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Bharat H. Desai
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Introduction

There is an active link between development of law and the institutional mechanisms that emerge from it. In this context, the establishment of a multilateral regulatory approach in the field of environment is no exception.

The process of centralized legalization concerning sectoral environmental problems has almost been institutionalized, especially in the past three decades. Despite the fact that this multilateral lawmaking modus operandi has worked in a piecemeal, ad hoc, and sporadic manner, it has contributed in thickening the web of treaties[1] as the most important source of international environmental law. It has emerged as a "predominant method"[2] of regulating state behavior on a global *problematique*.

[1] As per the state practice, nomenclature of a multilateral instrument depends on the idiosyncrasies of the parties. As such, it is not necessary that the contracting parties need to use specific words. To decipher the nature of the instrument at which the states have arrived, one needs to look for the intention of the parties as well as the content of the instrument. In general, use of the words "treaty" or "agreement" is commonplace. The Vienna Convention on the Law of Treaties (1969) 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" (see Article 2(a)); available at www.unog.ch/archives/vienna/vien_69.htm. Article 2(a) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) also uses the same language; available at www.unog.ch/archives/vienna/vien_86.htm.

[2] "Developments in the Law: International Environmental Law," *Harvard Law Review*, vol. 104, no. 3, 1991, p. 1521.

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Unlike the traditional method of resorting to development of a customary norm, states revert to treaties for the sake of, among other goals, convenience and certainty of the law, as warranted by the contingencies of a specific issue.

It appears that lawmaking on environmental issues is greatly facilitated through treaties because of scientific uncertainties and the sense of urgency involving environmental matters. As a result, multilateral environmental agreements (MEAs) have emerged as a unique technique, with flexibility, pragmatism, a built-in lawmaking mechanism, as well as a consensual approach to norm setting. MEAs are also regarded as part of a broader trend of an "increasingly more complex web of international treaties, conventions, and agreements."[3]

Treaty making on environmental issues has developed into a practice largely because of the inclination of states to resort to multilateralism[4] in addressing global problems. The states, ostensibly, claim to act in the "common"[5] interest when joining multilateral environmental negotiations. In view of the very nature of these negotiations and participation of a large majority[6] of the states, final outcome is achieved through the

[3] United Nations University, *Inter-Linkages: Synergies and Coordination between Multilateral Environmental Agreements* (Tokyo: UNU, 1999), pp. 5 and 8.

[4] It has been argued that opportunities for multilateralism "appear to abound," as they have in the "aftermath of both twentieth-century 'non-cold wars'"; see Michael G. Schechter, "International Institutions: Obstacles, Agents, or Conduits of Global Structural Change?" in Michael G. Schechter, *Innovation in Multilateralism* (Tokyo: UNU, 1999), p. 3.

[5] There is a general hypothesis that it is the *common interest* of states that propels them to negotiate an MEA. In general, however, the states are guided by their self-interest rather than any notion of common interest. In many of the cases, the move for an international legal instrument is pushed by a *trigger event*, for example, in the case of the ozone layer depletion or the climate change issue. The initiatives in both of these cases came in the wake of dire scientific findings, which forced international action.

[6] It is interesting that almost all of the MEAs negotiated in recent years have seen participation of an unprecedented number of states. For example, the 1985 Vienna Convention and 1987 Montreal Protocol on Substances that Deplete the Ozone Layer have been ratified by 195 states, see www.ozone.unep.org; the 1992 Framework Convention and the 1997 Kyoto Protocol on Climate Change have been ratified by 192 and 187

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lowest common denominator. Still, the "sense"[7] of negotiating MEAs remains a matter of debate.

There has been remarkable growth in the sheer volume of multilateral environmental instruments in recent years. Although it has resulted in gradual "institutionalization"[8] of international environmental law, it has also led to increased fragmentation of the environmental agenda. In turn, it has triggered the problems of ensuring synergies, interlinkages, and the coordination of these multilateral instruments. From 1990 through 1994, more than fifty such international instruments, most of them multilateral (representing a 10–15% increase),[9] were adopted by the states. MEAs established in recent years are significantly diverse, and most of them underscore the multidimensional nature of environmental problems. There seems to be an increasing tendency among states, especially industrialized ones, to push for a global framework for more and more environmental issues. There is, however, much skepticism and even some opposition to this approach. This skepticism often makes multilateral environmental negotiations acrimonious and virtually a battlefield on such issues, reflecting political and economic interests of states, which often results in a stalemate. The subject matter of MEAs ranges from issues such as protection of a species (whale), flora and/or fauna in general (elephant or tiger), and cultural and/or natural heritage sites to regulation of trade of hazardous chemicals and/or

states, respectively, see www.unfccc.int; the 1994 United Nations Convention to Combat Desertification has been ratified by 193 states, see www.unccd.int; the 1992 Convention on Biological Diversity has been ratified by 191 states, and the 2000 Cartegena Protocol on Biosafety has been ratified by 156 states, see www.cbd.int (all as of August 17, 2009).

[7] On the issue of reasons for going into negotiations on MEAs, see the essay "To Treaty or Not to Treaty? A Survey of Practical Experience," in Peter H. Sand, *Transnational Environmental Law: Lessons in Global Change* (The Hague: Kluwer Law International, 1999), pp. 55–60.

[8] For an exhaustive treatment on the process of institutionalization, see Bharat H. Desai, *Institutionalizing International Environmental Law* (New York: Transnational Publishers, 2004).

[9] Alexandre Kiss and Dinah Shelton, *International Environmental Law: 1994 Supplement* (New York: Transnational, 1994), p. 1.

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wastes, air pollution, and persistent organic pollutants; to more high profile issues like ozone depletion, climate change, and biological diversity. The MEAs on a host of these issues have in fact "changed over time, just as political, economic, social, and technological conditions have changed over time."[10]

In the history of international treaty making, the pace of development of MEAs has been unprecedented.[11] Such proliferation of intergovernmental instruments laying down obligations for the contracting states has created a unique situation and pressure for the participating states. This development has made a salutary contribution in 'engaging' the bulk of the members of the United Nations in the negotiations as well as in emerging normative framework. This has brought about a significant corpus of regulatory measures for the environmental behavior of states. At the same time, it has generated institutional mechanisms that serve as tools for these regulatory frameworks. Most of these institutional mechanisms have visibility in the public eye and are generally located at a 'seat' provided by the host country. As a logical corollary, this seat can be established by the MEA on its own or can be housed within an already existing international institution.

This book seeks to examine, among other aspects, the genesis, development, and proliferation of MEAs; their role as a technique to regulate state behavior, built-in lawmaking mechanisms, and process of "institutionalization"; their ad hoc and treaty-based status; issues of legal personality; and the status of the secretariats of the MEAs. Some legal aspects of the relationship that flow from the location of MEA secretariats within an existing international institution is also examined. A critical analysis reflects on the relevant issues in "relationship

[10] Edith Brown Weiss, "The Five International Treaties: A Living History," in Edith Brown Weiss and Harold K. Jacobson (Eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998), p. 89.

[11] It is estimated that, since 1868, there have been approximately 502 international treaties and agreements concerning the environment, of which almost 300 have been entered into since 1972; see United Nations doc. UNEP/IGM/1/INF/1 of March 30, 2001, pp. 3–4.

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agreements" – their context as well as interpretation of commonly used language that triggers such a relationship. The study examines an interpretation of the standard MEA clause on "providing a secretariat," a delegation of authority by the host institution to the head of the convention secretariat, possible conflict areas, the host country agreement, and the working of "relationship agreements." In view of the constraints of time and space, only a select number of MEAs are taken as illustrations to examine these issues as well as to unravel the growing phenomenon of existing international institutions (e.g., the United Nations Environment Programme [UNEP] and the International Union for Conservation of Nature [IUCN]), providing a "servicing base" for the MEAs. It triggers a chain of legal implications, including locations of the secretariats and their relationships with host countries and host institutions.

In the wake of this work, the author has collected three instruments on "relationship agreements" (Ramsar, CITES, and CBD) with the host institutions (IUCN and UNEP), as well as seven relevant headquarters agreements that govern the location of some of the MEA secretariats in host countries. It has been thought desirable to include these basic legal texts for ready reference material for scholars, practitioners, as well as international institutions. The fact that it took considerable amount of time and effort to obtain the original agreements testify to the need for inclusion of these texts in the book.

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1 Institutionalizing Cooperation

Introduction

The word *institution* indicates “the act or an instance of instituting”; “an established law, practice or custom.”[1] Thus, the process of instituting or establishing something results in an institution. In the national context, the process of institution building is much more smooth and orderly than at the international level, where sovereign states are the primary actors. In a national society, institutions emerge out of the needs of citizens at a given time. The practice of setting up an *organization* is just one such instance of establishing institutions. At the national level, governmental institutions derive their mandate as well as powers and competences from a statute enacted by the legislature. In the case of intergovernmental institutions, this is especially so as they derive their operational basis and *raison d’être* from an international instrument.

Organic Link

In general, the growth of law and the growth of institutions have been complementary to each other, and, in fact, do brook changes, keeping in view the needs of human society. Thomas Jefferson, one of the philosophers and architects of the American revolution, made a pertinent

[1] R.E. Allen (Ed.), *The Concise Oxford Dictionary* (Oxford: Clarendon, 1990), p. 614.

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observation about the adaptability of institutions to societal requirements:

> [*L*]*aws and institutions must go hand in hand with the progress of the human mind*. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, *with the change of circumstances, institutions must advance also to keep pace with the times*.[2] (emphasis added)

There seems to be an organic link between the development of law and the development of institutions – like an invisible umbilical cord. While institutions generally play a crucial role in triggering development of the law, they do so as institutional platforms on behalf of sovereign states. Such a role performed by the institutions could be the need of the hour as, increasingly, highly complex areas are being covered in the treaty-making venture. Institutions having a functional mandate in such areas are in the best position to take up such tasks, which require expertise, time, and continuous follow-up. In the past, one country could initiate the idea of a legal instrument and take responsibility for the entire process of treaty negotiations, including acting as a "depository" for the treaty.

This organic relationship applies especially to institutions set up at the international level. Unlike national law, the subjects of international law are primarily sovereign states. International law is unique in that its origin, sustenance, and development are essentially based on the *consent* of sovereign states. Because these states, with their national experience, determine the shape of international law, it is obvious that many of the concepts and national legal developments are reflected in it. Many times, international tribunals have derived inspiration from precedents and analogies[3] obtained at the national level. The growth of international

[2] Excerpt from Thomas Jefferson's letter to Samuel Kercheval, July 12, 1816; taken by the author from Thomas Jefferson Memorial, *Chamber Inscriptions*, Washington, DC.

[3] For a classical exposition on the subject of enrichment provided by private law analogies to international law, see H. Lauterpacht, *The Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longmans, Green and Co., 1927); reprinted edition by Archon Books, 1970.

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institutions is not immune to this process. This is amply demonstrated by the wide variety of ideas that have found reflection in the setting up of institutions at the international level, having had their roots in national experiences. This is a perfectly natural process. In this context, Lorimer observed:

> To me it has always appeared that our problem is to project into international life the institutions of which we have had experience in national life.[4]

At the international level, the function of institutions assumes importance not only for this but also for a host of other social, economic, and political purposes.[5]

Institutionalized Cooperation

In fact, the birth of an institutional form at the international level, for cooperation among states *inter se*, has been a remarkable development in view of the attendant surrender of state sovereignty for this purpose. It has been manifested in the efforts to "organize" cooperation among members of the international community. The concerted efforts for the purpose began sometime around the middle of the nineteenth century. The role of these institutions has been described thus by Brierly:

> These institutions operate by *organizing co-operation between the national governments and not by superseding or dictating to them*, and they are, therefore, probably not so much the beginnings of an international "government," though the term is often convenient, as

[4] J. Lorimer, *The Institutes of the Law of Nations* (1884), quoted in George Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed. (Milton: Professional Books, 1976), p. 192.

[5] For instance, Quincy Wright has remarked that: "Political institutions for the peaceful change of law are no less essential for a universal international system than legal institutions to maintain the law. The system of diplomacy, the United Nations and the Specialized Agencies were designed to supply this need that was formerly met in some measure by law and other uses of force"; see Quincy Wright, "The Foundations for a Universal International System" in R.P. Anand (Ed.), *Asian States and the Development of Universal International Law* (Delhi: Vikas, 1972), p. 164.

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> a substitute for one. Their consideration, however, invites the same questions as those which arise in the study of any other legal system, and it is proper to ask how far and in what manner they perform for international law the functions which governmental institutions perform for the law of a state. . . .[6] (emphasis added)

The rise of such institutions, assigned with specialized administrative functions, was essentially a product of the "compelling force of circumstances"[7] or "evident need"[8] arising from international intercourse as compared to other idealistic notions. The earliest version of such new institutions on the international scene came to be known as public international unions (PIU). These unions were set up basically on a functional basis for a variety of social and economic purposes and were administrative in nature.[9] Such international administrative unions emerged from the need to effectively administer certain natural resources (e.g., rivers, fisheries), deal with problems (e.g., opium), or regulate some common activities (e.g., post, telegraph, custom tariffs). In a way, they indicated the development of an "institutionalized international administrative law."[10]

[6] J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 4th ed. (Oxford: Clarendon Press, 1949), p. 86.

[7] Regarding the reason for this, Brierly has argued that "in one department of administration after another experience showed that government could not be even reasonably efficient if it continued to be organized on a purely national basis"; see note 6, p. 94 in Brierly.

[8] See D.W. Bowett, *The Law of International Institutions*, 4th ed. (London: Stevens & Sons, 1982), p. 1.

[9] These PIUs were designed specifically to administer several new areas, which became necessary in view of the technological innovations and the effect of such activities spanning continents or the globe. The earliest one was the International Telegraphic Union (1865). The PIUs set up were for postal communication (1874), protection of industrial property rights (1883), protection of copyrights (1886), international traffic of goods by rail (1890), publication of customs tariffs (1890), prevention of the spreading of disease (1892), abolition of sugar premiums (1902), agricultural interests (1905), radiotelegraphy (1906), fight against the abuse of opium (1909), and international commercial statistics (1913). For concise information on the issue, see, generally, Rüdiger Wolfrum, "International Administrative Unions" in Rudolf Berhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 5 (Amsterdam: North-Holland, 1983), pp. 42–49.

[10] See Wolfrum, *ibid*, p. 43.

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The gradual movement toward international administrative cooperation among states sometimes did not necessarily result in an institutional organ. It took the shape of an "agreement to co-ordinate national laws or to introduce uniform methods into the national administration."[11] There does not seem to be any consensus regarding distinguishing international administrative unions from international organizations. It has been suggested that the criteria for such may be along the lines of "administrative and technical" functions (indicating an international administrative union) as compared to "political and military" functions (characterizing international organizations), or considering institutional organs that exercise "executive" functions as international administrative unions.[12]

State entities, both as subjects and as makers of international law, have carved out the system of international institutions to serve their own interests. As creations of states, these institutions are as good as states want them to be. The practice, in place since the early twentieth century, reveals a preference for more concrete organizational forms of institutions. The evolution of international organization is a manifestation of the desire of states for a more durable structure – an association of states – to fulfill certain objectives.

It is no wonder that the twentieth century witnessed a remarkable effort to *organize* international relations among states. It shows progressive growth in the process of institutionalization, as dictated by the needs and interests of states at a given time. This evolution from PIUs to general international organizations also underscores multiplicity in institutional structures, as required by complexities of international society that arise from technological developments and the emergence of various global *problematiques*. That progressive development paved the way

[11] Brierly, note 6, p. 95. Such instances of "co-ordination" at the national level include the Convention for the Protection of Submarine Cables (1884) and the Automobile Convention (1904).

[12] See Wolfrum, note 9, p. 42. According to Wolfrum, however, "administrative unions may develop into political organizations or at least assume some political functions. Therefore, the classification is justified not from an accurate legal viewpoint but simply for its convenience for the purposes of presentation," *ibid*, p. 43.

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