SOURCES OF INTERNATIONAL LAW: AN APPRAISAL OF ITS SCOPE AND APPLICATION

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Introduction

Traditionally, international law is made by sovereign states, for sovereign states. It deals with such matters as diplomatic relations, military issues and state territory. This focus on relations among states has proved to be both a source of strength and of weakness. The control exercised by states over the making and development of international law contributes in some ways, to its effectiveness. States are unlikely to develop legal norms unless they are in harmony with their national interests and unless they plan to abide by them.

On the other hand, control by states over international law means that useful or necessary changes will be delayed or obstructed if they conflict with the interests of states. The current efforts to control global climate change are a case in point. The countries that matter the most, the major polluters, are those that are most reluctant to cooperate effectively. Yet, without their consent, there can be no real progress.

The cornerstone of international law is the consent of states. This consent emerges from a process of communication that is quite complex, but leads to typical outcomes. One such outcome, in which consent is given explicitly to a rule of international law, is a treaty. Another outcome, where such consent is more implicit, is customary international law. These two types of norms: treaties and customary law, continue to be the most important sources of international law.

In the course of the 20th Century, new areas of international law emerged, which do not fit the traditional pattern of a legal system concerned solely with relations among sovereign states. These new areas include human rights, which deal with the treatment of individuals and groups, international criminal law and international economic law that seek to regulate the activities of private participants in the international marketplace and also the way states deal with them. Unlike the more traditional areas of international law, these new fields are not primarily concerned with balancing state interests. They deal with the rights and duties of individuals, groups and companies. Many of the interests involved transcend state boundaries. Some of them concern the entire global community. But the legal techniques for tackling these international issues have remained largely unchanged. These legal tools are still controlled by states, are usually conditional upon their consent and are often used to further their specific interests.

At the outset, it would be appropriate to survey briefly the traditional typology of the sources of international law. Thereafter, the application of international law in one particular area, namely international investment law, can be demonstrated. Two major themes will emerge during the course of this discussion:

- The so-called sources of international law do not represent mutually exclusive sets of rules that coexist side by side. Rather, they are manifestations of a complex decision-making process in which different forms of legal authority interact. In other words, they are closely interrelated.
- The current System of international law sources, controlled by states and their governments through the underlying principle of consent, is inadequate to deal with the challenges of the modern world.

Traditional Sources of International Law

A discussion of the sources of international law typically starts with a key provision in the Statute of the International Court of Justice (ICJ). This provision states that the ICJ, which is entrusted with the task of deciding the basis of international law, shall apply treaties, customary international law and general principles of law. It shall also draw on decisions of courts and tribunals and on scholarly writings as evidence of the rules of law.[1]

Treaties

Treaties are the most obvious source of international law. These are agreements, concluded typically between sovereign states. Treaties may be given diverse names like pact, agreement, covenant, charter, protocol, memorandum of understanding and exchange of letters. Treaties may be either bilateral or multilateral, and deal with a wide range of matters. There are multilateral lawmaking treaties that codify certain fields like the Law of Diplomatic Relations or the Law of the Sea. These large multilateral treaties usually engage the attention of those who deal with the development of international law.

[1] The Statute of the International Court of Justice, Article 38 states:

Some of these treaties have been quite successful. These have been ratified by most states and have brought stability to the areas of international law regulated by them. The best example is probably the Vienna Convention on Diplomatic Relations, which commands almost universal participation and acceptance.

But such partial success cannot disguise the fact that law-making by multilateral treaties suffers from serious shortcomings. The process is both cumbersome and protracted. For example, the making of the Law of the Sea Convention, which was initiated in 1973 with the United Nations Conference on the Law of the Sea, took until 1994, to complete its entry into force for 60 states.

The making of a multilateral law-making treaty involves several stages. The first is deliberation by an expert body such as the International Law Commission. The next step is the acceptance of a draft treaty by a political body, such as the General Assembly of the United Nations. Then, there is usually a state Conference at which the text of the draft treaty is finalized. Eventually, the treaty will be ratified by individual countries leading to its entry into force. Even after entering into force, a treaty only binds those states that have given explicit consent to be bound. Withholding of such consent by a single powerful state, such as the United States, can seriously undermine the effectiveness of the treaty. Current examples for such a situation are the Law of the Sea Convention, the Comprehensive Nuclear Test Ban Treaty or the Rome Statute for an International Criminal Court.

Even if states do eventually ratify a treaty, they can reduce its impact by attaching far-reaching reservations to it. A reservation is a unilateral statement by a state whereby it purports to exclude or modify the legal effect of certain provisions of a treaty in their application to that particular state. Other states may raise objections to a reservation. The most important standard for the admissibility of a reservation is whether it conforms to the treaty's objective and purpose. A good example of the dilemma arising from reservations is the Convention on the Elimination of All Forms of Discrimination Against Women of 1979.[2] This Convention has been ratified by several Islamic states, but subject to far-reaching reservations. However, a number of other countries have opposed these reservations as being contrary to the objective and purpose of the Convention.[3]

[2] United Nations Treaty Series, vol. 1249, 13.
[3] Multilateral Treaties Deposited with the Secretary-General, Status as on April 30, 1999 (ST/LEG/SER.E/17) 179 et seq.

In addition, the interpretation and application of treaties is frequently complicated through different language versions and by lawyers who operate under different legal traditions. The multilateral law-making treaty is thus far from being considered as an effective instrument of international legislation.

Bilateral treaties also sometimes serve as an instrument of law making. In fact, certain areas of international law are primarily regulated through a series of bilateral treaties. Prime examples are extradition treaties, air transport agreements and bilateral investment treaties. However, it is obvious that this method is neither efficient nor elegant. To create a network of bilateral treaties on a single topic, among all 188 members of the United Nations, would require over 17,000 such treaties, with each of these treaties being negotiated individually! Although often similar, these treaties are likely to display variation and consequently, do not create uniformity and equality of treatment.

Customary Law

Customary law is much more common in international law than in most domestic legal systems. In a way, this reflects the inability of international law to develop an efficient method of written law making. Customary international law emerges from patterns of behavior among states. These behavior patterns are called practice. If there is also a belief that this practice is based on a legal obligation or *opinio juris*, this could be considered as customary international law. There are several theoretical problems with customary international law. For instance, how widespread must this practice be? How long does it take to be established? How is one rule of international law replaced by another such rule? These theoretical problems arc beyond the scope of the present discussion. It is sufficient to note that this system works much better in practice than one would assume in theory. The reason is that, quite frequently, stability and predictability arc in the interest of most states.

But there are also practical disadvantages. Customary international law can be difficult to prove conclusively. This may require a lot of research, to study the practices of as many states as possible and to find relevant statements expressing a legal conviction, where such is available. Customary international law is often somewhat vague and open to conflicting interpretations. If the perceived interests of certain states or groups of states change, so will their attitude towards

customary international law, and a particular rule may then be challenged. This theme will be elaborated later, in the context of international investment law.

General Principles of Law

General principles of law arc a source of international law that is theoretically equivalent to treaty or customary law. But in actual practice, general principles arc used mostly to close gaps left by treaties and customary law. General principles of law are established by comparing national legal systems. Any principles common to all or most of these systems, may be applied also in an international law context. Examples would be principles such as the binding nature of agreements, protection of acquired rights, prohibition of unjust enrichment or principles of procedural fairness before a court of law.

General principles of law are obviously useful and are quite often applied, especially by international arbitral tribunals. But these are also rather unwieldy, and positive proof of their existence and application can be somewhat complicated. Nobody can possibly compare all domestic legal systems. A practical solution is often found by studying some leading representative systems of law, derived from different legal cultures such as civil law, common law and Islamic law, often with the help of secondary publications in accessible languages.

Decisions of Courts and Tribunals

The decisions of courts and tribunals as well as scholarly writings arc not intended to be sources of law in the strict sense. In other words, courts of law and legal scholars are not supposed to create the law. They are merely called upon to shed light on existing laws, and to clarify legal provisions through their decisions and writings.

In reality, this distinction tends to get rather blurred. Anyone who studies international law in greater detail, can observe how courts and arbitral tribunals have actually advanced the law, and understand how the theoretical framework provided by a scholar tends to influence decision makers in practice. This is hardly surprising, as there is a good deal of interaction in professional circles, among those who are involved in treaty making, state practice, adjudication and scholarly publications. For instance, professors sometimes become judges, advise parties in legal proceedings or are consulted by government officials. In other words, there is a community of

international lawyers, akin to other scientific communities like those of astronomers, anthropologists or cardiologists.

Decisions of International Organizations

The foregoing sources complete the "official" list pertaining to sources of international law, as contained in the Statute of the International Court of Justice. Yet, the question remains: Have the sources of international law really been exhausted? One source is conspicuously missing from that list: the decisions of international organizations.

The reason for this omission is easily explained. The Statute of the International Court of Justice containing this "official" list was drafted about 80 years ago, long before international organizations became a prominent feature of international life. Therefore, these decisions are a relatively new phenomenon as a source of international law. Today their existence cannot be denied.

However, the acceptance of this new aspect leads to fresh problems. Decisions of international organizations are extremely diverse in reality and hence defy any generalized description or analysis. Yet, the fact that some emanate from regional organizations like the European Community or the Gulf Cooperation Council and others from global organizations, like the United Nations, is a relatively minor problem. Much trickier the question of their legal nature in a particular case.

Some decisions contain generally binding rules, like the regulations of the European Community, and are comparable to domestic legislation. Many others, like the Resolutions of the General Assembly of the United Nations, arc normally just recommendations. But it does not follow that they are legally irrelevant. In fact, recommendations are frequently relied upon in legal argument.[4]

Not all of these decisions are equally authoritative and a determination of their legal significance often requires detailed analysis of such factors as the number of positive votes, which countries voted in favor or any confirmation through repetition. To complicate matters further, some bodies like the United Nations Security Council will adopt binding decisions at times, such as

[4] See the Judgement of the International Court of Justice in Nicaragua v. United States, *ICJ Reports* (1986) 15 et seq.

resolutions imposing sanctions on members. At other times, the Security Council will merely pass a recommendation calling upon states to follow a particular course of action, like suggesting a form of dispute settlement. In order to determine the legal nature of a particular Security Council Resolution, its text needs to be studied with a view to gauge the precise intention of the Council. In most cases, however, this is not a practical problem.

Interaction of Sources

Having surveyed these different sources of international law, it is now necessary to clarify the relationship of these sources to each other. It would be quite incorrect to assume that they exist in isolation: that certain areas of international law are regulated by treaties, other areas by customary international law and yet other areas by the decisions of international organizations. In reality, these various sources interact closely and influence each other. Stated differently, international law is not a static system of rules but rather a decision-making process. The rules of law that are identified, are abstractions derived from this process, but they are not its essence.

Even a treaty, which is an apparently clear set of written rules, is part of this process. It is usually the product of a long evolution that involves customary international law, prior treaties and often deliberations and decisions made by international organizations. After its conclusion, the treaty is implemented and interpreted by international and domestic courts, becomes part of state practice, sometimes leading to new customary international law and may ultimately be amended or abrogated by another treaty.

This complex interaction of the different sources of international law has very practical consequences. When a specific legal question is being examined or a particular case is being decided, it is not enough to find the 'right' rule, by identifying the treaty that is applicable or the appropriate rule of customary international law. Rather, it is imperative to take a synoptic look at the various sources and to analyze their relative relevance and authority.[5]

International Investment Law

These rather theoretical observations can be illustrated by providing a broad overview of international investment law. Traditionally, investment law was derived mostly from customary international law. Some of this customary international law still exists today. It consists of

[5] Harris, D.J. *Cases and Materials on International Law* (Fifth Edition, 1998).

certain procedural guarantees for foreign investors, like fair treatment and protection of investors by the home states, vis-a-vis the host states.[6] Two particularly important features were and still are, the protection of property against expropriation, and compliance with contracts concluded between investors and host states.

In the course of the 20th Century, this seemingly stable picture of international investment law was disturbed by several events. The first was the rise of socialist ideologies, notably in the Soviet Union with its repudiation of private business and property rights. The second was the development of new doctrines in Latin America that aimed to shed economic domination by the European powers and later by the United States. Such Latin American ideas culminated in the Calvo Doctrine, named after the 19th Century Argentinian diplomat and Jurist Carlos Calvo. This doctrine essentially rejects any special guarantees for foreign investors and purports to treat them just like nationals, for better or for worse.[7]

The third and probably most consequential event was decolonization. Many newly independent developing countries argued, with some conviction, that the property rights and contractual guarantees obtained by foreign investors in their countries originated in situations of inequality, that they constituted a perpetuation of former exploitation, and that investors had made and were still making excessive profits, at the cost of the host countries and their populations. The investments that stirred controversy often concerned the exploitation of raw materials, in countries with a large or exclusive dependence on these raw materials for their export earnings.

The ensuing disputes were discussed in scholarly publications, in international organisations and before arbitral tribunals. These disputes involved not only references to customary international law but also the invocation of general principles of law by both sides. The investors' side relied on "acquired rights" and the "sanctity of contracts." The host countries relied on "unjust enrichment" and on the "unequal nature of the agreements" concerned. In addition, a new doctrine was developed under the label of "permanent sovereignty over natural resources." This doctrine found expression in several resolutions of the General Assembly of the United Nations[8] and essentially proclaimed that states had a permanent and inalienable right to control the natural

[6] Malanczuk, P. *Akehurst's Modern Introduction to International Law* (Seventh Edition, 1997)
[7] Jennings, R. and A. Watts. *Oppenheim's International Law* (Ninth Edition, 1992)
[8] See e.g. UN General Assembly Resolution 1803 (XVII) of 1962.

resources in their territory, regardless of any contractual or property rights that foreign investors may have acquired. It was argued that the permanent sovereignty over natural resources was superior to the principle of sanctity of contracts and to property rights.

This conflict found its culmination in a series of resolutions adopted by the UN General Assembly in the 1970s. The most important one of these was the so- called Charter of Economic Rights and Duties of States, adopted in December 1974.[9] It was approved by an overwhelming majority that was controlled by developing and socialist countries, against the negative votes or abstentions of western industrialized states.

Not everything in that resolution was controversial. Principles such as sovereign equality, peaceful settlement of disputes and promotion of international social justice were acceptable to all. But there was one point on which differences were irreconcilable. It was the provision on expropriation.

The right of states to expropriate was not contested in principle. However, there was a new clause in the Resolution stating that in case of a dispute over compensation for expropriation, the decision should be made by the courts of the expropriating state and on the basis of the law of the expropriating state. In other words, an attempt was made to de~ internationalize the issue and to make it an internal matter of the state that took the action. This turned out to be quite unacceptable to the capital-exporting states- and to the investors themselves. Capital exporting states and investors insisted that any expropriation would have to be compensated, and that this compensation would have to be adequate, meaning that it would have to represent the full value of the expropriated property, that it would have to be prompt, that is without undue delay, and that it would have to be effective, that is, in a convertible currency.

There was much discussion whether a nonbinding resolution of the United Nations General Assembly could abrogate customary international law. One famous arbitral award in a case against Libya specifically denied this.[10] On the other hand, it was difficult to speak of a continuing overwhelming legal conviction of the international community in the face of a contrary resolution of the General Assembly adopted with a large majority. This illustrates a

[9] UN General Assembly Resolution 3281 (XXIX).
[10] Texaco v. Libya, Award of January 19, 1977, *International Law Reports* vol. 53 (1979) 389 et seq.

conceptual problem of customary international law. How is an existing rule of customary international law terminated? Is it only by a new positive rule of customary international law? Or can it simply collapse, if one of the two elements for its creation, such as practice or legal conviction, no longer exists?

The practical consequences of these developments and the confrontational atmosphere that they engendered were not favorable to economic development. The pronouncements on investor protection in international organizations were matched by a number of uncompensated expropriations that received adverse publicity in the West. Investor confidence waned. Foreign direct investment dropped perceptibly in the 1970s and 1980s. One of the consequences was the debt crisis of the 1980s. Economic development in many countries came to a halt or even showed signs of regression.

This picture underwent a transformation in the 1990s. The underlying reason was the recognition in most developing countries that the biggest single factor in economic development is the continuing flow of private investment. However, private investment needs a secure legal environment, and these legal safeguards had been undermined seriously in the 1970s.[11]

Interestingly, the most important legal instrument to restore investor confidence turned out to be the traditional bilateral treaty. Pioneered by Switzerland and Germany, the bilateral investment treaty (BIT) became the favored way for many countries to guarantee legal protection to investors. BITs regulate access for investors and guarantee fair and equitable treatment. These treaties grant protection in case of expropriations, typically by providing for full, prompt and effective compensation. Perhaps most importantly, in case of disputes between investors and host states, they offer procedural guarantees, typically through provisions for international arbitration.

BITs are by no means concluded only between industrialized and developing countries. They have become a ubiquitous aspect of international economic relations. They are often concluded between developing countries. The successor states of the Soviet Union have concluded many BITs. The People's Republic of China has BITs with about 100 states. There are estimates that there are now over 1,500 BITs worldwide. Another unexpected source of international investment law is domestic legislation. Nowadays, capital-importing states all over the world are

[11] Pritchard, R. (ed.) *Economic Development, Foreign investment and the Law* (1996)

eager to project themselves as secure and reliable places for foreign direct investment. Many have passed investment codes, which are domestic laws setting out guarantees for foreign investors. These codes typically incorporate the standards of international law, but often go beyond them by promising favorable tax conditions and guaranteeing unimpeded transfers of money in and out of the country.

One obvious way of improving international investment law would be the creation of a multilateral treaty. Attempts to create a comprehensive Multilateral Agreement on investment (MAI) designed to supplement or replace the multitude of bilateral treaties have not succeeded and are unlikely to succeed in the near future.

However, there is one multilateral treaty dealing with dispute settlement that deserves mentioning. It is the Convention on the Settlement of investment Disputes between States and Nationals of other States. This Convention established the International Centre for Settlement of investment Disputes (ICSID). The ICSID Convention offers an independent system of conciliation and arbitration that is, in principle, available in most investment disputes. Most capital-exporting and capital importing countries have ratified this multilateral treaty. The host state and the investor have to agree to submit any disputes to this system. This can be done through a contract between the two parties.

More frequently, there is a clause in domestic legislation or in a bilateral investment treaty offering this form of dispute settlement to investors who may take up this offer at any time. This system of international dispute settlement offers advantages to both sides. The host state improves its investment climate by boosting investor confidence and is likely to attract more investment. In addition, the host state gains a guarantee that the home state of the investor will not exert diplomatic pressure on the host state. In turn, the investor no longer depends on the domestic courts of the host state that it may perceive as biased.[12]

Instead, he gains access to' an international arbitral tribunal. The tribunal will apply not only the law of the host state but also international law. The result is an arbitral award that is binding and enforceable in all countries that are parties to the Convention.

[12] Shaw, M.N. *International Law* (Fourth Edition, 1997).

There are estimates that more than half of the world's private investments are currently protected by this system. Quite a few cases have been decided under this system and numerous cases are still pending. More importantly, the mere knowledge that there is an effective system of dispute settlement has a deterrent effect. In other words, it is likely to induce legal conformity in the first place and will definitely contribute towards stability. In reviewing the decisions of arbitral tribunals under this system, an already familiar picture emerges. These tribunals apply all sources of international law in combination. They rely on multilateral and bilateral treaties, typically BITs. They apply customary international law and general principles of law. They refer back to decisions of other arbitral tribunals and international courts. Thus, the interaction and interrelation of the various sources of international law can be observed even in the microcosm of an arbitral award in an investment dispute.

Conclusion

There are different sources of international law such as treaties, customary international law and general principles of law. In their actual application, however, these sources are closely interrelated. They often interact by supplementing and replacing each other. Often a rule created in one type of source later emerges in the form of another source. Thus, these typical sources of international law ought never to be viewed in isolation.

The law-making process in the current international system is far from ideal, it is poorly coordinated and rather haphazard. Considering this structural weakness, the system works surprisingly well most of the time. However, this should not induce complacency. The nature and the magnitude of present and prospective global challenges require fresh thinking in the sphere of international law. It will require creativity to come up with innovative ideas and techniques and much courage to implement them effectively.