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Framework Conventions as a Regulatory Tool

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Abstract

The adoption of framework conventions is a relatively recent phenomenon in international law and has mainly been employed in the field of international environmental law. According to the so-called "framework convention and protocol approach" parties agree on a more general treaty, the framework convention, and more detailed protocols to fill out the room left for specific regulations. While there are no legal definition and fixed models for framework conventions, they have certain characteristics in common. Namely the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance are assigned to the framework, while more detailed rules and the setting of specific targets are left to either parallel or subsequent agreements between the parties. This regulatory technique has certain benefits compared to single "piecemeal" treaties in international law. Yet, framework conventions and protocols are subject to the law of treaties and relevant practice and thus not *per se* easier to negotiate or more flexible than other agreements.

A. Introduction

The regulation of international issues by framework conventions is a relatively recent regulatory technique in international law and has mainly been employed in the field of international environmental law.[1] Framework agreements are usually associated with the so-called "framework convention and protocol approach" by which parties agree on a more general treaty, the framework convention, and more detailed protocols to fill out the room left by the legal framework for specific regulations.[2] The conclusion of treaties establishing a framework for further and more detailed norms reflects a change in the subjects of international law on the one hand and the enhanced

[1] The vast majority of literature on the law of treaties has not yet recognized framework agreements as a subject of debate. The inclusion of an entry on "Framework Agreements" into the new edition of the *Encyclopedia of Public International Law (EPIL)*, however, is an example of growing awareness of the characteristics of framework conventions as a regulatory tool. See N. Matz-Lück, 'Framework Agreements', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2008) available at http://www.mpepil.com/ (last visited 23 August 2009).

[2] One of the first environmental framework agreements was the *Barcelona Convention for the Protection of the Mediterranean Sea against Pollution*, 16 February 1976, 15 I.L.M. 290.

complexity of contemporary international law on the other. A framework convention with one or several protocols could be a potential tool to effectively draft a new legal instrument on biochemicals to address the security issues associated with the rapid development of new substances.

There is no fixed model for framework agreements and the term does not have a technical meaning.[3] Contracting parties set up framework conventions which are adapted to their objectives and organisational needs. As a consequence they come in different shapes and institutional designs. They may range from mere procedural frameworks for further substantive agreements[4] to treaties that contain rights and obligations themselves while leaving certain specific questions to further regulation[5]. Yet framework treaties have certain fundamental characteristics in common. The character of an agreement as a framework is mainly established by the decision of the contracting parties to delegate questions that are relevant for achieving the agreement's objectives to additional regulation. Whether the issues of such regulations, most often adopted in the form of protocols, are already determined by the framework, whether they are negotiated in parallel or subsequently, depends upon the will of the negotiating states. Generally, the parties to the framework also establish some institutional structure for the further development of more substantive agreements.

If the title of a treaty explicitly refers to the instrument as a "framework convention", as does e.g. the UN Framework Convention on Climate Change,[6] the intent of the drafters to create a legal framework for further action is easy to identify. By labelling a treaty a framework convention the contracting parties indicate their intent to create a larger regulatory regime in a two-step procedure. However, the mentioning of the framework character in the title of a treaty is not a constitutive element. Sometimes conventions that were not explicitly drafted as framework agreements have been typified as such retrospectively when the "framework convention and protocol approach" was more widely used and qualified as a regulatory tech-

3 D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15.

4 An example for such a framework is the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, 22 June 1980, 19 I.L.M. 15.

5 The *Framework Convention on Climate Change*, 20 June 1992, 31 I.L.M. 849, for example, goes significantly further than the establishment of institutions for further negotiation and contains principles as well as rights and obligations for the different categories of States parties.

6 *Id.*

nique.[7] In this context, it should be stressed that the qualification as a framework convention does not bear any consequences under the law of treaties. All customary and codified rules governing *inter alia* the adoption, application, modification, interpretation and termination of treaties are, in principle, applicable to framework agreements and their protocols.[8]

B. Regulating International Affairs by Treaties

By sheer number treaties are the main legal tool regulating the relationship between states. Together with customary international law and general principles of law, treaties belong to the sources of international law.[9] Customary international law as an instrument is slow to evolve, restricted to fundamental rights and obligations, difficult to determine and generally inflexible. The evolution of customary international law requires two constitutive elements: state practice and the underlying *opinio juris*, i.e. the conviction that the relevant practice is owed to a legal obligation. In the absence of either codified treaty obligations or binding resolutions by the UN Security Council, state practice is difficult to steer when the development of new customary rules is desired and waited for. Although customary law is an important source of public international law it is hardly an instrument for the active creation of new international law. The figure of so-called "instant custom", i.e. customary international law that does not require a history of state practice, is questionable and, although proposed by some as a more flexible means of adapting international law to modern realities,[10] has not generally been accepted.[11]

7 The *Convention on the Prevention of Pollution from Ships*, 2 February 1973, (MARPOL 73/78), 12 I.L.M. 1319 and 1341 U.N.T.S. 3, with its different annexes on pollution sources and pollutants is an example to that extent, although it is not ordinarily classified as a framework convention D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15.

8 With only few exceptions the rules of the law of treaties are not of a compulsory nature. Hence, parties to a treaty can deviate by adopting specific provisions governing their agreement, e.g. on the entry into force or on amendments.

9 Art. 38 para. 1 lit. a) Statute of the International Court of Justice (ICJ) lists conventions as one of the primary means to decide cases in accordance with international law.

10 B. Langille, 'It's 'Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 *Boston College International and Comparative Law Review* (2003), 145, 149.

11 G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983), 86.

Law as it is codified in treaties, however, may influence and promote the development of customary international law. Although there is no formal relationship between them treaties and customary law are to some extent linked. Treaties may explicitly codify an already existing rule of customary law. They may also formulate and by this means draw attention to evolving, i.e. not yet legally accepted and binding, rules under customary law. In this case wide acceptance of the treaty by states or reference to rules codified by the treaty in judicial decisions may promote the process of evolution of the customary rule.[12] The emerging rule of customary international law would then also bind states who are not parties to the treaty.[13]

Over time the issues regulated by treaties and the legal approaches towards regulation have changed considerably. When international law was still perceived as a means to provide for the peaceful co-existence of states, it had a minimalist and largely negative connotation: the prevention of violence between states. Early treaties concerned issues on a mainly bilateral basis and regulated such issues as the delimitation of boundaries, peace after armed conflicts and trade. Once the treaty was concluded in most cases it remained unchanged. Institutional support of the treaty was lacking. The parties to the treaty controlled compliance in a reciprocal manner. Lack of performance led to diplomatic exchanges and ultimately dispute settlement. Although states still conclude bilateral treaties - e.g. border treaties - new challenges of a modern world order, such as the conservation of the global environment or the ban of weapons of mass destruction, called for multilateral and, preferably, universal instruments with institutions for compliance control and assistance for implementation. International law changed towards a law of co-operation.

Threats to the security of the international community like the proliferation of nuclear weapons or environmental hazards such as ozone deple-

[12] *The UN Convention on the Non-Navigational Use of International Watercourses*, 36 I.L.M. 700, has not yet entered into force. However, certain rules codified in the treaty are used by international courts and tribunals to argue the *lex lata*. Since the entry into force of the convention is doubtful, some authors argue that its relevance must be seen in its impact on customary law rather than an evolution of treaty law, A. Tanzi, 'The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes', 11 *Leiden Journal of International Law* (1998), 441, 442.

[13] Only States that qualify as persistent objectors to certain norms of customary international law are not bound by them. On the notion of persistent objectors see O. Elias, 'Some Remarks on the Persistent Objector Rule in Customary International Law', 6 *Denning Law Journal* (1991), 37.

tion have to be based upon co-operation of a large number of states to be effective. Co-operation as a principle and as an obligation that is promoted by an institutional structure is at the heart of modern international regulatory systems. For example, the effectiveness of the regulation of modern weapons for biological, chemical or nuclear warfare depends upon the close collaboration of the relevant international actors and upon institutional structures for monitoring, reporting and decision-making. The drafting of international legal instruments, which were designed to achieve the new objectives while receiving wide international acceptance, became challenging. As a consequence international law developed new modes of legal technique.

The establishment of institutions by the parties to a treaty is not a characteristic restricted to framework treaties. The UN Convention on the Law of the Sea,[14] for example, has a Meeting of States Parties and even its own tribunal. Despite the conclusion of two implementation agreements, the Convention on the Law of the Sea is not perceived as a framework convention. Rather, due to the comprehensiveness of its provisions it is called the "constitution of the oceans". The two implementation agreements that were adopted to elaborate further on deep seabed mining and straddling fish stocks respectively do not turn the Law of the Sea Convention into a mere framework to be filled in by additional instruments. Although they may differ with regard to their mandate and competencies the organs set up by framework agreements serve to guarantee a "living convention" that allows and facilitates further regulation. Many framework agreements have established organs which are comparable to one another concerning their function, e.g. a plenary body for decision-making which is usually called the Conference of the Parties (COP) or the Meeting of the Parties (MOP), a secretariat for handling administrative matters and e.g. the collection of national reports and a body for scientific advice. The circumstance that many framework agreements have established organs responsible for technical and scientific advice does not result from their character as a framework but from the fact that most have been established in the field of international environmental law. Although there is no specific institutional design which distinguishes framework agreements from other institutionalised agreements, framework conventions benefit greatly from a permanent structure that allows *inter alia* for the establishment and support of working groups for the preparation of protocols and supervision of the effectiveness of the regime.

[14] *UN Convention on the Law of the Sea*, 10 December 1982, 21 I.L.M. 1261.

While universal acceptance of multilateral treaties that address issues of global concern seems a necessity to effectively achieve these instruments' objectives, striving for universality may also be a significant obstacle for effectiveness. In a world that is politically divided by the interests of the North and the South, universal legal regulation requires compromise that impedes substantive commitments by the parties. Often the choice is between many states but weak regulation or strong legal obligations but few participants. Framework conventions following the so-called "framework/protocol" approach attempt to overcome this dilemma. A vague and relatively weak framework upon which all parties can agree is negotiated to provide for the general objectives, principles and institutions while specific obligations are transferred to a protocol. Although the protocol may have significantly fewer parties than the framework, the stage is set and parties have created some room for further negotiation, monitoring, scientific evidence and persuasion of more parties to join the protocol.

In principle, the content and structural design of a treaty depends upon the decision of the states or organisations negotiating the agreement. The rules established by the law of treaties, with few exceptions,[15] are not obligatory and only apply in the absence of an agreement to the contrary between the negotiating parties. From a legal perspective treaties are flexible tools that can be easily amended or modified depending upon the agreed modes for such activities. In practice, however, the negotiation of treaties is time-consuming and can take years, many do not enter into force and ultimately they are difficult to modify and to adapt to new situations. Tools such as a dynamic interpretation of treaties that allow new concerns to be taken into consideration are limited in number and face their own specific restrictions.

[15] The rule of *pacta sunt servanda* is one of the leading customary principles of international law not at the disposal of the parties. The purpose of legal regulation by treaties would be obsolete if treaties would not, as a general rule, have to be performed. This customary rule has also been codified in Art. 26 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 18232.

C. Notion and Legal Characteristics of Framework Conventions

I. Approaches to a Definition

As mentioned above the term "framework convention" is not a technical legal term. Since framework conventions vary considerably with regard to their content, the degree and form of substantive obligations and the institutional design, there is no agreed legal definition but only a collection of elements common to most framework agreements. One could argue from the function of framework agreements that they "establish a general system of governance, and not detailed obligations".[16] Hence, from a theoretical point of view one might say that the specific characteristic of a "typical" framework convention is the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance, while leaving more detailed rules and the setting of specific targets either to parallel or subsequent agreements between the parties. The "framework convention and protocol approach" which is used to describe the regulatory technique points at the two-step procedure inherent to most framework agreements. Such a process leads to the adoption of different international treaties on a subject matter that are linked by certain restrictions e.g. on the parties joining the protocols or by sharing institutions.[17] Such an aim at comprehensiveness can be contrasted with the so-called "piecemeal approach" to international regulation. In short, one could say that frameworks are broad and general treaties, whereas protocols are specific and detailed treaties. Taken together they attempt to address an issue of international law in an effective manner.

16 Bodansky, *supra* note 3, 15.

17 As the parties enjoy absolute freedom under the law of treaties as to design their agreement institutionally, the sharing of institutions between framework and protocol is not a necessity. Parties can either rely upon the institutional structure of the framework convention or create new institutions for the protocol. The freedom of institutional design may lead to structures which are abbreviated "COP-MOP": the Conference of the Parties (of the framework) serving as the Meeting of the Parties (to the protocol).

II. Piecemeal Approach v. Regulation by Framework Agreement and Protocol

The "framework convention and protocol approach" is usually perceived as the opposite to a "piecemeal approach" to legal regulation. When states pursue a piecemeal approach they try to address a larger problem by regulating isolated aspects thereof. Examples from the field of international environmental law are the Convention on Early Notification of a Nuclear Accident[18] and the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency.[19] Both were adopted as a reaction to the Chernobyl accident. States felt the need to address questions of preparedness to accidents as a matter of urgency without feeling able to comprehensively establish a regime on nuclear energy and environmental protection.[20]

While such a strategy has the benefit that parties can concentrate on the most pressing needs and adopt international law instruments in a timely manner, it also bears several risks. First of all the speedy negotiation and adoption of international treaties, i.e. often a quick compromise, can lead to shortcomings concerning the substantive regulations.[21]The negotiating parties may also lose sight of the larger picture if they only focus upon single aspects of an issue. Furthermore, international treaties may get more and more diversified and may contradict one another if there is no overarching framework that gives guidance on the general principles. The discussion of a specialization and fragmentation of public international law shows how difficult it can be to make different instruments dealing with aspects of the same larger issue coherent with one another. In general, a piecemeal approach may prove successful if a small and homogenous group of states seeks to regulate an issue urgently.[22] If such a group finds a solution by concluding an international treaty, this instrument can be used as a model for further regulation by other states or treaties on a regional or even global level.

18 *Convention on Early Notification of a Nuclear Accident*, 26 September 1986, 25 I.L.M. 1370.

19 *Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency*, 26 September 1986, 25 I.L.M. 1377.

20 U. Beyerlin, *Umweltvölkerrecht* (2000), 41.

21 This is also the main criticism concerning the mentioned treaties on nuclear accidents; see P. D. Cameron, 'Nuclear Safety after Chernobyl: The Role of International Law', 1 *Leiden Journal of International Law* (1988), 121.

22 Beyerlin, *supra* note 20, 41.

It proves complicated to form a comprehensive regime from different existing "piecemeal" agreements. In the field of biological diversity the many species-oriented or sectoral agreements that focused upon the conservation of certain animals or plants or regulated trade in species have not formally been linked to the 1992 Convention on Biological Diversity (CBD).[23] Although there had been plans to bring all former conventions together under a new "umbrella convention" all piecemeal treaties on different aspects of the conservation of biological diversity exist in parallel to one another. It depends upon implementation by the parties and upon co-operation between *inter alia* the secretariats and the conferences of the parties to different treaties to prevent contradictions or a doubling of efforts.

III. The Framework Convention as a Legal Tool

1. Different Shapes of Framework Agreements

While mainly developed in the environmental context, e.g. the Framework Convention on Climate Change, the Vienna Convention for the Protection of the Ozone Layer[24] or the Convention on Biological Diversity,[25] the framework convention as an instrument is not restricted to specific topics. So far the only agreement explicitly drafted as framework aiming at a "framework convention and protocol approach" in a non-environmental context is the Framework Convention on Tobacco Control(FCTC).[26] States parties have not yet agreed upon a protocol to the Framework Convention on Tobacco Control, but it leaves room for the regulation of different issues.[27] The European Framework Convention for

23 *Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 818.

24 *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 26 I.L.M. 1516.

25 While not a framework convention by name, the Convention on Biological Diversity bears certain characteristics of a framework agreement and has been accepted as such. Bodansky, *supra* note 3, 16, calls the agreement a "borderline case" because of its provisions, for example, on conservation of biological diversity and access to genetic resources, which he considers more specific than in typical framework conventions.

26 *Framework Convention on Tobacco Control*, 21 May 2003, 42 I.L.M. 518.

27 On the proposal for a protocol to prevent smuggling of tobacco see N. Boister & R. Burchill, 'Stopping the Smugglers: Proposals for an Additional Protocol to the World Health Organization's Framework Convention on Tobacco Control', 3 *Melbourne Journal of International Law* (2002) 1, 33

the Protection of National Minorities,[28] while explicitly established as a framework agreement, follows a different approach. In this context the framework serves as legally binding guidance for national regulation that is adapted to the specific needs of the parties. Here again, the framework serves as an umbrella setting the general objectives and main principles while allowing each party sufficient room to take national particularities into account. In this case the framework treaty is a "normal" and relatively general treaty of international law that permits parties a great deal of leeway at the implementation level.

Despite certain indicators for characterizing an agreement as a framework convention, it may be difficult to draw a line between typical framework agreements and hybrid forms, i.e. conventions that set out a framework of governance and procedure for some issues but establish substantial and detailed rules in other respects. Such hybrid forms may not represent "typical frameworks" but follow the same ideas for certain issues. All frameworks share the procedural possibility to address an issue in a comprehensive manner by codifying consensus on the general objectives and basic principles while allowing for parallel or later legal agreement on specific issues under or aided by the institutional roof of the parent convention. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[29] is an example in this regard: the convention establishes detailed rules on the transboundary movement of wastes but leaves the question of liability to a subsequent protocol.[30] The benefit of transferring single and difficult questions to a protocol lies in the circumstance that the convention remains in force and must be implemented even if the protocol fails due to the lack of ratifications.[31]

A slightly different approach to framework treaties and later agreements is the formulation of general principles in the framework and their application to a specific situation in a bilateral or regional context. The Draft

28 *European Framework Convention for the Protection of National Minorities,* 1 February 1995, 34 I.L.M. 351.

29 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 28 I.L.M. 657

30 *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal,* 10 December 1999 available at http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf (last visited 1 December 2008).

31 *The Liability Protocol to the Basel Convention,* 10 December 1999, has not yet entered into force. For a list of ratifications see http://www.basel.int/ratif/protocol.htm (last visited 1 December 2008).

Articles on a Law of Transboundary Aquifers[32] had originally been envisaged by the International Law Commission (ILC) as a framework treaty to serve as binding guidance for further bilateral treaties between parties on shared groundwater resources. Such an approach would formulate the minimum legal standards, e.g. the preservation of ecosystems and an equitable utilization of the water resources, while allowing states to find management solutions that take into consideration the specific hydrological, geographical and socio-economic aspects of a joint utilization of the resource. When the Articles were adopted, the ILC did not propose to turn them into a legally binding framework convention but to use them as "soft-law", i.e. non-binding, recommendations. However, in the future state practice shall be monitored in order to reassess the possibility of a framework agreement at a later stage. In any case, such an agreement would not follow a framework convention and protocol approach but give legally binding guidance on bilateral and regional treaties between states and for national implementation.

2. Political Reasons for the Creation of Frameworks

As mentioned above, framework conventions are used to establish larger regimes consisting of legal regulation and institutional structures for more effective governance of an international issue. Whether the framework agreement is a suitable instrument to regulate an issue depends mainly upon the need to comprehensively regulate a question of international law with general rules and further more detailed regulation in additional instruments. The reasons for choosing a process that takes several steps to regulate an issue may be political rather than legal, e.g. when states agree on the urgency to address a question more generally but cannot reach consensus on all the details of a regulation without further (and potentially lengthy) negotiation. In the context of climate change and ozone depletion, for example, the drafters first agreed upon the general principles, objectives and institutions but left specific targets and timetables for later regulation. Sometimes such an approach is not only politically feasible but allows for further research and scientific evidence and advice on the means to achieve the objectives of the convention.[33] Although the deferral of questions to later regula-

[32] Text as adopted by the Drafting Committee of the International Law Commission on second reading, UN Doc A/CN.4/L.724, 29 May 2008.

[33] Many environmental agreements have established bodies for scientific and technical advice that assist with the implementation and further development of the treaties; e.g.

tion may seem to evade the difficult process of finding solutions to acknowledged problems, such a tactical procedure may create some room for further negotiation, additional evidence, political persuasion, institution-building (e.g. for technical, financial or other assistance) and practice. Although there can be no guaranteed success of a two-step procedure, the postponement of regulation may prove more successful then negotiations under political pressure to reach consensus within a limited timeframe. One does not know beforehand, whether pressure owed to constraints in time may create the necessary consensus to substantively regulate an issue or lead to particularly weak achievements due to compromises.

3. The Legal Nature of Framework Conventions

Generally, treaties may regulate all aspects of international relations and may be very detailed. A framework agreement is a legally binding treaty of international law. By its principal legal nature it does not differ from other conventions. The rules on the law of treaties, e.g. concerning the interpretation, modification and termination of treaties,[34] are fully applicable to framework conventions as well as to protocols or implementation agreements. The Vienna Convention on the Law of Treaties (VCLT) – "the treaty on treaties" – does not mention framework agreements as it was adopted in 1969 i.e. before a framework/protocol approach established itself as a regulative technique of public international law. While it may be discussed for various reasons whether the Vienna Convention on the Law of Treaties is still a viable tool to address modern multilateral treaties there seems no need to specifically take up the issue of framework agreements.

The significant difference between "normal" treaties and framework agreements concerns the relationship between the framework and more detailed protocols to the convention. It is a particularity of the framework convention and protocol approach that it relies upon a closed treaty regime. Only parties to the framework agreement can become members to the protocols. This precondition guarantees that states are bound by the guiding principles of the framework when interpreting and implementing the rights and obligations under the protocol. This issue however is best addressed by the parties to the framework in the text of the framework treaty. The Vienna Convention for the Protection of the Ozone Layer regulates in its Art.

the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) (Art. 25 CBD).

34 These are governed by the Vienna Convention on the Law of Treaties and by customary international law.

16para. 1 that "[a] State or a regional economic integration organizations may not become a party to a protocol unless it is, or becomes at the same time, a Party to the Convention."The other framework conventions that rely upon a framework-protocol approach contain similar provisions, e.g. Art. 32 CBD and Art. 33 para. 4 FCTC.

IV. Protocols

Usually parallel or subsequent agreements on more detailed questions envisage broad participation by all parties to the framework and are drafted as so-called "protocols" to the mother convention. The Framework Convention on the Ozone Layer and its very successful Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[35] or the Framework Convention on Climate Change and its not so successful Kyoto Protocol[36] and the Convention on Biological Diversity with its Cartagena Protocol on Biosafety[37] are some examples in this regard. Such protocols are international treaties themselves and the rules on international treaties apply to the framework as well as to the protocol.

As a consequence, protocols are not necessarily easier to negotiate than other treaties. If states already had great difficulty in agreeing on a framework, it may be a lengthy process to find consensus concerning a protocol with clear and enforceable commitments, although time may allow for further developments such as scientific evidence or institutions supporting further regulation e.g. by granting assistance. Much depends upon the framework itself with its guiding objectives and the preparation of a protocol by e.g. the treaty's organs, and, of course, whether states entering into negotiations can agree on the substantive content of a protocol. Sometimes protocols are envisaged from the beginning and even negotiated in parallel to the framework convention. In other cases the framework only provides for the procedure to adopt protocols without specifying topics. The most effective method seems to include the most relevant issues for further protocols already in the text of the framework agreement in order to keep the focus on the most pressing needs for further development. The list, however,

35 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1550.

36 *Kyoto Protocol*, 11 December 1997, 37 I.L.M. 32; As the Kyoto Protocol terminates in 2012 parties are currently attempting to negotiate a new protocol which shall replace the Kyoto Protocol.

37 *Cartagena Protocol on Biosafety*, 29 January 2000, 39 I.L.M. 1027.

should not be enumerative to prevent a modification procedure if a change in circumstance requires a protocol on another issue. By such a procedure states are obliged to co-operate through or with assistance by the treaty's organs and negotiate on specific issues without losing the possibility to address further topics.

Even if targets and timetables are transferred to later agreements, the framework convention itself is not without effect. The establishment of the guiding principles and an institutional setting serve to facilitate the conclusion of further protocols while at the same time reducing the freedom of the parties to design the protocols and their national legislation. Since the principles and objectives as well as rules on governance of the treaty regime are laid down in the framework agreement, it is also relevant for the development of state practice in regard to the later protocols.

Apart from the limitations concerning the parties to the protocols the general rules of the law of treaties are applicable. Protocols only enter into force if a certain number of parties join. This number is specified in the protocol. The Montreal Protocol, for example, required 11 instruments of ratification or accessions[38] (Art. 16 para. 1 Montreal Protocol). Each party willing to be bound by the protocol has to sign and ratify the protocol or accede to it at a later stage.

V. Flexibility of Framework Conventions

Whether framework conventions are flexible to respond to scientific, technical or other changes depends upon the provisions for the adoption of protocols or annexes and methods of modification and amendment. It is not a specific characteristic of frameworks to be more flexible than other treaties. The possibility to adopt protocols to fill in the framework seems a flexible tool to address issues left open by the general setting. However, protocols being treaties the drafting process can be lengthy, the adoption can easily fail due to a lack of consensus and the entry into force depends upon ratification of each party to the framework. While some treaties accept majority voting for the adoption or modification of (technical) annexes, the modification of treaties still depends upon consensus of all states parties. If it is considered a viable tool to establish lists, e.g. listing prohibited substances, these should be included in annexes that can be changed more eas-

[38] A particularity, which is not unusual in environmental law, is the requirement that the eleven parties must represent two-thirds of 1986 global consumption of the controlled substances. Otherwise the entry into force is postponed until the condition is fulfilled.

ily to react to factual changes in a timely manner. Whether it is considered effective to operate with different technical lists or whether drafters prefer one substantive provision covering all known and future activities or a combination of both is a political decision.

VI. Relationship to Other Instruments

As a general rule – and subject to certain specific exceptions – international treaties exist independently from one another. There is no general hierarchy of sources or of treaties in international law. A rudimentary kind of ranking is established by the concept of *ius cogens*, i.e. norms of international law of a peremptory nature. In this case, a hierarchy between treaties can arise, because a treaty which codifies an accepted rule of *ius cogens* will render void all other treaties infringing that rule. Likewise if a new peremptory norm of general international law emerges any treaty in conflict with that norm is void and terminates (Art. 64 VCLT).Furthermore, one may argue that the UN Charter is a kind of prevailing constitution due to its Art. 103. However, even this perception is subject to much debate.[39]

In principle the validity and applicability of treaties is not affected by the conclusion of new agreements. In this respect framework agreements do not differ from other treaties. Their framework character is decisive for the relationship to their protocols but not for the one to other existing or future treaties. This means that a new framework convention on biochemical controls would exist in addition to the existing treaties.

The absence of a hierarchical legal order as known from national and supranational legal systems leads to a systemic structure in which international agreements are part of a parallel order. However, conventions do not exist in a legal vacuum. A new treaty is "born" into the existing system and may interact with existing and future agreements as well as with the existing rules of customary international law. Rules of the international law of treaties govern the relationship between different treaties.

In the simplest model all parties to an agreement later become parties to a new convention on the same subject matter. This case is addressed by Art. 30 para. 3 VCLT. Here the parties do not necessarily terminate the old agreement by the conclusion of a new one, but the prior one is only applicable as far as it is compatible with the later one. If all parties agree, existing treaties could also be modified in a way that they are governed by a new

[39] On the lack of general hierarchies see also R. Wolfrum & N. Matz, *Conflicts in International Environmental Law* (2003), 120 with further references.

legal and institutional framework. However, the case gets significantly more complicated if the parties to the two agreements are not identical. In such a case the old agreement remains fully applicable for states only party to this treaty in relation to all other parties, while the new one applies between all its parties. As a consequence there is no coherent legal regulation of an issue. The same may arise in the case of frameworks and protocols, if not all states to the framework also ratify the protocols. However, if a matter urgently requires regulation, it is beneficial to start a protocol with only a few parties and to hope for a role-model effect instead of adhering to the *status quo* or negotiating for consent of all parties. In case of the latter the necessary compromise to get all contracting parties of the framework to participate in the protocol may either take too much time or considerably water down the regulation.[40]

When attempting to create or add to a larger regulatory regime, the challenging task is to provide for the necessary complementarities. The interpretation of agreements in a "mutually supportive" way is one possibility to bring different agreements into coherence. Notions of a dynamic interpretation of agreements in the light of new facts or new legal commitments may also be employed. One of the main difficulties in the context of interpretation lies in the question which body is competent to decide on a (legally binding) interpretation.

Ultimately it depends upon the will of the parties to an agreement to design the relationship to other agreements. Parties can include so called "conflict clauses" in their agreements that regulate the relationship to existing or new treaties.[41] In the most common clause parties provide that the new agreement "shall not affect the rights and obligations under any existing […] international agreements"[42] or provide for a rule of interpretation

[40] It will remain difficult enough to establish a legal agreement that addresses the issue in question effectively and takes on board the most relevant global players. The Kyoto Protocol, for example, suffers *inter alia* from the fact that the USA as one of the largest emitters of carbon dioxide is not a party. The attempts to get Russia and Canada to join in order to achieve the necessary number of ratifications from industrialized states and states with economies in transition led to significant concessions.

[41] N. Matz-Lück, 'Treaties, Conflict Clauses', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008) available at http://www.mpepil.com (last visited 23 August 2009).

[42] Art. 47 para. 2 of the *Convention on the Stepping Up of Cross-border Cooperation particularly in Combating Terrorism, Cross-border Crime and Illegal Migration*, 7 July 2005 available at http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf (last visited 1 December 2008). Art. 22 para. 1 CBD is another example, yet,

that prevents limitations or detractions from the obligations under other treaties. Art. VIII of the Biological Weapons Convention (BWC) is an example of the latter concerning the relationship between the BWC and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Conflict clauses can be included in the preamble of a treaty or in the substantive provisions. The preamble of a treaty is not legally binding but serves as guidance for the interpretation of the treaty text. Inclusion in the preamble is an option if the contracting parties cannot agree on binding provisions but want to address an issue.

D. Conclusion

Any new convention, whether designed as a framework for subsequent legal regulations or not, has to clarify the relationship to existing agreements. To maintain the *status quo* as a minimum legal basis, a new convention should specify in its preamble or in its substantive provisions that the rights and obligations under the existing treaties remain unchanged. This does not hinder the adoption of further duties in the new treaty. Parties to the new framework and its protocols can agree on stricter standards *inter se* without terminating the existing treaties.

When drafting a new agreement the designation as a framework is not decisive from a legal perspective. Rather, negotiating states shall prudently design an instrument and set up the relevant institutions that best cater for their needs within the realm of the politically feasible. For rapidly developing issues the creation of a flexible and "living" treaty is essential. If, as a consequence of the necessary evolution of the agreement, the elaboration of parallel or later protocols is considered important, the approach may well be classified as a framework and protocol one. This, however, does not hinder the development of substantive and specific provisions in the mother agreement.

Although the design as a framework convention offers the possibility to adopt protocols on specific issues and allows for a dynamic development, such a setting does not overcome the existing problems which were *inter alia* experienced with the drafting of a protocol to the Biological Weapons Convention. The negotiation of protocols can be effectively supported by

> the clause goes on to specify that this general rule only applies, if the exercise of those rights and obligations does not cause serious damage to biological diversity. In fact this establishes preference for the Convention on Biological Diversity and shows the considerable flexibility in drafting conflict clauses.

organs of the framework, yet in principle they remain subject to the ordinary rules on the negotiation and adoption of treaties. Only majority voting and the entry into force of protocols (or annexes) for all parties without their express consent could guarantee an instrument that reacts to the developments in life sciences in a timely manner.[43] This, however, does not correspond with current practice in international law as far as security issues are concerned and would most likely face political resistance.

[43] On consent as an obstacle to urgent law-making in an environmental context and questions of legitimacy see J. Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* (2002) 1, 1.