

**The development of international environmental  
law at the Multilateral Environmental Agreements'  
Conference of the Parties and its validity**

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*Reliance on institutional machinery in the form of intergovernmental commissions and meetings of treaty parties as a means of co-ordinating policy, developing the law, supervising its implementation, resolving conflicts of interest and putting community pressure on individual States, meets these needs much more flexibly and effectively than traditional bilateral forms of dispute settlement...Institutional supervision of this kind has become since 1972 the international community's primary model for the regulation and control of environmental risks. No other model offers useful solutions to the problem of controlling phenomena of global character, such as global warming or ozone depletion, where no single State's acts are responsible and where the interests of all are at stake.<sup>1</sup>*

It is now well understood that many environmental challenges are global in nature. This recognition has led to a proliferation of international legal instruments directed at environmental conservation and protection, such as multilateral environmental agreements (**MEAs**). This paper examines the role of Conferences of the Parties (**CoPs**) in MEA based law making. It promotes the view that effective international environmental law must be dynamic and responsive to changing environmental conditions and changes in the state of knowledge on the best measures and methods to deal with the subject matter of MEAs. In this context, it is now recognised that while MEAs may set out the basic framework in respect of global environmental matters, treaty based law must be shaped by continuous interaction of member States to provide guidance on, and ensure consistency in, the implementation of the MEA in a way that responds to the environmental challenge it seeks to address. It is in this process that MEA CoPs have and should have law making functions. However, the legal status of acts and decisions of CoPs is unclear. To date, little consideration has been given to the legal personality of CoPs, in particular, whether the exercise of their law making powers (if any) are properly conceptualised within the law of treaties and/or within international institutional law. This in turn has given rise to questions regarding the validity and legally binding nature of CoP made 'law'.

In this context, this paper reviews existing research on what powers CoPs have to develop international law. It considers the validity of the exercise of these powers and the implications of CoP law making for the legitimacy of international environmental law. Through this process of review, several important research priorities are identified that must be urgently pursued in view of the significant role CoPs play in providing efficient and effective responses to serious emerging and pre-existing environmental challenges. The recent attention to CoP made law and the questions being asked about its legal basis will otherwise result in a significant threat to the legitimacy of international environmental law.

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<sup>1</sup> AE Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal Environmental Law* 229 at 230.

# 1 MEAs, CoPs and the global nature of various environmental challenges

Recognition of the inherently global character of many environmental challenges, for example, climate change and the depletion of the ozone layer, and the global impacts of these issues has resulted in the emergence of global regulatory regimes that seek to provide an appropriate global response, for example the *United Nations Framework Convention on Climate Change (UNFCCC)*,<sup>2</sup> the *Convention on the Protection of the Ozone Layer (Vienna Convention)*,<sup>3</sup> and their respective protocols.<sup>4</sup> Increasingly, international law is also addressing national or domestic environmental problems of global significance, such as through the conservation of biological diversity, protection of natural heritage areas, or promotion of sustainable development.

MEAs, amongst other international legal instruments for the regulation of activities affecting the environment, form an essential framework for the international community to respond to these environmental issues and to promote environmental protection and sustainable development.

There are over 500 international treaties and other agreements related to the environment, of which a substantial percentage are multilateral. Over 300 of these agreements have been negotiated since 1972.<sup>5</sup> The core environmental conventions and related international agreements are generally divided into five thematic clusters:

- Biodiversity;<sup>6</sup>
- Atmosphere;<sup>7</sup>
- Land;<sup>8</sup>
- Chemicals and hazardous wastes;<sup>9</sup> and
- Oceans, seas and water.<sup>10</sup>

This broad coverage of MEAs clearly establishes that these legal instruments, if effectively implemented, have an important role to play in international environmental protection. While there are many criticisms regarding the shortcomings of MEAs,<sup>11</sup> the reality is that MEAs are

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<sup>2</sup> New York, 9 May 1992. Available at: [www.unfccc.de/](http://www.unfccc.de/) (12 January 2007).

<sup>3</sup> Vienna, 22 March 1985, 1513 UNTS 293.

<sup>4</sup> P Birnie & A Boyle (2002) *International Law & The Environment* (2<sup>nd</sup> edition), Oxford University Press, New York at 7.

<sup>5</sup> *Multilateral Environmental Agreements: Summary* (UNEP/IGM/1/INF/1). 30 March 2001. *Background paper presented by the Secretariat at the Open-ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance, first meeting*. New York, 18 April 2001. Available at: <http://www.unep.org/IEG/WorkingDocuments.asp> (1 January 2007).

<sup>6</sup> For example, *Convention on International Trade in Endangered Species* and the *Convention on Biological Diversity*.

<sup>7</sup> For example, the *United Nations Framework Convention on Climate Change* and the *Vienna Convention for the Protection of the Ozone Layer*.

<sup>8</sup> For example, the *United Nations Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa*.

<sup>9</sup> For example, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*.

<sup>10</sup> For example, the *United Nations Convention on the Law of the Sea*. See UNEP, Division of Environmental Conventions, 'Links to Multilateral Environmental Agreements': <http://www.unep.org/dec/links/index.html> (1 January 2007).

<sup>11</sup> A review of many of these shortcomings can be found in C Bruch 'MEA Enforcement and Compliance Meeting Bulletin: A Summary Report of the High Level Meeting on Compliance with and the Enforcement of Multilateral Environmental Agreements (April 2006) *Ali-Aba Course of Study Materials*. Published by the International Institute for Sustainable Development. See also P Birnie & A Boyle, note 4 at 11-115

being used and will continue to be used, at least for the immediate future, as a primary international environmental law making tool, and, therefore, measures to improve the effectiveness of MEAs should continue to be investigated, including the role of MEA CoPs.

Many of the existing MEAs, in particular those post-dating 1972, set up a CoP shortly after the MEA came into force. The CoP then meets on a regular basis to, amongst other things, provide guidance on the implementation of the MEA.<sup>12</sup>

The CoP is typically the plenary organ of the MEA.<sup>13</sup> For example, Article 7.2 of the UNFCCC states:

*The Conference of the Parties, as the supreme body of the Convention, shall keep under regular review the implementation of the Convention and any related legal instrument 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.*

Accordingly, MEA law making processes essentially take place under this institutional core. As the CoPs are freestanding and distinct both from the State parties to a particular agreement and from existing intergovernmental organisations (IGOs), they are generally considered autonomous. They are also considered to be autonomous in the sense that they have their own law making powers and compliance mechanisms.<sup>14</sup> To evaluate the exercise of CoP 'law' making powers and their legal validity, it is useful to have a basic understanding of the genesis of CoPs.

## 2 History of the development of the MEA CoP

Strong institutional arrangements of MEAs (CoPs, secretariats and one or more specialist subsidiary bodies) have increasingly become recognised over time as crucial to their effectiveness. In particular, the lack of proper institutions makes it very difficult to develop, update and adapt MEAs to changing circumstances, which is necessary for two main reasons:<sup>15</sup>

- (a) knowledge of the environmental issues with which MEAs deal is constantly expanding; and
- (b) when an MEA is initially concluded, the parties may reach only limited political agreement on how to tackle the particular environmental challenge (eg, under framework conventions).<sup>16</sup>

This appreciation of the importance of strong institutional arrangements in aiding the effectiveness of international agreements informed the series of major MEAs that were developed at and grew out of the 1972 UN Conference on the Human Environment.<sup>17</sup>

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<sup>12</sup> Each meeting of the CoP is numbered (eg, CoP1, CoP2, etc).

<sup>13</sup> MEAs adopt different terms to describe their plenary organs, such as 'meeting of the parties' (MoPs) or 'conference of the contracting parties'. Unless otherwise indicated, the acronym 'CoP' is used generically in this paper to refer to all such organs.

<sup>14</sup> See, for example, R Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623 at 623.

<sup>15</sup> See G Palmer, 'New Ways to Make International Environmental Law' (1992) 86 *American Journal of International Law* 278 and R Churchill and G Ulfstein, note 14.

<sup>16</sup> For example, the Vienna Convention, *United Nations Framework Convention on Climate Change* and the *Convention on Biological Diversity*.

<sup>17</sup> R Churchill and G Ulfstein, note 114 at 629.

However, this period coincided with a period of widespread dissatisfaction with traditional IGOs because of their cost and bureaucratic nature. This in turn resulted in a disinclination to create new IGOs<sup>18</sup> and the alternative CoP model evolved over a period of time.

The earliest obvious form of the CoP was that introduced by the *Convention on Wetlands of International Importance, Especially as Waterfront Habitat (Ramsar Convention)* in 1971.<sup>19</sup> However, that CoP, as originally contemplated, was given advisory powers only. Article 6 of the Convention stated, at the time of introduction of the Convention, that “the Contracting Parties shall, as the necessity arises, convene Conferences on the Conservation of Wetlands and Waterfowl” and that these conferences should “have an advisory character”.<sup>20</sup> In 1987, experience in the working of these conferences and the operation of CoPs in other MEAs led the parties to amend Article 6 to provide for the establishment of a “Conference of the Contracting Parties to review and promote the implementation” of the Convention. The reference to the advisory character of the conference was deleted.<sup>21</sup>

In the next MEA on the *Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention)*<sup>22</sup> in 1972, the equivalent of the CoP was much more developed than the Ramsar Convention,<sup>23</sup> although it was not given any express power to establish subsidiary bodies and its powers of supervision were more limited.<sup>24</sup>

The first MEA to use the term ‘Conference of the Parties’ was the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)*<sup>25</sup> in 1973. The CITES CoP has amongst the broadest powers of the various types of CoPs. The CITES CoP originally lacked the power to adopt financial provisions, but this power was added by an amendment to the Convention in 1979.

Churchill and Ulfstein note the significance of the negotiation of the CITES Convention under the auspices of the United National Environmental Programme (UNEP), unlike the Ramsar and London Conventions.<sup>26</sup> The subsequent Conventions, in chronological order, the *Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)*,<sup>27</sup> the Vienna Convention,<sup>28</sup> the *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)*<sup>29</sup> and the *Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)*,<sup>30</sup> were also negotiated under the supervision of the UNEP and all contain the CoP model as their institutional arrangements. Broadly speaking, these Conventions have virtually the same powers as those of the CITES Convention CoP. The primary Articles of the above conventions that set out the powers of their CoPs are extracted and summarised in the table **attached** to the end of this paper. The table provides an overview of the current range of

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<sup>18</sup> As above.

<sup>19</sup> Ramsar, 2 February 1971. Available at: [www.ramsar.org/](http://www.ramsar.org/) (12 January 2007); 1971, TIAS No. 11,084, 996 UNTS 245.

<sup>20</sup> Ramsar Convention, note 19, Article 6.

<sup>21</sup> Amendments to Articles 6 and 7 of the *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, 28 May 1987, 1996 UKTS No. 13.

<sup>22</sup> 1972, 26 UST 2403, 1046 UNTS 120.

<sup>23</sup> This Convention adopted the term ‘Consultative Meetings of the Parties’.

<sup>24</sup> R Churchill and G Ulfstein, note 14 at 629.

<sup>25</sup> Washington, 3 March 1973. Available at: [www.wcmc.org.uk/cites/](http://www.wcmc.org.uk/cites/) (12 January 2007).

<sup>26</sup> Note 14 at 630.

<sup>27</sup> 1979, 1990 UKTS No.87.

<sup>28</sup> Note 3.

<sup>29</sup> Basel, 22 March 1989. Available at: [www.unep.ch/basel/index.html](http://www.unep.ch/basel/index.html) (12 January 2007); 1989, 28 ILM 657.

<sup>30</sup> Montreal, 16 September 1987. Available at: [www.unep.org/ozone/](http://www.unep.org/ozone/) (12 January 2007); 1987, 1522 UNTS 293.

powers of CoPs under various MEAs and their protocols and demonstrates that CoPs are not all set up the same nor do they have the same breadth of powers.

The flexibility of the CoP model and its acceptability to all States means that it is likely to continue to be used. Further, despite calls from some commentators,<sup>31</sup> both the 1992 UN Conference on Environment and Development and its follow up, the 1997 Special Session of the UN General Assembly, rejected the idea of creating new intergovernmental institutions for the environment.<sup>32</sup> Further, while there are also strong arguments in support of the establishment of a global environmental organization to respond to past inadequacies and limitations of MEAs,<sup>33</sup> at present, even if warranted, such an organization does not appear likely to emerge in the near future. This is largely because of the implications for sovereignty and the lack of consensus of the organizational model for such an institution,<sup>34</sup> in particular, the extent and parameters of the powers of the institution.<sup>35</sup> Accordingly, the roles of existing international institutions are now recognised as integral to the development of international environmental law.

With this realisation, the powers of international institutions, such as CoPs are evolving to include law making functions not previously enjoyed by their predecessors. This will mean increased scrutiny of the validity of the exercise of these powers and the legal status of CoP law. The law making powers of CoPs and other such international organisations that are not subsidiary organs of the United Nations is an important matter for international environmental law making, which has surprisingly received little attention to date.

Section 3 of this paper broadly identifies the primary roles of CoPs and section 4 considers the ways in which CoPs exercise law making powers to develop international law. Section 5 then considers the validity of CoP made 'law' in the context of current debates regarding whether CoP law making powers fall within the law of treaties and/or within the law of international institutions with capacity to exercise law making powers. Finally, limitations on the exercise of CoP law making powers are noted and various recommendations and research priorities identified.<sup>36</sup>

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<sup>31</sup> For example, LA Kimball & WC Boyd, 'International Institutional Arrangements for Environment and Development: A Post-Rio Assessment' (1992) 1 *Review of European Commission and International Environmental Law Journal* 295; and G Palmer, note 15 at 278-82.

<sup>32</sup> R Churchill and G Ulfstein, note 14 at 630.

<sup>33</sup> See, for example, F Biermann, 'The case for a World Environment Organisation' (2000) 42 *Environment Magazine* 23-31. Available at: [http://www.findarticles.com/p/articles/mi\\_m1076/is\\_9\\_42/ai\\_67319834](http://www.findarticles.com/p/articles/mi_m1076/is_9_42/ai_67319834) (12 January 2007); G Palmer, note 15 at 282; S Silard, 'The Global Environment Facility: A New Development in International Law and Organisation' (1995) 28 *George Washington Journal of International Law & Economics* 607; B Lukitsch Hicks, 'Treaty Congestion in International Environmental Law: The Need for Greater International Co-ordination' (1999) 32 *University of Richmond Law Review* 1643 at 1661-1662; and JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241 at 268-271.

<sup>34</sup> F Biermann, note 33, identifies three alternative models.

<sup>35</sup> See, for example, A Steiner, LA Kimball & J Scanlon, 'Global governance for the environment and the role of Multilateral Environmental Agreements in conservation' (2003) 37(2) *Oryx* 227-237 at 232; D Brack & J Hyvarinen (2000) *Global Environmental Institutions: Analysis and Options for Change*, Royal Institute of International Affairs, London. Available at: <http://www.chathamhouse.org.uk/index.php?id=135> (12 January 2007); D Brack & J Hyvarinen (eds) (2002) *Global Environmental Institutions: Perspectives on Reform*, Royal Institute of International Affairs, London. Available at: <http://www.chathamhouse.org.uk/index.php?id=135> (12 January 2007); and F Biermann, note 33.

<sup>36</sup> The most significant research on the law making powers of international institutions of relevance to the paper and identified by this article in the course of writing is that undertaken by J Bruneau, COPing with Consent: Law Making Under Multilateral Environmental Agreements (2002) 15 *Leiden Journal of International Law* 1-52; and R Churchill & G Ulfstein, note 14.

### 3 The roles of CoPs

The roles of MEA CoPs vary in accordance with the terms of the Articles of each Convention that establishes a CoP. It is apparent from a review of the resolutions of various CoPs that these institutions are integral to change management at the local, national and international level, as without this process of planning, information gathering, participation and awareness building, the objectives of MEAs would be unlikely to be effectively achieved.<sup>37</sup>

Generally speaking, CoPs exist to:

- set priorities and review implementation of the Convention based on reports submitted by governments;
- consider new information from governments, NGOs and individuals to make recommendations to the Parties on implementation;
- make decisions necessary to promote effective implementation;
- revise the treaty if necessary; and
- act as a forum for discussion on matters of importance.<sup>38</sup>

The powers of the CoP are explicitly set out in treaty articles and relate to, for example, the adoption of the rules of procedure, financial regulations and the budget, the establishment of new subsidiary bodies, and the provision of guidance to these bodies and the secretariat powers to develop substantive obligations through various forms of law making and treaty interpretation, powers to supervise the implementation of and compliance with those obligations; on the external plane MEAs have powers to enter into agreements with States, international organisations and the institutions of other MEAs.<sup>39</sup> Some MEAs also contain a catchall provision authorizing the CoP to “consider any additional action that may be required”,<sup>40</sup> “fulfil such other functions as may be appropriate under the provisions of the present Convention”<sup>41</sup> or “exercise such other functions as are required for the achievement of the objective of the Convention.”<sup>42</sup> Through such specific and general powers, the CoP is generally provided with authority at the internal level corresponding to that found in the constitutions of IGOs.

From the above it can be seen that CoPs have various roles at both the internal and external level. The focus of the paper is, however, on the role, if any, of CoPs in the development of international law by virtue of the exercise of any of these powers. This is considered in section 4 below.

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<sup>37</sup> The websites of MEAs generally give an outline of the number of CoPs to date and the themes of the discussion at each CoP. For example, the themes of the CoPs of the *Convention on Biological Diversity* can be viewed at: <http://www.biodiv.org/convention/cops.shtml> (1 January 2006); and the Ramsar Convention at: [http://www.ramsar.org/index\\_key\\_docs.htm](http://www.ramsar.org/index_key_docs.htm) (13 January 2006).

<sup>38</sup> UNEP, *GEO 2000*, 'Chapter Three: Policy Responses – Global and regional synthesis – MEAs and non-binding instruments'. Available at: <http://www.grida.no/geo2000/english/0136.htm> (1 January 2007).

<sup>39</sup> R Churchill & G Ulfstein, note 14 at 658-659. A more appreciable understanding of the roles of CoPs can be obtained from a review of the summary table attached to the end of this paper.

<sup>40</sup> London Convention, note 22, Article. XIV(4)(f).

<sup>41</sup> *Convention on Long-Range Transboundary Air Pollution*. Available at: <http://www.unece.org/env/lrtap/welcome.html> (13 January 2007). Article 10(2)(c).

<sup>42</sup> UNFCCC, note 2, Article 7(2)(m).

## 4 CoPs and the development of international environmental law

It is submitted that CoPs have five potential (albeit, to a certain extent, overlapping) law making powers, namely:

- (a) the power to decide on amendments to MEAs and the adoption of protocols;
- (b) decision making and resolution powers;
- (c) supervisory powers;
- (d) interpretation powers; and
- (e) powers in respect of the creation of compliance mechanisms.

Other soft law and general law powers are also considered below.

### 4.1 The power of CoPs to decide on amendments to MEAs and the adoption of protocols

One type of law making power commonly given to CoPs is the power to decide on amendments to MEAs. The procedures by which amendments to MEAs are to be adopted and come into force vary from agreement to agreement, but are broadly similar. Under the Ramsar, London and Bonn Conventions, and CITES, the CoP is to adopt amendments by a two thirds majority.<sup>43</sup> Under the more recent agreements, amendments are to be adopted by consensus, if at all possible. Failing consensus, they are to be adopted by either a two-thirds majority (the Montreal Protocol,<sup>44</sup> the *Convention on Biological Diversity (Biodiversity Convention)*<sup>45</sup> and the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*<sup>46</sup> (**Desertification Convention**)) or a three quarters majority (the Vienna<sup>47</sup> and Basel<sup>48</sup> Conventions and the UNFCCC).<sup>49</sup> In the case of all the agreements, amendments adopted by these procedures do not enter into force until ratified by the same proportion of parties as is required for their adoption, and then are in force only for those parties that have ratified them.<sup>50</sup>

CoPs may also add to parties' obligations by adopting protocols to agreements, in particular those MEAs that were drawn up in the form of framework treaties because of the lack or uncertainty of scientific knowledge concerning the environmental problem at issue and/or the lack of agreement on the action to be taken to tackle that problem when the MEA was concluded. Global MEAs that enable the CoP to adopt protocols include the Vienna Convention,<sup>51</sup> the Basel Convention,<sup>52</sup> the UNFCCC,<sup>53</sup> and the Biodiversity Convention.<sup>54</sup>

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<sup>43</sup> Articles 10, XV(i)(a), VII(7), and XV(j) respectively.

<sup>44</sup> Articles 2(9)(c) and 10(9)

<sup>45</sup> Nairobi, 22 May 1992. Available at: [www.biodiv.org/](http://www.biodiv.org/) (12 January 2007). Article 23(3).

<sup>46</sup> Paris, 17 June 1994. Available at: [www.unccd.de/](http://www.unccd.de/) (12 January 2007). Article 30(3).

<sup>47</sup> Article 9(3).

<sup>48</sup> Article 17(3).

<sup>49</sup> Article 15(3).

<sup>50</sup> R Churchill & G Ulfstein, note 14 at 636 who note that these procedures generally reflect the procedures for treaty amendment laid down in the *Vienna Convention on the Law of Treaties* and are neither unique nor novel to MEAs.

<sup>51</sup> Article 8.

<sup>52</sup> Article 15(5)(d).

<sup>53</sup> Article 17.

<sup>54</sup> Article 23(4)(c).

None of these agreements contain any provisions that spell out the procedure for the adoption of protocols and, accordingly, the matter falls to be regulated by the rules of procedure of the CoP.<sup>55</sup> In general, as per amendments to MEAs, protocols are generally adopted by consensus if at all possible, failing which they may be adopted by a two-thirds or three-quarters majority. Protocols, like treaty amendments, require ratification to enter into force. The number of ratifications required for entry into force, in the absence of provisions on the matter in the parent convention, is specified in the protocol itself. So far four protocols have been adopted by CoPs under global MEAs: the Montreal Protocol on Substances that Deplete the Ozone Layer (**Montreal Protocol**)<sup>56</sup> adopted by the CoP of the Vienna Convention, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (**Kyoto Protocol**)<sup>57</sup> adopted by the CoP of the UNFCCC, the *Protocol on Liability and Compensation*<sup>58</sup> adopted by the CoP of the Basel Convention, and the *Cartagena Protocol on Biosafety (Biosafety Protocol)*<sup>59</sup> adopted by the CoP of the Biodiversity Convention.

Brunee argues that the powers of CoPs to adopt amendments and protocols to MEAs are only indirect lawmaking powers, as these measures require ratification by State parties to become legally effective.<sup>60</sup> Consequently, it is argued that the CoP is merely a forum in which parties elaborate and adopt the protocol or amendment to the treaty, but do not alter the rights or obligations of the parties.<sup>61</sup> However, the power to amend the annexes attached to MEAs such as the London, Bonn and Basel Conventions, CITES, and the Montreal Protocol is not disputed by Brunee as being a genuine law making power.<sup>62</sup> These annexes usually contain more technical measures, which may require amendment or updating as a result of increased knowledge, greater political agreement, or some other change in circumstances.<sup>63</sup>

In some cases, such as the numerous amendments to the lists of species receiving protection in the annexes to CITES and the Bonn Convention, the CoPs' power to amend an MEA may be relatively minor in terms of affecting the parties' substantive obligations and interests. However, this is not always so. For example, the decisions of the CITES CoP concerning changes in the listing of whale and elephant products provoked considerable debate and controversy.<sup>64</sup> In other cases, the CoPs' power of amendment may clearly have a major impact on and radically change the obligations of parties to the MEA concerned. For example, the Consultative Meeting of the Parties to the London Convention, by amending its annexes, both introduced a scheme for regulating the incineration of waste at sea and later

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<sup>55</sup> See P Szell, 'Decision Making Under Multilateral Environmental Agreements' (1996) 26 *Environmental Policy and Law Journal* 210 at 213.

<sup>56</sup> 1987, 1522 UNTS 293. Available at: [http://hq.unep.org/ozone/montreal-protocol/montreal-Protocol\\_2000.shtml](http://hq.unep.org/ozone/montreal-protocol/montreal-Protocol_2000.shtml) (13 January 2007).

<sup>57</sup> 1997, UN Doc. FCCC/CP/2001/INF.1 (16 July 2001). Available at: <http://unfccc.int/resource/docs/covkp/kpeng.pdf> (18 January 2007).

<sup>58</sup> 10 December 1999. Available at: <http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf> (21 January 2007).

<sup>59</sup> 29 January 2000. Available at: <http://www.biodiv.org/biosafety/default.aspx> (21 January 2007).

<sup>60</sup> J Brunee, note 36 at 15.

<sup>61</sup> For example, J Brunee, note 36 at 18 referring to Articles 15 and 17 of the UNFCCC.

<sup>62</sup> As above.

<sup>63</sup> For example, variations to carbon emission targets in the Kyoto Protocol.

<sup>64</sup> CoP 12. A summary report is available at: <http://www.cites.org/eng/cop/12/rep/index.shtml> (21 January 2007).

banned such incineration.<sup>65</sup> In addition, the consultative meeting has phased out the dumping of industrial and radioactive wastes.<sup>66</sup>

Another example of the CoPs' power to amend the parties' obligations extensively is demonstrated by the Montreal Protocol. The Protocol, as originally drafted, stipulated that the production and consumption of the five main chlorofluorocarbons (**CFCs**) was to be reduced by 50 percent of 1986 levels by 1999. However, "adjustments" made to the Protocol by the MoP (ie, the equivalent of the CoP) in 1990 and 1992 determined that production and consumption of these CFCs should be phased out completely by 1996.<sup>67</sup> Similar far-reaching changes have subsequently been required for the use of other ozone-depleting substances listed in the various annexes to the Protocol.<sup>68</sup>

The procedure by which the CoP adopts amendments to annexes (or adjustments in the case of the Montreal Protocol) is the same as that for the adoption of amendments to the agreement, except that they do not need to be ratified by the State parties. Such amendments are binding on all parties unless objected to within a certain period of time. However, parties to the Montreal Protocol that are unhappy with an adjustment may not object to it and so not be bound. Their only option would be to denounce the Protocol.<sup>69</sup> This situation is extremely unusual. Since adjustments can be adopted in theory by a two-thirds majority at an MoP, the majority can bind the minority against its will. In practice, this has not yet happened, as all adjustments so far have been adopted by consensus. According to Szell, the reason why the Montreal Protocol does not allow its parties to object to adjustments is that "at the time of adopting the Protocol all prospective Parties knew that the trend of the instrument was in the direction of eventual total elimination of production and consumption of all the controlled substances."<sup>70</sup>

## 4.2 CoP decision making and resolutions

CoPs may also occasionally be authorized to make new rules by specific provisions of MEAs. For example, Article 17 of the Kyoto Protocol enables the CoP to adopt "rules" relating to the operation of the system for trading in emissions of greenhouse gases. The use of the word "rules" suggests that such a measure is intended to be legally binding. This interpretation is also supported by substantive considerations. Seemingly, a party that observes the "rules" on emissions trading can hardly be accused of non-compliance with the Protocol.

Besides rule making in a strict sense, CoPs may be authorized to adopt measures that relate to the implementation of the parties' substantive obligations and that, while not strictly legislative, have a certain normative content. See, for example, Article 4(2)(d) of the UNFCCC, which states that the CoP is to "take decisions regarding criteria for joint

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<sup>65</sup> London Consultative Meeting of the Parties Res. LDC.5(3) (1978), 1979 UKTS No. 71; Res. LDC.50(16) (1993), 1995 UKTS No. 90.

<sup>66</sup> London Consultative Meeting of the Parties Res. LDC.49(16), 51(16) (1993), 1995 UKTS Nos. 89, 91, respectively.

<sup>67</sup> Montreal Protocol MOP Decision II/1, Doc. (1990); and Montreal Protocol MOP Decisions IV/2, IV/3, Doc. UNEP/OzL.Pro.4/15 (1992) [http://www.unep.org/ozone/4mop\\_cph.htm](http://www.unep.org/ozone/4mop_cph.htm). "Adjustments" relate to changes in the timetable and targets set out in Article 2 of the Protocol for reducing the production and consumption of ozone-depleting substances; "amendments" refer to other changes in the Protocol.

<sup>68</sup> For a table showing the results of the changes made in the phasing out of ozone-depleting substances by adjustments to the Protocol up to and including 1997. See S Oberthur, 'Montreal Protocol: 10 Years After' (1997) 27 *Environmental Policy and Law Journal* 432 of 433.

<sup>69</sup> It should be noted, however, that under Article 19, a State must have been a party for at least four years before it may withdraw from the Protocol.

<sup>70</sup> P Szell, note 55 at 213.

implementation” of commitments by parties listed in Annex I<sup>71</sup> and Articles 16 to 18 of the Kyoto Protocol which provide that the CoP is responsible for:

- modifying as appropriate, the multilateral consultative process referred to in Article 13 of the Convention;
- defining the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading; and
- approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol.<sup>72</sup>

### 4.3 Supervisory powers

The absence of any provision for institutional supervision or regulation is often a sign that the treaty in question is ineffective and leads to obsolescence. Older treaties in this category, such as the 1940 *Western Hemisphere Convention*, have for this reason been described as ‘sleeping treaties’ and their impact on contemporary environmental protection is likely to be limited. As Lyster observes:

*...simply by requiring its Parties to meet regularly to review its implementation, a treaty can ensure that it stays at the forefront of its Parties’ attention.*<sup>73</sup>

Therefore, the combination of regulatory and supervisory functions in the hands of international institutions is of importance in making international agreements more effective in their operation and in securing a high level of compliance.

Accordingly, most MEAs assign a general supervisory role to the CoP entailing the negotiation and elaboration of detailed rules, standards or practices, usually as a means of giving effect to the more general provisions of framework treaties.<sup>74</sup> The UNFCCC CoP has, for example, exercised its supervisory powers in a manner that has developed international environmental law with respect to the regulation of climate change. One of the most important functions of the UNFCCC CoP has been to periodically review the state of the science regarding climate change and to evaluate the ultimate effectiveness of the regime in meeting its objectives. For example, after determining that, in fact, the Convention would not meet its objective of stabilising atmospheric greenhouse gas concentrations at safe levels, the CoP became the primary forum for the negotiation of binding targets and timetables under the 1997 Kyoto Protocol. The Antarctic Treaty System<sup>75</sup> is also a particularly good example of this feature. Through ‘consultative meetings’ the parties have negotiated treaties to regulate the conservation of seals, marine living resources, minerals exploitation and have also agreed measures to protect flora, fauna, and the environment. The Australian

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<sup>71</sup> Climate Change CoP Decision 5/CP.1, UN Doc. FCCC/CP/1995/7/Add.1, Institutional Linkage of the Convention Secretariat to the United Nations, Climate Change CoP Decision 14/CP.1, para. 2, UN Doc. FCCC/CP/1995/7/Add.1 at 42. Available at: <http://www.unfccc.de/resource/docs/cop1/07a01.htm>.

<sup>72</sup> See also Articles. 3.4, 5.1, 6.2, 8.4 and 12.7 of the Kyoto Protocol. Similar norm creating provisions exist in many various other MEAs.

<sup>73</sup> S Lyster (1985) *International Wildlife Law*, Cambridge University Press, Cambridge at 12.

<sup>74</sup> For example, Article 7 of the Montreal Protocol stipulates that the parties shall provide data on their annual production, imports and exports of controlled substances; Article 13 of the Basel Convention requires annual reports on transboundary movements of hazardous wastes; and Article 6.2 of the Ramsar Convention empowering its CoP to, amongst other things, request the preparation of reports and statistics on matters affecting methods and to adopt other recommendations or resolutions to promote the functioning of the Convention.

<sup>75</sup> See Australian Government Antarctic Division website: <http://www.22d.gov.au/default.asp?asid=78> (18 January 2007)

Government Antarctic Division website states that these threats have allowed the implementation of “legally binding provisions for the regulation of activities in Antarctica.”<sup>76</sup>

Not only does this form of law-making or international regulation facilitate treaty implementation, it also gives treaties a dynamic character and enables the parties to respond to new problems or priorities. The combination of regulatory and supervisory functions in the hands of international institutions is primarily of importance in making international agreements more effective in their operation. Both the Vienna Convention and the UNFCCC, for example, have evolved following regular CoPs, with additional protocols, amendments, adjustments and decisions.<sup>77</sup>

#### 4.4 Interpretation of treaties

CoPs engage from time to time in the interpretation of the provisions of MEAs in ways that relate to and affect the substantive obligations of the parties to the MEAs. In some cases, this power of interpretation is expressly conferred by the MEA. For example, Article 10(1) of the Montreal Protocol (as amended in 1990) authorized the MOP to interpret the term “agreed incremental costs” (incurred by developing State parties in complying with the Protocol) by establishing “an indicative list of incremental costs”. Similarly, the Antarctic Treaty System comprises the *Antarctic Treaty*, a number of related agreements and also includes the recommendations, measures, decisions and resolutions of the Consultative Meetings relating to matters such as:

*“scientific cooperation; protection of the Antarctic environment; conservation of plants and animals; preservation of historic sites; designation and management of protected areas; management of tourism; information exchange; collection of meteorological data; hydrographical charting; logistic cooperation; and communications and safety.”<sup>78</sup>*

More commonly, a CoP will interpret an MEA not because the agreement authorizes it, but because experience in the operation of the MEA or scientific, technical, or other developments are perceived as requiring it. For example, the CITES CoP has adopted interpretations of the provisions of the Convention relating to the conditions for entry into force of amendments<sup>79</sup> and the criteria for amending the appendices,<sup>80</sup> and the Consultative Meeting of the Parties to the London Convention has effectively expanded the definition of “dumping” under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling.<sup>81</sup>

The procedure for adopting decisions containing interpretations of the MEA will normally be set out in the rules of procedure of the CoP. In the more recent MEAs, such decisions, as

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<sup>76</sup> As above.

<sup>77</sup> See, for example, the history of the ozone regime as set out in (2005) 19(42) *Earth Negotiations Bulletin*. Available at: <http://www.iisd.org/vol19/enb1942e.html> (28 December 2006).

<sup>78</sup> Doc. UNEP/OzL.Pro.4/15, supra note 96, Annex VIII, reprinted in (1992) 3 *Yearbook of International Environmental Law* 822. Such a list was adopted in 1992.

<sup>79</sup> CITES CoP Res. CITES.CONF.4.27 (Apr. 1983). Available at: <http://www.wcmc.org.uk/CITES/eng/resols/resol4.shtml> (7 December 2006).

<sup>80</sup> CITES CoP Res. CITES.CONF.9.24 (Nov. 1994). Available at: [http://www.wcmc.org.uk/CITES/eng/resols/resol92\\_1.shtml#9.24](http://www.wcmc.org.uk/CITES/eng/resols/resol92_1.shtml#9.24) (7 December 2006).

<sup>81</sup> London Consultative Meeting of the Parties Res. LDC.41(13) (1990) reprinted in 'International Organisations and the Law of the Sea' (1990) *Documentary Yearbook* at 332..

matters of substance, are normally submitted for adoption by consensus, before resorting to majority voting.<sup>82</sup>

#### 4.5 Compliance mechanisms

CoPs are also useful for implementing non-compliance, law enforcement and dispute resolution procedures, that enable States to be held accountable to other member States.

Accountability is exercised mainly by techniques of general supervision or control of States in the performance of their international obligations, or other agreed standards of conduct. Non-compliance procedures are best understood as a form of 'dispute avoidance' or 'alternative dispute resolution' in the sense that resort to binding third-party procedures is avoided.

Soft settlement of this kind is exemplified by the non-compliance procedure adopted by parties to the Montreal Protocol. This procedure can be invoked by any party to the Protocol, or by the Protocol secretariat, or by the party itself, wherever there are thought to be problems regarding compliance. The matter is then referred for investigation to an Implementation Committee. After deliberation and assessment of the matter, a report is then made to the MoP, which decides what steps to call for in order to bring about full compliance.<sup>83</sup> These can include the provision of appropriate financial, technical, or training assistance in order to help the party to comply. If these measures are insufficient, cautions can be issued, or, as a last resort, rights and privileges under the treaty can be suspended in accordance with the law of treaties. The MoP will also decide on appropriate action when a developing State notifies the secretariat of its inability to implement the Protocol through the failure of developed States to provide finance or technology.<sup>84</sup> A very similar procedure has been adopted under the Basel Convention.<sup>85</sup>

Article 18 of the Kyoto Protocol also establishes a non-compliance procedure, as well as an even softer 'multilateral consultative process' to resolve questions regarding implementation.<sup>86</sup> Article 18 states:

*"The Conference of the Parties serving as the meeting of the Parties to this Protocol 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 this Protocol, including through the development of an indicative list of consequences taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."*

Conducted by a panel of experts, rather than by other member States, the latter is non-judicial in character, non confrontational, and advisory rather than supervisory.<sup>87</sup> However, the Marrakech Accords adopted by CoP 7 of the UNFCCC, contain rules and procedures relating to operation of the Kyoto mechanisms.<sup>88</sup> Those CoP decisions set out rights and

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<sup>82</sup> See notes 44-49 above.

<sup>83</sup> See Articles 8 and 11(3)(d).

<sup>84</sup> As above.

<sup>85</sup> See Articles 15 and 20(i).

<sup>86</sup> As above.

<sup>87</sup> D Hunter, J Salzman & D Zaelke (2005) *International Environmental Law and Policy* (2<sup>nd</sup> edition), Foundation Press, New York.

<sup>88</sup> I.e, emissions trading, the clean development mechanism and joint implementation. X Wang, 'Specific Trade Obligations and the Biosafety Protocol' (2003) *Bridges WTO News* 4. Available at: [www.ictsd.org](http://www.ictsd.org) (17 January 2007).

obligations for the parties to the Kyoto Protocol and breach of these rules will result in serious consequences for non-compliance imposed by the enforcement branch of the Protocol's Compliance Committee.<sup>89</sup> The enforceability of these rules contained in CoP decisions implies that these decisions have a de facto binding effect.<sup>90</sup>

Regulation and supervision by CoPs has been identified as part of a general trend away from the solution of problems by strictly judicial means and towards the resolution of conflicts through an equitable balancing of interests and ad hoc political compromise.<sup>91</sup> Used in this way, CoPs become a forum for dispute settlement and treaty compliance through discussion and negotiation, rather than by adjudication of questions of law or interpretation. Moreover, community pressure and the scrutiny of other States in an inter-governmental forum may often be more effective than other more confrontational methods. The MoPs to the Montreal Protocol,<sup>92</sup> and the consultative meeting of the London Convention<sup>93</sup> afford particularly good examples of this form of conflict resolution.

#### 4.6 Soft-Law Measures

From time to time, CoPs adopt measures that have some legal significance for the substantive obligations of State parties but, as is clearly demonstrated by their content or nomenclature, are not intended to be legally binding. CoPs generally turn to such 'soft law' measures because States are unwilling to commit themselves to a hard obligation. These soft-law measures are significant as they may serve as a catalyst for developing a treaty or lead to the generation of a new rule of customary international law.<sup>94</sup> Examples of soft-law measures adopted by CoPs include the CITES Guidelines for Transport and Preparation for Shipment of Live Animals and Plants<sup>95</sup> the Ramsar Framework for Implementation of the Convention<sup>96</sup> and the resolutions of the Consultative Meeting of the Parties to the London Convention that call for a moratorium on the dumping of radioactive waste.<sup>97</sup> The last of these progressed from soft to hard law by becoming incorporated in amendments to the Convention's annexes.<sup>98</sup>

#### 4.7 Other CoP law making powers

In addition to these specific powers, all the more recent MEAs empower the CoP to undertake any additional action that may be required to achieve the purpose of the agreement.<sup>99</sup> Whether this general power includes lawmaking power is highly controversial, as is evident with respect to the Basel Convention. Acting under this power, the Basel CoP

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<sup>89</sup> Procedures and mechanisms relating to compliance under the Kyoto Protocol, Volume III, *The Marrakech Accords*: <http://unfccc.int/resource/docs/cop7/13a03.pdf> (17 January 2007).

<sup>90</sup> X Wang, note 88.

<sup>91</sup> For example, Article 8 of the Montreal Protocol states 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 the treatment of Parties found to be in non-compliance."

<sup>92</sup> AE Boyle, note 1 at 233.

<sup>93</sup> As above.

<sup>94</sup> P Birnie & A Boyle, note 4 at 26-30; P Sands, *Principles of International Environmental Law Framework, Standards and Implementation*, Cambridge University Press, Cambridge at 16-17.

<sup>95</sup> CITES CoP Doc. Plen.2.6 (Rev.), item XIX (1980); see Michael Bowman, 'Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES' (1998) 1 *Journal of International Wildlife Law and Policy* 9.

<sup>96</sup> Ramsar CoP Recommendation 2.3, Doc. C.4.12 (1984) reprinted in (1984) 12 *Environmental Policy and Law Journal* 118.

<sup>97</sup> London Consultative Meeting of the Parties Res. LDC.14 (7) (1983) & LDC.21 (9) (1985), reprinted in *IMO, The London Dumping Convention: The First Decade and Beyond* 207, 208 (1991).

<sup>98</sup> London Consultative Meeting of the Parties Res. LDC.49(16), 51(16) (1993), 1995 UKTS Nos. 89, 91, respectively.

<sup>99</sup> For example Article 7(2)(m) of the UNFCCC; Article 22 of the Desertification Convention; Article 23(4)(i) of the Biodiversity Convention; and Article 15(5)(c) of the Basel Convention.

at its second meeting in 1994 adopted Decision II/12 prohibiting the transboundary movement of hazardous waste from OECD to non-OECD member states.<sup>100</sup> However, some States argued that the decision was not legally binding because the CoP could not alter parties' substantive obligations by using this general power to take action to achieve the objectives of the Convention. The third CoP in 1995 sought to resolve the controversy by adopting an amendment to the Convention that incorporated the substance of Decision II/12.<sup>101</sup> In a less controversial action, which may also have been based on this general power of the CoP, the MOP of the Montreal Protocol decided in 1990 to establish an Interim Multilateral Fund.<sup>102</sup>

## 5 The validity and legally binding nature of CoP law

### 5.1 Express and implied CoP law making powers

The legal basis for binding decision making by CoPs is ambiguous in most cases, in particular, in respect of CoP 'law' that arises from CoP decision making and interpretation powers and powers to impose compliance mechanisms. While there are examples of decision making for which there is explicit authority, in most cases, it appears that decisions are made on the assumption of implied authority.

#### (a) Amendments to MEAs and the adoption of Protocols

The most frequently cited example of explicit CoP power to 'adjust' or amend an MEA with binding consequences is that of Article 2.9 of the Montreal Protocol.<sup>103</sup> Article 2.9 states:

#### Article 2.9

- (a) *Based on the assessments made pursuant to Article 6, 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;*
  - (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 such adjustments and reductions should be;*
  - (iii) *in taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted and no agreement reached, such decisions shall, as a last resort, be adopted by a two thirds majority;*
  - (iv) *the decisions which shall be binding on all Parties, shall forthwith be communicated to the parties by the Depositary. Unless otherwise*

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<sup>100</sup> For the 1995 amendment, see (1995) 6 *Yearbook of International Environmental Law* 779.

<sup>101</sup> See PContini & PSands, 'Methods to Expedite Environment Protection: International Ecostandards' (1972) 66 *American Journal of International Law* 37, 41-53; and G Palmer, note 15, at 273-74 and cited references.

<sup>102</sup> Montreal Protocol MOP Decision II/8, Doc. UNEP/OzL.Pro.2/3, reprinted in 1 (1990) *Yearbook of International Environmental Law* 602. The fund was an interim one and remained in being only until the amendments to the Protocol establishing a permanent fund, which were adopted at the same time as Decision II/8, came into force. Decision II/8, like Decision II/12 of the Basel CoP, does not state on which provision of the agreement it is based.

<sup>103</sup> Montreal Protocol. Article 2.9(a).

*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 Depositary [emphasis added].*

Accordingly, this Article allows for changes by the MoP to the ozone depleting potential of substances that are already subject to the Protocol, or their phase-out schedule. These 'adjustments' can be adopted, as a last resort, by a two-thirds majority decision. The requisite majority is 'double weighted' and must include a majority of both industrialised and developing countries present and voting.<sup>104</sup>

As stated earlier in this paper, Article 2.9 of the Montreal Protocol deviates from the normal consent requirements and process of treaty law in two respects. First, parties are bound by adjustments adopted by the MoP to the Protocol. There is no further consent step, either actual or implied, to be taken by parties. Second, in the event of a majority decision, parties may be bound without consenting and, in fact, against their will.

This law making process must be seen in the context of a consensus among parties that certain substances pose urgent threats to the earth's ozone layer and that these substances should be phased out completely.<sup>105</sup> That is, there is a sense of urgency necessitating binding consequences in circumstances where State consent to such consequences has not been given. In this way, Article 2.9 can be explained as expressing the general consent of parties to the adjustment of the control measures as needed in light of new information. It should also be noted that the scope of this 'general consent' and of the MoP's resulting law making power is limited and subject to the amendment process for annexes and thus to an opt out procedure. Nonetheless, Article 2.9 is remarkable in that it allows for formally binding law making by the MoP in relation to alterations of the treaty's central commitments. Only a handful of other examples exist where MEAs allows CoPs to adopt 'adjustments' to similarly substantive annexes without providing parties with an 'opt-out' possibility. However, in these examples, the relevant decisions require adoption by consensus.<sup>106</sup>

Article 2.9 of the Montreal Protocol and the other limited examples aside, the binding consequences of CoP amendments to MEAs or adoption of protocols is at best implied. While express powers are often given to CoPs to amend MEAs or adopt protocols,<sup>107</sup> the consequences of the exercise of such powers, particularly for dissenting parties is less than certain. It is apparent that the validity of the binding nature of such powers will, for the most part, depend on the existence or otherwise of implied powers of CoPs. This is considered in more detail below.

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<sup>104</sup> Montreal Protocol. Article 2.9(c).

<sup>105</sup> P Szell, note 55 at 212.

<sup>106</sup> Footnote 109 in Bruneel at 22. Namely, the *Sulphur Protocol*, Art 11(6) (relating to Anns. II-IV, which concern matters such as sulphur emission ceilings and percentage emission reductions); *Multi-Effects Protocol*, Article 11(6) (relating to Ann. II, which contains emissions ceilings for various pollutants). An equivalent result is achieved under the *Rotterdam Convention*, Article 22.5. It allows amendments by consensus decision to the Convention's Ann. III, which lists the chemicals subject to the prior informed consent procedure. Bruneel also notes that a comparable approach to altering a treaty's substantive terms can also be found in the *Biosafety Protocol*.

<sup>107</sup> See notes 43-49 and 51-54.

## (b) Decision making powers

Aside from the general powers of CoPs noted above,<sup>108</sup> the binding nature of CoP decision making is at best uncertain. Decisions of CoPs are again largely reliant on implied powers. Explicit specific decision making powers with legally binding consequences are minimal.

Nonetheless, CoP decision making powers do have far reaching effects. For example, the Kyoto Protocol charges the UNFCCC CoP and its protocol counterpart, the MoP, with elaborating the terms that are needed to flesh out several of the Protocol's key provisions and make the Protocol operational. Notable examples are Articles 6.2, 12.7 and 17, which call upon the CoP or the MoP to adopt guidelines, rules or procedures for the Kyoto Mechanisms (joint implementation, clean development mechanism, international emissions trading), and Article 18, which calls upon the CoP/MoP to approve "procedures and mechanisms to determine and address cases of non-compliance" with the Protocol.<sup>109</sup> The sort of detail delegated by the Kyoto Protocol to CoP decisions has tended to historically be dealt with by way of protocols, amendments or annexes.

However, Brunee notes that the above mentioned Kyoto Protocol provisions do not make explicit provision for binding decision making by the CoP or the CoP/MoP. If the relevant provisions could nonetheless be interpreted as authorising binding decisions, these decisions could be conceptualised within the standard framework as covered by 'general consent'. However, some of the enabling provisions entitle the CoP or the MoP to adopt guidelines,<sup>110</sup> a term that arguably carries no connotation of bindingness. Given the exceptional nature of CoP authority to bind States, even the terms "procedures"<sup>111</sup> or "rules"<sup>112</sup> has given rise to competing arguments on whether CoPs have authority to bind.<sup>113</sup>

In view of the above, the position appears to be that procedures or rules can be binding, but are not necessarily so. As noted by Brunee, the fact that Article 18 of the Kyoto Protocol explicitly subjects non-compliance procedures and mechanisms 'entailing binding consequences' to an amendment requirement would seem to suggest that the parties did not envisage that CoP decisions under the various protocol provisions would result in binding law-making.<sup>114</sup> This view is further reinforced by the distinction drawn by the Kyoto Protocol between technical and substantive annexes. Changes to annexes related to emission reduction commitments are subject to express consent, rather than the opt-out procedure.

However, at CoP 7 of the UNFCCC, the parties adopted a decision on the compliance regime for the Kyoto Protocol, which is among the most comprehensive and rigorous in the international arena. It provides for facilitation, promotion and enforcement of the Protocol's equipment and used language that is normally reserved for legally binding commitments.<sup>115</sup> It also contained terms that significantly affects the parties' commitments under the Protocol. For example, under the Marrakech Accords, an industrialised country party is eligible to participate in the Mechanisms only if it is compliant with the:

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<sup>108</sup> Note 99.

<sup>109</sup> However, non-compliance procedures and mechanisms with binding consequences must be adopted by amendment to the Protocol, Article 18.

<sup>110</sup> Articles 5.1, 6.2, 7.4 and 8.4.

<sup>111</sup> See Articles 12.7 and 18

<sup>112</sup> See Articles 3.4 and 17

<sup>113</sup> J Brunee, note 36 at 24 and contra R Churchill & G Ulfstein, note 14 at 639.

<sup>114</sup> J Brunee, note 36 footnote 124 at 25.

<sup>115</sup> See the UNFCCC website: [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (11 January 2007).

- Clean Development Mechanism participation requirements as reflected in section F in the modalities and procedures;<sup>116</sup>
- Joint Implementation participation requirements as reflected in section D in the Guidelines for Implementation of Article 6 of the Kyoto Protocol;<sup>117</sup> and
- Emissions Trading participation requirements as reflected in the Modalities, rules and guidelines for emissions trading under Article 17 of the Kyoto Protocol.<sup>118</sup>

However, the consequence of non-compliance with the CoP 7 decision remains unresolved. Whether or not the mechanism rules, formally, are legally binding, they significantly affect the position of a party under the Agreement.

### (c) Interpretation and supervisory powers

Interpretation powers and supervisory powers expressly authorized by the MEA (as per Article 10(1) of the Montreal Protocol discussed above) are clearly intended to be legally binding. On the other hand the legally binding nature of interpretations of MEAs or the exercise of supervisory powers of CoPs, where the power of interpretation is not expressly conferred by the MEA, is more questionable. Unlike interpretations specifically authorized by an MEA or supervisory powers expressly conferred by the MEA, these powers cannot derive binding force from the agreement as such and, again, it appears that there is a reliance on implied powers.

## 5.2 Reviewing the validity of the exercise of CoP law making powers

From the above it can be seen that CoPs exercise their functions at the interface of the law of treaties and international institutional law. To date, very little consideration has been given to the international legal personality of the CoP. Further, there is also some dispute about whether CoPs exercise law making powers at all.<sup>119</sup>

As outlined above, this paper submits that there are various avenues by which such powers are exercised, albeit that the exercise of certain powers are more within the realm of norm creating than others (for example, decision making powers with binding consequences as against general supervisory powers with less significant binding implications).

To be validly exercised, the CoP law making powers identified in this paper, in particular, those exercised in reliance on implied law making powers, must either fall within one or both of the law of treaties or international institutional law. The appropriate characterisation of the exercise of CoP law making powers and, therefore, whether the exercise of such powers contributes to the development of international environmental law, is considered below.

### (a) The law of treaties

Without a clear provision in the treaty establishing the legal consequences of a resolution, recommendation or decision, the legal effect of such acts is unclear. For example, the legal effect of the resolution adopted by the ninth consultative meeting of the CoP under the London Convention on the dumping of radioactive wastes at sea, which agreed to a 'suspension of all dumping at sea of radioactive wastes and other radioactive matter'.<sup>120</sup>

<sup>116</sup> Decision 3/CMP.1. Available at: [http://unfccc.int/kyoto\\_protocol/mechanisms/items/1673.php](http://unfccc.int/kyoto_protocol/mechanisms/items/1673.php) (20 January 2007).

<sup>117</sup> Decision 9/CMP.1. Note 116.

<sup>118</sup> Decision 11/CMP.1. Note 116.

<sup>119</sup> For example, J Brunee, note 36 at 18.

<sup>120</sup> Copy available at: <http://www.londonconvention.org/Documents.htm> (7 January 2007).

Such resolutions addressing substantive matters are not binding *per se*, although they may contribute to the development of customary international law, or may set forth an authoritative interpretation of the international agreement under which they are adopted. The resolution or act could also bind those States supporting it through the operation of some general principle of law, such as the principle of estoppel.<sup>121</sup> Where the act is an internal act of the organisation (adopting a budget or procedural rules, or establishing a subsidiary organ), the resolution may bind all members of the organisation as a matter of the internal law of the organisation.<sup>122</sup>

However, it is submitted that all acts and decisions of CoPs within the framework of the particular treaty should be considered valid (including any legally binding consequences between the parties) under the law of treaties by virtue of the effect of Article 31 of the *Vienna Convention on the Law of Treaties (Law of Treaties)*. Article 31(2) states that:

*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

- (b) *any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
- (c) *any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

Article 31(3) further states:

*There shall be taken into account, together with the context:*

- (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
- (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and]*
- (c) *any relevant rules of international law applicable in the relations between the parties.*

In view of Article 31(3), decisions and acts of institutions established by treaties, even if they are not binding, have assumed a particular importance. For example, the CITES Conf. Resolution 5.11 concerning the meaning of 'pre-Convention specimen'<sup>123</sup> and Appendix I to Decision II/8, adopted at the second meeting of the parties to the Montreal Protocol establishing an indicative list of categories of incremental cost to be used by the Financial Mechanism.<sup>124</sup>

Many other far reaching decisions affecting the use of natural resources have resulted from acts of CoPs in reliance on Article 31(3). For example, the 1985 resolution of the consultative meeting of the parties to the London Convention adopting a moratorium on the

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<sup>121</sup> See *Nuclear Tests* cases, discussed at p 151 below, see also P Klein (2001) *Bowett's Law of International Institutions* (5<sup>th</sup> edition), Street & Maxwell, London at 289.

<sup>122</sup> The ICJ affirmed that resolutions of the General Assembly can have 'definitive legal effect': *Case Concerning Certain Phosphate Lands in Nauru* (1992) ICJ Reports 251 (concerning UNGA Res 2847).

<sup>123</sup> Copy of the Resolution 5.11 available on the CITES website: <http://www.cites.org/eng/res/05/05-11.shtml> (22 January 2007).

<sup>124</sup> UNEP/OzL. Pro. 2/3, 41, 29 June 1990.

dumping of radioactive waste at sea<sup>125</sup> and the 1989 decision by the CITES conference of the parties to ban the international trade in African elephant products.<sup>126</sup>

Similarly, an interpretation adopted by a CoP or act of supervision agreed by the CoP could be considered a subsequent 'agreement' or subsequent practice' by the parties to a treaty, which, according to Article 31(3)(a) and (b) of the Law of Treaties, as set out above, are elements that may be taken into account in interpreting the treaty.

In all legal systems, interpretation or an act of supervision in decision making by CoPs may be so far-reaching that it comes close to being an exercise in legislation. The interpretation of the London Convention referred to in section 4.4 above approaches legislation. In such cases, the action of the CoP might be better regarded as an agreement *inter partes* modifying or supplementing the MEA constituting a formal amendment to the treaty within the meaning of Article 39 or Article 41(1)(b) of the Law of Treaties, rather than a subsequent agreement or practice within the meaning of Article 31(3)(a) and (b) or the practice of an organ under international institutional law.

### **(b) International institutional law**

On the other hand, if international institutional law applies to CoPs, the CoP, like an IGO, would be regarded as the author of the practice, not the State parties. Under this alternative, the CoP would benefit from implied powers and the law of treaties would essentially not be applicable.

To determine whether international institutional law applies to CoPs to make the exercise of their law making powers legally binding, it is necessary to consider whether:

- (i) CoPs are international organisations; and, if so,
- (ii) whether CoPs have the implied powers referred to above.

There is no internationally accepted definition of what constitutes an international organisation. Schermers and Blokker define international organisations as:

*...forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law.*<sup>127</sup>

CoPs could be seen as 'self contained', in the sense that MEAs are subject only to the law of treaties and not to international institutional law. However, the CoP and its subsidiary bodies are self-governing since State parties may influence the work of these organs only by acting through them. CoPs also do not take instructions from the international organisation hosting their secretariat. Indeed the UN Secretary-General has noted, in relation to the UNFCCC, that 'the Conference of the Parties to the Convention is an independent legal character and is not a subsidiary of the General Assembly or of any other body'.<sup>128</sup> Similarly, Sands considers that "these institutional arrangements are, in effect, international organisations".<sup>129</sup> Further, the UN Office of Legal Affairs, in an opinion of 4 November 1993, stated that the UNFCCC established an "entity/organization" with international legal personality; and, in an

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<sup>125</sup> For details, see the London Convention website: [http://www.londonconvention.org/London\\_Convention.htm](http://www.londonconvention.org/London_Convention.htm) (13 January 2007).

<sup>126</sup> P Sands (2003), note 94 at 92.

<sup>127</sup> HG Schermers & N M Blokker (1995) *International Institutional Law* (3<sup>rd</sup> edition).

<sup>128</sup> Note by the Secretary-General, UN Doc. A/AC.237/79/Add.1 at 7 (1994).

<sup>129</sup> P Sands (2003), note 94 at 92.

opinion of 18 December 1995, it added that the bodies established by this Convention “have certain distinctive elements attributable to international organisations”.<sup>130</sup>

Churchill and Ulfstein conclude that the law of CoPs resembles that of IGOs more than it does the general law of treaties for the following reasons:<sup>131</sup>

- (a) MEAs are obviously treaties, but decisions of CoPs and subsidiary bodies at the internal level are not. As a consequence, the law of treaties does not directly apply to such decisions. The hierarchy of decision making under the MEA also forms a distinct feature of international institutional law.
- (b) The functions of CoPs and other autonomous institutional associations (**AIA**s) at the internal level are similar to IGOs. Although the law of treaties deals with some functions of AIAs, such as treaty amendment, it does not address such issues as the establishment of subsidiary bodies; the adoption of rules of procedure, financial rules and the budget; and the binding character of such decisions. International institutional law is far better equipped to handle such questions.
- (c) Finally, there is no indication that States parties to MEAs, by not establishing formal IGOs, intended to create less effective bodies at the internal level. Rather, it is assumed that the parties wanted to establish an effective and dynamic institutional framework, and thus that both the doctrine of implied powers and reliance on the practice of the treaty bodies should apply.<sup>132</sup>

In view of the above, Churchill and Ulfstein determine that, with regard to institutional organisation matters, CoPs are virtually identical to international organisations. Therefore, in the context of these matters, the principles of international institutional law, such as the doctrine of ‘implied powers; should supplement the law of treaties when it comes to assessing a CoPs decision making powers. However, Churchill, Ulfstein and Brunee note that the role of CoPs in international law making, that is, the creation of law that would apply between State parties, under MEAs, is more ambiguous.<sup>133</sup>

It is submitted that the law making powers of CoPs resemble those of many international organisations and, accordingly, it is arguable that international institutional law does apply between State parties. The difficulty with this contention is that resort to the doctrine of ‘implied powers’ under international institutional law would likely be severely constrained by the doctrine of ‘ultra vires’. The principle issue being that an international body can make binding law only where explicitly authorised in its constituent treaty. Consequently, Brunee concludes that it seems more plausible to conceptualise MEA based law making within the law of treaties and the various modes of consent it allows for.<sup>134</sup>

The relationship between the doctrine of implied powers and the doctrine of ultra vires is considered in detail below and it is submitted that this conclusion should be the subject of

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<sup>130</sup> United Nations Office of Legal Affairs, *Arrangements for the Implementation of the Provisions of Article 11 of the UN Framework Convention on Climate Change Convention Concerning the Financial Mechanism*, para. 4 (4 November 1993).

<sup>131</sup> Note 14 at 633-634.

<sup>132</sup> R Churchill & G Ulfstein, note 14 at 632-633.

<sup>133</sup> R Churchill and G Ulfstein, note 14 at 636-642; J Brunee, note 36; and see also N D White (1996) *Principles of the Institutional Law of International Organizations* at 268-273.

<sup>134</sup> Note 36 at 16.

further research and review, given its significance for the validity of CoP law making powers and the implications for the extent of the exercise of such powers.

### 5.3 The doctrine of implied powers in international institutional law

International institutional law has developed a doctrine of “implied powers” under which an effective interpretation of the treaty establishing the IGO is adopted that emphasises its object and purpose.<sup>135</sup> As stated by the International Court of Justice in Advisory Opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

*The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers.*<sup>136</sup>

Whether the doctrine of implied powers can be applied to CoPs established by MEAs depends on whether CoPs should properly be called IGOs and, therefore, governed by international institutional law. Churchill and Ulfstein conclude that in spite of not being established as formal IGOs, the institutions of MEAs should be considered to possess international legal personality and the capacity to act on the external plane, particularly in relation to the conclusion of agreements in the form of treaties with other subjects of international law.<sup>137</sup>

It seems clear that CoPs do have implied powers in relation to internal decision making. Like formal IGOs, they may enjoy similar powers in relation to matters concerning substantive obligations. CoPs have taken various lawmaking decisions that apparently were intended to be, and seem to be regarded as, legally binding. Since no express provision in the relevant MEA authorized their adoption, these decisions could be regarded as being based on implied powers. One example of such a decision is the quota systems adopted by CITES for trade in various animal products such as ivory.<sup>138</sup> Although the implied-powers doctrine could serve as the legal basis of this decision and other examples, it is a somewhat uncertain foundation for them. A State party unhappy with such a decision could argue that, as it was not expressly authorized by the MEA concerned, the CoP was acting *ultra vires* and/or was disregarding the amendment procedure of the MEA (insofar as the decision could be seen as amending the agreement). For this reason, it may be better to regard any such decisions that have not been challenged, as agreements in simplified form between parties to the MEA, rather than as decisions based on implied powers.<sup>139</sup> The question whether implied powers constitute a possible basis for decision making is perhaps not as critical for those MEAs (of which CITES is not one) that contain a general provision of the kind described above permitting any action to achieve the purposes of the agreement.<sup>140</sup> For Conventions with these general provisions, the law of treaties would seem to accommodate all law making powers of CoPs that do not, for explicit reasons, require a formal amendment, adjustment or the adoption of a protocol.

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<sup>135</sup> R Churchill and G Ulfstein, note 14 at 632.

<sup>136</sup> 1996 ICJ REP.66, 79, para 25 (8 July).

<sup>137</sup> J Brunee, note 36 at 29.

<sup>138</sup> P Sands, note 94 at 380. See also S Lyster, note 73 at 248-49.

<sup>139</sup> J Brunee, note 36.

<sup>140</sup> See note 99.

On the assumption that CoPs can be properly characterized as IGOs, Churchill and Ulfstein identify a number of consequences of applying international institutional law with its implied powers to CoPs.<sup>141</sup>

- (a) Any implied powers would supplement the law of treaties. For example, while several MEAs explicitly provide for the power to establish subsidiary bodies, such as the UNFCCC in Article 7(2)(i), this power should also be assumed in the absence of a specific provision.<sup>142</sup> In MEAs that do contain such a provision, the doctrine of implied powers will have limited relevance.
- (b) The application of international institutional law may also furnish certain presumptions in matters that are not clear in an MEA (or the rules of procedure of the CoP), for example, the legal nature of decisions by the CoP and its subsidiary bodies. Article 6(2)(f) of the Ramsar Convention gives the CoP the power both to make 'recommendations' and to adopt 'resolutions', which might suggest that 'resolutions' are binding and 'recommendations' are not. However, as contended by Amerasinghe, this and similar differences in wording in other MEAs should not generally be assumed to have been intended to indicate different powers to adopt binding decisions on the internal plane. As with IGOs, internal decisions, such as guidance by the CoP to subsidiary bodies and the secretariat, should be considered to be binding unless the MEA or the relevant decision itself specifically indicates that it was intended to be non-binding.<sup>143</sup>
- (c) Applying international institutional law to CoPs may lead to outcomes that would not be accepted under the law of treaties. For example, Churchill and Ulfstein note it has been argued that under the doctrine of implied powers a State can be expelled from an international organization even in the absence of an express provision in its constitution if the party through its behaviour prevents the organization from executing its functions.<sup>144</sup> Under the law of treaties, on the other hand, the only basis for expulsion would be a material breach of the treaty.<sup>145</sup>
- (d) Finally, in respect of the rules of procedure adopted by CoPs, decisions are generally taken by a simple majority.<sup>146</sup> This means that quite extensive powers may be exercised by majority voting if implied powers exist, such as adopting a binding program for developing new substantive commitments, establishing subsidiary organs and determining their composition, and, presumably, expelling State parties to MEAs. However, decisions on

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<sup>141</sup> R Churchill and G Ulfstein, note 14 at 633-634.

<sup>142</sup> CF Amerasinghe, J Crawford & J Bell (1996) *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge at 140.

<sup>143</sup> CF Amerasinghe, J Crawford & J Bell, note 142. HG Schermers & NM Blokker, note 127 at 744.

<sup>144</sup> See, for example, Rule 40(1) of the Rules of Procedure of both the Basel Convention (<http://www.basel.int/text/rules.html>) (12 January 2007) and the Biodiversity Convention (<http://www.biodiv.org/convention/rules.shtml>) (12 January 2007). In the absence of formally adopted rules of procedure, the UNFCCC applies draft rules contained in UN Doc. FCCC/CP/1996/2. Draft Rule 42 on majority voting, however, is not applied. See *Report of the Conference of the Parties on its Fifth Session*, UN Doc. FCCC/CP/1999/6, para. 14.

<sup>145</sup> R Churchill and G Ulfstein, note 14 at 634

<sup>146</sup> R Churchill and G Ulfstein, note 14 citing M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Yearbook of International Environmental Law* 123 at 134-137.

substantive matters usually require a qualified majority, and generally consensus is applied in both procedural and substantive matters.

While these consequences are relevant in any consideration of the law making role of CoPs, they do not undermine or prevent CoPs from effectively performing law making functions under international institutional law. The only real limitation on the exercise of implied powers by CoPs, on the assumption that international institutional law does apply to CoP law making, is that imposed by the doctrine of ultra vires.

#### 5.4 The doctrine of ultra vires

The legal status of an act or decision adopted by international organisations in excess of its authority generally depends on whether there is a possibility for review of that decision.<sup>147</sup> However, one of the complexities of the law of international organisations is that there is no real review machinery of their acts and decisions.

Some writers consider that the acts and decisions of international organisations cannot be regarded as automatically void if it is not possible to appeal them and no machinery exists for determining objections raised against them.<sup>148</sup> Others maintain, however, that even in the absence of compulsory jurisdiction or review machinery, the final acts and decisions that are manifestly outside the scope of the powers of an international organisation, or that are based on irrelevant political considerations, should be regarded as ultra vires and without legal effect.<sup>149</sup>

A distinction is generally drawn between procedural and substantive ultra vires acts and decisions. Generally stated, procedural irregularities (such as matters relating to voting methods and requirements, committee appointments and failure to comply with prescribed procedure) would not normally result in the relevant act being invalidated.

More relevant for the purpose of this paper, however, is the implication of ultra vires acts and decisions of CoPs on substantive, in particular, law making, matters. Opinion is divided among legal commentators on whether they are void ab initio or voidable.<sup>150</sup> However, it appears from the jurisprudence of the International Court of Justice and the law and practice of international organisations that, unless there are express provisions to the contrary, substantive ultra vires acts and decisions of international organisations are not void ab initio, but only cease to give rise to binding legal obligations with effect from the date of their invalidation.<sup>151</sup>

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<sup>147</sup> E Oseike, 'The legal validity of ultra vires decision of international organisations' (1983) 77 *American Journal of International Law* 239 at 243.

<sup>148</sup> D Pollard, 'Conflict Resolution Producers Associations' (1982) *International and Comparative Law Quarterly* 99 at 120; and S Oseike, 'Unconstitutional Acts in Organisations: The Law and Practice of the International Civil Aviation Organisations' (1979) *International and Comparative Law Quarterly* at 28.

<sup>149</sup> E Oseike, note 148 at 24 citing Judge Morelli in the *Certain Expenses* case (1962) ICJ REP at 222 and the dissenting opinion of Judge Bustamante at 304.

<sup>150</sup> D Ciobanu (1975) *Preliminary objections: related to the jurisdiction of the United Nations political organs*, The Hague, Nijhoff; H Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations' in (1965) *Cambridge Essays in International Law* 64; and S Oseike 'Ultra Vires' Acts in International Organisations – The Expense of the International Labour Organisation' (1976-1977) 48 *British Yearbook of International Law* 259.

<sup>151</sup> Advisory Opinion on the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (1960) ICJ Rep at 171 and subsequent resolution A.21 (II) 6 April 1961 25, cited by S Oseike, note 150 at 244.

## 5.5 State consent, sovereignty, efficiency, legitimacy and the validity of CoP law

It is clear that acts and decisions of CoPs are being accepted as legally valid, notwithstanding the question marks surrounding the legal basis for the exercise of these powers. While the legally binding nature and characterization of CoP acts and decisions as 'law' will and should continue to be the subject of further research and discussion, the importance of this CoP made law in determining the effectiveness of MEAs means that efforts should also be directed at ensuring its validity. Whether law making powers of CoPs fall within the law of treaties or international institutional law, in either case, provided the interpretation adopted by the CoP is uncontested and not modified by further practice, it is likely to be regarded as authoritative.

The authoritative nature of CoP law making powers, even if not legally binding, must, in the interim be vigilantly preserved in the interests of protecting and promoting the inroads CoPs have made in affording efficient and effective responses to environmental challenges that require a timely response from a great number of players on usually highly political complex subject matter.

To this end, the current emphasis, in the context of background research in enhancing the binding nature of CoP law making powers, should be on preserving and ensuring the legitimacy of CoP made law. It is noted that there is a lack of consensus on what constitutes 'legitimacy', but it is clear that legitimacy cannot be assessed in isolation from notions of State consent and sovereignty.

Bodansky identifies a normative and a sociological meaning of legitimacy. The former being "whether a claim to authority is well founded", the latter being concerned with whether those to whom authority is addressed "accept it as justified", in other words whether governance is perceived as legitimate.<sup>152</sup> It is argued that it is the latter which should be the focus of CoP law making.<sup>153</sup>

Presently, the perceived legitimacy of CoP law making appears to largely rest upon the consent-based structure of treaty law.<sup>154</sup> Bruneel observes that this firm grounding of international environmental law in consensual processes has helped shield it from the crisis of legitimacy that has afflicted other areas of international law, such as trade law.<sup>155</sup> To the extent that relevant domestic processes are triggered before international obligations are incurred, consent can afford international environmental law at least a degree of legitimisation.<sup>156</sup> If that link is broken, attention inevitably focuses upon the international law making process and upon ways in which it could be improved to overcome the 'democracy deficit'.<sup>157</sup> To the extent that CoPs are assuming more influential law-making roles,

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<sup>152</sup> D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 93 *American Journal of International Law* 596 at 597.

<sup>153</sup> See also J Bruneel, note 36 at 21.

<sup>154</sup> See Article 11 of the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, reprinted in 8 ILM 679, as cited in J Bruneel, note 36 at 5.

<sup>155</sup> Note 36 at 10.

<sup>156</sup> R Keohane & JS Nye Jr, 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy', John F Kennedy School of Government Faculty Research Working Paper Series, *Kennedy School of Government Working Paper No 01-004*, February 2001. Available at [http://papers.ssrn.com/paper.taf?abstract\\_id=262175](http://papers.ssrn.com/paper.taf?abstract_id=262175) (13 January 2007).

<sup>157</sup> See, for example, J Crawford & S Marks, 'The Global Democracy Deficit: An Essay in International Law and Its Limits' in D Archugi et al (eds.) (1998) *Re-Imagining Political Community*, London School of Economics and Political Science, London.

legitimacy considerations are emerging as increasingly important.<sup>158</sup> In particular, these considerations apply with particular force in the context of global environmental concerns, such as climate change, where international decision-making has increasingly direct implications for civil society (private and corporate actors alike).<sup>159</sup>

Presently, the exercise of powers by a CoP is generally only done by consensus or at least must be approved by a majority of member States. This means that any such exercise of powers constitutes some form of understanding or agreement among the sovereign States that participated in its adoption. Further, it could even be argued that those dissenting are legally bound by virtue of their own principle agreement to the terms of the MEA and all associated resolutions and amendments to its terms. From this perspective, an exercise of power accepted by a majority of States in the proper exercise of their rights should be considered legally binding or at least valid. However, postulating that a CoP can exercise law making powers that bind all parties, including those who did not support the decision,<sup>160</sup> is inconsistent with the traditional consent based structure of treaty law and, consequently, threatens its legitimacy and validity. Further, majority voting may risk alienating powerful minorities that simply ignore those decisions. Consequently, the use of law making powers by CoPs must be exercised with caution.

On the other hand, while consensus decision making promotes the taking of decisions that are likely to be universally acceptable, it slows down the reaching of decisions considerably and leads to decisions that represent the lowest common denominator and that are vague or ambiguous.<sup>161</sup> There is also no agreement on what is meant by consensus and how long efforts should be expended to try to reach consensus. Churchill and Ulfstein note that, as to the first question, “consensus is usually taken to mean the absence of formal objection to a proposed decision (which is not necessarily the same as unanimity)”.<sup>162</sup> There is no clear answer to the second question.

Further, the mounting concern regarding the urgent nature of various environmental problems has prompted calls for more efficient and effective international law responses that could produce meaningful and binding outcomes. Such calls have led to suggestions that procedures, within the MEA framework, should be implemented that can yield decisions without unanimous consent. However, these suggestions have been met with significant resistance in view of the loss of sovereignty necessarily entailed by the adoption of such processes.<sup>163</sup> Consequently, such processes do pose a threat to the legitimacy of MEA based international law, which is presently embodied in its consent based nature.

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<sup>158</sup> See, for example, D Bodansky, note 152 at 597, 607-610; and J Brunee, note 36 at 5.

<sup>159</sup> J Brunee, note 36 at 11, citing R Falk & A Strauss, ‘On the Creation of a Global Peoples’ Assembly: Legitimacy and the Power of Popular Sovereignty’ (2000) 36 *Stanford Journal of International Law* 191 at 213-24.

<sup>160</sup> See R Churchill & G Ulfstein, note 14 at 5.

<sup>161</sup> P Birnie & A Boyle, note 4 at 37.

<sup>162</sup> Note 14 at 643.

<sup>163</sup> This is evident by the way CoPs normally try to take decisions by consensus if possible and in the more recent MEAs, the CoP is legally required to make every effort to reach consensus before resort is had to voting, particularly under recent arrangements.

## 6 Limitations in the efficient and effective exercise of the law making powers of CoPs

In addition to the above uncertainties and difficulties surrounding the legal validity of CoP decisions and acts, the following criticisms have also been levelled at the effectiveness of CoPs to develop international environmental law:

- Agreement within the CoP is typically difficult to achieve. Political interests often become paramount, with North-South differences and conflicting political and economic interests among developed countries frequently highlighted, stymieing progress.<sup>164</sup> Moreover, even where adequate participation is achieved, CoPs are often open to the criticism that their decisions represent only the lowest common denominator of agreement, undermining the purported 'fiduciary' role of these institutions.
- While CoPs have certain advantages in terms of flexibility, they have very inadequate parliamentary input resulting in a democratic deficit.<sup>165</sup> With respect to negotiations of the CoPs to the UNFCCC, the existing practices fails to meet expected standards of legitimacy, transparency and accountability required for successful governance in the 21<sup>st</sup> century.<sup>166</sup>
- Since CoPs rely for effectiveness on consent and the operation of community pressure, they may be thought to lack real enforcement power. Moreover, the essentially political character of CoPs may dilute the force of legal standards and merely serve to legitimise practices otherwise insupportable from an environmental viewpoint.

Accordingly, the principal challenges in asserting a role for CoPs in law making is to balance the four following objectives:

- (a) law making efficiency that provides an effective, appropriate and timely response to the urgency of global environmental concerns;
- (b) the promotion of legitimacy, transparency and accountability in the exercise of law making powers and in voting arrangements with respect to the exercise of those powers;
- (c) protection of the sovereignty of member States; and
- (d) the adoption of measures that preserve the validity and promote the enforceability of the exercise of CoP powers in the creation of binding international law.

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<sup>164</sup> United Nations Development Programme, 'Strengthening international governance: priority tasks' in *World Resources 2002-2004: Decisions for the Earth: Balance, voice and power*, World Bank, World Resources Institute, 2003: [http://www.wri.org/biodiv/pubs\\_content\\_text.cfm?cid=1804](http://www.wri.org/biodiv/pubs_content_text.cfm?cid=1804) (12 January 2007); and J Speth, 'A New Green Regime: Attacking the Root Cause of Global Environmental Deterioration' (2002) 44(7) *Environment* 16-25.

<sup>165</sup> See, for example, J Crawford & S Marks, note 159.

<sup>166</sup> T Spencer, *The Evolution of Global Legislators: Practice, Theory, Practice*, prepared for *Global Environmental Governance: the Post Johannesburg Agenda*, 23-25 October 2003, Yale Center for Environmental Law and Policy, New Haven, CT: <http://www.yale.edu/gegdialogue/papers.htm> (17 January 2007).

## 7 Recommendations for strengthening the law making role of CoPs

In view of the above limitations on CoP law making powers and the imperative to preserve the legitimacy of the exercise of CoP law making, it is recommended that:

- The use of two-thirds majority voting be expanded to include a majority of developing State parties and a majority of developed State parties, such as in the Montreal Protocol, to other CoPs, particularly those that find it difficult to reach consensus.<sup>167</sup>
- The interactional understanding of CoP law making powers, as proffered by Brunee, is promoted and built upon.<sup>168</sup> Brunee observes that CoPs and their subsidiary bodies, in providing stable forums for exchange and examination of problems at hand from different angles, are particularly well placed to facilitate the continuous interactional processes that allow shared understandings to evolve, and collective identities and concerns to be shaped. As noted above, being formally binding says little about the norm's own ability, independent of the threat of enforcement to influence State conduct. Consequently, Brunee suggests that rather than try to fit CoP within notions of 'soft law' and 'hard law' and analyse whether such law is binding, an understanding of CoP law making as something interactional and dynamic should be adopted and added to traditional formal notions of legally binding law. This interactional account acknowledges that all norms can be influential and that law making occurs along a continuum of (formally) binding and non-binding outputs that accommodates, for example, the reality of the 'grey zone' of CoP decisions.
- To preserve the imperative of legitimacy, the meetings of CoPs should continue to be open to representatives of the parties and others and active participation in meetings should be encouraged. This will also assist in ensuring transparency of operation and cooperation with other intergovernmental bodies and non-state actors.<sup>169</sup>
- Finally, binding decision making directly by a COP rather than subject to the consent of States, should be addressed and encouraged in the drafting of all future MEAs. For example, by way of the inclusion of general provisions empowering CoPs to take all steps necessary to achieve the objectives of the Convention that explicitly includes the exercise of legally binding powers.

## 8 Research priorities

The review undertaken in this paper of the development of international environmental law by MEA CoPs has identified a number of research priorities which must be advanced to

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<sup>167</sup> See P Szell, note 55 at 213. It is noted that it may not be so easy to decide the form that weighted voting or special majorities should take for MEAs that cover a broad spectrum of issues and interests, such as the Biodiversity and Desertification Conventions.

<sup>168</sup> J Brunee, note 36.

<sup>169</sup> As above. For example, more than 200 intergovernmental and non-governmental organizations were represented at the meetings of the CoP of the UNFCCC in Bonn in 1995 and in Kyoto in 1997.

develop, enhance and legitimise the law making powers of MEA CoPs. In particular, research should be directed at providing guidance on the following issues:

- (a) The legal personality of CoPs and whether the exercise of CoP powers are properly characterised within the law of treaties and/or within international institutional law. If both international institutional law and the law of treaties apply, what implications this has for the exercise of CoP powers.
- (b) How the doctrines of implied powers and ultra vires should be applied to CoP decision making that is characterised as international institutional law.
- (c) What specific or implied powers, within the law of treaties, CoPs have to exercise powers with legally binding consequences, without needing to resort to formal amendments or adjustments of MEAs or the adoption of protocols.
- (d) How efficiencies in CoP decision making can be improved, in particular, by way of expanding majority voting arrangements, as per recent MEAs, while avoiding the position where dissenting parties disregard the exercise of CoP powers with which they do not agree.
- (e) In what ways compliance and enforcement powers of CoPs can be enhanced.
- (f) Whether a practical and acceptable notion of legitimacy can be established and what measures should be taken by CoPs in the course of the exercise of their law making powers to ensure that these powers are properly exercised and that the legitimacy of international environmental law is not undermined.
- (g) Finally, where and how parameters around the exercise of CoP law making powers (both soft law and hard law) should be set. It is suggested that such parameters should be broadly based rather than prescriptive, but should also be referable to the objectives of the MEA.

It is hoped that this paper has demonstrated that CoPs do play a crucial role in the vitality and continuing development of international environmental law, in particular, in the adaptation of international MEA based law to new information and changing circumstances, as the need arises. Further, it is often through the CoP that the most stringent treaty obligations are created and CoPs are also crucial to addressing environmental crises that cannot wait for the development and entry into force of entirely new conventions. The exercise of international law making by CoPs largely overcomes the constraints of international law's consent requirements and facilitates expeditious law making in response to changes in understanding of environmental conditions with which MEAs are trying to deal. However, the current ambiguities regarding the legal nature of CoP powers exposes international environmental governance to challenges, in particular, on the grounds of legitimacy. The difficulty in determining the validity of the exercise of CoP law making powers arises because CoPs exercise their functions at the interface of the law of treaties and international institutional law. Accordingly, urgent further research must be had into the appropriate legal basis and parameters of the law making powers of CoPs. This research is critical to ensuring the ongoing legitimacy of the development of international environmental law by CoPs that seek to implement efficient and effective responses to the ever increasing urgent nature of our global environmental challenges.

### Sample selection of the powers of CoPs under various MEAs and their associated Protocols

Convention	CoP roles	Voting
Ramsar Convention <sup>1</sup>	<ul style="list-style-type: none"> <li>• Article 6(1) states that the CoP is to review and promote the implementation of the Convention.</li> <li>• Article 6(2) states that CoP shall be competent to:               <ul style="list-style-type: none"> <li>• <i>to discuss the implementation of this Convention;</i></li> <li>• <i>to discuss additions to and changes in the List;</i></li> <li>• <i>to consider information regarding changes in the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3;</i></li> <li>• <i>to make general or specific recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna;</i></li> <li>• <i>to request relevant international bodies to prepare reports and statistics on matters which are essentially international in character affecting wetlands;</i></li> <li>• <i>to adopt other recommendations, or resolutions, to promote the functioning of this Convention.</i></li> </ul> </li> <li>• Article 6(3) states:               <p style="margin-left: 20px;"><i>The Contracting Parties shall ensure that those responsible at all levels for wetlands management shall be informed of, and take into consideration, recommendations of such Conferences concerning the conservation, management and wise use of wetlands and their flora and fauna.</i></p> </li> <li>• Article 6(4) states:               <p style="margin-left: 20px;"><i>The Conference of the Contracting Parties shall adopt rules of procedure for each of its meetings.</i></p> </li> <li>• Article 6(5) states:               <p style="margin-left: 20px;"><i>The Conference of the Contracting Parties shall establish and keep under review the financial regulations of this Convention. At each of its ordinary meetings, it shall adopt the budget for the next financial period by a two-third majority of Contracting Parties present and voting.</i></p> </li> </ul>	Article 10 empowers the CoP to adopt amendments to the Convention by a two-thirds majority of the Contracting Parties present and voting.
London Convention <sup>2</sup>	<ul style="list-style-type: none"> <li>• Article XIV states:               <ol style="list-style-type: none"> <li>1 <i>The Government of the United Kingdom of Great Britain and Northern Ireland as a depositary shall call a meeting of the Contracting Parties not later than three months after the entry into force of this Convention to decide on</i></li> </ol> </li> </ul>	Amendments to the Annexes and amendments to the Protocol are adopted by a two-thirds majority. <sup>3</sup>

<sup>1</sup> The equivalent of the CoP is referred to as the "Conference of the Contracting Parties".

<sup>2</sup> As above.

<sup>3</sup> Article XV(1)(a).

Convention	CoP roles	Voting
	<p><i>organizational matters.</i></p> <p>2 <i>The Contracting Parties shall designate a competent Organization existing at the time of that meeting to be responsible for secretariat duties in relation to this Convention. Any Party to this Convention not being a member of this Organization shall make an appropriate contribution to the expenses incurred by the Organization in performing these duties.</i></p> <p>3 <i>The Secretariat duties of the Organization shall include:</i></p> <p>(a) <i>the convening of consultative meetings of the Contracting Parties not less frequently than once every two years and of special meetings of the Parties at any time on the request of two thirds of the Parties;</i></p> <p>4 <i>Consultative or special meetings of the Contracting Parties shall keep under continuing review the implementation of this Convention and may, <u>inter alia</u>:</i></p> <p>(a) <i>review and adopt amendments to this Convention and its Annexes in accordance with article XV;</i>  (b) <i>invite the appropriate scientific body or bodies to collaborate with and to advise the Parties or the Organization on any scientific or technical aspect relevant to this Convention, including particularly the content of the Annexes;</i>  (c) <i>receive and consider reports made pursuant to article VI(4);</i>  (d) <i>promote co-operation with and between regional organizations concerned with the prevention of marine pollution;</i>  (e) <i>develop or adopt, in consultation with appropriate International Organizations, procedures referred to in article V(2), including basic criteria for determining exceptional and emergency situations, and procedures for consultative advice and the safe disposal of matter in such circumstances, including the designation of appropriate dumping areas, and recommend accordingly;</i>  (f) <i>consider any additional action that may be required.</i></p> <p>5 <i>The Contracting Parties at their first consultative meeting shall establish rules of procedure as necessary.</i></p> <ul style="list-style-type: none"> <li>• Article XV states: <p>1 (a) <i>At meetings of the Contracting Parties called in accordance with article XIV amendments to this Convention may be adopted by a two-thirds majority of those present. An amendment shall enter into force for the Parties which have accepted it on the sixtieth day after two thirds of the Parties shall have deposited an instrument of acceptance of the amendment with the Organization. Thereafter the amendment shall enter into force for any other Party 30 days after that Party deposits its instrument of acceptance of the amendment.</i></p> <p>(b) <i>The Organization shall inform all Contracting Parties of any request made for a special meeting under article XIV and of any amendments adopted at meetings of the Parties and of the date on which each such amendment enters into force for each Party.</i></p> <p>2 <i>Amendments to the Annexes will be based on scientific or technical considerations. Amendments to the annexes approved by a two-thirds majority of those present at a meeting called in accordance with article XIV shall enter</i></p> </li> </ul>	

Convention	CoP roles	Voting
	<p><i>into force for each Contracting Party immediately on notification of its acceptance to the Organization and 100 days after approval by the meeting for all other Parties except for those which before the end of the 100 days make a declaration that they are not able to accept the amendment at that time. Parties should endeavour to signify their acceptance of an amendment to the Organization as soon as possible after approval at a meeting. A Party may at any time substitute an acceptance for a previous declaration of objection and the amendment previously objected to shall thereupon enter into force for that Party.</i></p>	
CITES	<ul style="list-style-type: none"> <li>• At CoP meetings the parties are to review the implementation of the present Convention and may: <ul style="list-style-type: none"> <li>(a) <i>make such provision as may be necessary to enable the Secretariat to carry out its duties, and adopt financial provisions;</i></li> <li>(b) <i>consider and adopt amendments to Appendices I and II in accordance with Article XV;<sup>4</sup></i></li> <li>(c) <i>review the progress made towards the restoration and conservation of the species included in Appendices I, II and III;</i></li> <li>(d) <i>receive and consider any reports presented by the Secretariat or by any Party; and</i></li> <li>(e) <i>where appropriate, make recommendations for improving the effectiveness of the present Convention.<sup>5</sup></i></li> </ul> </li> </ul>	<p>Article XV(j) permits amendments to Annexures I and II “<i>provided that votes are received from one-half of the Parties, the amendment shall be permitted by a two thirds majority of Parties casting an affirmative or negative vote.</i>”</p> <p>Article XVII states that amendments to the Convention are “<i>adopted by a two-thirds majority of Parties present and voting</i>”.</p>
Bonn Convention	<ul style="list-style-type: none"> <li>• The CoP has the power to remove a migratory species from Appendix I<sup>6</sup> when the CoP makes certain determinations as set out in Article III(3). The CoP may also make recommendations to ‘Range States’ to take further measures to protect species listed in Appendix I.<sup>7</sup></li> <li>• The CoP is charged with the responsibility of establishing and keeping under review the financial regulations of the Convention.<sup>8</sup></li> <li>• The CoP is responsible for reviewing the implementation of the Convention and may in particular: <ul style="list-style-type: none"> <li>(a) <i>review and assess the conservation status of migratory species;</i></li> <li>(b) <i>review the progress made towards the conservation of migratory species, especially those listed in Appendices I and II;</i></li> <li>(c) <i>make such provision and provide such guidance as may be necessary to enable the Scientific Council and the Secretariat to carry out their duties;<sup>9</sup></i></li> </ul> </li> </ul>	<p>Financial regulations, including the provisions on the budget and the scale of contributions and their modifications are adopted by unanimous vote of the parties present and voting.<sup>10</sup></p> <p>Decisions at a meeting of the CoP require a two-thirds majority of the parties present and voting, except where otherwise stated in the Convention.<sup>11</sup></p> <p>The CoP may amend the Convention at any ordinary or</p>

<sup>4</sup> Appendices I, II and III to the Convention are lists of species afforded different levels or types of protection from over-exploitation.

<sup>5</sup> Article XI.

<sup>6</sup> Migratory species that have been categorized as being in danger of extinction throughout all or a significant proportion of their range are listed on Appendix I of the Convention.

<sup>7</sup> Article III(6).

<sup>8</sup> Article VII(4).

<sup>9</sup> See also Article VIII.

Convention	CoP roles	Voting
	<p>(d) receive and consider any reports presented by the Scientific Council, the Secretariat, any Party or any standing body established pursuant to an Agreement;</p> <p>(e) make recommendations to the Parties for improving the conservation status of migratory species and review the progress being made under Agreements;</p> <p>(f) in those cases where an Agreement has not been concluded, make recommendations for the convening of meetings of the Parties that are Range States of a migratory species or group of migratory species to discuss measures to improve the conservation status of the species;</p> <p>(g) make recommendations to the Parties for improving the effectiveness of this Convention; and</p> <p>(h) decide on any additional measure that should be taken to implement the objectives of this Convention.</p>	<p>extraordinary meeting by a two-thirds majority of the parties present and voting.<sup>12</sup></p>
<p>The Vienna Convention</p>	<ul style="list-style-type: none"> <li>• Article 6 states: <i>The Conference of the Parties shall keep under continuous review the implementation of this Convention, and, in addition, shall:</i> <ul style="list-style-type: none"> <li>(a) <i>Establish the form and the intervals for transmitting the information to be submitted in accordance with article 5 and consider such information as well as reports submitted by any subsidiary body;</i></li> <li>(b) <i>Review the scientific information on the ozone layer, on its possible modification and on possible effects of any such modification;</i></li> <li>(c) <i>Promote, in accordance with article 2, the harmonization of appropriate policies, strategies and measures for minimizing the release of substances causing or likely to cause modification of the ozone layer, and make recommendations on any other measures relating to this Convention;</i></li> <li>(d) <i>Adopt, in accordance with articles 3 and 4, programmes for research, systematic observations, scientific and technological co-operation, the exchange of information and the transfer of technology and knowledge;</i></li> <li>(e) <i>Consider and adopt, as required, in accordance with articles 9 and 10, amendments to this Convention and its annexes;</i></li> <li>(f) <i>Consider amendments to any protocol, as well as to any annexes thereto, and, if so decided, recommend their adoption to the parties to the protocol concerned;</i></li> <li>(g) <i>Consider and adopt, as required, in accordance with article 10, additional annexes to this Convention;</i></li> <li>(h) <i>Consider and adopt, as required, protocols in accordance with article 8;</i></li> <li>(i) <i>Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention;</i></li> <li>(j) <i>Seek, where appropriate, the services of competent international bodies and scientific committees, in particular the World Meteorological Organization and the World Health Organization, as well as the Co-ordinating Committee on the Ozone Layer, in scientific research, systematic observations and other activities pertinent to the objectives of this Convention, and make use as appropriate of information from these bodies and committees;</i></li> <li>(k) <i>Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention.</i></li> </ul> </li> <li>• Articles 8 and 9 empower the CoP to adopt protocols and amendments to the Convention.</li> <li>• Article 11(3)(a) empowers the CoP to adopt procedures for arbitration at its first meeting.</li> </ul>	<p>Article 6(3) states that the CoP is to, by consensus, agree upon and adopt rules of procedure and financial rules for itself and for any subsidiary bodies it may establish, as well as financial provisions governing the functioning of the secretariat.</p> <p>Article 9(3) states: <i>The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourth majority vote of the Parties present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, approval or acceptance.</i></p> <p>Article 9(4) states: <i>The procedure mentioned in</i></p>

<sup>10</sup> Article VII(4).

<sup>11</sup> Article VII(7).

<sup>12</sup> Article X(4).

Convention	CoP roles	Voting
		<p><i>paragraph 3 above shall apply to amendments to any protocol, except that a two-thirds majority of the parties to that</i></p> <p><i>protocol present and voting at the meeting shall suffice for their adoption.</i></p>
<p>The Montreal Protocol<sup>13</sup></p>	<p>Article 11 states:</p> <p>3. <i>The Parties, at their first meeting, shall:</i></p> <ul style="list-style-type: none"> <li><i>(a) adopt by consensus rules of procedure for their meetings;</i></li> <li><i>(b) adopt by consensus the financial rules referred to in paragraph 2 of Article 13;</i></li> <li><i>(c) establish the panels and determine the terms of reference referred to in Article 6;</i></li> <li><i>(d) consider and approve the procedures and institutional mechanisms specified in Article 8; and</i></li> <li><i>(e) begin preparation of work plans pursuant to paragraph 3 of Article 10;</i></li> </ul> <p>4. <i>The functions of the meetings of the Parties shall be to:</i></p> <ul style="list-style-type: none"> <li><i>(a) review the implementation of this Protocol;</i></li> <li><i>(b) decide on any adjustments or reductions referred to in paragraph 9 of Article 2;</i></li> <li><i>(c) decide on any addition to, insertion in or removal from any annex of substances and on related control measures in accordance with paragraph 10 of Article 2;</i></li> <li><i>(d) establish, where necessary, guidelines or procedures for reporting of information as provided for in Article 7 and paragraph 3 of Article 9;</i></li> <li><i>(e) review requests for technical assistance submitted pursuant to paragraph 2 of Article 10;</i></li> <li><i>(f) review reports prepared by the secretariat pursuant to subparagraph (c) of Article 12;</i></li> <li><i>(g) assess, in accordance with Article 6, the control measures provided for in Article 2;</i></li> <li><i>(h) consider and adopt, as required, proposals for amendment of this Protocol or any annex and for any new annex;</i></li> <li><i>(i) consider and adopt the budget for implementing this Protocol; and</i></li> <li><i>(j) consider and undertake any additional action that may be required for the achievement of the purposes of this Protocol.</i></li> </ul>	<p>Decisions under the Convention are generally taken by consensus wherever possible. If all efforts at consensus have been exhausted and no agreement reached, decisions are adopted by a two thirds majority vote of the Parties present and voting, representing a majority of the Parties present and voting.<sup>15</sup></p>

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<sup>13</sup> This Protocol uses the term "meeting of the parties" (MoP) rather than CoP.

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Convention	CoP roles	Voting
	<ul style="list-style-type: none"> <li>The admission and participation of observers is subject to the rules and procedure adopted at the MoP.<sup>14</sup></li> </ul>	
Basel Convention	<ul style="list-style-type: none"> <li>Article 15(5) states that the CoP shall “...keep under continuous review and evaluation the effective implementation of [the] Convention and, in addition, shall: <ul style="list-style-type: none"> <li>(a) Promote the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes;</li> <li>(b) Consider and adopt, as required, amendments to this Convention and its annexes, taking into consideration, inter alia, available scientific, technical, economic and environmental information;</li> <li>(c) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation and in the operation of the agreements and arrangements envisaged in Article 11;</li> <li>(d) Consider and adopt protocols as required; and</li> <li>(e) Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention.<sup>16</sup></li> </ul> </li> <li>The admission and participation of observers at a CoP meeting is subject to the rules of procedure adopted by the CoP.<sup>17</sup></li> <li>Article 15(7) empowers the CoP to undertake evaluations of the effectiveness of the Convention and, “if deemed necessary, to consider the adoption of a complete or partial ban of transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and economic information”.</li> <li>The CoP has certain powers with respect to the appointment and functions of the Secretariat.<sup>18</sup></li> </ul>	<p>Article 15(3) states the CoP “shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules to determine in particular the financial participation of the parties under the Convention.”</p> <p>Article 17(3) states:</p> <p><i>The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, approval, formal confirmation or acceptance.</i></p> <p>Article 17(4) states:</p> <p><i>The procedure mentioned in paragraph 3 above shall apply to amendments to any protocol, except that a two-thirds majority of the Parties to that protocol present and voting at the meeting shall suffice for their adoption.</i></p>

<sup>14</sup> Article 11(5).

<sup>15</sup> See, for example, Article 2(9)(c) and Article 10((9).

<sup>16</sup> See also Article 12 in respect of the CoPs role on the communication by the parties of information related to the implementation of the Convention.

<sup>17</sup> Article 15(6).

<sup>18</sup> Articles 16(1)(k), 16(2) and 16(3).

Convention	CoP roles	Voting
UNFCCC	<ul style="list-style-type: none"> <li>• The CoP is responsible for: <ul style="list-style-type: none"> <li>• Identifying methodologies for calculations of emissions by sources and removal by sinks of greenhouse gases and is responsible for reviewing measures and the adequacy of measures adopted by parties to mitigate climate change.<sup>19</sup></li> <li>• Reviewing available information with a view to taking decisions regarding amendments to the lists in Annexes I and II “as may be appropriate, with the approval of the Party concerned”.<sup>20</sup></li> <li>• Taking action, including actions related to funding, insurance and transfer of technology to address the needs and concerns of developing country parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures.<sup>21</sup></li> </ul> </li> <li>• Article 7(2) states: <p><i>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. To this end, it shall:</i></p> <ul style="list-style-type: none"> <li>(a) <i>Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge;</i></li> <li>(b) <i>Promote and facilitate the exchange of information on measures adopted by the Parties to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention;</i></li> <li>(c) <i>Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention;</i></li> <li>(d) <i>Promote and guide, in accordance with the objective and provisions of the Convention, the development and periodic refinement of comparable methodologies, to be agreed on by the Conference of the Parties, inter alia, for preparing inventories of greenhouse gas emissions by sources and removals by sinks, and for evaluating</i></li> </ul> </li> </ul>	<p>Article 15(3) states:</p> <p><i>The Parties shall make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted amendment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.</i></p>

<sup>19</sup> Article 4(1)(a) and Article 4(2).

<sup>20</sup> Article 4(2)(f).

<sup>21</sup> Article 4(8) and 4(9).

<sup>22</sup> Article 7(6).

Convention	CoP roles	Voting
	<p><i>the effectiveness of measures to limit the emissions and enhance the removals of these gases;</i></p> <p>(e) <i>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, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved;</i></p> <p>(f) <i>Consider and adopt regular reports on the implementation of the Convention and ensure their publication;</i></p> <p>(g) <i>Make recommendations on any matters necessary for the implementation of the Convention;</i></p> <p>(h) <i>Seek to mobilize financial resources in accordance with Article 4, paragraphs 3, 4 and 5, and Article 11;</i></p> <p>(i) <i>Establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;</i></p> <p>(j) <i>Review reports submitted by its subsidiary bodies and provide guidance to them;</i></p> <p>(k) <i>Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies;</i></p> <p>(l) <i>Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and</i></p> <p>(m) <i>Exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.</i></p> <ul style="list-style-type: none"> <li>• Article 7(3) adds that the CoP, at its first session, is charged with the power to “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”.</li> <li>• The admission and participation of observers at CoP meetings is subject to the rules of procedure adopted by the CoP.<sup>22</sup></li> <li>• The CoP is charged with certain functions in respect of the secretariat, the subsidiary body for scientific and technological advice and the subsidiary body for implementation and the financial mechanism of the Convention as set out in Articles 8, 9, 10 and 11.</li> <li>• Article 13 states that the CoP was to consider at its first session the “establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.”</li> <li>• Article 14(2)(b) empowers the CoP to adopt procedures for arbitration and conciliation.</li> <li>• The CoP is empowered by Article 15(2) to amend the Convention at any ordinary session of the CoP and Article 17(1) empowers the CoP to adopt protocols to the Convention.</li> </ul>	

Convention	CoP roles	Voting
The Biodiversity Convention	<ul style="list-style-type: none"> <li>• The CoP is the authority for the financial mechanism for the provision of financial resources to developing country Parties for the purpose of the Convention. This authority includes the power to “<i>determine the policy, strategy and programme priorities, as well as detailed criteria and guidelines for eligibility and access to and utilization of the financial resources including monitoring and evaluation on a regular basis of such utilization</i>” (to be determined at the first CoP and the reviewed on a regular basis after two years of entry of the Convention).<sup>23</sup></li> <li>• The CoP is required to “keep under review the implementation of the Convention” and for this purpose: <ul style="list-style-type: none"> <li>(a) <i>Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 26<sup>24</sup> and consider such information as well as reports submitted by any subsidiary body;</i></li> <li>(b) <i>Review scientific, technical and technological advice on biological diversity provided in accordance with Article 25;</i></li> <li>(c) <i>Consider and adopt, as required, protocols in accordance with Article 28;</i></li> <li>(d) <i>Consider and adopt, as required, in accordance with Articles 29 and 30, amendments to this Convention and its annexes;</i></li> <li>(e) <i>Consider amendments to any protocol, as well as to any annexes thereto, and, if so decided, recommend their adoption to the parties to the protocol concerned;</i></li> <li>(f) <i>Consider and adopt, as required, in accordance with Article 30, additional annexes to this Convention;</i></li> <li>(g) <i>Establish such subsidiary bodies, particularly to provide scientific and technical advice, as are deemed necessary for the implementation of this Convention;</i></li> <li>(h) <i>Contact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them; and</i></li> <li>(i) <i>Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation.</i><sup>25</sup></li> </ul> </li> </ul>	By consensus the CoP must agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat. <sup>26</sup>
Desertification Convention	<ul style="list-style-type: none"> <li>• The CoP is responsible for: <ul style="list-style-type: none"> <li>• Reviewing research priorities periodically on the advice of the Committee on Science and Technology.<sup>27</sup></li> <li>• Establishing and/or strengthening networks of regional education and training centres to combat desertification</li> </ul> </li> </ul>	Article 30(3) states: <i>The Parties shall make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all</i>

<sup>23</sup> Article 21.

<sup>24</sup> Namely, reports from contracting parties on measures taken for the implementation of the provisions of the Convention and their effectiveness in meeting the objectives of the Convention.

<sup>25</sup> Article 23(4). The CoP is also empowered by Article 23(5) to determine the rules of procedure for the admission and participation of observers to CoP meetings.

<sup>26</sup> Article 23(3).

<sup>27</sup> Article 17(2).

Convention	CoP roles	Voting
	<p>and mitigate the effects of drought.<sup>28</sup></p> <ul style="list-style-type: none"> <li>• Promoting the availability of financial mechanisms and other support structures to assist affected developing country parties to implement the Convention.<sup>29</sup></li> <li>• Identifying and agreeing upon modalities for the Global Mechanisms.<sup>30</sup></li> <li>• Article 22 states:  <i>The Conference of the Parties is the supreme body of the Convention. It shall make, within its mandate, the decisions necessary to promote its effective implementation. In particular, it shall:</i> <ul style="list-style-type: none"> <li>(a) <i>regularly review the implementation of the Convention and the functioning of its institutional arrangements in the light of the experience gained at the national, subregional, regional and international levels and on the basis of the evolution of scientific and technological knowledge;</i></li> <li>(b) <i>promote and facilitate the exchange of information on measures adopted by the Parties, and determine the form and timetable for transmitting the information to be submitted pursuant to article 26, review the reports and make recommendations on them;</i></li> <li>(c) <i>establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;</i></li> <li>(d) <i>review reports submitted by its subsidiary bodies and provide guidance to them;</i></li> <li>(e) <i>agree upon and adopt, by consensus, rules of procedure and financial rules for itself and any subsidiary bodies;</i></li> <li>(f) <i>adopt amendments to the Convention pursuant to articles 30 and 31;</i></li> <li>(g) <i>approve a programme and budget for its activities, including those of its subsidiary bodies, and undertake necessary arrangements for their financing;</i></li> <li>(h) <i>as appropriate, seek the cooperation of, and utilize the services of and information provided by, competent bodies or agencies, whether national or international, intergovernmental or non-governmental;</i></li> <li>(i) <i>promote and strengthen the relationship with other relevant conventions while avoiding duplication of effort; and</i></li> <li>(j) <i>exercise such other functions as may be necessary for the achievement of the objective of the Convention.</i></li> </ul> </li> <li>• Article 22(3) adds that the CoP, at its first session, is charged with the power to “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</li> </ul>	<p><i>efforts at consensus have been exhausted and no agreement reached, the amendment shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting at the meeting. The adopted amendment shall be communicated by the Permanent Secretariat to the Depositary, who shall circulate it to all Parties for their ratification, acceptance, approval or accession.</i></p>

<sup>28</sup> Article 19(4).

<sup>29</sup> Article 21(1) and (2).

<sup>30</sup> Article 21(5).

<sup>31</sup> Article 22(7).

<sup>32</sup> Articles 23, 24 and 25.

<sup>33</sup> Article 26.

Convention	CoP roles	Voting
	<p><i>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”.</i></p> <ul style="list-style-type: none"> <li>• The admission and participation of observers at CoP meetings is subject to the rules of procedure adopted by the CoP.<sup>31</sup></li> <li>• The CoP is also charged with powers in respect of the Secretariat, the Committee on Science and Technology and the networking of institutions, agencies and bodies.<sup>32</sup></li> <li>• The CoP is responsible for reviewing reports on the implementation of the Convention and facilitating the provision of support for the compiling and communicating of information to developing countries.<sup>33</sup></li> <li>• Under Article 27, the CoP is to consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention.</li> <li>• The CoP is empowered, pursuant to Article 28, to adopt procedures for arbitration and conciliation.</li> </ul>	
Kyoto Protocol	<ul style="list-style-type: none"> <li>• Article 3.4 states: <i>The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I, taking into account uncertainties, transparency in reporting, verifiability, the methodological work of the Intergovernmental Panel on Climate Change, the advice provided by the Subsidiary Body for Scientific and Technological Advice in accordance with Article 5 and the decisions of the Conference of the Parties.</i></li> <li>• The CoP has responsibilities for determining the methodologies for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol.<sup>34</sup></li> <li>• The CoP may implement guidelines for projects contemplated by Articles 6 and 7 aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases and the preparation of information in respect of such matters.<sup>35</sup></li> <li>• The CoP is charged with responsibility for adopting guidelines for the review of implementation of the Protocol by expert review teams.<sup>36</sup></li> </ul>	<p>Article 20(3) states: <i>The Parties shall make every effort to reach agreement on any proposed amendment to this Protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.</i></p>

<sup>34</sup> Article 5.1.

<sup>35</sup> Articles 6.2 and 7.4.

Convention	CoP roles	Voting
	<ul style="list-style-type: none"> <li>• The CoP must “<i>elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities</i>”.<sup>37</sup></li> <li>• The CoP is also responsible for: <ul style="list-style-type: none"> <li>• Modifying as appropriate, the multilateral consultative process referred to in Article 13 of the Convention.<sup>38</sup></li> <li>• Defining the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading<sup>39</sup></li> <li>• Approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol.<sup>40</sup></li> </ul> </li> </ul>	

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<sup>36</sup> Article 8.4.

<sup>37</sup> Article 12.7.

<sup>38</sup> Article 16.

<sup>39</sup> Article 17.

<sup>40</sup> Article 18.

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