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Introduction

Today, the international community faces massive global problems involving social injustice, environmental destruction, disease, poverty, and violent conflict. A chief means with which states have tried to address these issues is the creation of multilateral treaties.[1] In the past century, the growth in international law represented by treaties has been massive. In total, at the international level, thousands of multilateral agreements have been created to respond to these issues.[2] They span every area of global concern, including arms control, labour, environment, health, human rights, and transnational crime.[3] Treaties fulfil a vital function in international relations and are viewed by many as the most important sources of international law because they are formed through parties' express consent.[4]

Despite taking steps to address these problems in these ways, criticisms about the performance of international agreements and international institutions abound.[5] At a basic level many observers have concluded, on a

[1] Bruno Simma, 'From Bilateralism to Community Interest in International Law', 1994-VI *Recueil des cours de Academie de Droit International* 221 at 322 (multilateral treaties are increasingly used to deal with common problems of humanity).

[2] Duncan Hollis, 'Introduction', in ed. Duncan Hollis, *The Oxford Guide to Treaties* (Oxford University Press, 2013), p. 8; Charlotte Ku, 'Global Governance and the Changing Face of International Law' (ACUNS Keynote Paper 2001/2) p. 45 (noting that of approximately 6,000 multilateral treaties, approximately 30 per cent were general treaties, open for all states to participate). Campbell McLachlan, 'The Evolution of Treaty Obligations in International Law', in Georg Nolte, ed., *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 72 ('the general architecture of international law today is dominated by the great structures of the multilateral treaties').

[3] Hollis, 'Introduction', p. 8.

[4] Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), p. 94; see also Hollis, 'Introduction', p. 8 ('treaties are an essential vehicle for organization international cooperation and coordination').

[5] See, e.g., Mark Mazower, *Governing the World: The History of an Idea* (Penguin, 2012); Ian Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (Portfolio Penguin, 2012); Thomas Hale, David Held, and Kevin Young, *Gridlock: Why Global Cooperation is Failing When we Need it Most* (Polity, 2013); Charles Kupchen, *No One's World: The West, The Rising Rest, and the Coming Global Turn* (Oxford University Press,

variety of grounds, that treaties either do not work or do no work. An additional problem is the fragmentation of the international legal system, for which treaties bear a significant amount of the burden. These shortcomings can be seen as elements of the broader problem of the failure of multilateralism generally.[6] Together, these criticisms add up to a gloomy prognosis for treaties' contribution to an effective system of global governance.

Arguments about treaties' ineffectiveness are numerous. A dominant view is that states simply fail to comply with their obligations. One element of this view stems from realist critiques of international relations, which charge that treaties do not change state behaviour. Other critics point to the inflexibility of treaties as regulatory instruments, which makes them cumbersome to manage and unresponsive to the broader environment.[7] These views provide few grounds for optimism about treaties' abilities to achieve their intended regulatory aims.

The compliance critique alone has been a continuing topic of scholarly and policy discussion for many years. Compliance describes instances where an actor's behaviour conforms to an explicit rule of a treaty.[8] For many scholars and practitioners, compliance has become the central issue for multilateral treaties. In both international law and international relations, an array of theories has been developed to explain the conditions under which compliance with international law is likely to occur, or not. Reflecting widespread scepticism about the power of multilateral treaties, Andrew Guzman argues that international law can at best 'put a finger on the scale in favor of compliance'.[9]

Discussions in international relations and regulation have often identified characteristics of treaties that make them poor regulatory devices.[10]

2012); Ian Goldin, *Divided Nations: Why Global Governance is Failing, and What we Can Do About it* (Oxford University Press, 2013).

[6] Hale, et al., *Gridlock*, at p. 3.

[7] Sean Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties', in Nolte, *Treaties and Subsequent Practice*, p. 87 (noting that 'major multilateral treaties and institutions set up during the mid-20th century are in many respects showing their age, and hence we may be entering a period when greater flexibility in treaty interpretation is needed').

[8] Abram Chayes, Antonia Chayes, and Ronald Mitchell, 'Managing Compliance: A Comparative Perspective', in ed. Edith Brown Weiss and Harold Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998), p. 39–62.

[9] Andrew Guzman, *How International Law Works* (Oxford, 2008), p. 15.

[10] See, e.g., Ian Goldin, *Divided Nations*, p. 7 ('the treaties and other agreements that global governance structures have spawned are at best able to deal with a number of key challenges from the past').

To these views of individual treaties' weaknesses as regulatory devices can be added observations on treaties' broader role in the international legal system. The notion of fragmentation in international law has been a subject of substantial scholarly debate, culminating in a report by the International Law Commission.[11] Treaties' legal nature as agreements between state parties means that they generally have no necessary linkages to other treaties. From an operational standpoint, each sits on its own island, representing distinct sets of obligations binding only to their specific parties.[12]

Fragmentation is an element of an even larger crisis: the ineffectiveness of multilateral institutions. In recent years, successive international affairs scholars and commentators have criticized the failure of international organizations to manage and resolve problems affecting the global community, such as environmental issues and global warming, transnational crime and corruption, and human rights abuses. While there is widespread recognition that global problems require global solutions, faith in the ability of international institutions to meet these challenges has declined.

A steady flow of books has proclaimed the contemporary era to be devoid of leadership, resulting in a rudderless international system that is incapable of solving global problems. Hale et al. recount the failure of international cooperation today: 'Across a range of pressing global issues, countries have proven unable to cooperate effectively on issues of pressing global concern.' [13] Stuart Patrick offers an even bleaker assessment, writing that 'multilateral institutions ... muddle along, taking minor stabs at improving problems'.[14] Mark Mazower bemoans the transition from 'an era that had faith in the idea of international institutions to one that has lost it'.[15]

[11] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682.

[12] See, e.g., Neil Bolster, 'The (Un-) Systematic Nature of the UN Criminal Justice System: The (Non) Relationship between the Draft Illicit Tobacco Trade Protocol and the UN Convention Against Transnational Organised Crime', 21 *Criminal Law Forum* (2010), p. 361; Richard Caddell, 'The Integration of Multilateral Environmental Agreements: Lessons from the Biodiversity-Related Conventions', *Yearbook of International Environmental Law*, 2012, p. 1.

[13] Hale, et al., *Gridlock*, pp. 1–2.

[14] Stuart Patrick, 'The Unruled World', *Foreign Affairs*, Jan/Feb 2014, p. 58.

[15] Mazower, *Governing the World*, p. xi.

Among the criticisms levied against multilateral institutions, five stand out as the most compelling. The first concerns political considerations, which have undermined the development and application of international norms and standards. The lack of global leadership as a result of a multipolar or 'G-Zero world' prevents the exercise of decisive power to achieve critical goals.[16] Beyond politics, observers charge that international organizations are often ineffectual and incapable of problem solving. They have neither been given nor developed the means to manage complex challenges. They embody the worst of bureaucratic tendencies. A further view is that the lack of flexibility and impractical governance arrangements among multilateral instruments is said to be driving actors away from formal international agreements in favour of more flexible non-binding instruments as well as pacts within regional or selected groupings of states.

While many of these critiques suffer from the shortcoming of conflating different spheres of global governance – for instance, citing weaknesses in the UN Security Council as indicative of problems of compliance with international agreements generally – they do illuminate many of the challenges these institutions face. As will become evident in the course of this book, well-functioning international organizations are both a requirement of good treaty management and a consequence of it.

The current situation

As many observers have noted, the system of global governance that has emerged today is a network rather than a hierarchy.[17] Wider acceptance of this understanding is difficult, however, and demands for principal–agent style solutions to improving multilateral organizations remain widespread. The networked nature of global governance stems from the lack of any unified form of political authority over the relevant institutions coupled with the inclusion of a wide range of different types of actors, who contribute to its functioning.

A map of the United Nations system illustrates the story well.[18] It is composed of a hodgepodge of different organizations, departments,

[16] See generally, Bremmer, *Every Nation for Itself*.
[17] See, e.g., Ngaire Woods and Leonardo Martinez-Diaz, *Networks of Influence? : Developing Countries in a Networked Global Order* (Oxford University Press, 2009).
[18] On the UN organization and structure, see: www.un.org/en/aboutun/structure/org_chart.shtml.

commissions, programmes, tribunals, and financial institutions, only loosely linked. The UN Secretary-General has direct management authority over only the UN Secretariat, which represents a subset of the UN system. Each organization within the UN system has its own chief executive. The heads of the UN funds and programmes, Specialized Agencies, the IAEA, and WTO meet together periodically as a Chief Executive Board for Coordination, chaired by the Secretary-General, with the constituent organizations remaining largely autonomous. Political control by states is diffuse, with each body having its own governance structure populated by different designated officials from the governments of members. Within this framework, treaties constitute additional configurations of political authority, sometimes falling under the influence of the multilateral organizations under which they operate, yet ultimately controlled by their member parties. In this scenario, for any form of strong vertical accountability to come about, the nature of the UN system would need to change fundamentally.

Beyond the UN, hundreds of other political, economic, social, and academic organizations compete for authority in international affairs. These groups often work through formal institutions, such as the UN. However, they also have autonomous agendas that may or may not support those taken in intergovernmental settings.

If this complexity was isolated to international institutions, the challenge might be manageable. However, this image of global networked governance is one feature of the larger phenomenon of global interdependence and transformative technological change.[19] Major developments in science and technology, management techniques and operational systems, trade and financial arrangements, communications, and the forces of globalization have complicated the world in which treaties exist.

Public and private institutions have flattened out, deverticalized, and decentralized – creating a more complicated picture for all regulatory or governance systems.[20] Information technology has reshaped and increased our information gathering and processing capabilities, allowing us to generate ever-greater amounts of data. Communication is faster, more intense, and more far-reaching than ever before. Technological sophistication has expanded our research and development efforts. The volume of scientific knowledge is growing and the pace of technological change accelerating.

[19] Goldin, *Divided Nations*, pp. 4–6.
[20] See, e.g., Manuel Castells, *The Rise of the Network Society* (1996).

In a world of intense change, the task of developing and managing multilateral treaties has become an increasingly complex and delicate affair.

At the normative level, where in the past multilateral treaties developed under more or less 'greenfield' conditions, contemporary treaty making always begins where others left off and inevitably ends up complementing or overlapping with earlier treaties.[21] At the same time, the jurisprudence from international tribunals has become more voluminous, reducing the number of international legal issues that can be considered matters of first impression. Overall, negotiating the contemporary international legal landscape is more complicated and perilous, in ways that earlier practice was not.

At the operational level, whereas in the past good data on many problems was unavailable due to technological deficiencies or prohibitive costs, today sophisticated measurement can be conducted cheaply, accurately, and widely.[22] While data can be computed easily, actually processing the outputs is cognitively taxing and the responsibility for using it in decision making is palpable. Increasingly, today's expectations are that treaties are supported by a solid evidence base – in other words, objective scientific research or data to orient policies and practices.[23]

At the implementation level, where money to assist in national implementation came directly from treaty secretariats, which in turn dealt directly with donor governments in national capitals, today the aid effectiveness agenda has driven a decentralization of aid to the national level.[24] At the same time, such assistance must now be mainstreamed or integrated into national development strategies (NDS). Designing technical and financial assistance and capacity building in harmony with relevant institutions through appropriate modalities is more complicated than simply giving money directly to specific programmes of interest to donors.

At the monitoring level, information technology again allows the gathering and computation of data on implementation and compliance

[21] ILC, Fragmentation Report.

[22] See, e.g., Kyriakopoulos Avenhaus, Michel Richard Nicholas, and Gotthard Stein, *Verifying Treaty Compliance* (Springer, 2006).

[23] See, e.g., Framework Convention on Tobacco Control, Foreword ('The FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health'); Maputo Action Plan, Anti-personnel Mine Convention, p. 3, available at: www.maputoreviewconference.org/fileadmin/APMBC-RC3/3RC-Maputo-action-plan-adopted-27Jun2014.pdf (referencing 'evidence-based' land release methodologies).

[24] These topics are discussed in greater depth in Chapter 3.

and other data (e.g. third-party domestic litigation relying on treaty norms). Practices for the evaluation of development programming and auditing systems are becoming more sophisticated and demanding. Within treaty regimes, the creation of rigorous reporting, monitoring, compliance, and verification schemes generates increasing amounts of data relevant to treaties' performance.

In addition to the problem of their autonomous legal nature, treaties – both so-called law-making and treaty-contracts – have historically been considered more in contractual rather than organizational terms.[25] While not denying their actual legal nature under international law, as described below scholarship increasingly points to the incompatibility of this traditional view with the reality of how treaties function.[26]

From a legal to an operational understanding of treaties

The pioneering work of Chayes and Chayes provides the foundation for understanding the sustained, dynamic activities of multilateral treaty bodies. To illustrate how compliance with multilateral regulatory treaties is enabled, they developed a theoretical account – what they call 'managerialism'. A starting point of their analysis is the general propensity of states to comply with their international obligations.[27] In contrast to enforcement- and sanctions-driven accounts of treaty compliance, they examine a range of activities designed to build on that general propensity for compliance. These approaches reflect the efforts of parties to cooperate and, as the theory's title suggests, to manage their adherence to multilateral treaties.

The managerial processes reflect treaty bodies' active engagement over time. The methods used to promote compliance are 'verbal, interactive, and consensual'.[28] Treaty norms provide the basis for treaty bodies' applications of 'a series of measures and activities that separately and in intricate combination press towards compliance'.[29] The authors speak of the efforts as 'jawboning' rather than coercing states into compliance.[30] Among the compliance mechanisms they examine are processes for

[25] Shaw, *International Law*, p. 94.
[26] Hollis, *Oxford Guide*, p. 44 ('The range of the modern treaty suggests that a single, generic approach to defining "the" treaty and its essential rules ought to be revisited. This need not mean dispensing with international law's existing definition, but perhaps augmenting the definition to situate various species of treaties within a larger treaty genus.')
[27] Chayes and Chayes, *The New Sovereignty*, p. 3. [28] Ibid., p. 109. [29] Ibid., p. 110.
[30] Ibid.

reporting and data collection, verification and monitoring, capacity building and technical assistance, dispute resolution, and policy review and assessment. While limited to issues of compliance as opposed to broader questions of treaty effectiveness, the techniques they examine accurately represent the nature of ongoing managerial efforts.

With the development of multilateral treaty practice over the past fifteen years, the dynamic nature of treaty management that Chayes and Chayes described has only become more evident and has undergone further study. In particular, research into how treaty bodies of multilateral environmental agreements (MEAs) function has provided insights into the active, flexible practices that treaty parties now employ across a range of fields of international law.[31] The body of work by Churchill and Ulfstein, Brunnee, Wiersema, and Bowman seeks to understand the ongoing activities within Committees of Parties (COP) of MEAs to manage the agreements, which they consider to be novel and to stretch the boundaries of traditional international law.[32] In general, these authors – whom I will refer to collectively as the energized COP school – agree that existing categories of international law, specifically the law of treaties, does not fully account for the activity.[33] Nevertheless, their scholarship provides grounds for understanding the energized management of treaties as fully consistent with international law and further recognizes the need for treaty bodies to have the ability to operate in this fashion. Although they tend to focus on MEAs, as will be argued below, their views have wider application to other areas of treaty law.

A chief focus of this research is to understand the nature of treaty bodies and the legal basis and consequences of the actions they perform. The writers have all identified the COP or Meeting of Parties (MOP) as

[31] Churchill and Ulfstein (2000), 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', *The American Journal of International Law*, Vol. 94, No. 4; Jutta Brunnee, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* 1 (2002); Michael Bowman, 'Beyond the "Keystone" CoPs: The Ecology of Institutional Governance in Conservation Treaty Regimes', 15 *International Community Law Review* 5 (2013); Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', 31 *Michigan Journal of International Law* 231 (2009).

[32] Ibid.

[33] See, e.g., Duncan Hollis, 'Defining Treaties', in ed. Duncan Hollis, *Oxford Guide to Treaties* 44 ('The range of the modern treaty suggests that the single, generic approach to defining 'the' treaty and its associated rules ought to be revisited.').

the central decision making organ of MEAs, followed by the secretariat and various specialist subsidiary bodies.[34] In comparison to multilateral treaties agreed during the first half of the twentieth century, this type of institutional arrangement to govern MEAs is relatively novel and can be traced back to the unique governance arrangements of the Ramsar Convention launched in 1971.[35] It also explains why international law, particularly the international law of treaties, has not developed settled understandings of the legal significance of the arrangements. The emergence of COPs as central components of treaty activity 'have gone largely, if not completely, unnoticed in the general literature on international law'.[36] As a result, all of the cited authors have struggled to explain the phenomenon, providing a range of different views yet ultimately agreeing on some central aspects.

As an initial matter, the scholars have sought to define this activity. Churchill and Ulfstein refer to treaty bodies as 'alternative institutional arrangements', which 'while having a degree of autonomy from their parties are neither international organizations in the traditional sense nor mere diplomatic conference'.[37] Brunnee refers to COPs as hybrids that stand between 'issue-specific diplomatic conferences and permanent plenary bodies of international organizations'.[38] Reflecting this ambiguity, Bowman refers to 'the unique constitutional status of the COP for the purposes of treaty law'.[39]

They also find that COPs' powers are also not accounted for in the law of treaties. They are self-governing, in the sense that states' parties can influence their work only by acting through them, and 'they do not take instructions from the international organization hosting their secretariat'.[40] They have both express and implied powers to act on a wide range of internal as well as external matters.[41] Yet Brunnee contends that a 'significant grey zone has developed with respect to the scope of COP's law-making powers under MEAs'.[42] She considers the analogy of COPs

[34] Churchill and Ulfstein, 'Autonomous Institutional Arrangements', p. 623.
[35] Ibid., p. 629 ('The MEA that introduced the COP was the Ramsar Convention of 1971').
[36] Ibid., p. 625. Writing nine years later, Wieresema speaks of 'a nascent and still limited awareness that something important is afoot in international law: the activity of Conferences of the Parties (COPs) to multilateral environmental agreements (MEAs)': Wiersema, 'The New International Law Makers', p. 232.
[37] Churchill and Ulfstein, 'Autonomous Institutional Arrangements', p. 623.
[38] Brunnee, 'CoPing with Consent', p. 16.
[39] Bowman, 'Beyond the 'Keystone' CoPs', p. 25.
[40] Churchill and Ulfstein, 'Autonomous Institutional Arrangements', p. 633.
[41] Ibid., p. 639. [42] Brunnee, 'CoPing with Consent', p. 32.

to some sort of legislature, but ultimately concludes that they have assumed legislative roles in only a limited number of cases, whereas they have created forums for continuous interaction involving exchange of information and examination of problems.[43]

While the authority of COPs to act is relatively clear, the legal significance of the decisions they reach is uncertain. Questions concern the way in which decisions are reached and the binding nature of the decisions taken. Where parties actually consent to decisions, their actions are explainable through international law. Examples of such decisions include 'classic' matters, such as amendments. Yet, as Wieresma argues, rather than consent, COPs increasingly undertake decisions based on consensus. Where the various authors differ is on whether the decisions taken actually amount to international law.[44] For the most part, the decisions appear not to constitute mere soft law, because the parties appear to understand them as creating some obligation. Yet Brunnee distinguishes between a range of decisions straddling the boundary between 'operational' and 'substantive' and between what is 'legally binding and what is *de facto* mandatory'.[45] In lieu of arbitrary analytical distinctions between COP decisions' degrees of 'bindingness', she posits an interactional account that encompasses the 'entire normative continuum'.[46] She accepts the analogy of COPs to legislatures but seeks to supplement state consent as the basis for decisions by the inclusion of consensus and less formal procedures.

Among the decisions taken by parties in COPs, the authors catalogue a wide range of matters that go beyond the 'classic' sorts of treaty decisions. More traditional matters include acting on internal matters, such as the establishing of subsidiary bodies or setting arrangements for meetings, contributing to the development of new substantive obligations by amending the treaty, supervising implementation and noncompliance, and acting on the external level by adopting arrangements with international organizations and states.[47] To this standard list of activities, a host of operational and governance activities can be added, involving interpreting treaty obligations and developing rules, modalities, and procedures for implementation, addressing financial and organizational aspects of the treaties and their subsidiary organs, and setting strategic frameworks for the future of the treaty.[48] Overall, these activities show

[43] Ibid., p. 51. [44] Wieresma, 'The New International Law Makers'.
[45] Brunnee, 'CoPing with Consent', p. 32. [46] Ibid., p. 35.
[47] Churchill and Ulfstein, 'Autonomous Institutional Arrangements', p. 626.
[48] Wieresema, 'The New International Law Makers', p. 237.