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INSTITUTIONAL GOVERNANCE MECHANISMS OF CONTEMPORARY REGULATORY TREATIES: IMPLICATIONS FOR PANDEMIC RULEMAKING

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INTRODUCTION

This discussion paper has been prepared for the workshop "*Living Together Apart: Governance Questions for the Pandemic Accord and International Health Regulations (IHR)*" organized at the Geneva Graduate Institute on March 11, 2024.

The workshop aimed to provide an opportunity for members of Geneva-based permanent missions and government officials from capitals to discuss institutional governance frameworks within contemporary regulatory treaties.

At the time of writing, Member States of the World Health Organization (WHO) are actively negotiating an international agreement on pandemic prevention, preparedness, and response and amendments to the International Health Regulations (IHR). This workshop at the Geneva Graduate Institute offered an opportunity to reflect on the wide range of governance mechanisms available under international law and their relevance in light of the ongoing negotiations.

This paper begins by providing an introduction to institutional governance mechanisms of contemporary regulatory treaties in international law. It then presents examples of governance frameworks within the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC).

INSTITUTIONAL GOVERNANCE OF CONTEMPORARY REGULATORY TREATIES

By Jan Klabbers, Professor, Faculty of Law, University of Helsinki

INTRODUCING REGULATORY TREATIES

Treaties were already concluded between the city states of classical Greece, and even earlier, but these were rarely regulatory in nature – and 'regulatory' usually refers to instruments that provide for further action: constant adaption, development, interpretation, and management. On this line of thinking, a treaty to protect the natural habitat will be considered regulatory, while a treaty on treatment of prisoners of war or on providing mutual legal assistance in criminal affairs will not – the latter, after all, only comes into play if and when particular circumstances are present. The borderline, as we will see, is porous, but the distinction between regulatory and non-regulatory instruments nonetheless is a useful one, both analytically and practically.

Regulatory treaties, by their very nature, require (more or less constant) management. They typically consist of sets of relatively open-ended provisions, and operate in policy domains where political, technological, social and economic developments move fast. This instills a need for constant monitoring, not just for the sake of securing compliance, but also so as not to lose touch with what goes on. And it instills a need for constant adaptation, both relating to the behaviour of participants ('nudging' them into a particular course of action) and to the utility of the regulation itself. Where developments move fast, the regime has to move along, lest it loses its relevance. In these circumstances, ensuring compliance is but one of the many aspects of regulatory regimes, and its relevance should not be over-estimated. Instead of focusing on compliance, regulatory regimes are far more geared towards socialization, thinking in terms of carrots rather than sticks. This is about capacity-building, monitoring, reporting and data collection, transparency and inclusive participation, persuasion and nudging. Partly this is because regulatory treaties are typically tackling joint problems relating to public goods: the environment, health, communication, and transport are perhaps the most obvious examples of policy domains where regulatory regimes are or could be very useful, but similar mechanisms have been set up in the cultural domain (under the Cultural Diversity Convention), disarmament (Convention on Cluster Munitions) and corruption (Convention on Corruption). This widespread use suggests that indeed the boundary between 'regulatory' and 'non-regulatory' has shifted, and further suggests that the seemingly less formal nature of COPs and MOPs is considered quite appealing.

Mere reliance on the classic *pacta sunt servanda* principle is not enough for regulatory regimes. Pacta sunt servanda is the maxim according to which treaties are binding and shall be performed in good faith, since 1980 codified in article 26 of the 1969 Vienna Convention on the Law of Treaties (hereafter VCLT or Vienna Convention).[1] It exercises a strong normative force: most international lawyers are trained so as to respect it, and recognized exceptions to the principle are few and far between. The principle has ancient roots, and results from a certain logic: why bother to conclude treaties that would not bind the parties? Why bother to agree

1 The Vienna Convention (VCLT) was concluded in 1969, but entered into force only in 1980. Not all states are parties to it, but most of its provisions are deemed to reflect customary international law and therewith also bind states that have not joined the VCLT.

to do something together if that agreement can just be ignored? As a result, the principle is one of the centerpieces of international law: wherever and whenever a treaty is concluded, the expectation is that it shall be respected by the parties, even in adverse circumstances. But regulatory regimes need more, in much the same way in which marriage is more than just another contractual arrangement.

INSTITUTIONAL FORMS

Since the early 19th century, the governance mechanisms embodying regulatory regimes have predominantly taken the form of international organizations, originally specifically for the management of international rivers. Best-known is the Rhine Commission, set up in the aftermath of Napoleon's defeat, and followed by similar regimes for a number of other rivers in Europe. The Rhine Commission was an embryonic international organization, but still lacked a secretariat of its own: the functional role associated with a secretariat was performed by national delegates of the riparian states.[2]

Later entities did come to have a secretariat of sorts, invariably for regulatory regimes. Thus, in 1865 the International Telegraphic Union was established (to regulate such things as the management of submarine cables, and which type of code language to use - the choice fell on Morse code). Less than a decade later the Universal Postal Union was created in order to harmonize postal routes and rates. And this was followed by a number of similar entities to regulate, roughly, for the benefit of trade, transport and communication: additional river commissions (also outside Europe, with or without local participation), but also the International Bureau of Weights and Measures, the Intergovernmental Organization for International Carriage by Rail (known as OTIF, its French acronym), the International Copyright Union, and even organizations regulating the market in particular products or industries, such as the International Sugar Union or the International Institute for Agriculture. All of these, in various gradations, were considered to merely do a technical job, not involving any politics: states were participating at little financial cost and little sovereignty cost, as the leading contemporary authority could write in 1911.[3]

The pattern has not changed much, although some international organizations with broader, more political missions have been established: the League of Nations, the UN, and regionally perhaps the Council of Europe, African Union, Organization of American States, and Association of South East Asian Nations. But what has undergone some change is the form: if the earlier unions were all recognized as legal creatures, set up on the basis of international law with some kind of recognized legal existence, more recent mechanisms may be differently set up.[4]

One form this takes is the monitoring committee, usually with human rights treaties and similar conventions. The idea here is often that the parties are asked to report regularly about what they do to meet their obligations (a practice that goes back at least to the International Labour Organization, created more than a century ago), and can be asked by their peers - i.e., other parties - or an especially established committee to explain or justify their actions. In some cases, the mechanism is further evolved so as to include the possibility of individuals filing complaints in case they feel they have been mistreated or in case they feel the state in question has done too little to implement its obligations. With or without individual complaints, such mechanisms have a 'court-like' feel, with states being asked to defend and justify themselves.

2 Joanne Yao, *The Ideal River: How Control of Nature Shaped the International Order* (Manchester: University of Manchester Press, 2022); generally also Bob Reinalda, International Secretariats (Aldershot: Routledge, 2020).

3 Paul S. Reinsch, *Public International Unions* (Boston: Ginn & Co., 1911).

4 Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law,' (2001) 70 *Nordic Journal of International Law*, 403-421.

More common though (and less 'judicial') is the practice of establishing some kind of political negotiating forum. The typical scenario is that states conclude a treaty by which they also agree to establish a mechanism for further discussion. This was, to some extent, pioneered in the field of environmental protection, for the good reason that states could typically only reach agreement on broad principles, and thus needed an additional forum to work collectively on more detailed regulation. The bodies thus created are often known as Conferences of the Parties (COPs), sometimes also Meetings of the Parties (MOPs) or Assemblies of State Parties (ASP). And while this may have been pioneered in the field of environmental protection, the practice has spread: the Framework Convention on Tobacco Control has such a mechanism in place, as do several other conventions in different policy domains (as observed above), and even the International Criminal Court, its judicial character notwithstanding.

COPs are usually set up in this form because it seemingly allows for flexibility. Setting up a formal international organization, so the reasoning goes, may involve more stringent control by domestic representative and judicial actors, and may come with more elaborate rules on legal personality, the creation of further organs and bodies, and perhaps even responsibility. Against this background, the less formal nature of the COP is seen to be attractive. Typically, COPs are assisted by (permanent) secretariats, and may themselves spawn several organs: an executive board to supervise key commitments, a compliance mechanism, a scientific advisory board perhaps. Sometimes the secretariat may be housed within a formal international organization; sometimes they are self-standing entities. All things considered, the resulting structure usually does not differ much in appearance from the formal international organization, but whether COPs are really just international organizations under a different name, or actually of a different nature, is perhaps a somewhat academic question – in practice, they work in much the same way as international organizations, are structured in much the same way, have much the same competences, and may even benefit from privileges and immunities.[5] Quite a few COPs are accompanied by a 'compliance committee', with the specific aim to assist parties facing compliance problems. These may result not so much from the absence of a will to comply, but rather from other difficulties: financial issues, technological problems, external factors. In such circumstances, it is thought, there is little merit in insisting on holding the party concerned responsible and thinking in terms of 'crime and punishment'. It is considered better to assist the state concerned in trying to achieve compliance. Such procedures are typically listed as non-adversarial, and non-punitive.[6]

DRIVING THE MANAGEMENT OF REGULATORY TREATIES

States can collaborate with each other in a variety of manners or, put differently, have a variety of forms at their disposal. Classically the preferred form was the treaty,[7] and the bare-bones treaty, even in multilateral form, is mostly useful for arranging things that do not require constant attention. Where interactions may happen repeatedly but only if a particular situation arises, the bare-bones treaty will do just fine. Whether it concerns extradition treaties; double taxation treaties; social security treaties; legal assistance treaties, or even territorial arrangements – these do their job, but do not necessarily give rise to constant oversight or management organs. But in some cases, the bare-bones treaty will not do, and two such circumstances (often related) need to be singled out. The first, and most relevant, is where an approach demands constant management. Where standards need often to be re-considered; where a particular kind of

5 See generally Sebastián Rioseco Sullivan, *The Influence of Conferences of the Parties on the Content and Implementation of their Parent Treaties* (unpublished PhD thesis, University of Melbourne, 2021).

6 A principled foundation of sorts is provided by Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge MA: Harvard University Press, 1995).

7 The other classic form international law could take was the form of customary international law, but this is not suitable for collaboration: it is the normative distillate of the acts of individual states, without those states actively and intentionally agreeing on doing something together, and thus a coordination mechanism rather than a vehicle for collaboration.

expertise needs to be built; where practical issues keep recurring and decisions need to be made on a regular basis; where applicable standards may need to be adapted with some regularity – in such cases, states may be well-advised to set up an institution of sorts. Whether the institution is a formal international organization or something else is less relevant for present purposes.

Put differently, without some kind of institutional backing and institutional environment, what would have become of the International Health Regulations? Part of what makes the IHR work are precisely the institutional components: the WHO's Director-General with decision-making powers; various committees with tasks, powers and competences. It would be awkward to leave it to each and every individual state to declare a 'public health emergency of international concern', even if there would exist clear criteria for doing so. By the same token, the distribution of radio bandwiths demands a concerted approach and may demand constant adaptation, which is one of the reasons for the ITU's continued existence. States could not do this on their own, not even with clear instructions; and what is more, states would not be trusted to do this on their own. So, where a regime requires constant management, some kind of institutional mechanism will be helpful and should be considered.

In practice, this often turns out to be especially the case in policy domains which require considerable technical expertise. It is hardly a coincidence that many WHO officials have some medical background, and that the advisory committees in the global health domain tend to be composed of individuals with medical or public health training; or that many of the people working for the ITU are engineers and physicists. Meteorological organizations employ meteorologists, and in environmental matters, the Secretariats assisting the COPs will comprise many individuals with a background in environmental science. And in some cases, the origins of the organization are to be found in expert co-operation even before states as such entered the picture: Interpol might serve as an example.[8] In this light, establishing a scientific advisory body as part of an incipient regime that requires technical, scientific advice, can justifiably be welcomed.

Second, an institutional mechanism will also prove helpful when it comes to expanding the geographical scope of the regime. Often enough, of course, states are free to accede to treaties that are in force. Yet, as a practical matter, it might help if there is an institution promoting the regime, providing helpful services, and attracting further participation. Existing institutions can play a role (by way of example: the International Maritime Organization has been used to invite states to join smaller treaty regimes[9]), but things will be much smoother if the regime has its 'own' mechanism. Needless to say, in tandem these two factors become nearly irresistible. A regulatory treaty aiming for broad membership will rarely succeed without institutional mechanism.

FINANCIAL MATTERS

Various mechanisms have been thought of to aim and secure the funding of international organizations, organs and bodies. Traditionally, the basic idea used to be simple and straightforward: most 'formal' international organizations ask their member states to pay a membership fee, in order to take care of both the administrative costs and, where appropriate, operational costs. In some cases the fee is a flat-rate fee, where every member states pays the same, irrespective of GDP, size of the economy, or any other consideration: OPEC is perhaps the best-known example.

8 On Interpol, see Rutsel Martha, *The Legal Foundations of Interpol* (Oxford: Hart, 2010).

9 An intriguing example concerns the treaty on the maritime grave of the wreck of the M/S Estonia: see Marie Jacobsson and Jan Klabbers, 'Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia', (2000) 69 *Nordic Journal of International Law*, 317-332.

In most cases, however, the fee is based on an assessment of capacity to pay: richer members pay more, both in absolute and in relative terms, than poorer member states (in jargon: 'assessed contributions'). Typically though, the decision as to whether a member state is to be considered richer or poorer is a political decision, taken by the membership as a whole and involving much lobbying and horse-trading behind the scenes.

Monitoring bodies that are part of a bigger organizational framework tend to be financed from the organization's general budget. Thus, the various bodies monitoring implementation of treaties concluded under UN auspices (such as the Human Rights Committee, or the Committee on the Elimination of Discrimination of Women) are financed from the regular UN budget. While this could also be done for ad hoc mechanisms (think of peacekeeping), these tend to be financed separately, partly because they tend to be very costly, and partly because of geopolitical considerations: not all member states want to pay for particular operations.[10]

Over the last few decades, moreover, a number of new or relatively new financing techniques have been developed. Some organizations have become highly dependent on private sector contributions, whether through some form of corporate membership (as in the ITU) or through attracting the attention of philanthropists. Some others acquire most of their funding from selling their unique expertise and services: this applies for instance to WIPO and the IOM. Others have set up (or inspired) special foundations aiming to attract the interest of so-called High Net-Worth individuals. Almost all have come to accept voluntary donations (usually earmarked) from states as well as other actors, thus effectively functioning in part as the executive arm of the donor actor. And then there are all sorts of intermediate forms thinkable, from borrowing money on financial markets to getting governments or corporations to pledge sums for the foreseeable future.

CONCLUSION

When states imagine regimes that require management and monitoring, they have come to realize that some institutional mechanism is a far superior way of achieving results than leaving it to the goodwill of all individual participants, all the more so when some technical expertise is required. While all institutions are 'political' in an important sense (decisions of organizations are bound to have distributive consequences), nonetheless most also have a strong technical dimension, and this entails that scientific advisory bodies may perform a very useful role. As alluded to above, Paul Reinsch, arguably the founding father of international organizations law, already pointed out more than a century ago that international organizations provided states with considerable benefits, and did so (and still do) at very limited cost, both in terms of sovereignty and in financial terms. Participating in an international regime tends to bring huge benefits (even if not always quantifiable), and tends to do so at low financial expense, and when regulatory treaties are at issue, this should likely be part of the political equation for each and every prospective member state.

10 The *locus classicus* is *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151.

GOVERNANCE IN PRACTICE

THE GOVERNANCE FRAMEWORK OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)

By Daniela Morich, Global Health Centre, Geneva Graduate Institute

INTRODUCTION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), adopted on 3 March 1973 in Washington D.C., USA, is an international, legally binding agreement. In some countries, it is also known as the Washington Convention. The objective of CITES is to ensure that international trade in specimens of listed wild animals and plants does not threaten the survival of the species. Today CITES has 184 State Parties.

CITES is both a trade-related and a conservation convention. It employs trade-related measures to fulfill its primary conservation goal: ensuring that international trade does not lead to the unsustainable exploitation of wildlife. Under this agreement, State Parties must enact national laws to regulate international trade in CITES-listed species, appoint appropriate national management and scientific authorities, report annually on trade transactions, and impose penalties for any trade conducted in contravention of the Convention's provisions.

CITES regulates commercial and non-commercial international trade in over 40,900 species of animals and plants, including their parts and derivatives – roughly 6,610 species of animals and 34,310 species of plants (78% of which are orchids).[11] The nature of the trade measures utilized by CITES depends primarily upon the conservation status of the species, which, under the Convention, is determined by which Appendix they are listed on.

For certain species, commercial international trade in wild taken specimens is prohibited (unless they are bred in captivity or artificially propagated). These species are listed in Appendix I and are categorized as species threatened with extinction. Appendix II includes species not currently threatened with extinction but could become so without appropriate trade controls. The Convention does not prohibit trade in these species but requires Parties to regulate international trade through permits and certificates to ensure legality and sustainability. Appendix III lists species for which a country seeks international cooperation in controlling its trade. International trade is regulated through export permits from the listing country and certificates of origin from others involved in the trade.[12]

11 Data collected from CITES official website (last visited on 28 February 2024): https://cites.org/eng/disc/species.php#:~:text=Over%2040%2C900%20species%20%E2%80%93%20including%20roughly,in%20the%20three%20CITES%20Appendices.

12 CITES members can propose changes to the lists of species in Appendix I and II, as well as to CITES resolutions and decisions, during meetings of the Conference of the Parties. Additionally, countries have the flexibility to list species under their domestic regulations in Appendix III at any time.

GOVERNANCE STRUCTURE

CITES's governance structure is outlined in the Convention, featuring the Conference of the Parties and the Secretariat. However, over time, this structure has been refined and enhanced by the Parties to the Convention through a series of Resolutions to better serve the Convention's objectives. This has been achieved without the need for amendments to the Convention's text. The addition of the Standing Committee and two scientific bodies for animals and plants marked significant milestones in this evolution, enabling more effective decision-making and technical support. Furthermore, continuous efforts to establish robust compliance mechanisms through additional Resolutions adopted by the Parties highlight the ongoing evolution of CITES governance.

THE CONFERENCE OF THE PARTIES

Article XI of the Convention establishes the Conference of the Parties (COP), the supreme decision-making body of CITES.[13] The responsibilities of the COP include reviewing the Convention's implementation, adopting financial measures, considering amendments to Appendices I and II, and assessing progress in species conservation. Additionally, the COP is tasked with receiving and considering any reports presented by the Secretariat or by any Party.

Participants include Party representatives as voting members. Observers, such as the United Nations, its specialized agencies, and non-party States, have participation rights but no voting power. Additionally, technically qualified agencies or bodies in wildlife conservation can attend as observers, unless objected to by at least one-third of the attending Parties. The active involvement of observers in CITES processes is a feature of the Convention. Where there is no consensus, CITES COPs will take decisions on substantive issues through a two third majority vote of Parties present and voting.

THE SECRETARIAT

The Secretariat of the Convention is provided by the United Nations Environment Programme (UNEP), and the staff are employed under UNEP contracts. The Secretariat is fully funded by the CITES Parties. The appointment of the head of the secretariat, called the Secretary General, is made in consultation with the CITES Standing Committee. The Secretariat is responsible for facilitating and supporting the implementation of the Convention's provisions. Article XII of the Convention lays out its main responsibilities, including organizing and servicing meetings of the Parties, conducting scientific and technical studies to aid in conservation efforts, and studying reports submitted by Parties.

The Secretariat also plays a crucial role in disseminating information to Parties, publishing and distributing editions of Appendices I, II, and III, and providing guidance on species identification. It prepares annual reports on its activities and the implementation of the Convention, as well as other reports requested by the Parties. The Secretariat reports to the COP (and the Standing Committee between COPs), and it operates under the administration of the UNEP, with its headquarters located in Geneva, Switzerland. It's Secretary General is delegated a certain level of authority by the Executive Director of UNEP and the Secretariat reports to UNEP, as well as the COP.

13 The COP convenes every three years, with additional sessions possible upon request by one-third of the Parties.

SUBSIDIARY BODIES

I. STANDING COMMITTEE

The Standing Committee - established by CITES's first COP (Bern, 1976), is comprised of 18 representatives of State Parties and serves as a vital component of CITES governance, providing policy guidance and operational direction to the Secretariat concerning the implementation of CITES. Its responsibilities extend to coordinating the work of the other committees and facilitating decision-making processes, within the Convention framework by, for instance, drafting resolutions for consideration by the COP. It also carries out any activities assigned to it between meetings of the COPs and is responsible for overseeing the development and execution of the Secretariat's budget. The Standing Committee comprises representatives from each of the six CITES geographical regions. It meets annually, as well as immediately prior to and after a meeting of the COP.

Additionally, the Standing Committee fulfils the role of a compliance committee and is tasked with monitoring and assessing compliance with CITES obligations; advising and assisting Parties with compliance; verifying information; and taking compliance measures (see section on CITES's compliance mechanism).

The Committee's members are elected by the COP during its regular sessions. The composition of the Standing Committee aims to ensure geographic representation from different regions. It also includes a representative of the Depositary Government, Switzerland (that can only vote in the event of a tie), and the host country of the previous and upcoming COPs (as non-voting members).

I. ANIMALS AND PLANTS COMMITTEES

These committees of experts were established at the sixth meeting of the Conference of the Parties (Ottawa, 1987) to fill gaps in biological and other specialized knowledge regarding species of animals and plants that are (or might become) subject to CITES trade controls. They are composed each of 11 individuals with expertise in wildlife biology, ecology, and conservation and they serve in an individual capacity.

Their mandate includes conducting scientific assessments of species proposals , evaluating the conservation status of species, and providing recommendations for the sustainable management of wildlife populations through a process known as the 'Review of Significant Trade.'[14] Additionally, they offer scientific advice and guidance to other CITES bodies involved in ensuring compliance with the Convention's provisions. They report to the Conference of the Parties at its meetings.

CITES's regional groups nominate committee members, who are subsequently appointed by the COP. This system is designed to ensure geographic diversity, reflecting the global nature of wildlife conservation efforts and the diverse ecosystems impacted by international trade in endangered species.

14 CITES Animals and Plants Committees can ask exporting Parties questions about the levels of trade, including about their non-detriment finding, and make recommendations to the Party. If recommendations are not adequately implemented, the Standing Committee can take compliance measures, which can, as a last resort, result in a recommendation to suspend trade in the affected species.

CITES'S COMPLIANCE MECHANISM

There is no formal compliance mechanism established under the Convention. Instead, Article XIII on 'International Measures' authorizes the Secretariat to raise compliance issues with the individual parties concerned. The information received is reviewed by the COP, which "may make whatever recommendations it deems appropriate." The article does not provide further indications to guide its implementation.

To address this deficiency, in 2007, the COP established compliance procedures via the adoption of Resolution 14.3,[15] largely formalizing previous practices. This resolution has undergone several amendments since its inception, with the most recent revisions occurring at CoP19 (2022).

Adopting a supportive and non –adversarial approach, this document contains "non legally-binding" guidelines to inform the Parties and various bodies on compliance-related tasks. In addition, it assists parties in meeting their obligations regarding such compliance. It was observed that while Parties have accepted these guidelines, their effectiveness relies largely upon goodwill and parties' willingness to comply.[16]

The Standing Committee is the de facto compliance body as it handles general and specific compliance matters. The Animals and Plants committees advise and assist the Standing Committee with regard to compliance matters by, inter alia, undertaking necessary reviews, consultations, assessments and reporting.

The Standing Committee holds the authority to recommend various measures aimed at addressing non-compliance by Parties. These measures include, for instance, providing advice, information, and capacity-building support to the concerned Party or requesting special reporting. In extreme cases, the Standing Committee may recommend the suspension of commercial or all trade in specimens of one or more CITES-listed species as a measure of last resort.[17] In 2022, the Secretariat, upon request of the COP, established a Compliance Assistance Programme to support state parties in complying with the Convention.[18] While the CITES compliance processes are regarded as a strength of the Convention, their recent application has come under scrutiny raising issues with the Committee, and amongst observers, of due process, interpretation, and procedural fairness.[19]

15 Resolution 14.3, CITES compliance procedures, available at: https://cites.org/sites/default/files/document/E-Res-14-03-R18.pdf.

16 Cristina Voigt and John E Scanlon, *Does CITES Really Have 'Teeth'? CITES and Compliance* https://sdg.iisd.org/commentary/guest-articles/does-cites-really-have-teeth-cites-and-compliance/.

17 A list of Countries currently subject to a recommendation to suspend trade is available here: https://cites.org/eng/resources/ref/suspend.php.

18 Cop 19 (2022), Document 30: Compliance Assistance Programme: https://cites.org/sites/default/files/documents/E-CoP19-30_0.pdf.

19 John E Scanlon, *Is CITES Compliance Process Becoming a Game of Chance*? https://sdg.iisd.org/commentary/guest-articles/is-cites-compliance-process-becoming-a-game-of-chance/.

FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC)

This section is an excerpt from the publication: WHO FCTC, Information Kit for delegates to the Conference of the Parties to the WHO Framework Convention on Tobacco Control (2023).[20]

INTRODUCTION

What The WHO Framework Convention on Tobacco Control (WHO FCTC) is the first international treaty negotiated under the auspices of the World Health Organization (WHO). It was adopted by the World Health Assembly on 21 May 2003 and entered into force on 27 February 2005. It has since become one of the most rapidly and widely embraced treaties in United Nations history. Today the WHO FCTC has 183 Parties, including the European Union.

The WHO FCTC was developed in response to the globalization of the tobacco epidemic. It is an evidence-based treaty that reaffirms the right of all people to the highest standard of health. The treaty represents a milestone for the promotion of public health and provides new legal dimensions for international health cooperation.

The Conference of the Parties to the FCTC (COP) adopted an additional protocol, the Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol). This instrument was developed to address the issue of international illicit trade in tobacco products and builds upon and complements Article 15 of the WHO FCTC. The Protocol was adopted on 12 November 2012 at the Fifth session of the Conference of the Parties and entered into force on 25 September 2018. It currently has 68 Parties, including the European Union.

TREATY GOVERNING BODY AND ITS SUBSIDIARY BODIES

I. THE CONFERENCE OF THE PARTIES

The COP is the governing body of the WHO FCTC and is comprised of all Parties to the treaty. Any Member State of WHO which is not a Party to the Convention is admitted to attend COP meetings as an observer. It regularly reviews the implementation of the WHO FCTC and makes decisions necessary to promote its effective implementation. The COP may also adopt protocols, annexes and amendments to the WHO FCTC. The conduct of the sessions of the COP is governed by the Rules of Procedures of the COP to the WHO FCTC.[21] The governing body of the Protocol is the Meeting of the Parties. In accordance with Article 33 of the Protocol, the Meeting of the Parties is held immediately before or after regular sessions of the COP.

Since the Third session of the COP in 2008, regular sessions of the COP are held every two years. At each regular session, the COP decides on the dates and venue of its next regular session. According to the Rules of Procedure of the COP, extraordinary sessions of the COP may be held as may be deemed necessary by the COP or at the request of any Party.

In accordance with Rule 32 of the Rules of Procedure of the COP, sessions of the COP shall be public, unless the COP decides that they shall be open or restricted. In accordance with Rule 24 quinquies of the Rules of Procedure of the COP, the committees of the COP are Committee A, generally entrusted with work on treaty instruments and technical matters, and Committee B, generally entrusted with work on reporting, implementation assistance, international

20 WHO FCTC, *Information Kit for delegates to the Conference of the Parties to the WHO Framework Convention on Tobacco Control (2023)*, available at https://fctc.who.int/publications/i/item/information-kit-for-delegates-to-the-meeting-of-the-parties-to-the-protocol-to-eliminate-illicit-trade-in-tobacco-products This section is reproduced with the consent of the WHO FCTC Secretariat.

21 https://fctc.who.int/publications/m/item/9789241515351.

cooperation and institutional and budgetary matters. The meetings of the committees shall be held in public unless the committee concerned decides that they shall be open or restricted.

II. WORKING GROUPS AND EXPERT GROUPS

In accordance with Article 23.5(f) of the Convention and Rule 25 of the Rules of Procedure of the COP, the COP may establish such subsidiary bodies as are necessary to achieve the objective of the Convention. The COP developed a practice of establishing working groups and expert groups with specific mandates and terms of reference.

In the case of a working group, after notification by the Convention Secretariat, Parties can express interest to participate and nominate representatives. In the case of an expert group, individuals are nominated in accordance with the terms of reference and the required expertise.

Experts participate in expert group meetings in an individual capacity and not as representatives of their country.

Both types of groups report to the COP, and their work is expected, but not limited, to result in the development of guidelines and recommendations for the implementation of various articles of the Convention.

III. THE SECRETARIAT

Established in 2007, the Convention Secretariat serves as the secretariat of both the WHO FCTC and of the Protocol.

The Convention Secretariat is an entity hosted by WHO, but it has its own mandate and a governance arrangement distinct from WHO. The Convention Secretariat leads on WHO FCTC and Protocol matters under the guidance of the COP and of the Meeting of the Parties (MOP) to the Protocol, and their respective Bureaus.

The functions of the Convention Secretariat are articulated in Article 24 of the WHO FCTC and Article 34 of the Protocol, respectively, as well as in the Rules of Procedure of the COP and of the MOP. Its work is further defined in decisions of the COP and of the MOP, including the workplans and budgets adopted by the latter.

The Convention Secretariat mandate includes: serving the COP and the MOP, as well as their Bureaus and subsidiary bodies; assisting Parties in implementing the provisions of the WHO FCTC and the Protocol; assessing progress and sharing knowledge on implementation of the treaties; promoting international cooperation; and raising awareness and mobilizing resources.

Taking into account the specific provisions of the WHO FCTC and the Protocol, the Convention Secretariat abides by strict policies to prevent and address conflicts of interest involving the tobacco industry, its front groups and other vested commercial interests.

TOBACCO CONTROL ALSO GOVERNED BY WORLD HEALTH ASSEMBLY (WHA)

WHO governing bodies maintain continued oversight of tobacco control, reflecting the continued presence of tobacco control in the WHO General Programme of Work, the existence of the No-Tobacco Unit within the WHO Secretariat as part of the Department of Health Promotion at WHO's Headquarters, and the presence of tobacco control in other WHO norms, such as the Global Strategy on Prevention and Control of Noncommunicable Diseases.

COORDINATED GOVERNANCE THROUGH REPORTING

In response to the overlapping mandates of the WHO Secretariat and Convention Secretariat (and the WHA and the WHO FCTC COP) the WHA and COP have developed a reporting mechanism to ensure synergy between the two governing bodies. Under this mechanism, the WHA has a standing item to receive a report from the WHO FCTC COP (either through the President of the COP or the Head of the Convention Secretariat) on COP decisions and resolutions. The COP has a reciprocal standing item to receive a report from the WHO Director-General on relevant resolutions and decisions of the WHA.[22]

22 For an example of a report from the FCTC COP to the WHA, see A75/INF/4 (12 April 2022). For an example of a report from the WHA to the FCTC COP, see FCTC/COP/9/17 (11 August 2021).

CONCLUSION

The presentations included in this discussion paper, in particular the introductory paper by Jan Klabbers, point to the diffusion and popularity of multilateral regulatory treaties in contemporary international governance. This is due in good part to the need to address collective action problems such as environmental protection and allocation of limited natural resources, that require regular adaptation, evolution and monitoring. Establishing governance mechanisms has become an essential characteristic of regulatory treaties, as an institutional platform to enable parties to discuss and decide together on the implementation of their common instrument and develop additional instruments. Treaty practice shows the establishment of conferences, meetings or assemblies of the parties as customary institutional mechanisms for collective governance. Pandemic prevention, preparedness and response (PPPR) arguably constitutes collective action problems, hence the interest of WHO Member States on governance approaches for both the draft Pandemic Agreement (PA) as well as the International Health Regulations (IHR). The WHO Framework Convention on Tobacco Control (FCTC) is another example of an international regulatory issue in the field of public health.

The presentations also show the variety and flexibility of the models and approaches adopted in contemporary regulatory treaties, in order to respond to the needs of the parties as well as a result of political compromise. One important consideration that will be relevant for the ongoing negotiations on the PA and IHR is what level of detail should be included in the text of the instrument in question and how much should be left to decisions by the parties once the instrument enters into force. The CITES is a good example of how the governance of a treaty can evolve through decisions of the conference of the parties that fill the gaps or the lack of details in the treaty. One consideration that emerged through the various presentations is the need to ensure functions of particular importance for the integrity and viability of the various instruments as part of their governance. Examples mentioned range from increasing the precision of parties' obligations through devices such as protocols or guidelines, compliance assessment, financing and a science-policy interface. These functions can be carried out by subsidiary bodies of the Conference of the Parties such as CITES's Standing Committee, or by ad hoc thematic bodies such as the FCTC working and expert groups.

A permanent institutional mechanism requires secretariat support of different types and engagement, from organizing meetings of the conference of the parties and other bodies, to conducting research and studies and providing technical cooperation to parties in need. The presentations pointed to two paradigmatic models used in practice, i.e. secretariat services integrated in the functions of the "mother organization" of the treaty as in the case of CITES where the Secretariat is provided by UNEP; or a functionally separate secretariat "housed" in an international organization but otherwise entirely accountable to the governance of the treaty as in the case of the FCTC. In the latter case, emphasis was placed on the importance of clear relationships with the host organization in terms for example of financing, distribution of administrative authority and the process of appointment of the executive head.

A further point that emerged from some of the presentations concerned the institutional and legal interactions between different instruments and regimes. While possible overlaps or conflicts between substantive provisions can be addressed through tools such as "conflict

clauses" or rules of interpretation, institutional interactions have to be considered strategically to avoid unnecessary fragmentation, duplication and costs while fostering complementarity and synergy. This point is on the agenda of WHO Member States as they consider the interactions between the governance of the PA and that of the IHR, with the establishment of a new "Committee E" of the Health Assembly as a common forum for both instruments being proposed in a previously circulated draft.

Finally, we hope that the presentations and the discussion in the workshop have impressed upon delegations the importance of governance arrangements for regulatory treaties, that should not be considered as purely administrative issues but rather as important tools for the effectiveness of international governance instruments.

ANNEX 1: INFORMAL BACKGROUND NOTE ON GOVERNANCE CONSIDERATIONS RELATING TO THE PROPOSAL FOR NEGOTIATING TEXT OF THE WHO PANDEMIC AGREEMENT

26 January 2024

Informal background note on governance considerations relating to the proposal for negotiating text of the WHO Pandemic Agreement

This note, prepared by the WHO Secretariat following a request from the INB during the discussion of Chapter III of the of the Negotiating Text during the resumed seventh meeting of the INB (INB7), discusses certain governance and related concepts addressed in the Proposal for negotiating text of the WHO Pandemic Agreement ("Negotiating Text").[1] The purpose of this note is to assist the work of the INB, as INB Members deem appropriate. Readers of this note may also find it useful to refer to the earlier papers prepared by the WHO Secretariat for the INB on related topics.[2]

1. Instrument governance modalities, including as presented in the Negotiating Text

Multilateral treaties, which involve cooperation and agreements among multiple sovereign entities, require effective governance structures to oversee their implementation and evolution. A common feature found in many of these treaties, especially those that take a "framework" style approach,[3] is the establishment of a Conference of the Parties (COP).

The tasks and duties of a Conference of the Parties are set forth in the relevant instrument and can include a broad range of topics, including adopting rules of procedure, developing methodologies and formats for reporting, promoting the exchange of information, setting indicators for assessment of implementation progress, reviewing reports of Parties and subsidiary bodies, providing guidance, mobilizing financial resources, adopting annexes, and establishing working groups.[4]

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[1] INB document A/INB/7/3, available at: https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf

[2] Specifically, the *Background information related to the identification by the Intergovernmental Negotiating Body of the provision of the WHO Constitution under which the instrument should be adopted*, prepared for INB2 (document A/INB/2/INF./1, available at https://apps.who.int/gb/inb/pdf_files/inb2/A_INB2_INF1-en.pdf), and the *Secretariat background information paper on certain legal and governance considerations*, prepared for INB3 (document A/INB/3/INF./4, available at https://apps.who.int/gb/inb/pdf_files/inb3/A_INB3_INF4-en.pdf).

[3] The origins and use of framework agreements is discussed in detail in Framework Convention on Tobacco Control Technical Briefing Series Paper 1, *The Framework Convention/Protocol Approach* (Bodansky, 1999, available at : https://iris.who.int/handle/10665/65355), where it is noted that in the international environmental law field, framework instruments first appeared in the late 1970s, and are quite commonly used.

[4] A detailed discussion of the role of COPs, with examples, is provided in the WHO FCTC Working Group Paper *Elements of a WHO framework convention on tobacco control* (document A/FCTC/WG1/6 (1999), available at: https://apps.who.int/gb/fctc/PDF/wg1/e1t6.pdf).

Illustrating the significance of such governance structures is the World Health Organization Framework Convention on Tobacco Control (WHO FCTC). Within the WHO FCTC, the Conference of the Parties plays a central role in shaping global strategies to combat tobacco-related health challenges. Through regular meetings, the COP reviews progress reports from member states, deliberates on amendments or protocols, and allocates resources to strengthen the implementation of the convention. This showcases how the governance arrangement, particularly embodied in the COP, is not merely a procedural formality but a fundamental component that ensures the adaptability, coherence, and success of multilateral treaties.

Turning to the INB process, in December 2021, at its Second special session, the World Health Assembly adopted decision SSA2(5), and pursuant to paragraph 1(1) thereof decided to establish the INB "to draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB". Further, pursuant to paragraph 1(3) of that decision, the INB was to "identify the provision of the WHO Constitution under which the instrument should be adopted" by its second meeting (INB2), and in furtherance thereof, at INB2, the INB "agreed that the instrument should be legally binding and contain both legally binding as well as non-legally binding elements. In that regard, the INB identified Article 19 of the WHO Constitution as the comprehensive provision under which the instrument should be adopted, without prejudice to also considering, as work progresses, the suitability of Article 21. This identification is made mindful that the decision will be made by the World Health Assembly".[5]

With the above considerations in mind and following discussions by the INB regarding prior drafts, including the Conceptual Zero Draft, Zero Draft, and Bureau's text, the Governance and related provisions contained in the Negotiating Text closely follow the text of existing legally binding instruments adopted under the WHO Constitution, specifically the WHO FCTC and the International Health regulations (2005) (IHR). This includes, without limitation, the provisions of Articles 21 (Conference of the Parties), 22 (Right to vote), and 23 (Reports to the Conference of the Parties) of the Negotiating Text, which draw heavily from the related Articles in the WHO FCTC.

In that regard, the IHR do not presently have a separate governing body or structure, rather this is addressed through the World Health Assembly (WHA). The work of targeted amendments to the IHR, through the WGHIR, have addressed this topic, including,

[5] Report of the second meeting of the INB, paragraph 4 (document A/INB/2/5, available at: https://apps.who.int/gb/inb/pdf_files/inb2/A_INB2_5-en.pdf).

without limitation, as reflected in the Article-by-Article compilation of proposed IHR amendments.[6]

2. Factors and options for consideration regarding governance of the Pandemic Agreement (and, as appropriate, the IHR)

Potential governance structures for the Pandemic Agreement include the following options:

A. Establishing a separate governance body (a COP, or otherwise) for the Pandemic Agreement, with no formal connection to the World Health Assembly.

B. Establishing separate governance bodies for the Pandemic Agreement and IHR, with each body operating under the World Health Assembly (WHA), for example through the establishment of a third main committee of the WHA.[7,8]

C. Establishing a single, new governance body for both the Pandemic Agreement and the IHR, with such governing body operating under the WHA, through the establishment of a third main committee of the WHA.

D. Placing governance of both instruments directly under the World Health Assembly without creating any new governance bodies.

E. Not addressing the governance structure in the instrument, thereby remaining silent on the point.[9] If this approach is taken, as a practical matter the Health Assembly would be expected to serve as the governing body.

With respect to the above options, during INB7 a delegation requested an analysis of whether the options would vary in their application depending on the legal structure the Pandemic Agreement takes – *i.e.*, whether adopted under Article 19 or 21 of the WHO Constitution. Mindful of the procedural developments of the Health Assembly and the INB in that regard to date (as discussed in Part 2, above), the Secretariat notes that any of

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[6] As contained in the documents provided at WGHIR1, available at: https://apps.who.int/gb/wgihr/pdf_files/wgihr1/WGIHR_Compilation-en.pdf.

[7] The concept of a third Main Committee was initially proposed in the Bureau's text (document A/INB/5/6, available at: https://apps.who.int/gb/inb/pdf_files/inb5/A_INB5_6-en.pdf (Article 20.3).

[8] This approach could include, if so decided, modalities for communication and cross-collaboration between the governance bodies, including to promote synergies and reduce duplication.

[9] While this is approach is seen in older multilateral instruments, it is not a frequent approach in modern multilateral treaties.

the options above could, in principle, be applied to the Pandemic Agreement, whether it is adopted under Article 19 or 21 of the WHO Constitution.

3. Practical implications of potential governance modalities for the Negotiating Text

During INB7, two specific queries were raised with respect to the Pandemic Agreement's governance structure: 1) the relationship of such governance structure to the World Health Assembly (such as through the approach of a new Third Main Committee of the Assembly); and 2) the implications of the Pandemic Agreement having a different number (*i.e.*, fewer) of Parties than the 194 Member States of WHO, and any related practical considerations related thereto.

In regard to both these queries, as a matter of treaty law, it is generally accepted that non-parties to an instrument generally do not have rights or obligations under the instrument *per se*,[10] and thus, non-parties to the Pandemic Agreement could not, through the Health Assembly or otherwise, make decisions on behalf of Parties to the Pandemic Agreement with respect to that instrument.

With that in mind, should Member States so decide, the Health Assembly, operating under Article 18 of the WHO Constitution, could play a pivotal role by establishing policies for the Organization, which could be consistent with the approach and terms of the Pandemic Agreement. While such policy adoption(s) by the Health Assembly would not, in themselves, be legally binding on Member States, it could offer a mechanism for supporting policy coherence and harmonization for all WHO Member States, whether (or not) Party to the Pandemic Agreement. With respect to the WHO FCTC, the COP for the instrument meets every three years; if a COP was established for the Pandemic Agreement and it met on a similar basis, the Health Assembly meeting in the interim period(s) could further support temporal policy coherence by adopting non-legally binding guidance, pending a decision by the governance modality of the Pandemic Agreement.

Relatedly, and as clarified during INB7, the Health Assembly (acting outside of the context of the governance of the Pandemic Agreement) would not have the legal authority to overturn decisions made within the Pandemic Agreement governance framework with respect to that instrument.

[10] See, for example, Article 34 of the Vienna Convention on the Law of Treaties (1969), providing that "[a] treaty does not create either obligations or rights for a third State without its consent."

4. The role of the WHO Health Emergencies Programme (WHE) in the application of the Pandemic Agreement

During INB7, a delegation requested the Secretariat to discuss the interaction of the work of the WHO Secretariat, particularly through the Health Emergencies Programme (WHE), and the support WHO could provide to the Pandemic Agreement and amended IHR, including, for example, as treaty / instrument secretariat. In that regard, the WHO Secretariat emphasizes that regardless of the governance structure adopted for the two instruments, the WHO Secretariat remains committed to providing consistent and comprehensive support for the implementation of the instruments, in a manner aligned with its overall work in health emergencies synergistically and with avoidance of unnecessary duplication.

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