



5-16-2013

# The Relationship Between Domestic and International Environmental Law

Tseming Yang

*Santa Clara University School of Law*, [tyang@scu.edu](mailto:tyang@scu.edu)

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

---

## Automated Citation

Tseming Yang, *The Relationship Between Domestic and International Environmental Law* (2013),  
Available at: <http://digitalcommons.law.scu.edu/facpubs/768>

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

**The Relationship Between Domestic and International Environmental Law**

(Forthcoming in Martella R and Grosko B (eds.) *International Environmental Law: The Practitioner's Guide to the Laws of the Planet* (American Bar Association 2013).)

**Tseming Yang**  
**Professor of Law**  
**Santa Clara University Law School**  
**500 El Camino Real**  
**Santa Clara, CA 95053**  
[tyang@scu.edu](mailto:tyang@scu.edu)  
1 (408) 551-6037

Forthcoming in Martella R and Grosko B (eds.) *International Environmental Law: The Practitioner's Guide to the Laws of the Planet* (ABA 2013).

## **Chapter 2: The Relationship Between Domestic and International Environmental Law**

**By Tseming Yang<sup>1</sup>**

The connections between domestic and international law have proliferated in the last few decades as a directed result of the explosive growth of environmental treaties and other developments. Yet, most U.S. environmental lawyers remain relatively unaware even though these connections are increasingly affecting the practice of environmental law itself.<sup>2</sup> Most of the rest of this book provides background on the specific substantive content of global environmental laws, both international as well as the environmental law systems of other countries. This chapter will address the relationship between the international and the domestic system, primarily the US. It will address three related question: 1) What is international environmental law?, 2) what is its relationship to U.S. domestic law?, and 3) how is international environmental law implemented and applied in the U.S.?

### **I. What is International Environmental Law?**

The most common answer to this question refers to the sources of international law, set out in article 38 of the Statute of the International Court of Justice. Under article 38, that includes:

- a. international conventions,
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. 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.<sup>3</sup>

The three primary sources, treaties, customary law, and general principles will be explored below.

---

<sup>1</sup> Professor of Law, Santa Clara University School of Law; Deputy General Counsel for International Environmental Law, US Environmental Protection Agency (2010-2012); Chief of Party and Director, US-China Partnership for Environmental Law (2007-2010). I am grateful to Charles Lane for excellent research assistance and to David Gravalles for his valuable comments on a draft of the chapter.

<sup>2</sup> For a general discussion, see Tseming Yang, *The Emerging Practice of Global Environmental Law*, 1 *Transnational Environmental Law* 53 (2012).

<sup>3</sup> Contrary to the common law, judicial decisions or "case law" usually cannot in themselves create binding law or be binding authority within international law. However, judicial decisions can provide assistance in determining the specific contours and content of customary legal rules. Article 38(d).

## A. Environmental Treaties

The rapid growth of international environmental law in the past four decades has been driven primarily by the proliferation of environmental treaties, the predominant source of new international environmental law. In their substantive scope, they have covered the gamut of environmental and natural resource issues, including climate change,<sup>4</sup> ozone depletion,<sup>5</sup> biodiversity conservation,<sup>6</sup> hazardous waste trade,<sup>7</sup> trade in endangered species,<sup>8</sup> migratory species conservation,<sup>9</sup> chemicals management,<sup>10</sup> desertification,<sup>11</sup> marine pollution,<sup>12</sup> and whaling.<sup>13</sup> Their participation levels range from multilateral agreements that have universal or near universal membership to regional<sup>14</sup> or bilateral agreements.<sup>15</sup> Details about the substantive content of these agreements is left to subsequent chapters. This section will address the nature, creation and structure of environmental agreements.

### 1. The Nature of Environmental Treaties

The Vienna Convention defines treaties as “an international agreement concluded between States in written form and governed by international law.”<sup>16</sup> In practical terms, it means an agreement between states that satisfies criteria set out in the Vienna Convention.

A treaty creates binding legal commitments based on the State parties’ expression of a desire to be bound by the terms of their agreement. However, while the Vienna Convention on the Law of Treaties governs the formation of treaties within international law, the status of a treaty within a country’s national legal system,

<sup>4</sup> UN Framework Convention on Climate Change, 1771 U.N.T.S. 107 (1992); Kyoto Protocol, 37 ILM 22 (1997).

<sup>5</sup> Vienna Convention on the Protection of the Ozone Layer, 1513 U.N.T.S. 293 (1985); Montreal Protocol on Ozone Depleting Substances, 1522 U.N.T.S. 3 (1987).

<sup>6</sup> Convention on Biological Diversity, 1760 U.N.T.S. 79 (1992); Cartagena Biosafety Protocol, 39 I.L.M. 1027 (2000); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010), available at <http://www.cbd.int/abs/text/default.shtml>.

<sup>7</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 U.N.T.S. 57 (1989).

<sup>8</sup> Convention to Regulate International Trade in Endangered Species of Flora and Fauna, 993 U.N.T.S. 243, 12 I.L.M. 1085 (1973).

<sup>9</sup> Convention on the Conservation of Migratory Species of Wild Animals, 19 I.L.M. 15 (1979).

<sup>10</sup> Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. 532 (2001); Rotterdam Convention on Prior Informed Consent, 38 I.L.M. 1 (1999).

<sup>11</sup> UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly Africa, 1954 U.N.T.S. 3 (1994).

<sup>12</sup> MARPOL, 2 I.L.M. 1319 (1973); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 11 I.L.M. 1294 (1972).

<sup>13</sup> International Convention for the Regulation of Whaling, 161 U.N.T.S. 72, 10 U.S.T. 952 (1946).

<sup>14</sup> North American Agreement on Environmental Cooperation, 32 I.L.M. 1993.

<sup>15</sup> Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448

<sup>16</sup> Vienna Convention on the Law of Treaties Article 2.1 (a), (May 23, 19. 69, 1155 U.N.T.S. 331).

including the authority of officials to negotiate and enter into a treaty on behalf of a State, is determined by each State's own national requirements and processes.

Environmental treaties increasingly exhibit characteristics of both contract and legislation.<sup>17</sup> As agreements between state sovereigns, they are much like ordinary contracts between individuals. They are evidence of consent to be bound by the agreement's terms, and their applicability and legal effect depends on and is limited by that consent. Not surprisingly, many of the rules governing the creation, interpretation, and other aspects of treaties parallel contract law principles.

The contract characteristic of treaties is a useful way for understanding the core principles of the Vienna Convention on the Law of Treaties, which governs the creation, application and interpretation of treaties.<sup>18</sup> In short, it is essentially a road-map to the birth, life, and death of a treaty that spells out how and what the requirements are for the formation of treaties, their application and interpretation during their life-time existence, the process for change, and the process of termination.

At the same time, treaties also have characteristics of legislation because they can establish norms of a legal nature like the enactments of a legislature. This law-making aspect of the nature of treaties is particularly visible in instruments that create prospectively applicable legal norms, impose obligations that are directly applicable to private individuals or other entities, serve as organic charters for international institutions, or delegate regulatory authority to international bodies, including the authority to create new norms at times. Moreover, within the US system, agreements that have received the constitutionally required advice and consent of the U.S. Senate have the force of domestic law.

## 2. The Formation of Environmental Treaties

The process of treaty-making has no formally set requirement, though treaties governed by the Vienna Convention on the Law of Treaties must be in writing and concluded between States.<sup>19</sup> Nevertheless, contemporary treaty-making practices follows a common pattern that includes: 1) environmental problem identification, including determination of needs and negotiation goals, 2) negotiation of the treaty provisions, 3) adoption and signature of the treaty instrument, and 4) ratification.<sup>20</sup>

Identification of the problem, needs assessment and formulation of treaty objectives is necessary for optimal design of solutions. It requires assessment of the state of scientific understanding as well as the structure of the problem, including causes and interrelationship to other issues. Treaty negotiation may then proceed in a

---

<sup>17</sup> See, e.g., Tseming Yang, *The Challenge of Treaty Structure: The Case of NAFTA and the Environment*, 100 Proc. Ann. M. Am. Soc. Int. L. 32-37 (2006).

<sup>18</sup> While the United States is not a party to the Vienna Convention, the Convention is widely viewed as a codification of customary international law principles governing the law of treaties. As a practical matter, the Vienna Convention is routinely consulted and referred to in treaty interpretation.

<sup>19</sup> Vienna Convention Article 2(1)(a).

<sup>20</sup> David Hunter, James Salzman, Durwood Zaelke, *International Environmental Law and Policy* 288-300 (2011).

variety of ways, ranging from informal processes to formal large-scale UN-style conferences governed by a “standardized negotiation process.” Such formal negotiations are commonly associated with modern multilateral environmental agreements such as the Framework Convention on Climate Change.

The concluding step of a negotiation is adoption of the draft agreement, indicating that the negotiating parties “agree on the final form and content of the agreement,” and authentication, usually by signature, confirming that “the text of the treaty is authentic and definitive.”<sup>21</sup> Adoption and authentication do not, however, make the treaty binding on the parties. They obligate a state to “refrain from acts which would defeat the “object and purpose of the treaty.”<sup>22</sup>

Definitive consent to be bound by a treaty can be expressed by a variety of affirmative showings, including signature, exchange of instruments, deposit of instruments of ratification, acceptance, or approval, and by accession.<sup>23</sup> The most common method has been by ratification. A state that did not participate in the negotiations or sign the agreement may join the agreement at a later time by accession, usually requiring the State to deposit an instrument declaring “an intent to be bound by the treaty.”<sup>24</sup>

Legal obligations for party states are triggered by the entry-into-force provision. In modern multilateral environmental agreements, entry into force is often conditioned on a minimum number (or critical mass) of state ratifications or fulfillment of other conditions.<sup>25</sup> Satisfaction of the entry-into-force conditions then triggers legal effectiveness.

### 3. The Structure of Modern Environmental Agreements

Just as contracts frequently contain standard terms, so do environmental treaties. Some of the common elements shared by modern environmental agreements are subject matter specific while others are more generic. Types of common elements include the following.<sup>26</sup>

**Core (Primary) Substantive Commitments.** These are treaty obligations that one might characterize as the core commitments primarily relied on to accomplish the treaty’s purpose. Within the Montreal Protocol, the core commitments are to limit and reduce the production of CFCs as well as regulate its international trade. Within CITES, core commitments focus on the control of the international trade in endangered species through specific licensing requirements.

---

<sup>21</sup> Mark W. Janis, *International Law* 21 (2012.); see also Vienna Convention on the Law of Treaties, article 9 & 10.

<sup>22</sup> Vienna Convention Article 18.

<sup>23</sup> See Vienna Convention Article 11 -16.

<sup>24</sup> *Supra* Hunter, at 300.

<sup>25</sup> Vienna Convention article 24.

<sup>26</sup> See David Caron, “Analyzing and Understanding Treaties in the Area of International Environmental Law” (1998) (on file with author).

**Treaty-specific (Secondary) Support Mechanisms and Commitments.** Modern environmental agreements usually incorporate a number of supporting mechanisms and commitments that enhance the effectiveness of the core commitments. Such treaty-specific supporting (or secondary) provisions facilitate implementation by creating flexibility for the parties in achieving the core commitments, easing administration and compliance monitoring, and preventing unintended consequences such as leakage concerns, among others. For example, reliance on a basket approach in the Montreal Protocol (centered on a covered substance's ozone depletion potential) and in the Kyoto Protocol (focused on the GHG's global warming potential) or the creation of market-based mechanisms to facilitate achievement of the Kyoto GHG emission reduction targets helped create flexibility for the member states.

**Generic (Tertiary) Support Mechanisms and Commitments.** There is also a set of generic support mechanisms and commitments emerging in treaty-making that generally contribute to the accomplishment environmental goals. Their generic functions and purposes are non-specific to any particular agreement, though their operational implementation is likely to be tailored to the particular treaty objectives and core commitments. Examples are provisions setting up financial assistance for implementation in the developing world, scientific and technical research, information exchange, and implementation reporting and compliance monitoring. They are utilized in some version or another increasingly across modern environmental agreements.

**Organizational Entities and Structures.** Environmental agreements routinely commit states to particular actions. But increasingly, they also create institutional structures and bodies that can give a treaty regime a life of its own. These bodies are especially important in multilateral agreements and have come to resemble bureaucratic institutions not unlike administrative agencies in national systems of governance.

At their simplest, treaties provide for governing councils, usually referred to as the Conference of the Parties, and administrative support bodies, a Secretariat. Technically complex agreements, as most MEAs now are, also include entities providing scientific and technical expertise, administering financial assistance, policing compliance, and providing other useful functions. In some instances, these bodies, usually the COP, is provided with some limited law-making authority to modify treaty rules or requirements.

There has also been a trend to task some institutional bodies, such as the Kyoto Protocol's Clean Development Mechanism, directly with the implementation and application of treaty rules to the activities of private entities. The result has been the emergence of new forms of international administrative entities that exercise authority and implement treaty provisions much like, to some extent in place of or in addition to, national regulatory authorities.

**Mechanisms for Changing and Updating Treaties.** Because scientific understanding of environmental problems continues to evolve and the causes and pressures on the environmental problem may change over time, provisions allowing for modification and updating of treaty provisions have become increasingly sophisticated. Traditional rules of treaty amendment require the same process of adoption and

ratification as the original treaty itself, posing issues of delay and the free rider dilemma. As a response, modern environmental agreements have introduced simplified change, tacit amendment procedures, and non-consensus-based decision-making,<sup>27</sup> especially for technical changes.

**Non-Compliance Mechanisms.** Traditionally, environmental treaties had no compliance or enforcement mechanisms. To the extent that dispute settlement provisions were present, providing for mediation, conciliation, or arbitration of disagreements, they were rarely, if ever used. The realization that responses to non-compliance with treaty commitments implicate communal interests of member states were first formally recognized only with the establishment of a non-compliance mechanism by the Montreal Protocol. Since then, the trend has been to include implementation reporting and compliance monitoring provisions<sup>28</sup> as well as formal processes that allow for responses to specific events or allegations of non-compliance.<sup>29</sup>

**Scope, Function, and Objectives and Other Standard Treaty Provisions.** Components of treaties setting out preambular material, treaty objectives and principles, or closing provisions appear in all treaties. While some may provide interpretive context and articulate treaty purposes, they also provide an indication of the agreement's specific subject matter focus, overall objectives, and value considerations. For example, the UNFCCC has preambular materials and articles setting out the Convention's objectives as well as underlying principles. In addition, treaties usually contain standard terms specifying qualifications for membership, entry into force, depositaries, and amendment provisions.

## B. Customary International Law

Customary international law is the set of rules of state practice that are consistently and uniformly followed by states based on a sense of legal obligation –the belief that the associated behavior is legally required.<sup>30</sup>

Customary international law is an expansive and difficult to ascertain source of international law. Many of the rules have developed in areas of international relations where states have had extensive and frequent interactions over the centuries, such as immunities enjoyed by diplomats or navigation and other maritime matters. In the international environmental law context, the rule of greatest consensus is the obligation of a state not to allow its territory to be used to cause harm to the territory of another state.<sup>31</sup>

---

<sup>27</sup> Montreal Protocol article 2(9).

<sup>28</sup> See, e.g., UNFCCC arts. 9 & 10; Kyoto Protocol art. 15; CBD art. 26.

<sup>29</sup> See, e.g., Kyoto Protocol article 18; Rotterdam Convention article 17; Stockholm Convention article 17; London Protocol article 11.

<sup>30</sup> Supra note 2 at 310.

<sup>31</sup> Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938), further proceedings 3 R.I.A.A. 1938 (1941); see generally John E. Read, The Trail Smelter Dispute, 1 CAN. Y.B. INT'L L. 213 (1963); Stockholm Declaration, Principle 21, 11 I.L.M. 1416 (1972).



Formally, customary international law has two components: 1) State Practice and 2) *Opinio Juris*. Under the first element, state practice must be wide-spread and virtually uniform in conformance with the rule. The second element requires a belief that the state practice is legally compelled. Thus the behavior must have been engaged in due to a sense of legal obligation – as opposed to a sense of moral obligation or convenience.<sup>32</sup>

The challenging nature of this definition is apparent even to beginning law students. Not only does it call for an empirical assessment of the practices of states, which may not always be publicly known, but it also involves determining the motivations for engaging in particular practices.<sup>33</sup> Given the significant variance in behavior among States as well as their political motivations and goals, extrapolating customary legal rules would seem extremely difficult.<sup>34</sup> How does one ultimately distinguish customary rules of law from rules of convenience, courtesy, comity, or just plain custom?<sup>35</sup>

Moreover, the definition has been criticized for embodying serious potential for inconsistent findings since they are practically based on one's "more or less subjective weighing of the evidence."<sup>36</sup> In the end, these issues illustrate that international law is quite unlike domestic law -- not created by a central authority but rather representative of the consent by those governed by it. And the ambiguities of law are ultimately the result of the ambiguity and diversity of state consent. As a practical matter, then, judicial decisions and the writings of scholars thus become critical guides to the status and contours of customary law rules.<sup>37</sup>

One rule of customary law that enjoys consensus recognition is the duty to avoid transboundary harm, first explicitly articulated in the 1941 *Trail Smelter* arbitration. Faced with the first formal international dispute raising transboundary air pollution, the Trail Smelter Tribunal used "general principles of international law on State liability for cross-border damage" to settle the issue of transboundary harm that arose from the smelter.<sup>38</sup> Pursuant to the tribunal's arbitral decision, the Smelter was required to pay

---

<sup>32</sup> Janis, *supra*, at 46-48 (4<sup>th</sup> ed 2003). See also American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Section 102 (2) (1987).

<sup>33</sup> However, in democratic and transparent governments, it has become easier to observe the public as well as internal justifications provided in compliance with particular international legal rules.

<sup>34</sup> Janis at 53.

<sup>35</sup> There is also the additional problem of the persistent objector – when a state objects to an emerging customary international law rule by attempting to block uniformity of state practice, including by consistently rejecting it or acting explicitly in contravention. *Id.* at 54.

<sup>36</sup> *Id.*

<sup>37</sup> One special category of CIL norms are peremptory norms of international law. These norms are accepted by the international community as ones from which no derogation is permitted. They are universally applicable and cannot be changed, including by treaty. In their extraordinary nature, they are rare and reserved for rules where there is overwhelming consensus about their validity, such as prohibitions on slave-trading and piracy.

<sup>38</sup> Rebecca M. Bratspies and Russell A Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter*, at 3, available at [http://www.cambridge.org/servlet/file/store6/item2363260/version1/item\\_9780521856430\\_excerpt.pdf](http://www.cambridge.org/servlet/file/store6/item2363260/version1/item_9780521856430_excerpt.pdf)

millions to change operations and ensure that it would mitigate harm to American citizens across the border. *Trail Smelter* is commonly seen as a precursor to Principle 21 of the Stockholm Declaration, which stated that sovereign states may not allow their territory to be used to cause harm to the environment of other States or the global commons.<sup>39</sup>

Most recently, the International Court of Justice affirmed its recognition of the transboundary harm rule in *Argentina v. Uruguay*. In that same case, the ICJ went on to recognize the emergence of a customary legal obligation to perform transboundary environmental impact assessments in the situation of a shared watercourse.<sup>40</sup> In the underlying facts, Argentina had objected to Uruguay's decision to allow one of the world's largest pulp mills to be built on the banks of the Uruguay River, which forms the boundary between the two countries.

In deciding for Argentina, the International Court of Justice stated that the parties had an obligation under customary international law "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."<sup>41</sup> The Court also recognized that where there are shared natural resources, environmental impact assessments are now considered an international requirement where industrial activity poses a great risk to the environment in a "transboundary context."<sup>42</sup>

### C. General Principles of Law

Article 38 of the International Court of Justice Statute cites "general principles of law recognized by civilized nations" as a third source of international law. According to the Third Restatement of The Law of Foreign Relations, this source of law encompasses general principles of laws "common to the major legal systems [and] . . . may be invoked as supplementary rules of law where appropriate."<sup>43</sup> They are derived from the "rules accepted as domestic law of all civilized nations"<sup>44</sup> and understood as gap fillers for international law where treaty and custom are silent. General principles of law are found by comparative law analysis and an examination of fundamental principles.<sup>45</sup>

The emergence of global principles of environmental law arguably holds the greatest significance to this category of international environmental law. As global environmental law principles are finding a common expression in national legal systems

---

<sup>39</sup> The rule has also been recognized by the International Court of Justice in the Nuclear Test Cases, Rio Declaration Principle 2, and numerous international environmental agreements and non-binding instruments.

<sup>40</sup> Cymie R. Payne, *Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law*, available at <http://www.asil.org/insights100422.cfm>.

<sup>41</sup> *Id.* See also *Pulp Mills on The River Uruguay (Argentina v. Uruguay)* ICJ, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=135&code=au&p3=4>.

<sup>42</sup> *Id.*

<sup>43</sup> Restatement (Third) of the Foreign Relations Law of The United State Section 102(4) (1987).

<sup>44</sup> Hunter et al., *supra*, at 312, (citing Ian Brownlie, *Principles of Public International Law* 16 (2008)).

<sup>45</sup> Janis 56-57.

across the world, whether by transplantation, convergence or harmonization, they are likely to serve as the source for the rise of new international environmental law norms.

The duty to conduct environmental impact assessments appears to be one possible example.<sup>46</sup> Environmental impact assessment requirements are arguably the most widely adopted environmental law norms internationally, and they are now present in virtually every country's environmental regulatory system. It can also be found in many international environmental law instruments, and its international transboundary equivalent is the focus of the Espoo Convention.<sup>47</sup>

#### D. The Role of Soft International Environmental Law

One of the most important developments in international environmental law in recent decades has been the growth of soft law. Soft law has traditionally been used to describe norms that are "not yet law" or "not quite law." They are principles that are not considered to be law either because they are viewed as not legally binding or because they are unenforceable. Their legal significance derives from the aspirational values and objectives they articulate as well as their influence in animating international cooperation and other behavior. Since some of these soft norms evolve into binding international norms, they can thus be seen as intermediate manifestations of what could eventually become customary law or as norms that could eventually be adopted in environmental agreements as binding treaty commitments.

### II. What is its Relationship to US Domestic Law?

Given the broad and growing scope of international environmental law, how then does it connect with domestic law? With respect to treaties, domestic legal processes are relevant in the treaty-making process, in the incorporation of treaties into US law, and the domestic application/implementation of treaty commitments. With respect to customary law, the rules are deemed to be part of the common law.

#### A. General Relationship

The US system is traditionally referred to as a "dualist" system. In dualist systems, international and domestic laws are seen as operating in separate spheres.

---

<sup>46</sup> This provides an alternative view on the International Court of Justice's reference to transboundary environmental impact assessments in *Argentina v. Uruguay*. Rather than compelled as a prerequisite for avoiding transboundary harm, overwhelming adoption of EIA legal principles across the world suggests that it has joined as a general principle of the law of civilized nations.

<sup>47</sup> See <http://www.unece.org/env/eia/eia.html>. The Espoo Convention was adopted in 1991 and entered into force on September 10, 1997. It "sets out the obligations of Parties to assess the environmental impact at an early stage of planning" and includes member state obligations to "notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries."

National legal systems are “separate and discrete”<sup>48</sup> from the international one and “international law is generally not thought to be able to make itself effective in a domestic legal order [but rather] depends on the constitutional rules of the municipal system itself.”<sup>49</sup>

Within the U.S., this is manifested through domestic processes such as Senate advice and consent or the enactment of Congressional legislation to implement a treaty. Upon approval by the Senate, the President then usually deposits an instrument of ratification, an international step signifying ratification that is distinct from the domestic process and which then makes treaty membership effective as an international matter.

Conversely, international law has traditionally not concerned itself with a state’s internal laws, and internal matters including domestic laws do not usually affect international treaty obligations.<sup>50</sup> Yet, the practical connection between international and domestic affairs in international environmental law has grown significantly over the decades. Because most of environmental degradation is the result of private activity rather than direct government actions, the affirmative regulatory engagement and assistance of national and sub-national governments are usually critical in accomplishing a treaty’s environmental protection objectives. In other words, member states have a relationship with the treaty system that is much more like that of a co-regulator or regulatory delegatee, much like what is seen in the US environmental federalism structure, than of a “regulated entity,” as may be more common in the fields of arms control, humans rights, or trade regulation.

## B. Types of International Agreements in US Law

Apart from international agreements that have been approved by the U.S. Senate via the treaty clause and that have co-equal status to Congressional statutes, there are two other broad categories of international agreements. First, Congressional-Executive Agreements require approval only by a simple majority of both Houses of Congress.<sup>51</sup> Such agreements have been utilized primarily with respect to international trade agreements. They are usually negotiated by the Executive branch, oftentimes with negotiation parameters provided by Congress through special legislation. The final agreement is enacted by Congress as if it were ordinary domestic legislation.

A second category of agreements are sole executive agreements. They may be entered into by the President pursuant to his own constitutionally enumerated powers, such as his position as Commander-in-Chief of the Armed Forces and his foreign affairs power, or as authorized by Congress. Such executive agreements are usually not subject to formal Congressional approval, though informal consultations occur in the due course of ordinary executive-congressional interactions and congressional oversight.

---

<sup>48</sup> Janis at 87.

<sup>49</sup> Id.

<sup>50</sup> See, e.g., Vienna Convention art. 27.

<sup>51</sup> Frederic L. Kirgis, International Agreements and U.S. Law, <http://www.asil.org/insigh10.cfm>

### C. Oversight and Control over the Treaty-making Process

Oversight over the treaty-making process occurs both at the Congressional level as well as within the Executive branch itself. Within the U.S. system, the President may be formally in charge of treaty negotiations. As a practical matter, however, treaty-making is a collaborative process involving usually the Senate and oftentimes also the House of Representatives.

The Constitution requires Senate advice and consent by two-thirds of Senators for treaties to attain co-equal status with congressional enactments.<sup>52</sup> Moreover, Congress has constitutionally assigned authority over foreign commerce and may exercise its oversight, appropriations, and other authorities to ensure its involvement in foreign policy processes.<sup>53</sup> In fact, consultation and consideration of interests by Congress occurs on a regular basis before and during the negotiation process, especially when it is expected that Congress will ultimately need to enact legislation to implement a treaty domestically.

Within the Executive branch, oversight and control over treaty-making processes is largely vested in the State Department. Such oversight and control occurs primarily through the Circular 175 Procedure (C-175), which applies to both internal State Department as well as inter-agency coordination of negotiation of international agreements.<sup>54</sup> The State Department describes the procedure as intended “to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications.”<sup>55</sup> As a practical matter, it also ensures that agencies and officials of the federal government do not make legal commitments on behalf of the US government internationally, whether by informal memoranda of understandings or formal contracts, without involvement of the State Department.

The substance of the C-175 is designed to inform and address considerations ranging from “[t]he policy benefits to the United States, as well as potential risks;” to “[t]he environmental impact that may arise as a result of the agreement.”<sup>56</sup> The State Department’s Office of the Legal Adviser provides an analysis of international and domestic law issues, including “the Constitutional powers relied upon, that accompanies the C-175.”<sup>57</sup>

Within the US government, participation in negotiations for a multilateral environmental agreement may not commence absent authority provided through the C-175 process. C-175 authority may also provide authority to sign the resulting agreement.<sup>58</sup>

---

<sup>52</sup> U.S. Const. art II, § 2, cl. 2.

<sup>53</sup> See Richard F. Grimmert, Foreign Policy Roles of the President and Congress, available at <http://fpc.state.gov/6172.htm>.

<sup>54</sup> Case-Zablocki Act (1972), 1 U.S.C. 112b.

<sup>55</sup> <http://www.state.gov/s/l/treaty/c175/>

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> <http://www.state.gov/e/oes/rls/rpts/175/1265.htm>

### III. How is International Environmental Law Implemented and Applied?

Before official ratification of an agreement occurs, and thus before the US becomes a party, the question of domestic implementation must be resolved.

#### A. Congressional Implementing Legislation

It has been the practice for the US to ratify environmental agreements only when all necessary implementing domestic legal authorities are in place.<sup>59</sup> Oftentimes, this has meant that Congress had to enact legislative authority or appropriate funding for EPA or other federal agencies to fulfill new treaty commitments. On some occasions, new treaty obligations can be implemented with existing statutory authority.

At times, existing legislation or constitutional authority already vests a particular federal agency or the President with all the necessary powers to carry out US obligations under the new treaty. However, in either situation, whether implementation occurs through existing or new Congressional authority, implementing agencies are likely to have to promulgate new regulations or revise their existing ones.

#### B. Self-Executing and Non-Self-Executing Agreements

National implementation through legislatively delegated authority is the most common path for environmental agreements. When a treaty is deemed self-executing, however, it can be judicially enforced and thus become legally effective upon ratification. Professor Fred Kirgis has described whether a treaty is self-executing or not as a question focusing primarily on the

*intent--or lack thereof--that the provision become effective as judicially-enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing.*<sup>60</sup>

Given the need for treaty mandates to be tailored to the circumstances of specific industrial sectors as well as integrated into existing regulatory scheme so as to ensure effective implementation, environmental agreements have generally been interpreted as non-self-executing. At times, this has led to delay in the ability of the United States to ratify and participate in international environmental agreement.<sup>61</sup>

---

<sup>59</sup> "The American Approach to Treaties," Panel, American Society of International Law Annual Meeting (April 6, 2013), Remarks by Susan Biniarz, Deputy Legal Adviser, US Department of State (author's notes).

<sup>60</sup> Frederic L. Kirgis, *supra* note 58 (emphasis added). The inquiry into intent usually focuses on the participants in the treaty creation and ratification process.

<sup>61</sup> In the most extreme of examples, the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal received Senate advice and consent in 1993, but the United States has not yet

Once a treaty or agreement has passed through the necessary channels of ratification, and implementing authority is in place, the President issues a proclamation that the treaty has entered into force.<sup>62</sup> The President's proclamation puts the domestic legal community on notice and triggers the implementation process.<sup>63</sup>

### C. Adjustments of International Agreements and Domestic Linkage

The growing influence of environmental agreements on domestic regulatory systems is also casting a spotlight on processes used to change and adjust international agreements. Ordinarily, amendments of environmental agreements require the same adoption and ratification process as the underlying agreement. Increasingly, however, environmental agreements incorporate processes to allow for the revision or modification of a treaty in a simplified or expedited manner, such as through tacit amendment procedures.<sup>64</sup>

It has also become more common for US environmental statutes to directly incorporate or reference international treaty requirements. The Marine Protection, Research, and Sanctuaries Act (MPRSA) specifically requires application of standards and criteria that are binding under London Convention.<sup>65</sup> Likewise, Title VI of the Clean Air Act makes its provisions contingent on being "consistent with the Montreal Protocol" and sets out that in the event of conflict, "the more stringent provision shall govern."<sup>66</sup>

Tighter linkage of parts of domestic regulatory schemes to their international counterparts has ultimately furthered integration and effectiveness of US regulatory efforts with respect to its international commitments. Unfortunately, tighter linkage has also courted concerns about delegation of legislative and regulatory authority to international organizations.<sup>67</sup>

### D. The Growing Practice of International Environmental Law

The practice of international environmental law used to be almost exclusively confined to international lawyers providing legal counsel, support for treaty negotiations, participation in international organizations, and representation of the US before international tribunals. However, as the field has matured and implementation

---

ratified the agreement because of its position that implementing legislation is necessary. As of this writing, Congress has yet to act on proposed implementing legislation.

<sup>62</sup> Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations United States Senate, 106<sup>th</sup> Congress 2d Session, SPRT 106-71, 12 (2001). Available at <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>.

<sup>63</sup> Id

<sup>64</sup> Modern agreements have sought to introduce innovations that have departed from the traditional rule of unanimous consent, such as article 2(9) of the Montreal Protocol.

<sup>65</sup> Marine Protection, Research, and Sanctuaries Act of 1972, section 102(a), 33 U.S.C. 1412(a).

<sup>66</sup> Clean Air Act section 614.

<sup>67</sup> NRDC v. EPA, 464 F.3d 1.

processes have become more important, so has the range of lawyers who are engaged in this field and the scope of the legal practice.<sup>68</sup>

International environmental law is now practiced not only as a specialty in the State Department's Legal Advisor's Office or in International Organizations such as the United Nations or the World Bank, but also as a subject matter by domestic-focused lawyers in the Environmental Protection Agency, the Interior Department, the National Oceanographic and Atmospheric Administration, the Coast Guard, the Justice Department, and the Department of Defense. Their work addresses the promulgation of regulations, legislative drafting of implementing treaty commitments, and other domestic legal work. It includes interpretation of relevant treaty provisions that arise in civil and criminal enforcement actions designed to implement treaty requirements and scrutiny of treaty commitments to ensure compliance. Finally, the practice can involve providing technical assistance and capacity-building in other countries to help promote compliance.

Lawyers in the environmental NGO community and the commercial bar have also become more engaged in this field. For example, NGO lawyers have raised environment and human rights issues in Alien Tort Act claims in US courts or in petitions to international human rights tribunals, such as the Inter-American Commission on Human Rights. They have filed submissions under article 14 of the North American Agreement on Environmental Cooperation regarding a NAFTA party's failure to effectively enforce its environmental laws. The commercial bar has filed investor claims related to environmental regulatory issues under chapter 11 of NAFTA and represented corporate clients' interests by influencing the internal processes of international organizations. And finally, private lawyers (and consultants) are assisting their clients with navigating international administrative regulatory schemes and processes, such as the Clean Development Mechanism.

Undoubtedly, many of these practice areas are still small compared to traditional and more established areas of environmental regulation and litigation. As globalization continues to shrink the planet, link communities and environments, grow economic activities and ecological pressures on the earth, however, the need for regulatory approaches and legal solutions that integrate or harmonize national, sub-national, and international efforts will only grow. And with this trend, the volume and scope of this part of environmental law practice will grow as well.

#### IV. Contemporary Issues

As international environmental law has gained prominence, a serious contemporary challenge remains the difficult political climate in the United States for the ratification of environmental treaties. Among the major multilateral environmental agreements that the United States has signed, but not ratified, are the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes, the 1992

---

<sup>68</sup> See, e.g., Tseming Yang, *The Emerging Practice of Global Environmental Law*, 1 *Transnational Environmental Law* 53 (2012).



Convention on Biological Diversity, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, the 1997 Protocol to the London Convention, the 1998 Rotterdam Convention on Prior Informed Consent, and the 2001 Stockholm Convention Persistent Organic Pollutants.

Political opposition to ratification of international agreements is not unique to the environmental area, nor is opposition to new environmental legislation.<sup>69</sup> But these domestic political challenges do undermine the ability of the United States to effectively engage or play a leadership role within these multilateral environmental regimes -- simply because the US is a non-party. Even though usually permitted to participate as an observer, the U.S. has no vote or formal voice in treaty proceedings. The ability of its representative to fully protect US interests and concerns, including of US civil society organizations as well as industry, is undoubtedly greatly weakened.

A separate issue of contemporary significance has been the extraterritorial application of US environmental laws. When such instances have arisen, they have on occasion given rise to international disputes such as the Tuna-Dolphin GATT case and subsequent trade law challenges to fisheries and wildlife-related legislation.

Unilateral, extraterritorial action remains tempting because of the opportunity to recruit the weight of the United States economic and military power for environmental purposes. In contrast, treaty-making entails significant resource and personnel demands, faces challenges in terms of consensus-building, requires time to negotiate, and oftentimes leads ultimately to an agreement of limited effectiveness. Until these issues are better addressed, unilateral, extraterritorial application of US law is likely to remain an option of interest for environmentalists, however.

---

<sup>69</sup> The UN Convention on the Law of the Seas have been languishing for decades in spite of consistent Executive Branch support for ratification. And no comprehensive environmental legislation has been enacted since the 1990 Clean Air Act Amendments.