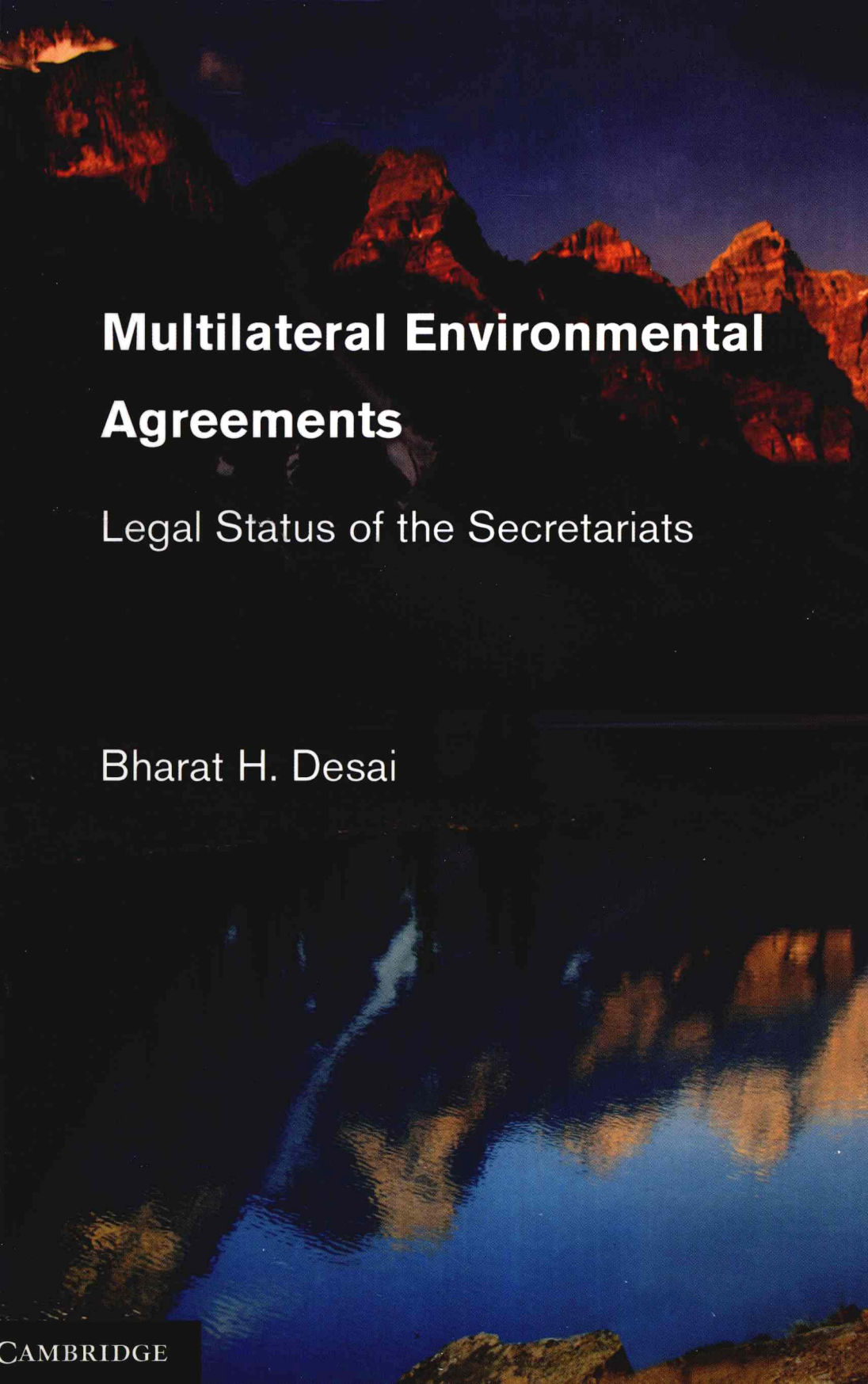

Multilateral Environmental Agreements

Legal Status of the Secretariats

Bharat H. Desai

CAMBRIDGE

Multilateral Environmental Agreements

LEGAL STATUS OF THE SECRETARIATS

Bharat H. Desai
Jawaharlal Nehru University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521883283

First published 2010

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Desai, Bharat.
Multilateral environmental agreements : legal status of the secretariats / Bharat H. Desai.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-521-88328-3 (hardback)
1. Environmental law, International. 2. Foreign trade regulation. 3. International trade. 4. International labor activities. I. Title.
K3585.D479 2010
341.4–dc22 2009042398

ISBN 978-0-521-88328-3 Hardback

Preface

This study is an off-shoot of the work (begun in 1998) by the author on the process of "institutionalization" in the field of international environmental law. This book seeks to take a closer view of the multilateral regulatory technique to address sector-specific environmental *problematique,* as well as of the legal status of the secretariats that "service" the institutionalized intergovernmental process. The work was spread over a period of some nine years, during which the author visited various secretariats of multilateral environmental agreements (MEAs) and held discussions with concerned *dramatis personae* in the field, both in person and through written communications.

The initial interest in the crucial aspect of legal status of the secretariats was triggered by interactions with Arnulf Müller-Helmbrecht, then Executive Secretary of the Convention on Migratory Species of Wild Animals (CMS), during my stay in Bonn. I was inspired by Ulf's sheer passion, knowledge of the field, legal acumen, and firsthand account of the pitched battles he fought to extract "legal due" for the secretariat of the CMS. The resultant insight provided the initial basis for a closer look into the mystical area of the legal status of convention secretariats from my perches at various times in the cities of Bonn, Geneva, and Heidelberg.

I express my gratitude to Alexander von Humboldt Stiftung who generously made possible my stays in Bonn, Geneva, and Heidelberg. I enjoyed the discussion sessions on multilateral institutional issues on the

environment with Rudolf Dolzer at the Institute of International Law of the University of Bonn. They helped me to have an incisive understanding of the role of various actors, as well as the workings of regime-based institutions. I have had the benefit of staying in Heidelberg to work at the Max-Planck Institute of Public International Law. I thank Rudiger Wolfrum and Armin von Bogdandy for providing me with work facilities.

In the course of writing this book, I had the great pleasure of interacting with several heads and legal officers of convention secretariats, UNEP officials, and officials of other host institutions who generously shared their views and made available relevant documents. They include Barbara Ruis, Calestous Juma, Dan Ogolla, Daniel Navid, Elizabeth Mrema, Francesco Bandarin, Gerardo Gunera-Lazzaroni, Iwona Rummel-Bulska, Janos Pasztor, Jim Armstrong, John Donaldson, Katharina Kummer, Lyle Glowka, Marci Yeater, Martin Krebs, Michael Graber, Richard Kinley, and Robert Hepworth. I greatly appreciate the working space provided to me by the secretariats of the UNFCCC and CMS in Bonn and of the UNITAR at the International Environment House in Geneva.

I greatly appreciate the special gestures of Ralph Zacklin, former Assistant Secretary General of the UN Office of Legal Affairs, and Klaus Töpfer, former UNEP Executive Director – who both took time to send me detailed notes on their respective perspectives on the subject – as well as of Maritta Koch-Weser, former Director-General of the IUCN, who spared time in Gland for discussions on various issues.

In the wake of this book, I have benefited from the insight – through discussions in person or through written communications – and the works and experiences of several scholars and practitioners in the field. These include Alan Boyle, the late Alexander Kiss, Alexander Timoshenko, Bakare Kante, C. F. Amerasinghe, Daniel Navid, David Freestone, Donald Kaniaru, Edith Brown Weiss, Geir Ulfstein, Gerhard Löibl, Günter Handl, Francoise Burhenne, Jan Klabbers, Jose Alwarez, Jutta Brunnee, Nick Robinson, Niels Blokker, Oran Young, Peter Sand, Philippe Sands, Rahmatullah Khan, R. R. Churchill, and Wolfgang Burhenne.

My scholarly quest in this field has been nurtured by regular interactions with some of my brightest students, who provided a stimulating springboard for classroom discussions and widening horizons through their research works under my supervision.

Last, but not least, I am grateful to John Berger, Senior Editor at Cambridge University Press, who all along has shown immense patience, and who encouraged me to overcome the vicissitudes of life in order to complete this book.

January 29, 2010
desai@mail.jnu.ac.in

Contents

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.

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

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.

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.

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.

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.