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# Defining International Environmental Law

A Book Review by Michelle Ben-David of *The Art and Craft of International Environmental Law* by Daniel Bodansky (Harvard University Press 2010).

## OVERVIEW

While the field of international environmental law is comparatively new, the trans-boundary nature of environmental challenges and the present landscape of global affairs have led to the development of a unique field of practice. International environmental laws must contend with the difficulties involved in quantifying and determining what constitutes a viable solution to an environmental ill within the context of opposing state interests. Professor Daniel Bodansky offers a sweeping explanation of the world of international environmental law in his book *The Art and Craft of International Environmental Law*.<sup>1</sup> He explains how the dynamic nature of environmental challenges requires flexibility in developing legal mechanisms as international environmental law transitions from its infancy to a more established field.<sup>2</sup> Each term in the phrase “international environmental law” carries its own distinctive complications.<sup>3</sup> What precisely constitutes an “environmental concern” has shifted over the years as new science develops and different social patterns emerge.<sup>4</sup> Moreover, which—and why—particular environmental issues arrive on the international stage is not necessarily straightforward.<sup>5</sup> Finally, while “law” typically implies the existence of enforcement mechanisms,<sup>6</sup> international environmental law is less precise than traditional legal models.<sup>7</sup> Though “international environmental law” is not a misnomer, it does challenge established principles of what constitutes “law.”

Professor Bodansky provides the reader with a broad and comprehensive description of international environmental law from its early history to the

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1. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* (2010).
2. *Id.* at 270.
3. *Id.* at 9.
4. *Id.* at 10.
5. *Id.* at 11.
6. *Id.* at 13.
7. *Id.* at 14.

current state of play, concluding with a rather optimistic assessment of its effectiveness. While Professor Bodansky's book might not offer many new answers for practitioners, it does raise important questions and challenge the way critics often evaluate this legal field. He suggests that, rather than measure international environmental law by individual benchmarks,<sup>8</sup> it is more appropriate to evaluate international environmental law holistically as "the art of the possible."<sup>9</sup> There is no definitive model of an effective international environmental agreement; instead, practitioners must work to design unique frameworks to deal with evolving environmental challenges.<sup>10</sup>

### I. "INTERNATIONAL"

Like most international issues, one major hurdle in international environmental law is the proverbial multitude of cooks in the kitchen.<sup>11</sup> International environmental law is often regarded as a negotiation between various state actors who have conflicting interests. While true, this is an oversimplification of the motivations and ambitions of, as well as the restrictions on, "states."<sup>12</sup>

Even though states are the principal traditional players in international regimes, they are not the only players.<sup>13</sup> There are a host of international institutions, non-governmental organizations, and business interests that insert themselves in the negotiating process.<sup>14</sup> National constituents and governmental structures limit how a state actor can and will be involved at the international level.<sup>15</sup> Professor Bodansky offers his perspective on the various actors affecting the international environmental regime from their respective roles.<sup>16</sup> Recognition that non-state actors have an influence on the process of creating international environmental mechanisms and a role to play in implementing international agreements is important when developing solutions to environmental challenges.<sup>17</sup> Moreover, many of the actors involved convey rhetoric that affects the state's eventual position on a given issue.<sup>18</sup> Although dispute resolution often involves a specific harm that two parties then negotiate

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8. Traditional benchmarks to measure the effectiveness of an environmental regime include whether the mechanisms succeed in addressing the challenges for which they were created and the "degree to which states participate and comply." *Id.* at 271.

9. *Id.*

10. *Id.*

11. *Id.* at 268.

12. *Id.* at 110.

13. *Id.* at 117.

14. *Id.* at 134.

15. *Id.* at 112.

16. *Id.* at 108–34.

17. *Id.* at 134.

18. *Id.* at 115.

around, environmental harms are imprecise, and blame is not easily assigned.<sup>19</sup> This complicates who is and who should be at the table.

That many actors are involved in the process of developing international law is a result of the nature of environmental challenges. That environmental problems transcend arbitrary state boundaries is one of the more obvious rationales for developing international mechanisms to solve global environmental challenges.<sup>20</sup> However, Professor Bodansky takes the analysis further by arguing that international agreements can also change “a state’s perceptions of its own interests through a process of social learning.”<sup>21</sup> As states tackle their own environmental challenges at home, international actors are able to share lessons learned and to think critically around current trends that could become entrenched environmental problems.<sup>22</sup> Furthermore, an international regime “can change the payoffs for cooperation versus non-cooperation.”<sup>23</sup> An international agreement can set aside funds to assist states with compliance, or it can set higher costs on a state that refuses to enter an agreement, thereby changing a state’s interest in involvement.<sup>24</sup>

Professor Bodansky is realistic about the challenges facing an international regime attempting to tackle environmental problems—given the level of complication inherent in coordinating so many different actors—but he is also ultimately optimistic. As Professor Bodansky points out, international regimes “build normative consensus not only about basic goals and values but also about possible outcomes.”<sup>25</sup> Furthermore, international regimes enhance capacity to handle complex problems.<sup>26</sup> The more pervasive a shared norm or value, and the more entrenched international partnerships become, the lower the cost of cooperation.<sup>27</sup> Each time an international regime comes together around an issue and parties learn to work together, transaction costs decrease due to increased fidelity and common understanding.<sup>28</sup>

## II. “ENVIRONMENTAL”

The scope and purpose of international agreements to address environmental issues have changed with shifts in understanding and thinking around the meaning of “environment.” International environmental law began as a nature conservation movement.<sup>29</sup> The early conservation ethos developed

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19. *Id.* at 37.

20. *See id.* at 28.

21. *Id.* at 152.

22. *Id.* at 150–51.

23. *Id.* at 152.

24. *Id.* at 151.

25. *Id.* at 152.

26. *Id.*

27. *Id.* at 151.

28. *Id.*

29. *Id.* at 22.

on a national scale, and the same driving conservation rhetoric became the framework for international negotiations.<sup>30</sup> Professor Bodansky uses the example of the 1911 North Pacific Fur Seals Convention<sup>31</sup> to illustrate how early regulatory schemes were primarily concerned with cooperation to manage an identified environmental problem, such as a dramatically declining fur seal population.<sup>32</sup> Unlike other international law regimes, many international environmental laws grow out of a need to work together to tackle a shared environmental concern, rather than to resolve a dispute between two opposing states.<sup>33</sup>

In the 1960s, concern about environmental protection became “a mass movement” centered around “broader issues of pollution, technology, population, and economic growth, rather than just on the conservation of nature.”<sup>34</sup> Concern about trans-boundary air pollution led to the 1972 international conference held in Stockholm,<sup>35</sup> which Professor Bodansky suggests might have been “*the* major catalyst” leading to the development of international environmental law.<sup>36</sup> Stockholm revealed a growing environmental ethic and set the stage for the development of subsequent theme conferences.<sup>37</sup> Domestic environmental regimes were on the rise in many countries at the same moment in history, creating the infrastructure necessary to help translate future international environmental agreements into national policies.<sup>38</sup>

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30. *Id.* at 21–22.

31. Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, U.S.-Gr. Brit-Japan-Russ., July 7, 1911, 37 Stat. 1542. Prior to adoption of this international agreement to manage trade in fur seals, Russia, the United States and other nations had already attempted unilateral measures to reduce over-hunting of the declining fur seal population, whose skins were a valuable commodity. In July 1911, four nations—Russia, Japan, Great Britain, and the United States—signed a treaty that outlawed hunting seals in open waters and allowed for U.S. management of onshore seal herds. *Id.*; see Natalia S. Mirovitskaya et al., *North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict*, in POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES 22, 22–55 (Oran R. Young & Gail Osherenko eds., 1993), available at <http://cmhc.ucsd.edu/content/1/docs/mirovitskaya.pdf>.

32. BODANSKY, *supra* note 1, at 23.

33. *Id.*

34. *Id.* at 26.

35. Increasing awareness of environmental challenges such as the effects of DDT, environmental destruction from the Vietnam War, and acidification from industrial air pollutants led to Sweden’s proposal to the United Nations for a Conference on the Human Environment. The conference was held in Stockholm in 1972, setting the stage for future such environmental conferences. The conference led to the development of the United Nations Environment Programme and the articulation of twenty-six fundamental principles on environment and development. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972); see JOHN MCCORMICK, *THE GLOBAL ENVIRONMENTAL MOVEMENT* 31 (2d ed. 1995).

36. BODANSKY, *supra* note 1, at 28.

37. *Id.*

38. See *id.* at 26.

The modern environmental era began in 1987 with the adoption of the Montreal Protocol<sup>39</sup> for the protection of atmospheric ozone and publication of the *Brundtland Commission*,<sup>40</sup> which “popularized the concept of sustainable development.”<sup>41</sup> While there is no one definition of sustainable development, international environmental agreements are now debated within the context of consideration of the rights of future generations and different expectations for and experiences of environmental challenges often referred to as the North-South debate.<sup>42</sup>

The scope of the international environmental movement has changed over the years with each new challenge and accompanying treaty negotiations further entrenching the legitimacy of an international framework to address environmental ills.

### III. “LAW”

While consensus grew around the need to tackle environmental challenges at the international level, the mechanisms by which to do so were developed through a process of trial and error. “For the environmental lawyer, law is a set of tools to help solve problems.”<sup>43</sup> What constitute environmental problems, let alone international environmental problems, are questions of science, social and cultural norms, economics, and politics. Law itself may have a place in changing and advancing “people’s environmental ethos” and the environmental decision-making born of those social conceptions.<sup>44</sup> Given the political nature of determining environmental problems, there should be little surprise, as Professor Bodansky points out, that prescribing a cure for environmental challenges is likewise fraught with political and economic calculations and trade-offs.<sup>45</sup>

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39. As scientists began to recognize thinning of the stratospheric ozone layer in the mid-1980s, the international community gathered to develop the Montreal Protocol in 1987. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541. More than 190 countries are now a party to the treaty, and ozone thinning has slowed due to regulation of chlorofluorocarbons (commonly known as CFCs), halons, and other ozone depleting substances. *Montreal Protocol Backgrounder*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/ozone/downloads/MP20\\_Backgrounder.pdf](http://www.epa.gov/ozone/downloads/MP20_Backgrounder.pdf) (last visited Mar. 23, 2011).

40. In 1987, the chair of the 1983 World Commission on Environment and Development, Gro Harlem Brundtland, published a report, commonly known as the *Brundtland Commission*, which articulated the notion of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” focusing “environmental protection, economic growth and social equity.” GRO HARLEM BRUNDTLAND, *THE BRUNDTLAND REPORT: OUR COMMON FUTURE* (1987), available at <http://www.earthsummit2012.org/index.php/earth-summit-history/historical-documents/92-our-common-future>.

41. BODANSKY, *supra* note 1, at 30–31.

42. *Id.* at 33–34.

43. *Id.* at 37.

44. *Id.* at 55.

45. *Id.* at 67.

Professor Bodansky demonstrates the variety of regulatory instruments available for dealing with international environmental concerns by offering up a litany of remedies that have been implemented in the past.<sup>46</sup> He describes methods ranging from market-based approaches to reporting requirements, and highlights their variable strengths and weaknesses.<sup>47</sup> Thus, the difficulty in designing effective international environmental law is not due to a lack of imaginative solutions.<sup>48</sup>

The goal of an international environmental agreement is to develop a mechanism that solves the environmental ill, while the challenge is developing a mechanism with which states will agree to participate and comply.<sup>49</sup> To that end, international environmental negotiations face two principle challenges: adoption of the agreement and implementation.<sup>50</sup>

There is no formula that produces effective international environmental regimes. Much of it is trial and error, often painstaking and incremental but nonetheless developing as a specialized field of law. When thinking through the design of an international environmental agreement, the most common of which is the treaty, the primary design issues involve legality, precision, legitimacy, type of commitments, assignment of implementation responsibilities, empowerment of domestic supporters, institutions, and international implementation procedures.<sup>51</sup> Effective agreement requires balancing these design features to achieve a mechanism that tackles the perceived environmental ill. In Professor Bodansky's explanation of the structure of international environmental law, three concepts stand out: norms, adoption, and implementation. Norms set the agenda, while adoption and implementation determine whether an environmental regime will be effective.

#### IV. NORMS

Despite a preoccupation among lawmakers over the effectiveness of legal versus non-legal mechanisms in international decision-making, Professor Bodansky argues the importance of recognizing non-legal norms in negotiating international environmental commitments.<sup>52</sup> The canon of formal international law includes treaties, customs, and general principles.<sup>53</sup> While a good deal of scholarship has been devoted to discussion of hard versus soft law and legal versus non-legal norms, Professor Bodansky suggests that the distinctions are

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46. *Id.* at 57–84.

47. *Id.*

48. *Id.* at 84.

49. *Id.* at 271.

50. *See id.*

51. *Id.* at 264–65.

52. *Id.* at 14.

53. *Id.* at 98.

not ultimately that important.<sup>54</sup> Rather, it is the capacity and willingness of state actors to comply with international agreements that matters.<sup>55</sup>

Norms are often created through both informal conversations and “purposive negotiations,” mobilizing various actors towards an agreement by framing the issues and perpetuating their importance.<sup>56</sup> Treaty conferences have themselves become a norm in international environmental law. Currently, critics worry that the proliferation of international environmental conferences has led to a backlog of uncoordinated and possibly even misaligned treaties.<sup>57</sup> Rather than highlight an ineffective regime, however, Professor Bodansky argues that these fears illustrate that international environmental law “is undergoing the complex transition from youth to middle age.”<sup>58</sup>

## V. ADOPTION AND IMPLEMENTATION

International environmental agreements cannot coerce a truly recalcitrant state to comply.<sup>59</sup> Rather, their strength lies in encouraging average states to take action.<sup>60</sup> Thus, carrots tend to be more effective than sticks in international environmental regimes, where there is no strong authority that can impose sanctions<sup>61</sup> or compel compliance through force. One particular obstacle involves incentivizing states to participate.<sup>62</sup> Those who stand to gain from stronger policies will typically push for a stronger mechanism, whereas those who profit from the status quo or stand to lose more tend to fall into the category of “draggers.”<sup>63</sup> A legal agreement may be adopted widely because it lacks teeth, while another might not be adopted because it is too restrictive.

Implementation is typically motivated by some combination of state self-interest and, as Professor Bodansky suggests, “normative feelings of obligation.”<sup>64</sup> Adoption and implementation are, in many ways, national processes. Actors on the ground are often the force behind adoption and implementation of international environmental agreements.<sup>65</sup> Obligations typically take the form of a standard that the state agrees to meet.<sup>66</sup> Treaties often call for transparency and reporting, or simple abstention from a harmful

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54. *Id.* at 106.

55. *Id.* at 231.

56. *Id.* at 203.

57. *Id.* at 35.

58. *Id.*

59. *See id.* at 250.

60. *Id.*

61. Though sanctions have been employed in different treaties such as trade restriction provisions in the Montreal Protocol. *See id.* at 249.

62. *Id.* at 145.

63. *Id.* at 143.

64. *Id.* at 218.

65. *Id.* at 223.

66. *Id.* at 211.

practice; but, where an agreement calls for an affirmative result, it typically leaves open to state decision making the mechanisms by which the state actor will achieve international goals.<sup>67</sup>

Even when the international community reaches a consensus on environmental issues, normatively adopting a particular understanding of an environmental challenge, the barriers of adopting and implementing an actual agreement can slow the process.<sup>68</sup> As climate change negotiations illustrate, it can take a long time to build understanding and acceptance of particular international environmental issues and even longer to translate that understanding into viable solutions vis-à-vis international agreements and mechanisms to address the environmental ill.<sup>69</sup>

Effective international environmental regimes must also address compliance. Successful agreements must determine the reasons for non-compliance and offer remedial assistance to states accordingly. Traditional forms of support involve funding mechanisms and technical assistance.<sup>70</sup> States typically do not act with the intent to disrupt an international agreement, though the literature has been quite concerned with the problem of “free-riding.”<sup>71</sup> While free-riding is certainly a concern, it has not proved to be as troublesome an issue as critics worried.<sup>72</sup> Typically, non-compliance reflects a lack of capacity or poor planning, which is why a carrot works more effectively than a stick.<sup>73</sup>

#### CONCLUSION

International environmental law is neither an ongoing success story nor a finished book. It is a subject of live debate and reconfiguration.<sup>74</sup> The good news is that “the trend has been toward greater compliance,” an international environmental ethos is growing, environmental activism and sustainable development have become accepted international norms, and international environmental law is a recognized field with its own rules and dimensions.<sup>75</sup> International environmental law is no longer in its nebulous infancy.<sup>76</sup> That said, the field is arguably experiencing growing pains. The upside is that it has

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67. *Id.* at 212.

68. *Id.* at 205.

69. *Id.* at 113–16.

70. *Id.* at 243.

71. Free-riding refers to when actors have no incentive to undertake any additional steps under an agreement because they benefit from the actions of others without paying any of the costs. An example would be not talking steps to reduce carbon emissions to curb global warming because other countries are doing so. *Id.* at 162–63.

72. *Id.* at 163.

73. *See id.* at 229.

74. *Id.* at 259.

75. *Id.* at 260.

76. *Id.* at 269.

developed its own norms and models that allow for flexibility in the process. While international environmental law may presently remain “an art and a craft,”<sup>77</sup> the hope is that the ultimate design will create a set of international environmental laws that facilitate sustainable development globally.

In *The Art and Craft of International Environmental Law*, Professor Bodansky does not promise to offer concrete solutions for how to tighten the movement. Rather, he outlines the structure of a very broad and interconnected field, touching on a variety of moving parts and describing how they fit together. Professor Bodansky does offer a critique of international environmental law, but the message of his book is likely best received by those interested in understanding the larger landscape of international environmental law going forward. Rather than a cookbook that provides recipes for effective international advocacy, policy, or law, Professor Bodansky offers information on the current structure of the field of international environmental law and shares questions that the international environmental legal community is working to answer. He does not provide the answers, but suggests that they exist, and that as the movement progresses there will be an emergence of dynamic solutions.

Professor Bodansky offers an interesting lens for viewing international environmental law more broadly than most traditional legal fields, liberating the idea of legal mechanisms from such rigid definition. The nature of environmental problems and international governance requires that practitioners be more creative when thinking about global environmental problems, which are inherently interdisciplinary. Bodansky does not downplay the need for strong international environmental agreements, but he does remind the reader that, like most systems, international environmental law is not free of political motivations and dimensions. Environmental problems do not reach the world stage in a vacuum; rather, they are pushed into the public forum until someone is willing to pay attention. The book provides a broad view of the field, leaving the reader with a realistic understanding of the current capacity of the international environmental legal regime. While many environmental challenges might be too complex for a governing system whose legitimacy is tenuous, “negotiated agreements based on state consent will likely remain a defining feature of the international law-making process.”<sup>78</sup> Ultimately, Professor Bodansky appears optimistic. International environmental law does

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77. *Id.* at 271.

78. *Id.* at 189.

not need to be a rigid science codified through formal legal structures. Designing an effective system of coordinated agreements to protect the planet appears to be within the realm of the possible.