5-24-2013

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Recommended Citation
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International Environmental Moneyball

Daniel Bodansky

I. What's the Problem?

The turning point of the movie, Moneyball, comes when Brad Pitt’s character, Billy Beane, asks the question, “What’s the problem?” Beane is the general manager of the Oakland Athletics baseball team, which needs to rebuild after losing several key players. The team’s scouts, with whom Beane is meeting, see the problem in traditional terms, as finding replacement players similar to the ones who have left. But Beane defines the problem differently. For him, the problem is, how can a poor team such as the Athletics compete against rich teams? His reconceptualization did not change the fundamentals of what needed to be done — acquiring new players who could help win games. But it directed attention to different aspects of that challenge, and led Beane to develop a new strategy, now known simply as “Moneyball,” aimed at identifying undervalued players who can be acquired cheaply.

International environmental law is, of course, very different from baseball. But in international environmental law as in any field, a crucial first step is to define the problem, since our definition of the international environmental problématique helps define what we see as answers.

Some see the problem facing international environmental law as weak standards and even weaker enforcement. This conceptualization of the problem suggests a simple answer, namely to develop international environmental regimes with “teeth,” which more closely resemble domestic law.¹ In a similar vein, Don Anton argues that the problem faced by international environmental law is conceptual: the field has been co-opted by the “misshapen,” “retrograde” concept of sustainable development, which has redirected attention from environmental protection to economic growth.² This conceptualization of the problem leads him to suggest, as an answer, that “we need to put the objective of environmental

protection front and centre as the primary objective of international environmental diplomacy, international environmental policy, and international environmental law."

Certainly, weak standards and weak enforcement are problems with international environmental law. So too is the ineffectiveness of international environmental law in solving pressing problems such as climate change, as John McArthur emphasizes. Thus, more stringent rules, with stronger enforcement, would represent answers. But they gloss over the hardest issue: How do we get from here to there? What has prevented the adoption of stronger standards and enforcement, and how do we address these obstacles? In this respect, proposals along these lines are a bit reminiscent of Steve Martin's classic monologue, "How to Become a Millionaire and Never Pay Taxes," in which Martin begins, “First, get a million dollars.”

The Art and Craft of International Environmental Law ("AC") focuses on the how-do-we-get-from-here-to-there issue. And this requires us to start from our current position, namely, a world dominated by sovereign states, who are reluctant to agree to strong standards and strong enforcement. We may deplore this situation. We may want to change it. And we may think that the process of change has already begun. But denying this reality will be no more effective than King Canute commanding the tides to stop. Instead, we must develop strategies that recognize our current predicament and try to work around it – for example, by relying more on non-state actors, who are playing an increasingly important role in international politics, or through strategies that encourage states to change their preferences or that make it easier for them to agree.

My concern with the question, "How do we move from here to there?" led me in two directions in writing AC: first, to a focus on process, and second, to a multi-disciplinary approach that draws on fields such as political science, economics, and, to a more limited degree, philosophy, sociology, and anthropology in attempting to understand the behavior of key actors. The result is a book that focuses on “international law in action,” as Sandrine Maljean-Dubois and Vanessa Richards put it, examining the “life cycle” of norms from conception to implementation to enforcement. Reflecting my experience as a U.S. government negotiator, NGO adviser, and UN consultant, the book aims to be pragmatic. Although it is theoretical, it tries to provide a real-world perspective on how international environmental works – and sometimes doesn’t work – using concrete examples to illustrate its theoretical points.

In this brief essay, I will attempt to respond to the very insightful and valuable comments of my eight reviewers. Rather than discuss each review individually, I will address them thematically. But, before beginning, let me say at the outset what an honor it is to have my

3. Id.
book be the subject of this symposium, and how much I appreciate not only the kind words of my reviewers, but also their occasionally strong criticisms. I am grateful to have the opportunity to be part of a conversation with so many interesting scholars, with so many valuable ideas.

II. A Focus on Process

In contrast to other treatises on international environmental law, AC focuses on the process by which international environmental norms emerge and are implemented, rather than on the content of these norms. How and why do international environmental norms arise? In what ways do they affect behavior? Do they change what states and individuals actually do, and, if so, why? How effective are they in solving international environmental problems? These are the sorts of questions I examine in AC. Accordingly, the book is not organized doctrinally, in terms of air pollution, marine pollution, chemicals, and so forth. Instead, it is organized thematically, with chapters on such topics as the causes of environmental problems, the varieties of international norms, the obstacles to international cooperation, the design of international agreements, policy implementation, enforcement and effectiveness.

In his review, Ilias Plakokefalos notes that “looking at law as a process is certainly not a novel idea.”7 Past proponents of a process-oriented approach have included Myres McDougal and Harold Lasswell, founders of the so-called New Haven school;8 Henry Hart and Albert Sachs in their classic casebook, the Legal Process;9 and Abram Chayes, who applied a process-oriented approach to international law beginning with his 1968 textbook on the international legal process10 and continuing through his much later work on compliance theory.11 The McDougal-Lasswell approach has indeed been applied to international environmental law in the work of Jan Schneider, World Public Order of the Environment.12 I am indebted to these earlier process-oriented writers and, in particular, to Michael Reisman, who was my teacher in law school and who had a profound influence on how I think about international law.

Despite my New Haven school pedigree, my approach in AC is closer to that of Hart & Sacks and Chayes than to McDougal & Lasswell. In describing what is distinctive about my book, I did not mean to suggest that focusing on process is itself novel. As the book acknowledges, process issues have received increasing attention in recent years in the study of international environmental law. My only claim was that the standard treatises on international environmental law focus more on substance than on process and that therefore

there is a niche for a work like AC, which examines the international environmental process as a whole, from beginning to end, synthesizing recent research on international environmental negotiations, treaty design, social norms, policy implementation, and effectiveness.

Plakokefalos questions whether focusing on process is enough, and suggests that international environmental law “has reached a level of maturity that allows for the adoption of more concrete, legally binding obligations.” I agree. My focus on process does not mean that I think that international environmental law is “just a process wherein decision making will take place without ever reaching a substantive result,” any more than a study of the car-making process should be seen as denying the existence of cars. Hart & Sacks believed that a defining feature of the legal process is that it produces "institutional settlements" through the prescription of rules, the adoption of regulations, and decisions in particular cases. In the world of international environmental law, these institutional settlements can take many forms: treaties, decisions, resolutions, codes of conduct, and sometimes even cases. Often the process of institutional settlement produces substantive rules, like the very detailed obligations in the Montreal Protocol to phase out the use of ozone-depleting substances. Indeed, one of the remarkable features of the international environmental process is that, despite the absence of a legislature, so much substantive law has developed. Of course, the process of institutional settlement does not stop the legal process from continuing, since rules and decisions must themselves be interpreted and applied. But they represent at least momentary points of repose. As I call them elsewhere, they represent punctuation marks in the ongoing flow of international environmental law.

III. Three Perspectives

In AC, I describe three general perspectives on international environmental law. First, one can describe the existing rules and processes. I call this the doctrinal approach, although doctrine in this context should be understood as encompassing procedure as well as substance — what H.L.A. Hart described as secondary as well as primary rules. Second, one can explain how international environmental law works — why we have the rules and procedures we do and how they influence behavior. Third, we can prescribe what the law should be, both procedurally and substantively. AC addresses all three of these perspectives, but it focuses primarily on the first two.

With respect to the explanatory perspective, Plakokefalos describes my approach as a “refined exercise of eclecticism,” McArthur as a “garbage can” approach. The two descriptions amount to more or less the same thing, and I am happy to accept either one. In

14. Id.
15. See Eskridge, Frickey & Hart, supra note 9.
18. Plakokefalos, supra note 7.
trying to understood how international environmental rules emerge and influence behavior, I take an inclusive approach, examining a wide range of causal factors and mechanisms, including interests, power, values, and knowledge. In general, my analysis is "actor-oriented," but I also try to include other factors such as international structure and domestic politics.

As McArthur notes, this eclectic approach does not "generate predictions." But it at least has the merit of more accurately reflecting how international environmental law actually works than the reductionist theories of political scientists, which tend to focus on a single explanatory factor such as interests, power, or knowledge. And because I think that international environmental is more an art and a craft than a science, I regard prediction as virtually impossible anyway.

Despite my eclecticism, several reviewers suggest that my account undervalues or even misses important causal factors. Victor Flatt, for example, suggests that the concepts of rights, equity and human entitlement have played a bigger role in the development of international environmental law than my account suggests. I think his point is well taken, and agree that perceptions of equity can play an important role in influencing behavior. In “fair division” games, for example, individuals typically prefer to get nothing than to accept a division of the pie that they regard as unfair. Nevertheless, I am a bit skeptical of Flatt’s claim about the causal importance of equity in the climate change regime. Although developing countries have framed many of their arguments in equity terms, my sense is that at least some of this rhetoric is a mask for self-interested positions. And to the extent that equity has played a role in the negotiations, it has been a largely negative one, impeding efforts to reach agreement.

Don Anton’s argument is similar in kind to Flatt’s, only Anton focuses on the causal role of sustainable development rather than equity. Like Flatt, Anton believes that concepts matter. Indeed, he suggests that the concept of sustainable development is largely to blame for the failures of international environmental law. Although I agree that ideas matter, I am not so sure about Anton’s specific claim about sustainable development. In order to test this claim, we would need to investigate the causal pathways by which concepts like sustainable development are used by, and in turn influence, the various actors in the international environmental process. And we would need to explore how the concept of sustainable development relates to other causal factors such as interests and power.

With respect to doctrine, AC focuses on what H.L.A. Hart refers to as secondary rather than primary rules: the rules about how international environmental law develops, is

20. Lee, supra note 5.
25. Anton, supra note 2, at 217 (“This change from a discourse of international environmental law, with a specific focus on environmental protection, to rhetoric bound up with international law in the field of sustainable development, with its focus on economic growth, has had a destructive impact.”).
interpreted and enforced, rather than the substantive rules themselves. Since I believe treaties are the source of most international environmental rules, I focus on issues of treaty design and implementation. These are the subjects of Chapters 8, 10 and 11, which are the heart of the book.

The reviews say comparatively little about these chapters, focusing instead on my discussion of customary law and state responsibility. Plakokefalos, in particular, criticizes my discussion of whether the duty to prevent is a rule of customary international law, noting that since it is a duty of conduct rather than result, “The fact that states pollute on a daily basis does not automatically mean that the rule is breached on a daily basis too.” This criticism is well taken, and I agree that the relevant question for the rule's customary law status is whether states have exercised due diligence to prevent transboundary pollution, rather than whether pollution has occurred. But since I am unaware of any systematic study that would answer this question, I believe that the customary status of the duty to prevent remains uncertain, even if understood as a duty of conduct rather than of result.

As Plakokefalos acutely notes, my views on customary international law have evolved, and I doubt that Chapter 9 of AC will be my last word on the subject. In an earlier work, I argued that the purported norms of customary international law really represent "declarative law," and are best understood as general principles rather than custom. In AC, I take a more pluralist view, arguing that some customary norms may emerge through a secondary process of customary lawmaking and others as social norms. Moreover, with respect to the significance of customary law and state responsibility, I agree that, in the context of dispute resolution, they have an important role to play. While international environmental litigation remains rare, so this role remains small, it is likely to grow.

Compared to the explanatory and doctrinal perspectives, AC devotes less space to the policy perspective, with the exception of Chapter 4, which surveys the various goals and regulatory instruments of international environmental policy. Although the book endorses a weak form of cost-benefit analysis, it does not suggest any new “grand discourse” of the kind that Lee suggests, or take a position about the desirability of deliberative democracy, an idea implicitly propounded by Stephanie Tai. Of course, my hope, in writing a book for the general public, was that if people better understood how international environmental law works, this would contribute to more informed, democratic discussions. So I am flattered that Tai thinks that my book might make a contribution in this regard. But I do not think anything in my book suggests that international environmental law, in its current state of development, particularly promotes deliberative democracy. Indeed, to the extent that

26. Plakokefalos, supra note 7. Plakokefalos’s criticism could be seen, at least in part, as directed at my explanatory account, arguing that I give insufficient weight to international discourse. As he claims with respect to customary international law, “the way states speak to each other sometimes does make a significant difference.” But I think Plakokefalos is mostly concerned about my doctrinal, not my explanatory, account.

27. Id.


29. Lee, supra note 5

interstate negotiations still play a crucial in the international environmental process, that process more typically involves positional bargaining than deliberation about the public good.

Of my reviewers, Don Anton is the most clearly normative, leveling strong criticisms at the concept of sustainable development. As a pragmatist rather than an absolutist, I think the story is more complex, with competing considerations that must be balanced. Environmental protection is a critical objective, but so too are alleviating poverty, providing people with sufficient food and clean drinking water, raising standards of living, and so forth. So I tend to see the competition between environmental protection and economic development in various shades of grey, rather than in black and white. But, in any event, the book is less about the ends of international environmental law than about the processes by which it develops and influences behavior.

IV. Mea Culpas

Needless to say, in a relatively short book about a large field, there are many lacunae. For example, as Maljean-Dubois & Richards note, the book has little to say about the relationship between international environmental law and other fields such as human rights and international trade, or about the relationship of global and regional efforts or other issues of scale. I have written about some of these topics elsewhere and agree that they are important. All I can say in response is that my book was intended to provide a brief, readable introduction to the international environmental law process, and inevitably had to downplay some topics.

To my mind the biggest gap in the book is the one highlighted by Oren Perez and seconded by Jae-Hyup Lee, concerning private transnational environmental regulation (PTER). Although I refer in a number of places to the role of private actors and private regulatory standards, I do not analyze the growth of private standard-setting in any systematic way. So I think Perez is entirely correct in calling this a "significant blind spot." I am not sure whether I would go so far as to describe PTER as having reached a "structural tipping point" that has made it an "ordered domain" with the "capacity for introspection, coordination and cross-regime synergy." But I agree that whether PTER schemes constitute law depends on the "state of mind of the actors that comprise the relevant community," so prejudging their legal status is unwarranted. Moreover, I couldn't agree more that this gap in my book "should be seen as an invitation for further scholarly work," including about the linkages between PTER and treaties.

31. Anton, supra note 2.
32. Maljean-Dubois & Richards, supra note 6.
33. Id.
36. Perez, supra note 35.
V. Should We Be Optimistic?

AC seeks to describe the various tools that international environmental law has developed to try to move the ball forward. Will these tools be enough to bring us across the finish line? Only time will tell. I hope so, but there is significant room for doubt.

McArthur describes me as an optimist about international environmental law, saying that I have “faith that the gradual evolution of environmental norms and the progress in developing new procedures to reach and extend agreements will keep pace with environmental problems.” But, after spending much of the last two decades involved in the climate change negotiations, with little to show for it, I am acutely aware of the limitations of international environmental law. In AC, I take issue not only with cynics who dismiss international environmental law as a sham, but also with true believers who see it as a panacea. As I emphasize, international environmental law can play a constructive role, but that is all. It can provide part, but only part, of the answer. It is what I call a 30% solution. Solving a problem such as climate change will depend on many other factors as well, and may depend ultimately more on moral outrage than on the kind of “cool analysis” exemplified in AC. My claim in AC is only that international environmental law has developed an innovative toolkit that allows it — sometimes — to play a positive role. This is a comparatively modest claim, but one that I think best reflects our current reality.