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‘Grand Pretentions, Faulty Execution and Puny Results’? A critical examination of the international community’s ability to turn international environmental treaties into environmnetally useful action

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This article considers international environmental treaties and endeavours to explore and evaluate the extent to which treaties produce tangible environmental results. It addresses the faultline between the treaty instrument itself and the transition required to transform textual agreement into environmentally beneficial action. The article takes a particular evaluative opinion from environmental expert Daniel Bodansky as a touchstone and proceeds to test his position by critiquing the development of the ‘environmental treaty environmental action’ dynamic across modern times. It is concluded that treaties will often fall entirely flat in practice, yet “this is by no means the general rule”.

This study engages with the process of turning international environ-

mental treaties into environmentally beneficial action. The investigation will evaluate the extent to which international environmental agreements have the propensity to crystallise actual environmental results.

A Point of Departure: Professor Bodansky

The quotation embedded in this article's title is drawn from the writings of environmental authority Daniel Bodansky. In The Art and Craft of International Environmental Law Bodansky (2010: 206), drawing in turn on Elmore (1978: 186), suggests that:

> *[t]ranslating international treaties on the environment into action is notoriously difficult. Many treaties are characterised… by 'grand pretentions, faulty execution and puny results.'*

This statement catches the spirit of the evaluative concerns driving the present critique. Note that Bodansky emphasises how '[m]any treaties' are fundamentally flawed. Not "all treaties", not "international environmental treaties", but 'many treaties'. The implication is not that the international treaty system is unworkable or that it ought somehow to be disposed of per se, but, rather, that many treaties are flawed, and one therefore infers, must consequently be flawed in specific, identifiable ways. This is a noteworthy point in a world where treaties are by no means valued across the board as an ideal international legal mechanism. For example, the eco-economic merit inherent in an environmental federalist approach to governance has been elaborated by B. Field and M. Field (2009: 357-360); in this sort of framework the onus of governance is placed upon small states rather than upon sweeping international arrangement.

Bodansky's comment also highlights how a treaty's potential flaws may realistically range beyond the actual treaty document so as to inhere in an extended process: 'grand pretentions' suggest that the intentions leading to a finalised treaty may exhibit a tendency to over-reach the treaty's own limitations in an unrealistic manner; 'faulty execution' pertains to the next stage, that is, the stage beyond the negotiation and construction of the treaty, suggesting that the treaty is carried out ineffectively after its construction; 'puny results' proceeds a step further again, the implication being that the treaty's actual environmental outcomes have fallen drastically below an acceptable threshold, perhaps even shamefully so: ('puny' is in effect a loaded, derogatory term). In other words, and for all its brevity, Bodansky's observation captures the spirit of a complex linear process beginning with the negotiation and creation of a given treaty, proceeding to its (inter)national implementation, and progressing thence to its tangible consequences for the environment. This article is primarily concerned with what is perhaps the most neglected element of this chain, namely the end-point of the process pertaining to an international treaty's environmental consequences.

Sowing the Seeds of 'International' Environmental Law

International environmental law exists as a body of multilateral agreements among states across the world (Bodansky, Brunnee and Hey 2007: 29-43). Such agreements can take a variety of forms, and the most predominant of these is the international environmental treaty. 'Treaties (also referred to as conventions, accords, agreements and protocols)', Sands (2003: 126) writes, 'are the primary source of international legal rights and obligations in relation to environmental protection'. The Convention to Protect Birds Useful to Agriculture (CPBUA), adopted in 1902 by 12 European nations, is normally held to be the first multilateral environmental treaty (Bodansky 2010: 23). This type of international law is not normally imbued with a level of binding legal force equivalent to that which underpins national law. Nonetheless, the cumulative universal attitude towards international treaty law is characterised by the dictum pacta sunt servanda – treaties must be obeyed – so that one starts from the assumption that a nation subscribes to an environmental treaty

because it intends to obey it. Indeed, Sunkin, Ong and Wight (2002: 3) suggest that 'the existence of a treaty relating to any particular matter will usually provide a clear and conclusive statement of the rights and duties of the States parties [sic.] to it in their relations with each other'. States then not only have an obligation to adhere to the treaties they subscribe to but also share a wider sense of obligation predicated upon their responsibilities toward other international signatories.

The 1902 CPBUA and the environmental treaties that slowly began to emerge in its wake across the early 1900s served to characterise the manner by which states were moving towards the understanding that supra-national environmental issues could not be addressed adequately in isolation (Kiss and Shelton 2007: 32-34). This development was bolstered in its infancy by an important international case commonly described as the Trail Smelter arbitration.

Trail Smelter centred on a major North American smelting plant located at Trail, Canada. The plant included two smokestacks stretching over 400ft into the sky that emitted thousands of tons of sulphur every month over the course of the plant's smelting operations. Situated approximately seven miles from the US–Canadian border, pollution from the stacks had been causing damage to trees, farms and properties in Washington State on the American side of the border. A Mixed Arbitral Tribunal consisting of a US jurist, a Canadian jurist, and a non-US citizen/non-British subject was convened to resolve the problem, and the tribunal's decision was set out in 1939: Trail Smelter Arbitral Tribunal (1939) 33 Am. J. Int'l L. 182. The tribunal ruled that Canada was legally culpable for the damage caused in Washington and this resolution inaugurated two key principles of international environmental law, summarised here by Bratspies and Miller (2006: 3):

the state has a duty to prevent transboundary harm… ('one should use one's own property so [as] not to injure another'); and

the 'polluter pays' principle, which holds that the polluting state should pay compensation for the transboundary harm it has caused.

As the seeds sown by the early international treaties and agreements began to blossom it became steadily apparent that if a profound level of international environmental action was to be achieved in practice then the construction of increasingly sophisticated international legal frameworks would be necessary. Following the United Nations Conference on the Human Environment in 1972, commonly known as the Stockholm Conference, this unfolding realisation reached its first apotheosis.

First Stop, Stockholm

The Stockholm Conference was attended by 113 States, and occurred at a period where "environmental law" was for the first time beginning to burst through into the mainstream legal disciplines (Sohn 1973). Internationally, 1970 was the inaugural year of First Earth Day, and at the domestic level in the UK it was the year in which the Department of the Environment was founded. This latter UK development pointed the way towards the Control of Pollution Act 1974, a first key step on the UK's path to enacting a sophisticated body of domestic environmental legislation. In the European Community (EC, now European Union) environmental law was coming similarly to the fore; 1973 heralding the adoption of the EC's first Environmental Action Plan, and in early 1970s America similar developments manifested in the creation of the Environmental Protection Agency, the National Environmental Policy Act, and the Clean Air and Clean Water Acts.

Persevering in the face of complications evoked by economic disparity between developed and developing countries, Stockholm resulted in three major documents (Galizzi, 2006): a Declaration on the Human Environment, known as the 'Stockholm Declaration,' which broke down the States' common outlook on the environment into 26 key principles;

an Action Plan, concerning direction on environmental activities; and a Resolution on Financial and Institutional Arrangements (Stockholm Conference 1972). The Action Plan is the most practical of the documents. It incorporated 109 recommendations, adopted by all of the subscribing States. These were divided into three categories which included: Earthwatch, the global environmental assessment programme; environmental management activities; and international measures to support the national and international actions of environmental assessment and management.

One important outcome of Stockholm was the founding of the United Nations Environment Programme, which was designed to monitor the progress of the international environmental movement. A decade after Stockholm this body reviewed the success of the Conference and this in turn led to the Nairobi Declaration. This Declaration asserted the need for refreshed and enhanced international measures to refine, restructure, and build upon the foundations laid by Stockholm. The Declaration concluded that:

> *the Action Plan has only been partially implemented, and the results cannot be considered as satisfactory… [T]he Action Plan has not had sufficient impact[.]*
> (Nairobi Declaration, para.2)

An apparently insufficient practical deployment of the Action Plan flagged by the Nairobi Declaration suggests that the condemnatory view embedded in this article's title concerning grand pretentions, faulty execution and puny results may be a potentially fair characterisation of the Stockholm gathering. Stockholm appears to have proven widely inadequate in terms of tangible results, it being remembered, of course, that the Action Plan was the crucial text in terms of tangible environmental action, as its title suggests.

Next Stop, Rio

The Nairobi Declaration was followed by the World Commission on Environment and Development (WCED). In 1987 the WCED published Our Common Future, known as the "Brundtland Report", a document that has had an enormous influence upon the trajectory of international environmental agreements. The Report articulated a firm interconnection between environmental protection and national development:

> Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.
> (World Commission on Environment 1987: 3.27)

The Report was published in the wake of the discovery of the Antarctic ozone hole (1985), which sparked an international concern regarding global warming, and this signposted the international community towards its next destination, the UN Conference on Environment and Development (UNCED), commonly described as the Rio Summit (Panjabi 1997). Considered by some as heralding a "New Ecological Order" (Sand 1993: 377), the Rio Summit took place in 1992 and was attended by 176 countries. The Bruntland Report's momentum was carried through so that a consequent preoccupation with the principle of "sustainable development" allowed the concept of environmental protection and the notion of national development to become inextricably fused together on Rio's international stage. Several key agreements were produced at the gathering. In the present context the most significant of these is "Agenda 21" which outlined the means of enhancing sustainable development in practice.

In observing that the practical strategies constructed at Stockholm had not produced the wide-ranging active environmental effects that had been intended, the Rio parties created a Commission on Sustainable De-

velopment to monitor the practical implementation of Agenda 21. The 1997 Earth Summit+5 was also put in place as a means of reviewing matters five years on. When the review finally occurred its findings were not overly encouraging in terms of a widely effective reduction in discernible international environmental damage; and Agenda 21, taken in a broad sense, was not a tremendous practical success (Speth 2004: 790). As, however, environmental scholar R.K. Turner (1993: 383) emphasised immediately after Rio had been signed, '[w]e do not yet have a blueprint for sustainability'. Agenda 21 might have yielded imperfect results, but the fact that Rio put in place a review process to detect and attempt to recalibrate matters some years on provides a valuable counterbalance that surely invites resistance to the view that Rio was thoroughly faulty and puny in its achievements.

To Comply or Not to Comply, That is the Question

The international environmental treaty system is a complex "umbrella" structure that overarches the signatory nations beneath it and, as Mbuna (in Suskind, Dolin and Breslin, 1992: 163) stresses, it is generally the case that 'few resources are provided at the secretariat level to do more than monitor adherence in a minimal way'. In the 1960s the International Whaling Commission (IWC) set a ban on the hunting of humpback whales due to a dangerous decline in their numbers. The Soviet Union had subscribed to the International Convention for the Regulation of Whaling in 1946 and under the terms of the treaty was obligated to abide by the ruling. After the dissembling of the Soviet Union, national records were revealed exposing how Soviet whalers had continued to kill the animals, pressing on, indeed, to exceed the regular slaughter levels by vast amounts. The treaty violation and intensified slaughter had been undertaken surreptitiously. The Secretary of the IWC declared that 'thousands of whales we thought were protected have been systematically slaughtered. The enormity of the deception is staggering'. (Walsh, 1999: 321-322). This example illustrates one country's premeditated disregard for treaty laws that it purports to uphold. Further, it exposes how such disregard can conceivably develop into a will to actively worsen the perceived environmental damage that the country is purporting to redress through treaty membership. Mitchell (in Cameron, Werkman and Roderick 1996: 22), drawing on Morgenthau, strikes at the heart of this dilemma though the simple observation that 'nobody at all has the obligation to enforce international law'. This in turn begs a further question, namely, why should a state bother to comply with the international environmental treaties that it signs up to?

Analysts have developed sophisticated theoretical frames in order to address core aspects of this issue. At the vanguard of these systems sits compliance theory. "Compliance" in this particular theoretical context is understood to mean 'an actor's behaviour that conforms to a treaty's explicit rules' (Mitchell in Cameron, Werkman and Roderick 1996: 5). Mitchell (1996: 3-28) has usefully overviewed three of the most prominent schools of compliance theory traditionally employed to elucidate the issue of international environmental treaty compliance. These can be summarised as the pragmatist, the realist, and the institutionalist models. The pragmatist system of compliance presupposes that the tangible success or otherwise of international treaties is extremely hard to pinpoint in direct, measureable terms. The realists and institutionalists foreground wider factors – power relations, institutional structures – which they argue exert a stronger collective shaping role upon collective behaviour than the given treaty in its own right, thereby, as with the pragmatist model, disturbing the idea that a simple and reliable means of interrogating and measuring treaty compliance and its associated perceptible levels of realised action can be readily employed. Space precludes detailed examination of these systems, however a useful lesson to be drawn for present purposes may be summarised as follows: the elements of this study's title pertaining to the evaluation of compliant "action" / "execution" / "results" constitute deceptively complex ground. Ground that is

so deeply contested that it is perhaps not hyperbole to suggest that there is no widely accepted common standard amongst scholarly commentators as to how one might work toward a satisfactory evaluative resolution of treaty compliance in the context of these issues.

Self-Interest trumps Environmental Action?

When first considered this all appears to evoke a sort of "take it or leave it" treaty system that facilitates the prevalence of self-interest and thereby represses a will to translate treaty arrangements into affirmative environmentally useful action. 'The simplest explanation of why a government or other actor regulated by a treaty undertakes a given behaviour', Mitchell (in Cameron, Werkman and Roderick 1996: 7) writes, 'is because they believe it furthers their interest'. Yet Alder and Wilkinson (1999: 116) have convincingly emphasised how certain international environmental treaties appear to construe nature as a phenomenon possessed of an intrinsic value that ought to be actively safeguarded for its own sake. For example, such environmental altruism is:

> *reflected in the 1950 International Convention for the Protection of Birds, which in contrast to its 1902 predecessor, was aimed at protecting all birds, not simply those useful to agriculture.*

An internationally recognised sense of value inhering in the natural environment serves to temper the forces of undiluted national self-interest somewhat. This perspective lends apparent weight to the international community's desire to translate international environmental treaties into environmentally valuable action and to progress towards a sustainable future (Meadowcroft 2000: 370).

Evidence of this momentum toward environmentally sound action was witnessed in the years prior to the environmental "boom" of the 1970s

through, for example, the Fur Seal Treaty. This agreement was set in place in 1911 in order to protect seals, whose numbers had declined dangerously during intensive kills. The signatories to the treaty were Japan, Canada, America and the USSR. It stipulated that the killing of seals at sea would cease and control of their killing on the islands on which they bred would fall to America and Russia, with a proportionate levy of these kills being siphoned off by Japan and Canada to compensate them for the new arrangement. By the 1950s the seal population had returned successfully to pre-exploitation figures. Similar environmentally positive outcomes can be detected during the booming 1970s: for example, the 1972 Oslo Convention compelled subscribing nations to implement legislation prohibiting the dumping of hazardous waste and thus helped such waste to be successfully eradicated from the North Sea. Post-1970s, the Montreal Ozone Protocol stands as a similarly strong example. This agreement allowed the international community to successfully reduce the use of ozone-depleting substances so that the ozone layer has since been able to begin the process of repairing itself. The active environmental results galvanised by the treaties drawn upon here are measureable, evident, and clearly successful.

Conclusion

This article has demonstrated that international environmental treaties allow nations to work together in order to affect a degree of active, tangible environmental change that is superior to a pattern characterised by the mere faulty application of international law leading to puny outcomes. This should not belie the fact, however, that the transition from "treaty instrument" to real-world "action" is difficult to achieve and may indeed fail. Thus, environmental treaties may be characterised on occasion by the "grand pretentions, faulty execution and puny results" that Bodansky speaks of, but this is by no means the general rule.

Bibliography

Alder. J. and Wilkinson, D. (1999) Environmental Law & Ethics. London: Macmillan.

Bodansky D. (2010) The Art and Craft of International Environmental Law. London: Harvard UP

Bodansky, D., Brunnee, J. and Hey, E. (2007) The Oxford Handbook of International Environmental Law. Oxford: OUP.

Bratspies, RM. and Miller, RM. (eds.) (2006) Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration. Cambridge: Cambridge UP.

Cameron, J., Werkman, J. and Roderick, P. (1996) Improving Compliance with International Environmental Law, Great Britain: Earthscan.

Elmore, RF. (1978) 'Organizational Models of Social Program Implementation' Public Policy Vol 26(2): 185-228.

Field, BC. and Field, MK. (2009) Environmental Economics. 5th edn. New York: McGraw Hill.

Galizzi, P. (2006) 'From Stockholm to New York, Via Rio and Johannesburg: Has the Environment Lost its way on the Global Agenda?' Fordham International Law Journal Vol.29: 952.

Kiss, A. and Shelton, D. (2007) Guide to International Environmental Law. Netherlands: Martinus Nijhoff.

Meadowcroft, J. 'Sustainable Development: a New(ish) Idea for a New Century?' Political Studies. Vol 48(2): 370

Nairobi Declaration. Available at: http://www.un-documents.net/nair-dec.htm (Accessed: 12 December 2012).

Panjabi, R. (1997) The Earth Summit at Rio. New England: Northwestern UP.

Sand, P. (1993) 'International Environmental Law after Rio' European Journal of International Law Vol 4: 377.

Sands, P. (2003) Principles of International Environmental Law. 2nd edn. Cambridge: Manchester University Press.

Sohn, L. (1973) 'The Stockholm Declaration on the Human Environment' Harvard Int'l Law Journal. Vol 14: 423.

Speth, JG. (2004) 'International Environmental Law: Can it Deal with the Big Issues?' Vermont Law Review. Vol 28: 779.

Stockholm Conference (1972):

'Stockholm Declaration'. Available at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 (Accessed: 14 December 2012).

'Action Plan'. Available at: http://www.unep.org/documents.multilingual/default.asp?DocumentID=97&ArticleID=1504&l=en (Accessed: 14 December 2012).

'Resolution on Financial and Institutional Arrangements'. Available at: http://www.un-documents.net/unche-if.htm (Accessed: 14 December 2012)

Sunkin, M. Ong, DM. and Wright, R. (2002) Sourcebook on Environmental Law. 2nd edn. Great Britain: Cavendish.

Suskind, LE. Dolin, EJ. And Breslin, JW. (1992) International Environmental Treaty Making. USA: Harvard Law.

Turner, RK. (1993) Sustainable Environmental Economics and Management: Principles and Practice. London: Belhaven Press.

Walsh, VM. (1999) 'Illegal Whaling for Humpbacks by the Soviet Union in the Antarctic, 1947-1972', Journal of Environment and Development Vol. 8: 307.

World Commission on Environment and Development. (1987) Our Common Future. Oxford: Oxford UP.