

Unravelling the UNFCCC'S institutional system: Halfway between treaty organs and international organization

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Abstract: According to the system established by the UNFCCC, the substantive obligations are adopted through different techniques and organs or bodies, from which emerges a large normative production with a different legal value.

These treaty organs or bodies can be grouped into different categories from which it can be inferred the complexification of the UNFCCC's organic system, and the absence of a clear legal status. To unravel this system and its organic structure, this paper will analyse the categories, comparing their composition, establishment and functions with the organs of international organizations, in order to determine how close they are to international organizations and how long the purported differentiation can be maintained or should be maintained.

Keywords: Treaty Organs- UNFCCC -International Organizations -Conference of the Parties- Treaty Bodies

(A) INTRODUCTION

The development of the treaty organs has been especially broad in the area of international environment law through Multilateral Environmental Agreements (MEAs), and the reluctance to create International Organizations (IOs) in this area can be traced back to the beginning of these regulations. In this regard, the 1902 Convention for the Protection of Birds Useful for Agriculture was the precedent of the International Ornithological Committee that was created many years later in 1978; the delay was due to the state parties' rejection of the "possibility of establishing a regulatory body and institutionalization of their cooperation, dreading any restraint on their sovereignty".¹

This principle of sovereignty² appeared again in the United Nations Framework Convention Climate Change (UNFCCC), whose preamble reaffirmed "the principle

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¹ J. Menkes and M. Menkes, 'International Organisations, Climate Change expectations, and the reality of institutionalisations- An analysis of the United Nations Framework Convention on Climate Change', 29 *Polish Yearbook of International Law* (2009), 115-137, at 118.

² According to Sarooshi the IOs are the 'real-world' manifestation of the contested concept of sovereignty. D. Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', 25 *Michigan Journal of Interna-*

of sovereignty of states in international cooperation to address climate change”. The respect of the principle of sovereignty and the fear of the states of losing that sovereignty in such a sensitive area has to be considered along with the different reasons, such as flexibility, less bureaucracy or fewer costs, provided by scholars for the avoidance of the establishment of an IO to regulate climate change³. However, is this truly the case?

The UNFCCC is, as its name confirms, a framework convention, which means that the convention does not establish substantive obligations for the state parties but identifies the subject matters for future regulations and establishes the bases, structure and legislative techniques for those regulations.⁴ According to this system established by the UNFCCC, the substantive obligations are adopted through different techniques and through different organs or bodies (it must be noted that the UNFCCC system refers to bodies to address treaty organs).

It is not the purpose of this work to analyse the normative evolution of climate change protection; therefore, references to norms and regulations will relate to the analysis of UNFCCC bodies and structure, which is our main subject of study. In this regard, two main legislative techniques can be highlighted. The first is through the adoption of protocols and agreements⁵ that came to enhance the objectives of the Convention and establish substantive and concrete obligations for the parties, which are adopted by the states. The second technique is through the activity of the UNFCCC bodies, from which emerges a large normative production with a different legal value⁶.

Therefore, the bodies of the UNFCCC have played an essential role in the regulation and implementation of the objectives and purposes of the Convention, Kyoto Protocol and Paris Agreement, which has resulted in the establishment of a complex organic system very distant from the postulates of less bureaucracy, fewer costs and more flexibility. So, why the reluctance to create an IO?

tional Law (2004), 1107-1139, at. 1110. In any case, as Schermers and Blokker state, “The fact that, since the early twentieth century, public international law has increasingly imposed substantial limitations upon the freedom of States does not take away their legal status as sovereign entities, as long as the essence of State functions is retained”. H. G. Schermers and N. M. Blokker, *International Institutional Law*, (Brill/Nijhoff, Leiden, 2011), at 5; See also. M. Martín Martínez, National sovereignty and international organizations, (Brill/Nijhoff, Leiden, 1996).

³ See E.J. Martínez Pérez, “La naturaleza jurídica de las decisiones adoptadas por las conferencias de las partes en el Protocolo de Kyoto”, 13 *Revista Electrónica de Relaciones Internacionales* (2007), 3

⁴ See P. Merkouris ‘United Framework Convention on Climate Change 1992’, in M. Fitzmaurice, et al (eds), *Multilateral Environmental Treaties. Elgar Encyclopedia of Environmental Law*, Vol. V. (Edward Elgar Publishing, Cheltenham, 2017) at 378; Menkes and Menkes, supra n. 1, at 121; A. Boyle and N. S. Ghaleigh, ‘Climate Change and International Law beyond the UNFCCC’, in K. R. Gray, R. Tarasofsky, and C. Carlarne (eds), *The Oxford Handbook of International Climate Change* (Oxford University Press, Oxford, 2016) at 29. On the contrary, Sands considers that to call the Climate Change Convention a ‘framework’ is a mistake since the Convention establishes different commitments, subsidiary bodies, guiding principles and dispute settlement mechanisms. P. J. Sands, *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2012) at 276.

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 162 (adopted 11 December 1997, entered into force 16 February 2005); Paris Agreement 3256 UNTS (adopted 12 December 2015, entered into force 4 November 2016).

⁶ On the legal value of the decisions adopted by the COP see. Martínez Pérez, supra n. 3.

When contemplating treaty organs and environmental agreements, the first treaty organ that come to mind is the Conference of the Parties (COP), which appears in the majority of the treaties and is naturally included, or rather established, in the UNFCCC Article 7.1 (“A Conference of the Parties is hereby established”). However, in the case of the UNFCCC, the organic structure goes much further than that in the rest of MEAs, as more than twenty treaty organs could be mentioned. These treaty organs or bodies, as they are called on the UNFCCC’s website, can be grouped into three different categories: Supreme Bodies, Subsidiary Bodies and Constituted Bodies.

Consequently, it can be inferred from this structure that the complexification of the UNFCCC’s organic system is a reality, and furthermore, the absence of a clear legal status may make its functioning difficult. As will be shown in this paper, a set of treaty organs has been established, and therefore we can talk about there being an institutionalized system to which the norms and rules of international institutional law apply.

To unravel this mentioned system, and its organic structure, in the sections that follow this paper will analyse the three categories of UNFCCC treaty organs, comparing their composition, establishment and functions with the organs of international organizations, in order to determine how close they are to international organizations and how long the purported differentiation can be maintained or should be maintained.

(B) PRINCIPAL UNFCCC TREATY ORGANS/BODIES

(1) The Conference of the Parties and the Meeting of the Parties

The COP is established in UNFCCC Article 7.2 as a supreme body and is entrusted in Article 7.3 with a number of tasks related to the implementation of the Convention and the related instruments.

The COP is a plenary and intergovernmental organ, where all the state parties to the Convention are represented, and therefore, it is the main decision-making organ of the Convention. The COP, through its decisions and inputs, is the organ that led, for example, to the adoption of the Kyoto Protocol and the Paris Agreement. In this regard, the Kyoto Protocol followed the Berlin Mandate and was adopted by COP decision 1/CP.1,⁷ and the Paris Agreement followed the Durban Platform for Enhanced Action and was established by COP decision 1/CP.17.⁸ In addition, the Kyoto Protocol and the Paris Agreement establish that the COP will serve as Meeting of the Parties (MOP) to the Protocol and the Agreement. Does this mean that we are discussing different treaty organs, or is the same treaty organ acting in different compositions?

Regarding the composition of the MOPs, only the parties that are party to the Protocol and the Agreement are represented in the COP acting as an MOP, while states that are not parties may participate as observers. However, considering the content of

⁷ Decision 1/CP.1. The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up. FCCC/CP/1995/7/Add.1

⁸ Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action. FCCC/CP/2011/9/Add.1

the establishment decisions, they still refer to the COP as serving as a MOP. Therefore, in theory and in practice, it seems difficult to divide the COP into three different treaty organs – rather the COP can be described as one single organ which differs according to its functions and composition.

Examples of different “compositions” of one organ can also be found in IOs, such as the European Union. Regarding the Council, when it is making a decision concerning the euro, only the states whose currency is the euro have the right to vote,⁹ similar to the case of enhanced cooperation,¹⁰ where the non-participant states may participate in the deliberations but have no right to vote and therefore have a position similar to that of observer.¹¹

Moving onto the issue of the decisions of the COP and MOPs, as a general rule these are adopted by consensus, although there is no agreement on the rules of procedure regarding the voting system¹² and no express reference to consensus in the Convention. This consensus can be considered a reflection of the mentioned principle of sovereignty¹³ that must rule the cooperation in regulating climate change. However, as it can be discerned, consensus can sometimes be a difficult threshold to reach in an organ with so many members (198 parties to the treaty), and it is probably here where the aforementioned flexibility could play a role. In this regard, although the rule was the consensus, in the Cancun Conference, two decisions were adopted despite the rejection from Bolivia¹⁴; this could mean that the consensus rule can be broken when the majority agree to implement the treaties; that is, “the strong collective political will to achieve results may prevail over the wish not to take decisions without consensus”.¹⁵ A similar

⁹ Art 136. 2 Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009)

¹⁰ Art 330 Treaty on the Functioning of the European Union.

¹¹ On the participation of the observers, see. E. Suy, ‘The Status of Observers in International Organizations’, 160 *Recueil des Cours* 75 (1978) 123-154. See also N. Sybesma-Knol, ‘The Continuing Relevance of the Participation of Observers in the Work of the United Nations’, in K. Wellens (ed) *International Law: Theory and Practice: Essays in Honour of Eric Suy*, (Nijhoff, The Hague, 1998); E. Brewer, ‘The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organisations’, 9 *International Organizations Law Review* (2012) 181-225 [doi: 10.1163/15723747-00901005]

¹² The COP adopted its rules of procedure, but there was no consensus on the voting rule established in article 42, which included two options in brackets. The first one refers to consensus, and in the case when no consensus is reached, the majority voting is established as an alternative. The second option includes only consensus. United Nations Framework Convention on Climate Change. Draft Rules of Procedure of the COP and its subsidiary bodies. FCCC/CP/1996/2. See Schermers and Blokker *supra* n. 2, at 541; L. Rajamani, ‘The United Nations Framework Convention on Climate Change: a framework approach to climate change’, in D. A. Farber and M. Peters (eds), *Climate Change Law, Elgar Encyclopedia of environmental Law* (Edward Elgar Publishing, Cheltenham, 2016, at 21; Merkouris *supra* n. 3, at 387-389; Martínez Pérez, *supra* n. 3, at. 6-7.

¹³ Although consensus is considered here as an expression of the principle of sovereignty, it does not mean that consensus is not a common voting method amongst IOs, as Verhoeven stated: ‘le consensus supplante très largement le vote de nombreuses organisations internationales’. J. Verhoeven, ‘Les activités normatives et quasi normatives’, in R-J Dupuy (ed), *Manuel sur les organisations internationales* (Brill/Nijhoff, Leiden, 1998) at 435; Schermers and Blokker, *supra* n. 2, at 536-545; J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge, 2015), at 177-178; N. White, ‘Decision-making’, in J. Klabbers and Å. Wallendahl, (ed.) *Research Handbook on International Organizations* (Edward Elgar Publishing, Cheltenham, 2011), 228.

¹⁴ Rajamani, *supra* n. 10, at. 212.

¹⁵ Schermers and Blokker, *supra* n. 2, at 542.

situation took place in the COP of the Convention on Biological Diversity,¹⁶ in which a decision was adopted with the objection of Australia.¹⁷

However, if this is an example of the flexibility that may characterize treaty organs and differentiates them from IOs, does it mean that the possibility of flexibility does not exist in IOs?

It is a common practice in IOs to introduce majority voting as an alternative to consensus, in cases in which consensus cannot be reached.¹⁸ However, what differs from the practice of the UNFCCC's COP is that in the case of many IOs, the possibility of majority voting is included in the voting rules,¹⁹ and therefore, the IOs are not acting without any legal bases.

In the abovementioned case regarding the UNFCCC, there were no voting rules to be applied but only an interpretation of the term consensus,²⁰ and in analysing this issue, it is interesting also to consider the practice of some organs of the United Nations, which allows for including reservations in consensus decisions. According to Cassan, this practice has been accepted by the Security Council and General Assembly, as well as by the United Nations Development Programme (UNDP), as the decisions taken by the UNDP are followed in the report with "observations and reservations raised by the Council decision".²¹ Therefore, although no formal objection is raised during the meeting, the decisions adopted by consensus do not always entail a unanimous acceptance, and therefore, the IOs also seem quite flexible in establishing mechanisms to avoid paralyzing decision-making and allow states to manifest their opposition to a decision adopted by consensus.

In conclusion, it can be said that the flexibility and the adoption of the decisions in the Cancun Conference arose not from the treaty organ model itself, but from the fact that the conference members were acting without voting rules and based on practice and a particular interpretation of the term 'consensus', which is not restricted to treaty bodies.²²

The different compositions of the COP and the abovementioned decision-making system lead to one of the main issues regarding this specific treaty body: the "*volonté distincte*"; that is, whether the COP's decisions can be attributable to the state parties.

¹⁶ Convention on Biological Diversity, 1760 UNTS 79 (adopted 22 May 1992, entered into force 29 December 1993)

¹⁷ Schermers and Blokker, *supra* n. 2, at 540.

¹⁸ Klabbers, *supra* n. 11, at 178.

¹⁹ The UNFCCC, Kyoto Protocol and Paris agreement include the majority as a last resort for the amendments when consensus cannot be reached. In this regard, the Doha amendment to the Kyoto Protocol was adopted with the objections of Russia, Ukraine and Belarus. Rajamani, *supra* n. 10, at 212.

²⁰ According to President Espinosa consensus didn't mean unanimity. Schermers and Blokker, *supra* n. 2, at 542

²¹ H. Cassan, 'Le consensus dans la pratique des Nations Unies' 20 *Annuaire Français de Droit International* (1974), at 484.

²² A similar case took place in the COP of the Convention of Biological Diversity, which, as Blokker states, together with the precedent of the UNFCCC, can facilitate a future adoption of 'consensus-minus-one' decisions, and taking into account the case of Doha, minus two or minus three... See Schermers and Blokker, *supra* n. 2, at 542.

The concept “will of its own” has been used as a requirement for the existence of an IO.²³ Therefore, the question lies on what determines the existence of an independent “will” different from that of the state parties. Furthermore, as Wessel states, we need to consider whether the organ “is able to produce a ‘corporate’ will, as opposed to a mere ‘aggregate’ of the wills of the member states”.²⁴

In this regard, is interesting to highlight the theory of attribution of powers established by Blokker, which differentiates the decisions taken by a group of States acting in a meeting from the decisions of the same group of States acting, for example, in the Security Council. According to Blokker, it would be the powers attributed to the Security Council that make the difference, as the “Security Council has the authority to do things that 15 States meeting in an ad hoc basis cannot do”.²⁵ Together with this theory of powers of the organs, the statement of Klabbers can also help elucidate some requirements to determine the existence of an autonomous will. In this regard, “as long as an organization is not empowered to take decisions binding its membership by a mere majority of its members, one can hardly speak, in any literal sense, of the organization having a ‘distinct will’; unanimous decisions, after all, can always be traced back to member states”.²⁶ This assertion is in the same line as that of White, although White introduces other criteria such as “width purposes” or “intrusiveness of the powers”²⁷ that could be linked with Blokker’s theory of the attribution of powers.

Therefore, to summarize, the adoption of decisions by majority²⁸ and the binding character of the decisions would constitute a “distinct will”. If we turn to the COP/MOP of the UNFCCC, it seems difficult for this treaty organ to comply with these requirements, for, as a general rule, the decisions are taken by consensus, and their binding character is still to be contested.²⁹

However, if one jumps from the theory, that is, from what is barely established in the treaty regarding these two issues, to practice, the perspective may change.

As referred to above,³⁰ when the COP’s rules of procedure were drafted, the option for a majority voting rule was included with the consensus without a final agreement being reached; therefore, the COP is currently acting through practice, which seems to facilitate the adaption of the organ’s procedures to necessity. In addition, there is no

²³ *Ibid* 45; Klabbers, *supra* n. 11, at 12; P. Sands and P. Klein, *Bowett’s Law of International Institutions*, (Sweet & Maxwell Thomson Reuters, London, 2009), at 15; M. Diez de Velasco, *Las Organizaciones Internacionales* (Tecnos, Madrid, 2010), at 43.

²⁴ RA. Wessel, ‘Revisiting the International Legal Status of the EU’, 5 *European Foreign Affairs Review* (2000), at 517.

²⁵ NM. Blokker, ‘International Organisations as Independent Actors: Sweet Memory or functionally necessary?’, in J. Wouters, E. Brems, S. Smis, P. Schmitt, *Accountability for human rights violations by international organisations* (Intersentia, Antwerp, 2010), at 39.

²⁶ Klabbers, *supra* n. 11, at 48. R. Higgins, *Problems and Process: International Law and How We use It*, (Oxford University Press, Oxford, 1995), at 46.

²⁷ Nigel D. White, *The Law of International organisations* (Manchester University Press, Manchester, 2017), at 111.

²⁸ Furthermore, Cassese considers that majority voting is an element that can determine the “detachment from its members”. Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2005) at 137

²⁹ A. Wiersema, ‘The new international law-makers? Conferences of the Parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law*, (2009) at 247 et seq.

³⁰ *Supra* n. 10.

explicit reference in the UNFCCC, Kyoto Protocol or Paris Agreement to the adoption of decisions by consensus, with the exception of the rules of procedure and the amendments,³¹ within the latter, the possibility of a three-fourths majority vote when no consensus has been reached. Finally, it has already been mentioned how in practice the COP can adopt decisions without the acceptance of all the parties, which may constitute the beginning of a practice that is applicable until a final agreement on the voting rules is reached. In conclusion, the possibility of considering that the COP adopts decisions out of unanimity should not be dismissed. On the other hand, consensus is largely used by IOs,³² and it does not prevent their decisions from being considered decisions of the organization.

Regarding the second issue, it must be said that the binding force of the COP decisions is contested. To analyse this issue, it is worth noting first the legal character of the decisions, and as Higgins stated, “When... decisions are made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is legal decision-making”.³³ Regarding the binding character of those legal decisions, the Convention does not expressly authorize binding law-making by the COP,³⁴ but as Brunnée has stated, “the distinction between COP decisions that are, technically speaking, legally binding and those that are not may well be more apparent than real”.³⁵ Does this mean that there are legally binding decisions? According to Ulfstein and Churchill, even if that possibility is not mentioned in the Convention, Protocol or Agreement, it is possible to find elements that lead to the consideration that in practice, some of the decisions adopted by the COP are binding for the States.³⁶

Regarding the UNFCCC, this issue would be probably easier to analyse when focusing on the activity of the Kyoto Protocol's COP/MOP, as the Kyoto Protocol establishes genuinely substantive obligations, and the MOP can “make, within its mandate, the decisions necessary to promote its effective implementation”.³⁷

Most likely, one of the clearest examples is Article 17 of the Kyoto Protocol, which establishes that the COP can adopt “relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading”. In addition, although it is clear that the principles, rules or guidelines are not necessarily binding rules, the COP/MOP has adopted rules regarding emission trading that have a “binding” character, as their fulfilment is mandatory for participation in the system and for compliance with the Kyoto Protocol.³⁸

³¹ Art. 15 United Nations Framework Convention on Climate Change, 1771 UNTS 107 (adopted 9 December 1992, entered into force 21 March 1994)

³² See *supra* n. 11; White *supra* n. 11, at 228-230

³³ R. Higgins, ‘Policy Considerations and the International Judicial Process’, 17 *The International and Comparative Quarterly* (1968), 58-84, at 58-59.

³⁴ Rajamani, *supra* n. 10, at 213

³⁵ J. Brunnée, ‘Coping with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law*, (2002) 1-52, at 33 [doi: <https://doi.org/10.1017/S0922156502000018>]

³⁶ R.R. Churchill and G. Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’, 94 *American Journal of International Law* (2000) 623-659, at 639.

³⁷ Art.3.4. Kyoto Protocol

³⁸ The Kyoto Protocol Reference Manual on accounting on emission and assigned amount contains the transactions rules and the COP decisions through which they were adopted. See Manual at 77- 89.

In addition to this system, the MOP adopted a Compliance Mechanism under Article 18 of the Kyoto Protocol,³⁹ which could be considered as important “intrusiveness powers”, in White’s words.⁴⁰ In this regard, the mechanism contains the possibility of suspending a non-compliant state from participation in the protocol system or deducting from the party’s assigned amount a “number of tonnes equal to 1.3 times the amount in tonnes of excess emissions”.⁴¹ Thus, although this decision is to be taken by the Executive Branch, it is the COP that has attributed that power to the branch and that can take the last decision by a three-fourths majority vote through the appeal procedure.⁴² Furthermore, the final decision will impose obligations on other State parties since they will not be allowed to trade with the suspended State.

This leads us lastly to discuss the contested issue of the COP’s legal personality. The legal personality of treaty organs is a controversial issue that has been the object of different analyses.⁴³ Without it being the object of this paper, we will consider that legal personality can be inferred with regard to treaty organs, in that it is necessary to examine legal capacities in order to determine whether there is such an implied legal personality.⁴⁴ With the UNFCCC’s COP, the capacity to adopt binding decisions as well as adopting decisions out of unanimity rule may suggest that the organ has a will of its own. In addition, treaty-making power can also be inferred from the COP’s capacities. In this regard, the United Nations Office of Legal Affairs established in its memorandum regarding the “Arrangements between the Conference of the Parties of the United Nations Framework Convention on Climate Change and the Global Environment Facility” that “in order to ensure the effective operation of the GEF as a source of funding of the activities under the Convention, the above-captioned issues should be spelled out in a legally binding treaty instrument”.⁴⁵ A party to this treaty should be the COP.

To this statement must be added the signature of a Memorandum of Understanding (MOU) between the Conference of the Parties and the Council of the Global Environment

<https://unfccc.int/sites/default/files/o8_unfccc_kp_ref_manual.pdf> accessed 9 March 2022. See R. De Wit Wijnen, ‘Emissions trading under Article 17 of the Kyoto Protocol’, in D. Freestone and Ch. Steck (eds) *Legal Aspects of implementing the Kyoto Protocol Mechanisms: Making Kyoto work* (Oxford University Press, Oxford, 2005), at 403-415.

³⁹ Decision 27/CMP.1. Procedures and mechanisms relating to compliance under the Kyoto Protocol . FCCC/KP/CMP/2005/8/Add.3

⁴⁰ White, *supra* n. 25, at III.

⁴¹ Section XV. 5. Decision 27/CMP.1. Procedures and mechanisms relating to compliance under the Kyoto Protocol. CCC/KP/CMP/2005/8/Add.3. On the procedure see F. Romanin Jacur, ‘The Kyoto’s Protocol’s compliance Mechanism’, in Peters *supra* n. 10; L. Massai, *The Kyoto Protocol in the EU: European Community and member states under international and European law* (T.M.C. Asser Press, The Hague, 2011); Brunnée, *supra* n. 33.

⁴² Section XI Decision 27/CMP.1.

⁴³ Churchill and Ulfstein, *supra* n. 34, at 623; V. Røben, ‘Environmental treaty bodies’ in R. Wolfrum, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2015); G. Ulfstein, ‘Reflections on Institutional Design – Especially Treaty Bodies’, in Klabbers and Wallendahl, *supra* n. 11; G. Ulfstein, ‘Treaty Bodies and Regimes’, in DB. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, Oxford, 2012); G. Fernández Arribas, ‘Rethinking International Institutionalisation through Treaty Organs’, 17 *International Organizations Law Review* (2020) [doi:10.1163/15723747-2019012]

⁴⁴ Fernández Arribas, *supra* n. 41, at 22.

⁴⁵ Intergovernmental Negotiating Committee for Framework Convention on Climate Change. Matters relating to arrangements for the Financial Mechanism and for Technical and Financial Support to Developing Country Parties A/AC.23/74, Annex 1, para 16.

Facility.⁴⁶ We must take into account that, despite the reluctance to consider a MOU as an international agreement, the International Court of Justice in the Maritime delimitation in the Indian Ocean case concluded after analysing the content of the MOU, the negotiation and signature procedure that the MOU between Somalia and Kenya was 'a valid treaty that entered into force upon signature and is binding on the Parties under international law'.⁴⁷ Thus, it will necessary to examine the content of the memorandum. In any case, as Desai stated, treaty-making capacity can include binding and non-binding agreements as well as arrangements.⁴⁸

Therefore, it can be assumed that some of the elements that allow an entity to be considered to have legal personality can be found in the COP of the UNFCCC; in fact, the UN Secretary General stated that the COP has "an independent legal character",⁴⁹ and the "distinct legal position (...) is often equated with the possession of legal personality";⁵⁰ this implies that this treaty organ enjoys legal personality. This conclusion would be important to recognize in order to normalize and clarify the status of the COP in the international sphere, for as Desai states, "an absence of legal capacity could lead to several practical problems".⁵¹

(2) The Secretariat

The UNFCCC establishes a Secretariat with several functions,⁵² which can be summarized as administrative functions and technical expertise. This Secretariat also serves as Secretariat for the Kyoto Protocol and the Paris Agreement, and it is located in Bonn.

However, the secretariats of the MEA treaty organs present a particularity: they are not independent secretariats since they are located within other IOs, mainly the United Nations.⁵³ In addition, and this is the pattern followed by UNFCCC Secretariat, the "Convention secretariat shall be institutionally linked to the United Nations, while

⁴⁶ Decision 12/CP.2 Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility. FCCC/CP/1996/15/Add.1

⁴⁷ *Case Concerning the Maritime Delimitation in the Indian Ocean* (Somalia v Kenya), preliminary objections, ICJ Reports (2017) 3.

⁴⁸ BH. Desai, *Multilateral Environmental Agreements. Legal Status of the Secretariats* (Cambridge University Press, Cambridge, 2010), at 139. Brölman has also stated regarding IOs that 'While in organizations' treaty practice formal designations such as "treaty" and "convention" appear to be avoided, the binding character of agreements is not at issue'. C. Brölman 'International Organizations and Treaties: Contractual Freedom and Institutional Constraint', in Klabbers and Wallendahl, *supra* n. 1, at 290.

⁴⁹ Intergovernmental Negotiating Committee for Framework Convention on Climate Change. Designation of a Permanent Secretariat and Arrangements for its Functioning. Note by the Secretary-General. A/AC.237/79/Add.1, p. 7

⁵⁰ NM. Blokker and R. A. Wessel, 'Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: The Interplay Between Law, Politics and Practice', in M. Steinbrück Platise, C. Moser, A. Peters (eds), *The Legal Framework of the OSCE* (Cambridge University Press, Cambridge, 2018), at 10. Martínez Pérez, *supra* n. 3, at 9-10.

⁵¹ Desai, *supra* n. 44, at 137. On the problems of the non-recognition of legal personality to OSCE see Blokker and Wessel, *supra* n. 46.

⁵² Art. 20 UNFCCC

⁵³ Different 'options such as locating the secretariat within an existing specialized agency of the UN, within one of the programs of the UN or linked to the UN headquarters or any other international entity' have been used. Desai, *supra* n. 44, at 142.

not being fully integrated in the work programme and management structure of any particular department or programme”.⁵⁴

The use of the secretariat of an IO by another IO is not common, but it is not an exclusive practice of MEAs since, for example, the International Development Association makes use of the Secretariat of the World Bank, and the African Civil Aviation makes use of the Secretariat of the International Civil Aviation Organization.⁵⁵

The abovementioned linkage between the UNFCCC Secretariat and the United Nations implies, for instance, that the Executive Secretary will be appointed by the United Nations Secretary General after consultation with the COP.⁵⁶ However, despite the power of the Secretary General to appoint the Executive Secretary, the Secretariat, in a perhaps too restricted vision, “works as a servicing arm” of the COP and “is expected to work within the boundaries of authority provided by the COP”.⁵⁷ In this regard, Article 20 of the UNFCCC contains a number of functions regarding the assistance of the Secretariat to the COP and leaves the possibility of other functions to be determined by the COP. However, the Secretariat not only is entrusted with assistance tasks but also, it could be said, works in a way for the Convention itself since, for example, the Secretariat shall ensure coordination with the secretariat of other international bodies,⁵⁸ may act as the registry⁵⁹ of arrangements, or will coordinate the expert review team established in Article 7 of the Kyoto Protocol⁶⁰.

The Secretariat has been considered a subsidiary body by some scholars,⁶¹ but if we look at the UNFCCC, which specifies the subsidiary bodies, the Secretariat is not included amongst them. In addition, the Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies,⁶² in Article 2, which contains the definitions, establishes a definition for the Secretariat different from that of the subsidiary bodies. Conversely, it is not possible to affirm the existence of a completely autonomous Secretariat;⁶³ the Secretariat acts under the control and authority of the COP and in connection with the United Nations. Therefore, we face another particularity of this kind of institutionalization.

The COP will also decide on the legal personality of the Secretariat⁶⁴ since the “Conference of the Parties should consider (...), whether the functions that have to be

⁵⁴ Decision 14/CP.1. Institutional linkage of the Convention secretariat to the United Nations, FCCC/CP/1995/7/Add.1.

⁵⁵ Schermers and Blokker, *supra* n. 2, at 322.

⁵⁶ *Ibidem*

⁵⁷ Desai, *supra* n. 44, at 164.

⁵⁸ Art 8e) UNFCCC

⁵⁹ Art 12 and 16 Paris Agreement

⁶⁰ Art 8 Kyoto Protocol

⁶¹ Menkes and Menkes, *supra* n. 1, at 130. Since the first secretariats were established to assist the activities of the principal organs, they have currently become the central organs of the IOs. Schermers and Blokker, *supra* n. 2, at 321-322

⁶² FCCC/CP/1996/2

⁶³ The Intergovernmental Negotiating Committee for Framework Convention on Climate Change decided that ‘it would defer for further study of the possible option of an entirely independent secretariat’. A/AC.237/79/Add.1.

⁶⁴ Decision 15/CP.2. Agreement concerning the headquarters of the Convention Secretariat. FCCC/CP/1996/15/Add.

carried out by the secretariat necessitate that it be given juridical personality on the international plane". And in this regard, we can conclude that the UNFCCC Secretariat's treaty-making capacity was implicitly recognized when it concluded the Headquarters Agreement between Germany and the United Nations. It must be highlighted that the agreement was not concluded on behalf of the COP,⁶⁵ on behalf of the UNFCCC – if this could be understood as an entity – or on behalf of the Member States;⁶⁶ it was concluded between the Secretariat and the other parties, which means that it is applicable only to the Secretariat and not to the rest of the UNFCCC's treaty organs. It is also interesting to note that although the Secretariat is linked to the United Nations, it is preferable for it to have its own legal personality,⁶⁷ so the United Nations cannot act on behalf of the Secretariat, and neither can the Secretariat benefit from the legal personality of the United Nations,⁶⁸ as the Secretariat is not integrated in the management structure or any organ or programme of the United Nations.

This *sui generis* relationship may cause practical problems and these problems led to the call of the Subsidiary Body of Implementation for the clarification of the legal status of the Secretariat.⁶⁹ An example of these kind of complications is presented by Klabbers regarding the International Court of Justice Advisory Opinion on the Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development. In this case, the Court held that because the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, was hosted and administered by the International Fund for Agricultural Development (IFAD), the IFAD could not "escape responsibility by pointing to the separate existence of the global Mechanism".⁷⁰ If one transfers this statement to the situation of the UNFCCC Secretariat and the linkage with the United Nations, some doubts may arise. The Secretariat is linked to the United Nations, but as the Secretary General established in his note regarding the linkage, the institutional arrangement should respect the "autonomy, responsiveness and accountability of its secretariat".⁷¹ In addition, the role of the United Nations is to provide administrative support,⁷² which does not mean that the Secretariat is completely administered by the United Nations. In fact, as has been established, the Secretariat is under the control and authority of the COP. Therefore, although the legal status is not clear, some evidence

⁶⁵ Churchill and Ulfstein consider that the agreement has been concluded on behalf of the COP because the secretariat is not a self-governing body and should be considered a subsidiary body of the COP. Churchill and Ulfstein, *supra* n. 34, at. 654. In this regard, Schermers and Blokker refer to agreements on privileges and immunities concluded between an organ of the organization and its members. Schermers and Blokker, *supra* n. 2, at 1135.

⁶⁶ Röben, *supra* n. 41, at 11.

⁶⁷ Subsidiary body for implementation. Institutional and Budgetary matters. Arrangements for relocation of the Convention Secretariat to Bonn. FCCC/SBI/1996/7

⁶⁸ The 'legal regime enjoyed by the United Nations cannot be extended automatically to the Convention Secretariat'. *Ibidem*.

⁶⁹ *Ibidem*. However, the Secretariat had already signed the agreement.

⁷⁰ J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', 70 *Nordic Journal of International Law* (2001) 403-421, at 9 [doi: <https://doi.org/10.1163/15718100120296647>]

⁷¹ A/AC.237/79/Add 1, p. 7

⁷² *Ibid* at 9.

could point to a different outcome from that of the IFAD in the case of the UNFCCC Secretariat and the United Nations, but in any case, the complexities we have mentioned are to be taken into account.

Finally, we wish to highlight that the conclusion reached by Blokker and Wessel about the OSCE and the application of international rules could apply perfectly to the situation of the UNFCCC COP and the Secretariat since, like the OSCE, the COP and the Secretariat do ‘not operate in an international legal vacuum, and pragmatic solutions and workarounds create legal effects and expectations by third parties’.⁷³

(3) The Bureau

Continuing with the *sui generis* institutionalization of the UNFCCC, the COP, through Article 22 of the Draft Rules of Procedure, established a Bureau, which is the process management body listed on the UNFCCC website.⁷⁴

The bureaux are also elements of the functioning of the IOs, but they are not considered organs of the organizations since they are included amongst the officers.⁷⁵ In addition, in the case of the UNFCCC Bureau, it seems that, despite its inclusion amongst the main organs or bodies on the UNFCCC website, its establishment, composition and functions are more like those of the officers than those of an organ of an IO.

According to rule 22 of the Draft Rules of Procedure, the bureau will be formed by the “President, seven Vice-Presidents, the Chairmen of the subsidiary bodies established by Articles 9 and 10 of the Convention, and a Rapporteur”, which is similar to the composition of the bureaux in the majority of the IOs. In fact, the UNFCCC Bureau follows a regional distribution with the representation of the five regional groups as well as a representative of the small island developing States; regional representation is also established in many IOs.⁷⁶

However, the issue that led the bureau to be considered just an element of the functioning of the COP/MOP instead of a treaty body is the functions attributed to the bureau.

It is worth noting that the earliest IOs created permanent organs, called bureaux, to perform administrative functions.⁷⁷ Currently, these activities are performed by the secretariats, but the recognition of the UNFCCC Bureau as one of the main bodies, as it is recognized on the website, could lead one to think that the Bureau in fact acts as a secretariat but uses an old-fashioned name. At first sight, and following this line of reasoning, it could be understood that the traditional functions of the secretariats are performed by the UNFCCC Secretariat as well as by the Bureau, but this is far from the

⁷³ Blokker and Wessel, *supra* n. 46, at 20

⁷⁴ <https://unfccc.int/process/#:4137a64e-efea-4bbc-b773-d25d83eb4c34:4eaecd80-5916-4055-bb34-b95f-3d402e78> accessed 9 March 2022.

⁷⁵ Schermers and Blokker, *supra* n. 2, at 278.

⁷⁶ *Ibidem*.

⁷⁷ *Ibid* 320; I. Seidl-Hohenveldern, ‘Les organes de les organisations internationales’, in Dupuy, *supra* n. 11, at 104.

truth. The Bureau is actually in charge of procedural matters of the sessions of the COP/MOP. For example, the Bureau examines credentials and submits a report to the COP;⁷⁸ its functions are therefore the same functions carried out by the officers' bureaux of the IOs. Therefore, the functions that have been traditionally assigned to the secretariats of the IOs are still performed by the UNFCCC Secretariat.

In sum, despite the inclusion of the Bureau amongst the main treaty bodies of the UNFCCC on the website, an in-depth analysis of this entity leads to a different conclusion; that is, the Bureau is part of the officers, and its composition and functions are closer to those of the officers' bureaux of IOs than to those of the organs of IOs, which is one of the characteristics of the treaty organs.

Therefore, the decision to include the Bureau in this section regarding the main treaty bodies of the UNFCCC is more related to an objective of clarification than to the purpose of affirming the existence of such a particular treaty organ.

(C) SUBSIDIARY TREATY ORGANS/BODIES

Subsidiary organs constitute one of the categories in which the organs of IOs can be classified. These organs can be found in different IOs, sometimes established as such in the constitutive instruments and sometimes established by principal organs of the organizations based on the power that the constitutive instruments have attributed to them or under implied competences,⁷⁹ as it has been recognized by the International Court of Justice in its Advisory Opinion on the Effect of Awards of Compensation made by the UN Administrative Tribunal in regard to the implied power of the General Assembly to establish a Tribunal.⁸⁰ Therefore, as Torres Bernárdez states, the establishment of subsidiary organs cannot be used as a criterion that could identify them.⁸¹

In this regard, the UNFCCC has established two subsidiary treaty bodies: the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation,⁸² which also serve as subsidiary bodies of the Kyoto Protocol⁸³ and the Paris Agreement.⁸⁴

The UNFCCC includes amongst the tasks of the COP the establishment of 'such subsidiary bodies as are deemed necessary for the implementation of the Convention',⁸⁵ which again confirms the similitude between the treaty bodies and the organs of IOs, for in practice, decisions of the principal organs of the organization represent the most common procedure for the establishment of subsidiary organs.⁸⁶

⁷⁸ Art 21. Draft rules of Procedure.

⁷⁹ S. Torres Bernárdez, 'Subsidiary Organs', in Dupuy, *supra* n. 11, at 117; Diez de Velasco, *supra* n. 21), at 102; Klabbers, *supra* n. 11, at. 216.

⁸⁰ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, ICJ Reports (1954) 47, at 59-60.

⁸¹ Torres Bernárdez, *supra* n. 75, at 124

⁸² Arts 9-10 UNFCCC

⁸³ Art 15 Kyoto Protocol

⁸⁴ Art 18 Paris Agreement

⁸⁵ Art 7 UNFCCC

⁸⁶ Torres Bernárdez, *supra* n. 77, at 117; Diez de Velasco, *supra* n. 21, at 102.

The COP has made use of these competences in two different ways. First, the COP/MOP has established ad hoc working groups of temporary nature, all of them established by COP/MOP's decisions and linked to the implementation of specific programmes or agreements. One of the latest ad hoc working group to conclude its work was the Ad Hoc Working Group on the Paris Agreement, established by the decision 1/CP.21 with the task of preparing for the entry into force of the agreement and the “convening of the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement”.⁸⁷ Previously, the COP/MOP had established ad hoc working groups to conduct a process to consider the further commitment of the parties to the Kyoto Protocol,⁸⁸ to conduct a “comprehensive process to enable the full, effective and sustained implementation of the Convention”⁸⁹ and to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties”⁹⁰ mainly regarding mitigation. It must be noted that in these cases, the activities were connected with the work and functions of the COP/MOP, which is in charge of promoting “the effective implementation of the Convention”.⁹¹

However, the COP has also made use of this competence in a second way, establishing treaty bodies included amongst what can be called a new category of bodies, the constituted bodies, which will be analysed in the next section.

Regarding the subsidiary treaty organs established expressly in the UNFCCC, they are called on to perform the traditional task of the subsidiary organs of IOs, which is to assist the principal organs;⁹² in the present case of the UNFCCC, this is to assist the COP. In fact, the tasks assigned to these organs would be, according to Torres Bernárdez, the criterion that may be truly useful for differentiating the subsidiary organs from the principal organs.⁹³

The assistance functions of the two subsidiary treaty organs, especially those of the Subsidiary Body for Implementation, are clearly established in the Convention since according to Article 9, the subsidiary body was “established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention”. Regarding the Subsidiary Body for Scientific and Technological Advice, although the word ‘assistance’ does not appear concerning the regulation of its establishment and tasks, assistance can be implied from the purpose of its creation, that is, “to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention”. However, its functions are not limited to those mentioned above, for according to Article 8, its functions will be further elaborated by the COP.

⁸⁷ Decision 1/CP.21. Adoption of the Paris Agreement. FCCC/CP/2015/10/Add.1

⁸⁸ Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol. Decision 1/CMP.1. Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol. FCCC/KP/CMP/2005/8/Add.1

⁸⁹ The Ad Hoc Working Group on Long-term Cooperative Action under the Convention. Decision 1/CP.13 Bali Action Plan. FCCC/CP/2007/6/Add.1

⁹⁰ Ad Hoc Working Group on the Durban Platform for Enhanced Action. Decision 1/CP.17. Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action. FCCC/CP/2011/9/Add.1

⁹¹ Art 7.2 UNFCCC

⁹² Torres Bernárdez, *supra* n. 77, at 126; Díez de Velasco, *supra* n 21, at 102.

⁹³ Torres Bernárdez, *supra* n. 77, at 125- 126.

Therefore, this is a subsidiary body that was established by the Convention with the function of assisting not only the governing body but also other subsidiary bodies and whose functions will be further elaborated by the governing body.

In fact, the functions of both subsidiary bodies have been further elaborated through decisions of the COP, mainly the Decision 6/CP.1 on “the subsidiary bodies established by the Convention”, in which the COP outlined the functions of both bodies in an annex.⁹⁴ This annex includes a large range of functions, which could lead to the thought that the tasks assigned to these treaty organs go further than those of pure assistance, but in fact, all of them were conceived to assist the COP. For example, the task of the Subsidiary Body for Scientific and Technological Advice is to prepare “scientific assessments on the effects of measures taken in the implementation of the Convention” or “respond to scientific, technological and methodological questions that the Conference of the Parties”. Furthermore, the tasks of the Subsidiary Body for Implementation are to assist “the Conference of the Parties in carrying out the reviews required by Article 4.2(d)” or assist “the Conference of the Parties, as appropriate, in the preparation and implementation of its decisions (Article 10.2(c)), taking into account advice from the SBSTA” (Subsidiary Body for Scientific and Technological Advice).

In addition, to clarify the different functions of these two subsidiary bodies, the Secretariat issued a note according to which perhaps the main difference amongst the functions is that the Subsidiary Body for Scientific and Technological Advice would be in charge of the scientific and technical aspects, and the Subsidiary Body for Implementation would address policy aspects.⁹⁵

On the other hand, the temporary subsidiary bodies – the ad hoc working groups – were created to implement the Convention, prepare the entry into force of the Paris Agreement or develop further commitments, thereby assisting with the COP’s work.

Finally, despite the technical tasks of some of the subsidiary bodies, their composition comprises representatives of governments who must be experts on matters related to climate change⁹⁶. In this respect, it seems that this composition would be appropriate especially for the ad hoc working groups because of the content of their tasks and perhaps for the Subsidiary Body for Implementation because of its attention to policy issues, but regarding the Subsidiary Body for Scientific and Technological Advice, because of its technical tasks, it would seem more appropriate to follow the practice of some IOs of composing these technical organs with individual experts⁹⁷. The reason for this composition is that it is preferable for the tasks of this body to be conducted in a more aseptic way, since the COP and the Subsidiary Body for Implementation are in charge of adapting technical findings to political necessities.

⁹⁴ FCCC/CP/1995/7/Add.1

⁹⁵ Subsidiary Body for Scientific and Technological Advice, Subsidiary Body For Implementation, Division of Labour between the subsidiary bodies established by the Convention. Note by the Secretariat. FCCC/SB/1995/Inf.1.

⁹⁶ Arts 9.1 and 10.1 UNFCCC

⁹⁷ Schermers and Blokker, *supra* n 2, at 214-219.

(D) CONSTITUTED BODIES

The analysis of the institutionalization of the UNFCCC has revealed the close resemblance between the organs of IOs and the treaty organs of the UNFCCC, but this system brings us a novelty, at least in name: the constituted bodies. This classification is not just an exceptional issue included on the UNFCCC website to provide clarification about the structure or division of bodies, but in fact, it is an official category, for it is included in numerous UNFCCC official documents.

If we look at the practice of IOs, it is not possible to find a kind of organ called a constituted organ, but as we have stated, this could be more a novelty regarding naming than a new kind of organ or entity. Therefore, the purpose of this section is to analyse the establishment and functions of these bodies to determine whether they represent a new kind of organ that would indicate the existence of an alternative path to that of IOs.

At the time of writing, there are sixteen constituted bodies in the structure of the UNFCCC, all of them are permanent bodies, and all of them have been established by COP/MOP decisions (some of them are mentioned in the legal instruments but not constituted⁹⁸); therefore, they are similar to the subsidiary organs of IOs and some of the subsidiary organs of the UNFCCC.

However, it must be noted that some of the constituted organs have been established based on the Convention⁹⁹ and others on the Kyoto Protocol¹⁰⁰ or the Paris Agreement.¹⁰¹ Therefore, in principle, these treaty bodies are linked with the instruments from which their functions stem. However, the mentioned linkage does not prevent such bodies from acting in the area of other legal instruments, especially in the case of the bodies constituted under the Convention, since, for example, the Technology Executive Committee, constituted under the Convention, also carries out functions for the implementation of the Paris Agreement.¹⁰²

Therefore, regarding the establishment of the constituted bodies and the subsidiary bodies, there are no differences between them, for both can be established by the COP/MOP and linked with some of the legal instruments, as in the case of the Ad Hoc Working Group on the Paris Agreement, for example. The only difference could be that the subsidiary bodies established by COP/MOP decisions are temporary, while the constituted bodies established by COP/MOP decisions are permanent bodies.

⁹⁸ The Clean Development Executive Board is mentioned in Article 12.4 of the Kyoto Protocol, and the Supervisory Body is mentioned in Article 6.4 of the Paris Agreement.

⁹⁹ For example: Adaptation Committee, Climate Technology Centre and Network, Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention, Least Developed Countries Expert Group; The Paris Committee on Capacity-building, Standing Committee on Finance, and Technology Executive Committee.

¹⁰⁰ For example: Adaptation Fund Board, Executive Board of the Clean Development Mechanism, Compliance Committee, and Joint Implementation Supervisory Committee.

¹⁰¹ For example: Executive Committee of the Warsaw International Mechanism for Loss and Damage, Committee referred to in article 15.2.

¹⁰² ‘With the Technology Mechanism serving the Paris Agreement, the TEC will play a key role in supporting countries to identify climate technology policies that support them to achieve the Agreement’s objectives’. See <http://unfccc.int/ttclear/tec> accessed 9 March 2022.

It is difficult to find IOs with a legal framework similar to that of the UNFCCC that comprises three legal instruments and has organs established under one of those legal instruments to implement specific objectives in a concrete treaty framework. However, the European Union may serve as an example, as it is possible to find a similar system in the Euratom Treaty,¹⁰³ since this Treaty established the Euratom Supply Agency (Articles 2.d) and 52), which carries out its tasks in the framework of that specific treaty. In any case, it must be noted that the particular legal status of the European agencies may differ from that of the traditional subsidiary bodies¹⁰⁴ and that the Euratom Supply Agency was established by the treaty and not by a principal organ.

Therefore, given that the existence of a legal framework based on different international instruments is not common amongst IOs, the analysis should be focused on whether it is possible to find subsidiary organs that have such a defined framework of activity. For that purpose, the United Nations system could be helpful, as, for example, the International Criminal Tribunal for Rwanda and the Criminal Tribunal for the former Yugoslavia were created by the Security Council¹⁰⁵ as subsidiary organs,¹⁰⁶ and these organs carried out their activities in conformity with their own statutes that were also adopted by the Security Council and that came to frame the activities of these tribunals in a similar way to those of the constituted treaty bodies.

However, if we look beyond the United Nations subsidiary organs, there are similarities between some of the General Assembly programmes or funds – which according to Szasz can be considered complex subsidiary organs¹⁰⁷ – and the constituted bodies, even though some of the former have a more complex governance structure. In this regard, some of these constituted bodies also have their own structural organization, for example the Executive Board of the Clean Development Mechanisms, which is supported by the Methodologies Panel, the Registration and Issuance Team, and the Afforestation and Reforestation Working Group, amongst others. In the same vein, the organizational structure of the United Nations Development Program (UNDP) together with the Executive Board comprises multiple offices. Nevertheless, their functions and degree of autonomy are probably that which would bring the constituted bodies closer to the General Assembly programmes or funds.

¹⁰³ Treaty establishing the European Atomic Energy Community (adopted 25 March 1957, entered into force 1 January 1958)

¹⁰⁴ According to Kelemen, an EU agency is “an organ of the EU created by an act of secondary legislation with a distinct legal personality and certain degree of organizational and financial autonomy from other EU bodies”. This is a restricted definition that would exclude the bodies created through EU treaties, such as the Euratom Supply Agency, but Kelemen also refers to an expansive definition that would include these bodies, despite the differences between the bodies created through secondary legislation and those created through the treaties. RD. Kelemen, ‘European Union Agencies’, in E. Jones, A. Menon and S. Weatherill (eds) *The Oxford Handbook of the European Union* (Oxford University Press, Oxford, 2012), at 393 and 401.

¹⁰⁵ SC Res. 955 (1994) 8 November 1994 and SC Res. 827 (1993) 25 May 1993

¹⁰⁶ Despite the confusion, this respects the position of international courts and tribunals. J. Klabbers, ‘Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation’, 14 *Melbourne Journal of International Law* (2013) 1-22, at 9

¹⁰⁷ PC. Szasz, ‘The complexification of the United Nations System’, 3 *Max Planck United Nations Yearbook* (1999) 1-57, at 5.

It has been assumed that the main purpose of the subsidiary organs is to assist the principal organ, something that has also been considered the main task of the UNFCCC subsidiary bodies, but if we look at the tasks and functions of the General Assembly programmes or funds together with those of the constituted bodies, it would be easy to conclude that their functions go further than those of pure assistance. These organs and bodies have been established to implement some specific tasks stemming from the legal instruments on which they are based and they have been also entrusted with a higher degree of autonomy than the traditional subsidiary organs have.¹⁰⁸ To illustrate this assertion, the World Food Programme can serve as an example.

The World Food Programme was established by a General Assembly resolution.¹⁰⁹ It was a programme to be undertaken jointly between the United Nations and the Food and Agriculture Organization, having as a main purpose facilitating the transfer of surpluses to “food-deficient people” and less developed countries. The annex of such a resolution also established that it would be necessary to pay attention to emergency food needs, chronic malnutrition, preschool and school feeding or pilots, such as those related to rural welfare. These original tasks have been expanded, and currently, the activities of the World Food Programme are divided into multiple objectives and areas of work. If we look at the General Assembly resolution, there is no mention of any task involving assistance to the General Assembly, even taking into consideration that according to the UN Charter, the “General Assembly may discuss any questions or any matters within the scope of the present Charter”¹¹⁰. In fact, it seems that the World Food Programme has been entrusted with one of the purposes of the United Nations, that is, to achieve international cooperation in solving international problems of economic and humanitarian character,¹¹¹ without any direction or guidance of the General Assembly. Therefore, the establishment of this Programme is linked more to the achievement of the objectives of the United Nations than to the assistance of an organ of the United Nations.

If we apply the same analysis to the constituted bodies of the UNFCCC, Kyoto Protocol or Paris Agreement, we could find a similar outcome in the majority of them. For this purpose, the Compliance Committee will be taken as an example. This Committee was established by COP decision 24/CP.7¹¹² and confirmed by MOP decision 27/CMP.1,¹¹³ and it has the objective to “facilitate, promote and enforce compliance with the commitments under the Protocol”. Therefore, assistance to the COP is not the purpose of this body, but rather, the implementation of the objectives of the Kyoto Protocol, in a way similar to that of the World Food Programme regarding the United Nations Charter. This kind of function can also be found, for example, in the Least Developed Countries Group, whose main function is to “advise on the preparation and implementation strategy for

¹⁰⁸ Klabbers, *supra* n 104, at 9.

¹⁰⁹ GA Res. 1714 (XVI), 19 December 1961.

¹¹⁰ Art 10 Charter of the United Nations, 1 UNTS XVI (adopted 25 October 1945, entered into force 24 September 1973)

¹¹¹ Art 1.3 Charter of the United Nations.

¹¹² Decision 24/CP.7. Procedures and mechanism relating to compliance under the Kyoto Protocol. FCCC/CP/2001/13/Add.3

¹¹³ Decision 27/CMP.1. Procedures and mechanism relating to compliance under the Kyoto Protocol. FCCC/KP/CMP/2005/8/Add.3

national adaptation programmes of action (NAPAs), which would meet the urgent and immediate adaptation needs of the least developed countries⁷⁷. Therefore, the assistance is provided to the countries, not to the COP, to comply with Article 4.9 of the UNFCCC.¹⁴⁴

Conversely, it is also possible to find less autonomous bodies inside the constituted bodies, such as the Executive Board of the Clean Development Mechanism (CDM), which will ‘supervise the CDM, under the authority and guidance of the COP/MOP, and (will) be fully accountable to the COP/MOP’.¹⁴⁵

To conclude, the constituted bodies are established through the power entrusted to the COP/MOP to establish subsidiary bodies, but they differ from the subsidiary bodies and other bodies established by COP/MOP due to their permanent character and the range of their activities that can go further than those of assistance.

The question regarding whether these bodies could be considered a new kind of organ should be answered with the consideration that the wide and flexible development of international institutional law has led to the establishment of many different organs adapted to the necessities of the many different international institutions, and therefore, inside this amalgam of organs, agencies, funds, programmes, etc., it is possible to find a body similar to the constituted bodies of the UNFCCC, which confirms that the framework of this institutional structure is similar to that of an IO.

(E) CONCLUDING REMARKS

The treaty organs constitute a new form of international cooperation and therefore a new institutional system, and the UNFCCC may be the most elaborate and complex example of a treaty organ system. Its three legal instruments, the Convention, the Kyoto Protocol and the Paris Agreement, have established an intricate set of organs in order to achieve the objectives established in the treaties.

In this regard, and once we have identified a new institutional system, we need to ask whether the current concept of international institutionalization should not be restricted to IOs, as this would entail the omission of a new reality based on many different kinds of international institutions that, similar to IOs, have international cooperation as an objective. These forms of cooperation, the treaty organs, share similarities with IOs, which make it possible to think about applying international institutional law in order to regulate them.

The mentioned similarities between treaty organs and international organizations and their organs, have been highlighted through analysis of the UNFCCC’s institutional system. We have found a set of organs that are similar to those of the IOs but to which some capacities have been assigned, such as the COP and the Secretariat’s treaty-making capacity or the Secretariat’s rights and immunities. In addition, some of these

¹⁴⁴ In any case, the tasks of this Group have been extended and include some assistance tasks to the COP/MOP. Decision 19/CP.21, Extension of the mandate of the Least Developed Countries Expert Group. FCCC/CP/2015/10/Add.3

¹⁴⁵ Decision 3/CMP.1 Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, ANNEX I. FCCC/KP/CMP/2005/8/Add.1

organs, such as the Compliance Committee, can adopt decisions that are binding to the Member States, which constitutes another element that is typical of IOs. Therefore, this set of organs cannot be considered as an IO; rather, the entire treaty body constitutes an international institutional system that is similar to an IO.

Therefore, treaty organs constitute an alternative to IOs for achieving the objectives established within a treaty. Since to comply with their purpose, treaty organs are institutions that act in the international sphere, their regulation through law applicable to international institutions has to be considered, albeit taking into account their special characteristics.

In addition, the UNFCCC system has revealed that some of the reasons for the avoidance of establishing an IO to regulate climate change, such as flexibility, less bureaucracy or fewer costs, are not completely achieved through the establishment of treaty organs. Rather, if we are facing institutions in whose structure may be identified elements of the traditional international intuitions, that is IOs, this fact may facilitate the application of, and show the necessity of applying, international institutional law to regulate them.

In conclusion, regarding treaty organs and specifically the UNFCCC, we are facing an international institutional system that is acting in very sensitive areas within the international sphere and to which no legal status has been assigned for the sake of sovereignty, flexibility and broad adherence. However, the UNFCCC also constitutes a system with multiple institutions or bodies and norms, which brings it closer to traditional legal systems, and like in any legal system, legal certainty is essential for its functioning, which calls for specific regulation, since it can no longer act within in a legal vacuum.