

The Climate Show – Episode 28

Transcript

00:00:04 Linnéa Nordlander

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change. This podcast is brought to you by the University of Copenhagen.

00:00:16 Beatriz Martinez

Hi. We are Beatrice Martinez

00:00:18 Linnéa Nordlander

And Linnéa Nordlander.

00:00:19 Alessandro Monti

And Alessandro Monti

00:00:20 Beatriz Martinez

And we are your host at the Climate Show.

00:00:26 Beatriz Martinez

Today, we are thrilled to welcome Professor Dan Bodansky to our climate show for the second time he was visiting us in CLIMA for our interact conference and delivered the conference keynote speech on non-state actors in international environmental law making.

00:00:40 Beatriz Martinez

In this episode, Professor Bodansky introduces the second edition of his book *The Art and Craft of International Environmental Law*, which he co-authored with Professor Harro van Asselt.

00:00:49 Beatriz Martinez

The newly released edition provides an excellent opportunity to discuss key themes and developments in international environmental and climate change law.

00:00:57 Linnéa Nordlander

Dan Bodansky is a regions professor of law at the Sandra Day O'Connor College of Law at Arizona State University, and he's a renowned expert in international environmental law and climate change policy.

00:01:07 Linnéa Nordlander

He has served as climate change coordinator at the US Department of State and consulted for the UN and advised on major projects.

00:01:14 Linnéa Nordlander

His extensive scholarship includes 3 books and numerous articles on international law and environmental governance.

00:01:28 Beatriz Martinez

It is a great honor to welcome Professor Dan Bodansky back to Copenhagen and to the climate show. This time he is here to participate in the final conference of our Interact project, international law making, actors in shipping and climate change.

00:01:41 Beatriz Martinez

We are here today to talk about the new edition of your book. The Art and Craft of International Environmental Law.

00:01:47 Beatriz Martinez

Which he has written with Professor Harro van Asselt, who also visited the Climate Show last year. Thank you so much for joining us for this episode and welcome.

00:01:56 Daniel Bodansky

Thanks very much. It's a pleasure to be here.

00:01:58 Beatriz Martinez

This episode aims to explore the updates in the new edition of the book The Current State and Future of International Environmental Law, in particular related to climate change, and to get your insights into this field, we will explore with you how to think like an international environmental lawyer version 2.0.

00:02:16 Beatriz Martinez

So my first question is what motivated you to publish The Art and Craft of International Environmental Law?

00:02:23 Daniel Bodansky

Well, thanks very much. The approach of a lot of people, I think initially with international environmental law, was just to treat it as any other field of international law.

00:02:34 Daniel Bodansky

And to focus primarily on the doctrines that international environmental laws developed, and I think of international environmental law, at least until recently, very much as a distinctive field it's not just a sub part of international law, it has its own distinctive approaches to how international environmental laws made how it's what kind of institutions there are, how it's applied and enforced.

00:02:57 Daniel Bodansky

The idea of writing the book really was to treat international environmental law as a distinctive field with its own distinctive processes and the book is, I think, different from a lot of the other books written on international environmental law.

00:03:10 Daniel Bodansky

In that it focuses much more on process than it does on doctrine.

00:03:15 Daniel Bodansky

How is international environmental law made? How is it implemented by states or not implemented by states? As the case may be. How do we judge whether it's effective or not?

00:03:25 Daniel Bodansky

The approach is very much a process-oriented approach and that I think makes it different from a lot of the other books written on the subject for the book is also, I think, distinctive in that it focuses very much on the treaty process.

00:03:39 Daniel Bodansky

It's very treaty centric. I think treaties have been a key aspect of international environmental law and it takes a functional approach to treaties. It deals with various functional problems. Treaty has to address for example how does it attract participation? How does it promote compliance? How does it evolve over time?

00:03:59 Daniel Bodansky

So these are functional questions. And so then the question is what kind of treaty design elements can be used to try to promote those functions and that kind of functional approach I think is also distinctive aspect of the book.

00:04:12 Daniel Bodansky

Another distinctive feature of international environmental law is how do we address it? It focuses much more on effectiveness than it does on compliance. International law usually focuses a lot on is international law being complied with, but compliance, I

think is a less relevant question to whether or not international environmental law is effective in actually addressing the problems that it seeks to deal with.

00:04:34 Daniel Bodansky

So these are some distinctive aspects about the book that I think are as much addressed in some of the other books written the subjects and one of the reasons I wrote the book initially.

00:04:46 Beatriz Martinez

And it's a very nice book. One of the books that I read when I started my PhD thesis and recommended to all our CLIMA researchers also to our students.

00:04:55 Daniel Bodansky

But thank you. Thank you.

00:04:59 Beatriz Martinez

Focusing on the second edition of the book, what are the most significant updates or additions?

00:05:04 Daniel Bodansky

So I wrote the first book back in the odds that came out in 2010 so it's almost 15 years old at this point.

00:05:11 Daniel Bodansky

And a lot has happened. Since then there have been a lot of developments, substantively, things like the development of a treaty dealing with mercury pollution, the Paris Agreement on climate change.

00:05:21 Daniel Bodansky

I think my book, as I said before, is less focused on doctrine than it is on process and I think in the 15 years since the 1st edition, there have been some important developments that from a process approach are also important.

00:05:34 Daniel Bodansky

One feature is that even though non state actors have played a big role, I'm always an international environmental law. I think their role has become even more important over the last 15 years.

00:05:46 Daniel Bodansky

The number of different groups in the different types of groups I could have been dealing with international environmental problems that has just exploded. One writer has called it a Cambrian explosion of non-state actors.

00:05:57 Daniel Bodansky

So one thing we did differently in the second edition from the 1st edition is we have a separate chapter specifically addressing non-state actors, non-state actors. Before we just sort of shut into these chapters on actors generally states and international organizations that we have them as a separate chapter because I think they really deserve separate treatment.

00:06:16 Daniel Bodansky

Another feature that I think has changed significantly is the growing role of courts. I wrote in the 1st edition that international environmental law. Is primarily a lawyer's focus on who are focusing on doctor and really making arguments to court, and they're playing to an empty house because courts don't really play much of a role.

00:06:36 Daniel Bodansky

Recently, courts have been playing a lot, lot more of a role. So we've emphasized the role of courts and I think this is really highlighted by the recent decision from the International Tribunal on the Law of the Sea.

00:06:46 Daniel Bodansky

Advisory opinion on climate. The pending advisory opinion from the International Court of Justice.

00:06:51 Daniel Bodansky

So, the second feature that's new in the book is the greater focus on the role of courts and international environmental law.

00:06:57 Daniel Bodansky

The third is the intersections between international environmental law and other areas of international law human rights, refugee law, investment law, trade law and so.

00:07:08 Daniel Bodansky

These are just beginning to emerge. When I wrote the 1st edition not to flying a much, much bigger role. We now have a Chapter what we call the architecture of international environmental law that looks at how now different actors are. How different fields of international environmental law are?

00:07:26 Daniel Bodansky

How both informal and formal process of law making or interacting, so we call this the architecture of international environmental law and that's another thing we really I didn't really address in the 1st edition, but Harro and I do address that now in a separate chapter in the new edition.

00:07:40 Beatriz Martinez

And how do you assess the current state of international environmental law? What are the primary strengths and weaknesses of the current system and how can it be improved?

00:07:48 Daniel Bodansky

So in the 1st edition or in the second edition, I don't think it's really changed I called international environmental law 30% solution. It helps solve problems, but it's not a full solution, not solving problems. International environmental problems depend on a lot of other factors. International environmental law can help, but it's not a be all end all. Not a pure solution.

00:08:10 Daniel Bodansky

So I think international environmental law has been quite successful in addressing some problems, like the depletion of the stratospheric ozone layer.

00:08:18 Daniel Bodansky

It's been much less successful in addressing other problems like climate change and loss of biodiversity, so why has it been successful in some areas and not others? I think because it really depends a lot on what states are willing to do.

00:08:33 Daniel Bodansky

It can have some effect on what states are willing to do, but it can't really fundamentally change what states, or at least it hasn't been able to so far. Where states are actually interested in addressing the problem and need to use international environmental laws, a tool to solve it.

00:08:46 Daniel Bodansky

International environmental it can work very well as demonstrated by the ozone case when international states are really reflecting in many ways to address a problem international environmental law has. Difficulty overcoming that resistant.

00:08:59 Daniel Bodansky

And that's true of climate change. And I think even though we now have probably a number of court decisions that are going to be addressing climate change, whether they'll really change the political dynamic, I think remains to be seen.

00:09:10 Daniel Bodansky

I think the fundamental challenge for international environmental laws, how can it influence the willingness of states to address international problems? Can it build greater?

00:09:22 Daniel Bodansky

Political will within states, and it can do that, I think, by giving more power to certain kinds of groups within states like environmental groups. It can do that by giving greater authority to actors within state systems like national courts. I think national courts are beginning to play a much more important role.

00:09:38 Daniel Bodansky

So I think international environmental law at the margins can make a difference in the question of real challenges. Can it maximize the influence it has? Within states on by empowering groups within states.

00:09:51 Beatriz Martinez

Dan, you touched upon the role of non-state actors in international environmental law. Could you maybe unpack a little bit more? What is the role and how they play in the processes?

00:10:01 Daniel Bodansky

So there's, as I said, there's been a huge explosion of the number of non-state actors that have been involved in the international process. And I think in terms of other geographic distribution, in terms of the kinds of things they, the kinds of strengths they have in terms of expertise advocacy, a large membership. Organizations, ones that are more business focused, ones that are more environmental. There's huge diversity in the number of non-state actors that are participating.

00:10:33 Daniel Bodansky

In the international environmental process, we also play a multiplicity of different roles. Some are largely focused on programmatic kinds of things, actually taking actions to reduce emissions of greenhouse gases, for example.

00:10:49 Daniel Bodansky

There's now a portal in which different non-state actors can record what actions they're taking to address climate change. They're not more than 30,000 different non-state actors who have recorded actions they're taking these ranges from sub national governments, private businesses, universities out there, academic institutions and various community based groups.

00:11:14 Daniel Bodansky

So there are now 10s of literally 10s of thousands of different actors who've taken, who've adopted some kind of climate change project or commitments.

00:11:24 Daniel Bodansky

So that's one kind of role. They can play an actual programmatic role in reducing emissions, and this could be critical because if you look at what states have pledged to do to address climate change.

00:11:35 Daniel Bodansky

There's a huge gap between what they pledged to do to address climate change and what's necessary to keep temperature increasing to below 1.5°C, which is a de facto global goal that states have adopted so non state actors can play a big role or could potentially play a big role in trying to fill that gap, but another role they play as an accountability function.

00:11:57 Daniel Bodansky

So a lot of the assessments of what states have pledged to do and how effective they are and whether they actually are in line with what they should be doing to address climate change.

00:12:08 Daniel Bodansky

Those outside of those assessments are now done largely by outside groups like Climate Tracker, where you can look and get assessments of the adequacy of what states have pledged to do to address climate change. So they plan accountability function as well.

00:12:23 Daniel Bodansky

They've also played, I think, a catalytic function in promoting the development of international environmental law, so they've set standards.

00:12:29 Daniel Bodansky

Privately and codes of conduct and guidelines, they've adopted the whole effort to develop different standards to track what business actors are doing to reduce their emissions, what are called scope 1-2 and three emissions. A lot of that work has been done by non-state actors, they influence the negotiations themselves by lobbying and advocacy.

00:12:50 Daniel Bodansky

And they've also been instrumental in bringing a lot of the cases dealing with climate change in courts. So there are various global NGO's, now that bring climate litigation throughout the world by clerical. So they played a whole variety of roles, from actually taking direct actions themselves to reduce emissions. Tip providing some accountability mechanisms to actually promoting the development of international environmental norms.

00:13:17 Beatriz Martinez

In the international law-making processes, do you see any barriers for the participation of these non-state actors?

00:13:23 Daniel Bodansky

Well, to a large dissent, they could participate indirectly so the actual treaties are negotiated by states. So NGO'S can influence that by lobbying their governments by making proposals.

00:13:37 Daniel Bodansky

By trying to exert pressure through advocacy types of activities. But they don't participate directly, and they don't have a seat at the table.

00:13:44 Daniel Bodansky

So to the extent that international environmental law is still largely made by means of treaties, their participation is indirect rather than direct. But I think even indirectly, by promoting rules and treaties, by bringing actions in courts both internationally and domestically. They are playing an increasingly important role.

00:14:09 Beatriz Martinez

And looking ahead, what do you see at the most critical challenges or future directions for this field for this discipline and how do you hope that your book will contribute to addressing them?

00:14:20 Daniel Bodansky

I hope the book helps contribute to this by helping people think more clearly about what international environmental law can do, and also what the limits are. I think it's really important to try to focus on areas where international environmental law can provide value added.

00:14:37 Daniel Bodansky

Maybe it also can help avoid trying to put a emphasis on areas where international environmental law probably won't work. I think, for example, the Kyoto Protocol on climate change was something of a dead end because it expected international environmental law to do more than it's really capable of doing.

00:14:55 Daniel Bodansky

It tried to require states to put limits on their emissions of greenhouse gases. Few states have quantitative limits. A few states were willing to do so. Most states were not willing to do so. It never attracted much participation globally, so it was a bit of a dead end.

00:15:11 Daniel Bodansky

So I hope my book helps people think more clearly about both the role of the role of international environmental law can be, and also what some of the limits are. And so I think hopefully it can make for more productive international environmental law making going forward.

00:15:27 Beatriz Martinez

We're very thankful. Finally, is there anything you would like to raise before we finish?

00:15:33 Daniel Bodansky

So I think you pretty much covered what the what focuses on and I guess I would hope people look to the second edition. The second edition is not just a of course it does update.

00:15:48 Daniel Bodansky

Things those new developments and so forth, but it also I think represents something of a shift in focus, some rethinking of some of the 1st edition aspects of the second edition is really. Something of a rethink as well as just a updating of what's in the book.

00:16:05 Beatriz Martinez

So you heard it here. Go and get your second edition of the article craft of international environmental law. Thank you ever so much for today's interview and we look forward to further collaboration with you. Maybe you can visit Copenhagen in December. I think it's the only season that you're missing.

00:16:21 Daniel Bodansky

I look forward to it. I look forward to it.

00:16:24 Beatriz Martinez

And we hope all of you enjoy this episode of the Climate Show. See you very soon in our next episode.

00:16:32 Linnéa Nordlander

Thank you for listening to this episode. You can find more about Professor Bodansky research and his book *The Art and Craft of International Environmental Law* and the show notes.

00:16:40 Linnéa Nordlander

Stay tuned for our next episode.