Institutional Developments under Modern International Environmental Agreements

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J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, 363–443.

The international community responds to the international environmental *problématique*[1] through an institutional innovation. Operating under a treaty-based standard organisational design (Part I.), Meetings of Parties (Part II.), Secretariats (Part III.) and International Commissions (Part IV.) exercise powers and competencies that amount to legislative, executive, quasi-judicial and policy setting functions. This institutional development of allocating functions to a specific organisational design takes place across the board of international environmental law. It establishes a process of making and enforcing law whose effectiveness

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1 The terminology is that of L. Guruswamy/G. Palmer/B. Weston, *International Environmental Law and World Order*, 1994, 218.

and legitimacy creates a strong pull-effect towards universalising the treaty regimes (Part V.).

I. Organisational Design of Modern International Environmental Agreements

States Parties provide for a standard organisational design of modern international environmental agreements.[2] There is a plenary organ, the Conference of the Parties in the case of a framework convention or the Meeting of the Parties in the case of protocols, which has at its disposition auxiliary organs, a Secretariat, and often a financial mechanism. The design holds a higher degree of organisational structure and differentiation than is the case with intergovernmental negotiating conferences complemented by subsequent review conferences.

The trend for thus institutionalising international environmental agreements began following the United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972, which led to the so-called second generation ozone and transboundary waste regimes. The third generation agreements adopted at the United Nations Conference on Environment and Development (UNCED) in 1992 on Climate Change[3] and Biodiversity[4] as well as those concluded pursuant to an UNCED negotiating mandate, i.e. the Anti-Desertification Convention and the United Nations Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea Relating to

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2 The term, as understood here, refers to multilateral treaties whose primary object is the protection of a natural resource.

3 For an account of the Convention's negotiating history see J. Barrett, "The Negotiating and Drafting of the Climate Change Convention", in: R Churchill/D. Freestone (eds), *International Law and Global Climate Change*, 1991, 183 et seq.; S. Oberthür, *Politik im Treibhaus. Die Entstehung des internationalen Klimaregimes*, 1993; I. Mintzer/A. Leonhard (eds), *Negotiating Climate Change. The Inside Story of the Rio Convention*, 1994; R. Loske, *Klimapolitik im Spannungsfeld von Kurzzeitinteressen und Langzeiterfordernissen*, 1996; H. Ott, "Das internationale Regime zum Schutz des Klimas", in: Th. Gehring/S. Oberthür (eds), *Internationale Umweltregime. Umweltschutz durch Verhandlungen und Verträge*, 1997.

4 F. Burhenne/S. Casey-Lefkowitz, "The Convention on Biological Diversity: A Hard won Global Achievement", *Yearbook of International Environmental Law* 3 (1992), 43 et seq.

the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement),[5] have continued this trend of institutionalisation in the field of international environmental law. Thus institutionalised international environmental agreements now cover most aspects of the global environmental *problématique*.[6]

The 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[7] establishes a Conference of Parties and a Secretariat, the latter to be provided by the Executive Director of UNEP.[8] The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals[9] establishes a Conference of Parties, the Standing Committee, a Scientific Council of Experts, and a Secretariat under the auspices of UNEP located in Bonn. The 1992 Convention on Biological Diversity[10] establishes a Conference of Parties, a Subsidiary Body on Scientific, Technical and Technological Advice, and a Secretariat, for which UNEP has established a special Secretariat unit in Montreal.[11]

The 1979 Convention on Long-Range Transboundary Air Pollution,[12] adopted under the auspices of the Economic Commission for Europe (ECE), establishes an Executive Body of States Parties representatives to be constituted within the framework of the Senior Advisers to ECE Governments on Environmental Problems, and assigns to

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5 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., 24 July – 4 August 1995, Doc. A/CONF.164/37 of 8 September 1995, *ILM* 34 (1995), 1542 et seq.

6 Guruswamy/Palmer/Weston, see note 1, understand the global environmental *problématique* to concern the 'atmosphere', 'biosphere', 'aquasphere' and 'lithosphere' as "conceptually divisible components of our otherwise indivisible environment".

7 UNTS Vol. 993 No. 14537, *ILM* 12 (1973), 1088 et seq., as amended in 1979 and 1983.

8 A special UNEP unit was established in Geneva, the UNEP Executive Director appoints the Secretary-General of CITES, who in turn appoints, in consultation with UNEP, further staff.

9 UNTS Vol. 1651 No. 28395, *ILM* 19 (1980), 15 et seq.

10 UNTS Vol. 1760 No. 30619, *ILM* 31 (1992), 818 et seq.

11 Doc. UNEP/CBD/COP/1/L 7.

12 UNTS Vol. 1302 No. 21623, *ILM* 18 (1979), 1442 et seq.; there are two protocols (of 1985 and 1988) to this convention (reprinted in: *ILM* 27 (1988), 707 et seq., and *ILM* 28 (1989), 214 et seq., respectively).

the Executive Secretary of ECE the task of carrying out specified Secretariat functions. The 1985 Vienna Convention for the Protection of the Ozone Layer establishes a Conference of Parties and a Secretariat to be provided by UNEP.[13] The Montreal Protocol to that Convention established a Meeting of States Parties and a Multilateral Fund, which is governed by an Executive Committee and has a separate Secretariat. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[14] establishes a Conference of Parties and provides for a Secretariat, which was then established as a special Secretariat unit in Geneva. The 1992 Framework Convention on Climate Change (FCCC)[15] establishes a Conference of Parties, subsidiary bodies of expert governmental representatives for scientific and technological advice and for implementation, and a Secretariat. The Convention also provides for a financial mechanism. In 1997, the Kyoto Protocol was signed.[16] According to article 13 para. 1 the "Conference of the Parties, the supreme body of the Convention, shall serve as the Meeting of the Parties to this Protocol".

The 1971 Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat[17] assigns the duties of the Secretariat to the International Union for the Conservation of Nature (IUCN). The 1994 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, especially in Africa,[18] established a Conference of Parties, a Committee on Science and Technology composed of governmental representatives with relevant expertise, and a Secretariat. An interim Secretariat has been appointed by the UN Secretary-General, the staff members are UN staff and are located in Geneva. The Convention also provides for a financial mechanism. The 1998 UNEP/FAO Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and

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13 UNTS Vol. 1513 No. 26164, *ILM* 26 (1987), 1529 et seq.

14 UNTS Vol. 1673 No. 28911, *ILM* 28 (1989), 675 et seq.

15 UNTS Vol. 1771 No. 30822, *ILM* 31 (1992), 849 et seq.

16 The Protocol was adopted by consensus on 11 December 1997 in Kyoto, Japan, by the Meeting of Parties at its third session pursuant to the Berlin Mandate (Decision 1/CP.1), Doc. FCCC/CP/1997/L.7/Add.1. As of 13 January 2000, 84 Parties (including the European Community) have signed the agreement and 8 states have ratified it.

17 UNTS Vol. 996 No. 14583, *ILM* 11 (1972), 969 et seq.

18 UNTS Vol. 1954 No. 33480, *ILM* 33 (1994), 1328 et seq.

Pesticides in International Trade (Rotterdam Convention)[19] established a Conference of Parties, a Secretariat, which at least initially is to be provided jointly by the UNEP Executive Director and the FAO Director-General, and a Chemicals Review Committee.

The oceans were seemingly left out of the international environmental agreements with a global reach that were concluded at UNCED. However, Chapter 17 of Agenda 21[20] called on the international community to address the question of the overfishing of highly migratory and straddling fish stocks, which led to the 1995 Fish Stocks Agreement.[21] The Agreement provides in article 36 for a review conference to be serviced by the UN Secretary- General.[22] Under the umbrella of the UN Convention of the Law of the Sea (UNCLOS),[23] as implemented by further agreements, protection of the marine environment is furthermore the object of international environmental agreements establishing so-called Commissions. Their analysis will offer possible solutions to questions that arise under the agreements providing for a Meeting of Parties.[24]

Only the Secretariats have a permanent seat. The Meetings of Parties and their auxiliary organs are itinerant. It is up to each State Party to offer to host a meeting and to bear the considerable administrative expenses incurred by hosting the event.

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19 Doc. UNEP/FAO/PIC/CONF.2 of 11 September 1998, *ILM* 38 (1999), 1 et seq.

20 Agenda 21, adopted by the UN Conference on Environment and Development, Doc. A/CONF. 151/26.

21 As of 13 January 2000, 25 states out of 30 required have ratified the treaty, which therefore has not yet entered into force. Nor has any state or entity undertaken to apply it provisionally, as allowed under the Agreement. The Code of Conduct for Responsible Fisheries, adopted by the FAO Conference in 1995, and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement) also need to be acceded to or applied with immediate effect; while the Code itself is voluntary, the Compliance Agreement is binding.

22 This conference shall assess the effectiveness of the Agreement and, if necessary, propose means of strengthening the substance and methods of the Agreement's provisions.

23 UNTS Vol. 1833 No. 31363.

24 See under IV.

II. Meetings of Parties

Position, powers and competencies of the Meeting of Parties are typically couched in the following general terms: "The Conference of the Parties, as the *supreme body* of this Convention, shall keep under regular review the *implementation* of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall *make*, within its mandate, the *decisions necessary* to promote the effective implementation of the Convention."[25] It is thus through the plenary body of modern international environmental agreements that States Parties primarily exercise legislative, executive, and quasi-judicial branch functions.

1. Organisation

The institutional centrepiece of international environmental agreements, its "supreme body", is the plenary organ called Conference of Parties in the case of framework conventions and Meeting of Parties in the case of protocols. In international environmental law states prefer a "convention-cum-protocol approach"[26] under which the mother convention spells out objectives as well as general obligations which are then concreted in separate treaties (protocols). Membership to either treaty may be different. While the earlier instruments such as the Vienna Convention and the Montreal Protocol of the ozone regime maintain an organisational separation between the two organs, the more recent treaties such as the climate and biodiversity regimes are more interested in efficiency, declaring that the Conference of Parties of the mother convention "serves as the Meeting of the Parties" to the protocol.[27] It is thus

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25 Article 7 para. 2 FCCC (emphasis added); see furthermore arts 23 para. 4 CBD, 6 para. 4 Vienna Convention, XI para. 3 CITES. Certain agreements such as CITES choose the term recommendations while in practice, the Meeting of Parties also makes "decisions": article XI para. 3: "At meetings [...] the Parties shall review the implementation of the present Convention and may: [...] (e) where appropriate, make recommendations for improving the effectiveness of the present Convention."

26 The term was coined by P. Sand, *Marine Environmental Law*, 1989, 1 et seq.

27 See article 13 Kyoto Protocol; this construction is consequently extended to the other organs of the Convention, see arts 14 for the Secretariat and 15

the plenary of the States Parties which, albeit in changing composition, acts based on the respective treaty. Therefore, in the following, Meeting of Parties shall be used as the generic term for the plenary of the Parties to an international environmental agreement.

The Meeting of Parties is increasingly turned into a permanent institution through "open-ended working groups" under the ozone regime or formal "Standing Committees" as in the case of the Bonn Convention, that meet intersessionally.[28] The plenary organ is supported by a variety of subsidiary bodies with a functionally limited mandate. Membership may mirror that of the plenary organ, but there are also limited membership bodies. Furthermore there are informal mechanisms.[29]

The Meetings of Parties are UN treaty organs.[30] This concept establishes functional links between the general organisation and the law of

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for the subsidiary bodies; Cartagena Protocol on Biosafety, article 27 (Conference of the Parties serving as the Meeting of the Parties).

28 See furthermore Intersessional Meeting on the Operations of the Convention on Biological Diversity, 21–30 June 1999.

29 The Annex I Group is an example of an informal mechanism that provides technical and analytical assistance to a group of Parties. The Group's activities include full participation of all countries listed in Annex I of the FCCC, but it is wholly funded by Annex II Parties. The financial support for this activity is provided by Annex II Parties through the OECD. The Annex I Expert Group provides a mechanism for all Annex I countries to discuss problems related to implementation of their obligations and to propose solutions to the Conference of Parties. It may be seen also as an informal mechanism to share experiences and to provide assistance to some of the Annex I countries.

30 In his presentation to the ICJ in the *Mazilu Case*, the UN Legal Counsel indicated that the United Nations had in the past considered numerous treaty bodies, such as the International Narcotics Control Board, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of All Forms of Discrimination against Women, as covered by article VI, section 22, of the General Convention (ICJ Pleadings, Applicability of article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Written Statement submitted on behalf of the Secretary-General of the United Nations, Annex I, Part A, 195–196). The UN Legal Counsel has arrived at the conclusion that the Commission on the Delimitation of the Continental Shelf is a treaty organ, see CLCS/5 of 11 March 1998, Legal Opinion on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission. Corre-

the United Nations and the organs of a treaty regime. The concept requires proximity between the UN and the treaty regime in question. The purpose of the international environmental agreements is to advance certain principles of the Charter of the United Nations as interpreted by the UN General Assembly. Furthermore, the UN has addressed the treaty organs of international environmental agreements requesting specific action. The most important cases are the resolutions adopted by the Commission on Sustainable Development and by the General Assembly, particularly Chapter 38 of Agenda 21 and para. 118 of the Overall Review and Appraisal of the Implementation of Agenda 21 taken at the 19th Special Sess. of the UN General Assembly to Review the Implementation of Agenda 21. Practical consequences flowing from the concept of UN treaty organs are, i.e., the organisational support of the UN Secretariat and the applicability of UN organisational law to the status of State Party representatives at meetings of treaty organs.

2. Legislative Function

The legislative function of modern international environmental agreements results from the Meetings of Parties' power to make binding decisions of a particular normative structure, based on competencies on a range of policy issues and adopted pursuant to a formalised procedure.

a. Power of Normative Decision-Making

All the Meetings of Parties have the power to "make decisions."[31] The agreements use "decision" as a generic term for the institution's instru-

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spondingly, under the Climate Change Convention, the Convention on the Privileges and Immunities of the United Nations is applied to the representatives of the parties and observers attending meetings organised by the Conventions Secretariat and officials of the Convention Secretariat and other staff of the UN performing functions for the Secretariat. In addition, the travel of staff of the Convention Secretariat on mission is covered by the issuance of the UN Laissez-Passer.

31 The Meeting of Parties to the Ramsar Convention, which originally was provided with consultative powers only, now disposes of decision-making competencies.

ment of action.[32] The Meetings of Parties of modern international environmental agreements in principle have the power to adopt externally binding normative decisions; it is a matter of interpretation to determine whether and to what extent a given decision is meant to be binding. Such decisions vary in their structure.

aa. Externally Binding Normative Decisions

It is well established in the law of international organisations that the competent decision-making organ may adopt measures that are binding internally, i.e. for the organisation's organs. The test of its legislative power lies in whether it may adopt measures that are binding externally.[33] A measure may deploy externally binding effects *vis-à-vis* States Parties, private entities, or third institutions. Regarding the effect of a Meeting of Parties' decision, the relevant question is whether the decision as such is binding on the States Parties or whether each state has to formally express its consent to be bound, e.g., through ratification. As will be argued in the following, Conferences of Parties of modern international environmental agreements increasingly have the power to adopt binding decisions as opposed to recommendations.[34]

bb. Explicit and Implicit Binding Effect of Normative Decisions

The binding nature of a decision may derive from an explicit provision in the international environmental agreement that the Meeting of Parties acts under or it may be a quality implicit in the individual decision

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32 An exception is OSPAR, see under IV., which distinguishes decisions and recommendations, defining the first as a binding and the second as a non-binding instrument of action for the COP. Under CITES, the COP may make recommendations for improving the effectiveness of the present Convention, article XI para. 3 lit.(e), which in practice includes decisions and resolutions.

33 See J. Frowein, "The Internal and External Effects of Resolutions by International Organisations", *ZaöRV* 49 (1989), 778 et seq., (778).

34 See CITES Decision 'Regarding entry into force of Resolutions and Decisions of the Conference of the Parties' "10.13: The recommendations contained in Resolutions and Decisions adopted by the Conference of the Parties shall be effective from the date on which they are sent by Notification to the Parties at the latest, unless otherwise specified in the recommendation concerned. 10.14 Their implementation by the individual Parties is subject to the procedures required under their national legislation".

taken. The Montreal Protocol provides illustrations of explicitly and implicitly binding decision-making of a legislative nature.

Under article 2 para. 9, the Meeting of Parties adjusts Parties' control obligations with regard to a number of parameters in general terms under the treaty.[35] Article 2 para. 9 lit.(a) provides that the Parties may decide whether: (i.) adjustments to the ozone depleting potentials specified in Annex A, Annex B, Annex C and/or Annex E should be made and, if so, what the adjustments should be; and (ii.) further adjustments and reductions of production or consumption of the controlled substances ... should be undertaken and, if so, what the scope, amount and timing of any such adjustments and reductions should be. Article 2 para. 9 lit.(d) prescribes that the decisions, "... which shall be binding on all Parties ... [36], shall forthwith be communicated to the Parties by the Depository. Unless otherwise provided in the decisions, they shall enter into force on the expiry of six months from the date of the circulation of the communication by the Depository". Thus, each State Party is bound by the decision. No individual expression of consent to being bound is required. This is true regardless of whether a State Party has voted for the decision or not.[37] Thus, the decision-making power of the Meeting of Parties bears the characteristics of a genuine legislative function, which can enact norms, the binding effect of which does not depend on the individual consent of the addressee.

Such explicit provision for the binding nature of Meeting of Parties decision-making is rare in international environmental agreements.[38] In most cases, the intended binding effect has to be inferred from the decision itself. Equally binding yet without a formal prescription to that effect in the treaty is the decision by which the Meeting of Parties

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35 The 2nd, 4th, 7th and 9th Mtgs of the parties to the Montreal Protocol decided, on the basis of assessments made pursuant to article 6 of the Protocol, to adopt adjustments and reductions of production and consumption of the controlled substances in Annexes A, B, C and E to the Protocol.

36 Emphasis added.

37 On voting requirements see under II. C.

38 On the specific negotiating history of the Montreal Protocol see D. Caron, "Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking", *Hastings Int'l & Comp. L. Rev.* 14 (1991), 755 et seq.; J.M. Kaufman, "Domestic and international linkages in global environmental politics: a case-study of the Montreal Protocol", in: M. Schreurs/E. Economy (eds), *The Internationalisation of Environmental Protection*, 1998, 74.

adopted a non-compliance procedure under the Montreal Protocol.[39] By way of its decision on compliance control, the Meeting of Parties redefined the legal situation of States Parties which from now on had to submit to a certain procedure[40] entailing a list of measures that might be taken in respect of non-compliance, set out in Annex V to the report of the fourth Meeting of the Parties.[41] The clear intention of the decision is that the States Parties be bound by the procedure and any executive decisions taken pursuant to it.[42]

Careful analysis of the wording and objective of a decision is called for in determining whether and to what extent it is meant to be binding.[43] It is another question whether the Meeting of Parties was competent to take a binding decision on the issue in question.

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39 Decision IV/5. Non-compliance procedure.

40 To adopt the non-compliance procedure, as set out in Annex IV to the report of the 4th Mtg of the Parties; Annex IV, Non-compliance procedure "The following procedure has been formulated pursuant to Article 8 of the Montreal Protocol. It shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention. [...]".

41 Annex V Indicative List of Measures that Might Be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol, "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."

42 On the regulatory details and actual working compliance mechanism see under b. bb. cc.

43 Such is the case even in the presence of a generic decision Regarding entry into force of Resolutions and Decisions of the Conference of the Parties as adopted by the Meeting of Parties to CITES and worded as follows: "10.13 The recommendations contained in Resolutions and Decisions adopted by the Conference of the Parties shall be effective from the date on which they are sent by Notification to the Parties at the latest, unless otherwise specified in the recommendation concerned. 10.14 Their implementation by the individual Parties is subject to the procedures required under their national legislation".

cc. Structure of Normative Decisions

Normative decisions by the Meetings of Parties vary in their structure. They may be fully formulated and unconditional to be applied by the States Parties, or they be less normatively dense, spelling out objectives to be attained while leaving to the States Parties discretion as to ways and means. The first type of norm compares to regulations, the second to directives in the terminology of the EC treaty. A self-executing decision is to be applied by the national executive and judiciary branches, otherwise the national legislator will have to act accordingly.[44]

b. Competencies

Pursuant to a principle of attributed competencies, international environmental agreements spell out the subject-matter on which the Meeting of Parties may adopt normative decisions. The proviso to make "necessary" decisions, contained in the provisions on the Meetings of Parties, does not confer an unlimited competence on that treaty organ. A better analogy would be the "necessary and proper" clause of the US Constitution, a provision presupposing substantive competence. The Meeting of Parties' competencies in implementing the treaty are enumerated throughout each agreement. Modern international environmental agreements vest the Meetings of Parties with the competence progressively to develop the agreement, to implement the agreement, and to set standards for national policies and laws.

aa. Progressive Development of the Agreement

The competence of the Meetings of Parties progressively to develop the agreement comprises adapting the regulatory action to factual changes and modifying the regulatory approach to implement new policy choices. Such competencies, which mostly concern controlled substances and species, empower the Meetings of Parties to revise the agreement. This raises the question of where to draw the line between Meetings of Parties' legislation and the formal amendment procedure.

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44 *Cf.* R. Wolfrum, "The Convention on Biological Diversity: Using State Jurisdiction as a Means of Ensuring Compliance", in: *id.* (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means*, 1996, 373 et seq.

aaa. Adapting the Regulatory Action

International environmental agreements provide Meetings of Parties with the competence to adapt technical requirements in conformity with the treaty's regulatory approach to take account of relevant factual changes. States Parties have to implement changes ruled as binding by the Meetings of Parties in the national legal orders.

The Montreal Protocol anticipates that continued revision may be necessary, and calls on the Parties periodically to assess the adequacy of the measures taken in the Protocol.[45] The Protocol explicitly authorises the Meeting of Parties to make binding decisions to adjust States Parties' obligations regarding controlled substances, article 2 para. 9. Such adjustments may concern the ozone depleting potential of controlled substances[46] and the scope, amount and timing of production or consumption of the controlled substances. The Meeting of Parties has made frequent use of that competence.[47] The basic approach of the Montreal Protocol in 1987 was to require the Parties to the Protocol to reduce their production and consumption of five CFCs (Chloro-Fluoro-Carbons) specified in Group I to Annex A of the Protocol. The London Adjustments to the Protocol accelerated this timetable and deepened the cuts by requiring the Parties to phase out production and consumption entirely by the year 2000.[48] Further adjustments were made at the Copenhagen Meeting of Parties.[49] However, the London Meeting of

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45 Article 6, which is basically unaltered in the Protocol as amended.

46 Specified in Annexes A, B, C and/or E.

47 In 1987, the Montreal Protocol required the parties to the Protocol to reduce their production and consumption of five CFCs specified in Group I to Annex A of the Protocol. The London Adjustments to the Protocol accelerated this timetable and deepened the cuts by requiring the parties to phase out production and consumption entirely by the year 2000. The 4th Mtg of the Parties at Copenhagen in 1993 adopted further adjustments pursuant to article 2 para. 9 lit.(d) of the Protocol, *ILM* 32 (1993), 874 et seq., and so did the 11th Mtg of the Parties at Beijing in 1999. The Beijing Adjustments will enter into force on 28 July 2000.

48 The London adjustments are a direct consequence of the fact that even as States Parties adopted the Montreal Protocol in September 1987, a major concern was that findings regarding the Antarctic ozone hole, officially confirmed only after the meeting in Montreal, had not been taken fully into account in the Protocol. See Caron, see note 38, (761).

49 Adjustments and Amendments to the Montreal Protocol, see note 47.

Parties had to resort to the amendment procedure to add new chemicals to the regulatory scheme, specifying them in a new Annex B.[50]

Thus, the Meeting of Parties to the Montreal Protocol may make adjustments to the substances already designated as controlled but inclusion of a new substance requires an amendment to the protocol.[51] Conversely, the Meeting of Parties is not competent to legislate on this matter. The different modes of legislation *via* amendments for the introduction of a further ozone-depleting substance into the Protocol's ambit and *via* adjustment of Annexes for the tightening of States Parties' obligations regarding the already controlled ozone-depleting substances appears somewhat arbitrary. In fact, the Montreal Protocol represents the States Parties' agreement on a specific regulatory approach to the problem of ozone depletion and, substantively, both the widening and the deepening of the Protocol could and should be regarded as implementation of that regulatory approach.[52] A proposal by the EC for

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50 A phaseout by the year 2000 is required for other fully halogenated CFCs and for carbon tetrachloride, while a phaseout of methyl chloroform is required by the year 2005.

51 The amendment procedure set forth in article 2 para. 10 provides as follows: "Based on the assessments made pursuant to Article 6 of this Protocol and in accordance with the procedure set out in Article 9 of the Convention, the Parties may decide: (i) whether any substances, and if so which, should be added to or removed from any annex to this Protocol, and (ii) the mechanism, scope and timing of the control measures that should apply to those substances".

52 Doc. UNEP/Ozl.Pro/Wg.1/19/4, Open-Ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 19th Mtg, 15-18 June 1999, Consideration of Proposed Adjustments and Amendments to the Montreal Protocol and Establishment of the Legal Drafting Group to Consolidate the Adjustments and Amendments Proposed and to Consider the Options Available Under the Montreal Protocol to Introduce Controls on New Ozone-Depleting Substances. Proposal by the European Community – Section c new ozone depleting substances–: "The community remains concerned that the addition of any new ozone-depleting substance to the Montreal Protocol requires an amendment to the protocol. This means that bringing a new substance under control is very slow and requires that each Party ratify a new amendment. The Community believes that, by ratifying the Montreal Protocol, each Party has declared its intent to phase out the production and consumption of ozone-depleting substances. A full amendment and ratification procedure should therefore not be necessary to extend existing controls to new substances, provided Parties have agreed that they pose a threat to the ozone

changes to the Montreal Protocol with respect to hydrofluorocarbon (HFC) production, consumption and trade with non-Parties, quarantine and pre-shipment uses of methyl bromide, new ozone-depleting substances, and continued CFC production for basic domestic needs, suggests adoption *in toto* through the adjustment procedure.[53] Following their consideration by the Legal Drafting Group,[54] the Working Group agreed that the proposed adjustments and amendment would require serious reflection and further debate.[55]

At the same time, the Meetings of Parties may adapt any implementing mechanisms created. This is the case with the Multilateral Fund that the London Meeting of the Parties had established. Since this measure clearly extended the basic regulatory approach of the Protocol it was adopted *via* the amendment procedure. However, the Meeting of Parties may adapt the implementing mechanisms created by way of a decision. Consequently, the Meeting of Parties continues to adapt the Fund, having recently extended it to a substance newly recognised as ozone-depleting,[56] to non-critical uses,[57] and to emergency use.[58]

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layer. The Community would like to see a 'lighter' procedure, involving a decision of the Parties and/or adjustment of the Protocol, by which control measures necessary to protect the ozone layer could, by consensus, quickly be extended to new substances. Subject to the advice to be received from the Legal Drafting Group under Decision X/8 paragraph 6, the Community proposes an amendment to article 2 along the following lines: Proposed Amendment C 1. The Parties shall list in Group II of Annex E to the Protocol, substances not listed in Annexes A, B, C and Group 1 of Annex E but which, in light of advice from the Scientific Assessment Panel, the Technology and Economic Assessment Panel or any other relevant information, the Parties have decided pose a threat to the stratospheric ozone layer. 2. The Parties shall, as necessary, decide [by consensus] on any control measures, including control measures on production and consumption, which should apply to the substances in Group II of Annex E, taking account of the special situation of Parties operating under paragraph 1 of Article 5."

53 Doc. UNEP/OzL.Pro/WG.1/97/7, paras 55–99.

54 Doc. UNEP/OzL.Pro.11/3.

55 Doc. UNEP/OzL.Pro/WG.1/19/7, para. 102.

56 See, e.g., Decision IX/5 -Conditions for control measures on Annex E substance in article 5 Parties "1. That, in the fulfilment of the control schedule set out in paragraph 8 ter (d) of Article 5 of the Protocol, the following conditions shall be met: a. The Multilateral Fund shall meet, on a grant basis, all agreed incremental costs of Parties operating under paragraph 1 of

The Kyoto Protocol may require similar adjustment in the light of new scientific evidence of global warming.[59]

The Meetings of Parties may wish to react to factual changes in third countries relevant to the agreement. The Montreal Protocol provides for a trading ban on controlled substances. The ban can be adjusted to take account of a policy change on the part of a state not party to the Protocol. Article 4 para. 8 states that "[n]otwithstanding the provisions of this Article, imports referred to in [this Article] and exports referred to in [this Article] may be permitted from, or to, any State not party to this Protocol, if that State is determined, by a Meeting of the Parties, to be in full compliance with Article 2, Articles 2A to 2E and this Article, and have submitted data to that effect as specified in Article 7". This provision has served as the basis for the Parties making more general exceptions to the trading prohibitions such as that contained in Decision IV/17C adopted at the 4th Meeting of Parties. The Decision provided for a temporary exemption from the ban on exports to non-Parties from January 1993 until the 5th Meeting of Parties for countries which met certain conditions.

The Basel, CITES and Rotterdam Conventions aim to protect the environment by controlling trade in certain substances (Basel, Rotterdam), and species (CITES). This regulatory approach is predicated on a listing of the objects controlled.

Article 5 to enable their compliance with the control measures on methyl bromide [...]".

57 Decision IX/6 Critical-use exemptions for methyl bromide "1. To apply the following criteria and procedure in assessing a critical methyl bromide use for the purposes of control measures in Article 2 of the Protocol. 2. To request the Technology and Economic Assessment Panel to review nominations and make recommendations based on the criteria established in paragraphs 1 (a) (ii) and 1 (b) of the present decision".

58 Decision IX/7 Emergency methyl-bromide use "To allow a Party, upon notification to the Secretariat, to use, in response to an emergency event, consumption of quantities not exceeding 20 tonnes of methyl bromide. The Secretariat and the Technology and Economic Assessment Panel will evaluate the use according to the "critical methyl bromide use" criteria and present this information to the next meeting of the Parties for review and appropriate guidance on future such emergencies, including whether or not the figure of 20 tonnes is appropriate.

59 The EU representative called at the first Plenary Mtg at COP-5 for stepping up the commitments undertaken by Annex I countries in the Protocol (Earth Negotiations Bulletin of 3 November 1999, 2).

The agreements allow for adapting their technical requirements by providing for a simplified (annex/appendix) amendment procedure.[60]

The need to react yet more flexibly to factual changes has arisen in the case of CITES where the Meeting of Parties circumvented the amendment procedure by laying down a legal regime for the trade in ivory. Currently 144 States Parties[61] act by banning commercial international trade in an agreed list of endangered species (Appendix I) and by regulating and monitoring trade in others that might become endangered (Appendix II).[62] The Meeting of Parties to this agreement has adapted that regulatory approach to factual changes in the controlled species. By spelling out the technical conditions under which trade in a listed species may be resumed in a decision,[63] the Meeting of Parties to

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60 E.g., article XI Bonn Convention para. 4: "Amendments shall be adopted by a two-thirds majority of Parties present and voting"; para. 5: "An amendment to the Appendices shall enter into force for all Parties ninety days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article". Similar article 30 para. 2 for the adoption of Annexes to the Biodiversity Convention.

61 As of 16 December 1999.

62 CITES aims are major components of caring for the Earth, a Strategy for Sustainable Living, launched in 1991 by UNEP, IUCN and WWF.

63 See, e.g., Decision 10.1 Conditions for the resumption of trade in African elephant ivory from populations transferred to Appendix II at the 10th Mtg of the Conference of the Parties. Part A: "Trade in raw ivory shall not resume unless: a) deficiencies identified by the CITES Panel of Experts (established pursuant to Resolution CONF. 7.9, replaced by Resolution CONF. 10.9) in enforcement and control measures have been remedied; b) the fulfilment of the conditions in this Decision has been verified by the CITES Secretariat in consultation with the African regional representatives on the Standing Committee, their alternates and other experts as appropriate; c) the Standing Committee has agreed that all of the conditions in this Decision have been met; d) the reservations entered by the range States with regard to the transfer of the African elephant to Appendix I were withdrawn by these range States prior to the entry into force of the transfer to Appendix II; e) the relevant range States support and commit themselves to international co-operation in law enforcement through such mechanisms as the Lusaka Agreement; f) the relevant range States have strengthened and/or established mechanisms to reinvest trade revenues into elephant conservation; g) the Standing Committee has agreed to a mechanism to halt trade and immediately re-transfer to Appendix I populations that have been transferred to Appendix II, in the event of non-compliance with the

CITES assumes the power of adopting normative decisions. Such decisions are implicitly binding as States Parties are prevented from trading in the species unless they fulfil the specified conditions.

The most recent international environmental agreement of this group, the Rotterdam Convention, empowers the Meeting of Parties to adapt the list of controlled chemicals through legislative action. Article 22 para. 5 lit.(a) requires approval of adoption of the amendment to Annex III by the Meeting of Parties according to article 21 para. 2 only, but not ratification, acceptance or approval by each State Party. Article 7 prescribes that the Meeting of Parties may decide on listing new chemicals in Annex III of the Convention on the basis of a 'draft decision guidance document' prepared by the Chemicals Review Committee. Article 22 para. 5 lit.(c) provides that an amendment to Annex III shall enter into force for all Parties on a date to be specified in the decision.

bbb. Modifying the Regulatory Approach

Decisions of the Meetings of Parties may concern a tenet of the treaty's regulatory approach to tackling the environmental issue if this approach proves to be flawed. The Montreal Protocol's original attempt to regulate ozone depleting substances not just as a product but also as an ingredient of industrial production processes of other products[64] has been

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conditions in this Decision or of the escalation of illegal hunting of elephants and/or trade in elephant products owing to the resumption of legal trade; h) all other precautionary undertakings by the relevant range States in the supporting statements to the proposals adopted at the 10th Mtg of the Conference of the Parties have been complied with; and i) the relevant range States, the CITES Secretariat, TRAFFIC International and any other approved party agree to: (i) an international system for reporting and monitoring legal and illegal international trade, through an international database in the CITES Secretariat and TRAFFIC International; and (ii) an international system for reporting and monitoring illegal trade and illegal hunting within or between elephant range States, through an international database in the CITES Secretariat, with support from TRAFFIC International and institutions such as the IUCN/SSC African Elephant Specialist Group and the Lusaka Agreement. [...]".

64 F. Orrego Vicuña, "Trade and Environment, New Issues under International Law", in: V. Götz et al. (eds), *Liber Amicorum G. Jaenicke*, 1998, 701 et seq., (709).

suspended by a decision of the Meeting of Parties.[65] Both of these decisions are binding on all States Parties and normative in nature. A similar development has taken place under the Basel Convention. Finding that the control procedure did not work as hoped, the Meeting of Parties adopted a decision to essentially ban exports from OECD countries to non-OCED countries.[66] Only after doubts about the legally binding force of that decision arose did the Meeting of Parties reframe the contents of Decision II/12 as an amendment to the Convention.[67]

bb. Implementing the Agreement

Modern international environmental agreements contain concepts designated to ensure effective and efficient compliance with the treaty obligations. Such is the case with regard to mechanisms for transactions and cooperation and compliance assistance and control. These concepts are not operational as couched in the treaty but need to be implemented through normative decisions by the Meetings of Parties. Decisions by the Meetings of Parties' that design the mechanisms as operable are of a self-executing nature; otherwise the international action has to be complemented by national legislative action.

aaa. Mechanisms for Transactions and Cooperation

Modern international environmental agreements such as climate change and biodiversity conventions provide for legal mechanisms by which private initiative for achieving the agreement's environmental objectives can be harnessed. Such mechanisms are designated for cross-border implementation of an international environmental agreement. The agreements render Meetings of Parties competent to implement the treaty concepts.

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65 Montreal Protocol, Decision V/17, see W. Lang, "Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law: Montreal Protocol on Substances that Deplete the Ozone Layer", in: Wolfrum (ed.), see note 44, 199, 265 et seq.

66 Decision II/12.

67 Decision III/1.

The Kyoto Protocol foresees the following mechanisms: Joint implementation,[68] Clean Development Mechanism[69] and Emissions trading.[70]

Under the Kyoto Protocol the competence for the Meeting of Parties to take such decisions is to be found in the relevant provisions of the agreement (arts 6, 8, 12) charging the Meeting of Parties with "implementing" each of the mechanisms.[71] The Meeting of Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The implementing legislation will be ground-breaking in several respects. For example, the rules that are required for making the Clean Develop-

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68 Annex I parties may implement their commitments by entering into a formal agreement to undertake their obligations jointly, to transfer emission reduction units from projects undertaken within their jurisdiction, article 6.

69 A form of joint implementation between Annex I and non-Annex I Parties using a "clean development mechanism" was defined in the Protocol, article 12. Under the "clean development mechanism" Annex I Parties have to invest in projects in developing countries which achieve sustainable development and contribute to the ultimate objectives of the Convention, and to use the certified emissions reductions accruing from such investment projects to contribute to compliance with "part of" their quantified emission limitation and reduction commitments (QELRCs). See J. Werksman, "The Clean Development Mechanism: Unwrapping the 'Kyoto Surprise'", *Review of European Community & International Environmental Law* 7 (1998), 147 et seq., (147). What the exact size of this "part" will be has been left to the Meeting of Parties to decide, see G. Verhoosel, "Beyond the Unsustainable Rhetoric Of Sustainable Development: Transferring Environmentally Sound Technologies", *Geo. Int'l Envtl L. Rev.* 11 (1999), 49 et seq., (69).

70 An international "emissions trading" regime will allow industrialised countries to buy and sell emissions credits among themselves, article 17. This mechanism is not as new as it appears, since under the Montreal Protocol, any party may transfer to another party any portion of its calculated level of production, so long as such transfers do not cause the parties involved to exceed collectively the production limit applicable to them as a group, see "CFC Trading under the Montreal Protocol: How Does it Work?", *Global Envtl Change Report* 21 December 1990, at 1.

71 Under the Buenos Aires Plan of Action, see under II. 5, States Parties committed themselves to deadlines for taking decisions on six key issues that will make the Kyoto Protocol operational, including the three Kyoto mechanisms.

ment Mechanism work will be relevant not only for States Parties that have undertaken the reduction commitments (Annex I countries) but also for non-Annex I countries. Furthermore, the Kyoto mechanisms address cross-border transactions between private entities.[72] The Meeting of Parties will have to keep its implementing legislation under continuous review,[73] as it has been doing in the case of 'activities implemented jointly'.[74]

Similar implementing legislation by the Meeting of Parties will be required under the Biodiversity Convention. This agreement contains provisions on transactions on genetic resources, based on access to such resources and the sharing of benefits arising out of their use in article 15 (access to genetic resources), article 16 para. 3 (access to and transfer of technology that makes use of genetic resources), and articles 19 para. 1 (participation in biotechnological research on genetic resources) and 19 para. 2 (access to results and benefits from biotechnology). These provisions address both users and providers of genetic resources.[75] They are not operable as such but need implementing legislation by the Meeting of Parties. The Meeting of Parties has been moving to prepare a decision on the requisite cross-border implementing institutions, which would allow private actors and government agencies to bargain for the terms of access.[76]

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72 F. Missfeldt, "Flexibility Mechanism: Which Path to take after Kyoto", *Review of European Community & International Environmental Law* 7 (1998), 128 et seq., (129).

73 Doc. FCCC/CP/1998/2, COP-4, Buenos Aires, item 4 (f) of the provisional agenda: Review of the Implementation of Commitments and of Other Provisions of the Convention Activities Implemented Jointly: Review of Progress Under the Pilot Phase (Decision 5/CP.1).

74 The Decision (Doc. FCCC/CP/1999/L.13), i.a., concludes the review process, continues the AIJ pilot phase begun at COP-1 beyond the end of the present decade, without prejudice to future decisions, and requires Parties to provide proposals to improve the draft revised uniform reporting format.

75 The Meeting of Parties to the Biodiversity Convention considered access and benefit-sharing at its second, third and fourth meetings.

76 See Consolidated draft report of the Experts Panel (Doc. UNEP/CBD/EP-ABS/L.5/Rev.1). The conclusions state that: contractual arrangements are the main mechanism for concluding access agreements and implementing benefit-sharing, and Mutually Agreed Terms (MAT) are central to the contracting process; the negotiation of MAT must respect the provider country's legal policy and administrative arrangements; MAT should include

There are, furthermore, a variety of innovative institutions designated to facilitating transactions such the Clearing-House mechanism under the Biodiversity Convention.[77] Apart from institutional developments,[78] the Meetings of Parties have, as yet, not adopted decisions that go beyond persuasive language.[79]

bbb. Compliance Mechanisms

The Meetings of Parties have, generally speaking, the competence to set forth self-executing compliance procedures and mechanisms.[80]

Under the Montreal Protocol, the non-compliance procedure, a crucial element of the Protocol's regulatory approach to achieving its objectives, has been developed through decisions adopted by the Meeting of the Parties, pursuant to article 8 of the Protocol.[81] The Meeting of Parties decided not to expedite the amendment procedure but rather to

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provisions on user obligations; and legislative, administrative and policy measures that provide the basis for MAT should seek to minimise transaction costs. They identify the most critical capacity-building needs as: assessment and inventory of biological resources; contract negotiation skills; legal drafting skills; and development of *sui generis* regimes for the protection of traditional knowledge associated with genetic resources.

77 Article 18 para. 3 of the Biodiversity Convention is the basis for the implementation of the clearing-house mechanism aimed at promoting and facilitating technical and scientific cooperation among Contracting Parties and partners. The 1st Mtg of Parties decided to implement the provisions of article 18 para. 3, of the Convention for the establishment of a clearing-house mechanism (CHM) to promote and facilitate technical and scientific cooperation (Decision I/3). See, for further developments Report on the implementation of the pilot phase of the clearing-house mechanism in facilitating and promoting technical and scientific co-operation (note by the Secretariat), Doc. UNEP/CBD/SBSTTA/3/3 of 15 June 1997.

78 African-Eurasian Waterbird Agreement, concluded pursuant to article IV Bonn Convention. Resolution 1.5 (AEWA/Res.1.5/Rev.1) establishes an international project register to facilitate training and technical and financial cooperation among parties and to coordinate measures to maintain a favorable conservation status for migratory waterbirds species.

79 COP-5 of the Climate Convention decided, however, that financial and technical support for capacity building in developing countries should be provided through the financial mechanism (Doc. FCCC/CP/1999/L.19).

80 See under II. 4.

81 Decision II/2 and Annex III; Decision IV/5 and Annex IV.

adopt a normative decision.[82] In so doing, it endorsed the view of the Legal Expert Group that had regarded article 8 of the Protocol as providing the requisite competence for the Meeting of Parties' decision on the non-compliance procedure.[83] States Parties comply with this objective legal institution.[84] The Meeting of Parties will progressively develop the operation of an institutionalised compliance system even after the initial set-up.[85]

Under the Climate regime, the Meetings of Parties may follow the example of the Montreal Protocol and institute the non-compliance procedure *via* a normative decision, dispensing with the amendment procedure. Legislative action by the Meeting of Parties under the Climate Convention, which set up a process for in-depth review of Annex I Parties national communications,[86] was endorsed and expanded upon in arts 7, 8 of the subsequently concluded Kyoto-Protocol. Article 13 of the Climate Convention calls for a Multilateral Consultative Process, which the Meeting of Parties has established.[87] Arts 17, 18 Kyoto-

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82 Decision IV/5 Non-compliance procedure para. 4: "To accept the recommendation that there is no need to expedite the amendment procedure under Article 9 of the Vienna Convention for the Protection of the Ozone Layer".

83 This view seems to be correct, see above.

84 See under II. 4 a. aa.

85 Most recently, Decision X/10 Review of the non-compliance procedure "Recalling decision IV/5 on a non-compliance procedure of the Montreal Protocol adopted by the 4th Mtg of the Parties, Recalling also Decision IX/35 on review of the non-compliance procedure adopted by the 9th Mtg Noting the report of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance established by Decision IX/35 (Doc. UNEP/OzL.Pro/WG.4/1/3) and, in particular, its conclusion that in general the non-compliance procedure has functioned satisfactorily but that further clarification was desirable and that some additional practices should be developed to streamline the procedure, [...] 2. To agree on the following changes in the text with a view to clarifying particular paragraphs of the non-compliance procedure:" Doc. UNEP/OzL.Pro.10/9.

86 Decision 2/CP.1; Doc. FCCC/CP/1995/Add.1.

87 According to article 13, the Meeting of Parties "shall consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention", see Decision 9/CP.5 Multilateral consultative process with Annex II to the report of the Ad Hoc Group on article 13 of its 6th Sess.

Protocol call for the setting-up of a compliance system through the Meeting of Parties. According to article 17, the Meeting of Parties shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.[88] The Protocol, however, limits the Meeting of Parties' competence in this field by providing, in article 18 2nd sentence, that for the system to entail binding consequences an amendment to the Protocol will be required.[89]

Meetings of Parties may, furthermore, link up with independent institutional bodies turning them into agencies for ensuring compliance with the international environmental agreement's objectives. The Meetings of Parties issue policy guidance of a normative nature to ensure that the third institutions implement the treaty according to Meetings of Parties' decisions. Such a third institution is the Global Environment Facility (GEF).[90] The GEF receives normative policy guidance from the Meetings of Parties to the Montreal Protocol, Biodiversity[91]

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88 The system will in a all likelihood cover the main elements of a modern compliance system. It will deal with fact finding, eligibility to trigger the mechanism, a compliance body, and differentiated response instruments calibrated to facilitation, on the one hand, and enforcement, on the other. See Report of the Joint Working Group on Compliance and Decision by the Conference of the Parties, Doc. FCCC/CP/1999/L.21. The requisite decision is scheduled to be taken at COP-6 in The Hague, Netherlands.

89 Report of the Joint Working Group on Compliance, ibid.

90 The GEF is a mechanism for international cooperation for the purpose of providing new, and additional, grant and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits in the areas of biological diversity, climate change, international waters, and ozone layer depletion. Land degradation issues, primarily desertification and deforestation, as they relate to the four focal areas will also be addressed. See L. Boisson de Chazournes, "Le fonds pour l'environnement mondial: Recherche et conquête de son identité", *AFDI* 41 (1995) 612 et seq.; M. Ehrmann, "Die Globale Umweltfazilität (GEF)", *ZaöRV* 57 (1997), 565 et seq.

91 Decision IV/13 Additional guidance to the financial mechanism "The Global Environment Facility should: 1. Provide adequate and timely support for country-driven projects at national, regional and subregional levels addressing the issue of alien species in accordance with decision IV/1 C; 2. Provide financial resources for country-driven activities within the context of its operation programmes to participate in the Global Taxonomy Initia-

and Climate[92] Conventions.[93] Executive agreements, so-called memoranda of understanding concluded between the Meeting of Parties and the Governing Council of the GEF,[94] render the guidance legally binding on the latter. The resulting rulemaking by the Meetings of Parties has analogies in national legal orders regarding legislative guidance for delegated rulemaking by agencies. The guidance thus is an element in the development of an executive branch function and its control by the body of highest legitimacy, i.e. the Meeting of Parties through legislation.

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tive which take into account as appropriate, elements of the Suggestions for Action contained in the Annex to Decision IV/1 D; 3. Within the context of implementing national biological diversity strategies and action plans, provide adequate and timely support to eligible projects which help parties to develop and implement national, sectoral and cross-sectoral plans for the conservation and sustainable use of biological diversity of inland water ecosystems in accordance with decision IV/4; [...]".

92 Decision 11/CP.1 (Doc. FCCC/CP/1995/7/Add.1) Initial guidance on policies, programme priorities and eligibility criteria to the operating entity or entities of the financial mechanism; Decision 12/CP.1 (Doc. FCCC/CP/1995/7/Add.1) Report of the GEF to the COP on the development of an operational strategy and on initial activities in the area of climate change; Decision 10/CP.2 (Doc. FCCC/CP/1996/15/Add.1) Communications from the Parties not included in Annex I to the Convention: guidelines, facilitation and process for consideration; Decision 11/CP.2 (Doc. FCCC/CP/1996/15/Add.1) Guidance to the GEF; Decision 2/CP.4 (Doc. FCCC/CP/1998/16/Add.1) Additional guidance to the operating entity of the financial mechanism. In addition, COP-4 adopted two other related Decisions: Decision 3/CP.4 Review of the financial mechanism and Decision 12/CP.4 Initial national communications from parties not included in Annex I to the convention.

93 The GEF acts through the 32-member Council, an Assembly, its Secretariat and the three Implementing Agencies UNDP, UNEP and the World Bank. While it was a mere credit window of the World Bank during its pilot phase, the GEF has been made more independent by its restructuring, even though its legal nature remains undecided. See W. P. Ofosu-Amaah/B. J. Lausche, "World Bank", *Yearbook of International Environmental Law* 1 (1990), 330 et seq., (334). The fund was replenished in a process that ended in March 1994.

94 See Decision 12/CP.3 "Decides to approve the annex to the Memorandum of Understanding concluded with the Council of the GEF, thereby bringing it into force".

cc. Setting Standards for National Laws and Policies

Modern international environmental agreements often rely on standards for how States Parties should treat the environmental problem under consideration thereby harmonising national policies, laws and regulations. Decisions of the Meetings of Parties will set emissions, technical and economic standards. It is a matter for each treaty whether and to what extent it provides the Meetings of Parties with the competence to promulgate such standards as binding law.

The competence of the Meeting of Parties to the Montreal Protocol to make binding decisions on ozone depleting standards and production and consumption standards allows it to set standards that States Parties have to implement in their national legal order.

Under the Kyoto Protocol, there is general agreement that, for flexibility mechanisms to work uniform standards for methodology etc. are indispensable. Pursuant to provisions in the Climate Convention equivalent to the Kyoto Protocol arts 5 (methodology), 7 (communication) and 8 (review of information), that call for their implementation, the Meeting of Parties adopted guidelines whose objective it is, i.a., to promote consistency in the review of annual Greenhouse Gas inventories of Annex I countries and to establish a process for a thorough and comprehensive technical assessment of inventories using mandatory language in part.[95] Since the technical review process to be established under the Protocol will base itself on the guidelines, the decision adopting them is *de facto* a mandatory standardisation of the national procedure in this field.[96] The Meeting of Parties to the Climate Con-

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[95] Decision 4/CP.5 Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications "The Conference of the Parties pursuant to arts 4, 6, 7 para. 2, 9 para. 2 lit.(b), 10 para. 2, and 12 para. 1. *Adopts* the guidelines for the preparation of national communications by parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications, contained in Doc. FCCC/CP/1999/L.3/Add.1; 2. *Decides* that Annex I Parties should use Part II of the UNFCCC reporting guidelines for the preparation of their third national communications due by 30 November 2001, in accordance with Decision 11/CP.4". See, OECD Environment Directorate, Monitoring, Reporting and Review of National Performance under the Kyoto Protocol, ENV/EPOC(99)20/Final.

[96] Decision 6/CP.5 Guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention "*The Con-*

vention has therefore decided that States Parties must make their greenhouse gas inventories and their national communications conform to the standards elaborated by the Intergovernmental Panel on Climate Control (IPCC).[97]

A specific form of legally binding standardisation takes place if a national action taken by one State Party is capable of triggering a uniform legal regime applicable to all States Parties. This is the case under the Rotterdam Convention where a State Party may submit a chemical with regard to which it has taken "final regulatory action" for listing. If the chemical is listed, that chemical cannot be exported to any State Party without the importer State's explicit consent.

Under modern international environmental agreements that are primarily concerned with the protection of the environment within States Parties, decisions by the Meeting of Parties setting certain standards are generally most detailed and thus apt to be self-executing. Yet the treaties stop short of providing for hard rules, rather using persuasive language, instead.

Typical is article III para. 6 of the Bonn Convention according to which "The Conferences of the Parties may recommend to the Parties that are Range States of a migratory species listed in Appendix I that they take further measures considered appropriate to benefit the species."[98]

The Wetlands (Ramsar) Convention in its article 4 spells out obligations of States Parties to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands. The Meeting of Parties may make "general or specific recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna", article 6 para. 2 lit.(d).

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ference of the Parties, [...] 1. *Adopts* for a trial period covering inventory submissions due in 2000 and 2001 the guidelines for the technical review of greenhouse gas inventories of Annex I Parties; [...]".

97 Doc. FCCC/CP5/1999/L.13.

98 At the 1st Mtg of parties to the African-Eurasian Waterbird Agreement implementing the Convention on Migratory Species, an aspect of biodiversity conservation draft Conservation Guidelines developed by Wetlands International were introduced with support from the governments of Switzerland and the Netherlands (AEWA/MOP 1.8). The EU welcomed the guidelines but emphasised that parties are not obligated to strictly abide by them (*Earth Negotiations Bulletin* of 8 November 1999, 1).

The Biodiversity Convention is concerned, i.a., with *in-situ* conservation, i.e. the legal and other protection of biological diversity within States Parties.[99] Article 8 of the Convention sets forth the obligations of the States Parties in this respect. Basing itself on the competence to implement the treaty, the Meeting of Parties to the Biodiversity Convention adopted a number of "recommendations" that lay out in very specific terms what legislative and executive action is required of States Parties in their domestic legal orders to ensure *in situ* conservation.[100] Adopting such recommendations is the functional equivalent of the European Community organs passing (binding) directives which set forth objectives while leaving Member States the choice as to the means to achieve them. However, the Meeting of Parties has framed the standards in "recommendations" using persuasive rather than mandatory language.

The Meeting of Parties obviously feels that it does not have the competence to adopt binding decisions in this field.

dd. Progressive Development and Revision of the Treaty

The Meetings of Parties' legislative competencies to progressively develop the agreement amount to powers of formal revision of the treaty. The competencies to implement the treaty and to set standards also create new law. This raises the issue of any limits to the mandate of the Meetings of Parties' to legislate on the treaty regime. Obviously, the Meetings of Parties may not legislate whenever the law-making requires ratification by the States Parties and thus most often involves the national legislatures. States Parties may either amend the original treaty or work out an implementing treaty, often called a protocol, which then may be amended in turn. The ozone regime, which consists of the Vi-

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99 See Wolfrum, see note 44, (375 et seq.).

100 Decision IV/10 Measures for implementing the Convention on Biological Diversity "A. Incentive measures: consideration of measures for the implementation of Article 11. The Conference of the Parties Encourages Parties, Governments and relevant organisations: (a) To promote the design and implementation of appropriate incentive measures, taking fully into account the ecosystem approach and the various conditions of the Parties and employing the precautionary approach of Principle 15 of the Rio Declaration on Environment and Development, in order to facilitate achieving the implementation of the objectives of the Convention and to integrate biological diversity concerns in sectoral policies, instruments and projects".

enna Convention and the Montreal Protocol as amended,[101] illustrates this type of progressive development of international law. Also, under the Biodiversity Convention, the need was felt to negotiate a separate protocol to ensure that transboundary movement in living modified organisms did not have an adverse effect on human health or biodiversity (Cartagena Biosafety Protocol).[102]

Modern international environmental agreements thus provide for two alternative routes for progressively developing the treaty regime. They do not, however, indicate in particular instances which route should be taken. It comes down to interpreting the provisions conferring competencies to legislate on the Meetings of Parties. A typical competence for legislative action by the Meeting of Parties is thus a treaty provision calling for its implementation.[103] The general international law rule of *effet utile* is to be observed in interpreting the treaty provisions conferring competencies on treaty organs.[104] However, the above analysed practice under modern international treaties allows us to draw a clear line that will be of help in defining the limits to Meetings of Parties' legislation under any given competence. Such a line would hold the Meeting of Parties competent to take action in conformity with the

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101 The 1987 Montreal Protocol as adjusted and amended by the second Mtg of the Parties (London 27–29 June 1990) and by the 4th Mtg of the Parties (Copenhagen 23–25 November 1992) and further adjusted by the 7th Mtg of the Parties (Vienna 5–7 December 1995) and further adjusted and amended by the 9th Mtg of the Parties (Montreal 15–17 September 1997) and further adjusted and amended by the 11th Mtg of the Parties (Beijing 27 November–3 December 1999). The Beijing Adjustments will enter into force on 28 July 2000 while the Beijing Amendment will enter into force on 1 January 2001 provided that at least 20 instruments of ratification of the Amendment have been deposited. No state or regional economic integration organisation may deposit such an instrument unless it has previously, or simultaneously, deposited such an instrument to the previous Amendments. With regard to ratifications, the Executive Director reported to the 11th Mtg of the Parties, Beijing, Doc. UNEP/OzL.Pro.10/9 of 3 December 1999, that the total number of parties to the Vienna Convention is 173, the Montreal Protocol 172, the London Amendment 137, the Copenhagen Amendment 103, and the Montreal Amendment 33 parties. Unless otherwise indicated citations are to the Protocol as amended and adjusted.

102 Conference of the Parties to the Convention on Biological Diversity, First extraordinary meeting (resumed session), Montreal 24–28 January 2000, Doc. UNEP/CBD/ExCOP/1/L.5.

103 See, e.g., arts 18 para. 3, 21 para. 1 phrase 4, 2, 3 Kyoto Protocol.

104 C. Rousseau, *Droit international public*, Vol. 1, 1971, para. 240.

policy approach underlying the international environmental agreement. It may not, however, impose substantial new obligations on States Parties.

This view seems reflected in the eventual decision of the Meeting of Parties to the Basel Convention to express the ban on exports of hazardous wastes to non-OECD countries as an amendment rather than as a legislative decision, as had been the case originally. An argument in support of this view may be taken from article 18 2nd sentence Kyoto Protocol, which explicitly precludes the Meeting of Parties from including binding consequences in the compliance mechanism which it is otherwise competent to set forth. Also, the fact that, under the Montreal Protocol, the Meeting of Parties adopted the compliance procedure through a decision and not through an amendment confirms the distinction drawn here. When adopted through an amendment, a compliance mechanism serves to enforce, to deepen the substantive obligations incurred by States Parties and stays within the regulatory approach endorsed by the treaty, rather than setting forth new substantive obligations for States Parties.

The line between such revision of an international environmental agreement which can be performed by way of legislative decision-making of the Meetings of Parties and such which requires a formal amendment of the treaty, i.e. an entirely new protocol, is however subject to interpretation in each specific instance. This is illustrated by the discussion about using the adjustment procedure for adding substances under the Montreal Protocol.[105]

c. Procedure

In making normative decisions the Meetings of Parties follow a procedure marked by the three elements: preparation; voting requirements; and conditions of deliberation.

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[105] The 10th Mtg of Parties addressed two new substances with ozone-depletion potential which were being marketed as ozone-safe products but not controlled under the Montreal Protocol. Measures to be taken shall be decided on at the next meeting. See Decision X/8 para. 6: "To request the legal drafting group which the Open-ended Working Group may establish to consider and report back to the Eleventh Meeting of the Parties through the Open-ended Working Group on the options available under the Montreal Protocol to introduce controls on new ozone-depleting substances".

aa. Preparation of Decision-Making

An indispensable element of the decision-making procedure of Meetings of Parties to modern international environmental agreements is their receiving quality scientific advice. Agreements therefore institutionalise expertise whose advice may amount to a powerful proposal for decision-making by the Meeting of Parties.

aaa. Institutionalising Expertise

In order to assist States Parties to make complex trade-offs between scientific uncertainties and political judgments, many international environmental agreements have established a subsidiary body on scientific, technological and technical advice. Such bodies may be established either by the international environmental agreement or *ad hoc* by the Meeting of Parties of the international environmental agreement as in the case of the Vienna Convention's Working Group for Scientific and Technological Advice.[106] The Meetings of Parties maintain control over the *modus operandi* of the bodies.[107] The subsidiary bodies of the Conferences of Parties provide input on specific issues to the benefit of both the Conference of Parties and the subsequent Meeting of Parties. The Meeting of Parties to a Protocol also may begin implementing the treaty before its entry into force provided for by the mother convention.[108]

The structure and mandate of each of these bodies reflect the degree to which Parties have decided to allow the discipline of scientific or other expertise to direct political action.

The institutional structure and mandate of the Climate Change Subsidiary Body for Scientific and Technological Advice (SBSTA) is designed to retain the political character and influence of the Meeting of Parties. Neither the size nor the qualifications for membership of the SBSTA is selective, as it is "open to participation by all parties". In

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106 CBD, Decision IV/15: "11. Adopts the modus operandi of the Subsidiary Body on Scientific, Technical and Technological Advice as set out in annex I to the present decision."

107 CBD, Decision IV/15: "11. Adopts the modus operandi of the Subsidiary Body on Scientific, Technical and Technological Advice as set out in annex I to the present decision."

108 E.g., 1st Mtg of Parties to the African-Eurasian Waterbird Agreement and remarks by the Executive Secretary of the Bonn Convention at COP-6 (*Earth Negotiations Bulletin* 18 of 8 November 1999, 2).

practice, SBSTA has proved a highly politicised forum which is virtually indistinguishable in its membership or its negotiation dynamic from the Convention's policy bodies.[109] As the pressure for efficacy has grown, smaller working groups have been formed such as the Joint Working Group on Compliance. A Committee on Science and Technology (CST) advises and meets simultaneously with the Meeting of Parties to the Desertification Convention. The Ramsar Convention has a Scientific and Technical Review Panel composed of experts from States Parties. The panel provides guidance on keys issues related to the application of the agreement.[110] The Montreal Protocol has an ad hoc Working Group of Legal and Technical Experts, which held two sessions in 1998 to review the non-compliance procedure under the Montreal Protocol.[111]

Under the Basel Convention, States Parties, through the Technical Working Group, are in the process of devising criteria for the environmentally sound management of hazardous and other wastes.

More objective, authoritative and influential scientific advice is provided by the Intergovernmental Panel on Climate Change (IPCC), a body of experts which is supported by the World Meteorological Organisation and UNEP, and is wholly independent from the Convention.[112] The IPCC released its Second Assessment Report in 1995[113] and continues to produce Technical Papers and develop methodologies (e.g. national greenhouse gas inventories) for use by Parties to the Climate Change Convention. The IPCC has had important impact on how

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109 Werksman, see note 69, (59).

110 The composition of the Ramsar Convention's Scientific and Technical Review Panel was a point of contention at the 7th Mtg of Parties (10–18 May 1999). In Resolution Doc. 15.2 the COP decides to introduce modifications to the STRP composition and modus operandi.

111 Convened pursuant to Decision IX/35 of the 9th Mtg of Parties to the Montreal Protocol. See Doc. UNEP/OzL.Pro/WG.4/1/3, Report on the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol.

112 The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 by the World Meteorological Organisation and UNEP to assess the available scientific, technical, and socio-economic information in the field of climate change. The IPCC is organised into three working groups: Working Group I concentrates on the climate system, Working Group II on impacts and response options, and Working Group III on economic and social dimensions.

113 *International Environment Reporter* (BNA), *Current Reports* 19 (1996), 3. The Third Assessment Report will be completed around the year 2000.

countries have perceived the imminence of global climate change. Its first report in 1992 helped create the momentum for the Convention to be adopted at UNCED, just as the second report contributed to States Parties' assuming target and timetable reduction obligations through the Kyoto Protocol.[114] Under the Montreal Protocol, the international community has reached a considerable level of agreement on the political and economic costs of reducing production and consumption of ozone-depleting substances. As a result, the Protocol's Parties have allowed its scientific advisory panels to consist of members who are selected on the basis of internationally recognised experts,[115] and may even be drawn from non-Parties, i.e. representatives of the relevant inter-governmental organisations.[116] This criterion is qualified only by assurances that selection will strive for the widest possible geographical balance of representation. On marine environmental matters, the International Council for the Exploration of the Sea (ICES) will provide independent advice.[117]

The role of such advisory bodies is strengthened considerably if international environmental agreements endorse the precautionary princi-

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[114] Following consideration by SBSTA, during which delegates debated the GEF's funding role in relation to the IPCC, the COP adopted a decision on co-operation with the IPCC (Doc. FCCC/CP/1999/L.18) on 4 November 1999. The decision expresses the COP's appreciation to the IPCC for its high quality work, notes with concern the IPCC's urgent appeal for additional resources, urges parties and other organisations to contribute financial support to enable the IPCC to complete its report, and invites SBI-12 to consider the matter of support for the IPCC, in the context of recommending additional guidance to the GEF.

[115] The Parties to the Protocol have established four such panels, on Scientific Assessment, Environmental Assessment, Technical Assessment and Economic Assessment. Report of the Parties to the Montreal Protocol on the Work of their First Session, Doc. UNEP/OzL Pro 1/5; Decision I/3, Annexes IV and V.

[116] Ibid.

[117] Protocol to the Convention for the International Council for the Exploration of the Sea, Done at Copenhagen 13 August 1970. The Governments of the States Parties to the Convention for the International Council for the Exploration of the Sea, signed at Copenhagen on the twelfth day of September 1964, to amend article 14 of the Convention shall be amended to read as follows: "(2) the Council shall *by a majority vote* of all the Contracting Parties approve an annual budget of the Council".

ple.[118] The strength of the advice given still depend, of course, on whether there is a consensus among the scientific community.[119] In the case of the Montreal Protocol, where scientific consensus existed, parties have strengthened their commitments three times since 1987.[120]

bbb. Power of Proposal

A move in the direction of allocating power of proposal to the institutionalized expertise can be found in the Rotterdam Convention. The Chemical Review Committee shall, i.a., recommend a chemical for listing in Annex III, which triggers the PIC procedure (article 7). The Rotterdam Convention covers two main categories of substances: (1) "banned" and "severely restricted" industrial chemicals[121] and (2) "severely hazardous"[122] pesticide formulations. Annex III lists those chemicals subject to the PIC procedures.[123] The procedure for expanding the list of chemicals differs for those two categories.[124] Yet in each

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118 Montreal Protocol, preamble, 5th and 6th tirets FCCC, article 3 para. 3; the Berlin Mandate Working Group's task was also to be carried out in the light of the best scientific information and assessment, Werksman, see note 69, (59).

119 E. A. Parson/O. Green, "The Complex Chemistry of the International Ozone Agreements", *Environment* 37 (1995), 2 et seq., (20).

120 See Parson/Green, above.

121 Article 2 lit. (b) defines Banned Chemicals "as a chemical all uses of which within one or more categories have been prohibited by final regulatory action, in order to protect human health or the environment". According to article 2 lit.(c) Severely restricted Chemical "means a chemical virtually all use of which within one or more categories has been prohibited by final regulatory action in order to protect human health or the environment, but for which certain specific uses remain allowed".

122 A Severely hazardous pesticide formulation is defined as "a chemical formulated for pesticidal use that produces severe health or environmental effects observable within a short period of time after single or multiple exposure, under conditions of use", Article 2 lit.(d).

123 The initial list incorporates 17 pesticides, five industrial chemicals, and five acutely hazardous pesticide formulations.

124 If at least one country in two PIC regions notifies the Convention Secretariat of an action to ban or severely restrict a chemical, and such notification meets the information requirements of Annex I, the Secretariat forwards that chemical nomination to the Chemical Review Committee. This Committee decides whether to recommend to the Conference of Parties

case the Chemicals Review Committee needs to make a recommendation before the Meeting of Parties may make a new listing. The recommendation appears to be a condition for the Meeting of Parties to take a decision on amending Annex III in the procedure provided for in article 22 para. 5 upon proposal by a State Party. Thus, the Committee has a negative monopoly of proposal under this Convention. It may take its decisions at a two-thirds majority, article 18 para. 6 lit.(c).

Under the Bonn Convention, the functions of the Scientific Council include making recommendations to the Meeting of Parties as to the migratory species to be included in Appendices I and II, together with an indication of the range of such migratory species.[125]

bb. Voting Requirements

International environmental agreements may provide for voting requirements for normative decision-making or leave it to the Meeting of Parties to decide on the question.

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that the chemical be included in Annex III based on verification that the final regulatory action has been taken to protect human health and the environment; that a risk evaluation has been completed according to scientifically recognised principles; and that the action provides a sufficiently broad basis to merit listing. The Chemical Committee must also prepare and submit to the Conference of Parties for approval, a draft decision guidance document for every chemical it recommends for listing, article 7. Once approved, the decision guidance document becomes a major informational source for importing countries in determining whether to consent to imports of PIC-listed chemicals, arts 7, 10 para. 2. For *severely hazardous* pesticide formulations, a developing country or country with an economy in transition must make the initial proposal for inclusion in Annex III. The Convention Secretariat is then responsible for collecting additional information such as whether handling and applicator restrictions exist in other countries, incidents in other countries, and risk and hazard evaluations where available. These are forwarded to the Chemical Review Committee, which decides whether to make a recommendation to the Conference of Parties that the severely hazardous pesticide formulation be listed in Annex III.

125 Article VIII para. 5; any State Party remains free to propose an amendment to the Appendices, article XI para. 2 Bonn Convention.

Adjustments under the Montreal Protocol may be decided by a weighted majority of States Parties.[126] The Protocol provides for a majority vote if the parties are unable to reach agreement on such adjustments. The vote required is both formally and materially qualified, as only a two-thirds majority adoption of adjustments shall be binding on all Parties to the Protocol,[127] whereas this two-thirds majority must also represent 50% of the total consumption of the controlled substances by the Parties. In the Protocol as amended, this weighted voting requirement of a two-thirds majority now has to encompass both a majority of those states whose special situation as developing countries is recognised under the Protocol as amended[128] and a majority of those states that do not fit within this category. The London Amendment thus ensures that the interests of the States Parties currently consuming CFCs and those that forego such consumption are represented in the majority vote.[129] The Rotterdam Convention provides for listing of chemicals on the basis of consensus by the Meeting of Parties, article 22 para. 5 lit.(b). This is in contrast to the voluntary regime which required that only five or more states take regulatory action to ban or severely restrict a chemical, or that an Expert Group recommend acutely hazardous formulations for listing.

However, international environmental agreements are in general silent on the point of how the Meetings of Parties are to proceed in exercising the subject-specific decision-making competencies conferred upon it by the conventions, leaving it for the Meetings of Parties to make the necessary arrangements in Rules of Procedure.[130] The Meetings of Parties may determine the quorum for its decision-making.[131]

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126 Article 2 para. 9 lit.(c). See 1990 London Amendment, H. article 2 para. 9 lit.(c): "The following words shall be deleted from paragraph 9 of Article 2 of the Protocol: representing at least fifty per cent of the total consumption of the controlled substances of the Parties" and replaced by: "representing a majority of the Parties operating under paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting".

127 Article 2 para. 9 Montreal Protocol.

128 Article 5 para. 1 bis London Amendment.

129 Caron, see note 38, (767 n. 53).

130 Rule 42, para. 1.

131 Delegates at the MOP-1 of AEWA agreed to change the rules of procedure to require a quorum of one half, *Earth Negotiations Bulletin* of 8 November 1991, 1.

The generic rules of procedure for Meetings of Parties to international environmental agreements stipulates accordingly: "[t]he Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include *specified majorities* required for the adoption of particular decisions."[132]

The Climate Change and Biodiversity Conventions, the parties to which have yet to adopt relevant Rules of Procedure, anticipate that "procedures may include specified majorities required for the adoption of particular decisions."[133] An indication of the growing importance of the decision-making power of the Conferences of Parties on the implementation of the treaty regime is the intensive and contentious negotiations within the Conferences of Parties under both agreements on the voting part of the Rules of Procedure of the two conventions. In fact, under both conventions elaborate proposals on qualified majority voting have been put forward in several drafts by the Secretariats and the Meeting of Parties presidents, as yet to no avail.[134] Both the Confer-

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132 Article 7 para. 3 FCCC (emphasis added).

133 Article 7 para. 3 FCCC, article 22 para. 3 CCD.

134 Report by the President to the 2nd Mtg of Parties to the Climate Change Convention: "The main outstanding issue concerns the majorities required for the adoption of specific types of decisions on matters of substance (rule 42, para. 1). Views are widely divergent on this issue. ... The following positions regarding voting majorities were discerned by the President as a result of consultations before COP-2: (a) Consensus or general agreement on all matters of substance (including the adoption of a protocol); (b) Three-fourths majority on all matters of substance (including the adoption of a protocol); (c) Two-thirds majority on all matters of substance (including the adoption of a protocol); (d) Double majority (Annex I and non-Annex I Parties) on all matters of substance (including the adoption of a protocol); (e) Consensus on matters relating to the financial mechanism and at least a two-thirds majority on all other matters of substance (including the adoption of a protocol); (f) Double three-fourths majority (Annex I and non-Annex I Parties) on matters relating to the financial mechanism; (g) Seven-eighths on all matters of substance (consensus required for a protocol); and (h) Three-fourths majority on all matters of substance, including the adoption of a protocol, and a simple double majority on matters relating to the financial mechanism. The following general conclusions were drawn by the President, as a basis for a possible agreement on procedures on taking decisions on matters of substance: (a) Parties should aim at reaching consensus

ences of Parties of the ozone regime[135] and CITES have, however, adopted their Rules of Procedure, which provide for majority voting.

Specific provisions of a protocol may require specific majorities.[136] All States Parties to the mother convention may attend the Meeting of Parties to the protocol, yet only States Parties to the Protocol have the right to vote on matters concerning the Protocol.[137]

cc. Deliberation at the Sessions of the Meetings of Parties

The Meetings of Parties may act as the Committee of the Whole of the States Parties to an international environmental agreement. Meetings are attended not only by the representatives of the State Parties but also by representatives of concerned States non-Party and intergovernmental and non-governmental organisations.

Traditionally, countries form groupings to develop common positions. New and more innovative approaches may be called for, such as

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on all such matters; (b) Consensus does not mean unanimity; and (c) Wherever it is not possible to reach decisions by consensus, the Parties may resort to voting. The President of COP 2 wishes to advance the following options on substantive decision-making for consideration by the Conference of the Parties: (a) Option 1: Three-fourths majority for all decisions on matters of substance, including the adoption of a protocol and decisions regarding the financial mechanism. This is the same voting majority as that established by article 15 of the Convention for the adoption of amendments, if the Parties are unable to reach agreement by consensus. (b) Option 2: Seven-eighths majority for all decisions on matters of substance, including the adoption of a protocol and decisions regarding the financial mechanism."

135 Typical for international environmental agreements is Rule 40 Vienna Convention/Montreal Protocol: "1. Unless otherwise provided by the Convention, decisions of a meeting on all matters of substance shall be taken by a two-thirds majority vote of the Parties present and voting, except as otherwise provided in the Terms of Reference for the administration of the Trust Fund. 2. Decisions of a meeting on matters of procedure shall be taken by a simple majority vote of the Parties present and voting."

136 Questionnaire circulated by G77/China at the 10th Sess. of FCCC SBI (reported in: *Earth Negotiations Bulletin* of 8 November 1999, 1).

137 Article 13 para. 2 Kyoto-Protocol.

introducing a facilitator appointed by the president of the Meeting of Parties.[138]

An innovative feature pioneered under the Climate Convention has been to split up the Meeting of Parties in a technical and a 'high level' segment. The latter reunites the competent ministers from the governments of States Parties. Deliberations at the Meeting of Parties thus gain a substantive political quality. At this phase, smaller informal negotiating circles tend to proliferate leaving little meaningful discussion at the plenary meetings.[139]

The strong presence of non-governmental actors both non-profit and for-profit, provides an element of democratic legitimacy to the decision-making process.[140] Following the lead of the UN,[141] international

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138 On the discussion at FCCC COP-5 in view of the objective of the entry into force of the Kyoto Protocol by 2002, see *Earth Negotiations Bulletin* of 8 November 1999, 13.

139 Following consultations with the COP Bureau, the UNFCCC Secretariat has offered the following suggestions for consideration by the SBI at its 10th Sess. (Doc. FCCC/SBI/1999/2, 7): "(a) It is difficult to apply a strict formula for constituting a closed negotiating or contact group, owing to the lack of a formal constituency structure. The chairperson should, however, strive for a composition that reflects all interests at stake. It would help the Secretariat if informal constituencies provided up-to-date information of their membership; (b) The possibility of informal consultations being limited to a selected group but conducted in full view of all interested Parties may be explored; (c) If a subsidiary body reports back to the COP that a contact group at the official (technical) level has been unable to arrive at a conclusion, the level of subsequent consultations should be raised, e.g. a minister could be asked to take over the consultations, possibly accompanied by an official; (d) The Secretariat will explore practical ways to make negotiation processes more transparent to those not involved, in particular by informing them of the state of play and of the anticipated schedule for plenary meetings. Situations in which non-participants in negotiations wait overnight for a result should be avoided; (e) Sessions should be concluded within the scheduled period. Final negotiations should end, at the latest, in the early hours of the scheduled last day of a session, permitting an orderly conclusion in a plenary meeting in the afternoon, with translation and full documentation."

140 See J. Delbrück, "Laws in the Public Interest — Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law", in: *Liber amicorum*, see note 64, 17 et seq.

141 E/RES/1996/31 of 25 July 1996, Consultative relationship between the United Nations and non-governmental organizations.

environmental agreements decide on the criteria for NGO attendance.[142]

3. Executive Function

The Meetings of Parties of modern international environmental agreements also perform an executive function. Acting directly or through agencies, they have the power to adopt binding decisions in individual cases based on legal authority and assessment of facts.

a. Internal and External Administration of the Treaty

Administrative and financial as well as organisational[143] matters are considered and definitely decided by the Meetings of Parties. In accordance with the law of international organisation, such "internal" decisions are binding for the treaty organs. The Meetings of Parties discharge them through the bureaux of the Meeting of Parties, whose composition is based on the principle of equitable geographic distribution.

External application refers to decisions by the Meetings of Parties or an agency of it that immediately apply the treaty to states or international organisations thereby changing their legal situation. Such decisions take the form of individual acts and of administrative rulemaking. The latter concerns rules that direct how the Meeting of Parties — or its implementing agencies — are to proceed in applying the agreement. Importantly, the Meetings of Parties may serve themselves of separate entities and organisations acting as agencies in making routine decisions.

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142 Such criteria are normally contained in the Rules of Procedure. Unusually, article XI para. 6 and 7 of the CITES Convention set out the criteria for attendance. The literature on the role of NGOs in international environmental governance is vast, see e.g. R. Falk, "Environmental protection in an era of globalization", *Yearbook of International Environmental Law* 6 (1995), 3 et seq.

143 Article VIII para. 5 Bonn Convention: "The Conference of the Parties shall determine the functions of the Scientific Council, which may include: [...]". Otherwise the Meeting of Parties decide on establishment of the permanent Secretariat, establishment of any subsidiary bodies, see, most recently, MOP-1 of the AEWA (AEWA/Res.1.1/Rev.1 and AEWA/Res.1.8/Rev.2); *Earth Negotiations Bulletin* of 10 November 1999, 3.

b. Competencies

There are three main competencies for the Meetings of Parties to act in an executive function: The Meetings of Parties administer adjustments, financial mechanisms and any implementing mechanisms decided on by the Meetings of Parties.

aa. Administering the Regulatory Approach

The Meetings of Parties may respond to changes in the factual situation by administrative adjustments of the treaty's regulatory approach. Such is the case with the trading ban under the Montreal Protocol. In order to prevent relocation of the production of ozone-depleting substances in non-Party States, the Montreal Protocol provides for a ban on trading in the substances controlled. However, the Montreal Protocol authorizes the Meeting of Parties to suspend the general trading ban with non-Parties in individual cases.[144] The Meeting of Parties correspondingly has allowed exports to non-Parties which have shown compliance with the control measures in the Protocol.

bb. Administering Implementing Mechanisms

The sophisticated efficiency-oriented mechanisms under certain agreements[145] require direct administration by the Meetings of Parties. These act through operational entities, models for which may be found in the limited membership bodies, the expert bodies or the bureaux of the conferences.

Such is the case with the implementation mechanisms designated by the Kyoto Protocol.[146] The Kyoto Protocol makes references to instituting "operational entities" for its flexibility mechanisms.[147] As these mechanisms conceptually rely on transactions between States Parties

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144 Article 4 para. 8 states that "notwithstanding the provisions of this Article, imports referred to in [this Article] and exports referred to in [this Article] may be permitted from, or to, any State not party to this Protocol, if that State is determined, by a meeting of the Parties, to be in full compliance with Article 2, Articles 2A to 2E and this Article, and have submitted data to that effect as specified in Article 7 [as amended]".

145 See II. 2. b. bb. aaa.

146 See *Earth Negotiations Bulletin* of 19 April 1999, 2 et seq.

147 Arts 12 para. 5, 6 para. 2.

and legal entities, a third institution is called for in order to enable, facilitate and supervise these transactions. Thus, Parties may only gain credit for projects in developing countries if the emission reductions are certified by an operational entity identified by the Meeting of Parties.

Regarding the management of clearing houses, the Meeting of Parties to the Biodiversity Convention enlists both the Secretariat[148] and also the GEF.[149] Under CITES, a trust fund[150] is set up to administer revenues from the ivory trade regulated by Meeting of Parties decision.

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148 Decision IV/2 Review of the operations of the Clearing-house Mechanism: "[...] 10. Instructs the Executive Secretary: [..] (e) To assist in ensuring that the implementation of articles 16 (Transfer of and Access to Technology), 17 (Information Exchange) and 18 (Scientific and Technical Cooperation) of the Convention on Biological Diversity is facilitated by the Clearing-house Mechanism; (k) To undertake an independent review of the pilot phase of the Clearing-house Mechanism, starting at the end of 1998, to be presented to the Subsidiary Body on Scientific, Technical and Technological Advice for its consideration together with a longer-term programme of work for the Clearing-house Mechanism".

149 Decision IV/2 Review of the operations of the Clearing-house Mechanism "[...] 9. Requests the Global Environmental Facility: (a) To be a catalyst in the development and implementation of the Clearing-house Mechanism, so as to assist it to fulfil its role in promoting and facilitating the implementation of the Convention, in a participatory manner and fully incorporating available modern information and communication tools; (b) To support capacity-building activities and country-driven pilot projects focused on priority areas, as critical components in the implementation of the Clearing-house Mechanism at the national, subregional, biogeographic, and regional levels, both during and after the pilot phase."

150 Decision 10.2 Conditions for the disposal of ivory stocks and generating resources for conservation in African elephant range States "a) The African elephant range States recognize: i) the threats that stockpiles pose to sustainable legal trade; ii) that stockpiles are a vital economic resource for them; iii) that various funding commitments were made by donor countries and agencies to offset the loss of assets in the interest of unifying these States regarding the inclusion of African elephant populations in Appendix I; iv) the significance of channelling such assets from ivory into improving conservation and community-based conservation and development programmes; v) the failure of donors to fund elephant conservation action plans drawn up by the range States at the urging of donor countries and conservation organisations; and vi) that, at its ninth meeting, the Conference of the Parties directed the Standing Committee to review the issue of stockpiles and to report back at the 10th meeting. b) Accordingly, the African elephant range States agree that all revenues from any purchase of

cc. Administering Compliance Mechanisms

Of fundamental importance is the administration of the financial mechanisms that most modern international environmental agreements provide for pursuant to Agenda 21 Chapter 33. Modern international environmental agreements dispose of an institutionalised financial mechanism through which they administer a compliance assistance scheme based on the principle of "common but differentiated responsibility". These mechanisms provide the financial resources to meet the agreed incremental costs incurred by developing country Parties in implementing their obligations under the respective agreement. A voluntary financial mechanism may also be instituted subsequent to an international environmental agreement's coming into force by a decision of the Meeting of Parties.[151]

The approach was pioneered under the Montreal Protocol where a Multilateral Fund and a corresponding institutional structure to administer it were set up.[152] More often, however, administration of the fund

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stockpiles by donor countries and organisations will be deposited in and managed through conservation trust funds, and that: i) such funds shall be managed by Boards of Trustees (such as representatives of governments, donors, the CITES Secretariat, etc.) set up, as appropriate, in each range State, which would direct the proceeds into enhanced conservation, monitoring, capacity building and local community-based programmes; and ii) these funds must have a positive rather than harmful influence on elephant conservation. c) It is understood that this decision provides for a one-off purchase for non-commercial purposes of government stocks declared by African elephant range States to the CITES Secretariat within the 90-day period before the transfer to Appendix II of certain populations of the African elephant takes effect. [...]".

151 This resolution (AEWA/Res.1.7/Rev.2) establishes a Small Conservation Grants Fund to facilitate implementation of the AEWA, to operate from the time of MOP-2. The resolution instructs the Secretariat to establish an interim mechanism to enable voluntary contributions for the purpose of providing small grants between MOP-1 and MOP-2, and urges parties and donors to make contributions. An Annex contains the CMS guide-lines for acceptance of financial contributions.

152 According to article 10 para. 1 the parties shall establish a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to parties operating under para. 1 of article 5 of this Protocol to enable their compliance with the control measures set out in arts 2A to 2E, and any control measures in arts 2F to 2H that are decided pursuant to para. 1 bis of article 5 of the Protocol. The mechanism shall

fed by developed country Party contributions is entrusted to a separate entity or entities. This, in practice, is most often the GEF but other institutions are also being called on.[153] The implementing agencies' juridical personality allows them to allocate the GEF resources to given projects in a legally binding manner.

The Meetings of Parties guide the GEF through a list of terms regarding objectives, methodology and criteria annexed to the decision entrusting it with the operation of the financial mechanism.[154] The GEF is reviewed accordingly on a regular basis. The GEF is requested to ensure that its implementing agencies are made aware of Meetings of Parties' decisions. The Meetings of Parties provide additional guidance as they see fit.[155] Since the guidance by the Meetings of Parties is of a di-

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meet all agreed incremental costs of such parties in order to enable their compliance with the control measures of the Protocol. An indicative list of the categories of incremental costs shall be decided by the Meeting of the Parties. The London Amendment (1990) to the Montreal Protocol on Substances that Deplete the Ozone Layer has provided for the creation of a Financial Mechanism to assist developing countries. The Mechanism includes a Multilateral Fund and other multilateral, regional and bilateral cooperation. The Fund meets the incremental costs of the Parties operating under article 5 of the Protocol (developing countries) to implement the control measures of the Protocol and finances all clearing house functions e.g. country studies, technical assistance, information, training and costs of the Fund Secretariat.

153 The GEF has been designated by the Meetings of Parties as the interim operational entity for the financial mechanisms established under the Climate and Biovdiversity Conventions. The Desertification Convention also provides for a financial mechanism, for which the International Fund for Agricultural Development (IFAD) was chosen on an interim basis.

154 E.g. FCCC, Decision 2/CP.4.

155 FCCC, Decision 2/CP.4 Additional Guidance to the Operating Entity of the Financial Mechanism, "The Parties decided that the Global Environment Facility (GEF) should provide funding to developing country Parties to: implement adaptation measures in particularly vulnerable countries and regions; enable them to identify their prioritized technology needs, build capacity for participation in systematic observational networks; meet the agreed full costs to prepare initial and subsequent national communications by maintaining and enhancing national capacity; assist with studies leading to the preparation of national programmes to address climate change and response measures; assist in strengthening national activities for public awareness and education; support capacity for identifying technology suppliers, designing and hosting projects, and accessing information from re-

rectory character, the GEF itself adopts policies fleshing out the guidance and setting forth the criteria for funding of projects. Insofar as the policy guidance received from the different Meetings of Parties cover similar issues the GEF may respond efficiently by way of a single project.[156] The detailed report that the GEF serves the Meetings of Parties will allow the latter to control compliance by the GEF with the policy guidance received.[157]

dd. Direct and Indirect Administration of International Environmental Agreements

Meetings of Parties of modern international environmental agreements increasingly administer the agreement directly either through operational entities or independent institutions. A conceptual distinction between direct administration (by treaty organs) and indirect administration (by States Parties' organs) analogous to the accepted terminology in EC law is thus called for.

c. Procedure

Typical for administrative rulemaking is the close involvement of groups holding a stake in the matter under consideration.

Considerations of protecting numerical minorities among States Parties are evident in weighted majority requirements.

Thus, article 10 para. 9 Montreal Protocol provides that decisions by the Meeting of Parties regarding the financial mechanism may be adopted by a two-thirds majority vote of the Parties, representing a majority of the Parties operating under article 5 and a majority of the Parties not so operating present and voting.

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gional centers and networks; GEF was also encouraged to further streamline its project cycle, simplify its project approval process and make transparent its process for determination of incremental costs. [...]".

156 See, e.g., Report to the COP-5 of the Climate Convention, para. 15: "recognizing the continued and strong emphasis on capacity building from the COPs of both the FCCC and the CBD, GEF Council agreed that a comprehensive and targeted assessment of capacity building would be timely".

157 See note by the Secretariat, *Report of the Global Environmental Facility to the Conference of the Parties at its 50th Session*, Doc. FCCC/CP/1999/3.

Furthermore, modern international environmental agreements rely heavily on involving non-governmental organisations in their administration.

The Instrument for the Establishment of the Restructured GEF endorses "consultation with, and participation as appropriate of, major groups throughout the project cycle" of GEF-financed projects as one of its basic principles.[158] Correspondingly, the World Bank is now integrating environmental NGOs in its development projects.[159] Under the so-called World Heritage Convention, three NGOs have been given official status in the agreement as advisors on which the World Heritage Committee can call "for the implementation of the programmes and projects".

4. Quasi-Judicial Function

Finally, the Meetings of Parties exercise a quasi-judicial function by assuming the power unilaterally to sanction conduct tested against a legal standard. Procedural shortcomings, however, make it a quasi-judicial function only. At least four steps within the compliance procedure need to be distinguished: Jurisdiction, institutionalised factual and legal assessment, consequences and procedure.

a. Jurisdiction

The Meetings of Parties have jurisdiction to conduct a procedure leading to a binding result with regard to compliance.

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158 Instrument for the Establishment of the Restructured GEF, Report of the GEF Participants Meeting, Geneva, Switzerland of 14-16 March 1994, 2, para. 5.

159 The World Bank has identified the following focal points of its environmental agenda: Assisting member countries in setting priorities, building institutions, and implementing programs for sound environmental stewardship; ensuring that potential adverse environmental impacts from Bank-financed projects are addressed; Addressing global environmental challenges through participation in the GEF.

aa. Compliance

The jurisdiction of Meetings of Parties covers the (non-) compliance procedures and mechanisms that modern international environmental agreements dispose of. While compliance control is a relatively new concept of international law,[160] most modern international environmental agreements provide for it.[161] The aim of compliance control is to prevent injury/damage through non-compliance, reflecting, in part, what has recently become known as the "precautionary approach" and preventing "disagreement on a matter of fact or law", which is the essence of a dispute.[162] In some form or another a specific mechanism to control States Parties' compliance with their obligations is increasingly part of the basic regulatory approach of modern international environmental agreements,[163] particularly of the Montreal Protocol, the two

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160 See R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", *RdC* 272 (1998), 25 et seq. While "implementation refers to legislation, the regulation and other steps required (of States Parties) to implement the agreement, compliance means not only whether the measures are observed but also whether the targets of the agreement change their behavior", E. Brown Weiss/H.J. Jacobson, "Why Do States Comply with International Agreements", *Human Dimensions* 1996, 1; see "Introduction and Overview", in: D. Victor/K. Raustila/E. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments*, 1998, 2.

161 On reporting and deliberation on non-compliance by a designated organ see arts 7, 8, 9 para. 3, para. 12, and Annex IV Montreal Protocol; arts 12, 13, 19 Basel Convention; arts 7 para. 2 lit.(i), 10-12 FCCC; article 23 para. 4 lit.(a)(g) CBD; Protocol to the Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, *ILM* 33 (1994), 1540 et seq., arts 5, 8; arts 26, 27 CCD; International Tropical Timber Agreement, UNCTAD Doc. TD/Timber/11, arts 30– 34, see, generally, A. & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995.

162 See M. C. W. Pinto, "From Dispute Resolution to Dispute Avoidance: Some Thoughts on Collective Management of Treaty Performance", in: *Liber Amicorum*, see note 64, 353 et seq., (367).

163 The Meetings of Parties approach reflects the assumption that non-compliance is frequently the consequence, not of malice or greed, but rather of technical, administrative or economic problems, see P. Széll, "Implementation Control: Non-compliance Procedure and Dispute Settlement in the Ozone Regime", in: W. Lang (ed.), *The Ozone Treaties and their in-*

Sulphur Protocols to the Geneva Convention on Long-Range Transboundary Air Pollution, and the Convention on the Protection of the Marine Environment of the North East Atlantic.[164] Such a system provides for a quasi-judicial settlement of compliance disputes.

bb. Interpretation of Agreement

Jurisdiction for authentic interpretation of the international environmental agreement, however, rests with the States Parties.[165]

b. Institutional Issues

In any of the systems developed to date, the Meetings of Parties retain ultimate authority over the compliance issue. However, the Meetings of Parties conduct the procedure through a limited membership organ such as the Implementation Committee instituted under the Montreal Protocol.[166]

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fluence on the building of international environmental regimes, 1996, 43–50, (46).

164 It is generally considered that international environmental agreements with the following characteristics are suited to an implementation mechanism only: (1) the objectives are stated in general terms and there are no target and timetables; (2) the commitments undertaken by States parties are flexible, leaving ample discretion to States Parties as to how to fulfil their obligations, see X. Wang, "Towards a System of Compliance. Designing a Mechanism for the Climate Change Convention", *Review of European Community & International Environmental Law* 7 (1998), 176 et seq., (176).

165 See, however, Decision IV/5 Non-compliance procedure para. 5: "To adopt the view that the responsibility for legal interpretation of the Protocol rests ultimately with the Parties themselves".

166 "7. The functions of the Implementation Committee shall be: (a) To receive, consider and report on any submission in accordance with paragraphs 1, 2 and 4; (b) To receive, consider and report on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12 (c) of the Protocol and on any other information received and forwarded by the Secretariat concerning compliance with the provisions of the Protocol; (c) To request, where it considers necessary, through the Secretariat, further information on matters under its consideration."

The character of the quasi-judicial feature depends on whether the Meetings of Parties can hear primarily disputes about allegedly violated rights of States Parties or about the common interest. This is the issue underlying eligibility to trigger the compliance procedure. Under its non-compliance procedure the Montreal Protocol Implementation Committee can receive and consider reports from Parties "wishing to express reservations regarding *another* Party's implementation of its obligations, the *Secretariat*, should it have similar concerns, or a Party itself, should it find *it* is having difficulty complying."[167] The Compliance Committee established by the common compliance regime adopted in 1997 for the Convention on Long-Range Transboundary Air Pollution and its eight Protocols[168] may consider specific issues referred to it by one or more Parties about another Party, one Party with its own compliance problems, or the Secretariat, based upon information received by Parties or other sources such as non-governmental organisations.

The task of fact-finding is generally allocated to the agreement's Secretariat. The Montreal Protocol empowers the Implementation Committee to conduct information gathering in the territory of a State Party that has so requested.[169] The Compliance Committee under the Transboundary Air Pollution regime can gather information from other sources through the Secretariat, receive expert advice from the Convention bodies or other experts, and visit countries by invitation. Parties have to submit two types of reports based on a framework common to the Convention and its Protocols, one on strategies and policies adopted to mitigate air pollution and another on emissions data. Under the in-depth review procedure of the Climate Convention, an expert review team may undertake fact finding upon authorisation by the subsidiary body.[170]

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167 Emphasis added.

168 Currently under revision.

169 Non-Compliance Procedure para. 7 lit. (e): "To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee".

170 The purpose of the review process, as defined in Decision 2/CP.1 of the first session of the Conference of the Parties (see Doc. FCCC/CP/1995/7/Add.1), is to review, in a facilitative, non-confrontational, open and transparent manner, the information contained in the communications from Annex I Parties to ensure that the Conference of the Parties has accurate, consistent and relevant information at its disposal to assist it in carrying out its responsibilities.

c. Factual Assessment and Legal Evaluation

A central element of the quasi-judicial function and any compliance procedure is the factual assessment and legal evaluation of a situation of potential non-compliance.

Under the Montreal Protocol, the central task of the Implementation Committee is to independently state the facts.[171] The Montreal Protocol empowers the Implementation Committee to conduct "information gathering in the territory" of a State Party that has so requested.[172] According to para. 9 of the Non-compliance Procedure, the Implementation Committee shall report to the Meeting of Parties, including any recommendations it considers appropriate. With the primary goal of "securing an amicable solution of the matter", the Implementation Committee shall include any recommendations it considers appropriate.[173] Thus, the preliminary legal evaluation, i.e. the finding whether the facts amount to a State Party's (non-)compliance with its obligations, is the task of the Implementation Committee. The process of compliance assessment, with the final determination left to the Meeting of Parties, takes on a different character from a diplomatic conference and resembles the proceedings before an administrative law judge.

The compliance system applicable to developing States Parties progresses on two levels, i.e. the Multilateral Fund, and the Implementation

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171 Non-Compliance Procedure para. 7 lit.(d) "To identify the facts and possible causes relating to individual cases of non-compliance referred to the Committee and make appropriate recommendations to the Meeting of the Parties. (e) To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee".

172 See, on the details, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, 3rd edition, UNEP (ed.), 1998.

173 Thus the Implementation Committee referred the following draft for a Decision to the Meeting of the Parties: "Decision (j) Inconsistencies in the timing for reporting data under article 7 and the phase-out schedule under article 5, 1. To urge the Implementation Committee to review and report on the status of the data reported by Parties operating under paragraph 1 of Article 5, relative to the freeze in production and consumption using the best available data submitted; 2. To urge the Implementation Committee to view the data from the July to June time period, or other time periods relevant to paragraph 8 bis of Article 5, as especially critical in cases where annual data submitted by Parties operating under paragraph 1 of Article 5 demonstrates that a country is very close to its baseline freeze level".

Committee. Upon the report from the Executive Committee of the Multilateral Fund, the Implementation Committee may make proposals for the article 5 (developing)-State party found in non-compliance to remedy that situation.[174] All final decisions are, however, reserved for the Meeting of Parties. This ensures that the conclusion on the assessment of compliance reached at the technical-legal level (the Multilateral Fund) can be evaluated at the political level. The Long-Range Transboundary Air Pollution regime provides for a similar institutionalised factual assessment and legal evaluation of compliance.

This bifurcation of the technical-legal and political elements of compliance reflects the quasi-judicial nature of the procedure. It is an important approximation to a genuinely judicial procedure that one institution is to rule on the factual and legal elements. But it also reflects the fact that the primary objective of the procedure is to achieve compliance not to settle disputes judicially. The first stage of the procedure facilitates Parties' reaching a political compromise on compliance by setting

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[174] E.g., concerning Azerbaijan, the Committee recently recommended "2. To express great concern about Azerbaijan's non-compliance and to note that Azerbaijan only very recently assumed the obligations of the Montreal Protocol, having ratified it in 1996. It is with that understanding that the Parties note, after reviewing the country programme and submissions of Azerbaijan (which was prepared with UNEP assistance), that Azerbaijan specifically commits: – To a phase-out of CFCs by 1 January 2001 (save for essential uses authorized by the Parties); – To establish, by 1 January 1999, a system for licensing imports and exports of ODS; – To establish a system for licensing operators in the refrigeration-servicing sector; – To tax the imports of ozone-depleting substances, to enable it to ensure that it meets the year 2001 phase-out; – To a ban, by 1 January 2001, on all imports of halons; and – To consider by 1999, a ban on the import of ODS-based equipment; 3. That the measures listed in paragraph 2 above should enable Azerbaijan to achieve the virtual phase out of CFCs, and a complete phase-out of halons by 1 January 2001. In this regard, the Parties urge Azerbaijan to work with relevant Implementing Agencies to shift current consumption to non-ozone-depleting alternatives, and to quickly develop a system for managing banked halon for any continuing critical uses. The Parties note that these actions are made all the more urgent due to the expected closure of CFC and halon-2402 production capacity in its major source (Russian Federation) by the year 2000, and the very limited international availability of halon-2402 from other sources; 4. To closely monitor the progress of Azerbaijan with regard to the phase-out of ozone-depleting substances, particularly towards meeting the specific commitments noted above".

out the facts and the law. Finally, the subsequent political stage is meant to generate acceptance of the relatively novel procedure with states.

The Climate Convention foresees an overall review of the steps taken by Annex I countries regarding their national policies, article 4 para. 2 lit.(b). The article 4 review builds on the national self-reporting obligation. This dovetails with the Meeting of Parties' power under article 7 para. 2 lit.(e) to "assess on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties". Under an in-depth review of Annex I Parties' national communications, adopted by the Meeting of Parties[175] and now enshrined in the Kyoto-Protocol,[176] the expert review teams shall prepare a report to the Meeting of Parties, assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments. The team submits a report to the Subsidiary Body on Implementation, which will consider the report and any comments by the State Party concerned. The decision[177] does not indicate what sort of measures the Subsidiary Body on Implementation may take upon completion of this stage, particularly whether there can be a legal evaluation of the State Party's compliance. Article 13 of the Climate Convention furthermore provides for a "multilateral consultative process", which shall be open to States Parties upon request. The Process therefore is a mechanism that will deal with a State Party's or a group of States Parties' performance with regard to its/their obligations under the Convention. The Process as implemented by the Meeting of Parties may lead to "recommendations", while being non-judicial in nature.[178]

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175 Decision 2/CP.1; Doc. FCCC/CP/1995/Add.1.

176 Article 8 para. 1 of the Protocol stipulates that the information submitted under article 7 by each party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Meeting of Parties and in accordance with guidelines adopted for this purpose by the Meeting of Parties. The information submitted under article 7 para. 1 by each party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts.

177 See note 171.

178 "3. The process shall be conducted in a facilitative, cooperative, non-confrontational, transparent and timely manner, and be non-judicial. Parties concerned shall be entitled to participate fully in the process"; At INC-3, the Co-chair of working group II proposed a procedure to deal with "questions regarding interpretation and application", Doc. A/AC.237/

This difference with the Non-compliance Procedure under the Montreal Protocol illustrates that States Parties calibrate a non-compliance mechanism on the nature of the obligations with which compliance is to be ensured. A need for an effective mechanism arises only if States Parties want to make a substantial deal stick. It is thus under the Kyoto Protocol only that the Subsidiary Body on Implementation may be allotted the functions and powers that the Implementation Body exercises under the Montreal Protocol. The Kyoto-Protocol now gives the Subsidiary Body on Implementation (SBI) and the Meeting of Parties a clear mandate to develop fully fledged compliance mechanisms[179] that may mirror that under the Montreal Protocol.

d. (Non-)compliance Response

Non-compliance responses may be of a facilitative or punitive nature. Facilitation is designed to bring about compliance where it results from inability to comply, while the power to sanction a case of wilful non-compliance with punitive or rather positive measures is reserved to cases of determined non-compliance.

With the primary goal of "securing an amicable solution of the matter", the Implementation Committee of the Montreal Protocol shall report to the Meeting of Parties and include any recommendations it considers appropriate. [180] After receiving a report by the Committee the

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Misc.13 et seq. of the Revised Single Text on Elements Relating to Mechanisms, see Wang, see note 164, (178).

179 See under II. 2. b. bb. bbb.

180 See, e.g., Doc. UNEP/OzL.Pro/ImpCom/21/3 of 7 December 1998 Report of the Implementation Committee Under the Non-Compliance Procedure for the Montreal Protocol on the Work of its Twenty-First Meeting "[...] 18. The Secretariat drew the Committee's attention to paragraphs 22-25 and tables 1 and 2 of its report, contained in Doc. UNEP/OzL.Pro.10/3, which discussed a number of Parties whose data suggested that they were in non-compliance in 1996 with the control measures in Article 2 of the Protocol. The Secretariat recalled that, at its twentieth meeting, the Committee had considered non-compliance with the Protocol by those Parties. The recommendations of the Committee on each of the cases had been conveyed to the Parties concerned, which had been requested to send the relevant information to the Secretariat by 30 September 1998, including provisions for interim reductions and other benchmarks which the Implementation Committee could use to monitor progress. [....] 51. The representative of GEF reported that three additional projects had been approved by the

Parties may, taking into consideration the circumstances of the matter, decide upon and call for steps to bring about full compliance with the Protocol, "including measures to assist the Parties' compliance with the Protocol, issuing cautions, and suspension of certain rights and privileges". The non-compliance responses available with regard to developing States Parties include the Protocol's Multilateral Fund.[181]

The international environmental agreements thus follow the approach pioneered by ILO where a Committee of Experts performs an in-depth review of national reports and provides individual countries with a clear indication of compliance problems. The Committee of Experts also suggests corrective action. A standard grace period of two years allows the country time to come into compliance. This period may be extended if the country is clearly moving toward compliance. If non-compliance persists, the violation is reported to the Conference Committee as part of its annual report. The report identifies individual countries and the nature of the compliance problem. The Conference

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GEF Council since July 1998, namely, projects for Argentina, Azerbaijan and Turkmenistan. Three countries, Estonia, Kazakhstan and Tajikistan, had already started project identification activities and their proposals should be presented in the next few months. [...] 53. The representative of UNDP informed the meeting that the Programme was implementing 21 institutional strengthening projects funded from the Multilateral Fund, 13 of which were for large-volume-consuming countries, including China, India and Mexico".

181 "In the Montreal Protocol on Substances that Deplete the Ozone Layer, ... most funding to address problems of poor implementation comes from the Protocol's Multilateral Fund, but the financing necessary for [a number of] states to comply with the Protocol flows from the Global Environmental Facility (GEF), a separate entity. In practice the GEF has made its funding contingent upon the prior approval of the parties to the Protocol. When non-compliance by ...[a number of Parties] became apparent, the GEF required those countries to have implementation plans approved via the Protocol's Non-compliance Procedure before funds were disbursed. The GEF's conditionality has, in turn, induced [an important Party] to supply data after years of refusal. These data have made it easier to assess ... compliance, to track emerging problems such as illegal trade in ozone-depleting substances, and to assess the overall effectiveness of the Montreal Protocol. In essence, the GEF acted as a critical part of the system for implementation and review, ensuring that the system operated well." D. Victor, "The Montreal Protocol's non-compliance procedure: lessons for making other international environmental regimes more effective", in: Lang, see note 163, 58 et seq., (61).

Committee addresses the most serious violations in a session where the country in question must be present and defend its position.

Under the Kyoto Protocol, suspension of specific rights, including the ability to participate in article 6 (joint implementation), 12 (clean development mechanism) and 17 (emissions trading) may be added to the list of non-compliance responses of a punitive nature.

e. Procedure

The non-compliance mechanism under the ozone and the Long-Range Transboundary Air Pollution regimes allot the main functional elements of judicial proceedings to several bodies. The most important body, the Implementation Committee of the Montreal Protocol even enjoys the independence of the assessment made by the Implementation Committee.[182] The procedure, however, is still too rudimentarily legalistic to speak of anything but a quasi-judicial function. The persons serving in the Implementation Committee do so as representatives of their respective state. The body charged with making the final decision is not bound by any decision preceding the factual assessment or political evaluations. The essentially political nature of the procedure becomes evident upon a comparison with the dispute settlement system established by the WTO. Just as in that system the panel report has to be approved by the Dispute Settlement Body representative of the diplomatic element, the conclusion of the Implementation Committee hearing the case precedes decision-making by the plenary organ. Yet the latter body's recommendations can be blocked by the state concerned refusing consensus while the former's are sure to be adopted by the Dispute Settlement Body given the negative consensus principle under which the successful applicant has to agree to reject the panel report.

The procedure reflects the fact that non-compliance in environmental matters often results from lack of capacity. A less stringent judicial nature of the procedure is thought to further compliance more effectively. However, it leaves the treaty open to cases of deliberate non-compliance, which are best addressed by judicial proceedings. The solution may be found in a combination of the current non-compliance

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[182] Para. 11 of the Non-compliance procedure: "No Party, whether or not a member of the Implementation Committee, involved in a matter under consideration by the Implementation Committee, shall take part in the elaboration and adoption of recommendations on that matter to be included in the report of the Committee".

mechanism with judicial proceedings. The arbitration procedure under the OSPAR Convention provides evidence that this is possible under modern international environmental agreements.[183]

5. Policy-Making Function

The Meetings of Parties also exercises a policy-making function.

Of ever greater importance in this respect are so-called action plans which the Meetings of Parties adopt to lay out objectives and approaches to implementing the agreement in the medium to long term. The plans represent the policy-making or gubernatorial function adhering to Meetings of Parties. It is marked by three elements. The Meetings of Parties thereby establish a functional link between policies and the legal instruments required to further them. The Meetings of Parties furthermore establish time limits and milestones in the approach to the policy goal. Third, the plan provides all institutions involved with limited mandates thus permitting the Meeting of Parties to programme the actions of other institutions.

Such plans abound. The Buenos Aires Plan of Action, adopted at the 4th Meeting of Parties to the Climate Convention, thus covers the entire Kyoto Protocol setting out actions and deadlines.[184] The Plan mandates the subsidiary bodies as well as the Secretariat to work towards the next Meeting of Parties deciding on the flexibility mechanisms provided for by the Kyoto Protocol. The work undertaken on the basis of that mandate allowed the Bonn Meeting of Parties to adopt decisions on a range of issues concerning these instruments.

Under the Biodiversity Convention, the Subsidiary Body on Scientific, Technical and Technological Advice in 1995 adopted a recommendation on the issue of conservation of coastal and marine biodiversity,

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183 See under IV. 3 a.

184 E.g., the Plan of Action also addresses technology transfer, whereby parties requested the Chair of the Convention's Subsidiary Body for Scientific and Technological Advice to establish a consultative process to consider a preliminary list of issues and questions. The process would result in recommendations on a framework for meaningful and effective actions to implement article 4 para. 5 of the Convention. Parties also adopted a program of work that calls for specific actions and deadlines, including identification of initial actions needed by COP-5 and taking decisions on further action by COP-6 in 2000.

detailing a programme of integrated coastal management.[185] It also addressed the issue of overfishing.[186] The 2nd Meeting of Parties to the Biodiversity Convention endorsed, with some modifications, the Subsidiary Body on Scientific, Technical and Technological Advice's recommendation as Decision II/10. The decision, together with the recommendation, on which it is based, is referred to as the "Jakarta Mandate". The Jakarta Mandate envisages the establishment of working groups to investigate various aspects of marine and coastal biodiversity.[187] Through its policy-setting function, the Meeting of Parties has thus been remedying shortcomings in the agreement regarding the marine environment.[188]

The Meetings of Parties furthermore exercise their policy-making functions by deciding on whether it is opportune progressively to develop the mother convention through protocols. For that purpose, the Meetings of Parties create a negotiating group that mirrors the Meetings of Parties and is vested with a negotiating mandate that is deadlined. The group will be able to draw on the treaty organs' resources. The immensely political character of such mandating is evident from the examples of the Kyoto Protocol and the Cartagena Protocol concluded, respectively, under the auspices of the Climate and the Biodiversity Conventions.

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185 E. Hey, "Global Fisheries Regulation in the First Half of the 1990s", *International Journal of Marine and Coastal Law* 11 (1996), 459 et seq., (584); M. Goote, "The Jakarta Mandate on Marine and Coastal Biodiversity", *International Journal of Marine and Coastal Law* 12 (1997), 91 et seq., (reproducing the text of the Annex to the SBSSTA recommendation as an Appendix).

186 Para. 7 of the Mandate.

187 Doc.UNEP/CBD/JM/Expert/1/5; Doc.UNEP/CBD/SBSSTA/3/Inf.1. The report of the Experts Working Group develops a methodology for the application of the precautionary approach to biodiversity impacts, as well as attempting an interim working definition of a healthy ecosystem (Annex V, paras II & IV). It develops the elements and priorities of a three-year work programme for the Biodiversity Convention on the Jakarta issues.

188 T. Scully, "The Protection of the Marine Environment and the UN Conference on Environment and Development", in: *The Law of the Sea: New Worlds, New Discoveries. Proceedings of the 26th Annual Conference of the Law of the Sea Institute, 22–25 June 1992*, 1992, 148, who suggests that in relation to marine biodiversity the Convention is "poorly drafted and a weak instrument" and that "one could read its obligations as a set back".

The strong policy setting function exercised by the Meetings of Parties raises the question of the corresponding functions of the Commission on Sustainable Development and UNEP. The Agenda 21, confirmed by the General Assembly Special Session, sees these two institutions as setting overall policy in the field of sustainable development.[189] This should be seen as an appeal to States Parties to set sectorial policy under an international environmental agreement in conformity with cross-sector recommendations particularly of the Commission on Sustainable Development.

III. Secretariats

International environmental agreements provide for small Secretariats only. The Secretariats' legislative, executive and quasi-judicial functions are important yet do not allow them to be an independent player in the progressive development of any particular treaty regime.

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189 The Commission on Sustainable Development was created by ECOSOC to ensure the effective follow up of UNCED Institutional Arrangements following Chapter 38 of Agenda 21, and in accordance with article 68 UN Charter. The Commission adopted a multi-year thematic programme of work. Each session reviewed different sectoral chapters in Agenda 21. They all considered cross-sectoral issues including finance, technology transfer, trade and the environment, and consumption and production patterns. The Special Session of the UN General Assembly met from 23–27 July 1997 (the so-called Earth Summit Plus 5). Among the decisions adopted at the Special Session was the CSD work programme for the following five years. It identifies sectoral, cross-sectoral and economic sector/major group themes for CSD 6-9 to consider. Overriding issues for each year will be poverty and consumption and production patterns. The CSD-6 to -10 agendas include the following: 1998: strategic approaches to freshwater management; transfer of technology, capacity-building, education, science, awareness-raising; industry; and the outstanding chapters of the Small Islands Developing States Programme of Action; 1999: oceans and seas; consumption and production patterns; and tourism; 2000: integrated planning and management of land resources; financial resources, trade and investment and economic growth and agriculture; 2001: atmosphere, energy and transport; and international cooperation for an enabling environment, information for decision-making and participation; 2002: comprehensive review.

1. Organisation

The organisation of the agreements' Secretariats highlights the continued role of the UN in institutionalising international environmental law. In deciding on how to perform the Secretariat's function under a modern international environmental agreement States Parties have the tendency to either resort to a unit of UNEP or to set up a specialised Secretariat linked to the United Nations Secretary-General.[190] The choice of UNEP to perform the secretariat's function generally reflects the initiating and co-ordinating role that it had held before the particular agreement's conclusion.[191] The specialised Secretariats of the Climate and Biodiversity Conventions are managed by an Executive Secretary, who is appointed by the Secretary-General of the United Nations after consulting the Conference of the Parties through its Bureau.[192] The Executive Secretary reports to the Secretary-General on administrative and financial matters through the Under-Secretary-General for the Department of Management and on other matters through the Under-Secretary-General for the Department of Economic and Social Affairs. The administrative aspects of the linkage provide for the Secretariat to be administered according to United Nations regulations and rules on personnel and financial matters, thereby avoiding the need for States

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190 See under I.

191 See Caron, see note 38, (766).

192 Note by the Executive Secretary, Institutional Linkage of the Convention Secretariat to the United Nations FCCC/SBI/1999/7 of 16 April 1999: "5. The institutional linkage of the Convention Secretariat to the United Nations has its roots in the fact that the ad hoc and interim Secretariats from which the permanent Secretariat was derived were administratively located within a headquarters department of the United Nations Secretariat. Thus, for the first five years, Secretariat services to the Convention process were provided within a United Nations context according to United Nations rules and practices, drawing upon the support and cooperation of various departments, programmes and agencies in the United Nations family and enjoying access to related intergovernmental processes. In envisaging the nature of the permanent Secretariat of the Convention, it was felt desirable to continue this type of arrangement on account of its several advantages. Consequently, a formal institutional linkage was proposed by the Secretary-General of the United Nations and accepted by the Conference of the Parties by its decision 14/CP.1".

Parties to develop their own rules.[193] Financially, provisions from the UN regular budget of conference services for meetings of Convention bodies has resulted in considerable savings to the Convention budget. On the substantive side, the linkage encourages the Secretariats, as part of the UN family of organisations, to cooperate with other departments, programmes and agencies that have a capacity to contribute to work on climate change at the global, regional and national levels.

A single Secretariat will serve the Meeting of the Parties and its subsidiary organs of the mother convention as well as that of any protocols.[194] The Secretariats operate under the guidance of the Meetings of Parties, which may add to as well as remove from the Secretariats' functions.[195]

The Secretariats may be vested with functional international juridical personality, particularly for the conclusion of host state agreements.

2. Legislative Function

With regard to the role of the Secretariat in the legislative function of modern international environmental agreements, initiation of decision-making by the Meetings of Parties, organisational preparation and informational preparation have to be distinguished.

a. Organisational Preparation of Decision-Making by Meetings of Parties

The Secretariats organisationally prepare a session of the Meetings of Parties.[196] They thereby enjoy a strong position *de facto* if not *de iure* in

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193 Including matters such as staff entitlements, post classification standards and supervision by the internal and external auditors of the United Nations.

194 See, e.g., article 14 para. 1 Kyoto Protocol.

195 The Rotterdam Convention specifies that the Secretariat may be stripped of its competencies by a three-fourths majority of the Meeting of Parties "should it find that the Secretariat is not functioning as intended", article 19 para. 4.

196 Article 8 para. 2 lit.(a) FCCC charges the Secretariat "to make arrangements for sessions of the Conference of the Parties and its subsidiary bodies established under the Convention and to provide them with services as required; lit.(b) to compile and transmit reports submitted to it".

the decision-making process by preparing the agenda, presenting issues and organising preparatory work. In so doing, the Secretariats will, to a certain extent, be able to pre-structure the political process at the meetings of the Meeting of Parties.

Rule 9 of the Climate Convention Rules of Procedure e.g., provides that, "in agreement with the President, the Secretariat shall draft the provisional agenda of each session". Most of the elements of the provisional agenda for the upcoming Meetings of Parties will also be on the agendas of the subsidiary bodies for the current session.[197]

Furthermore, the organisational power of the Secretariats extends to the important preparatory and committee work. In order to make progress in political issues, one response apparent at, e.g., the Biodiversity and Climate Conventions is the use of technical workshops to advance the preparations for discussions in the subsidiary bodies. The Secretariats exercise influence by summarising the results of the work of the subsidiary bodies and presenting introductory notes on submissions and papers of working groups or individual States Parties.

The structure of the meetings of the treaty organs are, however, decided by the Meetings of Parties, which rules out any chance of the Secretariat gaining a *de facto* power over the rulemaking process by way of scheduling meetings.

b. Initiating Decision-Making by Meetings of Parties

Secretariats — different from the Meetings of Parties' subsidiary organs[198] — have not been generally allowed to submit proposals in the form of recommendations to the Meeting of Parties as the latter are concerned about the position of sovereignty in the process.[199] Of

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[197] Thus, for the purpose of drawing up the provisional agenda for COP-5, the FCCC Secretariat has organised the elements of the Buenos Aires Plan of Action in five main groups: (a) Organisational and procedural matters; (b) Reports from the subsidiary bodies of the Convention on their work; (c) Convention implementation issues; (d) Preparations for the first session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol; (e) Administrative and financial matters.

[198] Draft decision recommended by the Ad Hoc Group on article 13 for adoption by the Conference of the Parties at its 4th Sess., 13, Doc. FCCC/AG13/1998/2 of 9 July 1998.

[199] S. Johnston, "The Convention on Biological Diversity: the next Phase", *RECIEL* 6 (1997), 219 et seq., (225). But see species proposals and results

course, nothing stands in the way of doing that on the basis of a specific mandate (instruction) by the Meetings of Parties. While without formal power to make proposals, the Secretariats *de facto* have great leverage in phrasing the issues that the Meetings of Parties will decide on. An example is provided by 'activities implemented jointly' under the Climate Convention where the summary of issues prepared by the Secretariat[200] shapes the corresponding decision by the Meeting of Parties.[201]

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for the 10th Conference of Parties to CITES on recommendations of the Secretariat.

200 See, e.g., the Main Conclusions prepared by the Secretariat for the 5th Meeting of Parties to the Climate Convention on the issue of the Activities Implemented Jointly " [...] 7. Considering the type of project activities, the prevalence, in absolute numbers, of renewable energy (40) and of energy efficiency (36) projects is obvious. They are followed by forest preservation, reforestation or restoration (11) projects. These three types of activity account, for over 90 per cent of all projects, which is a percentage similar to that given in the first synthesis report. 8 (d) The quality of reporting can be improved. Further clarification and harmonisation of the elements and the process of reporting are needed. In this context, consideration may be given to the development of guidelines which provide definitions of terms and descriptor lists and which specify reporting requirements. 10. Concerning financial additionality, the findings are similar to those of the first synthesis report. The sources of funding, or the need to secure these, are often described in detail. In cases of multiple sources of funding, it appears important that reports describe financial additionality with regard to the financial obligations of Annex II Parties within the financial mechanism and current official development assistance flows. 14. In the context of the AIJ pilot phase, in which crediting of emission reductions was excluded, ensuring modalities for mutually beneficial incentive structures for participating Parties remains an issue for consideration. The anticipated early start to the CDM may provide additional impetus for this discussion. 15. The need to further clarify approaches to the methodological issues adopted by the SBSTA at its 5th Sess., emphasized in the first synthesis, is again underlined by the analysis of the much enlarged body of activities considered in this second synthesis. Priority areas for work on methodological, technical and institutional issues, which will also be of importance in the context of the project-based mechanisms of the Kyoto Protocol, include the following: 16. With a view to developing approaches on the above-mentioned issues, the Secretariat is undertaking a number of initiatives: (a) It is carrying out methodological work with a view to developing practical options for the determination of baselines/additionality, monitoring and reporting requirements, and the verification and certification process. This also includes work on harmonizing definitions. Options under consideration

A stronger role is played by the Secretariat when it comes to preparing the informational basis for legislative decision-making by the Meetings of Parties.

Under the Vienna Convention and the Montreal Protocol, the Secretariat receives and analyses data and information from the Parties on the production and consumption of Ozone Depleting Substances. It bases its reporting to the Working Group and the Meetings of the Parties on the information thus gained.

Even more pronounced is the Secretariat's role under the Rotterdam Convention. The procedure for expanding the list for "severely hazardous pesticide formulations" subject to the PIC procedure requires a developing country or country with an economy in transition to make the initial proposal for inclusion in Annex III. It must provide specific types of information such as identification of the formulation and active ingredients, a clear description of incidents related to the problem, and any actions taken in response to such incidents. The Secretariat is then responsible for collecting additional information such as whether handling and applicator restrictions exist in other countries, incidents in other countries, and risk and hazard evaluations, where available. These are forwarded to the Chemical Review Committee, which decides whether to make a recommendation to the Meeting of Parties that the

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were discussed at a workshop organised by the Secretariat in Abidjan (Côte d'Ivoire) from 14 to16 September 1998; (b) Modalities are being developed for addressing capacity-building needs in host and investor countries, in the private and public sectors and at national, regional and international levels. Emerging approaches were considered by stakeholders participating in a second workshop organised by the Secretariat, held in conjunction with the above one, also in Abidjan (Côte d'Ivoire) from 17 to 18 September 1998; and (c) Finally, the Secretariat is participating in a series of workshops and seminars organised by other bodies on issues of monitoring, verification and certification and on lessons learnt from the AIJ pilot phase."

201 Decision 6/CP.4 "Decides to continue the pilot phase, Invites Parties to continue to submit new reports or updates on activities implemented jointly ... Reiterates the invitation to Parties contained in Decision 10/CP.3 to provide inputs to the Secretariat, ... Decides to begin preparations for a review process of the pilot phase and requests the subsidiary bodies to address the process at their tenth sessions, with a view to the Conference of the Parties taking a conclusive decision on the pilot phase, and the progression beyond that, no later than the end of the present decade."

severely hazardous pesticide formulation be listed in Annex III.[202] While the decision-making authority on Annex III expansion remains with the Meeting of Parties, the Secretariat's information gathering is an indispensable step towards legislative action by the Meeting of Parties.

3. Executive Function

The Secretariat of an international environmental agreement also performs an executive function. It administers the agreement and maintains relations with third agreements and their institutions.

a. Administering the Agreement

Secretariats partake in the direct and assist the indirect administration of international environmental agreements. Direct administration comprises administering implementing mechanisms and administering compliance mechanisms.

The Secretariats play a key role in the functioning of those numerous agreements that have as an implementing mechanism lists of the species, substances or areas controlled.[203] Such agreements require States Parties to provide information on national regulatory action that concerns the list to the Secretariat or to clearing houses,[204] which will be updated and maintained by the Secretariat. Similarly, under the ozone regime, the

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202 The Committee's formulation is based on the reliability of the evidence linking the pesticide formulation to the reported incidents; the relevance of the incidents to other countries with similar climates, conditions, and patterns of use; whether handling or applicator restrictions in place in other countries require technology or techniques that may not reasonably be practical or feasible in developing countries and the significance of reported effects in relation to the quantity of the formulation used.

203 See, e.g., African-Eurasian Waterbird Agreement, concluded pursuant to article IV of the Bonn Convention. Resolution 1.5 (AEWA/Res.1.5/Rev.1) establishes an international project register to facilitate training and technical and financial cooperation among parties and to coordinate measures to maintain a favourable conservation status for migratory waterbirds species. It requires the Technical Committee to approve new projects for inclusion and the AEWA Secretariat to act as depositary. The resolution gives a short description of each project and lists key partners.

204 See article 20 Cartagena Protocol on: "Information-Sharing and the Biosafety Clearing-House".

Secretariat receives and analyses data and information from the Parties on the production and consumption of Ozone Depleting Substances (ODSs).

This important administrative function, however, does not necessarily have to be performed by the Secretariat, but may be exercised by a non-governmental organisation, as is the case under the Bonn Convention.[205]

In indirect administration, the Secretariats also facilitate compliance with it by States Parties, particularly by assisting developing country Parties, on request, in the compilation and communication of information required in accordance with the provisions of the convention,[206] and by disseminating technology information.[207] The Secretariats fur-

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205 Article 8 "1. The International Union for Conservation of Nature and Natural Resources shall perform the continuing bureau duties under this Convention [...]. 2.The continuing bureau duties shall be, inter alia: [..] b. to maintain the List of Wetlands of International Importance and to be informed by the Contracting Parties of any additions, extensions, deletions or restrictions concerning wetlands included in the List provided in accordance with paragraph 5 of Article 2; c.to be informed by the Contracting Parties of any changes in the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3; d.to forward notification of any alterations to the List, or changes in character of wetlands included therein, to all Contracting Parties and to arrange for these matters to be discussed at the next Conference; e.to make known to the Contracting Party concerned, the recommendations of the Conferences in respect of such alterations to the List or of changes in the character of wetlands included therein".

206 E.g., article 7 FCCC. Clearly, the Secretariat is not alone in performing this taks. Early in its operation, the Implementation Committee under the Montreal Protocol provided a push to redirect resources and support for additional capacity-building through the various institutions supporting the implementation of the Protocol. The financial mechanism of the Climate Convention (operated through the GEF) also provides funding to needy countries with economies in transition to assist them with implementation of their reporting obligations.

207 E.g., the 3rd Meeting of Parties to FCCC by its Decision 9/CP.3 requested the Convention Secretariat "to work on the synthesis and dissemination of information on environmentally sound technologies and know-how conducive to mitigating, and adapting to, climate change; for example by accelerating the development of methodologies for adaptation technologies, in particular decision tools to evaluate alternative adaptation strategies".

thermore provide support to the financial mechanisms of modern international environmental agreements.

b. Relations with Third Institutions

A major concern of modern international environmental agreements is to prevent treaty congestion by co-ordinating efforts undertaken under the respective treaties.[208] The Secretariats are charged "to ensure the necessary co-ordination with the Secretariats of other relevant international bodies" and "to enter, under the overall guidance of the Meetings of Parties" into "such administrative and contractual arrangements as may be required for the effective discharge of its functions".[209] Vertically, the Secretariats are institutionally linked to the UN Secretariat.

4. Quasi-Judicial Function

The Secretariats partake in the quasi-judicial function under modern international environmental agreements.

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[208] Under the Biodiversity Convention, e.g., Decision IV/15 relates to "[t]he relationship of the convention with the Commission on Sustainable Development and biodiversity-related conventions, other international agreements, institutions and processes of relevance and in para. 10 states, that the Meeting of Parties emphasises that further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights and the Convention on Biological Diversity, in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic re-sources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". The Meeting of Parties has discussed issues concerning access to genetic resources and benefit-sharing already at its 3rd Mtg in 1997 (Decision III/15).

[209] See, e.g., arts 7 para. 2 lit.(c, f) FCCC; 24 lit.(d) CBD; 23 lit.(e) CCD; 19 para. 2 lit.(e) Rotterdam.

a. Enforcement

The Secretariats may perform two functions in an international environmental agreement's quasi-judicial enforcement procedure: triggering the procedure and providing factual information.

Secretariats are eligible to trigger the treaty's non-compliance procedure case under the Montreal Protocol and the common compliance regime for the Convention on Long-Range Transboundary Air Pollution and its eight protocols.[210]

Under several international environmental agreements, the Secretariats are the treaty organ charged with gathering the factual information relevant to the treaty's compliance system and forwarding it to the organ competent to assess and evaluate the facts. The prime source of factual information is still self-reporting by the States Parties addressed to the Secretariats. The Secretariats also participate in the in-depth review of national communications by expert teams as pioneered under the Climate Convention. According to article 8 para. 2 Kyoto Protocol the expert review teams shall be co-ordinated by the Secretariat and shall be composed of experts selected from those nominated by Parties and, as appropriate, by intergovernmental organisations, in accordance with guidance provided for this purpose by the Meeting of Parties. The teams undertake in-depth "paper" review and, with the prior approval of the State Party concerned, may conduct on-site visits.[211]

Under CITES, fact-finding is allotted to the IUCN as a non-governmental organisation. It may conduct on-site inspections with prior approval by the State Party concerned.

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[210] Para. 3 of the Montreal Protocol Non-compliance procedure provides "[w]here the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the matter may require and the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat *shall* include the matter in its report to the Meeting of the Parties pursuant to Article 12 (c) of the Protocol and inform the Implementation Committee, which shall consider the matter as soon as practicable." (Emphasis added).

[211] Under the Ramsar Convention more than 21 on-site inspections have been conducted, see C. de Klemm, "Natural Conservancy: Natural Lands and Biological Diversity", *Yearbook of International Environmental Law* 2 (1990), 187 et seq., (189).

Both the initiating and the fact-gathering functions are essential to an effective, quasi-judicial non-compliance procedure. As states are reluctant to trigger such procedures against each other, it is an important step forward to provide the agreements' Secretariat with the corresponding competence. Modern international environmental agreements display a trend to strengthen the information gathering as a crucial element of an effective compliance system. The Secretariats play a central role in it, which is, however, increasingly a coordinating one. Other actors, particularly non-governmental organisations will and should be resorted to to gain a complete picture of the compliance situation. The practice of the committees established by international human rights treaties concluded under the auspices of the UN provides models for possible progress in this respect.

b. Interpretation of Agreement

The Secretariat also will provide independent legal opinion on the interpretation and application of the respective international environmental agreement.[212] It may not, however, institute dispute settlement.

IV. International Commissions

Much of these institutional developments of modern international environmental agreements had been pioneered by independent commissions developed from the 1950s on for the (regional) international administration of marine living resources and protection of the marine environment.[213] Today, they hold solutions to some of the organisational,

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[212] See Note by the CITES Secretariat concerning Decision 10.2 Conditions for the disposal of ivory stocks and generating resources for conservation in African elephant range States: "This decision is in conflict with the text of the Convention. The mechanism for the transfer of species (including populations) from Appendix II to Appendix I is specified in Article XV of the Convention. Any such transfer can be done only if it is proposed by a Party and is agreed by the Conference of the Parties, either at a regular meeting or by the postal procedure, and will enter into force only 90 days after the proposal is adopted by the Conference. An appropriate action for the Standing Committee would be to request a Party (such as the Depositary Government) to submit the required proposal".

[213] For an overview of the numerous commissions, see UN Secretary-General, Annual Report to the UN General Assembly, Doc. A/53/456.

and legislative as well as outstanding judicial issues of the institutional development under modern international environmental agreements.

1. Organisation

The institutional structure of treaties specifically concerned with the protection of a given marine environment is very similar.[214] The Paris and Oslo Conventions have been replaced by the 1992 Convention on the Protection of the Marine Environment of the Northeast Atlantic (OSPAR).[215] Upon its entry into force in 1998, the Helsinki Convention, which concerns the Baltic Sea, had been substantially revised by a 1992 treaty of the same name.[216] To accomplish their aims, the conventions call for action to curb various sources of pollution. The principal organ in every instance is a Commission,[217] consisting of a representa-

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214 See K. von Moltke, "International Commissions and Implementation of International Environmental Law", in: J. Carroll (ed.), *International Environmental Diplomacy*, 1988, 87 et seq.

215 22 September 1992, *ILM* 32 (1993), 1072; the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic — hereinafter referred to as OSPAR — entered into force on 25 March 1998. Contracting Parties to the Convention are Belgium, Denmark, European Community, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and United Kingdom.

216 Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992, *BGBl.* 1994 II, 1397. Contracting Parties to HELCOM are Denmark, Estonia, European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden. For the purposes of this Convention the "Baltic Sea Area" includes the internal waters.

217 Article 10 OSPAR. According to article 10, the Commission shall act in seven areas: supervise the implementation of the Convention; generally review the condition of the maritime area, the effectiveness of the measures being adopted, the priorities and the need for any additional or different measures; draw up, in accordance with the General Obligations of the Convention, programmes and measures for the prevention and elimination of pollution and for the control of activities which may, directly or indirectly, adversely affect the maritime area; such programmes and measures may, when appropriate, include economic instruments; establish at regular intervals its programme of work; set up such subsidiary bodies as it considers necessary and to define their terms of reference; consider and, where appropriate, adopt proposals for the amendment of the Convention in ac-

tive of each State Party. The Commissions meet at varying levels of representation from the States Parties, the ministerial meeting being the forum for taking the most important decisions. The Commissions have established a number of expert bodies such as the Standing Advisory Committee for Scientific Advice of OSPAR, and common working groups such as the Joint Monitoring Group and the Joint Group of Chairmen and Vicechairmen. Both Commissions also have a joint Secretariat, which is a unit of the IMO in London.

The Law of the Sea Convention, as implemented in particular by the Fish Stocks Agreement, covers and balances the uses of the sea. It turns regional organisations into functional agencies for the implementation of the Convention's environmental principles and provisions.[218]

2. Legislative Function

Article 10 OSPAR establishes a Commission. The Commission has a legislative function, and the corresponding competencies and powers. The Commission exercises its rulemaking function through the various legislative instruments with specific requirements for (majority) voting and entry into force. The instruments are: amendment of the Convention, adoption of an Annex,[219] amendment of an Annex,[220] adoption of

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cordance with arts 15, 16, 17, 18, 19 and 27 of OSPAR; discharge the functions conferred by arts 21 and 23 of OSPAR and such other functions as may be appropriate under the terms of the Convention.

218 See International Tribunal for the Law of the Sea, Order for Provisional Measures — *The Southern Bluefin Tuna* (Nos. 3 and 4) *Cases* — 27 August 1999. The Tribunal makes clear that States Parties are bound by the Convention's environmental provisions, in particular article 116, when negotiating within a fishing commission. The Fish Stocks Agreement explicitly obliges States Parties to seek implementation through regional organisations and management schemes.

219 The Commission shall adopt any Annex referred to in article 7 by a three-quarters majority vote of the Contracting Parties, article 16 para. 1.

220 The Commission shall adopt amendments to any Annex by a three-quarters majority vote of the Contracting Parties bound by that Annex. If the amendment of an Annex is related to an amendment of the Convention, the amendment of the Annex shall be governed by the same provisions as apply to the amendment to the Convention.

an Appendix,[221] amendment of an Appendix,[222] and decisions. Recommendation are non-binding.[223] The competence to use these powers correlates to the importance of the matter regulated.[224] Thus, regulation of the areas of activity requires an Annex. For technical approaches an Appendix will be resorted to, and subject-specific questions of implementation may be addressed by way of a decision. Article 13 OSPAR deals with the entry into force of decisions adopted. According to its second paragraph decisions will enter into force for the Parties having voted for it — providing this includes the three-quarters quorum — on the expiry of a period of 200 days.[225] A State Party may opt out of this binding effect, though, by timely notification. All decisions adopted by the Commission shall, where appropriate, contain provisions specifying the timetable by which the decision shall be implemented. Allowing for enhanced cooperation among some States Parties, decisions concerning

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221 According to article 18 the procedure for adoption depends on whether the proposed Appendix is related to an amendment to the Convention or an Annex, or to an Annex to the Convention.

222 According to article 19, the Commission shall adopt the amendment to an Appendix by a three-quarters majority vote of the Contracting Parties bound by that Appendix. An amendment to an Appendix shall enter into force on the expiry of a period of 200 days after its adoption for those Contracting Parties which are bound by that Appendix and have not within that period notified the Depository Government in writing that they are unable to accept that amendment, provided that at the expiry of that period three-quarters of the Contracting Parties bound by that Appendix have either voted for the amendment or have notified the Depository Government in writing that they are able to accept the amendment.

223 Article 15 para. 2, 1st sentence.

224 The 1998 Ministerial Meeting of the OSPAR Commission was held in conjunction with the 1998 annual meeting of the Commission in Sintra (Portugal) on 22–23 July 1998. The main products of the meeting are a new Annex to the 1992 OSPAR Convention concerning the protection and conservation of the ecosystems and biological diversity of the maritime area covered by the Convention and a related Appendix and a Decision on the disposal of disused offshore installations.

225 Article 11 Vienna Convention on the Law of Treaties provides that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". Thus, if a decision does not set forth a specific mode for States Parties to express their consent to be bound in, it has to be assumed that the adoption as such also carries the requisite consent of the States Parties supporting the decision.

any Annex or Appendix shall be taken only by the Contracting Parties bound by the Annex or Appendix concerned.

As pointed out above,[226] international environmental agreements in general are silent on how the Meeting of Parties is to proceed in exercising the subject-specific decision-making competencies conferred onto it by the treaties, leaving it for the plenary organ to make the necessary arrangements in the Rules of Procedure. OSPAR marks an exception, stipulating in article 13 para. 1 that decisions and recommendations, notwithstanding the provisions for (non-subject-specific) amendments and Annexes, shall be adopted by unanimous vote, and, if unanimity is not attainable, by a three-quarters majority vote of the States Parties.

A further issue unresolved by international environmental agreements is whether any normative decisions are directly applicable in the States Parties or need to be transposed. An interesting solution is provided by article 2 para. 1 Annex 1 of OSPAR[227], which requires that States Parties shall, in allowing point source discharges to the maritime area, "implement relevant decisions of the Commissions which bind the relevant Contracting Party". Therefore, here, the Commission's decisions are to be applied by the States Parties' executives by virtue of being binding for the State Party in question. Thus, relevant decisions are binding, valid in the States Parties' legal order, and immediately applicable (self-executing).

3. Judicial Function

The Commissions include performance of a judicial function.

a. Enforcement

With regard to compliance, the OSPAR Commission shall, on the basis of the periodical reports, "assess" their compliance with the Convention and the decisions and recommendations adopted thereunder; when appropriate, it shall decide upon and call for steps to bring about full compliance with the Convention, and decisions adopted thereunder, and promote the implementation of recommendations, including meas-

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226 See under II. 2. c.

227 On the Prevention and Elimination of Pollution from Land-Based Sources, see article 3 OSPAR.

ures to assist a Contracting Party to carry out its obligations. Furthermore the Convention provides for compulsory dispute settlement. Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned shall, at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in article 32. Unless the parties to the dispute decide otherwise, the procedure of the arbitration shall be in accordance with paras 3 to 10 of this article. At the request addressed by one Contracting Party to another Contracting Party, an arbitral tribunal shall be constituted. The request for arbitration shall state the subject matter of the application including, in particular, the articles of the Convention, the interpretation or application which is in dispute. The arbitral tribunal shall consist of three members. Both a Party's arbitrator and the chairman of the arbitral tribunal may, by default, be designated by the President of the ICJ. The arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention. The arbitral tribunal may take all appropriate measures in order to establish the facts. It may, at the request of one of the parties, recommend essential interim measures of protection. Any Contracting Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal. The applicant Party shall inform the Commission that it has requested the setting up of an arbitral tribunal, stating the name of the party to the dispute and the articles of the Convention the interpretation or application of which, in its opinion, is in dispute. The Commission shall forward the information thus received to all Contracting Parties to the Convention.

Under OSPAR, a State Party may thus resort to compulsory dispute settlement to enforce another Party's compliance with any obligation under the Convention, including the obligation to submit periodical reports. The question of how to fit the traditional third-party dispute settlement with the compliance procedure of a modern international environmental agreement has thus been addressed by OSPAR.

b. Interpretation and Application of the Treaty

The fact that UNCLOS provides an umbrella under which the International Commissions act, opens up the dispute settlement mechanism of the Convention for the interpretation of any international commission treaty. The International Tribunal for the Law of the Sea has decided in

the *Southern Bluefin Tuna Cases*[228] that the dispute settlement procedure of Part XV of the Convention can be invoked at least if the procedure provided for in the international commission treaty does not lead to a binding decision. The competent tribunal will interpret the relevant provisions of the Convention,[229] which is the supreme law,[230] and thus guide the interpretation and application of the international commission treaty.

V. Conclusions

The institutional developments discussed above establish an innovative process of making and enforcing law whose effectiveness and legitimacy creates a strong pull-effect on the way towards universalising the respective treaty regimes.[231] They provide the international community with a model for tackling questions of sustainable development.

The objective of administering a natural resource corresponds to an institutionalised process of permanent or continuing decision-making.[232] The Meetings of Parties, as the supreme treaty organ, are competent to adopt binding normative decisions on reforming and implementing the agreement as well as standard setting. The Meetings of Parties also perform executive, quasi-judicial and policy-setting functions. They are assisted by a Secretariat. The allocation of powers and competencies amounting to legislative, executive, quasi-judicial and gubernatorial functions to a specific organisational design constitutes the process of law-making and enforcement under modern international

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228 *Southern Bluefin Tuna Cases*, see note 218.

229 In particular Part XII UNCLOS containing the precautionary approach, which extends to States Parties activities in all sea zones.

230 Article 311 UNCLOS.

231 See on the conditions for universality of environmental and other multilateral treaties R. Wolfrum, "Vorbereitende Willensbildung und der Entscheidungsprozeß beim Abschluß multilateraler völkerrechtlicher Verträge", in: *Festschrift Dietrich Rauschning* (forthcoming).

232 According to Duverger, institutions refers to a system of relationships that may not manifest themselves in formal organisations of brick and mortar, a headed notepaper, a ready acronym and an international staff. An institutional framework adds, however, stability, durability and cohesiveness to individual relationships which otherwise might be sporadic, ephemeral and unstable, see M. Duverger, *The Study of Politics*, 1972, 68.

environmental agreements. International Commissions illustrate ways and means for the possible further development of institutionalised international environmental agreements. These institutional developments taken together with the complementary action by national legislative, executive and judiciary organs yield the institutional structure of the governance of the international environmental *problématique*.

The institutional developments constitute a new centralised method of approaching the global environmental *problématique*, which combines identifying common interests[233] with establishing a flexible institutional framework to set forth rules and ensure compliance with the latter. The concept of "common concern of humankind"[234] points to the deeper rationale of the said method. The "common concern" formula does not in itself create legally binding obligations other than those specifically set forth in the relevant instrument. Rather, it conceptualises the fact that States Parties, as a community, administer the resource through the institutional framework of the agreements.[235] Acting as a community, States Parties adhere to a centralized process of decision-making in which all states may participate[236] yet which is marked by an embryonic form of majority voting. The international community thus becomes an agent which itself disposes of legislative, executive and quasi-judicial functions and which has an operational mode of its own.

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233 On this notion see, e.g., J. Brunnée, "'Common Interest' — Echoes from an Empty Shell? — Some Thoughts on Common Interest and International Environmental Law", *ZaöRV* 49 (1989), 791 et seq.

234 Neither the General Assembly resolutions nor the UNCED international environmental agreements provide an authoritative definition of the term "common concern". Climate and Biodiversity Conventions recognise that the "change in the Earth's climate and its adverse effects" as well as the "conservation of biological diversity" are the "common concern of humankind". Although the Montreal Protocol does not make specific reference to the concept of common concern of humankind it does recognise the obligation to take appropriate measures to "protect human health", and acknowledges that reductions in "world-wide emissions" of ozone-depleting substances will require international co-operation. Also, the more recent adaptations of the law of the sea, refer, *e.g.*, to fisheries on the high seas as "common concern of humankind".

235 See Wolfrum, see note 160, (151 et seq.), pointing out that in international environmental law states enforce the community, not the individual state interest.

236 Delbrück, see note 140; J. Charney, "Universal International Law", *AJIL* 87 (1993), 529 et seq., (544 et seq.).

Its operational mode is itinerant in nature in that it relies heavily on the State Party hosting the meeting. And it relies on each State Party mobilising its national bureaucracy to prepare for the sessions of the Meetings of Parties and to take the necessary implementing action. The international community thus becomes an actor in the international system aside from international organisations and individual states.

The international community's ability to form a will of its own through the Meetings of Parties makes it necessary to rethink the traditional definition of an international organisation.[237] Meetings of Parties can, as well as the organs of international organisations, occasionally take majority decisions. The main difference appears to be the degree to which the institution is rendered independent in its operational mode. The international environmental agreements considered here are different from the treaties constituting traditional international organisations in that they do not bring about a separate entity with defined objectives and approaches, finite instruments and a premium on stability. International organisations are fixed in place and equipped to operate independently of the Member States' input. Large, and expensive, Secretariats headed by a strong Director-General are required for such an operation. The institutions of international environmental agreements only have a lean operational base of their own. Yet they perform functions that few, if any, international organisations can match.

International organisations as the structured form of international cooperation thus become more varied in appearance. In addition to international organisations, international administrative unions[238] and international negotiating conferences, there are now institutionalised international agreements.

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237 See H. Schermers/N. Blokker, *International Institutional Law: Unity within Diversity*, 3 rd edition 1995, 23: "[F]orms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law."; R. Bindschedler, "International Organisations, General Aspects", in: R. Bernhardt (ed.), *EPIL*, Instalment, 2 (1995), 1289 provides the following definition: "[A]n association of States established and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organisation". Some authors require international legal personality for there to be an international organisation, see A. El Erian, "The Legal Organization of International Society", in: M. Soerensen (ed.), *Manual of Public International Law*, 1968, 68.

238 See R. Wolfrum, "International Administrative Unions", in: R. Bernhardt (ed.), *EPIL* 5 (1983), 42 et seq.

Underlying the institutional developments discussed are considerations of effectiveness and legitimacy.[239]

The institutional developments are designed to ensure effectiveness by rapid progressive development of the treaty legal order instead of having to go through the cumbersome amendment procedure, a progressive development whose application and compliance with is secured. The institutional machinery of modern international environmental agreements allowed to react to changing circumstances and to incrementally designing appropriate legal instruments. The Meeting of Parties ideally is able to pull together different strands, enable different interest groups to define components of success and thus to enlist their commitment and, because of its potentially high public profile, to provide impetus and momentum. The high profile creates the transparency that lets failures by States Parties to achieve results be sanctioned in the court of national as well as international public opinion. Efficiency reserves can be tapped by spontaneously bringing existing institutions' comparative strengths to bear on a given problem of the international environment. For the UN's substantive policies on the environment — within the concept of sustainable development — to succeed, highly innovative and pragmatic moves on the institutional level have to be considered. Consequently, modern international environmental agreements reflect a marked tendency away from a hierarchical and towards a rational conception of the institutional side of the law of co-operation.[240]

The effectiveness achieved through the institutional developments discussed also addresses the issue of the legitimacy of a state's involvement in the environmental regime. The moral high ground that environmental protection efforts claim and the considerable economic resources to be committed to the treaty can be maintained only if they are seen to produce an effect on the international environmental *problématique*. The specific legitimacy that control by states over the decision-making process entails also makes the involvement of larger swathes of the national business and other communities possible. Classical interna-

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239 States Parties' motives for the institutionalisation (and correspondingly its speed and degree) will, of course, be specific in each instance of international lawmaking in the field of the environment.

240 R. Dolzer, "Konzeption, Finanzierung und Durchführung des globalen Umweltschutzes", in: *Liber Amicorum*, see note 64, 37 et seq., (61), pointing out that the global environmental law is the most tangible manifestation of the paradigm shift from the law of co-ordination to the law of co-operation.

tional organisations with ability to form a will of their own, typically a limited membership body, and often a separate legal personality, tend to be seen to be costly and prone to institutional auto-dynamics. In the last analysis legitimacy will come to depend on democracy. The presence of genuinely self-motivated non-governmental organisations of different persuasions on the international sphere is a necessary step in this direction, as competition from the larger number of interests will be become more protective of freedom.[241] But this horizontal aspects complement the much stronger vertical democratic legitimacy that the very fact that states — and their governments — play such a direct and visible role in the decision-making process. They are accountable for their action in this process in the court of national opinion.

International environmental agreements, for the reason that they are concerned with producing the public good of a clean environment, aspire at universality of membership.[242] However, since free-riding on the efforts of the States Parties constitutes rational behaviour for any state non-Party, the need for providing the latter with an incentive to join arises. One approach used to this effect is for the States Parties to engage in trade sanctions against the absentees. However, this approach raises concerns on several fronts.[243] Capacity building and compliance assistance establish incentives to join the agreement for a limited constituency only. Therefore, international environmental agreements increasingly rely on the effect of the bandwagon, which states will feel the need to jump on. To borrow a conceptualization from the process of European integration: the treaties will widen as and because they are deepening. The more legitimately effective the making and enforcement of decision, the more coherent the resulting legal order, and the more substantial the areas concerned, the more states non-Parties will feel they have to join the agreement to have a say in its further development.

The institutional developments discussed here provide a model to be transposed to other areas of sustainable development. The fact that much of the institutional development under modern international envi-

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241 Cf. J. Madison, Federalist Paper No. 51 (reprint Philadelphia 1826, at 292 et seq.).

242 See on the conditions for universality of environmental and other multilateral treaties Wolfrum, see note 231.

243 See R. Hudec, "The GATT/WTO Dispute Settlement Process: Can It Reconcile Trade Rules and Environmental Needs", in: R. Wolfrum (ed.), see note 44, 123 et seq.; W. Lang, "Trade Restrictions as a Means of Enforcing Compliance with International Environmental Law", ibid., 265 et seq.

ronmental agreements was pioneered by International Commissions and was then taken up in the successive generations of agreements confirms the workings of a process through which institutional innovations are diffused within the international system. States Parties to modern international environmental agreements confirm through their practice that "sustainable development" has an institutional as well as substantive side.[244] In *Gabčíkovo*[245] the ICJ has made clear that the general international law of the environment translates normatively into procedural obligations. Indeed, the implementation of purposes and principles of international environmental law, as they stand after UNCED, depend on their being concretised and fleshed out in an institutional framework striving for universal participation.[246] There are clear signs of the attractiveness of the model of institutionalised cooperation that modern international environmental agreements provide. One instance of such "spill-over" of these developments in more traditional areas of international law is that the States Parties to the UN Convention on the Law of the Sea recently decided to establish a 'Meeting of States Parties' endowed with decision-making competencies of the kind explored here.[247] The developments with regard to the international protection of forests confirm that states have a clear preference for institutionalised treaties as the basis for administration of natural resources. This is illustrated by the developments with regard to the international protection of forests. At UNCED states adopted the so-called forest principles, a "soft-law instrument", and set up the 'Intergovernmental Panel on Forest Principles' under the auspices of the Commission on Sustainable Development, later transformed into the 'International Forum on Forests' (IFF). The 4th Sess. of the IFF has now decided to found an inter-

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244 Programme for the Further Implementation of Agenda 21, June 1997, A/RES/S-19/2 of 28 June 1997 (adopted at the Earth Summit Plus 5), para. 118: "The conferences of the parties to [1.] conventions signed at UNCED or [2.] as a result of it, as well as [3.] other conventions related to sustainable development [...]".

245 International Court of Justice, Judgement of 25 September 1997, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia).

246 International environmental agreements address such urgent needs of the international community that their very object necessitates compliance by all states. See Charney, see note 236, (529 et seq.); Delbrück, see note 140.

247 See UN General Assembly, 54th Sess., Agenda items 40(a) and (c) Oceans and the Law of the Sea: Law of the Sea; results of the review by the Commission on Sustainable Development of the sectoral theme of "oceans and seas", Report of the UN Secretary-General, Doc. A/54/429, paras 62–67.

governmental body, possibly called UN Forum on Forests, that will be empowered to act very much like a Meeting of Parties on the basis of an internationally legally binding instrument to be concluded within five years.[248]

248 See *Earth Negotiations Bulletin* of 14 February 2000, 8.