

Ascertaining the Juridical Basis of International Law by Analyzing the Move-structures of Treaties: A Possible Linguistics-oriented Exploration?

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Received: September 9, 2022

Accepted: October 26, 2022

Online Published: October 28, 2022

doi:10.5539/ilr.v11n1p351

URL: <https://doi.org/10.5539/ilr.v11n1p351>

This article is sponsored by the 2021 Key Research Program of Education Department of Hunan Province, PRC: "China's Rule of Law Approach to Counter Against Corruption Under the Context of International Investment Law" (21A0059); and "Construction Program of the First-Class Discipline" in Hunan Normal University.

Abstract

Treaties (conventions), international custom and the general principles of law generally constitute the formal sources of international law. The present linguistics-oriented study of exploring the juridical basis of international law specifically focuses on analyzing that of treaties. An empirical study of the linguistic expressions and forms of the treaties is supposed to probe into what the contracting parties really think when adopting the treaty texts. It applies the move structure approach of English linguistics for the purpose of ascertaining the juridical basis of treaties. After the generalization of a prototypical six-move-structure existing in treaties, this article specially makes a focal study on the second and third moves of the treaties, managing to find out the linguistic evidence of ascertaining the juridical basis of the treaties. "The Contracting Parties' Shared Conviction in Common Good as *opinio juris*" in Step 1 of "Move 2 Establishing Contextual Foundations for the Present Legislation" is ascertained as the juridical basis of international law from the linguistics-oriented perspective.

Keywords: English for legal purpose, genre analysis, move structure of treaties, juridical basis, international law

1. Introduction

It is widely recognized that international law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations, the European Union and OPEC etc.. If, then, we accept that international law is "law", albeit a very different kind of law from what we find in national legal systems, from where does it derive its legal validity? What is the juridical basis (origin or source) of international law? Such questions have vexed jurists for many years and a number of theories have been developed in pursuit of the answers.

Among them, John Austin representing the Command Theory sustains, "international law" is not "positive law" because it does not result from the commands of a sovereign. Customary law, for example, develops through state practice and treaty law develops through consent. Thus, international law, because it is not made up of commands, is properly to be regarded as a species of "positive morality" and is not within the province of jurisprudence. The basic tenet of the consensual theory is that the binding quality of international law---its existence as "law"--- flows from the consent of states. According to Natural Law Theory, International law is said to derive its binding force from the application of "the law of nature" to the methods of law creation used by states. In *Deconstructionist theories*, some jurists (e.g. Koskenniemi) argue that international law is not a system of "law" in the sense that it can be used to justify or criticize international behavior on a rational or objective basis. It is, rather, a conjunction

of politics, morality and self-interest that can be used alternatively to justify or condemn any behavior according to the standpoint of the critic. Based on “*Value*” oriented theories, McDougal, Lasswell and Feliciano see the role of international law as the pursuit of certain pre-existing community values. All rules should be interpreted and applied consistently with these values. *Realist theories* argue that the real importance of international law lies not in the validity or otherwise of its claim to be law, but in the impact it makes on the conduct of international relations.

Any attempt to reach a conclusion about the nature of international law or its claim to be a “system of law” is bound to attract criticism from all sides. However, this does not mean people (especially academia) should stop the efforts of researching on the basic theoretical question of international law--- anyway, an answer to this question is realistically needed. Just as Martin Dixon suggests, the first and most powerful reason why international law is to be regarded as law is that it is recognized as such by the persons whom it controls, the states and other subjects of international law. Perhaps, we can sense that by reading the forms which international law takes while it is being negotiated, written, used or interpreted.

“The law is a profession of words.” This dictum opens David Mellinkoff’s classic masterpiece, and it is not possible to find a more succinct way of revealing the relationship between law and language. Whatever the forms of the legal language takes --- treaties, laws and regulations, courtroom discourses, or the daily-used documents associated with legal affairs (such as contracts, conveyances, invoices, certificates and insurance policies, etc.) --- We are faced with this fundamental principle: the words of the law are, in fact, the law.

Every legal system must have some criteria by which legal norms or “laws” are recognized. It must have reasonably clear sources of law. Generally speaking, these sources of law are either “legally created” or “legally recognized”. Even though international law does not possess formal institutions responsible for law creation/stipulation, there are well-recognized or habitually-practised methods by which legal rules come into existence, as well as some ways in which the precise contents of legal rules may be identified. As is known to all, there are three formal sources of international law: treaties (conventions), international custom and the general principles of law.¹ The present linguistics-oriented study of exploring the juridical basis of international law is specifically committed to analyzing that of treaties for three reasons: First, treaties are the major sources of international law; Second, the legal validity of international custom is a prescriptive one which is presupposed²; Third, as for the general principles of law in national systems the search for the juridical origin of law goes beyond the existence of institutions or constitutions.³ Moreover, an empirical and inclusive study of the general principles of law recognized by various civilized nations is an almost impossible task beyond the length of this paper.

This article offers a linguistic perspective on the ascertainment of juridical basis of international law by way of analyzing the move-structures of treaties. To accomplish that objective, it is divided into five sections. Section II conducts a generic analysis of treaties in English language and surveys the move-structures of treaties. Section III manages to ascertain the juridical basis of treaties by employing an empirical study on the move structures of 330 English treaties. Section IV suggests that the substantive juridical basis of treaties lies in the contracting parties’ shared conviction in common good as *opinio juris*. To some extent, the linguistic empirical study overcomes the inability of and difficulties in testifying the juridical basis of treaties, hence ascertaining the juridical basis of international law --- such ideas as being held by some international law theorists though not having been linguistically testified. Section V provides a summary of conclusions.

¹ The traditional starting-point for a discussion of the sources of international law is Art. 38 of the Statute of the International Court of Justice. This provides that: (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations;

² Elements of customary international law consist of state practice and *opinio juris*. It is not enough for the formation of customary law that there is general, uniform and consistent state practice. In order that this practice constitutes law, states must recognize it as binding upon them as law. State practice must be accompanied by a belief that the practice is obligatory, rather than merely convenient or habitual. This belief in the obligatory nature of the practice is called the *opinio juris*.

³ Usually, in national legal systems there are formal institutions, like the UK Parliament and US Congress, whose task is to create law and which may be regarded as a “source of law”. However, while the existence of such institutions enables us to identify what is or is not “a law”, they do not explain why it is law. It may be that the constitution authorizes Parliament or Congress to make law, but from where does the constitution derive its authority? The juridical origin of law is a large question and it is inappropriate to think that only international law fails to find an answer.

2. Genre Analysis of Treaties: A Move-Structure Approach

Traditionally from a linguistic perspective, a lot of contributions have been made to analyze the form and function of the nonliterary legal discourse.⁴ In order to overcome the shortcomings which the surface-level of syntactic-grammatical analysis possesses, it is necessary to combine socio-cultural (including ethnographic) and psycholinguistic (including cognitive) advantages of text-construction and interpretation with linguistic insights. John Swales specifically advocates the genre analysis model, emphasizing its communicative function of the textual/discoursal structure from the social, cultural or psychological (even cognitive) perspectives. He proposes three elements for the model: moves, steps and sequencing. V. K. Bhatia observes a typical four-move-structure in judicial decisions: Move 1. Identifying the case; Move 2. Establishing facts of the case; Move 3. Arguing the case (a) Stating history of the case; (b) Presenting arguments; (c) Deriving *ratio decidendi*; Move 4. Pronouncing judgment.

2.1 Communicative Purposes of International Treaty as a Legal Language

Treaties (conventions) are concluded primarily by states, either for their own purposes or as a means of facilitating the functions of organizations of which they are members (E.g. UN Headquarters Agreement between the United Nations and the United States 1947). Generally, a treaty can be regarded as a legally binding agreement deliberately created by, and between, two or more subjects of international law who are recognized as having treaty-making capacity. It is an instrument governed by international law and, once it enters into force, the contracting parties thereto have legally binding treaty obligations under the framework of international law.

The term “legal language”, as Bhatia indicates, “encompasses several usefully distinguishable genres depending upon the communicative purposes they tend to fulfill, the settings or contexts in which they are used, the communicative events or activities they are associated with, the social or professional relationship between the participants taking part in such activities or events, the background knowledge that such participants bring to the situation in which that particular event is embedded and a number of other factors.” Owing to the exact communicative purposes which the legal writers and practitioners of treaties in legal community intend to fulfill, it is also easily to be concluded that like other genres in various legal professional settings, international treaty is also a legal language in written form on the international stage. For the purpose of making an empirical study on the move structure of treaties, the author specially established a small-scaled corpus database and collected 330 international multilateral English treaties (concluded and adopted by the international community between the years of 1875 and 2012) which the Chinese government had become a member (including signing, ratification, approval, acceptance, or accession to) as of December 31, 2014.

2.2 Move-structures of Treaties and Their Pragmatic Functions

International treaty is essentially a bargain between international law actors by handling international legal relations, hence it may cover a wide range of international political, economical, technological, cultural and social issues. The first pragmatic function intended for a treaty to fulfill is reflected in its title. It can be easily found out from the titles of the selected treaties the legal relations or specific issues they are going to handle.

Move 1 Identifying the Legal Relationship Intended for Contracting Parties to Govern

Specifically, the legal relationship (or subject matters) of the collected 330 treaties are all embodied in the titles of the treaties, and the titles are all noun phrases, and the head nouns are unexceptionally synonymous with “treaty” or “agreement”. People will also find an interesting phenomenon: in order to identify the complex legal relationship, the drafters of the treaty do not hesitate to use a large number of prepositions or prepositional phrases to restrain or modify the head noun, taking “Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations” as an example.

The head nouns used in the titles of 330 treaties and the variation of designations are outlined in Figure 1.

⁴ These researching methodologies/approaches mainly include: (1) Classical Rhetoric Studies; (2) Stylistic/Variety Analysis; (3) Genre Analysis; (4) Forensic Linguistics.

Designation (Head Noun)	Times of Using
convention	136
protocol	58
agreement	47
amendment	35
treaty	10
constitution	8
resolution	8
statute	6
charter	5
regulations	4
instrument	4
articles	2
code	2
arrangement	2
act	1
covenant	1
terms	1
Total	330

Figure 1. The variation of designations used in the treaty titles

It should be noted that the particular designation of the agreement does not affect its nature as a treaty. Among all the designations, “convention” is most frequently used (41.21%). This also shows that Chinese government tends to become a party of international multilateral agreement.

After the legal relationship intended for the contracting parties to govern has been identified, the treaty subsequently endeavors to serve its following pragmatic function.

Move 2 Establishing Contextual Foundations for the Present Legislation

Legislation is usually recognized as a low-context communication, which means the mass of the information is supposed to be vested in the form of explicit codes. Therefore, international treaty shall be drafted or stipulated as detailedly and precisely as possible to avoid uncertainty or even ambiguity in legal settings or discourse community on a bilateral /multilateral scale in accordance with the agreed conditions. Treaties (including its preamble and annexes) must be read or construed as a whole. So, there shall be a foundation part to provide assistance in clarifying and interpreting the purpose, definition of terms, law principles, and sources of the treaty. Thus, the intentions of the contracting parties are made known, and finally maximal effectiveness can be ensured in applying the treaty. The contextual foundations thus can be further divided into: 1) Purpose Provisions; 2) Principle Provisions; 3) Definition Provisions; and 4) Sources of Law Provisions whose main functions are to contextualize the legal texts while interpreting or applying the treaties.

Take the Purpose Provisions as an example. The purpose of law is a key concept in any theory of legal interpretation. It may broadly be understood to denote those aims, functions, or values whose realizations are the exact tasks for the legal rules to fulfill in general. Legislative purpose in the strict sense refers to the explicit or implicit aims of a statute or of the legal provisions contained therein. The contracting parties make clear the tasks the treaty wants to fulfill and depict the blueprint it desires for. They also provide the answer to what kind of framework should be established to solve the present problems and to govern the legal relationship as shown in the title of the treaty.

Purpose Provisions may be categorized into Explicit Purpose Provisions and Implicit Purpose Provisions. As for the Explicit Purpose Provisions, separate articles or parts are set alone in the treaty-making, which can be easily

observed. Article 1 of “Charter of the United Nations”⁵ is a good example of the first type of Purpose Provisions.

Article 1

The purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and ...

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

(3) To achieve international co-operation in solving international problems of ... and

(4) To be a center for harmonizing the actions of nations in the attainment of these common ends.

With regard to Implicit Purpose Provisions, Neil McCormick and Robert Summers hold that legislative purpose is a teleological/evaluative argument and that the mode of its determination may be either to reference the deliberations of those involved in the production of the statute at the preliminary stage, or to reflect on the rational aims which an ideal law maker attributes to the statute or the latter seeks to implement. In principle, however, a close reading and careful study of the full text of the statute may be sufficient to determine the general purpose of the statute or of some of its legal provisions. As language learners, we’d better keep sensitive to the wordings of international-treaty-makers, which will be conducive to our judgment on provisions of purposes. Let’s have a look at the examples below:

...

Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples,...

(From “Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies”⁶)

...

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save ...

AND FOR THESE ENDS

to practice...

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

...

(From the Preamble of “Charter of the United Nations”)

In these provisions, “aims”, “purposes” and “ends” are synonyms to “objective/attainment”, and “Desiring to”, “contribute to”, “determined”, “resolved”, “in order to”, and “dedicated (pledged) to” connote “determination and fulfillment”, both of which contribute to our understanding of the purposes attributed to the rules by the lawmakers either from the historical perspective or the contemporary angle.

Because of the length limitation of the article, Principle Provisions, Definition Provisions and Sources of Law Provisions may not be fully exemplified and further discussed.

International treaty is usually regarded as a contract between the governments of two or more sovereign states. Treaties are the result of direct negotiations between international legal equals (such as states and intergovernmental organizations) and each party is bound by the terms of the agreement because they have deliberately consented to the rights or obligations contained therein. Therefore, the following pragmatic function the treaty aims to fulfill is to express mutual consent.

Move 3 Declaring Mutual Consent to be Bound by the Terms of the Treaty

The consent declaration explicitly shows the contracting parties’ intention to be bound by the legal effects of the treaty. Actually, the mutual consent is made either following the preamble or heralding the treaty text (if without

⁵ “Charter of the United Nations” was signed in 1945.

⁶ This Treaty was signed in 1967.

a preamble). The simplest direct opening consent statement among all the treaties is drafted like this:

The States Parties to this Convention

Have agreed as follows:

...

(From “Convention on the Territorial Sea and the Contiguous Zone”⁷)

Thus, just as national contracts create specific obligations which “the law” says must be performed and observed, treaties create specific obligations for the contracting parties under the international law framework. If the state parties agreed to be bound by the terms of the treaty, they are legally bound to act in the agreed way and, in a practical sense, they have created laws for themselves. In fact, given that the purpose of all treaties is to regulate the future conducts of the parties, hence treaties are regarded as being laws among the members.

Move 4 Specifying Substantive Rights and Obligations of the Contracting Parties

The general function of legal documents is directive: to impose obligations and to confer rights. Treaties are the means by which states can create certain and specific obligations and, because they are the result of a conscious and deliberate act, they are more likely to be respected and followed. A treaty imposes obligations on the contracting parties, which must be carried out, and failure to conform to the terms of a binding treaty will incur international responsibility. Therefore, whether stipulating obligations or conferring legal rights should be done in a clear, definite and unambiguous way. The draftsmen are the spokesmen, representing all capable contracting parties to express their mutual wills. They are assumed authority to issue orders. The international convention is undoubtedly written in an authoritative tone which is not allowed to be challenged under usual conditions.

High frequency of using modal auxiliaries constitutes another one of the major features of the legal language. “Another high frequency structure in legal English is that of ‘Modal Auxiliary (usually SHALL+BE+Past Participle)’, which is one of the most striking characteristics of English legal language.” “SHALL” under this circumstances is invariably used to express what is to be the obligatory consequence of a legal decision and not simply as a marker of future tense, which is its main function in other varieties. By investigating the different modal auxiliaries used in the provisions of Move 4, the legal norms in treaties can be classified into three types: 1) Obligatory Norm; 2) Prohibitive Norm; and 3) Authorizing (Facultative) Norm. As “SHALL” is usually used in Obligatory Norm, “SHALL NOT” and “MAY NOT” often appear in Prohibitive Norm, however, “MAY” is mainly used in the third type of norms, mostly conveying the meaning of having rights instead of obligations. Examples are as follows:

Article 1

...

2. *This convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens.*

The expression of “shall not” herein indicates that this sentence is a Prohibitive Norm.

Article 2

Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; ...

As is known, “shall” is an indicator of an Obligatory Norm as this article.

Article 11

1. *If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the committee.*

It is an Authorizing (Facultative) Norm by observing the use of “may” in Paragraph 1 of Article 11.

(From *International Convention on the Elimination of All Forms of Racial Discrimination*⁸)

Let’s have a look of one more example:

Article 27 Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

⁷ This Treaty was signed in 1958.

⁸ This Treaty was signed in 1965.

This rule is without prejudice to article 46.

(From 1969 “Vienna Convention of Treaties”)

By way of finding out that there used the phrase “may not”, Article 27 is a Prohibitive Norm.

After the substantive rights and obligations have been laid down, the draftsmen comes to another equally important step of furthering the international- treaty-making, of which they will never think light --- the mechanics-framing-part of treaties: the way how they are concluded, interpreted, observed and terminated, or in other words, the procedural aspects of treaty formation and treaty application.

Move 5 Elaborating Procedural Issues of Applying the Treaty

Lawmaking is an intricate process as well as an arduous task. Its procedural aspect deals with rules pertaining to the creation of treaties in international law. Within this framework, how treaties come into being --- matters relating to the authority of state representatives, compliance by a state with its own national law, ratification of treaties, signature, authentication, exchange or deposit of instruments, and entry into force will certainly be made clear not only to the contracting parties but also to the depositariat (usually the Secretariat of the United Nations). Whether the procedures are open, just and reasonable will directly influence the authority and trustworthiness of the agreement. Of course, the failures will eventually lower its prestige among the later international legal subjects who desire to accede to it.

Generally, the procedural issues are composed of treaty-making procedures (including adoption, authentication, signature, ratification, exchange of instrument, entry into force, depositary, registration and publication), and treaty application procedures (such as accession, adhesion, reservation, amendment, revision, invalidation, termination, withdrawal, suspension of operation, disputes settlement, non-retroactivity, territorial application, and succession).

In some treaties, just like preamble in legal documents, annex is also a constituent part of the whole discourse.

Move 6 Attaching Optional Annexes

Figures, tables, formulas, diagrams, name lists of countries, organizations or institutions, price list, accounting list, voting chart or even formally complete and long passages are attached to the very end of a legal text because of the limitation of length or size of the main body of text. These materials are also of particular significance in the realization of pragmatic functions of treaties.

In “Constitution of the International Labor Organization⁹”, the aims/purposes and principle provisions (usually incorporated in Move 2) are found rarely annexed to the constitution. There are two annexes in “Wheat Trade Convention (1971)”, namely Annex A “Votes of Exporting Members” and Annex B “Votes of Importing Members”.

After closely examining the annexes in the treaties, we conclude that they often treat a particular issue, which is not often an indispensable part in the treaty but an optional one, aiming to help facilitate the operation of the treaty and make it in a complete, definite and constant shape.

In sum, as John Swales points out, “Individual instances of genres vary in the degree to which they conform to the prototypical structure.” The above Move-structure models are thus not in fixed-rule-governed patterns, but rather prototypes which are subject to individual or specific variations/changes: Elements of these structural formulae may be omitted, repeated, occur in a different order, or be embedded one within the other. As for the Move-structure in each international treaty, all the six moves are more or less obligatory (the number of moves for each treaty is specified in Figure 2).

⁹ “Constitution of the International Labor Organization” was adopted in 1919.

Treaty Number	Move 1	Move 2	Move 3	Move 4	Move 5	Move 6	MSs
1	1	1	1	1	1	0	5
2	1	1	1	1	0	0	4
3	1	1	1	1	0	0	4
4	1	1	1	1	1	1	6
...							
330	1	1	1	1	1	0	5

(MS= Move Structure, 1= Yes, 0=No)

Figure 2. The presence/absence of each move in the 330 treaties

As indicated in Figure 2, not all the 330 treaties contain a typical six-move-structure, and the number of moves in each treaty has a tendency of approaching number six. In the following Figure 3, the inclusive percentage of each move in every treaty is counted up.

	Move 1	Move 2	Move 3	Move 4	Move 5	Move 6
Yes	330(100%)	319(96.7%)	307(93.3%)	330(100%)	264 (80%)	32 (9.8%)
No	0 (0%)	11 (3.3%)	23 (6.7%)	0 (0%)	66 (20%)	298(90.2%)
Total	330(100%)	330 (100%)	30 (100%)	330(100%)	330(100%)	330(100%)

Figure 3. The inclusive percentage of each move in the 330 treaties

The statistical investigations are of substantial significance to prove that a prototypical six-move-structure model of international treaty actually exists. Move 1 (100%) and Move 4 (100%) can almost be regarded as constants, while other moves (except Move 6 since it's "optional") reflect certain flexibility within a limited scope (Move 3 accounts for 93.3%; Move 2 is 96.7%; Move 5 is 80%).

Number of Moves Included in the Treaty	The Number of Treaties Containing the Same Move-structure	Proportion to the Total Treaty
4	77	23.3
5	209	63.3
6	44	13.4
Total	330	100

Figure 4. The proportional percentage of three types of treaties containing the same move-structure

Figure 4 shows that among all the 330 treaties, each one contains at least four moves (Move Four: 23.3% + Move Five: 63.3% + Move Six: 13.4% =100%).

	Minimum	Maximum	Average
Number of the Moves in Each of the 330 Treaties	4	6	4.9

Figure 5. The number of the moves in each of the 330 treaties

The average number of all the moves in each treaty are of 4.9, as is shown in Figure 5.

To sum up, the finding that a prototypical six move-structure exists in the examined 330 English treaties confirms the author's original assumption that treaties generally achieve their special communicative goals by employing a specific move-structure respectively. Of course, the move-structure analyses of treaties are basically schemata-seeking instead of schemata-imposing. It is precisely because that genre analysis can deeply discover the macro-cognitive structure of various language texts or discourses, hence it becomes a useful and prospective supplement to the traditional methods of studying various legal texts or discourses.

3. Application of the Method of Genre Analysis in the Exploration of International Treaties

Treaties, whether general or particular, are now the most important source of international law and this is likely to remain so given the continuing efforts of International Law Commission to codify customary law in treaty form.

3.1 The Traditional Approaches to Analyzing the Juridical Basis of International Treaty

The juridical basis of treaties is also known as the validity basis or "effectiveness/validity origin" of treaties, which seeks to answer the question why treaties are effective, or it wants to pursue the reasons for, roots or origins of the validity of treaties. There are mainly two ways of researching the juridical basis of treaties.

(i) The Answer to the Juridical Basis of Treaties Derives from the General Conclusion of the Juridical Basis of International Law.

As discussed in the Introduction part of the article, the differences between international jurists on the juridical basis of international law first appear in the natural law school and the positive law school. The school of natural law advocates that the binding force of international law comes from "natural rationality", and international law is only a part of natural law. The school of positive law purports that the basis of the effectiveness of international law is not abstract human rationality, but the consent or common will of realistic countries, and "common recognition" is the only basis of international law. In the 1960s, the New Haven School at Yale University in the United States initiated "Policy Orientation" Theory, insisting that the effectiveness of international law comes from the "generalization of authoritative decisions" in the international community. Other western scholars emphasized the decisive role of "power politics" in international law and believed that the effectiveness of international law comes from the "balancing of power" of all countries. Chinese scholars also hold different opinions on the juridical basis of international law. The "Coordinative Will Theory" upholds that the binding force of international law comes from "the coordination of the will of all contracting parties". As international law scholars in China conducts the research on the question in depth, it is noted that scholars named Hu Binbin, Feng Hanqiao and so on, made certain new elaborations on this traditional theoretical problem from new academic perspectives.

Therefore, since treaty is the most important formal source of international law, the relevant research conclusions on the juridical basis of international law naturally apply to the same theoretical question of treaties.

(ii) The Research on the Juridical Basis of Treaties Focuses Specifically on the Treaty Itself.

International law theorists who adopt this research approach mainly include Detlev F. Vagts and W. E. Bulter, as well as Wang Tieya, Li Haopei, Li Ming and other domestic jurists. Among them, Li Haopei holds that the effectiveness of the treaty on the contracting parties comes from the principle of "*pacta sunt servanda*"; and Li Ming advocates: Why is the treaty binding on the contracting states? It is generally believed that this is the result of following the principle of "agreement must be observed" in international law.

As for the above-mentioned two research paths, the author believes that there exists a common "bottleneck": the juridical basis of international treaty remains difficult in proving and thus unascertained. Just as Hart said, the "recognition rule" suffers from "uncertainties", and "the effectiveness of the recognition rule is assumed but cannot be proved". Moreover, the Coordinative Will Theory on the juridical basis of treaty strongly advocated by Chinese scholars is not impeccable: First, the Coordinative Will Theory insists that the ultimate origin of the effectiveness of treaties is "the coordination of will", which is questionable; Second, this view intends to be a prescriptive one with sufficient room to become more linguistically descriptive or ascertainable, which remains the task for this article to fulfill.

3.2 Ascertaining the Juridical Basis of International Treaty by Analyzing Move 2 and Move 3 of Treaties

As far as the analysis of juridical basis of international treaty is concerned, Move 2 and Move 3 are the most important targets of examination which definitely can not be neglected. Actually, after making statistical examination on the moves 2 and 3 of these 330 English multilateral treaties, the author obtains the information about the appearing frequency of the two moves in all the treaties as is shown in Figure 6.

Moves	The Number of Treaties Containing Move 2 or Move 3	Proportion to the Total 330 Treaties
Move 2	325	98.6%
Move 3	320	96.9%

Figure 6. The appearing frequency of move 2 and move 3 in the 330 treaties

(i) Move 2 is the Justifiable Combination of Psychological Rubicon Shared and Physical Contents of Common Good Trusted by the Contracting Parties

Legislation is usually regarded as a low-context communicative activity. Treaty making is one of the major international legislative activities. Treaties must be concluded as carefully and accurately as possible to avoid uncertainty or even ambiguity. Therefore, it is necessary to set up a contextual foundation when drafting treaties. Only in this way can the effectiveness of the treaty be established, the intention of the contracting parties get known, and the treaty's subsequent effective application get ensured. In order to achieve this end, "Move 2 Establishing Contextual Foundations for the Present Legislation" of the treaty is usually subdivided into four steps: Step 1 Specifying the Contracting Parties' Shared Conviction in Common Good as *opinio juris*; Step 2 Identifying the Purpose of Treaty-making; Step 3 Clarifying the Application Scope of the Treaty; Step 4 Defining the Treaty Terms.

(a) Psychological Rubicon: Contracting Parties Firmly Believe in Law and Treating Treaty-making as Effective Legal Solution to Their Common Concerns

Law is possessed with a self-perpetuating quality. When it is conceived that the principles regulating the activities of a society amount to the status of "law", as is the case with countries and international law, the norms of that system are bestowed with a validity and force all of their own. The psychological validity of international rules as a system of law is a reason in itself why international law is followed. While closely examining Move 2 of the 330 English multilateral treaties, the author finds out that in the beginning part (especially in the preamble) of the studied treaties almost invariably abound with a lot of present or past participles or adjectival phrases, which are usually marked in somehow eye-catching ways (getting underlined or italicized or boldfaced) to show specific emphasis. It is further observed that both participles and adjectival phrases center around a converging meaning of "conviction", which represents the subjective psychological feelings of the contracting parties.

Taking the Preamble of the ICSID Convention as an examples. In the Preamble of the Convention, the drafters used seven present participle phrases in the form of boldfaced letters to indicate emphasis, i.e. "Considering that ...", "Bearing in mind that ...", "Recognizing that ...", "Attaching particular importance to...", "Desiring to ...", "Recognizing that...", and "Declaring that...", which are closely related to the legislators' subjective psychological feelings of "conviction" ---Such beliefs of the obligatory nature as strongly adhered to and deeply held by the official representatives during the treaty-making can be also referred to as the *opinio juris*.

(b) The Common Good is the Physical Contents of What Contracting Parties Believe as Law

After we have known that the contracting parties psychologically believe in treaty provisions as law, the next question lying ahead is: what are the exact contents they are "convinced of" in these treaties? By observing the grammatical objects immediately following the participle or adjectival phrases which connotes the "*opinio juris*" of the contracting parties, we come to realize: Common good is the physical contents of what contracting parties believe as law, including "better standards of life", "civilization", "common welfare", "conscience", "cooperation", "dignity", "economy", "efficiency", "equality and right", "faith", "freedom", "friendship", "general peace", "happiness", "harmonious relations", "health", "independent powers", "international justice", "improvements", "mutual understanding", "prosperity", "respect", "security", "solidarity", "safe and orderly manner", "social progress", "truth", "undertaking", "uniformity and precision", "worth" etc.

Undoubtedly, a very essential practical reason for the validity of international law is that it is based on common self-interest and realistic necessity within the global community. International society is at present more interconnected than ever and the volume of trans-boundary activity continues to increase. International law is needed for the purpose of guaranteeing a stable and well-ordered international society. It is in every country's interest to observe the norms of international law, for they stipulate well-designed and foreseeable principles for the operation of international relations and international commerce. For example, it is essential that the distribution of the scarce resources of the high seas and ocean floor is fulfilled smoothly and equitably and it is only through regulations of international law --- binding on the participating actors --- that this can be achieved. Similarly, the protection of the environment and the management of climate change are realized. Hence, a major reason for the operation of

international law is that it offers a stable and authoritative mechanism for the management of international relations and the governance of global issues in an increasingly interdependent “global village”.

As is strongly sustained by some theorists, “natural law” may be a good descriptive label for such concepts as equity, justice and legitimacy which have been embodied in the substantive rules of law, examples are those governing the contiguous zone, continental shelf, human rights, war crimes and rules of *jus cogens*. Actually, such values or concepts can be materialized/physicalized as common good to all the contracting parties, which constitutes the basic reason why the parties convened together and consider the treaty effective after the treaty-making.

However in an empirical sense, natural law theory finds little support in international law researching practice. Given that the method of law creation in international law is so heavily dependent on consent or practice, it is difficult to maintain that there is some guiding body of principles to which states defer when creating law. Therefore, the move-structure analysis (especially Move 2) of this article is hoped to make contributions in ascertaining or testifying linguistically the real existence of value-oriented “natural law”.

Again taking the ICSID Convention as an example, it is noted that the specific common good specified in the Preamble of the Treaty includes “the need for international cooperation for economic development”, “appropriate international methods of settlement” and “the availability of facilities for international mediation or arbitration”, which is really value-underlying terms advocated by the Natural Law Theory.

(ii) Move 3: A Linguistic Evidence of the Consensual Theory

Treaties are regarded as contracts concluded between capable subjects of international law. As the contract-natured texts, treaties must be based on consensus or agreement of the contracting parties. As have been discussed, almost all the parties to the selected 330 English treaties express their consensual standings before clarifying their respective substantive rights and obligations, and parties promise that after the ratification of the treaty, they must exercise their rights and perform their obligations in accordance with the provisions of the treaty without violating them instead. In order to fulfill this communicative purpose, treaties are “equipped” with Move 3, i.e. “Declaring Mutual Consent to be Bound by the Terms of the Treaty” by the contracting parties.

It thus can be said that the existence of move 3 is a significant linguistic finding for evidencing the somewhat correctness of the Consensual Theory on the juridical basis of treaty. As is well known, international community is different from any domestic societies. It is not like a domestic society divided into high and low levels of members (such as governmental organs and citizens), but a society mainly composed of legally equal sovereign states or intergovernmental organizations. As paragraph 1 in Article 2 of the Charter of the United Nations states writes: “the organization is based on the principle of the sovereign equality of Member States.” Since all countries have equal sovereignty, there exists no central legislative body above all countries on the global plane. Therefore, the Positivist School of Law advocates that there are only two sources of international law, namely, treaties and customs, and the binding force of treaties and customs on the state is based on the consent of the state: the binding force of treaties works due to the express consent of the state, while customs take effect due to the implied consent of the state concerned. According to this theory, it is clear that the treaty obligations which a contracting party must abide by can only arise from the consent of the member concerned.

Actually, either contracts in private law or treaties in international law are basically the same in their legal nature. As for contracts and treaties, the will autonomy of each party is the constituent condition for a legal relationship, and this legal relationship, ever since the time it comes into being, is independent of the free will of treatment on the part of each party. Contracts in private law are given objective effects by national laws, while treaties are bestowed with objective effects by a basic rule of international law, that is, *pacta sunt servanda*.

4. The Contracting Parties’ Shared Conviction in Common Good as “*Opinio Juris*” is the Juridical Basis of International Treaty

Concerning either the Consensual Theory or the Coordinative Will Theory on the juridical basis of treaty, the author believes that the two theories only tend to discover the juridical basis of treaties from the procedural perspective, in other word, they only probe into the formal or procedural basis of the treaty validity. Firstly, “coordination of will” can only be regarded as one of the links along the “validity chain” of treaties, not on the ultimate end of the “validity chain”. When we consider the sources of international law, it will become apparent that consent is a method for creating binding rules of law, rather than the reason why they are binding. Where is the legal authority for the *pacta sunt servanda*/consent rule? If we say that states have always behaved as if consent was fundamental to the creation of legal norms, we can ask further why it is the customary practice that should have the authority to validate legal rules. In fact, the search for the legal source of the consent rule can go on *ad*

infinitum, for we can always ask one more question and take one more step up the “ladder of authority”. In the case of “Move 3 Declaring Mutual Consent to be Bound by the Terms of the Treaty”, its closest upper link along the validity chain is “Move 2 Establishing Contextual Foundations for the Present Legislation”. In other word, coordinative will of the contracting parties is not the ultimate source or origin of the effect of treaties. Let’s make an analogy with the domestic law. Domestic laws are formulated or recognized through the exercise of legislative power by the national legislature. Therefore, state power is the formal origin of the validity of domestic law, or from a formal point of view, the basis on which law takes effect is state power. The validity of law formally/procedurally originates from the state by exercising the state power with due process. Secondly, a treaty enters into force in such manner and upon such date as it may provide or as the negotiating states may agree, which means the treaty may not definitely take effect even though consent to be bound by the treaty has been established for all the contracting parties. Therefore, either the “Mutual Consent to be Bound by the Terms of the Treaty” or the “Coordinative Will” does not amount to the juridical basis of a treaty.

Then what is the substantive contents underlie the form of “coordinative will” among contracting states? That is, what is the substantive basis of treaty validity? In the author’s viewpoint, the contracting parties’ conviction in common good as “*opinio juris*” is the the substantive basis of the treaty validity. In fact, according to the deconstruction of “validity chain”, the exact upper link of “coordinative will” should be “the conviction in common good as *opinio juris*”, that is, the validity of “coordinative will” derives from “the conviction in common good as *opinio juris*”, just as the empirical research result of the above international treaty move structure shows that “Move 2 Establishing Contextual Foundations for the Present Legislation” is positioned right before “Move 3 Declaring Mutual Consent to be Bound by the Terms of the Treaty”. It is even noted that in the Preamble part of such treaties as Berne Convention for the Protection of Literary and Artistic Works¹⁰, Convention Fixing the Minimum Age for Admission of Children to Employment at Sea¹¹, Convention Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea¹², Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers¹³, Convention Concerning the Rights of Association and Combination of Agricultural Workers¹⁴ and Convention Concerning the Application of the Weekly Resting Industrial Undertakings¹⁵, Move 2 “Establishing Contextual Foundations for the Present Legislation” does exist while Move 3 “Declaring Mutual Consent to be Bound by the Terms of the Treaty” is nowhere to be seen.

Furthermore, in terms of the function of Move 2 in a treaty, the author somehow disagree with the British International jurist Anthony Aust, who believes that there exists a natural but misguided tendency for people to negotiate or discuss the contents of the preamble at the very beginning of the treaty drafting. It may be logical to start with the discussion of the preamble, but by doing so is no more than “putting the cart before the horse”. Although the preamble serves its own role, its value is less important than the rest parts of the treaty. Each paragraph in the preamble begins with such participles as “recalling”, “recognizing”, “noting”, “convinced”. Traditionally, it is merely a matter of style to get these opening words underlined or italicized. However, the author insists that the preamble of a treaty should be considered at least as important (if not more important) as other parts of the treaty. Just think, if the preamble is of little importance, is there any need for the contracting parties to mark some terms in such a striking way? In a word, Move 2 “Establishing Contextual Foundations for the Present Legislation” usually getting crystallized in the preamble of a treaty is not simply a matter of style, but the subconscious or unconscious outpouring/expressing of mankind’s inherent understanding of the juridical basis of treaty when concluding treaties for hundreds of years. Of course, it is also the summarization and precipitation of human knowledge and experience for long.

Moreover, the idea that “the conviction in common good as *opinio juris*” is the substantive basis for treaty validity can be construed from two aspects. First, the content of a treaty is itself the product of “the conviction in common good as *opinio juris*”. If the contents of any treaty go against the natural truth and deviate from the basic human values which are deeply-rooted in international community, they cannot be actually implemented in the global practice of “rule of law” and certainly lose its validity eventually, even if the parties forcibly give the treaty effect by “Declaring Mutual Consent to be Bound by the Terms of the Treaty”; Second, people choose the form of treaty

¹⁰ This Convention was signed in 1886.

¹¹ This Convention was signed in 1920.

¹² This Convention was enacted in 1921.

¹³ This Convention was enacted in 1921.

¹⁴ This Convention was enacted in 1921.

¹⁵ This Convention was enacted in 1921.

and give treaty the legal effect by “Declaring Mutual Consent to be Bound by the Terms of the Treaty”, which is also the natural result of their “conviction in common good as *opinio juris*”. Treaties came to emerge and have gradually developed in human society after generations of practice. By way of social practising and rational thinking, people have reached a consensus that there must be a common code of conduct for the development of international community and the common survival of human society. This common code of conduct gradually developed into what we now call international law, whose sources are mainly the treaties. To make this common code of conduct really play a powerful role, it should be granted with effect. Who will give it effect formally? It is mainly the sovereign state who make common consent declaration in the treaty and eventually give legal effect to the treaty by using the power to fulfill a series of legislative procedures both at the domestic level as well as on the international stage. However complicated the procedures are, this development process in essence is ultimately the product of “conviction in common good as *opinio juris*” shared by contracting parties.

The common good recognized and trusted by mankind represents the mutual legal belief and legal experience shared by all human beings. Therefore, under the condition that they do not conflict with the actual situation of the international community, they should be applied by analogy as international law. While discussing inter-temporal law, Sorensen as the member of the international law society believes that “this method is rooted in some factors which transcend national or social differences and coexist in any legal structure. Some people say that there are some factors of natural law, while others just resort to the basis of some common and universal concepts, without which international law cannot survive.” Here, “some factors which transcend national or social differences and coexist in any legal structure” in Sorensen’s remarks refer to exactly the contracting parties’ shared conviction in common good as *opinio juris* in the case of international treaty.

5. Conclusion

A lot of linguistic contributions have traditionally been made to analyze the form and function of the nonliterary legal texts or discourses. By employing genre analysis approach, 330 English international multilateral treaties which have been concluded or acceded to by the Chinese government are selected to find out the move structure within the treaties. Aiming to fulfill the specific communicative purposes, the treaties are embedded with a prototypical six-move-structure: Move 1 Identifying the Legal Relationship Intended for Contracting Parties to Govern; Move 2 Establishing Contextual Foundations for the Present Legislation; Move 3 Declaring Mutual Consent to be Bound by the Terms of the Treaty; Move 4 Specifying Substantive Rights and Obligations of the Contracting Parties; Move 5 Elaborating Procedural Issues of Applying the Treaty; and Move 6 Attaching Optional Annexes.

On the issue of juridical basis of international law, it has vexed jurists for many years and a number of theories have been developed to answer the question. Treaties are the most important sources of international law. As for exploring the juridical basis of international law, treaties are the most suitable subjects to be empirically studied. In summary, the paper manages to conduct a linguistic-oriented exploration of the juridical basis of treaty, especially focusing on the language expression of Move 2 and Move 3 of the treaties. Among them, “Move 3 Declaring Mutual Consent to be Bound by the Terms of the Treaty” is a linguistic evidence to testify the correctness and pragmaticity of the Consensual Theory or “Coordinative Will” Theory. As for “Move 2 Establishing Contextual Foundations for the Present Legislation”, the author employs data analysis and language expressive examples to prove and explain the common good which the contracting parties believe in as law (i.e. “conviction in common good as *opinio juris*”) is the substantive validity basis of treaties. The reason lies in the view that the contracting parties are convinced of the basic values of mankind. Actually, the juridical force of international law does not derive from a traditional conception of law, nor is it based on consent, or derived from natural law. Its force comes from the fact that it is needed to ensure that international society operates efficiently and safely. “Law” is the hallmark of any political community and is necessary for the society to function and, because it is necessary, it is *ex hypothesi* binding.

Generally, this kind of linguistics-oriented and empirical method employed in the article on exploring the juridical basis of the treaty makes up for the disadvantages or weakness and meanwhile manages to find out answer to the perplexed problem confronted by researchers who previously or traditionally believed that the juridical basis of the treaty “cannot be proved” or is difficult to prove. The empirical research method, which starts with the linguistic examination of the treaty texts and further probes into the essence of the problem-solving, is somehow feasible, constructive and encouraging.

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