1-1-2000

# The Fount of Climate Change Scholarship

Daniel C. Esty
*Yale Law School*

# The Fount of Climate Change Scholarship

**Daniel C. Esty**[†]

Ten years ago, the world embarked on an extensive negotiating process to address the issue of possible climate change due to a buildup of greenhouse gas emissions in the atmosphere. The prospect of human-induced changes in mean temperatures, weather patterns, sea level, rainfall, soil moisture, and the severity of storms looms large as a potential threat to human well-being. But the complexity of the issue—arising from the need to address a range of sources of greenhouse gas emissions, engage the world community collectively, map the scientifically complex carbon cycle that lies at the heart of the issue, understand the role of sinks as well as sources, and confront the impacts of every business on the planet as well as virtually every individual—makes the task of fashioning an international policy response rather daunting. In 1992, the Framework Convention on Climate Change[1] was concluded and signed by more than 150 countries at the Rio Earth Summit. At the time, I was a climate change negotiator with the U.S. Environmental Protection Agency, making it a special privilege and pleasure to comment on *The United Nations Framework Convention on Climate Change: A Commentary*, written in 1993 by Dan Bodansky, at the time a young law professor.

Bodansky's article provides an extraordinarily detailed and thoroughly documented chronicle of the events that led to the development of the Convention. While written with the depth and nuance of a careful scholar, Bodansky's article benefited enormously from his insider's view of the process, derived from his experiences as a State Department lawyer and advisor to the Intergovernmental Negotiating Committee (INC) Secretariat. Bodansky's sweeping review of the issues, events, organizations, and personalities that contributed to the Convention that emerged in Rio makes for as compelling reading as one finds in the field of international law. In important ways, this *Commentary* laid the foundation for almost all of the climate change scholarship that has followed.

Indeed, one of the great virtues of the piece is its value as a reference work. For those interested in getting a basic understanding of climate change

---

† Clinical Professor of Environmental Law and Policy, Yale Law School; Associate Professor of Environmental Law and Policy and Associate Dean, Yale School of Forestry and Environmental Studies. Formerly Deputy Assistant Administrator for Policy and Chief Deputy of Staff for the U.S. Environmental Protection Agency.

1. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994) [hereinafter FCCC].

science, Professor Bodansky outlines how the greenhouse effect works, the various emissions sources, the array of sinks that sequester carbon, the workings of the carbon cycle, the differences between natural and anthropogenic flux in the cycle, and how computer models help to forecast what might occur when atmospheric concentrations of greenhouse gases rise. As a policy matter, Bodansky reviews the array of climate change effects that might be brought about by a buildup of greenhouse gases and he spells out the spectrum of policy options ranging from abatement through adaptation.

Perhaps more importantly, Bodansky provides a comprehensive history of the pre-negotiations that set the stage for the climate change discussions that occurred in 1991–92. For those who are unfamiliar with the extensive international process, Professor Bodansky traces the path from the Gillach Conference of 1985 through the Bellagio, Toronto, and Noordwijk conferences that followed. He explains the importance of the Second World Climate Conference and of the Bergen Declaration.[2] In doing so, Bodansky weaves together the intersecting roles played by international organizations such as the World Meteorological Organization and the U.N. Environment Programme, along with other pressures that were brought to bear from nongovernmental organizations, scientific entities, and governments. He also traces with great care the work undertaken by the Intergovernmental Negotiating Committee through its five negotiating sessions—from INC 1 in Chantilly, Virginia, in February 1991 through INC 5, which brought the negotiations to a close in New York in May 1992.

In telling the story of the negotiations, Professor Bodansky discusses what made the process so tortuous and difficult. He identifies the high stakes, significant scientific uncertainties, divergent interests (between the United States and Europe, as well as between the developed and developing worlds), and a wide range of levels of political commitment. The *Commentary* also paints a lively picture of how the negotiations unfolded, as delegates from 140 countries and an extensive list of nongovernmental organizations pushed and pulled the process in various directions.

Bodansky's *Commentary* further provides a thorough introduction to the Convention itself. He highlights many of the contentious issues and explains why they were so controversial. In many cases, these same elements remain contested today. For example, one can see the roots of the current difficulties of the Kyoto Protocol,[3] such as its lack of support in the U.S. Congress because of the limited participation of developing countries, in the 1992 Convention's suggestion that "standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."[4] In addition, the licensing of inaction on

2. Bergen Ministerial Declaration on Sustainable Development in the ECE Region, G.A. Preparatory Committee for the U. N. Conference on Environment and Development, 44th Sess., Annex I, at 19, U.N. Doc. A/CONF.151/PC/10 (1990).

3. Kyoto Protocol to the FCCC, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1998), *reprinted in* 37 I.L.M. 22 (1998).

4. FCCC, *supra* note 1, pmbl., 31 I.L.M. at 851.

the part of the developing world is evident in preambular language that emphasizes the "legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty."[5]

Bodansky walks through the commitments that were undertaken by the parties to the Convention and provides an excellent primer on the key concepts, and even the language, that continue to be at the center of climate change discussions. He spells out how the various classes of parties were identified, including the Annex I and Annex II countries that are still often separated out because they have undertaken the emissions control obligations that others have not. Bodansky's *Commentary* makes clear that the unwillingness in 1992 to have binding obligations was not simply a function of rejection by the United States, but reflected a broader negotiating dynamic that led to the famous compromise, committing OECD countries to "aim" at returning their year 2000 emissions to 1990 levels.[6] Bodansky also explains the dispute over whether to focus on just carbon dioxide, which represents about three-quarters of the impact or "radiative forcing" of all greenhouse gases, or to take a more "comprehensive approach" that would seek to control emissions of the full spectrum of greenhouse gases.

If there is a criticism to be leveled at the Bodansky commentary, it might be that after one hundred pages of narrative, the article concludes with a scant four pages of analysis. But this objection would really be a quibble and the article's value has been proven by the frequency of its citation. Moreover, Professor Bodansky catches most of the key issues in his closing analysis, noting that the results of the 1992 treaty negotiations were rather "modest." He suggests that, unlike the Montreal Protocol[7] and its various amendments, the Convention presents no real strategy for emissions control. Furthermore, again unlike the Montreal Protocol, the Convention has no enforcement mechanism.

With the benefit of the actual experience of the intervening years, one can add to Bodansky's observations. The seeds of later policy difficulties can clearly be found in the 1992 agreement. In particular, the disputes over who should take action and what a fair distribution of the burdens of action would be are already evident. Thus, while the Montreal Protocol provided for trade sanctions to be imposed on those who failed to join the CFC-control regime, the Convention provides no obligations for the developing world—and little in the way of inducements to bring them within the emissions control regime. The Convention offers lofty goals, but little in the way of a clear or realistic strategy for action. Fundamentally, the mechanisms for making progress are not identified and have yet to be fully developed. The Convention exists in a context of very serious weakness in the international environmental regime. There is little supporting infrastructure to provide the sort of institutional

5. *Id.*, 31 I.L.M. at 853.
6. *Id.* art. 4(2)(b), 31 I.L.M. at 857.
7. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541 (1987) (entered into force Jan. 1, 1989).

reinforcement that would be necessary for successful worldwide collective action on climate change.

The Bodansky *Commentary* has aged well, partly as a result of the fact that the policy process has advanced very little. As the debate over whether and how to implement the Kyoto Protocol moves forward, the very same set of issues Bodansky identified remains on the table. Who should act? Who should pay for the international emissions control program? How much of the problem can be addressed by enhancing sinks? What are the mechanisms available to motivate changes in behavior? How can developing countries be induced to play a role in the global climate change regime? What institutional structures are needed to make the policy response successful?

International law indubitably proceeds in fits and starts. But life does move on. Since the *Commentary* appeared, I have become a law professor and Professor Bodansky is now a climate change negotiator, developments that perhaps offer promise for the process of motivating global action, if not for improved international law scholarship.