

## Book reviews

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### *The Art and Craft of International Environmental Law*

Edited By Daniel Bodansky

Cambridge, Mass.: Harvard University Press, 2010, xv and 359 pp., ISBN 978-0-674-03543-0, £29.95.

Dan Bodansky has become well-known as one of the foremost US specialists in international environmental law. He is a career academic, but has also worked as a US government negotiator, NGO adviser, and UN consultant. His work on climate change in particular has earned him a reputation for highly capable scholarship, critical insight and a creative approach to addressing challenging regulatory problems. In 2007 he co-edited a large and impressive *Handbook of International Environmental Law*, in which a variety of authors addressed most of the central questions of the subject in an often original and penetrating fashion. Now he has turned his attention to an altogether different project and written what is essentially an introduction and overview. This is not a textbook in any sense, still less a potted summary of the law, but for anyone new to the discipline it provides an outstanding survey of what Bodansky rightly refers to as the “art and craft”. As he puts it, “I have attempted to write an elementary book from an advanced standpoint, with a stronger methodological and philosophical orientation than is typical in an introductory work” (p. xi). While he says little that is fresh or original, he displays to the full a mature and sophisticated understanding of the diverse perspectives and multidimensional character of contemporary international environmental law. His is not a static view of the law, but reflects the rather more dynamic perspective of someone mainly concerned with the process of making, implementing, and enforcing international environmental law, with its core values, and with the interaction of international law and politics. Observing in the preface that “Process issues have received increased attention in recent years but have not yet received a book-length treatment,” he “aims to fill that gap” (p. x). Rather than focus on one or two aspects, he sets out to examine “the process as a whole, from beginning to end, synthesizing recent research on international environmental negotiations, treaty design, social norms, policy implementation, and effectiveness” (p. x). He eschews the “moral outrage” which characterizes some genres of environmental scholarship in favour of an attempt “to understand problems as involving complex trade-offs” (p. xi). While there is some scepticism in evidence—deservedly so in some respects—he tries to provide “a real-world perspective on how international environmental law works—and sometimes doesn’t work” (p. xi).

From this starting point, he delivers more or less what he sets out to deliver. The first chapter sets the scene by asking “What is international environmental law?” Here he sets out

three complementary approaches: the doctrinal approach—focusing on what law is; the policy approach—focusing on what it should be; and the explanatory approach—focusing on the rather different perspectives of political or social scientists rather than lawyers. The last is necessary in order to understand the law-making process and evaluate the effectiveness of international environmental law—essentially a socio-legal enquiry. There is nothing unusual about combining these three different approaches: most serious attempts to teach the subject at a graduate level will follow the same prescription. What makes Bodansky's work a success at doing so is his use of key examples, and the breadth and depth of his understanding and experience of the subject.

Chapter 2 gives a brief history of the development of international environmental law, noting that as recently as 1979 Brownlie's textbook on international law had no entry for environment. The limited case law meant that most of the development of the subject was effected through multilateral treaty negotiations and intergovernmental conferences. Only relatively recently did a more-or-less coherent architecture begin to emerge, based on sustainable development and the treatment of global environmental issues as a common concern of humankind. He concludes that while international environmental law developed quite rapidly, "Now it is undergoing the complex transition from youth to middle age" (p. 35). Much the same could be said of many of its leading scholars.

The next three chapters outline the causes of global environmental problems and how international environmental policy has tried to cure them. Chapter 4 is particularly effective in asking the question "Whom should we regulate?" and sketching the various approaches to regulation which can be found both in national and international environmental law. This chapter should be read by anyone trying to understand the provisions of multilateral environmental agreements. It shows clearly why a background in administrative law and regulatory theory is essential for international and national environmental lawyers alike. Chapter 5 examines the variety of environmental norms, from an untypically theoretical perspective. This chapter strays from an examination of what norms are into an examination of why norms are obeyed, and what it means to describe them as legally binding. This is the one chapter that the initiated may want to skip, although the uninitiated should not do so. It is unsatisfactory largely because it fails to integrate the discussion of customary international law, which is left for a later chapter. In an environmental context it is hard to understand the function of customary international law if disassociated from treaty negotiation and soft law, and the author has at this point fallen into the trap of excessive formalism. Here, above all, is the point where process and form are intimately intertwined. To argue, as he does, that "the question 'what is law?'... has lost its preeminence" (p. 107), is unpersuasive, and no-one who has to deal with international environmental disputes or international litigation would share that view.

Thereafter, three more chapters deal more directly with questions of process: participation in the legal process, international co-operation, and negotiating international agreements. These three chapters are the core of the book, and although there are no novel insights, they are done well, the participation chapter especially so. The author observes that international environmental law

is largely treaty law, and is the product of consensually based negotiations. Not surprisingly he questions the political appeal and legitimacy of stronger non-consensual approaches to law-making. More surprisingly he says nothing about the inter-relationship of environmental treaties with other treaty regimes, like trade law or law of the sea, or with customary international law.

Customary international law is the subject of a chapter in itself. Bodansky, like many who approach the subject from a political-science perspective, has long been a sceptic about customary international environmental law. He focuses on state practice as the key determinant. This may explain his scepticism, but it misses the point that in this context the process of negotiating consensus rules may be rather more significant than state practice in generating custom binding on all, or most, states. In effect, modern custom is almost always negotiated; once the rules are agreed, the evidence of practice matters only to a limited degree. Insofar as custom represents observable social norms, it is the agreement rather than the practice itself that matters most. Almost all ICJ environmental cases follow this pattern when dealing with custom. Bodansky does not really bring this out or examine the case law, nor does he observe the interaction of international institutions, ILC codification, and the judgments of international courts. These omissions, and the failure to link this chapter to the earlier one on environmental norms, constitute the book's only real weaknesses. Here theory predominates and a real-world perspective is missing.

The remaining three chapters deal with implementation, compliance, and effectiveness. These are sensible chapters which draw on the author's own experience and knowledge of different regimes. The book ends with a short concluding chapter that notes rather than explores some further questions about the subject as a whole. Bodansky favours the creation of an international environmental organization, but is realistic enough to appreciate that the world probably cannot wait the length of time necessary for such a body to become useful. He thinks that much has been done and can still be done with the existing tools to develop dynamic regulatory regimes. Nevertheless, he does not believe that there is any single right approach to tackling complex global environmental problems. At best, we can only make practical judgments and compromise solutions, hence his preference for seeing international environmental law as an art rather than a science. This is no doubt correct, and it fits in with his analysis elsewhere of the problems facing climate change negotiations, although little of that debate is apparent here.

Overall, despite some key weaknesses, this new work by Dan Bodansky represents a useful addition to the literature on international environmental law. It will be especially valuable for graduate students used in conjunction with the major textbooks, and will help broaden their understanding of the subject. Some of us may continue to take issue with his treatment of custom, but this is a debate that will continue anyway.

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## ***Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond***

Edited by David Freestone and Charlotte Streck

Oxford: Oxford University Press, 2009, 657 pp., ISBN 978-0-19-956593-1, £99.95.

David Freestone and Charlotte Streck's pioneering book, *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* was published by Oxford University Press in 2009, a mere two years ago. Yet, since the time of its publication, the global community has witnessed significant transformations in the shape and character of global climate change politics and associated state-based efforts to address climate change. The book was released at the apparent apex of global climate politics and global carbon trading. Leading up to 2009, the global community had negotiated and acted within a political realm where the United States was, for all practical purposes, absent but indispensable to the political process. Since 1997, both developed and developing countries had pressed the United States to re-engage in global climate negotiations and to adopt a discrete and enforceable climate policy at home. Beginning with the election of Barack Obama to the US Presidency and culminating with the UN Climate Change Conference in Copenhagen, 2009 proved to be a capstone year in efforts to elevate climate change to the forefront of international law and policy. The distance between the beginning and end of 2009, however, proved critical both to global climate change negotiations generally and to the current and future shape of the global carbon market. In early 2009, President Obama took office on a platform that promised to prioritize domestic efforts to address climate change. During a session of the 111th Congress in the latter half of 2009, US Representatives Henry Waxman (D-Calif) and Ed Markey (D-Mass) released a widely heralded "discussion draft" of a climate change bill. The 932-page bill, entitled the 2009 American Clean Energy and Security Act (ACES), ultimately was approved by the House by vote of 219 to 212 on 26 June 2009. The Act outlined a detailed two-part plan of action for mitigating and adapting to climate change, the core of which was a cap-and-trade program that established mandatory caps on 87 per cent of US greenhouse gas emissions, including heavy industry and the electric-power and oil-and-gas sectors. If implemented, ACES would have mandated a reduction of emissions from covered sources to 17 per cent below 2005 levels (the baseline) by 2020 and 83 per cent below 2005 levels by 2050. ACES, however, eventually died on the Senate floor. The death of the US cap-and-trade bill was indicative of the larger trend in global climate politics, which saw the 2009 Copenhagen Climate Conference end in disarray offering no clear indicator of the future of either the Kyoto Protocol or the burgeoning carbon market to which it had given rise. Thus, by 2010, there was little hope that the United States would pass legislation creating the platform for a national carbon market and great uncertainty as to the future of the global carbon market.

*Legal Aspects of Carbon Trading* emerged against this uncertain backdrop. The book is divided into eight parts comprising twenty-eight chapters. Beginning with an Introduction through which Freestone offers a systematic overview of the history and development of the international climate change regime and the associated carbon market, the first twenty-two chapters of the book

offer analyses of multiple dimensions of the carbon market, including in-depth discussions of the Kyoto Protocol mechanisms and the associated regional, national, and sub-national trading schemes, as well as insightful examinations of the legal ownership and nature of emissions allowances, the role of private actors in international and domestic emissions trading schemes, and accounting mechanisms. While the Kyoto Protocol mechanisms have received considerable attention in the academic literature, questions of ownership, accounting, and the investment implications of carbon trading have received far less coverage in the legal literature, making Chapters 2 to 4 particularly valuable contributions to the growing body of scholarship on carbon trading. Throughout the core of the book, including Chapters 7 to 22, the authors consider a range of questions relating to the development of the Kyoto Protocol flexibility mechanisms and trading regimes. Within these sixteen chapters, the depth of coverage varies and at times there is repetition, but there is also a wealth of information on primary and secondary questions associated with carbon trading. There are also several exemplary chapters, such as Chapter 9, which offers an insightful analysis of the past and future challenges involved in developing Joint Implementation projects, Chapter 14, which takes on the task of better explaining the questions involved in carbon contracting, Chapter 16, which offers a helpful section on “Lessons Learned” through the experiences with the European Union’s Emissions Trading Scheme, and Chapter 18, which concisely explores some of the potential challenges to sub-national efforts to address climate change in the United States. Other chapters, such as Chapters 20 and 22, offer glimpses into Australian and Chinese carbon policy that leave the reader desiring more in-depth information and comparative analyses of the various domestic systems that exist and are evolving worldwide. In particular, Chapter 22, “Carbon Law and Policy in China”, provides a thumbnail sketch of Chinese sustainability and climate policy that is both fascinating and unsatisfying in that it raises more questions than it offers answers. This, of course, is not due to any fault on the part of the author. Instead, it reveals the extent to which states and the global community are learning on their feet as they develop climate policy, and it reminds us of the importance of comparative analysis as a tool for improving climate policy in a proactive rather than reactive manner.

Finally, the last six chapters of the book explore, first, the burgeoning voluntary carbon market, and, second, the future of the carbon market in a post-Kyoto world. These final chapters tackle a number of interesting topics, ranging from the legal issues surrounding the future of the voluntary carbon market, to predictions and visions for a post-2012 climate agreement, to market solutions to protect rainforests, to the future regulation of the aviation industry. While the chapters dealing with a vision for the post-2012 international climate change regime are now woefully outdated following the events at Copenhagen, the chapters exploring the voluntary carbon market and the viability of using market solutions to protect the tropical rainforests are more relevant than ever. Chapter 23, exploring the voluntary carbon market, offers critical insight into the present state of that market, but it stops short of answering many questions that surround its present and future viability and functioning. As with Chapter 22, the reader is left desiring more information about the voluntary market and wishing that more space within the book could have been dedicated to these questions. Again, however, this is in many ways indicative of the changes that the

global community has witnessed since 2009. With respect to Chapter 27, “International Market Solutions to Protect Tropical Rainforests”, this is the chapter that many readers will jump to when they pick up the book because it offers insight into what is now one of the hottest topics in global climate politics—the UN Program on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD). In a post-Copenhagen world, the REDD program and questions of how to improve sector-based strategies to mitigate climate change have taken on increasing importance, making Chapter 27 a valuable contribution to the book.

In concluding the book, Streck and Freestone aptly emphasize the role that uncertainty has played in the development of the carbon market. Now more than ever, uncertainty defines the field. Given the uncertain future of the Kyoto Protocol, the future of the carbon market, especially as it is tied to the Kyoto Protocol flexibility mechanisms, is precarious. In a post-Copenhagen world, one might wish that the Editors had placed greater emphasis on the limits to the carbon market, the future of the carbon market in the absence of the Kyoto Protocol, or even to alternative approaches to controlling carbon emissions. Such is the nature of writing in a field in which the legal and political terrain is shifting on a daily basis. Yet, despite the enormous difficulties inherent in attempting to discuss the ever-evolving questions surrounding carbon trading, this book offers a remarkably comprehensive, nuanced, and forward-looking review of the legal and political issues surrounding carbon trading at multiple levels and in multiple contexts. It is an invaluable resource for lawyers, bankers, students, or members of civil society working on questions of carbon trading, finance, or climate policy. The history of the climate regime can be tracked and better understood through the development of carbon trading, and this book offers one of the most comprehensive and helpful accounts to date of this fascinating and evolving field.

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### ***Trade Law and Regulation in Korea***

Edited by Seung Wha Chang and Won-Mog Choi

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*Trade Law and Regulation in Korea* is part of a new series by Edward Elgar which is intended to provide information about the Korean legal system in the English language. This particular volume addresses the legal regime relating to trade in goods and services in Korea. Given the growing role that Korea plays in the global economy, it is important that English-language scholars are able to access such resources. In 2009, Korea was the fifth largest exporter in merchandise trade after the European Union, China, the United States, and Japan. At the same time, it was the seventh largest importer, despite its relatively small population.

The collection provides a detailed and comprehensive overview of the domestic regulatory trade regime in Korea. Each chapter is written by a leading Korean academic. Overall, the book provides a systematic description of the relevant legal provisions of the Korean trade regime, and shows how Korea has implemented its obligations under the WTO Agreement and other relevant international instruments, and how it has sought to modify its domestic trade regime in order to improve transparency and efficiency.

Most of the book is dedicated to trade in goods. Individual chapters address the imposition of customs duties, export controls, the use of anti-dumping and countervailing duties, and safeguard measures. Other chapters in the book address the wider trading regime, including trade in services, international interactions of competition law, and trade-related aspects of international investment. The final chapter considers the institutional and procedural framework for the negotiation of free-trade agreements with third countries, as well as issues arising from the application of rules of origin.

It is the broader treatment of Korean trade law and policy in relation to its major trading partners that is perhaps of most general interest in this volume. The negotiation of economic-integration agreements is a particularly important topic for Korea, which has recently concluded free-trade agreements with several major economic actors, including ASEAN, the United States, and the European Union. Korea is also currently negotiating economic-integration agreements with a range of other countries such as Canada, Mexico, Australia, New Zealand, Peru, and Japan. As the book notes on several occasions, the conclusion of these economic-integration agreements has sometimes been controversial, and particular concerns have been raised about the impact of such agreements on the regulatory discretion of Korean public bodies. Several chapters of the book illustrate how the conclusion of free-trade agreements, which generally cover a range of economic policy areas (trade in goods, trade in services, competition, and investment), can have important implications for Korean trade policy, as well as other areas of government policy.

The impact of economic integration agreements often extends to environmental policy in general, and climate change policy in particular. This is clearly illustrated by the recent decision of the Korean Government in January 2011 to amend its regulations on CO<sub>2</sub> emissions from cars following pressure from foreign car manufacturers, particularly in the United States, the European Union, and Japan. The demands of these trade partners, with which Korea has either concluded or is in the process of concluding economic-integration agreements, led to imported foreign cars being partially exempted from the domestic CO<sub>2</sub> standards imposed on Korean cars. The new regulations permit other eco-innovations to be taken into account when determining the overall environmental performance of foreign cars. Whilst government officials in the United States and the European Union welcomed the “constructive attitude” of Korea on this issue, the changes also potentially have the effect of diluting Korea’s efforts to combat climate change.

*Trade Law and Regulation in Korea* is undoubtedly a specialist publication that will be largely relevant to practitioners or academics who have an interest in the Korean trading regime. It may also be useful for scholars who are conducting comparative studies of different domestic

trading regimes. Although the book does not directly address trade and the environment or trade and climate change, it does raise some interesting issues concerning Korean trade policy and the impact of economic-integration agreements that are of increasing relevance for lawyers and policymakers in many areas, including climate change. It would be highly desirable if further books in this series would touch more directly on the regulation of environmental issues in Korea and how this growing economic power is dealing with the tension between trade and the environment in the pursuit of sustainable development.

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