Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law

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AUTONOMOUS INSTITUTIONAL ARRANGEMENTS IN MULTILATERAL ENVIRONMENTAL AGREEMENTS: A LITTLE-NOTICED PHENOMENON IN INTERNATIONAL LAW

By Robin R. Churchill and Geir Ulfstein[*]

Since the early 1970s a considerable number of multilateral agreements have been concluded in the environmental field that establish a common pattern of institutional arrangements. The purpose of these arrangements is to develop the normative content of the regulatory regime established by each agreement[1] and to supervise the states parties' implementation of and compliance with that regime. These institutional arrangements usually comprise a conference or meeting of the parties (COP, MOP) with decision-making powers, a secretariat, and one or more specialist subsidiary bodies. Such arrangements, because of their ad hoc nature, are not intergovernmental organizations (IGOs) in the traditional sense. On the other hand, as the creatures of treaties, such conferences and meetings of the parties, with their secretariats and subsidiary bodies, add up to more than just diplomatic conferences. Because such arrangements do not constitute traditional IGOs and yet are freestanding and distinct both from the states parties to a particular agreement and from existing IGOs, we have chosen to describe them as "autonomous." They are also autonomous in the sense that they have their own lawmaking powers and compliance mechanisms.

Multilateral environmental agreements (MEAs) that establish these autonomous institutional arrangements include the Convention on Wetlands of International Importance, of 1971 (the Ramsar Convention);[2] the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, of 1972 (the London Convention);[3] the Convention on International Trade in Endangered Species of Wild Fauna and Flora, of 1973 (CITES);[4] the Convention on the Conservation of Migratory Species of Wild Animals, of 1979 (the Bonn Convention);[5] the Convention for the Protection of the Ozone Layer, of 1985 (the Vienna Convention),[6] together with the Montreal Protocol on Substances That Deplete the

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[1] Most of the agreements in question establish what international relations writers describe as regimes, i.e., to cite one widely quoted definition, "governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas. [Regimes] thus comprise a normative element, state practice, and organizational roles." Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753, 759 (1986). The normative content of the regime is therefore more than simply the provisions of the agreement concerned. This point will become clearer in part IV *infra*.

[2] Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, TIAS No. 11,084, 996 UNTS 245 [hereinafter Ramsar Convention].

[3] Dec. 29, 1972, 26 UST 2403, 1046 UNTS 120 [hereinafter London Convention].

[4] Mar. 3, 1973, 27 UST 1087, 993 UNTS 243 [hereinafter CITES].

[5] June 23, 1979, 1990 UKTS No. 87 [hereinafter Bonn Convention].

[6] Mar. 22, 1985, 1513 UNTS 293 [hereinafter Vienna Convention].

Ozone Layer, of 1987 (the Montreal Protocol);[7] the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, of 1989 (the Basel Convention),[8] together with its Protocol on Liability and Compensation, of 1999;[9] the United Nations Framework Convention on Climate Change, of 1992 (the Climate Change Convention),[10] together with the Kyoto Protocol, of 1997;[11] the Convention on Biological Diversity, of 1992 (the Biodiversity Convention),[12] together with the Cartagena Protocol on Biosafety, of 2000;[13] the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, of 1994 (the Desertification Convention);[14] and the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, of 1998 (the Prior Informed Consent Convention).[15]

Autonomous institutional arrangements are also found in numerous regional environmental agreements, including the conventions and protocols concluded under the Regional Seas Programme of the United Nations Environment Programme (UNEP);[16] instruments concluded under the auspices of the UN Economic Commission for Europe (ECE), such as the Convention on Long-Range Transboundary Air Pollution, of 1979 (the LRTAP Convention)[17] with its protocols, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, of 1992;[18] treaties concluded under the Bonn Convention, such as the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, of 1992[19] and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, of 1996;[20] the Convention on the Conservation of European Wildlife and Natural Habitats, of 1979 (the Bern Convention);[21] the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, of 1991;[22] the

[7] Sept. 19, 1987, 1522 UNTS 293 [hereinafter Montreal Protocol]. Documentation regarding the Montreal Protocol is available online at <http://www.unep.org/ozone/>.

[8] Mar. 22, 1989, 28 ILM 657 (1989) [hereinafter Basel Convention]. Documentation regarding the Basel Convention is available online at <http://www.unep.ch/basel/>.

[9] Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, Dec. 10, 1999 <http://www.basel.int/COP5/docs/prot-e.pdf>.

[10] May 9, 1992, 31 ILM 849 (1992) [hereinafter Climate Change Convention]. Documentation regarding the Climate Change Convention is available online at <http://www.unfccc.de/>.

[11] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 ILM 22 (1998) [hereinafter Kyoto Protocol].

[12] June 5, 1992, 31 ILM 818 (1992) [hereinafter Biodiversity Convention]. Documentation on the Biodiversity Convention is available online at <http://www.biodiv.org/>.

[13] Jan. 29, 2000, 39 ILM 1027 (2000) [hereinafter Biodiversity Convention].

[14] June 17, 1994, 33 ILM 1328 (1994) [hereinafter Desertification Convention].

[15] Sept. 11, 1998, 38 ILM 1 (1999) [hereinafter Prior Informed Consent Convention].

[16] These are as follows: Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 1102 UNTS 27; Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Apr. 24, 1978, 1140 UNTS 133; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Mar. 23, 1981, 20 ILM 746 (1981); Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, Nov. 12, 1981, *reprinted in* PETER H. SAND, MARINE ENVIRONMENT LAW IN THE UNITED NATIONS ENVIRONMENT PROGRAMME 84 (1988); Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Feb. 14, 1982, *reprinted in id.* at 114; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 22 ILM 227 (1983); Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, June 21, 1985, *reprinted in* 1986 O.J. EUR. COMM. (C 253) 10; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 16 ILM 41 (1987); and Convention on the Protection of the Black Sea Against Pollution, Apr. 21, 1992, L. SEA BULL., Jan. 1993, at 31.

[17] Nov. 13, 1979, TIAS No. 10,541, 1302 UNTS 217 [hereinafter LRTAP Convention].

[18] Mar. 17, 1992, 31 ILM 1312 (1992).

[19] Mar. 17, 1992, 1995 UKTS No. 52.

[20] Nov. 24, 1996, 36 ILM 777 (1997).

[21] Sept. 19, 1979, 1982 UKTS No. 56.

[22] Jan. 29, 1991, 30 ILM 773 (1991).

Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, of 1994;[23] and the Inter-American Convention for the Protection and Conservation of Sea Turtles, of 1996.[24]

The phenomenon we have chosen to call "autonomous institutional arrangements" is one that we believe to be significant, as in comparison to traditional IGOs, it marks a distinct and different approach to institutionalized collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance. This development appears to have gone largely, if not completely, unnoticed in the general literature on international law, and even not greatly commented upon in the specialist literature on international environmental law. This article aims at drawing this development to the attention of international lawyers in general (not just environmental law specialists) and at discussing some features of autonomous institutional arrangements and legal issues raised by them. Following this introduction, parts I and II give fuller descriptions of the autonomous institutions created by the referenced MEAs and try to explain why they were established. The next four parts discuss the scope of the decision-making powers of these arrangements as regards internal matters, substantive obligations, implementation and compliance, and their external capacity. In discussing these powers, we consider whether the traditional canons of treaty interpretation apply or, rather, whether the more liberal principles of international institutional law (such as the doctrine of "implied powers") should also apply. Furthermore, since MEAs either make use of the secretariats of existing international organizations or locate their own, rather limited secretariats within such organizations, we also examine the relationship between the "host" and the institutions established by the MEA. The proper legal characterization of autonomous institutional structures receives attention as well: are they merely treaty bodies or are they international organizations with a distinct legal personality? Part VII then compares the autonomous institutional arrangements of MEAs with the not entirely dissimilar institutional arrangements found in some other areas of international law, such as disarmament treaties and the Antarctic Treaty system. The article ends with some brief conclusions. In general, our discussion of legal issues tends to focus on global, rather than regional, MEAs, and we draw examples of practice largely from those instruments; we do so partly for reasons of convenience and partly because global MEAs obviously represent more widespread practice.

An important international relations dimension clearly attaches to the institutional arrangements discussed here; for reasons partly of space and partly of lack of expertise, we are unable to explore that aspect. We concentrate, as many lawyers would tend to do, on issues related to the form and powers of these arrangements. International relations writers, on the other hand, concern themselves more with how well the arrangements function in practice and the lessons that can be learned for designing institutional arrangements for future regimes.[25]

I. The Common Pattern of Autonomous Institutional Arrangements

In this section we discuss the common structure and functions of the autonomous institutional arrangements established by the MEAs referred to above, before turning to the legal issues to which these arrangements may give rise.

[23] June 16, 1994, 34 ILM 67 (1995).

[24] Dec. 1, 1996, *reprinted in* 1 J. Int'l Wildlife L. & Pol'y 179 (1998).

[25] On these issues, see, for example, from a large literature, The Implementation and Effectiveness of International Environmental Commitments, pt. I, *passim* (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998); Jørgen Wettestad, Designing Effective Environmental Regimes: The Key Conditions (1999); Thomas Bernauer, *The Effect of International Environmental Institutions: How We Might Learn More*, 49 Int'l Org. 351 (1995); Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, 1 Y.B. Int'l Envtl. L. 35 (1990). Many international relations writers make a distinction between organizations and institutions. No such distinction is made in this article and in general the terms are used interchangeably.

Conference of the Parties

As with a treaty creating a traditional IGO, the MEAs establish an organ on which all states parties are represented. Such a plenary organ is usually called the Conference of the Parties, but it may also have a different denomination, such as the Meeting of the Parties or the Executive Bureau. Names such as COPs and MOPs indicate a less formal function than that of a plenary organ of an IGO. Furthermore, the plenary organ of an MEA does not have a permanent seat, but meets at different venues around the world in accordance with its own decisions. The COP meets regularly, usually annually or every other year. A bureau elected by the COP may act on its behalf between its regular meetings, and serves as a facilitating organ during the COP's sessions.

The COP has a variety of functions. First, it acts in relation to internal matters, e.g., by establishing subsidiary bodies, deciding on arrangements for meetings, adopting rules of procedure for itself and subsidiary bodies, and providing guidance to those bodies and the secretariat (see part III below). Second, the COP contributes to the development of new substantive obligations by the parties by amending an MEA or by adopting new protocols (see part IV). Third, the COP supervises parties' implementation of and compliance with the MEA, and decides on the consequences of noncompliance (see part V). Finally, the COP may act at the external level by adopting arrangements with international organizations and states (see part VI).

Protocols to MEAs may have their own institutional structure. For example, the Montreal Protocol to the Vienna Ozone Convention establishes a MOP consisting of all parties to the Protocol, which shall convene its meetings in conjunction with the COP established by the Convention unless the parties decide otherwise (Art. 11(2)). In other MEAs, the plenary body of the convention may also serve as the entity that implements the protocols, as in the case of the Executive Body established by the LRTAP Convention (Art. 10). The Kyoto Protocol to the Climate Change Convention provides that the COP of the Convention shall serve as the MOP of the Protocol (Art. 13(1)), but parties to the Convention that are not parties to the Protocol may participate only as observers when the COP acts in this capacity (Art. 13(2)).

In this article the plenary body of an MEA will generally be referred to as the COP, regardless of its actual title, unless its own name (if not a COP) is considered more appropriate.

Subsidiary Bodies

Subsidiary organs may be established by the MEA itself or subsequently by the COP, and are generally of three kinds. The first is advisory, e.g., the Subsidiary Body for Scientific and Technological Advice of the Climate Change Convention and the Scientific Council of the Bonn Convention. In some cases, however, such bodies may be established by a separate arrangement outside the MEA; for example, the Intergovernmental Panel on Climate Change, which serves the Climate Change Convention, was established by UNEP and the World Meteorological Organization (before the Convention was adopted in fact).

The second type of subsidiary body is concerned with financial assistance and the transfer of technology. Thus, Article 10 of the Montreal Protocol establishes a mechanism to provide financial and technical cooperation, including a multilateral fund, which is operated by an Executive Committee. The Climate Change Convention, on the other hand, uses the Global Environment Facility (GEF), which is a separate institution but is guided by the terms of the Convention.

Third, some subsidiary bodies are responsible for implementation and compliance, such as the Implementation Committees of the Montreal Protocol (Art. 8) and the 1994 Sulphur Protocol to the LRTAP Convention (Art. 7), and the Subsidiary Body for Implementation (SBI) under the Climate Change Convention (Art. 10).

Occasionally, subsidiary bodies may be established for a purpose other than the three mentioned above, such as the Ad Hoc Group on the Berlin Mandate formed by the COP of the Climate Change Convention, whose work paved the way for the adoption of the Kyoto Protocol.

Subsidiary organs may have the same membership as the COP. But participation in them may also be more limited; the Implementation Committee of the Montreal Protocol, for example, consists of ten parties elected by the Meeting of the Parties. As to its composition, the only stipulation is that it shall be based on "equitable geographical distribution."[26] Membership in subsidiary organs may also require certain qualifications; e.g., the Scientific Council of the Bonn Convention shall consist of "qualified experts" (Art. VIII(2)).

Secretariat

A permanent secretariat may be designated in the MEA itself (as is done, for example, in CITES and the Bern and Bonn Conventions), or the MEA may establish an interim secretariat and leave the final decision to the COP (as do, e.g., the Vienna Convention and Montreal Protocol, the Climate Change Convention, and the Biodiversity Convention). Generally, however, the MEAs locate or make use of secretariats in existing IGOs, such as the United Nations (the Climate Change Convention), UNEP (CITES and the Basel and Biodiversity Conventions), the ECE (LRTAP and its Protocols), the Council of Europe (the Bern Convention), and the International Maritime Organization (IMO) (the London Convention). The Prior Informed Consent Convention establishes that the functions of a secretariat shall be undertaken jointly by UNEP and the Food and Agriculture Organization. The Ramsar Convention is unusual in that the secretariat is provided by a nongovernmental organization (NGO), the International Union for the Conservation of Nature (IUCN) (although membership in the IUCN does include states in addition to scientific, professional, and conservation bodies).[27]

The MEA concerned generally spells out the functions of the secretariat, which are to provide services to the COP and the subsidiary bodies, as well as the states parties, in the implementation and development of cooperation under the agreement. More specifically, this duty means that the secretariat engages in activities such as conducting studies, preparing draft decisions for the COP and relevant subsidiary bodies, assisting states parties, and receiving reports on the implementation of commitments. The secretariat also establishes liaison to other international organizations, financial institutions such as the GEF, other MEAs, and so forth.

Although the secretariat acts under the guidance of the COP, it is usually an integral part of an existing IGO. But the extent of that integration may vary, in both legal and factual terms. The COP of the Climate Change Convention has decided that "the Convention secretariat shall be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme."[28] The fact that several MEA secretariats are placed in a different location than their "host" organization—e.g., the secretariat of the Biodiversity Convention is based in

[26] Montreal Protocol MOP Decision II/5, Doc. UNEP/OzL.Pro.2/3 (1990) <http://www.unep.org/ozone/2mlonfin.htm>, *as amended by* Decision III/20, Doc. UNEP/OzL.Pro.3/11 (1991) <http://www.unep.org/ozone/3mnbofin.htm>. These decisions, and other decisions of the Montreal Protocol's Meeting of the Parties referred to below, as well as those of other COPs referred to in this article, are designated in accordance with the number of the meeting, in roman numerals, and the number of the decision, in arabic; hence, Decision II/5 is the fifth decision of the second MOP. Some COPs reverse the sequence and change the style of the numbers, *see, e.g.*, note 28 *infra*.

[27] *See* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 77–78 (1992).

[28] Institutional Linkage of the Convention Secretariat to the United Nations, Climate Change COP Decision 14/CP.1, para. 2, UN Doc. FCCC/CP/1995/7/Add.1, at 42 <http://www.unfccc.de/resource/docs/cop1/07a01.htm>.

Montreal, whereas its "host," UNEP, is in Nairobi—may also restrict the possibilities for control by those organizations. This point is considered further in part III below.

II. Why the Development of Autonomous Institutional Arrangements in MEAs?

This part attempts to explain why autonomous institutional arrangements of the kind described in the previous part were developed in the MEAs listed in the introduction. It will be noted that all those MEAs were negotiated and concluded after 1970. Before that date the institutional arrangements of MEAs (of which there were more than thirty)[29] could be described in three ways. In the first, the MEA set up an IGO with legal personality. Examples include the International Whaling Commission (established by the International Convention for the Regulation of Whaling, of 1946[30]) and international fisheries commissions such as the International Commission for the Northwest Atlantic Fisheries (established by the International Convention for the Northwest Atlantic Fisheries, of 1949[31]). Such bodies were generally used to adopt detailed measures to further the aims of the treaty and exercise a degree of supervision over its implementation and observance by the parties. In the second type of institutional arrangement, an existing IGO served as the institutional underpinning for an MEA, providing an institutional framework for possible amendment of the agreement and a degree of supervision over the parties. Examples include the International Maritime Organization with respect to the International Convention for the Prevention of Pollution of the Sea by Oil, of 1954,[32] and the Food and Agriculture Organization with respect to the International Plant Protection Convention, of 1951.[33] Finally, MEAs that fell into the third category effectively had no institutional arrangements at all. Examples include the Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, of 1940,[34] and the African Convention on the Conservation of Nature and Natural Resources, of 1968.[35] The lack of any institutional machinery was a real weakness of these agreements, inter alia, because it became impossible to update them, in particular the lists of species requiring protection.[36]

In general terms, the institutional arrangements of MEAs have become increasingly perceived as crucial to their effectiveness. As suggested above, the lack of proper institutions makes it very difficult to develop, update, and adapt MEAs to changing circumstances, which is necessary for two main reasons: First, knowledge of the environmental issues with which MEAs deal is constantly expanding. Second, when an MEA is initially concluded, the parties may reach only limited political agreement on how to tackle the environmental problem at issue; but over time consensus on taking stricter measures may gradually emerge. These factors explain why some MEAs take the form of framework conventions (for example, the Vienna, Climate Change, Biodiversity, and LRTAP Conventions). Thus, from time to time MEA institutions will need to adopt protocols to these framework conventions, as well as

[29] For lists of such agreements, see ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW, App. B at 479–82 (Edith Brown Weiss ed., 1992) [hereinafter ENVIRONMENTAL CHANGE]; Peter M. Haas with Jan Sundgren, *Evolving International Environmental Law: Changing Practices of National Sovereignty, in* GLOBAL ACCORD: ENVIRONMENTAL CHALLENGES AND INTERNATIONAL RESPONSES 401, 422–25 (Nazli Choucri ed., 1993).

[30] Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 72.

[31] Feb. 8, 1949, TIAS No. 2089, 157 UNTS 157. In general, international fisheries commissions, including the International Whaling Commission and the International Commission for the Northwest Atlantic Fisheries, were not explicitly endowed with legal personality by their constituent conventions; but in most cases legal personality was implicit in their functions and powers. *See* ALBERT W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 161–64 (1973).

[32] May 12, 1954, Art. XXI, 12 UST 2989, 327 UNTS 3.

[33] Dec. 6, 1951, Art. VII, 150 UNTS 67.

[34] Oct. 12, 1940, TS No. 981, 161 UNTS 193.

[35] Sept. 15, 1968, 1001 UNTS 3.

[36] *See* SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 110–11, 123–24 (1985).

amendments to the original text of more specific MEAs. The alternative to such institutional development of MEAs is amendment of agreements through the traditional procedure of ad hoc diplomatic conference followed by ratification—a cumbersome and slow process. Furthermore, the lack of proper institutions makes it very difficult to monitor states' implementation of and compliance with MEAs and to take action when noncompliance is established. The traditional mechanisms of state responsibility and bilateral dispute settlement (especially judicial settlement) are seen as increasingly inappropriate and ineffective, particularly because breach of an MEA often damages the interests of the international community in general, rather than those of any one state.[37]

This appreciation of the importance of strong institutional arrangements informed the series of major MEAs that were developed at and grew out of the 1972 UN Conference on the Human Environment. However, this period coincided with a time of widespread dissatisfaction with traditional intergovernmental organizations because of their cost and bureaucratic nature, which resulted in a disinclination to create new IGOs, especially perhaps in the environmental field.[38] This tendency is reflected in the fact that UNEP was set up as a subsidiary organ of the UN General Assembly[39] (and not as a UN specialized agency, which might have been expected and probably would have happened if the 1972 conference had taken place ten years earlier), and more generally in the Resolution on Institutional and Financial Arrangements adopted by the 1972 conference.[40]

Thus, it became clear that institutional arrangements for MEAs were unlikely to take the form of a traditional IGO. The alternative that evolved—what may be called the COP model—not surprisingly did not emerge full-blown, but took a little while to evolve into its now-standard form. The MEA that introduced the COP was the Ramsar Convention of 1971. However, that COP was a fairly embryonic creature at first. As originally drafted, Article 6 of the Convention stated that "[t]he Contracting Parties shall, as the necessity arises, convene Conferences on the Conservation of Wetlands and Waterfowl" and that these conferences should "have an advisory character."[41] In 1987 their experience in the working of these conferences and no doubt the operation of COPs in other MEAs led the parties to amend Article 6 so as to provide for the establishment of a "Conference of the Contracting Parties to review and promote the implementation" of the Convention, meeting at intervals of not more than three years; the reference to the advisory character of the conference was deleted.[42]

The next MEA, chronologically speaking, the London Convention of 1972, was much more developed than Ramsar. In comparison with later COPs, however, the Consultative

[37] See further, on the importance of strong institutional arrangements for MEAs, *id.* at 12–13, 277; Alan E. Boyle, *Saving the World? Implementation and Enforcement of International Law Through International Institutions*, 3 J. ENVTL. L. 229 (1991); Winfried Lang, *Diplomacy and International Environmental Law-Making: Some Observations*, 3 Y.B. INT'L ENVTL. L. 108, 115–16, 120–21 (1992); Günther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 3, 5–6, 16–17 (1990); Marc A. Levy, Peter M. Haas, & Robert O. Keohane, *Institutions for the Earth: Promoting International Environmental Protection*, 34 ENV'T 12 (1992).

[38] *See* Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, *in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 1, 34–35 (Andrew Hurrell & Benedict Kingsbury eds., 1992); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AJIL 259, 282 (1992); WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 9 (1987).

[39] *See* GA Res. 2997 (XXVII), UN GAOR, 27th Sess., Supp. No. 30, at 43, UN Doc. A/8730 (1972). On the origins and functioning of UNEP, see also Hurrell & Kingsbury, *supra* note 38, at 30–34, 186–88; Carol Annette Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U. J. INT'L L. & POL'Y 351, 354–56 (1990); Paul C. Szasz, *Restructuring the International Organizational Framework*, *in* ENVIRONMENTAL CHANGE, *supra* note 29, at 340, 340–44, 351–52.

[40] UN, REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, UN Doc. A/CONF.48/14, at 29 (1973). The contents of the resolution were subsequently substantially incorporated in Resolution 2997, *supra* note 39.

[41] Ramsar Convention, *supra* note 2, Art. 6.

[42] Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, May 28, 1987, 1996 UKTS No. 13. See further LYSTER, *supra* note 36, at 184, 203–07; M. J. Bowman, *The Ramsar Convention Comes of Age*, 42 NETH. INT'L L. REV. 1, 33–38 (1995).

Meetings of the Parties (this term was used rather than "Conference of the Parties") were given no express power to establish subsidiary bodies and their powers of supervision were more limited.

The first MEA to use the term "Conference of the Parties" was CITES in 1973. The CITES COP represents what one might call the full-fledged COP model, apart from the fact that it originally lacked the power to adopt financial provisions; the parties added this power by an amendment to the Convention in 1979. Significantly, CITES was negotiated under the auspices of UNEP, unlike the Ramsar and London Conventions. The next MEAs, chronologically speaking—the Bonn, Vienna, and Basel Conventions and the Montreal Protocol—were also all negotiated under the auspices of UNEP and all contain the COP model as their institutional arrangements. It is not surprising that having devised an institutional model for CITES that worked, UNEP utilized it in the later MEAs; as Lang notes, institutional arrangements tend to be used as precedents.[43] So widely perceived as a successful institutional model was the COP that in 1990 Working Group III of the Intergovernmental Panel on Climate Change, in its report discussing possible elements for inclusion in a Framework Convention on Climate Change, could remark that "[i]t has been the general practice under international environmental agreements to establish various institutional mechanisms. The parties to a Climate Change Convention might, therefore, wish to make provision for a Conference of the Parties, an Executive Organ and a Secretariat."[44]

Several reasons may explain the ascendancy of the COP model as the preferred institutional machinery in most global MEAs concluded since 1972, as opposed to the alternative, a traditional IGO. First, using a preexisting IGO as the institutional machinery for an MEA has the disadvantage of probably involving states not parties to the MEA concerned. Second, creating a new IGO for an MEA is probably perceived as more costly and more bureaucratic than using the COP model because it requires the acquisition of premises and possibly more staff than a COP secretariat would employ.[45] Furthermore, an IGO normally meets only at its headquarters, but a COP can (and invariably does) meet in different places. As a result, developing states frequently host meetings of COPs, whereas most global IGOs are located in developed states, a fact that has been a source of complaint among developing states. Finally, some may think that an IGO ought to meet more frequently than most COPs because of the former's more permanent appearance; the COP is a more flexible arrangement. Above all, COPs may be preferred because the model works well and is acceptable to all states. Thus, it is likely to continue to be used. Significantly, despite calls from some commentators,[46] both the 1992 UN Conference on Environment and Development and its follow-up, the 1997 Special Session of the UN General Assembly, rejected the idea of creating new intergovernmental institutions for the environment.[47]

The COP model, however, is not the exclusive form of institutional machinery for MEAs. At the global level, a few MEAs concluded since 1972 rely on an existing IGO for their institutional machinery. Examples include the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL)[48] and the 1990 International Convention on Oil Pollu-

[43] Lang, *supra* note 37, at 114.

[44] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, WORKING GROUP III, FORMULATION OF RESPONSE STRATEGIES: LEGAL AND INSTITUTIONAL MECHANISMS 255 (1990), *reprinted in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 295, 299 (Robin Churchill & David Freestone eds., 1991) [hereinafter GLOBAL CLIMATE CHANGE].

[45] COPs that meet frequently may not differ so much in cost because premises have to be hired for the meetings and members of the secretariat, which is usually located elsewhere, must be transported to them, often at considerable expense.

[46] *E.g.*, Lee A. Kimball & William C. Boyd, *International Institutional Arrangements for Environment and Development: A Post-Rio Assessment*, 1 REV. EUR. COMM. & INT'L ENVTL. L. 295 (1992); Palmer, *supra* note 38, at 278–82.

[47] AGENDA 21, ch. 38.1(I), 1 REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, UN Sales No. E.93.I.8 (1993); GA Res. S–19/2, pt. IVA, 36 ILM 1639 (1997).

[48] Nov. 2, 1973, 12 ILM 1319 (1973) (in particular Arts. 2(7), 4(3), 6(4), 8(2), 11, 12(2), 16, 17).

tion Preparedness, Response and Co-operation,[49] for both of which the International Maritime Organization serves as the institutional machinery, and the 1986 Conventions on Early Notification of a Nuclear Accident and on Assistance in the Case of a Nuclear Accident,[50] for which the International Atomic Energy Agency serves as the institutional machinery. Unlike the MEAs with autonomous institutional arrangements listed in the introduction, none of these four treaties (except MARPOL) is a regulatory agreement and they therefore have a much slighter need for strong institutional machinery. MARPOL is probably located in the IMO because it replaces the 1954 oil pollution Convention, for which the IMO served as the institutional machinery.

As far as we are aware, no global MEA has been concluded since 1972 that establishes a new IGO for its institutional machinery, no doubt for the reasons alluded to above. New IGOs have, however, been established on various occasions at the regional level, especially in relation to fisheries and marine pollution. Examples include the Northwest Atlantic Fisheries Organization, established by the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries;[51] the Commission on the Conservation of Antarctic Marine Living Resources, established by the 1980 Convention of the same name;[52] and the Paris Commission, originally established by the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources[53] and continued by the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (which replaces the 1974 Convention).[54] Such regional IGOs are often much less formal and bureaucratic than their global counterparts, and in fact the distinction between these IGOs and autonomous institutional arrangements is much less clear-cut.

III. The Powers of MEA Institutions on the Internal Plane

For the regime established by an MEA to function effectively, decisions at the internal level, i.e., of an organizational and procedural character, must be taken. Such decisions may relate to the work of the MEA institutions (e.g., adoption of the rules of procedure, the financial rules, and the budget); to the determination of the rights and obligations of member states (e.g., exclusion or suspension of voting and other rights); to representatives of member states (e.g., approval of credentials and election of officers to the bureau); to the admittance of observers from NGOs, IGOs, and non–member states; and to officials in the secretariat (e.g., hiring and firing).

The autonomous institutional arrangements (AIAs) of MEAs are hierarchical, with the COP as the supreme body. Some of the MEAs specify this structure, such as the Climate Change Convention (Art. 7(2)) and the Desertification Convention (Art. 22(2)). In other MEAs it may be inferred from provisions establishing that the subsidiary bodies and the secretariat act under the guidance of the COP, e.g., the Bonn Convention (Arts. VII(5)(c), IX(4)(k)).

The powers of the COP at the internal level are explicitly set out in treaty articles relating to, for example, the adoption of the rules of procedure, financial regulations and the budget, the establishment of new subsidiary bodies, and the provision of guidance to these bodies and the secretariat. Some MEAs also contain a catchall provision authorizing the COP to "consider any additional action that may be required,"[55] "fulfil such other functions

[49] Nov. 30, 1990, 30 ILM 733 (1991) (in particular Arts. 2(6), 12, 14).
[50] Sept. 26, 1986, 25 ILM 1370, Art. 4, and 1377, Art. 5 (1986).
[51] Oct. 24, 1978, Art. II, S. Exec. Doc. T, 90th Cong. (1979), Cmnd. 7569.
[52] May 20, 1980, Arts. VII, VIII, 33 UST 3476, 1329 UNTS 47.
[53] June 4, 1974, Arts. 15–18, 1978 UKTS No. 64.
[54] Sept. 22, 1992, Arts. 10–12, 1999 UKTS No. 14.
[55] London Convention, *supra* note 3, Art. XIV(4)(f).

as may be appropriate under the provisions of the present Convention,"[56] or "[e]xercise such other functions as are required for the achievement of the objective of the Convention."[57] Through such specific and general powers, the COP is generally provided with authority at the internal level corresponding to that found in the constitutions of IGOs.

In the case of traditional IGOs, international institutional law has developed a doctrine of "implied powers" under which an effective interpretation of the treaty establishing the IGO is adopted that emphasizes its object and purpose.[58] As stated by the International Court of Justice (ICJ) in its Advisory Opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.[59]

The Court applied this doctrine at the internal level in the *Effect of Awards* case, where it concluded that the United Nations had an implied power to establish administrative tribunals to settle disputes with its staff.[60] The law of international institutions also derives dynamism from the weight it gives to the practice of organs of these institutions.[61] In the *Namibia* case, the Court relied on such practice in accepting that abstention by a permanent member did not prevent the Security Council from adopting decisions under Article 27(3) of the UN Charter.[62]

Can such a doctrine of implied powers be applied to the AIAs established by MEAs, in particular the COP? One possible approach would be to ask whether such institutional arrangements should properly be called IGOs, and thus be governed by international institutional law. It has been argued that "[t]hese institutional arrangements are, in effect, international organisations."[63] The UN Office of Legal Affairs, in an opinion of November 4, 1993, stated that the Climate Change Convention established an "entity/organization" with international legal personality; and, in an opinion of December 18, 1995, it added that the bodies established by this Convention "have certain distinctive elements attributable to international organizations."[64]

Are these views correct? There is no legal or generally accepted definition of an international organization. We have chosen to rely on the definition given by Schermers and Blokker in their authoritative treatise on the subject. They define international organizations as "forms of cooperation founded on an international agreement creating at least one

[56] LRTAP Convention, *supra* note 17, Art. 10(2)(c).

[57] Climate Change Convention, *supra* note 10, Art. 7(2)(m).

[58] Concerning this feature of international institutional law, see C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 44–48 (1996); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 158–63 (3d rev. ed. 1995); N. D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS, ch. 5 (1996).

[59] 1996 ICJ REP. 66, 79, para. 25 (July 8).

[60] Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 ICJ REP. 47, 53 (July 13).

[61] *See* AMERASINGHE, *supra* note 58, at 48–55; SCHERMERS & BLOKKER, *supra* note 58, at 718–19.

[62] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16 (June 21).

[63] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: FRAMEWORK, STANDARDS AND IMPLEMENTATION 92 (1995). A similar view is expressed by Szasz, *supra* note 39, at 347. *See also* Jacob Werksman, *The Conference of Parties to Environmental Treaties*, *in* GREENING INTERNATIONAL INSTITUTIONS 55, 55 (Jacob Werksman ed., 1996) (stating that "these MEAs establish independent intergovernmental bodies . . . with the potential to develop powers over states that may far exceed those of more formally established international institutions" (citation omitted)).

[64] *See* notes 156, 178 *infra* and corresponding text.

organ with a will of its own, established under international law."[65] The COP and its subsidiary bodies are self-governing since states parties may influence the work of these organs only by acting through them, and they do not take instructions from the international organization hosting their secretariat.[66] One could argue that an international treaty conference is also a self-governing body,[67] without being considered an IGO. The AIAs of MEAs, however, are established by an international agreement, which is also a requirement under the above definition. Consequently, these bodies fulfill the necessary criteria for an IGO and would thus aspire to the application of international institutional law.

But does the fact that the states parties to MEAs have chosen not to establish formal IGOs prevent such application? Arguably, the legal regimes of MEAs could be seen as "self-contained," in the sense that MEAs are subject only to the law of treaties and not to international institutional law.[68]

First, however, we submit that the law of AIAs resembles that of IGOs more than it does the general law of treaties. MEAs are obviously treaties, but decisions of COPs and subsidiary bodies at the internal level are not. As a result, the law of treaties does not directly apply to such decisions. Furthermore, the law of AIAs takes a hierarchical form: the MEA serves as *lex superior* and decisions by the COP, subsidiary bodies, and the secretariat constitute stepwise levels of authority. Such a hierarchy between the constitution of an IGO and decisions of its organs is unknown in the law of treaties, but forms a distinct feature of international institutional law.

Second, the functions of AIAs at the internal level are similar to those of IGOs, and to a large extent dissimilar to the ones known in the law of treaties. Although the law of treaties deals with some of the functions of AIAs, such as treaty amendment, it does not address such issues as the establishment of subsidiary bodies; the adoption of rules of procedure, financial rules, and the budget; and the binding character of such decisions. International institutional law is far better equipped to handle such questions.

Finally, we find no indication that states parties to MEAs, by not establishing formal IGOs, intended to create less effective bodies at the internal level. On the contrary, it should be assumed that the parties wanted to establish an effective and dynamic institutional framework, and thus that both the doctrine of implied powers and reliance on the practice of the treaty bodies should apply. Accordingly, the law of international institutions should be applied to AIAs at the internal level.

Among the consequences of applying international institutional law with its "implied powers" is first of all that it would supplement the law of treaties. For example, while several MEAs explicitly provide for the power to establish subsidiary bodies, such as the Climate Change Convention in Article 7(2)(i), this power should also be assumed in the absence of a specific provision.[69] The right to establish subsidiary bodies may, however, be based on such a catchall provision as was mentioned above. Indeed, in MEAs containing such a provision, the doctrine of implied powers will have limited relevance.

The application of international institutional law may also furnish certain presumptions in matters that are not clear in an MEA (or the rules of procedure of the COP), for ex-

[65] SCHERMERS & BLOKKER, *supra* note 58, at 23; *see also* AMERASINGHE, *supra* note 58, at 9.

[66] See "Powers of the Host Organization," the next section below.

[67] *See* ROBBIE SABEL, PROCEDURE AT INTERNATIONAL CONFERENCES 19 (1997).

[68] On "self-contained" regimes, see United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 39–41 (May 24). *See also* Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123, 134–37 (1992) (discussing the relationship between the noncompliance procedure of the Montreal Protocol and, on the other hand, the law of treaties and the law of state responsibility).

[69] *See* AMERASINGHE, *supra* note 58, at 140; SCHERMERS & BLOKKER, *supra* note 58, at 743. In fact, the CITES COP has established subsidiary bodies even though it has no explicit power to do so (and its catchall power allows it to do no more than "make recommendations for improving the effectiveness" of the Convention, *see* CITES, *supra* note 4, Art. XI(3)(e)). It must be assumed that such establishment was based on implied powers.

ample, the legal nature of decisions by the COP and its subsidiary bodies. Article 6(2)(f) of the Ramsar Convention gives the COP the power both to make "recommendations" and to adopt "resolutions," which might suggest that "resolutions" are binding and "recommendations" are not. Yet this and similar differences in wording in other MEAs should not generally be assumed to have been intended to indicate different powers to adopt binding decisions on the internal plane. As with IGOs, internal decisions, such as guidance by the COP to subsidiary bodies and the secretariat, should be considered to be binding unless the MEA or the relevant decision itself specifically indicates that it was intended to be nonbinding.[70]

Applying international institutional law to AIAs may lead to outcomes that would not be accepted under the law of treaties. Thus, it has been argued that under the doctrine of implied powers a state can be expelled from an international organization even in the absence of an express provision in its constitution if the party through its behavior prevents the organization from executing its functions.[71] Under the law of treaties, on the other hand, the only basis for expulsion would be a material breach of the treaty (Vienna Convention on the Law of Treaties, Art. 60(2)).[72]

Finally, to turn from the substance of the powers of AIAs to the procedures by which they are exercised, the rules of procedure adopted by the COP generally provide for procedural decisions to be taken by a simple majority.[73] Consequently, quite extensive powers may be exercised by majority voting, such as adopting a binding work program for developing new substantive commitments, establishing subsidiary organs and determining their composition, and, presumably, expelling states parties.[74] Decisions on substantive matters require a qualified majority, but generally consensus is applied in both procedural and substantive matters.[75]

Powers of the Host Organization

The supremacy of the COP means that the international organization hosting the secretariat may exercise only the powers flowing from this particular function, and has no powers to instruct the COP or its subsidiary bodies. Thus, the UN General Assembly and Secretariat have no right to instruct these bodies even though the United Nations hosts several MEA secretariats (through UNEP, the ECE, or directly in the case of the Climate Change Convention). As the UN Secretary-General has noted in relation to the latter Convention, "the Conference of the Parties to the Convention (COP) has an independent legal character and is not a subsidiary of the General Assembly or of any other body."[76]

As regards the secretariat, however, matters are different. Both the COP and the host organization possess powers in relation to the secretariat. The COP and its subsidiary bodies must be considered to have the authority to instruct the secretariat in substantive matters, as well as in procedural questions, e.g., preparations for meetings of the COP, assistance to states parties, and contact with other international organizations and MEAs. On the other hand, as the host organization employs the officials of the secretariats, it has the right to appoint, promote, and terminate staff. In the case of the Climate Change Convention, the

[70] *See* AMERASINGHE, *supra* note 58, at 192; SCHERMERS & BLOKKER, *supra* note 58, at 744.

[71] *See* SCHERMERS & BLOKKER, *supra* note 58, at 104–05.

[72] See part V *infra* for further discussion of this matter.

[73] See, for example, Rule 40(1) of the Rules of Procedure of both the Basel Convention and the Biodiversity Convention. For the former, see <http://www.basel.int/text/rules.html>. For the latter, see UN Doc. UNEP/CBD/COP/1/17, Annex III (Jan. 1995), <http://www.unep.ch/bio/cdbrepi.htm>. In the absence of formally adopted rules of procedure, the Climate Change Convention applies draft rules contained in UN Doc. FCCC/CP/1996/2. Draft Rule 42 on majority voting, however, is not applied. *See* Report of the Conference of the Parties on Its Fifth Session, UN Doc. FCCC/CP/1999/6, para. 14.

[74] Koskenniemi, *supra* note 68, at 139, holds that suspension of rights is a matter of substance under the Montreal Protocol and would require a qualified majority.

[75] See part IV *infra* for further discussion.

[76] Note by the Secretary-General, UN Doc. A/AC.237/79/Add.1, at 7 (1994).

COP has requested that the UN Secretary-General "appoint, after consultation with the Conference of the Parties through its Bureau, the head of the Convention secretariat, with the title of Executive Secretary."[77] The latter is vested with the authority to appoint certain categories of the secretariat's staff, but appointments are made on behalf of the UN Secretary-General.[78] The UN Staff Regulations apply to all secretariats hosted by the United Nations, including the ECE and UNEP. Similarly, the IUCN Staff Rules apply to the secretariat of the Ramsar Convention.[79] As a consequence of the staff being its employees, the host organization must also have the right to direct officials in personnel and administrative matters.[80] Hence, it may in general instruct officials in how to carry out their work. The interface between the instructions to the secretariat from the COP and its subsidiary bodies, and instructions to officials from the host organization, may obviously harbor a potential for conflict.

Where the secretariat of an existing international organization is designated as the secretariat of an MEA (e.g., the IMO secretariat in the case of the London Convention), that secretariat does not cease to be part of the host organization. Consequently, if the host and the COP or its subsidiary bodies impose contradictory instructions, the relevant officials would be obliged, under the internal law of the organization, to carry out its instructions. These instructions, however, could violate the commitments undertaken by the organization in agreeing to serve as a host organization for the COP. The possibilities for contradictory instructions may be reduced by appropriate rule making in the host organization, such as the internal job descriptions in the ECE specifying the tasks of officials in servicing the LRTAP Convention.[81]

As mentioned above in part I, the COP of the Climate Change Convention has decided that "the Convention secretariat shall be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme."[82] This semi-independent status arguably means that the United Nations has no right to instruct the officials of the secretariat. Support for limiting the powers of the United Nations to administrative matters may be found in a suggestion by the Secretary-General on the institutional linkage between the two bodies:

> 5. The head of the Convention secretariat shall be accountable:
>
> (a) to the Conference of the Parties for the implementation of the policies and programme of work approved by the Conference;
>
> (b) to the Secretary-General as the chief administrative officer of the Organization, including for the observance of the Financial and Staff Regulations and Rules of the United Nations.[83]

Another possible source of conflict may be the magnitude of the resources, in terms of both personnel and money, that should be allocated to tasks defined by the COP. The COP generally has the powers to adopt the budget and financial regulations. While the COP will control the financial contributions from states parties, the host organization wields general control over resources that it allocates to secretarial work under the MEA. Depending upon the resources and priorities of the organization, this control may be to the benefit or the disadvantage of MEAs. To the extent that it is supposed to provide secretarial resources, denying them may be considered a breach of its obligations as a host organization.

[77] Decision 14/CP.1, *supra* note 28, para. 7.

[78] *See* Letter from Richard Kinley, Climate Change Convention secretariat (Dec. 4, 1998) (on file with authors).

[79] *See* E-mail from Julia Tucker, Ramsar secretariat (May 28, 1999) (on file with authors).

[80] *See* Kinley, *supra* note 78; fax from Gilbert M. Bankobeza, UNEP (Feb. 9, 1999) (on file with authors).

[81] *See* Letter from Lars Nordberg, UN/ECE (Jan. 28, 1999) (on file with authors).

[82] *See* note 28 *supra* and corresponding text.

[83] Letter to the President of the Climate Change COP from the Special Adviser to the Secretary-General (Apr. 5, 1995), UN Doc. FCCC/CP/1995/5/Add.4, annex.

As far as we are aware, potential conflicts of the kinds described above have not (yet) emerged as a serious problem in practice.

IV. Decision-Making Powers of MEA Institutions Relating to the Parties' Substantive Obligations

In addition to decisions concerning internal matters described in the previous section, COPs are authorized by many MEAs to take decisions relating to states parties' substantive obligations under those agreements. Indeed, as explained above, one of the reasons autonomous institutional arrangements are included in MEAs is to develop the norms they contain.

The Amendment of MEAs and the Adoption of Protocols

One type of substantive decision-making power is that given to COPs to decide on amendments to MEAs. This power is found in most of the global MEAs referred to in the introduction.[84] The procedures by which such amendments are to be adopted and come into force vary from agreement to agreement, but in broad outline they are similar. Under the Ramsar, London, and Bonn Conventions, and CITES, the COP is to adopt amendments by a two-thirds majority. Under the later agreements, amendments are to be adopted by consensus if at all possible: failing consensus, they are to be adopted by either a two-thirds majority (the Montreal Protocol and the Biodiversity and Desertification Conventions) or a three-quarters majority (the Vienna, Basel, and Climate Change Conventions). In the case of all the agreements, amendments adopted by these procedures do not enter into force until ratified by the same proportion of parties as is required for their adoption, and then are in force only for those parties that have ratified them.

In practice, this power has been used to amend several of the agreements.[85] Such treaty-amendment procedures are neither novel nor unique to MEAs. Indeed, these procedures essentially reflect the general procedures for treaty amendment laid down in the Vienna Convention on the Law of Treaties,[86] though in institutionalized and more streamlined form, and are broadly comparable to those laid down in the constituent treaties of international organizations, which frequently provide for their amendment through the adoption of the provisions concerned by the principal organ(s) of the organization, followed by ratification by a certain proportion of the member states.[87] Nevertheless, in practice the treaty-amending procedures of MEAs have involved some unusual, and possibly novel, features. The main example concerns the Montreal Protocol. In 1990 some important amendments to the Protocol were adopted by the second Meeting of the Parties.[88] According to Article 9(5) of the Vienna Ozone Convention, amendments to the Montreal Protocol require ratification by two-thirds of its parties to enter into force. At the time the amendments were adopted, there were fifty-eight parties to the Protocol: thus, their entry into force would have required forty ratifications. However, many of the parties were eager for the

[84] *See, e.g.*, Ramsar Convention, *supra* note 2, Art. 10 *bis* (added by the Protocol of Dec. 3, 1982, TIAS No. 11,084); London Convention, *supra* note 3, Art. 15; CITES, *supra* note 4, Art. XVII; Bonn Convention, *supra* note 5, Art. X; Vienna Convention, *supra* note 6, Art. 6(4); Montreal Protocol, *supra* note 7, Art. 11(4)(h); Basel Convention, *supra* note 8, Art. 15(5); Climate Change Convention, *supra* note 10, Art. 15; Biodiversity Convention, *supra* note 12, Art. 23(4)(d); Desertification Convention, *supra* note 14, Art. 22(2)(f).

[85] *E.g.*, Ramsar Convention, *supra* note 2 (in 1987); London Convention, *supra* note 3 (in 1978); CITES, *supra* note 4 (in 1979); Basel Convention, *supra* note 8 (in 1995); Montreal Protocol, *supra* note 7 (in 1990, 1992, 1997, 1999).

[86] *Opened for signature* May 23, 1969, Arts. 39–40, 1155 UNTS 331.

[87] *See, e.g.*, UN Charter Arts. 108–09; Convention on the International Maritime Organization, Mar. 6, 1948, Art. 52, 9 UST 621, 289 UNTS 48; Council of Europe Statute Art. 41.

[88] Montreal Protocol MOP Decision II/2, Doc. UNEP/OzL.Pro.2/3, *supra* note 26, *reprinted in* 1993 UKTS No. 4.

amendments to enter into force quickly, and notwithstanding Article 9(5) of the Vienna Ozone Convention, succeeded in persuading the meeting to provide in Article 2 of the amendments that they would enter into force once ratified by twenty parties. The meeting overcame objections to this course of action by regarding Article 2 as an agreement *inter partes* modifying Article 9(5) of the Vienna Ozone Convention, as provided for in Article 41(1)(*b*) of the Vienna Convention on the Law of Treaties.[89] Article 2(3) provides that following entry into force after ratification by twenty parties, the amendments enter into force for each remaining party upon ratification by that party. Such ratifications have been fairly slow in coming. One of the changes made by the 1990 amendments was to add a number of ozone-depleting substances to the list of controlled substances regulated by the Protocol. It might have been expected, in the light of the traditional consensual approach to treaty participation, that only those states that had ratified the 1990 amendments could participate in decisions at subsequent Meetings of the Parties to make changes in the regulations governing the controlled substances added by those amendments. In fact, however, so as to reflect the interest of all the parties to the Montreal Protocol in its future development, all parties, regardless of whether or not they have ratified the 1990 amendments, have been allowed to participate in the consensus procedures used to adjust these regulations.[90]

Besides having the power to alter parties' substantive obligations by adopting amendments to agreements, COPs may add to parties' obligations by adopting protocols to agreements. The latter power is found predominantly, although not exclusively, in those MEAs that were drawn up in the form of framework treaties because of the lack or uncertainty of scientific knowledge concerning the environmental problem at issue and/or the lack of agreement on the action to be taken to tackle that problem when the MEA was concluded. Global MEAs that enable the COP to adopt protocols include the Vienna Convention (Art. 8), the Basel Convention (Art. 15(5)(d)), the Climate Change Convention (Art. 17), and the Biodiversity Convention (Art. 23(4)(c)). Curiously, none of these agreements contains any provisions that spell out the procedure for the adoption of protocols, although all except the Climate Change Convention specify in detail how the protocols may be amended, once adopted. The matter thus falls to be regulated by the rules of procedure of the COP.[91] In general, these provide for the adoption of protocols by consensus if at all possible, failing which they may be adopted by a two-thirds or three-quarters majority. Protocols, like treaty amendments, clearly require ratification to enter into force. The number of ratifications required for entry into force, in the absence of provisions on the matter in the parent convention, is specified in the protocol itself. So far four protocols have been adopted by COPs under global MEAs: the Montreal Protocol adopted by the COP of the Vienna Convention, the Kyoto Protocol adopted by the COP of the Climate Change Convention, the Protocol on Liability and Compensation adopted by the COP of the Basel Convention, and the Cartagena Protocol on Biosafety adopted by the COP of the Biodiversity Convention.[92] Many protocols have been adopted in respect of regional MEAs, but diplomatic conferences have done so rather than COPs.[93]

[89] *See* Jill Barrett, *The Negotiation and Drafting of the Climate Change Convention*, *in* GLOBAL CLIMATE CHANGE, *supra* note 44, at 183, 190. But this justification for the action of the Meeting of the Parties has been questioned, *see* Gehring, *supra* note 25, at 48. Subsequent amendments to the Montreal Protocol have the same provisions relating to entry into force as the 1990 amendments.

[90] See further Werksman, *supra* note 63, at 65–67. An analogous situation has occurred in the Ramsar COP. *See* M. J. Bowman, *The Multilateral Treaty Amendment Process: A Case Study*, 44 INT'L & COMP. L.Q. 540, 549–50 (1995).

[91] See further on this point Patrick Széll, *Decision Making Under Multilateral Environmental Agreements*, 26 ENVTL. POL'Y & L. 210, 213 (1996).

[92] For these Protocols, see *supra* notes 7, 9, 11, 13, respectively.

[93] For example, the Protocols to UNEP's Regional Seas Conventions, *supra* note 16, and the Protocols to the LRTAP Convention, *supra* note 17.

Lawmaking Powers

The powers of COPs to adopt amendments and protocols to MEAs are only indirect lawmaking powers, as these measures require ratification by states parties to become legally effective. Some COPs, however, have genuine lawmaking powers: one, fairly common, form is the power to amend the annexes attached to MEAs such as the London, Bonn, and Basel Conventions, CITES, and the Montreal Protocol. These annexes usually contain more technical measures, which may require amendment or updating as a result of increased knowledge, greater political agreement, or some other change in circumstances. In some cases, such as the numerous amendments to the lists of species receiving protection in the annexes to CITES and the Bonn and Bern Conventions, the COP's power to amend may be relatively minor in terms of affecting the parties' substantive obligations and interests. But this is not always so; for example, the decisions of the CITES COP concerning changes in the listing of whale and elephant products provoked considerable debate and controversy. In other cases, the COP's power of amendment may clearly have a major impact on and radically change the obligations of parties to the MEA concerned. For example, the Consultative Meeting of the Parties to the London Convention, by amending its annexes, both introduced a scheme for regulating the incineration of waste at sea and later banned such incineration;[94] in addition, the consultative meeting has phased out the dumping of industrial and radioactive wastes.[95] These constitute major changes in the Convention. Another example of the COP's power to amend the parties' obligations extensively is demonstrated by the Montreal Protocol. The Protocol, as originally drafted, stipulated that the production and consumption of the five main chlorofluorocarbons (CFCs, which are ozone-depleting gases) was to be reduced by 50 percent of 1986 levels by 1999. However, "adjustments" made to the Protocol by the Meeting of the Parties in 1990 and 1992 determined that production and consumption of these CFCs should be phased out completely by 1996.[96] Similar far-reaching changes have subsequently been required for the use of other ozone-depleting substances listed in the various annexes to the Protocol.[97]

The procedure by which the COP adopts amendments to annexes (or adjustments in the case of the Montreal Protocol) is the same as that for the adoption of amendments to the agreement, except that they do not need to be ratified by the states parties. Such amendments are binding on all parties unless objected to within a certain period of time. However, parties to the Montreal Protocol that are unhappy with an adjustment may not object to it and so not be bound. Their only option would be to denounce the Protocol.[98] This situation is rather remarkable. Since adjustments can be adopted in theory by a two-thirds majority at a Meeting of the Parties, the majority can bind the minority against its will. In practice, this has not yet happened, as all adjustments so far have been adopted by consensus. According to Széll, the reason why the Montreal Protocol does not allow its parties to object to adjustments is that "at the time of adopting the Protocol all prospective Parties knew that

[94] London Consultative Meeting of the Parties Res. LDC.5(3) (1978), 1979 UKTS No. 71; Res. LDC.50(16) (1993), 1995 UKTS No. 90.

[95] London Consultative Meeting of the Parties Res. LDC.49(16), 51(16) (1993), 1995 UKTS Nos. 89, 91, respectively.

[96] Montreal Protocol MOP Decision II/1, Doc. UNEP/OzL.Pro2/3, *supra* note 26, *reprinted in* 1 Y.B. INT'L ENVTL. L. 612 (1990); Montreal Protocol MOP Decisions IV/2, IV/3, Doc. UNEP/OzL.Pro.4/15 (1992) <http://www.unep.org/ozone/4mop_cph.htm>, *reprinted in* 3 Y.B. INT'L ENVTL. L. 805, 806 (1992). "Adjustments" relate to changes in the timetable and targets set out in Article 2 of the Protocol for reducing the production and consumption of ozone-depleting substances; "amendments" refer to other changes in the Protocol.

[97] For a table showing the results of the changes made in the phasing out of ozone-depleting substances by adjustments to the Protocol up to and including 1997, see Sebastian Oberthür, *Montreal Protocol: 10 Years After*, 27 ENVTL. POL'Y & L. 432, 433 (1997).

[98] It should be noted, however, that under Article 19, a state must have been a party for at least four years before it may withdraw from the Protocol.

the trend of the instrument was in the direction of eventual total elimination of production and consumption of all the controlled substances."[99]

Apart from having a general power to make law by amending the annexes of MEAs (or in the case of the Montreal Protocol by "adjusting" that part of the main body of the Protocol relating to the timetable for phasing out the production and consumption of ozone-depleting substances), COPs may occasionally be authorized to make new rules by specific provisions of MEAs. For example, Article 17 of the Kyoto Protocol enables the COP to adopt "rules" relating to the operation of the system for trading in emissions of greenhouse gases. The use of the word "rules" suggests that such a measure is intended to be legally binding. This interpretation is also supported by substantive considerations: seemingly, a party that observes the "rules" on emissions trading can hardly be accused of noncompliance with the Protocol. Besides rule making in a fairly strict sense, COPs may be authorized to adopt measures that relate to the implementation of the parties' substantive obligations and that, while not strictly legislative, have a certain normative content. Thus, under Article 4(2)(d) of the Climate Change Convention, the COP is to "take decisions regarding criteria for joint implementation" of commitments by parties listed in Annex I. Such criteria were adopted in Decision 5/CP.1 of 1995.[100]

In addition to these specific powers, all the more recent MEAs empower the COP to undertake any additional action that may be required to achieve the purpose of the agreement. Whether this general power includes lawmaking is controversial, as is shown by the Basel Convention. Apparently acting under this power, the Basel COP at its second meeting in 1994 adopted Decision II/12 prohibiting the transboundary movement of hazardous waste from OECD to non-OECD member states.[101] However, this action was controversial, some states arguing that the decision was not legally binding because the COP could not alter parties' substantive obligations by utilizing the general power to take action to achieve the objectives of the Convention. The third COP in 1995 sought to resolve the controversy by adopting an amendment to the Convention that incorporated the substance of Decision II/12.[102] However, this amendment has not yet entered into force, and as of March 2000 had received only twenty of the sixty-two ratifications necessary to do so.[103] In a less controversial action, which may also have been based on this general power of the COP, the MOP of the Montreal Protocol decided in 1990 to establish an Interim Multilateral Fund.[104]

As was seen in the previous part, COPs have implied powers in relation to internal decision making. Like formal IGOs, they may enjoy similar powers in relation to matters concerning substantive obligations. COPs have taken various lawmaking decisions that apparently were intended to be, and seem to be regarded as, legally binding. Since no express provision in the relevant MEA authorized their adoption, these decisions could be regarded as being based on implied powers. Perhaps the best example of such a decision is the quota systems adopted by CITES for trade in various animal products such as ivory.[105] Although the

[99] Széll, *supra* note 91, at 213; *see also* RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 90 (1991). Compare Werksman, *supra* note 63, at 62, who speaks of the adjustment process as being tailored to the "scientific imperative of ozone depletion."

[100] Climate Change COP Decision 5/CP.1, UN Doc. FCCC/CP/1995/7/Add.1, *supra* note 28, at 18.

[101] Basel COP Decision II/12 (1994), *reprinted in* 5 Y.B. INT'L ENVTL. L. 868 (1994).

[102] For the 1995 amendment, see 6 Y.B. INT'L ENVTL. L. 779 (1995).

[103] See further Werksman, *supra* note 63, at 63–64. *See also* KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES 63–65 (1995); Louise de La Fayette, *Legal and Practical Implications of the Ban Amendment to the Basel Convention*, 6 Y.B. INT'L ENVTL. L. 703, 705–10 (1995).

[104] Montreal Protocol MOP Decision II/8, Doc. UNEP/OzL.Pro.2/3, *supra* note 26, *reprinted in* 1 Y.B. INT'L ENVTL. L. 602 (1990); *see also* Gehring, *supra* note 25, at 49. The fund was an interim one and remained in being only until the amendments to the Protocol establishing a permanent fund, which were adopted at the same time as Decision II/8, came into force. Decision II/8, like Decision II/12 of the Basel COP, does not state on which provision of the agreement it is based.

[105] *See* SANDS, *supra* note 63, at 380; *see also* LYSTER, *supra* note 36, at 248–49.

implied-powers doctrine could serve as the legal basis of this and other examples, it is a somewhat uncertain foundation for them. A state party unhappy with such a decision could argue that, as it was not expressly authorized by the MEA concerned, the COP was acting *ultra vires* and/or was disregarding the amendment procedure of the MEA (insofar as the decision could be seen as amending the agreement). For this reason, it may be better to regard any such decisions that have not been challenged as agreements in simplified form between parties to the MEA, rather than as decisions based on implied powers. The question whether implied powers constitute a possible basis for decision making does not loom as large for those MEAs (of which CITES is not one) that contain a general provision of the kind described above permitting any action to achieve the purposes of the agreement.

The various lawmaking powers of COPs described here[106] are comparable to those enjoyed by many traditional IGOs in the environmental field. For example, the International Maritime Organization can alter marine-pollution conventions by the so-called tacit amendment procedure, by which the amendments enter into force for all parties unless objected to within a certain period of time. Similarly, the International Whaling Commission and various international fisheries commissions may adopt resource management measures that bind all their members unless objected to. Even the remarkable provisions of the Montreal Protocol under which all parties are bound by adjustments without the possibility of objection do not lack precedent among IGOs; for example, both the International Civil Aviation Organization and the International Atomic Energy Agency have the power to take certain rule-making decisions by majority vote that bind all parties without the possibility of objection.[107]

Procedurally, as has been seen, COPs usually take the various kinds of lawmaking decisions outlined above by consensus if at all possible, failing which a two-thirds or three-quarters majority must be obtained. Unlike amendments to an agreement, these decisions do not require ratification. Since many of the rule-making decisions adopted by the simplified procedure are far-reaching in nature, Széll has suggested that the same procedure could be used for amendments to agreements, dispensing with the requirement of ratification.[108] This suggestion has much to commend it and seems to fall within the realm of the politically possible. The requirement of ratification often means that amendments are slow to enter into force; for example, the 1987 amendments to the Ramsar Convention took seven years to enter into force and the 1978 amendments to the London Convention have not yet done so. It may also mean that amendments are not ratified by (and so are not binding on) all parties to the agreement. For example, as of May 31, 2000, the 1990, 1992, and 1997 amendments to the Montreal Protocol had been ratified by 139, 106, and 37 parties, respectively, out of a total of 175 parties; nonratifiers are therefore not bound to phase out production and consumption of the many ozone-depleting substances added by those amendments. Széll has also wondered whether the procedure for adopting adjustments to the Montreal Protocol (i.e., precluding any opting out by states parties) could be used in other agreements.[109] While such a possibility exerts a certain attraction, it is unlikely to prove acceptable to states, except perhaps in highly unusual situations such as that of the Montreal Protocol,

[106] While all the various powers discussed here are described as "lawmaking," some writers make a distinction between legislative powers (which enable a majority of states to bind a minority, leaving the minority no possibility of opting out of the measure by objecting to it) and quasi-legislative powers (under which decisions taken by the majority can be objected to). See Julia Sommer, *Environmental Law-Making by International Organizations*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 628, 634–35 (1996) and literature cited there.

[107] On ICAO, see D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 145–47 (4th ed. 1982). On the IAEA, see Paul C. Szasz, *International Norm-Making*, *in* ENVIRONMENTAL CHANGE, *supra* note 29, at 41, 65. See further Paolo Contini & Peter H. Sand, *Methods to Expedite Environment Protection: International Ecostandards*, 66 AJIL 37, 41–53 (1972); Palmer, *supra* note 38, at 273–74 and literature cited there.

[108] Széll, *supra* note 91, at 212; *see also* PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 14–18 (1990).

[109] Széll, *supra* note 91, at 213.

because it makes too great an inroad into the traditional international law principle of consent, which states still strongly embrace despite urgings to the contrary.[110] In any case, current experience suggests that such a development would offer little practical advantage, as states rarely avail themselves of the opportunity to object to measures adopted by COPs, probably because most of these measures are adopted by consensus.

The Interpretation of Agreements

COPs engage from time to time in interpretation of the provisions of MEAs in ways that relate to and affect the substantive obligations of their parties. In some cases, this power of interpretation is expressly conferred by the MEA. Thus, Article 10(1) of the Montreal Protocol (as amended in 1990) authorizes the MOP to interpret the term "agreed incremental costs" (incurred by developing state parties in complying with the Protocol) by establishing "[a]n indicative list of . . . incremental costs."[111] Such a list was adopted in 1992.[112] Interpretations so authorized by the MEA clearly appear to be intended to be legally binding.

More commonly, a COP will interpret an MEA not because the agreement authorizes it, but because experience in the operation of the MEA or scientific, technical, or other developments are perceived as requiring it. For example, the CITES COP has adopted interpretations of the provisions of the Convention relating to the conditions for entry into force of amendments[113] and the criteria for amending the appendices,[114] and the Consultative Meeting of the Parties to the London Convention has effectively expanded the definition of "dumping" under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunneling.[115] Are such interpretations legally binding? Unlike interpretations specifically authorized by an MEA, they cannot derive binding force from the agreement as such. However, an interpretation adopted by a COP could be considered subsequent practice by the parties to a treaty, which, according to Article 31(3)(*b*) of the Vienna Convention on the Law of Treaties, is an element that may be taken into account in interpreting the treaty. On the other hand, if international institutional law applies, the COP, like an IGO organ, would be regarded as the author of the practice, not the states parties, and the law of treaties would therefore not be applicable. In either case, provided the interpretation adopted by the COP is uncontested and not modified by further practice, it is likely to be regarded as authoritative.

In all legal systems, interpretation may be so far-reaching that it comes close to being an exercise in legislation. In this respect international law in general, and decision making by COPs in particular, are no exception. The interpretation of the London Convention referred to above approaches legislation. In such cases, the action of the COP might be better regarded as an agreement *inter partes* modifying or supplementing the MEA within the meaning of Article 39 or Article 41(1)(*b*) of the Vienna Convention on the Law of Treaties, rather than subsequent practice within the meaning of Article 31(3)(*b*) or the practice of an organ under international institutional law.

As regards the procedure for adopting decisions containing interpretations of the MEA, it will normally be set out in the rules of procedure of the COP. In the more recent MEAs,

[110] *See* Handl, *supra* note 37, at 33; Palmer, *supra* note 38, at 270–78.

[111] Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer, 30 ILM 537, 550 (1991).

[112] Doc. UNEP/OzL.Pro.4/15, *supra* note 96, Annex VIII, *reprinted in* 3 Y.B. INT'L ENVTL. L. 822 (1992).

[113] CITES COP Res. CITES.CONF.4.27 (Apr. 1983) <http://www.wcmc.org.uk/CITES/eng/resols/resol4.shtml>.

[114] CITES COP Res. CITES.CONF.9.24 (Nov. 1994) <http://www.wcmc.org.uk/CITES/eng/resols/resol921.shtml#9.24>; *see also* Sommer, *supra* note 106, at 637, 647.

[115] London Consultative Meeting of the Parties Res. LDC.41(13) (1990), *reprinted in* 6 INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA: DOCUMENTARY YEARBOOK 332 (1990).

such decisions, as matters of substance, should normally be submitted for adoption by consensus, before resorting to majority voting.

Soft-Law Measures

From time to time, COPs adopt measures that do not lack some legal significance for the substantive obligations of states parties but, as is clearly demonstrated by their content or nomenclature, are not intended to be legally binding—in other words, soft-law measures. COPs turn to such measures for the same reasons that soft law is used generally in international environmental law—and international law in general (e.g., because states are unwilling to commit themselves to a "hard" obligation)—and they have the same legal significance (e.g., a soft-law measure may serve as a catalyst for developing a treaty or lead to the generation of a new rule of customary international law).[116] Examples of soft-law measures adopted by COPs include the CITES Guidelines for Transport and Preparation for Shipment of Live Animals and Plants (1980),[117] the Ramsar Framework for Implementation of the Convention (1984),[118] and the resolutions of the Consultative Meeting of the Parties to the London Convention that call for a moratorium on the dumping of radioactive waste (1983 and 1985).[119] The last of these progressed from soft to hard law by becoming incorporated in amendments to the Convention's annexes in 1993.[120]

Some Questions of Procedure

As has been pointed out, in practice COPs normally try to take decisions by consensus if possible (and under the more recent MEAs the COP is legally required to make every effort to reach consensus before resort is had to voting). This feature of COPs deserves some comment.

Consensus has been used informally in various UN bodies, such as the United Nations Conference on Trade and Development and the United Nations Development Programme, since the mid-1960s: it made its first formal appearance in the Rules of Procedure for the Third United Nations Conference on the Law of the Sea, adopted in 1973.[121] Since then consensus has been increasingly used; it first appeared in an MEA of the kind discussed in this article in the LRTAP Convention of 1979. Consensus decision taking has replaced straightforward majority voting as a result, in Buzan's pithy phrase, of "the divorce of power from voting majorities";[122] in such a situation, taking decisions by majority voting becomes undesirable because of the risk of alienating powerful minorities that may simply ignore those decisions. In view of the consequent need for "a technique that [would] ensure very broadly based support for decisions in a highly divided system,"[123] consensus decision making developed. While this procedure promotes the taking of decisions that are likely to be universally acceptable, it does have some drawbacks. It is likely to slow down the reaching of decisions and to lead to decisions that represent the lowest common denominator and

[116] On the use of soft law in international environmental law, see, from a considerable literature, BIRNIE & BOYLE, *supra* note 27, at 26–30; Handl, *supra* note 37, at 7–8; Palmer, *supra* note 38, at 269–70; SAND, *supra* note 108, at 16–17; and Szasz, *supra* note 107, at 69–72.

[117] CITES COP Doc. Plen.2.6 (Rev.), item XIX (1980); *see* Michael Bowman, *Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES*, 1 J. INT'L WILDLIFE L. & POL'Y 9 (1998).

[118] Ramsar COP Recommendation 2.3, Doc. C.4.12 (1984), *reprinted in* 12 ENVTL. POL'Y & L. 118 (1984).

[119] London Consultative Meeting of the Parties Res. LDC.14 (7) (1983) & LDC.21 (9) (1985), *reprinted in* IMO, THE LONDON DUMPING CONVENTION: THE FIRST DECADE AND BEYOND 207, 208 (1991).

[120] *See* note 95 *supra* and corresponding text.

[121] *See* Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AJIL 324, 325–26 (1981).

[122] *Id.* at 326.

[123] *Id.* at 327.

are vague or, to use Birnie and Boyle's phrase, " 'constructively' ambiguous."[124] Consensus decision making also raises the questions of, first, what is meant by consensus, and, second, how long the search for consensus must continue before resort may be had to voting. As regards the first question, consensus is usually taken to mean the absence of formal objection to a proposed decision (which is not necessarily the same as unanimity).[125] As regards the second question, no precise answer can obviously be given.

When consensus cannot be reached, there is a case, if voting is resorted to, for requiring special majorities or weighting the votes to try to ensure that decisions receive broad support from the more powerful and interested states or groups of states. Such techniques have been developed for some IGOs such as the International Sea-Bed Authority and the World Bank's Global Environment Facility, but so far their use by the COPs of MEAs has been very limited. The only example appears to be the MOP of the Montreal Protocol, which has employed both a form of weighted voting and double majorities. Thus, under Article 2(9) of the Protocol (in its original form) decisions on the "adjustment" of the timetable for phasing out the production and consumption of ozone-depleting substances that could not be reached by consensus were to be taken by voting, provided that two-thirds of the parties voted in favor and that such parties represented at least 50 percent of the consumption of the substances in question. In 1990 this form of weighted decision making was replaced by a requirement of a double majority. Decisions on this matter (and on some others, such as the financial mechanism) now require a two-thirds majority that itself must include a majority of developing state parties and a majority of developed state parties. There seems to be a good case for considering extending such forms of decision making to other COPs, particularly those that find it difficult to reach consensus. However, it may not be so easy to decide the form that weighted voting or special majorities should take for MEAs that cover a broad spectrum of issues and interests, such as the Biodiversity and Desertification Conventions.[126] Moreover, where decisions are taken by majority vote, the possibility in most MEAs for states parties to object to, and so not be bound by, those they do not like serves as a safety valve to prevent the minority from feeling tyrannized by the majority. The absence of such objection procedures in the Montreal Protocol probably helps to explain why so far it appears to be the only MEA whose COP utilizes special voting procedures.

V. Supervision by MEA Institutions of Implementation of and Compliance with Substantive Obligations

There is a need for procedures and mechanisms to monitor and facilitate states parties' implementation of and compliance with their substantive obligations under multilateral environmental agreements.[127] Most MEAs assign a general supervisory role to the COP in this regard.[128] To enable the COP to fulfill this role, many MEAs require the parties to

[124] BIRNIE & BOYLE, *supra* note 27, at 37.

[125] *See* Széll, *supra* note 91, at 212; SCHERMERS & BLOKKER, *supra* note 58, at 506, 512–15. It is also of interest that at the fourth meeting of the Climate Change Convention COP, held in 1998, Switzerland protested against a decision that had been adopted by consensus but did not formally object to it.

[126] *See* Széll, *supra* note 91, at 213.

[127] This section deals only with institutional aspects of the topic. For a broader perspective, see, from a growing literature, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW (James Cameron, Jacob Werksman, & Peter Roderick eds., 1996); Martti Koskenniemi, *New Institutions for Implementation Control and Reaction*, *in* GREENING INTERNATIONAL INSTITUTIONS, *supra* note 63, at 236; Kamen Sachariew, *Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms*, 2 Y.B. INT'L ENVTL. L. 31 (1991); Patrick Széll, *Compliance Regimes for Mulilateral Environmental Agreements—A Progress Report*, 27 ENVTL. POL'Y & L. 304 (1997).

[128] *See, e.g.*, CITES, *supra* note 4, Art. XI(3); Bonn Convention, *supra* note 5, Art. VII(5); Basel Convention, *supra* note 8, Art. 15(5); Climate Change Convention, *supra* note 10, Art. 7(2)(e–g); Biodiversity Convention, *supra* note 12, Art. 23(4).

report on their implementation of the agreement. For example, Article 7 of the Montreal Protocol stipulates that the parties shall provide data on their annual production, imports, and exports of controlled substances, and Article 13 of the Basel Convention requires annual reports on transboundary movements of hazardous waste. In many MEAs these reports are to be considered by the COP, often after examination by a specialist subsidiary body, such as the Subsidiary Body for Implementation under the Climate Change Convention. Such consideration may reveal that a party is not complying with its obligations.

Where noncompliance is alleged, either as a result of a national report or in some other way (e.g., information provided by an NGO), the matter could in theory be resolved through traditional forms of dispute settlement. MEAs, however, offer fairly limited possibilities for binding dispute settlement. Normally, negotiation is the preferred procedure for settling disputes, although some MEAs call for binding resolution by mutual consent of the disputing parties; e.g., CITES (Art. XVIII(2)) and the Bonn Convention (Art. XIII) provide for submission of the dispute to arbitration, and the Basel Convention (Art. 20(2)) provides for submission to the ICJ or arbitration. Some agreements stipulate that the disputing parties may accept compulsory binding resolution by prior unilateral declaration, with provision for compulsory (but nonbinding) conciliation if they have chosen a different means of settlement or have not made a declaration; see, for example, the 1994 Sulphur Protocol to the LRTAP Convention (Art. 9(2) and (5)), the Vienna Ozone Convention (Art. 11(3) and (4)), the Biodiversity Convention (Art. 27(3) and (4)), and the Climate Change Convention (Art. 14). Only one MEA requires unconditional binding settlement of disputes on the basis of a unilateral request, namely, the Bern Convention, which in Article 18(2) provides for compulsory arbitration unless the parties agree otherwise. Unlike the noncompliance procedures discussed below, the dispute settlement procedures just described confer no real role on MEA institutions.

Rather than place much emphasis on traditional dispute settlement procedures, some MEAs establish specific bodies to determine and deal with cases of noncompliance with substantive commitments. Article 8 of the Montreal Protocol, for example, provides that "[t]he Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance."[129] In accordance with this provision, the Meeting of the Parties has established a noncompliance mechanism/procedure whose institutional component, the Implementation Committee, considers allegations of noncompliance (which may be referred to it by any state party or the secretariat) and recommends any action to be taken to the MOP.[130] Noncompliance mechanisms either have also been established or are provided for in the 1994 Sulphur Protocol to the LRTAP Convention (Art. 7(1)), the 1996 Protocol to the London Convention (Art. 11(1)), and the Desertification Convention (Art. 27). The Climate Change Convention and the Kyoto Protocol provide for a "multilateral consultative process" with a similar purpose.[131] In our view, subsidiary bodies for operating noncompliance mechanisms could also be established without an explicit provision in the MEA, on the basis of "implied powers."[132]

The advantages of using noncompliance mechanisms rather than traditional dispute settlement procedures are twofold. First, because questions of compliance with MEA commitments are multilateral in character and usually affect all parties equally rather than any particular party or parties specifically, they should preferably be addressed in a multilateral context, rather than in a bilateral dispute settlement procedure. Second, noncompliance procedures

[129] Montreal Protocol, *supra* note 7, Art. 8.

[130] Montreal Protocol MOP Decision II/5, *supra* note 26; Montreal Protocol MOP Decision IV/5, Doc. UNEP/OzL.Pro4/15, *supra* note 96.

[131] Climate Change Convention, *supra* note 10, Art. 13; Kyoto Protocol, *supra* note 11, Art. 16.

[132] *See* text at notes 58–72 *supra*.

may promote the resolution of compliance problems in a cooperative, rather than an adversarial, manner.[133]

The nonconfrontational approach is reflected in the mandate of the Implementation Committee of the Montreal Protocol, which is to seek an "amicable solution";[134] that of the Implementation Committee established under the LRTAP Convention, which is to address noncompliance with a view to securing a "constructive solution";[135] and that of the Multilateral Consultative Process under the Climate Change Convention, whose deliberations are to be conducted in a "facilitative, cooperative, non-confrontational, transparent and timely manner, and be non-judicial."[136]

Furthermore, the outcome of the procedure is directed more toward assistance than sanctions. The 1996 Protocol to the London Convention, for example, provides that the COP may offer "advice, assistance or co-operation" to parties and nonparties.[137] The Multilateral Consultative Process under the Climate Change Convention refers to "appropriate assistance."[138] The "indicative list of measures" under the Montreal Protocol, however, refers not only to supportive measures (A), but also to cautions (B) and suspension (C):

> A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.
>
> B. Issuing cautions.
>
> C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.[139]

The noncompliance procedure of the LRTAP Convention seems rather open-ended in establishing that the Executive Body may "decide upon measures of a non-discriminatory nature to bring about full compliance with the protocol in question, including measures to assist a Party's compliance."[140] The report of the Executive Body, however, states that "[i]t was understood by the delegations . . . that the Executive Body's decisions concerning compliance were not legally binding unless a provision in the protocol in question rendered them so."[141] Similarly, the Kyoto Protocol provides that "procedures and mechanisms" on noncompliance established under its Article 18 entailing "binding consequences" shall be adopted by an amendment to the Protocol.[142]

One might ask whether the noncompliance procedures establish "self-contained" regimes, which would preclude recourse to sanctions under general international law such as the suspension or termination of a treaty following a material breach in accordance with Article

[133] Noncompliance mechanisms have been criticized, however, for blurring the adjudicative and conciliatory functions and for not taking account of the interests of the international community in general, *see* Christine Chinkin, *Alternative Dispute Resolution Under International Law, in* REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 123, 128–34 (Malcolm Evans ed., 1998).

[134] Montreal Protocol MOP Decision IV/5, *supra* note 130, para. 8.

[135] LRTAP Executive Body Decision 1997/2, annex, para. 3(b) <http://www.unece.org/env/lrtap/conv/report/eb53_a3.htm>.

[136] Climate Change COP Decision 10/CP.4, UN Doc. FCCC/CP/1998/16/Add.1, annex, para. 3, *obtainable from* <http://www.cop4.org>.

[137] Nov. 7, 1996, Art. 11(2), 36 ILM 710 (1997).

[138] Climate Change COP Decision 10/CP.4, *supra* note 136, annex, paras. 6, 12.

[139] Montreal Protocol MOP Decision IV/5, *supra* note 130.

[140] LRTAP Executive Body Decision 1997/2, annex, *supra* note 135, para. 11.

[141] LRTAP Executive Body, Report of the Fifteenth Session, UN Doc. ECE/EB.AIR/53, para. 48 (Jan. 7, 1998) <http://www.unece.org/env/lrtap/conv/report/ebair53.htm>.

[142] Kyoto Protocol, *supra* note 11, Art. 18.

60 of the Vienna Convention on the Law of Treaties, or the use of countermeasures under the law of state responsibility. That question, however, falls outside the ambit of this article.[143] We focus instead on the extent to which the use of sanctions provided for by the law of international institutions is allowed.

We concluded earlier that international institutional law should apply in establishing the powers of AIAs at the internal level.[144] We would argue that this approach should also hold true when considering the power to adopt sanctions if substantive obligations are violated. First, the law of treaties is not directly applicable to the breach of a binding decision by a COP or other MEA body, as opposed to the breach of a treaty obligation. While certain binding substantive decisions are formally amendments to an MEA, such as decisions on the protection of species under the Bern Convention (Art. 17), other substantive decisions are not, such as the rules for emissions trading under the Kyoto Protocol (Art. 17).[145] Second, cooperation on noncompliance more closely resembles solutions to corresponding problems in traditional IGOs than dispute settlement for breach of a treaty, since account must be taken of the need for continuing cooperation under the MEA in controlling the observance of existing obligations and developing new commitments.[146] Furthermore, various incentives and sanctions are available under MEA cooperation that are unknown in the law of treaties. Third, the parties to MEAs, by establishing AIAs rather than formal IGOs, should not be considered to have intended them to be less effective institutions. Finally, while so far the measures adopted in response to a breach have been rather cautious, this should not be taken as an indication that the parties intended that the COPs could not adopt stronger measures. However, if a list of indicative measures to be taken has been adopted (as in the case of the Montreal Protocol), the use of other kinds of measures may be restricted until it has been amended.

We may thus conclude that international institutional law applies to breaches of substantive obligations in MEAs. This conclusion then raises the question of the kinds of sanctions that should be considered available under such law.

A mild kind of sanction is the "shaming" represented by merely naming a state in noncompliance. As regards formal IGOs, some commentators have argued that the competence to determine noncompliance is implied in the right to discuss the report of a supervisory organ.[147] This sanction may also be used when a situation of noncompliance has been brought to an end, as was done in the case of the Czech Republic under the Montreal Protocol.[148]

Discretionary powers to provide financial and technological assistance, or other services or privileges, may afford positive incentives to parties to comply with their commitments. But denial of assistance and privileges, or making them conditional, may serve as negative leverage: this sanction should probably be accepted as available even in the absence of explicit competence.[149] Conditions were attached to assistance to Russia under the Montreal Protocol, requiring further actions by that state to implement its obligations.[150]

More radical sanctions have also been imposed by international organizations, with or without an explicit basis, such as suspension of voting rights or representation, or of other rights and privileges of membership.[151] Under the Montreal Protocol, the MOP has cautioned several countries with economies in transition, in accordance with the indicative list

[143] On this question, see Koskenniemi, *supra* note 68.

[144] *See* text at notes 63–72 *supra*.

[145] *See* part IV *supra*.

[146] *See* SCHERMERS & BLOKKER, *supra* note 58, at 866.

[147] *See id.* at 898.

[148] *See* Montreal Protocol MOP Decision VIII/24, Doc. UNEP/OzL.Pro8/12 (1996), <http://www.unep.org/ozone/8mop_snj.htm>.

[149] *See* SCHERMERS & BLOKKER, *supra* note 58, at 906, 913–14.

[150] *See* Montreal Protocol MOP Decision VIII/25, Doc. UNEP/OzL.Pro8/12, *supra* note 148.

[151] *See* SCHERMERS & BLOKKER, *supra* note 58, at 906–12, 916–18.

of measures in subparagraph B, that measures consistent with subparagraph C, including suspension of the right to trade in ozone-depleting substances under Article 4 of the Protocol, might be considered.[152] The reference in subparagraph C to "the applicable rules of international law concerning the suspension of the operation of a treaty," rather than to the appropriate law of international institutions, seems unnecessarily restrictive.[153]

In certain circumstances, international institutional law allows the suspension or expulsion of states parties from cooperation under the MEA concerned.[154] This sanction may be the most dramatic, but not necessarily the most effective, since it would prevent the supervision of such states' activities in matters covered by the MEA. Thus, MEA COPs, like international organizations, should generally avoid this sanction.[155]

International institutional law should also be applied in interpreting explicit restrictions on the application of sanctions. Article 18 of the Kyoto Protocol, as stated above, establishes that measures with "binding consequences" shall be adopted by amending the Protocol. International institutional law could be used to interpret what is meant by "binding" in this context. It could thus be argued that sanctions such as suspension of assistance and possibly also of the use of the "Kyoto mechanisms," e.g., emissions trading, are not binding, at least to the extent that such assistance and mechanisms are considered to be "privileges" rather than "rights."

At present, much of the above discussion is rather theoretical, as the only MEA whose noncompliance mechanisms have been invoked so far in practice is the Montreal Protocol.

VI. The External Capacity of MEA Institutions

The opinion of the UN Office of Legal Affairs of November 4, 1993, mentioned above (UNOLA I), stated that the Climate Change Convention established "an international entity/organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat (Articles 3, 7–10)."[156] In this part we consider whether, as this statement suggests, MEA institutions, like IGOs, may possess international legal personality and therefore act on the external plane, especially in the form of entering into formally binding agreements (i.e., treaties) with states (e.g., on privileges and immunities), or with international organizations (such as the organization hosting the secretariat), or with financial institutions (for example, the GEF). We begin by examining the wording of MEAs and then go on to consider the doctrine of implied powers and the practice of MEA institutions.

Wording of MEAs

In UNOLA I, the UN Office of Legal Affairs refers to the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, which states that the capacity of an international organization to conclude treaties is governed by the "rules of the organization" (Art. 6).[157] The latter are defined, in

[152] Montreal Protocol MOP Decisions X/20, 21, 23–28 (1998) <http://www.unep.org/ozone/10mop-rpt.htm>, concerning Azerbaijan, Belarus, Estonia, Latvia, Lithuania, the Russian Federation, Ukraine, and Uzbekistan. As pointed out by Werksman, the application of trade measures may conflict with commitments under GATT/World Trade Organization. Jacob Werksman, *Compliance and Transition, Russia's Non-Compliance Tests the Ozone Regime*, 56 ZaöRV 750, 773 (1996).

[153] *See* text at note 139 *supra*.

[154] *See* text at note 71 *supra*.

[155] *See* SCHERMERS & BLOKKER, *supra* note 58, at 97; AMERASINGHE, *supra* note 58, at 124.

[156] United Nations Office of Legal Affairs, Arrangements for the Implementation of the Provisions of Article 11 of the UN Framework Convention on Climate Change Concerning the Financial Mechanism, para. 4 (Nov. 4, 1993) (on file with authors) [hereinafter UNOLA I]; *see also* UN Doc. A/AC.237/50 (1993).

[157] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 ILM 543 (1986).

particular, as the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization (Art. 2(1)(j)).

The opinion continues:

> 6. The United Nations Framework Convention on Climate Change of 9 May 1992 provides in Article 7 that the Conference of the Parties (COP) is established as the *supreme body* of the Convention with the responsibility to keep under regular review the implementation of the Convention with the authority to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. In addition to the wide range of functions referred to in Article 7, paragraph 2 (a–l) of the Convention, including *inter alia* the establishment of cooperative relations with competent international organizations and bodies, the COP can also exercise such other functions as are required for the achievement of the objective of the Convention (Article 7, paragraph 2-m).[158]

On the basis of the provisions mentioned, the opinion concluded that the COP had the legal capacity, within the limits of its mandate, to enter into agreements with other entities possessing the authority to do so.

It should be noted, first, that UNOLA I refers to the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (which is not in force), even though AIAs, including COPs, have not been established as formal international organizations. This accords with our characterization of AIAs as self-governing bodies, and thus as informal organizations.

Second, MEAs do not contain any explicit provisions setting out their international legal personality or their treaty-making capacity. Treaties establishing formal international organizations, however, also commonly lack such provisions.[159]

Third, several provisions in the Climate Change Convention—and other MEAs—may be taken to provide a treaty-making capacity for the COP, thus implying that AIAs have international legal personality. UNOLA I refers to the catchall phrase in the Climate Change Convention (Art. 7(2)), which states that the COP "shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention." To this end, it shall "(m) Exercise such other functions as are required for the achievement of the objective of the Convention."[160]

In addition to being very broad, this wording does not distinguish between decisions on the internal plane, those concerning substantive obligations, and those related to actions on the external plane. Whereas the terms "effective implementation of the Convention" and "achievement of the objective of the Convention" indicate extensive powers, the references to "necessary" and "required" arguably impose restrictions on these powers. Nothing suggests, however, that these restrictions preclude legal capacity to act on the external plane. Similar wording can be found in several other MEAs, such as the Bonn and Desertification Conventions, which provide respectively that their COPs may decide on "any additional measure that should be taken to implement the objects of this Convention" and "such other functions as may be necessary for the achievement of the objective of the Convention."[161]

UNOLA I also refers to more specific functions of the COP listed in Article 7(2), subparagraphs (a) to (l) of the Climate Change Convention, including the competence to "(l) [s]eek and utilize, where appropriate, the services and cooperation of . . . competent inter-

[158] UNOLA I, *supra* note 156, para. 6.

[159] *See* AMERASINGHE, *supra* note 58, at 85; SCHERMERS & BLOKKER, *supra* note 58, at 978.

[160] UNOLA I, *supra* note 156, para. 6 (quoting Climate Change Convention, *supra* note 10, Art. 7(2)).

[161] Bonn Convention, *supra* note 5, Art. VII(5)(h); Desertification Convention, *supra* note 14, Art. 22(2)(j); *see also* LRTAP Convention, *supra* note 17, Art. 10(2)(c); Vienna Convention, *supra* note 6, Art. 6(2)(k); Montreal Protocol, *supra* note 7, Art. 11(3)(j); Basel Convention, *supra* note 8, Art. 15(5)(c); Kyoto Protocol, *supra* note 11, Art. 13(4); Prior Informed Consent Convention, *supra* note 15, Art. 18(5)(c).

national organizations and intergovernmental and non-governmental bodies."[162] It is not stated in what form such cooperation should be conducted, but binding agreements, i.e., treaties, are not excluded. International organizations and intergovernmental bodies would include formal international organizations, as well as bodies established by other MEAs.

Reference should also be made to Article 8(2)(f) of the Convention, which authorizes the secretariat to "enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions." Nothing is said about limiting such arrangements to domestic law instruments; thus, the wording also seems to allow the secretariat to enter into binding international agreements to the extent "required" for the "effective" discharge of its functions. Similar provisions are contained in the Desertification Convention (Art. 23(2)(e)), the Vienna Ozone Convention (Art. 7(1)(e)), and the Basel Convention (Art. 15(5)(d)).

As can be seen, the wording of MEAs covers both general and specific powers relevant to the legal capacity of COPs at the external level. Since the general powers contained in catch-all phrases relate to what is necessary for the effective implementation of the MEA, powers on the external plane, including entering into treaties, seem to be included. The specific powers refer to arrangements, but they include contractual arrangements with international bodies, which should also indicate a treaty-making capacity.

Even if the view is taken that MEA institutions, or at least certain ones, do not enjoy international legal personality and treaty-making capacity by virtue of express provisions in the relevant agreement, they may still possess such personality and capacity as a result of implied powers.

Implied Powers

The doctrine of implied powers found its authoritative expression in the *Reparations* case,[163] which concerned the United Nations' capacity to bring international claims, i.e., its powers on the external plane. This reliance on the object and purpose ("effective interpretation") of the constitutive treaty has since been generally accepted as a basis for determining the external capacity of IGOs. We argued earlier that this doctrine should be applied when determining the internal powers of MEA institutions, as well as their powers to adopt substantive decisions. But what about their capacity on the external plane?

As already mentioned, the absence of an explicit provision on international legal personality, while common in formal IGOs, has not prevented them from having such personality. It is difficult to see a greater need for an explicit basis in the case of MEA institutions. States parties should therefore not be surprised to learn that they have allocated more powers to AIAs than they have expressly conferred on them.

Second, the fact that AIAs have been established rather than new formal IGOs should not be a reason for denying implied powers to AIAs; they were established instead of formal IGOs because of the need for "institutional economy" rather than a desire to establish less effective institutions. Just like formal IGOs, AIAs need to act on the external plane; for example, in relation to the organization hosting the secretariat, international financial institutions, the state where the secretariat is located, and the bodies of other MEAs. AIAs should be able to enter into binding agreements, i.e., treaties, with such entities.

We may thus conclude that, in addition or as an alternative to express powers, MEA institutions have implied powers to act on the external plane, including the capacity to enter into treaties when necessary to carry out their functions. We now turn to actual practice in the exercise of these powers.

[162] UNOLA I, *supra* note 156, para. 6 (citing Climate Change Convention, *supra* note 10, Art. 7(2)(l)).

[163] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174 (Apr. 11).

The Practice of MEA Institutions

Arrangements with the host organization. The secretariats designated in MEAs, or established by their COPs, formally constitute a part of another international organization, i.e., the host organization. It is necessary both for the host organization to accept this responsibility and for it to make arrangements with the COP relating to the functioning of the secretariat. The making of such arrangements is provided for, inter alia, in Article 11(3) of the Climate Change Convention, Article 23(3) of the Desertification Convention, and Article 19(3) of the Prior Informed Consent Convention.

The MEAs do not define the legal character of an organization's consent to host or provide a secretariat and the consequent arrangements. In practice, these matters have not yet been the subject of a binding, or even a nonbinding, agreement entered into and signed by representatives of the AIAs and the host organization. Instead, consultations between the two parties have led to parallel decisions setting out their mutual relationship. Thus, as we have seen, in Decision 14/CP.1, the COP of the Climate Change Convention decided that "the Convention secretariat shall be institutionally linked to the United Nations, while not being fully integrated in the work programme and management structure of any particular department or programme."[164] The General Assembly responded by adopting Resolution 50/115 of December 20, 1995, which"[e]ndorse[d] the institutional linkage between the Convention secretariat and the United Nations, as advised by the Secretary-General and adopted by the Conference of the Parties."[165] Arrangements between the parties are reflected in subsequent COP decisions, such as Decision 14/CP.2, Establishment of the Permanent Secretariat and Arrangements for Its Functioning.

Nothing is said in these decisions about the international legal personality of the COP. Two self-governing bodies, however, rather than the states parties to the MEA and the host organization, entered into these arrangements. Furthermore, the character of the arrangements is international and not domestic. There may be some doubt as to whether they are binding or nonbinding. At present, such arrangements take the form of parallel decisions (though obviously underpinned by a mutual understanding) rather than formal agreements, but there seems to be no reason why in principle the competence to conclude a binding agreement should not be considered to fall within the powers of the COP.

Arrangements with financial institutions. The Climate Change Convention establishes that a mechanism for the provision of financial resources, including the transfer of technology, is "defined," and that arrangements shall be agreed upon between the COP and the "entity or entities" entrusted with the operation of this mechanism (Art. 11(1) and (3)). The Biodiversity Convention establishes that there shall be a financial mechanism and that the COP shall decide on appropriate arrangements after consultation with the institution entrusted with the operation of this mechanism (Art. 21(1) and (3)).

The opinion of the UN Office of Legal Affairs referred to above as UNOLA I concerned the arrangements between the COP of the Climate Change Convention and the GEF as the financial mechanism. In this opinion it is stated:

> In light of the above, as far as the question of the legal capacity of the COP is concerned, it may be concluded that in accordance with the relevant provisions of the Convention, the COP has the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with entities, such as states, intergovernmental and non-governmental organizations and bodies, which also have the authority to do so.[166]

[164] *See* note 28 *supra* and corresponding text.

[165] GA Res. 50/115, UN GAOR, 50th Sess., Supp. No. 49, Vol. 1, at 174, UN Doc. A/50/49 (1995) (emphasis omitted).

[166] UNOLA I, *supra* note 156, para. 7; *see also* Jacob Werksman, *Consolidating Governance of Global Commons: Insights from the Global Environment Facility*, 6 Y.B. INT'L ENVTL. L. 27, 54–60 (1995).

In a subsequent opinion of August 23, 1994 (UNOLA II), the UN Office of Legal Affairs recommended that the COP enter into "a legally-binding treaty instrument" on its relationship with the GEF:

> It may be stated with sufficient certainty that complex issues, such as accountability, observance of compliance with the eligibility criteria for funding, procedures for the reconsideration of particular funding decisions and, last but not least, procedures for joint determination and periodical review of the aggregate GEF funding necessary and available for the implementation of the Convention, will have to be regulated in an agreement concluded for these purposes. . . . [T]o ensure the effective operation of the GEF as a source of funding of the activities under the Convention, the above-captioned issues should be spelled out in a legally-binding treaty instrument.[167]

In 1996 a memorandum of understanding (MOU) was entered into by the COP and the Council of the GEF.[168] MOUs are generally meant to signify nonbinding, rather than binding, arrangements. But their legal character depends on the intention of the parties, which must also be determined on the basis of factors other than their name, especially their wording.[169] The MOU between the COP of the Climate Change Convention and the Council of the GEF contains provisions on its modification, entry into effect, and termination, which are usual in binding agreements. The relevant decision of the COP adopts the MOU, "thereby bringing it into force."[170] However, the tenor of the wording indicates its nonbinding character by using "will" and "should" rather than "shall," although it also states that the two secretariats "shall" cooperate. Furthermore, the fact that the Council of the GEF is a party strongly suggests that the MOU is meant to be nonbinding; for, according to UNOLA II, "the founders of the restructured GEF did not provide it with the legal capacity to enter into legally binding arrangements or agreements. . . . Thus, if a cooperative arrangement or agreement is negotiated by the GEF with the COP, subsequently it will have to be formalized by the World Bank."[171] Since the MOU was to come into force by acceptance of the COP and the Council of the GEF, and needed no confirmation by the World Bank, it should be considered to be nonbinding. On the other hand, nowhere is it suggested that the nonbinding status of the arrangement was chosen because the COP lacked competence to enter into binding agreements.[172]

Arrangements with the host state. When an MEA secretariat (or other subsidiary body) is located in a state other than the seat of the headquarters of the organization hosting that secretariat, arrangements must be reached, inter alia on privileges and immunities, with that other state. The incorporation of these arrangements in binding agreements under international law, with the COP as a party, would be evidence of its international legal personality. Two such arrangements will be examined to see if this is the case: the 1998 Agreement between the Multilateral Fund for the Implementation of the Montreal Protocol and Canada,[173] and the 1996 Agreement between the United Nations, the Federal Republic of Germany, and the secretariat of the Climate Change Convention.[174]

[167] UN Doc. A/AC.237/74, annex, para. 16 (1994) [hereinafter UNOLA II].

[168] Memorandum of Understanding Between the Conference of the Parties to the United Nations Framework Convention on Climate Change and the Council of the Global Environment Facility, Decision 12/CP.2, annex, UN Doc. FCCC/CP/1996/15/Add.1 (1996).

[169] *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 800–04 (1986).

[170] Climate Change COP Decision 12/CP.2, *supra* note 168, para. 2; *see also* Biodiversity COP Decision III/8, Doc. UNEP/CBD/COP/3/38, at 61 (1996), <http://www.biodiv.org/Decisions/COP3/pdf/COP-3-AllDecisions-e.pdf>.

[171] UNOLA II, *supra* note 167, paras. 18, 19.

[172] See the documents presented by the secretariat to the Subsidiary Body for Implementation and the COP, respectively, UN Docs. FCCC/SBI/1995/3, FCCC/CP/1996/9.

[173] Agreement Regulating Matters Resulting from the Establishment in Canada of the Multilateral Fund and Its Organs, Nov. 23, 1998, Can.–Multilateral Fund for the Implementation of the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (on file with authors).

[174] Agreement Concerning the Headquarters of the Convention Secretariat, UN–FRG–Secretariat of UN Framework Convention on Climate Change, June 20, 1996 (on file with authors) [hereinafter 1996 Agreement].

The Montreal Protocol does not make use of the GEF as a financial mechanism but specifies, instead, that the parties shall establish a mechanism for providing financial and technical cooperation, which shall include a multilateral fund (Art. 10(1) and (2)). Such a fund was established by the MOP and situated in Canada,[175] whereas the secretariat of the Protocol is located in Kenya at the headquarters of its host organization, UNEP. The MOP subsequently decided that the fund shall enjoy "such legal capacity as is necessary for the exercise of its functions and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defence of its interests."[176] Furthermore, the fund as well as its officials shall enjoy such privileges and immunities as are necessary for the fulfillment, respectively, of its purposes and their functions.

The 1998 Agreement between the multilateral fund and Canada regulates the privileges and immunities of the fund, its officials, representatives of member states, and experts. It establishes rights and obligations regarding the fund that are typical of a headquarters agreement of an international organization, such as inviolability of the office premises (Art. 3), exemption from taxes and duties (Art. 5), operation of communication facilities (Art. 6), and privileges and immunities necessary for officials to exercise their functions independently (Arts. 9 and 10).

Although the Agreement does not state that it is governed by international, rather than domestic, law, this conclusion is inescapable. It follows, first, from the object and purpose of the Agreement, since the independence purportedly conferred on the fund would not be achieved if Canada were entitled to eliminate the privileges and immunities by unilateral domestic acts. Second, the Agreement establishes in several provisions that the fund and its representatives shall have protection similar to that enjoyed by diplomatic missions and agents or international organizations and their representatives (e.g., Arts. 3(2), 6(1) and (2), 9(1) and (2), and 10). Third, the duty of persons enjoying privileges and immunities under the Agreement to respect the laws and regulations of Canada applies without prejudice to those privileges and immunities (Art. 12), which gives priority to the latter. Finally, under the procedure laid down in the Agreement for settling disputes by means of arbitration, when the parties cannot agree on the third member of the arbitral tribunal, that member shall be appointed by the president of the International Court of Justice. All these factors indicate that the Agreement is an instrument under international law.

We may thus conclude that the Agreement is a treaty entered into by the multilateral fund, on the basis of a decision of the MOP of the Montreal Protocol. It is difficult to accept that the MOP could have the capacity to establish an entity with international legal personality without itself having such personality. The MOP's decision and the subsequent Agreement should thus be regarded as evidence of the international legal personality of the MOP of the Montreal Protocol.

Although the United Nations hosts the secretariat of the Climate Change Convention, it is located in Bonn, which necessitated the conclusion of proper arrangements with the Federal Republic of Germany. The COP invited the executive secretary of the interim secretariat to consult the German authorities regarding these arrangements.[177] The executive secretary requested advice from the UN Office of Legal Affairs to clarify the legal personality and capacity of the Convention secretariat. The opinion of December 18, 1995 (UNOLA III), stated that the bodies established by the Convention "have certain distinctive elements attributable to international organizations. However, it is clear that none of these bodies is

[175] Montreal Protocol MOP Decision IV/18, Doc. UNEP/OzL.Pro.4/15, *supra* note 96.

[176] Montreal Protocol MOP Decision VI/16, Doc. UNEP/OzL.Pro.6/7 (1994), <http://www.unep.org/ozone/6mop_nbo.htm>.

[177] Climate Change COP Decision 16/CP.1, UN Doc. FCCC/CP/1995/7/Add.1, para. 2.

de jure a UN subsidiary organ."[178] Specifically in relation to the secretariat, the opinion reasoned that, "[i]n view of the distinct nature of the Convention bodies and notwithstanding the fact that the Convention Secretariat is 'institutionally linked to the United Nations', the legal regime enjoyed by the United Nations under applicable agreements cannot be automatically attached to the Convention Secretariat."[179]

The nature and status of the secretariat therefore required clarification. One possible way suggested in UNOLA III would have been for the COP or the Subsidiary Body for Implementation to adopt a decision "conferring the required juridical personality and legal capacity upon the Convention Secretariat and according it such privileges and immunities as are necessary for the fulfilment of its purposes."[180] In this context, attention was drawn to the above-mentioned decision by the MOP of the Montreal Protocol conferring juridical personality and legal capacity on the multilateral fund and vesting it with the necessary privileges and immunities. However, the SBI referred to the "exceptional circumstances" and the "urgency of concluding the legal arrangements arising from the location of the secretariat in Germany" and requested that the executive secretary enter into an appropriate agreement with Germany on the necessary legal capacity and privileges and immunities.[181]

The agreement subsequently concluded, the 1996 Agreement between the United Nations, Germany, and the secretariat of the Climate Change Convention, states that the United Nations Volunteers Programme Headquarters Agreement[182] (UNV Agreement) shall be applicable, *mutatis mutandis*, to the Convention secretariat, subject to the specific provisions of the 1996 Agreement (Art. 3(1)). It provides that the secretariat shall have legal capacity in Germany (Art. 4), and privileges and immunities are accorded to the secretariat, its officials, representatives of member and observer states, and persons invited to participate in the work of the Convention (Arts. 3 and 5).

This Agreement was approved by the COP in its Decision 15/CP.2, paragraph 1. Paragraph 2 states that the COP should consider "whether the functions that have to be carried out by the secretariat necessitate that it be given juridical personality on the international plane."[183] In the SBI, the executive secretary has stated that different legal opinions have been expressed on the international legal personality of the secretariat and welcomed consideration of the question by the parties.[184]

Arguably, the COP queried the international legal personality of the secretariat in paragraph 2 of Decision 15/CP.2. At least so far, it has not followed the advice in UNOLA III to give the secretariat international legal personality, as in the case of the multilateral fund under the Montreal Protocol. On the other hand, the COP did approve the Agreement entered into by the secretariat.

Is the Agreement then an international agreement or one entered into under domestic law? While the latter is a perfectly possible answer, it would make the Agreement subject to German domestic legislation, and as such incapable of providing the protection sought. Furthermore, as an instrument subject to domestic law, it would deviate from most other agreements on privileges and immunities. The Agreement also refers in several provisions

[178] Institutional and Budgetary Matters: Arrangements for Relocation of the Convention Secretariat to Bonn, UN Doc. FCCC/SBI/1996/7, para. 11(2) (1996).

[179] *Id.*, para. 11(5).

[180] *Id.*

[181] Report of the Subsidiary Body for Implementation on the Work of Its Second Session, UN Doc. FCCC/SBI/1996/9, para. 66(c).

[182] Agreement Concerning the Headquarters of the United Nations Volunteers Programme, Nov. 10, 1995, UN-FRG [hereinafter UNV Agreement] (on file with authors).

[183] Climate Change COP Decision 15/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, para. 2.

[184] Report of the Subsidiary Body for Implementation on the Work of Its Third Session, UN Doc. FCCC/SBI/1996/12, para. 46.

to protection under international law.[185] Finally, its status would seem to be explicitly settled by the 1996 Agreement itself, since Article 6(4) establishes that any disputes shall be resolved in accordance with Article 26(2) of the UNV Agreement. Article 26(2) provides that disputes shall be resolved by arbitration "on the basis of the applicable rules of international law."[186]

It could also be argued that the signature by the representative of the Climate Change Convention's secretariat was redundant, and that legally the 1996 Agreement was concluded by only two parties, the United Nations and Germany. In fact, the Agreement was entered into under Article 4(3) of the UNV Agreement between the United Nations and Germany, which provides that the Agreement "may also be made applicable *mutatis mutandis* to other intergovernmental entities, institutionally linked to the United Nations, by agreement among such entities, the Government and the United Nations."[187] However, the title of the 1996 Agreement, its three signatures, the COP's acceptance of the Agreement, and its entry into force upon notification by all three signatories under Article 6(6), all indicate that the institutions of the Convention are a party on a par with the other two parties. Nevertheless, one may find it hard to believe that the secretariat, as a non-self-governing international body, could have the international legal capacity to become a party to the Agreement. To the extent that the secretariat is not *de jure* a UN subsidiary body, as stated in UNOLA III, it should be considered a subsidiary of the COP. Consequently, the COP with its subsidiary bodies should be considered as a whole to be a party to the Agreement.

The 1996 Agreement can therefore be understood to constitute evidence that the COP has the international legal capacity to enter into agreements on privileges and immunities.

Arrangements with other MEAs. A United Nations task force has recommended that the international community strive toward strengthening linkages between MEAs to facilitate synergies and promote coherence of policies.[188] MEA secretariats have been given the function of ensuring the necessary coordination with other relevant international "bodies," in particular by entering into the necessary administrative and contractual arrangements; see, for example, the Vienna Ozone Convention (Art. 7(1)(e)), the Basel Convention (Art. 16(1)(d)), and the Biodiversity Convention (Art. 14(1)(d)). These provisions do not state that the referenced "bodies" are COPs of other MEAs. So far few, if any, such links appear to have been established, so that no conclusions can be drawn from the cited provisions about the possible treaty-making powers of MEA institutions.

The Biodiversity Convention provides that the COP shall contact the executive bodies of other relevant conventions so as to enter into "appropriate forms of cooperation" with them.[189] This provision has formed the basis for memoranda of cooperation with the secretariats of relevant MEAs, such as the Ramsar and Bonn Conventions and CITES.[190] The memorandum of cooperation with the Ramsar secretariat is called an "agreement" and requires a year's written notice for termination (Art. 6), which could indicate its binding character.[191] On the other hand, the term "memorandum of cooperation" and its wording, which uses phrases such as "will" and "will seek to promote" instead of "shall," together with its purpose, lead to the conclusion that it is a nonbinding arrangement. This conclusion also seems to hold

[185] *E.g.*, UNV Agreement, *supra* note 182, Arts. 4, 13, 14. *Cf.* 1996 Agreement, *supra* note 174, Art. 3.

[186] UNV Agreement, *supra* note 182, Art. 26(2).

[187] *Id.*, Art. 4(3).

[188] Report of the United Nations Task Force on Environment and Human Settlements, UN Doc. A/53/463, annex, para. 30 (1998).

[189] Biodiversity Convention, *supra* note 12, Art. 23(4)(h).

[190] *See* Biodiversity COP Decision II/13, Doc. UNEP/CBD/COP/2/19, at 24 (1995), <http://www.biodiv.org/cop2/COP2_decisions_e.pdf>, *reprinted in* 6 Y.B. INT'L ENVTL. L. 830 (1995); Biodiversity COP Decision III/21, para. 2, Doc. UNEP/CBD/COP/3/38, *supra* note 170, at 112; Biodiversity COP Decision IV/15, para. 3 (1998) <http://www.biodiv.org/Decisions/COP4/html/COP-4-Dec-15.html>.

[191] *See* UNEP, A PROGRAMME FOR CHANGE: DECISIONS FROM THE FOURTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY 119–22 (UNEP/IUC/98/8, 1998).

true for the other memoranda of cooperation entered into by the secretariat of the Biodiversity Convention. It should not necessarily be taken to indicate a lack of international legal personality but, rather, that internationally binding agreements are not necessary or desirable for such coordination between secretariats.

In sum, MEAs do not contain any provisions explicitly establishing the international legal personality or treaty-making capacity of their institutions. But both general and specific powers conferred on COPs (and some other bodies) may be interpreted to include such personality and capacity. The doctrine of implied powers as developed for formal IGOs should also be applied to MEA institutions as a source of international legal personality in addition to or in lieu of express powers. That such institutions have international legal personality and the right to enter into treaties is further confirmed by practice.

If MEA institutions did not have international legal personality, it would be necessary instead to consider the collective of states parties to the MEA as parties to agreements that have been concluded. This interpretation, however, would be a very artificial construct. Alternatively, the international organization hosting the secretariat could be seen as having entered into the agreements, rather than the MEA institution. But this approach would not be tenable as regards arrangements between the COP and the host organization. Furthermore, it could infringe the self-governing character of the COP. This quality is especially important when it comes to agreements with international financial institutions or bodies of other MEAs. It could be argued that agreements on privileges and immunities with host states take a standard form and should not be considered as encroaching on the self-governing status of the COP. However, there are policy aspects even to the drafting and enforcement of such agreements, and they may apply to persons other than officials of the secretariat, such as representatives of member states. Hence, it should be concluded that agreements should be (and have been) entered into by the COP, rather than by the organization hosting the secretariat.

In spite of not being established as formal IGOs, the institutions of MEAs should be considered to possess international legal personality and the capacity to act on the external plane, particularly in relation to the conclusion of agreements in the form of treaties with other subjects of international law.

VII. Are Autonomous Institutional Arrangements of MEAs Unique?

We now consider whether the autonomous institutional arrangements found in MEAs that were described above are unique to environmental agreements or whether they can be found in agreements in other areas of international law.

Some human rights treaties[192] and some arms control treaties[193] provide for their parties to meet from time to time for the purpose, typically, of considering proposed amendments to the treaty and/or of electing members of some supervisory body.[194] While at first glance these arrangements might appear to be embryonic forms of the autonomous institutional arrangements of MEAs, they are in fact very different. First, meetings of the parties to human rights and arms control treaties generally take place on an ad hoc basis and are usually called by a UN body. By contrast, the COPs of MEAs are autonomous bodies, deciding themselves whether and when to convene and meeting normally on a regular basis. Second, unlike the COPs of MEAs, meetings of parties to human rights and arms control treaties

[192] *E.g.*, Convention Against Torture, *opened for signature* Dec. 10, 1984, Arts. 17, 29, 1465 UNTS 85; Convention on the Rights of the Child, Nov. 20, 1989, Arts. 43, 50, 1577 UNTS 3.

[193] *E.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, Art. VIII, 21 UST 483, 729 UNTS 161; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, Art. 8, 19 ILM 1523 (1980).

[194] A somewhat similar situation also applies to the 1982 UN Convention on the Law of the Sea.

have no permanent secretariat to assist their functioning. Third, the role of human rights and arms control meetings of parties in developing the normative content of the relevant regime is limited to considering possible amendments to the constitutive treaty. COPs, as we have seen, play a much broader role in developing the normative content of environmental regimes. Last, unlike COPs in MEAs, meetings of the parties to human rights and arms control treaties take no real part in supervising parties' implementation of the treaty concerned. To be sure, human rights treaties do provide for a supervisory organ, but it is quite separate from and independent of the meeting of the parties and normally consists of a limited number of individuals serving in their personal capacity. Indeed, such organs are autonomous vis-à-vis both the parties to the relevant treaty and the organization under whose auspices the treaty was concluded. Under MEAs, however, the COP is seen as the most appropriate forum to determine allegations of noncompliance, which may amount to challenges to the normative content of the regime.[195] Employing Sommer's typology of institutional arrangements,[196] we may say that meetings of parties to human rights and arms control treaties can be classified as "ad hoc conferences," whereas the COPs of MEAs are "treaty-management organizations."

As far as we are aware, there are only a handful of treaty arrangements outside the environmental field that bear any real similarity to the autonomous institutional arrangements of MEAs described above and that may therefore be classified as "treaty-management organizations" rather than "ad hoc conferences" or traditional IGOs (the third category of Sommer's threefold classification).

The first of these treaty arrangements, chronologically speaking, is the General Agreement on Tariffs and Trade (GATT).[197] Between its adoption in 1947 and the birth of the World Trade Organization in 1994, the GATT displayed many of the organizational features of the MEAs considered above. Above all, it was not a formal intergovernmental institution. Instead, periodic meetings of the parties were held under Article XXV and were serviced by a permanent secretariat and supported by various subsidiary bodies. The meetings of the parties developed the normative content of the Agreement, and through the subsidiary bodies exercised a supervisory role over its implementation and observance by the parties. In general, decision making was by consensus. These similarities with the COP of an MEA, however, amount to something of an accident. It was originally assumed that the International Trade Organization would be created (as an IGO) and would provide the appropriate institutional machinery for the GATT; but mainly because of opposition by the United States, the International Trade Organization never came into being.[198] The institutional role it would have assumed is now fulfilled by the World Trade Organization (an IGO).

A second example of a treaty with institutional arrangements somewhat similar to those of an MEA is the Antarctic Treaty of 1959.[199] Under Article IX of the Treaty, the consultative parties meet regularly.[200] Like the COP of an MEA, these meetings have developed the normative content of the Antarctic regime, first, by the adoption of more than 150 "recommendations" under Article IX(1) and, second, by serving as the forum for the negotiation of further treaties, such as the 1980 Convention for the Conservation of Antarctic Marine Living Resources and the 1991 Protocol on Environmental Protection. The 1980 Convention establishes its own institutional arrangement, a commission with legal personality (i.e., an

[195] *See* Gehring, *supra* note 25, at 54.

[196] Sommer, *supra* note 106, at 629–33.

[197] General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 188.

[198] *See* BOWETT, *supra* note 107, at 118; *see also* M. A. G. VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 90–95 (2d ed. 1971).

[199] Antarctic Treaty, Dec. 1, 1959, 12 UST 794, 402 UNTS 71.

[200] It should be noted that consultative parties do not comprise all parties to the Treaty, but the original 12 parties, together with such other parties as conduct "substantial scientific research activity" in Antarctica. *Id.*, Art. IX(1), (2).

IGO),[201] but the Protocol is served by the consultative parties to the 1959 Treaty as the principal institutional arrangement, although it also set up a Committee for Environmental Protection.[202] Like a COP, the meetings of the consultative parties have a supervisory role, which is fairly limited in the case of the 1959 Treaty and rather more extensive in the case of the Protocol.[203] Unlike a COP, the meetings of the consultative parties are not serviced by a permanent secretariat. The establishment of such a body has been mooted, but the consultative parties have resisted it so far.[204] Thus, the institutional arrangements of the Antarctic Treaty, and especially its Protocol (which in any case may arguably be classified as an MEA), in many respects resemble the autonomous institutional arrangements of MEAs. The rationale for the Antarctic institutional arrangements—to provide flexibility for future development[205]—also finds parallels in the rationale for the COP model in MEA institutional arrangements.

As mentioned at the beginning of this part, several arms control treaties provide for occasional meetings of the parties to review their provisions. Some more recent arms control treaties, however, go considerably farther in their institutional provisions. The Ottawa Convention on land mines of 1997[206] provides for its parties to meet regularly to consider any matter relating to the application or implementation of the Convention. While these meetings have a role in reviewing implementation of and compliance with the Convention, the parties report on their implementation to the UN Secretary-General, not the meeting of the parties, and the noncompliance procedure, in its initial stages and some aspects of its later stages, operates through the Secretary-General, not the meeting. Compared with an MEA COP, the meeting of the parties enjoys a limited degree of autonomy, which is further shown by the fact that meetings are convened by the Secretary-General. Moreover, the meeting of the parties has no subsidiary bodies, nor does it have a secretariat (in effect, the UN Secretary-General fulfills this role). Unlike an MEA COP, the meeting of the parties to the Ottawa Convention appears to have no role in developing the normative content of the Convention. The only provision for such development is by amending the Convention, but amendments are to be adopted by a Special Amendment Conference and not the meeting of the parties as such. A second arms control treaty, the Protocol on mines, booby traps and other devices to the 1980 Convention on conventional weapons, as amended in 1996,[207] establishes institutional arrangements that are broadly comparable to those of the Ottawa Convention but less detailed and lacking a noncompliance mechanism.

Mention should also be made of two further arms control treaties whose institutional arrangements resemble something of a hybrid between a traditional IGO and a COP. The 1993 Convention on chemical weapons[208] and the 1996 Comprehensive Test Ban Treaty[209] each establish an "Organization," with a permanent headquarters and "such legal capacity and such privileges and immunities as are necessary for the exercise of its functions,"[210] to

[201] Convention on the Conservation of Antarctic Marine Living Resources, *supra* note 52, Arts. VII–XXI.

[202] Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, Arts. 10–12, 30 ILM 1455 (1991) [hereinafter 1991 Protocol].

[203] *See* Antarctic Treaty, *supra* note 199, Art. IX(3); 1991 Protocol, *supra* note 202, Arts. 12, 15.

[204] On the carrying out of secretariat functions in the Antarctic Treaty system, see R. T. Scully, *Alternatives for Cooperation and Institutionalization in Antarctica: Outlook for the 1990s, in* ANTARCTIC RESOURCES POLICY 281, 284–85 (Francisco Orrego Vicuña ed., 1983). *See also* JEFFREY D. MYHRE, THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW AND DIPLOMACY, chs. IV, IX (1986).

[205] *See* Scully, *supra* note 204, at 283.

[206] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997).

[207] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996, 35 ILM 1206 (1996).

[208] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 ILM 800 (1993) [hereinafter Chemical Weapons Convention].

[209] *Opened for signature* Sept. 24, 1996, 35 ILM 1439 (1996) [hereinafter Test Ban Treaty].

[210] Chemical Weapons Convention, *supra* note 208, Art. VIII(48); Test Ban Treaty, *supra* note 209, Art. II(54).

achieve the object and purpose of the treaties, to ensure the implementation of their provisions, and to provide a forum for consultation and cooperation between states parties. Each organization has three organs—the Conference of the States Parties, the Executive Council, and the Technical Secretariat. The functions of the Conference of the States Parties, which pertain to supervising the implementation of and compliance with the treaty and to developing its normative content, are not dissimilar to those of an MEA COP. The Executive Council to some extent resembles the bureau of an MEA COP, but it also plays an important role in the noncompliance procedure and may conclude "agreements" on certain matters with states and international organizations.[211]

Finally, we briefly call attention to the autonomous institutions (not IGOs) that have been set up by decisions of the states concerned rather than by a treaty, and that do not operate by reference to a treaty. Examples include the Conference on Security and Co-operation in Europe[212] and the Arctic Council (set up in 1996).[213] While these institutions display some of the characteristics of MEA institutions, the obvious difference is that they have no role in developing the normative content of a treaty or of ensuring compliance with it (although they do have roughly comparable roles in relation to a variety of soft-law instruments).

Of the various agreements outside the environmental field surveyed here, the institutional arrangements of GATT before 1994 come closest to those of an MEA, although the form of the GATT arrangements was largely a historical accident. The institutional arrangements of the Antarctic Treaty and certain recent arms control treaties resemble the autonomous institutional arrangements of MEAs to some extent, but they also differ from AIAs in significant ways.

VIII. Conclusion

A special feature of many MEAs is that they establish an institutional framework of what we have called autonomous institutional arrangements, in the form of COPs, subsidiary bodies, and secretariats, to develop and control their parties' environmental commitments, rather than setting up formal IGOs of the traditional kind. Some treaties other than MEAs also establish institutional arrangements that are not formal IGOs. Meetings of the parties and control bodies are provided for in several treaties, but except for the institutional arrangements of the former GATT institutions, the Antarctic Treaty, and some recent arms control treaties, we have not found any institutional framework essentially similar to AIAs.

In spite of their formal denomination, we nevertheless conclude that these self-governing, treaty-based AIAs of MEAs may be considered to be IGOs, albeit of a less formal, more ad hoc nature than traditional IGOs. This conclusion is based on Schermers and Blokker's definition of an international organization as a form of cooperation founded on an international agreement (the MEA), creating at least one organ with a will of its own (the COP) established under international law. This conclusion is further supported by the character, functions, and practice of these AIAs. Thus, while due account should be taken of the special characteristics of these arrangements, international institutional law should apply to them and supplement the law of treaties when it comes to assessing their powers. On this basis, AIAs have a wide range of both explicit and implied powers. These include powers at the internal level for purposes such as the establishment of subsidiary bodies and the adoption of rules of procedure and a budget; powers to develop substantive obligations through

[211] Chemical Weapons Convention, *supra* note 208, Art. VIII(34); Test Ban Treaty, *supra* note 209, Art. II(38).

[212] The CSCE came into being following the adoption of the Helsinki Final Act, Aug. 1, 1975, 14 ILM 1292 (1975). It became more fully institutionalized after the adoption of the Charter of Paris, Nov. 21, 1990, 30 ILM 190 (1991). In 1994 the CSCE was converted into the Organization for Security and Co-operation in Europe. See further Dominic McGoldrick, *The Development of the Conference on Security and Co-operation in Europe—From Process to Institution, in* LEGAL VISIONS OF THE NEW EUROPE 135 (Bernard S. Jackson & Dominic McGoldrick eds., 1993).

[213] Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 ILM 1382 (1996).

various forms of lawmaking and treaty interpretation; powers to supervise the implementation of and compliance with those obligations (especially by the use of noncompliance mechanisms rather than traditional dispute settlement procedures); and powers on the external plane to enter into arrangements with states, international organizations, and the institutions of other MEAs (some of which may be regarded as genuine treaty-making powers).

We must emphasize, however, that one should not lose sight of the special characteristics of these arrangements and that, accordingly, the powers of AIAs are not necessarily identical to those of formal IGOs in all respects. Furthermore, whereas the law of treaties may also be considered insufficient in determining the legal status and powers of treaty-based bodies that differ from AIAs, caution is advised in applying *in toto* bodies of law developed for other purposes, such as international institutional law. Diversity in treaty cooperation seems to require diversity in legal response.

Such a treaty-based institutional framework may be regarded as an aspect of a more general development in international law. It has been argued that traditional international law concentrated mostly on preservation of the peaceful coexistence of states, whereas their increasing interdependence requires an international law of cooperation.[214] The creation of institutions for the development and control of obligations in treaties may be seen as part of this more cooperative international law. It remains to be seen whether an institutional framework comparable to that developed in international environmental law will be applied more extensively in other fields of international law. In any case, these institutional arrangements demonstrate that international cooperation may take innovative forms designed for specific needs, presenting challenges to the international lawyer.

[214] *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 60–62 (1964).