate when he declares in the Preface that 'this book represents the first comprehensive analysis of the jurisprudence [of international environmental dispute settlement] through the lens of global environmental governance and sustainable ecological development' (p xiv). Indeed, even recognising the extended treatment given to the subject in the 1970s by Richard Bilder[3] and Aida Levin,[4] I would argue because the situation is so different today that Stephens' text is, in fact, the only reliable comprehensive exploration of the subject.

If we start by looking at where we have been, it is undeniable that following UNCHE a voluminous, mostly reactive, corpus of environmental treaty law — and concomitant institutions — proliferated with increasing frequency. The proliferation started slowly and interest in the subject in the academe was even slower to develop.[5] However, by the late 20th and early 21st Centuries international environmental law-making was generating such prodigious volume that it was creating concern over 'treaty congestion'[6] and the amount of academic literature currently being produced makes is hard for even a sophisticated student of the area to keep up. One might think with this robust international environmental legal output the international community had established (or was well on its way to establishing) an effective global legal regime(s) for environmental protection. The distressing reality, however, is that the indicators of global environmental health continue to signal deterioration in almost all areas.[7]

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3 R B Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 144 *Recueil des Cours* 139.

4 A Levin, *Protecting the Human Environment: Procedures and Principles for Preventing and Resolving International Controversies* (1977).

5 Philippe Sands notes that, as late as 1989, the leading treatises and textbooks on international law 'fail in their index to make any mention of the words "environment"or "pollution".' P Sands, 'Environment, Community and International Law' (1989) 30 *Harvard International Law Journal* 393, 394 fn 3.

6 See, eg, E Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675, 697–02. By one estimate, the international community generated 369 binding multilateral environmental agreements from 1960–99: R Ramlogan, 'The Environment and International Law: Rethinking the Traditional Approach' (2001) 3 *Vermont Journal of Environmental Law* 1, 3, Table 1.

7 See generally United Nations Environment Programme, *Global Environmental Outlook (GEO4): Environment for Development* (2007).

With so much environmental treaty law out there, the continuing ecological decline raises fundamental issues about the effectiveness of international environmental law in ways important to international environmental adjudication. Perhaps most important, is whether the surfeit of environmental norms that have been called forth over the last forty years is worth the reams of paper on which they are written. In order to answer this question, we need to consider two related effectiveness matters: whether international environmental treaties are framed adequately and addressing problems as intended and if so and degradation is continuing, whether normative compliance (the normally used proxy for effectiveness), is implicated. As Stephens notes generally, international adjudication may be more or less important depending on the situation. So here too.

If we assume perfect — or near perfect — compliance with the existing plethora of treaty obligations, it should mean that we see demonstrable environmental improvement (or at least a cessation or slowing of harm) in the real world. If not, as seems to be the case, two possible courses of action (or a combination of them) appear to be called for: (i) the amendment of specific treaties because their protection provisions are presumably insufficient; or (ii) the creation of yet more law because *lacunae* remain despite our prodigious law-making efforts. This first aspect of effectiveness remains problematic. It is often extremely difficult to show a causal relation between international obligations and environmental consequences. And, lack of indicators, uneven monitoring, and scare or non-existent data raise even more hurdles. Problems aside, though, it is apparent in this situation that international adjudication will contribute little, if anything, to improving the overall well-being of the environment. True, the posture of adjudication may periodically be such, as Stephens shows in Part II of the text, to allow a court or tribunal to do what any court worth its salt does — to make normative contributions by elaborating and extending first principles in concrete cases. However, this alone will not remediate environmental degradation and these cases are still too few and, in any event, cannot be counted upon to timely or proactively develop the law in any sort of systematic way.

Moreover, as Stephens recognises, the perception remains that international adjudication generally has only a relatively minor part to play in the greater scheme of lessening humanity's environmental impact on the Earth. Diplomatic hurdles, the consent barrier, attribution, difficulties in proof, time, expense, etcetera, all conspire to make successful international environmental litigation still a relatively little used (outside of Europe), long shot. [8] Moreover, piecemeal litigation in international courts and tribunals, which is highly dependent on specific legal context, the right constellation of facts, and often some serendipity, is not an optimal form of global environmental governance. While Stephens would probably

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8 See, eg, J L Dunoff, 'Institutional Misfits: The GATT, The ICJ & Trade and Environment Disputes' (1994) 15 *Michigan Journal of International Law* 1043, 1100–06 (outlining inherent difficulties and highlighting 'an almost barren history of international environmental adjudication, with little prospect for dramatic change').

disagree that international judicial bodies suffer from these ‘inherent limitations’ (p 91–92), to his credit, Stephens is realistic in his assessment, recognising that international litigation is no ‘panacea’ for the problems we face (p 365) and that ‘regime context is (almost) everything’ in making utility assessments (p 116).

Indeed, one is pleasantly surprised time and again throughout the entire text as Stephens insightfully balances argument and counter-argument about the utility of adjudication. These insights alone provide a rich resource for scholars of peaceful settlement of international disputes. The real value of Stephens’ contribution, however, is in providing new illumination on the potential that international adjudications has, not to improve the environmental condition of the Earth *per se*, but to promote and improve the effective functioning of international environmental law as it is, in line with his aims for the text mentioned above – resolving disputes, promoting compliance, and developing principles. On the whole, one finds his recommendations for improving current deficiencies compelling.

With these preliminaries in mind, we now turn to the specifics of Stephens’ excellent text. The monograph is organised in three major Parts, with a free standing introduction and conclusion. Part I (Chapters 2–4) treats the role and relevance of international courts in the scheme of environmental governance. Chapter 2 outlines the host of legal *fora* already in place for the resolution of environmental disputes, using the term ‘environmental’ in its broadest sense. As one would expect, Stephens discusses well established courts and tribunals and those recognised as having and environmental bearing. This includes a variety of arbitral processes, the International Court of Justice, the International Tribunal for the Law of the Sea, the World Trade Organization, and the European Court of Justice. His treatment also comprehends the less apparent, but no less important, human rights courts and treaty bodies, which have well established individual complaints mechanisms, something sadly lacking in the vast majority of environmental agreements. Accordingly, these courts and bodies are increasingly involved in cases where human rights violations are threatened or occasioned by environmental harm. Finally, possibilities for the International Criminal Court are considered. Chapter 2 examines in detail unique aspects and the opportunities and problems present in each of these *fora*. In so doing, it becomes a valuable tool for the international environmental practitioner and student alike. It also cogently highlights a growing diversity and ‘patchwork’ of jurisdictions, which Stephens returns to in Part III when considering the so-called fragmentation of international law and the need for judicial coordination. Chapter 2 concludes with an evaluation and rejection of the periodic proposals for the establishment of an International Court for the Environment that have been in play since Judge Amedeo Postiglioni of the *Corte Suprema di Cassazione* steered the first proposal through the International Court for the Environment Foundation in 1989.[9]

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9 See A Postiglione, *The Global Village Without Regulations: Ethical, Economical, Social and Legal Motivations for an International Court of the Environment* (1992).

Chapter 3 focuses on the issue of compliance with, and enforcement of, norms of international environmental law. It evaluates the traditional modes of compelling compliance through self-help, state-responsibility and recourse to international courts and tribunals. It then charts the development of international environmental non-adversarial governance structures that have become part and parcel of contemporary multilateral environmental agreements. Stephens highlights the flexible, well-adapted alternatives these 'managerial' structures provide to third party dispute settlement in the environmental context. He also notes how some critics believe they weaken the secondary rules of state responsibility. As well, attention is called to the fact that these managerial structures are conspicuously absent from a number of environmental treaties and how some non-compliance procedures have turned toward inclusion of adjudicative elements. Accordingly, international adjudication still has a role to play in settling disputes and promoting compliance.

In Chapter 4 Stephens makes the case for international adjudication 'as an institution for environmental governance' (p 115). He details adjudication as a method of dispute settlement and as a means of facilitating normative compliance, identifying pros and cons with high level analysis. His conclusion, however, gives one pause. It is worth quoting in some detail:

> Despite several apparent limits, adjudication possesses particular strengths in the environmental context, including the capacity to address environmental disputes through a process that is to a considerable extent divorced from political disputation. The institution of adjudication (in its independence), the process of argumentation (according to criteria of rationality), and the decision-making process (according to law) means that courts, international and national, are uniquely placed to speak beyond the confines of the dispute at hand and confront major environmental challenges of our time (p 116).

The identification of the strengths of adjudication is right on the mark. However, if I read Stephens correctly, many would take issue with the claim that these strengths lead to the conclusion that it is apropos for international courts to attempt to set global environmental policy beyond the law of the case. To start with, the idea of *stare decisis* has been resisted by states (at least in a formal sense) in international law. To move from a legal rule that teaches decisions of international courts have 'no binding force except between the parties and in respect of [a] particular case'[10] to one where courts are permitted not only to bind future legal decision-makers, but also declare policy at large seems like a stretch, even if we grant it is inevitable that international courts do look to past rulings.[11] Putting this aside, though, more fundamental objections are likely to come from those who view such wider policy ambitions as 'judicial activism', especially in a legal system lacking a legislative mechanism that might respond to particular pronouncements.

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10 Statute of the International Court of Justice (1976) *Yearbook of the United Nations* 1052, art 59.

11 O L Lissitzyn, *The International Court of Justice* (1951) 18–21.

Part II of the text (Chapters 5–7) is devoted to the judicial development of international environmental law. Part II focuses on the bread and butter jurisprudence of international environmental lawyers in three particular areas: transboundary environmental harm (Chapter 5), freshwater resources (Chapter 6), and marine biological diversity (Chapter 7). It should come as no surprise that analysis of foundational and leading cases is covered, including the cases of *Bering Sea Fur Seals, North Atlantic Coast Fisheries, River Oder, Trail Smelter, Lac Lanoux, Fisheries Jurisdiction, Nuclear Tests, Gabčíkovo-Nagymaros Project,* the *Estai, Southern Bluefin Tuna, MOX Plant, Swordfish Stocks, Straits of Johor,* and *Pulp Mills*. While the subject matter of Part II has been covered extensively (especially the cases through *MOX Plant*), it is in these chapters that Stevens provides a penetrating, and often fresh, assessment of the 'judicial development of international environmental law'. The result of Stephens' assessment is mixed, with some cases giving life to principles today reflected as binding norms in an array of environmental agreements, and other cases impeding progress. Stephens helpfully charts the manner in which 'environmental concepts and principles' have been received by international courts (sometimes eagerly, more often with difficulty). With a keen analysis, he unpacks the structural, procedural and substantive reasons behind the variability of judicial contributions. The tyro and sophisticate alike will find profit in studying Stephens' treatment.

Part III (Chapters 8–10) highlights three contemporary challenges for international environmental adjudication – opening the court house doors to non-state actors, the need to coordinate the jurisdictions of myriad dispute settlement institutions, and the 'fragmentation' of international law between different regimes. Much of the analysis can be translated across all forms of international dispute settlement. Chapter 8 opens Part III with challenges posed by public interest proceedings and calls to mind the exclamation 'sue the bastards!' That refrain – popularised by Victor Yannacone [12] and a staple of municipal environmental lawyers for generations now — is still heard with envy by international environmental lawyers (at least those with a 'public interest' bent). Yannacone, however, always viewed adjudication as a secondary tool. Winning in court was not the main game. Rather, court action was intended to drive public opinion and ultimately compel society-wide and more durable solutions by legislation. [13] Of course, the existence of a court with jurisdiction and the ability to get through those court house doors by meeting sometimes difficult procedural requirements (for example standing, necessary joinder, *forum non conveniens*, etcetera) was a necessary predicate to Yannacone's underlying strategy. While Stephens has not given us a public interest litigation manual for international environmental

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12 The expression, at least in an environmental legal context, has been attributed to the pioneering lawyer Victor Yannacone. See V Yannacone, 'Sue the Bastards' in National Staff of Environmental Action (eds), *Earth Day—The Beginning: A Guide for Survival* (1970) 199–215. See also 'Sue the Bastards' *Time Magazine* (October 18, 1971) 54

13 See S Udall, *The Quiet Crisis and the Next Generation* (1988) 224.

lawyers,[14] he does set out the increasing importance of civil society actors in dispute settlement. He studies the limited opportunities present for non-state litigants in international courts and tribunals and argues that these opportunities will not expand unless we reconceptualise public interest litigation. Still, the advent of the international *amicus curiae* and avenues of individual complaint in human rights bodies provide hope for Stephens that we might at least standardise rules for this limited judicial intervention by non-state actors.

Chapter 9 takes on the significant problem of judicial coordination in an international salmagundi of disparate institutions, across a wide spectrum of regimes, with differing adjudicative procedures and objectives. To make matters more difficult, significant jurisdictional gaps and overlap exist between these institutions. These problems 'compromise the effective operation of international courts' and 'prevent environmental cases from being resolved promptly and effectively' (p 271). They have resulted in significant inefficiencies in the settlement of disputes and the promotion of compliance either by way of roadblocks or competition. By exploring several recent disputes in detail, Stephens succeeds in suggesting a number of possible realistic strategies by which to reduce three major practical problems of coordination — forum shopping, the commencement of simultaneous proceeding in different venues over the same dispute, and successive proceedings over the same dispute in different tribunals. Suffice it to say here that, as Stephens points out, absent a thoughtful, comprehensive jurisdictional rationalization by states – an extremely unlikely bet – problems will remain. The 'most that might reasonably be expected is a basic level of harmony in the operation of potentially competing jurisdictions' (p 303).

Chapter 10 addresses the so-called fragmentation in international law. Some view the proliferation of legal and quasi-legal authority in the international legal system as raising intractable problems for the consistent application of law and the uniformity of interpretation of legal norms because the system has no court of compulsory ultimate jurisdiction. Others see these developments as a consequence of a maturing legal system and not so very different from complex municipal legal systems in which cross-fertilization of norms across a multitude of jurisdictions is commonplace. For Stephens, the problem seems to come down to 'the possibility of conflict between legal norms applicable to the same state behaviour' (p 305). Leaving aside critical legal scholarship that has identified the indeterminacy of legal norms as a problem for normative coherency altogether[15] (much less for

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14 For an excellent guide to the circumscribed opportunities for the public interest environmental lawyer in international *fora*, see L A Malone and S Pasternack, *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (2004).

15 See, eg, M Koskenniemi, *From Apology to Utopia* (1989) 40–48. Interestingly, Martii Koskenniemi chaired the International Law Commission Study Group on Fragmentation of International Law. The Final Report of the Study Group assumes that international law is a legal system and that its rules can be applied to resolve disputes to reach best outcomes. See 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law': Report of the

normative consistency or interpretive uniformity), Oscar Schacter, more generally, exposed the endemic nature of this problem for international law. He highlighted that principles of international law often march in diametrically opposed pairs and, in a judicial setting, are regularly called upon by agents representing contending governments for application to the same set of facts by adjudicators.[16] It is the adjudicator's job to weigh conflicting norms with potential application to a common core of facts and balance them in a way best for the situation. True, the problem may be exacerbated by more courts and tribunals, but it seems that there may be nothing new under the sun here.[17]

When I was first asked to review a text entitled *International Courts and Environmental Protection*, I was reminded of a casebook that I adopted to teach the subject of International Environmental Law in 1998. It highlighted that recourse to judicial tribunals in international environmental cases was uncommon and pointed out that in the realm of transboundary air pollution, at least, 'only one international adjudication exists with respect to traditional air pollution issues'.[18] At that time it seemed ordinary to view international environmental litigation as exceptional because of its inherent difficulty and seemingly consistent state reticence to third party environmental dispute settlement.[19]

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International Law Commission on the Work of its Fifty-Eight Session, UN GAOR, 56th sess, Supp No 10, UN Doc A/61/10, 407–23.

16 O Schacter, *International Law in Theory and Practice* (1991) 20–21. Schachter writes that:

> it has often been observed that principles like proverbs can be paired off into opposites. It is easy to find such opposites in international law: non-use of force versus self-defence, self-determination versus territorial integrity, freedom of the seas versus historic rights. Faced with competing principles of equal legal status, a . . . decision-maker . . . must weigh and balance them to reach a specific solution. . . . Contradictory principles are not seen as defects in the law but as reflections of complex social realities. . . . The technique of balancing requires an evaluation of the importance of the competing interests in a particular context. In practice this allows for specific interests to be taken into account and weighed more heavily than more general factors. The effect . . . is to facilitate legal justification in support of a particular action or claim [footnotes omitted].

17 Students of English legal history, when considering fragmentation, may be reminded of the early jurisdictional struggles over business and rules between Royal judges, baronial and other local courts, chancery clerks, and common law courts and the growth of the writ system. See generally AR Hogue, *Origins of the Common Law* (1966); F Pollock and F W Maitland, *The History of English Law*, Cambridge (2nd ed, 1898) chap 3.

18 D Hunter, J Salzman and D Zaelke, *International Environmental Law and Policy* (1998) 512.

19 Indeed, sound arguments can still be made that international environmental adjudication should be more aberrant than normal; that our focus and resources should always be directed to the avoidance of disputes and the *prevention* of environmental harm in the first instance, rather than on *post hoc* litigation in international courts seeking remedies that can rarely, if ever, restore the *status quo*.