

# Environmental Law-Making by International Organisations

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## *I. Categories of International Organisations*

Environmental law-making in its great variety is shaped to a large extent by international organisations. As subjects of international law, they can directly or indirectly affect the legal obligations of states and can be entrusted with law-making competence through the transfer of sovereign powers. The legal effect of acts of an international organisation depends

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upon the constitutive treaty of that organisation.<sup>1</sup> Because an organisation cannot award greater competence to an organ or a subsidiary organ than itself possesses, the powers of such entities also depend on the constitution of the organisation.<sup>2</sup>

Although there is no international organisation *stricto sensu* with an overall responsibility for the environment, a variety of global and regional organisations participate in various ways in the environmental law-making process.<sup>3</sup> This article reviews the different law-making powers and techniques of these international organisations in the field of environmental law-making.

The main international organisation active in this field is the United Nations itself.<sup>4</sup> Most of its activities in the law-making field are executed by subsidiary organs and affiliated organisations and not by the General Assembly and the Security Council. Intergovernmental negotiating committees, the United Nations Environment Programme (UNEP), the Economic Commission for Europe (ECE) and particularly the specialised international organisations such as the Food and Agriculture Organization (FAO) and the International Maritime Organization (IMO) are some of the main players in international environmental law-making.

### 1. Global Policy-Making Organisations

The constitutions of these and other specialised organisations contain a number of provisions relating to international law-making. This article will focus, therefore, on the FAO, the World Health Organization (WHO), the IMO, the International Atomic Energy Agency (IAEA) and the World Meteorological Organization (WMO). Their environmental mandate is explicitly laid down in their constitutions or is based on the constitutional mandate to protect health and property. The (amended)

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<sup>1</sup> See I. Detter, *Law Making by International Organizations* (1965), 23, and P. Sands, *Principles of International Environmental Law, Frameworks, Standards and Implementation*, Vol.I (1995), 115.

<sup>2</sup> See H. Schermers/N. Blokker, *International Institutional Law*, 3rd ed. (1995), 153.

<sup>3</sup> A general overview of the different organisations and subsidiary entities active in the field of environmental protection is given by P. Birnie/A. Boyle, *International Law and the Environment* (1992), 32 – 78, and A. Kiss/D. Shelton, *International Environmental Law* (1991), 55 – 93.

<sup>4</sup> See Sands (note 1), 69 et seq.

constitution of the IMO, for example, provides that the adoption of the “highest practicable standards in matters concerning maritime safety, [...] and the prevention and control of marine pollution from ships” shall be one of the purposes of the organisation.<sup>5</sup> The functions of the IAEA are, *inter alia*, “to establish or adopt [...] standards of safety for protection of health and minimisation of danger to life and property”.<sup>6</sup> The constitution of the WHO proclaims the promotion and improvement of sanitation and other aspects of “environmental hygiene” to be one of the objectives of the organisation.<sup>7</sup> The mandate of the FAO extends to the promotion of the conservation of natural resources, the term “agriculture” being defined as including “fisheries, marine products, forestry [...]”.<sup>8</sup> And the purposes of the WMO are, *inter alia*, to “further the application of meteorology to [...] water problems, agriculture and other human activities”.<sup>9</sup>

Even the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Civil Aviation Organization (ICAO) have adopted rules relating to the protection of the environment. ILO has adopted conventions to protect workers against occupational environmental hazards.<sup>10</sup> The ICAO environmental standards on aircraft engine emissions and aircraft noise are based on its mandate to adopt international standards dealing, *inter alia*, with “airworthiness of aircraft” and “[...] the safety, regularity

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<sup>5</sup> Article 1(a) of the Convention on the International Maritime Organization, Text in: P. Kapteyn [et al.] (eds.), *International Organization and Integration*, Vol.I.B. (1982), at 1.10.a. [*cit.* hereinafter: I.O.I.].

<sup>6</sup> Statute of the International Atomic Energy Agency, Article III(A) paragraph 6, in: I.O.I. (note 5), Vol.I.B. at 2.2.a.

<sup>7</sup> Constitution of the World Health Organization, Article 2(i), in: I.O.I. (note 5), Vol.I.B. at 1.5.a. An overview of the WHO law-making techniques gives C. Vignes, *Towards the Harmonisation of Health Legislation: The Role of the World Health Organization*, *International Digest of Health Legislation* 46 (1995), 422 – 427. For the concept of “Environmental Health” see K. Tomasevski, *Health*, in: O. Schachter/C. Joyner (eds.), *United Nations Legal Order*, Vol.2 (1995), 895 et seq. [*cit.* hereinafter: *United Nations Legal Order*].

<sup>8</sup> Article I paragraph 1 and paragraph 2(c) of the Constitution of the Food and Agriculture Organization of the United Nations, in: I.O.I. (note 5), Vol.I.B. at 1.3.a.

<sup>9</sup> Article 2(d) of the Convention of the World Meteorological Organization, in: I.O.I. (note 5), Vol.I.B. at 1.9.a.

<sup>10</sup> For example the Radiation Protection Convention, 1960; the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977; the Occupational Safety and Health Convention, 1981; the Convention Concerning Occupational Health Services, 1985 and the Convention on Chemicals in the Workplace, 1990.

and efficiency of air navigation".<sup>11</sup> There is also a Committee on Aviation Environmental Protection whose activities are planned to be expanded.<sup>12</sup> UNESCO has sponsored two major environmental conventions, each based on its constitutional mandate to recommend "the necessary international conventions" relating to the conservation of the world's cultural heritage.<sup>13</sup>

## 2. Treaty-Management Organisations

Apart from these international organisations in the traditional sense there are a number of organisations established under environmental conventions for the implementation of the substantive treaty provisions. Their purpose often is the management of specific global, regional or subregional resources. They are called "treaty-management organisations" in contrast to the above-described global "policy-making organisations" which are vested with a more comprehensive mandate. The latter primarily participate in the law-making process through the enactment of secondary legislation, whereas the treaty-management organisations primarily participate in the adoption of technical regulations designed as annexes to the respective conventions or amendments to the respective treaty.

The question of the legal capacity of treaty-management organisations in international relations is controversial. As far as they possess at least one permanent organ and a plenary organ made up of state delegations which is capable of expressing its will through, e.g., resolutions (mostly

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<sup>11</sup> Article 37(e) and (k) of the Convention on International Civil Aviation (Chicago Convention), in: I.O.I. (note 5), Vol.I.B. at 1.6.a. For the standards see ICAO: International Standards and Recommended Practices, Environmental Protection, Annex 16 to the Convention on International Civil Aviation, Vol.I Aircraft Noise, 3rd ed. (1993) and Vol.II, Aircraft Engine Emissions, 2nd ed. (1993). On the law-making activities of ICAO in general see T. Buergenthal, Law-Making in the International Civil Aviation Organization (1969).

<sup>12</sup> See ICAO: Environmental Impact of Civil Aviation on the Upper Atmosphere, Assembly Resolution A 29-12, in: Environmental Policy and Law [*cit. hereinafter: EPL*] 24 (1994), 184.

<sup>13</sup> The Convention Concerning the Protection of World Cultural and Natural Heritage, Paris 1972 and the Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar 1971 (Ramsar Convention). For the mandate of UNESCO see Article I paragraph 2(c) of the Constitution of the United Nations Educational, Scientific and Cultural Organization, in: I.O.I. (note 5), Vol.I.B. at 1.4.a.

so-called “Conferences of the Parties”), they are, for the purpose of this analysis, thus considered to be international organisations.<sup>14</sup> This is true in particular for the various fisheries commissions and fluvial commissions. Some conventions explicitly fix the status of their institutions as subjects of international law. This is, for instance, the case for the International Sea-Bed Authority.<sup>15</sup>

### 3. *Ad-Hoc* Conferences, Committees and Subsidiary Bodies

The difference between “Conferences of the Parties” in the framework of an environmental convention and mere intergovernmental *ad-hoc* conferences for the adoption of a convention, resolutions or decisions is that the *ad-hoc* conferences lack permanent organs.<sup>16</sup> International negotiating committees established for the purpose of elaborating a convention also are not permanent but mostly restricted to a specific number of sessions.<sup>17</sup> Such bodies vary in structure and procedural rules according to the *ad-hoc* mandate conferred upon them.

In addition, other institutions not established under an intergovernmental convention participate in the environmental law-making process. They do not constitute international organisations. As far as they are subsidiary entities of other organisations, their powers depend on the powers

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<sup>14</sup> For the definition of “international organisation” see Schermers/Blokker (note 2), 23–31; Detter (note 1), 19, and I. Seidl-Hohenveldern, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 5th ed. (1992), annotation 0105–0112. C. Rousseau contends that there is a presumption for intergovernmental organisations in general international law to enjoy international legal personality (C. Rousseau, *Droit international public*, 11th ed., 462 et seq.). Sands (note 1) generally classifies institutional arrangements of environmental treaties as international organisations with international legal status (*ibid.*, 92).

<sup>15</sup> Article 176 of the United Nations Convention on the Law of the Sea, Montego Bay 1982 (UNCLOS): “The Authority shall have international legal personality [...]”, text in: 21 ILM 1261 (1982).

<sup>16</sup> See Detter (note 1), 19.

<sup>17</sup> See for instance General Assembly Resolution 47/188 of 22 December 1992 on the Establishment of an Intergovernmental Negotiating Committee (INC) for the elaboration of an international convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, adopted at the 93rd plenary meeting, in: U.N. Doc., 47th session, 137. According to the resolution, the INC shall hold five substantive sessions, each lasting two weeks.

of their parent organisation.<sup>18</sup> UNEP, for example, was established under Resolution 2997 of the U.N. General Assembly,<sup>19</sup> as was the Commission on Sustainable Development (CSD)<sup>20</sup>. The Economic Commission for Europe (ECE), which has sponsored a variety of international environmental conventions, is a regional commission of the United Nations Economic and Social Council (ECOSOC), an organ of the U.N. Although these institutions are very active in the field of elaborating conventions, they have not been given permanent and specific powers in that law-making process, but rather depend on *ad-hoc* mandates, relating in particular to the “servicing” of other law-making bodies. Although UNEP, for instance, may invite governments to participate in the elaboration of a convention and may set up an *ad-hoc* panel of experts to elaborate a draft convention, Resolution 2997 does not provide for a permanent, institutionalised law-making procedure which is typical for the WHO, the ILO and the UNESCO. The Governing Council of UNEP is enabled only to “promote international co-operation in the field of the environment”, and the Executive Director shall “provide, at the request of all parties concerned, advisory services for the promotion of international co-operation in the field of the environment”<sup>21</sup>. In particular, the Governing Council is not empowered to adopt a convention by a majority vote and thereupon commit member states to submit the adopted convention to the competent national authorities.<sup>22</sup>

Not being intergovernmental organisations with permanent law-making power, these *ad-hoc* conferences, international negotiating committees and subsidiary entities will not be dealt with in more detail.

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<sup>18</sup> Schermers/Blokker (note 2) state that it can be taken as “a general rule that an organ may create subsidiary organs to which it may delegate part of its functions, provided that such new organs do not increase the obligations of the organisation or of its members” (ibid., 152).

<sup>19</sup> U.N. GA Res.2997 on Institutional and Financial Arrangements for International Environmental Co-operation, 15 December 1972, 27 U.N. GA OR (Supp.No.30) 43.

<sup>20</sup> U.N. GA Res.47/191 on the Institutional Arrangements to follow UNCED, 22 December 1992, U.N. Doc. A/47/719, p. 19 (1992). The CSD has the status of a functional commission of the ECOSOC. On the CSD see also P. Orliange, La commission du développement durable, *Annuaire français de droit international* 39 (1993), 824.

<sup>21</sup> Part I paragraph 2(a) and Part II paragraph 2(e) of GA Res.2997 (note 19).

<sup>22</sup> See also Birnie/Boyle (note 3) who state that UNEP “has no supranational powers” (ibid., 42). Compare S. Anderson, Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement, *Hastings International & Comparative Law Journal* 18 (1995), 806 et seq. S. Anderson states that the world political community has failed to grant the agency “any significant formal powers” (ibid.).

## *II. Law-Making Techniques – Overview*

Three main categories of law-making activities can be distinguished in the international legal process “mediated”<sup>23</sup> by intergovernmental organisations.

First, organisations participate in the elaboration or amendment of environmental conventions that require ratification or other forms of acceptance by each prospective state party. This treaty-making process is governed by the principle of consent<sup>24</sup>. As a rule, it follows the process of adoption and ratification, acceptance or approval laid down in the Vienna Convention on the Law of Treaties. Each convention binds only states having explicitly accepted its rules; therefore it does not constitute legislation.

The second category is legislation, i.e. the enactment of rules by an international organisation not requiring an act of approval by each state to become bound. In contrast to treaty-making, legislation is characterised by the majority rule, which binds the minority without need for ratification or other individual approval.<sup>25</sup> A legislative act is an act of unilateral character, adopted in application of the legislative principle, i.e. the majority rule.<sup>26</sup> To speak of a real legislative power, the unilateral character and the majority rule must come together. According to some constitutional instruments, amendments to these constitutions shall come into force for all members when adopted by a two-thirds majority vote and accepted by two-thirds of the members according to their respective constitutional procedures.<sup>27</sup> This application of the legislative principle within the treaty-making process is a “hybrid”, existing in between legislation and treaty making.<sup>28</sup> However, this “hybrid” amendment

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<sup>23</sup> Term by P. Szasz, *General Law-Making Process*, in: *United Nations Legal Order* (note 7), Vol.1, 58.

<sup>24</sup> See C. Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973), 7. See also E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (1969), 8.

<sup>25</sup> Compare R. Wolfrum, *Die Internationalisierung staatsfreier Räume – Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden* (1984), 78 and 168 et seq.

<sup>26</sup> Alexandrowicz (note 24), 7 and 10. Compare also J. Ducrest, *Legislative and Quasi-Legislative Functions of ICAO: Towards Improved Efficiency*, *Annals of Air and Space Law* 20 (1995), 352 et seq.

<sup>27</sup> See for example the Charter of the United Nations, Article 108, the Constitution of the World Health Organization, Article 73, the Convention on the International Maritime Organization, Article 62 (as amended in 1979).

<sup>28</sup> Alexandrowicz (note 24), 7–10 and 155.

procedure is currently not very relevant for substantive environmental law-making.<sup>29</sup>

The third type of law-making lies in between legislation and treaty-making; it is characterized by a procedure that has been described as quasi-legislation.<sup>30</sup> If, after the adoption of a regulation by the competent organ of an organisation, there is no need for individual ratification, acceptance or approval by the states bound, this regulation does not constitute treaty law in a strict sense. Nevertheless, there is a possibility to “opt-out” of the international regulation by notifying the organisation within a certain time limit of the non-acceptance of the regulation. The consent of the states is tacitly expressed by not objecting; thus, states are not bound against their will.<sup>31</sup>

Some argue that organisations also participate in the international law-making process through legislative fact-finding.<sup>32</sup> Agencies with technical expertise, for instance, can elaborate definitions of terms used in environmental regulations. For example, the IAEA is said to have been required by the London Dumping Convention<sup>33</sup> to define categories of radioactive waste unsuitable for dumping.<sup>34</sup> However, acts of this type may not be real law-making as they do not create general norms but rather implement norms through elaborating a description of their content. Nevertheless, as long as such acts are applicable without further enactment by states, they form an integral part of the law-making process. This does not seem to be the case with the London Dumping Convention, as the relevant wording provides that the parties “should take full account of the recommendations of the competent international body”.<sup>35</sup> Pursuant to this mandate, IAEA attempted to gain the approval of the

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<sup>29</sup> Compare F. Kirgis, *Specialized Law-Making Processes*, in: *United Nations Legal Order* (note 7), 121.

<sup>30</sup> Alexandrowicz (note 24), 11 and 40 et seq.; Ducrest (note 26), 354, and Wolfrum (note 25), 172.

<sup>31</sup> See also Alexandrowicz (note 24), 152, and Wolfrum (note 25), 78. Relating to ICAO, Yemin (note 24), however, contends that the suggestion of a “tacit acceptance” is a fiction with respect to instruments enacted by the Council (*ibid.*, 137). As the Council of ICAO is the organ of limited membership, the legislative effect of these instruments is, indeed, enhanced compared to other opt-out procedures.

<sup>32</sup> Kirgis (note 29), 139 et seq. and 160.

<sup>33</sup> *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, London 1972, Annex II(D) and Article VI paragraph 1(a), Text in: 11 ILM 1294 (1972).

<sup>34</sup> Kirgis (note 29), 141.

<sup>35</sup> Emphasis added by the author.



contracting parties for a document containing the categories at the 18th Consultative Meeting of the Parties in December 1995.<sup>36</sup>

Usually, law is considered to be binding on the parties concerned. But there is an increasing number of non-binding guidelines and other instruments, together called soft law in the field of international environmental relations.<sup>37</sup> Many international organisations are vested with the competence to issue such guidelines, often by a majority vote.<sup>38</sup> These guidelines are not binding *per se* but they influence the development of customary law and function as a catalyst in environmental law-making.<sup>39</sup> Another possibility is the upgrading of soft law to "hard law" through its incorporation by reference into binding conventions. For instance, the above-mentioned safety standards of the IAEA are not binding upon member states *per se*. They are obligatory for IAEA-sponsored operations only, but can, nevertheless, be applied to operations under bilateral and multilateral agreements, upon request of the parties.<sup>40</sup> Additional examples of incorporation by reference to guidelines are outlined *infra* when dealing with "indirect legislation".

Non-binding guidelines and standards can also be taken as criteria for the decision of an international organisation whether or not to grant benefits administered by the organisation. Such a benefit can consist of the access to natural resources that are under the exclusive administration of the organisation. Other benefits can relate to participation in financial funds or other services provided by an organisation. These guidelines and standards are not mandatory to states *ipso jure*, i.e. they do not bind states upon their enactment. It is rather the organisation itself that is bound by

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<sup>36</sup> See Weltweite Konvention zum Meeresumweltschutz wird überarbeitet, Umwelt 2 (1996), 71.

<sup>37</sup> For a comprehensive list of soft law instruments in the field of environmental protection see W. Burhenne, International Environmental Soft Law: a Collection of Relevant Instruments (1994). Two more recent examples are the FAO Code of Conduct for Responsible Fisheries adopted in March 1995, see EPL 25 (1995), 180, and the IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste adopted in June 1990, Text in: P. Sands/R. Tarasofsky/M. Weiss (eds.), Documents in International Environmental Law, Vol.IIB (1994), No.56.

<sup>38</sup> See, for instance, Article V(D) of the Statute of the IAEA, Article 3(a), Article 16(j), Article 22(b) and Article 30 of the Convention on IMO and Article IV paragraph 3 of the Constitution of FAO.

<sup>39</sup> Among others see P.-M. Dupuy, Soft Law and the International Law of the Environment, Michigan Journal of International Law 12 (1991), 420 et seq., and P. Sand, Lessons Learned in Global Environmental Governance (1990), 16 et seq.

<sup>40</sup> Article III(A) paragraph 6 of the Statute (note 6).

the adoption of the guidelines or standards.<sup>41</sup> But the standards are then applied *de facto* to states that seek to profit from the services or the natural resources administered by the organisation when the organisation decides whether to grant such services or not.

Interpretative acts by the competent organs of an organisation also are often non-binding. They are frequently issued in the form of guidelines and are a means of interpretation according to the Vienna Convention on the Law of Treaties.<sup>42</sup> For instance, the Conference of the Parties of CITES<sup>43</sup> approved at its ninth session guidelines setting out criteria for the assessment of the degree of danger to species, thereby defining the treaty notion of “threat of extinction”.<sup>44</sup> The fourteenth Consultative Meeting of the London Dumping Convention requested the Secretariat to issue a circular letter interpreting the terms “force majeure” and “emergencies” as used in the Convention.<sup>45</sup> A slight “legislative” effect can nevertheless be attained if the competent organ is empowered to decide by majority vote, in contrast to the Vienna Convention, which relates to interpretation agreements between all contracting parties.

Conferences of the Parties to environmental conventions sometimes adopt acts in the form of seemingly binding “resolutions” and “decisions” that are designed to tighten the respective treaty provisions.<sup>46</sup> If the content of such a resolution amounts to an amendment of the treaty, the amendment procedure of the treaty must be respected. Resolutions that do not follow the procedure laid down in the convention cannot be binding *ipso jure* upon the parties.<sup>47</sup> They must be considered as an act *ultra vires* by the treaty organ, if there is no respective authorisation in

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<sup>41</sup> Compare Seidl-Hohenveldern (note 14), annotation 1548.

<sup>42</sup> Article 31 paragraph 3 of the Convention.

<sup>43</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington 1973, Text in: 12 ILM 1085 (1973).

<sup>44</sup> See CITES: 9th Conference of the Parties, EPL 25 (1995), 88.

<sup>45</sup> See IMO: Activities against Marine Pollution, EPL 25 (1995), 87.

<sup>46</sup> An example is the Resolution LDC.21(9) on Dumping of Radioactive Wastes at Sea of the London Dumping Convention Consultative Meeting. There, the parties agree to a suspension of all dumping at sea of radioactive wastes (Text in: Sands/Tarasofsky/Weiss [note 37], Vol.II A, No.15A). Another case is the decision of the Second Meeting of the Conference of the Parties to the Basel Treaty on the Control of Transboundary Movements of Hazardous Wastes “to prohibit immediately all transboundary movements of hazardous wastes” from OECD to non-OECD states (see Control of Hazardous Waste Strengthened, EPL 24 [1994], 251 and 290).

<sup>47</sup> See also Sands (note 1), 116.

the convention.<sup>48</sup> These acts therefore do not have the legal effect of an amendment to the convention but can be used as a means of interpretation, of course only as long as they do not contradict explicit treaty provisions. In addition, they may be considered as a commitment of the states parties to enter into negotiations with respect to an amendment of the treaty.<sup>49</sup>

Most constitutions of global policy organisations provide for the settlement of questions concerning their interpretation through the plenary organ before a dispute is referred to the International Court of Justice.<sup>50</sup> Such interpretative acts belong to the field of dispute settlement, although there is often only a fine line between law-making, interpretation and dispute settlement.

### *III. Facilitating Intergovernmental Treaty-Making*

Probably the bulk of law-making activities involves participation in intergovernmental treaty-making. As indicated above, this process is not real law-making by an international organisation but rather the preparation of inter-state law-making within an international organisation.<sup>51</sup> However, international organisations initiate, expedite and shape in various ways environmental rules contained in a convention.<sup>52</sup> A particularly elaborate system of participation in treaty-making can be found in the constitutions of the ILO, FAO, IMO and UNESCO.

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<sup>48</sup> See also Schermers/Blokker (note 2), 473. It is a general rule in international law that international organisations cannot take binding external decisions, i.e. decisions that change the legal situation, unless their constitutions expressly so provide (*ibid.*, 813).

<sup>49</sup> In practice, however, issues that would have been subjected to the process of formally amending the relevant instrument are resolved increasingly by informal interpretations agreed upon in an organ of the respective organisation. For IMO see F. Kirgis, Shipping, in: United Nations Legal Order (note 7), Vol.2, 741 et seq. See also Szasz (note 23) who states that members of an organisation have at least an obligation to consider non-binding recommendations in good faith. He also refers to the principle of estoppel (*ibid.*, 63 et seq.).

<sup>50</sup> See for instance Article XVII of the Constitution of FAO and Article 75 of the Constitution of WHO.

<sup>51</sup> See also Alexandrowicz (note 25), 6 et seq.

<sup>52</sup> Some authors argue that through the participation of an international organisation by elaborating and adopting a treaty, the treaty can lose its bilateral character and constitute a complex unilateral legislative act. But as ratification or acceptance as forms of expressing the individual will to be bound are still necessary for the legal effectiveness of the convention, this opinion can not be followed. For the discussion see Yemin (note 24), 9–12.

## 1. The Forum Role of International Organisations

The “forum role”<sup>53</sup> of international organisations in the process of intergovernmental treaty-making is well known. This role consists of providing the logistical functions of a secretariat, as well as of catalysing and facilitating the negotiation process.<sup>54</sup> Secretariat functions include the circulation of documents, the convening of meetings, and the provision of documentation and translation services. By catalysing and by facilitating the mediation of conflicts in the negotiation process, the organisations try subtly to direct the negotiations. This covers, *inter alia*, the mobilisation of pertinent data, the sponsoring of scientific studies and the drafting of proposed clauses of the treaty.<sup>55</sup> Depending on the personality of the head of the sponsoring organisation, the sponsoring activities may also involve personal intervention in the negotiating process by convening informal *ad-hoc* negotiating groups and bringing world public opinion to bear on the parties.<sup>56</sup>

The forum role is fulfilled by almost all international organisations, even where there are no relevant procedural provisions in their respective constitutions. For instance, the IAEA was the forum for the 1986 negotiations on the Vienna Conventions on Notification and on Assistance in case of a Nuclear Accident, as well as for the Convention on Nuclear Safety.<sup>57</sup> The statute of the IAEA, however, “only” contains the above-

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<sup>53</sup> B. Oxman, Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation, *The International Journal of Marine and Coastal Law* 10/4 (1995), 468.

<sup>54</sup> Compare W. Lang, Specific Characteristics of Environmental Diplomacy, in: O. Höll (ed.), *Environmental Cooperation in Europe* (1994), 97. See also V. Rittberger, *Internationale Organisationen* (1994), 124 et seq. Rittberger outlines the co-ordinating function of international organisations by structuring both the intergovernmental treaty-making process and the decision-making of state representatives in the bodies of the organisation (*ibid.*).

<sup>55</sup> Compare R. Benedict, Perspectives of a Negotiation Practitioner, in: G. Sjöstedt (ed.), *International Environmental Negotiation* (1995), 223 et seq.

<sup>56</sup> On the environmental negotiation process see F. Hampson/M. Hart (eds.), *Multilateral Negotiations, Lessons from Arms Control, Trade and the Environment* (1995); Lang (note 54), Sjöstedt (note 55); L. Susskind, *Environmental Diplomacy, Negotiating More Effective Global Agreements* (1994).

<sup>57</sup> Texts in: 25 ILM (1986), 1370 and 1377; 33 ILM (1994), 1518. See G. Sjöstedt, *Negotiations on Nuclear Pollution: The Vienna Conventions on Notification and Assistance in Case of a Nuclear Accident*, in: Sjöstedt (note 55), 63 et seq. The Convention on Nuclear Safety was adopted in June 1994 by a Diplomatic Conference convened by the IAEA. See M. Kamminga, *The IAEA Convention on Nuclear Safety, International and Comparative Law Quarterly* 44 (1995), 872 et seq.

cited mandate to establish or adopt safety standards. It also empowers the plenary organ, the General Conference of the IAEA, to discuss any question within the scope of the statute and to make recommendations to the members on any such question.<sup>58</sup> Safety standards are only binding on the IAEA's own operations or, at the request of the parties, on operations under bilateral or multilateral arrangements.<sup>59</sup> Nothing in the constitution hints at the convening of intergovernmental conferences and the elaboration of draft conventions, as the Board of Governors has done.

Other international organisations have a special mandate to convene conferences for the elaboration of intergovernmental conventions, as is the case for UNESCO, WHO, IMO and the FAO. IMO's constitution precisely regulates the drafting process for an international convention. According to Article 3(b), the IMO shall provide for the drafting of conventions, agreements, or other suitable instruments.<sup>60</sup> It shall recommend these instruments to governments and convene such conferences as may be necessary for their adoption. The Assembly, the plenary organ that decides in general by a majority vote, has the competence to take a decision in regard to convening any international conference or to follow any other appropriate procedure for the adoption of international conventions.<sup>61</sup> The Marine Environment Protection Committee (MEPC) shall submit to the Council proposals for regulations for the prevention and control of marine pollution from ships as well as for amendments to such regulations.<sup>62</sup> Currently, the MEPC is working on an Annex to MARPOL concerning air pollution from ships. In addition, the Legal Committee (LC) of the IMO has the mandate to elaborate drafts of international conventions and of amendments to conventions which the LC has developed, and to submit these documents to the Council.<sup>63</sup> The LC is working on a Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea.<sup>64</sup> The Council, in turn, can also consider such matters as the formu-

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<sup>58</sup> Article III(A) paragraph 6 and Article V(D) of the Statute.

<sup>59</sup> See Article III(A) paragraph 6, *ibid.*

<sup>60</sup> On the drafting process in the framework of the IMO and one of the recent projects see B. Okamura, Proposed IMO Regulations for the Prevention of Air Pollution from Ships, *Journal of Maritime Law and Commerce* 26 (1995), 183–195.

<sup>61</sup> Article 16(k) and Article 53(b) of the Convention on IMO.

<sup>62</sup> Article 40(a), *ibid.*

<sup>63</sup> Article 35(a), *ibid.*

<sup>64</sup> See IMO, Draft Convention on Liability and Compensation, *EPL* 24 (1994), 150.

lation of conventions upon request by the Assembly.<sup>65</sup> Conventions elaborated under the auspices of IMO include the International Convention for the Prevention of Pollution from Ships (MARPOL), the Convention on the International Regulations for Preventing Collisions at Sea and the International Convention on Oil Pollution Preparedness, Response and Co-operation.

Sometimes an international organisation is charged with the forum role by environmental conventions that are distinct from its constitution. The United Nations Convention on the Law of the Seas (UNCLOS) provides in Article 211 paragraph 1 for states to establish international rules and standards for pollution control "acting through the competent international organisation or general diplomatic conference". IMO also functions as an optional amendment forum under MARPOL.<sup>66</sup>

The forum role is widely recognised as an important part of environmental law-making by international organisations. It has even been stated that there is a "dependency" on international organisations in the environmental law-making process.<sup>67</sup>

## 2. Participatory Powers

In addition to assigning to an organisation the task of initiating the drafting of an international agreement, some constitutions create duties for member states relating to further steps in the law-making process. Thus, the constitutions of WHO and ILO oblige their member states to submit the approved text to the competent national authorities and to report to the organisation on the action taken.<sup>68</sup> They must also outline the reasons given in the case of non-ratification.<sup>69</sup> Sometimes, the organisa-

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<sup>65</sup> Article 16(i) of the Convention on IMO.

<sup>66</sup> Article 16 of the International Convention for the Prevention of Pollution from Ships, London 1973 (MARPOL), Text in: 12 ILM 1319 (1973). The modifications by the 1978 Protocol do not affect the amendment procedure.

<sup>67</sup> Lang (note 54), 97. See also the literature quoted in respect to the environmental negotiation process (note 56).

<sup>68</sup> In contrast to the numerous conventions adopted by the ILO, the WHO has not focused on the elaboration of international treaties, i.e. this technique has never been used. The tendency has rather been to rely on the procedure provided under Article 23 of the Constitution relating to recommendations. The time required for the implementation of a convention being rarely less than 10 years, the convention technique is considered as inadequate in a field where scientific and technical knowledge changes constantly. See Vignes (note 7), 424 et seq.

<sup>69</sup> Article 19 and Article 20 of the Constitution of WHO. For ILO see *infra* (note 71).

tions are also granted the power to approve norms that might be enacted later in other fora or to provide for rules of procedure for the treaty-making process.<sup>70</sup>

Having decided whether a subject should be dealt with through either an international convention or a recommendation, the General Conference of ILO may adopt a convention by a two-thirds majority vote.<sup>71</sup> To ensure thorough technical preparation and adequate consultation of the members primarily concerned, the Governing Body is entitled to make rules for the convening of a preparatory conference or other means of preparation.<sup>72</sup> As is the case for conventions adopted by the General Conference of UNESCO, the member states must bring the convention before the national authorities competent to enact legislation within a certain period after the adoption.<sup>73</sup> They must further inform the Director-General of ILO of the measures taken. If no ratification has been obtained, the member shall report to the Director-General on the national law and practice in the matter and state the difficulties which prevent or delay ratification. If the member obtains the consent of its competent authorities, it must communicate the formal ratification of the convention to the Director-General and must take action to make the provisions of such a convention effective, i.e. the governments are required to ratify conventions accepted by the domestic legislature.<sup>74</sup> The procedure for the

<sup>70</sup> An intergovernmental organisation can also be given an approval role with respect to national legislation, in contrast to the approval of international instruments. UNCLOS (note 15) accords such a role to IMO regarding certain navigation safety and traffic regulations adopted by riparian states. See Oxman (note 53), 479 et seq.

<sup>71</sup> Article 19 paragraph 1 and 2 of the Constitution of ILO, Text in: I.O.I. (note 5), Vol.I.B. at 1.2.a. Alexandrowicz (note 24) points out that the members of the General Conference act as members of a legislature would do because of the tripartite representation system (*ibid.*, 154). The delegations from member states consist of two government delegates, one employers' delegate and one workers' delegate (Article 3 paragraph 1 of the constitution). The two non-governmental representatives do not act in a plenipotentiary way on behalf of the government. In contrast to the WHO, the ILO has been very active in the field of treaty-making. Some of the conventions are listed *supra*, note 10.

<sup>72</sup> Article 14 paragraph 2, *ibid.*

<sup>73</sup> Article IV paragraph 4 of the Constitution of UNESCO (note 13). A similar obligatory follow-up procedure applies to recommendations of UNESCO; Article 19 paragraph 5 of the Constitution of ILO. This obligation is said to be one main reason for the big number of ratifications of ILO conventions. See N. Valticos, *Les conventions de l'organisation internationale du travail à la croisée des anniversaires*, *Revue Générale de Droit International Public*, Vol.C (1996), 11.

<sup>74</sup> Article 19 paragraph 5(d), *ibid.* See F. Kirgis (note 29), 113. Under general international law a state is under no legal obligation to ratify a treaty even if it has completed its internal procedure.

adoption of conventions is laid down in detail in the Standing Orders of the Conference.<sup>75</sup>

The last example of participation in intergovernmental treaty-making is the Food and Agriculture Organization. FAO has been particularly active in the field of fisheries and plant protection, i.e. in the management of natural resources. One of the most recent conventions adopted under Article XIV of the Constitution of FAO is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.<sup>76</sup> Apart from similar constitutional provisions to these of the ILO,<sup>77</sup> the FAO is vested with the power to participate in the amendment procedure of some conventions that had been adopted under its auspices. The International Plant Protection Convention<sup>78</sup> vests the FAO with the power to propose supplementary agreements to the contracting governments on its own initiative. Any such agreement shall come into force after acceptance in accordance with the provisions of the constitution of FAO and its rules of procedure.<sup>79</sup> The automatic application of the rules of procedure originating from a foreign body is rare. Most conferences of (prospective) states parties to a treaty prefer to adopt their own rules of procedure or at least to modify those recommended as a model.<sup>80</sup> Under the Agreement for the Establishment of a General Fisheries Council for the Mediterranean, FAO participates in the amendment procedure of that agreement. The General Fisheries Council may amend the agreement by a two-thirds majority, any amendment becoming effective only after concurrence of the Council of FAO or its Conference.<sup>81</sup>

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<sup>75</sup> See International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (1994), Articles 34 to 45.

<sup>76</sup> Adopted in November 1993, Text in: 33 ILM 968 (1994) [*cit. hereinafter*: FAO Compliance Agreement].

<sup>77</sup> See Article XIV of the Constitution of FAO (note 8).

<sup>78</sup> Done at Rome, 1951, Text in: A. Kiss (ed.), *Selected Multilateral Treaties in the Field of the Environment*, Vol. 1 (1983), No. 8.

<sup>79</sup> Article III paragraph 1 and 2, *ibid.*

<sup>80</sup> See Detter (note 1), 44. See also General Assembly Res. 47/188 (note 17). The resolution requests the Secretary-General to prepare draft rules of procedure but has the INC to decide upon the rules at its organisational session. Compare also the Rules of Procedure for the Meetings of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, published by UNEP as amended in January 1991, Na. 91-8077-J1. The rules of procedure were drafted by UNEP and then revised and adopted by the First Meeting of the Parties to the Montreal Protocol.

<sup>81</sup> Article VIII of the Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Rome 1949, Text in: Kiss (note 78), No. 5.



The provisions described above make international organisations duly participating actors in the intergovernmental treaty-making process, comparable to national organs in the national law-making process. This is why the powers conferred by these provisions are called here “participatory powers”. They include the power to initiate and adopt conventions combined with the power to compel member states to submit those conventions to the competent national authorities, the reporting procedure and the duty of governments to state the reasons for non-ratification, as well as, in some cases, the right to lay down the rules of procedure for the drafting process and the need to obtain approval by an international organisation.

#### IV. “Quasi-Legislative” Powers

Where there is no need for ratification of the norms developed by international organisations, the adoption of regulations by such organisations often is linked with the possibility for states to opt-out. This is done by states notifying the secretariat or the depository in writing within a certain time limit of their inability to give effect to a regulation. Thus, the lethargy of states can be used in favour of the enactment of rules demanding a negative notification in case of non-acceptance instead of a positive action to become bound.<sup>82</sup> The majorities required for the adoption of regulations can vary, ranging from simple majority, two-thirds, three-fourths and even to nine-tenths majority votes. The legislative character of such a nine-tenths vote obviously is minimal.

Sometimes, this procedure is supplemented by safeguards against states becoming bound too easily against their interests. For instance, a certain number of opt-out notifications can prevent the regulation from coming into force. Such a “prohibitive quorum” equals the veto right of a certain group or majority. There are also cases where a “positive” quorum of consenting parties is necessary for the entry into force of a regulation, either

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<sup>82</sup> See also W. Lang, *Environmental Treaty-making: Lessons Learned for Controlling Pollution of Outer Space*, in: J. Simpson, *Preservation of Near-Earth Space for Future Generations* (1994), 169. Ambassador Lang points out that the opting-out technique is frequently used by negotiators if they are unable to achieve full consensus, the legal effect being the same as if states had entered a reservation in respect to the respective provisions. The procedure is also said to discourage states from opting-out because of the consequences of publicly rejecting an international standard, i.e. “the mobilisation of shame”. See D. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, *Iowa Law Review* 79 (1994), 796.

by determining the number of the parties not opting-out or by requiring a number of positive notifications indicating the explicit will to be bound. In other cases, the concurrence of another international organisation must be obtained. The participation of various bodies with different composition in the adoption procedure guarantees the integration of various interest groups in that procedure. The same goes for fixing substantive criteria governing the decisions to be taken. Another safeguard is the guarantee of reciprocity in the opting-out procedure. This is done by notifying the others that a party opts out and thereupon prolonging the time limit for the other parties to enable them to opt-out in reaction as well.

### 1. Examples of Opting-Out, Tacit Consent and Sovereignty Safeguards

The opting-out procedure was first set out in the constitutions of WHO, ICAO and WMO.<sup>83</sup> According to Article 21 of the WHO Constitution, in conjunction with Article 60, the Health Assembly has the authority to adopt regulations by majority vote concerning, among other things, sanitary requirements and standards with respect to the purity of biological and other products. These regulations shall come into force for all members except those members as may notify the Director-General of their rejection or reservations within a certain period.<sup>84</sup> The International Health Regulations, which have been enacted under this procedure, slightly modify the procedure by prescribing that reservations to these regulations shall not be valid unless accepted by the Health Assembly.<sup>85</sup> If a reservation is not withdrawn after objection by the Assembly on the ground of a substantial detraction from the character of the regulations, the regulations shall not enter into force with respect to the state which has made such a reservation. Thus, the state is still free to become bound or not, but is not permitted to modify the content of the regulations by making selective reservations.

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<sup>83</sup> For a detailed description of the respective law-making process see Alexandrowicz (note 24), 40 et seq., and Yemin (note 24), 114 et seq. On ICAO see F. Kirgis, Aviation, in: United Nations Legal Order (note 7), Vol.2, 828 et seq.

<sup>84</sup> Article 22 of the Constitution (note 7). Regulations adopted under Article 21 are the Nomenclature Regulations (WHO Regulations No.1), adopted in 1948 and repeatedly revised and the International Health Regulations (before: International Sanitary Regulations, WHO Regulations No.2), adopted in 1951 and consolidated in 1969. Legal Counsel of WHO, Claude-Henri Vignes, states that despite the potential of this law-making technique, it seems that there is no intention of further developing it. See Vignes (note 7), 424.

<sup>85</sup> Article 107 of the Regulations No. 2.

The Council of ICAO, an organ of limited membership, is empowered to adopt international standards by a two-thirds majority vote and to designate them as annexes to the Chicago Convention.<sup>86</sup> The possibility to opt-out is contained in Article 38 of the Convention: any state which finds it impracticable to comply with such a standard shall give immediate notification to the ICAO of the differences in relation to its own practice. In addition, an annex shall not become effective if, within three months after its submission, a majority of states parties register their disapproval with the Council.<sup>87</sup> This is an example of the above-described “prohibitive quorum”. Particularly interesting in the case of ICAO is that the organ of limited membership is vested with the law-making competence. Thus, the legislative effect is increased through committing states by a decision of an organ on which they are not represented.

As mentioned above, IMO and in particular its committees function as an optional forum for amending the MARPOL convention. Amendments to an annex or an appendix adopted by the organisation are subject to an opting-out procedure. Parties can either make a declaration that they do not accept the amendment or that their express approval is necessary.<sup>88</sup> In addition, an amendment shall not be deemed to have been accepted if one third of the parties or parties whose combined merchant fleets represent at least fifty per cent of gross tonnage of the world’s merchant fleet have objected (“prohibitive quorum”). The Marine Environment Protection Committee of IMO has recently adopted several amendments to the annexes of MARPOL that entered into force in March 1996.<sup>89</sup> An opting-out procedure is also established for amendments adopted by IMO to OILPOL.<sup>90</sup> Included in this procedure is a safeguard mechanism to ensure the equal application of the obligations with a view to preventing a selective approach by states that would affect the equilibrium of rights and duties in the convention. The Assembly of IMO may, by a two-thirds majority vote and in concurrence with two thirds of the contracting parties, determine an amendment to be of such importance that any contract-

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<sup>86</sup> Article 54 paragraph 1 and Article 90(a) of the Chicago Convention (note 11).

<sup>87</sup> Article 90(a), *ibid.*

<sup>88</sup> Article 16 paragraph 2(f) and (g)(ii), of MARPOL (note 66).

<sup>89</sup> See IMO: Activities against Marine Pollution, EPL 25 (1995), 87.

<sup>90</sup> Article XVI paragraph 4 of OILPOL, Text in: Kiss (note 78), No. 54. OILPOL has been superseded by MARPOL for the parties to the latter. See Article 9 paragraph 1 of MARPOL.

ing party making use of the opting-out procedure shall cease to be a party to OILPOL.<sup>91</sup> This provision allows for the expulsion of a contracting party as a sanction for opting-out and comes close to a right of approval for the IMO.

In addition, there are various treaty-management organisations that make use of the opting-out procedure, mostly for amending annexes or appendices. For instance, the Conference of the Parties (COP) of the Convention on Migratory Species (CMS) is empowered to adopt amendments to Appendices I and II by a two-thirds majority.<sup>92</sup> The amendments enter into force for all parties ninety days after the meeting of the COP, except for those parties which notify the depositary in writing of a reservation with respect to the amendment. These annexes comprise lists of migratory species requiring special conservation. For example, at the fourth meeting of the COP in June 1994, the Conference decided to include three additional species on Appendix I upon the recommendation of the Scientific Council, an advisory body of CMS established to make recommendations to the COP as to the inclusion of species on the Annexes.<sup>93</sup>

Similarly, CITES allows the Conference of the Parties to adopt amendments to Appendices I and II.<sup>94</sup> The 9th COP, which took place in November 1994, approved guidelines containing criteria for taking decisions on the amendment of the appendices.<sup>95</sup> The so-called Everglades Criteria set out conditions under which species are listed in Appendix I or II. Although these guidelines do not have the legal force to amend the Convention, they direct the amendment procedure through interpretation of the substantive criteria of the Convention.

Another example in the field of nature conservation is the Convention on Biological Diversity.<sup>96</sup> Article 30, in conjunction with Article 29, provides for the adoption and amendment of annexes through a two-thirds majority vote if no agreement by consensus can be reached. If a party is unable to approve an additional annex or an amendment to an annex, it shall so notify the depositary within one year. After one year, the amend-

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<sup>91</sup> Article XVI paragraph 5, *ibid.*

<sup>92</sup> Article XI of the Convention on the Conservation of Migratory Species of Wild Animals, Bonn 1979, Text in: 19 ILM 15 (1980).

<sup>93</sup> See H y k l e, Bonn Convention – Outcome of the Fourth Meeting of the Conference of the Parties, EPL 24 (1994), 252.

<sup>94</sup> Article XV of CITES (note 43).

<sup>95</sup> See CITES: 9th Conference of the Parties, EPL 25 (1995), 88.

<sup>96</sup> Done at Rio de Janeiro, 1992, Text in: 31 ILM 818 (1992).

ment shall enter into force for all contracting parties which have not submitted such a notification. Slightly different from CMS and CITES is the explicit requirement of reaching a consensus before the vote.

The Convention on the Transboundary Effects of Industrial Accidents also requires the parties to make every effort to reach agreement by consensus before the Conference of the Parties may decide on amendments to Annex I by a nine-tenths majority vote.<sup>97</sup> The amendments become effective for parties not opting-out within one year if there are at least sixteen of those parties. This is a case of a “positive quorum” being used as safeguard to ensure that a sufficient number of countries comply with the decision.

The fisheries commissions are another field of application for the opting-out procedure. For instance, the International Whaling Commission (IWC) may amend the so-called Schedule by adopting regulations fixing, *inter alia*, protected and unprotected species and open or closed seasons.<sup>98</sup> There are substantive criteria to be met, such as the requirement that amendments be “necessary” to further the purposes of the convention and the requirement to consider scientific findings. Each amendment, which must be adopted by a three-fourths majority, shall become effective after ninety days, except when a government presents an objection within that period.<sup>99</sup> Thereupon, any other contracting party may, within an additional ninety-day period, present an objection. The amendment then becomes effective for all parties not having presented objections. On the basis of these provisions, the IWC has adopted a moratorium on commercial whaling in 1983, which was upheld in 1992 at its 44th annual meeting.<sup>100</sup> In reaction, Iceland formally withdrew from the Commission and Norway announced a unilateral resumption of commercial whaling. As with the IWC, the Southeast Atlantic Living Resources Convention and the Baltic Sea Fishing Convention contain opting-out procedures, requiring the respective treaty Commissions to regulate matters such as fishing gear and catching methods.<sup>101</sup>

<sup>97</sup> Article 26 paragraph 4 of the Convention on the Transboundary Effects of Industrial Accidents, Helsinki 1992, Text in: 31 ILM 1333 (1992).

<sup>98</sup> International Convention for the Regulation of Whaling, Washington 1946, Article V, Text in: Kiss (note 78), No.3.

<sup>99</sup> Article III paragraph 2 and Article V paragraph 3, *ibid*.

<sup>100</sup> EPL 22 (1992), 332.

<sup>101</sup> See Article VIII in conjunction with Articles IX and V paragraph 3 of the Convention on the Conservation of the Living Resources of the Southeast Atlantic, Rome 1969 and Articles X, XI and VIII paragraph 3 of the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Gdansk 1973, Texts in: Kiss (note 78), Nos.42 and 58.

## 2. Grey Area of Quasi-Legislation

“Downgraded versions” of the opting-out procedure can be found in some conventions that do not provide for ratification but require the parties’ consent to be explicitly expressed at some point in the adoption process. In other conventions, a procedure of tacit consent is established, but one objection is sufficient to halt a regulation’s entry into force.

The International Commission for the Protection of the Danube River may amend Annexes I to III of the Danube River Protection Convention by a four-fifths majority vote if consensus cannot be attained.<sup>102</sup> Such an amendment, however, becomes binding only for contracting parties having voted for it and not having opted-out within a certain period. Thus, the parties are not bound by tacit consent but by explicitly voting for the amendment.

Under the Convention on the Protection of the Marine Environment of the Baltic Sea Area, the Baltic Marine Environment Protection Commission (HELCOM) may adopt amendments to annexes.<sup>103</sup> Such amendments shall be deemed to have been accepted at the end of a specific period unless within that period any one of the contracting parties has objected to the amendment. Although the amendment can only be adopted unanimously, a fact that contradicts the term “legislation” as defined above, no explicit ratification or approval procedure is necessary if there is no objection at all.

A provisional quasi-legislative power has been accorded to the Council of the International Sea-Bed Authority. Under UNCLOS, the Council may adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area.<sup>104</sup> These decisions shall be taken by consensus. The term is defined as meaning the absence of any formal objection, thus requiring “only” tacit consent.<sup>105</sup> If a formal objection to the adoption of a proposal is foreseeable, the convention provides for a conciliation procedure for the purpose of producing a proposal that can be adopted by consensus.

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<sup>102</sup> Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Article 23 paragraph 6 and Article 5 of the Statute of the Commission (Annex IV to the Convention). Text in: Bundesrat, Drucksache 268/95 of 12.5.1995.

<sup>103</sup> Done at Helsinki, 1974 and revised in 1992, Article 24, Text in: 13 ILM (1974), 544; BGBl 1994 II, 1397.

<sup>104</sup> Article 162 paragraph 2(o)(ii) of UNCLOS (note 15). The Area is the sea-bed and the ocean floor beyond the limits of national jurisdiction, see Article 1 paragraph 1(1) of UNCLOS.

<sup>105</sup> Article 161 paragraph 8(d) and (e), *ibid.*

This chapter has demonstrated how many ways exist to shape a quasi-legislative procedure with a view to adequately representing the interests of the contracting parties. These interests float between the poles of timely international standard setting and the preservation of sovereign standard setting by the states themselves.

### V. Legislative Powers

As defined above, legislative powers exist where an international organisation has the right to bind all states by a majority vote of its competent organ, without requiring ratification or any other act of individual acceptance or providing for an opting-out procedure. As legislative powers include the competence to bind the parties to a regulation, as a rule the mandate to issue "soft law" is not considered to be a legislative competence. However, non-binding regulations can subsequently become binding through their subsequent incorporation into a convention. Relevant examples are considered below under the heading of "indirect legislation".

#### 1. Direct Legislation

The main field of legislative action taken by international organisations concerns rules on internal administrative matters, such as staff, financing and rules of procedure, based on the principle of self-organisation.<sup>106</sup> In fact, particularly the rules of procedure have importance for the substantive decision-making process. But the crucial regulations, particularly the voting system, often have already been fixed in the constitutive convention.<sup>107</sup>

Various organisations have established additional institutional frameworks for the protection of the environment.<sup>108</sup> As outlined above, the law-making powers of such subsidiary entities depend on the powers of

<sup>106</sup> See Detter (note 1), 44 et seq., and Seidl-Hohenveldern (note 14), annotation 1522. See also Szasz (note 23), 100 et seq., and Kirgis (note 29), 111.

<sup>107</sup> The Framework Convention on Climate Change allows for the fixing of the decision-making procedure through the Conference of the Parties. This relates to matters not already covered by a decision-making procedure in the convention and may include, *inter alia*, specific majorities required for the adoption of decisions. See Article 7 paragraph 3 of the Convention, Text in: 31 ILM 849 (1992).

<sup>108</sup> FAO and WHO, for example, established the Codex Alimentarius Commission (see Alexandrowicz [note 24], 75 et seq.). Other examples are the above cited subsidiary entities of the United Nations, such as the CSD and UNEP and the (recently restructured)

their parent organisation. Nevertheless, the constitutive treaty of the organisation may envisage the creation of subsidiary organs and empower the organisation to vest these organs with particular functions in the field of law-making.

Decisions on financial regulations can also be of interest in the framework of environmental law. Apart from decisions concerning funds for compensation in the case of accidents, the financial mechanism of the Global Environment Facility (GEF) is of particular interest.<sup>109</sup> This mechanism relates to the funding of environmental protection activities in the framework of several environmental conventions. The eligibility criteria for access to the financial resources are enacted by the Conferences of the Parties of the respective environmental conventions, giving those conferences the mandate to decide on financial regulations with impact on the protection of the environment.<sup>110</sup>

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Global Environment Facility (GEF) created by the World Bank, UNEP and UNDP (see *infra*). See also the Memorandum of Understanding between FAO-ILO-OECD-UNEP-UNIDO-WHO establishing an Inter-Organization Coordinating Committee (IOCC) (see *infra*, note 111). On the capacity of international institutions to create subsidiary institutions see Schermers/Blokker (note 2), 152–156, 743, relating to subsidiary organs, and 1119 et seq. relating to the creation of organisations with legal capacity. On the procedure of the establishment of the Global Environment Facility and its legal implications for the question of being a subsidiary entity or an independent organisation see J. Werksman, Consolidating Governance of the Global Commons: Insights from the Global Environment Facility, soon to be published in: Yearbook of International Environmental Law 6 (1995).

<sup>109</sup> Instrument for the Establishment of the Restructured Global Environment Facility, Text in: 33 ILM 1273 (1994). See also S. Mertens, Towards Accountability in the Restructured Global Environment Facility, Review of European Community & International Environmental Law 3 (1994), 105–110.

<sup>110</sup> Article 21 of the Biodiversity Convention (note 96) and Article 11 of the Climate Change Convention (note 107). However, given the provisions of the Instrument establishing the restructured GEF, the direct legal implications of such eligibility criteria seem to be questioned. Part I paragraph 9 *lit. a* states that GEF grants “[...] shall be in conformity with the eligibility criteria decided by the Conference of the Parties (COP) of each convention, as provided under the arrangement or agreements referred to in paragraph 27” [emphasis added by the author]. The wording suggests a negotiation between GEF and the respective COPs over the criteria. This interpretation is supported by the wording of paragraph 27, reading: “[...] arrangements or agreements shall be in conformity with the relevant provisions of the convention concerned regarding its financial mechanism and shall include procedures for determining jointly the aggregate GEF funding requirements [...]” [emphasis added by the author]. This would conflict with the concept of a hierarchical relationship between the Conferences of the Parties and GEF, as has been emphasised by the COPs (compare Werksman [note 108]).



Apart from unilateral acts, there are numerous inter-agency agreements and non-binding "memoranda of understanding" (MOU's).<sup>111</sup> Inter-agency agreements are decided upon autonomously by the competent organisation on the basis of its treaty-making power.<sup>112</sup> Most law-making in administrative matters is part of the implementation of environmental treaties, i.e. the establishment of funding mechanisms<sup>113</sup> and compliance control, or constitutes the preparation of further environmental law-making.<sup>114</sup>

In a few cases, international organisations have the competence to enact substantive environmental protection rules by a majority vote. This is particularly true in the case of management of resources in areas beyond national jurisdiction. But the respective bodies are not always allowed to impose new obligations on states. The Mediterranean Fisheries Council, for example, may amend its constitutive agreement by a two-thirds majority vote of all members.<sup>115</sup> But this only concerns amendments not involving additional obligations. Other amendments come into force with respect to each member only upon the members' acceptance of the amendment. In addition, the first kind of amendments only become effective after concurrence of the Council of FAO. Similarly, the European and Mediterranean Plant Protection Organization is empowered to amend its constitutive convention by a two-thirds majority vote only if there are no additional obligations involved.<sup>116</sup> Otherwise, the amendments must be accepted by each government individually.

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<sup>111</sup> See, for instance, the Memorandum of Understanding Concerning Establishment of the Inter-Organization Programme for the Sound Management of Chemicals between FAO-ILO-OECD-UNEP-UNIDO-WHO, March 13, 1995, Text in: 34 ILM 1311 (1995).

<sup>112</sup> See, for instance, Article 26(a) of the Constitution of IMO (note 5) and Articles 33 and 70 of the constitution of WHO (note 7). On the treaty-making power of international organisations see Schermers/Blokker (note 2), 1096 et seq.

<sup>113</sup> Especially the World Bank has enhanced its activities in the field of the protection of the environment. On the "Greening of the Bretton Woods Institutions" see H. French, Partnership for the Planet. An Environment for the United Nations, Worldwatch Paper 126 (1995), 36 et seq., and A. Steer/J. Mason, The Role of Multilateral Finance and the Environment: A View from the World Bank, Indiana Journal of Global Legal Studies 3 (1995), 35 et seq.

<sup>114</sup> See for instance the functions of the IOCC (note 108) that consist of, *inter alia*, consultation, the identification of gaps, the recommendation of common policies, the exchange of information and the review of actions taken.

<sup>115</sup> Article VIII of the Agreement (note 81).

<sup>116</sup> Convention on the Establishment of the European and Mediterranean Plant Protection Organization, Paris 1951, Article XIX. Text in: Kiss (note 78), No.7.

The Conference of the Parties of the Montreal Protocol (the Protocol on Substances that Deplete the Ozone Layer) is vested with a real legislative competence.<sup>117</sup> The COP may decide on adjustments to the ozone depleting potential of substances and on further reductions of production or consumption of the controlled substances.<sup>118</sup> This is done by a two-thirds majority vote if no agreement can be reached. The decisions are binding on all parties without a possibility to opt-out and without the need for ratification. However, within the two-thirds majority there is a veto right for both a majority of the developed and the developing countries.<sup>119</sup>

The Assembly of the International Sea-Bed Authority is empowered to decide, *inter alia*, on “rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area” by a two-thirds majority.<sup>120</sup> According to Article 145 of UNCLOS, the “rules, regulations and procedures” of the Authority have to ensure the effective protection of the marine environment from harmful effects which may arise from such activities. However, under the Agreement Relating to the Implementation of Part XI of UNCLOS, the parties must first seek to reach a decision by consensus.<sup>121</sup> Another safeguard is the participation of the Council of the Authority in the decision-making process. Decisions of the Assembly on matters for which the Council also has competence, as is the case for the said rules and regulations, shall be based on recommendations of the Council.<sup>122</sup> The Council, in turn, must decide on those rules by consensus as outlined above. The composition of the Council provides for a comprehensive representation of all interests at stake, combining the prin-

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<sup>117</sup> See also D. Caron, Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking, *Hastings International and Comparative Law Review* 14 (1991), 767.

<sup>118</sup> Article 2 paragraph 9 of the Protocol on Substances that Deplete the Ozone Layer, Montreal 1987, Text in: 26 ILM 1550 (1987).

<sup>119</sup> This veto right has been introduced by the 1990 London Amendments (Section H), Text in: 30 ILM 537 (1990). Before the London Amendments, the Protocol granted a veto right to parties making up for more than fifty per cent of the total consumption of the controlled substances.

<sup>120</sup> Article 160 paragraph 2(f)(ii) in conjunction with Article 159 paragraph 8 of UNCLOS (note 15).

<sup>121</sup> Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (Implementation Agreement), Annex, Section 3 paragraphs 2 and 3, Text in: 33 ILM 1309 (1994).

<sup>122</sup> Section 3 paragraph 4 of the Annex to the Implementation Agreement.

ciple of equitable geographic representation and the principle of the representation of special interests.<sup>123</sup>

The International Civil Aviation Organization is also said to have been vested with a legislative power relating to aviation rules over the high seas.<sup>124</sup> This assumption is based upon Article 12 of the Chicago Convention, which states that “over the high seas, the rules in force shall be those established under this Convention”. As outlined above, the Council of the organisation may adopt international standards by a two-thirds majority if they are designed as annexes to the convention. The question is whether the opting-out procedure is applicable. Even if the individual opting-out procedure of Article 38 is not applicable, the “prohibitive quorum” of Article 90 will be applied to rules adopted as annexes to the convention.<sup>125</sup> Thus, the contracting states can prevent the entry into force by a majority registering its disapproval. However, the relevance for environmental legislation is minimal as the above-cited rules only seem to relate to air traffic rules and not to emission standards.<sup>126</sup>

## 2. Indirect Legislation

Recent conventions increasingly incorporate by reference non-binding guidelines or standards adopted in the framework of international organisations. These standards and rules may also stem from other environmental conventions with differing contracting parties. To which kind of standards and rules the reference is made is a question of interpretation and involves the risk of future disputes among the contracting parties and the organisation if the reference does not relate to specific instruments. One may distinguish “static” and “dynamic” references. In the latter case, standards to be adopted in future are incorporated whereas in the former the reference is made to a specific, already existing set of rules and standards.

Another mechanism of indirect legislation is “persuading” states to agree to regulations of international organisations by threatening to exclude their benefits and services if they refuse. States or organisations that

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<sup>123</sup> See R. Wolfrum, *The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for Other International Economic Organisations?*, *ZaöRV* 55 (1995), 312 et seq.

<sup>124</sup> See Kirgis (note 83), 831 and 833, and Sand (note 39), 18.

<sup>125</sup> See also Wolfrum (note 25), 243. Wolfrum points out that Article 38 is not applicable to the adoption of rules over the high seas, but that the procedure of Article 90 remains applicable.

<sup>126</sup> *Ibid.*

decide upon those benefits may then *de facto* apply the standards to the reluctant state by using them as eligibility criteria. This technique often applies to decisions taken on the distribution of natural resources, financial funds and other services of organisations. It is applied, e.g., by the IAEA, the World Bank and in the framework of the Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as will be shown below.

A closely related mechanism of *de facto* application is the port state control over vessels.<sup>127</sup> Ships are under the jurisdiction of the flag states.<sup>128</sup> When a flag state does not agree to an international rule, the rule can nevertheless be applied if the port state is granted the authority to investigate and prosecute offences against international rules and standards. If the vessel wants to land and to unload, it is automatically submitted to the international regime although the flag state might not be formally bound by the rules and standards.

#### *a) Incorporation by Reference – Some Examples*

The Convention on the Law of the Seas refers at several places to “generally accepted international rules and standards established through the competent international organization [...]” and to “internationally agreed rules, standards and recommended practices [...]”.<sup>129</sup> Sometimes, such norms constitute mandatory minimum standards for state regulation, sometimes they function, again, as guidelines for the parties to UNCLOS. For instance, Article 211 requires the flag states to adopt laws for vessel pollution control that shall have at least the same effect as generally accepted international rules and standards. Under special circumstances, coastal states are given authority to regulate pollution from vessels in their economic zones in co-operation with the competent international organisation. By so doing, they implement international rules and standards made applicable to special areas through the organisation. Foreign

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<sup>127</sup> On the instrument of port state control see M. Cuttler, Incentives for Reducing Oil Pollution from Ships: The Case for Enhanced Port State Control, *Georgetown International Environmental Law Review* 8 (1996), 175 – 205.

<sup>128</sup> *Ibid.*, 191. The FAO Compliance Agreement (note 76) builds on the concept of flag state responsibility but tries to strengthen the obligations of flag states as to the supervision of its vessels.

<sup>129</sup> This wording is contained in Article 211 paragraph 2 and in Article 207 paragraph 1 of UNCLOS (note 15). A similar wording can be found in Articles 210 paragraph 6, 216 paragraph 1, 217, 219, 220, 226, 228 paragraph 1 concerning pollution from ships.

vessels are not obliged to observe construction and equipment standards other than generally accepted international standards.<sup>130</sup> Regarding pollution from or through the atmosphere, states are obliged only to take internationally agreed rules and standards “into account”, thus leaving some leeway to states for regulation. The phrase “the competent international organization” may be understood as referring to IMO when relating to globally applicable shipping norms.<sup>131</sup> Whether “rules and standards” are only those contained in other environmental conventions and their annexes, or whether they include so-called soft law that becomes mandatory through the reference, is not clear from the wording.<sup>132</sup> The distinction made between clearly mandatory “rules” and “standards” suggests a difference as to their interpretation.<sup>133</sup> As they have to be “generally accepted” this would appear to exclude disputed guidelines adopted by a simple or even two-thirds majority vote that have not been subsequently followed by uniform state practice.

The Convention on Oil Pollution Preparedness, Response and Co-operation, adopted under the auspices of IMO in 1990<sup>134</sup>, eases this problem of interpretation. The parties to this convention have adopted a list containing the instruments developed by IMO that are referred to by the Oil Preparedness Convention. The list is contained in a Conference Resolution attached to the Convention.<sup>135</sup> Although the Convention refers generally to “provisions adopted by the Organisation” which must be obeyed when establishing oil pollution emergency plans, the Conference Resolution restricts IMO’s discretion in enacting such provisions by limiting the reference to Regulation 26 of Annex I of MARPOL (added through the 1978 Protocol). Similarly, other references in the Convention also are

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<sup>130</sup> Paragraph 6(a) and (c) of Article 211, *ibid.*

<sup>131</sup> See Kirgis (note 49), 734, and Oxman (note 53), 473.

<sup>132</sup> On the standards applicable to ocean dumping, sea-bed activities and offshore installations compare Oxman (note 53) who refers primarily to international conventions (*ibid.*, 469 et seq.). However, he suggests that the IMO has been conferred a standard setting role, being able to bind non-IMO members and non-parties to the treaty containing the relevant standards (*ibid.*, 474). Birnie/Boyle (note 3) refer to MARPOL and “possibly other international standards” (*ibid.*, 279).

<sup>133</sup> For the inclusion of guidelines that were adopted by overwhelming vote or by consensus Kirgis (note 49), 735 et seq.

<sup>134</sup> London 1990, Text in: 30 ILM 733 (1991).

<sup>135</sup> Conference Resolution 1: References to Instruments and other Documents Developed by the International Maritime Organization under Articles of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990, Text in: 30 ILM 752 (1991).

interpreted as referring primarily to MARPOL or particular guidelines. Those guidelines, however, do not become mandatory through the Convention but are to be only used “in so far as practicable” or simply are to be taken into account.<sup>136</sup>

Whereas UNCLOS primarily contains “dynamic” references, the MARPOL convention incorporates a specific IMO code through a “static” reference in Annex II Regulation 13. Accordingly, requirements for chemical tankers shall “contain at least” all the provisions given in the Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk, adopted by the Assembly of IMO. This Code may only be amended by IMO in accordance with the amendment procedure of MARPOL relating to appendices to an annex. Thus, the code was upgraded through its incorporation into an annex of MARPOL. At the same time, the legislative competence of IMO was restricted through the application of the opting-out procedure in Article 16 of the same convention.

*b) De Facto Application of Internationally Agreed Norms*

As mentioned above, the Straddling Fish Stocks Convention contains a mechanism to ensure the application of conservation and management measures adopted by regional and subregional fisheries commissions.<sup>137</sup> This mechanism is very interesting for several reasons. First, the contracting states have a contractual duty to establish such commissions or to adhere to them should they already exist.<sup>138</sup> In the framework of these commissions, the states shall agree on the adoption of various conservation and management measures.<sup>139</sup> Even if a state does not become a member of a competent commission, it shall give effect to its duty to co-operate “by agreeing to apply the conservation and management measures established by such organisation [...]”.<sup>140</sup> According to Article 8 paragraph 4,

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<sup>136</sup> See Article 5 paragraph 4 and Article 6 paragraph 1(b), *ibid.*

<sup>137</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982: Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in 1995, Text in: 34 ILM 1542 (1995) [*cit.* hereinafter: Straddling Fish Stocks Convention]. On the convention see D. Balton, Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Ocean Development & International Law* 27 (1996), 125–151.

<sup>138</sup> Article 8 paragraphs 5 and 3, *ibid.*

<sup>139</sup> Articles 9 and 10, *ibid.*

<sup>140</sup> Article 8 paragraph 3, *ibid.*

only states which agree to apply such measures shall have access to the fishery resources to which those measures apply. In addition, a state which does not agree to apply these measures is not discharged from the obligation to co-operate in the conservation and management of the relevant fish stocks.<sup>141</sup> A port state, which has the right and the duty to promote the effectiveness of the said conservation measures, may inspect the vessels in its port and may prohibit landings and transshipments where it has been established that the catch has been taken infringing upon sub-regional, regional and global conservation measures.<sup>142</sup> Judging from the wording of the Convention, the regional conservation measures are not *ipso jure* mandatory to states which have not agreed to apply them but are *de facto* applicable through the implementation powers of port states.<sup>143</sup> In regard to specific fishing entities, the convention explicitly provides for the “*de facto* application” of conservation measures.<sup>144</sup> In addition to the port state control, states are encouraged – one might even say urged – to agree to such conservation measures if they want to benefit from the fishery resources. However, the primary ground for these obligations is the contractual commitment of the states party to the convention.<sup>145</sup>

As mentioned above, the IAEA may adopt safety standards for the protection of health and the minimisation of danger to life and property.<sup>146</sup> Apart from the possibility of incorporating them into agreements upon request of the parties, these standards apply to the operations of the IAEA as well as to “the operations making use of materials, services, equipment, facilities and information made available by the agency” and operations under the control or supervision of the IAEA. Thus, beneficiaries of the services of the IAEA are indirectly bound to the IAEA safety standards.

The World Bank, which is becoming more and more active in the field of the protection of the environment, adopted an Operational Directive

<sup>141</sup> Article 17 paragraphs 1 and 2, *ibid.*

<sup>142</sup> Article 23, *ibid.*

<sup>143</sup> Another example for the mechanism of port state control is UNCLOS which was the first convention to expand port state authority. See particularly Article 218 of UNCLOS (note 15). On the details of the inspection procedure see Article 226 of UNCLOS. On the Paris Memorandum of Understanding that aims to co-ordinate port state control procedures see Cuttler (note 127), 194 et seq., and R. Mitchell, *Intentional Oil Pollution at Sea, Environmental Policy and Treaty Compliance* (1995), 105 et seq.

<sup>144</sup> Article 17 paragraph 3 of the Straddling Fish Stocks Convention.

<sup>145</sup> Compare Szasz (note 23) who refers to “derivative treaty obligations” (*ibid.*, 41).

<sup>146</sup> Article III.(A) paragraph 6 of the Statute.

on Environmental Assessment.<sup>147</sup> The directive “outlines Bank policy and procedures for the environmental assessment (EA) of Bank investment lending operations”.<sup>148</sup> The EA shall be part of the project preparation and is therefore the borrower’s responsibility, although the EA preparation is assisted and monitored by the Bank. The outcome of the EA is to be submitted to the Bank by the borrower prior to the Bank’s appraisal of the project. The main findings will provide the basis for the environmental clearance prior to the authorisation of negotiations on the project concerned and for decisions on specific loan conditionality.<sup>149</sup> Therefore, the borrower has to follow closely the procedural provisions and the substantive criteria of the Operational Directive, although the directive is not directly addressed to him but outlines the policy of the World Bank.

## VI. Conclusions

### 1. Evaluation

As outlined above, traditional global international organisations such as IMO, FAO and WHO primarily either participate in the intergovernmental treaty-making process or enact environmentally relevant standards via opting-out procedures. Their environmental law-making consists of secondary legislative acts, distinct from their constitutive instruments which are often restricted to institutional provisions. Thus, it is not the amendment procedures of the respective constitutions but the internal decision-making procedure which is of primary importance. The exception to this rule is the ICAO whose navigation standards are designed as annexes to the Chicago Convention. In addition, these policy-making organisations enact the largest number of non-binding guidelines. Such guidelines may be incorporated by reference into mandatory instruments or may, as mentioned above, influence the environmental law-making process as interpretative acts, a starting point for the elaboration of a convention or a factor in the development of customary law.

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<sup>147</sup> World Bank Operational Directive 4.00 Annex A: Environmental Assessment, 1989, Text in: Sands/Tarasofsky/Weiss (note 37), No.68. According to Steer/Mason (note 113), the World Bank has screened over one thousand projects since 1989. Round about ten percent shall have been subjected to a full EA (ibid., 42).

<sup>148</sup> Paragraph 1 of OD 4.00, ibid.

<sup>149</sup> Paragraph 25 and 26, ibid.



In contrast, law-making by treaty-management organisations does not, as a rule, constitute “independent” secondary legislation but amounts to amending their own constitutive convention or its protocols, annexes and appendices thereto. Organisations of this type guarantee the continuous development of the respective legal regime by adapting it to the changing ecological, scientific and technical conditions.<sup>150</sup> In the framework of such organisations, the amendment procedures are of particular interest for the law-making process. Here, the exception to the rule is the International Sea-Bed Authority which enacts secondary rules and regulations, distinct from the Convention on the Law of the Sea.

One may doubt whether the type of decisions normally taken by management organisations really form part of international environmental law.<sup>151</sup> Legal norms are general in character, addressed to an indeterminate number of persons, and susceptible of repeated application.<sup>152</sup> This is certainly true for the “rules and regulations” that may be adopted by the International Sea-Bed Authority. There are, however, also other acts constituting decisions on concrete questions, some of which can nevertheless produce a broad range of legal consequences. For example, amendments to Appendixes I and II of CITES concern the placement of individual species but can lead to an indefinite number of prohibitions and restrictions to importation. However, the distinction between general norms and concrete decisions stems from the concept of separation of powers in national constitutional law. There, the legislature is empowered to enact abstract norms that are to be applied by the executive branch through concrete decisions. As there is no strict distinction between the executive branch and

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<sup>150</sup> Compare American Bar Association (ed.), *Trends in International Environmental Law* (1992), stating that environmental problems require ongoing solutions and that effective international environmental agreements must therefore establish institutional arrangements for continuous cooperation (*ibid.*, 112). See also Lang (note 82), 166. Lang points out that multilateral treaties need the support of an international organisation in order to become and remain operational. “Thus, international law becomes something of a ‘living organism’ serving the changing needs of the society” (*ibid.*).

<sup>151</sup> In favour of the qualification as part of international environmental law Sands (note 1), 92 and 115 et seq.

<sup>152</sup> See Yemin (note 24), 18, and Seidl-Hohenveldern (note 14), annotation 1501. Seidl-Hohenveldern points out that the distinction between administrative activities and law-making activities in the framework of international organisations is sometimes hard to make (*ibid.*), compare also Kirgis (note 29), 110. According to Kirgis, the “legislative form” of a measure depends on three points: (1) Some degree of formality through the adoption by an authorised body of an organisation; (2) The measure is intended to provide a channel for the conduct of “entities”, usually states; (3) The general application of the measure.

the legislature in international law, at least these concrete decisions, which result in amendments to conventions and their annexes, can be considered as part of international law.

Each law-making process meets specific needs for regulation. The character of the decisions to be made is reflected in the structure of the decision-making process.<sup>153</sup>

If regular and timely revision of norms is required because of the dynamism of the regulated issue, legislative or quasi-legislative procedures seem to be advisable because they shorten the lengthy treaty negotiation process.<sup>154</sup> This is particularly the case for the management of resources where changing ecological conditions are to be met, as, for instance, the management of the whaling population through the IWC. The same applies to technical subjects and questions to be decided based on rapidly changing scientific knowledge. Consequently, as outlined above, numerous management organisations and global international organisations dealing with technical questions have at least a quasi-legislative process at their disposal.

The law-making technique does not depend alone on the subject-matter but also upon the various actors involved representing different interests. The need to integrate these actors could be met by having recourse to the treaty-making process. This process is based on the principle of consent and therefore guarantees the integration of all participating actors. However, integration does not necessarily require the negotiation of new agreements. There are possibilities of refining the decision-making process within international organisations without reverting to the lengthy traditional treaty-making process. Interest integration may be achieved through adequate composition of the decision-making organs of the competent organisation as well as through participatory rights. This has been reached in the case of, *inter alia*, the Council of ICAO,<sup>155</sup> the Council of IMO<sup>156</sup> and the Council of the International Sea-Bed Authority.<sup>157</sup> As

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<sup>153</sup> Wolfrum (note 123), 311.

<sup>154</sup> Compare Sand (note 39), 5 and 15. Sand points out that the time lag between the drafting, adoption and entry into force of treaty standards possibly is the most serious drawback of the treaty method. The average tempo of acceptance is said to be about five years (*ibid.*, 15). Compare also C. Joyner/E. Martell, Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law, Ocean Development & International Law 27(1996), 82 et seq.

<sup>155</sup> See Article 50 of the Chicago Convention (note 11).

<sup>156</sup> See Article 18 of the Constitution (note 5).

<sup>157</sup> See Section 3 paragraph 9 to 15 of the Annex of the Implementation Agreement (note 121) and Wolfrum (note 123), 312 et seq.

outlined above, provisions for quorums and veto rights for particular interest groups or for weighted voting, can also be used as integrating elements in a law-making process.<sup>158</sup> A particularly interesting system of weighted voting is the “double weighted majority” of the restructured Global Environment Facility.<sup>159</sup> Another approach is a “double weighted prohibitive quorum”. An example is the above outlined amendment procedure of MARPOL in the framework of IMO. There, one-third of the parties or, alternatively, parties that make up for a certain percentage of the world’s merchant fleet tonnage, can inhibit an amendment’s entry into force. All these techniques can also be combined with each other according to the interests at stake. In this respect, the decision-making process of the International Sea-Bed Authority is particularly elaborate and complex, providing for a veto right exercised by a majority in one of the chambers of the Council and the interaction of two organs of different composition and powers in the decision-making process.<sup>160</sup>

While the adoption of general rules of international environmental law may necessitate broad participation in view of their prospective implementation, rules concerning the management of resources may be implemented without a deliberate acceptance by the affected states. General rules and principles in international conventions mostly are not self-executing, i.e. they need to be specified by national law. As long as states do not agree on an effective compliance procedure, overruled states can just ignore such rules without fearing negative consequences – except for the “moral-hazard” problem. These rules therefore need to be thoroughly discussed and fashioned with the participation and agreement of all states bound. Concrete rules concerning the management of resources, on the other hand, may be implemented indirectly. They can be applied *de facto* by depriving the reluctant state of natural resources or other services man-

<sup>158</sup> The weighting of votes exists mainly in the framework of financial and economic organisations such as the World Bank and the International Monetary Fund. For the variety of arrangements relating to the decision-making process of international economic organisations see R. Wolfrum, *Neue Elemente im Willensbildungsprozeß internationaler Wirtschaftsorganisationen*, Vereinte Nationen 2 (1981), 50 et seq.

<sup>159</sup> According to Part IV paragraph 25(c) of the Instrument on GEF (note 109), an affirmative vote has to represent both a 60 percent majority of the total number of participants and a 60 percent majority of the total contributions. Thus, the voting system combines the principles of weighted voting of the participating World Bank and the one-country one-vote principle of the United Nations.

<sup>160</sup> For a detailed description and analysis see Wolfrum (note 123). The veto right concerns decisions taken by majority vote and not the above cited rules and regulations that are to be adopted by consensus.

aged by the international regime. In this case, the majority rule can be effective. An example is the Straddling Fish Stocks Convention that provides for port state control and the regulation of access to regional fishery resources.

After all, the interrelation between the decision-making process and the implementation phase has to be taken into account. Interests that have been ignored or overruled during the decision-making process can and most certainly will resurface as obstacles to the implementation of that rule.<sup>161</sup> Therefore, international legislative powers, i.e. majority decisions, need to be accompanied by matching compliance procedures.

## 2. Perspectives

Recently, some commentators have called for a new global environment organisation with widespread regulative competence.<sup>162</sup> However, most of the organisations with comprehensive rule-making powers were founded in the first half of this century, for example, ILO in 1919, ICAO in 1944, and WHO and IWC in 1946. One may even discern a shift from the “legislative principle” to the principle of state consent. As outlined above, the Assembly of the International Sea-Bed Authority, for instance, under UNCLOS has the authority to decide on questions of substance by a two-thirds majority vote. Under the Implementation Agreement, this rule has now been modified by paragraph 2 of Section 3, stating that “as a general rule, decision-making in the organs of the Authority should be by consensus”. Only if all efforts to reach a decision by consensus have been exhausted, the Assembly shall decide by a two-thirds majority vote. In addition, even where majority votes are allowed, in practice decisions are rather adopted by consensus or “pseudo-consensus”, avoiding voting

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<sup>161</sup> See the findings of A. Windhoff-Héritier, *Politikimplementation* (1980), 29 et seq. See also Joyner/Martell (note 154), who state that only “decisions that take into consideration the interests of those states particularly affected by the treaty are likely to generate sound and acceptable norms of behaviour” (ibid., 80).

<sup>162</sup> In particular Sir Geoffrey Palmer, *New Ways to Make International Environmental Law*, *American Journal of International Law* 86 (1992), 281. See also Kirgis (note 29), 120, and H. French, *Wirksame Gestaltung von Umweltschutzabkommen*, *Spektrum der Wissenschaft* (1995), 63 et seq. In *Partnership for the Planet* (note 113), H. French supports the centralisation of the existing bodies under one roof in the sense of a co-location (ibid., 23). L. Kimball, on the other hand, speaks of a “web of relationships” consisting of specialized regimes (L. Kimball, *Toward Global Environmental Management: the Institutional Setting*, *Yearbook of International Environmental Law* 3 [1992], 34).

through lengthy informal prenegotiations to obtain a universally accepted compromise.<sup>163</sup> Alternatively, states are encouraged to make reservations instead of casting a negative vote.<sup>164</sup> Consequently, the more recent instruments often explicitly prescribe that first all efforts have to be made to attain consensus. Only upon failure of these efforts, the convention allows for a vote by a certain majority.

The question of the preferable law-making technique should be decided in the light of the goal to be achieved. This should be the effectiveness of the measures taken and not the making of law *per se*. In other words, the aim cannot be to adopt the largest number of environmental rules in the shortest period of time, but, to adopt rules which can be effectively implemented. Accordingly, the Straddling Fish Stocks Convention requires the contracting parties to agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner.<sup>165</sup> This requires to take into account the interests of the participants in the law-making process, as well as to shape the latter according to the envisaged compliance procedure. The establishment of a new centralised global organisation seems to ignore the various experiences and expertise gained by the existing organisations and runs the risk of harmonising the environmental law-making process at the expense of adequate interest representation, hindering the effective implementation of the measures adopted.

There is, however, a need to co-ordinate the activities of existing international environmental organisations and to fill in the existing gaps as to the norm-setting competencies of relevant organisations. According to Agenda 21, co-ordination should be provided by UNEP as far as Convention secretariats are concerned<sup>166</sup> and by the CSD, in regard to imple-

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<sup>163</sup> See Szasz (note 23), 84 et seq., and Birnie/Boyle (note 3), 37. For decisions of the Council of ICAO see Kirgis (note 83), 827. For the adoption of decisions by "pseudo-consensus" see J. Kaufmann, *United Nations Decision Making* (1980), 127 et seq. On the "decline of majority voting and the rise of consensus" in general and the difference between consensus and unanimity see Schermers/Blokker (note 2), 512–516.

<sup>164</sup> See Kaufmann (note 163). Of course, reservations can only be issued if they are not forbidden by the respective instrument. This is increasingly the case for environmental conventions (see Sands [note 1], 111). However, the opting-out procedure has a similar function and effect like the use of reservations.

<sup>165</sup> Article 10(j) of the Convention (note 137).

<sup>166</sup> Paragraph 22 of Agenda 21 Chapter 38 reads: "Priority areas on which UNEP should concentrate include the following: [...] and coordinating functions arising from an increasing number of international legal agreements, *inter alia*, the functioning of the secretariats of the Conventions, taking into account the need for the most efficient use of

mentation review.<sup>167</sup> The Secretary-General of the United Nations has already established a new Department for Policy Coordination and Sustainable Development (DPCSD) at the Under-Secretary-General level as a secretariat support structure for the CSD.<sup>168</sup> In addition to the CSD, an Inter-Agency Committee on Sustainable Development (IACSD) was created to improve co-ordination and co-operation between the relevant U.N. agencies.<sup>169</sup> But these subsidiary bodies of the United Nations lack any special powers to co-ordinate the law-making activities of international organisations and states effectively.<sup>170</sup> The CSD even failed to install an obligatory reporting procedure.<sup>171</sup>

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resources, including possible co-location of secretariats established in the future". See also GA Res. 2997 (note 19), Part II paragraph 2 *lit.*b, stating that the Executive Director is entrusted with the responsibility to "coordinate [...] environmental programmes within the United Nations system, to keep their implementation under review and to assess their effectiveness". French (note 113) claims that UNEP's mission to integrate environmental activities into the work of other U.N. agencies was largely usurped by shifting this responsibility to the CSD and the IACSD (*ibid.*, 32).

<sup>167</sup> For the CSD see paragraphs 11 to 13 of Chapter 38 (*ibid.*).

<sup>168</sup> See Orliange (note 20), 827, and paragraph 32 of GA Res.47/191 (note 20).

<sup>169</sup> See French (note 113), 31. On the work of the IACSD see the Report of the Secretary-General on the Implementation of General Assembly Resolution 47/191 on the institutional arrangements to follow up the United Nations Conference on Environment and Development, paragraph 6 and 7, Text in: U.N.Doc. No. A/48/442, 14 October 1993.

<sup>170</sup> The relationship of the CSD, e.g., with other agencies of the U.N. is governed by the rules of procedure that are the same as for other functional commissions of ECOSOC (see ECOSOC Decision 1993/215 of 12 February 1993). These rules of procedure provide for the participation and consultation with specialised agencies and other intergovernmental organisations (Rules 71 to 74, Text in: Doc.No.E/5975/Rev.1, United Nations, 1983). The agencies are entitled to be represented and to participate without the right to vote (Rule 71).

On the relationship to the treaty-management organisations see for instance the wording of GA Res.47/191 (note 20) paragraph 3(a) relating to the functions of the CSD: "To consider, where appropriate, information regarding the progress made in the implementation of environmental conventions, which could be made available by the relevant Conferences of Parties" [emphasis added by the author]. P. Orliange (note 20) points out that the CSD has no compulsory measures at hand (*ibid.*, 832). L. Kimball (note 162) states that "when it comes to reviewing other agencies' programs, there is no single authority in the system of international institutions, comparable to a head of government, that can set policy for all the different international agencies and programs" (*ibid.*, 24).

<sup>171</sup> See paragraph 22 of the Report of the Commission on Sustainable Development on its First Session reading: "Bearing in mind the voluntary nature of information to be provided by Governments and that it will be up to individual Governments to decide on its degree of detail and regularity [...]". Text in: Official Records of the ECOSOC, 1993 Supplement No.5A (E/1993/25/Add.1). At the first session, the Chair had introduced a draft

One might imagine an international organisation responsible for co-ordination acting as a subsidiary forum for environmental law-making if no other specialised organisation is competent *prima facie*. This organisation could be vested with participatory powers such as the power to take the initiative in drafting instruments, to compel member states to submit the adopted instrument to the competent national authorities combined with a reporting procedure. It could determine the international organisation which should take action and it could provide for scientific support services.<sup>172</sup> As an optional law-making forum it could further provide for several “services” relating to the negotiating process. Apart from responsibility for the logistics, i.e. the rooms and secretariat services, it could also offer optional rules of procedure which would function as a model. These rules would provide differing procedures and structures adjustable to the specific problem at hand. In addition, mediation procedures could be at hand to solve deadlock situations during environmental negotiations.<sup>173</sup> Another field of action could be technical standard setting through an opting-out procedure. And, last but not least, tasks relating to the implementation of the respective instruments could also be carried out by such an organisation. For the time being, this vision is rather utopian in particular because of the financial restraints.<sup>174</sup> However, it could eventually be attained gradually through the step-by-step upgrading of UNEP or CSD.<sup>175</sup>

Another perspective for environmental law-making by international organisations is increased incorporation by reference of non-binding guidelines. This approach is followed by MARPOL and UNCLOS as shown above. Particularly interesting is the incorporation through “dynamic” reference, i.e. of standards and rules to be adopted by those organisations

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decision on “Guidelines to the Secretariat for organising information provided by governments on issues related to the implementation of Agenda 21” that gave rise to several statements on the importance of the voluntary nature of reporting (according to the summary of the plenary discussion in EPL 23 (1993), 191).

<sup>172</sup> Compare American Bar Association (note 150) advocating to increase reciprocal relations among environmental intergovernmental organisations through reciprocal voting or veto privileges (*ibid.*, 130 et seq.).

<sup>173</sup> For the establishment of “mediation teams” see G. Sjöstedt/B. Spector, Conclusion, in: Sjöstedt (note 55), 299. See also J. Rubin, Third-Party Roles: Mediation in International Environmental Disputes, in: *ibid.*, 275 et seq.

<sup>174</sup> Compare Szasz (note 23), 107, and Lang (note 82), 174.

<sup>175</sup> Compare French (note 113) who favours the transformation of UNEP into an operational U.N. agency. The agency could then serve as an umbrella organisation for the “currently scattered collection of treaty bodies” (*ibid.*, 54 et seq.).

in future. Another “promising” field of indirect legislation is the *de facto* application of internationally enacted norms through treaty-implementation by other actors, e.g. port states, and the exclusion of benefits in the case of infringement upon such rules as provided for by the Straddling Fish Stocks Convention. Moreover, the provisional application of rules<sup>176</sup> that have been adopted by an organ of limited membership as provided for in the framework of the International Sea-Bed Authority, or even the final law-making competence conferred upon such an organ, even if it has to act by consensus, are forms that come close to legislation through international organisations.

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<sup>176</sup> See Kirgis (note 29), 118, and Sand (note 39), 15 et seq.