

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

Louise Kathleen Camenzuli



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

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.¹²

The CoP is typically the plenary organ of the MEA.¹³ 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.¹⁴ 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, out in the sense tshu

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 IGOs¹⁸ 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 1971.¹⁹ However, that CoP, as originally contemplated, was given advisory powers only. Article 6 of the Convention stated, at

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,³¹ 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.³² 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,³³ 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,³⁴ in particular, the extent and parameters of the powers of the institution.³⁵ 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.³⁶

³¹ 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.

³² R Churchill and G Ulfstein, note 14 at 630.

³³ 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 (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.

³⁴ F Biermann, note 33, identifies three alternative models.

³⁵ 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*

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

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;

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.⁵⁵ 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**)⁵⁶ adopted by the CoP of the Vienna Convention, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (**Kyoto Protocol**)⁵⁷ adopted by the CoP of the UNFCCC, the *Protocol on Liability and Compensation*⁵⁸ adopted by the CoP of the Basel Convention, and the *Cartagena Protocol on Biosafety* (**Biosafety Protocol**)⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² 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.⁶³

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.⁶⁴⁶³

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

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 1996.⁶⁷ Similar far-reaching changes have subsequently been required for the use of other ozone- depleting substances listed in the various annexes to the Protocol.⁶⁸

The procedure by which the CoP adopts amendments to annexes (or adjustments in the

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

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.⁸³ 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.⁸⁴ A very similar procedure has been adopted under the Basel Convention.⁸⁵

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.⁸⁶ 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

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.⁸⁹ The enforceability of these rules contained in CoP decisions implies that these decisions have a de facto binding effect.⁹⁰

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.⁹¹ 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,⁹² and the consultative meeting of the London Convention⁹³ 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.⁹⁴ Examples of soft-law measures adopted by CoPs include the CITES Guidelines for Transport and Preparation for Shipment of Live Animals and Plants⁹⁵ the Ramsar Framework for Implementation of the Convention⁹⁶ 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.⁹⁷ The last of these progressed from soft to hard law by becoming incorporated in amendments to the Convention's annexes.⁹⁸

4.7 Other CoP law Con

at its second meeting in 1994 adopted Decision II/12 prohibiting the transboundary movement of hazardous waste from OECD to non-OECD member states.¹⁰⁰ 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/12.¹⁰¹ 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.¹⁰²

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.¹⁰³ 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*

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

¹⁰¹ 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.

¹⁰² 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.

¹⁰³ 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].

(b) Decision making powers

Aside from the general powers of CoPs noted above,¹⁰⁸ 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.¹⁰⁹ 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,¹¹⁰ a term that arguably carries no connotation of bindingness. Given the exceptional nature of CoP

Clean Development Mechanism participation requirements as reflected in section F in the modalities and procedures;¹¹⁶

Joint Implementation participation requirements as reflected in section D in the Guidelines for Implementation of Article 6 of the Kyoto Protocol;¹¹⁷ and

Emissions Trading participation requirements as reflected in the Modalities, rules and guidelines for emissions trading under Article 17 of the Kyoto Protocol.¹¹⁸

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.¹¹⁹

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'.¹²⁰

¹¹⁶ Decision 3/CMP.1. Available at: http://unfccc.int/kyoto_protocol/mechanisms/items/1673.php (20 January 2007).

¹¹⁷ Decision 9/CMP.1. Note 116.

¹¹⁸ Decision 11/CMP.1. Note 116.

¹¹⁹ For example, J Brunee, note 36 at 18.

¹²⁰ 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.¹²¹ 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

dumping of radioactive waste at sea¹²⁵ and the 1989 decision by the CITES conference of the parties to ban the international trade in African elephant products.¹²⁶

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.*¹²⁷

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'.¹²⁸ Similarly, Sands considers that "these institutional arrangements are, in effect, international organisations".¹²⁹

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

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:¹³¹

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.¹⁴¹

- (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.¹⁴² 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.¹⁴³
- (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.¹⁴⁴ Under the law of treaties, on the other hand, the only basis for expulsion would be a material breach of the treaty.¹⁴⁵
- (d) Finally, in respect of the rules of procedure adopted by CoPs, decisions are generally taken by a simple majority.¹⁴⁶ 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

¹⁴¹ R Churchill and G Ulfstein, note 14 at 633-634.

¹⁴² CF Amerasinghe, J Crawford & J Bell (1996) *Principles of the Institutional Law of International Organizations*,

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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹

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

¹⁴⁸ 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.

¹⁴⁹ 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.

¹⁵⁰ 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.

¹⁵¹ 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.

legitimacy considerations are emerging as increasingly important.¹⁵⁸ 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).¹⁵⁹

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

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.¹⁶⁴ Moreover, even where adequate participation is achieved, CoPs are often open to the criticism that their dec

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.¹⁶⁷

The interactional understanding of CoP law making powers, as proffered by Brunee, is promoted and built upon.¹⁶⁸ 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.¹⁶⁹

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

¹⁶⁷ 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.

¹⁶⁸ J Brunee, note 36.

¹⁶⁹ 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.



organizational matters.

- 2 *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.*
 - 3 *The Secretariat duties of the Organization shall include:*
 - (a) *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;*
 - 4 *Consultative or special meetings of the Contracting Parties shall keep under continuing review the implementation of this Convention and may, inter alia:*
 - (a) *review and adopt amendments to this Convention and its Annexes in accordance with article XV;*
 - (b) *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;*
 - (c) *receive and consider reports made pursuant to article VI(4);*
 - (d) *promote co-operation with and between regional organizations concerned with the prevention of marine pollution;*
 - (e) *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;*
 - (f) *consider any additional action that may be required.*
 - 5 *The Contracting Parties*
-

	<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

At CoP meetings the parties are to review the implementation of the present Convention and may:

- (a) *make such provision as may be necessary to enable the Secretariat to carry out its duties, and adopt financial provisions;*
- (b) *consider and adopt amendments to Appendices I and II in accordance with Article XV;⁴*
- (c) *review the progress made towards the restoration and conservation of the species included in Appendices I, II*



		<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>

The Montreal Protocol¹³

Article 11 states:

3. *The Parties, at their first meeting, shall:*
 - (a) *adopt by consensus rules of procedure for their meetings;*
 - (b) *adopt by consensus the financial rules referred to in paragraph 2 of Article 13;*
 - (c) *establish the panels and determine the terms of reference referred to in Article 6;*
 - (d) *consider and approve the procedures and institutional mechanisms specified in Article 8; and*
 - (e) *begin preparation of work plans pursuant to paragraph 3 of Article 10;*

4. *The functions of the meetings of the Parties shall be to:*
 - (a) *review the implementation of this Protocol;*
 - (b) *decide on any adjustments or reductions referred to in paragraph 9 of Article 2;*
 - (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;*





the effectiveness of measures to limit the emissions and enhance the removals of these gases;

- (e) 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;*
 - (f) Consider and adopt regular reports on the implementation of the Convention and ensure their publication;*
 - (g) Make recommendations on any matters necessary for the implementation of the Convention;*
 - (h) Seek to mobilize financial resources in accordance with Article 4, paragraphs 3, 4 and 5, and Article 11;*
 - (i) Establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;*
 - (j) Review reports submitted by its subsidiary bodies and provide guidance to them;*
 - (k) Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies;*
 - (l) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and*
-

--	--	--

The
Biodiversity
Convention

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 “*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*” (to be determined at the first CoP and the reviewed on a regular basis after two years of entry of the Convention).²³

The CoP is required to “keep under review the

and mitigate the effects of drought.²⁸

Promoting the availability of financial mechanisms and other support structures to assist affected developing country parties to implement the Convention.²⁹

Identifying and agreeing upon modalities for the Global Mechanisms.³⁰

Article 22 states:

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:

- (a) 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;*
 - (b) 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;*
 - (c) establish such subsidiary bodies as are deemed necessary for the implementation of the Convention;*
-

--	--	--

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”.

The admission and participation of observers at CoP meetings is subject to the rules of procedure adopted by the CoP.³¹

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.³²

	<p>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>.³⁷</p> <p>The CoP is also responsible for:</p> <ul style="list-style-type: none"> Modifying as appropriate, the multilateral consultative process referred to in Article 13 of the Convention.³⁸ Defining the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading³⁹ Approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol.⁴⁰ 	

³⁶ Article 8.4.
³⁷ Article 12.7.
³⁸ Article 16.
³⁹ Article 17.
⁴⁰ Article 18.
