

REVIEW BODIES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

COMPETENCES, COHERENCE, COORDINATION

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Introduction

One of the core tasks of Global Administrative Law (“GAL”) is ensuring the vitality, effectiveness and legitimacy of International Environmental Law (“IEL”) through the development of robust, coherent and trustworthy administrative review mechanisms. IEL and its regulatory instruments, mainly the Multilateral Environmental Agreements (“MEAs”), are poor in (a) reviewing the relevant science and technology that could help furthering the objective of a MEA and streamlining the content of a MEA with newly generated knowledge (“progressive implementation”), (b) reviewing the degree and the means that the signatory States and other participants in a MEA keep up with their obligations *via* implementation of and compliance with the provision of a MEA, as well as its enforcement, and (c) settling disputes regarding cases of non-implementation, non-compliance, and non-enforcement *via* administrative means.

The current paper discusses the review mechanisms under the MEAs with global objective and outreach. The principal rule that governs the review mechanism of these MEAs is that the “competence of the competence” for review remains with the Signatory States. Various formations of the signatory States, e.g. the Conference of the Parties (“COP”), are those who exercise review, introducing, thus, an approach to review that resembles more to a political type of “oversight”. MEAs also include some administrative review bodies/panels/organs/committees that, neither share similar competences, nor enjoy full review powers, are, however, comprised by experts in environmental law, policy and science. This paper introduces those expert review bodies, discusses their composition and their exact competences, presents a comparative table among those bodies and concludes with some suggestions for optimization of the global administrative review system. The proposition of the paper is that by empowering the review competences of expert bodies GAL will better integrate environmental science in IEL, develop a “check and balances” approach to review that will promote the rule of

International Law and will further the goals of the MEAs, that is, the protection of our global natural environment and public health.

1. Expert Bodies with Competences for Review of Science & Technology for the Progressive Implementation of MEAs

Scientific Committee of the Convention on the Conservation of Antarctic Marine Living Resources

The Convention on the Conservation of Antarctic Marine Living Resources (“CCAMLR”) establishes a political body, namely the CCAMLR Commission, a Scientific Committee that assists the Commission by providing scientific advice,¹ and a Secretariat that provides administrative assistance and manages the annual budget.² According to Article XIV para 2 and 3 of the CCAMLR, members of the Scientific Committee are scientists appointed by the signatory States to the CCAMLR, that may be assisted by external, independent scientists.

It is the Commission that, based mainly on advice from the Scientific Committee, determines catch levels for harvested species, adopts measures aimed at minimizing any potential impact that fishing activities may exert on non-target species etc. The Scientific Committee provides a forum for consultation and co-operation concerning the collection, study and exchange of information.³ The CCAMLR, however, includes a very important provision regarding the integration of the science to the new legislation that the CCAMLR Commission will adopt. The Commission which is the decision-making body “must take full account of the recommendations and advice of the Scientific Committee regarding the development of measures to implement the principles of conservation embodied in the Convention.”⁴ This is a unique phrase that has not been used thus far in any other international environmental legal instrument.⁵ It implies an obligation of the Commission to seriously consider the recommendations and advice of the Scientific Committee and be able to depart from such recommendations and advice only after proper justification.

CITES Advisory Animals and Plants Committees

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¹ Article XIV. For more information about the Scientific Committee, visit its official webpage available at: <http://www.ccamlr.org/pu/e/sc/intro.htm>, last visited on May 10, 2009.

² Article XVII. For the establishment of a permanent secretariat to the 1959 Antarctic Treaty (Washington, in force 1961, 402 UNTS 71) to serve the whole Antarctic Treaty System (AST), see, Karen Scott, Institutional Developments within the Antarctic Treaty System, 521 CLG 473 (2003.)

³ Article XV para 1 of the CCAMLR Convention.

⁴ Article IX.4 of the CCAMLR Convention.

⁵ In literature, the only reference to this provision found is at: SIR ARTHOUR WATTS, INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM, Hersch Lauterpacht Memorial Lectures, Grotius Publ., 1992, p. 220.

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)⁶ regulates the international trade of wild animals and plants listed in its three Appendices.⁷ The governance of the CITES includes a COP with decision-making competences, a Secretariat with an assisting role, and the advisory Animals, Plants, and Nomenclature Committees.⁸ The CITES allows the Conference of the Parties to meet every two years in order to adopt binding amendments to its appendices, limit trade in listed species, review progress made, and make recommendations for improving the treaty’s efficiency. The CITES Secretariat is administered by UNEP and is located at Geneva, Switzerland. It has a pivotal role, fundamental to the Convention and its functions are laid down in Article XII of the text of the Convention, including making recommendations regarding the implementation of the Convention and preparing annual reports to the Parties on its own work and the implementation of the Convention.

The animal, plant and nomenclature committees of experts were established at the sixth meeting of the Conference of the Parties (Ottawa, 1987) to fill gaps in biological and other specialized knowledge regarding species of animals and plants that are (or might become) subject to CITES trade controls. Their role is to provide technical support to decision-making bodies about these species. These two Committees have similar terms of reference, detailed in Resolution Conf. 11.1 (Rev. CoP14), Annex 2, which include, *inter alia*, the undertaking of periodic reviews of species, in order to ensure appropriate categorization in the CITES Appendices and advising when certain species are subject to unsustainable trade and recommending remedial action, through a process known as the ‘Review of Significant Trade’. The Animals and Plants Committees meet twice between meetings of the Conference of the Parties. They report to the Conference of the Parties at its meetings and, if so requested, provide advice to the Standing Committee between such meetings. As afore-mentioned, the COP is the body that will finally take the decision regarding the suggestions of the scientific committees under CITES. The members of the Animals and Plants Committees are individuals from the six major geographical regions (Africa, Asia, Europe, North America, Central and South America and the Caribbean, and Oceania) as well as one specialist on nomenclature on each of the two committees. They are elected at the meetings of the Conference of the Parties, with the number of regional representatives weighted according to the number of Parties within each region and according to the regional distribution of biodiversity.

⁶ Convention on International Trade in Endangered Species of Wild Flora, Mar. 3, 1973, 12 I.L.M. 1085.

⁷ CITES, *id*, Article 2. See, generally, ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST, PRESENT, AND FUTURE OF CITES, THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (Jon Hotton & Barnabus Dickson eds., 2000); P. Matthews, *Problems Related to the Convention on the International Trade in Endangered Species*, 45 International and Comparative Law Quarterly 421, 1996; PrC. W. Burns, *The International Convention to Combat Desertification: Drawing a Line in the Sand?*, 16 Michigan Journal of International Law 831, 1995; M. L. Ditkof, *International Trade in Endangered Species Under CITES: Direct Listing vs. Reverse Listing*, 15 Cornell International Law Journal 107, 1982; D. S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES, Martinus Nijhoff Publications, Dordrecht, 1989; D. S. Favre, *Tension Points Within the Language of the CITES Treaty*, 5 Boston University International Law Journal 247, 1987.

⁸ Eleventh Meeting of the Conference of the Parties, Gigiri, Kenya, Apr. 10-20, 2000, Resolution Conf. 11.1: Establishment of Committees: Annex 2, available at <http://www.cites.org/eng/res/all/11/E11-01R13.pdf> [hereinafter: CITES Resolution Conf. 11.1.]

The Standing Committee provides policy guidance to the Secretariat concerning the implementation of the Convention and oversees the management of the budget by the Secretariat. Beyond these key roles, it coordinates and oversees, where required, the work of other committees and working groups; carries out tasks given to it by the Conference of the Parties; and drafts resolutions for consideration by the Conference of the Parties.⁹ The members of the Standing Committee are Parties representing each of the six major geographical regions (Africa, Asia, Europe, North America, Central and South America and the Caribbean, and Oceania), with the number of representatives weighted according to the number of Parties within the region.¹⁰

External expert bodies, such as the United Nations Environmental Program (UNEP) and UNEP-WCMC,¹¹ IUCN, and TRAFFIC play an assisting and reviewing role on the effective implementation of and compliance with CITES, as well as to the provision of authoritative information about biodiversity conservation.

Scientific Council of the 1979 Convention on the Conservation of Migratory Species of Wild Animals

The 1979 Convention on Migratory Species of Wild Animals (“CMS” or “Bonn Convention”) aims to protect migratory species by granting special protection to species that are endangered.¹² The decision-making body of the Convention is the COP. The COP has also the mandate to review the implementation of the Convention.¹³ The COP meets at intervals of not more than three years. The COP is assisted by a Secretariat, and a Scientific Council that advises the COP on scientific matters.¹⁴ The Secretariat plays a supportive, administrative role and establishes and keeps under review the financial regulations of the Convention. In particular, it may review and assess the conservation status of migratory species and the progress made towards their conservation.

The Standing Committee was established by Resolution 1.1 of the Conference of the Parties.¹⁵ Its functions are to provide policy and administrative guidance between regular meetings of the Conference of the Parties. It consists of representatives of every global region, of the Depositary and, where applicable, of the country which plans to host the next meeting of the COP, being, thus, a political body.

⁹ See Resolution Conf. 11.1 (Rev. CoP14) Annex 1.

¹⁰ *Id.*

¹¹ UNEP World Conservation Monitoring Center (UNEP-WCMC) is collaboration between UNEP, and WCMC 2000, a UK-based charity. Its mission is to evaluate and highlight the many values of biodiversity and put authoritative knowledge at the centre of decision-making. The Centre has a mandate from the UNEP Governing Council to provide a range of biodiversity-related services to UNEP, the biodiversity-related conventions and their constituent party-states and other bodies in the non-governmental and private sectors (Decision GC 22/1/III). For more information, visit the official website, available at: <http://www.unep-wcmc.org/aboutWCMC/>, last visited on May 10, 2009.

¹² See, 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, 19 I.L.M. 15 (1980). Visit also the official site of the Convention is: <http://www.cms.int/>.

¹³ *Id.* art. VII.

¹⁴ *Id.* arts. VIII, IX.

¹⁵ See, the text of Resolution 1.1 at the official site of the Convention, *supra* note 19.

The establishment of a Scientific Council in order to provide advice on scientific matters is foreseen in Article VIII of the Convention and holds purely advisory competences. Each State Party is entitled to appoint a qualified expert as a member of the Scientific Council. In addition to the members appointed by the individual Parties, the Conference of the Parties can appoint to the Scientific Council other experts to cover fields of particular interest to the Convention.¹⁶ The Scientific Council makes recommendations to the COP on issues such as research on migratory species, specific conservation and management measures, inclusion of migratory species in the Appendices and designation of species for Concerted or Cooperative Actions under the Convention.

Committee on Science and Technology of the United Nations Convention to Combat Desertification

The United Nations Convention to Combat Desertification (CCD)¹⁷ aims to combat desertification and mitigate the effects of drought.¹⁸ The institutional structure that the CCD establishes in order to support the implementation of the Convention includes a decision-making COP, a Secretariat offering administrative support¹⁹, and an advisory Committee on Science and Technology (CST).²⁰ Regarding review, one key task of the secretariat is to compile and transmit reports submitted to it. The Committee on Science and Technology, which is open to all of the Parties, furnishes the Conference with advice on scientific and technological matters.²¹

Technical Working Group of the Basel Convention

This institutional structure of the Basel Convention²² comprises a decision-making COP responsible for reviewing and evaluating the Convention's implementation,

¹⁶ See, P. VAN HEIJNSBERGEN, *INTERNATIONAL LEGAL PROTECTION OF WILD FAUNA AND FLORA*, IOS Press, Amsterdam, 1997, p. 175.

¹⁷ Convention to Combat Desertification, June 17, 1994, 33 I.L.M. 1332.

¹⁸ William C. Burns, *The International Convention to Combat Desertification: Drawing a Line in the Sand?* 16 Mich. J. Int'l L. 831, 857-58 (1995); Alia Jamal, *The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; Implementing Agenda 21*, 6 Rev. Eur. Cmty. & Int'l Env'tl. L. 1, 3-4 (1997); Kyle W. Danish, *International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention*, 3 Ind. J. Global Legal Stud. 133, 150 (1995.)

¹⁹ About the functions of the Secretariat, visit the official website of the Convention, specifically at the Secretariat's page, available at: <http://www.unccd.int/secretariat/menu.php>, last visited on May 9, 2009.

²⁰ CCD, *supra* note 19, arts. 22-24.

²¹ CCD, *supra* note 19, pt. IV, art. 24, P 2.

²² Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, 28 I.L.M. 649, 657. About the Basel Convention, among others see: D. E. J. Currie, and J. M. Van Dyke: *The Shipment of Ultrahazardous Nuclear Materials in International Law*, 2 Review of European Community and International Environmental Law 113, p. 8, 1999; F. L. Morrison and W. Carol Muffett, *Hazardous Waste*, in *INTERNATIONAL, REGIONAL AND NATIONAL ENVIRONMENTAL LAW* (Fred L. Morrison and R. Wolfrum eds., 1999), Kluwer Law International, The Hague, p. 416.

as well as a Secretariat assisting the COP and its Parties in carrying out their duties.²³ Of particular relevance is the Technical Working Group, a subsidiary body established according to Resolution 8 of the Basel Convention's Final Act, which is mandated to prepare guidelines for the environmentally sound management of hazardous waste.²⁴ The technical guidelines for the environmentally sound management of the waste falling under the scope of the Convention shall be decided by the COP. The Technical Working Group of the Basel Convention has launched pioneer work in regard to better defining or clarifying what constitutes environmentally sound management of hazardous wastes. The Technical Guidelines Committee provide for the foundation upon which countries can operate at a standard that is not less environmentally sound than that required by the Basel Convention. The experts participating in the work of the Technical Working Group of the Basel Convention come from all regions of the world, from Contracting Parties to the Basel Convention and non-Contracting Parties, their work, therefore, represents the world community's perception of what is required to aim at, and hopefully achieve, the environmentally sound management of hazardous wastes.

Subsidiary Body for Scientific and Technological Advice to the United Nations Framework Convention on Climate Change

The 1992 United Nations Framework Convention on Climate Change (“UNFCCC”) and its subsequent instruments, the global legal framework for combating and adapting to the climate change challenge, establish a Conference of the Parties (“COP”), a Secretariat, a Subsidiary Body for Scientific and Technical Advice (“SBSTA”), a Subsidiary Body for Implementation (“SBI”) and an *Ad Hoc* Working Group for Further Commitments (“AWG”) by Annex I Parties under the Kyoto Protocol.²⁵ The COP is the supreme body of the Convention that keeps under regular review the implementation of the Convention.

The SBSTA was established at the first Conference of the Parties to the UNFCCC in 1995 in order to provide the COP and the subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention. The SBSTA serves as a link between information and assessments provided by expert sources, such as the International Panel on Climate Change (“IPCC”). It was established as a multidisciplinary body, comprised of government representatives competent in the relevant field of expertise. The members of SBSTA are State representatives, and thus, SBSTA seems to serve as a smaller formation of the COP itself.²⁶

Finally, there is an Expert Group on Technology Transfer (“EGTT”) that seeks to spur the sharing of technology with less-advanced nations. The expert group on technology transfer has the objectives of enhancing the implementation of Article 4,

²³ Basel Convention, *id.*, arts. 15, 16.

²⁴ U.N. Conference of Plenipotentiaries on the Global Convention on the Control Transboundary Movements of Hazardous Wastes, Mar. 20-22, 1989, Final Act and Text of Basel Convention, 28 I.L.M. 649.

²⁶ BHARAT H. DESAI, INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW, (Transnational Publishers, Ardsley, NY, 2004.)

paragraph 5, of the Convention and advancing the technology transfer activities under the Convention. The EGTT analyzes and identifies ways to facilitate and advance technology transfer activities, and make recommendations to the SBSTA. The members of the expert group on technology transfer serve in their personal capacity and shall have expertise in any of the following areas, inter alia, greenhouse gas mitigation and adaptation technologies, technology assessments, information technology, resource economics, or social development.²⁷

Technology and Economic Assessment Panel of the Montreal Protocol

The Technology and Economic Assessment Panel (“TEAP”) of the Montreal Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”)²⁸ was formed only by the second revision of the Montreal Protocol in 1992.²⁹ The first version of the Montreal Protocol, as it was initially adopted in 1987, included provisions for four assessment panels: an Atmospheric Science Panel, an Effects Panel, an Economics Panel and a Technology Panel. However, in response to the difficulties reported by the Economics Panel in 1989, this Panel was merged with the Technology Panel to form the Technology and Economics Assessment Panel.³⁰ TEAP is being composed by the world’s top experts, including highly placed actors in key positions in the industry, government, academia and citizen organizations around the world. TEAP created additional social networks and was a capable commander of organizational resources. TEAP is further divided into six subsidiary bodies: the Chemicals Technical Options Committee (CTOC), the Foams Technical Options Committee (FTOC), the Halons Technical Options Committee (HTOC), the Medical Technical Options Committee (MTOC), the Methyl Bromide Technical Options Committee (MBTOC) and the Refrigeration, Air Conditioning and Heat Pumps Technical Options Committee (RTOC).³¹

“TEAP made three basic contributions to the development of the regime: providing advice on feasible reductions, as charged; advancing the margin of feasible reductions through focused technical problem-solving; and advancing the reductions actually achieved, by supporting the dissemination of knowledge about emerging reduction options. Evidence of success of the technology assessment process is of several kinds. TEAP and its sub-bodies provided a huge number of specific technical judgments that were, with few exceptions, persuasive, technically supported, consensual and, when tested by subsequent technology development, were found to be accurate or somewhat conservative. While carefully avoiding usurping parties’ authority, TEAP exercised substantial influence over their decisions.”³²

²⁷ For more information on the EGTT, visit its page on the official website of the UNFCCC, available at: http://unfccc.int/essential_background/convention/convention_bodies/constituted_bodies/items/2581.php, last visited on May 10, 2009.

²⁸ Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature Sept. 16, S. TREATY DOC. 10, 100th Cong., 2d Sess. (1987), reprinted in 26 I.L.M. 1550 (1987).

²⁹ For an overview of the work of the TEAP and its documents, visit the official website of the Ozone Secretariat available at: <http://ozone.unep.org/teap/>, last visited on May 10, 2009.

³⁰ See, EDWARD A. PARSON, PROTECTING THE OZONE LAYER – YCIENCE AND STRATEGY, p. 209.

³¹ See, the official website of the Ozone Secretariat referring specifically to the subsidiary bodies, available at: http://ozone.unep.org/Assessment_Panels/TEAP/subsidiary_bodies.shtml, last visited on May 10, 2009.

³² *Id.*

The experts working for the groups of the TEAP are independent, acting under their individual capacity and the reports promulgated by the TEAP are peer reviewed three to five times.³³ Canan and Reichman comment that: “we cannot overemphasize the importance of the autonomy granted to the TEAP. Acting only under instructions from the parties to the Protocol, the experts did not negotiate their opinions with “outside” employers or governments. This independence promoted their own sense of responsibility and authenticity. It also resulted in the parties receiving the most credible and objective expert advice possible.”³⁴

Persistent Organic Pollutant Review Committee

The governance structure established by the Stockholm Convention of Persistent Organic Pollutants (POP Convention)³⁵ includes the Conference of the Parties (COP),³⁶ the Secretariat,³⁷ and the Persistent Organic Pollutants Review Committee (POPRC).³⁸ Article 19 refers to the establishment of the COP as the body enshrined with the continuous review of the implementation of the POP Convention. Article 20 defines the United Nations Environment Program (UNEP), as the interim Secretariat for this Convention.³⁹ The Secretariat has only administrative and coordination role.^{40, 41}

The POPRC has been established according to Article 19 by the COP as a subsidiary body to the Convention. According to Article 19 para 6 of the Convention, the members of the POPRC shall be appointed by the Conference of the Parties. Membership of the POPRC shall consist of government-designated experts in chemical assessment or management. The members of the POPRC shall be appointed on the basis of equitable geographical distribution, designated by governments for two- or four year terms, these scientists are drawn from the civil service, the academia the NGOs. In case of disagreement regarding the identification of additional substances as persistent organic

³³ Albritton, D.L., *What Should be Done in a Science Assessment*, in P.G. LePreste, J.D. Reid and E.T. Morehouse, Jr. eds., *PROTECTING THE OZONE LAYER: LESSONS, MODELS AND PROSPECTS* (Boston, MA: Kluwer), p. 70, (1998.)

³⁴ Penelope Canan & Nancy Reichman, *OZONE CONNECTIONS, EXPERT NETWORKS IN GLOBAL ENVIRONMENTAL GOVERNANCE*, Greenleaf Publ., (2002), p. 186.

³⁵ See, e.g. Erin Perkins, *The Stockholm Convention on Persistent Organic Pollutants, A Step toward the Vision of Rachel Carson*, *Colo.J.Int'l Env'l. L. & Policy* 191, 2001; Joel A. Mintz, *Two Cheers for Global POPs: A Summary and Assessment of the Stockholm Convention on Persistent Organic Pollutants*, 14 *Geo. Int'l Env'tl. L. Rev.* 319, 320 (2001); Peter L. Lallas, *The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants*, 19 *UCLA J. Env'tl. L. & Pol'y* 83, 2000-2001.

³⁶ Article 19.

³⁷ Article 20.

³⁸ Article 19.

³⁹ Interim Secretariat for the Stockholm Convention, UNEP Chemicals, International Environment House, 11-13 Chemin des Anemones, CH-1219 Châtelaine, Geneva, Switzerland.

⁴⁰ Art. 20 para 2 (d.)

⁴¹ In order to strengthen cooperation and increase coordination in the field of chemical safety the Inter-Organization Programme for the Sound Management of Chemicals (IOMC) was established in 1995. See relevant information available on the IOMC website at: <http://www.who.int/iomc/en/>, last visited on May 10, 2009.

pollutants, the POPRC is able to make a proposal to the COP to decide upon the inclusion of a new chemical to the lists of the Convention, provided that, if not a consensus, at least a two-third majority vote will be achieved.⁴²

Regarding the initiation of the procedure to add a new substance on the POP list, according to Article 8 any signatory State may nominate a new substance for listing under the Convention by submitting relevant information to the Secretariat. The Secretariat will submit then this information to the POPRC. The POPRC will further review the information by applying the screening criteria that are specified in Annex D and then will prepare a risk profile and risk management plan and will decide whether to recommend to the COP that the chemical should be listed in order to be regulated under the Convention.⁴³ The final decision about the inclusion of a chemical in one of the annexes of the Conventions remains with the COP.⁴⁴

What is most interesting is that, if the POPRC decides that the proposal for the listing of a chemical does not satisfy the screening criteria, it shall, through the Secretariat, inform all of the Parties and observers and make the proposal and the evaluation of the Committee available to all of the Parties and the proposal shall be set aside.⁴⁵ The initial rejection of the proposal is not necessarily final. Any Party may resubmit the proposal even without offering any additional elements. If the POPRC again sets the proposal aside, the Party may challenge the decision of the Committee and the Conference of the Parties shall consider the matter at its next session and may decide, based on the screening criteria in Annex D and taking into account the evaluation of the Committee and any additional information provided by any Party or observer that the proposal should proceed.⁴⁶

Chemicals Review Committee of the Rotterdam Convention

The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)⁴⁷ requires States of export to ensure States of import receive notice and consent before shipment of listed banned or severely restricted chemicals commerce. For a new substance to be added to the list of the Hazardous Chemicals and Pesticides, a review by the Chemicals Review Committee and a decision of the COP are necessary.⁴⁸ The Chemicals Review Committee was established by Article 18 para. 6 as a subsidiary body to the COP. The Members of the Committee shall be appointed by the COP. Membership shall consist of a limited number of government-designated experts in chemicals management, on the basis of equitable geographical distribution.⁴⁹ The Chemicals Review Committee shall decide

⁴² Article 19 para. 6(c).

⁴³ Article 8 para 7 (a).

⁴⁴ Article 8 para 9.

⁴⁵ Article 8 para 4 b.

⁴⁶ Article 8 para 5.

⁴⁷ Reprinted in (1999) 38 International Legal Materials 1. Visit the official website available on: <http://www.pic.int/finale.htm>, last visited on May 10, 2009.

⁴⁸ Article 5 para. 6.

⁴⁹ Article 18 para. 6 (a).

either by consensus, or by a two-thirds majority vote of the members present and voting.⁵⁰

2. Expert Bodies with Competences regarding Review of Implementation

The implementation of environmental provisions includes the enactment of, *inter alia*, all of the relevant laws, regulations, policies, and other measures and initiatives that the contracting parties should adopt in order to meet their obligations under a multilateral environmental agreement, if necessary, when the provisions of MEAs require further specification, as it is usually the case in IEL. Implementation is “the process of putting... commitments into practice.”⁵¹ Implementation is also a prerequisite for compliance, since only detailed provisions and provisions that are fully enacted and functional within the legal order of a State can enjoy compliance.

Secretariats play a meaningful role to the implementation of the MEA they serve, by e.g. providing technical information and advice to the signatory States on how to effectively implement the provisions of the MEA, or by keeping and publishing the reports submitted by the signatory States. Due to the complexities of reviewing the implementation of scientifically and technologically demanding, as well as globally extended MEAs, secretariats could not be adequate for such review. As a result, the Secretariats usually share these competences with specialized expert bodies established within the framework of MEAs, namely the Implementation Committees (ICs.) The ICs are those bodies of the MEAs especially entrusted with the task to assist with and review of the implementation process. The composition of the ICs differs from MEA to MEA. The ICs maybe composed by state representatives and in this case they are simply short formations of the COP, that is express the political positions of the signatory Members, or they maybe composed by independent experts that belong to global administration and in this case they express the scientific judgment of the regime of the MEA they serve. A presentation of the implementation committees of the most important MEAs follows, with the view to explore their composition and competences.

Implementation Committee of the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution

The Implementation Committee of the 1979 ECE Convention on Long-Range Transboundary Air Pollution was established by the Executive Body of the Convention in 1997 to review compliance of the signatory States with their obligations under the protocols to the Convention.⁵² The name of this Committee is another example of the confusion between the notions of “implementation” and “compliance.” Whereas, the Committee has the capacity primarily to review the implementation process of the

⁵⁰ Article 18 para. 6 (C).

⁵¹ Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 539 (2002.)

⁵² Decision 1997/2 of the Executive Committee of the Convention.

Convention, it does so under the spectrum of reviewing the compliance on behalf of the signatory States with the Convention. The work of the Committee focuses on three main areas: it reviews periodically compliance with Parties' reporting obligations, considers any submission or referral of possible non-compliance by an individual Party with any of its obligations under a given protocol and carries out in-depth reviews of specified obligations in an individual protocol at the request of the Executive Body.⁵³ The Committee consists of nine Parties to the Convention, each elected for a term of two years.⁵⁴ It meets twice a year and reports annually to the Executive Body which makes decisions upon recommendations by the Committee.

Working Groups on Implementation of the Convention of Wetlands of International Importance, Especially as Waterfowl Habitat

The 1971 Convention on Wetlands of International Importance, Especially as Waterfowl Habitat ("Ramsar Convention")⁵⁵ aims to "stem the progressive encroachment on and loss of wetlands" and establishes a list of internationally important wetlands to this end.⁵⁶ The Ramsar Convention provided that its COP, namely the Conference on the Conservation of Wetlands and Waterfowl, would meet as necessary to review implementation.⁵⁷ The COP of the Ramsar Convention meets every three years and has the advisory power to consider problems of implementation. It also meets to consider additions and changes to the list of protected wetland areas contained in the Convention. The COP is served by a secretariat, housed by the IUCN which is independent from other intergovernmental organizations, but retains close relations with those. The institutional regime of the Ramsar Convention includes, apart from the COP and the Secretariat, also the Scientific and Technical Review Panel (STRP), the Standing Committee and the Management Working Group, all of them sharing competence to review the implementation of the Ramsar Convention.

The Scientific and Technical Review Panel (STRP) of the Ramsar Convention was established in 1993 by Resolution 5.5 as a subsidiary body of the Convention to provide scientific and technical guidance to the Conference of the Parties, the Standing Committee, and the Ramsar secretariat.⁵⁸ Individual members are elected by the Standing Committee, based upon nominations from the Parties, on the same regionally

⁵³ Id. As two footnotes above – review number upon completion of the paper!

⁵⁴ Visit: <http://www.unece.org/env/lrtap/ic/welcome.htm>, last visited on November 23, 2008.

⁵⁵ The Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, 11 I.L.M. 963 [hereinafter "Ramsar Convention"].

⁵⁶ Ramsar Convention, id. Preamble para. 4. and Articles 2(1) and 4(1.)

⁵⁷ Visit the official website of the Ramsar Convention, available at: <http://www.ramsar.org/>, last visited on May 10, 2009; see, also: David Farrier and Linda Tucker, *Wise Use of Wetlands Under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law*, 12 J. Env'tl. L. 21 (2000.)

⁵⁸ See about the Fifth Meeting of the Conference of the Contracting Parties, June 9-16, 1993, Resolution 5.5 on the Establishment of a Scientific and Technical Review Panel, at the official site of the Ramsar Convention, available at: http://www.ramsar.org/res/key_res_5.5.htm, last visited on May 10, 2009. See, also the texts of Resolution VII.2, Resolution VIII.28 and Resolution X.9 that have shaped the modus operandi of the STRP, available at: http://www.ramsar.org/res/key_res_vii.02e.htm, http://www.ramsar.org/res/key_res_viii_28_e.htm, and http://www.ramsar.org/strp/key_strp_index.htm (which offers the text of Resolution X.9 in a PDF format) respectively, last visited on May 10, 2009.

proportionate basis that is used for electing the Standing Committee itself, but they serve in their own capacities as experts in the scientific areas required by the STRP's Work Plan and not as representatives of their countries.⁵⁹ What is most interesting in the composition of STRP is that in addition to the twelve individual STRP members, delegates from the five International Organization Partners -- BirdLife International, International Water Management Institute (IWMI), IUCN-The World Conservation Union, Wetlands International, and WWF International -- represent their organizations as full members of the Panel. Plus, numerous experts working under other MEAs regimes are also invited to participate in the work of the STRP, but as observers. The STRP has also developed a large network of scientists via its focal points and via electronic communications with other external expert groups, with the view to exchange information. The STRP does not have any right of initiative, but its Work Plan for each triennium is built around the priority tasks determined by the Standing Committee, which are based upon requests from the Conference of the Parties by means of its Strategic Plan and COP Resolutions and Recommendations.

Subsidiary Body on Scientific, Technical and Technological Advice to the Convention on Biological Diversity

The Convention on Biological Diversity ("CBD") has three objectives: the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.⁶⁰ The institutional structure of the CBD includes a COP, a Secretariat, and a Subsidiary Body on Scientific, Technical, and Technological Advice ("SBSTTA").⁶¹ According to Article 25 of the CBD, the SBSTTA is being composed by independent experts nominated by the signatory States to the CBD, as well as by other intergovernmental organizations.⁶² It is entrusted with the provision of information and advice regarding state-of-the-art technology and science to the COP, so that the COP bases its decisions on updated information. Apart from the implementation of the existing provisions of a MEA, new scientific and technical information might require the adoption of new provisions and require, thus, "progressive implementation" of the MEAs. Review of the existing and emerging science and technology is an important and rare feature of this expert subsidiary body. Given the speed by which science and technology develop nowadays and the necessity to cope with environmental issues by using the best available technologies, such kind of review should be a task attributed to at least one of the expert

⁵⁹ *Id.* Resolution X.9.

⁶⁰ Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 [hereinafter CDB], art. 1. See, Michael Bowman, *The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law*, in *INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY*, p. 5 (Michael Bowman & Catherine Regwell eds., 1996.)

⁶¹ CDB, Articles 23-25.

⁶² See, Article 18 para 2 of the Consolidated Modus Operandi of the Subsidiary Body on Scientific, Technical and Technological Advice (Annex III of decision VIII/10), available at: <http://www.cbd.int/convention/sbstta-modus.shtml>, last visited on May 10, 2009.

bodies of a MEA, in order to keep the MEA in good standing to respond to environmental challenges *via* progressive implementation.⁶³

Implementation Committee of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context

The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo EIA Convention”) sets out the obligations of Parties to carry out an environmental impact assessment (“EIA”) of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all of the major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.⁶⁴ Apart from the MOP and its secretariat, Article 11 para 2 of the Convention foresees the establishment of an Implementation Committee and calls the MOP to “keep under continuous review the implementation of this Convention”. The Implementation Committee comprises eight members that are nominated by the Parties and are elected by the Meeting of the Parties.⁶⁵ Decision II/4 provides the structure and functions of the Implementation Committee and also procedures for review of compliance. The objectives of the Implementation Committee are, thus, despite its name, dual; namely to review both implementation and compliance.

Subsidiary Body for Implementation of the UN Framework of Climate Change

The Subsidiary Body for Implementation (“SBI”) considers “the informal communicated to assess the overall aggregated effects of the steps taken by the Parties in the light of the latest scientific assessment concerning climate change” makes recommendations on policy to the COP and, if requested, to other bodies⁶⁶ and reviews information regarding the implementation of the UNFCCC.⁶⁷ Membership to both

⁶³ Dagmar Lohan, *A Framework for Assessing the Input of Scientific Information into Global Decision-Making*, 17 Colo. J. Int'l Envtl. L. & Pol'y 1 (2006) with reference to: Peter H. Sand, *The Effectiveness of International Environmental Agreements* 7 (1992); Winfried Lang, *Diplomacy and International Environmental Law: Some Observations*, 3 Y.B. Int'l Envtl. L. 108 (1992); KAREN T. LITFIN, OZONE DISCOURSES: SCIENCE AND POLITICS IN GLOBAL ENVIRONMENTAL COOPERATION, p. 117-18 (1994.)

⁶⁴ For more information, visit the official website of the Convention, available at: <http://www.unece.org/env/eia/>, last visited on May 10, 2009.

⁶⁵ ECOSOC, ECE, Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Report of the Third Meeting, Ann. II to Decision III/2, app. P 1(a), U.N. Doc. ECE/MP.EIA/6 (Sept. 13, 2004), available at: <http://www.unece.org/env/documents/2004/eia/ece.mp.eia.6.e.pdf>, last visited on May 10, 2009 [hereinafter “Revised Espoo Compliance Procedure” (2004)]. The Implementation Committee was first established in 2001, after the Convention had entered into force in 1997. See ECOSOC, ECE, Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Report of the Second Meeting, Ann. IV to Decision II/4, app. P 1, U.N. Doc. ECE/MP.EIA/4 (Aug. 7, 2001), available at: <http://www.unece.org/env/documents/2001/eia/ece.mp.eia.4.e.pdf>, last visited on May 10, 2009 [hereinafter: “Original Espoo Compliance Procedure” (2001)].

⁶⁶ Article 10 para ii (a) of the UNFCCC.

⁶⁷ For further information on the work of the SBI, visit the official website of the Clean Development Mechanism (“CDM”) of the Kyoto Protocol, available at: <http://cdmrulebook.org/PageId/73>, last visited on May 10, 2009.

SBSTA and SBI is open to all of the Signatory States. As it is the case with SBSTA, so SBI is also comprised by state representatives who are experts on matters related to climate change.⁶⁸

Consultative Group of Experts on National Communications of the UN Framework Convention on Climate Change

Under the UNFCCC and the Kyoto Protocol, several other expert groups promote the implementation of and compliance with the climate change regime. Those groups include, among others, a Consultative Group of Experts (“CGE”) on National Communications for "non-Annex 1 Parties" that helps developing countries prepares national reports on climate change issues. The activities of the CGE include the examination of national communications of non-Annex I Parties, the conduct of regional hands-on training workshops on greenhouse gas inventories, vulnerability and adaptation assessments and mitigation assessments in the context of the preparation of national communications, and preparation of technical reports to the Subsidiary Body for Implementation (“SBI”), such as ways to improve access to financial and technical support for the preparation of national communications. The CGE is composed of twenty four (24) members representing the regions of the world and some important intergovernmental arrangements whose work is relevant to climate change: five members each one from Africa, Asia and the Pacific, and Latin America and the Caribbean, six members from Annex I Parties, one member each from three international organizations, that is, from the IPCC/GHG Inventory Task Force, the National Communications Support Programme (“NCSP/GEF/UNDP/UNEP”)⁶⁹ and UNEP.⁷⁰

Further, there is a Least Developed Country Expert Group (“LEG”) that advises such nations on establishing programs for adapting to climate change. The objective of the LEG is to provide advice to Least Developed Countries (“LDCs”) on the preparation and implementation of national adaptation programs of action. It is composed of twelve experts, including five from African LDC Parties, two from Asian LDC Parties, two from small island LDC Parties, and three from Annex II Parties.⁷¹

3. Expert Bodies with Competence in Review of Compliance

⁶⁸ See, Article 10 para 1 of the UNFCCC.

⁶⁹ For information about the National Communication Support Program, visit its official website, available at: <http://ncsp.undp.org/>, last visited on May 10, 2009.

⁷⁰ For more information on the CGE, visit its page on the official website of the UNFCCC, available at: http://unfccc.int/national_reports/non-annex_i_natcom/cge/items/2608.php. last visited on May 10, 2009.

⁷¹ For more information on the LEG, visit its page on the official website of the UNFCCC, available at: http://unfccc.int/essential_background/convention/convention_bodies/constituted_bodies/items/2582.php, last visited on May 10, 2009.

According to a common definition “compliance” means the fulfillment by the contracting parties of their international obligations, in other words a state of conformity with the rules in International Law no matter the source of those laws.⁷² The actors that support compliance with MEAs are first and foremost the secretariats, further assisted by expert bodies that, whenever it deems necessary, provide valuable information to states on how better to comply with their obligations.

Compliance Committee of the Basel Convention

In order to promote implementation of and compliance with the obligations set out in the Basel Convention, a “Mechanism” has been adopted entrusted by a Committee, according to Article 15 para 5(e) of the Convention.⁷³ The Mechanism for promoting implementation of and compliance with the Basel Convention was established by Decision VI/12 of the Conference of the Parties adopted in 2002, as a subsidiary body of the COP.⁷⁴ The Mechanism includes two alternative approaches: (1) the so-called “specific submission” and (2) the General Review. The Commission initiates its work by the “specific submissions” procedure after request by (a) a Party as to its own compliance difficulty (“self-submission”), (b) a Party as to another Party’s failure to comply with the obligations under the Convention (“party-to-party submission”), and (c) the Secretariat as to a Party’s reporting obligations under the Convention (“Secretariat submission”).⁷⁵ As it holds true for the rest of the Basel Convention bodies, every effort is taken to reach decision on matters of substance first by consensus. Where consensus cannot be reached, decisions are adopted by a two-thirds majority of the members present and voting, or by eight members, whichever is greater. Decisions will only be adopted if there are at least ten members of the Committee present. The General Review process can be initiated by a decision of the COP. The Committee reports its findings to the COP, which proceeds to non-binding, voluntary recommendations and suggestions for future work.

Compliance Committee of the Aarhus Convention

The compliance mechanism of the Aarhus Convention⁷⁶ includes several significant features including: (1) the ability of nongovernmental organizations to nominate experts for possible election to the Compliance Committee; (2) the requirement that all Committee members be independent experts rather than representatives of state Parties to the Convention; and (3) the right of any member of the public and any NGO to file a “communication” with the Committee alleging a Party's

⁷² See, Edith Brown Weiss, *Strengthening National Compliance with International Environmental Agreements*, 27 *Env'tl. Poly. & L.* 297 (1997); Günther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 *Tul. J. Int'l & Comp. L.* 29 (1997.)

⁷³ See, the guide that the Committee itself prepared under the title: “The Basel Convention Mechanism for Promoting Implementation and Mechanism” available at: <http://www.basel.int/legalmatters/compcommittee/brochure-xx0706.pdf>, last visited on May 10, 2009.

⁷⁴ See, UNEP/CHW/OEWG/2/12, Annex V.

⁷⁵ See, Article 13 and 16 of the Basel Convention.

⁷⁶ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 *I.L.M.* 517 (entered into force Oct. 30, 2001) [hereinafter: “Aarhus Convention”].

non compliance.^{77, 78} The most important feature of the Committee is the use of independent experts serving in their personal capacity rather than serving as representatives of the signatory States.⁷⁹ The Compliance Committee of the Aarhus Convention is made up of eight persons, each serving in a “personal capacity” and the Committee is “composed of nationals of the Parties and Signatories to the Convention who shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.”⁸⁰ By contrast, the compliance mechanisms for most MEAs do not provide for independent experts. An important and rather unusual feature of the Aarhus Convention is that the Compliance Committee accepts not only the submissions of Parties and referrals from the Secretariat about non-compliance with the Convention (which are the only sources of information for other conventions).⁸¹ This openness to public participation by civil society has already produced remarkable results in the functioning of the Committee.^{82, 83}

In just two years of considering cases, the Aarhus compliance mechanism has already dealt with several significant issues in each of the three areas that the Aarhus Convention covers: access to information, public participation, and access to justice. The

⁷⁷ Secretary General of the United Nations, Kofi Annan, described the Convention as “the most ambitious venture in the area of ‘environmental democracy’ so far undertaken under auspices of the United Nations” and its adoption as “a giant step in development of international law.” ECOSOC, ECE, The Aarhus Convention: An Implementation Guide v, U.N. Doc. ECE/CEP/72 (2000) (prepared by Stephen Stec & Susan Casey-Lefkowitz), available at <http://www.unece.org/env/pp/acig.pdf>, last visited May 10, 2009.

⁷⁸ Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 Colo. J. Int’l Envtl. L. & Pol’y 1, 2007.

⁷⁹ The origin of this language can be traced to Article 28 of the International Covenant on Civil and Political Rights, signed in 1966, which established a United Nations Human Rights Committee of eighteen members elected to serve “in their personal capacity”; these members had to be “persons of high moral character and recognized competence in the *field* of human rights.” International Covenant on Civil and Political Rights, art. 28, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966.) Similar language can be found in the American Convention on Human Rights of 1969, establishing the Inter-American Commission on Human Rights (American Convention on Human Rights, art. 34, Nov. 21, 1969, 9 I.L.M. 99), and numerous other human rights conventions. See, e.g., African [Banjul] Charter on Human and Peoples’ Rights, art. 31, June 27, 1981, 21 I.L.M. 58.

⁸⁰ Aarhus Compliance Procedure, *supra* note 29, Ann. PP 1-2.

⁸¹ Aarhus Convention, *supra* note 29, art. 15.

⁸² Each “case” is listed and linked at the Aarhus Convention, Communications from the Public, available at: <http://www.unece.org/env/pp/pubcom.htm>, last visited on May 10, 2009. Only one submission has been lodged by a Party, namely the Government of Romania against the Government of Ukraine concerning a proposal to build a canal in the Danube Delta. Aarhus Convention, Submissions by Parties, Submission by Romania about Compliance by Ukraine, available at: <http://www.unece.org/env/pp/Submissions.htm#SubmissionsOther> (last visited Feb. 15, 2007, last visited on May 10, 2009).

⁸³ The idea of accepting communications from the public has a strong history in human rights instruments. For example, the European Convention on Human Rights guarantees the right of “any person, non-governmental organization or group of individuals claiming to be the victim” of a violation of rights to submit a “petition” to the European Court of Human Rights. See, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 25, P 1, Nov. 4, 1950, 213 U.N.T.S. 221. Similarly, the First Optional Protocol to the International Covenant on Civil and Political Rights states that “individuals who claim that any of their rights enumerated in the Covenant have been violated . . . may submit a written communication to the Committee for consideration.” See, Optional Protocol to the International Covenant on Civil and Political Rights, Art. 2, Dec. 16, 1966, 999 U.N.T.S. 302.

Compliance Committee and Meeting of the Parties have ruled that governments may not insist that people asking for environmental information provide their reason for seeking that information, and also that governments must provide clear guidance to public authorities on providing information to the public. Regarding public participation, the decisions spell out duties of providing adequate public notice, adequate procedures for written or oral comments, and careful consideration of comments that the public or NGOs may make. Complaints about lack of access to justice have also been resolved in decisions where Parties have been found in non-compliance with the Aarhus Convention because of failure to provide legal standing to NGOs and because of slow judicial review procedures. The independence, transparency, and NGO involvement in the Convention's novel compliance mechanism represent an ambitious effort to bring democracy and participation to the very heart of compliance itself and lead the way for better balancing between expert management and democratic governance in IEL.

Compliance Committee of the Cartagena Protocol on Biosafety

The Convention on Biological Diversity (“CDB”) has three main objectives: to conserve biological diversity, to use biological diversity in a sustainable fashion and to share the benefits of biological diversity fairly and equitably.⁸⁴ On January 29, 2000, the Conference of the Parties to the Convention on Biological Diversity adopted a supplementary agreement to the Convention known as the Cartagena Protocol on Biosafety. The Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. In accordance with Article 34 of the Protocol, the Conference of the Parties serving as the meeting of the Parties to the Protocol (“COP-MOP”) adopted procedures and mechanisms on compliance and established a Compliance Committee to promote compliance, to address cases of non-compliance, and to provide advice or assistance.⁸⁵

The Compliance Committee is composed of 15 members nominated by Parties and elected by the COP-MOP on the basis of three members from each of the five regional groups of the United Nations. The members of the Committee shall serve objectively and in a personal capacity. The Committee receives reports regarding compliance either by the signatory State itself or by a State Party against another State Party. The compliance submissions are being received by the Secretariat. In case that the Committee reaffirms that there is no compliance with the provisions of the Convention, the Committee may: (a) providing advice or assistance to the Party concerned; (b) making recommendations to the COP-MOP regarding the provision of financial and technical assistance, technology transfer, training and other capacity building measures; (c) requesting or assisting the Party concerned to develop a compliance action plan regarding the achievement of compliance with the Protocol within a timeframe to be agreed upon between the Committee and the Party. COP-MOP

⁸⁴ See, the official website of the Convention available at: <http://www.cbd.int/convention/about.shtml>, last visited on May 10, 2009.

⁸⁵ See, the official website on the Cartagena Protocol of Biosafety in regard with the Compliance Committee, available at: <http://www.cbd.int/biosafety/issues/compliance.shtml>, last visited on May 10, 2009.

may, upon the recommendations of the Compliance Committee, decide upon one or more of the following measures: (a) provide financial and technical assistance; (b) issue a caution to the concerned Party; (c) request the Executive Secretary to publish cases of non-compliance in the Biosafety Clearing-House; and (d) in cases of repeated non-compliance, take such measures as may be decided by the COP-MOP. Thus far, no body under the Protocol has reached any concrete decision on how to handle with the repeated non compliance.⁸⁶

Kyoto Protocol Compliance Mechanism

The Kyoto Protocol compliance mechanism is designed to strengthen the Protocol's environmental integrity, support the carbon market's credibility and ensure transparency of accounting by Parties. Its objective is to facilitate, promote and enforce compliance with the commitments under the Protocol and seems to belong among the most comprehensive and rigorous systems of compliance established by a MEA.⁸⁷ The mechanism is built on a compliance committee, the Kyoto Compliance Committee. This committee consists of two branches: a facilitative branch and an enforcement branch.⁸⁸ Through its branches, the Committee considers questions of implementation which can be raised by expert review teams under Article 8 of the Protocol, any Party with respect to itself, or a Party with respect to another Party. Each Party designates an agent who signs submissions containing such questions, as well as comments.

The “facilitative” branch of the Kyoto Compliance Committee aims to assist in providing several benefits, including building confidence in the treaty regime, ensuring that all Parties have the institutional, technical, and financial capacity to fulfil their obligations; reinforcing the Parties' sense of collective action and obligation, demonstrating that obligations are reasonable and attainable, and encouraging greater participation in the regime, while lowering resistance to the adoption of additional binding commitments.⁸⁹ In the case of the enforcement branch, each type of non-compliance requires a specific course of action.⁹⁰ For instance, where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount, it must declare that that Party is in non-compliance and require the Party to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of thirty percent. In addition, it shall require the

⁸⁶ See, <http://www.cbd.int/doc/meetings/bs/mop-03/official/mop-03-02-add1-en.pdf>, last visited on May 10, 2009.

⁸⁷ For more information visit the official website at: http://unfccc.int/kyoto_protocol/compliance/items/2875.php, last visited on May 10, 2009.

⁸⁸ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 1st Sess., Montreal, Can., Nov. 28 Dec. 10, 2005, *Decision 27/CMP.1, Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, 92, 94-96, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006).

⁸⁹ Donald M. Goldberg et al., *Building a Compliance Regime under the Kyoto Protocol*, Ctr. for Int'l Envtl. Law & Euronatura, 2 (1998), available at : <http://www.ciel.org/Publications/buildingacomplianceregimeunderKP.pdf>, last visited on May 10, 2009.

⁹⁰ For more information on the enforcement branch, see its page at the official website of the UNFCCC available at: http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php, last visited on May 10, 2009.

Party to submit a compliance action plan and suspend the eligibility of the Party to make transfers under emissions trading until the Party is reinstated.

“Any Party not complying with reporting requirements must develop a compliance action plan, as well, and Parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, the enforcement branch will make a public declaration that the Party is in non-compliance and will also make public the consequences to be applied. If a Party’s eligibility is withdrawn or suspended, it may request, either through an expert review team or directly to the enforcement branch, to have its eligibility restored if it believes it has rectified the problem and is again meeting the relevant criteria. In the case of compliance with emission targets, Annex I Parties have 100 days after the expert review of their final annual emissions inventory has finished to make up any shortfall in compliance (e.g. by acquiring AAUs, CERs, ERUs or RMUs through emissions trading). If, at the end of this period, a Party’s emissions are still greater than its assigned amount, the enforcement branch will declare the Party to be in non-compliance and apply the consequences outlined above. As a general rule, decisions taken by the two branches of the Committee cannot be appealed. The exception is a decision of the enforcement branch relating to emissions targets. Even then, a Party can only appeal if it believes it has been denied due process.”⁹¹

4. Comparative Remarks and Notes on the Review Function of the Global Administration

After reading through the paper, the strong impression that remains with the reader is that, in principle, the review competences remain with the signatory States of a MEA, the States acting as either individual entities or members of a single body, e.g. a COP or a MOP, or even in shorter formations, such as in the case of the Executive Committees of a COP or a MOP. Even in cases where there are no legal provisions in the MEAs attributing review competences to any of their bodies, or even when there is no provisions for the establishment of such bodies at all, the competence for review remains with the signatory States, which can assemble and review the legislative development, the implementation, compliance and enforcement of the MEA at any time. Namely, the signatory States retain the competence of the competence (“*Kompetenz - Kompetenz*”) of reviewing the MEAs. This is also the case, even when review is exercised by expert bodies of the MEAs, when the participants in those bodies are employees of national administrations of their respective countries and are appointed as delegates of those administrations to the expert review bodies. As a result of this affiliation between the experts and their signatory States, the experts have to hold positions that would necessarily reflect those positions of the signatory States.

The powerful presence of the States in the loose institutional architecture of the MEAs introduces a type of review process that rather resembles the political “oversight” than *strictu sensu* administrative procedures. The repetitive, active involvement of the

⁹¹ See, the description of the compliance process as it is described at the official website of the UNFCCC, available at: http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php, last visited on May 10, 2009.

signatory States themselves may create new impetus for the success of the MEAs. This type of review, however, is not adequate, and this becomes immediately obvious taking into account that implementation, legislative development, and compliance still remain major open questions in IEL. Data proving the insufficiency of those review mechanisms should have been a part of this paper, there is, however, not enough space for such empirical approach of the review mechanisms. Relevant literature on implementation and compliance, data presented on the websites of the MEAs, the very few cases that the review bodies have reviewed and contributed decisively in, as well as the state of our global environment might serve as some preliminary, but explicit indications of the poor performance of the afore-mentioned review mechanisms. The main question that GAL should address in the future is whether further empowerment of the international administration through reallocation of powers between states and the international administration, especially expert bodies of the MEAs, could be an answer to those issues, and, if so, under which conditions such arrangements should occur. By comparison of the most effective of the afore-mentioned mechanisms *via* a. a comparative approach of their features (refer also to the Table annexed at the end of the paper) and b. a comparative empirical research of the work of these bodies, GAL should be able to design more effective review procedures for IEL. In the following paragraphs, the paper discusses main issues that should be taken into account while designing the new global administrative review procedures.

Appointment of Independent Experts

Instead of representatives of the signatory States, independent experts should be working as Members of the review committees. Nowadays, there are only few cases where experts participating in the review committees of the MEAs are working exclusively for those committees and are, consequently, able to express the collective, independent position of the review body. Another category of experts working within an international arrangement are those who are working in other settings, e.g. in the academia or research organizations, and are employed part-time by an international arrangements to constitute expert bodies that meet regularly to work on an issue. These groups are diverse in character. They could, however, be regarded as independent review bodies. Further, there are experts that represent NGOs or non-institutionalized segments of the civil society, and lately from the industry. These expert groups express positions that are independent from the influence of the signatory States and the international organizations. The afore-mentioned are the cases of the Technology and Economic Assessment Panel of the Montreal Protocol, the Working Group on Implementation of the Convention of Wetlands of International Importance, Especially as Waterfowl Habitat, the Subsidiary Body on Scientific, Technical and Technological Advice to the Convention of Biological Diversity, and the Compliance Committee of Aarhus Convention. Some of these groups have a mixed status, since they accept as their members both independent scientists acting under their individual capacity and experts appointed by the signatory States. In the later case, when it comes to their work as members of an expert review body thought, those experts participate solely and act on

their individual capacity. This is the case of the IUCN World Commission on Protected Areas⁹² and the International Council for Science (“ICSU”).)

Review bodies that are comprised by national experts present a further drawback regarding the input of information, since the national experts might be less receptive to the input of citizens criticizing government actions, thereby depriving a committee of information that could help it assess the true state of compliance.⁹³ Further, the national driven approach itself might retard or even prohibit the review process, depending on the social and economic dynamics that prevail in the interior political scene of each signatory States. Thus, this type of review bodies reinforces the two-level game played in contemporary international politics⁹⁴ whereas the interference by independent experts on the second level of bargaining international law and policies “breaks” creatively this traditional game and adds non-politically negotiated, science-based data in the international decision-making process.

A further issue that the designers of review institutions should take into account is the issue of stability and continuity regarding the composition of the expert review bodies. Currently, there is nothing to prevent a signatory State from sending different governmental officials at different times to represent it. It takes time for a new representative to understand the process and make valuable contributions. Following the example of the Montreal Protocol, MEAs should include provisions that the signatory States “shall endeavour to ensure that the same individual remains its representative throughout the entire term of office.”⁹⁵ Nevertheless, no procedure can ensure continuity as much as choosing as a member of a review body an independent expert who cannot be easily removed or replaced by the signatory State.⁹⁶

The Right of Initiative and the Openness Question

Most of the review bodies or other expert bodies that belong to the institutional architecture of the MEAs do not hold the right to take the initiative and propose amendments to the existing provisions of MEAs or adoption of new legislation, based on the expertise they hold. The right of initiative remains with the signatory States, which, even if they hold information about e.g. the nature of a substance adequate to categorize

⁹² See, the official cite of the IUCN, available at www.iucn.org, last visited on May 6, 2009.

⁹³ Svitlana Kravchenko, *supra* note 78, p. 12.

⁹⁴ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also DOUBLE-EDGED DIPLOMACY (Peter Evans et al. eds., 1993).

⁹⁵ Paragraph 5 of the Non-Compliance Procedure (1998), following procedure has been formulated pursuant to Article 8 of the Montreal Protocol, UNEP/OzL.Pro/WG.1/18/CRP.8, p. 22.

⁹⁶ The problem of lack of continuity was raised during a review of experience with the procedure over the previous six years, conducted by the Ad Hoc Working Group of Legal and Technical Experts on Non-compliance. UNEP, Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol, Report on the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol P 16, U.N. Doc. UNEP/OzL.Pro/WG.4/1/3 (Nov. 18, 1998), available at <http://www.unep.ch/ozone/docs/adhoc-rpt.doc>, most visited on May 10, 2009. Changes were then adopted in 1998 by the Tenth Meeting of the Parties. Montreal Non-Compliance Procedure, *supra* note 49, p. 5.

this substance among the POPs, the Parties enjoy the discretion and do not have the obligation to propose this substance for listing. The only way that expert bodies, NGOs, academic and other type of institutions could make the case for a substance to be listed as a POP under the Stockholm Convention is to communicate the information they hold to the administration of a signatory State hoping that the State will choose to proceed by submitting a proposal to be reviewed by the POPRC. There are, thus, not just one, but two levels of negotiation that an interesting Party will have to go through, before it makes its case, the national level coming first and then the international level. This structure reflects the traditional two-level negotiation game followed in the international relations. In addition, this process prohibits anybody else, namely NGOs and individuals, from having a say at the international level. The power of initiative for review should not remain only with the signatory States. The emerging global administrative review bodies of the MEAs should also hold such competence due to their expertise, which legitimizes them to play a more meaningful and active role in the decision-making processes on the international level.

In correlation to this, another proposition to take into account when designing the new global review processes is that an open circle of actors should have standing before the review organs. Not only signatory States, but also intergovernmental organizations, international arrangements, epistemic communities and the civil society at large should be able to request the initiation of a review process. Such request should have binding effect on the review organs, provided that there is some minimum validity to the request. The Aarhus Convention is a good example regarding openness. The openness of the review procedures would lead to further integration of information to the decision-making system, as well as empowerment of the oversight processes.

Further, the effectiveness of those internal review bodies could be further empowered if there was any provision under the MEAs allowing for the exercise of external review by international arrangements that are not subsidiary bodies to or otherwise affiliated with the COP or the MOP or any other political body of the MEAs. Such “external review bodies” could for instance be the Committee of Sustainable Development (“CSD”) which is a corpus of the majority of the contemporary Member States of the United Nations, the Economic and Social Council of the United Nations (“ECOSOC”), the United Nations Environment Program (“UNEP”) itself, or other relevant formations, that enjoy credibility and legitimacy of the world community. The Rotterdam Convention review processes are an interesting example for the development of such useful integrated synergies among the MEA mechanisms and external review actors. In addition to specialized Intergovernmental Organizations and their organs, there are numerous external expert groups and networks that, although they function outside the institutional framework of the MEAs, are able to provide advice to the decision-making bodies of the MEAs and to assist the latter with reviewing. This is, for example, the case of the International Panel of Climate Change (“IPCC”), the most authoritative body on climate change issues globally.⁹⁷

⁹⁷ Visit the official webpage of the IPCC available at: www.ipcc.ch, last visited on May 10, 2009.

The Time Dimension

Another issue that should be seriously taken into account is the time dimension of the review process. Since the review process is initiated and conducted primarily by the political bodies of the MEAs, that is, the COPs or MOPs, and those bodies meet only rarely, usually every two, even three, years, the review process is getting automatically too lengthy, while the expert bodies more flexible and meet much more regularly. For example, the Chemical Review Committee meets annually (generally in February or March), while the Conference of the Party meets every two years (generally October). There is, thus, potentially a period as much as 18 months elapsed between the completion of the decision guidance document by the Chemical Review Committee and consideration of the recommendation for listing in Annex III by the Conference of the Parties. In cases where the Conference of the Parties is unable to take a decision on its first consideration of a recommendation of the Chemical Review Committee, the time between the conclusion of the work of the Chemical Review Committee and a further consideration by the Conference of the Parties can be in the order of 3.5 years. The same holds true regarding the review processes of the Rotterdam Convention. Listing of additional chemicals is likely to be slow given a rather tedious procedure including a proposal for the submission by a signatory State, followed by a review by the POP Committee, a risk profile, a risk management evaluation and finally a decision by the COP. In order to avoid retarded review results, one approach that the global review process could adopt is the, under conditions, introduction of the provisional effect of decisions taken by the expert review bodies. In other words, review evaluation and corrective measures could be adopted by the expert bodies on a provisional basis followed by the later approval of the full membership political body.

Enforcement Committees

In the most important, global MEAs presented in this paper, there are no special bodies with competence to review enforcement. Administrative bodies with competence to impose enforcement measures are met mostly within the domestic jurisdictions of the signatory States rather than within the framework of MEAs. International law itself remains almost entirely without coercive enforcement. Since enforceability presents a serious challenge to the effectiveness of many environmental regimes, the various bodies of the MEAs entrusted with general competences of review should also be able to examine the enforcement performance of the signatory Members. However, even if those bodies became by law competent to conduct review on enforcement practices, the issue of detection on non-enforcement is and will remain very pervasive especially in the environmental field. Since the main tool for detecting non-compliance is the self-reporting of the signatory States, the sources regarding enforcement by the signatory States that are available to the review bodies are limited. Consider, for example, how one will trace the violations of the ban on chlorofluorocarbons by the Montreal Protocol.⁹⁸ Accordingly, the MEAs regime should, along with the review-, the implementation- and

⁹⁸ See, Daniel Bodansky, *The Legitimacy of International Governance: A Coming Change for International Environmental Law?* 93 Am. J. Int'l L. 596 (1999); MAKING LAW WORK, (Volumes I and II) - ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT (Durwood Zaelke, Donald Kaniaru, and Eva Kružíková eds.), Cameron May Ltd., International Law Publishers, London, England, 2006.)

the compliance committees to include also enforcement committees and develop further inspection mechanisms.⁹⁹

This proposal, however, enjoys few possibilities to be followed by the emerging global administration, since, in effect, recent shifts in compliance and implementation review mechanisms move away from traditional confrontational methods of enforcement of multilateral environmental agreements (i.e. dispute settlement, arbitration, and countermeasures, including sanctions) and toward a more flexible, non-confrontational and cooperative approach.¹⁰⁰ This inexistence of effective compliance and enforcement mechanisms has led some authors to speak about “soft compliance” or even “dispute avoidance” or even “non-implementation” and “non-enforcement”, especially because, in most cases, the MEAs promote conciliation and negotiation as the preferable means for the settlement of their disputes.¹⁰¹

Judicial Review

The judicial review is outside of the focus of the present paper. Discussing, however, the role that the international administration plays in settlement of disputes arising under the implementation, legislative development and compliance with the MEAs, one can say in short that the international administration plays an important role when it comes to the “soft means” of dispute settlement, namely negotiations, good offices, conciliation etc. Most MEAs provide for those means. In general, international administration facilitates those type of procedures and even some of the administrators or the experts employed at the Secretariats or expert bodies of the MEAs may act as the actual negotiators etc, bringing, thus, their own environmental expertise on the table of the dispute settlement. These dispute settlement means leave, however, too many open issues to be decided and enforced upon the discretion of the signatory States.

On the other way round, experts and administrators play a very limited role, when international environmental disputes comes, even most rarely, to be settled by obligatory means of settlement, namely *via* arbitration and adjudication. In these cases, the international administration might serve as the secretariat facilitating international *ad hoc* or permanent courts and arbitral tribunals, and is restricted to this almost insignificant role. The expert bodies of a MEA are, in principle, not able to actively participate in the obligatory dispute settlement procedures, and may simply provide information, when and

⁹⁹ Richard W. Emory, Jr., *Improving National Enforcement for Better Governance Multilateral Environmental Agreements*, 36 Denv. J. Int'l L. & Pol'y 381, 381, 2008.

¹⁰⁰ RONALD B. MITCHELL, COMPLIANCE THEORY: AN OVERVIEW, IN *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW*, (James Cameron, Jacob Werksman, & Peter Roderick eds., 1996), p. 3-28; Michael Bothe, *The Evaluation of Enforcement Mechanisms in International Environmental Law: An Overview*, in *ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS?* 13, 27-29 (Rüdiger Wolfrum ed., 1996.)

¹⁰¹ See, SALEM H. NASSER, SOURCES AND NORMS OF INTERNATIONAL LAW – W RTUDY ON SOFT LAW, Galda + Wilch Verlag, Glienicke/Berlin – Madison/Wisconsin 2008, p. 119, with reference to: Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, in 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1999, p. 909.

if requested. Thus, in the realm of IEL expert bodies may play an advisory role in dispute settlement. This is the case, for instance, of the disputes arising under the TBT Agreement.¹⁰² According to Annex II of the TBT Agreement, there are procedures for the Technical Expert Groups set up under Article 14 in order them to assist with dispute settlement.

In general there are no provisions that would allow for the administration or the expert bodies of a MEA to bring a case before a dispute settlement mechanism. In case that there is a disagreement between an expert body and a political body, and the second, being the decision-making body of the MEA, takes scientifically arbitrary decisions, the expert bodies have no recourse to a dispute settlement mechanism and thus there is no effective judicial review of the work done by the political body of a MEA. Even the International Court of Justice (“ICJ”), which should be considered the supreme judicial organ on the international level,¹⁰³ does not enjoy any obligatory jurisdiction to judge a case submitted by an international arrangement, especially the bodies that belong to the “loose” institutional regime of a MEA and do not enjoy their own international legal personality and thus standing before the ICJ. The only way the ICJ could exercise some kind of review on the work of MEAs is *via* its advisory function, and only if an intergovernmental organization (“IO”), but not the representative body of a MEA, submits such question, and provided that this question falls within the subject matter of that IO.¹⁰⁴ However, judicial oversight of the work of the global administration is a necessary tool for an integrated international law compliance and enforcement system.

A further connection that could be easily established between the review bodies of a MEA and the dispute settlement mechanisms is the right of the review bodies themselves to submit a case to be settled. Currently, such right does not exist for any body of a MEA. Further, there could also be a connection between the review organs of a MEA and the dispute settlement organs acting within the jurisdiction of the signatory States. Such connection could be established by a mechanism that would follow the meaning of the “preliminary question” mechanism employed by the European Community Law. The “preliminary question” mechanism allows domestic courts to request advice by the European Court of Justice before they determine the outcome of a case brought before them that requires application of the EU Law.

Conclusion

The global administration, and not the *ad hoc*, political Conferences and Meetings of the Parties, should be the institutions to move towards the adoption of more coherent

¹⁰² Agreement on Technical Barriers to Trade, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, reprinted in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125 (1994.)

¹⁰³ For a comprehensive analysis of the role of the ICJ as a supreme global judicial body, see GIULIANA ZICCARDI CAPALDO, *THE PILLARS OF GLOBAL LAW*, Ashgate Publications, 2008, p. 95.

¹⁰⁴ ICJ Reports 1993, pages 467-468. In 1946 the General Assembly authorized the WHO to request advisory opinions from the ICJ on judicial issues arising in the framework of its activity in accordance with articles 96.2 of the Charter, 76 of the Constitution of the WHO and X.2 of the agreement between the UNO and the WHO.

review mechanisms with competence to review the actions of both the bodies that belong to the institutional structure of the MEAs and the signatory States regarding enforcement and implementation of the MEAs. The development of robust review mechanisms should be in the core of the development of the GAL. Two major themes should be in the core of the deliberations for the design of these mechanisms: first, the inclusion of sufficient “checks and balances” that would ensure the scientific validity of IEL, by, *inter alia*, appointing independent experts as members of the review committees and second, that GAL should further institutionalize procedures so that not only States, but also other international arrangements and the civil society to have standing to raise issues before the global review mechanisms, increasing in this way the democratic legitimization of institutions of the IEL.

ANNEX I

Function & Features/ Administrative Bodies	Science & Technology Review (Progressive Implementation)	Review of Implementation	Review of Compliance	Binding Contribution to Progressive Implementation	Centralized Administration offered by UNEP	Independent Experts as Participants to Review Bodies
<i>Scientific Committee of the Convention on the Conservation of Antarctic Marine Living Resources</i>	<i>X</i>			<i>X</i>		
<i>CITES Advisory Animals and Plants Committees</i>	<i>X</i>				<i>X</i>	
<i>Scientific Council of the Convention on the Conservation of Migratory Species of Wild Animals</i>	<i>X</i>					
<i>Committee on Science and Technology of the UN Convention to Combat Desertification</i>	<i>X</i>					
<i>Technical Working Group of the Basel Convention</i>	<i>X</i>					
<i>Subsidiary Body for Scientific and Technological Advice to the UN Framework Convention on Climate Change</i>	<i>X</i>					
<i>Technology and Economic Assessment Panel of the Montreal Protocol</i>	<i>X</i>					<i>X</i>
<i>Persistent Organic Pollutant Review Committee</i>	<i>X</i>				<i>X</i>	
<i>Chemicals Review Committee of the Rotterdam Convention</i>	<i>X</i>					
<i>Implementation</i>		<i>(X)</i>	<i>X</i>			

<i>Committee of the Protocols to the Convention on Long-Range Transboundary Air Pollution</i>						
<i>Working Groups on Implementation of the Convention of Wetlands of International Importance, Especially as Waterfowl Habitat</i>		X				X
<i>Subsidiary Body on Scientific, Technical and Technological Advice to the Convention of Biological Diversity</i>	X	X			X	X
<i>Implementation Committee of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context</i>		X				
<i>Subsidiary Body for Implementation of the UNFCCC</i>		X				
<i>Consultative Group of Experts on National Communications of the UNFCCC</i>			X			X
<i>Compliance Committee of the Basel Convention</i>						
<i>Compliance Committee of Aarhus Convention</i>			X			X
<i>Compliance Committee of the Cartagena Protocol on Biosafety</i>			X			
<i>Kyoto Protocol Compliance Mechanism</i>		X	X			

Table: REVIEW COMPETENCES AND FEATURES OF THE GLOBAL MEAS