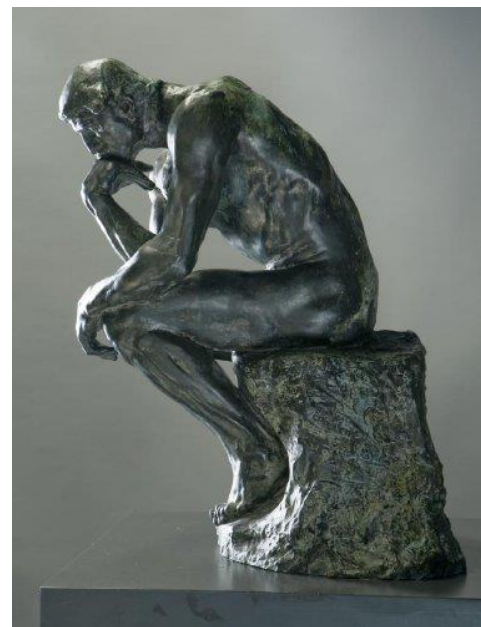


# How to Think Like an International Environmental Lawyer – 2022 Edition

---

*Daniel Bodansky*  
*Sandra Day O'Connor College of Law*  
*Arizona State University*

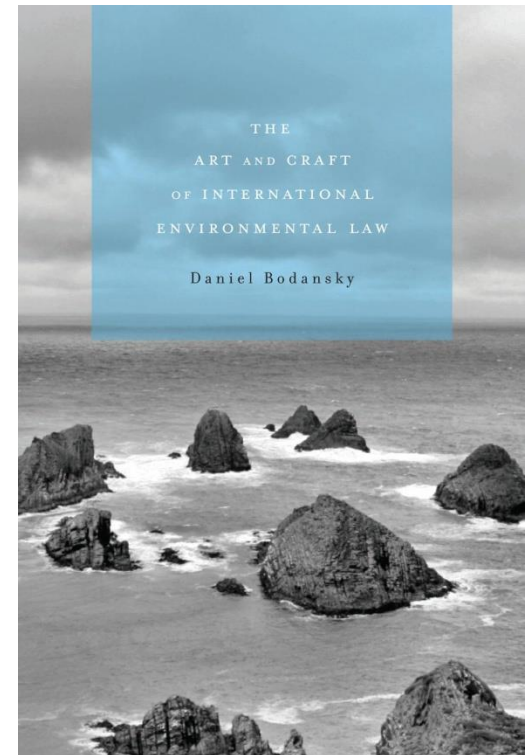
Center for International Law  
National University of Singapore  
October 17, 2022



# How to think like an international environmental lawyer – 2010 edition

## *The Art and Craft of International Environmental Law (2010)*

- Multi-disciplinary and pragmatic
- 5 key points
  - Process-oriented
  - IEL as a distinct field
  - IEL as a 30% solution
  - Treaty-centric
  - Focus on effectiveness rather than compliance



1<sup>st</sup> edition (2010)

# Point 1: Process oriented

- Focused on process rather than doctrine
- How does IEL emerge, develop, and influence behavior?
  - Who are the principal actors?
  - What motivates/determines their behavior?
  - Why and how do they develop international environmental rules?
  - Why and how do they influence behavior?

# Three perspectives on IEL

- Doctrinal
- Policy
- Explanatory

Typical approach to IEL is doctrinal

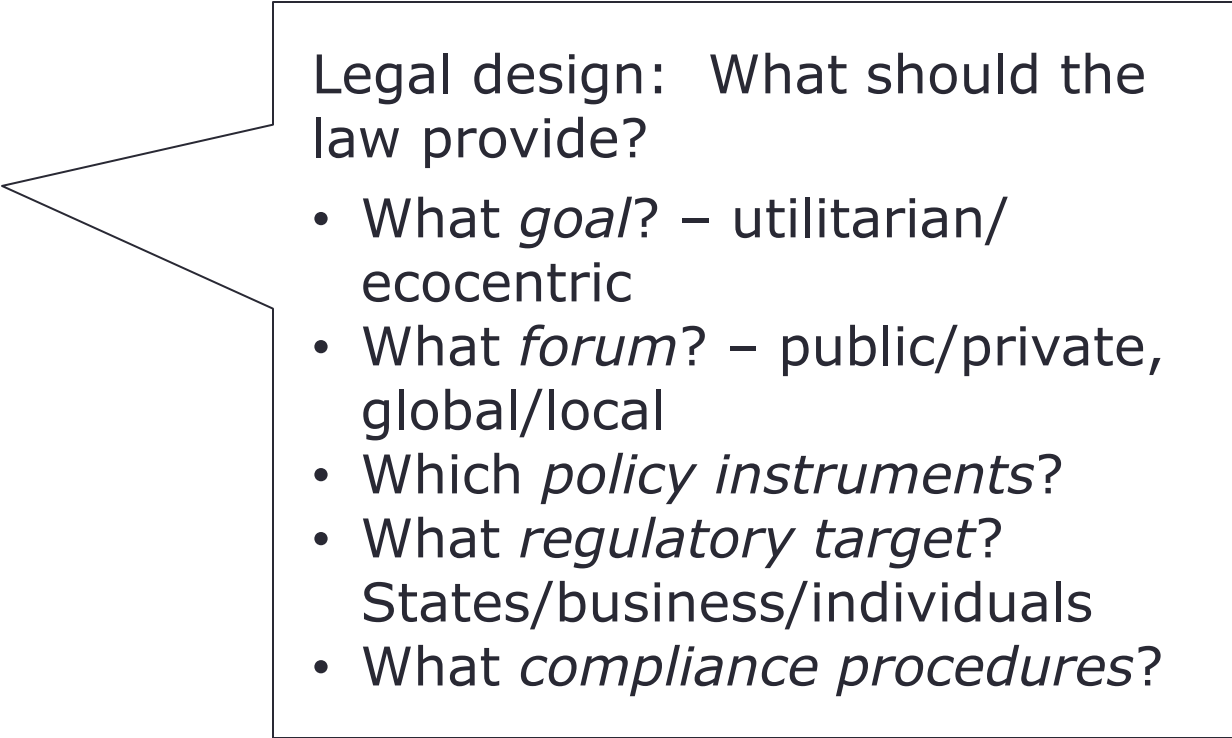
Q: What does the law provide?

Sources of international law

- Treaties
- Custom
- General principles

# Three perspectives on IEL

- Doctrinal
- Policy
- Explanatory



Legal design: What should the law provide?

- What *goal*? – utilitarian/ecocentric
- What *forum*? – public/private, global/local
- Which *policy instruments*?
- What *regulatory target*?  
States/business/individuals
- What *compliance procedures*?

# Three perspectives on IEL

- Doctrinal
- Policy
- Explanatory

How do norms emerge and affect behavior?

- Who are the principal actors?
- What factors influence their behavior?
- Standard-setting: How and why do they develop legal norms?
- Effectiveness: How and why do legal norms influence them?

# Three perspectives on IEL

- Doctrinal
- Policy
- Explanatory

## Pathways of influence

- Instrumental factors: change calculus of costs and benefits
  - Raise costs of non-compliance
  - Lower costs of compliance
- Normative factors
  - Create sense of obligation
  - Promote social learning
- Domestic politics
  - Reallocate power within a country (bureaucracy, courts, NGOs)

# Three perspectives on IEL

- Doctrinal

Typical approach

- Policy

Process-oriented approach

- Explanatory



## Point 2

### IEL as a distinct field

- Weak sense: Distinct subject matter
- Strong sense: Distinct secondary rules about how law is created and applied

# IEL as a distinct field: Standard-setting

- Dynamic treaty regimes
  - Framework Convention / protocol approach
  - Tacit amendment procedures
  - Elaboration by decisions of parties
- Soft law instruments
- Private standard-setting

# IEL as a distinct field

## Institutions

- Political rather than legal
  - Conference of the parties
  - Implementation, (non-)compliance committees

# IEL as a distinct field

## Compliance

### Traditional International Law State Responsibility

- Backward-looking: breach > state responsibility
- Adversarial
  - Invocation of responsibility, dispute settlement, restitution and compensation
- Causal theory of state behavior
  - States are rational entities that maximize utility
  - States will violate treaties if benefits outweigh costs
  - Treaties must either raise costs of violation or lower costs of compliance

### IEL Managerial Model

- Forward looking
- Non-adversarial
- Focus on effectiveness rather than compliance
  - Work with countries to achieve compliance: compliance action plan
  - Provide assistance
- Assumption is that states are products of socialized environment > want to comply, but lack the ability

# IEL as a distinct field

- Blurring of lines between
  - Political and legal
  - Public and private
  - International and domestic

# IEL as a distinct field

## Distinctive features of environmental problems

- Caused primarily by private conduct
- Scientific/technological component
- Highly uncertain and rapidly changing
- Interconnected

## Distinctive features of IEL

- Business/NGO involvement
- Role of science
- Must be dynamic
- Must address issues holistically

# Point 3

## IEL as a 30% solution

- Not a panacea
- But can help move the ball forward
  - Tool to allow states to further their interests
  - Role in social learning, changing interests over time

# Two conceptions of international law

## Law as a Stick

- Imposes specific constraints on behavior
- Compulsory binding dispute resolution
- Sanctions for violations



Need new institutional authority

- ICC: ecocide
- WEO

## Law as a Facilitator

- Encourages and enables cooperation
- Helps build cognitive and normative consensus
- Addresses barriers to cooperation such as mistrust and lack of capacity



# The diagnostic method

Obstacle	Role of IEL
Uncertainty	<ul style="list-style-type: none"><li>• Promote scientific research</li></ul>
Collective action problem	<ul style="list-style-type: none"><li>• Change incentive structure</li><li>• Make commitments more credible, e.g., through reporting and review</li></ul>
Domestic politics	<ul style="list-style-type: none"><li>• Empower domestic groups</li></ul>
Lack of legitimacy	<ul style="list-style-type: none"><li>• More democratic decisionmaking</li><li>• Address equity issues</li></ul>
Lack of domestic capacity	<ul style="list-style-type: none"><li>• Provide financial and technical assistance</li></ul>

# Point 4: How do we evaluate success?

## Three meanings of effectiveness

- Legal effectiveness = compliance
  - Congruence between norms and behavior
- Behavioral effectiveness
  - Change in behavior due to treaty
  - Requires implementation
- Problem-solving effectiveness

# Promoting problem-solving effectiveness

- Problem-solving effectiveness is a function of three variables:
  - Stringency of commitments
  - Participation
  - Compliance
- Variables interdependent:
  - Strengthening stringency doesn't help if leads to less participation and/or compliance

$$E: f(S,P,C)$$

# Point 5: Treaty-centric

## Why treaties?

- Allow states to address issues in purposive, rational manner
- Promote reciprocity by allowing states to delineate precisely what each side will do
- Canonical form provides greater certainty
- Allow states to tailor institutions to fit the particular problem

# Design issues

- Functional tasks
  - How to encourage participation?
  - How to allow flexibility?
  - How to encourage evolution/growth over time?
  - How to promote compliance?
- Variables
  - Scope: geographic and substantive
  - Norms/commitments
    - Hard vs. soft? Legal vs. non-legal?
    - Precise vs. vague
    - Choice of regulatory instrument
    - Common vs. differentiated
  - Institutions
  - Amendment procedures
  - Dispute resolution procedures
  - Carrots and sticks
    - Assistance
    - Trade measures

# Choice of negotiating forum and mandate

- Illustration: Climate change regime
  - Negotiation under auspices of UNEP/WMO or UNGA?
  - Negotiating mandate:
    - Law of atmosphere or focus only on climate change?
    - Framework or regulatory convention?

# Types of commitments

- Obligations of conduct
  - Command-and-control regulation (MARPOL)
  - Permitting schemes (CITES)
  - PIC (Basel, Rotterdam)
- Obligations of result
  - National targets and timetables (Montreal, Kyoto)

# Bindingness of commitments

## 4 dimensions of “binding-ness”

- Legal form of agreement
  - Treaties vs. decisions, resolutions, political agreements
- Mandatory quality of provisions
  - Shall, should, may, will ...
- Precision
  - Rules vs standards
- International supervision and enforcement
  - Legal (independent, compulsory, binding) vs political (state officials, consensual, non-binding)



# Differentiation of commitments

## Key variables

- Why?
  - Historical responsibility
  - Capacity
  - National circumstances
- Who?
  - Lists/annexes
  - Objective criteria (per capital GDP)
  - General descriptor (“developed”, “developing”)
  - Self-determined
- What?
  - Type of commitment
  - Timing of commitment
  - Flexibility in implementation

# Promoting participation

- Adding or subtracting issues
- Lower costs of joining
  - Implementation costs: differential/flexible standards, assistance/support, market-based mechanisms
  - Sovereignty costs: self-determined commitments, menu approach. lesser “bindingness,” opt-out/exit procedures, consensus decisionmaking
  - Competitiveness costs: trade measures
- Increase costs of staying out
  - Trade measures

# Building treaty regimes over time




- Incremental approach: start weak and build
  - Soft law > hard law
  - Framework convention > protocol
  - Vague (treaty text) > more precise (elaboration through decisions of parties)
  - Dispute settlement: political > legal
- Asymmetric standards: one size doesn't fit all
  - Regional agreements
  - Differential standards
  - Incentives (financial and technical assistance)
- Adaptability: keeping treaties up to date
  - Regulatory annexes with flexible adjustment mechanisms (Montreal Protocol , Whaling convention)
  - Decisions of parties

# What's New?

## Top 10 developments in international environmental law

1. Wider
2. Deeper
3. Innovative design features to promote participation
4. More nuanced approaches to differentiation
5. Elaboration by decisions of parties
6. Role of international courts and tribunals
7. Private regulation
8. Deeper engagement with non-state actors
9. IEL and ....
10. Maturation as a discipline

# How to think like an international environmental lawyer, 2022 edition

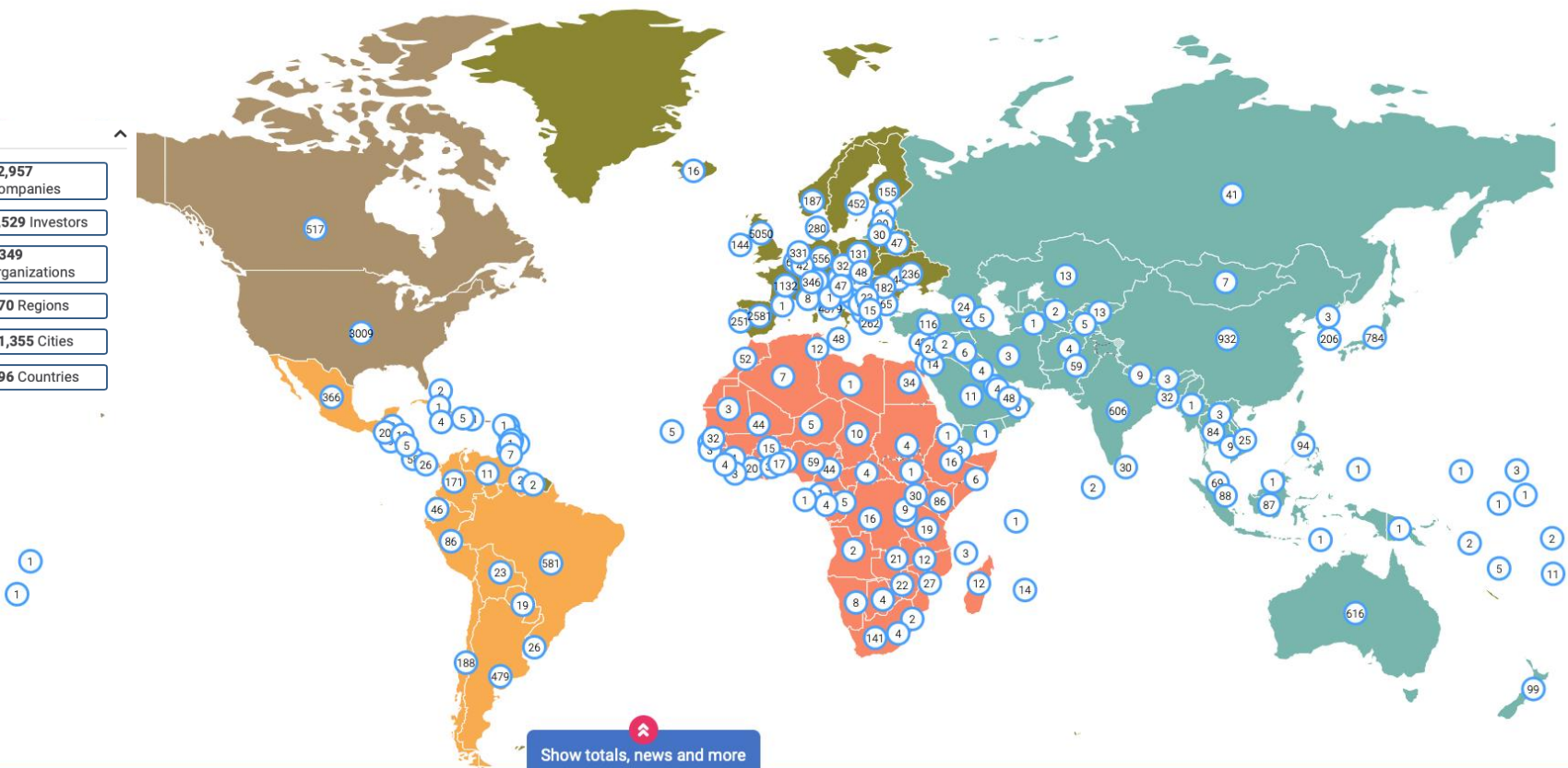
- 2010 edition plus
  - Increasing role of non-state actors / private regulatory systems >  importance of private governance
  - Increasing role of courts >  importance of doctrine
  - IEL and .... >  importance of interrelationships, architecture

# Increasing role of non-state actors

29,656 actors engaging in climate actions

## Actors

- 12,957 Companies
- 1,529 Investors
- 3,349 Organizations
- 270 Regions
- 11,355 Cities
- 196 Countries



# Increasing role of courts

- National courts
- International courts

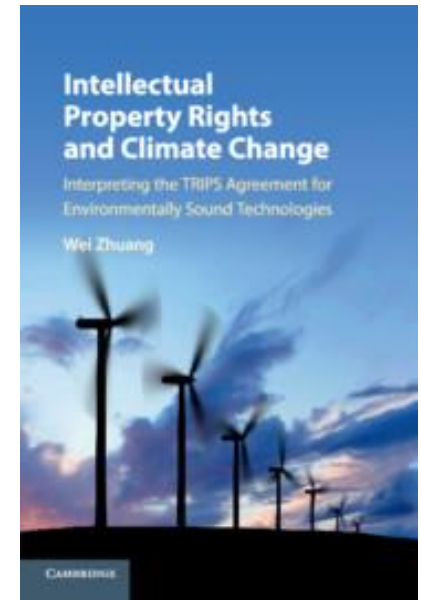


#climatecase



# IEL and ...

- Human rights law
- Trade law
- Investment law
- Intellectual property law
- Disaster law
- Refugee law





**THANK YOU!**

---