

TREATIES AS A SOURCE OF INTERNATIONAL ENVIRONMENTAL LAW

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Summary

Throughout this paper the main focus was to explain the contribution of conventions and treaties to the creation of IEL. We covered the various levels and techniques of treaty-making; the contents of a treaty in general were specified as well as the characteristics of environmental negotiations. The advantages of the treaty-making approach to IEL were compared with its drawbacks before throwing some light on the ingredients of optimal treaty-making. Finally a brief reference was made to the intricacies of compliance-control and its innovative contributions to international law.

1. Introduction

Sustainable development, defined by the Brundtland Commission as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” has become a broadly accepted goal of public policy. Its implementation requires a sound legal basis: domestic and international law. The latter is called for whenever this policy goal is to be put into practice in a transboundary context, which means that it concerns at least two states and their citizens (individuals

or corporations). As the environment does not respect national borders its protection, as well as to some extent sustainable development, have become from the outset highly international issues. Especially, formal international cooperation for the environment requires a firm agreement between the states concerned with the objectives of this cooperation and on the ways and means to achieve them. Such agreements take the form of law, which prescribes the behavior of the respective states and their agents, be it in the field of sustainable development or the protection of the environment. However, lawyers and environmentalists, or those responsible for development, are mentally far apart. They usually adopt quite different approaches or strategies. A considerable effort aimed at confidence-building is necessary to make sure that the two sides work in parallel and in harmony.

2. International Law

International environmental law (IEL) has been integrated into international law as such. The sources of this law are manifold and differ according to various criteria:

2.1. Hard Law vs. Soft Law

Hard law represents law in its traditional meaning; it is compulsory (“shall”); it reflects a real obligation that “must” be fulfilled; if it is violated the perpetrator incurs international responsibility, which implies compensation for any loss or repair of any damage caused by the actor’s behaviors. Soft law is a relatively new notion; it is of a recommendatory nature (“should”). If it is violated it entails criticism and the qualification as an unfriendly act. But even these relatively weak consequences of misbehavior can be damaging for the perpetrator; his/her reputation are at stake, which again has a certain impact on the educated and alert public opinion in our open societies.

2.2. Treaty Law vs. Customary law

This distinction mainly relates to the origins of a norm. A treaty concluded in the proper way (formalities) or a custom deemed to have the force of law are both legally binding. In both cases one assumes the consent (express or tacit) of the states concerned. Treaties are expected to follow the precepts of the Vienna Convention on the Law of Treaties, whereas the contours of custom remain vague; the frequent repetition of certain practices may indicate the existence of a customary rule. Treaty law is “made” by negotiators and their governments; customary law “emerges” in the daily practice, in legal opinions, writings of eminent scholars, etc. According to the aforementioned Convention, a treaty means “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.”

2.3. Principles vs. Jurisprudence

There are important points of departure for any new kind of law which is IEL. As regards principles, one can identify those of a general nature (“good faith”) and those with an environmental connotation (“precautionary approach”). The legal value of most

principles is subject to dispute as they are norms which only give guidance but are not directly applicable; some of them may be precursors of customary law such as the Stockholm Principle 21 (prohibition of damage to the environment beyond one's own territory). Jurisprudence only reflects the opinion of courts; but by the mechanism of precedents such opinion may also become a reflection of customary law; see the recent decision of the ICJ on the Gabcikovo-Nagymaros dispute between Hungary and Slovakia, or the earlier cases such as Trail Smelter, Corfu Channel and Lac Lanoux. The drawbacks of these two sources are their uncertain normative value and the frequent lack of clarity as regards the exact contents of the norm.

3. International Treaties

When does treaty-making start? If states feel that there is a need for cooperation at a larger scale and over an extended period they will resort to treaty-making. Such treaty-making is nothing else than negotiations which take into account and match the interests of the actors involved. As a rule diplomatic channels are used to indicate to the other side one's desire and/or willingness to negotiate with the aim of treaty-making. This implies also law-making, in so far as the usual goal is a legally binding instrument, that will become a part of IEL.

According to the scope of the problem to be settled and the number of actors (states) involved, one may distinguish three levels of treaty-making. If there is a problem between two neighboring countries, e.g. the waters of a common river or lake, or the transboundary impact of accidents in a nuclear power plant situated near a common border, a *bilateral treaty* is called for. It will provide for technical cooperation and mutual assistance in case of accidents. If the problem concerns several states in a geographically restricted area, a *regional treaty* will be the appropriate instrument; such a treaty may cover long range air pollution or marine pollution in semi-enclosed sea areas such as the Baltic Sea or the Black Sea.

As membership grows in such treaties, there also grows the need for a special institutional machinery to administer the treaty: a Commission, a Secretariat. *Global treaties* are used to approach and solve global problems such as ozone depletion, climate change, and protection of biodiversity. These treaties are most difficult to negotiate because they are also supposed to bridge the gap between the conflicting interests of developing countries and industrialized states. In order to get all countries "on board"—become parties to the treaty—some groups (mainly developing countries) may be granted exceptions from general duties (reduction of emissions), be it by means of delayed application, so-called "grace periods," or by enjoying lower standards. Such "positive discrimination" may well be warranted to achieve global membership in a global treaty. Global treaties usually necessitate an elaborate institutional machinery which serves several purposes: to develop and extend obligations of parties; control the application of the treaty's provisions; avoid and/or settle disputes between the parties. Thus emerges a so-called "treaty-regime," which means that the treaty does not remain a dead letter, but that it comes to life due to the dynamism of the respective institution, which again depends on the interests of the parties that their agreement becomes operational and on the creativity of the members of that institution.

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Biographical Sketch

Winfried Lang, an Austrian diplomat and Professor of International Law at the University of Vienna, served as an Austrian Ambassador to Switzerland (1993–1996) and to Belgium (from 1997 till his death in May, 1999). He chaired the Office of Economic Cooperation and Development's Transformation Pollution Group (1977–1982) and presided over the United Nations Conference on the Protection of the Ozone Layer in 1987. During the GATT negotiations, he arbitrated a trade and environment dispute between the United States and the European Union (Tuna- Dispute). Since 1993, he served as a Chairman of the Council of the European Free Trade Association (EFTA) and a member of the Board of Trustees of the United Nations Institute for Training and Research (UNITAR). He was also a member of the IIASA Project since 1988. Lang was the author of the first comprehensive treatise on international environmental law (*internationaler Umweltschutz*) in the German language. As editor, he was responsible for the volumes *Environmental Protection and International Law* and *Sustainable Development and International Law*. He published some 50 articles on disarmament, political and economic integration (transboundary regionalism), environmental law issues (Montreal Protocol, climate change, trade and environment, compliance-control, etc.). Lang was Laureate of the Elisabeth-Haub-Award for Environmental Law (University of Brussels, 1994).