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Subsidiary Decision-making under the Espoo Convention: Legal Status and Legitimacy

Neil Craik and Timo Koivurova

A fundamental challenge in environmental law is designing institutions that can adequately respond to a highly variable and dynamic environment. The preferred approach in both domestic and international settings is to create regulatory tools that can respond to changing circumstances in both the physical and institutional environment. This responsiveness is achieved in large measure through some form of administrative rule-making, whereby authority to interpret, elaborate and apply legal prescriptions is delegated to subsidiary bodies, which are able to craft context specific rules more efficiently. This efficiency does not, however, come without a cost. As decision-making authority is devolved to administrative actors, the links to legitimizing institutions such as legislatures and, in the international context, mechanisms of state consent, become more attenuated. In the context of international environmental law, the turn away from state consent, through the formal treaty process, as the sole source of rules raises important questions regarding the legal status of these subsidiary prescriptions. State consent, in addition to underlying the legality of international rules, also provides the chief source of legitimacy for those rules. Since multilateral environmental agreements rely upon subsidiary mechanisms that do not derive their legitimacy from state consent, greater attention ought to be paid to the legitimacy enhancing features of subsidiary rule-making processes.

The focus of this paper is to consider the use of subsidiary decision-making mechanisms under the 1991 *Espoo Convention on Environmental Impact in a*

Transboundary Context (the "*Espoo Convention"*). [1] This treaty, which was negotiated under the auspices of the United Nations Economic Commission for Europe (UN ECE) and signed in Espoo, Finland in 1991, imposes obligations on state parties to conduct an environmental impact assessment (EIA) where the activities of the state (the state of origin) are likely to cause a significant adverse transboundary impact to the environment of another state party (the affected state). [2] The Convention prescribes the circumstances under which the obligation to conduct an EIA is triggered, the content of the EIA, and prescribes associated obligations to notify and engage in consultations with the affected state and the public within the affected state. The *Espoo Convention* itself is fairly concise, consisting of twenty articles and six appendices, but the parties have developed through regularly held Meetings of the Parties (MoP) a dense and complex constellation of mechanisms, guidelines, and interpretations to aid in the effective implementation of the treaty. In this regard, the *Espoo Convention* has adopted the dynamic regime approach that has become the preferred model in international environmental law-making. [3]

The aim of this article is to describe the kinds of activities that subsidiary bodies are being called upon to perform under the *Espoo Convention* and the legal status of these normative developments. We then draw out some of the practical implications of the use of subsidiary bodies in light of their legal status. Our principal observation here is that the normative guidance provided by subsidiary bodies, in particular the Implementation Committee of the Meeting of the Parties,

[1] The Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, ILM, vol.30, 1991, 800 [hereinafter Espoo Convention]. The Convention entered into force on 10 September 1997. There is an increasing body of literature on transboundary EIA; see, e.g., "the special issue on transboundary EIA", 26 *Impact Assessment and Project Assessment (IAPR)* (2008); *Theory and Practise of Transboundary Environmental Impact Assessment* (Bastmeijer Kees & Koivurova Timo eds., 2008); Neil Craik, *The International Law of Environmental Impact Assessment*, *Process, Substance and Integration* (Cambridge University Press, 2008).

[2] For an overview of the negotiations, see Robert Connelly, *"The UN Convention on EIA in a Transboundary Context: A Historical Perspective",* 19 *Environmental Impact Assessment Review,* 37 (1999).

[3] Thomas Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems" (1990) 1 *Yearbook of International Environmental Law* 35. See also Robin Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *American Journal of International Law (AJIL)*, 623 (2000).

has developed a kind of twilight legal status; being both formally non-binding yet authoritative.[4] In the final section of the paper, we consider more directly the manner by which the subsidiary bodies address the need for legitimacy and the critical role that these legitimacy-enhancing processes play in maintaining the efficacy of the Convention. In particular, we posit that if the continued vitality and robustness of the Espoo regime complex is to be maintained, careful attention must be paid to questions of accountability, procedural justice and the quality of justification provided by subsidiary bodies – considerations not unfamiliar to domestic administrative lawyers.

The Espoo Regime Structure

If we look to most domestic EIA systems, for instance those of Canada and the United States, we see that the actual legislative basis is often quite spare in its structure. The EIA provisions of the *National Environmental Policy Act (NEPA)*, the source of EIA rules for the U.S. federal government, consist of a few paragraphs, but a sprawling governance system has grown around the legislation, providing authoritative interpretations of ambiguous provisions, creating specialized rules and guidance to account for the various agencies involved, the types of projects assessed and the types of environmental problems encountered.[5] So, for example, under *NEPA* there are some 70 separate regulations, 35 executive orders, and 25 guidance documents that support the implementation of EIA within the U.S. federal government. The Canadian system, in addition to the *Canadian Environmental Assessment Act* (CEAA) itself, has 9 separate regulations, executive orders and cooperation agreements with different provinces; it also has engendered about 25 different guidance documents, addressing matters such as public participation,

[4] Schachter, "The Twilight Existence of Non-binding International Agreements" 71 *AJIL* (1977), 300; D. Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations", 33 *Texas International Law Journal* (1998), 281.
[5] *National Environmental Policy Act*, 42 USC §§ 4321-4370(f). For a listing of related statutory instruments, see NEPAnet, online: http://ceq.hss.doe.gov/nepa/nepanet.htm (accessed: XX).

cumulative impacts, and scoping procedures.[6] There is, in addition, a vast amount of judicial decisions that provide further authoritative guidance on the interpretation and application of EIA processes under both *NEPA* and *CEAA*.[7]

It is worth recalling that the Canadian EIA system started as a stand-alone cabinet order. Thus, both EIA systems evolved from fairly simple directives to very complex regulatory structures through their implementation. In order to understand why this evolution occurred, it is useful to consider the complexities involved in implementing EIA systems. At a principled level, the concept of EIA is quite straight forward – requiring proponents of planned activities to evaluate the environmental consequences of those activities where there is a potential for harm. However, it quickly became evident that more tightly prescribed rules regarding the exact kinds of activities that would necessarily be subject or exempt from EIA processes were desirable since EIA requirements otherwise cast their nets very widely. As a result, domestic EIA systems have enacted regulations identifying activities or classes of activities that are automatically subject to, or exempt from, full EIA requirements. Under *NEPA*, because of the diversity of federal agencies that are required to implement EIA requirements, these agencies have enacted their own EIA regulations to account for the specific activities and circumstances that engage that agency. Because the constituent steps of the EIA process are ill defined in the base legislation, both courts and administrative bodies have sought to elaborate on the precise nature of the commitments to assess, notify and consult. In the last fifteen years, emerging environmental issues such as climate change and biological diversity have required further guidance to those responsible for carrying out EIAs to promote adoption of best practices and consistency of implementation in relation to increasingly cumulative, interdependent and scientifically uncertain

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[6] *Canadian Environmental Assessment Act,* S.C. 1992, c.37. For a listing of related statutory instruments, see Canadian Environmental Assessment Agency, online: http://www.ceaa.gc.ca(accessed: XX).

[7] The U.S. Council on Environmental Quality publishes annual surveys on NEPA litigation, see CEQ, online: http://ceq.hss.doe.gov/legal_corner/litigation.html. For cases under CEAA, see Beverly Hobby and Garry Mancell, *Canadian Environmental Assessment Act: An Annotated Guide*, looseleaf (Canada Law Book: 1997).

environmental issues. Specialized agencies have been created under both systems to oversee EIA processes and to continually develop and refine EIA practices.

The *Espoo Convention* has undergone an analogous transformation, with the development of several treaty bodies that provide similar forms of guidance to the Parties. The central decision-making body of the Convention is the Meeting of the Parties (MoP), which is the plenary organ of the Parties to the Convention. The functions of the MoP are loosely prescribed by the Convention itself, with the central role of the MoP being the "continuous review of Implementation of the Convention" and includes a broad authority for the MoP to "[c]onsider and undertake any additional activities that may be required for the achievement of the purposes of this Convention".[8] The MoP has met five times since the Convention came into force in 1997 and has issued 43 decisions, the majority of which involve issues of implementation and compliance, including capacity building and amendments to the treaty. Decisions taken by the MoP are to be taken wherever possible on the basis of consensus, but the MoP rules of procedure allow decisions to be adopted by a 3/4ths majority vote.[9]

The Meeting of the Parties has also created a Working Group on EIA and an Implementation Committee that provide assistance and direction on implementation and compliance, including investigating and determining matters of non-compliance. Because the MoP only meets every three years,[10] the subsidiary bodies provide continued direction to the Parties between meetings, addressing compliance issues as they arise and developing strategies for the improved functioning of the Convention. The Working Group on EIA, in which all Parties are entitled to participate, manages the work plan for the Convention and provides a forum for the exchange of information and expertise on EIA, including the

[8] Espoo Convention, Article 11.
[9] Rules of Procedure, Rule 37. Procedural decisions can be taken by a simple majority, see para. 2 of rule 37. MP.EIA/1998/1, 27 March 1998, at http://live.unece.org/fileadmin/DAM/env/documents/1998/eia/mp.eia.1998.1.e.pdf (accessed: XX).
[10] The interval between the third and fourth meeting was four years.

development of guidelines and tools for capacity building.[11] Unlike the Working Group on EIA, the Implementation Committee is constituted by a subset of the parties.[12] Its eight members are elected by the Parties to serve up to two terms, each term being the period between Meetings of the Parties. The bulk of the Implementation Committee's workload relates to matters of compliance; both general compliance concerns (unrelated to a specific Party) and specific submissions made in relation to the possible non-compliance by a Party. Both subsidiary bodies are subject to the oversight of the Meeting of the Parties. The Convention also provides for an *ad hoc* Inquiry Commission under Article 3(7) that, in the event of a disagreement, provides advise on whether an activity is likely to have a significant transboundary environmental impact and thereby trigger obligations under the Convention. Much of the day-to-day administration of the Convention is supported by the Bureau and Secretariat. The Espoo regime nests within the overall environmental policy guidance institutions of the UN ECE.

The creation of subsidiary bodies (to the MoP) is not explicitly recognized by the Espoo Convention, in contrast to the formal recognition of subsidiary bodies under other MEAs, such as the United Nations Framework Convention on Climate Change[13] and the Vienna Convention's Montreal Protocol on Substances that Deplete the Ozone Layer.[14] The authority to create subsidiary bodies does, however, fall within the very broad residual authority granted to the MoP to undertake any additional action required for the achievement of the purposes of the

[11] The Working Group on EIA was established by the Meeting of the Parties in Decision 1/2. MP.EIA/1998/2, 27 March 1998.
[12] The Implementation Committee was established by the Meeting of the Parties in February 2001, Decision II/4, ECE/MP.EIA/4. The current rules respecting the Implementation Committee's structure are found in "Structure and Functions of the Implementation Committee and Procedures for Review of Compliance" Appendix to MoP Decision III/2, ECE/MP.EIA/3.
[13] The United Nations Framework Convention on Climate Change, at: http://unfccc.int/resource/docs/convkp/conveng.pdf (accessed: XX).
[14] The 1985 Vienna Convention for the Protection of the Ozone Layer, see at http://www.unep.org/ozone/vc-text.shtml (accessed: XX) and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, at: http://ozone.unep.org/new_site/en/Treaties/treaty_text.php?treatyID=2 (accessed: XX)., See UNFCCC, Articles 9 and 10, creating the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation, respectively; Montreal Protocol, Annex IV, Non-compliance Procedure, Article 5, establishing Implementation Committee.

Convention.[15] Nevertheless, the Parties have also adopted an amendment to the Convention, not yet in force, providing for the establishment of subsidiary bodies.[16]

The result is the transformation from a stand-alone treaty that is the sole source of normative commitments between the parties, to a regime whereby normative guidance is provided through a constellation of treaty and subsidiary bodies. The development of treaty-based institutional frameworks can be seen as an alternative to the creation of formal international organizations, and responds to the need to develop ancillary rules for the implementation of complex regulatory activities. [17] One of the difficulties that institutional decision-making seeks to overcome is the time consuming and onerous requirements of creating formal legal obligations through treaties.[18] As an example, the two amendments to the Espoo Convention unanimously adopted by the Meeting of the Parties remain not in force owing to the lack of ratifications by the Parties.[19]

The development of treaty-based institutional frameworks is now widespread in multilateral environmental agreements and parallels the development of administrative procedures in domestic law. Indeed, the development of supplemental rules and processes under the Espoo Convention responds to similar demands seen in domestic EIA systems, such as adapting EIA practices to more complex activities, programmes and policies. It also accounts for the application of EIA processes across very different regulatory contexts, including highly divergent national systems and capabilities, incorporating emerging environmental issues and ensuring consistent application of the often ambiguous requirements.

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[15] Article 11(2)(f), the Espoo Convention.
[16] Second Amendment, Decision III/7, para. 3 (d), reads: "Establish such subsidiary bodies as they consider necessary for the implementation of this Convention". See at: http://live.unece.org/env/eia/about/amendment2.html (accessed: XX).
[17] Ulfstein and Churchill make an argument that many of the MEA regimes can effectively be equated to inter-governmental organizations. Hence, the law applicable to inter-governmental organizations should also apply to MEA's. See Churchill and Ulfstein, *supra* note 3
[18] See Geoffrey Palmer, "New Ways to Make International Environmental Law" (1992) 86 *AJIL* 259.
[19] The status of ratification of amendments is listed on the Convention website, supra n.16.

2. The Legal Status of Subsidiary Body Rulings

Because the decisions of treaty bodies do not follow the formal requirements for the creation of binding legal obligations, the legal character of decisions is ambiguous. As a matter of formal international law, decisions of the Meeting of the Parties can be legally binding where there are specific treaty provisions setting out the conditions under which the Meeting of the Parties may bind members. For example, the Montreal Protocol provides clear authority for the Meeting of the Parties to make binding decisions respecting adjustments to control measures for ozone depleting substances.[20] The Espoo Convention contains no such express provisions; consequently any power that the MoP has to bind Parties must be implied or read into the very broad powers of Article 11. The MoP and the Implementation Committee have not clearly commented on the nature of MoP decisions. The Implementation Committee suggested in 2003 that MoP decisions are not binding, but, as outlined below, it later indicated that MoP decisions could be the subject of compliance review.[21] Notwithstanding their uncertain formal legal status, the decisions of the MoP and the Implementation Committee often are intended to have authoritative value, insofar as the treaty bodies identify preferred interpretations of treaty provisions, impose duties on parties and determine the rights of third parties.

For example, at the Fifth MoP, the Parties issued a decision respecting the interpretation of Article 14 of the Convention addressing the requirements for entry into force of amendments to the Convention along the lines prescribed by the amendment.[22] The Article in question requires that an amendment to the

[20] Montreal Protocol, Article 2(9).
[21] Original Implementation Committee statement found in MP.EIA/WG.1/2003/3, para. 10. Subsequent MoP decision, Decision IV/1, para. 8.
[22] Fifth Meeting of the Parties, Geneva, June 20-23, 2011, Decision V/2. Decision V(2) provides that "Noting that article 14, paragraph 4, of the Convention, which establishes the conditions for entry into force of amendments to the Convention other than those to an annex, is open to different interpretations due to the ambiguity inherent in the expression "by at least three fourths of these Parties", Recalling that the second amendment to the Convention replaces the above-cited expression with "by at least three fourths of the number of Parties at the time of their adoption", Recalling also

Convention adopted by the Parties shall enter into force upon the "ratification, approval or acceptance by at least three fourths of these Parties".[23] The phrase "by at least three fourths of these Parties" gives rise to some ambiguity as it is not clear whether the number of Parties to be considered should include only those Parties that were party to the Convention at the time of adoption of the amendment or three fourths of the current number of Parties. The ambiguity is of practical consideration as the latter interpretation raises the number of ratifications required from 24 to 33 in the case of the first amendment and from 30 to 33 in the case of the second amendment. This ambiguity is itself the subject of the second amendment whereby the Parties agreed to replace the above-cited wording with the phrase, "by at least three fourths of the number of Parties at the time of their adoption".[24] The fact that the Parties adopted an amendment, even if of a clarifying nature, suggests that the matter could not be addressed through the MoP alone.[25] The interpretation would have the effect of altering (or clarifying) when amendments to the Convention come into force, and is clearly intended to be determinative of the matter.

A parallel example arises in relation to the obligation of the Parties to report on compliance matters. This obligation is also the subject of an adopted, but not in force, amendment to the Convention, which provides that the Meeting of the Parties may decide on the frequency of reporting required and the information to be provided. Notwithstanding, the absence of a formal legal obligation to report, the

article 31 of the Vienna Convention on the Law of Treaties, which sets out general rules on the interpretation of treaties and which requires, in paragraph 3 (a), that any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions shall be taken into account…[d]esiring to bring about an early entry into force of the amendments adopted through its decisions II/14 and III/7, 1. Agrees to interpret the expression "by at least three fourths of these Parties" as meaning at least three fourths of the Parties to the Convention that were Parties at the time of the adoption of the amendment in question; 2. Decides that any State that becomes a Party to the Convention after the date of adoption of this decision is also deemed to have agreed to the interpretation of article 14, paragraph 4, of the Convention set out above.

[23] Espoo Convention, Article 14.

[24] Decision III/7.

[25] The amendment was suggested by a sub-group of the Working Group on EIA. The justification for the amendment was to bring the wording in line with the wording used in the subsequently adopted Strategic Environmental Assessment Protocol, See "Working Group on Environmental Impact Assessment, Sixth Meeting", October 27-29, 2003, MP.EIA/WG.1/2003/10.

Implementation Committee and the Meeting of the Parties subsequently decided that a failure to report on implementation might be a compliance matter to be decided by the Implementation Committee. From the Implementation Committee's perspective, the adoption of the amendment indicated an intention by the Parties to be subject to reporting obligations, which in turn gives rise to question of non-compliance if these obligations are not met.[26] The position of the Implementation Committee was supported by a subsequent decision of the Meeting of the Parties, which required the Parties to complete a reporting questionnaire, and noted that a failure to do so might be subject to collective scrutiny through the Implementation Committee.[27]

This second example differs from providing an authoritative interpretation since in the first example the rule has its foundation in the treaty. Here there is no textual basis to support a duty to report on implementation, rather the obligation is wholly a product of the MoP. The Implementation Committee does not directly address the legal status the MoP decisions enjoy. However, by maintaining that the requirements are subject to collective scrutiny through the Implementation Committee the rules are given a hard edge. There is nothing inherently contradictory in subjecting formally non-binding rules to non-compliance processes. The Implementation Committee's mandate is "non-adversarial and assistance-oriented" and they have limited powers to recommend penalties for non-compliance and only in exceptional circumstances.[28] In this context, requiring information regarding implementation simply allows the Implementation Committee to fulfill its mandate, which may be compromised if Parties are not required to provide information regarding their activities. This is particularly important in relation to

[26] MP.EIA/WG.1/2005/3.
[27] Decision IV/1.
[28] According to Rule 12 (d and e) of the Operating Rules of the Committee, the Committee may recommend to the MoP for it to issue a declaration of non-compliance but, in exceptional circumstances, even "to suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention. ECE/MP.EIA/10, at: http://live.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/IC_operating_rules_en.pdf (accessed: XX).

transboundary EIA activities, which are implemented through domestic EIA and difficult to monitor externally.

Decisions and rule-making by the MoP maintain strong democratic credentials because of the MoP's plenary and consensus driven nature. Greater concerns may arise in relation to the decisions of the Implementation Committee given its much smaller composition. As noted, the decisions of the Implementation Committee are subject to the oversight of the MoP, but the Committee operates with significant autonomy in many of its functions. For example, in their deliberations regarding the Ukraine's non-compliance with certain provisions of the treaty in relation to the Bystroe Canal, the Implementation Committee was required to consider the legal implications of an Inquiry Commission determination of a likelihood of significant transboundary environmental impact.[29] Under the Espoo Convention, an Inquiry Commission, which is an *ad hoc* body composed of three experts, can be convened at the request of a Party, where there is a disagreement about whether a planned activity is likely to have a significant adverse transboundary impact, and thereby triggering the application of further obligations under the Convention. Article 3(7) of the Convention describes the role of the Inquiry Commission to provide "advice", on the likelihood of a significant impact. The wording suggests that the findings of an Inquiry Commission are not determinative, but recommendations to the Parties, although there is some ambiguity. The Implementation Committee, however, expressed the view that:

> The final opinion of an inquiry commission is a matter of fact and takes effect immediately; in particular the Convention does not provide for the Parties to 'study' such an opinion…The final opinion of an inquiry commission cannot be challenged and should lead to notification if the opinion is that a significant adverse transboundary impact is likely; and that

[29] See the evolvement of the Bystroe Canal case, at: http://live.unece.org/env/eia/implementation/inquiry.html (accessed: XX).

> the source state must immediately suspend implementation of the project in question.[30]

This decision of the Implementation Committee is far reaching not only because it impacts the substantive rights of the source state so directly and without recourse, but also because the interpretation will influence the rights of future parties in relation to Inquiry Commission. In this case, the interpretation of the legal significance of the Inquiry Commission's advice led quite directly to a finding of non-compliance by the Implementation Committee.[31] In providing this opinion, the Implementation Committee approached the interpretive task in much the same way as a court, citing legal principles such as the prevention principle in support of their decision.[32]

It is, of course, a natural consequence of the Implementation Committee's mandate that it be required to interpret and elaborate upon the Convention's requirements. In exercising its authority, the Implementation Committee decisions are beginning to take on a quasi-judicial form: the Committee provides reasoned justifications for its decisions, references international law, and relies on guidance documents in support of its interpretations. The Implementation Committee demonstrates an awareness of the need for objectivity and avoidance of bias through rules requiring members to excuse themselves of decisions affecting their own state. Most recently, the Implementation Committee collated and published its previous opinions on matters related to the Convention, suggesting a clear desire for adherence to its past decisions; they are in effect a form of precedent. In considering the "Opinions of the Implementation Committee" at its fifth Meeting the MoP "urged" the Parties to take the opinions into account, suggesting their strong

[30] MOP Decision IV/2, annex 1, para 43, 53.
[31] Findings and Recommendation further to a submission by Romania regarding Ukraine, ECE/MP.EIA/2008/6.
[32] Para 53, *infra* note 31.

interpretive value.[33] In its consideration of the Implementation Committee's report on its activities, the MoP goes further and specifically adopts a number of the Implementation Committee's interpretive positions (including its position on the status of Inquiry Commission advice, discussed above) as its own.[34] (The MoP uses the term "considers" to indicate that the view of the Implementation Committee is the view of the MoP.)

The Implementation Committee also exercises important authority to determine its own processes, subject again to MoP oversight, and can have important consequences for the future development of the Convention. At an early meeting of the Implementation Committee, the Committee was asked to consider a non-compliance issue that was brought to the attention of the Implementation Committee by an NGO, not a Party. The Committee's mandate did not clearly specify whether it should consider non-compliance issues initiated by the public. It is noteworthy that the Convention itself requires Parties to notify the public in the affected state where a proposed activity may have a significant adverse transboundary impact and requires the Parties to provide a mechanism whereby the public can provide its comments on proposed activities.[35] In this manner, the Convention indirectly confers rights on the public of affected states by specifying the obligations to notify and consult affected persons. The Aarhus Convention, which similarly confers rights of public participation, does allow the public to raise non-compliance issues directly.[36] However, a majority of the Committee members were of the view that extending these rights to the public in the case of the Espoo Convention exceeded the Implementation Committee's mandate.[37] The MoP has

[33] Opinions of the Implementation Committee, 2001–2010, ECE/MP.EIA/2011/6, at http://live.unece.org/fileadmin/DAM/env/documents/2011/eia/ece.mp.eia.2011.6.e.pdf (accessed: XX).
[34] Decision V/4.
[35] Articles 3(1) and 3(8), the Espoo Convention.
[36] Paragraphs 18 to 24, Annex to Decision I/7, MoP Aarhus Convention
[37] Report of the Fifth Meeting of the Implementation Committee, para.7, ECE/MP.EIOA/WG.1/2004/4. For an analysis, see T. Koivurova, "The Convention on Environmental Impact Assessment in a Transboundary Context" in *Making Treaties Work* (edited by Ulfstein, G. in collaboration with Marauhn, T., and Zimmermann, A.), Cambridge University Press (2007), 218-239..

subsequently taken a less rigid view of the ability of non-Parties to initiate compliance proceedings. In the Operating rules for the Implementation Committee, the MoP decided not to limit initiatives with reference to the source of the information regarding non-compliance, but with regard to the nature and quality of the information provided.[38]

Before turning to the question of legitimacy, several observations regarding the nature and legality of treaty body decisions may be useful. First, there is no debate regarding the ability of the Implementation Committee to create formally binding rules. It cannot. However, the Implementation Committee is very clearly an important source of normative guidance and has considerable discretion to interpret and apply the Convention within the direction of the MoP. The 'judicialization' of the Implementation Committee shifts the function of the Implementation Committee towards a more autonomous role, whose authority is linked to its adherence to fair process and reasoned decision-making. The publication of prior 'opinions' with the express hope that they guide future decision-making and Party behavior demonstrates the self-conscious embracing of this role.

The legal status of MoP decisions is less straightforward. But given the MoP's superior status within the Convention structure, it is evident to us that the Implementation Committee is bound by the decisions of the MoP.[39] Thus, the

[38] Rule 15 states:
1. The sources of information by which the Committee might become aware of a possible non-compliance could be:
(a) Parties' work under the Convention; (b) Any other source.
2. In determining whether to begin a Committee initiative, in accordance with paragraph 6 of the appendix to decision III/2, the Committee should take into account, inter alia, the following:
(a) The source of the information is known and not anonymous;
(b) The information relates to an activity listed in Appendix I to the Convention likely to have a significant adverse transboundary impact;
(c) The information is the basis for a profound suspicion of non-compliance; (d) The information relates to the implementation of Convention provisions; (e) Committee time and resources are available, see at:
http://live.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/IC_operating rules_en.pdf (accessed: XX).

[39] See Geir Ulfstein, "Treaty Bodies" in *The Oxford Handbook of International Environmental Law* (Daniel Bodansky, Jutta Brunnee and Ellen Hey, eds.), Oxford University Press (2007), 877 at 881.

Implementation Committee is bound to follow both procedural directions from the MoP and must adhere to interpretive positions taken by the MoP. In our view, the Implementation Committee's suggestion that decisions of the MoP are not binding is incorrect and is likely dependent upon the content of the decision. Ulfstein and Churchill have suggested that treaty bodies, like international organizations, possess implied powers that are necessary to carry out their express purposes.[40] Resort to a doctrine of implied powers is not strictly necessary under the Espoo Convention, since the Convention confers broad powers on the MoP to take necessary actions in furtherance of the Convention's purposes.[41] This is not an open-ended authority, but would reasonably include the authority to determine matters of internal administration and exclude the imposition of substantive obligations, which would require an amendment to the Convention. The reporting obligation falls somewhere in between these poles and for this reason the MoP has hedged its position by adopting an amendment to the Convention, but also indicating it considers the requirement mandatory (notwithstanding that the amendment is not in force).

The MoP's interpretive function is supported by its institutional position. As the principal treaty organ responsible for implementing the Convention, it is institutionally required to interpret the Convention. It is fair to attribute to the Parties the interpretive practices of the MoP, particularly where they are arrived at by consensus. In this circumstance, it would seem that MoP decisions can be considered "subsequent practice in the application of the treaty" per Article 31(3)(b) of the Vienna Convention, particularly where those interpretive practices become embedded in the activities of the treaty bodies.[42] There is an inevitable line

[40] *Supra* n. 3
[41] Article 11(2)(f), the Espoo Convention.
[42] The 1969 Vienna Convention on the Law of Treaties, which is widely seen as representing customary law of treaties, at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed: XX). See decision V (2) of the meeting of the parties where the MoP explicitly stated that its decision should be viewed in light of "… article 31 of the Vienna Convention on the Law of Treaties, which sets out general rules on the interpretation of treaties and which requires, in paragraph 3 (a), that any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions shall be taken into account", *supra* note 20.

drawing exercise between interpretation of the Convention and making amendments to it. Matters subject to amendment are explicitly subject to formal ratification requirements. The distinction is, of course, imprecise, and blurred by the MoP's adoption of amendments that seek to clarify the interpretation of the Convention.

3. Legitimacy

There is a strong functionalist approach that is apparent in the MoP's activities where legal formality is subordinated to effectiveness concerns. This is most evident in the interpretation of the effect of Inquiry Commission "advice". Had the Implementation Committee and, subsequently, the MoP, maintained that the Inquiry Commission's determination of significant adverse transboundary impact was recommendatory in nature, the effectiveness of the Espoo Convention would have been undermined. A fundamental advantage held by the Espoo Convention over other international rules regarding EIA is the availability of a mandatory process to determine whether an impact is significant and thereby triggers other obligations. Outside of the Espoo Convention, where this mechanism is not available, the determination of significant impact has led to a number of international disputes.[43] In order to ensure that the Espoo Convention would be applied with greater certainty and to prevent recalcitrant Parties from refusing to accept the Inquiry Committee's advice, the Parties opted for a functional, not literal, interpretation of the Committee's powers. This same preference for functionalism can be seen in the Implementation Committee and MoP's approach to compliance with reporting requirements and determining the rights of third parties to initiate compliance proceedings.

The authoritativeness of the Implementation Committee and MoP's decisions comes not from its formal legal nature, but from its attention to principles of

[43] See Alan Boyle, this issue. See also Craik, *supra* n.1 at 111 -120, describing interstate EIA disputes.

accountability, procedural justice and the quality of the justification given. The move away from state consent as the principal criteria for binding states and the consequent normative ambiguity requires an explanation of compliance rooted in legitimacy not legality.[44] Here we can identify four distinct strategies employed by the treaty bodies to enhance their legitimacy.[45]

Consensus driven decision-making within the MoP ensures a level of consent from state representatives, and while not adhering to the formal requirements of international law-making it provides clear lines of democratic accountability. Some care should be taken not to equate consensus decision-making by the MoP with formal state consent, as the former does not adequately penetrate the democratic institutions of the state itself. From a compliance standpoint states will be loath to not comply with MoP decisions in which they have participated. The accountability of the Implementation Committee is similarly addressed through MoP oversight.

Second, conformity with norms of procedural fairness, such as transparency and participation, further promote the legitimacy of the treaty bodies' outcomes. The Implementation Committee's Operating Rules provide a set of procedural rules covering matters such as notification, and participation of Parties whose compliance is subject to review, including opportunities to make representations respecting draft findings, conflicts of interest, confidentiality and the publication of documentation.[46] The importance of these rules is to promote the acceptance of outcomes by requiring adherence to fair procedures.

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[44] For an account of compliance that focus on the role of legitimacy see Jutta Brunnee and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

[45] The concept of legitimacy is subject to multiple meanings. Here we refer to normative legitimacy in that we are identifying those attributes of the treaty bodies which ought to lead to acceptance by Parties and other actors of the authoritativeness of decisions by Espoo Convention treaty bodies. For a discussion of the concept of legitimacy in international environmental law, see Daniel Bodansky, "Legitimacy" in *The Oxford Handbook of International Environmental Law*, Bodansky, Brunnee and Hey, eds., (Oxford University Press, 2007) at 704.

[46] Operating Rules, Annex to Decision IV/2.

A third, and related, approach to legitimacy is the adoption of judicialized forms of decision-making. We note the attention to neutrality, transparency and opportunities for affected Parties to make representations, but also in the substantive form of the decisions themselves, which are justified in light of principles of international law and guidance documents generated by the MoP.[47] Importantly, the Implementation Committee is emerging as both a source and an arbiter of these rules as it publicizes its prior opinions, which themselves are intended to have normative value.

Finally, substantive legitimacy is enhanced through the MoP's focus on improving the effectiveness of the Convention; that is, the ability of the Convention to achieve its purposes. In dynamic environments, formality and rigidity may undermine the effectiveness of international rules, as contexts evolve or unforeseen circumstances arise. The ability of the MoP to overcome the constraints of formal international law-making in order to achieve collectively sought ends, promotes the acceptance of the MoP's authority.[48]

We would posit that the means of promoting legitimacy are not only directed towards Parties, but to other actors as well. The transnational nature of the Espoo Convention means that the decisions of the treaty bodies not only affect the State Parties, but also non-state actors impacted by transboundary environmental impacts. In this regard, state participation in MoP decisions alone may be insufficient to generate legitimacy among members of the participating state's public, which may not share the same interests as the state itself. However, by ensuring that its processes are open and adhere to accepted procedural and substantive norms, treaty bodies can enhance their standing beyond the state.

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[47] For instance, the implementation committee provides in its synthesis 2001-2010 report (para. 22) that: "The immediate suspension of implementation [as a result of a request for establishment of an inquiry commission] can … be invoked from the objective and purpose of the Convention. As set out in the preamble and in article 2, paragraph 1, the Convention is based on the principle of prevention, which is well embedded into international environmental law", see *supra* note 30.

[48] See Daniel Bodansky, "The Legitimacy of International Governance: A Common Challenge for International Environmental Law?" 93 *AJIL* (1999), 596, describing substantive legitimacy.

There is a relationship between the evolution of the Espoo Convention from being a static source of rules towards becoming a more dynamic regime and the increased emphasis on legitimacy, as opposed to legality. Instead of relying on state consent, which is external to the Convention, the regime is able to generate legitimacy from within, as the Parties create new or refined norms through mechanisms that are internal to the Convention structure. In this regard, the various sources of legitimacy we identify above operate in a complementary and overlapping fashion. For example, the compliance functions of the Implementation Committee provide an opportunity for the Parties to collective examine the application of treaty rules and procedures and to refine those rules in light of this information by formulating new interpretations or creating new processes. We posit that this structure provides a resiliency to the regime, as it allows for change through multiple avenues (for example, through Convention amendments and parallel MoP decisions) and provides multiple sources of system authority. Formal legality is not rendered irrelevant, but it becomes one strand in a more complex system of normative guidance.

4. Conclusion

The pattern that emerges from the law-making activities of the Convention treaty bodies is one where formal legality loses its primacy as the Parties privilege regime effectiveness over the need for formal state consent. Decisions from treaty bodies can often have an ambiguous legal status – but the Parties collectively recognize the value of maintaining high expectations of compliance with the decisions of treaty bodies. Compliance becomes self-propagating – as parties treat decisions of the meeting of the parties and the Implementation Committee having authoritative value. Authoritativeness in this context does not emerge automatically, but as a result of the Parties' careful attention to legitimacy.

Why does this require our attention? While compliance has not been a serious issue with the Espoo Convention, the same questions that are confronting other multilateral environmental regimes are likely to arise in the future regarding why states ought to comply with Espoo regime prescriptions that are not clearly formally binding. Providing a satisfactory answer to this question contributes to the robust nature of the Convention as it moves forward. The absence of the formal criteria of legality requires in our view a different theory of compliance based on legitimacy not legality. Decisions ought to be complied with to the extent that the decision-makers pay careful attention to accountability, right process and can offer reasons for their decision which adhere to accepted substantive norms and values. The requirement for accountability suggests that the Parties ought to take seriously the supervisory role of the Meeting of the Parties, in particular in view of the various normative functions the Implementation Committee plays. This would appear to be the case, as demonstrated by the MoP's decision to admit the possibility of a non-Party initiated compliance question after the Implementation Committee had held otherwise.

Over the last twenty years we have seen an evolution of the Espoo Convention from a stand-alone treaty to a more complex regime and this evolution has been accompanied more recently by a shift from treaty compliance to regime compliance. That shift has necessitated a blurring of the line between implementation and law-making – which results in a tension between the desire for efficacy, on the one hand, and the need for state consent, on the other. This tension, however, can be successfully mediated with careful attention to concepts of administrative legitimacy.

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