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Book - Sources of international law (Part I - The Law of Treaties)

Book - Sources of international environmental law

Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS
Course: Introductory course to International Environmental Law
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1. Introduction

Widespread concern about the need for global action for the protection of the natural environment is a relatively recent phenomenon. General public awareness of the problems relating to the global environment and the need for coordinated multilateral action to address these problems was not evident even a few decades ago. With the wider dissemination of information relating to the ever increasing environmental challenges, international concern has grown steadily over the years.

Some inter-state efforts to address problems relating to the oceans, endangered species, and other natural resources, date back to the nineteenth century, but many problem areas relating to the environment remained to be addressed. These early international efforts were relatively uncoordinated. Modern international environmental law received a major boost with the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden, which brought much broader attention to the issues.

International environmental law

In order to understand international environmental law, it is necessary to have a basic grasp of general international law. International environmental law is a subset of international law; and international law has been developing over a long period of time.

Since a significant part of international environmental law is incorporated in Multilateral Environmental Agreements ("MEAs"), an introduction to treaty law is essential for understanding the contents of this course.

2. International Court of Justice

The principal judicial organ of the United Nations (”UN”) is the International Court of Justice (“ICJ”).

The jurisdiction of the ICJ, specified in article 36(1) of its Statute, “...comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force...”

The United Nations’ Charter further stipulates that all members of the United Nations are *ipso facto* parties to the ICJ Statute (article 93). Besides decisions, the ICJ is authorized to render advisory opinions on any legal question, when requested by the General Assembly or the Security Council. Other organs of the United Nations and specialized agencies may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities, when authorized by the United Nations General Assembly (“UNGA”) (article 96).

The ICJ, by the very nature of its functions, plays an important role in the development of international law. Accordingly, the sources of law relied upon by the ICJ are pertinent when examining the sources of international law and, consequently, international environmental law.

Sources of international law

Article 38(1) of this Statute lists the four sources that the ICJ may rely upon to determine the law applicable to a case brought to its attention. The sources listed in article 38(1) are regarded as the authoritative sources of international law, and thus also of international environmental law.

Statute of the International Court of Justice (Article 38)

"1.The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

1. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Article 38 establishes a practical hierarchy of sources of international law in settling of disputes. First, relevant treaty provisions applicable between the parties to the dispute must be employed. In the event that there are no applicable treaty provisions, rules of "customary international law" should be applied. If neither a treaty provision nor a customary rule of international law can be identified, then reliance should be placed on the general principles of law recognized by civilized nations. Finally, judicial decisions and writings of highly qualified jurists may be utilized as a subsidiary means of determining the dispute. It is important to remember that in many cases, due to the absence of any unambiguous rules, the ICJ has had to rely on multiple sources.

Article 38(1)(a), (b) and (c) are the main sources of international law and international environmental law. However, given the uncertainties that prevail, article 38(1)(d) also becomes a significant source in this area of law.

3. Law of Treaties

Today, treaties are the major mechanism employed by states in the conduct of their relations with each other. They provide the framework for modern international relations and the main source of international law.

The starting point for determining what constitutes a treaty is to be found in a treaty itself, the **Vienna Convention on the Law of Treaties**, a treaty on treaty law. It was concluded in 1969 and entered into force in 1980 (“1969 Vienna Convention”).

Whilst the United Nations has 193 Member States, the 1969 Vienna Convention has only 114 parties (as of September 2015). A treaty is binding only among its parties. Although the 1969 Vienna Convention is not a treaty with global participation, it is widely acknowledged that many of its provisions have codified existing customary international law. Other provisions may have acquired customary international law status. Since customary international law and treaty law have the same status at international law, many provisions of the 1969 Vienna Convention are considered to be binding on all states.

3.1. Terms

Article 2(1)(a) of the 1969 Vienna Convention defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Accordingly, the designation employed in a document does not determine whether it is a treaty. Regardless of the designation, an international agreement falling under the above definition is considered to be a treaty. The term “treaty” is the generic name. The term “treaty” encompasses, among others, the terms convention, agreement, pact, protocol, charter, statute, covenant, engagement, accord, exchange of notes, *modus vivendi,* and Memorandum of Understanding. As long as an instrument falls under the above definition, it would be considered to be a treaty and, therefore, binding under international law. International organizations are also recognized as capable of concluding treaties, depending on their constituent instruments.

Occasionally, some of these terms employed by drafters and negotiators may suggest other meanings without much consideration for their traditionally accepted meanings; that is, they may also be used to mean something other than treaties, which, on occasion, makes treaty terminology confusing and interpretation a problem.

The terms vary because they are often employed to indicate differing degrees of political or practical significance. For example, a simple bilateral agreement on technical or administrative cooperation will rarely be designated to be a “covenant” or “charter”, whereas an agreement establishing an international organization will usually not be given such labels as “agreed minutes” or “Memorandum of Understanding”. So, the nature of the labelling used to describe an international agreement may say something about its content, although this is not always the case. The two principal categories of treaties are the bilateral and the multilateral agreements, the former having only two parties and the latter at least two, and often involving global participation.

Treaty

The term “treaty” can be used as a generic term or as a specific term which indicates an instrument with certain characteristics. There are no consistent rules to determine when state practice employs the term “treaty” as a title for an international instrument. Although in the practice of certain countries, the term “treaty” indicates an agreement of a more solemn nature, and is usually reserved for regulating matters of some gravity.

In the case of bilateral agreements, affixed signatures are usually sealed. Typical examples of international instruments designated as “treaties” include Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties and Treaties of Friendship, Commerce and Cooperation. The designation “convention” and “agreement” appear to be more widely used today in the case of multilateral environmental instruments.

Agreement

The term “agreement” can also have a generic and a specific meaning. The term “international agreement” in its generic sense embraces the widest range of international instruments. In the practice of certain countries, the term “agreement” invariably signifies a treaty. “Agreement” as a particular term usually signifies an instrument less formal than a “treaty” and deals with a narrower range of subject matter. There is a general tendency to apply the term “agreement” to bilateral or restricted multilateral treaties. It is employed especially for instruments of a technical or administrative character, which are signed by the representatives of government departments, and are not subject to ratification. Typical agreements deal with matters of economic, cultural, scientific and technical cooperation, and financial matters, such as avoidance of double taxation. Especially in international economic law, the term “agreement” is also used to describe broad multilateral agreements (e.g., the commodity agreements). Today, the majority of international environmental instruments are designated as agreements.

Convention

The term “convention” can also have both a generic and a specific meaning. The generic term “convention” is synonymous with the generic term “treaty.” With regard to “convention” as a specific term, in the last century it was regularly employed for bilateral agreements but now it is generally used for formal multilateral treaties with a broad range of parties. Conventions are normally open for participation by the international community as a whole or by a large number of states.

Usually, the instruments negotiated under the auspices of the United Nations are entitled conventions (e.g., the 1992 Convention on Biological Diversity and the 1982 United Nations Convention on the Law of the Sea).

Because so many international instruments in the field of environment and sustainable development are negotiated under the auspices of the United Nations, many instruments in those areas are called “conventions,” such as the 1994 United Nations Conventions to combat Desertification in Countries experiencing serious Drought and/or Desertification, particularly in Africa, and the 2001 Convention on Persistent Organic Pollutants, among others.

Charter

The term “charter” is used for particularly formal and solemn instruments, such as the constituent treaty of an international organisation. The term itself has an emotive content that goes back to the Magna Carta of 1215.

More recent examples include the 1945 Charter of the United Nations, the 1963 Charter of the Organization of African Unity and the 1981 African (Banjul) Charter on Human and Peoples’ Rights. The 1982 World Charter for Nature is a resolution adopted by the General Assembly of the United Nations and is not a treaty.

Protocol

The term “protocol” is used for agreements less formal than those entitled “treaty” or “convention”, but they also possess the same legal force. A protocol signifies an instrument that creates legally binding obligations at international law. In most cases this term encompasses an instrument which is subsidiary to a treaty. The term is used to cover, among others, the following instruments:

- An optional protocol to a treaty is an instrument that establishes additional rights and obligations with regard to a treaty. Parties to the main treaty are not obliged to become party to an optional protocol. An optional protocol is sometimes adopted on the same day as the main treaty, but is of independent character and subject to independent signature and ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the main treaty and to which not all parties of the main treaty consent, creating a “two-tier system.” An example is found in the optional protocols to the 1966 International Covenant on Civil and Political Rights, the first optional protocol of which deals with direct access for individuals to the committee established under it.
- A protocol can be a supplementary treaty, in this case it is an instrument which contains supplementary provisions to a previous treaty (e.g., the 1966 Protocol relating to the Status of Refugees to the 1951 Convention relating to the Status of Refugees).
- A protocol can be based on and further elaborate a framework convention. The framework “umbrella convention,” which sets general objectives, contains the most fundamental rules of a more general character, both procedural and substantive. These objectives are subsequently elaborated by a protocol, with specific substantive obligations, consistent with the rules agreed upon in the framework treaty. This structure is known as the so-called “framework-protocol approach.” Examples include the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol on Substances that deplete the Ozone Layer with its subsequent amendments, the 1992 United Nations Framework Convention on Climate Change with its 1997 Kyoto Protocol, and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes with its 1999 Protocol on Water and Health and its 2003 (Kiev) Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. (See chapters 9 and 10 of this Manual).
- A protocol of signature is another instrument subsidiary to a main treaty, and is drawn up by the same parties. Such a protocol deals with additional matters such as the interpretation of particular clauses of the treaty. Ratification of the treaty will normally also involve ratification of such a protocol. The Protocol of Provisional Application of the General Agreement on Tariffs and Trade (“GATT”) was concluded to bring the 1947 GATT quickly into force in view of the difficulties facing the ratification of the International Trade Organization.

Declaration

The term “declaration” is used to describe various international instruments. However, in most cases declarations are not legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely seek to declare certain aspirations.

Examples include the 1992 Rio Declaration on Environment and Development, the 2000 United Nations Millennium Declaration and the 2002 Johannesburg Declaration on Sustainable Development. Exceptionally, declarations may sometimes be treaties in the generic sense intended to be binding at international law.

An example is the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, which was registered as a treaty by both parties with the United Nations Secretariat, pursuant to article 102 of the United Nations Charter.

It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations, often a difficult task. Some instruments entitled “declarations” were not originally intended to have binding force but their provisions may have reflected customary international law or may have gained binding character as customary international law at a later stage, as is the case with the 1948 Universal Declaration of Human Rights.

3.2. Treaty Actions

Once the text of a treaty is agreed upon, states indicate their intention to undertake measures to express their consent to be bound by the treaty.

Signature

Signing the treaty usually achieves this purpose; and a state that signs a treaty is a signatory to the treaty.

Signature also authenticates the text and is a voluntary act. Often major treaties are opened for signature amidst much pomp and ceremony. The United Nations Treaty Section organizes major theme based treaty events in conjunction with the annual General Assembly of the United Nations to encourage wider participation in the treaties deposited with the Secretary-General. The events tend to encourage states to undertake treaty actions in much larger numbers than usual.

Once a treaty is signed, customary law, as well as the 1969 Vienna Convention, provides that a state must not act contrary to the object and purpose of the particular treaty, even if it has not entered into force yet.

1969 Vienna Convention on the Law of Treaties (Article 18)

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

Ratification

The next step is the ratification of the treaty. Bilateral treaties, often dealing with more routine and less politicised matters, do not normally require ratification and are brought into force by definitive signature, without recourse to the additional procedure of ratification.

1969 Vienna Convention on the Law of Treaties (Article 12)

"The consent of a State to be bound by a treaty is expressed by the signature of its representative when: (a) the treaty provides that signature shall have that effect; (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation. (...)"

In the first instance, the signatory state is required to comply with its constitutional and other domestic legal requirements in order to ratify the treaty. This act of ratification, depending on domestic legal provisions, may have to be approved by the legislature, parliament, the Head of State, or similar entity.

It is important to distinguish between the act of domestic ratification and the act of international ratification. Once the domestic legal requirements are satisfied, in order to undertake the international act of ratification the state concerned must formally inform the other parties to the treaty of its commitment to undertake the binding obligations under the treaty. In the case of a multilateral treaty, this constitutes submitting a formal instrument signed by the Head of State or Government or the Minister of Foreign Affairs to the depositary who, in turn, informs the other parties.

With ratification, a signatory state expresses its consent to be bound by the treaty. Instead of ratification, it can also use the mechanism of acceptance or approval, depending on its domestic legal or policy requirements.

Accession

A non-signatory state, which wishes to join the treaty after its entry into force, usually does so by lodging an instrument of accession. Reflecting a recent development in international law, some modern treaties, such as the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, make it possible for accession from the date of opening for signature.

Entry into force

Entry into force is the moment in time when a treaty becomes legally binding for the parties.

Accordingly, the adoption of the treaty text does not, by itself, create any international obligations. Similarly, in the case of multilateral treaties, signature by a state normally does not create legally binding obligations. A state usually signs a treaty stipulating that it is subject to ratification, acceptance or approval. It is the action of ratification, accession, acceptance, approval, *et cetera,* which creates legally binding rights and obligations. However, the creation of binding rights and obligations is subject to the treaty's entry into force.

When does a treaty enter into force?

The provisions of the treaty determine the moment upon which the treaty enters into force.

In other words, a treaty does not enter into force and create legally binding rights and obligations until the necessary conditions stipulated by it are satisfied. For example, the expression of the parties' consent to be bound by a specified number of states. Sometimes, depending on the treaty provisions, it is possible for treaty parties to agree to apply a treaty provisionally until its entry into force.

If there is nothing governing the entry into force in the treaty, the general rule is that the treaty will enter into force when all the states participating in drafting the treaty have expressed their consent to be bound. It is possible for the treaty to stipulate a specific date, such as 1 January 2007, for its entry into force.

In most cases, the treaty enters into force when a specified number of states has ratified it. A provision in the treaty that governs its entry into force will stipulate that entry into force will occur after a certain time period has elapsed (such as 90 days) after the tenth (i.e., 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora), fifteenth (i.e., 1979 Convention on the Conservation of Migratory Species of Wild Animals), twentieth (i.e., 1985 Vienna Convention for the Protection of the Ozone Layer), thirtieth (1992 Convention on Biological Diversity) or fiftieth (i.e., 1992 United Nations Framework Convention on Climate Change, 1994 Desertification Convention ratification, accession, approval, acceptance, etc. A treaty enters into force only for the states that have ratified it.

A treaty can also specify certain additional conditions regarding the states that have to ratify the treaty before it can enter into force. For example, the 1987 Montreal Protocol to the Vienna Convention includes the provision that it would enter into force on 1 January 1989, provided that there were at least eleven ratifications of states which were responsible in 1986 for at least two-thirds of the estimated global consumption of the substances the protocol is covering (article 16). The entry into force of the 1997 Kyoto Protocol was also subjected to strict conditions- it entered into force "on the ninetieth day after the date on which not less than fifty-five parties to the Convention, incorporating parties included in Annex I which accounted in total for at least 55% of the total carbon dioxide emissions for 1990 of the parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession " (article 24).

Reservation

One of the mechanisms used in treaty law to facilitate agreement on the text is to leave the possibility open for a state to make a reservation on becoming a party. A reservation modifies or excludes the application of a treaty provision. A state may use this option for joining a treaty even though it is concerned about certain provisions. A reservation must be lodged at the time of signature, or ratification, or acceptance, or approval, or accession.

The 1969 Vienna Convention on the Law of Treaties deals with reservations in its articles 19 through 23, including their formulation, their acceptance and the issue of objecting to reservations, the legal effects of reservations and of objections to reservations, the withdrawal of reservations and of objections to reservations, and the procedure regarding reservations. In general, reservations are permissible except when they are prohibited by the treaty, they are not expressly authorized reservations if the treaty provides only specified reservations, or they are otherwise incompatible with the object and purpose of the treaty.

The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, entertains late reservations, i.e. reservations lodged after the act of ratification, acceptance, approval or accession. Late reservations are accepted in deposit only in the absence of any objection by a party to the treaty. Where a treaty is silent on reservations, it is possible to lodge reservations as long as they are not contrary to the object and purpose of the treaty.

Other parties to a treaty can object to a reservation when it is contrary to the object and purpose of the treaty. An objecting party can even state that it does not want the treaty to enter into force between the state that made the reservation and itself but this happens very rarely and is unusual today. Recently, it has become more common for treaties, including most of the recently concluded environmental treaties, to include provisions that prohibit reservations. Examples are the 1985 Vienna Convention for the Protection of the Ozone Layer (article 18) and its 1987 Montreal Protocol on Substances that deplete the Ozone Layer (article 18), the 1992 Convention on Biological Diversity (article 37) and its 2000 Cartagena Protocol on Biosafety (article 38).

Declaration

A state may also make a declaration to a treaty on becoming party to it. A declaration simply states the understanding of that state with regard to a treaty provision without excluding the application of or modifying a treaty provision. Some treaties provide for mandatory and/or optional declarations. These create binding obligations.

Reservations are lodged by a state at signature or when expressing its consent to be bound by a treaty. Where a reservation is made on signature it must be confirmed on ratification. A declaration, in contrast, can be made at any time although normally they are deposited on signature or when the consent to be bound is expressed.

Amendment and revision

An important issue is how to make changes to an already agreed treaty text. The treaty itself normally provides for a procedure to change its provisions, usually by amending the specific provision. Depending on the provisions of the treaty, amendment of a treaty usually needs the consensus of all parties or a specified majority such as two- thirds of the parties, who must be present and voting.

Besides amending, there is also the possibility of revising a treaty. The term “revision” is typically reserved for a more profound change of text.

Deposit

Another important term relating to treaty law is the depositary. A depositary is usually designated in the text of a multilateral treaty. The depositary is the custodian of the treaty and is entrusted with the functions specified in article 77 of the 1969 Vienna Convention.

1969 Vienna Convention on the Law of Treaties (Article 77)

"1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

(...)"

Who is the depositary?

Among others, the depository acts as the “collection point.” A state will transmit its instrument of ratification, acceptance, approval, accession, or its reservation or denunciation to the depositary, who notifies other states. Usually, the Chief Executive of an international organization is designated as the depositary.

States deposit their treaty actions with the depositary instead of with all other states parties to the treaty. Often, the Secretary-General of the United Nations is designated as the depositary. The Secretary-General is at present the depositary for over 550 multilateral treaties, including over 55 Multilateral Environmental Agreements. Individual states, and various international and regional organizations, are also designated as depositaries. There are over two thousand multilateral treaties at present. Bilateral treaties are deposited with the two states involved, since a bilateral treaty is usually signed in duplicate. A regional treaty is often deposited with a regional organization.

All treaties entered into by members of the United Nations must be registered with the United Nations Secretariat pursuant to article 102 of the Charter of the United Nations once they have entered into force.

Registered treaties are published in the United Nations Treaty Series, the most authoritative collection of existing treaties. The United Nations Treaty Series contains over fifty thousand treaties and a similar number of related treaty actions. This is done to ensure transparency.