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EXAMPLES OF SECONDARY PROVISIONS IN INTERNATIONAL TREATIES

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ABSTRACT

This paper explores the various forms and functions of secondary provisions in international treaties, highlighting their significance in shaping compliance, dispute resolution, and monitoring mechanisms within the international legal order. It examines how these provisions operate across diverse treaty types—including environmental, human rights, trade, and disarmament agreements—to enhance implementation and accountability among state parties. The study identifies three major categories of secondary provisions: dispute settlement clauses, monitoring mechanisms, and compliance frameworks. Dispute settlement aim to promote peaceful and structured resolution of conflicts through negotiation, arbitration, and judicial settlement. Monitoring provisions, particularly prevalent in human rights, establish treaty bodies that assess state performance and provide recommendations to ensure adherence. Compliance provisions, on the other hand, focus on ensuring effective implementation through review systems, self-reporting obligations, and non-compliance response mechanisms, as exemplified in environmental and human rights treaties. While these secondary provisions contribute significantly to strengthening treaty performance and preventing breaches, they do not entirely displace the general rules of state responsibility. Instead, they function as complementary instruments that reinforce the broader framework of international accountability, promoting coherence, effectiveness, and the progressive development of international law.

Secondary provisions in treaties, irrespective of the type of treaty could cover various areas of law, depending on various factors. Some examples of the areas of concern that secondary rules have been known to cover in international treaties include:

Dispute settlement secondary provisions in international treaties

These are secondary provisions that have to do with amicable and swift resolution of disputes among state parties to a treaty. Such agreements usually have clauses embedded in them that specifically address the resolution of possible disputes of and when they arise. Since dispute resolution is a major focus of treaty relationship, it has been a provision of priority to many subjects of international law for a long time. Dispute settlement is a theory of international law that could be said to be a provision of customary international law.[1] States in their relations are obliged to make efforts towards the resolution of disputes that may arise while they relate with one another. In fact, the United Nations Charter of 1945 provides that States are to resolve disputes in a peaceful manner.[2] This is because dispute settlement is relevant in the maintenance of stability and peace in the world. Furthermore, dispute settlement as a secondary provision of treaty could include those provisions that relates to the settlement of any kind of dispute, or the settlement of disputes that specifically relate to the application of the treaty.

Some international treaties are more prone to include secondary provisions that address dispute settlement more than others, because of their nature, and the sphere of ideas that they govern. Since the United Nations was established, it has become customary for international treaties to contain a clause on dispute settlement, also known as a "compromissory" clause, which specifies the process that states parties will follow in the event that there is disagreement over how the treaty should be interpreted or applied. These regulations use a wide range of techniques, even though their general goal is to guarantee that disagreements are settled amicably.

[1] Anais Kedgley Laidlaw and Shaun Kang, 'The Dispute Settlement Mechanisms in Major Multilateral Treaties' NUS Centre for International Law Working Paper 18/02 (October 2018) <https://cil.nus.edu.sg/publication/the-dispute-settlement-mechanisms-in-major-multilateral-treaties/> accessed 29 November 2023.
[2] Article 2(3) of the UN Charter

Generally, dispute settlement can include negotiation (this allows the parties to meet to settle the dispute). An example of a treaty that used the negotiation method in its dispute resolution provision is the General Agreement on Tariff and Trade of 1947 (The GATT). In this treaty, in the event of a dispute arising, state parties are to settle without third part intervention. According to article 12 of the agreement,

"1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation (negotiation) regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

Another method is refereed to as conciliation (the introduction of an independent third party known as a conciliator to settle dispute). This method is very similar to mediation (where parties meet with a mutually selected impartial and neutral person who assists with negotiation). We also have arbitration (the introduction of an independent person known as an arbitrator to hear arguments and evidences from both sides and the decides a binding outcome), and judicial settlement. Consequently, in international treaties with dispute resolution secondary provision, such provisions may come in any of the various forms mentioned above. An example of a dispute settlement clause providing for judicial settlement is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article 21 of which requires that all disputes must be submitted to the ICJ.[3] Another example is the 1961 Vienna Convention on Diplomatic Relations, which includes a judicial settlement dispute resolution provision in its optional protocol.[4] Some other treaties combine two or more dispute settlement methods. An example is the 1979 Convention on the Elimination of All forms of Discrimination Against Women, which provides for both negotiation and arbitration in the event of a dispute arising. Article 29 of this treaty states:

"Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration".[5] Furthermore, treaties are characterized differently depending on type, number of parties, subject matter of the treaty and so on. It appears that the category of treaty that stands out when it comes to secondary provisions on dispute mechanisms is the subject matter category. Environmental treaties[6] are known to favor conciliation more than other techniques of dispute settlement. For example, the 1982 UN Law of the Sea Convention's (UNCLOS) has one of the most advance and extensive dispute resolution processes. 16 of the 18 environmental treaties listed on the UN treaty Bodies list provide for a referral to conciliation. Whereas, commodity treaties such as the 1955 grains trade convention generally prefer referral to a treaty body (a special committee or board designated for the settlement of disputes that may arise out of that treaty). Human right conventions also use treaty bodies as a mechanism for dispute settlement.

On the other hand, there are certain subject matters for which treaties do not usually have dispute mechanisms secondary provisions. For example, treaties that regulate human rights, disarmament, commercial arbitration and the likes do not normally carry a dispute settlement secondary provision. The reason in that the purpose of these kinds of treaties is not always to impose obligations on state parties, but to articulate certain rules and encourage state parties to begin to think towards development in that area. Treaties that do not place specific responsibilities on state parties are often of less concern to them and therefore, there may be considerably lower chances of a dispute arising. For example, the 1958 convention on the recognition and enforcement of foreign arbitral awards[7] probably doesn't have any secondary provisions on dispute settlement because the treaty

[3] That provision states that "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

[4] Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Done at Vienna, April 18, 1961.

[5] 1979 Convention on the Elimination of All forms of Discrimination Against Women, United Nations, Treaty Series, vol. 1249, p. 13

[6] Natalie Klein, Settlement of International Environmental Law Disputes in Research Handbook on International Environmental Law, (2010, Elgar), 379

[7] 1958 Convention on the recognition and enforcement of foreign arbitral awards, 330 UNTS 3, [1975] ATS 25, 4 ILM 532 (1965), UKTS 26 (1976)

doesn't impose any actual obligations on state parties, but rather serve as a foundational basis for understanding, and the regulation of foreign arbitral awards.

As for human right treaties, though imposing obligation on certain parties, the tone of the obligations and provisions are toned down in a way to encourage state parties to enforce those human right obligations in their states. Typically, in human right treaties, its common to see the use of "non-binding" language such as "may" instead of "shall" which is commonly used in treaties with more obligatory characters. Consequently, because these kinds of treaties do not necessarily impose obligations on state parties, then there is like going to be no need for a dispute to arise. As for those treaties that have an obligatory, non-derogatory nature, such as some human right treaties and disarmament treaties,[8] the reason they sometimes lack dispute resolution mechanisms might be because some of them have extensive compliance provisions already, and there is a lesser likelihood for a dispute to come up. For example, the 1966 ICESR has no dispute resolution provisions but include the 2008 optional protocol to the treaty, which provides strict compliance mechanisms to the ICESR.

Even more popular treaties such as the charter of the United Nations of 1945 and the statute of the ICJ of do not include any separate dispute resolution mechanisms, that is, in form of a "secondary provision". The UN charter acts like a world-renowned code of conduct for states while the statute of the ICJ might represent the judicial contribution that the statute needs. Perhaps these are some of the reason these two treaties have no separate dispute settlement secondary provisions included in them.

Monitoring secondary provisions in international treaties

Monitoring provisions in international agreements happen to be more common with international human right treaties. Most human right conventions have a monitoring component attached to them, especially the ones that are legally binding. Often they are included as provisions inside the treaties themselves, such as the International Convention on the Elimination of All Forms of Racial Discrimination, which is monitored by the Committee on the Elimination of Racial Discrimination, according to the rules set out in Article 17 of the Convention,[9] or they could be separate optional protocol to the treaties or conventions.

The United Nations has different monitoring mechanisms. In the UN, there are human right treaty bodies, established under various human right treaties, which consist of committees of independent experts that oversee the implementation of the nine main international human rights treaties of the United Nations. States that ratify, or join, an international human rights treaty take on the legal responsibility to carry out the rights outlined in that instrument. Reporting to the appropriate treaty body on a regular basis about the implementation of the rights is one of the duties. Following that, the committees adopt concluding observations (concerns and recommendations) with the goal of giving the reporting states helpful guidance and motivation on how to go forward with implementing the rights outlined in the relevant treaties. Examples of such include: The Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child and so on. The Subcommittee on Prevention of Torture, established in 2007 under the Optional Protocol to the Convention against Torture, carries out fact-finding visits to any places of detention and other places of deprivation of liberty in the territories of State parties, including police stations, prisons, mental health and social care institutions.

[8] For example, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons doesn't have any dispute resolution provisions.

[9] That article states that: For the purpose of considering the progress made in the implementation of the present Convention, there shall be established Committee on the elimination of all forms of discrimination against women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

Even from the ordinary meaning of the words of article 17 of the CEDAW, we understand that the committee's duty is to monitor the progress of the convention. Article 21 of the ICCPR goes further to elucidate that the committee must make annual reports to the general assembly of the United Nations, thereby specifying the actual function of the committee.

"The state parties to the present protocol, considering that in order to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the covenant), and the implementation of his provisions, it would be appropriate to enable the Human Rights Committee set up in part IV of the covenant (hereinafter referred to as the committee) to receive and consider, as provided in the present protocol, communication from individuals claiming to be victims of violations of any rights set forth in the covenant".

Most of the human right conventions provide for monitoring both at the national and international level. This is very important in the enforcement of compliance of international agreements, since most monitoring provisions are set up to monitor compliance of the treaties. Under the United Nations, states must submit periodic reports to the treaty bodies attached to that particular treaty on the implementation of human rights embedded in the treaty. The aim of this is for the monitoring body to be able to provide recommendations and suggestions on the further implementation of human rights after their reports have been analyzed and discussed.

The Human Right Council carries out a universal periodic review, which is an initiative created through a resolution of the general assembly. This initiative is timely and useful as it allows for a compulsory review of the implementation of human right in the member states of the United Nations. This way, every state would be able to be monitored at one point or the other. This kind of "compulsory" monitoring may cause state parties to ensure implementation in their respective countries for various reasons. One being that no one country wants to be the "black sheep" of human right implementation, and every country wants to show other counterparts that they are putting their best foot forward when it comes to implementing treaty. This way, either voluntarily or involuntarily, in a sense, human right conventions are likely to be implemented. By 2011, the Human Rights Council had completed its first review of the human rights records of all 193-member states of the United Nations.

In many African counties, the work of the United Nations missions cannot be overemphasized. These missions have been helpful in the re establishment of peace, order and stability in these counties at different times. For instance, Togo experienced a constitutional crisis in February 2005 after the death of its president. The OHCHR sent a delegation to aid in the development of a protection strategy after the UN country team requested help. Also, The OHCHR sent a fact-finding mission to Kenya in February 2008 to investigate the violence and claims of violations of human rights that occurred after the presidential elections.

Furthermore, the work of monitoring bodies also sometimes include the creation of temporary non-judicial bodies to establish the facts where there have been claims of gross human right violations. These are a little different from international criminal tribunals whose work is mainly judicial and more permanent in nature. The functions of the former are usually to establish the facts and help in the reconciliation process. For example, in Sierra Leone, following an 11-year civil war, the Truth and Reconciliation Commission of Sierra Leone was established.

Fact finding, investigation, field work, awareness- raising initiatives and technical cooperation projects that are carried out by monitoring bodies are so vital to the success of any treaty or convention. However, monitoring provisions must not violate other rules of international law such as the duty not to interferer in matters that are part of the domestic affairs of a nation. State parties on the other hand must provide the right working conditions and situations to monitoring bodies, granting them the necessary privileges to be able to perform their functions.

Some monitoring bodies wind up serving as dispute resolution bodies rather than monitoring bodies, especially under human rights conventions. Some monitoring bodies in human rights treaties may, under certain circumstances, consider individual complaints or letters. This is the situation with the ICCPR, whose human rights committee permits anyone to seek remedies from the committee if they feel their rights have been violated and have used all available domestic routes.

Based on the above functions, Monitoring bodies ultimately do not have the task of identifying when a breach of the provisions of a treaty has been violated, or even aim at enforcing compliance. Therefore, their inclusion in an international treaty does not completely exclude the application of the rules of state responsibility.

Compliance secondary provisions in international treaties

Compliance mechanisms are provisions that have to do with whether a state part to a treaty has complied to its obligation under that treaty. These provisions aim to match the behavior of subjects of international law with their treaty obligations and combine treaty provisions aimed at mere compliance as well as treaty implementation. Some treaties have separate provisions that have been included in them, aimed at monitoring, improving and enforcing the compliance of that particular treaty.[10] For Parties to properly execute the treaty at the national level and report on progress, the treaty's text itself must contain explicit and obligatory obligations. Parties to a treaty may occasionally act contrary to the terms of the agreement, either individually or collectively, or fail to complete implementation requirements by scheduled deadlines. Because of this, treaties should contain provisions for both implementation and compliance. This particular type of secondary provision includes provisions governing all areas of compliance in a treaty, namely approach of compliance,[11] compliance body, [12] and non-compliance response methods among others. The majority of treaties have compliance secondary provisions or compliance mechanisms that primarily aim to facilitate compliance by offering advice, solutions, and support. However, the governing body may decide to establish alternative strategies in order to deal with instances of purposeful or persistent non-compliance.

Compliance mechanisms include a range of activities that have to do with the collection of information that reviews the performance of a treaty obligation, carry out procedures that directly counter or consider possible instances of non-performance, the adoption of methods to respond to this non-compliance and sometimes the introduction of ways to resolve disputes. Compliance mechanisms can be found in such treaties such as environmental treaties and human right treaties. One major characteristic of these kinds of treaties is that they are often multilateral agreements.

The type of secondary compliance provision being discussed here does not refer to compliance with standing, or substantive rules that are automatically expected of parties to an agreement or treaty. Treaty participation requires a little part of letting go of a states absolute sovereignty to another state or party to the treaty, which puts obligation on a state to comply with its duties and obligations according to said treaty. However, these kinds of secondary provisions focus primarily on extra measures to be taken to ensure that states comply with treaty obligations. They include compliance with the authoritative decision of a third party, such as a panel of the World Trade Organization, the United Nations Human Rights Committee, etc. while automatic obligation to comply might not be a documented provision of a treaty rather than an expected obligation, and therefore might be unclear, secondary provisions on compliance concentrate on a specific, behaviors, or well-made decision, so reducing the variety of actions that would be considered compliance. Ultimately, even while state parties to a treaty may attempt in good faith to comply, they may not behave in a way that is prescribed by the agreement, since there's room for various interpretation to treaty provisions. Secondary provisions on compliance decrease the chances of wrong interpretation and make specific arrangements to promote compliance to treaty obligation. One of the more common compliance mechanisms particularly involved with environmental treaties is performance review information. Performance review information is gathered primarily through self-reporting of state parties of their compliance activities within their own jurisdictions. It could also include performance review information gathered through third party monitoring or verification bodies. These bodies review, gather information on, and report treaty performance.

A group of experts oversees and provides feedback on compliance reports that nations are required to submit on a regular basis for each of the major universal treaties. A group of experts oversees and provides feedback on compliance reports that nations are required to submit on a regular basis for each of the major universal treaties. For instance, the 2008 Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, which creates an interstate complaints mechanism, is part of the complex compliance mechanism of the 1966 International Covenant on Economic, Social, and Cultural Rights, which does not include a dispute settlement clause. Although the focus of these compliance mechanisms is on a State Party's compliance with the treaty, rather than on interpretation or application issues, these mechanisms would probably offer a forum to address interpretation and application issues because they are typically interconnected (and States usually only care about issues of interpretation or application when they are linked to compliance).

[10] The Montreal protocol to the Vienna convention on ozone layer, 1987

[11] The Montreal Protocol ("Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.")

[12] Basel Convention's Implementation and Compliance Committee includes fifteen members and is expert-based

Treaties with sophisticated compliance mechanisms seem less likely to contain a dispute settlement provision (see paragraph 45(c)). This is particularly so for human rights and disarmament treaties. This procedure addresses and eventually prevents breaches of States' obligations, and its novelty lies in their function as a means of avoiding disputes rather than having the objective of settling disputes. If breaches were prevented from occurring, then state responsibility would have no place or opportunity. If these compliance mechanisms are strictly utilized, there's a possibility that treaties wit compliance provisions have low recourse to the application of the rules of state responsibility. However, if serious breaches still happen to occur despite the compliance provisions in place, then the general rules of state responsibility come to play. The issue of which more effectively enforces compliance depends on the type of treaty. For example, compliance mechanisms appear to be more effective in maintaining compliance in international environmental treaties than the general rule of state responsibility.[13]

Generally, an 'internationally wrongful act' can only be assessed from the perspective of general international law and, therefore, the specific non-compliance regime cannot be used to determine wrongfulness.[14] However, some treaties have very comprehensive compliance secondary provisions,[15] and even go ahead to include concrete repercussions for states that may seem to violate their obligations under the treaty. Article 18 of that protocol allows for the addressing of cases of non-compliance with the provisions of the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non- compliance.

Conclusion

Treaties may contain secondary provisions that aim to help distribute liability, or responsibility for breach of the provisions of the treaty. This does not however, annul the application of the secondary rules of state responsibility on these kinds of treaties, except there is a conflict. Treaties represent primary rules, capable of creating rights and obligations, but the rules of state responsibility are secondary rules. The application of the rules of state responsibility to treaties that have room for secondary provisions on responsibility are applicable only so far as the parties to the treaties allow and to the extent that the rules of state responsibility being applied are provisions of customary international law. Whatever the case may be, the most important advantage is the fact that, state responsibility is being applied one way or the other.

Treaties have a variety of disincentives and incentives to include secondary provisions; these are often outlined in later judgments made by the body that has the role to ensure those provisions according to the treaty. These incentives normally include includes capacity building, in-country assistance, technical assessment, a verification mission, providing advice, and trade suspension, dispute resolution instructions, monitoring mechanisms among others.

It should become a more common practice for states to go the extra mile in the protection of treaty law. For example, Treaty bodies should be mandated to establish noncompliance reaction methods in future decisions, even though they are not required to be included in the language of the treaty itself. Generally, compliance procedures included in a treaty can help with the implementation of legally enforceable duties and the advancement of common objectives. The language of the treaty should set up the basic structure for compliance and give the governing body extensive authority to make judgments in the future that will simplify compliance processes and address issues that are found.

Ultimately, as indicated above, secondary provisions that facilitate the responsibility of breach of treaty obligations do not complete eradicate the need for the secondary rules of state responsibility.

[13] Handl, 'Controlling Implementation of Compliance with International Environmental Commitments: The Rocky Road from Rio', 5 *Colorado Journal of Environmental Law and Policy* (1994) 328.
[14] M. Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol", 3 *Yearbook of International Environmental Law* (1992) 121.
[15] For example the Kyoto protocol of 1997 is known as one of those treaties with strict compliance mechanisms that