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## 2 International framework for environmental decision-making

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### **Introduction**

The international character of the most serious environmental challenges makes cooperation between States imperative. As a response to this need, international environmental law, as developed since the 1970s, includes essential institutional characteristics. Such institutions provide permanent fora for negotiating and adopting relevant measures for environmental protection.

The United Nations has played a pivotal role as a framework for developing environmental decision-making, particularly the General Assembly and the United Nations Environment Programme (UNEP). Several of the UN specialized agencies are also involved in environmental decision-making, such as the Food and Agriculture Organizations (FAO) and the International Maritime Organization (IMO). A particular feature of international environmental law is the 'treaty bodies' established by many multilateral environmental agreements (MEAs). These bodies, and in particular, their 'conference of the parties' (COP), are permanent organs with subsidiary bodies and a secretariat, and have important functions in law-making as well as compliance control. In addition, international financial organizations, such as the World Bank, play a vital role. Finally, international environmental organizations and treaty bodies are found also at the regional level.

Environmental problems require urgent international action. They are furthermore interconnected and need to be addressed in a comprehensive manner. This has given rise to a concern that there may be a need for a more effective and inclusive cooperation. Hence, the design of international environmental governance has for a long time been under scrutiny.

### **The United Nations**

#### *1. General Assembly*

While environmental matters were not explicitly included in the United Nations Charter in 1945, the UN has had no difficulties in incorporating the environment among its concerns. The General Assembly is the general organ of the organization, empowered to deal with any subject-matter falling within the scope of the Charter. The Assembly may adopt resolutions setting out environmental principles for member States, such as the 1982 World Charter for Nature, but it has played a more critical role in initiating processes, establishing the institutional machinery, and adopting benchmarks for environmental cooperation.

The General Assembly has convened three global environmental conferences: the 1972 Stockholm Conference on the Human Environment, the 1992 Rio Conference on Environment and Development, and the 2002 Johannesburg World Summit on Sustainable Development. The outcomes of these conferences have been declarations, treaties and action plans, as well as institutional innovations. The three basic declarations are the Stockholm

Declaration on the Human Environment, the Rio Declaration on Environment and Development and the Johannesburg Declaration on Sustainable Development. Both the Stockholm and Rio Declarations contain environmental principles, such as sustainable development and the use of a precautionary approach, some of which may have attained the status of customary international law. The Rio Conference also adopted the Convention on Biological Diversity and the UN Framework Convention on Climate Change.

Agenda 21, agreed to at the Rio Conference, is a 700-page action plan, addressing a wide variety of issues related to sustainable development, for example poverty, demographic dynamics, management of fragile ecosystems and protection of biological diversity. On the institutional side, the Stockholm Conference resulted in the establishment of UNEP, whereas one upshot of the Rio Conference was the Commission on Sustainable Development.

Environmental commitments may also be included in General Assembly resolutions with a wider scope. The 2000 UN Millennium Development Goals include aims such as integrating the principle of sustainable development into national policy-making, reversing loss of environmental resources and ensuring access to drinking water (United Nations Millennium Declaration, 2000). One of the outcomes of the 2005 World Summit was that member States reaffirmed their

commitment to achieve the goal of sustainable development, including through the implementation of Agenda 21 and the Johannesburg Plan of Implementation. To this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles. (2005 World Summit Outcome, General Assembly resolution, 2005: para. 48)

## 2. *Security Council*

The Security Council has 'primary responsibility for the maintenance of international peace and security'. Hence, its role in environmental cooperation is limited to incidences where environmental degradation may threaten international security. One example of Security Council action was in 1991 when it held Iraq liable for environmental damage caused by the invasion of Kuwait (Security Council Resolution 687: 1991; see also Sands, 2003: 93–4). Another example was the first Council debate on climate change as a matter of international peace and security on 17 April 2007.<sup>1</sup>

## 3. *ECOSOC*

The Economic and Social Council (ECOSOC) has functions in economic, social and cultural matters, and has also been allocated tasks in the environmental field. It has established the five Regional Economic Commissions of the UN; in particular the Economic Commission for Europe has played an important role in environmental matters, facilitating and providing secretariat functions for environmental agreements, inter alia on transboundary air pollution, protection of watercourses and ensuring public access and participation in environmental decision-making. ECOSOC has the responsibility for coordinating the activities of the UN specialized agencies, such as FAO, WHO and IMO. The specialized agencies, UNEP and CSD report to the General Assembly through ECOSOC.

## 4. *UNEP*

UNEP is not a separate international organization like the specialized agencies; as a Programme, it is an integrated part of the UN structure. Established by the General Assembly

in 1972 (General Assembly Resolution 2997(XXVII), 1972), it has a mandate to assess the status of the global environment and initiate and coordinate environmental action among States and international institutions. Its Governing Council consists of 58 members elected by the General Assembly. In 1999 the General Assembly endorsed the establishment of the Global Ministerial Environment Forum (GMEF) which meets annually in connection with regular and special sessions of the Governing Council. The Committee of Permanent Representatives is a subsidiary body of the Governing Council. UNEP's headquarters is in Nairobi.

UNEP has been instrumental in bringing about important environmental conventions; the most well-known is perhaps the 1987 Montreal Protocol of the Vienna Convention for the Protection of the Ozone Layer. It also provides secretariat functions for several of these conventions, such as the Montreal Protocol, the Convention on International Trade in Endangered Species (CITES) and the Convention on Biological Diversity. UNEP has played a key role in developing the Regional Seas Programme, which covers several treaties and action plans. It has also adopted a number of non-binding environmental guidelines on land-based marine pollution, the management of hazardous wastes, etc. UNEP is furthermore one of three implementing agencies of the Global Environment Facility (GEF), with the World Bank and the UN Development Programme (UNDP). It has also a responsibility for capacity-building, exemplified by the Bali Strategic Plan for Technology Support and Capacity-building (2005).

It is, however, a widespread view that UNEP is too weak to meet the important environmental challenges of our times. Hence, the High-level Panel on UN System-wide Coherence in the areas of Development, Humanitarian Assistance and the Environment stated that 'UNEP, the principal environment organization of the United Nations – with its normative, scientific, analytical and coordinating mandate – is considered weak, under-funded and ineffective in core functions' (*Delivering as One*, Report of the High-level Panel on United Nations System-wide Coherence, 2006: para. 37).<sup>2</sup>

Several suggestions have been forwarded to strengthen UNEP's role in global decision-making and coordination in environmental matters. One proposal is that membership of the Governing Council should be made universal. There are, however, strongly divided opinions on the feasibility of such an amendment. The opposition refers inter alia to the fact that UN subsidiary bodies are usually governed by a body with limited membership, increased administrative costs, and that the present system is working adequately (UNEP, 2007: 6–7). The Governing Council/GMEF was at its 24th session in 2007 unable to reach a decision on this question. There has also been a need to strengthen UNEP by ensuring 'adequate, stable and predictable' funding. The Governing Council/GMEF has therefore encouraged member States to contribute to the Environment Fund rather than to earmarked trust funds, to allow a more important role for the Council in setting priorities (UNEP, 2007: 8).

The High-level Panel on UN System-wide Coherence suggested that UNEP should be upgraded with a renewed mandate and improved funding. It should

have a real authority as the environment policy pillar of the United Nations system, backed by normative and analytical capacity and with broad responsibility to review progress towards improving the global environment. (*Delivering as One*, 2006: para. 39)

##### 5. *Commission on Sustainable Development*

The Commission on Sustainable Development (CSD) was set up by ECOSOC at the request of the General Assembly with the mandate to

ensure effective follow-up to the [Rio] Conference, as well as to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 (General Assembly Resolution 47/191, 1992).

The CSD consists of 53 representatives from member States. It meets annually, focusing on thematic and cross-sectoral issues. The thematic cluster for 2006/2007 was for example energy for sustainable development, industrial development, air pollution/atmosphere, and climate change.

The CSD has been criticized for being 'a permanent diplomatic forum for continued negotiation on all matters concerned with sustainable development, but one with no powers, few resources, and limited influence' (Birnie and Boyle, 2002: 52). The 2002 Johannesburg Plan of Implementation concluded that the CSD

needs to be strengthened, taking into account the role of relevant institutions and organizations. An enhanced role of the Commission should include reviewing and monitoring progress in the implementation of Agenda 21 and fostering coherence of implementation, initiatives and partnerships. (The Johannesburg Plan of Implementation, 2002: para. 145)

The High-level Panel on UN System-wide Coherence concluded that the CSD

has proved successful as a model for incorporating stakeholders and as a forum to interact and exchange ideas. It has been far less effective in ensuring that the promise of integrating environment and development is fulfilled. (*Delivering as One*, 2006: para. 44)

One may also wonder how establishing one more institution like the CSD could be seen as a rationalization of decision-making.

## 6. *Administrative coordination*

The United Nations has made efforts to coordinate the activities of different international institutions. The Chief Executive Board (CEB) will further coordination on a more general basis in the United Nations, under the chairmanship of the Secretary General. In the environmental field, we find the Environment Management Group (EMG) consisting of all UN agencies and secretariats of multilateral environmental agreements (MEAs) as well as the World Bank, IMF and the World Trade Organization (WTO). UNEP hosts the secretariat. In order to strengthen UNEP's role in coordination of environmental policy, the High-level Panel on UN System-wide Coherence proposed that 'the Environmental Management Group should be given a clearer mandate and be better utilized. It should be linked with the broader framework of sustainable development coordination' (*Delivering as One*, 2006: para. 39).

## **Treaty bodies**

### 1. *Introduction*

The 'treaty bodies' established by many multilateral environmental agreements (MEAs) represent a new form of international cooperation.<sup>3</sup> These bodies, and, in particular, their 'conferences of the parties' (COPs), are not merely intergovernmental conferences, since they are established by treaties as permanent organs and have subsidiary bodies and a secretariat, while they also differ from traditional intergovernmental organizations (IGOs). These new

institutional arrangements grew out of the 1972 UN Conference on the Human Environment in Stockholm. Although a few MEAs have used an existing IGO or have established a new IGO, more recently, COPs have become the preferred institutional machinery for cooperation under MEAs. They have been established, for example, by global treaties addressing climate change, ozone depletion, and biodiversity, as well as by regional agreements addressing acid rain in Europe and hazardous wastes in Africa.

Treaty Parties may have several reasons for choosing the COP model rather than traditional IGOs. First, using an existing IGO may have the disadvantage of including States that are not Parties to the relevant MEA. Second, the establishment of a new IGO may be perceived as more costly and bureaucratic. Third, COPs offer greater flexibility since they do not have a permanent seat but may instead convene meetings in different countries and in different parts of the world.

## *2. Structure and functions of treaty bodies*

The COP, as the supreme organ under MEAs that are applying the COP model, is composed of all treaty Parties.<sup>4</sup> COPs meet regularly, usually annually or every second year. A bureau elected by the COP may act on its behalf between its regular meetings and serves as a facilitating organ during the COP's sessions. The functions of COPs are spelled out in their constitutive MEAs, although COPs may have 'implied powers' as well.<sup>5</sup> Typical functions with respect to matters internal to the MEA include establishing subsidiary bodies, adopting rules of procedure, and giving guidance to subsidiary bodies and the secretariat. In addition, COPs are instrumental in developing Parties' substantive cooperation under the MEA by adopting new binding or non-binding commitments by the Parties (see below). Finally, COPs may act at the external level by entering into arrangements with States, IGOs, or the organs of other MEAs – raising the question about their 'international legal personality' (see below).

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

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

A permanent secretariat may be designated in the MEA itself, or the MEA may establish an interim secretariat and leave the final decision to the COP. While the COP and subsidiary bodies are independent organs, many MEAs locate their secretariats with existing IGOs, such

as the UN, UNEP, the UN Economic Commission for Europe (UNECE) or the International Maritime Organization (IMO), although some establish more autonomous secretariats. For example, the UNFCCC is 'institutionally linked' to the United Nations but without being fully integrated into any of its departments or programmes. The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) is unusual in that it uses a non-governmental organization (NGO) – the International Union for Conservation of Nature (IUCN) – as its secretariat. When a MEA uses an existing IGO to perform secretariat functions, the location of the MEA secretariat may be different from that of the host organization. For example, the secretariat of the Convention on Biological Diversity (CBD) is based in Montreal, whereas the 'host', UNEP, is based in Nairobi.

The functions of the secretariat are generally spelled out in the MEA. Typical functions include conducting studies, preparing draft decisions for the COP and subsidiary bodies, providing technical assistance to the Parties, and receiving and circulating reports on the implementation of commitments. The secretariat may also serve as the conduit for cooperation with other MEAs and relevant international organizations and bodies, including financial institutions.

### *3. Substantive decision-making*

COPs, together with their subsidiary bodies and secretariat, have important roles in developing the substantive commitments of MEA Parties. The Parties will usually meet in the subsidiary organs as well as in the COP, hammering out decisions through negotiations in these permanent forums. This process is far more effective than convening ad hoc diplomatic conferences for defined purposes.

#### 3.1. AMENDMENTS TO MEAS

The governing MEA will set out the decision-making powers of the COP in relation to the adoption of new substantive commitments. Virtually all COPs may adopt amendments to their governing MEA that contain new legal obligations. Such amendments will, however, require subsequent ratification by States Parties to the MEA in order to create binding obligations for individual Parties. Generally, a minimum number of ratifications is required in order for an amendment to enter into force. This type of amendment process is well known from other multilateral treaties, including treaties establishing IGOs.

#### 3.2. ADOPTION OF PROTOCOLS

Many MEAs reflect the framework treaty-protocol approach, whereby the COP is allocated powers to adopt protocols to the MEA that contain new commitments. Examples include the Vienna Convention and its Montreal Protocol and the UN Framework Convention on Climate Change (UNFCCC) with its Kyoto Protocol. In these cases, the normal treaty-making approach has been applied, but use has been made of the institutional machinery established by the MEA to further develop the regime by way of protocols. However, since they are treaties in their own rights, these protocols also require subsequent ratification to bind individual States and a minimum number of ratifications to enter into force.

#### 3.3. AMENDMENT OF ANNEXES

Several MEAs provide for their COPs to adopt or amend annexes to the MEA or its protocols, subject to the non-acceptance of these decisions by individual Parties. Annexes are often

of a 'technical' nature, but they may also involve controversial political issues, such as lists of prohibited substances or of protected animals or plants. Relevant examples can be found under the Montreal Protocol, the Convention on International Trade in Endangered Species (CITES), and the Convention on the Conservation of Migratory Species of Wild Animals (CMS Convention). Although the Parties retain the formal right to make a notification of non-acceptance, there may be considerable political pressure not to make such a notification. By requiring action by States in order for them not to become committed rather than to become committed – opting out, instead of opting in – the efficiency of law-making is greatly enhanced.

#### 3.4. BINDING DECISIONS

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

A controversial issue is whether COPs can have law-making powers without the explicit authority to make binding decisions being given in the text of the MEA. Generally, such powers would encroach on the sovereignty of States and should not easily be presumed. However, Article 17 of the Kyoto Protocol, for example, enables the COP to adopt 'rules' relating to the operation of the system for trading in emissions of greenhouse gases. The use of the word 'rules' suggests that such measures are intended to be legally binding. This idea is supported by the fact that Article 17 refers to 'relevant principles, modalities, rules and guidelines', indicating that 'rules' are different from, for example, non-binding 'principles' or 'guidelines'. Such an interpretation is also supported by substantive considerations. For instance, a Party that makes use of the 'rules' on emissions trading by buying emission quotas cannot, arguably, be accused of non-compliance with the protocol when it wants to add these quotas to the emission limits of the protocol (Churchill and Ulfstein, 2000: 639).<sup>6</sup>

#### 3.5. INTERPRETATION OF MEAS AND PROTOCOLS

COPs may also engage in interpretation of the provisions of their governing MEA or protocol. To the extent that such interpretation is expressly authorized by the governing MEA or protocol, it appears intended to be of a legally binding character. An example would be Article 10(1) of the Montreal Protocol, which establishes that contributions from developed countries to the Protocol's financial mechanism shall 'meet all agreed incremental costs' incurred by developing countries in complying with commitments under the protocol. The MOP was to decide on an 'indicative list' of incremental costs, which it did in 1992 ('Indicative list of categories of incremental costs', reprinted in: (1992), *YBIEL* 3, 822). The fact that there was express authorization of this decision in the Montreal Protocol means that it should be considered to be of a binding nature.

However, interpretation of MEAs may also be undertaken in the absence of such explicit

authorization. For example, the Consultative MOP to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter has decided that 'dumping' under the convention covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling (London Consultative Meeting of the Parties, 1990; see also Churchill and Ulfstein, 2000: 641). In such cases, the interpretation could be considered subsequent practice by the Parties to a treaty, which, according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, is an element that may be taken into account in interpreting the treaty. On the other hand, if international institutional law applies, the COP, like an IGO organ, would be regarded as the author of the practice, and not the States Parties. In either case, provided the interpretation adopted by the COP is uncontested and not modified by further practice, it should carry considerable weight in interpreting the relevant terms of the MEA. Of course, certain interpretative acts may be so far-reaching that they may better be understood as an attempt to amend the MEA between all Parties or to modify the MEA between the Parties voting in favour of the decision (Vienna Convention on the Law of Treaties, 1969: Arts 39 and 41 respectively). Since the MEA will usually contain an amendment procedure requiring subsequent ratification by States Parties, such a form of simplified amendment or modification should not easily be presumed.

### 3.6. SOFT LAW

Finally, the COPs may adopt decisions that concern substantive commitments but are not meant to be of a binding character – 'soft law' measures. The Parties may apply such measures in order to develop their commitments without being ready to undertake new legal obligations. Soft law measures may be effective in themselves, but they may also be the first step in adopting binding regulations. For example, the ban on the export of hazardous waste from Organisation for Economic Co-operation and Development (OECD) countries to non-OECD countries was first adopted by a COP decision under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and subsequently adopted as an amendment to the convention (Decision II/12, 1994; Decision III/1, 1995). Non-binding decisions may also contribute to developing new customary international law, for example, as expressions of *opinio juris* in relation to concepts such as 'sustainable development' or the 'precautionary principle'.

### 3.7. VOTING PROCEDURES

The voting procedures for adopting new substantive commitments – be they of a binding or non-binding character – will follow from provisions in the relevant MEA or protocol or from the COP's rules of procedure. Most MEAs provide that the Parties shall try to reach a consensus decision, but, if this proves impossible, they will allow decisions to be taken by a qualified majority. However, some MEAs establish special procedures, such as the requirement of a 'double majority' of developed and developing countries in the Montreal Protocol, when exercising the 'legislative' functions mentioned earlier. Similar voting arrangements may also be found in subsidiary organs, such as the Enforcement Branch of the Compliance Committee under the Kyoto Protocol, which requires a three-quarters majority and a majority among both developed and developing States for making decisions.

## 4. *Dispute settlement, non-compliance procedures and enforcement*

As a more comprehensive international legal framework has been developed, added emphasis

has been directed towards effective implementation of the environmental obligations (see Ulfstein, 2007a: 115–34).<sup>7</sup> The world's environmental ministers stated in 2000 that there is an 'alarming discrepancy between commitments and action' (Malmö Ministerial Declaration, 2000).<sup>8</sup> UNEP's Governing Council called in 2001 for 'speedy implementation of the legal commitments contained in the multilateral environmental agreements' (UNEP Governing Council Decision 21/27, 2001). As a result, a special session of UNEP's Governing Council adopted a set of guidelines on compliance with and enforcement of MEAs (UNEP Governing Council Decision SS. VII/4, 2002).<sup>9</sup> These guidelines recognize, however, that the Parties to each treaty have the primary responsibility for designing effective mechanisms and procedures to ensure implementation.

Most MEAs contain dispute settlement procedures allowing Parties to bring questions of violation of treaty obligations before an international court or arbitral tribunal. But use of such procedures will generally require consent from both Parties, and this avenue is not commonly applied. Instead, several MEAs have set up specialized bodies and procedures to deal with cases of non-compliance. A number of advantages of using such non-compliance mechanisms rather than more traditional dispute settlement procedures have been highlighted in the literature (see Cameron et al. (eds), 1996; Széll, 1997: 304; Weiss and Jacobson (eds), 1998; Victor et al. (eds), 1998; Wolfrum, 1998: 9–154; Fitzmaurice and Redgwell, 2000: 35–65). First, such mechanisms allow compliance issues to be addressed in a multilateral context, rather than through bilateral dispute settlement procedures. Second, non-compliance procedures may prevent potential violations rather than waiting for a breach to be established. Finally, non-compliance procedures may promote the resolution of compliance problems in a cooperative, rather than adversarial, manner through procedures designed to facilitate rather than enforce compliance. It has, however, been questioned to what extent there is a development from a 'managerial approach' to an 'enforcement approach' in MEAs, especially in treaties imposing environmental obligations with heavier economic and social costs.<sup>10</sup>

#### 4.1. DISPUTE SETTLEMENT PROCEDURES

Various dispute settlement systems have been established in recent years, for example the International Tribunal for the Law of the Sea (ITLOS) and the WTO Dispute Settlement Understanding (DSU). The International Court of Justice established a seven-member Chamber for Environmental Matters in 1993 and the Permanent Court of Arbitration adopted the Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ('Environmental Rules') in 2001.

The principal advantages of using international courts and tribunals for dispute settlement are that they represent impartial organs with legal expertise, and have a procedure well-suited to resolving legal disputes. They also provide binding and final decisions in the form of *res judicata*, and may impose obligations of reinstatement and payment of reparations for suffered damage. But, as already mentioned, the disadvantage of using these mechanisms in international environmental law is that they represent bilateral approaches to multilateral problems, that they are available only *ex post facto*, and that they are of a confrontational character. It may also be difficult to prove causality between breach of an international obligation and environmental damage, and such damage may be difficult to rectify.

A common feature of multilateral environmental agreements is an obligation to accept negotiations in cases of disputes (see Convention on International Trade in Endangered Species, 1973: Art. XVIII; Convention on Long-range Transboundary Air Pollution, 1979:

Art. 13). Some MEAs also provide for unilateral declarations accepting compulsory jurisdiction under the International Court of Justice or by arbitration, in relation to any other States submitting a similar declaration.<sup>11</sup> An innovative facet of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context is its inquiry commissions. If the Parties disagree about the extent to which an activity may cause 'significant adverse transboundary impact' – and therefore be covered by the scope of the Convention – one of the Parties may call upon an inquiry commission (Espoo Convention, 1991: Art. 3(7) and Annex IV). Such a commission will be composed of experts and, although only advisory, its opinion may put pressure on the State that plans an activity to respect the commission's recommendations. Inquiry commissions are of particular interest in selecting one possible bone of contention, that is, the issue of significant transboundary impact, for a compulsory dispute resolution mechanism. But compulsory binding adjudication is rarely found in MEAs (Birnie and Boyle, 2002: 226).

Dispute settlement, to the extent available, is also rarely used. One example of their use is that Poland, under the Espoo Convention, has requested negotiations with Germany over the Convention's obligations to take into account comments from the public and the outcome of consultations, in the management of the River Oder. Furthermore, the Convention's inquiry commission procedure has been invoked in one case between Romania and Ukraine on the building of a navigation canal in the Danube (Koivurova, 2007: 222–6). Mention may also be made of Ireland's use of the compulsory jurisdiction provided by the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (the OSPAR Convention) against the United Kingdom in the so-called MOX case on access to information under Article 9 of the Convention.<sup>12</sup>

The Espoo and OSPAR agreements demonstrate that dispute settlement procedures may be invoked in cases under MEAs having bilateral aspects, that is, activities in one State having concrete effect in a neighbouring State. In such cases, the affected State may want a binding determination that an obligation provided by the relevant Convention has been violated, and possibly to obtain reparation for damages.

Such bilateral aspects may, however, not only transpire between neighbouring States. Several MEAs have bilateral effects in a wider sense, such as the trade in endangered species under the Convention on International Trade in Endangered Species (CITES) or the control of export and import of hazardous substances under the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

States may even have an interest in pursuing a violation having multilateral effects, but where certain States are particularly affected. One example may be the effects of rising sea level on small island States as a result of violation of the Kyoto Protocol on climate change. Another example could be States suffering particularly serious damages as a result of air pollution due to a combination of particular wind conditions and precipitation and a sensitive nature, caused by violations of relevant protocols under the Convention on Long-Range Transboundary Air Pollution.

Finally, it cannot be excluded that a State may want to act also in cases where it does not have a special interest other than being a Party to the relevant MEA. This may occur either to prevent the other Party from acting as a 'free rider' or out of concern for the threat against the environment represented by the violation. The more intrusive commitments and more threatened the environment, the more compelled other States may feel to act. We may see more of such commitments in the future, such as the measures undertaken in the Kyoto Protocol.

It is true that unlike the non-compliance procedure discussed below, traditional dispute settlement has a confrontational character, and that they apply *ex post facto*. It has also been claimed by the 'managerial school' that the main reason for non-compliance with international commitments is not bad will, but lack of resources and capacity.

There obviously exists a need to prevent violations by providing developing countries with the necessary resources, expertise and technology. But there may be examples where both developing and developed States have the capacity to honour their commitments, but are not willing to do so due to domestic political or economic costs. The existence of persistent non-complying States may in itself create confrontations and obstruct political cooperation. If non-compliance procedures are unable to deal with the situation in an effective way, concerned States may choose to have recourse to dispute settlement procedures. Such procedures may also represent an option if Parties disagree on whether a violation has occurred, and a binding settlement therefore is sought. On the other hand, the dispute settlement mechanisms in MEAs do not provide for adjudication if a Party feels that the treaty bodies, including the conference of the Parties, have adopted an unlawful decision. The latter aspect may, however, become more important to the extent treaty bodies are allocated power to make binding decisions, possibly including sanctions against the offender.

#### 4.2. COMPLIANCE CONTROL

Non-compliance procedures, including the establishment of a non-compliance or implementation committee, are innovative and significant features of MEAs (Birnie and Boyle, 2002: 207; Sands, 2003: 205). The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer was the first MEA to establish what has been known as the non-compliance procedures of environmental agreements. Article 8 of the Protocol provides that the Parties at their first meeting 'shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance'. An Implementation Committee was established by the Meeting of the Parties on an interim basis in 1990, and made permanent in 1992.

In several MEAs, whether they are global, regional or have bilateral aspects, or deal with protection of nature, pollution, access to information and justice, or environmental impact assessments, a need has been felt to develop non-compliance mechanisms. Non-compliance procedures are increasingly legally formalized by being explicitly based in the respective MEAs, rather than merely in decisions by COPs. Following the establishment of a compliance mechanism in the 1994 Sulphur Protocol, the Executive Body (that is, the plenary organ) of the Convention on Long-range Transboundary Air Pollution established in 1997 an Implementation Committee for all Protocols to the Convention. Subsequent protocols provide that compliance review shall take place according to the 1997 decision and any amendments thereto. The Espoo Convention does not contain provisions on compliance control. But the Meeting of the Parties (MOP) established an Implementation Committee in 2001, and an amendment was proposed by an ad hoc subsidiary body to the MOP that a formal basis for an implementation body was included in the Convention. Article 15 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters provides that the MOP 'shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention'.

Non-compliance committees are generally composed of representatives of the Parties. In

this sense they differ from supervisory bodies of human rights conventions in being political organs rather than expert bodies. The Aarhus Convention provides an exception in the sense that its members are acting in their personal capacity. Furthermore, candidates may be nominated by Parties and Signatories, as well as by relevant NGOs. Members shall be persons of 'high moral character and recognized competence in the fields to which the Convention relates, including persons having legal expertise'. They shall 'make a solemn declaration in a meeting of the Committee that he or she will perform his or her functions impartially and conscientiously' (Koester, 2007: 179–217). The reason for these features of the Aarhus Convention is presumably that its obligations are comparable to those of human rights conventions, by giving individuals access to information, participation in decision-making and access to justice. The requirements of high moral character and qualifications are akin to the 1966 International Covenant on Civil and Political Rights, but the Aarhus Convention goes even further in openness by allowing for nomination by NGOs, while the Covenant reserves this right to States (Articles 28 and 29 of the International Covenant on Civil and Political Rights (1966)).

The Compliance Committee of the Kyoto Protocol consists also of independent experts, even though it bears no resemblance to human rights conventions. The reason is probably the importance States attach to determination of non-compliance in cases that may involve heavy economic and political costs. Hence, independence from political control may be considered important both when it comes to protection of obligations towards individuals and in order to secure the interests of States where important economic and political interests are at stake.

Non-compliance committees have generally a limited membership. The CITES Standing Committee has 17 members, the Implementation Committee of the Montreal Protocol has ten members, the Implementation Committee of the Convention on Long-range Transboundary Air Pollution has nine members, the Espoo Convention's Implementation Committee will have eight members, and similarly the Aarhus Convention's Compliance Committee has eight members. The Facilitative Branch and the Enforcement Branch of the Kyoto Compliance Committee will each have ten members. This restricted representation may advance the effectiveness of compliance review, and may also add to the independent status of these bodies in relation to COPs.

Non-compliance procedures may be triggered by the non-complying Party itself, by other States Parties, or by the secretariat. While States are reluctant to bring non-compliance cases against other States, it is not unusual that States notify their own implementation problems. The Aarhus Convention is special also in this respect, in providing for a right of individuals and NGOs to trigger cases of non-compliance, presumably an aspect of the Convention's human rights character. The Implementation Committee of the Espoo Convention has, however, decided by majority vote not to consider communications from NGOs. While the role of the secretariat varies between different MEAs, it has been a concern under certain MEAs that an active role of the secretariat may compromise their neutral role in treaty cooperation. The CITES secretariat has, however, been exceedingly active in securing compliance with treaty commitments (Reeve, 2007: 134–60).

The principal basis for compliance control in MEAs is reports on implementation of commitments by the States Parties. Both the Montreal Protocol (paras 7–8) and the Convention on Long-range Transboundary Air Pollution (Annex V, para. 6) establish that the respective Implementation Committees shall base their recommendations on information forwarded by the Secretariat. We find, however, arrangements for transparency when it

comes to both access to information and NGO participation. The Aarhus Convention establishes that its Compliance Committee may consider ‘any relevant information submitted to it’ (Decision I/7: para. 25(c)). The Espoo Convention is representative in providing that the meetings of the Implementation Committee are open to the public, unless the Committee decides otherwise (Decision III/2: para. 3).

There are also procedural safeguards, such as the requirements of CITES about notice to be given to the non-compliant Party and allowing time to respond. The Implementation Committee of the Convention on Long-range Transboundary Air Pollution shall allow the relevant Party to participate in the work of the Committee, but it shall not take part in the preparation and adoption of the Committee’s conclusions (Decision 1997/2: Annex V, para. 8). The Aarhus Convention allows also such a right of participation, and provides furthermore that the Party shall receive the Committee’s draft conclusions and the Committee shall ‘take into account’ any comments received from the Party (Decision I/7: para. 34). The Marrakesh Accords of the Kyoto Protocol set out even more extensive procedural rights for the Party, including notifications, access to information, issuing of preliminary findings, allowing comments, and in the setting of time limits (Decision 24/CP.7: Sections VII, VIII and IX). The rationale is doubtlessly that the use of ‘hard’ sanctions in cases of non-compliance (see below) requires more ‘due process’ assurances.

Non-compliance committees do not have the power to adopt binding decisions, but may recommend measures to be taken by the supreme political organ of the cooperation, that is, the COP. The Kyoto Protocol is an exception in setting out that the Enforcement Branch of the Compliance Committee takes the final decision, unless overturned by the Meeting of the Parties in its limited role as an appeals body (Decision 24/CP.7: Section XI).

More generally, the legal status of a finding by the COP that a State is in non-compliance with one or more of its obligations may be questioned. First, the mandate of the COP is to determine the objective fact of non-compliance with the legal obligations under the MEA (Birnie and Boyle, 2002: 207; Koskenniemi, 1992: 128). The COP will, however, not express any opinion about the availability of measures allowed under the law of treaties, such as suspension or termination of the MEA, or about the conditions for invoking State responsibility, such as the existence of circumstances precluding responsibility. Furthermore, a finding of non-compliance is not binding in the sense that it in itself entails substantive legal consequences for the non-complying State. But it will establish an internal legal obligation of the other MEA organs to recognize the non-compliant status of the relevant State party (see below on the binding character of non-compliance decisions under the Kyoto Protocol) (Churchill and Ulfstein, 2000: 634). It is finally clear that a finding by the COP of non-compliance is different from a *res judicata* decision of an international tribunal.

#### 4.3. ENFORCEMENT

The term ‘enforcement’ may have different connotations, such as measures to ensure respect for legislation at the domestic level, to obtain an international ruling, or taking measures against a State not fulfilling its obligations. In the present context, the concept is used to identify measures taken by MEA treaty bodies in order to induce States to comply with their commitments by exerting some kind of pressure on the Parties.

Material breach of a MEA may give other States Parties a right to suspend or terminate the agreement in accordance with Article 60 of the Vienna Convention on the Law of Treaties. Termination or suspension of mutual obligations is, however, rather a counter-productive

measure when it comes to protection of the environment. While counter-measures under the law of State responsibility may provide effective pressure on a non-complying State, they represent a disadvantage common to measures under treaty law, that is, that they are in principle unilateral measures, whereas measures adopted by MEA bodies represent concerted approaches to common problems. Furthermore, measures taken under MEAs may have a facilitative rather than a confrontational character. Such measures may thus substitute or supplement measures under general treaty law as a response to breach of an MEA.

Non-compliance procedures in MEAs emphasize their non-confrontational character. This is for example reflected in the mandate of the Implementation Committee of the Montreal Protocol, which shall seek an ‘amicable solution’ (MOP Decision IV/5: para. 8), the Implementation Committee established under the Convention on Long-range Transboundary Air Pollution shall address non-compliance with a view to securing a ‘constructive solution’, the Aarhus Convention refers to ‘non-confrontational, non-judicial and consultative measures’ (Decision I/7, Review of compliance: para. 37(g)), and the deliberations of the Multilateral Consultative Process under the Climate Change Convention shall be conducted in a ‘facilitative, cooperative, non-confrontational, transparent and timely manner, and be non-judicial’ (Climate Change COP Decision 10/CP.4: Annex, para. 3). Such facilitation may consist in economic and professional assistance, with the contributions from funds, such as the Multilateral Fund under the Montreal Protocol or the Global Environment Facility (GEF).

States may feel that ‘shaming’ by being named as non-complying is in itself a form of pressure. The Implementation Committee of the Convention on Long-range Transboundary Air Pollution, with the support of the Executive Body, has, however, brought to bear more extensive, but still gentle pressure on non-complying States, such as requesting progress reports on the fulfilment of obligations, and urging the head of delegation together with an expert to visit the secretariat to find ways to achieve compliance. These measures are seen as providing an effective incitement to improve compliance, and no State has protested against being the subject of such measures (Kuokkanen, 2007: 161–75).

In addition to assistance, the Montreal Protocol provides for the use of cautions and 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’ (UNEP, 2003: Section 2.7).<sup>13</sup> We find a similar wording in the Aarhus Convention (Decision I/7, Review of compliance: para. 37). The non-compliance committee of the Montreal Protocol has issued several cautions that further measures, including suspension of the right to trade in ozone-depleting substances under Article 4 of the Protocol, might be considered (Decision XIII/16). So far, however, it has not taken the next step in putting these cautions into operation.

CITES employs what could be termed a ‘hard’ sanction, that is, trade measures in listed species against non-complying Parties. Other forms of sanctions, such as financial penalties and suspension of rights and privileges have, however, been rejected by the Parties. The trade measures seem to be effective in inducing States to take steps to bring about compliance (Reeve, 2007: 152–7). The Kyoto Protocol also makes use of measures of a penal character if a State violates its emission limits. In these cases, the Enforcement Branch will reduce the Party’s emission quota for the second commitment period by a number of tonnes equal to 1.3 times the excess emissions (Decision 24/CP.7: Section XV, para. 5(a)).

Trade measures under CITES are of a recommendatory character, and are accordingly not binding. Binding measures of this kind would require a formal basis in the agreement itself.

Correspondingly, Article 18 of the Kyoto Protocol establishes that mechanisms 'entailing binding consequences shall be adopted by means of an amendment to this Protocol'. The Parties have, however, deferred this decision in the Marrakesh Accords by stating that

it is the prerogative of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to decide on the legal form of the procedures and mechanisms relating to compliance. (Decision 24/CP.7: 7th preambular paragraph)

Article 18 leaves uncertain the legal status of measures adopted by the Enforcement Branch of the Compliance Committee in response to non-compliance. For example, it may be argued that deduction of emission quotas at a penalty rate as a response to non-compliance with a Party's assigned amount of emissions, which is one of the most significant consequences envisaged, is a 'binding consequence' requiring the amendment procedure (Ulfstein and Werksman, 2005: 58). Absent such an amendment, it remains unclear whether, and with what legal effect, this consequence could be imposed.<sup>14</sup> Hence, so far it seems that 'hard' sanctions are only acceptable to the extent that they are non-binding. It should also be recalled that there is continuing potential that sanctions in the form of trade measures may be struck down as violating WTO commitments.<sup>15</sup>

It may be concluded that 'hard' sanctions are the exceptions rather than the rule. The reluctance to impose measures of a more penal character against non-complying States may have diverse reasons. First, it may be a matter of protecting State sovereignty from international pressure. Second, the motivation may be that facilitative approaches are regarded as more effective, as is advocated by the 'managerial school', especially taking into account the need to preserve a constructive political cooperation. Third, it may be that the sort of environmental problems regulated by MEAs have not required hard sanctions, while environmental challenges requiring more stringent regulations would presuppose the utilization of harder sanctions.

Finally, the use of hard sanctions may be seen in the light of international law as being essentially of a horizontal character. In the context of State responsibility, States have not been willing to accept certain violations of international law as 'international crimes' (Crawford, 2002: 16–20). While there is in principle nothing to prevent the use of penalties in international law, there are as yet no effective international organs to put into effect enforcement measures. States may also choose to leave a MEA that applies sanctions of a penal character. But as stronger international institutions are developed, they may be entrusted with more enforcement power. States may also be more reluctant to bear the political and legal costs of leaving such institutions, including the institutional framework of MEAs. In any case, it would seem that MEAs should make use of the full repertoire of measures to combat non-compliance, measures both of a facilitative and an enforcement character.

##### *5. International legal personality*

Most of the attention devoted to the powers and functions of MEAs has focused on standard-setting and the implementation of these standards within the scope of the agreement. MEAs, however, may also need to have a 'foreign policy' – for instance, the relationship to the IGO hosting the secretariat must be arranged; there may be a need for agreement with the state hosting the secretariat and meetings of the Parties; implementation of commitments may require financial assistance and capacity-building and, hence, arrangements with international

financial institutions; and, finally, because several environmental problems are interconnected, it may be necessary to require cooperation between different MEAs and IGOs involved in the environmental field. This raises the question about the 'international legal personality' of COPs to enter into binding agreements under international law.

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

The main basis for accepting the international legal capacity of IGOs at the external level has, however, been the doctrine of 'implied powers' (see above). The reason for establishing COPs, subsidiary bodies, and secretariats rather than formal IGOs was 'institutional economy' and not a desire to have less effective institutions. Furthermore, there is a need for MEA organs to act at the external level. Hence, 'implied powers' should be equally acceptable as a basis for the treaty-making capacity of MEAs as for that of IGOs.<sup>16</sup>

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

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

### **Financial organizations**

The protection of the environment may involve considerable costs. One of the principles of the Rio Declaration is the 'common but differentiated responsibilities' of developed and developing countries (Principle 7). The developed countries acknowledge their responsibility 'in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they

command'. Transfer of technological and financial resources from developed to developing countries has also been seen as a condition for the implementation of commitments undertaken in multilateral environmental agreements (MEAs) by developing countries (Montreal Protocol, 1987: Art. 5.7; CBD, 1992: Art. 20.4; UNFCCC, 1992: Art. 4.7; Stockholm Convention, 2001: Art. 13.4. Boisson de Chazournes, 2007: 970–71; see further, Hey, 2007: 760 *et seq.*).

While some MEAs have set up their own financial institutions, such as the Multilateral Fund of the Montreal Protocol on Substances that Deplete the Ozone Layer, the most important financial institution in international environmental law is the Global Environment Facility (GEF). The 176 member countries are represented in its Assembly and 32 members sit in its Council. The GEF serves as 'financial mechanism' for four MEAs: the Convention on Biological Diversity, the Climate Change Convention, the UN Convention to Combat Desertification and the Stockholm Convention on Persistent Organic Pollutants, and it collaborates with other environmental agreements. Its projects are managed by the GEF Implementing Agencies, that is, UNEP, UNDP and the World Bank. Since 1991 GEF has financed projects in more than 160 developing countries and countries with economies in transition.

### **Improving international environmental governance?**

The international environmental machinery is multifaceted, but it is an open question to what extent it is well-suited to tackle the world's environmental problems. While the UN General Assembly is unchallenged as the apex of international environmental governance, the international institutions supposed to implement environmental policy are fragmented and in want of legal and political clout. As stated above, UNEP has been characterized as 'weak, underfunded and ineffective' by the High-level Panel on UN System-wide Coherence and 'should be upgraded with a renewed mandate and improved funding'. The Commission on Sustainable Development was seen as a useful diplomatic forum, but had not fulfilled its role in integrating environment and development.

It seems for example that the Human Rights Commission in its field has been more innovative, especially with its 'special procedures' system, consisting of independent special rapporteurs on defined themes and countries (Birnie and Boyle, 2002: 52). The Human Rights Council replaced the Human Rights Commission in 2006, and was upgraded from an organ under ECOSOC to a subsidiary body under the General Assembly. One should, however, be careful in drawing such comparisons: while the Human Rights Council has primarily a responsibility for monitoring States' human rights performance, UNEP has manifold tasks, including supplying the scientific basis for environmental measures, developing new measures, and assisting in their implementation.

The upgrading of UNEP to a formal organization in the form of a specialized agency or even the establishment of a World Environment Organization has been ventilated (Ayling, 1997: 243; Desai, 2000: 21–43; Desai, 2004; von Moltke, 2001: 23; Biermann, 2002: 297–315; Charnovitz, 2002: 323–62; Oberthür and Gehring, 2004: 359–81). This would supposedly contribute to more effective and more comprehensive decision-making, and even ensure that the environment would speak with 'one voice', particularly in relation to trade interests. However, not much progress has been made. The 2005 World Summit recognized 'the need for more efficient environmental activities in the United Nations system' and acknowledged the need 'to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure', but in stating that improvements

should build on 'existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies', it did not foresee new institutional structures.

The establishment of treaty bodies by MEAs may be regarded as part of a more general trend in international law towards the institutionalization of cooperation between States to solve common problems.<sup>17</sup> These treaty bodies have traits of intergovernmental organizations – the designation 'conferences' of the Parties is thus something of a misnomer. Although we find some similarities in the institutional set-up of treaties outside the field of international environmental law, it is difficult to find other examples of treaties establishing COPs with a comparable role in standard-setting and non-compliance. True enough, human rights treaties and some arms-control treaties provide for their Parties to meet from time to time but, typically, only for considering amendments to the treaty and/or electing members of supervisory organs. Supervisory organs of human rights treaties may have some resemblance to those set up under non-compliance procedures in MEAs, but the human rights organs are composed of independent experts and not of representatives from the States Parties. The composition of the Compliance Committee of the Aarhus Convention and the Kyoto Protocol is, however, comparable in this respect to that of human rights supervisory organs.

As in most forms of international institutions, there have been disagreements over the powers of COPs, both in substantive decision-making and in relation to compliance control. Although a comprehensive institutional framework exists, there is an almost complete absence of powers to make binding decisions by majority-voting. Some would therefore claim that these institutions have not been given a sufficient legal competence to counter the environmental challenges. On the other hand, concern has also been raised, particularly by the United States, about the increasing powers of MEA organs (Brunnée, 2004: 636–8).

It is of significance in itself that States meet regularly in fora such as in the COPs and their subsidiary bodies. It should also be emphasized that in the absence of law-making in the strict sense, decision-making has come a long way, through innovative features such as the requirement to opt out instead of opting in to become bound by a decision. Neither should the significance of striving towards consensus be underestimated; it may have an important role in ensuring compliance with commitments in a legal system where international enforcement is the exception rather than the rule. It seems fair to say that MEAs with their COPs, subsidiary bodies, and secretariats have generally been successful in providing a non-bureaucratic and dynamic framework for environmental cooperation. To the extent that more effective international cooperation is developed, more attention should, however, be directed towards the legitimacy of decision-making under MEAs, such as the roles of public participation, the scientific basis for decisions, and state consent (Bodansky, 1999: 624; Bodansky, 2007: 704–27; see also Hey, 2003).

The non-compliance procedures of MEAs are generally of a facilitative character. But there has been considerable creativity in designing measures that may be considered non-confrontational but still put pressure on States to comply. Furthermore, the Convention on International Trade in Endangered Species (CITES) applies trade measures against non-complying States and the Kyoto Protocol uses sanctions in form of a penalty reduction of emission quotas. Applying measures of a penal character is rather unique in international law. But such an enforcement approach may become more common as MEAs incorporate more stringent restrictions on States' economic activities. Development towards an enforcement approach may, however, provoke calls to include 'due process' guarantees. In this sense, we may experience a convergence between dispute settlement and non-compliance procedures.

The fragmentation of international law has received much attention in recent years, not least in the United Nations International Law Commission (Report of the Study Group of the International Law Commission, 2006). Fragmentation in international environmental law is, however, more a problem for effective policy-making than a legal problem.<sup>18</sup> In addition, there are the financial aspects of maintaining international secretariats in different geographical locations and the human capacity needed to participate effectively in meetings under MEAs, especially for developing countries. It is thus a policy question how cooperation between different MEAs should be facilitated and, indeed, to what extent a more comprehensive approach to international environmental problems and governance is required. There is an obvious need for arrangements formalizing cooperation between different MEAs. In the chemicals sector, the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on the Prior Informed Consent Procedure and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal have agreed to address the issue of improved cooperation and have established an ad hoc joint working group for this purpose. Several memoranda of cooperation have been entered into between organs of MEAs responsible for biological diversity.

The High-level Panel on UN System-wide Coherence proposed that the United Nations Secretary-General 'commission an independent assessment of international environmental governance within the United Nations system and related reform'. Such an assessment should indeed be welcomed. A more effective and comprehensive approach to international environmental governance is called for. On the other hand, environmental concerns should be 'mainstreamed' into all relevant subject-matters, such as industrial production, agriculture or fisheries, and not remain a specialized field outside other politics. Furthermore, different environmental issues should be addressed on the basis of their own merits, instead of applying a 'one size fits all' approach. The challenge is therefore to design a system of international environmental governance taking into account all these concerns.

## Notes

1. 'U.N. Security Council holds groundbreaking debate on climate change over protests from developing countries', *International Herald Tribune*, 17 April 2007, accessible at: <http://www.iht.com/articles/ap/2007/04/17/news/UN-GEN-UN-Climate-Change.php> (last visited on 14 April 2008).
2. Hereinafter: *Delivering as One*.
3. Treaty bodies of MEAs are further examined in Churchill and Ulfstein (2000: 623); Ulfstein (2007bb) from which this section has been adapted.
4. This plenary organ may have different denominations, such as Meeting of the Parties (MOP) or Executive Body.
5. The doctrine of 'implied powers' has been developed in international law since it found its expression in: (*Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations*, 1949: 174).
- 6.. More sceptical about the binding character is J. Brunnée (Brunnée, 2002: 24–6).
7. This section has been adapted from that article.
8. Available at [http://www.unep.org/malmo/malmo\\_ministerial.htm](http://www.unep.org/malmo/malmo_ministerial.htm) (last visited on 10 April 2008).
9. In the European context, the Fifth Ministerial Conference of Environment for Europe, 13–15 February 2002, endorsed the Guidelines for Strengthening Compliance with and Implementation of MEAs in the UNECE Region.
10. On the managerial and enforcement models, see Chayes and Chayes (1995); Danish (1997: 789); Raustiala and Slaughter (2002: 538–59); Brunnée and Toope (2002: 1–14)..
11. Article 11 of the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone under the Convention on Long-range Transboundary Air Pollution provides an example. Article 15(2) of the Espoo Convention and Article 16(2) of the Aarhus Convention both establish that arbitration shall be conducted in accordance with an Annex to the respective Conventions. But only four States have submitted a declaration accepting compulsory jurisdiction under the Espoo Convention. Article 11(5) of the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone also establishes that if the Parties in their declarations

on compulsory adjudication have not chosen the same procedure of dispute settlement, one of the Parties to the dispute may require compulsory conciliation.

12. The Final Award of 2 July 2003 can be found on the website of the Permanent Court of Arbitration <http://www.pca-cpa.org/> (last visited on 10 April 2008).
13. Indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol (Source: Annex V of the report of the Fourth Meeting of the Parties: p. 297).
14. The sensitive nature of this issue is illustrated by the fact that, at its first meeting in December 2005, the COP/MOP was unable to reach final agreement on it. It adopted the compliance procedures and mechanisms by simple decision but provided for consideration of an amendment with a view to making a decision by its third meeting in 2007.
15. See about trade measures under the Montreal Protocol, Werksman (1996: 773).
16. The UN Office of Legal Affairs stated in an opinion of 4 November 1993 that the UNFCCC established 'an international entity/organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat' (Articles 3, 7–10), (United Nations Office of Legal Affairs, 1993: para. 4).
17. See also E. Hey on the shift towards a move beyond the interstate paradigm to a sort of 'public law' (Hey, 2007: 750).
18. But fragmentation may cause legal difficulties in relation to other fields of law, such as between the environment and international trade (Boyle, 2007: 125–47).

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