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NOTES ON EXTERNAL POWERS OF AUTONOMOUS INSTITUTIONAL ARRANGEMENTS

Abstract

The primary aim of this article is to analyze the external powers of the Autonomous Institutional Arrangements (AIAS), with a particular focus on their treaty-making powers. AIAs represent a largely overlooked phenomenon in contemporary international institutional law, yet by the will of States they possess and exercise certain powers. These include not only internal (*pro foro interno*) powers but also significant external (*pro foro externo*) powers, such as law-making powers and treaty-making powers. This enables AIAs, much like international organizations, to influence the evolution and development of modern international law. Examining the legal status of such bodies must be based on the rules of the law of treaties and international institutional law. Such a discussion is necessary insofar as academic research should answer the needs of international practice. Moreover, in Polish international law scholarship, these issues remain underexplored, highlighting the need for further study.

KEYWORDS

Autonomous Institutional Arrangements (AIAs), Multilateral Environmental Agreements (MEAs), international organizations, external powers, treaty-making powers

SŁOWA KLUCZOWE

autonomiczne instytucje implementacyjne, wielostronne traktaty środowiskowe, organizacje międzynarodowe, stosunki zewnętrzne, kompetencje traktatowe

I. INTRODUCTION

In the process of implementing of international co-operation between States, we find, first of all, international governmental organizations (IGOs), which are usually referred to as 'fully-fledged international organizations', as well as other, less formalized institutions of such cooperation. IGOs are currently the most important non-State members of the international community. It is also indisputably true that they need to be considered as subjects of international law. The creation of international organizations and their dynamic development, particularly from the second half of the 20th century, have played a pivotal role in the evolution of international law. In her study, Boisson de Chazournes emphasizes that in modern international relations '[c]ooperation through international organizations has become a fundamental pillar of the international legal order'.[1] IGOs stemmed from the practical necessity for States to co-operate in various and often rather technical areas. Their dynamic development has resulted not only in the institutionalization of international co-operation, but also in their becoming, alongside States, key actors in modern international relations. The dynamic evolution of IGOs in recent times has engendered significant transformations in the international community, in turn calling for a redefinition of the concept of international law as a natural consequence of this process. This process has been termed by some as an 'organizational revolution'. International organizations have become important actors on the international scene. They now constitute a unique apparatus for law-making and other international activities and remain at the forefront of the development of some areas of modern international law. The proliferation of international organizations and the continual extension of the fields of activity they cover has made them a necessary tool in shaping international co-operation.

The international co-operation between States frequently takes place outside official forms of international organizations. There are various reasons States prefer less formal ways of co-operating. Such co-operation may then be more flexible and its forms easier to modify. Such forms of co-operation are described

[1] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations* (Leiden, Brill Nijhoff 2017) 1.

by some as 'soft organizations'.[2] The evolution of the forms of co-operation within such institutions is much easier than in the case of international organizations. Such cooperation is based on an international arrangement, but the extent to which it is formalized or institutionalized varies – Conference on Security and Co-operation in Europe (CSCE) being a good example.[3] Sometimes such cooperation undergoes evolutionary changes and transforms into an international organization, but sometimes it simply continues as an informal co-operation and remains so. In this context, it is important to keep in mind some other institutions of international cooperation that are not classified as international organizations, but which are developing dynamically in some areas of cooperation. This is a growing group of entities called 'treaty bodies'. In practice, treaties, or more broadly speaking treaties and other instruments governed by international law, may establish either international organizations or less formalized forms of international cooperation referred to as 'soft organizations', and other entities of cooperation traditionally defined as treaty bodies. Although treaty bodies are similar to international organizations and more flexible forms of co-operation indicated above, there exist substantial differences between them. Grasping these similarities and differences is rather complicated and as Klabbers noted: '[i]n what exactly the distinction between an organization and a treaty organ resides is unclear'.[4] Problems with a clear-cut classification of treaty bodies also arise from the fact that the doctrine offers different names and terms for these institutions of co-operation. For instance, in Polish legal doctrine on international law, apart from a literary translation of the term 'treaty bodies' (Pl *organy traktatowe*), there appear such terms as international organs established by a treaty and autonomous implementation institutions.[5] In practice, it is difficult to distinguish treaty bodies from international organizations or other more flexible forms of co-operation, but it is also difficult to provide an unambiguous and clear-cut assessment of treaty bodies. This is because treaty bodies take a variety of forms and serve a variety of functions. This considerable variety in treaty bodies, both with regards to their designation and organizational structure, means that they must be assessed *ad casum*. Treaty bodies function in a number of different fields of international co-operation. Clearly, however, in the broadest terms we will find them in two

[2] Geir Ulfstein, *Institutions and Competences*, in J. Klabbers, A. Peters, G. Ulfstein (eds), *The Constitutionalization of International Law* (Oxford, Oxford University Press 2009) 51.

[3] Laurence Boisson de Chazournes, Andrzej Gadkowski, *The External Relations of the* OSCE, in: M. Steinbrück Platise, C. Moser, A. Peters (eds), *Revisiting the Legal Status of the OSCE* (Cambridge, Cambridge University Press 2019) 214.

[4] Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge, Cambridge University Press 2015) 10.

[5] Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa, Wydawnictwo Prawo i Polityka Gospodarcza 2006) 108.

areas of international co-operation: the international protection of human rights and international environmental law.

Treaty bodies found in Multilateral Environmental Agreements (MEAs), which are traditionally referred to as Autonomous Institutional Arrangements (AIAs), are extremely specific in nature and, as a result, were and still are perceived as 'a little-noticed phenomenon in international law'.[6] AIAs are particularly characteristic of the environmental treaty system, described by Gehring as forming 'hybrid structures somewhere between traditional international treaties […] and international organizations […] In addition to substantive obligations, they include institutional components of varying design, which are, compared to multilateral agreements in other policy fields, remarkably strong'.[7] The creation and development of AIAs appears to reflect the unique tendency for development in international environmental law. This tendency arose, *inter alia*, because individual environmental agreements (primarily universal, but also regional) formed specific treaty institutions and entrusted them with the decision-making functions within a given agreement.[8] Some commentators are of the opinion that this tendency is a reflection of the States' parties to MEAs recognizing their common interest in matters that are often of a global nature.[9] International environmental law has developed rapidly since the 1970s, and this has led to the adoption of international conventions, both universal and regional, concerning the environment in general and within specific issues. This process reflected the evolution of international environmental law. The treaties regulating the increasingly dynamic cooperation between States in this field are an illustration of the apparent paradox whereby treaties must be both stable on the one hand but flexible on the other. As a feature of environmental treaties, flexibility is mainly the result of scientific and technical progress, as well as the introduction of new technologies in environmental research and the sustainable use of environmental and natural resources. The requirement of flexibility applies not only to MEAs themselves but also to the institutional forms of co-operation they establish, such as treaty bodies and, in particular, AIAs. As a result of this, and in order to implement the cooperation provided for in these conventions, States gradually ceased to resort to traditional

[6] Robin Churchill, Geir Ulfstein, '*Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law'* (2000), 94(4) American Journal of International Law 623.

[7] Thomas Gehring, *Treaty-Making and Treaty Evolution*, in D Bodansky, J Brunnée, E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2014) 468.

[8] List of MEAs, see Andrzej Gadkowski, *Treaty-Making Powers of International Organizations* (Poznań, Wydawnictwo Naukowe UAM 2018) 251ff.

[9] Rudiger Wolfrum, Volker Roben, *Developments of International Law in Treaty Making* (Berlin, Springer 2005) 153.

institutional actors, namely international organizations, for the implementation of cooperation specified in these conventions and began to choose other forms of co-operation.[10]

These forms were more informal and flexible, as well as more effective and often more innovative than international organizations. Some commentators who have examined the reasons States established these new treaty bodies describe them as an 'institutional economy'.[11] Clearly, this does not mean that since then treaty bodies have represented the only form of co-operation in the institutional structure of contemporary MEAs. Some of these agreements still see co-operation as based on existing international organizations, the most noteworthy examples being the two 1986 post-Chernobyl conventions. Yet, all universal MEAs concluded today establish treaty bodies: Conferences of the Parties (COPs), or Meetings of the Parties (MOPs).

It appears that three important reasons seem to have been behind the evolution of the institutional arrangements provided for in MEAs. Firstly, the number of MEAs began to rise sharply as a result of the United Nations (UN) Conference on Human Environment. Secondly, as international environmental law was dynamically developing, effective measures and methods for its implementation were required. Traditional forms of co-operation within the framework of international organizations failed to guarantee effectiveness, not only with regard to managing various projects but also in ensuring the flexible implementation of legal regulations and their modification to meet the requirements of practice. A much greater probability of fulfilling these tasks was guaranteed with more flexible forms of co-operation: treaty bodies. Thirdly, at the end of the 20th century, States clearly demonstrated their dissatisfaction with the way many international organizations operated, for such trivial reasons as their operating costs or bureaucratic nature. Seeking new forms of co-operation, particularly in the area of environmental protection, that would be more acceptable to States developed as a consequence of this criticism of international organizations. It was, therefore, decided that new, stronger institutional arrangements were necessary for a dynamic evolution of MEAs. The hopes of States understandably lay in AIAs, which have since become the most recognizable feature of MEAs.[12] For all these reasons, the conclusion of MEAs may be considered the main vehicle of development and one of the greatest achievements in the process of evolution of the international environmental law.

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[10] Karen N Scott, *Managing Fragmentation through Governance: International Environmental Law in a Globalised World*, in A Byrnes, M Hayashi, Ch Michaelsen (eds), *International Law in the New Age of Globalization* (Martinus Nijhoff, Leiden-Boston 2013) 207.

[11] Geir Ulfstein, *Treaty Bodies*, in D Bodansky, J Brunnée, E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2014) 886.

[12] Thomas Gehring, 'International environmental regimes: dynamic sectoral legal systems' (1991), 1 Yearbook of International Environmental Law 35.

All of this underscores the relevance of presenting this compelling research issue. The author argues that AIAs, by the will of States, possess powers typical of international organizations in both their internal and external relations. This is especially significant in the context of their ability to exercise law-making and treaty-making powers. To support this argument, the author will examine a notable example of the 1992 UN Framework Convention on Climate Change and the Green Climate Fund and its relations with the the Green Climate Fund.

An appropriate methodology is essential for examining research issues in a way that effectively meets the study's objectives and addresses its key questions. The most common approach in legal methodology is the legal dogmatic method, without which proper analysis of the sources of international law and, in particular, international institutional law would not be possible.[13] In order to achieve the aim of this study it will be necessary to draw heavily on the comparative research method.

II. AUTONOMOUS INSTITUTIONAL ARRANGEMENTS – LEGAL BASIS AND INSTITUTIONAL STRUCTURE

The legal basis of AIAs, similarly to those of typical international organizations, is specified, in particular, by the provisions of multilateral international agreements. This position should be clarified by saying that in international environmental law this legal basis is provided by typical MEAs, the protocols that usually supplement these emphasized that in the process of developing international environmental law the number of these amendments is almost equal to, or perhaps even greater than, the number of agreements, as has been the case in recent years. The prototype of the MEA was undoubtedly the 1971 Ramsar Convention on Wetlands of International Importance.[14] It established an autonomous institutional arrangement which is today commonly referred to as the Conference of the Parties (COP). This convention initiated the dynamic development of MEAs and AIAs established on their basis. In practice, it is the case that the legal basis for the creation and functioning of treaty bodies in international environmental law is to be found not only in typical MEAs, but also in other international agreements, some of which constitute significant codifications of international law.

[13] The concept of international institutional encompasses not only international organizations, but also extends more broadly to international institutions. This is explored in detail by Henry G. Schermers, Niels M. Blokker, *International Institutional Law* (Martinus Nijhof Publishers, Leiden, Boston 2011) 1ff.

[14] United Nations Treaty Series (UNTS) Vol 996, 245.

An example is the 1982 UN Convention on the Law of the Sea (UNCLOS), which provides for a treaty body called the Meeting of the Parties to the Convention (SPLOS).[15] As a special treaty body it is more than simply an important forum for the development of the international law of the sea.

This means that the legal bases of AIAs are broad and varied. Definitively, therefore, it should be stated that primary source of these institutions is the will of States. The will of States expressed in agreements forms the basis for institutional arrangements, arrangements which constitute entities that are autonomous in character. As a result, their status may be compared to those international organizations that also constitute autonomous entities, usually established under international agreements.

It is important to note that in the case of typical IGOs, their institutional structure is specified in its constituent instruments and depends on the specific nature of the organization. In fact, the diversity of international organizations implies diversity in the institutional set-up of their structures. In MEAs, however, we usually find solutions in line with an institutional model designed by the United Nations Environment Programme (UNEP).[16] For this reason, it is often stressed in the literature that the institutional structures developed in international environmental law are often reproduced in subsequent MEAs, in particular with reference to the powers of AIAs. The fact that modern MEAs are concluded in accordance with the UNEP institutional model means that every such agreement has its own institutional apparatus consisting of treaty bodies. The typical institutional framework of an MEA is generally organized in a hierarchical way, with a plenary body which holds decision-making powers and occupies the highest position (COP). This body is traditionally supported by temporary or permanent subsidiary bodies together with a secretariat dealing with administrative and organizational matters. Some AIAs explicitly provide for such a hierarchy of treaty bodies, while other agreements only specify that their subsidiary bodies and secretariats operate under the guidance of the COP. This institutional model of MEAs, which was adopted in the 1973 Washington CITES Convention[17] and which was later repeated in other environmental agreements, is commonly referred to as the COP model.[18]

When identifying the COP model as prevalent in modern environmental agreements, one should bear in mind that, while it may be the most important today, it is not the only form of institutional structure of such agreements. Only in

[15] UNTS Vol 1833, 3.

[16] Laurence Mee, 'The Role of UNEP and UNDP in Multilateral Environmental Agreements' (2005), 5 International Environmental Agreements: Politics, Law and Economy 227, 263.

[17] UNTS Vol 1046, 120.

[18] Nikolaos Lavranos, 'Multilateral Environmental Agreements: Who Makes the Binding Decisions?' (2002), 11 European Environmental Law Review 44, 50.

a few of the MEAs concluded after 1972 has the institutional structure been based on existing international organizations (International Atomic Energy Agency (IAEA), International Maritime Organization (IMO)). As a rule today, MEAs establish no new international organizations that would be used to implement their provisions.

The status of the COP as hierarchically the most important in the institutional structure of MEAs results primarily from its being a plenary body that may be compared to its plenary body, if not to the international organization itself, than to its plenary body. A commonly accepted characteristic of this body in comparison with the plenary bodies of international organizations is the fact that it is less costly and less bureaucratic. It also holds conferences in different States, which is welcomed particularly by the developing ones as they are rarely the seats of universal international organizations. Although the COPs are a less formal structure than the plenary body of an international organization, they usually possess and exercises law-making powers, both internally and externally. Although the Conference of the Parties is the commonly accepted name for this body, in practice other names are also used, for example Meeting of the Parties, Executive Bureau and Consultative Meeting. The many names for this body alone support the claim that it is far less formal in character than the plenary body of an international organization.[19]

It has been considered that the emergence and subsequent development of such bodies reflected a dissatisfaction with international organizations, and thus the development of such bodies became an alternative model of international co-operation.[20] As emphasised by Fitzmaurice, the powers of COPs established on the basis of MEAs are used to fill gaps in vague treaty provisions and to set up compliance regimes. Looking at the activity of COPs (MOPs), Fitzmaurice observed that their functions derived from the law of treaties, as well as from alternative sources. In conclusion, she also claimed that 'it is a new way of international law-making and a new way of expressing consent to be bound, which modifies traditional ways enumerated in Article 11 of the VCLT [Vienna Convention on the Law of Treaties]'.[21]

COPs as plenary bodies reflect the political will of the contracting States. As such, they represent supreme decision-making bodies in the institutional structures of all modern MEAs. As Camenzuli stresses, generally speaking COPs exist to 'set priorities and review implementation of the Convention based on reports

[19] Philippe Sands, Jaqueline Peel, *Principles of International Environmental Law* (Cambridge, Cambridge University Press 2003), 84, 85.

[20] Robin Churchill, Geir Ulfstein (n 6) 623ff.

[21] Malgosia Fitzmaurice, *Law-making and international environmental law. The legal character of decisions of conferences of the parties,* in R. Liivoja, J. Petman (eds), *International Law-making. Essays in honour of Jan Klabbers* (Oxon, Routledge 2014) 210.

submitted by governments; consider new information from governments, NGOs and individuals to make recommendations to the Parties on implementation; make decisions necessary to promote effective implementation; revise the treaty if necessary; and act as a forum for discussion on matters of importance'.[22] The specific powers of COPs, particularly in external relations and including their treaty-making powers, will be discussed below.

III. EXTERNAL POWERS OF THE AUTONOMOUS INSTITUTIONAL ARRANGEMENTS

Contemporary AIAs, which operate under the regime of international environmental law, without doubt represent a distinct and different approach to institutionalised forms of co-operation between States, which often resemble classic international organizations.[23] A comparison of AIAs with international organizations to help determine whether these special treaty bodies may be defined as international organizations requires some initial remarks on their external powers. This issue should be discussed from the perspective of the potential international legal personality of AIAs and particularly in the context of their treaty-making powers.[24] When an international entity, such as an international organization, has international personality, it may undertake independent activity internationally without the assistance of its Member States. International practice shows that, since 1990, the constituent instruments of international organizations have increasingly contained provisions expressly referring to their international legal personality. Explicitly providing for the international legal personality of an international organization in its statute, however, is not a *sine qua non* for using this personality in practice. International legal personality may be implied from the nature of a given organization, as well as from its functions and powers. If we go on to apply these observations to modern AIAs, we may say that there are no MEAs that would explicitly define their bodies, particularly COPs, as international legal persons. As Ulfstein highlights, the provisions of MEAs provide for the implementation of a kind of foreign policy.[25] This foreign policy includes such important matters as the relationship to the international organization or

[22] Louise K. Camenzuli, *The development of international environmental law at the Multilateral Environmental Agreements' Conference of the Parties and its Validity* (2007) 7 <https://wwfin.awsassets.panda.org/downloads/mea_3.pdf> accessed 30 December 2023.

[23] Karen N Scott (n 10) 217.

[24] Andrzej Gadkowski (n 8) 270ff.

[25] Robin Chrurchill, Geir Ulfstein (n 6) 885.

State hosting the secretariat, which requires an appropriate agreement; financial assistance related to the implementation of commitments, which requires arrangements with international financial institutions; and co-operation between different MEAs and international organizations on various environmental matters, which also requires appropriate agreements that may take the form of memoranda of understanding. We, therefore, need to find those provisions of MEAs that explicitly or implicitly confer on their institutions such external powers, particularly treaty-making powers, that determine their ability to function as international legal persons within a certain scope. It is necessary, therefore, to look for the legal capacity of AIAs in a wider context by deducing it from 'the chain of legal relationships that arise from various legal instruments surrounding the MEA'.[26] This will clearly not enable us to automatically classify such bodies as international organizations. Although the provisions of MEAs do not expressly vest AIAs with international legal personality, some commentators recognise this personality, or at least some of its attributes, and its justification may be found in the opinions of the UN Office of Legal Affairs (UNOLA) quoted below.

The primary source of the external powers of AIAs is without doubt the will of States. As was explained above, the legal basis of AIAs, like the legal basis of typical international organizations, may be found in the provisions of international agreements – MEAs – which may be defined both as classic environmental agreements and as protocols or amendments to these agreements and protocols. Since MEAs do not provide *expressis verbis* the legal personality of AIAs, this personality must be deduced from the provisions specifying their external powers, particularly treaty-making powers, or allow their implication, as in the case of the constituent instruments of international organizations. That MEAs do not contain explicit provisions defining the treaty-making powers of AIAs holds true for most international organizations.

In contemporary practice the treaty activity of different international organizations was, and remains, to a large extent conducted based on the doctrine of implied powers, doubtlessly one of the most characteristic features of modern international institutional law. The claim that the treaty-making powers of AIAs may be implied just like the treaty-making powers of international organizations appears rational and justified. States opting to create such autonomous institutions were driven mostly by practical reasons, usually described as institutional economy. Indeed, it appears rather unlikely that the States that are parties to MEAs wanted the institutions established under these agreements to be less effective in implementing environmental agreements. The dynamics of environmental co-operation, however, require forms of co-operation that are less complex and

[26] Bharat Desai, *Multilateral Environmental Agreements. Legal Status of the Secretariats* (Cambridge, Cambridge University Press, Cambridge 2010) 140.

more flexible, more innovative and cheaper, but not less effective, than classic international organizations. In order to ensure the effectiveness of AIAs, they need to be granted specific powers in external relations, especially treaty-making powers, on similar terms as traditional international organizations.

The provisions of MEAs are usually structured in such a way as to enable their powers in internal relations, and especially the law-making powers of COPs, to be implied. In the case of AIAs, as in the case of classic international organizations, the rules of implication of internal powers are clearly different from the rules of implication of external powers. There are, nevertheless, no reasons that would make implication of the external powers of AIAs, and particularly their treaty-making powers, impossible. It does seem, however, that the extent to which AIAs, and especially COPs, possess such powers is less clear than in the case of traditional international organizations. One may, however, say without doubt that these powers are limited mostly by the nature and functions of a given treaty body. It also seems that in practice they are orientated towards co-operation with similar bodies established by other MEAs, with international environmental institutions, such as UNEP or the Global Environmental Fund, and with international non-governmental organizations of a scientific and technical nature.[27] The process of implying the powers of AIAs clearly creates problems and elicits questions, already considered in the context of implying the treaty-making powers of international organizations; yet these problems and questions are unavoidable when implying the powers of any entity established on the basis of the will of States. Every such entity, even one with a distinct legal personality, is merely a non-state entity. It is obvious, however, that if the international legal personality and treaty-making powers of AIAs are rarely expressly provided for in the provisions of MEAs, and if such institutions are created by States for the effective implementation of specific environmental agreements, their internal and external powers may be implied on similar terms as those accepted and used in implying the powers of international organizations.

Discussions on the treaty sources of the treaty-making powers of AIAs usually cite Article 7(2) of the 1992 UN Framework Convention on Climate Change (UNFCCC).[28] Its content is not only considered a model example of specifying the internal and external powers of AIAs in the provisions of a typical MEA, but is also the subject of three consecutive opinions of the UN Office of Legal Affairs. According to one of these opinions dated 1995, the treaty bodies established by this Convention 'have certain distinctive elements attributable to international organizations'.[29] All commentators agree that the provisions of the UNFCCC, and

[27] Karen N Scott (n 10) 214.

[28] UNTS Vol 1771, 107.

[29] United Nations Juridical Yearbook (UNJY) 1995, 452.

particularly the catch-all phrase in Article 7(2), may be understood as conferring treaty-making powers on environmental treaty bodies, and in particular on COPs, as supreme autonomous institutional arrangements.[30]

Article 7(2) assumes that the COP is the supreme body of the UNFCCC and as such it 'shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention'. As for the COP's powers in external relations, Article 7(l) stipulates that COPs shall 'seek and utilise, where appropriate, the services and co-operation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies'. By contrast, the implementation framework for the treaty-making and other powers of COPs are found in a clause contained in Article 7(2)(m), which stipulates that COPs may 'exercise such other functions as are required for the achievement of the objective of the Convention, as well as all other functions assigned to it under the Convention'. This clause explicitly refers to the objective and functions of the Convention, namely the classic conditions for implication of the treaty-making powers of international organizations which were confirmed by the case law of both the International Court of Justice (ICJ) and the Court of Justice of the European Union (CJEU). These provisions support the above claim that the treaty-making powers of AIAs may be implied on similar grounds as the external powers of international organizations. The provisions of the UNFCCC also provide for the external powers of another treaty body of this Convention: the Secretariat. Article 8(2)(f) stipulates that the Secretariat shall have powers to 'enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions'. It follows that these powers may also be implied in order for this treaty body to fulfil its functions.

The above provisions of Articles 7 and 8 of the UNFCCC were cited by the UNOLA in three consecutive opinions, dated 1993, 1994 and 1995, pertaining to the arrangements for the implementation of the provisions of Article 11 of the UNFCCC concerning the financial mechanism, specified as a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology. In these opinions, the UNOLA invoked the provisions of Article 6 of the 1986 Vienna Convention concerning agreements concluded between States and international organizations, or between international organizations.[31] Article 6 of this Convention provides that the powers of an inter-

[30] Geir Ulfstein (n 11) 886.

[31] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed at Vienna on 21 March 1986, UN Doc. A/CONF.129/15; 25 ILM 543.

national organization to conclude treaties be governed by the regulations of the organization concerned. Whether this assumption means that, according to the UNOLA, the status of the UNFCCC treaty bodies is the same as the status of international organizations is uncertain.

In all three opinions, the UNOLA considered matters relating to arrangements for the financial mechanism and for technical and financial support to developing country parties and, in particular, the implementation of Article 11 of the UNFCCC. In these opinions, the UNOLA highlighted significant differences between the legal status of the COP as a UNFCCC treaty body and the Global Environmental Facility (GEF) as a parent institution of the World Bank, the UNDP and UNEP.[32] In its opinion of 2 December 1993, the UNOLA explicitly stated that 'the Conference of the Parties (COP) has the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with entities, such as States, intergovernmental and non-governmental organizations and bodies, which also have the authority to do so'.[33] On the other hand, the UNOLA had no doubt that the GEF 'does not, at the present time, have the legal capacity to enter on its own into agreements and arrangements with other entities. If the COP wanted to use the present GEF as an operating entity, it would have to enter into agreement or an arrangement with the World Bank as the parent organization'.[34] At the same time, the UNOLA stated that it was not possible to determine whether a restructured GEF would have legal capacity, particularly the capacity to enter into agreements or other arrangements with entities such as COPs. Indeed, the answer to this question depends on the status and structure of the restructured GEF. After the UNFCCC came into force, which followed the first restructuring of the GEF – that is once the three-year pilot phase (1991–1994) was over – UNOLA issued a second opinion on the matter, dated 23 August 1994. In it, the UNOLA confirmed that COPs have international legal personality and may enter into legally binding agreements and arrangements, including agreements with the World Bank concerning the financial mechanism operated by the GEF. The UNOLA also pointed out that the GEF is a subsidiary body of the World Bank and the UN, acting through the UNDP and UNEP, and 'while its organs have considerable authority in governance of the GEF activities, the founders of the restructured GEF did not provide it with the legal capacity to enter into legally binding arrangements or agreements'.[35] In other words, the GEF still had

[32] See: Laurence Boisson de Chazournes, 'The Global Environmental Facility (GEF): a unique and crucial institution' (2005), 14(3) Review of European Community and International Environmental Law 193 and 'The Global Environmental Facility Galaxy: on Linkages among Institutions' (1999), 3 Max Planck Yearbook of United Nations Law 254.

[33] UN Doc. A/AC.237/50, para 22.

[34] ibid.

[35] UN Doc. A/AC.237/74, para 18.

no possibility to enter into arrangements or agreements on its own, and if any co-operative arrangement or agreement was negotiated by the GEF with the COP, it had to be formalised by the World Bank.[36] It thus follows from this opinion that the GEF's parent institutions bestowed on it no legal capacity to enter into legally binding arrangements or agreements without the formal approval of the World Bank.[37] In a subsequent opinion, dated 8 March 1995, the UNOLA repeated and even elaborated upon its previous position on the legal capacity and treaty-making powers of the UNFCCC treaty bodies, namely both the COP and the Secretariat.[38] Based on the analysis of the legal nature and functions of both of the UNFCCC treaty bodies, the UNOLA concluded that they shared certain characteristics with international organizations.

On the other hand, the UNOLA opinions emphasised that the GEF, as an operating financial entity of the UNFCCC, had no legal capacity of its own to enter into agreements or arrangements with other institutions. Such a position, however, is unclear. The restructured GEF, certain commentators stress, at the very least resembles an international organization. Whether it has the legal capacity to enter into agreements could therefore be open to question,[39] a view which is supported by practice. The UNOLA held that there were significant practical issues, such as 'accountability, observance of compliance with the eligibility criteria for funding, procedures for the reconsideration of particular funding decisions and […] procedures for joint determination and periodical review of the aggregate GEF funding necessary and available for the implementation of the Convention',[40] which should be regulated by an agreement concluded between the COP, as a treaty body of the UNFCCC, and the GEF. These matters were covered by the Memorandum of Understanding (MOU) between the COP to the UNFCCC and the Council of the GEF of 19 July 1996.[41] The binding force of MOUs is extensively discussed in the doctrine, but is not the subject of this thesis; still, it should be borne in mind

[36] ibid para 19.

[37] Friedrich Soltau *Fairness in International Climate Change Law and Policy* (Cambridge University Press, Cambridge, 2009) 212.

[38] UN Doc. A/AC.237/91.

[39] Jacob Werksman, 'Consolidation Governance of the Global Commons: Insights from the Global Environmental Facility' (1995), 6 Yearbook of International Law 54 and Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Brill, Leiden, 2005) 95ff.

[40] UNFCCC Documentation, UN Doc A/AC.237.74, 23 August 1994; *Modalities for the functioning of operational linkages between the Conference of the Parties and the operating entity or entities of the financial mechanism: legal opinion of the United Nations Office of Legal Affairs*, para 16.

[41] Decision 12/CP.2, annex, UN Doc. FCCC/CP/1996/15/Add.1.

that MOUs are usually non-binding agreements.[42] Scholars studying this particular MOU emphasise that 'the tenor of the wording indicates its non-binding character by using "will" and "should" rather than "shall", although it also states that the two secretariats "shall co-operate"'.[43] If our evaluation of this document is based on the UNOLA's view expressed in the 1994 opinion, according to which the GEF has no legal capacity to enter into legally binding arrangements or agreements, it will be rather difficult to accept the binding force of this MOU. There is little doubt that if our evaluation considers the actual treaty-making powers of the COP as a UNFCCC body, as well as the assumption that not every MOU is, as a rule, a non-binding instrument, then we shall be unlikely to arrive at a definite conclusion.

When analysing the treaty-making powers of the COP to the UNFCCC as those of a typical MEA treaty body and examining the relationship between this convention and the GEF as its operating financial mechanism, one needs to bear in mind certain changes that took place in this regard. In 2010, the Conference of the Parties to the UNFCCC held in Cancun adopted a decision which established the Green Climate Fund (GCF) as an operating entity of the financial mechanism of the UNFCCC.[44] Its governing instrument was adopted in 2011 at the COP meeting in Durban.[45] By decision 3/CP17, the COP was deemed to confer juridical personality and legal capacity on the Fund. Paragraph 11 of the decision provides that the COP '[d]ecides that the Green Climate Fund be conferred judicial personality and legal capacity and shall enjoy such privileges and immunities related to the discharge and fulfilment of its functions'.[46] In June 2013, an Agreement between the Republic of Korea and the Green Climate Fund concerning the Headquarters of the Green Climate Fund was signed.[47] Article 13 of this provides that '[t]he Fund shall possess such juridical personality and legal capacity as may be necessary to operate effectively internationally, to enter into this Headquarters Agreement, and for the exercise of its official functions and the fulfilment of its purposes'. Article 9 of the Agreement addresses the issue of the immunity of the

[42] As resented by Anthony Aust, each MOU must be evaluated on a case-by-case basis, since its legal character depends primarily on the intention of the parties '*which must also be determined on the basis of factors other than* [its] *name, especially* [its] *wording*'; see: Anthony Aust,'The Theory and Practice of Informal International Instruments' (1986), 38 International and Comparative Law Quarterly 800ff.

[43] Robin Churchill, Geir Ulfstein (n 6) 651.

[44] UN FCCC/CP/2010/7/Add.1.

[45] UN FCCC/CP/2011/9/Add.1. For more on this, see: Yulia Yanmineva, Kati Kulovesi, *The New Framework for Climate Finance under the UN Framework Convention on Climate Change: A Breakthrough or an Empty Promise?*, in EJ Hollo, K Kulovesi, M Mehling (eds), *Climate Change and the Law* (Springer, Dordrecht, 2013) 191ff.

[46] In this decision, the COP relies on paragraphs 7 and 8 of the GCF Governing Instrument.

[47] See https://www.greenclimate.fund.

Fund and its property, and Article 8 the inviolability of its archives. The question of the privileges and immunities of the staff of the Fund is specified in Article 13.

By decision B.05/11, the Board of the GCF requested the Secretariat to seek a legal opinion from the UNOLA on the possible institutional linkages between the GCF and the UN.[48] In its opinion, the UNOLA emphasised the fact that the institutional linkage that currently exists between the UN and the UNFCCC Secretariat does not apply to the Fund. There is, moreover, no multilateral treaty establishing the GCF that provides 'for the privileges and immunities of its officials and there is no relationship agreement between the UN and the Fund'.[49]

IV. CONCLUSIONS

The results of this research support the following claim: for the implementation of certain international agreements, especially multilateral environmental agreements, States create dedicated treaty bodies with competences not only to implement these agreements but also to exercise law-making powers, including treaty-making powers. These bodies, which constitute more flexible forms of co-operation between States, are described in international environmental law as AIAs. These arrangements also exercise treaty-making powers that are largely implied. While the similarities between them and international organizations are considerable, they do not qualify as fully-fledged international organizations. They do, however, provide an example of a new form of the institutionalisation of international co-operation: as international organizations *sui generis* that retain their autonomy. They may be considered a new generation of international organization that reflects the process of synergy aimed at improving coherent implementation of environmental conventions through a wide range of co-operative activities between the arrangements.

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