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Environmental Law in International Tribunals

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INTERNATIONAL
ENVIRONMENTAL
LAW REPORTS

Volume 5

INTERNATIONAL ENVIRONMENTAL LAW
IN INTERNATIONAL TRIBUNALS

The fifth and final volume of the *International Environmental Law Reports* collects together eighteen decisions from international tribunals. As well as decisions of the International Court of Justice, the volume includes decisions from the International Tribunal for the Law of the Sea, various arbitral tribunals and the United Nations Compensation Commission. The comprehensive case summaries are backed up by detailed cross-references to original sources. Covering four decades of legal proceedings, this volume brings the 'classic' decisions up to date with the major modern decisions of international tribunals.

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INTERNATIONAL ENVIRONMENTAL LAW REPORTS

Volume 5

INTERNATIONAL ENVIRONMENTAL LAW
IN INTERNATIONAL TRIBUNALS

Edited by

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Preface

This is the fifth and final volume in this series of *International Environmental Law Reports*. As stated in the Preface to volume 1 (1999), it was intended 'to present [the] considerable and growing body of relevant jurisprudence' concerning international environmental law.

Volume 5 is in a sense a companion to volume 1 which began the series. Volume 1 covered in accessible form twenty-eight 'classic' decisions, many of them still cited as foundational to the subject: for example, *Behring Fur Seals*, *Trail Smelter*, *Diversion of Waters from the Meuse*, *Lac Lanoux*. The present volume brings the classics up to date, so to speak, with the major modern decisions of the International Court and the various tribunals which exercise jurisdiction under the 1982 UN Convention on the Law of the Sea. These cases – from *Fisheries Jurisdiction* through *Gabčíkovo–Nagyymaros* and *Southern Bluefin Tuna* to *MOX Plant* and *Land Reclamation* – are now central to the subject. It is curious that none of them have yet generated, or perhaps are likely to generate, the immediate name recognition of *Trail Smelter*, and that none have associated with them a general principle of the *sic utere tuo* kind for which *Trail Smelter* is cited in a thousand academic articles and a million undergraduate essays. This prompts two questions – why do there seem to be no 'modern classics' of environmental law, and is this situation to be regretted?

As to the first question, the answer may simply be that name recognition takes time and repetition – often, it must be said, rather thoughtless repetition, of the kind that has for so long treated the *Corfu Channel* case as if it concerned an issue of environmental law or involved the application of the *sic utere tuo* principle, which it did not. Even with decisions which do involve issues of international environmental law, with time the case may come to stand straightforwardly for a proposition which tells only part of the story: the complex proceedings in *Trail Smelter* itself (set out in 1 *IELR* 231–331) provide an example. No doubt the modern cases may eventually acquire the status of 'classics', perhaps because they too will come to be treated as icons rather than as complex events. For – and this brings us to the second

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question – international environmental law is almost always about complexity and uncertainty, about striking a balance between conflicting uses and potentially conflicting rights and interests, in which issues of fact and appreciation are dominant and there is no trump card. Issues concerning the environment have to be worked through, understood in a measure of detail, lived rather than encapsulated. That is yet another reason why *Corfu Channel*, with the trump card of Article 2(4) of the United Nations Charter and the prohibition of forcible intervention, is very far from the present field.

At any rate, the modern decisions show clearly enough the processes by which international courts and tribunals, often at an interlocutory stage, are confronted with environmental issues and with conflicting assertions of right as between States. There can be little doubt that the frequency with which these issues come before international courts has increased. The substantial jurisprudence of the WTO and of international human rights tribunals was presented in volumes 2 and 3, and here we have, as it were, the remainder or residue – the international claims dealt with on an interstate basis by courts applying general international law. They present a fascinating picture of a still emerging jurisprudence, filling out (with nuances and occasional backslidings) the law so prolifically set out in the great number of treaties.

Thanks are due to many people for their assistance in the preparation of this volume. We are particularly grateful to Dapo Akande, Susan Breau, Joshua Brien, Kylie Evans, Professor Christopher Greenwood CMG, QC, Edward Helgeson and Samuel Wordsworth for writing the summaries and to the Editors of the *International Law Reports* for their kind permission to adapt those summaries that were originally written for the *ILR*. Our thanks also go to Tara Grant for her invaluable general and secretarial assistance, to Miss Maureen MacGlashan CMG, for her thorough preparation of the index and the table of treaties, to Diane Ilott for her patience and attention to detail in copy-editing this volume and to Finola O’Sullivan and everyone else at Cambridge University Press who has helped to publish this volume.

James Crawford

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Editorial note

The five volumes of *International Environmental Law Reports* contain significant decisions pertaining to the field of international environmental law rendered by various national and international tribunals. The decisions have been reproduced to the greatest extent possible in the form in which they were originally reported or handed down. Some old punctuation has been modernised, and efforts have been made to standardise typefaces; otherwise the texts are as originally published. For this reason the reader will find that spellings, especially of place names, may vary.

For reasons of space, the texts of the decisions of the International Court of Justice and other international tribunals in this volume have been heavily dissected and only relevant extracts relating to environmental issues broadly conceived are included. Report citations for omitted material are given in editorial footnotes in the list of documents following the summary where possible. Within the text omitted material is indicated by an ellipsis in square brackets. The report from which the decision has been reproduced is cited at the end of each decision, and the bold page numbers in square brackets throughout a decision refer to the pagination of that report.

Each case has been summarised. Although only relevant extracts of the texts of decisions are reproduced, the summary sums up the facts and decision(s) in the case as a whole so that the highlighted points of environmental interest can be understood in the context of the case. Each summary is preceded by italicised digest entries. The digest entries are collected together in the Digest at the beginning of the volume to give the reader an overview of the issues covered in the volume.

Immediately after the summary is a list of the documents that follow, and the pages on which they commence. In addition to the decision(s) being reported this may include any relevant special agreement or related decision. Occasionally an editorial note concerning subsequent or related events or decisions is included at the end of a case.

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Footnotes in the summary cross-refer to other cases in the *Reports* or in the *International Law Reports* and provide other useful information. The original footnotes in the texts of the decisions have been renumbered for reasons of text extraction and every effort has been made to adapt the reproduced footnotes where appropriate. Any editorial footnotes in the texts of the decisions appear in square brackets.

For the reader's convenience the volume contains tables of cases reported, a digest, a table of treaties and an index.

The cases reported here may be cited as 5 *IELR* followed by the relevant page number, e.g. 5 *IELR* 1.

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Abbreviations

ADL	Arthur D. Little, consultancy
AFMA	Australian Fisheries Management Authority
BNFL	British Nuclear Fuels plc
BPC	British Phosphate Commissioners
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CMLR	Common Market Law Reports
DEFRA	Department of the Environment, Food and Rural Affairs (UK)
DETR	Department of the Environment, Transport and the Regions (UK)
EA	Euratom Treaty
EAEC	European Atomic Energy Community
EC	European Community
ECE	Economic Commission for Europe
ECR	European Court Reports
EEZ	exclusive economic zone
EFP	experimental fishing programme
EFPWG	Experimental Fishing Programme Working Group
EIA	environmental impact assessment
EIS	environmental impact statement
ESSD	environmentally and socially sustainable development
EU	European Union
EURATOM	Treaty Establishing the European Atomic Energy Community
FAO	United Nations Food and Agriculture Organization
FMA	Australian Fisheries Management Act 1991

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GIS	Geographic Information System
GOE	group of experts
HAST	highly active storage tank
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSU	International Council of Scientific Unions
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IPPNW	International Physicians for the Prevention of Nuclear War
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported and unregulated [fishing]
JCP	Joint Contractual Plan
KOC	Kuwaiti Oil Company
KPC	Kuwait Petroleum Corporation
KPI	Kuwait Petroleum International Limited
LOS	Law of the Sea
MAFF	Ministry of Agriculture, Fisheries and Food (UK)
MOX	mixed oxide fuel
MSJCE	Malaysia–Singapore Joint Committee on the Environment
NAFO	North Atlantic Fisheries Organisation
NAFTA	North Atlantic Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NLGC	Nauru Local Government Council
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
OJ	Official Journal (of the European Union)
OSPAR Convention	Convention for the Protection of the Marine Environment of the North East Atlantic, 1992
PA	PA Consulting Group, London
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

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PNEs	peaceful nuclear explosions
RIAA	Reports of International Arbitral Awards
ROPME	Regional Organization for the Protection of the Marine Environment
SAR Zone	search and rescue zone
SBT	southern bluefin tuna
SCOPE	Scientific Committee on Problems of the Environment
SMP	Sellafield MOX Plant
TAC	total allowable catch
THORP	Thermal Oxide Reprocessing Plant
TTAPS	Turco, Toon, Ackerman, Pollack and Sagan
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNIDIR	United Nations Institute of Disarmament Research
UNIDO	United Nations Industrial Development Organization
UNSC	United Nations Security Council
UNSCEAR	United Nations Scientific Committee on the Effects of Atomic Radiation
UNSCR	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
USD	United States Dollars
USSR	Union of Soviet Socialist Republics
VMS	Vessel Management System
WBC Claim	Well Blowout Control Claim
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization

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