15E COMMISSION

STATUTE AND FUNCTIONS OF THE CONFERENCE OF THE PARTIES TO A TREATY

STATUT ET FONCTIONS DES ASSEMBLÉES DES ETATS PARTIES À UN TRAITÉ

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PARTIAL PRELIMINARY REPORT

0. PRELIMINARY NOTE

This report has been prepared as part of the work of the Fifteenth Commission of *L'Institut de Droit international* on the 'Statute and Functions of the Conference of the Parties to a Treaty'. The Commission was established in Naples in 2009 and consist – in addition to rapporteurs Malgosia Fitzmaurice and Geneviève Bastid-Burdeau – of the following members: José E. Alvarez, Jean Michel Arrighi, Masahiko Asada, Mohamed Bennouna, Jutta Brunnée, Philippe Couvreur, Olufemi Elias, Bing Bing JIA, Philippe Kirsch, Edward Kwakwa, Georg Nolte, Bernard H. Oxman, Georg Ress, Malcolm N. Shaw, and Santiago Villalpando.

The mandate of the Commission is to assess the Statute and Functions of the Conference of the Parties to a Treaty across different areas of international law. The proposed listed topics by the *confrères* and *consoeurs* of this mandate are as follows: 1) privileges and immunities of COPs; 2) treaty-making by COPs; 3) institutional framework of COPs; 4) functions of COPs; 5) status of COPs; 6) legitimacy of COPs; and 7) COPs as legal persons. The Commission assesses these topics within the areas of international criminal law, international environmental law, international economic law, international health law, international disarmament law and international culture law.

This report by Professor Malgosia Fitzmaurice has been prepared as a part of the Commission's broader report of the mandate as a whole. It assesses exclusively the institutional framework, functions, status, legitimacy, treaty-making, and responsibility of COPs in the context of multilateral environmental agreements (MEAs) only.

1. INSTITUTIONAL FRAMEWORK OF COPS/MOPS

The phenomenon of Conferences of the Parties/Meetings of the Parties (COPs/MOPs) is relatively recent. With the advent of Multilateral Environmental Agreements (MEAs) after the 1972 Stockholm Conference on Human Environment, COPs/MOPs were created in order to make the managing of MEAs more efficient and flexible. The COP is the supreme organ under MEAs that are applying the COP model and is composed of all treaty parties. COPs meet regularly, usually annually or every second year. A bureau elected by the COP may act on its behalf between its regular meetings and serves as a facilitating organ during the COP's sessions.

The functions of COPs are spelled out in their constitutive MEAs, although COPs may have 'implied powers' as well. Typical functions with respect to matters internal to the MEA include establishing subsidiary bodies, adopting rules of procedure, and giving guidance to subsidiary bodies and the secretariat (further below). In addition, COPs are instrumental in developing parties' substantive cooperation under the MEA by adopting new binding or non-binding

I.S.B.N. 978-2-233-01042-1

commitments by the Parties. Finally, COPs may act at the external level by entering into arrangements with States, intergovernmental organisations (IGOs), or the organs of other MEAs – raising the question about their 'international legal personality' (further below).

Protocols to MEAs – insofar as they are formally separate agreements – may have their own institutional structure. The substantive linkage between the parent convention and the protocol – and full or partial overlap in membership between the two – may, however, militate in favour of joint institutions or meetings. The Montreal Protocol on Substances That Deplete the Ozone Layer is an example of a protocol that establishes a separate MOP, which meets in conjunction with the COP of the convention. In contrast, the plenary body of the regional Convention on Long-Range Transboundary Air Pollution (LRTAP Convention) also serves as the governing body of its relevant protocols. The Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC) provides that the COP of the convention shall serve as the MOP of the Agreement, but Parties to the convention that are not Parties to the protocol may participate only as observers when the COP acts in this capacity.

Subsidiary bodies may be established through provisions in a MEA itself or, as already mentioned, by decision of the COP. They may have different functions, including financial assistance (as in the case of the Montreal Protocol's Executive Body), technology transfer, compliance (as in the case of the Montreal Protocol's Implementation Committee), or scientific advice. Subsidiary organs may have the same membership as the COP, but they may also be established with a limited membership, and even be composed of persons acting in their individual capacity.

2. FUNCTIONS OF COPS/MOPS

General Functions

The powers of COPs vary and there is not one standard common to all COPs. A common trend, however, is that the powers of COPs are expanding, and do at present include law-making. Functions of COPs regard both external and internal matters of managing the convention.[1] The following general powers can be singled out:

- Setting priorities and reviewing the implementation of the convention, based on the reports submitted by governments;
- Consolidating and analysing information from governments, NGOs, and individuals to make recommendations to the Parties on the implementation of the convention;
- Making decisions necessary for promoting the effectiveness of the convention; revising the convention when necessary; and acting as a forum for discussing matters of importance.[2]

[1] Louise Kathleen Camenzuli, 'The development of international environmental law at the Multilateral Environmental Agreements' Conference of the Parties and its validity, IUCN 7 <MON-085461.pdf >.
[2] *Ibid*.

I.S.B.N. 978-2-233-01042-1

As a rule, the powers of COPs are set out in treaty. However, certain treaties leave open ended the extent of the powers of COPs. For example, the London Convention provides that the COP is 'to consider any additional action that may be required' (Article XIV (4(f)). The 1979 Convention on Long-range Transboundary Air Pollution (LRTAP) provides that the COP can '[f]ulfil such other functions as may be appropriate under the provisions … of the Convention' (Article 10 (2) (c)).[3] The UNFCCC states that the COP is to '[e]xercise such other functions are required for the achievement of the objective of the Convention' (Article 7 (2)).[4]

Early MEAs exemplify the development of the functions of COPs. Their functions have evolved from the basic COP with limited powers as in the Ramsar Convention on Wetlands of International Importance. Original Article 6 of the Convention provided that the COP would 'as the necessity arises, convene Conferences on the Conservation of Wetlands and Waterfowl'. It also stated that the COP had an advisory character. This provision was amended in 1986 in order to create a COP to be tasked with the overviewing and promoting of the implementation of the Convention. The reference to the advisory character of the Convention was deleted.

Interpretative Functions

COPs may play an interpretative role. In particular, COPs can be engaged in the legislative or quasi-legislative function in relation to the parties of MEAs through the interpretation of certain ambiguous treaty provisions.[5] There are several examples of such interpretative functions.[6] One of the most important examples is that of CITES, which has provided the interpretation of certain provisions of the treaty. One of such interpretation was the definition of the species to be considered as a captive stock. There are some provisions relating to the captive stock and artificially propagated species in the text of the CITES (Article VII (4)). CITES provides that specimen of Appendix I animals 'bred in captivity for commercial purposes' and specimens of Appendix I plants 'artificially propagated for commercial purposes', shall be considered as Appendix II specimens.

Appendix I provides a very strictest protection and allows trade under limited conditions. CITES Animals Committee had observed that such a bare formulation in the CITES had led to various divergent and unsatisfactory interpretations by the parties to the CITES. CITES COP clarified the ambiguous provisions of the CITES by the Resolution Conf. 10.36 which said, *inter alia,* that an animal specimen 'bred

[3] Convention on Long-range Transboundary Air Pollution (adopted 13 November 1979, entered into force 10 March 1983) 1302 UNTS 20117.
[4] The 1992 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 29 December 1998) 170 UNTS 79.
[5] E.g. according to Davies the example of the Bern Convention is illustrative of the interpretation not modification, Peter Davies, 'Non-Compliance – A Pivotal or Secondary Function of COP Governance?' in Malgosia Fitzmaurice and Duncan French (eds), *International Law and Governance* (Leiden: Brill /Nijhoff) 2013) 93.
[6] *Ibid* 91-93.

I.S.B.N. 978-2-233-01042-1

in captivity' must be 'born or otherwise produced in a controlled environment' (sexual reproduction); or were in a controlled environment when offspring development commenced (asexual reproduction). The breeding stock must be established in accordance with the provisions of CITES and relevant national laws in a manner not detrimental to the survival of the species in the wild'.[7] The criteria in relation to plants were established by CITES COP.

Other examples of interpretative functions include the Executive Body of the LRTAP, which has interpreted unclear provisions of the Sulphur Dioxide Protocol. The Protocol provides that the parties 'shall reduce their natural annual sulphur emissions of their transboundary fluxes by at least 30% as soon as possible and at least by 1993, using 1980 levels as the basis of calculation and reduction' (Article 2). The Executive Body reached a 'common understanding' interpreting this obligation:

> *The obligation for the Parties to reduce their national annual Sulphur emissions or their transboundary fluxes by at least 30 % …at the latest by 1993…means that reduction to that extent should be reached in that time frame and the levels maintained or further reduced after being reached.*[8]

In 1996, the Executive Body interpreted in a similar manner Article 2(1) of the LRTAP 1988 Sofia Protocol on the control of emissions of Nitrogen Oxides. This Article provides that parties shall 'take effective measures to control and/or reduce their national annul emissions of nitrogen oxides... so that these, at the latest by 31 December 1994, do not exceed their national annual emission of nitrogen oxides…for the calendar year 1987'. The clarification provided by the Executive Body observed that this provision 'should be taken to mean that emission levels for the years after 1994 should not exceed those specified in that paragraph'.[9] As it was noted by Davies the application of both interpretations had a serious effect in finding certain States to be in non-compliance.[10]

One last example is that of the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention).[11] The definitional question has arisen concerning which the migratory 'endangered' species covered by Appendix I are. The definition in Article 1(e) of the Convention was very succinct and defined 'endangered' as where 'it is in danger of extinction throughout all or a significant portion of its range'. The CMS COP adopted Resolution 5.3 to more precisely define the term 'endangered' which is to be interpreted to mean a species 'facing a very high risk of extinction in the wild'.

[7] There were more detailed conditions such as: 'Specimens must be maintained 'without the introduction of specimens from the wild, except for the occasional addition to animals, eggs or gametes' to inter alia, 'prevent or alleviate deleterious inbreeding' either be managed in a way shown to be 'capable of reliably producing second generation offspring in a controlled environment' or have 'produced offspring of second generation or subsequent generation ' in such an environment', see Davies (n 5) 92.

[8] The Third Report of the Implementation Committee, EB.AIR/2000/2, para. 28, cited in Davies (n 5) 94.

[9] The Third Report of the Implementation Committee, EB.AIR/2000/2, para. 1, cited in Davies (n 5) 4.

[10] Davies (n 5) 94.

[11] Conservation of Migratory Species of Wild Animals (signed 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.

I.S.B.N. 978-2-233-01042-1

The guidance on this is to be sought by the parties by findings of the IUCN or be the assessment by the CMS Convention's Scientific Council. As Davies explains this listing has resulted in adding two new species to Appendix I of the CMS.[12]

In general, as Tardieu observed the COPs have inherent powers to interpret MEAs, even without a specific authorisation. They have the task of making the objectives of the Convention more precise, without modifying the provisions of MEAs. Tardieu argues that such an interpretative activity is rather about adjusting some elements according to the objectives of the Convention than its modification, since its draftsmen considered *ab initio* certain elements as variables.[13] This observation reflects the interpretative practice in the majority of cases, but we have to bear in mind that in certain cases, the difference between the interpretation and modification (amendment) is almost undistinguishable.

It may be observed that innovative interpretative techniques adopted by COPs in MEAs are not always shared by COPs in other multilateral conventions. An instructive example is the Framework Convention on Tobacco Control (FCTC).[14] In broad brushstrokes, a question has arisen as to decision powers of the FCTC COP concerning the regulation of the trade in tobacco products i.e. the relation of the FCTC and the World Trade Organization (WTO). Powers of the COP are defined by Article 23 (5) of the Convention and the Rules of Procedure (Rule 50).[15] Gruszczynski correctly states that the text of these provisions does not explicitly grant any powers to the FCTC COP to adopt binding substantive rules. It only authorises the FCTC COP to adopt decisions necessary to promote effective implementation of the Convention, in contrast with Article 2.9 of the Montreal Protocol, based on which binding obligations can be imposed on State parties.[16]

The same author is of the view that such powers cannot be implied. He has based his reasoning on the institution of consent to be bound as fundamental to the

[12] Davies (n 5) 95.

[13] Tardieu Aurélie. Les conférences des États parties. In: *Annuaire français de droit international*, volume 57, 2011. pp. 111, 123, 'si les conventions ne prévoient pas expressément l'interprétation authentique de leurs dispositions par la conférence des parties, elles lui attribuent néanmoins souvent la tâche de préciser concrètement l'objet de la convention en établissant des nomenclatures ou en déterminant le contenu de nomenclatures créées par les rédacteurs de la convention. Il s'agit plus d'*ajuster* certains éléments conformément aux objectifs de la convention que de modifier cette dernière puisque ses rédacteurs considèrent *ab initio* ces éléments comme des variables'.

[14] WHO Framework Convention on Tobacco Control (opened for signature 16 June 2003, entered into force 27 February 2005) 2302 UNTS 166. See on this L Gruszczynski, 'Tobacco and International Trade: Recent Activities of the FCTC Conference of the Parties' (2015) 49 *Journal of World Trade* 665.

[15] Article 23 (5): '[t]he Conference of the Parties shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention, in accordance with Articles 28, 29 and 33'. Rule 50: '2. For all other decisions [than on budgetary and financial matters], the Conference of the Parties shall make every effort to reach agreement by consensus. 3. If all efforts to reach consensus on decision referred to in paragraph 2 have been exhausted and no agreement has been reached, the Conference of the Parties shall proceed as a last resort as follows: (a) decision on substantive matters shall be taken by a three fourths majority vote of the Parties present and voting, unless otherwise provided by the Convention, or by these rules […]', cited in Gruszczynski (n 14) 670.

[16] Gruszczynski (n 14) 673.

I.S.B.N. 978-2-233-01042-1

creation of binding international obligations. The formulation of a general clause of Article 23 with the corresponding rule in the COP Rules of Procedures does not 'vest the COP with law-making authority and implies the consent of all Parties (including those which vote against a particular decision) to be bound by COP decisions'.[17] Therefore, Gruszczynski opines that COP decisions, which are not based on explicit language in a treaty cannot create binding obligations on States.[18] There are also other indications that FCTC COP has no law-making powers towards State parties. For example, the language used in Article 23(5) of the FCTC does not include the term 'rules' or 'norms but merely 'decisions necessary to promote its [the Convention's] effective implementation'.[19] Finally, guidelines to various provisions of the FCTC are adopted in the form of COP decisions, and they are considered as a type of soft law, which require a subsequent formal consent of State parties to give them legal force. As Gruszczynski states: '[a]ll these elements clearly suggest that the FCTC does not provide any general power to the COP to adopt decisions that would create binding obligations on the State-Parties'.[20]

Furthermore, the Draft Conclusion 11(2) of the ILC's 2018 work on subsequent agreements and subsequent practice states that depending on the circumstances, a COP decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a) VCLT, or give rise to subsequent practice under article 31, paragraph 3 (b) VCLT, or to subsequent practice under article 32 VCLT.[21] A decision adopted within the framework of a COP embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.[22]

As the commentary explains, 'the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides"'.[23] Furthermore, the word 'any' clarifies 'that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure'.[24]

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid* 674.
[20] *Ibid*.
[21] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries 2018, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). The report appears in Yearbook of the International Law Commission, 2018, vol. II, Part Two.
[22] *Ibid*, Draft Conclusion 11(3).
[23] Commentary to Draft Conclusion 11(2), at para 9.
[24] *Ibid.*

I.S.B.N. 978-2-233-01042-1

Examples include the Biological Weapons Convention Review Conference, which has regularly adopted 'understandings and additional agreements' regarding the interpretation of the Convention's provisions.[25] These agreements have been adopted by consensus by States parties within the framework of the review conferences. As such, they 'have evolved across all articles of the treaty to address specific issues as and when they arose'.[26] In adopting these understandings, States parties agree on the interpretation of the provisions of the Convention by 'defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation'.[27]

The International Court of Justice (ICJ) has likewise recognised that decisions of COPs may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a) VCLT, or give rise to subsequent practice under article 31, paragraph 3 (b) VCLT with respect to the role of the International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling. In addressing the recommendations of the IWC - which take the form of resolutions but are not binding – the ICJ pointed out that such resolutions, when they are adopted by consensus or by a unanimous vote, may be relevant for the interpretation of the Convention or its Schedule.[28]

There are further examples from the practice of COPs which support the viewpoint that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a).[29] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides in Article 17, paragraph 5, that: 'Amendments … shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted [them] …'. In 2011, the COP clarified the requirement of the acceptance by three fourths of the Parties, by agreeing:

> *without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment.*[30]

[25] As pointed out in the Commentary to Conclusion 11(2), at para 11.
[26] See P. Millett, 'The Biological Weapons Convention: securing biology in the twenty-first century', *Journal of Conflict and Security Law*, vol. 15 (2010), pp. 25–43, at p. 33.
[27] ILC Draft Conclusions (n 21), Commentary to Article 11(2), at para 11.
[28] *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226, at p. 257, para. 83.
[29] Recognised in the ILC Draft Conclusions (n 21), Commentary to Draft Conclusion 11(2), para 22.
[30] See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena, Colombia, 17–

I.S.B.N. 978-2-233-01042-1

The parties adopted this decision by consensus, with many States Parties 'underlining that the Conferences of States Parties to any convention are "the ultimate authority as to its interpretation"'.[31] Thus, decisions of COPs may under certain circumstances embody subsequent agreements under Article 31(3)(a) VCLT. Such decisions may also give rise to subsequent practice under Articles 31(3)(b), or to other subsequent practice within the meaning of Article 32. As the commentary to Article 11 observes, the character of a COP decision must be carefully assessed and identified.[32] For this purpose, the Commentary suggests that the 'specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties' decision as a whole, its object and purpose, and the way in which it is applied', need to be taken into account.[33]

Decisions of COPs have also been regarded as a subsequent practice in the meaning of Article 31 (3) (a, b) VCLT by scholars. As Davies opined: '[a]n authentic interpretation by a given treaty regime's CoP should legitimately be regarded as such an agreement or evidence of such a practice particularly bearing in mind the CoP's role as the plenary and political body in which all State Parties are represented and can actively participate'.[34] Another possibility is that decisions of COPs are an example of so-called 'evolutionary interpretation, which is a consequence of approaching a treaty as a 'living instrument'.[35] In the jurisprudence of the European Court of Human Rights (ECTHR), it means that the Court responds in its interpretation of the European Convention on Human Rights (ECHR) and its Protocols in light of the present day conditions.[36]

Furthermore, it may be said that through general authorisation in MEA, MEAs gave a very general authorisation to create new rules, principles and regulations for their parties. Thus it may be said that the organs of MEAs have the powers to interpret the treaty in an evolutionary manner through crystallization (but also modification) of general provisions.[37] The changing practices and circumstances over the course of time and changing practical realities, social attitudes and normative demands call for flexible and evolutionary approaches to treaty interpretation.[38] There is of course an inherent problem of the distinction between

21 October 2011), UNEP/CHW.10/28, annex 1, Decision BC-10/3 (Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention), para. 2.

[31] ILC Draft Conclusions (n 21), Commentary to Draft Conclusion 11(2), para 22.

[32] *Ibid*, Commentary to Draft Conclusion 11(2), para 23.

[33] *Ibid*.

[34] Davies (n 5) 86.

[35] See Michael J. Bowman '"Normalizing"' the International Convention for the Regulation of Whaling' (2008) 29(3) *Mich. J. Int'l L.* 293, 338–339; Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I', 21 *Hague Yearbook of International Law* (2008) 101, and 'Dynamic (Evolutive) Interpretation of Treaties, Part II', 22 *Hague Yearbook of International Law* (2009) 3; Davies (n 5) 83-84; Danie Moeckli and Nigel D. White, 'Treaties as "Living Instruments"' in Michael J. Bowman and Dino Kritsiotis, *Conceptual and Contextual Perspectives on the Modern law of Treaties* (Cambridge: Cambridge University Press 2018) 136.

[36] Moeckli and White (n 35) 148.

[37] Fitzmaurice (n 35) 4.

[38] Bowman and Kritsiotis (n 35) 459.

I.S.B.N. 978-2-233-01042-1

evolutionary interpretation and subsequent practice, an issue which has arisen in international case law.

The purpose of Draft Conclusion 8 is to emphasize that subsequent agreements and subsequent practice, as any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation 'may assist in determining whether or not an evolutive interpretation is appropriate with regard to a particular treaty term'.[39] Draft Conclusion 8 deals with the thorny issue of intentions of parties and refers to 'presumed intention' of the parties to the treaty. Although interpretation must seek to identify he intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.[40]

The significance of the intention is confirmed by scholars, as it is viewed as a cornerstone of evolutionary interpretation i.e. obligations can evolve only if the parties intended that a particular term, or the treaty as a whole, have an evolutionary character. One of the unresolved and difficult issues is how to establish such an intention.[41] Taking into account many unresolved questions and the practical impact on the States' obligations of the application of evolutionary interpretation, it is not surprising that the ILC recommends in general a cautious approach to it.[42]

In conclusion, the short and long-term consequences of evolutionary interpretation and interpretation based on subsequent practice should be taken into consideration in light of the usual factors of the Vienna rule. In choosing whether to apply one or the other technique, the following questions should be considered: whether application of one or the other technique will have a different expansive potential; whether they favour the subsequent intentions of the parties or put the future development of the treaty somewhat beyond the parties' grasp; and whether the interpretation will carry with it horizontal consequences. These considerations should be taken in light of the intention of the parties to the extent that this is expressed in the plain text, in light of the object and purpose of the treaty and with regard to its context.[43]

[39] ILC Draft Conclusions (n 21), Commentary to Draft Conclusion 8, at para 4.
[40] *Ibid*, at para 5.
[41] Julian Arrato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences' (2014) 9 The Law and practice of International Courts and Tribunals 443, 466.
[42] ILC Draft Conclusions (n 21), Commentary to Draft Conclusion 8, at para 10.
[43] Arrato (n 41) 494.

I.S.B.N. 978-2-233-01042-1

Substantive Decision-Making Functions

COPs, together with their subsidiary bodies and secretariat, have important roles in developing the substantive commitments of MEA Parties. The Parties will usually meet in the subsidiary organs as well as in the COP, reaching decisions through negotiations. The governing MEA will set out the decision-making powers of the COP in relation to the adoption of new substantive commitments. Virtually all COPs may adopt amendments to their governing MEA that contain new legal obligations. Such amendments will, however, require subsequent ratification by States parties to the MEA in order to create binding obligations for individual Parties.

Several MEAs provide for their COPs to adopt or amend annexes to the MEA or its protocols, subject to the non-acceptance of these decisions by individual Parties. Annexes are often of a 'technical' nature, but they may also involve controversial political issues, such as lists of prohibited substances or of protected animals or plants. Relevant examples can be found under the Montreal Protocol, CITES, and the Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention). Although the Parties retain the formal right to make a notification of non-acceptance, there may be considerable political pressure not to make such a notification. By requiring action by States in order for them not to become committed rather than to become committed – opting-out, instead of opting-in – the efficiency of law-making is greatly enhanced.

Adoption of Binding Decisions

The most advanced form of delegated powers to the COP is found in treaties that authorize it to adopt binding decisions. This approach has the advantage of allowing for a more speedy process and of preventing States from staying outside new commitments, since otherwise they could do so by non-ratification or non-acceptance of amendments or protocols. In such cases of binding COP decision-making, we may truly speak of international legislation. However, it seems that the only MEA-based example of such explicit powers is Article 2.9 of the Montreal Protocol, which allows the adoption of certain new obligations in the form of 'adjustment' – with binding effect for all Parties. Although Article 2.9 has never been used, one cannot exclude the possibility that the mere existence of this option can help achieve solutions based on consensus.

A controversial issue is whether COPs can have law-making powers without the explicit authority to make binding decisions being given in the text of the MEA. Generally, such powers would encroach on the sovereignty of States and should not easily be presumed. However, Article 17 of the Kyoto Protocol, for example, enables the COP to adopt 'rules' relating to the operation of the system for trading in emissions of greenhouse gases. The use of the word 'rules' suggests that such measures are intended to be legally binding. This idea is supported by the fact that Article 17 refers to 'relevant principles, modalities, rules and guidelines', indicating that 'rules' are different from, for example, non-binding 'principles' or 'guidelines.' Such an interpretation is also supported by substantive

I.S.B.N. 978-2-233-01042-1

considerations. For instance, a Party that makes use of the 'rules' on emissions trading by buying emission quotas cannot, arguably, be accused of non-compliance with the protocol when it wants to add these quotas to the emission limits of the protocol.[44]

3. STATUS OF COPS/MOPS

The ILC's 2018 work on subsequent agreements and subsequent practice states that the 'legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure'. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty. There is no uniform and consistent approach to the legal nature of the COPs in the legal debate. The most prevalent is that they are of a hybrid character, positioned between issue-specific diplomatic conferences and the permanent plenary bodies of international organizations and that they exercise their functions at the interface of the law of treaties and the law of international organizations. This is a very wide approach, lacking a more specific and detailed definition. Nolte in his seminal work, *Treaties and Subsequent Practice*, stated that they are situated somewhere in between a diplomatic conference and an international organization.[45] They constitute useful *fora* for state parties to evolve treaty regimes and cooperate. They are treaty bodies in the sense that they are created on the basis of treaties; they are not to be equated, however, with bodies which comprise independent experts or bodies with a limited membership.[46]

The extensive functions of MEAs is one of the examples of the growing area of so–called 'creative legal engineering'.[47] The powers of the organs based on MEAs, particular COPs gave rise to varying views as to the nature of the convention organs or bodies concerned in making the decisions. According to one view, they can be seen as free standing entities, involving institutional arrangements, or structures, which are independent from the parties, and having, at least to a certain extent, an autonomous character the sense of having their own law-making or rule-making powers, or at least, power to generate or alter, the obligations, as between themselves, of the parties; and to formulate, or operate, mechanisms, such as compliance mechanisms, within the treaty regime which may have effects which are binding on the parties. Churchill and Ulfstein call such institutions 'autonomous institutional arrangements' (AIA).

If we adhere to the view that COPs can be seen as no more than a form of diplomatic conferences providing a continuous, or at least regular, context within

[44] Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94(4) *AJIL* 639.
[45] Georg Nolte 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial and Quasi-Judicial Proceedings' in Georg Nolte (ed.) *Treaties and Subsequent Practice* (Oxford: Oxford University Press 2013) 36.
[46] *Ibid.*
[47] Rene Lefeber, 'Creative Legal Engineering' (2004) 13 *Leiden Journal of International Law* 1.

I.S.B.N. 978-2-233-01042-1

decisions can more readily be made than through the calling of *ad hoc* diplomatic conferences. In fact, it is submitted that COPs and MOPs may partake character of either, depending on both the substantive nature of what is discussed, and on whether or not their decisions will require subsequent validation to become binding on the parties.

4. LEGITIMACY OF COPS/MOPS

The procedure of tacit acceptance /opting-out procedure has been known for a long time in relation to organizations such as the International Labour Organization (ILO), the World Health Organization (WHO), the International Telecommunications Union (ITU), the World Meteorological Organization (WMO), the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the International Whaling Commission (IWC). This procedure is not uncommon in relation to organs established by environmental treaties such the Consultative Meeting of the Contracting Parties established by the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Convention),[48] but is best known as applied by the IMO in the treaties concluded under its auspices. Within the framework of the IMO, the International Convention for the Prevention of Pollution from Ships (MARPOL)[49] and the International Convention for the Safety of Life at Sea (SOLAS)[50] were the first instruments to introduce these procedures.

This procedure, however, is not exclusive to these organizations and is also widely used in other international institutions such as many international fisheries commissions such as the North East Atlantic Fishery Commission (NEAFC),[51] the Northwest Atlantic Fisheries Organization (NAFO),[52] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[53] and the IWC.[54] The system of 'opting-out' is a mechanism which was a precursor of the expanding phenomenon of the so-called autonomous institutional arrangements (AIAs), as described by Churchill and Ulfstein, and the increasing legislative powers of COPs/MOPs, including amendments to treaties.[55]

[48] 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120.
[49] 1973 International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184.
[50] 1974 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278.
[51] 1980 Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries (adopted 18 November 1980, entered into force 17 March 1982) 1285 UNTS 129.
[52] 1949 International Convention for the Northwest Atlantic Fisheries (adopted 8 February 1949, entered into force 3 July 1950) 157 UNTS 158.
[53] 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.
[54] 1946 International Convention for the Regulation of Whaling.
[55] Churchill and Ulfstein, 'Autonomous Institutional Arrangements' (n 44). This issue will be analyzed in more detail *infra*, in Section 7.

I.S.B.N. 978-2-233-01042-1

The procedures, which characterise the legal acts of an organization set up under a treaty by way of involving the 'tacit acceptance' system, are: firstly, the acts are adopted by a majority vote, and, secondly, that member States can lodge an objection and, thus, avoid being bound by the act. The essential characteristic is based on the premise that a member State is automatically bound by the act of the organization unless it takes specific action to avoid being so bound (ie by way of 'opting-out').[56] Thus, this system encompasses in equal measure the legal problems of consent to be bound by a treaty and the law-making or at least rule-making acts of an international organization, which may result in a treaty being amended.

The advantages of tacit acceptance/opting out are numerous, in particular due to its quick, simple and efficient modification of conventions to conform to the development of technology in shipping industry. A very important element of this procedure is, as it was observed, that it provides certainty as to the date upon which an amendment becomes effective, rather than leaving this to the timing of individual acceptances. However, it may happen that States do not lodge an objection in time ('opt out'), and then they are bound by the amendment. In such an event, the tacit acceptance/ opting out procedures may prove to be disadvantageous for States. Such a situation was also noted by Shi. This author especially focused on the situation of developing States. He has observed that since one-third of contracting States needs to object to an amendment to bar it from entering into force, it is of utmost importance that in particular developing countries, are involved in the amendment process. These States who are not in favour in accepting amendments, have an opportunity to raise their concerns during the review process. 'Otherwise, once an amendment is adopted, it will apply to reluctant nations by default'.[57] Shi further explains that the tacit acceptance/ opting out procedure was problematic for developing countries. In particular, the frequency of amendments coming into force has impaired governments' abilities to implement amendment changes.[58]

The question of the legitimacy of COPs/MOPs decisions has been questioned by some authors, in view of their general impact on States' conduct and domestic democratic procedures implementing international law. These considerations also relate to their functions concerning tacit amendment /opting out procedures. In view of the present author, two such theories evidence the complexity of

[56] On the subject, see, in particular, Krzysztof Skubiszewski, 'A New Source of the Law of Nations Resolutions of International Organisations' in P Guggenheim and M Battelli (eds), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Imprimerie de la Tribune de Genève 1968) 508.
[57] Shi, 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1999) 11(2) *University of San Francisco Maritime Law Journal* 310.
[58] *Ibid.* 'For example, after the first set of amendments to SOLAS was adopted in 1981, Brazil informed the IMO of its difficulty in complying with the amendments and submitted its own time schedule for compliance. Similarly, on July 15, 1986, Columbia communicated to the Secretary-General of the IMO that although it had accepted the International Convention for the Prevention of Pollution from Ships and its Protocol of 1978 ("MARPOL 73/78"), Columbia was unable to implement the amendment due to its high financial cost. For Columbia and Brazil, as with other developing countries, it is often more difficult to comply with amendments that are more stringent than the parent conventions themselves.' (footnotes omitted)

I.S.B.N. 978-2-233-01042-1

capturing the legitimacy of acts of COP/MOPs, i.e., the theory of fairness of Thomas Franck[59] and the interactional theory of Lon Fuller.[60]

Bodansky, commenting on legitimacy in the context of international environmental law, expressed the view that although environmental law had developed 'through a consensual rather than an authoritative process' the phenomenon of authority plays an ancillary role.[61] This statement holds as well in relation to the issue of legitimacy in the case of COPs/MOPs, due to their—at times—authoritarian functions and activities, influencing the behaviour of States. The question of legitimacy of actions and functions of COPs has taken a central place in discussion relating to the role of COPs/MOPs. As was stated by Bernstein:

> *Legality is potentially violated when a treaty body, group of experts such as scientists empowered by a treaty … or even a representative body of state delegates, makes a decision that appears to go beyond the mandate given to them by the statute to which states consented.*[62]

The question of legitimacy can be analysed from the point of view of fairness, a theme that was elaborated in seminal works of Professor Franck. A full account of this author's theory exceeds the purpose of this report. However, it is worthwhile to remind oneself of the main tenets of his theory, in order to pose the question whether far-reaching obligations of States outside their jurisdiction fall within the concept of legitimacy, understood as fairness. It was emphasised by Franck that the key factor of legitimacy is fairness, which accommodates a popular belief that a system of rules, to be fair, must be firmly rooted in a framework of formal requirements about how the rules are made, interpreted and applied.[63] The belief that a rule is legitimate reinforces the perception of its fairness and contributes to compliance. Fairness, he further explains, is the only formula which will command respect and ensure compliance.[64] The attributes of legitimacy are symbolic validation, determinacy, adherence and coherence. The first of these, determinacy, is defined by Franck as '[t]he ability of a text to convey a clear message. To appear transparent in the sense that can see through the language of law to its essential meaning'.[65]

The perceived legitimacy of a rule also relies on the generality (coherence) of principles the rules apply. The belief of illegitimacy is rooted in the rule's lack of generality, i.e. its applicability only in one instance. Such rules are, as Franck observes, 'unprincipled'; 'they do not treaty likes and alike and they therefore lack coherence'.[66] The rule is coherent

[59] Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press 1995).
[60] Jutta Brunnée and Stephan Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 19 *ColumJTransnat'lL* 19, 49-53
[61] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *AJIL* 596, 604.
[62] S. Bernstein, 'Legitimacy in a Global Environmental Governance' (2005) 1 *JILIR* 139, 153-4.
[63] Franck (n 59) 25.
[64] *Ibid* 13.
[65] *Ibid* 30.
[66] *Ibid* 38.

I.S.B.N. 978-2-233-01042-1

> *[w]hen its application treats cases alike and when the rule relates in a principled fashion to other rules in the same system. Constancy requires that a rule, whatever its content, be applied uniformly in every 'similar' or 'applicable' instance.*[67]

COPs /MOPs amend/modify MEAs by fleshing out certain of their fundamental provisions, and formulate general, coherent and well determined new rules, which are applicable in a repeated fashion in the practice of state parties, as it was evidenced in cases of the CITES and the Montreal Protocol. There are attempts by theorists to explain the question of legitimacy of COPs/MOPs' decisions based on the 'interactional theory' of Lon Fuller, transposed into the field of international environmental law by Jutta Brunnée and Stephen Toope.[68] This theory of 'internal morality' is based on avoidance of contradiction, generality and congruence with underlying rules. Fuller's 'internal morality' is associated with the essential processes by which law is created, interpreted and administered.[69] In this theory, legitimacy is based on cooperation and interaction between actors (the governing and governed) rooted within the social practice and conventions they created, within the context of norms and institutions they established.[70] Legitimacy is based on a 'thick' acceptance of the need for emerging norms, which is 'promoted by reference to past practice, contemporary aspirations and the deployment of reasoning by analogy'.[71]

The interactional perspective is not based on formal 'bindingness', and thus abandons the division between soft and hard law. The differentiation between legal norms and non-legal norms is effected through internal characteristics, which entail distinctive legal legitimacy and persuasiveness, requiring that rules be compatible with one another and reasonable, that official action is congruent with known rules and that rules are transparent and relatively predictable. The degree to which these requirements are met, defines the legitimacy of the norms or legal system, 'and their power to promote adherence'.[72]

Brunnée describes as follows the working of this theory:

> *States (and other international actors), through their interaction, influence the scope and content of international norms and institutions. In turn, these norms and institutions furnish the context within which interaction takes place and shape the identities of the actors themselves. In other words, in this continuous process, actors come to understand themselves and their interests in light of their interaction with others and in light of the norms that frame the interaction. International law is generated as patterns of*

[67] *Ibid* 43.
[68] Brunnée and Toope (n 60) 49-53; Brunnée, 'COPing with Consent' (2002) 15(1) *LJIL* 15.
[69] Jutta Brunnée and Stephan Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Pres, 2010) 56.
[70] *Ibid.*
[71] *Ibid* 66.
[72] Brunnée, 'COPing with Consent' 36.

I.S.B.N. 978-2-233-01042-1

> *social practice emerge and increasingly influential mutual expectations and shared understandings of actors evolve.*[73]

Brunnée, explains that due to its characteristics, the interactional theory (without the formal division between binding and non-binding norms), depicts in a more accurate way the role of COPs as legislators as 'in an interactional account, legislation, whether at the national or international level, is never unidirectional imposition of authority'.[74] COPs' legislating process, according to this theory, is engaged in a broader collective process, congruent with the expectations of society; and meets internal requirements. In this theory of law-making, state consent plays a secondary role.

States may be most likely to agree to make law 'enforceable' when it has become binding in the interactional sense. Alternatively, states may be most likely to insist on formal consent where there is an insufficient foundation of shared understandings (such as when a protocol or an amendment on new substances or control measures has to be negotiated). In this context, the requirement of formal consent may in fact provide a protective mechanism that facilitates effective interactive processes by enabling states to participate, at least in principle, as equals.[75]

Brunnée analyses the question of legitimacy within the context of COPs through the prism of interactional theory. Lawmakers, such as COPs, should keep the various legitimacy criteria in constant reference; the rules will gain more legitimacy (be more persuasive and influential) when there is stronger adherence to the criteria, with the participation of all actors.[76]

The question of legitimacy can also be analysed through the lens of simple consent, which of course is anything but simple. However, as Bowman opined legitimacy is itself often a prerequisite to efficacy in international affairs, and the great virtue of collective decision-making through treaty institutions is that it has the capacity for continual self-legitimation through its inherently inclusive and consensual nature. Of course, what counts as "consent" for legal purposes depends very much upon the circumstances, and it is clear that simply forgoing the chance to object may often be sufficient. Accordingly, mere acquiescence can serve as an extremely powerful vector for legitimating change in international legal relationships, but at the very least this will require the conferral of a formal opportunity to dissent, which regular plenary meetings obviously provide.[77]

Savaşan is of the view that procedural safeguards protect legitimacy, such as a preliminary phase a prior consultation between the parties concerned; due process; transparency of proceedings. However, as Savaşan has observed the concept of

[73] *Ibid* 34.
[74] *Ibid* 38.
[75] *Ibid.*
[76] *Ibid* 46.
[77] Michael J Bowman, 'Beyond the "Keystone" COPS:s: The Ecology of International Governance in Conservation Treaty Regimes' in Malgosia Fitzmaurice and Duncan French (eds) *International Law and Governance* (Leiden: Brill /Nijhoff 2013), 27.

I.S.B.N. 978-2-233-01042-1

legitimacy is very complicated and complex, consisting of very diverse elements. Thus, diversity related to this issue of legitimacy commands further examination and empirical studies 'on the distinctive characteristics of different institutions and to develop legitimacy perspective for each one of these'.[78] There is a great variety at present of these mechanisms, and they require case –by-case studies of legitimacy,[79] based on theory and practice.

This short section is meant to be illustrative of the complex question of the legitimacy of the decisions of COPs/MOPs. The author of this chapter do not presume that there is one theory which would 'legitimize', in a persuasive and absolutely acceptable fashion, the legitimacy of COPs/MOPs' functions. However, the quest for justification evidences the dilemma faced by States. Such functions of COPs/MOPs reformulate the notion of consent as classically established, therefore resulting in attempts at legitimatization.

5. INTERNATIONAL LEGAL PERSONALITY OF COPS/MOPS

Most of the attention devoted to the powers and functions of MEAs has focused on standard setting and the implementation of these standards within the scope of the agreement. MEAs, however, may also need to have a 'foreign policy' – for instance, the relationship to the IGO hosting the secretariat must be arranged; there may be a need for agreement with the State hosting the secretariat and meetings of the Parties; implementation of commitments may require financial assistance and capacity building and, hence, arrangements with international financial institutions; and, finally, because several environmental problems are inter-connected, it may be necessary to require cooperation between different MEAs and IGOs involved in the environmental field. This raises the question about the 'international legal personality' of COPs to enter into binding agreements under international law.

MEAs do not contain explicit provisions setting out their treaty-making capacity. This absence of explicit provisions is, however, also common to most IGOs, without preventing them from enjoying such legal capacity. Furthermore, several provisions of MEAs may be taken to provide treaty-making capacity, such as the catch-all phrase in Article 7(2) of the Climate Change Convention, which states that the COP 'shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention'; Article 7(1) authorizing the COP to '[s]eek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies'; and the powers of the secretariat under Article 8(2)(f) to 'enter, under the overall guidance of the

[78] Zerrin Savaşan, 'Legitimacy Questions of Non-Compliance Procedures: Examples from Kyoto and Montreal Protocols', in: Christina Voigt (ed) *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge: Cambridge University Press 2019) 364.
[79] *Ibid.*

I.S.B.N. 978-2-233-01042-1

Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions'.

The main basis for accepting the international legal capacity of IGOs at the external level has, however, been the doctrine of 'implied powers'. The reason for establishing COPs, subsidiary bodies, and secretariats rather than formal IGOs was 'institutional economy' and not a desire to have less effective institutions. Furthermore, there is a need for MEA organs to act at the external level. Hence, 'implied powers' should be equally acceptable as a basis for the treaty-making capacity of MEAs as for that of IGOs.

If we take a look at the arrangements actually entered into by COPs, we find, first, that the relationship with the organization hosting the secretariat is not based on a binding or non-binding agreement but rather on parallel decisions of the COP and of the organs of the host organization on their mutual relationship. Thus, the COP of the Climate Change Convention decided at its first meeting in 1995 that 'the Convention secretariat shall be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme' (Decision 14/CP.1). The UN General Assembly responded by adopting a resolution which '[e]ndorse[d] the institutional linkage between the Convention secretariat and the United Nations, as advised by the Secretary-General and adopted by the Conference of the Parties' (Resolution 50/115, 1995).

However, in regard to the arrangements made between the MEA organs and the State hosting the secretariat or meetings of such organs, we find agreements, such as on privileges and immunities, that should be considered to be of a legally binding nature. Examples are the 1996 Agreement between the United Nations, the Federal Republic of Germany, and the Secretariat of the Climate Change Convention and the 1998 Agreement between the Multilateral Fund for the Implementation of the Montreal Protocol and Canada. These agreements were accepted by the COPs, respectively, of the Climate Change Convention and of the Montreal Protocol.

6. NON-COMPLIANCE PROCEDURES AS A SPECIALIST AREA OF COPS/MOPS

Non-compliance procedures, which concern measures directed at the parties to MEAs in cases of non-compliance with the treaty provisions or the decisions of COPs. Non-compliance procedures can be named *quasi*–legal as they-with the possible exception of the non-compliance mechanism under the Kyoto Protocol – do not result in 'absolutely' binding decisions from which States cannot escape. However, it may be mentioned that decisions of COPs on non-compliance carry a great weight and although formally non-binding, they have proven to be a very effective mechanisms to bring States to compliance. Moreover, through compliance procedures COPs exercise powers that shape the obligations of States parties to MEAs. The question that may be asked concerning compliance procedures in relation to law-making is whether they 'make' law for the parties to

I.S.B.N. 978-2-233-01042-1

MEAs. Since the establishment of a Non-Compliance under the Montreal Protocol in 1992, it has been a common practice of States parties to MEAs to create treaty bodies, called 'Compliance' or 'Implementation Committees' which have the function of determining a State party's compliance with its international obligations and reporting non-compliance to the COPs.[80]

It may be observed that the functions of non-compliance bodies are based on a composite notion of compliance comprising monitoring, verification and including national reporting, which is a of a fundamental importance for the functioning of MEAs but may be quite unsatisfactory.[81] As Davies explains it is the UNFCC, which is a blueprint for other MEAs regarding the role of COPs in determining that reports from State parties would be made subject to review by a team of experts. Monitoring is a system set by COPs and this task is entrusted either to a non-compliance body or to a Secretariat, such in the LRTAP Convention.[82] Under the LRTAP regime, the Implementation Committee is responsible for the monitoring of the Parties' reporting obligations and also their obligations to reduce emissions under the various protocols. On the basis of Resolutions, CITES COP has established mechanisms designed to improve compliance, such as the establishment of the 'Review of Significant Trade' procedure originally introduced pursuant to monitor trade in Appendix II species believed to be subject to significant trade.[83] This procedure originated in order to identify difficulties experienced by national Scientific Authorities in their determination as to whether continued trade in a species would be detrimental to that species' survival. Non-compliance with the recommendations of the Animals or Plants Committee range may result by in the Standing Committee taking on appropriate action which may include a possible suspension of trade between Parties and the range State in non-compliance.[84]

NCPs were designed to respond to a breach of environmental obligations in a multilateral, not a bilateral, context, which is 'capable of accommodating community interests in a truly satisfactory manner'. Environmental obligations, in particular relating to global issues are not reciprocal in nature.[85] Therefore the classical settlement of dispute procedures as envisaged by Article 33 of the UN Charter, bilateral in nature, are not suitable for addressing non-compliance within a multilateral context and therefore remedying non-compliance relating to global

[80] Montreal Protocol, Article 8 and Annex IV (Implementation Committee); 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (signed 23 June 1998, entered into force 30 October 2000) 2162 UNTS 447, Article 15; (Compliance Committee: Decision VI /12, Conference of the Parties of the Basel Convention, 2002, UN Doc.UNEP/CWH.6/40, 6 February 2003, Annex (Committee); Kyoto Protocol (signed 11 December 1997, entered into force 16 February 2005) 2303 UNTS 262, Article 18 (Compliance Committee). Under the CITES, the role of the Compliance Committee is performed by the Standing Committee.
[81] Davies (n 5) 100-104.
[82] *Ibid* 97.
[83] CITES Resolution Conf. 12.8 (Rev. CoP13) cited in Davies (n 5) 97.
[84] Davies (n 5) 98. There are numerous other examples, see Davies (n 5) 98-100.
[85] Bruno Simma, 'From Bilateralism to Community of Interests' (1994) 221 *Recueil Des Cours* 217.

I.S.B.N. 978-2-233-01042-1

issues such as climate change, protection of biodiversity or the ozone layer. There are alternative explanations as to why NCPs are more suited to deal with non-compliance than traditional disputes procedures. It may be that States prefer NCPs, due to the fact that they exercise more control over the whole process and its result than over third-party mechanisms, such as the judicial or arbitral procedures. These procedures have less stringent effects; the decisions of non-compliance bodies are not final in the form of *res judicata* and are less intrusive. NCPs are based on the approach favouring prevention, which suits better the general trend in international environmental law, relying to a greater degree on such means as reporting or verification processes rather than having recourse to settlement of disputes procedures.

The character of the NCPs is well defined by the NCP of the Basel Convention. In its Objectives it is stated as follows:

> *The objective of the mechanisms is to assist Parties to comply their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of the compliance with the obligations under the Convention.*

The mechanism's nature is described in the following terms:

> *The mechanism shall be non-confrontational, transparent, effective and preventive in nature, simple, flexible, non-binding oriented in the direction of helping parties to implement provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries with economies in transition, and is intended to promote co-operation between the Parties. The mechanism should complement work performed by other Convention bodies and by its Basel Convention Regional Centres.*

The classical, first NCP was established under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention on the Protection of the Ozone Layer. At present almost all MEAs established Non-Compliance procedures. It has to be said that although NCPs share certain common features, they are designed to reflect the character of the MEA on the basis of which they are established. For example, in the Aarhus Convention, which is a hybrid human right and environmental treaty, civil society play a major role in submitting cases to the Compliance Committee.

The main features of the NCP of the Montreal Protocol are its facilitative character and transparency. In addition, the NCP under the Montreal Protocol follows the requirements of due process: notification, right to fair hearing, and impartiality. It may be observed that although NCP is not a judicial procedure, it has certain of its characteristics, such as the right to a fair hearing, which according to paragraph 10 of the NCP accords to the Party potentially in non-compliance, the right to participate in the consideration by the Committee of that submission'. The Party in alleged non-compliance is not allowed participate in the elaboration and adoption of recommendations concerning its own compliance (paragraph 11 of the NCP). Three organs are involved in the NCP: the Implementation

I.S.B.N. 978-2-233-01042-1

Committee, the Secretariat and the COP. The main function of the Secretariat regarding non-compliance is to receive the reports of Parties concerning non-compliance and submitting them to the Implementation Committee. The Secretariat as well may observe non-compliance on the basis of the reports of the Parties and inform the Implementation Committee (paragraphs 1, 2, 4 of the NCP). The main task of the Implementation Committee is to act in advisory capacity to the COP. It must be stressed that the final decision of non-compliance rests with COP.

It is composed of ten representatives of the Parties and is elected by the COP for a term of two years, based on equitable geographical representation (paragraph 5 of the NCP). The COP is the highest body, representing all Parties. It has the powers to adopt a decision on non-compliance and to decide what measure will be applied in the event of non-compliance (see below). The NCP may be triggered either by the Secretariat, by any Party (Parties) concerned about non-compliance or potential non-compliance of another party (paragraph 1 of the NCP) and by the Party in non-compliance itself (paragraph 4 of the NCP). The NCP includes several procedural safeguards for a Party under this procedure. A Party, which is not a member of the Implementation Committee and is identified as being potentially in non-compliance, or has itself made such a submission, shall be entitled to participate in the meetings of the Implementation Committee, when it considers its non-compliance (paragraph 10 of the NCP). The NCP is also based on confidentiality, i.e. the Parties and the Implementation Committee involved in deliberations protect the confidentiality of information they receive (paragraph 15 of the NCP). Exceptionally, only the Kyoto Protocol allowed its compliance committee to make all decisions without the participation of COP in the final decision. Decision of both Branches of the Compliance mechanisms are final (there is a limited possibility of an appeal from a decision of the Enforcement Branch to the COP). As Davies observes 'the issue remains as to whether, in particular, any Enforcement Branch decisions of a punitive nature could be regarded as legally binding'.[86] Where a State Party had failed to comply with its emissions reduction target under the Kyoto Protocol's 2008–2012 period, the Enforcement Branch shall *inter alia* deduct 'a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions' from that State Party's assigned amount in a second commitment period. But Article 18 of the Kyoto Protocol stipulates that non-compliance procedures 'entailing binding consequences shall be adopted by means of an amendment to this Protocol'.

As Davies argues 'in the absence of such a formal amendment, a State in non-compliance might argue that any future decision by the Enforcement Branch to deduct emissions lacks consequences of a legally binding nature'.[87] The compliance mechanism set up under the Kyoto Protocol was abandoned in the

[86] Davies (n 5) 111.
[87] *Ibid* 111-12.

I.S.B.N. 978-2-233-01042-1

Paris Agreement,[88] based on Article 15, which is an enabling clause.[89] The task of the Committee is facilitative: 'The Article 15 Committee is expected to enhance the effective functioning of the Paris Agreement both by encouraging parties to implement the Agreement and by holding them accountable for aspects of their performance'.[90] The Committee is part of the mechanism established under Article 15(1) of the Agreement. It is a standing, expert body with a mandate to address situations related to the performance of individual parties.[91] The complex procedure under the Paris Agreement has been described as follows:

The Article 15 modalities and procedures are carefully designed to respect the transparent, non-adversarial, facilitative and non-punitive nature of the Committee's work. They also respect parties' sovereignty and their respective national capabilities and circumstances… The Committee can only apply facilitative measures, and cannot impose penalties, fines, fees, sanctions, or enforcement measures of any kind. However, there will be an element of public and political accountability associated with the Committee's recommendations, including the 'findings of fact', as these relate to the non-performance of the relevant provisions.[92]

The more common measures adopted in the case of non-compliance are these listed in the Montreal Protocol:

> *a) appropriate assistance, including assistance for reporting of data, technical assistance, technology financial assistance, information transfer and training; cautions; c) suspension, in accordance with applicable international law concerning suspension of the operation of specific rights and privileges under the Protocol, subject to time limits, including those concerned rationalization, production, consumption, trade, technology, financial mechanism and institutional arrangements.*

Finally, mention must be made of the CITES NCP, which differs to a certain extent from other NCP procedures. It has been put together based on various elements, already in existence but lacking coherence as a uniform regime.[93] In contrast to existing NCPs, the CITES regime has no Implementation or a Compliance Committee but the Standing Committee is the focal body acting in accordance with instructions from an authority delegated by the COP. It deals with all matters, concerning compliance, including, *inter alia*, monitoring and assessing overall compliance with obligations under the CITES and adopting measures in

[88] Paris Agreement (signed 22 April 2016, entered into force 4 November 2016) 2187 UNTS 90.
[89] Paris Agreement, Decision 20/cma.1, Modalities and Procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement, fccc/PA/CMA/2018/3/Add.2 (19 March 2019) (hereinafter Art. 15 MP); Gu Zihua, Christina Voigt, Jacob Werksman, 'Facilitating Implementation and Promoting Compliance With the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices' (2019) 9 *Climate Law,* 65-100.
[90] Zihua et al. (n 89) 66.
[91] *Ibid* 70.
[92] *Ibid* 98-99.
[93] CITES Resolution Conf. 14.3.

I.S.B.N. 978-2-233-01042-1

cases of non-compliance. These measures include: giving advice, asking for special reports from parties, issuing a caution, providing technical assistance, and requesting a compliance plan to be submitted and recommending the suspension of commercial or all trade in specimens of one or more CITES-listed species, in case a party's compliance matter is 'unresolved and persistent and the Party is showing no intention to achieve compliance …' (paragraph 30).

According to the NCP procedure, any decision of the Standing Committee is subject to review by the COP (paragraph 10(c)). Interestingly, in contrast with other MEAs, in practice, Standing Committee's recommendations to the parties to suspend trade with another party have been notified by the CITES Secretariat to the parties without an official confirmation by a COP decision.[94] Therefore, it may be said that '[w]hile the CoP has determined the remit of the Standing Committee, it has effectively delegated much of its authority to it on compliance issues (subject to possible review by the CoP at its regular meetings)'.[95]

The legal character and the different objectives of NCPs have evolved and fundamentally changed. Previous, classical procedures relied frequently on harsh methods, such as the CITES NCP regime under which States face suspension in trade rights. The new generation of NCPs have a different *ethos* and *telos*. Their structure, functions and measures are different and are based on the premise of facilitation. Such an evolution warrants a different approach in ascertaining the legitimacy of decisions adopted by compliance bodies, and COPs/MOPs, which have all become more facilitative bodies. In calculating the legitimacy of such new generation NCPs, procedural aspects come to the fore, focussing on transparency, and the participation of civil society etc., rather than more exclusively on State consent.

It is submitted that the diametrically different character of the new generation of NCPs should also be reflected in the change of the names of "Non-Compliance Committees" into "Implementation Committees" (a nomenclature already used in many MEAs). The new generation of NCPs are in fact implementation and facilitation bodies, whose functions are very different from the classical ones. A new classification of NCPs should be established, as the traditional approaches do not reflect the substantively divergent phenomenon of the new and facilitative NCPs. It may also be noted that despite the quite detailed and at times far reaching obligations imposed on States by certain MEAs (such as the Montreal Protocol and the Aarhus Convention), COPs/MOPs have refrained from the imposition of harsh measures to ensure compliance, thus confirming the general trend of cooperation and understanding.

[94] Davies (n 5) 113.
[95] *Ibid.*

I.S.B.N. 978-2-233-01042-1

7. COPS/MOPS, TREATY-MAKING AND CONSENT TO BE BOUND

This part will be focused on the development of treaty regimes through COPs. These practises have raised potential doctrinal problems due to their departure from the provisions of the VCLT and customary international law on interpretation and amendment or modification of a treaty, and because their legal character is very complex and difficult to define in a precise manner. It may be concluded nonetheless that from the practical point of view, their relative flexibility is very well suited to deal with technical and discrete questions regarding treaties, which are under their management.

As it was explained in the majority of the MEAs, annexes or appendices are amended by means of a tacit consent/opting out procedure, which relates to amendments adopted by treaty organ such as the COP/MOPs or a commission/committee of experts by a majority vote. They become effective for all States Parties with the exception of such parties, which lodged their objection within a prescribed period of time.[96] The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora 'CITES) is an example of such procedures adopted in the MEA. CITES categorises species in three appendices according to how threatened they are by international trade. Appendix I includes species threatened with extinction and CITES prohibits international trade in specimens of these species except when the purpose of the import is not commercial. Appendix II lists species that are not necessarily now threatened with extinction but that may become so unless trade is closely controlled. It also includes so-called 'look-alike species', i.e. species whose specimens in trade look like those of species listed for conservation reasons. Appendix III lists of species included at the request of a Party that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation.[97]

Annexes I and II are subject to amendments that include removing, or transferring certain species from one Appendix to the other. A two-thirds majority of parties present at the COP and voting adopts them. They enter into force for all parties 90 days after that meeting, except for those, which make a reservation by notification in writing to the depositary government with respect to that amendment (Art. XV CITES). A reserving State-party is in fact in a position of a non-party in relation to trade in these species. As König, observes '[t]herefore, a reservation is in fact an objection to the amendment, namely a way of opting out from it. This simplified amendment procedure has far-reaching consequences for the national law of States Parties…Since they are obliged to penalize the trade in specimens in violation of CITES (Art. VIII CITES), amendments to the Appendices are usually incorporated into national penal law without the

[96] Doris König, 'Tacit Consent/Opting Out Procedure', Oxford Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1478?print=pdf para 12.
[97] CITES https://cites.org/eng/app/index.php .

I.S.B.N. 978-2-233-01042-1

participation of national parliaments. Thus, majority decisions adopted in a tacit consent/opting out procedure have a considerable effect on individual rights which gives rise to concerns regarding the legitimacy of treaty-based law-making.'[98]

An interesting example of tacit acceptance/opting out procedure is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The Montreal Protocol has so -called adjustment procedures (Article 2(9). This procedure regulates the modification in the scope of the parties' duties under the Protocol, such as the tightening of control measures by bringing forward the phasing-out of certain substances (i.e. chlorofluorocarbons and halons). Decisions adopting an adjustment are as a rule adopted by consensus. However, in the case of a failure of all efforts to reach a consensus, such decisions can be adopted by a two-thirds majority vote of all parties present and voting, and representing a majority of both developed and developing countries. The decision has to be communicated to the parties and then enters into force for all parties, including those that opposed the adoption, six months from the date of circulation of the communication.

Decisions taken by the majority under this procedure are absolutely binding, not in a 'soft' or 'de facto' way. The question arises whether such a decision with new strict emission targets, constitute a new obligation; or perhaps it is a modification of a previous one. As König has noted 'in relation to 'adjustments' 'the Meeting of the Parties has legislative powers with regard to some of the core commitments of the protocol'. [99] It may be added that the Montreal Protocol can also be subject of a 'classical' amendment procedure requiring ratification (Article 9 of the Vienna Convention on the Protection of Ozone Layer).

Mention must be made of the tacit acceptance/option out procedure adopted within the International Whaling Commission (IWC), which is a regulatory body of the 1946 International Convention for the Regulation of Whaling (ICRW). ICRW comprises a Convention and a Schedule (which lists e.g. types of whales, seasons for whaling and includes indigenous whaling), which is an integral part of the Whaling Convention. IWC has powers to amend the Schedule on the basis of a three-quarters majority vote (Art. III (2) ICRW), which triggers off an opting out procedure. Such amendment becomes effective for all parties, unless any party files an objection within a 90-day period. In this case, the time limit for opting out is automatically prolonged for another 90-day period. During this additional time period any other party has the opportunity to opt out in reaction to the other party's objection. Thereafter, the amendment enters into force for all those parties that have not notified their objections within the 180-day period. The 1982 moratorium on commercial whaling (effective from 1986) was adopted on the basis of this procedure, with a notable example of Norway opting out from it and is still conducting commercial whaling.

Article 11 of the VCLT is the embodiment of techniques by which States express their consent to be bound by a treaty. In cases of the amendment of treaty, consent

[98] König (n 96) para. 12.
[99] König (n 96) para 14.

I.S.B.N. 978-2-233-01042-1

plays a pivotal role. The question, which may be asked in relation to tacit acceptance procedure, is what is the exact moment of such an expression of consent. Is it a moment of adoption of the amendment; or when States remain silent, thus exercising their power to opt out.[100] It appears that the view shared by the majority of scholars is that the silence of States is the expression of consent to be bound.[101] Therefore, the element of tacit consent in the opting out procedure is 'the element that triggers the legal obligation; it is the source of validity of the rule. Silence acquires that value of acquiescence, and the treaty bond is created.[102] The second question which arises in relation tacit acceptance does it embody the second limb of Article 11 i.e. 'any other means'. The unduly formalistic and unrealistic view is that only very clear methods of consent to be bound that are listed I Article 11. However, it may be argued that this Article does not impose any limitations on the expression of the consent to be bound. The opting out procedure fully accommodates sovereignty of States in allowing them to consent to any amendments they wish: by opting out, they reject the amendment and remain bound by the original version; by silence (not opting out), they accept the amended version.[103] Thus, this procedure does not compromise legal security, as States fully informed to the consequences of this procedure.[104] We should approach such a procedure as 'a continuous la-making process, which encourages States to reach a common understanding through mutual interaction'.

8. CONCLUSIONS

The legal character of COPs and their decisions has been subject to many debates, but in the view of the present author, it still remains unclear and elusive to define. There is no doubt that COPs retain certain autonomy but are not fully-fledged international organisations. It must be said, however, that they have quite wide functions, and they exert a considerable power on States parties to MEAs and in respect of interpreting or even modifying treaty provisions. This is an extraordinarily broad jurisdiction. States through consent to be bound by a MEA, subject themselves to obligations stemming from the treaty and are obliged to follow them in accordance with the principle *pacta sunt servanda*. MEA is a primary legislation in relation to its State parties. Decisions of COPs are a secondary legislation to which State parties only have consented in the broadest sense through the indirect means of being bound by a treaty, which has established the COP. Non-Compliance Procedures are set out by decisions of COPs, which are the ultimate organ to impose measures in cases on non-compliance. Such

[100] Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties. Challenge and Perspectives* (Cheltenham: Edward Elgar 2017) 123.
[101] *Ibid.*
[102] *Ibid.*
[103] Malgosia Fitzmaurice, 'Expression, of Consent to be Bound by a Treaty as Developed in certain Environmental Treaties' in Jan Klabbers and Rene Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Beet Vierdag*, (The Hague: Martinus Nijhoff, 1998) 59, 73.
[104] Pergantis (n 100) 125.

I.S.B.N. 978-2-233-01042-1

measure can be very far reaching, including the suspension in the rights of a State –party. The extent of jurisdiction exercised by Compliance Body (established by COP) of the Kyoto Protocol, had resulted in Saudi Arabia protesting that it should have been done through a classical amendment to the treaty rather than the decision of the COP. Such extensive powers raise the question of legitimacy of COPs decisions. It may be that the debate regarding the broadness of these powers resulted in new order of NCPs having softer and more facilitative character (e.g. the compliance procedure under the Paris Agreement). Such protestations, as in case of Saudi Arabia, are very rare, however, and States appear to accept the role of COPs in NCPs and evolving treaty provisions beyond the text of the treaty. The phenomenon of COPs is indeed one of the most intriguing and fascinating developments in contemporary international law. The position of the ATCPs and its decisions is qualitatively different from COPs due to a different character of the ATS. Its character described as an objective regime by some authors and of an *erga omnes* nature cannot be compared with COPs, which are confined to the legal regime of one MEA. However, this regime also poses many questions relating to the normative value of ATCP recommendations, the position of non-Consultative Parties and third States (in particular in light of the special character of the ATS, the decisions of the ATCP and the principle *pacta tertiis nec nocent nec prosunt*).

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