

EDITORIAL

In this issue, reports of recent international Conferences and Meetings of Parties (COPs and MOPs) return the often recurring issue of rules of procedure to the forefront of our minds. In one sense, the issue should remind us of the actual legal significance of international treaties, and the reasons that international diplomatic practices cannot simply be seen as mirrors of national parliamentary operations. Certainly, in considering rules of procedure, the somewhat novel nature of the most recent multilateral environmental agreements (MEAs) must be kept in mind.

Earlier MEAs, such as the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) and the World Heritage Convention (WHC), addressed truly international objectives. Thus, CITES is clearly applicable to species moving in “international trade”. While its concept of “trade” is broadened beyond any legal or dictionary meaning, it uses “international” rather strictly, and does not apply to domestic trade. Similarly, the WHC focuses on creating a recognised list of “World Heritage areas” around the globe, potentially assisting with the declaration and management of those protected areas and turning the World-Heritage designation into a valuable “brand”.

The strict limitation of these conventions to actions, transactions and objectives that are “international” is sometimes considered limiting by activists focused on species and ecosystems (which know no borders). In a very real sense, however, it is the source of success of these instruments – it enabled the CITES COP and committees and the World Heritage Commission and the General Assembly to adopt voting rules and operate by a less-than-consensus majority, at least with regard to certain decisions. By definition, these decisions do not – cannot – affect any part of the States Parties’ sovereignty beyond what they committed to in the ratifying the convention. CITES and the WHC are among the most successful international laws, not because they have enabled non-consensus voting by their governing bodies, but because of their strength and clarity regarding their shared mandates.

Among the more recent MEAs, only the Montreal Protocol on Substances That Deplete the Ozone Layer (MP) achieves a similar level of commitment and coincidentally allows decisions by vote. The MP was adopted in 1987, in response to a concrete and generally recognised globally shared threat – the atmospheric “ozone hole” discovered in 1984. Consequently, the MP’s connection to the global environment is perhaps the most clearly defined of any MEA – it focuses on decreasing atmospheric releases of substances that are chemically shown to negatively impact (deplete) the ozone layer. As such, the MP’s operative provisions involve identifying and phasing out the use of ozone depleting substances (ODSs) – a national regulatory matter – to promote the global objective of reducing ODS impact on the atmospheric ozone layer. In addition, the MP created and controls an international fund, further bolstering the international nature of its objectives. To achieve its goals through its processes, the MP’s MOP operates under rules of procedure that are relatively complete and specify that most decisions may be made by vote of two-thirds of members present and voting – an option that makes sense, in light of the protocol’s carefully limited scope and close link to an internationally shared concern.

By contrast, most newer MEAs are elementally different in coverage and objective. Most are far more expansive in their coverage of domestic actions and far less specific regarding the global nature of the convention objectives. The activities and priorities they address are primarily domestic in scope. Their “international” justification is often a vaguely stated belief that these activities might, if not carefully overseen, negatively impact the global environment. The Convention on Biological Diversity (CBD), for example, identifies conservation, sustainable development and equity – generally matters seen as national – as its global objectives, and the overwhelming bulk of its provisions call for national legislative, administrative and on-the-ground measures. Relatively few of its provisions specifically focus on actions, interactions or objectives that are global or international in nature, and where they exist, such provisions are generally vague or incomplete – left for later agreement. Small wonder, perhaps, that the CBD COP’s Rules of Procedure still contain bracketed text, indicating a lack of consensus on whether there are any matters that the COP may decide by a less-than-consensus vote. These same factors have combined to cause the negotiated CBD text to be primarily phrased in non-mandatory terms. Even so, however,

many States that are Party to the CBD are uncomfortable about enabling a voting process the results of which might have an impact on a State's domestic legislation and objectives even where that State voted against that decision. Similar challenges attend most of the MEAs adopted in the 1980s and thereafter, including, as discussed in this issue, the UN Framework Convention on Climate Change (p. 113) and the Minamata Convention on Mercury (p. 98). In general, all of their COPs, MOPs or other governing bodies have responded to the challenge in the same way – adopting nearly identical rules of procedure containing nearly identical bracketed voting provisions.

In their zeal to get international agreements adopted, many more recent international negotiators frequently use a catch phrase – “constructive ambiguity” – to describe their approach to negotiations. This refers to the fact that newer agreements have often been intentionally vague, enabling each Party to use its own definitions, when adopting national implementing measures. This approach was, perhaps, reasonable, particularly where the MEA addresses national measures and priorities that are almost entirely domestic in scope. It is little wonder, perhaps, that their COPs have found it difficult to develop functional voting-based procedures where the instrument lacks specifics about commitments and internationally shared challenges. Often, however, the voices that have lauded constructive ambiguity have also been strident in demanding voting processes that enable faster action and avoid the ability of a single State to block consensus. Those are frequently also the voices calling for binding commitments, international enforcement and/or increased ambition.

Admittedly, the voices in favour of constructive ambiguity have nearly all fitted within one of two categories: (i) negotiators whose backgrounds were not in law or policy; or (ii) negotiators from States whose negotiating positions strongly opposed increases in commitment or the recognition of stronger international environmental obligations.

Given that many of the States in category (ii) above appear to be leaving or renouncing some MEAs, it is possible to see the current difficult times for environmental law in a new light. Perhaps, when fewer such States have procedural rights in those COPs, MOPs and other governing bodies, it may be possible for the remaining law and policy professionals within those bodies to set new levels of ambition for themselves. Specifically, they might seek to develop new innovations in COP voting procedures that help resolve the voting rights problems without unduly limiting the sovereignty of States Parties. They might also help educate other negotiators regarding the importance of carefully crafted voting rights, the reasons international bodies cannot easily mirror the parliamentary rules of national-level bodies and the potential costs incurred every time an MEA's negotiating or governing body settles for a “constructively ambiguous” provision or a bracketed rule.

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