# International Environmental Law and Governance

Edited by

Malgosia Fitzmaurice

Duncan French

Queen Mary Studies in International Law

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*Edited by*

Malgosia Fitzmaurice
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# Contents

# Introduction

The present book is the updated version of articles published in the Special Issue of the International Community Law Review, which in turn arose out of a one-day workshop held at Queen Mary, University of London, in March 2011, organised by Professors Malgosia Fitzmaurice and Duncan French, which encouraged the participants to examine the current state of international environmental law-making and to take stock of developments in environmental treaty governance.

It can be safely said that international environmental law has matured sufficiently that it has strayed significantly beyond any form of ontological questioning. Though there remain interesting avenues of research about specialisation in international environmental law and what this evolution reveals about international law's overall fragmentation, general debates as to the existence of a discrete corpus of law relating to the environment have long passed.

Rather, the debate has moved on to consider more nuanced questions over the legitimacy and efficacy of what is being created, to reflect on structural innovation and to analyse whether these developments are achieving the desired goals of environmental protection, and the necessary international collaboration to achieve this. Though this is true of general international environmental law to some extent – with due consideration given to the work undertaken by the International Law Commission, in particular, on prevention of harm and especially the increasingly significant jurisprudence of the International Court and other tribunals – attention has been given, both in the legal and political science literature, to the operation of multilateral environmental agreements.

The focus of the discussion of this volume is on the powers of COPs, an issue which has been puzzling international lawyers, in particular since the establishment of the compliance regimes under several Multilateral Environmental Agreements (MEAs) on the basis of the decisions of the COPS in the implementation of so-called "enabling clauses"; or in some cases even without them, such as the compliance mechanism of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal.[1] The powers of COPs were assessed from the points of view of international law; the law of treaties; but also from a more general point of view of the legitimacy, which

1 See on this in general and the review of views; Malgosia Fitzmaurice, "Law – Making and International Environmental Law. The Legal Character of Decisions of Conferences of the Parties", in: Rain Liivoja and Jarna Petman (eds.,) International Law-making. Essays in Honour of Jan Klabbers (Abington and New York:Routledge, 2014), 190–210.

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was extensively discussed by political scientists. The question which was most challenging was why do States Parties to MEAs comply in most cases with decisions of COPs which are not fully authorised by international law. There are several such theories in political science, the full analysis of which exceeds the content of this Introduction. There is the so-called managerial, process-oriented approach;[2] compliance based on close vertical interactions between various actors (public and private) through discursive interpretation of international norms (mainly by domestic institutions, as the key policy makers);[3] compliance based on so-called "interactional theory" – based on interactions between States;[4] there is a transformationalists theory;[5] and one based on a presumption that engaging States in an agreement is of fundamental importance. This theory distinguishes three alternative compliance strategies: sunshine; incentive; and sanctions.[6] We can also mention Franck's theory of legitimacy which is based on a presumption that States comply with international law even in instances when it does not further their own interests. Therefore, he argued, international law has a "compliance pull" which is underscored by the perception of it by its addressees as being legitimate.[7]

These and other topics which were discussed during the lively discussion at the workshop showed, as these papers highlight, that a number of themes can be seen to have emerged. First, the development of environmental regimes is far from being of interest just to scholars of international relations. International lawyers bring a constructive and critical eye to the formation and elaboration of such structures and processes, not simply because they have emerged from

2 Abraham Chayes and Antonia Handler Chayes, The new Sovereignty: Compliance with International Regulatory Agreements (Harvard University Press, 1998); See also Abraham Chayes, "Compliance without Enforcement", 91 American Society of International Law Proceedings (1997), 53–56.

3 Harold Hongiu Koh, "The hy nations Obey International Law", 165 Yale Law Journal (1997), 2599–639.

4 Juttta Brunnée and Stephan J. Toope, *Legitimacy and Legality in International Law; An International Account* (Cambridge University Press, 2010), 124.

5 George W, Downs, David M. Rocke and peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation?" 50 *International Organisation* (1996), 379–406 These School of thought is of the view that compliance appears to be high in regimes requiring slightly more from Stats than they are expected to do in the absence of a regime.

6 Edith Brown Weiss and Harold Karan Jacobson "A Framework for Analysis" in Edith Brown – Weiss and Harold Karan Jacobson (eds.,) *Engaging Countries: Strengthening Compliance with International Law* (MIT Press, 1998), 1–18.

7 Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1988), 705–59.

legally binding treaties (though that is important) but because the norms and procedures thereby established invariably create internationally significant expectations and even perhaps binding obligations, in the form of secondary legislation. Secondly, dichotomies of hard-versus-soft law, treaty-versus-institutional law, and Parties-versus-participants, whilst formally and practically important, are not rigid divisions. Rather, such dichotomies frame a more open discourse around international governance, its parameters, its nature and even its purpose. Thirdly, there are examples of shared practice between COPs, but there is equally significant institutional divergence between the environmental regimes. We should avoid the temptation of over-generalisation; the practice and priorities of States Parties and institutional actors will continue to ensure important differences in approach between the various treaties. Finally, continuing this motif of difference, not all issues are governed by treaty institutional arrangements for reasons of political sensitivity, historical anomaly and fragmented policy frameworks; thus it would be wrong to assume environmental governance invariably demands a particular institutional form.

The volume can only provide partial coverage of this broader debate, but we are confident that it does so expertly and with intellectual rigour.

Bowman argues that the effectiveness of conservation treaty regimes plainly depends heavily on the extent to which they are informed by developing scientific understanding of the principles which govern the operation of biological systems and natural processes generally. As a result, the "ecosystem approach" has become a crucial element in the substantive conservation policies which underpin such regimes. There is an emerging view, however, that the principles which determine the essential robustness, stability and productivity of biological systems may actually be applicable to complex systems of any kind, including those of an institutional character. Accordingly, it may be instructive to have regard to such principles when devising the institutional arrangements which indisputably represent another crucial element of regime effectiveness. This article explores the relevance of such matters in relation to the structures, attributes and commitments with which such arrangements will need to be invested if their respective regimes are to flourish. He is also of that the view that the acquisition of enhanced understanding of fundamental ecological processes, and its effective reflection within the normative structure of the regime, could never of itself be sufficient to guarantee the success of international agreements for the conservation of biological diversity. No less important will be the development of appropriate administrative procedures, operational techniques and institutional arrangements to underpin the operations of the regulatory instruments themselves, in order that this enhanced technical competence may be more effectively enshrined and exploited within the system.

Goodwin deals with the little known subject of the way delegations prepare for, and then participate in, plenary meetings under multi-lateral environmental agreements – a key administrative stage in the ongoing development of international environmental regimes and law. Goodwin based his research on the 1971 Convention on Wetlands of International Importance. This Chapter explores the external rules that shape the "internal modalities" of states and their delegations as they undertake these stages. Other insights into delegate preparation and participation are sought from published accounts and internet based resources. Goodwin's research question divides into two parts (preparation and participation). However, the main endeavour will be to identify and analyse the sets of rules, customs and ethics that operate within delegations when they undertake these stages.

Davies' Chapter seeks to assess the extent to which Conferences of the Parties (COPs) of Multilateral Environmental Agreements (MEAs) have played a role in the establishing and operation of compliance systems and techniques. The roles of plenary bodies of a number of earlier MEAs adopted in the 1970s provide the particular focus of discussion (CITES, Ramsar, the CMS Convention, LRTAP and the Berne Convention). Discussion will focus on the given plenary body's role in the following areas: clarification of compliance by means of the interpretation of primary rules; the monitoring and verification process; establishing reporting requirements and improving reporting by parties; the facilitation of compliance by means of capacity-building and funding; the establishment and development of non-compliance procedures and mechanisms without an express treaty basis; and, finally, determining the consequences of non-compliance.

Lesniewska's Chapter examines how COP activities can have law-making effect beyond a regime by proxy without there being any 'formal' legal mechanism being agreed. It uses recent legal theory to interpret both the UNFCCC COP REDD+ decisions as well as the process adopted to develop them over time. Lesniewska comes to the conclusion that the UNFCCC REDD+ mechanism is a valuable example of COPs as law-makers. The UNFCCC has essentially created a sub-regime that has become a centre point around which all international forest law themes oscillate and appear now to gauge their own developments. It has achieved this through a flexible, iterative process. Yet it is important that international forest law evolves in a balanced manner and is not hijacked by certain substantive and procedural elements within the REDD+ mechanism. REDD+ should be part of international forest law not the other way round. The UNFCCC COP also illustrates the need for mechanisms to ensure equitable, fair and transparent participation in these new law-making processes to realise legitimate outcomes. Again this comes back to safeguards

and essentially a commitment to strengthen the enforcement of existing international forest law and governance.

Cullet's Chapter critically analyses the contribution that global administrative law makes to our understanding of environmental stewardship, and looks at ongoing institutional reforms in the water sector that are not based on COPs being the main actor. He concludes that the new environmental stewardship in the context of water is thus one where existing categories have both imploded and exploded. This leaves developing countries generally, and least developed countries in particular, exposed to outcomes that are neither equitable nor environmentally sustainable. Further reforms are needed to take into account the reality of international governance that has seen the private sector making significant inroads into the existing framework, while ensuring that no change comes at the expense of the weakest states. Further, the primacy of the realisation of the right to water, and more broadly the right to a clean environment, needs to be reasserted so that everyone's individual basic rights take precedence over other elements, such as efficiency concerns.

We hope that such in-depth study of environmental treaty regimes; their organs and their effectiveness, will contribute to the solving of the puzzle of certain environmental law institutional and legal arrangements.

# Beyond the "Keystone" COPs: The Ecology of Institutional Governance in Conservation Treaty Regimes

*Michael Bowman*

**Abstract**

The effectiveness of conservation treaty regimes plainly depends heavily on the extent to which they are informed by developing scientific understanding of the principles which govern the operation of biological systems and natural processes generally. As a result, the "ecosystem approach" has become a crucial element in the substantive conservation policies which underpin such regimes. There is an emerging view, however, that the principles which determine the essential robustness, stability and productivity of biological systems may actually be applicable to complex systems of any kind, including those of an institutional character. Accordingly, it may be instructive to have regard to such principles when devising the institutional arrangements which indisputably represent another crucial element of regime effectiveness. This article explores the relevance of such matters in relation to the structures, attributes and commitments with which such arrangements will need to be invested if their respective regimes are to flourish.

**Keywords**

conservation treaties – regime effectiveness – institutional governance – ecosystem approach

## 1 Introduction: The Determinants of Regime Effectiveness

As the International Year of Biodiversity fades into memory, the time seems ripe for renewed reflection upon almost 150 years' experience of multilateral law-making efforts to preserve wildlife, the natural environment and the life-support systems of the planet.[1] Undoubtedly, a great many lessons have been learned during this protracted process of conservation endeavour, though it

1 See further M.J. Bowman, P.G.G. Davies and C.J. Redgwell, *Lyster's International Wildlife Law* (2nd edn., 2010, hereafter *Lyster*), Chapter 1. This work as a whole contains extended discussion of most of the treaties referred to in this paper.

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may be that there are still more to be absorbed, especially since, in the event, the various targets which were originally set for slowing or halting the rate of biodiversity loss by the year 2010 proved so resistant to attainment that the UN has subsequently committed to the dedication not merely of a single calendar year, but of an entire decade, to their more effective realisation.[2] It may be helpful in this context to recall that the prospects of success inherent in any treaty-based conservation endeavour are likely to be a function of three principal variables, namely (i) the range, rigour and appropriateness of the substantive provisions of the legal instrument in question; (ii) the effectiveness of its machinery for implementation and enforcement; and (iii) the level of participation by states, and, indeed, other key actors.[3] Although it is the second of these elements that forms the primary focus of attention of the present study, all three are in fact inter-connected in a variety of ways, and any meaningful appraisal of progress to date must accordingly embrace relevant aspects of each.

### 1.1 *Substantive Obligations: The Evolution of Ecological Understanding*

With respect to the first, one obvious pre-requisite is the compilation and effective application of a sufficient body of technical knowledge regarding the ecological processes relevant to the treaty's particular conservation objectives to ensure that the powers, duties and other legal functions it creates can be suitably conceived and crafted in the first instance, and then monitored and (where necessary) progressively refined thereafter, so as to enable these objectives to be continuously fulfilled over the course of time.[4] In that regard, any serious and systematic evaluation of contemporary conservation arrangements would surely confirm that they have indeed been fuelled by an ever-evolving scientific understanding of the workings of natural systems.[5] In particular, it is now widely recognised that there is little purpose in seeking to protect instrumentally or aesthetically valued species without regard to the broader network of ecological relationships upon which the *taxa* in question are ultimately

2 UNGA Resolution 65/161, specifying 2011–2020 for this purpose, in accordance with the current strategic plan of the 1992 Convention on Biological Diversity (CBD), 31 *ILM* 818. On this point, see CBD COP Decisions X/2 and X/8 and, for further information, www.cbd.int/doc/strategic-plan/UN-Decade-Biodiversity.pdf. On the seriousness of the current state of diminution of biological diversity, see especially J. Rockström, W. Steffen *et al.,* "Planetary Boundaries: Exploring the Safe Operating Space for Humanity" (2009) 14 *Ecology & Society* 32.

3 M.J. Bowman, "The Effectiveness of International Nature Conservation Agreements" in H.T. Anker and E.M. Basse (eds.), *Land Use and Nature Protection* (2000).

4 In some cases, of course, the objectives themselves may ultimately require fine-tuning.

5 For an accessible recent overview of such matters, see K. Thompson, *Do We Need Pandas?* (2010).

dependent. As a result, the focus of regulatory attention has gradually shifted away from a narrow preoccupation with protecting individual species of known anthropocentric utility[6] (or, conversely, persecuting those perceived to pose a direct threat to human interests)[7] to embrace a more sophisticated appreciation of the need to protect and preserve the overall functioning of ecosystems and the whole complex of life-forms which they sustain, and by which they are themselves in turn sustained. Accordingly, the "ecosystem approach" has become a central focus of contemporary global endeavours for biodiversity conservation.[8]

Initially, one of the principal determinants of ecological stability which tended to be emphasised by scientists who studied natural ecosystems was the sheer profusion and diversity of the life-forms they contained.[9] This perspective is, of course, pervasive throughout the principal legal instrument in the conservation field – the 1992 Biodiversity Convention – though its founding fathers were wise enough to ensure that attention was paid not only to the diversity of species as such but also to variability at both higher and lower levels of biological organisation.[10] Since, moreover, living things plainly do not exist in isolation, other factors which came to attract attention alongside diversity *per se* were the complexity and inter-connectivity of ecological relationships.[11] Indeed, the realisation gradually dawned that there might be certain life-forms whose contribution to the maintenance of the overall system was wholly disproportionate to their prolificity or biomass, with the

6 For early examples of treaties in this vein, see e.g., the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa, 94 *BFSP* 715 (preamble); 1902 Convention for the Protection of Birds Useful to Agriculture, 102 *BFSP* 969; 1911 Treaty for the Preservation and Protection of Fur Seals, 37 *Stat* 1542, *USTS* 564.

7 See, e.g., the 1881 International Convention respecting Measures to be Taken against *Phylloxera vastatrix,* 73 *BFSP* 323, and 1889 Additional Convention, 81 *BFSP* 1311. More generally, various species identified in the 1900 and 1902 Conventions, *supra* note 6, as harmful (*"nuisibles"*) to human interests were not merely excluded from protection but targeted for persecution.

8 See especially CBD COP Decisions II/8, V/6, VII/11.

9 See, e.g., R.H. MacArthur, "Fluctuations of Animal Populations and a Measure of Community Stability" (1955) 36 *Ecology* 533. For a recent survey of subsequent studies in this vein, see A.R. Hughes, "Disturbance and Diversity: An Ecological Chicken and Egg Problem" (2010) 1(8) *Nature Education Knowledge* 26.

10 Thus, Article 2, CBD defines biological diversity to include "diversity within species, between species and of ecosystems".

11 R.M. May, *Stability and Complexity in Model Ecosystems* (1973). For further references, see Hughes, *supra* note 9.

result that their specific disappearance or decline might not be capable of redemption by the mere abundance or diversity of other forms: hence the notion of *keystone* species was born.[12] Unfortunately, such species do not necessarily signal their importance in any overt or reliably detectable fashion: as one recent account puts it: "we still have no better way of identifying them than taking them away and seeing what happens".[13] This naturally reinforces the importance of endeavouring to preserve *all* the various components of functioning ecosystems, including species that might hitherto have been targets for persecution. Indeed, one consideration that has become increasingly apparent is that, contrary to initial, impressionistic suppositions that their overall impact was essentially pernicious and destructive, large predators might actually serve as crucial guarantors of ecological resilience and stability.[14]

A more justifiable cause of concern, however, has been the anthropogenic introduction into natural ecosystems (whether deliberately or accidentally) of specimens of invasive alien species: since such life-forms have, by definition, not previously featured as a component of the local ecology, there is a serious risk that they may pose threats against which indigenous species have not evolved any counter-strategy or coping mechanism.[15] The introduction of rats,

12 The term is, of course, architectural in origin: the "keystone" is the one at the summit of an arch, removal of which will cause the entire structure to collapse, despite the fact that it bears the least pressure itself. It was first employed in relation to species by Robert Paine: see his "Food Web Complexity and Species Diversity" (1966) 100 "*American Naturalist* 65; see further L.S. Mills, M.E. Soulé and D.F. Doak, "The Keystone Species Concept in Ecology and Conservation" (1993) 43(4) *Bioscience* 219; R.T. Paine, "A Conversation on Refining the Concept of Keystone Species" (1995) 9 *Conservation Biology* 962; R.D. Davic, "Linking Keystone Species and Functional Groups: A New Definition of the Keystone Species Concept" (2003) 7(1) *Conservation Ecology* r11.

13 Thompson, *supra* note 5, at 68.

14 Such creatures were particularly likely to be denied protection as being "noxious", as per *supra* note 7: see *Lyster*, *supra* note 1, at 5. The folly of such an approach has become ever more apparent, however: for contemporary scientific perspectives, see, e.g., W.J. Ripple and R.L. Beschta, "Linking Wolves and Plants: Aldo Leopold on Trophic Cascades" (2005) 55 *Bioscience* 613; W.T. Flueck, "Predators' Effects on Ecosystem Entropy" (2011) 333 *Science* 1092; W. Stolzenberg, *Where the Wild Things Were: Life, Death and Ecological Wreckage in a Land of Vanishing Predators* (2008); J. Terborgh and J.A. Estes (eds.), *Trophic Cascades: Predators, Prey and the Changing Dynamics of Nature* (2010).

15 For a brief sample of the vast literature, see C.S. Elton, *The Ecology of Invasions by Animals and Plants* (1958); M.E. Soulé, "The Onslaught of Alien Species, and Other Challenges in the Coming Decades" (1990) 4 *Conservation Biology* 233; M. Williamson, *Biological Invasions* (1996); G.W. Cox, *Alien Species and Evolution* (2004).

cats and other predators into the ecological communities of small islands, for example, poses a major threat to the various species of flightless birds which have evolved in such environments in the absence of any indigenous predators to exploit their lack of aerial escape options.[16] Consequently, the prevention of such introductions – and, where necessary, the eradication of aliens already present – has become a central feature of contemporary conservation policy.[17] Latterly, however, there are signs of the emergence of a moderating counter-current of scientific opinion, urging accommodation to the status quo, questioning the propensity to over-generalise the destructiveness of exotic species and even acknowledging potential benefits from their introduction in some cases.[18]

Most recently of all, a tendency has emerged of supplementing the conventional emphasis upon the individual biological components of ecosystems – organisms, species, communities etc. – with a keener eye to the connective *ecological processes* that allow them to interact, survive and flourish. Although the critical significance in this context of such abiotic elements of the landscape as soil and water has long been appreciated,[19] emerging perspectives have highlighted the importance of other chemical compounds by which the ecosystem is more discreetly infused, and which may serve effectively as its channels or media of communication.[20] Perhaps the best-known example to date is dimethyl sulphide (DMS), which is released into the atmosphere by microscopic marine algae as they are consumed by predators. Once in the atmosphere, it is oxidised into other compounds, some of which act as condensation nuclei for the droplets that form clouds, which in turn reflect sunlight

16 See, e.g., G. Mountford, *Rare Birds of the World* (1988), Chapter 1, esp at 19–21; and, for a series of specific examples, A. Diamond, R.L. Schreiber *et al., Save the Birds* (ICBP, rev edn, 1989), esp at 96, 98, 102–3, 113, 179, 261.

17 See P.W. Birnie, A.E. Boyle and C.J. Redgwell, *International Law & the Environment* (3rd edn., 2009), 624–6.

18 See, e.g., S.P. Carroll, "Conciliation Biology: The Eco-Evolutionary Management of Permanently Invaded Biotic Systems" (2011) 4 *Evolutionary Applications* 184; M.A. Schlaepfer, D.F. Sax and J.A. Olden, "The Potential Conservation Value of Non-Native Species" (2011) 25 *Conservation Biology* 428; C. Zimmer, "Alien Species Reconsidered: Finding a Value in Non-Natives" (2011) *Yale Environment 360*, available online via http://e360yale.edu.

19 In the legal context, specific attention to these elements was accorded by Articles 4 and 5 of the 1968 African regional convention, discussed in the following sub-section.

20 See generally S. Gupta, "The Hunt for Life's Communication Links", *New Scientist,* 22 January 2011, 14.

and cool the planet.[21] Yet it seems that DMS may also have been opportunistically recruited by nature to fulfil a host of other functions: for example, since various species of seabirds and fish are sensitive to its characteristic odour,[22] they can use it to track the crustaceans upon which they predate, who unwittingly give away their own position whenever they feast upon the algae in question. It is also an attractant to larger creatures still higher up the chain of predation, such as fur seals, whose excrement may serve to nourish and sustain the algae themselves, and thereby complete an ecological circle.[23] Thus, the circulation of such chemicals throughout the ecosystem serves to activate and sustain it in much the same fashion, perhaps, as an individual animal depends upon its blood supply or nervous system. Accordingly, the notion of "keystone molecules" has recently emerged as a central pillar of the nascent discipline of "neuroecology".[24]

### 1.2 *The Development of Institutional Arrangements*

Yet the acquisition of enhanced understanding of fundamental ecological processes, and its effective reflection within the normative structure of the regime, could never of itself be sufficient to guarantee the success of international agreements for the conservation of biological diversity. No less important will be the development of appropriate administrative procedures, operational techniques and institutional arrangements to underpin the operations of the regulatory instruments themselves, in order that this enhanced technical

21 R.J. Charlson, J.E. Lovelock *et al.,* "Oceanic Phytoplankton, Atmospheric Sulphur, Cloud Albedo and Climate" (1987) 326 *Nature* 655; G. Malin, S.M. Turner and P.S. Liss, "The Plankton/Climate Connection" (1992) 28 *Jnl of Phycology* 590.

22 It is a significant component of the smell produced by cooking vegetables such as cabbage and beetroot, as well as of the characteristic "smell of the sea", conventionally (but wrongly) attributed to ozone.

23 In a similar way, recent research has identified the importance of the chemical tetrodotoxin (TTX) – which is stored in the bodies of certain species of newt, toads, fish, flatworms etc – across at least four levels of the trophic web: Gupta, *supra* note 20.

24 This emerging field of study seeks to link the work of psychologists and neuroscientists regarding adaptive variation in the brain and its cognitive capacities with that of biologists and ecologists on the functioning of ecosystems, so as to explore the relationship between neural effects and ecological consequences: see further D.F. Sherry, "Neuroecology" (2005) 57 *Annual Review of Psychology* 167; R.K. Zimmer and C.D. Derby, "The Neuroecology of Chemical Defense" (2007) 213 *Biological Bulletin* 205, and the collected papers in the same thematic issue. Note, however, that the same term has sometimes been employed by cognitive scientists in a much looser, more metaphorical, sense, just as one might speak of the "architecture" of the brain.

competence may be more effectively enshrined and exploited within the system. Indeed, in his ground-breaking analysis of international wildlife law published over a quarter of a century ago,[25] Simon Lyster perceptively identified the establishment of a viable system of administration as a virtual pre-requisite to the effective implementation of any multilateral agreement for the conservation of nature.[26] The decidedly limited practical impact of many earlier wildlife treaties, such as the 1940 Western Hemisphere Convention or the 1950 Birds Convention,[27] could in large measure be attributed to the failure of the negotiating states to incorporate any such feature, resulting in the effective relegation of their regulatory creations to the forlorn category of "sleeping treaties", to use the same author's own evocative phrase.

Naturally enough, Lyster was not alone in reaching this realisation. Even in official quarters, the point had been recognised from much earlier times,[28] and a reasonably serious attempt had in fact been made to address it in the 1933 African regional conservation convention, concluded amongst the colonial powers which then governed the continent.[29] An accompanying protocol, which was deemed to be binding upon all parties to the Convention automatically without the need for separate acceptance,[30] provided that "periodic international Conferences shall be held at appropriate intervals" in order to facilitate co-operation for the conservation of fauna and flora, and to monitor the workings of the Convention and consider any improvements that might be required.[31] The first such meeting was scheduled to occur within four years,[32] and actually took place, it seems, almost in accordance with this timetable,

25 S. Lyster, *International Wildlife Law* (1985), the 25th anniversary of the publication of which was recently celebrated in the form of a 2nd edition, cited in *supra* note 1.

26 *Ibid., passim*, but see especially 12–13, 301–304.

27 The 1940 Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 161 *UNTS* 229; the 1950 International Convention for the Protection of Birds, 638 *UNTS* 186.

28 The notion had first taken root in the field of fisheries conservation, beginning with the 1923 Convention for the Preservation of the Halibut Fisheries of the North Pacific Ocean, *USTS* 701, though in that sector the potential benefits have, regrettably, tended to be negated by other factors: see further Section 3 below.

29 1933 International Convention for the Protection of Fauna and Flora, 172 *LNTS* 241, designed as a replacement for the 1900 Convention discussed above.

30 1933 Convention, Article 12(3).

31 Protocol to the 1933 Convention, Article 1. On the powers and functions of such meetings, see further Article 3.

32 *Ibid.,* Article 2.

in 1938.[33] Thereafter, however, events conspired to bring this process to a premature end. The outbreak of World War II represented the first overwhelming impediment, followed by a period of post-war austerity during which the British government, as depositary, was unwilling to convene a further meeting. As time wore on, the very notion of an African wildlife regime concocted at the behest of European colonial powers seemed increasingly inappropriate, and the gradual but inexorable process whereby African dependent territories secured their independence led to the conclusion in 1968 of a replacement treaty under the aegis of the recently-created Organisation of African Unity.[34] Although this agreement made express provision for the OAU to "organize any meeting which may be necessary to dispose of any matters covered by this Convention" at the request of three contracting states, and with the approval of two-thirds of the proposed participants,[35] it seems that no such meeting was ever convened.[36] A further provision, however, established a procedure to be conducted under the aegis of the OAU for the actual revision of the Agreement or its Annex,[37] and a substantially updated instrument – this time incorporating a basic suite of institutional arrangements – was ultimately concluded under this rubric, with the assistance of UNEP and IUCN, in 2003.[38]

In institutional and administrative terms, the multilateral agreements of the late 1960s might be regarded as marking the end of a distinct phase of international treaty-making in the environmental field,[39] with the Ramsar Wetlands

33 UK Foreign & Commonwealth Office, *2nd International Conference for the Preservation of the Fauna & Flora of Africa* (London, 1938), noted in R. Boardman, *International Organization and the Conservation of Nature* (1981), at 146; and P.J. van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (1997), at 17. See further the brief report by J.-P. Harroy, *Conference for the Establishment of the International Union for the Protection of Nature,* UNESCO Doc. NS/UIPN/8, Paris 22 September 1948, Section III(v)(b).

34 1968 African Convention on the Conservation of Nature and Natural Resources, 1001 *UNTS* 3. The OAU itself had been created pursuant to a Charter of 1963, 479 *UNTS* 39; it has since been superseded by the African Union.

35 Article XVI(3).

36 Lyster, *supra* note 25, at 123.

37 Article XXIV.

38 For the text, see http://au.int/en/treaties. The Revised Convention is not yet in force. It has 42 signatures, and twelve of the 15 acceptances required for entry into force. For discussion, see *Lyster,* Chapter 9; IUCN, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* (IUCN, 2004); M.A. Mekouar, "La Convention Africaine: Petite Histoire d'une Grande Rénovation" (2004) 34 *EPL* 43.

39 For a parallel to the 1968 African Convention in the pollution field, note the 1969 Agreement concerning Pollution of the North Sea by Oil, 704 *UNTS* 3, which represented one of several treaty-based responses to the *Torrey Canyon* incident two years earlier.

Convention,[40] concluded at the beginning of the following decade, serving as the tentative herald of a new dawn. From that time onward, international endeavours regarding wildlife conservation have almost routinely incorporated the institutional machinery needed to fulfil their regulatory commitments and aspirations.[41] The Stockholm Declaration, adopted in June 1972 at the UN Conference on the Human Environment, provided in Principles 24 and 25 that environmental problems should be tackled in a cooperative spirit through multilateral or bilateral arrangements, and with international organisations playing a "coordinated, efficient and dynamic role". Accordingly, the World Heritage Convention (WHC),[42] concluded a few months later under the auspices of UNESCO, not only created a new inter-governmental committee with responsibility to perform certain functions judged crucial to the treaty's protective regime for the world cultural and natural heritage, but also tapped into UNESCO's own existing institutional structure for various purposes.[43] The following year, the Convention on Trade in Endangered Species (CITES)[44] made provision for a broad suite of institutions, both at the national and international levels, dedicated to the effective regulation of the wildlife trade, thereby underlining the indispensability of such bodies to the ongoing global conservation project. Conservation treaties concluded since that time have generally treated the incorporation of such elements as *de rigueur*, resulting in the generation of an entire family of "living instruments" in this field.

### 1.3 *The Expansion of Participation*

Given the wide-ranging, and potentially global, ambit of many environmental problems and the virtual irrelevance of national boundaries to the way in which they unfold, any serious attempt to address them is likely to require the widest possible participation. Until the 1970s, however, there was relatively little

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Although it provided for various forms of co-operation between the parties in the eventuality of an oil pollution threat, it created no institutional arrangements for that purpose and was – partly for that reason – substantially revised in 1983, *Misc* 26 (1984), *Cmnd* 9104. For the current text, see www.bonnagreement.org.

40 The 1971 Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 996 *UNTS* 245.

41 *Lyster,* Chapter 1, Section 5.

42 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 *UNJYB* 89; 11 *ILM* 1358.

43 See, e.g., Articles 8, 14, 16, 18, 29, 37. UNESCO also acts as depositary for the Convention, under the terms of its final clauses.

44 International Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 *UNTS* 243.

sign of the dawning of this realisation, or of the fashioning of meaningful forms of response. Historically, treaties in the wildlife field had tended to enjoy a rather restricted geo-political ambit, being conceived for the most part either as regional or even purely bilateral initiatives, or alternatively as conservation regimes applicable only to the states exploiting a particular resource. Into the former category would obviously be placed the Western Hemisphere Convention, referred to in the preceding section, together with the migratory bird treaties previously negotiated by the United States with its immediate neighbours.[45] The series of conservation arrangements concluded with respect to Africa, also noted above, are of a similar ilk. Even the 1950 Birds Convention, while in principle open to accession by any non-signatory state, remained in practice an exclusively European operation.

On one view, indeed, it is precisely at the regional level that conservation problems might most profitably be tackled.[46] This perspective, moreover, is certainly not to be dismissed out of hand: the existing continental land masses are, after all, by no means irrelevant to the distribution, migration and speciation of wildlife, while the countries of any given region might also be expected to have much in common with one another in terms of political perspective, economic development and ecological status, enhancing the prospects of meaningful co-operation. Yet the historical record reveals little indication of instruments of this kind having actually achieved any special form of vibrancy: to the contrary, their vital signs currently suggest that they have succumbed to a variety of undesired fates, ranging from still-birth and delayed parturition to congenital morbidity, persistent coma and cryogenic suspension, or even outright demise.[47] Even the one example that is unmistakably still flourishing – the

45 The 1916 Convention for the Protection of Migratory Birds (with Canada), 39 *Stat* 1702, *USTS* 628; the 1936 Convention for the Protection of Migratory Birds and Game Mammals (with Mexico), 178 *LNTS* 309.

46 For further discussion, see P. Sands and J. Peel, *Principles of International Environmental Law* (3rd edn., 2012), 77–82, 479–492.

47 Indeed, a number of these outcomes have been exemplified successively by a single treaty, the 1976 Apia Convention on Conservation of Nature in the South Pacific, [1990] *ATS* 41. It did not actually enter into force until 1990, and then struggled along with only five parties, who eventually decided in 2006 to suspend its operation in the light of the overarching role played by the Biodiversity Convention. In the African region, a succession of treaties have failed to become true living instruments, having respectively succumbed to still-birth (1900), functional disablement during infancy (1933), sleeping sickness (1968) and delayed parturition (2003), though there is at least still hope for the last of these. Finally, in the Americas, the Pan-American Union's 1940 Western Hemisphere Convention, while still technically in force, must also be placed firmly in the category of

1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern)[48] – might be thought to have been the fortuitous beneficiary of external life support.[49]

The treaties that were specifically conceived as resource management regimes are scarcely deserving of greater approbation. Crucial lessons were never really learned from the earliest, and most conspicuously successful, regime in this category – that concerning the northern fur seal[50] – with the result that later operations were almost invariably blighted by motivational myopia and unrestrained competitive excess. As a group, indeed, fisheries conventions stand out as easily the least impressive of all conservation treaties, and the most urgently in need of radical reform.[51] It is difficult to avoid the conclusion that their characteristically restrictive approach towards participation has been a key determinant of the abject character of their

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sleeping treaties, while, in South-East Asia, the 1985 ASEAN Agreement (note 62 below) has never entered into force at all. For further discussion of all these instruments, see *Lyster*, Chapters 8, 9, 12.

48 1284 *UNTS* 209; *ETS* 104.

49 That is to say, from the parallel conservation regime operated by the European Union, which is a party to the Convention. For discussion of a specific example of the inter-relationship in action, see *Lyster*, at 338–342. For further examples of the attachment of wildlife conservation endeavours to broader institutional arrangements for economic development, see the 1993 North American Agreement on Environmental Co-operation, (1993) 4 *YIEL* 831, which is a 'side agreement' to the 1992 North American Free Trade Agreement, (1993) 32 ILM 682; and the 1999 Protocol on Wildlife Conservation and Law Enforcement, one of the many supplementary agreements to the 1992 Treaty of the Southern African Development Community, texts available via www.sadc.int/key-documents/.

50 See the 1911 Convention for the Preservation and Protection of Fur Seals, 8 *IPE* 3682, and its successor, the 1957 Interim Convention on Conservation of North Pacific Fur Seals, 314 *UNTS* 105, and later amendments. For discussion, see, e.g., N.S. Mirovitskaya, M. Clark and R.G. Purver, "North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict" in O.R. Young and G. Osherenko (eds.), *Polar Politics: Creating International Environmental Regimes* (1993).

51 For recent appraisal, see, e.g., *Lyster,* Chapter 5; Birnie, Boyle and Redgwell, *supra* note 17, Chapter 13; S. Kay, *International Fisheries Management* (2001); K.M. Gjerde, "High Seas Fisheries Management under the Convention on the Law of the Sea" in D.A.C. Freestone, R. Barnes and D.M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006); M.J. Bowman, "Transcending the Fisheries Paradigm: Towards a Rational Approach to Determining the Future of the International Whaling Commission" (2009) 7 *NZYIL* 85; D.R. Rothwell and T. Stephens, *The International Law of the Sea* (2010), Chapter 13; R. Barnes, "Fisheries and Marine Biodiversity" in M. Fitzmaurice, D.M. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2010).

performance.[52] The Whaling Convention of 1946,[53] by contrast, was undoubtedly visionary in its attempt to open up the regulation of whaling to participation by all states,[54] regardless of their past or present involvement in the harvesting of the species that fell within its purview, but this innovatory provision did not truly come to fruition until the influx of new members following the 1972 Stockholm Conference. Prior to that time, the Convention had in practice rather assumed the characteristics of a trade cartel, with predictably disastrous results.[55]

The 1958 Fisheries Convention[56] undoubtedly represented a genuine attempt to establish a global regime based on universal principles of conservation, but in that respect was probably over-ambitious in political terms and consequently proved the least successful of the four Geneva Conventions on the Law of the Sea, attracting acceptance by only around three dozen governments, many of whom embraced contrasting interpretations of its provisions.[57] Commentators have been largely dismissive of its significance[58] and it has in any event now effectively been superseded by the 1982 Law of the Sea Convention,[59] which approaches the questions of conservation and environmental protection in a more integrated, holistic fashion.[60]

At the same time, it is not to be overlooked that, however narrowly circumscribed are the parameters for formal applicability of international treaty regimes, the concept of participation in its broadest sense should plainly not be seen as limited to states and their surrogate creations, inter-governmental organisations. Rather, every opportunity should be afforded to civil society to

52 See further on this point M.J. Bowman, " 'Normalizing' the International Convention for the Regulation of Whaling" (2008) 29 *Michigan JIL* 293, esp at 419–423.

53 1946 International Convention for the Regulation of Whaling (ICRW), 161 *UNTS* 72.

54 See Article 10, which placed no restrictions on governmental participation, consistently with the first recital of the preamble, which expressly recognised "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks".

55 See Bowman, *supra* note 52 , Part III(B) esp at 391–398, 431–436.

56 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 *UNTS* 285.

57 See especially on this point M.S. McDougal and W.T. Burke, *The Public Order of the Oceans* (1962), 972–975.

58 See, e.g., McDougal and Burke, *ibid.*; Birnie, Boyle and Redgwell, *supra* note 17, 709–711; Rothwell and Stephens, *supra* note 51, 295–297; R.R. Churchill and A.V. Lowe *The Law of the Sea* (3rd edn., 1999), 281, 287.

59 1982 UN Convention on the Law of the Sea, (1982) 21 *ILM* 1261, Article 311(1).

60 See especially Parts V, VII(2), XII.

play its part, or, more accurately, the very wide range of roles that it is capable of fulfilling.[61]

## 2 Inter-Relationships between the Principal Variables

Although the three factors identified above as critical determinants of the prospects of success of international treaty arrangements are in one sense independent elements in the overall equation, it is equally clear that they cannot realistically be considered in isolation from each other. The degree of rigour realistically appropriate to the substantive commitments and mechanisms for implementation, for example, may be significantly affected by the geographical distribution and state of economic development of the intended participants. Most obviously, there will be little purpose in creating a treaty regime which boasts an array of finely crafted, highly exacting substantive conservation commitments, elaborate and inclusive institutional arrangements and rigorous and intrusive procedures for implementation and enforcement if the only discernible effect of these features is to discourage states from actually risking participation in the first place. The 1985 ASEAN Agreement[62] serves as a particularly potent cautionary tale in that respect.

A potentially more promising model, at least for certain forms of conservation endeavour, entails the imposition of substantive commitments and implementation arrangements of relatively modest rigour in the early stages, so that states are not discouraged from participation, and then employing the institutional machinery established by the treaty to develop and intensify these aspects over the course of time. Such an approach has now, of course, effectively been formalised and consolidated through the medium of the "framework" convention,[63] of which the CMS and the CBD itself are notable examples in the conservation field, but similar lessons are evident from the pioneering experience of certain earlier instruments which are not ostensibly cast in that mould, most notably the Ramsar Wetlands Convention. The Convention's visionary focus upon conservation at the level of the ecosystem was bound to

61 See further S. Charnovitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18 *Michigan JIL* 183; P.J. Spiro, "Non-Governmental Organizations and Civil Society" in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007).

62 The 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, (1985) EPL 64. For discussion, see *Lyster*, Chapter 12, Section 2.

63 As to which, see *Lyster*, 30–31.

prove daunting to states – much more so, obviously, than treaty regimes that seek merely to establish limitations upon the exploitation of particular species – so it might well have proved fatal to its prospects of attracting a reasonable constituency of parties to have sought to impose substantive duties and monitoring arrangements of over-ambitious strictness in the first instance. Yet, in accordance with the evolutionary approach indicated above, the undoubted laxity and vagueness of the original, central obligation regarding promotion of the conservation and wise use of wetlands has now been substantially clarified, amplified and intensified by the mass of technical guidance that has been formulated upon the precise implications of that commitment.[64] Viable mechanisms for monitoring and encouraging the performance of the conservation duties established have also been developed over time, and certain unintended and purely incidental disincentives to participation have been eliminated.[65] Even the institutional machinery employed for the achievement of these advances, which was admittedly of a somewhat primitive nature originally, has itself been overhauled and reconfigured in the light of experience, including that of later conservation treaties.[66] In view of these considerations, much of the criticism that has been levelled at the convention over the years appears unduly harsh,[67] and in some cases, indeed, positively misconceived.[68]

These brief comments should suffice to confirm the clear and close relationship between the various key determinants of treaty effectiveness when taken in a literal sense and viewed from an objective, pragmatic perspective.

64 There are currently 21 volumes of such guidance (16 of which focus specifically upon the wise use concept), accessible via the "Publications" link on the Ramsar website at www.ramsar.org/.

65 Notably, the provision in the testimonium clause that, in the event of inconsistency between the authentic language texts of the Convention, the English text should prevail. In practice, this had served to discourage the participation of francophone countries, and was eliminated by the 1982 Protocol of Amendment.

66 For discussion and general appraisal, see *Lyster*, Chapter 13; M.J. Bowman, "The Ramsar Convention Comes of Age" (1995) 42 *Neths ILR* 1 and the various other works included in the Ramsar Wise Use Resource Library on the Ramsar website.

67 See, e.g., IUCN/UNEP/WWF, *World Conservation Strategy* (1980), Section 15; D. Farrier and L. Tucker, "Wise Use of Wetlands under the Ramsar Convention" (2000) 12 *JEL* 21; Birnie *et al.*, *supra* note 17, 672–677; A. Aust, *Modern Treaty Law and Practice* (2nd edn., 2007), 239–240.

68 In 2001, the Ramsar Bureau took the unusual step of issuing a public rebuttal of certain criticisms made in the Farrier/Tucker article, *ibid.,* (see Delmar Blasco's letter to the editor of the JEL, dated 23 February 2001) and commissioned a paper by a Ramsar insider, Dr. W. Phillips, to set the record straight: these documents are also viewable in the Wise Use Resource Library, *supra* note 66.

In particular, the crucial virtue of establishing permanent institutional arrangements is that they provide the mechanism through which *all* the various elements of the regime in question, including those arrangements themselves, may be continuously informed and reinvigorated, and any deficiencies addressed.[69] Yet recent research suggests that there may also be much more subtle, indirect and abstract modes of inter-connectivity amongst these elements, stemming specifically from the figurative significance and contextual transferability of principles derived from ecological theory. To elaborate, it has already been noted that the level of practical success perceived to have been achieved by particular treaty regimes has commonly been reflected in their description as "living instruments" rather than "sleeping treaties". Since this analogy is drawn from the biological context, it may be relevant to consider the factors that affect the robustness and resilience of natural systems when considering the prospects of their metaphorical counterparts in the global institutional order. It is, moreover, the case that a growing body of scholarship is building up around the conviction that an enhanced understanding of ecological process at a holistic level is not only essential to the conservation of natural ecosystems themselves, but may also offer vital lessons for policy-makers concerned with the design and development of the very institutional arrangements required for that purpose (or, indeed, for any other.) That is to say, that there are certain universal principles which transcend substantive contexts and disciplinary preoccupations in such a way as to govern the stability, robustness and durability of complex systems generally – whether biological, neurological, electrical, mechanical, economic, socio-political or institutional.[70] Of all these types, natural ecosystems may well represent the clearest and most compelling paradigm of resilience, having successfully withstood the empirical tests of natural selection over the course of time, and in some cases for many millions of years. By contrast, it has been suggested that the dramatic recent declines, failures and collapses that have been experienced within such policy sectors as

69 The Ramsar experience provides a particularly compelling illustration of the many aspects of this process.

70 For a helpful recent overview, see C. Zimmer, "Network Theory: A Key to Unravelling How Nature Works" (2010), viewable online at http://e360.yale.edu/content/feature.msp?id=2233. For the report of a major recent international and interdisciplinary conference in this field, see J. Kambhu, S. Weidman and N. Krishnan (rapporteurs), *New Directions for Understanding Systemic Risk* (2007), also at (2007) 13(2) *Economic Policy Review*; and for a sense of the work of one particular academic institution devoted to this subject-area specifically, see the key publications of Northeastern University's Center for Complex Networks Research, headed by Professor A.-L. Barabasi, viewable at www.barabasilab.com/pubs-topten.php.

fisheries and finance may in fact be explicable on the basis of certain inherent weaknesses in the institutional systems through which they operate and are regulated.[71]

Above all, there is a need for an appropriate balance to be struck within any complex system between *connectivity*, so as to maximise the flow of energy and sustenance amongst the various nodes of which it is constructed, and *modularity*, so as to minimise the chances of contagion, disruption and progressive collapse. What constitutes an appropriate balance can, of course, only be determined in the light of the particular assaults to which the system is known or likely to be subject. As a general rule, however, "assortative" systems – where all the major nodes in the network are linked directly to one another – are likely to be at much greater risk of collapse than their "disassortative" counterparts, where the majority of the connections of the principal nodes are with less significant entities. In the world of human affairs, all too many governmental and regulatory systems are of the former kind, whereas in the natural world, it seems, ecosystems tend to be of the latter.[72] In particular, most wildlife species are specialists, interacting directly with only relatively few other life-forms. The principal element of interconnectivity stems from a much smaller number of generalists, each of which interacts with many other species, which themselves may exhibit either a specialist or generalist disposition (though predominantly, as noted above, the former). As a result, the overall system tends to organise itself in the form of a loosely connected network of identifiable hubs, at the heart of which lie the keystone species, such as sharks or whales in marine ecosystems. This tends to produce an organisational structure of great resilience – unless, of course, the keystone species themselves come under targeted attack, characteristically from outside the system. It may, of course, be precisely through such means that humans are currently eroding planetary biodiversity in such an alarming fashion.

Given the well-documented foibles of human psychology,[73] the principal risks faced by treaties designed primarily for *conservation* purposes undoubtedly include the simple dissipation of energy and commitment over the course

71 See, e.g., R. May, S. Levin and G. Sugihara, "Complex Systems: Ecology for Bankers" (2008) 451 *Nature* 893.

72 See generally R.V. Solé and J. Bascompte, *Self-Organization in Complex Ecosystems* (2006).

73 See, e.g., D. Ariely, *Predictably Irrational* (2008); C. Chabris and D. Simons, *The Invisible Gorilla* (2010); D. Brooks, *The Social Animal* (2011). For a compelling discussion of the way in which typical human aspirations tend to become self-defeating if pursued too single-mindedly, and of the mechanisms that can be deployed to overcome these tendencies, see J. Kay, *Obliquity: Why Our Goals are Best Achieved Indirectly* (2010).

of time, and institutional structures should therefore ideally be fashioned around the systemic inter-connectivity that is required to maintain enthusiasm, develop co-operation and disseminate expertise and awareness throughout the system. Where, by contrast, the primary declared objective or dominant underlying motivation is the exploitation (or even "sustainable utilisation") of natural resources, there is likely to be a much greater need for mechanisms to restrain the contagious potential of unduly exploitative and competitive zeal. A notable example of inbuilt, infectious negativity in that regard can be found in the ICRW, where the power given to individual IWC members to opt out of majority-approved conservation measures was complemented by extension of the opportunity for others to follow suit:[74] the predictable result was that the effect of such measures was sometimes effectively negated in respect of *all* those states that were actually engaged in harvesting the stock in question![75] More generally, indeed, it seems that treaty regimes that essentially comprise mere consortia of governmental agencies that are engaged in the exploitation of particular resources, such as the fisheries conventions, are systemically prone to failure, largely by virtue of their intrinsically assortative nature. Arguably therefore, the regulation of such activities could better be conducted within the context of a much wider arrangement focused upon the protection of the marine ecosystem generally, within which fishing activities are merely one factor to be considered, since that would maximise the chances of diluting destructive tendencies. The majority of the treaties under consideration in this paper are probably rather closer to this broader and more far-sighted conservation paradigm, and it therefore seems clear that institutional arrangements will need to be built around the fundamental need to preserve and enhance commitment and ensure that enthusiasm for the overall project is not simply frittered away.

An important factor which must always be borne in mind when considering the vitality of complex systems of any description lies in the concept of *entropy*, usually defined as representing a measure of the unavailability for work of the energy within a closed system.[76] In any such system, the physical laws of thermodynamics[77] ensure that differences in temperature, pressure, density and chemical potential tend to equalise over time, as where hot food cools down in

74 ICRW, Article 5(3).

75 For examples, see *Lyster*, at 162–163.

76 For further enlightenment, see *Oxford Dictionary of Physics* (6th edn., 2009), at 169–170. Energy itself, of course, can neither be created nor destroyed, merely transformed and/or redistributed.

77 *Ibid.,* 546–547.

a cool room, or ice gradually melts in a warm one. The transference of heat produces "work" as manifest in the change of state described, bringing the room towards overall thermodynamic equilibrium, by which stage there is no more work which can be performed: the entropy of the room as a whole is at a maximum. It was on the basis of this notion of the relentless dissipation of energy that the 19th-century Irish physicist Lord Kelvin calculated – against the objections of geologists and biologists – that, given that it must be slowly cooling at a steady rate, the age of the Earth "as an abode fitted for life" could be no more than twenty million years.[78] This pronouncement was, of course, hopelessly inaccurate, and it is now apparent that most of the assumptions upon which he based his calculation were incorrect: in particular, however, he was unaware of the heat generated through the decay of radioactive isotopes in rock.[79] One enduring lesson from this experience, therefore, is never to underestimate the importance of the various sub-systems of which any given system is composed, and of the energy that may be locked up within them, and potentially available for release. Ecological realities on the surface of the Earth, moreover, serve as a reminder that energy may also, in appropriate circumstances, be endlessly transformed and recycled, since the laws of biology operate, at the very least, as a significant local palliative to any overall trend towards energy dissipation and ultimate lifelessness.

At the heart of this experience lies the realisation that, in the "real" world, systems tend not to be "closed", which is to say that atoms, molecules and larger entities very seldom exist in isolation; in consequence, the dissipation or outflow of energy from one system may infuse and invigorate another in such a way that decay is balanced or, at least offset, by growth and death by life. It is on this basis, as Nobel Laureate Ilya Prigogine has explained,[80] that non-equilibrium brings order out of chaos.[81] This potential is, of course, dependent

78 See W. Thomson (Lord Kelvin), "On the Secular Cooling of the Earth" (1863) 25 *Philosophical Magazine* 1. At the time, this was regarded by some as an insuperable objection to Darwinian theories of evolution.

79 For modern discussion and appraisal, see respectively J.D. Burchfield, *Lord Kelvin and the Age of the Earth* (1975); F.M. Richter, "Kelvin and the Age of the Earth" (1986) 94 *Jnl of Geology* 395; F.D. Stacey, "Kelvin's Age of the Earth Paradox Revisited" (2000) 105 (B6) *Jnl of Geophysical Research* 13,155; P.A. Corning and S.J. Kline, "Thermodynamics, Information and Life Revisited, Parts I and II" (1998) 15 *Systems Research & Behavioural Science* 273, 453.

80 Prigogine (1917–2003) was a Russian-born, naturalised Belgian physical chemist, who, amongst other distinctions, was awarded the Nobel Prize in Chemistry in 1977.

81 Prigogine explored these ideas, together with various collaborators, through a host of publications, including *Introduction to Thermodynamics of Irreversible Processes* (1961);

upon the condition that there is a second system which falls within the ambit of, and is suitably responsive to, the influence of the first; it would therefore seem to follow that the greater the proliferation and proximity of systems, and the wider the variability of their modes of receptiveness, the lesser will be the chances of the energy available within them going to waste. The ability to procure the energy necessary for their own self-perpetuation is, of course, one of the most distinctive characteristics of biological organisms, and the reason why they have been enabled to flourish in such profusion and over such enormous timescales. It is with precisely this same capacity for self-invigoration and self-direction that treaty regimes must be systemically invested (whether through direct original conferment, opportunistic, *ad hoc* sequestration or gradual evolutionary assimilation), in order to ensure that they remain living instruments, capable of exerting a continuous positive impact upon their contracting parties, and thereby avoid the fates of marginalisation, moribundity or outright demise to which they have such a natural propensity.

To draw these various ideas together, we may note that the creation of any treaty regime establishes a system or network of sorts, but that, in the absence of institutional arrangements, the connections between the individual nodes (i.e., the parties themselves) are likely to prove too frail and attenuated to prevent the progressive dissipation of energy and commitment, at least in circumstances where the objectives of the treaty are not absolutely central to the parties' respective political agendas. The commitment of national governments to the cause of nature conservation is most unlikely to satisfy this test, which is why treaty bodies and other institutional arrangements have proved so important. As such bodies are constituted, an entirely new form of "node" comes into existence, as the parties in plenary session effectively become a form of collective,[82] possessed of significant regulatory authority and creative potential, while always retaining their original, individual, juridical status. National delegations, moreover, require to be staffed, and in the very nature of things those chosen as representatives are likely to be persons possessed of expertise

*Self-Organization in Non-Equilibrium Systems* (1977, with G. Nicolis); *From Being to Becoming* (1980); *Order Out of Chaos: Man's New Dialogue with Nature* (1984, with I. Stengers); *Exploring Complexity: An Introduction* (1989, with G. Nicolis); and *Advances in Chemical Physics* (2002).

82 In cases where this collective activity results in the creation of an authentic inter-governmental organisation, it will, of course, be invested with formal legal personality. Treaty COPs are typically not of this kind, but have still been regarded as possessing a form of autonomy for the purposes of international law: see R.R. Churchill and G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements" (2000) 94 *AJIL* 623.

and commitment that is especially relevant to the treaty's objectives. The very convocation of such individuals in concentrated work sessions, and the interactions that are thereby permitted, will naturally offer a much greater chance of preserving, enhancing and capitalising upon the energy available to the system than would otherwise be the case.

Nevertheless, there is much more to an effective institutional system than is available from mere periodic meetings of governments, and it is therefore necessary to examine the precise nature of the organs and arrangements that are likely to be needed in order to maximise the chances of advancing the treaty's objectives.

## 3 Surveying the Institutional Ecology

Such an examination would be likely to reveal an array of features that have proved critical to such success as these treaties have achieved, as well as suggesting a number of distinct categories into which they may be placed.

### 3.1 *Critical Components of an Institutional Regime*

The lessons of history point unmistakeably in the direction of the need for incorporation of at least four key pieces in the overall institutional jigsaw.

#### 3.1.1 A Plenary Political Organ

First, it is surely now well beyond dispute that provision for regular meetings of a plenary body open to all the contracting parties represents an indispensable element in the institutional life support system for most international treaties in the environmental field. It has become usual to refer to this organ as the Conference of the Parties (COP),[83] though other appellations are also encountered, including Meeting of the Parties (MOP), more commonly employed in relation to instruments which are appended or ancillary to some overarching parent treaty.[84] Conservation agreements which have created new, (semi-) formal, intergovernmental organisations in their own right, such as the regional fisheries management or plant protection bodies, often refer to these plenary

83 See, e.g, the CBD, Article 23; CITES, Article 11; CMS, Article 7; Ramsar, Article 6, as amended.

84 Note in particular the arrangements adopted under the various CMS "daughter" agreements, such as the 1995 Agreement on the Conservation of African-Eurasian Waterbirds (AEWA), (1995) 6 *YIEL* 306, and the 1991 Agreement on the Conservation of Populations of European Bats, *UKTS* No. 9 (1994), Cm 2472, as amended.

occasions as meetings of the "commission" or "organisation" as such,[85] while those which have been concluded under the auspices of an already established institution, and have drawn upon its existing institutional infrastructure for certain purposes, have tended to go their own way in terms of labels: thus, the plenary body of the World Heritage Convention is entitled the General Assembly of States Parties,[86] while that of the Bern Convention is known (in keeping with common practice within the Council of Europe) as the Standing Committee.[87]

Obviously, however, this question of nomenclature is of entirely trivial significance by comparison with the imperative need for such a body actually to exist, for in its absence implementation will be left essentially in the hands of the parties individually, subject only to such desultory moderation as may derive from occasional, adventitious interchanges between them, characteristically on a purely bilateral basis and in circumstances where some notable conflict or coincidence of interests or activities under the treaty comes incidentally to their attention. If such matters are ever actually addressed at all in any formal manner, it is most likely to be through simple negotiation between the relevant states, since, although many treaties provide for the resolution of controversies through third party mechanisms, the record shows that such procedures are very seldom utilised in practice.[88] In countries where treaties are constitutionally regarded as direct sources of legal obligation for the internal purposes of the national legal system, the opportunity may arise for international conservation commitments to be invoked, explored and enforced by domestic constituencies, though once again such cases have so far proved to be relatively few in number, and seldom productive of any decisive and enduring consequence.[89]

None of these potential avenues for keeping the treaty alive remotely embodies the impact that is achievable through the recurrent, formalised scrutiny of performance that is entailed in regular meetings of the parties as a whole. In the absence of such a mechanism, the energy and commitment devoted to the whole project by its parties is likely to dissipate very rapidly, leaving the treaty in force in a technical, legal sense, but devoid of all substantive practical

85 See respectively the ICRW, Article 3; 1951 Convention for the Establishment of the European and Mediterranean Plant Protection Organisation, Articles 1, 4, 9.

86 WHC, Article 8(1).

87 Bern, Article 13.

88 Birnie, Boyle and Redgwell, *supra* note 17, Chapter 4, Section 4; C.P.R. Romano, "International Dispute Settlement" in Bodansky *et al.*, *supra* note 61; N. Klein, "Settlement of International Environmental Law Disputes" in Fitzmaurice *et al., supra* note 51.

89 See generally *Lyster* pp. 34–36, 100–104; M. Anderson and P. Galizzi (eds.), *International Environmental Law in National Courts* (2002).

effect upon their ongoing activities. If the objectives of the treaty in question are ever to be met, it will be vital to ensure that the need for performance of the obligations it contains remains at the forefront of the parties' individual and collective attention, and systematic reviews of implementation by the parties as a whole are undoubtedly critical to that objective.

It may be, for example, that the provisions of the treaty require clarification, supplementation or even wholesale reconstruction before they can be meaningfully implemented, and it is evident that only the parties collectively enjoy the formal capacity to undertake such elaboration. For this reason, it is likely to prove unworkable in practical terms simply to leave the implementation of a multilateral treaty to unsystematic individual, bilateral or even plurilateral interpretation. Under the 1969 Vienna Convention on the Law of Treaties (VCLoT),[90] the possibility of substantive incremental changes to the legal regime becoming uniformly binding upon the entire constituency of parties – whether under the rubric of formal amendment or of evolutionary interpretational development – is, in full accordance with the prevailing paradigm of individual state sovereignty under international law, dependent upon the consent of each of them individually.[91] The creation of a formal plenary body of the parties is therefore vital to the formal legitimacy of the review process, seen from a primarily juridical perspective, as well as to its practical efficacy, when judged in political and ecological terms. Indeed, 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-legitimisation through its inherently inclusive and consensual nature.[92] 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.[93] 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.

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90 1155 *UNTS* 331.

91 In relation to formal amendment, note VCLoT, Article 40(2–4); the revision of a treaty by a subset of the parties *inter se* is known, by contrast, as *modification* (Article 41). As regards the revision of a treaty on the basis of subsequent practice, Article 31(3) is silent on this point, but the ILC Commentary suggests that the acquiescence, if not explicit consent, of all parties is required: see (1966 – II) *YBILC* 187, 222.

92 For further elaboration of these issues in a conservation context, see Bowman, *supra* note 52, esp at 326–333.

93 See, e.g., VCLoT, Articles 20(5), 36(1), 45(b), 59(b), 65(2).

Even if the terms of the treaty are admirably clear and apposite, the issues thrown up by their practical application on the ground are sure to benefit from the opportunity for collective deliberation, since there may be mechanisms for ensuring the treaty's more effective implementation that can only realistically be established through collaborative action. The systematic development and dissemination of information and expertise, for example, not to mention the acquisition and deployment of the financial and material resources that are commonly necessary to enable many parties to comply with their commitments, are likely to require the establishment of arrangements that will be dependent upon the approval and support of the parties as a whole.[94] The internal institutional infrastructure that will be needed to render such projects viable in the first place is bound to prove costly, and hence budgetary arrangements will have to be agreed, which can only feasibly be achieved through collective action of the parties in plenary. Hence, the role of the Conference of the Parties is certain to be critical to the treaty's overall prospects of success. To put it another way, the COP can be seen as a *keystone species* in the overall institutional ecology of the treaty regime.

Yet it is equally apparent that the incorporation of such a feature is of itself by no means sufficient for that regime's effective operation. Indeed, it is implicit in the very nature of a keystone that it can only perform its critical sustaining role by serving as the topmost and consolidating element in the wider assembly of component blocks from which the archway is progressively formed. Without their support, indeed, it is scarcely more than a hypothesis in tectonic theory, and incapable of bearing a physical load of any description. Little imagination is required to identify the pragmatic reasons which underlie this intrinsic lack of self-sufficiency. In particular, the COP of any treaty of intended universal scope is sure to prove far too large and unwieldy a body for detailed policy formulation and decision-making, especially if it starts with a blank slate. The inherent complexities of many of the issues to be discussed, coupled with the inevitable constraints imposed by time, material resources, political circumstances and inter-governmental dynamics, are simply not conducive to the achievement by such a forum of significant substantive progress in the realisation of ambitious, technically-complex conservation objectives. At the very least, there will be a need for meticulous, advance preparation of its agenda, yet this is an essentially bureaucratic task that any plenary political

94 There is certainly no reason in principle why one state should not offer to provide financial or material support to another as a purely private initiative, but experience suggests that such arrangements are far more likely to occur within the framework of some broader policy agreed amongst the parties as a whole.

institution is inherently ill-equipped to perform on its own account.[95] Even if a suitable framework for the discussion of substantive controversies or obstacles to implementation can somehow be secured, the quest for effective technical solutions is likely to be extremely challenging in the absence of detailed advance elaboration of the issues for the benefit of national delegations.

It will therefore be apparent that, if taken in isolation, these "keystone" COPs are probably no more likely to achieve their ultimate goals than their namesakes from the era of silent film.[96] Indeed, this cinematic allusion turns out to be apposite in more senses than might have been supposed, since the established *modus operandi* of Mack Sennett's comedic constabulary – to turn up mob-handed and ill-prepared in response to some impending crisis, engage in short bursts of frenetic, ill-conceived and uncoordinated activity, and ultimately in all likelihood actually precipitate or exacerbate the very tragedy they were hoping to forestall – helps to capture, if only by way of extreme caricature, the very weaknesses of a system grounded exclusively in episodic mass conventions of representatives of the contracting parties. Accordingly, to pursue the "performing arts" analogy a little further, once the COPs have been created, they will tend quite rapidly to retreat into more of a background role, as other bodies capture the limelight as far as day-to-day activities are concerned.[97] Indeed, an important part of their function in the early years may be to provide a stage upon which certain players may take the opportunity to reveal the promise that earmarks them for leading roles in the subsequent evolutionary development of the regime.[98] Thus, particular delegations may display the commitment, expertise and imagination that prompt others to allow them special prominence in the work of subsidiary organs designed for the detailed crafting or implementation of policy, while individual delegates may reveal the vision, technical awareness and/or diplomatic skills that will be needed for chairing key bodies or piloting crucial initiatives.

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95 In the case of the 1933 African agreement, these preparatory functions were assigned to the depositary government, the UK (see Protocol, Article 2), which may help to explain its unwillingness to convene the event.

96 For information on the Keystone Kops, whose film appearances began in 1912 and continued into the 1920s, see J. Basinger, *Silent Stars* (1999); R. King, *The Keystone Film Company and the Emergence of Mass Culture* (2008).

97 The Kops themselves were accorded starring roles only in their very earliest films, such as *Hoffmeyer's Legacy* (1912) and *The Bangville Police* (1913). From 1914 onwards, they tended to feature as support for individual leading players, such as Charlie Chaplin, Roscoe "Fatty" Arbuckle and Mabel Normand.

98 Chaplin and Arbuckle themselves, along with Chester Conklin and Ford Sterling, were amongst the actors who went on to enjoy wider fame after early appearances as Keystone Kops.

Be that as it may, the unique constitutional status of the COP for the purposes of treaty law guarantees that it will always remain crucial to the overall process of legitimating the evolutionary development of the treaty and according final, formal approval to activities pursued under its rubric. In particular, it is uncommon for ultimate decision-making power to be surrendered (whether by the treaty itself, or pursuant to some power created by it) to any entity or institution other than the plenary assembly. Such delegation is not completely inconceivable, however: the conservation treaty that has seemingly gone furthest in this direction is the World Heritage Convention, where the elected World Heritage Committee has been described as the main "engine" of the regime,[99] and the Convention's General Assembly is effectively limited to selecting its membership and determining the parties' contributions to its operating budget.[100] Even such matters as the supervision of reports upon implementation and the revision of the Convention itself are effectively removed from its purview and entrusted instead to the General Conference of UNESCO.[101] Nevertheless, such arrangements are strikingly unusual, and the COP will generally retain the ultimate formal power for shaping and directing the conservation regime.

### 3.1.2 A Permanent Bureaucracy

The inevitable practical limitations of a plenary political body which (even disregarding observers) may comprise almost two hundred delegations,[102] convening only in short, spasmodic conference sessions, point clearly to the need for other forms of institutional support. Many of these limitations can be offset, if not overcome entirely, by the creation of a permanent, self-contained bureaucratic unit entrusted with the performance of the routine administrative tasks that will be necessary to foster the treaty's detailed implementation and advance its conservation goals in a more general sense. Accordingly, it has become more or less standard practice within the wildlife treaty sector to create a permanent secretariat to discharge these functions.[103] In addition to the self-evident virtue of ensuring that these essential administrative tasks are capable of fulfilment at a

99 See *Lyster,* at 472, and, for fuller discussion, E.J. Goodwin, "The World Heritage Convention, the Environment and Compliance" (2009) 20 *Colorado JIELP* 157.

100 See Articles 8(1), 16(1).

101 See Articles 29, 37. Naturally, however, no amendment that might ultimately emerge from this process can become binding upon the parties themselves in the absence of their individual acceptance: Article 37(1).

102 The CBD, for example, currently boasts 195 parties and the World Heritage Convention 191.

103 See, e.g., CBD, Article 24; Ramsar, Article 8; CITES, Article 12; CMS, Article 9; ICRW, Article 3(3).

practical level, the creation of a body of this kind ensures that there is one agency at least that is directly associated with – indeed, specifically dedicated to – the fulfilment of the treaty's objectives. Furthermore, this body is likely to become, in many cases, the main focal point for the conduct of the parties' business under the treaty, creating a hub of organised activity rather than a flimsy network of diverse, purely bilateral exchanges. The importance of this factor can scarcely be over-emphasised, because for the parties themselves the period from initial negotiation to formal acceptance of an environmental treaty may well represent the high-water mark of their commitment to its objectives, with enthusiasm subsequently tending to dissipate very rapidly, as the full practical implications of the commitments they have undertaken progressively become apparent, and other, seemingly more pressing, priorities crowd inexorably on to their evolving political agendas. With the establishment of a permanent secretariat – and particularly if its staff have been wisely chosen – a mechanism is created not merely for the *performance* of work but for its *perpetual generation and review*, minimising the chances of the treaty regime succumbing to the paralysis that political entropy might otherwise produce.

The precise inventory of tasks to be performed by such a body will naturally vary from case to case, though some are likely to be relatively standard features: these include assistance in the organisation of the periodic meetings of the COP itself; promulgating the recommendations, resolutions and/or decisions of that body, including any that have the specific effect of amending the treaty or its annexes; maintaining authoritative records of specific unilateral or co-operative actions taken by the parties in pursuance of their obligations, and processing any more wide-ranging reports regarding their performance; drawing attention to emerging problems concerning implementation or compliance; commissioning or carrying out technical studies related to the matters covered by the treaty; and formulating recommendations concerning the more effective achievement of its ultimate objectives.[104] The secretariat is also, for most practical purposes, both the "public face" and "mouthpiece" of the convention, not only in relation to the parties themselves, but also to non-contracting states and, indeed, to the wider political community.

### 3.1.3 A Bridging Mechanism

For all the undoubted virtues of the two indispensable elements of the institutional jigsaw identified above, they are unlikely to be able to maximise their

104 For examples, see Ramsar, Article 8(2); CITES, Article 12(2); CMS, Article 9(4); CBD, Article 24. These functions are characteristically elaborated in much greater detail in rolling work-plans devised and approved by relevant treaty bodies.

potential for advancing the treaty's conservation goals in the absence of some mechanism for ensuring effective connectivity between them. That is to say, that the operational gulf that is characteristically evident between the periodic, policy-making determinations of the plenary body and the routine, day-to-day bureaucratic activities of the secretariat is likely to be too extensive to be proof against occasional disjunction, or even to more thoroughgoing dysfunction. The favoured approach towards the effective abridgement of this gulf lies in the establishment of a relatively small committee of states to act as representatives of the parties as a whole for the purpose of supervising the translation of collective policy into effective administrative action. The need for such an organ has seldom been perceived in advance or addressed in the treaty text itself, however, with such bodies tending to have come into existence as a result of a specific COP initiative once the cycle of plenary meetings has been set in motion.[105]

In the majority of instances, this organ will be referred to as the Standing Committee,[106] though under the Bern Convention, where that title has already been allocated to the plenary organ, it is known as the Bureau.[107] In cases where international supervisory arrangements represent a particularly critical element of the regime established, special emphasis may be placed on the centrality of this body to the treaty's overall functioning, resulting perhaps in the allocation of some grander appellation, as in the case of the World Heritage Committee, referred to in Section 3.1.1 above. Conversely, where the essential function of the plenary body is pure policy creation, and implementation is to be left firmly in the hands of the individual parties themselves, this element of the institutional set-up may be de-emphasised, or even, perhaps, dispensed with entirely. In the case of the CBD, for example, the text itself provides only, in Article 18(3), for an information services function known as the Clearing-House Mechanism.[108] Even here, however, the need for an inter-governmental mechanism for the review of implementation has subsequently become apparent, though to date it is manifest only in the Ad Hoc Open-ended Working Group on Review of Implementation of the Convention (WGRI), established

105 See, e.g., Ramsar Resolution 3.3; CITES Resolution Conf.3.1; CMS Resolution 1.1. It may, indeed, actually be preferable to allow the need for such a body to emerge over the course of time, rather than to stipulate for its creation in advance, when it may be perceived as a threatening "cabal": see on this point the discussion of the ICRW, text accompanying note 110 below.

106 As in the case of all the conventions mentioned in the previous note.

107 See *Lyster,* at 330.

108 The CHM incorporates both a national and an international element: for its current operation, pursuant to the Strategic Plan for Biodiversity 2011–2020, see CBD Decision X.15.

in 2002.[109] In the early historical phase of the establishment of treaty-based conservation regimes, it seems that inherent mistrust of the political motivations of other participating governments was itself occasionally sufficient to derail proposals for an "inner cabinet" of the type discussed here,[110] though experience has once again confirmed the need for the eventual creation of some kind of intermediate administrative body, albeit, perhaps, only as a much diluted version of the original conception.[111]

In the very nature of things, a sub-group of this nature will be able to meet on a more regular basis than the plenary assembly itself, and also to tackle tasks of far greater technical and administrative complexity. In consequence, it may be assigned such roles as the planning of COP business, the direction of relations with external organisations, and the practical administration of treaty programmes involving the transfer of technology or resources. Its key task, however, in keeping with the essential nature of its "bridging" role, usually lies in the assumption of responsibility for the formulation, implementation and monitoring of a detailed action plan to crystallise the specific responsibilities of the secretariat during the period between conferences.[112]

### 3.1.4 Scientific Input

Given the fundamentality of reliable scientific knowledge and understanding to the effective management of wildlife resources and natural ecosystems, suitable provision for the input of technical, ecological expertise must be counted as a further imperative to the effective operation of any conservation treaty regime. This in turn requires the establishment of appropriate organisational mechanisms through which such input may be delivered. It is, perhaps, in respect of this particular function that the greatest diversity of institutional approach is evident amongst treaty regimes, as a combination of pure historical accident and genuine divergences both in economic and political circumstances and in practical, technical needs have conspired to produce a considerable assortment of institutional configurations.

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109 By April 2015, five meetings had been held: for further information, see www.cbd.int/wgri/.

110 In the case of the ICRW, for example, the original US draft had made provision for the establishment of an administrative committee, but this was one of the few of its proposals to be rejected at the 1946 Washington drafting conference.

111 *Viz.,* the Finance and Administration Committee: for details of its latest meeting, see the Chair's Report of the 65th Meeting of the IWC (2014), viewable via the IWC archive at https://iwc.int/chairs-reports.

112 For the current position under Ramsar, for example, see the Report of the 48th Meeting of the Standing Committee, Agenda Item 9 and Decision SC48-07.

One relatively common model for the delivery of such expertise is the single, over-arching scientific organ upon which each party (or broader constituency of parties) is entitled to be represented by appropriately qualified persons. Prominent instances of explicit textual provision for the creation of bodies of this kind concern the CBD's Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA, established under Article 25) and the Bonn Convention's Scientific Council (stipulated by Article 8), while the Ramsar Convention's Scientific and Technical Review Panel (STRP) was set up some years after the Convention's entry into force at the behest of the Conference of the Parties.[113] A pioneering early example of such a development in the conservation field was, of course, the Scientific Committee of the IWC, established in 1950 pursuant to a general power to create committees conferred by Article 3(4) of the ICRW.[114]

As noted above, however, other treaties have opted to employ rather different models. In the case of CITES, the scientific function has long been divided between specialist committees for plants and animals.[115] The Bern Convention, moreover, has from its inception preferred an advisory system based upon the convocation *ad hoc* of different groups of experts, and has been sufficiently satisfied with the results to reject a specific recent proposal to move over to the more standard model centred around a single permanent body.[116] One potential advantage of the Bern approach is that it is by its very nature more likely to treat recognised expertise, rather than governmental representativity, as the principal determinant of the appointment process, which may well serve to enhance the strength and reliability of the advice and information given.[117] A further source of scientific expertise that is independent of the parties themselves may also, of course, be found within the various non-governmental technical organisations that attend COP meetings as observers, or are otherwise active within the treaty regime in question, and in a few cases such entities have actually been made the mainstay of the advisory system. Perhaps the most notable example is the allocation to IUCN, a non-governmental organisation, of certain

113 See Ramsar Recommendation 4.7 and Resolution 5.5.

114 For information on its work, see http://iwcoffice.org/commission/iwcmain.htm#committee.

115 These were first established in 1987, and are now governed by CITES Resolution Conf.11.1(Rev.CoP15). For further information on their work, see respectively www.cites.org/eng/com/pc/index.php and www.cites.org/eng/com/ac/index.php.

116 See Bern, Article 14(2) and, for discussion, *Lyster,* at 331–332. For an indication of the current activities of these groups, see www.coe.int/t/dg4/cultureheritage/nature/experts_en.asp.

117 See further subsection (b)(iv) below.

crucial functions arising under the World Heritage Convention.[118] In other cases, such as Ramsar, a number of key technical organisations have been formally invested with "Partner" status, which entails automatic representation on all relevant Ramsar committees.[119]

#### 3.1.5 Other Institutional Functions

Beyond the four virtually indispensible elements referred to above, the institutional landscape may be populated by any number of other entities, depending entirely upon the needs and aspirations of the particular regime at any given moment. Some of the bodies referred to above, for example, may find it expedient to form subsidiary organs for the discharge of certain specialised functions.[120] It should also come as no surprise that, within the sector as a whole, there has been considerable reliance upon *ad hoc* working groups created in order to address specific issues that have from time to time been identified as being of particular concern. Reference has already been made in passing to certain significant examples.[121] In some cases, moreover, these have ultimately been transformed into (semi-)permanent features of the institutional ecology.[122]

### 3.2 *Critical Attributes*

It is, of course, by no means sufficient that convention bodies of the kinds referred to above simply be brought into existence: if they are to achieve "fitness" for their particular purpose, they will also need to display certain characteristics which are critical to the achievement of the tasks that fall within their respective remits. Given the highly divergent functions and constitutions of these various bodies, these attributes will for the most part be specialised and peculiar to each of them, but there are nonetheless arguably certain prerequisites that are common to each. The most obvious of these is that they should command the confidence of all those involved in the detailed implementation of the treaty's overall programme. This is likely in turn to require as a minimum the identification and consolidation within the overall system of what in

118 See, e.g., Articles 8(3), 13(7), 14(2). The role of IUCN in relation to the natural heritage is, of course, paralleled by that of other bodies with appropriate technical expertise regarding cultural sites.

119 For details, see *Lyster* at 430–431.

120 The Ramsar Standing Committee, for example, currently has several subsidiary bodies, concerned with such matters as finance, strategy, outreach, COP organisation and administrative reform.

121 Currently under Ramsar, for example, the Ad Hoc Working Group on Administrative Reform.

122 The CBD-WGRI, referred to in the text accompanying *supra* note 109, has already been in existence for over ten years.

ecological terms might be described as their particular *niche*, through the reasonably precise definition of the mission, competence, functions and responsibilities of the organ in question, so that its role within the regime as a whole is widely understood and supported. This task is customarily achieved through the adoption by the COP of detailed, but continually reviewable, terms of reference for the entity in question.[123] Stemming from that process of job specification, certain other, more particularised, adaptive traits will also inevitably emerge.

### 3.2.1 Plenary Bodies

Since the basic constituency for the plenary body is merely the aggregate of all those states (and, conceivably, other international persons) that have opted to become party to the treaty in question, it is scarcely possible to stipulate particular attributes that they should as a matter of principle possess, whether individually or collectively. If there are specific attributes that should necessarily be exhibited by any state that becomes involved in the conservation regime in question, it is to be expected that they will be specified as formal pre-requisites to participation, typically in the final clauses of the treaty governing signature, ratification and accession. Yet, since the conservation of biological diversity generally has now been authoritatively recognised to be a matter of "common concern",[124] treaty regimes should ideally steer clear of unnecessarily exclusionary approaches to participation: above all, the restriction of formal participation in a conservation regime to those states that are actively involved in the exploitation of a particular resource is likely to prove a recipe for disaster. Here again, the fisheries conventions generally offer a model to be avoided.

Once the regime is operational, and regardless of the precise profile of its constituents, it will certainly be important that government delegations display a willingness to attend, participate and treat the matters in hand with all due seriousness, but such desiderata are not really matters which can realistically be stipulated or guaranteed in advance, other than through the ubiquitous requirement upon treaty parties to act always in good faith.[125] However, the prospect of securing direct material benefits from the regime in question, whether in the form of technical or financial support, should serve as a significant incentive on this front.[126]

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123 In the case of the Bonn Convention's Scientific Council, for example, see CMS Resolutions 1.4, 3.4, 4.5, 6.7, 7.12, 8.21 and 11.4.

124 CBD, preamble, third recital.

125 VCLoT, Articles 26, 31(1).

126 Provision for the conferral of such benefits is now a more or less standard feature of conservation regimes, the World Heritage Convention having played a pioneering role in that respect.

Although the regular and active participation of all the relevant state players must be deemed an extremely important goal, it is no less crucial to the ultimate prospects of success of the enterprise that the level of commitment to conservation to be expected of this particular cast of characters be bolstered and enriched by that of a further constituency, namely the non-governmental sector. Governments themselves inevitably have a great many projects to accomplish, not least the securing of their own survival, and there is no reason to believe that protection of the environment will necessarily be placed anywhere near the top of their respective agendas at any given moment, however important it may appear to be from an objective point of view. It is therefore essential that the ongoing conservation dialogue which the regime in question generates be infused with the distinctive perspective of organisations whose entire *raison d'être* is grounded in such considerations, and, ideally, closely aligned with the stated objectives of the treaty itself. Given that such objectives are commonly highly complex and multi-faceted, however, it may be no bad thing if this non-governmental constituency itself incorporates a range of different entities and perspectives, which can usually be quite easily secured by the adoption of an appropriately inclusive verbal formula to define their entitlement to take part. Under CITES, for example, participation in COP meetings is open (subject to objection by one-third of the parties present) to any "body or agency technically qualified in protection, conservation or management of wild fauna and flora",[127] and this has led to the active involvement of a host of highly divergent entities from the conservation, animal welfare and commercial fields.[128]

### 3.2.2 Secretariats

Obviously the critical factor which underpins the capacity of the secretariat to deliver the level of service required is the basic competence, experience, resourcefulness and commitment of its staff. This in turn demands that considerable attention and effort be devoted to the process of recruitment. In several cases, the provision of such services has been entrusted to UNEP,[129] though there would seem to be no reason in principle to suppose that an alternative arrangement should not prove equally beneficial.[130] It is, indeed, possible that a form of provision which emerges from, and is thereby inevitably imbued

127 CITES, Article 11(7), which stipulates, however, that *national, non-governmental* entities require in addition the specific endorsement of their home state.

128 For full details of attendance at the 2013 COP, see the Provisional List of Participants at www.cites.org/eng/cop/index.php.

129 CITES, Article 12(1); CMS, Article 9(2).

130 For arrangements under the CBD, see *Lyster,* 617–618.

with the ethos of, a front-line, global political institution like the UN may actually prove a little too bureaucratic and "politically correct" for its own good. Initiative, flexibility and pragmatism are key requirements for treaty officers, and these can easily be stifled by such considerations. It seems clear from the published documentation that something of a battle along these lines has recently been conducted behind the scenes at the Bonn Convention,[131] and it remains to be seen whether the convention will actually emerge the stronger from the aftermath. Certainly, the incumbency of the recently departed Secretary-General, Robert Hepworth, appears to have been a period of considerable substantive progress in the rather chequered overall history of the CMS, and it is to be hoped that this recent record of effectiveness will not be compromised under a changed regime.

In every case, the capability of the secretariat to deliver an appropriate range of services to a suitable standard will obviously be dependent upon the provision of adequate funding, and it is undeniable that this requirement has in practice proved a recurrent impediment to the maintenance of effective bureaucratic support. In the case of the CMS, for example, the decidedly slow rate at which states initially consented to participate in the regime, and thereby contribute to its running costs, meant that the bureaucracy was starved of finance from the outset, and for some time comprised no more than two full-time and two part-time members of staff: it is obvious that only the most minimal level of administrative services can be delivered from such a resource base.[132] The early years of Ramsar were equally characterised by financial struggle, with the Bureau established only through the good offices of IUCN, and supported by voluntary contributions from a handful of governments that were particularly sympathetic to the cause of wetland conservation. The establishment of a formal budget, with an accepted scale of contributions from party states (which, in the case of Ramsar, did not occur until 1987) is therefore an effective prerequisite to the achievement of substantive progress. Even then, the scale of party contributions is likely to remain an ongoing focus of controversy, and in some cases entire COP meetings have been dominated by such financial wrangling.[133] The tragedy of this lies in the fact the amounts of money involved are so utterly trivial when set beside the quite staggering sums

131 See the report of the meeting of the CMS Standing Committee of 8 June 2009, UNEP/CMS/Ex-StC/6.

132 For an indication of these difficulties, see the Opening Address to the 2nd CMS COP at UNEP/CMS/Conf 2/16.

133 See further M.J. Bowman, "Recent Developments concerning the Convention on Wetlands of International Importance" (1995) 10 *IJMCL* 547.

which represent the value of the material services offered to humankind by natural ecosystems in their flourishing state.[134]

As is evident from the early experience under Ramsar, it is not invariably the case that either the financial cost or the operational burden of secretariat services will be borne directly by the parties as such, and a further alternative model is offered by certain instruments that have been designed to operate within the framework of broader political institutions or treaty regimes. "Daughter" agreements of an informal character concluded within the Bonn Convention family, for example, are in the main serviced directly by the CMS Secretariat itself,[135] while secretarial functions arising under the Bern and World Heritage Conventions are discharged by the Council of Europe and UNESCO respectively and the costs defrayed from the general funds of those organisations. Yet, aside from the possible benefits obtainable here by virtue of economies of scale, there is no particular reason to suppose that such an arrangement will necessarily result in either a superior or an inferior level of provision: everything will depend on the financial position of the hosting organisation itself and the weight accorded to the nature conservation brief within its overall operational remit. Certainly, the Bern Convention regime itself has experienced fluctuating financial fortunes on this account in recent years.[136] There may also be a risk in such circumstances of secretariat operations being skewed by considerations that stem not from the treaty itself but from broader preoccupations and priorities of its institutional host. Obviously, this is equally possible in the unusual event that the host is an NGO rather than an IGO, though in the case of Ramsar any difficulties that have been generated by the carefully ring-fenced operation created for the purposes of administering the treaty have probably worked more to the discomfiture of IUCN than the converse.[137]

Such considerations are not, of course, the sole possible source of diversion of treaty managers and bureaucrats from unswerving devotion to the fulfilment of the programmes, policies and objectives of the instrument in question, as personal convictions or idiosyncrasies, or financial or political pressures emanating from external actors,[138] may also give rise to difficulty. There will, of

134 The current annual budget for Ramsar, for example, is approximately CHF 5,000,000. The annual value of the ecosystem services provided by wetlands, by contrast, was recently estimated at US$14 trillion.

135 Though this is not universally the case: for details, see *Lyster* at 580.

136 On this point, see *Lyster* 330–331.

137 See further Bowman, *supra* note 66, 35–37.

138 Such risks are particularly obvious in circumstances where significant funding is obtained from external sources, whether commercial or non-commercial in character.

course, often be room for perfectly genuine differences of opinion as to where the true path of treaty implementation lies, but the decision by UNEP in 1990 not to renew the employment contract of CITES Secretary-General Eugene Lapointe suggests that the leeway allowed to treaty officers in this regard is by no means unlimited.[139]

Although the functions of secretariats are for the most part internal to the regime they service, it has already been noted that they also represent its public face and mouthpiece for the purpose of external affairs, and it is obviously essential that they should carry the authority and gravitas necessary to discharge such functions effectively. It seems that Ramsar has experienced some difficulties in that regard,[140] and it was specifically with a view to addressing them that the recent change in nomenclature from "Bureau" to "Secretariat" was instigated. Although some lingering problems with external funding have evidently remained, when the current arrangements were reconsidered at the 11th COP in 2012, it was decided to retain them rather than to transfer the relevant functions to UNEP as some had proposed.[141] On balance, this outcome appears to be a welcome one, since, given the ever-present financial constraints, the breadth and quality of service delivered to date appears to an outsider to have been of an exemplary standard, and the overall ethos created a positive model for other regimes.

### 3.2.3 Standing Committees

The key determinants of the confidence commanded by such organs are naturally likely to include their attentiveness to the effective translation of COP policy into practical action, but more immediately, perhaps, the responsiveness of committee members to the concerns expressed by the various constituencies they represent. With that in mind, the goal of securing a functionally appropriate and geopolitically balanced composition for such bodies is usually

139 For further information on this matter, see D. Favre, "Trade in Endangered Species" at (1990) 1 *YIEL* 195 and (1991) 2 *YIEL* 206. The manner of Lapointe's removal was subsequently condemned by a UN Administrative Tribunal. For his own perspective on these events, see the website of his new foundation, the "IWMC World Conservation Trust", at www.conservingwildlife.org/eugene_resume.html, though the account presented there tends to reinforce rather than to dispel the perception of a surprisingly strong personal agenda for a treaty bureaucrat.

140 Such problems, one imagines, are most likely to arise in relation to dealings with non-party states, or with IGOs lacking any direct connection with the treaty regime.

141 See Ramsar Resolutions IX.10 and X.5, and XI.1; Document CoP11 DOC17; and Report of the 11th Meeting of the COP, especially paras. 136–150, 164–169, 218–221, 264–267, 238–312 and 473–482.

reflected in a primarily regional approach to membership. Since, however, one particularly crucial task will typically be the planning and preparation of meetings of the COP itself, the governments designated to host the forthcoming and, in some cases, the immediately preceding events of this kind are commonly also appointed to serve *ex officio*, either on a permanent or *ad hoc* basis.[142] Beyond that, each region will usually select one or more representatives, with possible provision for alternates in the former eventuality.[143]

It is interesting to note that, almost as an unplanned by-product of such approaches to selection, an additional, distinctively regional, dimension has been engendered and encouraged to flourish even in treaties of avowedly global application.[144] This might begin with meetings designed simply for the briefing of regional representatives and the provision of feedback from them to other national delegations, but has the potential to mushroom into arrangements for the holding of substantive seminars, workshops and collaborative research or training programmes related to the treaty's overall conservation objectives. Such arrangements are likely to yield particular benefits for regions where free-standing conservation treaty regimes of specifically localised application are lacking or have failed to prosper, and may well, indeed, ultimately prove to be a superior medium in principle for the advancement of co-operation at that particular geopolitical level.

### 3.2.4 Scientific Advisory Bodies

The credibility of scientific input is most obviously dependent upon the personal integrity and operational independence of the individuals involved, and above all upon the breadth and depth of the technical expertise at their disposal; in an ideal world, accordingly, the selection criteria for participants would probably focus on such considerations exclusively. As we have seen above in the case of the World Heritage Convention, even the entrusting of key advisory functions to wholly independent external agencies is not completely unknown, but the heavily politicised context in which such bodies have to function is usually liable to result in the adoption of a rather different approach. In particular, states are likely to place more confidence in bodies to which they are entitled to appoint their own nominees than those composed exclusively of independent experts. Since this point has essentially been conceded even in the judicial context,[145] it would seem unrealistic to seek to deny it in other

142 See, e.g., Ramsar Resolution VII.1; CMS Resolution 9.15.

143 For the broadly similar arrangements for Ramsar and CMS, see *Lyster* at 432, 568.

144 Note especially the case of Ramsar, discussed in *Lyster* at 441–442.

145 For example, through provision for the appointment of *ad hoc* judges to the World Court.

spheres of expert activity: it is accordingly common for treaty arrangements to accord states such powers in relation to the composition of scientific advisory organs.[146] In defence of such an approach, it has the merit of facilitating the widest possible dissemination of technical awareness and collective wisdom across the international community as a whole. In any event, the risk of partiality to which reliance upon national appointees naturally gives rise tends in practice to be offset by other considerations, not least the fact that the sheer numbers of individuals involved greatly reduces the chances of purely nationalistic idiosyncrasy exerting much significant influence. Measures of a more formal kind adopted to preserve the range, quality and impartiality of scientific advice include the parallel appointment of experts by the COP itself, collectively,[147] and provision for systematic input from the non-governmental sector – in many cases, indeed, such contributions represent the principal driving force behind the entire scientific aspect of the operation.[148]

### 3.3 *Critical Commitments*

As indicated in Section 1.1 above, contemporary ecological thinking is displaying an increasing concern not only with the biological components of ecosystems, and with their individual characteristics, but with the mechanisms and media of *connectivity* between them. Just as natural ecosystems are characterised by certain chemical pathways and signalling systems which are critical to their functioning, so too must the institutional ecology of conservation treaty regimes be infused with appropriate, universally-held commitments and motivational undercurrents to nourish and lubricate the system and serve as psychological stimulants to action. These are likely to be quite diverse in character, spanning the juridical, ethical, political, administrative and technical spheres, and the overall effectiveness of a given treaty regime is likely to be intimately bound up with the degree of success achieved in securing an authentic recognition and harmonious blend of these various elements.

146 See, e.g., the arrangements for appointments to the CMS Scientific Council, Bonn Convention, Article 8(2).

147 As in the case of the CMS, Article 8 of which not only allows each party to appoint its own representative, but also provides for additional appointments by the COP itself (of which there are currently eight, including two from non-party states).

148 Note, for example, the adoption under the Bern Convention of a series of species-specific action plans for birds, formulated essentially by Birdlife International. Under Ramsar, Partner Organisations have automatic representation on the STRP, while other scientific NGOs may be invited to attend as observers: see Ramsar Resolution X.9.

### 3.3.1 Respect for Science

It is evident from the discussion above that the lessons taught by scientific research must lie at the very heart of contemporary global conservation policy, but it is equally clear that the political will to ensure that such policies are faithfully implemented will depend upon a range of factors, not least the depth of respect and confidence that such findings truly command within national communities individually. While it might have been supposed that growing respect for science would be a natural concomitant of the continual refinement of its methods, and of the onward march of civilisation generally, it is clear that in reality the foibles of human nature are likely to generate a variety of manifestations of backlash. In particular, where the policy implications of research findings pose significant challenges to vested economic interests or culturally entrenched patterns of behaviour, to fundamentalist interpretations of religious tradition or to libertarian ideologies that are resentful of any form of systematised restriction upon freedom of action, the voice of science is sure to encounter strong resistance. In cases where these counter-currents chance to combine[149] – and where, as in the case of climate change, they even find temporary reflection in the official stance of governments that might reasonably have been expected to display political leadership on the matter[150] – substantive progress will inevitably be slow and difficult, as it can be guaranteed that every conceivable effort will be made to distort, discredit or downplay the findings of scientific research.

There is, of course, no simple solution to such problems, though the widespread dissemination, explanation and discussion of relevant research is an important first step, underlining the importance of those clauses of legal instruments, so commonly glossed over by commentators, that make express provision for the institution and formalisation of such procedures.[151] In some cases, it may be necessary to go beyond such measures, through the establishment of dedicated global frameworks for the promulgation of scientific advice, such as the Intergovernmental Panel on Climate Change (IPCC), or the more recently created Intergovernmental Platform on Biodiversity and Ecosystem Services

149 See on this point the recent Special Report "Unscientific America: A Dangerous Retreat from Reason" *New Scientist,* 29 October 2011, 38–45.

150 On the performance of the Bush regime in particular, see J. Brunnée, "The United States and International Environmental law: Living with an Elephant" (2004) 15 *EJIL* 617; J. Depledge, "Against the Grain: The United States and the Global Climate Change Regime" (2005) 17 *Global Change, Peace & Security* 11.

151 See, e.g., CBD, Articles 12,13, 25(2); Ramsar, Article 4(3); CMS, Articles 2(3)(a), 5(5)(c-d); 8(5)(b); Bern, Article 11(1)(b).

(IPBES).[152] Regardless of the precise vehicle through which their services are delivered, scientists themselves must be sure to do nothing to give ammunition to their detractors, however irrational the original basis of their scepticism. The patient refutation of ill-informed counter-arguments, delivered where necessary with the assistance of those skilled in the arts of public relations,[153] is likely to prove far more effective than peremptory dismissal, whether delivered in choleric or condescending mode. Even in cases where environmental problems seem most acute, it is probably unwise for the scientific community to risk overstating the extent or implications of their current knowledge and understanding when providing input to the policy-determination process: a better tactic might be to emphasise the importance of the precautionary approach in the light of the knowledge they do possess.[154] In the work of bodies like IPCC and IPBES, which have been deliberately constructed along the frontier where science and policy converge, it may be particularly important to ensure that some element of substantive demarcation is preserved between the findings of the former and the prescriptions of the latter.

Finally, it should be noted that respect for science certainly should not be equated with unquestioning acceptance of the current consensus. Since all scientific knowledge is essentially provisional in nature, it should always be approached with a critical eye, and scientists themselves prepared to remain as open as possible to alternative hypotheses, and even home-spun challenges to prevailing paradigms.[155] In that regard, it is to be remembered that Kelvin's increasingly dogmatic response to evolutionary theory, as noted above, arguably set back the development both of biology and of physics itself for several decades. In any event, scientists should accept that the maintenance of *proper* respect for their endeavours may sometimes entail the need to ensure that they are not presented as the *exclusive* driving force of inter-governmental responses to conservation concerns, since these may also have to take account of pragmatic considerations and normative behavioural codes that are equally worthy of widespread support. Inevitably, this will entail attention to the question of environmental ethics.

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152 For information on the work of this body, see www.ipbes.net/.

153 See further P. Aldhous, "Don't Tell it So Straight" *New Scientist,* 29 October 2011, 42.

154 That is to say, in relation to the potential scale and seriousness of the problems envisaged, should they materialise, and the comparative feasibility and effectiveness of protective measures either now or later.

155 In recent decades, particularly noteworthy paradigm shifts have been brought about by James Lovelock's Gaia theory and Jane Goodall's observational fieldwork with chimpanzees in the wild, neither of which emanated from the mainstream of the scientific establishment.

### 3.3.2 Secure Ethical Foundations

Accordingly, a further pre-requisite to the effective pursuit of rational global policies in field of conservation is the elaboration and application of appropriate ethical standards to guide the overall process.[156] Although it is often claimed that cultural differences across the international community are such that any attempt to formulate a universal ethic in this area is unrealistic, there is good reason to believe that such assertions are unduly pessimistic, since a clear basis can be found in a host of eclectic and widely-supported international documents, from the revised version of the World Conservation Strategy to the pronouncements of the Council for the Parliament of the World's Religions and the preamble of the Biodiversity Convention itself.[157] What is undeniably the case, however, is that the scramble for economic development often causes political communities and their governing elites, or particular factions thereof, temporarily to lose sight of the principles and traditions embracing respect for the environment and for other life forms that have shaped their own cultures so profoundly. Since these factions often prove particularly adept at seizing the megaphone through which the cruder forms of international discourse and diplomacy are conducted, it remains essential that they be subjected to continuous challenge in the form of reminders of the underlying moral principles that have already secured formal universal acceptance.[158]

Above all, the profoundly pluralistic nature of this ethic – embracing concepts of intrinsic value, alongside its instrumental and inherent counterparts – must constantly be reaffirmed, since it remains crucial to the realisation of its potential for inspiring more effective progress towards current conservation goals.[159] In particular, it should be remembered that the discipline of economics has not yet shown itself to be an effective paradigm even for the management of the global economy,[160] and therefore attempts to accord it a

156 For a valuable discussion, see A. Gillespie, *International Environmental Law, Policy & Ethics* (1997).

157 See respectively IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Sustainable Living* (IUCN, 1991); "Towards a Global Ethic: An Initial Declaration" text in J. Beversluis, *Sourcebook of the World's Religions* (3rd edn., 2000); CBD, preamble, first recital. For further discussion, see *Lyster,* Chapters 3 and 22.

158 The CBD has, of course, secured the participation of virtually the entire global community, and even the one key state that remains aloof, the US, has done so for reasons other than the Convention's underlying ethic.

159 See further on this point Bowman, *supra* note 51, esp sections II, III.

160 When even *The Economist* carries a leader (16 July 2009) entitled "What Went Wrong with Economics?" one can be sure that there is something seriously amiss with the discipline. This article also quotes Nobel Economics Laureate Paul Krugman's description of much

pre-eminent role in the management of planetary ecology and natural resources should be firmly resisted and a more balanced approach retained. Significant deficiencies are, after all, only to be expected in a discipline that has its foundations in the relatively primitive 18th-century mechanistic perspectives derived from Newtonian physics, and has still to be adequately informed by the subsequent emergence of biology as a coherent discipline, and the ultimate values that lie at its heart,[161] not to mention the radically transformed conception of physics itself which has emerged in the meantime.[162] Economists should by all means be encouraged to persist with efforts to calculate the economic value to humankind of the services provided by natural ecosystems in a flourishing state,[163] but this should not be allowed to obscure the inherent limitations of its perspectives upon value, especially with regard to the intrinsic moral significance of individual organisms of every species, which it has no means of measuring. It is quite insufficient, moreover, that the recognition of such values be treated merely as the subject for pious intonement in preambles or on ritual occasions – rather, it must be fully embraced by treaty bodies at every level and faithfully reflected in all aspects of regulation, from the primary principles governing exploitation and management[164] to the secondary rules

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of the past 30 years of macroeconomics as "spectacularly useless at best, and positively harmful at worst", before predictably attempting a salvage operation of sorts. At a more formal level, note J. E. Stiglitz and Members of the UN Commission of Financial Experts, *Reforming the International Monetary and Financial Systems in the Wake of the Global Crisis* ("The Stiglitz Report", 2010).

161 The issue has, of course, been deliberated for decades, though without apparent resolution – see, e.g., J.C. Moorhouse, *The Mechanistic Foundations of Economic Analysis* (Reason Papers No. 4, Winter 1978); L.P. Liggio, "The Limits of Mechanistic Economics" 2(2) *Literature of Liberty* April/June, 1979; F. Capra, *The Turning Point: Science, Society and the Rising Culture* (1982), Chapter 7; C-Y. Hsieh and M-H. Ye, *Economics, Philosophy and Physics* (1991); M. Ruth, "Evolutionary Economics at the Crossroads of Biology and Physics" (1996) *Jnl of Social & Evolutionary Systems* 125; G.M. Hodgson, *How Economics Forgot History* (2001); R.L. Nadeau, *The Wealth of Nature: How Mainstream Economics Failed the Environment* (2003) and "Brother Can You Spare Me a Planet? Mainstream Economics and the Environmental Crisis" (2009) 2.1 *SAPIENS* online; J. Reardon, "What are the Questions We Should be Asking in MicroEconomics?" *Economía Informa* Num 367, March/April 2011; D.H. Freedman, "Why Economic Models Are Always Wrong" *Scientific American* 26 October 2011.

162 Above all, through the lessons of quantum theory.

163 On this latter point specifically, see P. ten Brink (ed.), *The Economics of Ecosystems and Biodiversity in National and International Policy Making* (2011); D. Helm and C. Hepburn (eds.), Nature in the Balance: The Economics of BIodiversity (2014).

164 At the general level, the CBD's Addis Ababa Guidelines on Sustainable Use, CBD Decision VII/12, represent a reasonably encouraging start; for an interesting practical example of a

on compensation for environmental damage.[165] This consideration in turn points to the need for the third crucial commitment that is necessary to enable the system to flourish – namely, respect for the rule of law.

### 3.3.3 Respect for the Rule of Law

Another crucial tenet which must be kept perpetually at the forefront of the minds of all those engaged in the operation of any regime of the kind under discussion here is that a conservation treaty is a formal legal instrument with binding effects under international law, in accordance with the fundamental customary principle of *pacta sunt servanda.* All too often, the parties to such treaties succumb to the tendency to treat the conservation commitments they have undertaken as mere aspirations, despite the fact that they will commonly entail legal duties scrupulous adherence to which is imperative in the global interest. This relaxed approach to legal obligation doubtless represents one of the principal reasons why progress towards the attainment of global targets for halting the diminution in biological diversity has so far proved elusive. In consequence, it may be necessary for treaty organs or officials to issue periodic reminders to participating governments of their responsibilities, and even to contemplate the ultimate use of sanctions against recalcitrant offenders. Naturally, the invocation of such measures should normally be viewed as a last resort, and in any event the scope for their deployment is likely to be limited. In many cases, the commitments undertaken are not actually expressed in particularly rigorous terms, or may offer leeway to states in the form of discretions, exceptions and legitimated excuses, and in such circumstances the optimum strategy for treaty institutions will probably lie in the provision of aids and incentives to greater commitment, rather than heavy-handed approaches to enforcement.[166]

Beyond that, the implications of the rule of law should be understood also to embrace respect for other fundamental aspects of the international legal

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specific kind, note the 2007 Agreement on the Conservation of Gorillas and their Habitats, text at www.cms.int/species/gorillas/agreement_text.html.

165 See further M.J. Bowman and A.E. Boyle, *Environmental Damage in International and Comparative Law* (2002), especially Chapter 4, cited by the International Law Commission in paragraph 20 of its *Commentary* to Principle 2 of its 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, which perhaps give the most expansive definition yet in an international instrument to the concept of environmental damage.

166 For a comparison of the respective ranges of mechanisms which have been utilised to enhance compliance with two global conservation treaties of very different outlooks, see *Lyster,* Chapter 14, Section 6 (Ramsar) and 15, sections 8, 9 (CITES).

order. These should plainly include the more detailed ramifications of the established law of treaties, regardless of whether the government in question is formally bound by the 1969 Vienna Convention, in which they are currently codified.[167] In particular, the interpretation and implementation of any treaty must be undertaken in good faith, with due regard to its object and purpose and to the principle of effectiveness, and taking full account of any other "relevant rules of international law applicable in the relations between the parties".[168] As to the question of good faith, the preamble and introductory provisions of individual treaties will normally provide suitable enlightenment as to the original, underlying motivations, but it is essential that such indications be viewed, and where necessary re-interpreted, in the light of the fundamental objectives of the sector as a whole. These can be regarded as having been expressed in the preambular statements of the CBD, in the Strategic Objectives of the UN Decade for Biodiversity, and in other similar pronouncements. Plainly, the majority of conservation treaties will already be fully attuned to these objectives, but there may be others that would benefit from a subtle re-orientation in that regard. In some cases, moreover, this should prove readily achievable without formal changes to the wording of the treaties in question, if only the requisite political will can be summoned.

This related requirement that account be taken of other relevant legal rules is particularly essential if the gradual fragmentation of international law is to be countered, and "systemic integrity" enhanced across the global legal order as a whole.[169] Although international courts and tribunals undoubtedly have a role to play in this regard, the constraints upon innovation implicit in the judicial function, together with the dearth of international litigation in any event, suggest that their contribution is likely to remain limited, and that the integrative function will for the most part have be achieved by other interpreters, from

167 Even where the principles established by the Vienna Convention clearly went beyond the mere codification of existing customary law, it is likely that they will now be regarded as crystallisations of emerging norms or as the historical source of norms that have subsequently acquired customary status, as envisaged by the ICJ in the *North Sea Continental Shelf* cases, (1969) *ICJ Rep* 3. Accordingly, states that now wish to exempt themselves from the operation of such rules will probably have to demonstrate that they have by some recognised method positively excluded their applicability: i.e., by formulating a reservation to the relevant provision of the VCLoT, or by expressing their dissent from any parallel customary norm right from its formative period.

168 VCLoT, Article 31(3)(c).

169 C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *ICLQ* 279; D. French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules" (2006) 55 *ICLQ* 281.

the individuals charged with securing the performance of treaty obligations at the national level to the members and officials of the various treaty organs discussed above. Even here, however, the decisions of judicial and arbitral bodies may have an influence on the precise way in which that interpretation process is conducted.[170]

In the final analysis, the achievement of effective integration and coherence within the system is likely to require the establishment of an additional tier of co-operative institutional arrangements, designed to span the divide between individual treaty regimes and, indeed, entire substantive sectors of treaty-based activity. At its simplest level, this will entail the conferral of formal observer status for other treaty secretariats at the COPs of conservation treaty regimes, a practice which is by now already well entrenched. Beyond that, collaboration may graduate to the adoption of formal joint work plans between the secretariats of treaties with overlapping concerns, which is also now a reasonably well-established feature of the system. Ultimately, a forum may be created for the more general exchange of information, expertise and perspectives upon policy, as is evident for the conservation sector in the form of the Biodiversity Liaison Group.[171]

It is at the level of *trans-sectoral* co-ordination, however, that much more effort and imagination is still required, since the principal threats to biological diversity almost certainly emanate from international activities beyond the conservation sector itself: for that reason, the performance to date of bodies such as the WTO's Committee on Trade and Environment must be counted as profoundly disappointing.[172] Given that the principle of integration has been so widely recognised as an indispensable component of the global approach to sustainable development,[173] which is itself specifically recognised as an objective of the Agreement establishing the WTO,[174] it is surely inexcusable that so little progress has been made on this front. In this context, the undue *modularity* of the overall system is currently preventing it from flourishing or achieving its broadest policy goals: accordingly, if any truly coherent legal order is ever to emerge at the international level, it will surely be necessary to ensure that

170 The current docket of the International Court offers some interesting possibilities for progress, though the approach adopted in the *Pulp Mills* case (2010) *ICJ Rep* 14 unfortunately does not engender great optimism.

171 For information on the groups remit and activities, see www.cbd.int/blg/.

172 For discussion, see *Lyster*, Chapter 19, esp Section 4.

173 Stockholm Declaration, Principles 13, 14; Rio Declaration, Principle 4, 25; World Charter for Nature, Principles 7, 8; Birnie, Boyle and Redgwell, *supra* note 17, 116–118; Sands, *supra* note 46, 252–266.

174 (1994) 33 *ILM* 1125.

much greater commitment is invested in overturning the barriers which have been erected between different legal sub-disciplines and their respective treaty regimes. It is difficult to see how this can be achieved, moreover, without the creation of an overarching network of robust, vigorous and innovative institutional arrangements to inspire and foster the process. And when that stage has been reached, this further layer of institutional governance, with its own distinctive ecology, will doubtless require investigation and analysis by later generations of commentator.

# Delegate Preparation and Participation in Conferences of the Parties to Environmental Treaties

*Edward J. Goodwin*

**Abstract**

Little research has been conducted into the way delegations prepare for, and then participate in, plenary meetings under multi-lateral environmental agreements – a key administrative stage in the ongoing development of international environmental regimes and law. Using the 1971 Convention on Wetlands of International Importance as the main example, this paper explores the external rules that shape the 'internal modalities' of states and their delegations as they undertake these stages. Other insights into delegate preparation and participation are sought from published accounts and internet-based resources.

**Keywords**

delegations – conference of the parties – state position formulation – delegate identity and experience – credentials – full powers – consensus

## 1 Introduction

Since Robin Churchill and Geir Ulfstein first sought to widen academic enquiry into the institutional arrangements established to serve environmental treaties,[1] numerous authors have looked to engage with the topic and their article.[2]

1 R.R. Churchill and G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *American Journal of International Law* (2000) pp. 623–659.

2 G. Loibl, "The Proliferation of International Institutions Dealing with International Environmental Matters", in N.M. Blokker and G. Schermers (eds.), *Proliferation of International Organisations: Legal Issues* (2001) pp. 151–175; J. Brunnée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements", 15 *Leiden Journal of International Law* (2002)

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Indeed, the subsequent literature could lead to the view that the administrative dimensions of multilateral environmental agreements ('MEAs') have finally received the level of analysis that Churchill and Ulfstein thought wanting 12 years ago.[3]

Nevertheless, the academic attention that has been devoted to institutional arrangements has predominantly focused upon the legal significance of outputs from Conferences of the Parties (or their counterparts). This is not a criticism, not least because the question of legal significance has become a pressing issue given the growing corpus of decisions, recommendations, and resolutions of Conferences of the Parties (hereafter, 'COPs'). That accumulation has accelerated through the adoption of more environmental treaties since the 1970s and the now standard practice of establishing plenary bodies under these agreements. It is unwise to immediately dismiss this sizeable output, especially since COP decisions can be of great significance.

But there is more that deserves to be investigated and diverse paths that can be pursued, for example on such matters as compliance, global administrative law and systems theory. The current paper, using the 1971 Convention on Wetlands of International Importance[4] as the main example, looks to introduce a new path; one which if ultimately followed in full will serve to add significant depth to our understanding and critique of administrative processes

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pp. 1–52; M. Fitzmaurice, "Consent to be Bound – Anything New Under the Sun?", 74 *Nordic Journal of International Law* (2005) pp. 483–508; L.K. Camenzuli, 'The Development of International Environmental Law at the Multilateral Environmental Agreements' Conference of the Parties and its Validity' (2007), available <http://cmsdata.iucn.org/downloads/cel10_camenzuli.pdf>; T. Gehring, "Treaty-Making and Treaty Evolution", in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007) pp. 469–497; A. Wiersma 'The New International Law Makers? Conferences of the Parties to Multilateral Environmental Agreements", 31 *Michigan Journal of International Law* (2009) pp. 231–287.

3 Churchill and Ulfstein, *supra* note 1, at 625. The importance of administrative arrangements had been appreciated before 2000. However, Churchill and Ulfstein's article is seminal in relation to a number of topics; principally the law-making powers and personality of COPs (and their counterparts). For example *see* S. Lyster, *International Wildlife Law* (1995) at 12–14, 110–11, 123–24; M.J. Bowman, "The Ramsar Convention Comes of Age", 42 *Netherlands International Law Review* (1995) pp. 1–52, at 33–43; J. Werksman, "The Conference of Parties to Environmental Treaties", in J. Werksman (ed.), *Greening International Institutions* (1996) pp. 55–68; R. Lefeber, "Creative Legal Engineering", 13 *Leiden Journal of International Law* (2000) pp. 1–9.

4 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 and commonly referred to as Ramsar after the Iranian town in which the treaty was adopted (hereafter, 'Ramsar').

and the sources of international law. Simply stated, there is a need to investigate how delegates prepare for COPs and how they then participate.

## 2 Methods and Contributions

### 2.1 *Focus on 'Internal Modalities'*

Whilst the research question divides into two parts (preparation and participation), the main endeavour will be to identify and analyse the sets of rules, customs and ethics that operate within delegations when they undertake these stages. A short-hand term will be used to encapsulate these sets: 'internal modalities'. Internal modalities exist within many groups in society beyond delegations to COPs. Take, for example, professional team sports. All of the teams will operate an internal modality tailored towards an individual goal. Such goals can vary, for example winning a league or cup, or financial survival. Setting this modality will be the responsibility of the team's director or owner. For example, they will establish ways of generating income to fund the team, and recruit managers with responsibility for developing tactics for games. At the same time, other rival teams are doing likewise. Significantly, it is during the game that these modalities become entwined and affect each other, ultimately producing a result.

Two key features of internal modalities are, first, that they can be adjusted, and second, there will often be external rules that shape these practices. For example, the governing body of the sport in question must protect the interest of the sport, which includes ensuring that there are participants, that there are rules to the competition and that there is public interest.

The internal modalities of delegations to COPs behave in a similar way and setting. Whilst competitiveness is not necessarily present in every plenary meeting under an MEA, delegations will have their own internal modalities governing how they prepare for meetings and how they will participate in the work of a session. These will be set according to their objectives and these modalities will ultimately become entwined with those of other states during COPs. What is more, autonomy to determine the nature of that internal modality is also constrained to the extent that international law, the treaty establishing the COP and rules of procedure must be respected and followed. As matters stand, no-one has identified, described and assessed those internal modalities, or reviewed the external forces that can shape them.

The intention of this paper is to see what can be revealed about the internal modalities surrounding preparation and participation based upon existing scholarship and records. As will be seen, modest progress can be made on the

external influences but information on the internal modalities themselves is harder to locate. Furthermore, and as a reflection of the paucity of work that has been undertaken in this area, the available sources of information still leave many fascinating questions unanswered. Ultimately a different methodology based upon interviews may yield new insights and take a step towards answering these questions.

### 2.2 *Placing the Research*

Many who research public international law concentrate upon the output of multi-state relations and particularly the formal sources of international law, i.e. treaties, non-binding initiatives, resolutions of COPs, amendments to appendices, and judicial and arbitral pronouncements. Such sources for the purposes of this paper are regarded as the 'foreground' of international environmental law. Theories and rules concerning the normative force of this foreground,[5] and the best way to draw states towards compliance,[6] have been developed. However, there is a lack of realism in focusing only upon these acts since this misses much of importance that came before and shaped those outputs.[7] Some international lawyers may feel that activities on these planes that lie behind the foreground should be the preserve of politics and international relations scholars. Certainly those focused solely upon the task of interpretation of an international legal text will only be interested in antecedent events to the extent that such activity is recognised as a source for treaty interpretation.[8] Nevertheless, and additional to the pursuit of realism, there are good

5 *See*, for example, Churchill and Ulfstein, *supra* note 1; Brunnée, *supra* note 2; Camenzuli, *supra* note 2; Fitzmaurice, *supra* note 2; and Wiersma, *supra* note 2.

6 *See*, for example, T.M. Franck, *The Power of Legitimacy Among Nations* (1990); J. Cameron, J. Werksman and P. Roderick (eds.), *Improving Compliance with International Environmental Law* (1996); M.A. Fitzmaurice and C. Redgwell, "Environmental Non-Compliance Procedures and International Law", 31 *Netherlands Yearbook of International Law* (2000) pp. 35–65; W. Bradford, "International Legal Compliance: Surveying the Field", 36 *Georgetown Journal of International Law* (2005) pp. 495–536; U. Beyerlin, P.T. Stoll and R. Wolfrum (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006); D. Bodansky, J. Brunnée and E. Hey, *The Oxford Handbook of International Environmental Law* (2007), Part VII; M. Fitzmaurice, D.M. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2010), Part VI; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010).

7 D. Kennedy, "Challenging expert rule: The politics of global governance", 27(5) *Sydney Law Review* (2005) pp. 5–28, at 7.

8 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 8 ILM (1969), 679 (hereafter 'VCLT'), Article 31 and 32.

reasons for legal scholars to analyse antecedent processes like decision-making at COPs. For example, by introducing a shift in the focus of enquiry to activity on these planes – the 'background' (national policies and practices, like preparation) and 'middle-ground' (the interactions of states through, for example, participation at COPs) – a richer appreciation of the way MEAs mature and evolve will be provided. Furthermore, new themes (e.g. internal modalities) found on these planes should be opened up for challenge or sharing as best practice.

Such investigation will also serve to remind others that, as Daniel Bodansky says, 'in the end, decisions are made not by abstract entities, but by individuals who are motivated by a multitude of factors: promoting what they believe to be in the national interest, promoting their own interests, doing what they believe is right, doing what they believe the law requires, and so forth.'[9]

Finally, and without the need to favour any one school of thought, the research might inform theories surrounding the likelihood of states and private individuals following a particular decision or direction. For example, under Brunnée and Toope's interactional theory, law's value lies in the sense of obligation it generates.[10] That obligation is generated where states and actors perceive law-making to be legitimate.[11] In their theory, legitimacy flows from three factors:[12] (i) shared understandings of the role of law and particular norms; (ii) a norm substantially adhering to criteria of legality, such as the fact a norm must not demand the impossible;[13] and (iii) reinforcement of the norm through a continuing practice of legality.

9 D. Bodansky, *The Art and Craft of International Environmental Law* (2010), at 115. Vaughan Lowe also observes 'We speak of states acting. States do not, of course, act: people act for them'; A.V. Lowe, *International Law* (2007), at 20. Jutta Brunnée and Stephen Toope comment that despite a focus on 'states', the salient interactions are actually those between individuals or groups of people like diplomats or scientists; Brunnée and Toope, *supra* note 6, at 6.

10 Brunnée and Toope *ibid.*, at 55. Franck was also similarly interested in theories of legal obligation and he sought an understanding of the formal characteristics of norms that result in 'compliance pull'; *see* Franck , *supra* note 6.

11 Brunnée and Toope, *ibid.*

12 *Ibid,* at 53–54.

13 *Ibid,* at 26. The eight criteria of legality are taken from Lon Fuller's theory concerning the internal morality of law, namely: (i) generality, (ii) promulgation, (iii) prospective effect, (iv) clarity, (v) consistency, (vi) realistic demands, (vii) stability, and (viii) congruency between the rules as promulgated and as administered; L.L. Fuller, *The Morality of Law* (1969), at 39.

COPs play a key role in nurturing obligation, as the forum for building a community of practice and sustaining shared understanding and interaction within it.[14] As will be seen, COPs may well also be the body responsible for producing or developing norms that will need to adhere to the criteria of legality. Given this, it is possible to see how research on preparation and participation might inform this theory of obligation. For example, the community of practice operating under an MEA thrives through nourishment from others existing at the national and international levels.[15] This means preparation that facilitates communication and interaction with these communities ought to be valuable. Preparation might also establish that which is practicable and consistent with national and international commitments already undertaken by a state, thereby delivering on elements of legality. Finally, the findings on participation might be such that they too indicate a propensity to deliver on the criteria of legality, and generate genuine and shared understandings.

As an alternative example, and looking to assimilate a number of schools, Bodansky regards states and individuals as being responsive to substance, legitimacy and/or pressure from a third party [16] and it is easy to see how this research could relate to two of his ideas. Looking at the first of these, the suggestion is that if the substance of a direction is convincing on its merits this can lead to particular behaviour. This may be because it is interpreted as being in the interest of a state or the individual whose acts count as those of the state.[17] Nevertheless, a decision may also be rationally persuasive for other reasons, for example when it is felt to be justified by science, or because of fairness.[18] The degree of substantive persuasiveness is therefore partly dependent upon the formulation of a decision; that is the ability of the state to identify its interests and then (if needed) influence the content of a decision in the run-up to its adoption.

Of course, a decision might be followed, regardless of a state's stance on its persuasiveness, because of pressure from a third party against a state.[19] This

14 Brunnée and Toope, *ibid,* at 356.

15 *Ibid,* Chapter 2.

16 D. Bodansky, "Legitimacy", in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007) pp. 706–723.

17 Indeed, Vaughan Lowe notes that given the dominant role of consent within international law, states are often agreeing to be bound by rules that it is already believed by the government serve the national interest, whilst those civil servants and ministers charged with implementing these commitments personally find compliance the safer option; Lowe, *supra* note 9, at 19–21.

18 Bodansky, *supra* note 16, at 707.

19 *Ibid.* The EU presents a special case in that COP decisions may be directly embraced by EU legislation and thereby subject to the enforcement mechanisms available within the

relies upon an external power or force. As such, the relevant force comes after the production of a decision, and might include threats of trade sanctions,[20] or measures imposed by COPs as part of compliance procedures. It is anticipated that looking at preparation and participation will not offer many insights into the exercise of such power.

Finally, even in the absence of power, and even if an individual is not persuaded by the substance of a decision, they may still follow it because of the perceived legitimacy of the decision-maker or decision-making process.[21] Therefore, legitimacy in this sense is also derived from events that are often antecedent to the passing of a decision. For example, a law may seem unreasonable, but is followed because it is perceived as having been properly enacted; or the grounds for a recommendation hard for an individual to appreciate, but they remain inclined to accept the word of the decision-maker so they act in accordance with the direction. Legitimacy and its effects in this sense are dependent upon the perception of the target audience. Thus research in this field should seek to reveal the internal modalities of preparation and participation, enabling perceptions as to legitimacy of the COP process to be checked and better informed.

## 3 COPs – Connecting the Foreground and Background

Broadly conceived COPs can be seen as the conduit through which the national position of contracting parties can be represented and advanced on the way towards adopting decisions, recommendations or resolutions. Thus they are the middle-ground link between part of the background and foreground of international environmental law. Some detail on this role is desirable in order to clarify the demands upon delegates when preparing for and attending COPs, and its impact upon the eventual research methodology.

### 3.1 *The Development of COPs*

Many MEAs have chosen to establish dedicated institutional arrangements instead of relying upon the services of international organisations.[22] These

union; *see* for example, the incorporation of COP decisions made under the Convention on International Trade in Endangered Species, *supra* note 54, into EU law under Council Regulation (EC) 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora by Regulating Trade therein [1997] OJ L61/1.

20 Bodansky, *supra* note 16, at 707.

21 *Ibid*, 707–8.

22 For an indicative list, *see* Churchill and Ulfstein, *supra* note 1, at 623–4.

administrative structures comprise a number of component parts, usually incorporating a Secretariat, a COP, an interim committee of some contracting states to assist the Secretariat between plenary sessions, a scientific advisory group and *ad hoc* working groups instructed to work on particular topics. The COP is therefore one part of this set-up, although its centrality to the functioning of the legal regime means that almost all of the business performed under the auspices of a convention comes before or originates from this plenary body. Indeed, some MEAs explicitly recognise the hierarchical superiority of the COP, whilst others imply such a hierarchy where subsidiary bodies are ordered to act under the guidance of the COP.[23]

3.1.1 Diplomatic Conferences, Intergovernmental Organisations and COPs

Historically speaking, COPs as an institutional phenomenon represent the latest development in the continuing evolution of international cooperation. Philippe Sands and Pierre Klein describe how international conferences were increasingly used in the nineteenth century as a solution to the limitations of interaction through diplomatic embassies.[24] They are characterised by their temporary nature. Arnold Tammes evoked this fleeting existence when describing them as 'a preparatory phase in a law-making process; a passing event doomed to be buried in archives together with all its rules and its organisational structure and leaving behind nothing except the living results'.[25] This, in turn, gave rise to one of the limitations to such conferences. This is an efficiency deficit, since another conference (needing new rules of procedure and a secretariat) was required whenever a new problem arose.[26] Other limitations centred upon a lack of flexibility in debates, an 'invitation only' approach to participation and the nineteenth- and early twentieth-century practice of requiring unanimity in voting on issues of substance.[27]

The response was the formation of a range of permanent unions of interested parties. They have taken many forms including unions of private individuals and unions of states. Much attention has been focused on inter-governmental

23 *Ibid,* 631.

24 P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed., 2009), at 1–2.

25 Quoted in R. Sabel, *Procedure at International Conferences* (2nd ed., 2006), at 1. Thomas Gehring, likewise, describes diplomatic conferences as being 'convened when a group of actors so desires, and dissolved upon the adoption of the final act of the conference to which the treaty is attached.'; Gehring , *supra* note 2, at 470.

26 *Ibid,* at 3. Bodansky, *supra* note 9, at 120.

27 C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed., 2005), at 2–3; Sands and Klein, *supra* note 24, at 3–4.

organisations ('IGOs') – in particular those that are a part of the United Nations system. As part of the post-war rejuvenation of inter-state relations, the UN bodies have merited sustained consideration and much research has been completed on them.[28]

Even though IGOs represented a more efficient, permanent and regularised means for states to perform functions that they could not individually undertake, interest in expanding their number dropped off. It has been claimed that this was in part because, in a context of continuing conflicts, there were doubts about the effectiveness of IGOs, and because the supranational authority of IGOs was inconsistent with increasing assertions of property rights, particularly over environmental resources.[29] Establishing new IGOs therefore fell out of favour. This, however, coincided with the expansion of international environmental treaty law. For these MEAs there remained a well-known need for regular meetings which could not be met by temporary diplomatic conferences.

It is appreciated that regular meetings of the contracting parties prevent initiatives from stalling or being ignored.[30] Furthermore, environmental knowledge is continually evolving, even after an MEA has been concluded. Best practice can change, and the status of species may become more or less endangered. Additionally, treaty negotiations can be difficult as states may be wary about the economic and social costs of action, and argue over who should take on the greatest burden when addressing a threat. Limited political agreement may therefore be the only possibility coupled to acceptance that further refinement will take place as greater consensus becomes possible.[31] Thomas Gehring concludes that diplomatic conferences for negotiating an MEA simply cannot be expected, under such conditions, to produce a 'complete contract' from the start.[32] Environmental problems, therefore, demand regimes that are sufficiently malleable to respond to subsequent and rapid developments.[33]

28 B.A. Simmons and L.L. Martin, "International Organizations and Institutions", in W. Carlsnaes, T. Risse and B.A. Simmons (eds.), *Handbook of International Relations* (2002) pp. 192–211, at 192–193.

29 *Ibid.,* 193.

30 Simon Lyster famously called agreements that do not hold such sessions 'sleeping treaties'; M.J. Bowman, P.G.G. Davies and C. Redgwell, *Lyster's International Wildlife Law* (2nd ed., 2010) at 533.

31 Churchill and Ulfstein, *supra* note 1, at 628.

32 Gehring, *supra* note 2, at 474.

33 Churchill and Ulfstein, *supra* note 1, at 628.

COPs were therefore designed to provide flexibility and to overcome the failings of diplomatic conferences and IGOs.[34] Consequently, since the 1971 Convention on Wetlands of International Importance (hereafter 'Ramsar')[35] was the first to employ a COP,[36] they have been the favoured approach.

### 3.1.2 Implications for the Proposed Research

The emergence of COPs has had some interesting consequences. First, international relations scholars have had cause to move their focus away from 'international organisations' and to re-train it upon 'international institutions'; a field defined in broader terms to encompass the new forms of international cooperation.[37] For international environmental law scholars, one question has been whether international institutional law applies to COPs.[38] In the context of this project, the significance stems from the fact that there are very few resources on the internal modalities for COP preparation and participation, compared to those available on diplomatic conferences and IGOs. Is it therefore appropriate to look for ideas and guidance from these resources when pursuing research into participation and preparation for COPs?

This resolves into a familiar question: are COPs international organisations, negotiating conferences, or something distinct from both of these? As others have found, a definitive answer to this is elusive, not least since, as Nigel White observes, a precise definition of an international organisation is impossible.[39] Indeed there is some divergence on the principal features of such IGOs.[40] Nevertheless, in attempting to determine whether COPs are, or are closely related to, IGOs, Henry Schermers and Niels Blokker's definition is a common starting point. They define international organisations as 'forms of cooperation founded on an international agreement creating at least one organ with a

34 There are other known benefits over IGOs, including savings from not requiring a permanent head-quarters; *ibid,* at 630; H. Schermers and N. Blokker, *International Institutional Law* (4th ed., 2003) at 246.

35 *Supra* note 4.

36 Although such meetings under Ramsar were originally termed 'Conferences on the Conservation of Wetlands and Waterfowl' and are now termed 'Conferences of the Contracting Parties'; Ramsar, Article 6(1).

37 Simmons and Martin, *supra* note 28, at 192–4. As Simmons and Martin also note, there was an intervening period where the research enquiry was framed around 'international regimes', *id.*

38 *See* on implied powers, Churchill and Ulfstein, *supra* note 1, at 631–634.

39 N.D. White, *The Law of International Organisations* (2nd ed., 2005) at 1.

40 *cf* White, *ibid,* at 1–2, Amerasinghe, *supra* note 27, at 10, and Sands and Klein, *supra* note 24, at 15–16.

will of its own, established under international law'.[41] Most writers then begin by recognising that COPs bear some similarities to this conception of IGOs. Churchill and Ulfstein observe that they are self-governing creatures, born of treaties, and that together with their secretariats and committees they amount to more than a diplomatic conference.[42] Nevertheless, the COPs' narrow focus upon specific problems, with less scope to adapt to other purposes, means that they were not IGOs in a traditional sense. Thus, Ulfstein later confirmed that COPs 'are not merely intergovernmental conferences, since they are established by treaties as permanent organs…while they also differ from traditional [IGOs].'[43]

If instead a purposive and practical approach is adopted for comparing COPs with IGOs and diplomatic conferences, the boundaries between all three seem less clear. Whilst each developed from the short-comings described, the dynamics between the parties and the need to represent the national interest in a multi-lateral context remained the same. Thus it is possible to claim that COPs are in practice like both IGOs and diplomatic conferences. Thus, Philippe Sands can regard COPs as 'in effect' international organisations[44] and Churchill and Ulfstein regard that the functions of COPs are similar to IGOs thereby justifying the extension of international institutional law.[45] Equally, Jacob Werksman is correct in observing that 'the participants and the *modus operandi* of the states involved in an international negotiating conference and a COP [are] outwardly similar,' with the same people meeting in the same room discussing the same issues.[46]

Given such similarities in terms of state concerns and motivation for engaging in multi-lateral discussions, it is felt that the literature on IGOs and diplomatic conferences should be considered as informative for research on COPs. That said caution will be necessary where rules of procedure differ.

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41 Schermers and Blokker , *supra* note 34, at 26. White and Amerasinghe contest the necessity of such autonomous will, albeit for differing reasons; White, *supra* note 39, at 1–2; Amerasinghe, s*upra* note 27, at 10–11.

42 Churchill and Ulfstein, *supra* note 1, at 623 and 633. Rather more contentious is whether COPs have a will of their own; Loibl, *supra* note 2, at 167 *cf* P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed., 2009) at 87.

43 G. Ulfstein, "International framework for environmental decision-making" in M. Fitzmaurice, D. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2010) pp. 29–47.

44 P. Sands, *Principles of International Environmental Law* (2nd ed, 2003) p. 92.

45 Churchill and Ulfstein , *supra* note 1, at 633.

46 Werksman, *supra* note 3, at 57. *See also* Birnie et al., *supra* note 42, at 87: '… the conference of the parties… is in substance no more than a diplomatic conference.'

### 3.2 *The Power of COPs*

It was noted that COPs were intended to offer monitoring, review and development opportunities for environmental regimes. This breaks down into more specific powers, but there remains considerable variety as to the extent of the powers awarded to the COPs and the tasks with which they may be presented. This variety exists between MEAs and also between plenary sessions under the same convention. Broadly speaking, the responsibilities of the COP cover (i) systems management, (ii) strategic planning, (iii) reviewing compliance and progress, and (iv) obligation development.

#### 3.2.1 Systems Management

These responsibilities, given that they focus upon maintaining the administrative support and operating systems of an MEA, are primarily internal in effect. For example, delegations will work together as part of exercising the COPs authority to set budgets, adopt rules of procedure, establish *ad hoc* committees, elect states to executive committees, and appoint a body to undertake the role of a Secretariat.

#### 3.2.2 Strategic Planning

In order to reach the long-term objectives set by the majority of MEAs, short- and medium-term programming is necessary. This priority and policy setting is a common responsibility for COPs, although as part of this they will often delegate detailed drafting and discussions to supporting *ad hoc* and scientific committees. The extent to which delegations at COPs then rework the output from these committees, or simply accept their proposals at face value, is unknown and should be an issue requiring investigation in any subsequent research project.

#### 3.2.3 Reviewing Compliance and Progress

The possibility of stagnation is one of the major reasons for the inclusion of regular COPs. Thus many are charged with reviewing implementation and progress for their founding conventions.[47] Diversity begins to appear in the powers conferred upon the COP to identify and respond to instances of non-compliance with obligations. Techniques for promoting compliance range from reporting and capacity-building, through verification and inspections,

47 *See* for example, the Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM (1992), 851 (hereafter 'UNFCCC'), Article 7(2)(e). *See* also the summary of COP duties and powers provided in Camenzuli , *supra* note 2 for an indication of how often this role is given to the COP.

to non-compliance adjudications and sanctions.[48] COPs differ with regard to how far along this continuum their roles and powers extend. The majority are engaged in reviewing the periodic reports on implementation which contracting parties are often obliged to submit.[49] In contrast just a few are involved on those rare occasions where non-compliance adjudications and suspension of rights and privileges are part of the MEA regime.[50]

### 3.2.4 Development of Substantive Obligations

The involvement of COPs in the development of the substantive obligations for contracting parties has been the subject of extensive academic analysis. However, the details of the debates surrounding any law-making powers of the COP need to be delayed until consideration is given later in this paper to the composition of delegations. Here it is simply necessary to observe that the plenary body to MEAs can be authorised to develop the substantive obligations in certain ways.[51] A COP can have all or a selection of the following powers, namely to: adopt amendments to the original treaty;[52] adopt protocols and thereby add to the substantive obligations of the original agreement;[53] amend annexes to the treaty;[54] adopt interpretations, or rules governing a desired mechanism, pursuant to an explicit request in the MEA;[55] adopt interpretations for the operation of the convention that are not explicitly called for in the founding treaty.[56]

These powers may be exercised occasionally or regularly, and thus in the latter situation be a recurring feature on the agenda of a COP. The 1973

48 *See* Fitzmaurice and Redgwell, *supra* note 6.

49 *See* for example Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 31 ILM (1992), 818 (hereafter 'CBD'), Article 23(4)(a).

50 *See* for information on formal non-compliance procedures, J. Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law", in U. Beyerlin, P.T. Stoll and R. Wolfrum (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006) pp. 1–23, at 18.

51 *See* Churchill and Ulfstein, *supra* note 1, at 636–642.

52 *See* for example, Ramsar, Article 10*bis*.

53 *See* for example, UNFCCC, Article 17(1) and the Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM (1998) 22 pursuant to this provision.

54 *See* for example, Convention on International Trade in Endangered Species of Wild Fauna and Fauna (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (hereafter 'CITES'), Article XI(3)(b).

55 The Montreal Protocol authorised the plenary body thereto to interpret the term 'agreed incremental costs'; Montreal Protocol, Article 10(1).

56 *See* for example, the interpretation of the term 'Introduction from the Sea' provided in Resolution 14.6 of the COP to CITES.

Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES')[57] exemplifies this, where the appendices are continually amended, thereby altering the reach of the trade controls introduced under that agreement. However, there can still be differences between such work. For example, and returning to CITES, separate proposals for different species to be include in CITES' appendices may be more politically or economically sensitive for one species than another.[58] The stakes for delegations may therefore vary depending upon the context in which the powers to alter substantive obligations are being used.

#### 3.2.5 Further Implications for the Research

The above gives a deeper appreciation of the diverse demands that are placed upon delegates to COPs and the variety of matters that preparation and participation may need to address. However, these powers of plenary bodies to MEAs also raise methodological implications for the research. What has been revealed is that there is great diversity both within and amongst COPs and their work, such that any research into the internal modalities of preparation and participation must exercise caution if making comparisons and claiming generality when drawing conclusions. The distinctive roles of COPs mean that they can justifiably be researched in isolation, however, findings do not necessarily apply to a different plenary body under another MEA.

## 4 The Internal Modalities for Preparation

In the remaining sections, the internal modalities of COP delegations will be explored as far as possible. This will be approached by assessing the external rules that partially constrain the autonomy of states to set their own modalities. Thereafter further information will be sought in the writings of former delegates and academics, as well as in records maintained under MEAs. This reveals interesting insights but also leads to more intriguing questions. Furthermore, the Ramsar Convention will be used to illustrate these constraining rules and to exemplify the unanswered questions that merit subsequent research. Additional formative insights into the previous modalities of the UK delegation to Ramsar are also offered in the light of discussions with one

57 *Supra* note 54.

58 Recent contentious examples include tuna and the ongoing issue of ivory trading. *See also* Ulfstein, *supra* note 43, at 31–32.

long-serving representative.[59] Whilst there is obviously a need to verify the information obtained, these discussions have highlighted the potential such a research methodology offers for insights into modalities that are not evident in official documentation.

### 4.1 *Preparation in Context and External Constraints*

With respect to preparation, this takes place in a context where the primary actors under international law (states) are, as Bodansky says, 'complex entities, with many constituent parts, often with very different interests and beliefs of their own.'[60] These parts can include an executive branch of government, legislative and judicial branches, federal governments and private actors.[61] There can be great diversity between the interests of these branches and also within each of these parts.[62]

Implementation of an MEA will be led by a particular ministry and it is this body that will set the tone and priorities for participation. This may be a mixed-ministry or one more dedicated to environmental protection. Furthermore, the lead ministry may be engaging with a COP because of its own national agenda; looking for international sanctioning for a position it wishes to adopt in national debates.[63] Alternatively, the delegation may be looking to exploit any informal hierarchy of the MEAs to bring forward debates in a 'sub-ordinate' regime.

It might then be thought that best practice for preparing delegations for COPs would be to engage with all of the noted branches as part of defining the national interest on a given issue.[64] Nevertheless, this is difficult given the limited time available to consult groups, and the diversity of political, commercial and personal interests which may be irreconcilable. What is more, making environmental policies democratically accountable is near impossible as national votes cannot be taken on every issue being listed on a COP agenda. Thus modalities for selecting key stakeholders are significant since they affect who has an input and will feel engaged with the COP process. However, as

59 Interview with David Stroud, Senior Ornithologist, Joint Nature Conservation Committee (Peterborough, UK, 30 August 2011). David Stroud has represented the UK at a number of COPs, including Ramsar.

60 Bodansky, *supra* note 9, at 112.

61 *Ibid,* at 113–115.

62 *Ibid.*

63 *See* for example, references to the Inter-Maghreb Highway in Ramsar Recommendation 5.1, which were specifically requested by the delegation of Mauritania itself in Workshop A (Conservation of Listed Sites) held at COP5.

64 *See* Brunnée, *supra* note 2, at 10–11.

Bodansky observes, there may be no right to vote for these stakeholders so they do not have any real decision-making powers themselves.[65] A significant threat to the persuasiveness and legitimacy of a decision therefore comes from those excluded.

There are few external controls on state modalities for consultations as part of preparing for COPs. Wide consultation is promoted in Principle 10 of the 1992 Rio Declaration which recommends that environmental issues are best handled with the participation of all concerned citizens.[66] Building upon this, the 1998 Aarhus Convention[67] in Article 3(7) requires the 44 contracting parties[68] to promote transparency and participation in international environmental decision-making processes. This provision has been developed in the Almaty Guidelines, which observe that 'public participation generally contributes to the quality of decision-making on environmental matters in international forums by bringing different opinions and expertise to the process and increasing transparency and accountability'.[69] The guidelines go on to say participation should be as wide as possible, highlighting members of the public most directly affected by an environmental issue, public-interest organisations, and those causing, or contributing to, or able to alleviate, a problem, as deserving of particular consideration.[70]

A final, less direct, external constraint upon the process of preparing for a COP is provided by the rules of procedure. These will have a practical effect upon preparation since they set timeframes for submission of proposals for any agenda, when the agenda will be finalised, and when full documentation will be circulated relating to each issue being discussed. For example, the Rules of Procedure for the Ramsar COP provides that the provisional agenda and dates for the plenary meeting will be circulated one year in advance.[71] The documentation providing detailed information on the proposed agenda is circulated three months before the opening of the COP.[72] This means that there is limited time to consult the state departments, public bodies and stakeholders.

65 Bodansky, *supra* note 16, at 717.

66 Rio Declaration on Environment and Development 31 ILM 874.

67 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 38 ILM 517.

68 From continental Europe and the Commonwealth of Independent States.

69 Second Meeting of the Parties, Almaty, Kazakhstan, Decision II/4, [28].

70 *Ibid,* at [30].

71 Rules of Procedure (2005) Ramsar COP10 DOC.2 Rev.1, Rule 5.

72 *Ibid,* Rule 10.

### 4.2 *UK Preparation for Ramsar COPs*

Implementation of Ramsar in the UK is entrusted to the National Ramsar Committee.[73] This body has operated as two separate parts since the late 1990s and is aligned with the UK's Natura 2000 programme being pursued under EU directives. One part – the Natura 2000/Ramsar Steering Committee ('NRSC') – is comprised of representatives from (i) government departments such as DEFRA, and the Department of Energy and Climate Change, (ii) the devolved administrations, and (iii) public bodies like Natural England and the Joint Nature Conservation Committee.[74] The NRSC is chaired by DEFRA and meets annually but otherwise exists in a virtual environment whereby regular communication is maintained via email and the internet. This means face-to-face meetings are not necessary to ensure integration as Ramsar information can be distributed electronically and views canvassed from around the country through a central co-ordinator.

When the documentation for an upcoming Ramsar COP is released, DEFRA generates a position document covering the resolutions, which is circulated to designated individuals across government and public bodies. The precise circulation list is not known to the author. It might be expected that those who participate in the NRSC will be included, although this could be investigated through further interviewing with DEFRA. Of additional interest would be the level of seniority of the individuals consulted and how this compares to preparation for other MEAs. Whilst input at more senior levels may bring welcome ministerial backing for Ramsar implementation, it can also unduly politicise discussions on resolutions.[75] Again, this is conducted electronically, and indicates that states ought not to be criticised for failing to hold a face-to-face meeting to debate agenda items if there are other more efficient methods available through technology.

Consultations outside of government include coordination at the EU level, as well as communication through the Natura 2000/Ramsar Forum. The latter group comprises representatives from the NRSC constituents, plus members invited by the NRSC. No information is provided with respect to how an NGO receives an invite, although the Terms of Reference suggest the list should be reviewed every year.[76] Permanent members include 15 NGOs, such as the

73 This and much of the information in this section was identified after discussions with David Stroud; *supra* note 59.

74 Natura 2000 and Ramsar Steering Committee Terms of Reference (amended November 2010) available <http://archive.defra.gov.uk/rural/protected/internationally-designated-sites/n2kr-sc-tor-1011.pdf>.

75 *See* in a marine pollution context Bodansky, *supra* note 9, at 113.

76 Natura 2000 and Ramsar Forum Terms of Reference available <http://archive.defra.gov.uk/rural/protected/internationally-designated-sites/n2krf-tor-0810.pdf>.

Wildfowl and Wetlands Trust, UK Major Ports Group, and the National Farmers Union.[77] The forum is a sounding board for their views, with members entitled to add agenda items to meetings. The forum represents a new channel for consultation with NGOs. Previously, delegates had arranged to meet during Ramsar COPs with UK NGOs that had sent representatives, in order to discuss their respective positions and to resolve any disagreements if possible. This tended to be a small number of NGOs – predominantly the RSPB and the Wildfowl and Wetlands Trust. The forum marks an expansion in the scope of consultation and brings forward in time the opportunity to finalise DEFRA's position document.

The end product of the UK preparation stage is a document that could allow for wide government, EU and NGO consultation, and establishes the 'state' position. The document can then be carried by all delegates to the COP and, if they are required to engage in discussions on any resolution, they have a point of reference for the national stance. Establishing the extent to which other nations adopt a similar approach or have found alternative ways to establish the national position would be of value.

## 5 Composition of Delegations

If a contracting party elects to send a delegation to a COP,[78] it needs to decide during its preparation who will participate as a delegate. This decision, however, will have a sizeable impact upon the way the delegation participates at the COP and might initially better be thought of as an important part of the modalities of participation. The selection of delegates and the size of delegations is the subject of limited external controls.

### 5.1 *External Controls: Full Powers, Credentials and COPs*

From the early stages of a COP, an *ad hoc* committee will review the 'credentials' of the delegates.[79] For example, the procedural rules for the plenary meetings held under the Convention on Biological Diversity require that any delegation be

77 *Ibid.*

78 Contracting parties have the right to send delegations, but there is no obligation to attend. In the context of IGOs, possibly only a systematic policy of refusing to attend might, therefore, lead to claims about a lack of commitment to the objectives of the regime; Schermers and Blokker , *supra* note 34, at 194–5.

79 This process might continue for much of the plenary as credentials come in late.

comprised of a designated head and other accredited people.[80] That accreditation is to be proved through delivery of credentials issued by the Head of State or Government or by the Minister of Foreign Affairs.[81] Similarly, CITES demands that delegations be made up of a representative, alternative representatives (who may take the representative's place at any time), and advisors.[82] The representative and alternatives must have been granted powers by 'a proper authority, i.e. the Head of State, the Head of Government or the Minister of Foreign Affairs, enabling him/her to represent the Party at the meeting.'[83] Until such credentials have been supplied and approved by the designated committee at the COP, the representative may not vote on any proposal.[84] This restriction on the right to vote is of some importance given the potential significance to international trade of the regular adjustments to the CITES appendices.[85]

Few have considered the level of authority substantiated by the credentials requested by COPs. International lawyers will be familiar with the term, albeit in the different context of IGOs and diplomatic conferences.[86] They will also be used to contrasting the idea with that of 'full powers'. Credentials support less extensive authority compared to full powers. In the context of diplomatic conferences, credentials are understood as granting authority to the bearer to engage in three activities: negotiating a treaty, voting to adopt the final version of the text and signing a final act.[87] These stages, whilst important in the process of creating a treaty, do not result in a binding agreement. This is because a state must first express its consent to be bound. Under the Vienna Convention on the Law of Treaties ('VCLT')[88] this consent to be bound can only be expressed

80 *Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity* (as adopted and amended pursuant to Decision I/1 and V/20), Rule 16, available <http://www.cbd.int/doc/legal/cbd-rules-procedure.pdf>.

81 *Ibid,* Rule 18.

82 *Rules of Procedure of the Conference of the Parties* (last amended 2007), Rule 1, available <http://www.cites.org/eng/cop/E14-Rules.pdf>.

83 *Ibid,* Rule 3(1).

84 *Ibid,* Rule 3(4) and 24. This rule allows the Representative to still provisionally participate in the sessions.

85 *See* Section 2.3.4 of this paper.

86 For analysis of credentials in the context of IGOs, and their part in arguments about legitimate and representative governments, *see* White, *supra* note 39, at 122–126. As to credentials in the context of IGOs *see* Sabel, *supra* note 25, at 58–67.

87 A. Aust, *Modern Treaty Law and Practice* (2nd ed., 2007) at 76; M. Fitzmaurice, "The Practical Working of the Law of Treaties", in M.D. Evans (ed.), *International Law* (2nd ed., 2006) pp. 187–213, at 191.

88 VCLT, Article 11.

by way of 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'.

In comparison, 'full powers' are:

> A document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty.[89]

The issuing of 'full powers' therefore covers some of the activities authorised in credentials (negotiation and adoption), but also empowers the holder to do more. Some of these acts can give rise to obligations for the state. For instance, if the treaty calls for a state to signal its consent to be bound by way of signature, then the signatory must carry full powers. Consent by way of signature, however, is rare[90] with many treaties preferring consent by ratification or accession.[91] Nevertheless, the final stages of negotiating such a treaty may well include a ceremonial signing of the adopted treaty text which serves to authenticate the version in question. Authenticating the text of the treaty may not amount to consent to be bound, but a signatory state must refrain thereafter from acts that would defeat the object and purpose of the treaty.[92] Again, this obligation can only arise where the signatory holds full powers allowing them to authenticate a text.

Full powers might, therefore, be viewed as a key document where treaties rely upon acts of delegates to signal consent to be bound by new obligations. Furthermore, the VCLT does allow an unlimited range of other methods to be agreed between states, generating the potential for consent to be bound to take a new form which relies upon the act of an individual at a COP.

The question that arises in the light of these established rules is whether the credentials being requested for COPs are the same limited form as those for diplomatic conferences, or whether they need to perform the wider functions of full powers. Logically, the answer will involve the COP's powers to develop obligations and depend upon whether new obligations are being introduced to which delegates are expected to provide consent to be bound.

In Section 3.2.4, the variety of powers for developing the obligations of the contracting parties were listed. Each will be taken in turn, beginning with

89 VCLT, Article 2(1)(c).

90 Ramsar is, actually, such an example; Ramsar Article 9(2).

91 M.N. Shaw, *International Law* (6th ed., 2008) at 911.

92 *Ibid.*

amending treaties and adopting protocols. Here it is possible to see that a delegate attending a COP, whose work includes adopting amendments to the original treaty or a protocol, requires credentials in the limited sense. Consent to be bound will usually be expected subsequently by way of ratification, acceptance, approval or accession.[93] Of course, if there is to be authentication of the protocol or amended text at the plenary, then full powers will be needed.

Moving on, powers to amend annexes or appendices can be found in wildlife treaties such as CITES and pollution conventions such as the Montreal Protocol on Substances that Deplete the Ozone Layer.[94] Adding species to appendices in order to extend protection over their populations, or altering emissions targets for particular substances, may deliver desirable flexibility in an uncertain or dynamic field of regulation. It may also appear less controversial and simply a matter of technical detail which does not add to the parties commitments under the convention.[95] However, this is not necessarily true in all cases and changes can significantly add to the extent of the parties obligations and be politically controversial.[96] With only a few exceptions, these amendments to MEAs eventually become binding for all contracting parties except those that declare, within a given time period, their non-acceptance.[97]

Locating states' tacit consent to be bound in such 'opting-out' situations is said to fall within the bounds of 'any other agreed means' under the VCLT.[98] What seems less immediately apparent is whether such consent by silence or implication is to be attributed to the acts of the delegates attending a COP. This seems unlikely given the practice of delaying entry into force of amendments until a time after the end of a COP, during which period a larger group of individuals might be regarded as having remained silent.[99] It therefore appears that developing obligations in this manner does not usually require full powers for the delegates and that credentials in the limited sense would be sufficient.

The Montreal Protocol is an anomaly with regards to some amendments to its appendices since it does not allow for opting out of certain adjustments

93 Ulfstein, *supra* note 43, at 31; Brunnée, *supra* note 2, at 17–18.

94 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, in force 1 January 1989) 26 ILM 1550 (hereafter 'Montreal Protocol').

95 Brunnée, *supra* note 2, at 18.

96 *See* Section 3.2.4.

97 *See* for example CITES, Article XV(1).

98 Brunnée, *supra* note 2, at 19.

99 *See* for example CITES, Article XV (1)(c); 1979 Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) ETS 104, Article 17(3).

and reductions in the permitted levels of consumption and production of controlled substances.[100] Such amendments may be made by consensus and, failing that, by a two-thirds majority binding on all, including those that voted against.[101] Identifying consent to be bound in these circumstances is difficult. Where they may be made by majority vote, it seems consent to be bound may be absent, leading to doubts about the legal force of such adjustments. Alternatively, it has been argued a form of advance consent (by one of the regular means) was provided at the time of consenting to the protocol, which was possible because the parties were aware of the adjustments that would be needed at that time.[102] These alternatives, however, do not seem to suggest that full powers would be required by the delegates to these meetings.

The final form of power concerns interpretation of terms. In some instances these may be expressly authorised in the text of the treaty.[103] Churchill and Ulfstein believe the intention was therefore to create binding interpretations,[104] but locating consent to be bound is again problematic. A form of general consent, similar to that described for the Montreal Protocol, has been suggested.[105] However, it is difficult to see that the parties had the same level of awareness of the likely form these future decisions would take. And such delimiting of general consent, so as to be available where parties do not know the detail of future decisions, would seem to remove the need for 'tacit consent' to explain binding amendments to appendices. Ultimately, if this is the basis for making these interpretations binding, then delegates still do not require full powers. The alternative is to question the independent binding force of these interpretations,[106] and to either argue that they are agreed interpretations (see below) or soft-law with which states are prepared to comply. Again, this would also imply that delegates would need no more than traditional credentials for negotiations.

On other occasions, COPs have issued official interpretations without express authorisation from the treaty. Churchill and Ulfstein doubt that such

100 Montreal Protocol, Article 2(9).

101 *Ibid.* This type of amendment does not extend to the addition of new controlled substances, which remains subject to formal ratification under the 1985 Convention for the Protection of the Ozone Layer (adopted 22 March 1985, in force 22 September 1988) 26 ILM 1529, Article 9.

102 Fitzmaurice, *supra* note 2, at 497; Brunnée, *supra* note 2, at 22; Camenzuli, *supra* note 2, at 16.

103 *Supra* note 55.

104 Ulfstein, *supra* note 43, at 32.

105 Brunnée, *supra* note 2, at 24.

106 *Ibid,* at 24–29; Fitzmaurice, *supra* note 2, at 497–500.

decisions are binding, but instead suggest that they are at best authoritative.[107] Nevertheless, as Alan Boyle recognises, such decisions may constitute an agreed interpretation of the treaty which carries significance under Article 31(3)(a), VCLT.[108] As a result, these decisions might not add anything new to the original treaty obligations – they merely clarify what was originally intended.[109] Again the position is reached that the authority required need only be traditional credentials.

On balance, this analysis suggests that despite the range of powers available to develop or add to the obligations of contracting parties, the credentials committees of COPs need not demand 'full powers' for delegates. Thus, the individuals chosen to represent states need only produce evidence of authority to negotiate and adopt decisions since they are not called upon to express consent to be bound.

### 5.2 *External Controls: MEA Provisions*

Beyond the demands imposed for credentials, rarely is anything else stipulated about the identity of delegates. There is, however, a notable exception. A few international institutions require or request that states appoint delegates with particular qualifications. For example, in the context of IGOs, the World Meteorological Organization stipulates that delegations to its congress must designate a head who should be the director of its meteorological or hydrometeorological service.[110] Further, the constitution to the International Labour Organisation expects delegations to be made up of four members, two of whom are to represent the government whilst the remaining two are to represent respectively the employers and the workers.[111]

MEAs very rarely seek to direct the qualifications of delegates. The Ramsar Convention is virtually unique in providing that:

107 Churchill and Ulfstein, *supra* note 1, at 641.

108 A. Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change", 54 *International and Comparative Law Quarterly* (2005) pp. 563–584, 572.

109 Brunnée, *supra* note 2, at 31.

110 Convention of the World Meteorological Organization (adopted 11 October 1947, entered into force 23 March 1950), Article 7(b) available <http://www.wmo.int/pages/governance/policy/index_en.html>.

111 Constitution of the International Labour Organization (1919, as amended), Article 3(1) available <http://www.ilo.org/ilolex/english/constq.htm>. An interesting variant on the credentials procedure is provided by this since the representative of the workers and employers are supposed to have been legitimately nominated by these groups; Schermers and Blokker, *supra* note 34, at 197.

> The representatives of the Contracting Parties at such Conferences should include persons who are experts on wetlands or waterfowl by reason of knowledge and experience gained in scientific, administrative or other appropriate capacities.[112]

The World Heritage Convention includes a similar demand, albeit in the context of the World Heritage Committee which performs the same functions as a COP, but is not a plenary body. Thus the representatives of those states elected to a seat on the executive committee are to be 'persons qualified in the field of the cultural or natural heritage.'[113]

These two articles, which seek to dictate the characteristics of delegates, are not found in other MEAs. They raise interesting points. The first is that the external control sought is rather weak given the drafting deployed. In the case of Ramsar, the article merely establishes that parties 'should' send someone with suitable qualifications. Further, the expertise is not limited to a scientific qualification, but can be derived from administrative experience or any other appropriate capabilities chosen by the contracting party. What is more, the degree of knowledge and experience is left open-ended. This indeterminacy in the expertise actually required is echoed in the World Heritage Convention provision given that the forms of qualification for representatives are also left undefined.

It would be interesting to discover whether the credentials committee for Ramsar and the Secretariat to the World Heritage Convention pay much heed to these provisions. Certainly the publicly available reports of the credentials committee to Ramsar do not contain sufficient detail to be able to answer this. Furthermore, the Rules of Procedure for the World Heritage Committee might require that state members forward names and qualifications of their representatives to the Secretariat, but they are silent as to what is and can be done with those details.[114] From an alternative perspective, the question could be asked whether the contracting parties consciously look to meet this requirement when putting together a delegation. This too is difficult to answer. A sense cannot be gained from the lists of those who attend the COP to Ramsar

112 Ramsar, Article 7(1).

113 Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 11 ILM 1358, Article 9(3). The Rules of Procedure for the committee add that parties are strongly recommended to include people with expertise in both fields; Rule of Procedure (1977, as amended), Rule 5.2 available <http://whc.unesco.org/en/committeerules/>.

114 Rules of Procedure, *supra* note 113, at 5.3.

and the World Heritage Committee, since they do not reliably or clearly indicate expertise.

The thinking behind these provisions is also unclear. Schermers has noted a number of perceived advantages of scientific experts as delegates over those from governments in the context of non-plenary organs.[115] Of note is the presumed advantage that the interests of the IGO will be more of a focus for participants than those tied to a political agenda, although there may be less access to government branches for such individuals creating implementation problems in the long-term.[116] In reality, MEAs sometimes require expert input and at other times political. It may be that in the case of Ramsar and the World Heritage Convention the need for regular technical scientific input at plenary meetings was known from the start,[117] whilst other conventions needed predominantly political judgments to be made on the scientific evidence that was being produced.[118] Equally plausible, but rather more troubling, would be if, given the other MEAs were predominantly negotiated under the auspices of UNEP, a common precedent was used as a foundation for negotiations, which led to the tendency to omit such a clause.[119]

### 5.3 *Leads from Practice*

As has been observed, there are limited external controls upon the identity of delegates, and the internal modalities of states can operate relatively unfettered. As to evidence of the modalities states have adopted, few printed resources are available. The most obvious are the lists of participants to each COP, but these can only generate possible lines of enquiry since they do not give a sufficiently reliable or detailed account of an individual and their skills. Furthermore, such lists are not always kept or made readily available to the public.[120] Where there are consecutive or complete runs for all COPs, leads on the internal modalities present themselves.

115 H.G. Schermers, "The International Organizations", in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) pp. 67–100, at 89.

116 *Ibid.*

117 Particularly for Ramsar which did not have a dedicated scientific committee until 1993, when the Scientific and Technical Review Panel was established at COP5; Resolution 5.5.

118 *See* for example, the political decision needed to determine 'dangerous' interference with the climate system identified in M. Meinshausen, "What does a 2°C target mean for greenhouse concentrations?", in H.J. Schellnhuber and others (eds.), *Avoiding Dangerous Climate Change* (2006) pp. 265–280, at 265.

119 For the use of such precedents *see* Churchill and Ulfstein, *supra* note 1, at 630.

120 For example, the Convention on Biological Diversity only provides such lists online for COPs 1,2,8,9, and 10.

The Ramsar Convention provides a good example of this potential. There have been ten COPs since Ramsar entered into force.[121] The lists of participants have been analysed and data produced on two bases. The first considers the size of the delegations that states prefer to send to meetings. The second traces individual delegates through COPs so as to gain an impression of the level of experience that is present in delegations.

### 5.3.1 Delegation Sizes

When considering delegation sizes it is first necessary to separate out those countries that host the COP. This is because hosting generates huge anomalies in the size of delegations, as revealed in Table 1.[122] There is then a second group of states for whom care must be exercised when including their numbers. These are states that, at the time of the COP, hold the Presidency of the Council to the European Union. Despite the European Union being a non-party to the Ramsar Convention, since the inclusion of a common foreign and security policy chapter in the Treaty on European Union, member states have promised to coordinate their actions in international organisations and conferences so as to uphold the Union's position.[123] Whilst a common position is not demanded in such situations, softer coordination still requires additional capacity in terms of delegates so that if a common position does exist, a joint front can be presented.[124]

What the remaining figures reveal is that the average size for delegations has increased from two to three over the 10 Ramsar COPs. In addition, some states, which have been contracting parties for a significant period of time, have failed to attend any COPs, these being Bahrain and Luxembourg. Nevertheless, attendance remains very good; averaging 90% of contracting parties. More interestingly, although perhaps not as surprising given their greater available resources, developed and advanced developing state parties have most often

121 COP1, Cagliari, Italy (1980); COP2, Groningen, Netherlands (1983); COP3, Regina, Canada (1987); COP4, Montreux, Switzerland (1990); COP5, Kushiro, Japan (1993); COP6, Brisbane, Australia (1996); COP7, San José, Costa Rica (1999); COP8, Valencia, Spain (2002); COP9, Kampala, Uganda (2005); COP10, Changwon, Rep. of Korea (2008).

122 Even though the spikes in delegation size are anomalous, there may be some residual interest in studying the impact of hosting upon the internal modalities. For example, are such large delegations stratified so as to include a core negotiation team whose focus upon the agenda need not be compromised by hosting duties, or does hosting offer the luxury of 'rolling' attendance where experts can drop-in for particular negotiations?

123 Treaty on European Union, Article 34, OJ 2010/C 83/01.

124 For example, the UK (as President at the time) had to send extra people to COP9; *supra* note 59.

TABLE 1 *COP host states and delegation size over time*[125]

| | COP 1 | COP 2 | COP 3 | COP 4 | COP 5 | COP 6 | COP 7 | COP 8 | COP 9 | COP 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| Australia | 0 | 4 | 2 | 4 | 3 | 20 | 7 | 7 | 7 | 8 |
| Canada | | 2 | 29 | 4 | 3 | 5 | 7 | 12 | 6 | 4 |
| Costa Rica | | | | | 2 | 4 | 13 | 4 | 1 | 2 |
| Italy | 19 | 1 | 1 | 4 | 1 | 2 | 5 | 4 | 6 | 3 |
| Japan | 2 | 2 | 2 | 6 | 52 | 7 | 10 | 8 | 10 | 8 |
| Netherlands | 6 | 14 | 3 | 6 | 5 | 6 | 10 | 6 | 7 | 6 |
| Rep. of Korea | | | | | | | 10 | 10 | 21 | 35 |
| Spain | | 2 | 2 | 2 | 2 | 1 | 8 | 43 | 7 | 5 |
| Switzerland | 1 | 2 | 1 | 8 | 1 | 3 | 2 | 5 | 3 | 2 |
| Uganda | | | | 3 | 2 | 4 | 4 | 7 | 11 | 13 |

sent a delegation which exceeds the average size for a given COP; 34% and 60% of the time respectively. In contrast, developing and least developed state parties have only exceeded the average on 13% and 9% of the occasions a delegation was sent. More generally, and as illustrated in Figure 1, the latter two sets of states are most likely to send between two and three delegates, but are no more likely to fail to attend than developed states. This may be because of the availability of external funding for the least developed and developing states which can cover the cost of these delegates.

Further observations based on the attendance records for delegation sizes indicate two phenomena. The first is that some states habitually send what will be described as super delegations. These are delegations comprising 10 or more delegates. France, Japan, the Republic of Korea, the United States of America, China, and Malaysia have regularly adopted this modality whilst isolated instances for recent COPs can be observed for South Africa, Thailand, Uganda and Tanzania. Second, a number of states consistently send larger than average delegations. For example, the Netherlands, the United Kingdom, Denmark from 1980–2002, Brazil, South Africa, Thailand, Kenya, Uganda and Tanzania.

125 Highlighted cells indicate the year in which that state was the host. Empty cells indicate that the state was not, at the time, a contracting party with full participatory rights. A value of zero indicates the state was a contracting party and so could have sent a delegation. All figures taken from the lists of participants available through <http://www.ramsar.org/cda/en/ramsar-documents-cops/main/ramsar/1-31-58_4000_0__>.

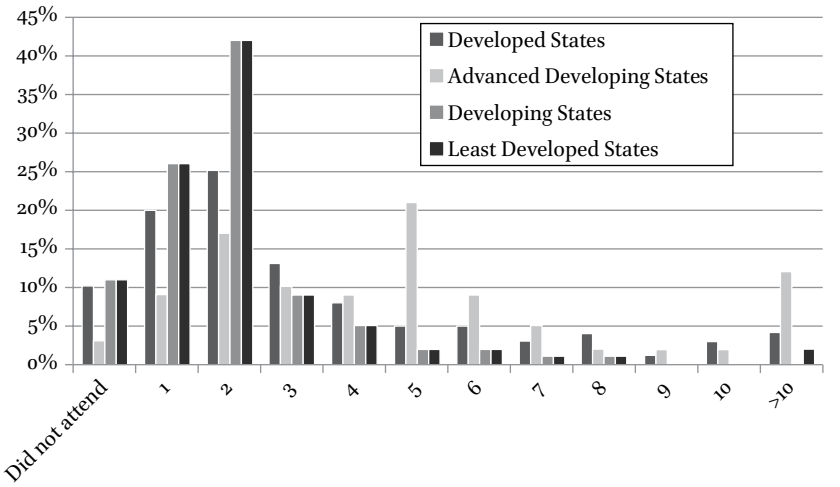


FIGURE 1 *Number of times delegations of various sizes attended.*[126]

These records and the statistics that can be generated from them demonstrate some of the information that can be gleaned from the Ramsar list of participants, and the patterns that can be revealed. If the lists available under other MEAs are investigated, average delegation sizes can be tentatively compared. Early research into the Convention on Climate Change ('UNFCCC'),[127] CBD and CITES indicate that far more resources and senior politicians are committed to these COPs. For example, the average delegation size at the most recent COPs are 31 (UNFCCC), 10 (CBD) and 5.5 (CITES), whilst the involvement of ministers is – as might be anticipated – close to 60% of delegations for the UNFCCC. However in these instances, such data is intriguing as to the possible thinking behind, and consequences of, these modalities. These can only be explored fully through interviewing those responsible for setting them.

### 5.3.2 Delegate Experience

The Ramsar lists of participants also reveal information about the level of experience present in delegations. Thus, where a state party had the possibility of sending someone who had previously attended a COP, a note can be made of those occasions when they did and when they didn't. The first item to note

126 Figures calculated on the basis that once a state is a party to Ramsar they could have sent a delegation. Failure to do so is recorded as a 'Did not attend'.

127 *Supra* note 47.

from this is that experience is often present. Of those contracting parties in a position to include a delegate with experience at COPs 2–10, on average 62% did so. Thereafter the states fall into a number of groups. The first is those states that regularly send a super delegation and which include a number of delegates with previous experience. The best examples of this practice are China and the USA. At COP10, China sent 17 delegates, of whom seven had attended a Ramsar COP in the past. Likewise, at COP9 the USA sent 10 delegates, five of whom had previous experience of a Ramsar COP.

Thereafter states fall into groups combining (i) experience with larger than average delegations,[128] (ii) those that might send an average or below average sized delegation, but they have almost always included one individual who has previous experience,[129] (iii) those that have never sent an experienced delegate but do send large delegations,[130] and (iv) those that regularly send average sized (or smaller) inexperienced delegations.[131]

The records also reveal that some individuals have provided long service for their states. For example, Uganda has attended every COP since becoming a contracting party in 1990, and Paul Mafabi has always been one of its delegates. Other long-serving delegates include Veit Koester (1980–2002) and Paul Jepsen (1987–2002) for Denmark, Makoto Komoda (since 1990) for Japan, and Dr Zygmunt Krzeminski (1980–1999) and Dr Kazimierz Dobrowolski (1980–83 and 1990–99) for Poland. The effect of such individuals upon negotiations and developments under COPs remains unclear.[132]

The modalities described above concern intra-COP patterns, but an added dimension, which ought to be considered in the future, is that of inter-COP experience. The atomised nature of MEA administration threatens the ability of regimes to complement each other. Delegate experience from other plenary bodies may therefore be an additional factor in the internal modalities of delegations.

### 5.4 *Further Research Questions*

As noted, the records that are available on delegation composition are predominantly intriguing rather than conclusive. With respect to the size of delegations

128 e.g. the UK sent larger than average delegations to the last seven COPs, all bar one of which had an experienced delegate.

129 e.g. Namibia, Botswana and Senegal.

130 The best example is Indonesia which has sent delegations of six to eight individuals to the last three COPs, none of whom had attended a Ramsar COP before.

131 e.g. New Zealand and Sri Lanka.

132 There is some familiarity with the impact of charismatic leaders upon global environmental governance, such as Rachel Carson and Al Gore; K. O'Neill, *The Environment and International Relations* (2009), at 68.

and the capabilities of delegates, the data merely notes fluctuations without establishing the reasoning behind these modalities and their consequences. In this respect, accounts of UNGA could provide good theories of the likely tactics being employed and consequences. For example, if delegation size is taken as a starting point, Robert Keohane observes that many states (particularly small states) cannot afford to send large enough delegations to keep up with all of the work of UNGA.[133] This, he suggested, gave larger and better informed states and regional groupings more influence over the smaller delegations.[134] More recently, Schermers and Blokker stated that whilst many international organisations are principally interested in a member being present, there are advantages and disadvantages to having a small delegation.[135] Small delegations are more flexible and can easily maintain coherence in the positions adopted, whilst large delegations are likely to contain greater experience and be able to engage in more negotiations or meetings, particularly where there are sub-groups meeting simultaneously.[136] Despite running for a short period, COPs to environmental treaties have much work to complete in a tight timeframe, and parallel working is therefore also common.

In terms of case studies, the author's initial investigations suggest that the UK's approach in the past appeared to be to send sufficient delegates to be able to take part in contact groups for resolutions that required greater implementation by the UK.[137] This was because the UK recognised the need to implement these resolutions with fidelity and therefore it was necessary to ensure that that which was agreed was practicable.[138] Faith is also placed in the briefing document prepared by DEFRA to ensure that the delegation would act consistently, and not least because, by the time the COP opened, any reworking of draft resolutions would likely be minor.[139]

With respect to the capability of delegates, Conor Cruise O'Brien, reflecting upon his personal experiences of UNGA, sought to remind others that:

> The United Nations is made up of people…and their differences do affect the proceedings and the decisions. It can be argued that delegates, being

133 R.O. Keohane, *Political Influence in the General Assembly* (*International Conciliation No. 557*), (1966) at 27.

134 *Ibid.*

135 Schermers and Blokker, *supra* note 34, at 187.

136 *Ibid.*

137 *Supra* note 59.

138 *Ibid.*

139 *Ibid.*

> there to represent their country, not themselves, ought not to have personal outlooks, or at least ought not to allow them to intrude; but this is in practice impossible.[140]

Similarly John Hadwin and Johan Kaufmann felt that the political importance and experience of delegates was significant since UNGA debates and decisions were affected by the personality of delegates.[141] Furthermore, lack of experience would inhibit interventions.[142] This experience can relate to the plenary itself, or amount to subject expertise. With respect to the former, it is difficult to know how many meetings it takes until an individual derives benefit from experience when negotiating.[143] But thereafter, a number of other questions arise. Are there any individuals, for instance those who have served for long periods as delegates, who have been able to influence negotiations to a greater extent? Do some find themselves being more frequently invited to lead work on sub-committees and, if so, why? What impact does the retirement of long-serving delegates have upon the implementation of the MEA in their states and upon future internal modalities? For example, ever since Krzeminski and Dobrowolski stopped acting as delegates in 1999, Poland has failed to send any delegates with prior experience of Ramsar COPs. Finally, whilst Hadwin and Kaufmann recall the saying that in selecting delegates it was better to have 'continuous clods than occasional geniuses', they also warned against the long-serving delegate who has had time to build an empire without much regard for coordination with the government position.[144]

Subject experience may also prove important for shaping negotiations. Some states will ensure that suitable specialists are available if resolutions so demand. For example, at COP10 of Ramsar, Resolution X.25 was adopted on Wetlands and Biofuels. This was a resolution of importance to the UK, and a specialist in the field (with additional experience of similar discussion conducted under the CBD) was chosen as a delegate for the UK in order to cover the contact group working on this resolution.[145] Nevertheless, not all states have this option and the concern is that individuals cannot be expected to be experts in all of the subjects being discussed.[146] It is suspected that this is a

140 C.C. O'Brien, *To Katanga and Back* (1962) at 28.

141 J.G. Hadwin and J. Kaufmann, *How United Nations Decisions are Made* (1960) at 29.

142 *Ibid,* at 28.

143 David Stroud felt he understood the COP process by his third meeting; *supra* note 59.

144 Hadwin and Kaufmann, *supra* note 141, at 27 and 31.

145 *Supra* note 59.

146 Hadwin and Kaufmann, *supra* note 141, at 26.

particular difficulty for smaller delegations without large panels of experts in their country of origin who can be despatched to COPs or contacted. This may be especially so in COPs to MEAs with extremely wide mandates. For example, the CBD is intended to deal with diversity between species, ecosystems and genes, whilst Ramsar itself covers inland and marine wetlands. The question that follows from this is whether such inexperienced delegations find themselves sidelined from debates or quick to accept the word of other delegations or the advice issued by Scientific Committees to a COP.[147]

## 6 The Internal Modalities for Participation

The mechanics of participating in COPs are largely defined by the treaty and, in particular, its rules of procedures. The rules on voting procedures will have a particular influence upon the way states negotiate. In contrast to UNGA, where decisions are made on a simple or two-thirds majority vote,[148] MEAs predominantly favour decisions made on the basis of consensus, although voting arrangements are often put in place as a fall back. Consensus decision-making is considered as the absence of any objection from a state to the decision proposed.[149] For example, Ramsar provides for resolutions, recommendations and decisions to be adopted by a simple majority of those present and voting, although the Rules of Procedure say that this must be a last resort after every effort has been made to reach consensus.[150] Voting is very rare under Ramsar, but not so for CITES where additions to and amendments of the appendices are regularly made following a vote.[151]

Where forms of majority voting are employed – and the best documented is UNGA – delegations might need to identify those states that will support the desired outcome, those that will not, and those who are undecided but may be

147 Ramsar provides formal briefing sessions on technical resolutions to help states understand proposals; *supra* note 59.

148 Rules of Procedure of the General Assembly (as amended September 2007), Rule 82–86 available <http://www.un.org/ga/search/view_doc.asp?symbol=A/520/rev.17&Lang=E>.

149 Gehring, *supra* note 2, at 470. The simplicity of this was challenged at the Cancun round of climate change talks where Bolivia's objections were not allowed to prevent the adoption of the Cancun Agreements by the COP; *Earth Negotiations Bulletin* v.12 (498), at 28 available <http://www.iisd.ca/download/pdf/enb12498e.pdf>.

150 Ramsar, Article 7(2) *cf* Ramsar Rules of Procedure , *supra* note 71, Rule 40.

151 *See* for example the Summary Records for Committee I, 18–23 March 2010 available <http://www.cites.org/eng/cop/15/sum/index.shtml>.

open to persuasion to either vote in favour or at least abstain.[152] Influential states may also be contacted in order to see whether their support can encourage others to vote accordingly, whilst the vote of small nations might be given a lower priority.[153]

In theory, consensus decision-making should preserve the right of parties to object whilst also ensuring that a positive vote is not necessary.[154] In practice this raises a number of interesting questions. First, does this lead to ambitious states holding out for significant concessions in order to buy their support or at least silence?[155] Second, to what extent does consensus decision-making ensure that more states participate in decision-making? With non-plenary contact groups and discussions in meeting rooms being of significance for negotiations, how do delegations operate to ensure they have access to the discussions of a contact group?[156] Is language a barrier to such participation for some states? In theory an uninvolved state may raise an objection in plenary following the outcomes of those contact group negotiations, resulting in the decision either being defeated or delayed until that state has been consulted. However, do states consider this a last resort due to embarrassment? Alternatively, such objections may be limited by the rules of procedure, as is the case under CITES which restricts the reopening of a recommendation in plenary if it has been debated in the sub-committees with the availability of full translation.[157] Thus consensus decision-making may still require a modality of proactive engagement with negotiations by states before any formal adoption. This in turn requires sufficient numbers of delegates as well as experience in how to engage with contact groups.

Beyond this, the external controls on modalities become softer. They may simply try to steer groups towards particular forms of negotiation. For example, in 1994 at the Fort Lauderdale COP, CITES introduced new guidelines for inscribing species in its appendices.[158] These were notable for attempting to

152 *See* O'Brien, *supra* note 140, Chapter 1; Hadwin and Kaufmann, *supra* note 141, Chapter 11.

153 Keohane, *supra* note 133, at 37.

154 Gehring, *supra* note 2, at 470.

155 This was a concern raised by Oran Young; O. Young, "Political leadership and regime formation in the development of institutions in international society", 45 *International Organization* (1991) pp. 281–308, at 284.

156 *See* in the context of inexperienced NGOs being unfamiliar with ways to influence the COP process, E. Corell, "Non-state actor influence in the negotiations of the Convention to Combat Desertification", 4(3) *International Negotiation* (1999) pp. 197–223 , at 209–210 and 213.

157 *Supra* note 82, Rule 19.

158 CITES Resolution Conf. 9.24 (Rev. COP 15). *See* generally, Bowman, Davies and Redgwell, *supra* note 30, at 492–499.

ensure that listing decisions were based upon objective or scientific criteria.[159] Thus, the guidelines seek to make particular forms of argumentation the legitimate basis for negotiations, rather than unrestrained bargaining.[160]

Otherwise, states are free to develop their own modalities for participation in COPs. Once again, the few available accounts on participation (mainly in UNGA) may provide insights into the likely modalities that would be encountered for COPs. For instance, most UNGA delegates act on instructions from their home government, although there remain exceptions.[161] As Schermers observes, the more junior the delegate, the more detailed the instructions are likely to be.[162] Hadwin and Kaufmann felt that ideally instructions would be the result of careful consideration by relevant departments before the meeting, duly approved at the highest political level, and specific as to objectives and the activity required but with some freedom if matters took an unexpected turn.[163] Certainly the UK's preparations described earlier come close to good practice by this measure. Of course, strategic pauses can be taken in proceedings if the chair of a session feels it is beneficial to give delegates a chance to communicate with their home departments.[164]

A final area of interest concerns the general strategy adopted by the delegation for looking to influence proceedings. Here there exist theories concerning different forms of leadership,[165] and more recognition that, in epistemic communities, the claim to knowledge is a source of influence.[166] What is more, those communities, if they are involved in a number of MEAs, may be able to take coordinated action in multiple plenary bodies in order to drive through a

159 S.M. Dansky, "The CITES "objective" listing criteria: Are they objective enough to protect the African Elephant?", 73 *Tulane Law Review* (1999) pp. 961–980 , at 964–965.

160 *See* T. Gehring and E. Ruffing, "When arguments prevail over power: The CITES procedure for the listing of endangered species", 8(2) *Global Environmental Politics* (2008) pp. 123–148.

161 Bodansky, *supra* note 9, at 116.

162 Schermers, *supra* note 115, at 85.

163 Hadwin and Kaufmann, *supra* note 141, at 34.

164 At COP7 in Costa Rica, delegates to the Ramsar meeting found themselves in the unusual position of a state (Serbia) using the proceedings to try and gain international recognition. Given the political sensitivity of the situation, lines of communication to the UK Foreign and Commonwealth Office were made available for use by the delegation; *supra* note 59.

165 *See* Keohane, *supra* note 133, at 37–38; J. Gupta and L. Ringius, "The EU's climate leadership: Reconciling ambition and reality", 1(2) *International Environmental Agreements: Politics, Law and Economics* (2001) pp. 281–299, at 282.

166 Corell, *supra* note 156, at 199.

particular policy. This was recently exemplified in relation to the bird flu outbreak, which had generated misguided proposals from the public and politicians that threatened wildfowl and their habitats.[167]

## 7 Conclusions

The unobtrusive measures that have been deployed in this paper to investigate the internal modalities of delegate preparation for, and participation in, COPs have advanced understandings on the middle- and background to decisions. External rules generated by treaties and rules of procedure are relatively easy to identify. They concern the timing of document circulation, consultation with a variety of stakeholders, the credentials of delegates, delegate capabilities and the running of proceedings. Nevertheless, they leave a weak impression upon the autonomy of states to define their own modalities. These customs, rules and ethics are harder to uncover using library-based research. Statistical analysis of delegations generates intriguing patterns and leads, but with reports of proceedings containing so little detail on who said what and when, library sourced records have limited usefulness. Finally, there are few accounts on preparation and participation, and those that exist predominantly relate to IGOs and are over 50 years old. Nevertheless, it was argued that they could still be useful in the context of COPs, and they did prove illuminating. Such sources gave support to, and generated suspicions, concerning the way delegations operate.

Ultimately, however, the analysis has left far more questions unanswered than resolved. Key areas identified include: establishing the ways different states prepare their positions on draft resolutions (who leads preparation, is chosen for consultation, and why), the extent credentials committees and states enforce capability requirements for delegates, the rationale behind the differing delegation sizes and levels of expertise plus any observed consequences during COPs, the impact of individuals upon proceedings and national implementation, the extent to which the advice of sub-committees is questioned, and the practical working of consensus decision-making.

The paper has therefore illuminated the field but also revealed the limits of library research. Nevertheless, significant foundations have been provided for further research employing alternative methodologies, such as interviewing

167 *See* R. Cromie and others, "Responding to emerging challenges: Multilateral environmental agreements and highly pathogenic Avian Influenza H5N1", 14(3–4) *Journal of International Wildlife Law & Policy* (2011) pp. 206–242.

delegates. Here, one test interview revealed far more about the modalities of UK preparation and participation in the context of Ramsar than was apparent from the internet sources. Not only did the interview suggest the UK's modalities are considered and sophisticated, but it gave encouragement for further interviews. What is more, many of the insights were gained independently from the questions the interviewer had in mind. This lends weight towards favouring unstructured 'elite' interviews,[168] rather than fully structured (possibly questionnaire based)[169] qualitative research. The difficulty, however, lies in selecting and securing further interviews. In this regard the paper has highlighted the diversity between MEAs, suggesting that, as long as conclusions are predominantly confined to the regime under consideration, conventions can and should be studied in isolation.

From the outset it has been argued that researching delegate preparation and participation will, amongst other things, inform judgments on the legitimacy of the decisions reached and consequently the likelihood that they will prove persuasive. Furthermore, conducting more research in this field will give a more realistic appreciation of the contribution of COPs to international environmental law, and open up new spaces for challenge or recognition as best practice.

168 For a good guide to elite interviewing techniques *see* L.A. Dexter, *Elite and Specialized Interviewing* (2006).

169 On the use of questionnaires with delegates to international organisations *see* H.K. Jacobson, "Deriving Data from Delegates to International Assemblies", 21(3) *International Organization* (1967) pp. 592–613.

# Non-Compliance – A Pivotal or Secondary Function of COP Governance?

*Peter G.G. Davies*

**Abstract**

This article seeks to assess the extent to which Conferences of the Parties (COPs) of Multilateral Environmental Agreements (MEAs), rather than other treaty bodies established within MEA regimes, have played and continue to play a role in the establishing and operation of compliance systems and techniques. The roles of plenary bodies of a number of earlier MEAs adopted in the 1970s provide the particular focus of discussion (CITES, Ramsar, the CMS Convention, LRTAP and the Berne Convention). Discussion will focus on the given plenary body's role in the following areas: clarification of compliance by means of the interpretation of primary rules; the monitoring and verification process; establishing reporting requirements and improving reporting by parties; the facilitation of compliance by means of capacity-building and funding; the establishment and development of non-compliance procedures and mechanisms without an express treaty basis; and, finally, determining the consequences of non-compliance.

**Keywords**

Conferences of the Parties (COPs) – compliance – authentic and dynamic interpretation – monitoring – reporting – capacity-building – funding – establishing non-compliance procedures and/or techniques

## 1 Introduction

Early environmental treaty regimes placed little emphasis on the development of systems designed to assess compliance by State Parties with their international commitments or to facilitate such compliance. More recently, however, the introduction of procedures to ensure compliance has been a central feature of many Multilateral Environmental Agreements (MEAs),[1] a process which

1 Scott notes that there are now "over 20 non-compliance procedures that actively seek to support and facilitate compliance with international obligations in areas such as air,

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has been said to underline "the evolutionary nature of many wildlife treaty institutions and the dynamic effect of decision-making by the conference of the parties (COP), as well as the impact of the work of treaty subsidiary bodies and secretariats."[2] COPs as established by MEAs are generally given a role in relation to the review of national implementation.[3] However, there is a growing trend within MEA regimes to establish formal non-compliance procedures under which other designated treaty bodies, often called "Compliance" or "Implementation" committees, are specifically tasked with determining a given State's compliance with its international obligations.[4]

My assignment in this article is to assess the extent to which COPs, rather than such specifically established institutions or indeed other treaty bodies, have played and continue to play a role in the establishing and operation of MEA compliance systems and techniques. Additionally, whilst attention in the academic literature has tended to be upon more recent treaty regimes and their compliance systems,[5] the manner in which plenary bodies of earlier

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pollution, climate change, marine environmental pollution, biodiversity conservation, environmental impact assessment, fisheries management, freshwater resources, and transboundary movement of chemicals, pesticides and waste"; K. Scott, "Non-compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements" in D. French, M. Saul and N. White (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (2010), p. 225.

2 M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law* (2010), pp. 110–111.

3 For example, see Convention on Long-range Transboundary Air Pollution (LRTAP) Article 10(2)a, CMS Convention Article VII(5), CITES Article XI(3) and Ramsar Article 6(2)A.

4 For example, see Article 8 and Annex IV of the 1987 Montreal Protocol to the Ozone Convention (Implementation Committee), Article 15 of the 1998 Aarhus Convention (Compliance Committee), Decision VI/12 of the COP to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous wastes and their disposal (UNEP/CHW.6/40, 10/02/2003) (Committee), and Article 18 of the 1997 Kyoto Protocol (Compliance Committee). For a discussion on the relationship between such non-compliance procedures, dispute settlement procedures, breach of treaties, and state responsibility, see M. Fitzmaurice and C. Redgwell, "Environmental Non-compliance Procedures and International Law", 31 *Netherlands Yearbook of International Law* (2000) 35.

5 For example, see O. Stokke, J. Hovi and G. Ullstein (eds.), *Implementing the Climate Regime: International Compliance* (2005); J. Brunnée, M. Doelle and L. Rajamani (eds.), *Promoting Compliance in an Evolving Climate Regime* (2011); M. Fitzmaurice, "The Kyoto Protocol Compliance Regime and Treaty Law", 8 *Singapore Yearbook of International Law* (2004) 23; O. Yoshida, "Soft Enforcement of Treaties: the Montreal Protocol's Non-compliance Procedure and the Functions of Internal International Institutions", (1999) 10(1) *Colorado Journal of International Environmental Law and Policy* 95; F. Lesniewska, "Filling the holes: the Montreal Protocol's non-compliance mechanism", in M. Fitzmaurice, D.M. Ong and

MEAs have played a part in facilitating compliance and establishing compliance systems will provide a particular focus of discussion. These treaty regimes include the 1971 Convention on Wetlands of International Importance (Ramsar Convention),[6] the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[7] the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention),[8] the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention),[9] and the 1979 Convention on Long-range Transboundary Air Pollution (LRTAP).[10] The term "compliance" in this article is defined as the "fulfilment by contracting parties of their obligations under a [MEA] and any amendments to the [MEA]".[11]

The following issues will be addressed in discussion:

- Clarifying compliance; interpreting primary rules
- Monitoring and verification
- National reports
- Facilitating compliance; capacity-building and funding
- Establishing and developing non-compliance procedures and mechanisms without an express treaty basis
- Determining the consequences of non-compliance

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P. Merkouris (eds.), *Research Handbook on International Environmental Law* (2010), pp. 471–489; S. Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Agreements", 18(1) *Colorado Journal of International Environmental Law and Policy* (2007) 1; A. Shibata, "The Basel Compliance Mechanism", 12(2) *RECIEL* (2003) 193; K.M. Sarma, "Compliance with Multilateral Environmental Agreements to Protect the Ozone Layer" in Beyerlin et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: a dialogue between Practitioners and Academia* (2006), pp. 25-38. Also generally see T. Treves, A. Tanzi, C. Pitea, C. Ragni and L. Pineschi (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009).

6 *UKTS* 34 (1976); 996 *UNTS* 245.

7 993 *UNTS* 243; 12 *ILM* 1085 (1973).

8 *UKTS* 56 (1982); *ETS* 104.

9 19 *ILM* 15 (1980).

10 *UKTS* 57 (1983); text available at www.unece.org/env/lrtap/lrtap_h1.htm.

11 *UNEP*'s advisory "Guidelines for Enhancing Compliance with Multilateral Environmental Agreements" adopted in 2002; para. 5. On UNEP's guidelines see discussion in E.M. Mrema, "Cross-cutting Issues Related to Ensuring Compliance with MEAs" in Beyerlin, Stoll and Wolfrum (eds.,), *supra* note 5, at pp. 208–221.

It is in these areas that MEA plenary bodies can potentially play a key role in relation to the promotion of compliance for a number of reasons. First, a given COP is ideally placed as the plenary and political body representing all Parties to clarify the meaning of treaty obligations thereby ensuring ratifying States are aware of what is expected of them in implementing their international obligations. Secondly, COPs of successful MEAs meet regularly to review implementation and have encouraged and/or devised numerous monitoring techniques to assist in this regard (monitoring, verification and reporting). Thirdly, a plenary body provides a vital forum in which developing State Parties can in particular express their concerns in relation to the need for technical, scientific and financial support. As such, capacity-building assistance can be endorsed by the Parties in the form of COP resolutions to, for example, provide funding or the transfer of expertise in appropriate cases. Lastly, MEA plenary bodies can adopt non-compliance procedures or processes by which Parties are called to account for non-compliance, and can oversee the operation of the same in their regular meetings.

## 2 Clarifying Compliance; Interpreting Primary Rules

Beyerlin has astutely noted that "[a]ny treaty obligation must be designed in such a way that the contracting parties are fully aware of what they are expected to undertake for achieving the treaty's objective", and further that "the content of the treaty obligation must be so-clear cut and definite that its fulfilment can be effectively controlled."[12] However, the negotiation of any MEA is often a fraught process in which a variety of competing interests and positions must be accommodated. The text eventually adopted will very often include ambiguities necessary to reach a compromise agreement.[13] Obligations may well not be suitably defined and, once a treaty enters into force, the COP is left to make sense of these obligations and, in doing so, provide direction for Parties. Noting that one of the key reasons for non-compliance is "incertitude with treaty standards",[14] Sand notes that "the preferred method of ascertaining indeterminate standards under international environmental agreements has been 'authentic' interpretations formulated or endorsed by the Contracting

12 U. Beyerlin, "Preface", in Beyerlin et al. (eds.), *supra* note 5, at vii.

13 P.H. Sand, "Institution Building to Assist Compliance with International Environmental Law: Perspectives", 56 *Heidelberg Journal of International Law* (1996) 774–795, at p. 776.

14 *Ibid.*, pp. 777–778.

Parties themselves."[15] The importance of the role of the COP in interpreting unclear treaty provisions cannot be over-emphasised as such interpretations do provide essential guidance to the Parties thereby facilitating compliance. Without such guidance the essentially cooperative nature of activities encouraged within MEA regimes might be undermined, increasing the likelihood of either resorting to formal dispute settlement procedures when disagreements arise between States as to the interpretation of treaty terms or, as is more likely in practice, simply leaving the issue unresolved. The COP as the plenary body of MEAs is well-placed to develop specific guidance beyond the bare text of international treaties as it is in essence engaging in a political process in which all Parties are represented and can be seen to play a part.

An example of the importance of authentic interpretation offered by plenary bodies is provided by the CITES COP which has provided interpretation and detailed guidance on various issues pertaining to the primary rules of the CITES treaty.[16] The issue as to which species can be regarded as captive stock can be used as an example. CITES makes special provision for specimens that are captive bred or artificially propagated. The treaty text stipulates in Article VII(4) that specimens of Appendix I animals "bred in captivity for commercial purposes" and specimens of Appendix I plants "artificially propagated for commercial purposes" shall be treated as Appendix II specimens.[17] Appendix I species are given the strictest protection under CITES and such status ensures that, for the most part, these species may not be commercially traded. Being treated as Appendix II specimens, however, means that captive bred or artificially propagated animals and plants can be traded subject to certain conditions being satisfied. However, no further definition of either "bred in captivity for commercial purposes" or "artificially propagated for commercial purposes" is provided in the treaty text, and the CITES' Animals Committee has had reason to note that "[t]he manner in which the Parties have interpreted and implemented the provisions of [Article VII] regarding specimens of animal

15 *Ibid.*, p. 778.

16 See, for example, guidance as to 'readily recognizable parts or derivative' (Article 1(b); CITES Resolution Conf. 9.6 (Rev.)); 'specimens…acquired before the provisions of [CITES] applied' (Article VII(2); CITES Resolution Conf. 13.6); 'personal and household effects' (Article VII(3); CITES Resolution Conf. 13.7); reservations (Article XXIII(2); CITES Resolution Conf. 4.25 (Rev COP14)); as to the listing criteria for the inclusion of species in the Appendices (CITES Resolution Conf. 9.24 (Rev. COP14)); and on the issue of ranching (Resolution Conf. 11.16 (Rev. COP14)). See also Sand, *supra* note 13, p. 779 (emphasis added).

17 CITES, Article VII(4).

species in Appendix I that are bred in captivity for commercial purposes has, over the years, proven to be particularly problematic."[18]

The CITES COP has therefore stepped in to provide much needed guidance. The 1997 Harare COP adopted Resolution Conf. 10.16 (Rev.) which notes that an animal specimen "bred in captivity" must be "born or otherwise produced in a controlled environment", and the parents must have either mated in a controlled environment (if reproduction is sexual) or were in a controlled environment when offspring development commenced (if asexual reproduction).[19] In addition, the breeding stock must be established "in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild", be maintained "without the introduction of specimens from the wild, except for the occasional addition of animals, eggs or gametes" to *inter alia* "prevent or alleviate deleterious inbreeding", and either be managed in a way shown to be "capable of reliably producing second-generation offspring in a controlled environment" or have indeed "produced offspring of second generation or subsequent generation" in such an environment.[20] The 2000 CITES Gigiri COP established criteria to be satisfied before plants can be considered "artificially propagated".[21]

The clarifications provided by the Harare and Gigiri CITES COPs underline the importance of replenishing captive bred or artificially propagated stock only in exceptional circumstances. As such an undue burden will not be placed on wild populations of such species. Without the need significantly to replenish from the wild, the captive stock in question must be largely capable of sustainable exploitation in its own right if trade is to continue in the long term under the "captive bred" or "artificially propagated" special provisions of CITES.

18 Report of the Chairman (Animals Committee) Doc. 11.11.1, Eleventh meeting of the COP (2000).

19 CITES Resolution Conf. 10.16 (Rev.).

20 *Ibid.*

21 The criteria, as amended, stipulate that plant specimens are to be regarded as "artificially propagated" if "(a) grown under controlled conditions; and (b) grown from seeds, cuttings, divisions, callus tissues or other plant tissues, spores or other propagules that are either exempt or have been derived from cultivated parental stock"; CITES Resolution Conf. 11.11 (Rev. COP14). To be regarded as a "cultivated parental stock" plants must be grown in controlled conditions, established in accordance with CITES and any relevant domestic laws in a manner not detrimental to the survival of the species in the wild, and "maintained in sufficient quantities for propagation so as to minimize or eliminate the need for augmentation from the wild, with such augmentation occurring only as an exception and limited to the amount necessary to maintain the vigour and productivity of the cultivated parental stock"; CITES Resolution Conf. 11.11 (Rev. COP14).

Such clarifications go far beyond the mere interpretation of key terms (as one might find in the definition section of a treaty) to establish a form of regulatory regime for "captive bred" or "artificially propagated" species. The interpretation offered by the COP has been utilised in assessing the appropriateness of certain breeding operations. For example, it will be recalled that Resolution Conf. 10.16 (Rev.) indicates that the breeding stock must be established "in accordance with the provisions of CITES and relevant national laws" if it is to achieve captive-breeding status. This aspect of the resolution was applied at the recent 2010 CITES COP in relation to an application to register a captive-breeding operation for certain parrots in the Philippines as a valid operation for CITES purposes. Some Parties took the view that there was insufficient documentation to determine whether the breeding stock had been legally exported from range states in accordance with CITES. This was undoubtedly a factor in the application being rejected by the COP.[22]

The ability of a supreme decision-making body to provide substance or interpretation to ambiguous treaty or protocol provisions is now a common practice within MEA regimes. Another instance of a plenary body seeing fit to provide an interpretation of a vague treaty obligation is provided by the Standing Committee of the 1979 Berne Convention (the Berne Convention's COP). Article 4(1) Berne Convention stipulates that Parties must "take appropriate measures…to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats". Furthermore, Article 4(2) notes that the Parties "in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimize as far as possible any deterioration of such areas". These provisions have been the subject of criticism due to their ambiguous nature.[23] As a result the Standing Committee has taken action to address this situation including the adoption of "Recommendation No. 25 (1991) on the conservation of natural areas outside protected areas" which calls on Parties to consider adopting a variety of measures, such as the setting up of environmental corridors and a network of nature parks to fulfil obligations under Article 4.[24]

The Executive Body of LRTAP, the treaty regime's COP, has also seen fit to provide interpretations of ambiguous wording in a legally binding agreement. For example, the 1985 Sulphur Dioxide Protocol stipulated that Parties "shall

22 CITES COP15 Plen. 4 (Rev.2).

23 See Bowman et al., *supra* note 2, p. 306.

24 *Ibid.*

reduce their national annual sulphur emissions or their transboundary fluxes by at least 30% as soon as possible and at the latest by 1993, using 1980 levels as the basis of calculation of reductions".[25] Four years after the protocol's adoption, the Parties in 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*.[26]

Bearing in mind the Executive Body's interpretation, the Implementation Committee, responsible for the operation of the regime's non-compliance procedure, concluded in 2000 that Bulgaria was not in compliance with its obligations.[27] In 1996 the Executive Body provided a similar interpretation in relation to Article 2(1) of LRTAP's 1988 Sofia Protocol concerning the control of emissions of Nitrogen Oxides. This article stipulates that Parties are to "take effective measures to control and/or reduce their national annual emissions of nitrogen oxides…so that these, at the latest by 31 December 1994, do not exceed their national annual emissions of nitrogen oxides…for the calendar year 1987." The Executive Body in 1996 provided clarification by noting that this provision "should be taken to mean that emission levels for the years after 1994 should not exceed those specified in that paragraph."[28] Applying this interpretation, LRTAP's Implementation Committee in 2000 noted that both Ireland and Spain were in non-compliance as their emissions were above the 1987 level in a number of years post-1994.[29]

A final example is provided by the 1979 CMS Convention.[30] This treaty affords particular attention to those endangered migratory species in Appendix I. However, in what way is "endangered" to be defined? Article II(1)e merely indicates that a migratory species is "endangered" where "it is in danger of extinction throughout all or a significant portion of its range." The CMS COP in 1997 adopted Resolution 5.3 to clarify the term "endangered" which is to be

25 Article 2.

26 See Report of the 7th session of the Executive Body, doc. ECE/EB.AIR/20, paragraph 22 (emphasis added); also Sand, *supra* note 13, p. 778.

27 The Third Report of the Implementation Committee, EB.AIR/2000/2, para. 28.

28 See ECE/EB.AIR/49, para. 21.

29 The Third Report of the Implementation Committee, EB.AIR/2000/2, para. 31.

30 See M.J. Bowman "'Normalizing' the International Convention for the Regulation of Whaling", 29(3) *Mich. J. Int'l L.* (2008) 293, at pp. 338–339.

interpreted as meaning a species "facing a very high risk of extinction in the wild" and that the Parties would be guided in this regard by findings of the IUCN Council or by an assessment by the CMS Convention's Scientific Council. This approach has led to the listing of various species in Appendix I. For example, the 17th meeting of the CMS Convention's Scientific Council held in November 2011 endorsed proposals to list both the Far Eastern Curlew and the Bristle-thighed Curlew on Appendix I.[31] Having noted such endorsements, the 10th meeting of the CMS COP held after the said Scientific Council's meeting duly approved Appendix I status for both species.[32]

Under the terms of the Vienna Convention on the Law of Treaties (VCLT) treaty interpretation shall take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"[33] and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[34] An 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.[35] Indeed, it can be argued that such interpretations by COPs are a form of dynamic or "evolutionary" interpretation designed to improve a given treaty's effectiveness over the course of time.[36] In this context, the MEAs in question

31 17th Meeting of the Scientific Council, 17–18 November 2011, UNEP/CMS/ScC17/Report/Annex VI, paras. 271 and 274.

32 10th Meeting of the COP, 20–25 November 2011, UNEP/CMS/Report/Day 5, para. 461-2.

33 VCLT Article 31(3)a. The International Law Commission (ILC) has noted that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation"; "Draft Articles on the Law of Treaties with commentaries", *Yearbook of the International Law* (1966) vol. II at p. 221.

34 VCLT Article 31(3)b. The ILC notes that "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty"; *ibid.*

35 See generally A. Aust, *Modern Treaty Law and Practice* (2nd Ed, 2007) p. 239. Bowman notes that "the primary purpose of [VCLT Article 31(3)a & b] was to admit evidence of subsequent developments as a means of shedding light retrospectively on the *original intentions* of the parties at the time of the treaty's adoption. Yet, it is clear that it may also be used as a means of shaping the ongoing development of the instrument based on the *modification of those intentions*, regardless of whether it is expressed in the form of clarification, amplification, or even outright transformation"; Bowman, *supra* note 30, pp. 337–338.

36 On dynamic or evolutionary interpretation see M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties, Part I", 21 *Hague Yearbook of International Law* (2008) 101, and

should be regarded as "living instruments" within which "more attention is to be focused on ongoing developments than upon the mind-sets of the parties back when the treaty was negotiated".[37] One final point on authentic interpretations can usefully be made; the fact that all State Parties can play a part in agreeing to these interpretations may in itself facilitate compliance as States feel that a given interpretation is a fair one having been able to play a part in the defining process within the COP.[38]

## 3 Compliance Mechanisms and Techniques

### 3.1 *Monitoring and Verification*

Many MEAs have now introduced detailed monitoring/verification procedures such as the Climate Change Convention, described as "a forerunner" in this

"Dynamic (Evolutive) Interpretation of Treaties, Part II", 22 *Hague Yearbook of International Law* (2009) 3. In Part II of her work Fitzmaurice notes that "MEAs gave only very general authorization to create new rules, principles and regulations for their parties, therefore, for all purposes, enabling the organs of treaties in particular COPs or MOPs to interpret the treaty in an evolutive manner through crystallization of general provisions and specifying their obligations"; *ibid.*, at p. 4. On the link between evolutive interpretation and effectiveness, see *ibid.*, at pp. 16–17. Bowman notes that "the law of treaties, as explained and applied by the ICJ in a series of high-profile cases, permits, and indeed commonly requires, that the interpretation of 'generic' or open-textured expressions in treaty texts be undertaken in a flexible and evolutionary fashion. This is based…on the presumed intentions of the parties themselves, and is designed to ensure that the continuous pursuit of the object and purpose of the treaty can be maintained over the course of time and in light of ever-changing practical realities, social attitudes and normative demands of the wider legal system"; *supra* note 30, p. 459. Further on dynamic or evolutionary interpretation see R. Bernhardt, "Evolutive Treaty Interpretation, especially of the European Convention on Human Rights", 42 *German Yearbook of International Law* (1999) 11; the author at p. 15 stipulates that "it is to be noted that the rules on treaty interpretation in the Vienna Convention take account of possible dynamic or progressive developments in the life of a treaty. [VCLT Article 31(3)] refers to subsequent agreements and subsequent practice. Even if only to a limited extent, further developments of a treaty regime are recognised as elements of treaty interpretation."

37 Bowman et al., *supra* note 2, p. 46. In Part 1 of her above noted work Fitzmaurice notes that "the dynamic (evolutive) interpretation of treaties derives from the idea that the treaty is a 'living instrument'"; *supra* note 36, p. 132.

38 Breitmeier et al. note that "the legitimacy of a rule is a function of the extent to which decision-making regarding the rule is judged to be fair. Subjects are likely to regard a rule as fair when they have an opportunity to participate in decision-making relating to the rule"; H. Breitmeier, O.R Young and M. Zurn, *Analyzing International Environmental Regimes from Case Study to Database* (2006), p. 91.

respect;[39] the first COP played a key role by determining that reports from State Parties would be made subject to detailed review by teams of experts.[40] This may be said to be symptomatic of a pattern in which COPs facilitate the establishment of a process in which monitoring takes place, such process then being operated either by dedicated compliance committees or other treaty bodies such as secretariats. An example of a COP establishing a specific dedicated compliance committee is provided by the LRTAP regime. The LRTAP Implementation Committee is responsible for the monitoring of the Parties' reporting obligations and also their obligations to reduce emissions under the various protocols.[41] However, the exact functions of the Implementation Committee in this regard have been established by the LRTAP's plenary body, the Executive Body.[42] While provisions allowing site inspections are few and far between in MEAs,[43] it is of interest to note that the Executive Body has made provision for the Implementation Committee to "undertake, at the invitation of the Party concerned, information gathering in the territory of that Party."[44]

The CITES COP has passed numerous resolutions establishing mechanisms designed to improve compliance. One such instance relates to the establishment of the "Review of Significant Trade" procedure originally introduced pursuant to COP resolution in 1992 to monitor trade in Appendix II species believed to be subject to significant trade. CITES Resolution Conf. 12.8 (Rev. COP13)[45]

39 Wettestad, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), p. 982. On the compliance regime established under the Climate Change Convention and the Kyoto Protocol, see R. Wolfrum and J. Friedrich, "The Framework Convention on Climate Change and the Kyoto Protocol", in Beyerlin et al. (eds.,), *supra* note 5, pp. 53–68.

40 Wettestad *supra* note 39, p. 982.

41 Originally LRTAP Executive Body Decision 1997/2, and now Decision 2006/2.

42 LRTAP Executive Body Decision 2006/2 which *inter alia* notes that the Implementation Committee shall "review periodically compliance by the Parties with the reporting requirements of the protocols" (para. 3(a)). It must also consider any submission either made by a Party about another Party's compliance with a protocol, or by a Party itself which is unable to comply with its obligations (paras. 4(a) and (b)). Where the secretariat in fulfilling its own monitoring role (review of reports) becomes aware of potential non-compliance it too can refer the issue to the Implementation Committee for consideration (para. 5). The role of the Implementation Committee, as determined by the Executive Body, also includes the provision of reviews of the protocols designed to assess the effectiveness of a given protocol; (para. 3(d)).

43 J. Brunnée, "Compliance Control" in G. Ulfstein, T. Marauhn and A. Zimmermann (eds.), *Making Treaties Work* (2007), p. 378.

44 LRTAP Executive Body Decision 2006/2, para. 6(b).

45 This resolution replaced CITES Resolution Conf. 8.9 (Rev.).

now obliges the CITES Animals and Plants Committees to work with the Secretariat and to consult with range states to review information on Appendix II species which are subject to levels of trade deemed to be significant.[46] In essence, the procedure is designed 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. If the recommendations of the Animals or Plants Committee are not heeded by range states in relation to species deemed to be of particular concern, the Standing Committee decides on appropriate action which includes a possible suspension of trade between Parties and the range state in question.

Another example of a plenary body's influence over the roles of subsidiary bodies carrying out monitoring roles is provided by Ramsar. The "Montreux Record" is an important monitoring system designed to highlight the need for support to specific wetland sites and, although maintained by the Ramsar Bureau, was established by the Ramsar COP.[47] A further important feature of the Ramsar regime is the "Ramsar Advisory Mission" under which a team of experts is sent to inspect a listed wetland site undergoing ecological change, and to provide technical guidance in the form of recommendations in relation to the site in question. Originally set up by the Ramsar Standing Committee, the process, then known as the "Ramsar Monitoring Procedure", was importantly formally endorsed by the 1990 Ramsar COP which instructed the Ramsar Bureau "to continue to operate this procedure when it receives information on adverse, or likely adverse changes in ecological character at Ramsar sites".[48]

The "Concerted Action" review process under the CMS Convention also underlines the trend of a plenary body introducing important measures that help to facilitate the monitoring of national implementation whilst designating the day-to-day responsibility for the initiative to another regime body. In 1991 the CMS COP introduced this formal review process in relation to certain

46 UNEP-WCMC give statistics on such trade to the Secretariat and this information is utilised in making decisions as to which species should be reviewed under this procedure. TRAFFIC and the IUCN act as independent monitors of wildlife traffic and will inform the CITES Secretariat of trade which raises concern; see Wettestad, in Bodansky et al. (eds.), *supra* note 39, at p. 980.

47 Ramsar Recommendation 4.8. Current Ramsar COP guidance notes that "The Montreux Record is the principal tool of the Convention for highlighting those sites where an adverse change in ecological character has occurred, is occurring, or is likely to occur, and which are therefore in need of priority conservation attention. It shall be maintained as part of the Ramsar Database and shall be subject to continuous review"; para. 3.1 Resolution VI.1 (Brisbane COP, 1996).

48 Ramsar Recommendation 4.7.

endangered species listed in Appendix I with a view to establishing initiatives for their benefit.[49] The onus falls on the Secretariat to coordinate the preparation of review reports on those species which have been identified by the COP. The Secretariat is to be assisted in this regard by another treaty body, the Scientific Council. A species review report is to contain certain information which includes data on a given species' distribution, habitat, population, and migratory patterns as well as an indication of those conservation measures already introduced by State Parties. Importantly, the report is also to contain recommendations for further measures to improve conservation, research and monitoring. In the period 2012–2014 34 species were designated for concerted action.[50] Of those designated, 8 species were cetaceans (the Sperm, Sei, Fin, Blue, Humpback and Southern Right whales as well as the Ganges River and La Plata dolphins). Whilst the COP in 2011 called on the Secretariat to "commission an independent assessment of the utility and impact" of the Concerted Action mechanism "with particular regard to whether the process is leading to positive conservation outcomes",[51] there is no doubt that under the CMS Convention important collaborative efforts have indeed recently been endorsed in relation to cetacean conservation under the "Global Programme of Work for Cetaceans (2012–2024)" adopted by the CMS COP in November 2011.[52]

Having noted that the plenary bodies of many MEAs have established the procedures within which other regime bodies then proceed to monitor compliance, the role of the Standing Committee under the Berne Convention provides an example of a monitoring system in which the plenary body itself plays a far more fundamental practical role. The Standing Committee (Berne Convention's COP) determines whether or not to open a case within the "files procedure" following a complaint alleging a Party to be in breach of its obligations. The plenary body can then make recommendations to the Party concerned and the issue will remain current until the Standing Committee itself takes the view that the matter in question has been addressed. The file opened on the Green turtle in Kazanli (Turkey) is a case in point. The Kazanli beach is a highly important nesting point for the Green turtle and was threatened by the presence of a chrome factory. A file was opened in November 2000 by the Standing Committee to encourage more effective conservation. The Committee decided that an on-the-spot appraisal should be carried out under the files procedure in May 2002. This visit led to a number of recommendations being

49 CMS Resolution 3.2.

50 CMS Resolution 10.23.

51 *Ibid.*, Annex 3.

52 CMS Resolution 10.15.

made by the Standing Committee which included the cleaning of the beach and demolition of certain buildings. Turkey reported back on action taken by it to comply with these recommendations at the 23rd Standing Committee meeting in December 2003 but, although acknowledging some progress, the Standing Committee was not minded to close the file at that point as further progress needed to be made.[53] It was only at the 24th meeting of the Standing Committee that a decision was taken to close the file "in view of the action taken by the Turkish Government and its determination" in relation to the issue.[54]

### 3.2 *Enhancing National Reporting*

An essential feature of many modern MEAs, such as the 1992 Climate Change Convention,[55] the 1992 Biodiversity Convention[56] and the 1987 Montreal Protocol,[57] is the ability to obtain information from Parties in the form of regular reports on implementation.[58] The data obtained from such reports provides a potentially invaluable source of information to be used in assessing whether or not Parties are complying with their obligations.[59] However, whilst, for example, the 1946 International Convention for the Regulation of Whaling

53 Report of the Berne Convention's Standing Committee 23rd Meeting (1–4 December 2003), pp. 12-13 (doc: T-PVS (2003) 24).

54 Report of the Berne Convention's Standing Committee 24th Meeting (29 November–3 December 2004), pp. 10 (doc: T-PVS (2004) 16). On the role of the CMS Standing Committee and the "files procedure" see generally M. Bowman, P. Davies and C. Redgwell, *supra* note 2, pp. 337–342.

55 See Articles 4(1)(a) and 12(1)(a) & (b) of the Climate Change Convention [31 *ILM* (1992) 851].

56 See Article 26 of the Convention on Biological Diversity [31 *ILM* (1992) 818].

57 Article 7 of the Montreal Protocol on Substances that Deplete the Ozone Layer, *UKTS* 19 (1990); more generally on this reporting requirement and the manner in which it has been supplemented by the MOP see K.M. Sarma, "Compliance with Multilateral Environmental Agreements to Protect the Ozone Layer" in Beyerlin et al. (eds.), *supra* note 5, pp. 31–32.

58 On reporting in MEAs and the review of such reports see A. Kiss, "Reporting Obligations and Assessment of Report" in Beyerlin et al. (eds.), *supra* note 5, pp. 229–245. Also generally, see G. Loibl, "Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – the role of International Institutions", 5 *Non-State Actors and International Law* (2005) pp. 1–19.

59 Marauhn notes that "national self-reporting is not only a starting point within the routine procedure of implementation review but it is also of major importance in the context of any *ad hoc* or non-compliance procedure"; T. Marauhn, "Towards a Procedural Law of Compliance Control in International Environmental Relations", 56 *Heidelberg Journal of International Law* (1996) 696–731, at pp. 707.

(Whaling Convention)[60] imposes an obligation on Parties to report to the International Whaling Commission on infractions of the treaty carried out by their respective nationals or registered vessels,[61] some other early treaties such as the 1950 International Convention for the Protection of Birds[62] and the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere[63] failed to establish any reporting obligation in the treaty text. This omission, together with a lack of provision for regular meetings of the Parties, undoubtedly contributed to their lack of impact. By the 1970s this lesson had been taken on board. CITES, the CMS Convention and LRTAP, for example, make provision for such reports.[64]

However, where early treaties have failed to make it explicitly clear that Parties should report regularly on implementation, there are instances where plenary bodies have stepped in to fill the void by recommending in no uncertain terms that they do so. For example, the 1971 Ramsar Convention did not expressly make provision for the regular submission of national reports, but it is of interest to highlight that the second Ramsar COP, held in Groningen, adopted Recommendation 2.1 (1984) which noted that "all Parties should submit detailed national reports to the [Ramsar Secretariat] at least six months prior to each ordinary meeting of the Conference of the

60 161 *UNTS* 72.

61 Whaling Convention, Article IX(4).

62 638 *UNTS* 186.

63 161 *UNTS* 193.

64 Article VIII(7)(a) of CITES requires Parties to submit to the CITES Secretariat an annual report on trade in regulated species including the number and type of permits, the details of other Parties involved in such trade, the amount and type of specimens, and the names of regulated species involved. In addition, a biennial report is required on "legislative, regulatory and administrative measures taken to enforce [CITES]"; CITES Article VIII(7) b. See discussion *infra* in text accompanying note 66 in relation to reporting as required by Article VI(3) of the CMS Convention. All of LRTAP's protocols obliging Parties to reduce specific emissions also provide for annual reporting to the Executive Body on national measures adopted and annual reporting on national emission levels to either the Executive Body or the "Co-operative Programme for the Monitoring and Evaluation of the Long-range Transmission of Air Pollution in Europe (EMEP)"; 1985 Protocol on the reduction of sulphur emissions or their transboundary fluxes by at least 30% (Articles 4 & 6); 1988 Protocol concerning the control of emissions of nitrogen oxides or their transboundary fluxes (Article 8); 1991 Protocol concerning the control of emissions of volatile organic compounds or their transboundary fluxes (Article 8); 1994 Protocol on further reductions of sulphur emissions (Article 5); 1998 Protocol on heavy metals (Article 7); 1998 Protocol on persistent organic compounds (Article 9); and 1999 Protocol to abate acidification, eutrophication and ground-level ozone (Article 7).

Parties."[65] Similarly the 4th COP of the CMS Convention, having noted that Article VI(3) of the treaty stipulated that Parties "which are Range States for *migratory species listed in Appendix I or II* should inform the [COP] through the Secretariat…on measures that they are taking to implement the provisions of this Convention *for those species*" (emphasis added), duly interpreted this provision in COP Resolution 4.1 to the effect that Parties should submit to the Secretariat "comprehensive national reports on the implementation of the Convention" in line with an agreed format which was annexed to the resolution.[66] As such, the CMS Convention COP applied the reporting requirement not just to Appendix I and II species, but also to all migratory species generally.[67]

Often reporting by Parties under MEAs is unsatisfactory, an "obvious weakness [being] that much will depend on the diligence and accuracy of the reporting authorities."[68] Marauhn indeed succinctly notes that "[i]f garbage is what state parties feed into the reporting system, then garbage is what will come out of it."[69] Plenary bodies have therefore seen fit to endorse guidance as to reporting.[70] For example, reporting under CITES has certainly been irregular over the years,[71] and "[r]ecognizing the importance of the annual reports

65 See Kiss, *supra* note 58, p. 232. See also Bowman et al., *supra* note 2, at pp. 438–439 where it is noted that the "text of Ramsar provides only for the duty to notify the Secretariat of adverse ecological changes at listed sites."

66 See Kiss, *supra* note 58, p. 237.

67 Article II(1) notes that "[t]he Parties acknowledge the importance of migratory species being conserved …", and Article VII(5)(a) stipulates that the COP may "review and assess the conservation status of migratory species". These two provisions underline that the treaty's remit applies generally to migratory species and is not only restricted to those in Appendix I or II; Bowman et al., *supra* note 2, p. 544.

68 See P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed., 2009), p. 243.

69 Marauhn, *supra* note 59, at pp. 707.

70 *Ibid*., pp. 705–706.

71 The CITES Secretariat has indicated that "reporting still appears to be viewed as a burdensome obligation rather than a useful management tool", and that "[s]ince the Convention's entry into force, on-time submission levels for annual reports have waxed and waned between 60 per cent and 35 per cent. Overall submission levels can reach 80 per cent or higher about three years after the deadline for a particular annual report but the trade data being reported are quite old by that time"; CITES Secretariat, 'Annual Reports' prepared for the 12th Conference of the Parties at Santiago, 3–15 November 2002 (COP12 Doc. 22.1). Biennial reporting has been said to be "virtually moribund"; R. Reeve, in Ulfstein, et al. (eds.), *supra* note 43, p.139. For example, the 2005–2006 biennial report was due by the end of October 2007 but just 32 Parties complied with this deadline.

and biennial reports as the only available means of monitoring the implementation of [CITES] and the level of international trade in specimens of species included in the appendices",[72] the CITES COP has taken steps designed to improve compliance with the submission of national reports. The latest COP resolution in this respect *inter alia* urges all Parties to submit on time and endorses the work of the CITES Secretariat by further urging Parties to submit in accordance with the guidelines on reporting prepared by the latter.[73] As such it is acknowledging the ongoing monitoring work of its Secretariat in this respect,[74] but also playing its own part in highlighting an important issue relating to compliance.[75]

LRTAP provides another example of a plenary body highlighting the issue of poor compliance with reporting obligations, and recommending the adherence by Parties to reporting guidelines. Kuokkanen notes in relation to LRTAP that "the quality of national reporting has improved markedly over the years."[76] There is little doubt that LRTAP's Implementation Committee should indeed take credit for the fact that data on emissions has been improved in Parties' reports since it started its work to review such information.[77] However, it has been noted that reporting "continues to be, uneven in length, depth and content."[78] In an effort to further improve the standard of reporting in much the same way as the CITES COP, the Executive Body has seen fit to take action. For example, in June 2008 EMEP's Steering Committee endorsed the necessarily technical guidelines for reporting prepared by LRTAP's "Task Force on Emissions Inventories and Projections" and submitted them to the plenary

72 CITES Resolution Conf. 11.17 (Rev.COP14).

73 *Ibid.*

74 See, for example, CITES Notification to the Parties no. 2010/013 (17/6/2010) noting the transmission by the CITES Secretariat of the latest revised "Guidelines for the preparation and submission of CITES annual reports".

75 It also should not be forgotten that CITES Standing Committee has played a significant role in this process; in 2003 it set up a working group to establish the reasons for non-compliance with reporting obligations and to make proposals for improvement. These proposals were passed to the Bangkok COP in 2004 and have led to revision of the COP's recommendations on reporting. See "Reporting under the Convention" at www.cites.org/eng/resources/reports.shtml.

76 T. Kuokkanen, "Practice of the Implementation Committee under the Convention on Long-range Transboundary Air Pollution" in Beyerlin et al. (eds.), *supra* note 5, p. 42.

77 *Ibid.*, p. 43.

78 *Ibid.*, p. 42.

Executive Body for approval.[79] In January 2009 these "Guidelines for Reporting Data under [LRTAP]" were formally adopted by the Executive Body.[80]

The quality and timeliness of national reporting has also been an issue under the CMS Convention. As long ago as 1994 the CMS COP drew attention to the fact that "many Parties…have never submitted national reports or have not submitted information in sufficient detail", and therefore introduced a standard format for reports.[81] The COP has also requested the Secretariat to tell Parties of the date their reports are due, and to remind them of their obligation in this regard if the report has still not been received at that point.[82] Additionally, the COP has asked the Secretariat to further the harmonisation of the content of reports with other MEAs through the development of common reporting modules via the Biodiversity Liaison Group framework,[83] and to make it easier for States to report online.[84] Such action to improve the frequency and utility of national reports has met with some success but there is certainly still room for improvement. For example, only 60 reports were submitted to the 2008 COP although 102 were due. The trend of a plenary body establishing guidelines for reporting is also evident in more recent MEAs, such as, for example, the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).[85]

### 3.3 *Facilitating Compliance; Capacity-Building and Funding*

The international community has long endorsed the need to enhance the capacity of developing states to promote sustainable development.[86] COPs have played an important role in this regard by endorsing capacity-building with a view to assisting developing countries to implement and comply with their international obligations. For example, the CITES COP has determined that both its Standing Committee and Secretariat are to advise and assist

79 See doc. ECE/EB.AIR/GE.1/2008/11.

80 See doc. ECE/EB/AIR/97.

81 CMS Resolution 4.1.

82 See CMS Resolution 8.24 para. 4, and CMS Resolution 9.4 para. 4.

83 CMS Resolution 9.4 para. 5.

84 CMS Resolution 8.24 para. 5, and CMS Resolution 9.4 para. 6. See generally Bowman et al., *supra* note 2, pp. 571–572 on the need to improve reporting under the CMS.

85 See www.unece.org/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf.

86 The 1992 Rio Declaration notes in principle 9 that "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies."

Parties in complying with their obligations.[87] As such the Standing Committee can provide advice as to specific capacity-building issues and also offer technical assistance in a given state if invited by that state to do so.[88] The CITES Secretariat includes a Scientific Support unit and has also been particularly active in providing assistance; for example, for some time the Secretariat has been involved in the organisation of workshops that provide countries with technical and scientific support in determining whether or not trade in a given species is detrimental to its survival. Workshops of this nature in the 2008–9 period included sessions in relation to the African cherry tree, the bigleaf mahogany and giant clams.[89]

Financial assistance is also viewed as critical by many developing states to fulfil their international obligations. Decisions by plenary bodies have played a key role in establishing funding opportunities which may assist existing State Parties in this regard. An illustration is provided by the Ramsar COP's decision in 1990 to establish the Wetland Conservation Fund which has now been renamed the Ramsar Small Grants Fund for Wetlands Conservation and Wise Use (Ramsar SGF).[90] The fund is supervised by the Ramsar Standing Committee but administered by the Ramsar Bureau. It is designed to assist developing countries to improve the management of listed Ramsar sites (for example the monitoring of sites, the preparation of management plans, and the training of site managers), to support action needed to designate sites (such as surveying and threat identification), and to promote the "wise use" of wetlands.[91] In the period 1991–2010 the Ramsar SGF funded 237 projects in 109 countries to the sum of 7.8 million Swiss Francs.[92] For instance, a project in the Nucanchi Turupampa wetland area in Ecuador was given the sum of over 84,000 Swiss Francs and this money was used *inter alia* to improve capacity building activities in relation to field monitoring.[93] A further example of a plenary body establishing a funding mechanism is provided by the CMS Trust Fund established at the first meeting of the CMS COP in 1985.[94] In the period

87 CITES Resolution Conf. 14.3, paras. 12(b) and 14(c).

88 CITES Resolution Conf. 14.3, para. 29.

89 CITES Secretariat, "Activity Report 2008-9", pp. 20–21 (available at http://www.cites.org/eng/disc/sec/ann_rep/2008-09.pdf).

90 Ramsar Resolution 4.3; see Ramsar Resolution VI.6 as to the renaming of the fund.

91 *Ibid.*

92 Ramsar, *Working for Wetlands – the Ramsar Small Grants Fund* (2011) available at http://www.ramsar.org/pdf/sgf/SGFPortfolio2011.pdf.

93 *Ibid.*

94 CMS Resolution 1.2, Annex 3.

2002–2005 approximately US $465,000 was allocated to fund 17 projects,[95] and the grants, albeit small as under the Ramsar SGF, have been described as "the main tool to support Concerted Actions for Appendix I species."[96] The CMS COP in November 2011 adopted a resolution encouraging further capacity building in the 2012–14 period noting that "financial support for capacity building is imperative in order to implement planned capacity building activities".[97] At the time treaties are negotiated, funding issues may well not be foremost in the minds of those involved in a given negotiating process as other considerations may either appear more important or prove easier to reach agreement upon. This being the case, it is at the regular COP meetings that financial issues can be debated by all Parties and an appropriate way forward agreed upon by, for example, establishing a funding mechanism which may be replenished by Parties' voluntary contributions as the need arises over time.

### 3.4 *Establishing and Developing Non-Compliance Procedures and Mechanisms without an Express Treaty Basis*

The development of specific non-compliance procedures is a relatively recent development in treaty regimes but a growing number of MEAs have now established dedicated committees dealing only with compliance issues. The first was established by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer in 1990 and there is a growing tendency in the texts of modern MEAs expressly to note the need to establish such a formal non-compliance procedure.[98] For example, the 2003 revised African Convention on the Conservation of Nature and Natural Resources places an obligation on the Conference of the Parties "as soon as possible" to "develop and adopt rules, procedures and institutional mechanisms to promote and enhance compliance",[99] the 2001 Stockholm Convention on Persistent Organic Pollutants stipulates that the Conference of the Parties "shall, as soon as possible, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance",[100] and the 1997 Kyoto Protocol obliges

95 See CMS Standing Committee, "Overview of the Status of Small-scale Projects financed by the CMS Trust Fund" (2005) (doc CMS/StC28/13-E0), p. 1.

96 *Ibid.*, p.2.

97 CMS Resolution 10.6.

98 See G. Ulfstein, "Dispute resolution, compliance control and enforcement in international environmental law", in Ulfstein et al. (eds.), *supra* note 43, p. 125.

99 2003 Revised African Convention on the Conservation of Nature and Natural Resources, Article XXIII. Treaty text available at www.africa-union.org; the treaty is not yet in force.

100 2001 Convention on Persistent Organic Compounds, Article 17 (40 ILM (2001) 532).

the parties to "approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance".[101]

But what if no express provision for the establishment of such a compliance procedure is included in a treaty's text as may well be the case in earlier treaties? In this situation the role of the COP can be of considerable importance in developing compliance systems. For example, CITES' compliance system has evolved over many years by means of COP resolutions and decisions.[102] CITES has to a significant extent delegated authority in matters of compliance to the Standing Committee of the COP, established in 1979 by COP decision.[103] The Standing Committee deals with issues relating to the monitoring and assessment of compliance, the verification of information, and the giving of advice to Parties on compliance issues.[104] For example, noting that "failure to submit an annual report…constitutes a major problem with the implementation of the Convention", the CITES COP has decided that any such failure will be reported to the Standing Committee by the Secretariat.[105] The COP has further resolved that Parties should not trade in CITES specimens with a given Party following a determination by the Standing Committee that the said Party has failed to submit an annual report for three consecutive years.[106] A structure has therefore been developed by the CITES COP by resolution which enables the CITES Standing Committee to decide which countries have failed to submit reports

101 1997 Protocol to the Framework Convention on Climate Change, Article 18 (37 ILM (1998) 22).

102 R. Reeve, "CITES" in Ulfstein et al. (eds.), *supra* note 43, p. 136, and G. Ulfstein in Ulfstein et al., *ibid*., p. 125. See in particular CITES Resolution Conf. 11.7 (Rev. COP14) re national reports, CITES Resolution Conf. 12.8 (Rev. COP13) re 'Review of Trade' procedure, CITES Resolution Conf. 11.3 (Rev. COP 15) re compliance and enforcement, and the CITES Resolution Conf. 14.3 entitled 'CITES Compliance Procedures'. Note also CITES Decision 14.29 re national implementing laws.

103 CITES Resolution Conf. 2.2.

104 CITES Resolution Conf. 14.3, para. 12.

105 CITES Resolution Conf. 11.17 (Rev. COP14). The text of CITES gives the CITES Secretariat a significant role in monitoring compliance with the treaty generally. See, for example, Article XII(2)e which obliges the Secretariat to "invite the attention of Parties to any matter pertaining to the aims of [CITES]" and Article XII(2)h which gives it the authority to "make recommendations for the implementation of the aims and provisions of [CITES]". Reeve notes that the "recommendatory function in sub-paragraph (h) has been exercised to the full by the CITES Secretariat which plays an unusually strong role in implementation and compliance control"; Reeve, in Ulfstein et al. (eds.), *supra* note 43, p. 140. The Secretariat has seen fit to make visits to State Parties having difficulties with non-compliance; see R. Reeve "Verification mechanisms in CITES" in T. Findlay and O. Meier (eds.), *Verification Yearbook 2001* (2001), pp. 143–144.

106 CITES Resolution 11.17 (Rev. COP14).

without good excuse. In similar fashion, the CITES COP has passed a resolution on national laws implementing the treaty which directs the CITES Secretariat to identify those Parties without adequate national legislation and to report a finding of non-compliance to the Standing Committee which may then take action against the offending State.[107] As such, the CITES example underlines the role COPs can play in introducing systems designed to address non-compliance in the absence of an article in the treaty text specifically authorising such a development.[108]

Another example of a compliance mechanism being established without an express treaty basis for its establishment is the aforementioned "Ramsar Advisory Mission" under which a team of experts is sent to inspect a listed wetland site undergoing ecological change, and to provide technical guidance in the form of recommendations. In 1987 the Ramsar COP in Recommendation 3.9 urged Parties to "take swift and effective action to prevent any further degradation of sites and to restore…the value of damaged sites". Pursuant to that recommendation the Ramsar Standing Committee in January 1988 established this inspection procedure which was then formally endorsed in a recommendation by the next Ramsar COP held at Montreux, Switzerland in 1990.[109] LRTAP provides a further illustration as the text of the 1979 treaty provided no express provision for the establishment of a compliance

107 CITES Resolution Conf. 8.4 (Rev. COP15). The resolution recognises the work of the Secretariat under the "National Legislation Project" set up in 1992 to review national implementing measures.

108 R. Reeve, "CITES", in Ulfstein et al. (eds), *supra* note 43, p. 136.

109 Ramsar Recommendation 4.7.

In relation to those treaty regimes which, unlike CITES or Ramsar, have established dedicated compliance committees dealing only with compliance issues, non-compliance procedures have been introduced in a number of regimes in situations where the relevant COP is not expressly empowered to establish them; see G. Loibl, 'Compliance Procedures and Mechanisms' in Fitzmaurice et al. (eds.), *supra* note 5, p. 428. For example, in 2002 the COP to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal decided "to adopt the terms of reference for the mechanism for promoting implementation and compliance"; Decision VI/12 of the COP to the1989 Basel Convention on the Control of Transboundary Movements of Hazardous wastes and their disposal (UNEP/CHW.6/40, 10/02/2003). This decision established a "Committee" to promote a compliance mechanism and was based on Article 15(5)(e) of the Basel Convention allowing the COP to "[e]stablish such subsidiary bodies as are deemed necessary for the implementation of this Convention"; see A. Shibata, 'Ensuring Compliance with the Basel Convention – its Unique Features' in Beyerlin et al. (eds.), *supra* note 5, p. 78, and Loibl in Fitzmaurice et al. (eds.), *supra* note 5, p. 428.

committee.[110] Instead the regime's plenary body, the Executive Body, adopted Decision 1997/2 which established the Implementation Committee to promote and improve compliance with its protocols.[111] All these examples typify the evolutionary nature of the treaty regimes in question and the critical role played by the regular meetings of the Parties in the promotion of compliance. The fact that such plenary meetings are held regularly provides State Parties with the opportunity to adapt the treaty regime in question thereby addressing issues relating to compliance which may only become apparent once the treaty has entered into force.

### 3.5 *Determining the Consequences of Non-Compliance*

It is usual practice in the majority of those MEAs which have established a dedicated compliance committee for the latter to carry out an investigation and then to produce a recommendatory report on its findings to the COP.[112] It is the latter which will then make the decision as to how to proceed in the circumstances,[113] having previously determined the range of potential measures that could be utilised.[114] For example, the Implementation Committee of

110 See UNEP, *Manual on Compliance with and Enforcement of MEAs* (2006), p. 165.

111 Prior to this decision the regime's 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds (VOC Protocol) had called on its Parties to "establish a mechanism for monitoring compliance with the present Protocol" (para. 3), and its 1994 Protocol on Further Reductions of Sulphur Emissions (Further Sulphur Emissions Protocol) had established an Implementation Committee to review implementation under that protocol (para. 7.1). The VOC Protocol entered into force on 29 September 1997 and in January 1998 its Parties agreed to use the Implementation Committee newly established by LRTAP Decision 1997/2 to monitor compliance. The Further Sulphur Emissions Protocol entered into force on 5 August 1998 after the Executive Body's decision to establish the Implementation Committee under LRTAP Decision 1997/2. In January 1999 the Parties to the Further Sulphur Emissions Protocol also agreed to utilise the Implementation Committee established under LRTAP Decision 1997/2 instead of the regime established in the Protocol's text; see LRTAP Decision 1998/6 concerning the application of the compliance procedure to the Oslo Protocol. All LRTAP's subsequent protocols now utilise the Implementation Committee originally established by the Executive Body under LRTAP Decision 1997/2 to review compliance.

112 J. Klabbers, 'Compliance Procedures' in Bodansky et al. (eds.), *supra* note 39, p. 998.

113 *Ibid*. See G. Loibl, in Fitzmaurice et al. (eds.), *supra* note 5, p. 436, and Marauhn, *supra* note 59, at p. 719. Scott too notes that "in the majority of cases measures recommended by the compliance body must be ratified by the meeting or conference of the parties"; Scott in French et al. (eds.), *supra* note 1, p. 247.

114 See, for example, Decision IV/18 taken by the MOP of the Montreal Protocol in 1992 which indicates that appropriate assistance might be provided (including technical assistance

LRTAP reports annually to the Executive Body on its activities and makes recommendations in relation to compliance issues,[115] but, having given due consideration to those recommendations, the Executive Body itself is empowered to "decide upon measures…to bring about full compliance".[116]

The fact that in most cases the COP retains the right to make final determinations as to non-compliance and as to the consequences of non-compliance could be said to add to the legitimacy of the process.[117] The COP as the key politically representative organ makes final decisions, a possible reason why non-compliance procedures appear to retain the backing of the Parties. Only the Kyoto Protocol allows its compliance committee to make all decisions without recourse to the COP.[118] The COP in establishing this procedure has

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and technology transfer), cautions issued or the suspension of specific rights and privileges under the Protocol; see further K.M. Sarma, "Compliance with Multilateral Environmental Agreements to Protect the Ozone Layer" in Beyerlin et al. (eds.), *supra* note 5, p. 30.

115 LRTAP Decision 2006/2, para. 9.

116 *Ibid.*, para. 11. See also Loibl, in Fitzmaurice et al. (eds.), *supra* note 5, p. 436.

117 Loibl notes that "[t]his procedure has the advantage that the recommendations and decisions are taken by the supreme organ and thus have more authority"; Loibl, in Fitzmaurice et al., *ibid.*, p. 436. This approach would appear in line with conclusions of an international workshop (Heidelberg, 20–22 March 1996) on "Institution-Building in International Environmental Law" summarised in the following terms:

"Several participants pointed to the important role of expert committees in routine as well as in non-compliance procedures. As several speakers pointed out, the role of expert bodies should, nevertheless, be limited. There was agreement that only a political body such as the Conference of the Parties should be empowered to decide upon reactions to non-compliance. Full membership and governmental representation within such a treaty organ would ensure participation of a state party under scrutiny in the consideration of the case and would also guarantee the "peer review" of one state by another one. Also, only a political body would be in a position to flexibly respond to alleged cases of non-compliance, including not only sticks and carrots, but also the authentic interpretation of the relevant agreement";

T. Marauhn and M. Ehrman, "Summary of the discussion", 56 *Heidelberg Journal of International Law* (1996) 820–827, at pp. 825–6.

118 Loibl, in Fitzmaurice et al. (eds.), *supra* note 5, p. 436. A few procedures endorse a hybrid system allowing the dedicated compliance committee to make some decisions such as whether to offer advice or to ask the party to prepare a compliance action plan, while reserving to the COP the power to decide on further measures of greater consequence such as the provision of technology transfer and financial aid; *ibid*. For example, the Basel Convention's Compliance Committee may itself "provide a Party…with advice, non-binding recommendations and information" in relation to *inter alia* the strengthening of its national regime, access to financial and technical support, and the elaboration of voluntary compliance action plans; Decision VI/12 of the COP to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous wastes and their disposal

determined that, save for a limited right to appeal to a decision of the Enforcement Branch to the Protocol's MOP,[119] the two branches (Facilitative and Enforcement Branches) of the Compliance Committee will be the final decision-makers under the regime.[120] However, although the Facilitative and Enforcement Branches can decide on consequences of non-compliance without recourse to the Kyoto Protocol's MOP, the issue remains as to whether, in particular, any Enforcement Branch decisions of a punitive nature could be regarded as legally binding.[121] Where a State Party fails 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"[122] 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". 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.[123] One could argue that in practice less controversy might surround any future decision of this nature had the Kyoto Protocol's MOP itself been required to make final determinations bearing in mind mere recommendations by the Enforcement Branch; any non-complying State might perhaps be slower in these circumstances to raise

(UNEP/CHW.6/40, 10/02/2003), Appendix, para. 19. However, once that facilitation procedure has been undertaken the Compliance Committee may consider it necessary "to pursue further measures to address a Party's compliance difficulties" and recommend to the COP that due consideration be given to "[i]ssuing a cautionary statement and providing advice regarding future compliance in order to help Parties to implement the provisions of the Basel Convention and to promote cooperation between all Parties"; *ibid.*, para 20.

119 On the basis of a denial of due process; see COP Decision 27/CP.7 "Procedures and mechanisms relating to compliance under the Kyoto Protocol", Article XI.

120 This approach has been described by distinguished commentators as "remarkable" in allowing the two branches of the Compliance Committee to "act independently of the cop/MOP"; R. Wolfrum and J. Friedrich, "The Framework Convention on Climate Change and the Kyoto Protocol" in Beyerlin et al. (eds.), *supra* note 5, p. 59. The authors also interestingly note that the Compliance Committee is "strengthened and less dependent on the political body of the MOP", an approach which builds "mechanisms and the institutions to deal with compliance in a depoliticised manner, thereby reinforcing the role of legal norms in the process" *ibid.*, p. 67.

121 See G. Ulfstein, "Treaty Bodies," in Bodansky et al., *supra* note 39, p. 883.

122 COP decision 27/CMP.1 "Procedure and Mechanism relating to compliance under the Kyoto Protocol" Article XV(5)(a).

123 See generally G. Ulfstein, in Bodansky et al., *supra* note 39, p. 883.

questions as to the legal effect of a decision had it been formally endorsed by the COP as the political body representing all State Parties.

Having noted that most compliance procedures provide for the COP to determine consequences in cases of non-compliance, the exercise of discretion by the plenary body in this regard is fairly minimal on occasion. It has already been noted that LRTAP's Implementation Committee, for instance, is obliged to report to the Executive Body at least on an annual basis as to its role in monitoring compliance and to make recommendations. It is then for the Executive Body to decide upon measures designed to bring about full compliance. In these circumstances, in principle a given COP could take the view that it will not endorse the findings of its compliance committee. However, certainly within LRTAP this would be most unusual.[124] In relation to national reporting and emission reduction obligations under LRTAPs protocols, it is normal for LRTAP's Executive Body to endorse its Implementation Committee's recommendations. For example, all the latter's sixteen recommendations were adopted verbatim at the Executive Body's 28th Session in 2010[125] with one relatively minor omission; Executive Body Decision 2010/11 only made reference to Bulgaria, Croatia, Estonia, Hungary, Iceland, Romania, the Russian Federation, Spain and Switzerland in relation to failure to fulfil their reporting obligations on strategies and policies. The Czech Republic, Portugal and the UK had also been named as being in non-compliance in the Implementation Committee's report but these countries had satisfied the Executive Body that they had complied with their obligations in this respect after the Implementation Committee had drafted its recommendations. It is quite clear therefore that as far as LRTAP is concerned, the plenary body (Executive Body) will take the final decision but has in general seen fit simply to endorse its Implementation Committee's findings.

An analysis of the approach in the CITES regime is also of interest. The CITES COP recently took note of a "Guide to CITES Compliance Procedures" which informed the Parties as to existing compliance procedures.[126] The guide stipulates that the Standing Committee "acting in accordance with instructions from and authority delegated by the [COP], handles general and

124 Kuokkanen has noted that "[t]o date, the Executive Body has adopted all the recommendations presented to it" by the Implementation Committee concerning Parties' compliance with emissions reduction obligations; T. Kuokkanen, "The Convention on Long-Range Transboundary Air Pollution," in Ulfstein et al. (eds.), *supra* note 43, pp. 170-171.

125 See the Executive Body's decisions in doc. ECE/EB/AIR/106/Add.1 (LRTAP Decisions 2010/3- 2010/16) when compared to the Implementation Committee's draft recommendations (doc. ECE/EB.AIR/2010/6).

126 CITES Resolution Conf. 14.3.

specific compliance matters, including…monitoring and assessing overall compliance with obligations under the Convention [and] taking compliance measures…".[127] These compliance measures include giving advice, asking for special reports from Parties, issuing a caution, providing technical assistance, and requesting a compliance plan to be submitted.[128] Importantly, the Standing Committee can also decide "to recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species…[where] a Party's compliance matter is unresolved and persistent and the Party is showing no intention to achieve compliance…".[129] However, any decision of the Standing Committee is subject to review by the COP as the Guide notes that the plenary body is to review "as needed decisions of the Standing Committee related to specific compliance matters".[130] This approach therefore might be said to be in line with those MEAs which allow a final determination of consequences to be made by the plenary body concerned in matters relating to compliance. However, it is clear that specific Standing Committee recommendations to the Parties to suspend trade with another Party have routinely been notified by the CITES Secretariat to the Parties without being officially endorsed by a COP decision.[131] For example, the sixteenth and most recent CITES COP met in March 2013, but a notification was sent on 19th March 2015 recommending that Parties suspend commercial trade in specimens of CITES-listed species with Nigeria until further notice. The recommendation currently remains in place. Of course, this decision would be subject to potential review by the next COP in 2016, but in the meantime it is the Standing Committee and/or the Secretariat which will determine the length of this suspension. It is clearly evident that State Parties certainly take action to implement notifications without waiting for subsequent endorsement from the full plenary body.[132] Indeed this appears to be the

127 *Ibid*., para. 12.

128 *Ibid*., para. 29.

129 *Ibid.*, para. 30.

130 CITES Resolution Conf. 14.3, para. 10(c). The CITES COP is also to receive reports from the Standing Committee as to compliance matters; *ibid*, para. 36.

131 The role of the CITES Secretariat must not be overlooked in the process. Reeve notes in relation to the CITES compliance system that "central to its operation are the Secretariat and Standing Committee. The former wields considerable power, since not only does it review and verify information, but it also makes recommendations to the COP and the Standing Committee, which on occasion are far reaching and are often acted on"; Reeve, in Findlay and Meier (eds.), *supra* note 105, p. 151.

132 In a communication between the author and the UK's Department for Environment, Food and Rural Affairs (Defra) in March 2011 the issue was raised as to whether recommendations to suspend trade issued by the CITES Secretariat were immediately

only practical approach to address a pressing trade-related issue that immediately threatens the conservation status of a given species. While 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).[133]

## 4 Some Concluding Remarks

This article has sought to address the role of COPs in facilitating compliance with particular emphasis on earlier MEAs established in the 1970s. Whether or not the modern trend in adopting a dedicated compliance committee has been followed in such treaty regimes, it is clear that the plenary body can still play an important role in matters relating to compliance. Undoubtedly, the COP's role in offering interpretations of ambiguous treaty obligations has been of particular relevance and has facilitated Parties' compliance by providing much needed clarification. COPs are political bodies and are therefore in the unique position within a given treaty regime to provide clarifications to ambiguities in treaty texts as the need arises.[134] It can therefore be argued that COPs have played a pivotal role in improving the effectiveness of treaty regimes in this way.

While the content of national reports submitted within MEA regimes are often primarily processed by other treaty bodies rather than by COPs, the plenary bodies of MEAs have played a significant role where the text of treaties failed to establish the need for comprehensive reporting. They have also sought to improve the regularity of reporting and the content of national reports by adopting appropriate guidance and recommendations. These examples again serve to underline the evolving character of environmental treaty regimes and the central role played by the plenary body in this evolutionary process, as do the instances where plenary bodies have established capacity-building and funding opportunities. On the other hand, in relation to monitoring and verifi-

actionable. In response Defra indicated that the "CITES Secretariat uses a Notification to inform Parties of the Standing Committees' recommendations to suspend trade. The procedure in the European Union, on the receipt of the Notification, is that the European Commission (EC) consults Member States with a proposal to implement the recommendation immediately. This gives Member States two weeks to disagree with the recommendation. During this two weeks Member States will not determine any current applications, pending agreement within the EC. Once the recommendation is agreed I can confirm that the UK, in concert with all other Member States, acts immediately on the suspension" (cited with permission).

133 See also Scott, in French et al. (eds.), *supra* note 1, p. 247.

134 See also Marauhn and Ehrman, *supra* note 117.

cation, plenary bodies have undoubtedly been to the fore in establishing by COP resolution a variety of compliance techniques and mechanisms which are then, on the whole, overseen by other treaty bodies. As such, the COPs can be said to have often played a highly important role in establishing these compliance systems, but now perform more of a secondary role in their practical application.

Discussion in this article has also addressed COP activity in developing compliance systems in the absence of an explicit legal basis for such activity in the primary text. Clearly in these situations COPs have acted in an essential manner as they have played a key role in establishing an effective structure in which compliance can be assessed. Finally, whether or not a dedicated compliance committee has been established, it is more often than not the case that the COP retains the authority to make decisions as to the consequences of non-compliance. It could therefore be said that plenary bodies continue to play a pivotal role in this respect, although it might also be argued that in practice the plenary bodies in making such decisions actually often rely heavily on the deliberations and recommendations made by subsidiary bodies established within the applicable treaty regime to carry out functions relating to compliance assessment.

What do these developments tell us about how MEAs will operate in the future? Undoubtedly, plenary bodies will continue to provide further clarifications of treaty texts in the form of authentic interpretations, thereby ensuring that MEAs develop to address changing needs and circumstances. Moreover they are ideally placed in the future to highlight the need for improved reporting by parties, and, additionally, not only to establish innovative capacity-building and funding opportunities, but also new monitoring techniques and modifications to non-compliance procedures. As such, treaty regimes will continue to evolve over time adapting to new problems in implementation and compliance as and when the need arises. The legitimacy of these developments will be enhanced by the fact that decisions are made by the key political body within a given MEA. However, the growing sophistication of treaty regimes in the environmental field necessarily means that plenary bodies can only do so much – secretariats and/or specialist subsidiary bodies established within MEAs will deal with the detail of monitoring and verification, and to a large extent inform and guide plenary bodies on the way in which to react to non-compliance within guidelines established either in treaty text or, more likely, by COP resolution. In doing so however, such treaty bodies will need to maintain the confidence of COPs in carrying out their functions, or potentially risk questions being raised as to the appropriateness of their actions or roles. Only with the backing of the political plenary body will they be able to continue to influence developments designed to improve compliance with treaty obligations.

# UNFCCC Conference of the Parties: The Key International Forest Law-Makers for Better or for Worse

*Feja Lesniewska*

**Abstract**

This chapter examines how COP activities can have law-making effect beyond a regime by proxy without there being any 'formal' legal mechanism being agreed. It uses recent legal theory to interpret both UNFCCC COP REDD+ decisions as well as the process adopted to develop them over time. It firstly provides an outline of theoretical approaches to interpreting treaty-based activities. Secondly, it gives a brief overview of international forest law's form, following this with an introduction to climate change, forests and REDD+. The following section examines in detail UNFCCC COP REDD+ decisions on: finance, monitoring, reporting and verification, and safeguards, illustrating the legal force that these can have. The next section focuses on the process adopted by the UNFCCC to pilot REDD+ projects and considers how this has fed into the iterative development of the mechanism under the UNFCCC. The concluding section outlines the tools used: information-sharing, participation and regime coordination to develop a legitimate UNFCCC REDD+ mechanism that creates synergies to avoid conflict with other international forest law.

**Keywords**

treaty-based activity – COP decisions – international forest law – climate change – mechanism to reduce emissions from deforestation and degradation (REDD+) – finance – MRV – safeguards

## 1 Introduction

In 2007 the UN Framework Convention of Climate Change (UNFCCC) adopted the Bali Roadmap for a post-Kyoto climate agreement. The Roadmap included a decision to negotiate options for a mechanism to reduce emissions from deforestation and degradation (REDD+). Since 2007 REDD+ has increasingly dominated the discursive agenda on international law and forests. Whether

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this dominance is beneficial for forests and forest peoples is disputed.[1] Yet assumptions about the influence of UNFCCC REDD+ decisions, for better or for worse, are founded upon the belief that treaty-based activities, such as conference of the parties (COP) decisions, have normative, substantive and procedural effects on how law and policy evolves.

International law has grown significantly in both volume and scope resulting in an increase in the number of decision-making bodies established by the different treaty regime frameworks. This has led to an exponential growth in the volume of decisions by treaty-based bodies.[2] Amongst international legal scholars however assumptions of the legal effect that treaty-based activities have upon individual regimes and international law remains open to debate.[3] Determining the legal effects of this growing volume of outcomes from treaty regimes is important for international law and practice to manage conflicts and where possible build synergies. Recent legal scholarship has attempted to tackle the issue more directly by identifying how, and in what ways, treaty-based activities contribute to law-making processes and international law more generally. Attention has focused both on activities within single treaty regimes, as well as the effects of one regime's activities upon other related regimes.[4]

This chapter examines how COP activities can have law-making effect beyond a regime by proxy without there being any 'formal' legal mechanism being agreed. It draws on recent legal theory to interpret both the UNFCCC COP REDD+ decisions, as well as the process adopted to develop them over time. It firstly provides an outline of theoretical approaches to interpreting treaty-based activities. Secondly, it gives a brief overview of international forest law's form, following this with an introduction to climate change, forests and REDD+. The following section examines in detail UNFCCC COP REDD+ decisions on: finance, monitoring, reporting and verification, and safeguards,

1 David Humphreys, "Climate change and deforestation: The evolution of an intersecting policy domain", Vol. 35. *Environmental Science and Policy* (2014) pp. 1–11.

2 Joost Paulwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands", 25 *Michigan Journal of International Law* (2003–04) pp. 903–15; Tomer Broude and Yuval Shany, "The International Law and Policy of Multi-Sourced Equivalent Norms" in Tomer Broude and Yuval Shany, *Multi-Sourced Equivalent Norms in International Law* (2011) Hart Publishing pp. 1–14.

3 Annecoos Wiersema, "The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements", 31 *Michigan Journal of International Law* (2009) pp. 231–287.

4 Harro Van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (2014) Cheltenham: Edward Elgar.

illustrating the legal force that these can have. The next section focuses on the process adopted by the UNFCCC to pilot REDD+ projects. It considers how this has fed into the iterative development of the mechanism under the UNFCCC. The concluding section outlines the tools used: information sharing, participation and regime coordination, to develop a legitimate UNFCCC REDD+ mechanism that creates synergies to avoid conflict with other international forest law.

## 2 Interpreting Treaty-Based Regime Activities

As treaty-based activities increasingly add to international laws' scope and complexity questions surrounding their legal effect, although not new, become ever more pronounced.[5] Recognition of this issue led the United Nations to mandate the International Law Commission (ILC) to consider the matter, referred to as 'fragmentation', to provide greater clarification of it's extent, nature and implications. In it's conclusions the ILC noted that "no regime is entirely self-contained and that as such no regime is completely independent of international law beyond its own regime".[6] However, determining law beyond an individual regime presents challenges, especially with increasing amounts of treaty-based activities. The Vienna Convention on the Law of Treaties is of limited assistance on this issue. In Article 31(3)(c) it states that "any relevant rules of international law applicable in the relations between the parties" should be taken into account when interpreting a treaty. However, it remains unclear which treaty-based activities constitute part of the 'relevant rules' by which a treaty, or other related treaties, can be interpreted.[7] This presents difficulties for determining the legal effect of treaty-based activities beyond a single treaty regime.

Classical international legal scholarship does not offer clear guidance on this either. Traditional approaches to interpreting treaty-based activities separate different treaty components into a hierarchical system: a convention, a protocol, amendments, and treaty-based activities. Any COP decisions are interpreted as largely technical and/or political outcomes implementing the

5 Martti Koskenniemi and Paivi Leion, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002) pp. 553–579.

6 International Law Commission, 58th Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, U.N. Doc. A/CN.4/L.682.

7 Article 31(3)(c) Vienna Convention on the Law of Treaties (1969).

treaty agreement. Such an interpretative approach does not provide the legal space to recognise the, often significant, normative influence that treaty-based activities can have upon future substantive and procedural obligations, as well as the interpretation of existing treaty commitments for Parties. For particular international legal regimes this traditional interpretation results in omissions from any research agenda aiming to identify treaty regime developments as well as inter-linkages to other regimes. This is particularly the case with multilateral environmental framework agreements such as the UNFCCC and the UN Convention on Biological Diversity (CBD). Under such framework agreements the design, scope and commitments are continually negotiated and drafted through ongoing negotiations between member Parties within decision-making bodies, such as the COPs. Several international law scholars have sought to develop new approaches to researching treaty regime activities, especially for framework treaties, to understand how, if at all, they contribute to law-making processes.[8] There is also an interest amongst researchers in identifying the legal and institutional linkages that exist between different specialised regimes and the impact treaty-based activities have upon them.

The central treaty regime considered in this chapter is the UNFCCC. According to the Convention text COP decisions have an important role for its future implementation.[9] Under Article 7(2) the COP is the supreme body of the UNFCCC. It has the authority to review the implementation of the Convention though either any related legal instruments or decisions that Parties adopt.[10] The article implies that the COP may adopt legal instruments to facilitate implementation of the Convention such as amendments,[11] annexes[12] and protocols.[13] Such a range implies a division in the legal significance between individual COP decisions. Yet it is misleading to perceive COP decisions in this way because, not only can individual decisions contribute to the implementation of the climate change regime, but also international law as a whole. Moreover

8 Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law", Vol. 94 *The American Journal of International Law* (2000) pp. 623–659; Jutta Brunnée, "COPing with Consent: Lawmaking under Multilateral Environmental Agreements", 15 *Leiden Journal of International Law* (2002) pp. 1–52; Wiersema, *supra* note 3.

9 Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A guide to Rules, Institutions and Procedures* (2004) Cambridge University Press p. 4.

10 UNFCCC art. 7(2).

11 UNFCCC art. 15.

12 UNFCCC art. 16.

13 UNFCCC art. 1 para. 7.

a series of decisions to implement a particular element of the Convention, such as increasing the potential to include forest mitigation activities, can lead to a sub-regime that in itself has important interlinkages with other related regimes e.g. REDD+ and international forest law. Mapping and understanding these dynamics is essential to preventing inter-regime conflicts and promoting synergies to gain greater determinacy across international law.

Overall, treaty-based activities are viewed by legal scholars as contributing positively to developing and implementing international laws within treaty regimes. Brunnée argues that the iterative interactions enabled by treaty decision-making bodies can facilitate opportunities for more inclusive creative flexible approaches to international law-making. She specifically identifies COPs for their role in the law-making process within multilateral framework agreements. She claims that the COPs work is more 'flexible' and 'informal' and so can often facilitate innovative ways to create norms.[14] Wiersema adds to this observation suggesting that given the feedback mechanisms of framework treaty regimes pilot initiatives can be tried and tested, after which any lessons learnt can be rapidly shared amongst Parties within and between different treaty regimes.[15] In this manner any conflicts and synergies can be identified within the regime and with other related regimes. Then they can be dealt with *ex-ante* when any future legally binding agreement is reached being negotiated.[16]

Despite some agreement amongst some scholars on the significance of treaty body activities for evolving international law, others raise concerns particularly regarding the theoretical approaches employed. Without placing treaty-based activities within their political, economic and social context one can end up with a rather technocratic perspective that is devoid of reality. Twinning suggests that international law research needs to focus on how different legal orders and actors may "complement each other; investigating if the relationship is one of cooperation, co-option, competition, subordination, or stable symbiosis; and whether the approaches converge, assimilate, merge, repress, imitate, echo, or avoid each other".[17] This is a particularly beneficial approach to adopt when considering developments within the international forest regime due to the diverse range of stakeholders who often have conflicting interests in how forest law and policy develops.

14 Brunnée, *supra* note 8 p. 7.

15 Wiersema, *supra* note 3, p. 238; Van Asselt, *supra* note 4.

16 Annalisa Savaresi, The Role of REDD in the Harmonisation of Overlapping International Obligations, in Erkki J. Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (2013) Springer, pp. 391–419.

17 William Twinning, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009) Cambridge University Press p. 277.

The remainder of the chapter examines how COP decisions by the UNFCCC to develop a REDD+ mechanism have evolved through an iterative process drawing on existing international forest-related law. It outlines the current gaps within the key elements of the UNFCCC REDD+ mechanism, and considers the role that information, participation and cooperation are playing beyond the climate regime to fill them.

## 3 The International Forest Regime

International forest law offers a cogent example of fragmentation in international law because it is constituted by a diversity of treaties and agreements that are evolving relatively independent to each other.[18] Forests regulate local and global climates, ameliorate weather events, regulate hydrological cycles, protect watersheds and their vegetation, water flows and soils, and provide a vast store of genetic information.[19] Different treaties and agreements of the international forest regime focus on different aspects of these forest functions.[20] Yet it is this multi-functionality that presents challenges for international law because several forest functions are transboundary, essentially public goods; so do not neatly fit into an international jurisdictional system based on a sovereign

18 Harro van Asselt, "Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes", 44 *New York University Journal of International Law and Policy* (2011–12) pp. 1205–1278 p. 1206.

19 David Pearce and Corin Pearce, *The Value of Forest Ecosystems: A Report to The Secretariat Convention on Biological Diversity* (February 2001) p1, available http://eprints.ucl.ac.uk/17587/1/17587.pdf.

20 These include Non-legally Binding Instrument on All Types of Forests (2007); Convention on Wetlands of International Importance (1971); the Declaration of the United Nations Conference on the Human Environment (1972); the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) CITES (1974); the Amazon Cooperation Treaty (1978); the United Nations Framework Convention on Climate Change (1992) and its Kyoto Protocol, Convention on Biological Diversity (1992), and its Cartagena Protocol on Biosafety (2000), the Rio Declaration on Environment and Development (1992), Rio Forest Principles (1992); Agenda 21, Report of the United Nations Conference on Environment and Development (1992); the Central American Forest Convention (1993); the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994); the International Treaty on Plant Genetic Resources for Food and Agriculture (2001); the South African Development Community Forestry Protocol (2002); the International Tropical Timber Agreement (2006).

territorial administrative model.[21] Despite this the international customary legal principle of permanent sovereignty over natural resources dominates all treaties and agreements relating to forests prioritising their value in terms of national economic wealth. Equally important to ecosystem functions in the design and developments of international forest law are human and indigenous peoples' rights. Approximately 1.6 billion people, many who are indigenous peoples and/or minority communities, livelihoods, as well as often traditional cultures, are dependent on forests. A range of human and indigenous peoples' rights within international law increasingly offer mechanisms to submit reports, file complaints and make legal claims for breaches of rights.[22] Attempts at consolidating all forest-related issues within one single treaty have as yet remained unsuccessful.[23] As a result international forest law is an amalgam of international treaties and agreements rather than a single treaty to which COP decisions under individual treaty regimes further add. This makes tracking the developments in international forest-related law challenging.

The interlinkages and interactions between the different threads, themes and issues in international forest law are receiving increasing attention from scholars across a range of disciplines.[24] This is due, in part, to a growing interest in forests and international law generated by several REDD+ COP decisions, especially on safeguards (see section 5.3 below). It is also because of the fragmented nature of the international forest regime and its suitability for research on regime treaty-based decisions impacts across a range of legal fields: trade, environment and human rights. Van Asselt, for example, examined the links between the international climate change and biodiversity regimes on forest specific issues.[25] Savaresi has covered the linkages between forests, climate change and human rights, exploring the challenges to achieving synergise for

21 Rowena Maguire, *Global Forest Governance: Legal Concepts and Policy Trends*, (2013) Edward Elgar pp. 43–70.

22 For a useful survey of forest-related human rights and indigenous peoples rights law see Janet Pritchard, Feja Lesniewska, Tom Lomax, Saskia Ozinga and Cynthia Morel, *Securing community land and resource rights in Africa: A guide to legal reform and best practice*s, (2013) ClientEarth, FERN Forest Peoples Programme and CED, Annex 2 available http://www.clientearth.org/reports/20141402-forests-securing-community-land-report.pdf.

23 For a summary of initiatives to negotiate an international forest treaty see Catherine P. MacKenzie, 'Future Prospects for International Forest Law', Vol. 14, Issue 2 *International Forestry Review* (2012) pp. 249–259 p. 251.

24 Constanze Haug and Joyeeta Gupta, Global Forest Governance, in Joyeeta Gupta, Nicolien van der Grijp and Onno Kuik (eds), *Climate Change, Forests and REDD: Lessons for Institutional Design*, (2013) Routledge pp. 52–77.

25 van Asselt, *supra* note 18.

implementation.[26] Whilst MacKenzie has considered broader institutional possibilities between different regimes within international forest law identifying flexibility and fluidity to create opportunities for improved global governance.[27] This is in contrast to some observers who question the effectiveness of the international forest regime to address the multilevel crosscutting issues that forests present to law and policy design due to institutional and legal plurality.[28]

## 4 Forests, the UNFCCC and REDD+

Forests have an important role in tackling climate change. Forests, and the land sector more broadly, are unique to climate change mitigation because they are the only sector where both greenhouse gas (GHG) emissions and removals, both anthropogenic and natural, can occur simultaneously. The significance of the forest sector's contribution to climate change is recognised increasingly by climate scientists. In the fifth Intergovernmental Panel on Climate Change (IPCC) report global GHG emissions from deforestation and degradation were estimated to range from between 18-25%.[29] To reach globally agreed-upon targets for GHG concentrations of 445ppm – 490ppm scientists recommend goals of reducing global deforestation by 50% by 2020 and 100% by 2030.[30] Given the significance of GHG emissions from forestry and land use reducing deforestation and forest degradation is integral to achieving rapid and significant global climate change mitigation.

Under the UNFCCC Parties are encouraged to reduce deforestation and maintain net carbon sink coverage through policies and measures.[31] Parties are

26 Savaresi, *supra* note 16.

27 Catherine P. MacKenzie, "Lessons from Forestry for International Environmental Law", 21(2) Review of European Community & International Environmental Law (2012) pp. 114–126, p. 128.

28 Lukas Giessen, "Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation", *International Forestry Review*, (2013) Vol. 15 Issue 2 pp. 60–70; Radoslav Dimitrov, "Hostage to Norms: States, Institutions and Global Forest Politics", Vol. 5 Issue. 4 *Global Environmental Politics* (2005) pp. 1–24; Jeremy Rayner, Alexander Buck & Pia Katila (eds.), *Embracing complexity: Meeting the challenges of international forest governance: A global assessment report*, prepared by the Global Forest Expert Panel on the International Forest Regime, (2010), IUFRO World Series Volume 28.

29 Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report* (2014) IPCC.

30 Jonas Eliasch, *Climate Change: Financing Global Forests*, (2008) London, UK: Office of Climate Change.

31 UNFCCC art. 4.1 (a), (b), (c).

responsible for deciding how to achieve these GHG reductions, although sustainable management of forests is encouraged.[32] Reporting on mitigation policies and measures is not mandatory for developing country Parties. In the UNFCCC's Kyoto Protocol specific forestry-related measures that Annex I (developed countries) Parties could apply to further achieve GHG emission reductions targets were included.[33] It introduced several flexibility-based mechanisms to incentivise the low carbon management of forests, including the Clean Development Mechanism (CDM). This permitted afforestation and reforestation type projects in non-Annex I (developing) countries to contribute, through certified emission reductions, to Annex I Parties efforts to reach their legally binding targets under the Protocol. During the development of the Kyoto Protocol's operational rules and modalities, known as the Marrakech Accords, the inclusion of a mechanism for reduced emissions from avoided deforestation was rejected due to methodological concerns including permanence, leakage, monitoring and measuring carbon.[34] There were also questions surrounding the equity and fairness of developing countries being the source of emissions reductions for Annex I country Parties to meet mitigation target commitments through an expanded forest carbon trading system in the CDM.[35] The decision to limit activities under the CDM to afforestation and reforestation and not include avoided deforestation was not without controversy at the time.[36] A Coalition of Rainforest Countries, including Costa Rica and Papua New Guinea, argued this prevented non-Annex I Parties using national forest carbon sequestration capacity as a potential revenue source that could be traded with Annex I Parties to reach legally binding GHG emissions reduction targets under the Kyoto Protocol. These same Parties continued to pursue the issue.

32 Ian Fry, "More Twists, Turns and Stumbles in the Jungle: A Further Exploration of Land Use, Land Use Change and Forestry Decisions within the Kyoto Protocol", 16 (3) *Review of European Community & International Environmental Law* (2007) pp. 341–355.

33 Sebastian M. Scholz and Martina Jung, "Forestry Projects under the Clean Development Mechanism and Joint Implementation: Rules and Regulations in the Climate Regime", in Charlotte Streck, Robert O'Sullivan, Toby Janson-Smith and Richard Tarasofsky (eds,), *Climate Change and Forests: Emerging Policy and Market Opportunities* (2008) Brookings/Chatham House pp. 71–86.

34 See Decision 11/CP-7, 'Land use, land-use change and forestry', in Report of the Conference of the Parties on its seventh session held at Marrakech, 29 October–10 November 2001 (FCCC/CP/2001/13/Add.1, 21 January 2002), Addendum.

35 Fry, *supra* note 32 p. 350.

36 Rosemary Lyster, "The New Frontier of Climate Law: Reducing Emissions from Deforestation and Degradation", 10/8 *Sydney Law School Legal Research Paper* (2010).

In December 2005 at the UNFCCC COP in Montreal Parties agreed, after a proposal by Papua New Guinea and Costa Rica, to discuss options for reducing emissions from deforestation in tropical countries, to establish a two-year review of relevant scientific and methodological issues, and to consider policy approaches and incentives for reducing emissions from deforestation in developing countries.[37] Although reducing GHG emissions from deforestation was not a new issue to the UNFCCC the Montreal decision began a dedicated initiative on it by Parties to explore the potential approaches to stimulate action to further the UNFCCC's implementation through forestry.[38] Papua New Guinea and Costa Rica offered two options around which to develop flexible compensation mechanisms for avoided deforestation in tropical forest countries. The first was to develop a single special protocol on Reducing Emission from Deforestation. The second was to modify the Marrakesh Accord to the Kyoto Protocol so as to include 'avoided deforestation' projects in the CDM mechanism.[39] At COP 11 Parties were invited to submit their views and the UNFCCC's Subsidiary Body for Scientific and Technological Advice was also appointed to prepare a recommendation for COP 13 to be held in Bali, Indonesia.[40] After Montreal the role of the forestry sector, particularly in tropical forest countries, to sequester carbon in the fight against climate change gained increasing attention from a diverse range of actors, many new to forest-related issues, in the run up to the UNFCCC Bali COP.[41] In 2007 the Bali Action Plan gave a mandate to the Ad-hoc Working Group on Long-Term Cooperative Action to address 'policy approaches and positive incentives on issues relating to REDD

37 Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, First Sess., Montreal, Can., Nov. 28 – Dec. 10. 2005, *Report of the Conference of the Parties on its Eleventh Session, Held at Montreal from 28 November to 10 December 2005*, U.N. Doc. FCCC/CP/2005/5, pp. 76–84.

38 David Humphreys, "The Politics of 'Avoided Deforestation': Historical Context and Contemporary Issues", 10(3) *International Forestry Review* (2008) pp. 433–442.

39 See submission by the Governments of Papua New Guinea and Costa Rica, Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action (FCCC/CP/2005/MISC.1, 11 November 2005).

40 Report of the Conference of the Parties on its eleventh sessions, held at Montreal from 28 November to 10 December 2005, Agenda item 6, Reducing emissions from deforestation in developing countries: approaches to stimulate action, FCCC/CP/2005/5, 30 March 2006, para. 82 and 83.

41 William Boyd, "Ways of Seeing in Environmental Law: How Deforestation became an Object of Climate Governance," 37(3) *Ecology Law Quarterly* (2010) p. 843.

in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' as part of a post-2012 agreement to the Kyoto Protocol.[42] This expanded the initial scope in Montreal from reducing emissions from deforestation (RED) to also include forest degradation (REDD), and three additional 'plus' elements: conservation and enhancement of forest carbon stocks, and sustainable management of forests, together known as REDD+.

## 5 UNFCCC REDD+ COP Decisions: Form and Substance

Since Bali the UNFCCC treaty bodies have worked towards the design of a REDD+ mechanism. It is still a work in progress. Although in December 2013 UNFCCC Parties agreed to the Warsaw REDD+ Framework, a series of seven decisions on a mechanism's form and substance, negotiations are ongoing as several key aspects need to be finalised before the 2015 deadline for adoption of a "protocol, legal instrument or agreed outcome with legal force" at the COP in Paris.[43] The following section focuses on three issues in detail: finance; monitoring, reporting and verification; and safeguards that have proved contentious both within the UNFCCC negotiations and amongst other REDD+ stakeholders. The form and substance of each are critical to the overall design of any future UNFCCC REDD+ mechanism and the legal structures necessary for its implementation.

### 5.1 *Finance*

Primarily REDD+ is a compensation mechanism to incentivise tropical forest countries to reduce emissions from deforestation and degradation, as such funding is a key issue. Initially economists argued that REDD+ was a 'low hanging fruit' climate mitigation measure that would be inexpensive to develop and implement. Leading climate change economist Nicholas Stern went so far as to state that "curbing deforestation is a highly cost effective way of reducing

42 Conference of the Parties to the UNFCCC, Thirteenth Sess., Bali, Indonesia, Dec. 3–15, 2007, *Decision 2/CP.13, Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Decision 2/CP.13]. For an historical analysis of how REDD emerged on the climate agenda, see Humphreys, *supra* note 38.

43 The Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but no later than 2015 in order to adopt [a] protocol, legal instrument or agreed outcome with legal force - Decision 2/CP.17.

greenhouse gas emissions and has the potential to offer significant reduction fairly quickly."[44] There is a broad understanding that both private and public sectors would have a role to play in supplying funds through different fiscal mechanisms.[45] Eliasch estimated that to halve emissions through REDD+ by 2030 would require US$17–33 billion per year.[46] However, economists in general have underestimated the challenges faced in trying to develop and implement a successful REDD+ mechanism and the long-term costs associated with doing so. These predictions not only failed to take into account the real cost of resolving long standing financial and technical shortfalls within forestry administrations experienced in tropical forest countries, but also legal conflicts over forest land tenure for indigenous communities. In reality a REDD+ mechanism's real cost will be much greater and require longer to develop with a larger number of stakeholders engaged in the process.

Forest finance, including the impact of private investment, has for years been a contentious issue within a range of international forest-related meetings, forums and negotiations.[47] Like other areas of international environmental law the increasing penetration of neoliberal approaches, with an enhanced role for the private sector and voluntary rules, has resulted in a bias in how forest governance issues are approached.[48] The UNFCCC's Kyoto Protocol was at the forefront of taking forward market-based approaches to finance within a multilateral environmental treaty. As noted above, despite concerns over the CDM's effectiveness, including for forest-related projects, and questions relating to fairness, environmental integrity and equity a number of developing country Parties sought to broaden the scope of the CDM.[49] It is no coincidence that the current UNFCCC REDD+ is primarily

44 Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007) Cambridge University Press, p. 537.

45 Robert O'Sullivan et al, "Engaging the Private Sector in the Potential Generation of Carbon Credits from REDD+: An Analysis of Issues", *Report to the UK Department for International Development* (DFID), (4 August 2010) 8, 51.

46 Jonas Eliasch, *Climate Change: Financing Global Forests*, (2008) London, UK: Office of Climate Change.

47 Humphreys, *supra* note 1. p. 322.

48 Stephen Bernstein, "Liberal environmentalisms and global environmental governance", 2.3 *Global Environmental Politics* (2002) pp. 1–16.

49 Chukwumerije Okereke and Kate Dooley, "Principles of justice in proposals and policy approaches to avoided deforestation: Towards a post-Kyoto climate agreement", 20 (1) *Global Environmental Change,* (February 2010) pp. 82–95; Christina Voigt, "Is the Clean Development Mechanism Sustainable? Some Critical Aspects", 7(2) *Sustainable Development Law & Policy* (Winter 2008) pp. 15–21.

designed to be a market-based cap and trade mechanism despite not being included within the CDM.

In 2011 in Durban at UNFCCC COP 17, Parties agreed that from the "experience gained from current and future demonstration activities, appropriate market-based approaches could be developed … to support results-based actions by developing country Parties".[50] Key actors, including international financial institutions, such as the World Bank, were advocates of a market-based cap and trade global forest market from 2007. Benoit Bosquet, who led the development of the Bank's Forest Carbon Partnership Facility (FCPF),[51] stated, "the facility's ultimate goal is to jump-start a forest carbon market that tips the economic balance in favour of conserving forests."[52] The fund is closely aligned with the UNFCCC and guarantees that it will "seek to ensure consistency with the UNFCCC Guidance on REDD."[53] This has important implications for the design of rules and procedures, as well as safeguards, to realise UNFCCC REDD+. A REDD+ market-based trading mechanism requires certain legal issues to be addressed, including property rights over carbon, liability for the failure of a project and the access and benefit rights of forest-based communities including indigenous peoples.[54]

The 2013 Warsaw Framework recognised funds to implement REDD+ at a global scale were significantly lacking.[55] This situation existed despite developed countries pledging in December 2009 in the nonbinding Copenhagen Accord to provide US$30 billion, so-called "fast start financing", from 2010 to 2012 and to mobilise US$100 billion per year by 2020 in funding for climate

50 Decision 1/17 para.77.

51 The Forest Carbon Partnership Facility is 'performance-based payment system for emission reductions generated from REDD activities' that makes funding available to tropical forest countries seeking to develop REDD+ initiatives. By December 2013, the FCPF was collaborating with forty four forest developing countries (17 in Africa, 16 in Latin America and the Caribbean, and 11 in Asia-Pacific).

52 World Bank, Forest Carbon Partnership Facility Takes Aim at Deforestation, 11 December 2007 available http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21581819~pagePK:64257043~piPK:437376~theSitePK:4607,00.html.

53 Article 3.1c World Bank Forest Carbon Partnership Charter.

54 Sophie Chapman and Martijn Wilder, "Attracting Private Investment into REDD+ Projects: An Overview of Regulatory Challenges", *International Journal of Rural Law and Policy* (2013).

55 Decision 9/CP.19.

finance including REDD+.[56] These pledges were formalised by the COP as part of the Cancun Agreements that countries negotiated in December 2010. The amount of international funding for REDD+, therefore, will be largely dependent on the ability of developed countries to meet the long-term US$100 billion pledge and the types of sources they mobilise to do so. A significant portion—although definitely not all—of the long-term Copenhagen pledge of US$100 billion per year by 2020 is expected to flow through the UNFCCC Green Climate Fund. The mechanisms put in place by the Green Climate Fund will impact REDD+ funding, though what level of funds for REDD+ will come from the fund is not yet determined.[57] If funds are not made available in sufficient quantities, then developing countries will not be able, nor willing, to "implement the activities to slow, halt and reverse forest cover and carbon loss, in accordance with national circumstances, consistent with the ultimate objective of the Convention, as stated in Article 2".[58]

Under the UNFCCC developed Parties should provide "agreed full incremental costs" of climate action in developing nations as part of common but differentiated responsibilities and capabilities.[59] For developing country Parties these funds should be new, additional [to existing overseas development aid] and predictable. To meet the need for finance Parties agreed in December 2011, at the 17th COP in Durban, that "results-based finance provided to developing country parties that is new, additional and predictable may come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources" and that "appropriate market-based approaches [...] to support results-based actions by developing countries" could be developed.[60] In 2013 at the Warsaw COP Parties reaffirmed that results-based finance may come "from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources".[61] Such a diversity of potential funding sources will engage a wide range of stakeholders, each of whom may have different priorities in

56 Decision 1/CP.16.

57 Charlotte Streck and John Costenbader, *Standards for Results-Based* REDD+ *Finance: Overview and Design Parameters*, (2012) ClimateFocus available http://www.climatefocus.com/documents/files/standards_for_resultsbased_redd_finance.pdf.

58 Decision 1/CP.16, para 7.

59 United Nations Framework Convention on Climate Change, Article 4, Paragraph 3.

60 UNFCCC (2011). Decision 2/CP.17. Par. 66. U.N. Doc. FCCC/CP/2011/9/Add.1. (15 Mar 2012).

61 Decision 9/CP.19.

financing REDD+. Managing these different priorities to safeguard forest ecosystem functions and forest people's rights, as well as contribute to emissions reductions, will need strong and well implemented legal frameworks.[62] The UNFCCC COP has recommended safeguards as a way forward on this issue [see 5.3 below].

Notwithstanding the challenges of scaling up REDD+ finance UNFCCC Parties also need to address the complexities of delivering fiscal mechanisms that are fair, transparent and accountable. Poor forest governance and high levels of corruption beset many potential REDD+ countries.[63] To tackle these issues the UNFCCC COP decided that REDD+ financing should be distributed in three phases using a results-based approach.[64] Under the Warsaw REDD+ Framework Parties adopted a 'phased approach' to the distribution of results-based payments. The three phased approach would begin with the development of national strategies or action plans, policies and measures, and capacity-building. This would be followed by the implementation of national policies and measures, as well as national strategies or action plans, that could involve further capacity-building, technology development and transfer, and results-based demonstration activities. Finally these would evolve into results-based actions that would be fully measured, reported and verified.[65] The phased approach is seen to present measurable flexibility for countries with different challenges and capacities to establish the necessary REDD+ legal and institutional framework to implement the final mechanism.[66] The UNFCCC COP has introduced mandatory requirements to be met within the phased approach before results-based payments would be distributed to Parties, including a national forest monitoring system. Ultimately the credibility and acceptance of results-based finance frameworks depend on the rigor of the applied measurement methodologies and the transparency of the emissions reduction-crediting scheme used.[67] Parties have sought to address these issues through the decisions on MRV and safeguards.

62 Chapman and Wilder, *supra* note 55.

63 Transparency International, *Keeping* REDD+ *Clean: A Step by Step Guide to Preventing Corruption* (2012) Transparency International available http://issuu.com/transparencyinternational/docs/2012_keepingreddclean_en?e=2496456/1427494.

64 The UNFCCC phased approach drew on the World Bank's Forest Carbon Partnership Facility model. The FCPF established in 2007 is a funding programme for REDD+ projects.

65 Decision 1/CP.16, para. 73.

66 Streck and Costenbader, *supra* note 58.

67 Decision 9/CP.19.

### 5.2 *Monitoring, Reporting and Verification*

For the UNFCCC accurate carbon accounting is fundamental to ensuring that emissions reduction that counts towards a Parties legally-binding targets are legitimate. Monitoring, reporting and verification (MRV) are important elements in gaining the credibility needed to capture the potential benefits of the forestry sector. Monitoring involves measuring country progress from theoretically established mitigation baselines. Reporting can flow through either the national government, or independent review to allow for greater confidence. Verifying outcomes of particular mitigation strategies inspires mutual confidence in the international community.[68] Emissions and removals associated with biological systems can be difficult to estimate. Forests present a challenge to carbon stock accounting because of concerns over measurability, emission leakage, and permanence. These concerns are the reason why many land use, land-use change and forestry (LULUCF) activities were excluded from the Kyoto Protocol CDM eligible projects. Despite improvements in methods these are not always well developed, especially in many tropical forest developing countries.[69]

Advances in monitoring have largely occurred in developed countries. The UNFCCC Kyoto Protocol emission reductions targets required comprehensive MRV guidelines to be agreed and employed by Annex I parties. The IPCC developed a series of Guidelines which were adopted by the UNFCCC to be used for LULUCF accounting.[70] The use of the Guidelines and the accounting for LULUCF-related activities under the Kyoto Protocol has received criticism for it's loopholes that Parties can exploit to meet emission reduction targets, as well as practice unsustainable forestry to the detriment of either, or both, ecosystems and forest peoples.[71] Despite this the MRV of emissions and removals, forest carbon stock and forest area changes resulting from REDD+ should be consistent with UNFCCC the IPCC Good Practice Guidance for Land Use, Land Use Change and Forestry,

68 Bilala Bawany, *Know thy forests – technical barriers to reducing emissions from forests*, (2014) Major Economies and Climate Change Research Group, University of Texas, available https://blogs.utexas.edu/mecc/2014/04/04/know-thy-forests-technical-barriers-to-reducing-emissions-from-forests/.

69 Manuel Estrada et al, *Land Use in a Future Climate Agreement* (2014) Meridian Institute, available http://merid.org/~/media/Files/Projects/Advancing%20REDD/Land%20Use%20and%20ADP2%200nline%20FINAL.pdf.

70 IPCC, *Good Practice Guidance for Land Use, Land-Use Change and Forestry*, (2000) – revised in 2006 available http://www.ipcc-nggip.iges.or.jp/public/gpglulucf/gpglulucf.html.

71 Andrew K. MacIntosh, "LULUCF in the post-2012 regime: fixing the problems of the past?" Vol. 12 Issue 3 *Climate Policy* (2012), pp. 341–355.

data and information transparent and consistent over time, and with a verified established reference level.[72] This means that countries now understand how they will be judged and can develop their own systems.[73] This process is important because without verification, REDD+ funding will not be disbursed.

The onus lies with Parties to develop and manage their MRV systems, however, this needs to be undertaken in accordance with existing guidelines and approaches. All national MRV systems and forest reference levels will be verified at the international level. Previous COP decisions encouraged developing countries to establish a national forest monitoring system (NFMS) as part of their MRV system to better understand the drivers of deforestation and plan a REDD+ strategy.[74] The Warsaw Framework makes NFMS mandatory for all developing nations participating in REDD+ as part of a phased approach.[75] Importantly it stipulates what should be monitored and how. Developing countries must MRV "anthropogenic forest-related emissions by sources and removals by sinks, forest carbon stocks, and forest carbon stock and forestarea changes."[76] The Warsaw Framework also made MRV mandatory for results-based financial disbursements to ensure accountability.[77] This is a clear attempt to ensure comparability between NFMS and national MRV systems in light of there being no international system under the UNFCCC.[78] Given the significant differences in capacity between REDD+ countries' achieving comparable data sets on forest carbon accounting is a challenge. Korhonen-Kurki et al note that to overcome risks that "effective multilevel governance mechanisms, such as novel cross-scale institutional arrangements, uniform regulations on the rights, responsibilities and procedures for monitoring information flows, and participation across levels" need to be developed.[79] Doing so requires investment of human,

72 Decision 14/CP.19.

73 Fred Stolle and Ariana Alisjahbana, *Warsaw Climate Meeting Makes Progress on Forests, REDD+* (2014) *World Resources Institute*, http://www.wri.org/blog/2013/12/warsaw-climate-meeting-makes-progress-forests-redd.

74 Decision 4/CP.15 para. 1(d) – requested developing countries to develop a 'robust and transparent' NFMS.

75 Stolle and Alisjahbana, *supra* note 74.

76 Decision 1/CP.16 para. 70.

77 Decisions 1/CP.16.

78 David Tackas, "Measuring, Monitoring, Reporting and Verifying (MMRV): Negotiating Trust in Transnational Contracts for REDD+", 106 *American Society of International Law Proceedings* (2012) p. 518.

79 Kaisa Korhonen-Kurki et al, "Multiple levels and multiple challenges for measurement, reporting and verification of REDD+", Vol 7, No 2 *International Journal of the Commons* (2013) available http://www.thecommonsjournal.org/index.php/ijc/article/view/372/348.

technical and financial capital over the long term in countries, many of which are ranked low on international transparency indexes. This could have significant implications for the further development of MRV in other international forest law, especially those identified as co-beneficiaries from REDD+.

Building trust about national MRV and NFMS through knowledge sharing and transparency is important for accountability and legitimacy. To assist this process the COP agreed to establish an information hub on the REDD Web Platform to publish information on REDD+ results and corresponding results-based payments, with the aim to increase transparency.[80] The hub would feature information on REDD+ activities, including results-based payments, technical reports that describe how GHG emissions savings are calculated, national forest strategy and action plans, information on how safeguards are addressed, and more. Stolle and Alisjahbana argue that hub is a big step as it will increase the understanding of each country's successes by making all this information widely available. It will however only be as good as the information and data made available by Parties and other actors involved in REDD+ activities.

Concerns also continue regarding REDD+ MRV due to the focus on carbon over and above other ecosystem functions. Under the Warsaw REDD+ Framework the matrix for measurement remains carbon.[81] McDermott argues, amongst others, that this has had a distorting effect on the larger international forest governance discourse.[82] To counter imbalances the UNFCCC Parties have recognised the non-carbon values of forests, the co-benefits of other ecosystem functions and rights of forest-based communities, and sought to develop a safeguard mechanism to ensure they are not undermined by any REDD+ activities.

### 5.3 *Safeguards*

The popularity of REDD+ across a broad range of stakeholders' lies in its potential to simultaneously promote carbon and non-carbon values associated with forest conservation and sustainable development, particularly for the benefit of forest-based communities.[83] The UNFCCC COP decided that REDD+ must

80 Decision 9/CP.19.

81 Decision 14/CP.19.

82 Humphreys, *supra* note 1; Constance McDermott, "REDDuced: From sustainability to legality to units of carbon—The search for common interests in international forest governance", Vol. 35 *Environmental Science and Policy* (2014) pp. 12–19.

83 Constance McDermott et al, "Operationalizing social safeguards in REDD+: actors, interests and ideas", Vol. 21 *Environmental Science and Policy* (2012) pp. 63–72.

be "implemented in the context of sustainable development and reducing poverty."[84] The potential to realise non-carbon values, referred to as co-benefits, is why REDD+ is referred to as a win-win initiative for forests ecosystems, forest peoples and climate change. But to realise win-win outcomes a REDD+ mechanism faces complexities due to the multifunctional and multilevel governance of forests. It will be the institutions and organisations involved in defining, funding, MRV REDD+ activities who will determine the nature and extent of co-benefits.[85] Seymour believes there will undoubtedly be trade-offs resulting in winners and losers.[86] Who those winners and losers are depends to a large extent on the design and implementation of REDD+ safeguards.

'Safeguard' is a term that can be traced to financial institutions such as the World Bank, where it refers to measures to prevent and mitigate undue harm from investment or development activities.[87] In response to concerns, especially from forest peoples' non-governmental organisations, that a poorly designed REDD+ mechanism could have perverse negative impacts on forest ecosystems and forest dependent communities, the UNFCCC Parties in Cancun, Mexico, adopted safeguards for REDD+ activities.[88] Safeguards are intended to ensure that REDD+ is implemented in equitable ways and in accordance with a country's sovereignty.[89] The Cancun safeguard framework took the form of seven social and environmental safeguards defined as "policies and measures that aim to address both direct and indirect impacts on communities and ecosystems" from REDD+ activities.[90] The UNFCCC REDD+ safeguards include aspects of international and regional human rights instruments, such as "respect for the knowledge and rights of indigenous peoples and members of local communities' [as well as] "the full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities".[91] The safeguards are intended to encourage Parties to ensure that REDD+ activities "complement or are consistent with relevant international conventions and agreements".[92] For example, according to the Durban COP decision, the financing of REDD+ should ensure 'environmental integrity.' to be consistent with

84 Decisions 1/CP. 11 Annex I 1(g).

85 McDermott et al, *supra* note 84, p. 63.

86 Frances Seymour, *Forests, Climate Change and Human Rights*, 15 Centre for International Forestry Research, (2008) Bogar, Indonesia.

87 McDermott et al, *supra* note 84, p. 64.

88 Decision 1/CP.16, appendix 1, para. 2.

89 Stolle and Alisjahbana, *supra* note 74.

90 Decision 1/CP.16, appendix 1, para. 2.

91 Decision 1/CP.16, Appendix I, para. 2(c) and 2(d).

92 Decision 1/CP.16 Appendix I, para. 2(a).

international forest law's normative objectives.[93] In this sense REDD+ safeguards do not create new substantive obligations, they merely create a procedural mechanism to implement existing international law.

Parties' commitments to REDD+ safeguards have legally 'thickened' since first being introduced at Cancun in 2010. To achieve effective implementation of safeguards Parties are required to develop a system for providing information on how safeguards are being addressed and respected, a safeguard information system (SIS).[94] Initially a voluntary commitment the development of SIS is now linked to the prospect of obtaining results-based finance.[95] This link makes SIS a mandatory procedural requirement for Parties seeking to undertake REDD+ activities using funds held under the UNFCCC. Safeguards are to be 'promoted and supported', and evidence demonstrating this through an SIS is to be provided that can be verified internationally, regardless of the source or type of funding for UNFCCC REDD+ activities.[96] This applies to any actor involved in the implementation of REDD+ activities: including national governments, multilateral financial institutions, bilateral donors, civil society and the private sector, – who must comply with them. The Warsaw Framework establishes requires safeguards be measured and publicly reported every two years, with the first public reports due in December 2014. Especially notable is the requirement that countries should include a full assessment report on how safeguards are met.[97]

Qualifying terminology introduced by the COP, however, potentially could weaken the safeguards, and a continuing lack of clear guidance on SIS has raised concerns regarding their real value to ensuring co-benefits in a fair, equitable and accountable manner.[98] COP 17 agreed that the COP 16 imperative for developing countries to provide information on how safeguards are addressed and respected by stating "national circumstances and respective capabilities" should be taken into account while "recognising national sovereignty and legislation".[99] Guidance from the UNFCCC Subsidiary Body for Scientific and Technological Advice to "ensure transparency, consistency, comprehensiveness

93 Decision 1/17 para. 77.

94 Decision 1/CP.16 para. 71(d).

95 Decision 9/CP.19 para. 3.

96 Decision 2/CP.17 para. 63.

97 Decision 2/CP.17 para. 71 (e).

98 Albert A. Arhin, "Safeguards and Dangerguards: A Framework for Unpacking the Black Box of Safeguards for REDD+", *Forest Policy and Economics* (2014).

99 Rosemary Lyster, "International Legal Frameworks for REDD+" in Rosemary Lyster, Catherine MacKenzie and Constance McDermott (eds), *Law, Tropical Forests, and Carbon: The Case of REDD+* (2013) Cambridge University Press, pp. 3–26 p. 13.

and effectiveness when informing on how all safeguards are addressed and respected" is however, only required 'where appropriate' in the implementation of REDD+ activities.[100] The 'where appropriate' leaves scope for Parties to not apply safeguards as rigorously as necessary to achieve their end objective. Moreover ambiguity surrounding how to prioritise safeguards different values (e.g. carbon versus biodiversity versus social benefits), and what constitutes an adequate safeguard, could severely undermine their potential to raise the governance standards in developing countries where REDD+ activities take place.[101]

The Cancun REDD+ safeguards, and subsequent decisions, are potentially significant because they provide a "*lato sensu* normative environment that States need to take into consideration when they carry out REDD activities."[102] REDD+ safeguards' promise is acting as a conduit, linking fragmented areas of international forest law, including human and indigenous peoples' rights, in a manner that improves implementation of shared objectives. Levin et al. have argued that the emphasis on safeguards in REDD+ has provided a space in which the inter-linkages of forest related law from rights-based approaches could be explored to greater depth.[103] It is this that makes UNFCCC REDD+ safeguards potentially a game changer for international forest law and governance. Saveresi, however, argues that without an institutional interlocutor that can provide guidance on overlaps between REDD+ and instruments dealing with all areas of forest related law, including indigenous peoples' rights, cooperation will be limited.[104] But this may be too much a top-down perspective. Country led SIS as mandated by the Warsaw REDD+ Framework may lead to more coherent, legitimate and effective REDD+ implementation that involves key stakeholders and results in the delivery of non-carbon benefits, particu-

100 *Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emissions levels and forest reference levels as referred to in decision 1/CP.16* – available http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_safeguards.pdf.

101 McDermott et al, *supra* note p64.

102 Annalisa Saveresi, "The Human Rights Dimension of REDD", 21 (2) *Review of European Community & International Environmental Law* (July 2012) pp. 102–113 p. 111; see also D. Murphy, "*Safeguards and Multiple Benefits in a REDD+ Mechanism",* (2011) International Institute for Sustainable Development, pp. 102–113.

103 Kelly Levin, Constance L. McDermott, and Benjamin Cashore, "Building the Forest-Climate Bandwagon: REDD+ and the Logic of Problem Amelioration," 11(3) *Global Environmental Politics*, (2011) pp. 85–103.

104 Saveresi *supra* note 103.

larly for forest-based communities.[105] To achieve this ambitious goal will require strong legal frameworks and governance to be developed in tropical forest countries, many of which face immense challenges to the rule of law on a day-to-day level. Safeguard advocates argue that it is through SIS, especially if these are country led and have the full participation of forest peoples' communities, that REDD+ will have a beneficial impact on forest law and governance both internationally and nationally.

UNFCCC COP decisions have established a REDD+ framework since 2007. The key elements on finance, MRV and safeguards have each evolved through an iterative process drawing on international forest law treaties and tools, such as safeguards from international organisations like the World Bank. Although under traditional international legal theory the UNFCCC REDD+ mechanism has limited legal status it has by proxy, especially through permitting REDD+ pilot projects had law-making effect through interactions with other actors and treaty regimes. The final section examines how these interactions beyond the UNFCCC are occurring, through information sharing, participation and treaty regime cooperation. It also highlights the need for ongoing advocacy by more marginalised stakeholders to contribute to shaping future forest related laws and policies.

## 6 REDD+ Pilots: Learning by Doing?

Commentaries on COP decisions law-making effects emphasise the iterative interactions, enabled by treaty decision-making bodies, that can facilitate opportunities for more inclusive creative and flexible approaches to international law-making.[106] Wiersema argues that with COPs ability to "infiltrate national boundaries" they can allow for treaty obligations to be applied more easily at the local level by moving beyond the international scale and contributing to multiple, nested scales of management required for sound environmental protection.[107] In the case of forests and the UNFCCC there is a clear attempt to facilitate flexible opportunities for international law-making. From the outset the UNFCCC COP has piloted REDD+ activities. The Bali REDD+ decision itself gave a 'green light' for Parties "to explore actions, including

105 Daniela Rey, Steve Swan, Adrian Enright, A. *A country-led approach to REDD+ safeguards and multiple benefits*. (2013) SNV – The Netherlands Development Organisation, Ho Chi Minh City, Vietnam.

106 Brunnée, *supra* note 8.

107 Wiersema, *supra* note 3, p278.

demonstration activities; provide indicative guidance for demonstration activities; and to mobilise resources."[108] This encouraged experimental REDD+ pilot activities before any legal agreement on principles, rights, safeguards, finance, monitoring, reporting and verification was reached under the UNFCCC.[109] The decision, founded upon a 'learning by doing' ethos, was intended to provide important insights from pilot projects for negotiators who were involved in developing a legal architecture for a REDD+ mechanism within the UN climate change regime.[110] Whether this has provided a procedural channel for building REDD+ based on real life experiences or merely let the 'genie out of the bottle' over which there is virtually no control for the UNFCCC Parties is a key question.

Ideally, COPs provide a forum for activity that "not only allows information to move from the top down to lower levels of governance and management, but can also allow information to move more readily from the bottom upward. COP activity allows information to move both ways by allowing for more participation by NGOs, scientists, and other private parties, and, more importantly, by relying on these groups for information that in turn feeds into the possibilities to respond to the information."[111] In the case of REDD+, multiple and diverse actors and processes have engaged in climate change governance and policy-making because of the pilot approach adopted. International organisations, like the World Bank, have been at the forefront of the development of REDD+. The gathering, collating and exchange of information, data and experiences from pilot REDD+ initiatives is necessary for there to be any 'learning by doing'. Alliances, memoranda of understanding and mutual collaborations across actor groups, including large conservation organisations, investment banks and multinational corporations, international organisations, indigenous peoples and civil society, are integral to how REDD+ has, and continues to evolve. The World Bank's FCPF, in line with the Bali COP decision on REDD+ pilot projects. It claims that all "knowledge gained in the development of the Facility and implementation of Readiness Preparation Proposals and Emission Reductions Programs' will be 'disseminated widely".[112]

108 Decision 2/CP.13.

109 Decision 2/CP.13.

110 Feja Lesniewska, "REDD: The Copenhagen Effect", 6/1 *Law, Environment and Development Journal* (2010), p102.

111 Wiersema, *supra* note 3, p283.

112 Article 2. Section 2.1 International Bank for Reconstruction and Development, Charter Establishing the Forest Carbon Partnership Facility [herein after referred to as the 'FCPF Charter'], revised 11 May 2011 available http://www.forestcarbonpartnership.org/fcp/sites/

The establishment of the REDD Web Platform to publish information on REDD+ results and corresponding results-based payments, with the aim to increase transparency has the potential to increase the legitimacy of projects.[113] However, this can only occur when all actors can access the channels through which to provide information, and also have the resources to engage. It is the COP activity that facilitates the contributions of other actors to the treaty regime. In many ways it helps to create a community of participants operating within a particular treaty or set of treaties. There is a danger however, that an elite technocratic capture develops which becomes increasingly self-referential, undermining inclusive, participatory law-making processes that are informed from experience.[114] Only by engaging forest peoples through their free, prior informed consent will a legitimate, equitable and effective REDD+ emerge.

## 7 UNFCCC REDD+: Building Synergies beyond the Climate Regime

The UNFCCC REDD+ mechanism is, by its nature, directly linked to a much broader discourse on international forest law. This can result in overlaps across different forest related regime activities providing opportunities to build synergies, e.g. in reporting mechanisms. Ensuring that any overlaps resulting from COP decisions do not conflict requires communication and coordination between treaty bodies, as well as other related institutions and organisations, including non-state actors. The CBD and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) are two components of international forest law. Both have had a significant influence on how the UNFCCC REDD+ has evolved; one through inter-regime cooperation, the other as a result of advocacy both within the UN system, as well as by indigenous peoples rights organisations.

With REDD+ other international forest related law treaties and agreements have sought to communicate and coordinate with the UNFCCC treaty bodies, none more so than the UN CBD Secretariat. Discussions on forests under the UNFCCC and Kyoto Protocol, on the one hand, and the CBD, on the other, were the original focus of debates on synergies between the two regimes and remain very contentious now that attention has turned to REDD+. Specifically, COP 9

forestcarbonpartnership.org/files/Documents/PDF/May2011/FCPF%20Charter%20-%20CF%2005-11-2011%20redlines.pdf.

113 Decision 9/CP.19.

114 Martti Koskenniemi, "The Politics of International Law – 20 Years Later", Vol. 20 Issue 1 *European Journal of International Law* (2009) pp. 7–19.

called on Parties, other governments and international organisations, to ensure that "REDD+ activities do not run counter to the objectives of the Convention on Biological Diversity."[115] Eventually, the CBD Parties at COP 10 agreed to a less ambitious plan. With a view to raising existing, *ad hoc*, collaboration to a more programmatic interaction with the UNFCCC. The CBD COP 10 requested the CBD Secretariat to convey a "proposal to develop *joint activities* between the Rio Conventions" (UNFCCC, CBD and the UN Convention on Combating Desertification) to their Secretariat, abandoning an earlier more ambitious specific idea of a joint programme.[116] COP 10 also drew up proposals defining the role of the CBD in the application and monitoring of biodiversity safeguards for REDD+.[117] Overall these developments under the CBD provide a path for international cooperation on forests, biodiversity, and climate change, with a view to ensuring environmental sustainability in a holistic way, both within and without the international climate change regime. The guidelines to CBD Parties provide pragmatic suggestions, aimed to ensure the mutually supportive implementation of the obligations of the CBD and REDD+.[118]

At COP 16 the UNFCCC noted that "the General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples." Parties agreed "when under- taking [REDD+] activities, respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws' should be supported."[119] Actual recognition of indigenous peoples' rights could not be included in the UNFCCC text due to the legally non-binding nature of UNDRIP. This decision by the UNFCCC COP was welcomed as concerns that REDD+ activities may constitute a threat for indigenous peoples rights were shared by many, especially amongst advocacy groups.[120] However, the UNDRIP specifically requires any matters that impact indigenous peoples' rights to be handled through a 'process of free, prior and informed consent.' Under Article 32, States are required to obtain the free, prior and informed

115 CBD COP Decision IX/5.

116 CBD COP decision X/33.

117 CBD COP decision X/33.

118 CBD COP decision X/33.

119 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', in Report of the Conference of the Parties on its sixteenth session, held in Cancun, 29 November–10 December 2010 (FCCC/CP/2010/7/Add.1, 15 March 2011), Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session.

120 Lorenz Cotula and James Mayers, *Tenure in REDD: Start-point or After- thought?*, (2009) IIED.

consent of indigenous peoples before approving projects that may affect their lands. Furthermore, indigenous peoples are provided the right to redress, including restitution and a right to compensation if restitution of the land is not possible.[121] Although the legal status of UNDRIP remains disputed, its impact in determining the development of law and policy relating to indigenous peoples is not.[122] It represents an important step towards the recognition and protection of indigenous peoples' rights at the international level. The interplay with REDD+ has provided an opportunity to further indigenous peoples rights recognition based on the UNDRIP.

Both the above examples, the CBD and the UNDRIP, illustrate the institutional communication and collaboration by UNFCCC relating to REDD+. Although limited, and at times fraught, these efforts are pushing a dialogue that can build synergies and avoid conflicts down the line. Yet concerns remain whether it is REDD+ that is setting the terms of the discourse rather than broader issues of international forest governance.[123]

## 8 Conclusion

International forest law is composed of a number of diverse treaties and agreements. Since 2007 the UNFCCC negotiations on REDD+ have dominated forest law-related discourse at the international level. Although formally the UNFCCC REDD+ mechanism has no legal force it has clearly infiltrated both international and national forest law-making processes. This process of law shaping has particularly been aided by a pilot based approach to developing the mechanisms drawing on a learning by doing ethos whereby multiple actors beyond the state were invited to participate in REDD+ project experimentation, feeding back lessons learnt to the UNFCCC COP. The UNFCCC REDD+ mechanism is also shaped by existing international forest-related norms, including those relating to biodiversity, sustainable forest management and indigenous peoples rights. The degree to which this is followed through when REDD+ is implemented will depend on strong enforcement of all safeguards.

121 Art 28.1 UNDRIP.

122 Jose Rodríguez-Pinero Royo '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration', in: C. Charters and R. Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, International Work Group for Indigenous Affairs, (2009), p. 314.

123 Humphreys, *supra* note 1.

The UNFCCC REDD+ mechanism is a valuable example of COPs as law-makers. The UNFCCC has essentially created a sub-regime that has become a centre point around which all international forest law themes oscillate and appear now to gauge their own developments. It has achieved this through a flexible, iterative process. Yet it is important that international forest law evolves in a balanced manner and is not hijacked by certain substantive and procedural elements within the REDD+ mechanism. REDD+ should be part of international forest law not the other way round. The UNFCCC COP also illustrates the need for mechanisms to ensure equitable, fair and transparent participation in these new law-making processes to realise legitimate outcomes. Again this comes back to safeguards and essentially a commitment to strengthen the enforcement of existing international forest law and governance.

# Governing the Environment without COPs – The Case of Water

*Philippe Cullet*

**Abstract**

COPs have played a key role in governing the environment. Yet, COPs have only provided the institutional framework for governing issues falling under existing treaty regimes. They have not been able to go beyond the regimes they govern. In the case of water, the absence of a well-developed treaty regime has opened the door to new non-governmental institutions taking the lead. This happens to coincide in part with the framework proposed by global administrative law that sees governance as a set of largely non-hierarchical relationships where states are not necessarily dominant. This chapter critically analyses the contribution that global administrative law makes to our understanding of environmental stewardship, and looks at ongoing institutional reforms in the water sector that are not based on COPs being the main actor.

**Keywords**

international environmental law – environmental governance – water governance – private governance – water law and policy

## 1 Introduction

Environmental stewardship has developed in a variety of ways over the past two decades. The early years of international environmental law saw the relatively fast creation of principles, norms and standards, at least up to the United Nations Conference on Environment and Development (UNCED) and the adoption of the Rio Declaration.[1]

The spurt of standard creation progressively gave way to a period of consolidation during which a number of existing regimes have grown internally, both institutionally and substantively. It is in this context that conferences of the

1 Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/26 (Vol. I).

 | DOI 10.1163/9789004297845_007

parties to various environmental treaties have made an immense contribution, as reflected in the various papers published in this book.

The contribution of Conferences of the Parties to environmental stewardship notwithstanding, some separate developments can also be highlighted. Indeed, the environment, like other sectors, has been subject to tremendous pressure over the past couple of decades in the context of neoliberal reforms. This is particularly true with regard to the progressive diminution of the importance of states as the primary actors of governance and the growing emphasis given to the role of non-state actors, in particular the private sector and civil society.[2] This has had an impact on the role played by states and state-led institutions, such as Conferences of the Parties. This was illustrated at the Rio+20 summit where some participants did not believe or expect that states were the main actors.[3]

Within the environment sector, some areas have never developed entirely along the traditional model centred around a treaty and a conference of the parties. This is, for instance, the case of water. In the water sector, a superficial reading of the situation indicates that there is one main water treaty, the UN Watercourses Convention.[4] Yet, this treaty is not a framework water treaty since it focuses specifically on watercourses. While hard law is sparse in this area, there has been a sustained effort to develop legal instruments in this field. The peculiarity of the water sector is that some of the key developments have taken place outside of the UN, in institutions set up specifically to provide more direct representation to non-state actors.[5] Further, instruments adopted are all soft law. Yet, the informality of these arrangements masks their effectiveness on the ground since the international water policy consensus has become part of the core fabric of the water sector in many countries of the South. This highlights some of the new ways in which the national mixes with the international in the context of issues, which are local, national and global at the same time, such as water or climate change.

2 E.g., Robert Falkner, 'Private Environmental Governance and International Relations – Exploring the Links', 3(2) *Global Envtl Politics* (2003) 72.

3 Herbert Docena, From Culprits to Saviors: The Triumph of Green Capital at the Rio+20 (4 July 2012), available at http://isa-global-dialogue.net/from-culprits-to-saviors-the-triumph-of-green-capital-at-the-rio20-july-4-2012/.

4 Convention on the Law of the Non-navigational Uses of International Watercourses, New York, 21 May 1997, UN Doc. A/51/869.

5 This is, for instance, the case of the World Water Council, about which see text at note 45.

This article first highlights some of the patterns of change that can be identified in environmental stewardship over the past two decades. It then examines the contribution that global administrative law makes to our understanding of environmental stewardship. The next section then analyses specifically the water sector, one of the areas of the broader environmental sector that best highlights some of the most significant changes that have taken place in recent years.

## 2 Evolution of Environmental Stewardship

Stewardship of the environment at the international level has witnessed a significant evolution over the past four decades. The environment sector is of particular interest because it has evolved partly in tandem with other sectors and partly by developing its own special framework.

In the early 1970s, the shaping of the stewardship of the environment was based, as for other sectors, on an institutional framework centred around states and UN institutions. At the same time, the environmental sector was from the start distinct from other sectors. This is in part the case because states never gave environmental governance a strong centre in the form of a world environment organisation.[6] The setting up of the UN Environment Programme (UNEP) was a very powerful statement by UN member states that the environment had become a key issue at the international level. Yet, the specific way in which UNEP was set up made it a relatively weak institution from the outset.[7]

The lack of a clear power centre for environmental issues soon led to a process of fragmentation within what was still a traditional model where state-led institutions were at the centre. One of the hallmarks of the fragmentation affecting the environmental sector has been the growing role of the Conference of the Parties (COP)/Meeting of the Parties (MOP) in fostering the implementation of treaties and the further development of the regime to which they are attached. COP/MOPs have thus played a key role both in relatively specific treaties, such as the Whaling Convention,[8] or in the case of framework conventions, such as the climate change and biodiversity conventions.[9] They have

6 E.g., Nils Meyer-Ohlendorf, 'Would a United Nations Environment Organization Help to Achieve the Millennium Development Goals?', 15(1) *Rev. Eur. Community & Int'l Envtl. L.* (2006) 23.

7 E.g., Bharat H. Desai, 'UNEP: A Global Environmental Authority?', 36(3–4) *Envtl Poly & L.* (2006) 137, 140.

8 International Convention for the Regulation of Whaling, Washington, 2 December 1946.

9 United Nations Framework Convention on Climate Change, New York, 9 May 1992 and Convention on Biological Diversity, Rio de Janeiro, 5 June 1992.

helped to strengthen treaties from within in different ways: This has included giving specificity to the treaty where it was lacking, as in the case of the Ramsar Convention's listing criteria.[10] In other cases, the COP/MOP has contributed to the implementation of the treaty through the development of provisions insufficiently articulated in the main instrument. This was, for instance, the case of articles 6, 12 and 18 of the Kyoto Protocol.[11] Further, COP/MOPs have also contributed to the development of additional legal instruments, as in the case of the protocols to the Biodiversity Convention.[12]

The environmental framework has evolved alongside the increasing complexity of the issues addressed and attempts to bring more specificity to the implementation of existing treaties. In a context where international environmental institutions do not necessarily have the financial, human or administrative resources to perform all the tasks associated with the implementation of a particular treaty, an increasingly complex web of relationships between international regimes and member states has developed. This can already be identified in an early convention such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora that specifically relies on a close collaboration between its own institutions and national level management and scientific authorities.[13] Ongoing globalisation has further reinforced the web of links between the national and international levels. The basic cooperation between national and international authorities has given way to a broader array of relationships, including a variety of non-state actors contributing to setting up and implementing environmental regimes in formal and informal contexts.

Over the past couple of decades significant changes have taken place in the way the environment sector is governed. The central role that states played has

10 E.g., Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', 31 *Mich. J. Int'l L.* (2009) 231.

11 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997 and decisions 15/CP.7, 16/CP.7 & 17/CP.7, *in* Report of the Conference of the Parties on its Seventh Session, Marrakesh, 29 October-10 November 2001, UN Doc. FCCC/CP/2001/13/Add.2.

12 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 20 January 2000 and Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010.

13 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, Art 1(f) and (g). See also Christine Fuchs, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) - Conservation Efforts Undermine the Legality Principle', 9 *German L.J.* (2008) 1565.

increasingly been challenged in a variety of ways. Firstly, COP/MOPs have had to gradually share their central position with a broader range of actors. This participates of a broader process whereby non-state actors have been taking increasingly visible roles in international affairs. In the environmental context, this includes the progressively much more direct involvement of the private sector in negotiating rooms, such as in the context of the Biodiversity Convention.[14] A much more visible change can be identified in the climate change regime. The UN Framework Convention on Climate Change included a relatively innocuous provision that provided the basis for Activities Implemented Jointly.[15] This subsequently led to the development of the three Kyoto mechanisms directly involving the private sector.[16] Interestingly, the Kyoto mechanisms turned out in the intervening period to be one of the linchpins of the whole climate change regime. This confirms that forms of public-private governance have started to impact significantly on traditional international environmental stewardship.

Secondly, there has been evolution in the range of institutions involved in the stewardship of the environment at the international level. While a majority of key developments in the 1970s and 1980s originated in the context of UN institutions or forums constituted of states, their grip has progressively weakened over the past two decades. In particular, private environmental governance has rapidly developed.[17] This includes initiatives from organisations with a general mandate, like the International Organisation for Standardisation that has also addressed environmental issues through the creation of a global standard for environmental management systems.[18] There are also organisations focusing specifically on water, such as the World Water Council, an organisation with a broad membership but with an important representation of the private sector as well as professional organisations,[19] which have played a key role in the development of water-specific soft law.

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14 E.g., Natasha Affolder, 'The Market for Treaties', 11 *Chi. J. Int'l L.* (2010) 159.

15 United Nations Framework Convention on Climate Change, New York, 9 May 1992, Art 4(2)(a). See also Donald M. Goldberg and Glenn M. Wiser, 'Rethinking The JI Pilot Phase: A Call for Independent Evaluation and a Legal Framework', 3-*FALL Widener L. Symp. J.* (1998) 385, 388.

16 E.g., Irja Vormedal 'The Influence of Business and Industry NGOs in the Negotiation of the Kyoto Mechanisms: The Case of Carbon Capture and Storage in the CDM', 8/4 *Global Environmental Politics* 36 (2008).

17 E.g., Falkner, *supra* note 2.

18 E.g., ISO Standards, ISO 14001:2004.

19 For the list of members as of March 2015, see http://www.worldwatercouncil.org/fileadmin/world_water_council/documents/wwc-membership/List_of_Members_March_2015.pdf.

## 3 Global Administrative Law and Stewardship of the Environment

Evolving environmental stewardship can be analysed within the field of international environmental law as well as in relation to developments elsewhere. In a context where an increasing array of issues are analysed through the lens of globalisation, it is important to take stock of the contribution that broader debates can make to an understanding of environmental stewardship. Indeed, the environment is one of the quintessential case studies of globalisation. This is not only due to the fact that a number of environmental problems are truly global in scale but also because sustainable and equitable solutions to these problems require taking action at the same time from the most local level to the global level.

The debates on something identified as 'global administrative law' constitute one of the entry points for identifying lessons that may be learnt for the further development of environmental stewardship. This section reviews and critically analyses some of the key features of global administrative law from the standpoint of environmental stewardship.

At the outset, global administrative law can be identified as an extension of an older phenomenon called international administrative law that was seen as encompassing legal rules at the national and international levels dealing with administrative activity on the international plane.[20] Global administrative law is the twenty-first century avatar, based on the idea that much of global governance can be analysed as administration.[21] One of the key elements highlighted is the idea that there is a global administrative space that brings together private, local, national and inter-state regulation in a context including international institutions, transnational networks and domestic administrative bodies.[22] One of the distinguishing features of global administrative law is that it includes a much broader array of actors and institutions that go beyond traditional state-based instruments and institutions. It also highlights the increasing engagement of administrative bodies at the national and international levels in regulatory cooperation and in implementation.[23]

20 E.g., Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law', 20 *Eur. J. Int'l L.* (2009) 23.

21 For a definition of global governance that shares a lot with that of global administrative law, e.g., Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9/11 *German Law Journal* (2008) 1375.

22 E.g., Kingsbury *supra* note 20, 24.

23 E.g., Alexander Somek, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *Eur. J. Int'l L.* (2009) 985.

One of the key features of global administrative law is that it is not structured around a hierarchical system.[24] In fact, it specifically moves away from the existing structured and hierarchical system of norms and institutions towards recognising a set of looser relationships, wherein a UN Security Council resolution can be put side by side with a resolution of the World Water Forum,[25] without prejudging their respective weight or legitimacy. To some extent, global administrative law entirely rethinks the international governance framework by moving beyond existing legal and institutional structures. This impacts not only international governance but also domestic administration. Indeed, the basic concept seems to put all administrators on the same plane. This not only puts domestic and international regulators in a new relationship but also implies that various forms of administration, in particular private governance, are to be factored in on a level of equality with states. This reconstitution of relations between the national and international level has the potential to ensure that global institutions do not undermine national institutions. Yet, this has been increasingly controversial as international institutions are strengthened, while state institutions – in particular in the South – are losing part of their regulatory and financial capacity to administer. Further, the global administrative law project has the potential to undermine democratic institutions by putting all administrative structures in a parallel framework where nations' states do not play a dominant role but are not replaced by other democratic structures.[26]

Another dimension of global administrative law is its emphasis on process rather than substance. On the one hand, it emphasises procedural fairness, transparency and accountability. On the other hand, it functions largely as a pragmatic tool rather than proposing a set of basic principles for equitable and sustainable governance.[27] In general, global administrative law seeks to enhance the legitimacy of global administration but does this in a manner, which removes it from traditional political processes.[28] Thus, while it seeks to foster more legitimacy in global administration it may at the same time undermine existing democratic processes. In other words, global administrative law may have positive impacts for the management of regimes but does not address

24 *Ibid.*, 986.

25 On the World Water Forum, see *infra* note 52.

26 E.g., Ming-Sung Kuo, 'Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Global Constitutionalism', 10 *San Diego Int'l L.J.* (2009) 439.

27 *Ibid.*, 447.

28 *Ibid.*, 456.

underlying politics.[29] This participates of a trend that portrays governance as largely apolitical.[30]

Global administrative law situates itself in a context where nation states are in retreat. It thus assumes that the world has entered a post-Westphalian status wherein a range of other actors have challenged nation states' supremacy and have acquired the legitimacy to take on specific roles in global administration. This brings a new plurality to international governance. This plurality of actors involved in global administration brings with it a concomitant informality insofar as the traditional formal structures, such as UN institutions, are sidelined.

The recognition of these trends is a welcome step that needs to be emphasised. Global administrative law, however, fails to address these developments with a critical eye. Firstly, plurality implies for all practical purposes a much stronger role for private actors in global governance. Global administrative law seems to simply assume that what is in effect a trend towards forms of privatisation of global governance is to be welcomed and that private legitimacy can replace public legitimacy without affecting the bases of global governance.[31] Secondly, it seems to imply that informality is a step forward in ensuring more rational outcomes. Here, global administrative law fails to critically examine the consequences of dismantling existing frameworks of governance without replacing them with another set of basic principles ensuring fairness and equity.[32]

From the point of view of environmental stewardship, the understanding fostered by global administrative law is important. Indeed, the framework proposed by global administrative law coincides in part with developments in environmental stewardship over the past couple of decades. At the same time, global administrative law neither effectively describes evolving environmental governance nor provides an appropriate framework for reform. The point concerning fragmentation is, for instance, of particular interest in the context of environmental stewardship that has been affected by this phenomenon more or less since its inception. However, environmental governance's fragmentation started before private sector actors began playing a more formal role in

29 E.g., David Kennedy, 'The TWAIL Conference: Keynote Address Albany, New York April 2007', 9 *International Community Law Review* (2007) 333.

30 E.g., Matthew Paterson, David Humphreys and Lloyd Pettiford, 'Conceptualizing Global Environmental Governance – From Interstate Regimes to Counter-Hegemonic Struggles', 3(2) *Global Envtl Politics* (2003) 1.

31 E.g., Ming-Sung Kuo, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *Eur. J. Int'l L.* 7 (2009) 99.

32 C.f. Kuo *supra* note 26, 445.

environmental governance and is thus more complex than what global administrative law describes. Indeed, environmental stewardship is today both fragmented within the traditional governance framework centred around nation states and with regard to recent developments where non-state actors have started playing an increasingly important role in the administration of environmental regimes.

More broadly, global administrative law fails to engage with some of the basic issues that underlie most of international environmental stewardship. In particular, the attempt to assume that the world is post-Westphalian does not answer any of the difficult questions concerning the North–south dimension of virtually every environmental problem addressed at the international level. Indeed, one of the basic unresolved issues is that the framework through which states engage with each other assumes that they are equal from the negotiation to the implementation stage, when states are in fact unequal. International environmental stewardship has in part shown a method of redefining the way in which international regulation is conceived. The concept of differential treatment, which seeks to move beyond traditional categories of international governance, constitutes a first step forward in attempting to redress procedural and substantive inequity in the existing international governance framework, in particular between developed and developing countries.[33] Global administrative law does not address this contribution of environmental governance to tackling basic shortcomings of the Westphalian model in the context of global issues. Further, it does not propose an alternative that would provide a set of substantive principles to move forward. In fact, it has the potential to make the system more inequitable because the least developed states that benefit today from a basic level of support in the inter-governmental environmental stewardship context consistently fare badly in existing private environmental governance contexts.[34]

On the whole, the contribution of global administrative law seems to be limited to highlighting ongoing patterns of change that affect various areas of global governance, including environmental stewardship. Since it does not engage with substantive issues in any depth, the only way to approach the issue in more detail is by looking at areas where some of the development of plurality and informality as conceived by global administrative law is most vis-

33 E.g., Philippe Cullet, 'Common but Differentiated Responsibilities', *in* Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds,), *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010), p. 161.

34 E.g., Falkner, *supra* note 2, 78.

ible. In an environmental context, this happens to be in the area of water, which is examined in more detail in the next section.

## 4 Evolving Stewardship – The Case of Water

As indicated at the outset, water is a sector where there is little international law, as confirmed by the fact that the only global convention identified as a water convention has not even come into force. The lack of a well-established state-based multilateral regime of the kind found in environmental law by the beginning of the last decade of the twentieth century provided an apt ground for significant reforms in the water sector, given the important regulatory gaps at the international level.

The lack of a comprehensive treaty regime in the water sector can be explained in part by the fact that water is often considered as part of environmental law. While this is correct and many environmental law treaties include a water dimension, this does not provide the basis for addressing all the various issues related to water. Thus, approaching water from an environmental law perspective does not provide a comprehensive basis for either addressing drinking water or irrigation. In addition, current environmental law has failed to address in enough specificity issues related to the global dimension of water (the global water cycle) that is intrinsically linked to global environmental change but also needs to be addressed separately.

The absence of a wide-ranging body of water law at the international law level in a context where water is increasingly important in international relations points to a significant gap in governance. This has not remained unnoticed by actors with growing vested interests in this sector. The increasing importance of water for business at the national and international levels has thus led to a flurry of activity that largely takes place in parallel with traditional state-based institutions. This does not mean that the UN system has no stake in the water sector, as highlighted by the setting up of the coordinating structure known as UN-Water. Yet, the latter does little more than profiling existing activities of UN organisations concerning water. It is thus specifically tasked with enhancing the 'coherence, credibility and visibility' of the UN system in the water sector but does not have a mandate to take forward water policy development.[35]

The governance framework for water at the international level in effect started shifting away from the UN in the early 1990s while the preparations for UNCED were taking place. Water was one of the important issues addressed at UNCED, as reflected, for instance, in the fact that Agenda 21 devoted its whole

35 UN Water, Terms of Reference, version of 25 August 2012, para. 11.

chapter 18 to water.[36] Yet, within the water sector, it is not chapter 18 that has had the most influence on subsequent policy developments at the national and international levels. It is rather the Dublin Statement adopted at the International Conference on Water and the Environment (Dublin Conference) that has come to dominate water policy, in particular its call for water in 'all its competing uses' to be recognised as an economic good.[37]

In view of the key role of the Dublin Statement in the past two decades, further background on its adoption is required. The Dublin Conference was organized in the context of the preparations for the UNCED but was separate from the meetings of the Preparatory Committee. This was due in part to the fact that UNEP and the WMO had planned on organising a technical conference before international policy attention focused on the preparations for UNCED.[38] This led to a hybrid formula. On the one hand, the proposed conference was to act as the formal entry for issues related to water for UNCED.[39] On the other hand, representation in the conference was not organised according to the practice that the UN General Assembly followed, for instance, in the Preparatory Committee for UNCED.[40] Indeed, the conference was not attended by government representatives but by a diverse mix of people, focusing on expert participants.[41]

The choice of experts to attend the Dublin Conference was not inappropriate considering that it was meant to be a technical conference in the first instance. What is more surprising is that a technical meeting attended mostly by experts adopted a policy statement that has come to be regarded as the definitive international water policy statement. The fact that the Dublin Statement had little legitimacy in itself was recognised from the outset. Indeed, the statement was only 'commended' to government representatives attending UNCED.[42]

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36 Agenda 21, Report of the UNCED, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1, Annex II) c 18.

37 Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992, principle 4.

38 Letter from GOP Obasi to J Pérez de Cuéllar, No 37.760/H/S-118, dated Geneva, 23 October 1990.

39 Preparatory Committee for the UNCED, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources, UN Doc. A/CONF.151/PC/73 (1991) 3.

40 E.g., United Nations General Assembly Resolution 44/228, United Nations Conference on Environment and Development, 22 December 1989, UN Doc. A/RES/44/228, II.1.

41 Preparatory Committee for the UNCED, *supra* note 39, 5.

42 *See* Introduction to the Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992.

In addition to procedural issues, the language of Agenda 21 and the Dublin Statement differ. There is thus no basis in Agenda 21 to assume that the international community believes that water is an economic good in all its dimensions since it uses a much more balanced formulation.[43] It is thus surprising that the principles contained in the Dublin Statement are today often referred to as the Dublin-Rio principles.[44] This would be of little consequence if these principles had been subsequently widely debated in UN forums. In practice, however, international water policy has evolved since 1992 largely through meetings organised outside of a UN context. Further, it is instruments adopted outside of the UN that have been the most influential, even if they lack in formal legitimacy.

The evolving international water policy has been driven in part by two institutions set up in the aftermath of UNCED. The World Water Council is usually described as a think-tank and is constituted in the form of an association under French law.[45] Its objectives include the development of 'a common strategic vision on integrated water resources management on a sustainable basis' as well as the promotion of 'the implementation of effective policies and strategies worldwide'.[46] One of its main activities has been the organisation of the World Water Forum. The second is the Global Water Partnership (GWP), which was set up by the World Bank, UNDP and the Swedish International Development Agency.[47] The arrangement was formalised in 2002 with the establishment of a GWP Organisation whose mandate is to support the GWP Network.[48] The GWP is based on the 'simple concept' that 'freshwater resources are finite and their various uses are interdependent, but most of the water management activities carried out at the national or international level do not recognize these interdependencies'.[49] This is reflected in the statutes of the GWP Network,

43 Agenda 21, Report of the UNCED, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1, Annex II) c 18(68) reads '[w]ater should be regarded as a finite resource having an economic value with significant social and economic implications reflecting the importance of meeting basic needs'.

44 E.g., Richard Hoare et al, External Review of Global Water Partnership – Final Report (2003) 4.

45 World Water Council Constitution, 14 June 1996 (as amended).

46 *Ibid.*, Art 2(3).

47 E.g., Hoare, *supra* note 44, 4.

48 Statutes for the Global Water Partnership Network and the Global Water Partnership Organisation, 12 December 2002 (as amended), Art 2(3).

49 S. Özgediz and B. Axelsson, Report of the Management Advisory Review of the Global Water Partnership (Stockholm: Global Water Partnership, 1998) 2.

which determine that the single objective of the Network is to develop and promote the principles of integrated water resource management.[50]

One of the objectives behind the setting up of these two new bodies has been to provide new platforms where a greater number of entities involved in the water sector can be involved, in particular private sector water companies.[51] This need not be particularly significant, since there have been organisations of the private sector lobbying states for quite some time. The actual importance of these developments is however highlighted in the context of the World Water Forum. The World Water Forum is organised every three years by the World Water Council. It brings together a selection of private sector, non-governmental actors and elected officials, including ministers. While the World Water Forum is not an inter-governmental meeting, its outcomes, such as the ministerial declarations, acquire a kind of state-sanctioned legitimacy because of the presence of ministers.[52]

Another crucial aspect of the evolving international water policy model is that it blends different actors together without formal acknowledgment of the same. The Dublin Statement that was adopted in a meeting of technical experts in the run up to an intergovernmental conference has been repeated and strengthened through meetings such as the World Water Forum. The principles expounded in the Dublin Statement are on the whole the same set of policy prescriptions that the World Bank has adopted internally and exports to borrowing countries through its loans.[53] This leads to undesirable but possibly not unexpected results. The policy consensus existing at the international level among a limited set of actors is increasingly identified as the basis for law and policy reforms in many countries of the South.[54] This has happened in part through direct conditionality of institutions like the World Bank,[55] and in part through much more diffuse policy advice to developing countries.

50 Statutes for the Global Water Partnership Network and the Global Water Partnership Organisation, 12 December 2002, Art 2.

51 E.g., Riccardo Petrella, *The Water Manifesto: Arguments for a World Water Contract* (London: Zed, 2001) 23; and Matthias Finger and Jeremy Allouche, *Water Privatization – Trans-National Corporations and the Re-Regulation of the Water Industry* (London: Spon Press, 2002) 28.

52 E.g., Ministerial Declaration, 6th World Water Forum, Marseilles, 13 March 2012.

53 E.g., World Bank, Water Resources Sector Strategy, 2004.

54 E.g., Philippe Cullet, *Water Law, Poverty and Development – Water Law Reforms in India* (Oxford: Oxford University Press, 2009).

55 E.g., Videh Upadhyay, *Law under Globalization – Assessing 'Donor Supported' Law Making and Judicial Behavior in India* (Delhi: National Social Watch Coalition, 2008).

## 5 Concluding Remarks

The case of water highlighted in this paper shows that environmental stewardship has evolved significantly in certain sectors. This is a worrying development because it takes the framework for governance away from the gains that had been achieved in earlier decades. This is, for instance, the case with regard to the principle differential treatment for the South that has become a hallmark of international environmental law and ensures that the specific situation of developing countries is at least partly taken into account in international legal frameworks.

One of the key problems is that the new model of governance in the water sector does not follow established governance structures at the international level that have at least some potential in ensuring that the interests of the weakest states are not ignored. Further, while none of the instruments adopted through this new governance framework are binding in terms of the existing categories of law-making at the international level, an examination of water law and policy in a number of countries of the South would leave any uninformed observer assuming that these countries are striving to implement international law commitments they have undertaken.

A number of reasons may explain why countries of the South would put so much energy into implementing frameworks which have no force of law in existing environmental governance frameworks. Yet, it is undisputable that the return of agencies like the World Bank to law conditionality requesting borrowing states to adopt certain specific water laws has a lot to do with this level of 'compliance' with soft law frameworks.

The new environmental stewardship in the context of water is thus one where existing categories have both imploded and exploded. This leaves developing countries generally, and least developed countries in particular, exposed to outcomes that are neither equitable nor environmentally sustainable. Further reforms are needed to take into account the reality of international governance that has seen the private sector making significant inroads into the existing framework, while ensuring that no change comes at the expense of the weakest states. Further, the primacy of the realisation of the right to water, and more broadly the right to a clean environment, needs to be reasserted so that everyone's individual basic rights take precedence over other elements, such as efficiency concerns.

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