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# The “Thirty-Percent Solution” and the Future of International Environmental Law<sup>1</sup>

Donald K. Anton\*

## I. Introduction

It is a genuine pleasure to contribute to this collection of review essays on Daniel Bodansky’s *The Art and Craft of International Environmental Law* (hereinafter *Art and Craft*) organized by the Santa Clara Journal of International Law. Dan Bodansky has been toiling in the field of contemporary international environmental law and policy for over twenty-five years, a true pioneer. His academic efforts and professional contributions have helped firmly establish the area in the corpus of international law. His sapient analysis across a wide spectrum of regimes and issues, especially those associated with climate change, has often illuminated the way forward. *Art and Craft* marks a major multidisciplinary explanation of the complexities behind the variegated operation of international environmental law in its political, economic, and social contexts.

Earlier this year, *Art and Craft* received the richly deserved 2011 Harold and Margaret Sprout Award, presented by the International Studies Association for 2010’s best book published in the field of international environmental politics.<sup>2</sup> Already, the text has been the subject of at least five favorable book reviews<sup>3</sup> and an extended online discussion at the

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1. This title is drawn from the name of a subsection in Chapter 1 of *The Art and Craft of International Environmental Law* (DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 15 (2010) (hereinafter *Art and Craft*)) and from an *Opinio Juris* blog post by Bodansky in a late January 2010 online discussion of the book. Dan Bodansky, *International Environmental Law as a 30% Solution*, OPINIO JURIS (Jan. 29, 2010), <http://opiniojuris.org/2010/01/29/international-environmental-law-as-a-30-solution/>. One is also reminded of Nicholas Meyer’s late “Seven Percent Solution” addition to the oeuvre of cases solved by Sherlock Holmes. NICHOLAS MEYER, THE SEVEN-PER-CENT SOLUTION: BEING A REPRINT FROM THE REMINISCENCES OF JOHN H. WATSON, M.D. (1974), even though that solution was an admixture instead of an answer.
2. *2011 Harold and Margaret Sprout Award*, HARVARD UNIVERSITY PRESS, <http://www.hup.harvard.edu/catalog.php?isbn=9780674035430> (last visited Apr. 18, 2012).
3. See Alan Boyle, *The Art and Craft of International Environmental Law*, 2 CLIMATE L. 291 (2011) (reviewing DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW (2010)); Elisa Morgera, *The Art and Craft of International Environmental Law*, 23 J. ENVTL. L. 349

*Opinio Juris* blog.<sup>4</sup> Given Bodansky's expertise and the fact that *Art and Craft* was more than a decade in the making,<sup>5</sup> awards and good reviews are hardly surprising.

Bodansky, himself, characterizes *Art and Craft* as "an elementary book from an advanced standpoint, with a stronger methodological and philosophical orientation than is typical in an introductory work."<sup>6</sup> It is, however, much more than a mere introduction to the subject — although it is that too. It is not Bodansky's aim to limit the work to a hornbook outline of doctrine for the tyro. *Art and Craft* is a more sophisticated treatment, and also much more pragmatic. It is, in essence, a guidebook for the aspiring practitioner of international environmental law from which any seasoned student of the discipline will also profit.<sup>7</sup> To this end, it focuses on the complete process of international environmental law, "from beginning to end [including] international environmental negotiations, treaty design, social norms, policy implementation, and effectiveness."<sup>8</sup> Because it is process-based, it provides "the reader with the analytical tools necessary to understand what international environmental law is, how it operates, and what role it can play in addressing environmental problems."<sup>9</sup> It is this last aspect of *Art and Craft* — international environmental law's role in addressing continuing global environmental decline — that is most pressing today and interests me here.

In framing the text, Bodansky starts with an anecdotal tale of a non-lawyer's faith in the importance of international environmental law; that legality (or not), indeed, matters in the

(2011) (reviewing the same); Jörg Balsiger, *The Art and Craft of International Environmental Law*, 28 REV. POLY RES. 392 (2011) (reviewing the same); Michelle Ben-David, *Defining International Environmental Law*, 38 ECOLOGY L. Q. 553 (2011) (reviewing the same); *The Art and Craft of International Environmental Law*, 35 YALE J. INT'L L. 548-550 (2010) (reviewing the same). The biggest peccadillo of the reviewers seems to be one aspect or another of Bodansky's treatment of normativity. Alan Boyle, for instance, challenges Bodansky's skepticism about the customary status of norms attended by little or ambiguous practice. For Boyle, in today's world, custom normative agreement (rather than what states do in the world) matters most. Boyle, *supra*, at 293. I note what seems to be internal inconsistency. Fifteen years ago, in a well-known article that now forms the major part of Chapter 9 of *Art and Craft*, Bodansky identified a number of norms that had been advanced by a number of international lawyers as customary international environmental law, including the duty to prevent transboundary harm. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 106-107 (1995). A short exposition of the classic treatment of the creation of customary international law followed, including a positivist account of the empirical ascertainment of custom — the observation of widespread and consistent regularities in state behavior coupled with the acceptance by states of these regularities as law. Bodansky then turned his attention to the lawyer's ability to forecast legal outcomes on the basis of international environmental customary law. Bodansky famously proclaimed that in terms of traditional international normativity, "reliance on the purported norms of customary international environmental law as the basis of one's predictions would constitute malpractice." *Id.* at 111. Bodansky seems to have changed his mind, at least with respect to the duty to prevent harm. In Chapter 2 of *Art and Craft* he says that it "is now widely regarded as international law." *Art and Craft*, *supra* note 1, at 28.

4. Peggy McGuinness, *Opinio Juris Book Discussion: "The Art and Craft of International Environmental Law," by Daniel Bodansky*, OPINIO JURIS (Jan. 25, 2010), <http://opiniojuris.org/2010/01/25/opinio-juris-book-discussion-the-art-and-craft-of-international-environmental-law-by-daniel-bodansky/>.
5. Dan Bodansky, *The Art and Craft of International Environmental Law*, OPINIO JURIS (Jan. 25, 2010), <http://opiniojuris.org/2010/01/25/the-art-and-craft-of-international-environmental-law/>.
6. *Art and Craft*, *supra* note 1, at xi.
7. See e.g., FRANCIS WELLMAN, *THE ART OF CROSS-EXAMINATION* (1997) (offering an early and influential guidebook model).
8. *Art and Craft*, *supra* note 1, at x.
9. *Id.* at xi.

real world. One point of the anecdote is to contrast the denier’s opposite take; that “international environmental law is simply rhetoric, which does not affect how states behave.”<sup>10</sup> For Bodansky, “the answer is somewhere in between. International environmental law is neither a panacea nor a sham. It can play a constructive role, but that is all. It might be called a “thirty-percent” solution.”<sup>11</sup> Initially, a “thirty-percent solution” might strike some as somewhat less than constructive. Thirty percent hardly seems like a cause for confidence in international environmental law. Even those who view international law as an apology for what states would otherwise do<sup>12</sup> might still expect international environmental law to be more effective — at least in terms of compliance rates.<sup>13</sup>

Yet, it is in thinking about the “thirty-percent solution” — or any solution at all to international environmental problems — that Bodansky’s text serves best, in my view, as an entrée for the uninitiated to this increasingly vital subject in the international law curriculum and provides the veteran practitioner with ideas for potential purchase to leverage ameliorative improvements. *Art and Craft* facilitates these functions by visiting the various key sites in which “solutions” to international environmental problems can be generated and highlights the multifaceted aspects of the sorts of “solutions” international environmental law might be expected to provide. The process focus of the book is able to deeply engage the reader in how “solutions” to international environmental problems come about and are crafted. In particular, the chapters on diagnosing problems (Chapter 3), prescribing cure (Chapter 4), overcoming obstacles to cooperation (Chapter 7), negotiating agreements (Chapter 8), implementation (Chapter 10), incentives and disincentives (Chapter 11), and effectiveness (Chapter 12), all directly bear on various process aspects involved in the development of “solutions”. Because the solutions in which international lawyers are ordinarily interested are legal solutions, the two normative chapters on varieties of norms (Chapter 5) and customary norms (Chapter 9) are also important. As this content makes plain, “solutions” feature in one major way or another throughout the bulk of *Art and Craft*.

Given the short compass of this form of review essay, I want to concentrate on Bodansky’s “thirty-percent solution” as a way to highlight what I consider the most pressing need for the future of international environmental law. Today, more than anything else, the international community has an obvious need to dramatically improve upon what Bodansky labels as international environmental law’s “problem-solving effectiveness,”<sup>14</sup> an effectiveness measured by tangible improvement across an array of, up to now, almost universally and continually declining global environmental indicators. These indicators present a host of disturbing existential prospects for generations in being and, even more so, for posterity to follow.

10. *Id.* at 15.

11. *Id.*

12. *See, e.g.,* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 2-51 (Cambridge University Press 1989).

13. *See, e.g.,* Abram Chayes, Antonia Handler Chayes, and Ronald B. Mitchell, *Managing Compliance: A Comparative Perspective*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ACCORDS* 42 (Edith Brown Weiss & Harold K. Jacobson, eds., MIT Press 2000) (stating that compliance, at least initially, may be motivated by normative consensus).

14. *Art and Craft*, *supra* note 1, at 256-258.

I should be clear up front that I agree completely with Bodansky that international environmental law is consequential. It does matter. It should matter much more. That fact is, however, only in a very few instances, such as environmentally safe ship construction requirements and limits on production and consumption of ozone depleting substances, that the law has had a major salutary impact on environmental problems. Much more commonly, precise limits, technical requirements, and mandatory financial and technological transfers go wanting and the law is marginally significant as a procedural ambient background.<sup>15</sup> It is my view that the development and implementation of these necessary predicates to global environmental solutions has been retarded by the establishment of the concept of sustainable development as the focal point for international environmental law.

Accordingly, my look at *Art and Craft* here critiques what Bodansky insightfully identifies as the pervasive “organizing principle” of contemporary international environmental law since at least 1987 — the concept of “sustainable development”<sup>16</sup> — as a major impediment to solutions. It is an obstacle, which, if not addressed, condemns international environmental law to become much less than a 30% solution. I maintain that after twenty-five years of failure, the time has come to jettison this concept as the heart of international environmental law (even though equitable and ameliorative aspects of the concept need to be retained). I start by examining the surfeit of conventional international environmental law that the international community has produced to highlight that reaching international agreement on norms, without more, is insufficient to provide environmental protection.

## II. The Proliferation of International Environmental Law and Continuing Environmental Decline

In thinking about solutions — thirty percent or otherwise — an obvious starting point is to consider whether the corpus of international environmental law has been sufficiently developed to address challenges posed. As Bodansky points out, a normative dearth has not been a problem for contemporary international environmental law.<sup>17</sup> Looking back now, the rapid growth of international environmental conventional norms that took place over roughly the last thirty years of the twentieth century is striking.<sup>18</sup> Few fields have burst on the scene with as much unplanned fecundity. The standard account tells of a reactive and *ad hoc* proliferation of international environmental law as a response to particular crisis and new

15. Dan Tarlock makes this same point in connection with the overwhelming procedural nature of the *National Environmental Policy Act* in the United States. A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, in NATURAL RESOURCE POLICY AND LAW: TRENDS AND DIRECTIONS 173-174 (Lawrence J. MacDonnell & Sarah F. Bates, eds., Island Press 1993).

16. *Art and Craft*, *supra* note 1, at 33-34.

17. *Id.* at 154.

18. Birnie, Boyle and Redgwell highlight the modern profligacy of international environmental law in the opening to the third edition of their pioneering treatise: “[L]a grande fertilité de cette branche du droit international.” PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW & THE ENVIRONMENT 1 (3rd ed. 2009) (quoting P.M. Dupuy, *Où en est le droit international de l’environnement à la fin du siècle?* 101 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 873, 900 (1997)). See also Daniel Bodansky, Jutta Brunnee, and Ellen Hey, *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 3 (Daniel Bodansky, Jutta Brunnee, and Ellen Hey, eds., Oxford University Press, USA, 2007).

challenges and problems.<sup>19</sup> As these increased in number and international environmental law-making gathered steam, just keeping up-to-date required (and still requires) concerted effort.<sup>20</sup>

For international environmental law, the normative proliferation took place in plain view and was contemporaneously chronicled in an array of treaty collections. Starting in the mid-1970s with Wolfgang Burhenne and Robert Muecke’s ongoing loose-leaf service<sup>21</sup> and Bernd Rüter and Bruno Simma’s thirty volume collection of international environmental treaties,<sup>22</sup> and continuing with increasing frequency, an impressive host of general and specialized compilations of the multiplying numbers of multilateral environmental agreements appeared.<sup>23</sup> By the early 1990s, it was estimated that 885 different international

19. UNITED NATIONS ENVIRONMENTAL PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 23 (2006).
20. The majority of the academe was somewhat slow to catch up with the expanding field. There were, of course, a number of early pioneering texts, including RICHARD FALK, THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL (1972); LAW, INSTITUTIONS & THE GLOBAL ENVIRONMENT (John L. Hargrove ed., 1972); LYNTON K. CALDWELL, IN DEFENSE OF EARTH: INTERNATIONAL PROTECTION OF THE BIOSPHERE (1972). However, as late as 1989, Philippe Sands was able to write that the leading treatises and textbooks on international law “fail in their index to make any mention of the words ‘environment’ or ‘pollution.’” Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT’L L.J. 393, 394 (1989). Surprisingly, some still appear to view the field of international environmental law as a normatively barren landscape, asserting that international environmental law does “not [have] a great deal of law in it.” Catherine MacKenzie, LL.M. Subject Forum 2010: International Environmental Law, University of Cambridge, Faculty of Law, available at <http://www.law.cam.ac.uk/faculty-resources/summary/llm-subject-forum-2011-international-environmental-law/9116>.
21. INTERNATIONAL ENVIRONMENTAL LAW: MULTILATERAL TREATIES, 9 loose-leaf vols [1974 -] (W. E. Burhenne, ed., Robert Muecke, comp., Berlin, E. Schmidt).
22. INTERNATIONAL PROTECTION OF THE ENVIRONMENT: MULTILATERAL TREATIES, 30 vols [1754-1981], (Bernd Rüter & Bruno Simma eds, Dobbs Ferry, NY: Oceana Publications, 1975-1983). In 1990, the publication, with a slightly modified title but with the same editors and publisher, continued in a second series, INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS, SECOND SERIES [1981-] (Bernd Rüter & Bruno Simma, eds., Dobbs Ferry, NY: Oceana Publications, 1989-). A six volume third series also appeared specifically for the proceedings of the 1992 United Nations Conference on Environment and Development. See AGENDA 21 & THE UNCED PROCEEDINGS (Nicholas A. Robinson, ed., New York: Oceana Publications, Inc., 1992).
23. See 1 Selected Multilateral Treaties in the Field of the Environment, Nairobi, Kenya: United Nations Environment Programme (Alexandre Charles Kiss, ed., 1983); PHILIPPE SANDS, CHERNOBYL: LAW AND COMMUNICATION (Cambridge: Grotius Publications 1988); PETER SAND, MARINE ENVIRONMENTAL LAW IN THE UNITED NATIONS ENVIRONMENT PROGRAMME (Dublin: Tycooly 1988); United Nations Environment Programme, Register of International Treaties and Other Agreements in the Field of the Environment (Nairobi, Kenya, 1989 and updated regularly, currently U.N. Doc. UNEP/Env.Law/2005/3 (2005)); 2 Selected Multilateral Treaties in the Field of the Environment, Nairobi: United Nations Environment Programme (Iwona Rummel-Bulska and Seth Osafo, eds., 1991); INTERNATIONAL ENVIRONMENTAL LAW: PRIMARY MATERIALS (Paul R. Molitor, ed., Deventer/Boston: Kluwer Law and Taxation Publishers 1991); INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES (Edith Brown Weiss, Paul C. Szasz & Daniel B. Magraw, eds., Dobbs Ferry, NY: Transnational Publishers, Inc. 1992); 3 BASIC DOCUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW (Harold Hohmann, ed., London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff 1992); Preparatory Committee for the United Nations Conference on Environment and Development, Report of the Secretary-General of the Conference on the Survey of Existing Agreements and Instruments and its Follow-up, U.N. Doc. A/CONF.151/PC/103 and Add.1 (30 Apr. 1992); TRANSBOUNDARY MOVEMENTS AND DISPOSAL OF HAZARDOUS WASTES IN INTERNATIONAL LAW: BASIC DOCUMENTS (Barbara Kwiatkowska & Alfred H.A. Soons, eds., Dordrecht/Boston/London: Martinus Nijhoff/Graham & Trotman, 1993); INTERNATIONAL CONVENTIONS ON PROTECTION OF HUMANITY AND ENVIRONMENT (Günter Hoog &

environmental legal instruments (hard and soft)<sup>24</sup> and 139 different major international environmental treaties<sup>25</sup> were in existence. In the years between 1972 and 1992 alone, it was said that more than 50 multilateral treaties relating to the protection of the marine environment were concluded.<sup>26</sup> In the years between 1970 and 2004, three hundred and forty-eight multilateral treaties and one hundred and forty nine protocols were concluded, an average of roughly 100 combined instruments every five years until 2005.<sup>27</sup>

As this normative proliferation took place, one was reminded of Cicero's teaching, *summum ius summa iniuria* ("the more law, the less justice")<sup>28</sup> and it became apparent that the increasing number of treaties and subjects of international environmental obligation would pose several distinct challenges related to normative "fragmentation" and the capacity to implement obligations.<sup>29</sup> At the same time, it might have seemed intuitive that a greatly expanding body of law would at least start stemming environmental decline, if not directly improve environmental quality. This was not the case. Concrete environmental

Angela Steinmetz, eds., Berlin/New York: Walter de Gruyter 1993); INTERNATIONAL ENVIRONMENTAL SOFT LAW: COLLECTION OF RELEVANT INSTRUMENTS (Wolfgang Burhenne & Marlene Jahnke, eds., Dordrecht/Boston: Martinus Nijhoff Publishers 1993-2003); 2 Documents in International Environmental Law (Philippe Sands, Richard Tarasofsky, and Mary Weiss, eds., Manchester, UK: Manchester Univ. Press 1994); Basic Documents on International Environmental Law (Patricia W. Birnie & Alan Boyle, eds., Oxford: Clarendon Press 1995); INTERNATIONAL PROTECTION OF THE ENVIRONMENT: CONSERVATION IN SUSTAINABLE DEVELOPMENT, looseleaf service, 1995-present (Wolfgang Burhenne & Nicholas Robinson, eds., Dobbs Ferry, NY: Oceana Publications); UNITED STATES NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, 1998 YEAR OF THE OCEAN: A SURVEY OF INTERNATIONAL AGREEMENTS (Washington, DC: NOAA, 1998); INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES 1992-1999 (Edith Brown Weiss, Daniel Barstow Magraw & Paul C. Szasz eds., Dobbs Ferry, NY: Transnational Publishers, Inc., 1999); MARK AUSTEN & TAMARA RICHARDS, BASIC LEGAL DOCUMENTS ON INTERNATIONAL ANIMAL WELFARE AND WILDLIFE CONSERVATION (The Hague/London/Boston: Kluwer Law International 2000). Also see the extensive document supplements that have accompanied the various editions of major casebooks on International Environmental Law. SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER (Lakshman D. Guruswamy, Geoffrey W.R. Palmer, Burns H. Weston, Jonathan C. Carlson, eds., St Paul: West Group 1994 and 1999); INTERNATIONAL ENVIRONMENTAL LAW AND POLICY TREATY SUPPLEMENT (David Hunter, James Salzman & Durwood Zaelke, eds., New York: Foundation Press 2002, 2007 and 2011); INTERNATIONAL ENVIRONMENTAL LAW: CASES, MATERIALS, PROBLEMS: DOCUMENT SUPPLEMENT (Donald K. Anton, Jonathan I. Charney, Philippe Sands, Thomas J. Schoenbaum & Michael K. Young, eds., Newark: LexisNexis 2007).

24. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES ix (1991). *See also* Edith Brown Weiss, *New Directions in International Environmental Law* 4-7 (paper delivered 15 Mar. 1995 at the United Nations Congress on Public International Law, New York).
25. UNEP, *Register of International Treaties and Other Agreements in the Field of the Environment*, U.N. Doc. UNEP/GC.15/Inf.2 (1989).
26. ANDRONICO O. ADEDE, INTERNATIONAL ENVIRONMENTAL LAW DIGEST: INSTRUMENTS FOR INTERNATIONAL RESPONSES TO PROBLEMS OF ENVIRONMENT AND DEVELOPMENT 1972-1992 14 (1993).
27. *See* Ronald B. Mitchell, *International Environmental Agreements Database Project, Environmental Agreements by Date*, UNIVERSITY OF OREGON (2002-2012) <http://iea.uoregon.edu/page.php?query=summary&type=MEA> (last visited 22 Apr. 2012).
28. M. TULLII CICERONIS, DE OFFICIIS AD MARCUM FILIUM 18 (Erklaert G. Fr. Unger, Leipzig: Weidmann's Buchhandlung 1852); MARCUS TULLIUS CICERO, DE OFFICIIS 33 (Walter Miller, trans., Cambridge: Harvard Univ. Press 1913). *See* DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 205 (Athens: GA, Univ. of Georgia Press 2002).
29. Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 697-702 (1993).

improvement remains to be seen in most areas, even today. Emissions of almost all greenhouse gases continue to rise. Water stress and scarcity is increasing and access to potable water is decreasing. The earth’s biological diversity is under increasing threat and habitat destruction and modification continues apace. The sharp trend of overexploitation and depletion of dwindling fish stocks continues unabated. Land degradation continues to worsen. The world’s remaining forest ecosystems continue to be degraded and fragmented.<sup>30</sup> As a general matter of legal effectiveness, the apparent continuing environmental decline, despite the normative build-up, prompted Martti Koskenniemi to write in 1992 that “[w]hat is needed now is less the adoption of new instruments than more effective implementation of existing ones.”<sup>31</sup>

### III. Sustainable Development as an Obstacle to Solutions

*Art and Craft* provides an excellent overview of the major legal, political, and economic obstacles to general international cooperation on solutions to international environmental problems.<sup>32</sup> It also addresses in detail the significant instrumental and normative factors that can serve as roadblocks to the adoption of treaties designed to impose significant limits on environmentally harmful municipal activities, to require international supervision, or oblige equitable distributive transfers to promote implementation.<sup>33</sup> In both instances, it outlines salient strategies for strengthening the process. In the case of cooperation obstacles, Bodansky focuses on building political will, facilitating agreement, and enhancing capacity.<sup>34</sup> In the case of treaty roadblocks, Bodansky highlights potential benefits of treaty design and temporal ways to strengthen weak treaties.<sup>35</sup>

As intimated above, however, one obstacle (at least in my view) that escapes attention in *Art and Craft* is deployment of the concept of sustainable development — in an environmentally ambivalent or even hostile form — as international environmental law’s polestar. Over the last 40 years there has been a clearly discernible shift away from a specific environmental emphasis in international environmental policy. The international community today wears its environmental concern on its sleeve, when in fact it is mostly pretence — a pretence that is consciously or subconsciously driven by our almost wholesale embrace of a concept of sustainable development co-opted by environmentally ambivalent or hostile agendas. The most recent manifestation is reflected in the lead up to the 2012 United Nations Conference on Sustainable Development and its fixation on the green economy. Underneath it all is the misplaced faith (or wish) that continued economic growth and development will drive effective protection of the global environment.

30. See e.g., UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3 (Oxford University Press 1997); UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 298 (Earthscan Publications 2002). See also Worldwatch Institute, STATE OF THE WORLD, Worldwatch Institute, VITAL SIGNS (Annual publications).

31. Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. OF INT’L ENVTL. L. 123, 123 (1992).

32. *Art and Craft*, *supra* note 1, at 139-45.

33. *Id.* at 159-66, 172-83.

34. *Id.* at 149-52.

35. *Id.* at 172-88.



This is not to say that there was no recognition in 1972 at the Stockholm Conference on the Human Environment that the environmental problems of developing countries were different in kind and prominently included under-development;<sup>36</sup> nor is it the case that the United Nations Conference on Environment and Development in Rio in 1992 failed to account for the idea of sustainable development popularized by the World Commission on Environment and Development in its well-known Report, *Our Common Future*.<sup>37</sup> However, it was generally recognised at the time that those “who planned [the 1972 and 1992 Conferences] certainly had foremost in mind . . . the spiritual qualities of our relation to the earth [and] *the ecological health of our planet*.”<sup>38</sup>

This primary concern over the continuing deterioration of the state of the world’s environment<sup>39</sup> largely disappeared in the years following the 1992 Rio Conference. Today, instead, we find ourselves preoccupied with *green growth*, in a global *green economy*, in which environmental protection is to be *integrated in a “balanced” way* with economic growth and social development. I believe that this shift has been insidious for international environmental protection as the focus for international environmental law.

Consider the following potted history: We start with 1987, the year the World Commission on Environment and Development issued *Our Common Future*. The Report laudably defined the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>40</sup> The Report also stressed the need to get a handle on unsustainable patterns of consumption and production; it emphasised a necessary reduction in the amount consumed by the affluent.<sup>41</sup> The Report, however, did much more than this. For a start, it highlighted with striking certainty that “inequality is the planet’s main ‘environmental’ problem. . . .”<sup>42</sup> Inequality is, of course, a disturbing, persistent, and growing problem. It most certainly deserves to be addressed in its own right as a matter of priority. However, it is much less clear that it is our main environmental problem.

More disturbingly, though, when *Our Common Future* was presented to the Governing Council of UNEP by the Commission’s Chair, Gro Harlem Brundtland, she asserted that the idea of sustainable development was really “a new concept for economic growth.”<sup>43</sup> It did not

36. See DEVELOPMENT AND ENVIRONMENT: REPORT AND WORKING PAPERS OF A PANEL OF EXPERTS CONVENED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, HELD AT FOUNEX, SWITZERLAND, JUNE 4-12, 1971 (Paris: Mouton 1972).

37. See OUR COMMON FUTURE: REPORT OF THE WORLD COMMISSION ON ENVIRONMENT & DEVELOPMENT (1987).

38. BARBARA WARD & RENÉ DUBOS, ONLY ONE EARTH: THE CARE AND MAINTENANCE OF A SMALL PLANET xii (1972) (emphasis added).

39. As reflected in the General Assembly Resolutions convening the 1972 Conference on the Human Environment, GA Res. 2398, (XXIII) (3 Dec. 1968) and the 1992 Conference on Environment and Development, GA Res 44/228 (22 Dec. 1989).

40. OUR COMMON FUTURE, *supra* note 37, at 43.

41. *Id.* at 9.

42. *Id.* at 5-6.

43. Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW 14 (Philippe Sands ed., 1993) reprinted from 1 REV. EUR. COMM. & INT’L ENVTL. L. 254, 261 (1992); See also Gro Harlem Brundtland, *James Marshall Memorial Lecture* (Oct. 19, 1987) (“Sustainable development itself — the overriding political concept of the Commission — is, in fact, a new concept for economic growth”) (on file with author).

take long for those countries with a free market, free trade, and laissez-faire capitalist agendas to seize on this and, for at least some, to recast their ambitions for unbridled economic growth in the “green language” of sustainable development. The first step was to equate sustainable development with sustainable economic growth. The next step, losing all pretence, was to assert that unlimited sustained economic growth was the way to achieve sustainable development.

In 1989, this subversion of sustainable development found its way into the General Assembly Resolution convening the 1992 Rio Conference. The Resolution affirmed in a number of places the importance of economic growth. In particular, it proclaimed “the importance of a supportive economic environment that would result in sustained economic growth . . . in all countries.”<sup>44</sup> Once we got to Rio, a number of additional things happened, three of which I mention here. First of all, unlike Stockholm in 1972, the ecological tenor of the 1992 conference in Rio was downgraded; instead of recognising human beings as part of nature, Principle 1 of the Rio Declaration anthropocentrically declares, “human beings are at the center of concerns for sustainable development.”<sup>45</sup> Those who had hopes for an Earth Charter in Rio, not only did not get an Earth Charter, but also saw the planet Earth and nature placed into the shadows of an increasingly euphemistic notion of sustainable development.

Second, by the time we got to Rio in 1992, the Brazilian delegate on Working Group III of the Preparatory Committee of the Conference had successfully persuaded all the delegates to substitute the new term “international law in the field of sustainable development” for the established field of international environmental law in all the conference documents. It was reported that following his success, the Brazilian delegate flashed a mischievous smile and said, “[t]hat will keep you lawyers busy well into the 21st Century.”<sup>46</sup> If all that this entailed was a lawyerly struggle with ambiguity created by new terminology it would not have been out of the ordinary.

However, more than just a change of name has been involved, and this brings me to my third point. The 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. As Marc Pallemaerts presciently predicted back in 1992, it has diminished and subordinated international environmental protection to economic growth and social development under what has become known as the principle of integration. The principle of integration reduces environmental imperatives to just one factor (along with economic and social desires) to be weighed in decision-making.<sup>47</sup> The problem, of course, is that the environment usually comes

44. See G.A. Res. 44/228 ¶6, U.N. Doc. A/Res/44/228 (Dec. 22, 1989).

45. United Nations Conference on Environment and Development, Rio de Janeiro, Braz. June 2-14, 1992, Rio Declaration on Environment and Development, A/CONF.151/26/Rev.1 (Vol. 1) Annex I, prin. 1 (Aug. 12, 1992).

46. Peter H. Sand, *UNCED and the Development of International Environmental Law*, 3 YEARBOOK OF INT'L ENV. LAW 3, 17 (1992). See also Michael A. DiMaggio, *Environmental Law: When Does it Make Sense to Negotiate International Agreements?*, 87 AM. SOC'Y INT'L L. PROC. 383, 394 (1993) (comments by Sand).

47. Pallemaerts, *supra* note 43, at 17-18.

out on the losing end because sustainable development eschews any sort of legal limits that provide substantive environmental protection.

The trajectory of displacement of specific environmental concern for the plant — in favor of the idea of sustainable development informed by growth — proceeds apace today. Instead of law and policies to support the global environment by the necessary modifications of our own economic and social activities, we find documents like the UNEP's 4th *Global Environmental Outlook (GEO)* turning the idea of using the economy to support environmental protection insideout like a glove. The 4th UNEP *GEO* is subtitled "Environment for Development"<sup>48</sup> and states, "Society has the capacity to make a difference in the way the environment is used to underpin [economic] development. . . ." (emphasis added).<sup>49</sup> This formulation clearly renders the environment a mere instrument of development and, presumably, today, of the green economy. In this way, environmental degradation is seen as a spoiler of development, instead of viewed in light of what is really needed — legal constraint on economic development to protect the environment.

These retrograde views obtain in many of the documents now circulating around Rio+ 20. Two examples will suffice. First, the General Assembly, in convening Rio+ 20, "reaffirmed" the environment as subservient to the economy by emphasizing that it is the protection and management of the natural resource base of economic and social development that is the "overarching objective and essential requirement of sustainable development."<sup>50</sup> Second, last December, the Secretary-General reported on the objectives and themes of the conference and put forward a formulation of sustainable development that "emphasizes . . . strong economic performance" and "rests on integration and a balanced consideration of social, economic and environmental goals and objectives. . . ."<sup>51</sup> In the same report, the Secretary-General highlights that any transition to a green economy requires "public policies to avoid negative effects on economic growth."<sup>52</sup> It seems austerity is fine when creditors need to be paid, but has no place in protecting the planet and all of this is far removed from the objective of global environmental protection as an important end in itself.

#### IV. Conclusion

In order to allow international environmental law to be better than a thirty-percent solution, I believe that we need to put the objective of environmental protection front and center as the primary focus of international environmental diplomacy, international environmental policy, and international environmental law. How to accomplish this, though,

48. Unfortunately, this 2007 slogan has stuck and it is now featured on the UNEP homepage next to its logo as its clarion call. See UNITED NATIONS ENVIRONMENT PROGRAMME, [www.unep.org](http://www.unep.org) (last visited Apr. 22, 2012).

49. *Global Environment Outlook: Environment for Development: GEO4*, UNITED NATIONS ENVIRONMENT PROGRAMME 5 (2007) (emphasis added), available at [http://www.unep.org/geo/GEO4/report/GEO-4\\_Report\\_Full\\_en.pdf](http://www.unep.org/geo/GEO4/report/GEO-4_Report_Full_en.pdf).

50. G.A. Res. 64/236 U.N. Doc. A/RES/64/236 (Dec. 24, 2009). (citing preamble ¶13) available at <http://www.uncsd2012.org/files/OD/ARES64236E.pdf>.

51. Objectives and Themes of the United Nations Conference on Sustainable Development, *Report of the Secretary-General*, ¶ 4, U.N. Doc. A/CONF.216/PC/7 (Dec. 22, 2010).

52. *Id.* at ¶ 36.

is far from clear and will be a struggle no matter how approached. I do believe, however, that what we are doing now, using a misshapen concept of sustainable development as our guide, is not working. I appreciate that there are good people invested in the concept with genuine belief that at least certain aspects promote a healthy environment. I used to be one of them, but, as I always tell my students on the first day of the course in international environmental law, we must constantly be attuned to, and think about, the effectiveness of our efforts to protect the Planet. If I look out my window today, it is clear that 25 years of sustainable development has done little to improve global environmental conditions.