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'Cannabis Regulation and the UN Drug Control Treaties'

The Modernization of Treaty Regimes:

The Contrasting Cases of International Drug Control and Environmental Regulation

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Effective international regimes are not static constructs. While there remains definitional variation concerning exactly what constitutes a regime – a situation that exists not only across but also within the increasingly synergistic disciplines of International Relations (IR) and International Law (IL)[1] - there is general agreement that they operate in terms of 'lifecycles'[2] and consequently 'tend to change more or less profoundly during their lifetime.'[3] Still an area of relatively limited study, the concept of regime evolution takes on increasing salience in light of a significant expansion in the number of international legal instruments in operation today. As the International Law Commission noted in 2006, 'the volume of multilateral - "legislative" – treaty activity has grown manifold in the past fifty years.'[4] Furthermore, observe Simmons and Steinberg, such expansion has been accompanied by an increase in 'the scope of topics and subjects addressed by treaty law,'

[1] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), pp. 54-7 and S. V. Scott, *International Law in World Politics*, Boulder-London; Lynne Rienner Publishers, 2017, 3rd edition), pp. 149-51

[2] See for example, P. Merkouris, *The Political Economy of International Treaties*, University of Groningen Faculty of Law Research Paper Series, No.18/2015, December 2014, p. 3

[3] T. Gehring and S. Oberthür, 'Expanding Regime Interaction' in A. Underdal and o. Young (eds.), *Regime Consequences: Methodological Challenges and Research Strategies* (Dordrecht, the Netherlands, Kluwer Academic Publishers, 2004), p. 251. It is useful to note the views of Bodansky and Diringer who point out that 'Although many regimes have developed in an evolutionary manner, there is nothing inevitable about regime evolution. Whether and the degree to which a regime evolves depends on a variety of factors, including whether the level of political will to address a problem grows. Often regimes develop in fits and starts. Indeed, at times regimes even move backwards as interest in an issue ebbs or when a regime has moved ahead too quickly, ahead of what the political traffic will bear.' Daniel Bodansky and Elliot Diringer, *The Evolution of Multilateral Regimes: Implications for Climate Change*, Pew Center on Global Climate Change, December 2010, p. 4

[4] United Nations General Assembly, International Law Commission, Fifty-Eighth session, Geneva, 1 May – 9 June and 3 July – 11 August 2006, A/CN.4/L.682, 13 April 2006, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, p.10

with treaty growth being 'especially marked in economic affairs, as well as in the areas of human welfare and the environment.'[5]

Although various processes of regime evolution can be found across all three categories, this paper focuses on examples from the fields of human welfare (broadly defined) and the environment; more specifically the treaty regime based upon the United Nations (UN) drug control conventions and the regime of environmental regulation and its underpinning Multilateral Environmental Agreements (MEAs). With a basis in comparative analysis, our aim here is to explore how these multilateral treaty based regimes have altered and are capable of modernization over time in response to changes in circumstances and requirements of regime members. Moreover, within the context of shifts in the way that a growing number of jurisdictions are choosing to deal with the illicit use of cannabis within their territories, the paper seeks to demonstrate the extent to which the evolutionary capacity of what has been usefully called the 'global drug prohibition regime'[6] (GDPR), can be considered out of step with a more dynamic regime like that dealing with transnational environmental concerns. In so doing, we hope to help move current discussions concerning the tensions presently surrounding the operation of the GDPR beyond the narrow confines of drug policy analysis and locate them within the broader context of IL, IR and wider investigation of regime evolution and modernization in general.

Beyond the fact that environmental regimes have been the subject of the most study on evolution and change, the focus on MEAs as a principle comparator to the GDPR rests on two factors. The first of these is the important, although very different, role that the advancement of scientific knowledge plays in the lifecycle of both regimes. The second relates to the regimes' age and the associated structures and mechanisms that come with it. As will be discussed, such factors go some way to help explain why from an IL perspective the GDPR has been described as 'Jurassic' with its underpinning drug conventions 'so stubbornly resistant to change compared to other treaty systems' that they almost seem '"frozen in time."'[7]

The paper begins with an overview of the GDPR. This includes discussion of structural and normative mechanisms, processes and examples of regime 'change' and transformation as well as their limitations. It then moves on to an examination of MEAs and the key elements of the environmental regime that allow for change; the existence of a Conference or Meeting of the Parties and related legal structures allowing for the incorporation of far-reaching changes to environmental instruments. Examples of these mechanisms and other relevant features are explored specifically through structural analysis of the 1987 Montreal Protocol, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the UN European Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Arhus Convention).

[5] B. A. Simmons and R. H. Steinberg (eds), *International Law and International Relations,* (Cambridge University press, 2006), p. xxx

[6] E. A. Nadelmann, 'Global prohibition regimes; the evolution of norms in international society', *International organisation*, 1990 Vol 44 Issue 4, pp. 479-526

[7] International Law and Drug Policy Reform. Report of a GDPO/ICHRDP/TNI/WOLA Expert Seminar, Washington DC, 17-18 October 2014, pp. 34-5

We conclude that in all issue areas successful regimes must have the capacity to evolve and modernize; a process vital for the maintenance of regime integrity. Furthermore, it is posited that in the absence of viable mechanisms for structural change, states wishing to move beyond the confines of the GDPR may need to consider avenues that, while in conformity with international law, are more innovative than in issue areas where more dynamic legal structures are in place. Moreover, while the efforts of Parties to adjust their relationship to the GDPR may help deal with the exigencies of specific shifts in domestic drug policy – cannabis regulation, for instance -, they do little to address more fundamental structural problems inherent within the punitive nature of the regime.

The Global Drug Prohibition Regime

The GDPR is an almost universally accepted treaty-based system currently built on a suite of three UN treaties. These are little know examples of so-called 'suppression conventions" that underpin a range of prohibition regimes in international law.[8] Dating back to the first decades of the twentieth century, the bedrock of the regime in its current form is the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol); one of the many multilateral instruments to be agreed during the exceptional period of treaty making activity in the third quarter of the twentieth century (1951-1975).[9] As in other issue areas, these pieces of hard law are accompanied by periodic soft law instruments (Political Declarations and variations thereof) and supported by several treaty bodies and agencies to create what is intended to be an internally coherent and mutually reinforcing legal framework.

The regime's overarching goal as expressed in the preamble of the Single Convention is to safeguard the 'health and welfare' of humankind. In so doing it applies a dual imperative: to ensure an adequate supply of pharmaceuticals for the licit market – including World Health Organization (WHO) listed essential medicines - and at the same time prevent the non-scientific and non-medical production, supply and use of narcotic and psychotropic substances. Within this context, the system has been developed on two interconnected tenets. First, a deeply held belief that the best way to protect health and reduce what has become known simply and somewhat vaguely as the 'world drug problem' and the harms associated with it is to minimize the scale of - and ultimately eliminate - the illicit market. And second, that this can be achieved through a reliance on prohibition oriented and supply-side dominated measures.[10] In this way, and while permitting some deviation from its

[8] See E. A. Nadelmann, 'Global prohibition regimes; the evolution of norms in international society', *International organisation*, 1990, Vol 44 Issue 4, pp. 479-526. Nadelmann used the term 'global prohibition regime' to describe the various regimes that have been developed to prohibit certain activities globally. On 'suppression conventions' see N. Boister, *Penal Aspects of the UN Drug Conventions,* Kluwer Law International, 2001, p 3 and 'Human Rights Protections in the Suppression Conventions', 2002, 2 *Human Rights Law Review* 199, p. 210

[9] B. A. Simmons and R. H. Steinberg (eds.), *International Law and International Relations,* (Cambridge University press, 2006), p. xxx-xxxi

[10] See 'General Obligations' of the Single Convention, Article 4, 'The parties shall take such legislative and administrative measures as may be necessary…(c), 'Subject to the provisions of this Convention. To limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.'

authoritative norm, from an IR perspective the regime has successfully generated a powerful prohibitionist expectancy in relation to how its members approach the non-medical and non-scientific use of substances scheduled in the UN drug control conventions.[11]

The GDPR's (limited) Capacity for Change

As suggested above, the GDPR certainly has some capacity for change and evolution. A useful taxonomy to help understand the mechanisms and process behind such transformation can derived from the ideas of Diehl and Ku regarding two distinct but inter-related aspects of international law: *operating systems* and *normative systems*.[12]

Viewing treaties as core to any regime's operating system and 'an important repository of modes or techniques for change'[13] several processes can be identified to show how the GDPR has changed overtime. To be sure, while the course of multilateral drug control is sometimes portrayed as 'a smooth continuum connecting events in the first decade of the twentieth century to the present day; an arc of unbroken progress incorporating both soft and hard law instruments alike', a strong case can be made that the Single Convention itself was more than just a consolidating treaty.[14] Rather, although largely successful in achieving this goal, its passage should be regarded as a significant 'watershed' event when the 'multilateral framework shifted away from regulation and introduced a more prohibitive ethos to the issue of drug control'.[15]

Moreover, in codifying into a single instrument most of the pre-1961 'foundational treaties', the Convention was originally intended to be the 'book of books' and the last word in international drug control.[16] Nonetheless, in response to changes in the nature of the illicit drug market in the following years, member states – notable amongst them the USA – felt it necessary to strengthen and expand the UN control framework at various points. Consequently, as well as itself being altered in 1972, the Single Convention was supplemented by the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This was an expansion and evolution of the regime paradoxically necessitated by the ineffectiveness of the Single Convention itself.

From an operating system perspective, it is also important to appreciate not only the capacity of the GDPR to expand its purview through the development of new instruments but also the availability of structural mechanisms for change within the conventions themselves. Key among these is treaty modification, a process that allows for constant adjustment in the scope of the GDPR via the scheduling procedure. As noted elsewhere,

[11] D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured*, (Cambridge University Press, Cambridge, 2012)
[12] Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law*, (Cambridge University press, 2010), p. 2
[13] *Ibid* Diehl and Ku
[14] See D. Bewley-Taylor and M. Jelsma, 'Regime change: Revisiting the 1961 Single Convention on Narcotic Drugs,' *International Journal of Drug Policy*, 23 (2012), pp. 72-81
[15] *Ibid* Taylor 2012
[16] See D. Bewley-Taylor and M. Jelsma, 'Regime change: Revisiting the 1961 Single Convention on Narcotic Drugs,' *International Journal of Drug Policy*, 23 (2012), p. 80

while 'often viewed as an obscure issue' scheduling 'lies at the core of the functioning of the international drug control system.'[17] Based on recommendations from the WHO, or more precisely its Expert Committee on Drug Dependence, the Commission on Narcotic Drugs (CND or Commission) – the regime's Vienna based 53- member central policy making body – makes decisions on adding, removing or transferring between schedules or conventions narcotic drugs and psychotropic substances under international control as laid out in the Single Convention and the 1971 Convention. Provisions concerning changes in the 'scope of control' are contained within articles 3 and 2 of those Conventions respectively. Additionally, in line with Article 12 of the 1988 Convention, the Commission, decides on the inclusion in, deletion from or transfer between its 'tables' 'Substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances,' more commonly referred to as pre-cursors. This decision is made upon recommendations from the International Narcotics Control Board (INCB or Board). Created under the Single Convention and established in 1968, the INCB is the product of a merging of two much older bodies: The Permanent Central Opium Board, created by the 1925 International Opium Convention and the Drug Supervisory Body, created by the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics Drugs. According to its own literature, the Board is the 'independent and quasi-judicial expert body' for 'monitoring and supporting Governments' compliance with the international drug control treaties.'[18]

At a more substantive level, the drug control treaties also allow for revision through amendment; the formal alteration of a convention article or articles. This option is provided for in Article 47 of the Single Convention, Article 30 of the 1971 and Article 31 of the 1988 Convention. Procedures for amending both the 1961 and 1971 Conventions are almost identical. Parties can at any time notify the UN Secretary-General of a proposal for an amendment, including the reasoning behind the move. The UNSG then communicates the proposed amendment and reasons for it to the Parties and the CND's parent body, the Economic and Social Council (ECOSOC or Council), which, depending upon their responses, decides on how to proceed. The amendment procedure of the 1988 Convention differs subtly from its antecedents. In the first instance, the Council is bypassed and the UNSG proceeds on his or her own authority to circulate the proposed amendment and the reasoning behind it to the Parties to the Convention and asks whether they accept it.[19]

It was the use of Article 47 of the Single Convention that began the process leading to the Amending Protocol in 1972. Then, owing much to the energetic endeavours of Washington D.C., ECOSOC passed a resolution calling for a plenipotentiary conference to amend the Convention[20] with US diplomats arguing that it was 'time for the international community to build on the foundation of the Single Convention, since a decade has given a better

[17] C. Hallam, D. Bewley-Taylor & M. Jelsma, *Scheduling in the international drug control system,* Transnational Institute-International Drug Policy Consortium, Series on legislative Reform of Drug Policies, No. 25, June 2014, p. 1 https://www.tni.org/files/download/dlr25_0.pdf

[18] https://www.incb.org/incb/en/index.html Accessed 2 October 2017

[19] For a detailed discussion on modification and amendment see D.R. Bewley-Taylor, 'Challenging the UN Drug Control Conventions: Problems and Possibilities', *International Journal of Drug Policy,* 14, 2 (2003), pp. 174-6

[20] ECOSOC resolution 1577, 21 May 1971. Although not mentioned in Article 47, the Council may submit proposed amendments to the General Assembly for 'consideration and possible adoption in accordance with Article 62, paragraph 3 of the United Nations.' *Commentary on the Single Convention on Narcotic Drugs, 1961,* (New York: United Nations, 1973), pp. 462-463

perspective on its strengths and weaknesses.'[21] Held in Geneva, the resulting conference was sponsored by 31 nations, attended by representatives from 97 states and considered an extensive set of amendments. The product of the meeting, the Protocol Amending the Single Convention on Narcotic Drugs, was signed on 25 March 1972 and came into force in August 1975.[22] Rather than making dramatic changes to the Single Convention, the Amending Protocol fine-tuned existing provisions relating to the drug estimates system, data collection and output, while also strengthening law enforcement measures and extradition and the functioning of the Board.[23] Importantly, following provisions within the 1971 Convention, it drew attention to the need to provide treatment and alternatives to penal sanctions for drug users.

All that said, while Article 47 facilitated appreciable treaty revision in the early 1970s and substances are scheduled and rescheduled on a regular basis, both amendment and modification of all three conventions are highly susceptible to blocking action of states wishing, for whatever reason, to preserve the existing shape of the regime. In terms of alteration of schedules, and with its origins dating back to the 1931 Convention,[24] the Single Convention requires a simple majority of CND member states. For the 1971 Convention a decision of two-thirds is required. Both treaties also include a facility whereby the request of one Party can trigger the appeal of a scheduling decision to the Council, whose majority based verdict is final.[25] Although the Board rather than WHO takes the lead in the modification process, similar issues pertain regarding the 1988 Convention. Like the 1971 Convention, the Commission's decision must be carried with a two-thirds majority and again any Party can initiate a review of the CND's decision by the Council. As with the earlier Conventions, ECOSOC may confirm, alter, or reverse the decision of the Commission.

Similarly, procedures within all three treaties allow even limited opposition to a proposed amendment to thwart the initiative. For both the 1961 and 1971 Conventions, if no Party rejects the amendment within 18 months after circulation 'it shall thereupon enter into force.' (Article 47 (2) and Article 30 (2) respectively). However, if a proposed amendment is rejected by one or more Parties the Council may follow suit in 'response to objections

[21] United Nations, 'Memorandum of the United States of America Respecting its proposed Amendments to the Single Convention on Narcotic Drugs, 1961,' E/CONF.63/10 in *United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs, 1961 (Geneva 6 – 24 March 1972): Official Records,* vol. 1 (New York: UN, 1974), pp. 3-4 cited in M. Jelsma, 'UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy', *Journal of Drug Policy Analysis,* 2016, https://doi.org/10.1515/jdpa-2015-0021

[22] See D. Bewley-Taylor and M. Jelsma, 'Regime change: Revisiting the 1961 Single Convention on Narcotic Drugs,' *International Journal of Drug Policy,* 23 (2012), pp. 78-79. For a detailed account of the protocol see N. G. Gross and G. J. Greenwald, 'The 1972 narcotics protocol,' *Contemporary Drug Problems,* 2, 1973, pp. 119-163

[23] N. Boister, *Penal Aspects of the UN Drug Conventions,* Kluwer Law International, 2001, p. 47-48

[24] C. Hallam, D. Bewley-Taylor & M. Jelsma, *Scheduling in the international drug control system,* Transnational Institute-International Drug Policy Consortium, Series on legislative Reform of Drug Policies, No. 25, June 2014, p. 3 https://www.tni.org/files/download/dlr25_0.pdf

[25] See C. Hallam, D. Bewley-Taylor & M. Jelsma, *Scheduling in the international drug control system,* Transnational Institute-International Drug Policy Consortium, Series on legislative Reform of Drug Policies, No. 25, June 2014, pp. 10-11 https://www.tni.org/files/download/dlr25_0.pdf and D.R. Bewley-Taylor, 'Challenging the UN Drug Control Conventions: Problems and Possibilities', *International Journal of Drug Policy,* 14, 2 (2003), pp. 174-6

and the substantial arguments provided'[26] or decide whether a conference should be called to consider the amendment. As well as operating on a more generous timetable, provisions within the 1988 Convention differ somewhat in other respects. According to Article 31 (1), if a proposed and circulated amendment has not been rejected by any party within 24 months, 'it shall be deemed to have been accepted and shall enter into force in respect of a Party…' However, moving away from 'tacit approval' within the earlier treaties,[27] this comes into effect ninety days after 'that party has deposited with the Secretary General an instrument expressing its consent to be bound by that amendment.' In this case, if the proposed amendment is rejected by any party, the UNSG must consult with the Parties and 'if a majority so requests, bring the matter to the Council which may decide to call a conference.' (Article 31 (2)).

The origins of the provisions for amendment within the current UN conventions appear to stem from articles concerning 'revisions' in the 1931 Convention and the 1936 Convention for the Suppression of the illicit Traffic in Dangerous Drugs, the only foundational treaties to contain such mechanisms.[28] The approach may also have been influenced by Article 22 of the 1953 Protocol for Limiting and Regulating the Cultivation of the poppy Plant, the Production of, International Whole Trade in and Use of Opium.[29] This was a treaty that came into force in 1962 only to be superseded by the 1961 instrument in 1964.[30] Although the thresholds and bodies involved in the pre-UN treaties differ to those within the existing regime, the option of convening all the parties to discuss proposed amendments is complicated relative to more recent instruments in other issue areas, including MEAs. This is the case in spite of efforts at the 1961 plenipotentiary conference to reduce the complexity of the process contained in early drafts of the Single Convention. As a reading of the *travaux* reveals, discussions around the amendment procedures focused on keeping

[26] International Drug Policy Consortium Advocacy Note, *Correcting a historical error: IDPC calls on countries to abstain from submitting objections to the Bolivian proposal to remove ban on the chewing of the coca leaf*, January 2011, https://www.tni.org/files/publication-downloads/idpc_advocacy_note_-_support_bolivia_proposal_on_coca_leaf.pdf Accessed 6th September 2017

[27] *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. Done at Vienna on 20 December 1988,* United nations, New York, 1998. P. pp. 412-13

[28] Article 33 of the 1931 Convention for the Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, (as amended by the protocol signed at Lake Success, 1947) – 'A request for the revision of the present Convention may at any time be made by any High Contracting Party, by means of a notice addressed to the Secretary General of the United Nations. Such notice shall be communicated by the Secretary-General to the other High Contracting parties and, if endorsed by not less than one-third of them, the High Contracting Parties agree to meet for the purpose of revising the Convention'. Article 25 of the 1936 Convention for the Suppression of the illicit Traffic in Dangerous Drugs (as amended by the protocol signed at Lake Success, 1947), 'Request for revision of the present Convention may be made at any time by any high contracting Party by means of a notice addressed to the Secretary- General of the United Nations. Such notice shall be communicated by the Secretary-General to other High Contracting parties, and if endorsed by no less than one-third of them, the High Contracting Parties agree to meet for the purpose of revising the Convention.'

[29] Article 22, 'Revision. (1) Any Party may request revision of this Protocol at any time by a notification addressed to the Secretary-General. (2) The Council, after consultation with the Commission, shall recommend the steps to be taken in respect of such request.'

[30] W. B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History*, (London and New York: Routledge, 2000), pp. 179-184, 202-204 and D. R. Bewley-Taylor, *The United States and Drug Control, 1909-1997* (Pinter, 1999), pp. 92-93

the process of whether to convene a conference to consider amendments as simple as possible with the outcome leaving much discretion with ECOSOC.[31]

As such, despite some differences in approach for both modification and amendment, the result is the same. Although formal mechanisms for revision exist within all the treaty texts and consequently generate the impression of dynamism, the reality is stasis on anything other than non-controversial issues. On this point, it is worth recalling a message within the first edition of the *World Drug Report* in 1997. Then the United Nations International Drug Control Programme, forerunner of the current UN agency responsible for coordinating international drug control activities, the United Nations Office on Drugs (UNODC), noted that 'Laws – even the international Conventions – are not written in stone; they can be changed when the democratic will of nations so wishes it.'[32] With regard to amendment in particular, while remarkably progressive for a UN document, sentiment within the publication belies the daunting political and procedural obstacles confronting any member state or states wishing to initiate a formal change of the current regime. This is particularly so during the current era when, unlike the early 1970s, there is significant divergence in the way regime members are choosing to deal with substances deemed illicit for anything other than medical and scientific purposes. Further complicating the situation is the often-contradictory approach to protecting regime integrity deployed by Parties who are themselves deviating in one way or another from the regime's authoritative norm; a point to which we will return to below.

Indeed, while as in other issue area regimes norms are important in the overall functioning of the GDPR, they are particularly relevant to the last aspect of its operating system to be discussed here, the generation of resolutions and decisions by bodies such as the CND, ECOSOC and the UN General Assembly. An important component of treaty evolution, arguably it is here where amalgamation of the regime's operating and normative systems is most obvious. This is the case since, working within the over-arching principles of the regime framework, resolutions and decisions do much to reaffirm or adjust the regime's normative tone and character. Although non-binding, resolutions in particular are considered to have some moral weight. This is particularly so regarding the products of the CND's 'Committee of the Whole' (CoW), the technical committee where resolutions are negotiated and agreed upon before being submitted to the CND Plenary, and then ECOSOC, for the formality of adoption.[33] It is consequently in the CoW that on some occasions Parties engage in laboured and even heated debates and negotiations on specific issues and how they relate to interpretative practice around both the letter and the spirit of the treaties. Considerable diplomatic capital may be invested in this process because interpretations that remain uncontested by other Parties within the Commission can over time become part of acceptable scope for interpretation and shift the regime's normative focus.[34] It is plausible to suggest that the intensity of negotiations around not only some CND Resolutions but also

[31] *United Nations Conference for the Adoption of a Single Convention on Drugs, New York – 24 January – 25 March 1961, Official Records. Volume I: Summary Records of Plenary Meetings*, New York: United Nations, 1964) (E/CONF.34/24), pp. 175-177

[32] United Nations International Drug Control Programme, *World Drug Report* (Oxford University press, 1997), p. 199

[33] https://www.unodc.org/unodc/en/commissions/CND/CND_Meetings-Current-Year.html

[34] D. Bewley-Taylor and M. Jelsma, *The UN drug control conventions: The limits of latitude*, Transnational Institute-International Drug Policy Consortium, Series on Legislative Reform of Drug Policies, Nr. 18, March 2012, p. 3

more prominent soft law instruments such as Political Declarations is in some ways a result of the lack of realistic structural modalities for formal revision of the regime.

On this point, the GDPR is certainly not free from the maxim that treaty interpretation is an art not a science. Utilization of the extant flexibility and ambiguity within the texts has over the years permitted a significant number of states increasingly dissatisfied with the punitive approach privileged by the conventions to engage in a process of what can be called 'soft defection'. Rather than quitting the regime, utilizing the inherent plasticity within the treaties these states have chosen to deviate from its prohibitive norm. Such an approach creates policy space at the national level while allowing the Parties to technically remain within the legal boundaries of the Conventions. Since norms are crucial to the essential character of any regime, such a process of what should be considered normative attrition represents a form of regime transformation. Crucially, however, in this case the transformation involves regime weakening and changes *within* rather than a more substantive change *of* the regime. This would require a significant alteration in normative focus via formal treaty revision or other processes. Although regime transformation through soft defection can be identified from the early years of the contemporary UN regime, it has been especially prominent since the late 1990s. The last twenty-years or so have seen a growing number of Parties engage with not only the public health-oriented harm reduction approach, but also implement the depenalization or decriminalization of the possession of drugs for personal use, particularly in relation to cannabis, as well as medical marijuana schemes.[35] Such a shift has had much to do with an improving evidence base concerning the effectiveness of market interventions, particularly in relation to health oriented versus law enforcement dominated approaches. This has also been accompanied by an increasing realization of the tension that often exists between drug policy and human rights norms and obligations; a tension that is exacerbated by the GDPR. As Damon Barrett and Manfred Nowak highlighted in 2009, 'Unlike human rights law, which focuses to a large extent on the protection of the most vulnerable, the drug conventions criminalise specifically vulnerable groups. They criminalise people who use drugs, known to be vulnerable to HIV, homelessness, discrimination, violence and premature death…'[36] Paradoxically, while legitimizing space for policy plurality at the domestic level, through working within its overarching architecture the process of soft defection actually helps to sustain the existing operating structures. Moreover, as the Board's changing interpretative stance on several policy choices demonstrates, at a system level the regime has an impressive ability to absorb normative shifts.

From Soft Defection to Recalibration and Breach

The process of soft defection and absorption can only go so far, however. While containing considerable flexibility, the plasticity of the treaty system is not infinite.[37] Recent years

[35] D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured,* (Cambridge University Press, Cambridge, 2012), passim

[36] D. Barrett and M. Nowak, 'The United Nations and Drug Policy: Towards a Human Rights Based Approach', in A. Constantinides and N. Zaikos, (eds.), *The Diversity of International Law:Eessays in Honour of Professor Kalliopi K. Koufa,* (Leiden, The Netherlands: Brill/Martinus Nijhoff, 2009), p. 557

[37] D. Bewley-Taylor and M. Jelsma, *The UN drug control conventions: The limits of latitude,* Transnational Institute-International Drug Policy Consortium, Series on Legislative Reform of Drug Policies, Nr. 18, March 2012

have witnessed the policy choices of several Parties, or territories therein, reveal not only the regime's shortcomings in dealing with advances in scientific knowledge and international human rights law, but also its suborn resistance to substantive change. The result has been the forced use of extraordinary legal procedures and recourse to unconvincing legal argumentation. The latter has created a state of legal limbo that does little for either the credibility or integrity of the regime and generates potential problems for international law well beyond the realms of transnational drug policy.

As has been well documented elsewhere,[38] in an effort to reconcile its international obligations under the GDPR with its new constitution, the government of Bolivia moved to amend the Single Convention in March 2009 by removing two sub-paragraphs of Article 49 that bans coca leaf chewing. This was the first attempt at treaty amendment since 1972. As entitled under the provisions of Article 47, a group of 17 states presented objections within the 12-month period established by the procedure and blocked the amendment.[39] Having had the option for amendment denied, La Paz consequently had little choice but to withdraw from the Single Convention, (via Article 46, Denunciation), and re-accede with a reservation, pursuant to Article 50 (3). This is a legitimate although rarely used and controversial practice deployed in the 'absence of alternative paths to resolve legal conflicts.'[40] The success of the procedure was predicated on the hope that less than one-third of the parties to the Convention would object. Ultimately only 15 countries, considerably short of the necessary 62, rejected the move and Bolivia's re-accession entered into force with its reservation on February 10, 2013. This marked the end of an arduous process bringing its coca chewing policy into compliance with international law.

It is not insignificant that efforts to block Bolivia's proposed amendment to the Single Convention was led by the US, a long time and particularly active defender of the GDPR and a Party no doubt troubled by policy shifts concerning the recreational use of cannabis. Despite, due to the unique character of the issue, the fact that any resultant changes would – as has been now shown - have only a limited direct impact on the US or any of the other objectors, the amendment was opposed on the grounds that it would damage the integrity of the regime. An unconvincing legal argument bearing in mind the widespread practice of coca chewing within parts of the country. Ironically, this position was maintained at the same time as the first of a steady trickle of US states moved to create regulated markets for the recreational use of cannabis; a policy choice that by all reasonable treaty interpretations is not permissible within the current confines of the GDPR.[41]

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[38] See for example, Transnational Institute press release, 'Bolivia wins a rightful victory on the coca leaf: Creates positive example for modernizing the UN drug conventions https://www.tni.org/en/article/bolivia-wins-a-rightful-victory-on-the-coca-leaf-0 and TNI website more generally. Also see B. Reidel, 'Note. I'd like to Make a reservation: Bolivian Coca Control and Why the United Nations Should Amend the Single Convention on Narcotic Drugs,' *George Washington International Law Review*, 49, 711, 2016-17 ,

[39] See Objections and support for Bolivia's coca amendment http://druglawreform.info/en/issues/unscheduling-the-coca-leaf/item/1184-objections-and-support-for-bolivias-coca-amendment Accessed 7th September 2017

[40] Transnational Institute press release, 'Bolivia wins a rightful victory on the coca leaf: Creates positive example for modernizing the UN drug conventions https://www.tni.org/en/article/bolivia-wins-a-rightful-victory-on-the-coca-leaf-0

[41] See, for example, INCB reports and statements, *The UN Drug Conventions – Room for Flexibility*, Lord Carlile of Berriew, CBE, QC & Sarah Clarke, December 2013, Legal Opinion commissioned by All- Party Parliamentary Group for Drug Policy Reform. For research into treaty flexibility pre-dating the current debates around cannabis see Dorn, N. & Jamieson, A. *Room for Manoeuvre: Overview of Comparative Legal Research into National Drug*

Even though the legalization of the non-medical and non-scientific use of cannabis within a state or any territories thereof represents a clear breach of international law, the US Federal government has constructed a legally dubious, but politically seductive, argument around dynamic interpretation and treaty flexibility to defend the awkward position in which it finds itself.[42] A similarly problematic legal justification has been deployed by Uruguay, which in 2012 became the first nation state to pass a bill to legally regulate the cannabis market from seed to sale. In the Uruguayan case, however, while acknowledging that the treaty system may require 'a revision and modernization' at some point,[43] Montevideo defends its position by referring to the need to respect other legal obligations, particularly those regarding human rights principles. These, according to this perspective, should always take precedence over drug control in case of any doubt. Moreover, the government claims its policy decision is fully in line with the drug control treaties' original objectives, which they have subsequently failed to achieve: the protection of the health and welfare of humankind.[44]

Such 'untidy legal justifications'[45] have certainly permitted both the US and Uruguay to deflect much criticism concerning what are obvious treaty breaches. That said, despite justifiable criticism from the INCB and some member states, the more widespread calculated political denial that currently pervades the conference rooms of Vienna[46] is not tenable in the long term. It is plausible to suggest that the existence of this legal netherworld is the result of the GDPR's primitive non-compliance structures; a point discussed further below. The INCB's relies primarily on 'naming and shaming' what it deems to be errant Parties into changing their behaviour.[47] It is true that the Single Convention allows for some consultation in this regard. According to Article 9 all measures taken by the INCB must be 'with the intent to further the cooperation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the

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Law of France, Germany, Italy, Spain the Netherlands and Sweden and their Relationship to three International Drugs Conventions, Volume 1, Strategic Research Series, Drugscope, 2000 and De Ruyver et al, *Multidisciplinary Drug Policies and the UN Drug Treaties,* Institute for International Research on Criminal Policy, Ghent University, Maklu, Antwerpen/Apeldorn, 2002,

[42] M. Jelsma, 'UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy', *Journal of Drug Policy Analysis,* 2016, https://doi.org/10.1515/jdpa-2015-0021, D. Bewley-Taylor, M. Jelsma & D. Barrett, 'Fatal Attraction: Brownfield's flexibility Doctrine and Global Drug Policy Reform, *Huffpost*, The Blog, 18 January 2015. For a critique of the application of dynamic interpretation see R. Lines, D. Barrett and P. Gallahue, 'Guest Post: Has the US just called for unilateral interpretation of multilateral obligations?' *Opinio Juris* 18 December 2014 http://opiniojuris.org/2014/12/18/guest-post-us-just-called-unilateral-interpretation-multilateral-obligations/#more-31427

[43] D. Bewley-Taylor, T. Blickam & M. Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform,* Transnational Institute-Global Drug Policy Observatory, Amsterdam/Swansea, March 2014, p. 68

[44] D. Bewley-Taylor, T. Blickam & M. Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform,* Transnational Institute-Global Drug Policy Observatory, Amsterdam/Swansea, March 2014, p. 69

[45] D. Bewley-Taylor, T. Blickam & M. Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform,* Transnational Institute-Global Drug Policy Observatory, Amsterdam/Swansea, March 2014, p. 68

[46] See International Drug Policy Consortium (July 2016), *The Commission on Narcotic Drugs and its Special Session on preparations for the UNGASS on the World Drug Problem: Report of Proceedings*

[47] H. R. Friman, 'Behind the Curtain: Naming and Shaming in International Drug Control' in H.R. Friman, *The Politics of Leverage in International Relations: Name, Shame and Sanction,* Palgrave Macmillan, 2015, pp. 143-164

aims' of the Convention. Nonetheless, this structure does not easily allow for more inclusive and responsive discussion with other Parties and provides little guidance concerning the Board's role in resolving instances of treaty breach beyond the use of Article 14. Compounding this predicament, its formal powers under this Article are limited to recommending an embargo on the import and export of drugs to a Party seen to be 'endangering' the aims of the Single Convention. This is an inherent paradox within the instrument that demonstrates how its prohibition-oriented character generates tensions with the regime's own overarching goal, 'the health and welfare of mankind'. Indeed, Article 14 has never been triggered, although some states – notably Afghanistan – have been called to account in line with the mechanism. The 1988 Convention is also an exceptional case of a UN treaty that does not have any monitoring or review mechanism because the INCB mandate was limited to the precursor control regime established under Article 12. Moreover, for many years the Board benefitted from the US's unofficial and unilateral policing role, including the 'certification' and 'Presidential determination' processes. Although Washington D.C still flexes its considerable diplomatic muscle within the issue area, its own position vis-à-vis regulated cannabis markets at the state level puts the US in an awkward position internationally.

Indeed, the US stance on cannabis legalization is not inconsequential. It might be argued that if the US interpretative position attracted a significant level of political acceptance and became part of an extended practice of flexible treaty interpretation, it may open room for manoeuvre. Other Parties might be able to apply similar arguments, not only to legally justify cannabis regulation, but for other contested policy options that may emerge.[48] Nonetheless, not only would such a unilateral 'a la carte' approach to multilateral treaty obligations have consequences in other issue areas, a key question remains, where would the judgement on the use of flexibility lie? As Lines, Barrett and Gallahue presciently argued in 2014, 'the flexibility that the US seeks for itself may not extend to others at all'[49]; a prediction confirmed by US-Jamaican narco-diplomacy in 2015. Then, in response to early and generalised discussions concerning the creation of legal cannabis markets on the island, Washington, D.C. strongly opposed any move on the grounds that Jamaica was a transit country. With such a complex and often contradictory politico-legal environment framing discussion - or more accurately stifling discussion - on cannabis at the CND, the future remains unclear. That said, how Canada chooses to reconcile its recent domestic policy shifts with its international drug control treaty commitments will surely do much to influence the choices of other states struggling to deal with the rigidity of the regime. As the emerging literature on the topic on treaty reform demonstrates, there are various options available for Parties to pursue, each with their own advantages and shortcomings.[50]

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[48] D. Bewley-Taylor, T. Blickman & M. Jelsma, *The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform,* Transnational Institute-Global Drug Policy Observatory, Amsterdam/Swansea, March 2014, p. 70

[49] R. Lines, D. Barrett and P. Gallahue, 'Guest Post: Has the US just called for unilateral interpretation of multilateral obligations?' *Opinio Juris* 18 December 2014 http://opiniojuris.org/2014/12/18/guest-post-us-just-called-unilateral-interpretation-multilateral-obligations/#more-31427

[50] See for example, R. Room et al, *Cannabis Policy: Moving Beyond Stalemate* (OUP, 2010), R. Room, 'Reform by Subtraction: The Path of Denunciation of International Drug Treaties and Reaccession with Reservations,' (2012), *International Journal of Drug Policy,* pp. 401-6 and D. Bewley-Taylor et al, *Cannabis Regulation and the UN Drug Treaties: Strategies for Reform,* June 2016,

In the foreword to its annual report for 2016, the INCB President stated that while '…some actors will continue to talk about the need to "modernize" the treaties and their provisions; INCB is of the view that the international drug control system continues to provide a modern and flexible structure that can meet the world's drug control needs for today and tomorrow.'[51] In so doing, despite growing challenges to such a perspective,[52] the Board dismisses the concept of regime evolution and modernization and the fact that substantive change does take place in other issue areas. Examples can be found in a range of other contemporary transnational issues of concern. This includes the global anti-money laundering regime based around the UN Convention against Transnational Organised Crime (UNTOC or Palermo Convention) and the UN Convention against Corruption (UNCAC), both of which build upon provisions within the 1988 Convention.[53] Another example can be found within the realm of international trade policy. As the transition from the regime based around the General Agreement on Tariffs and Trade (GATT), a system emerging from the same post war environment as the GDPR, to the World Trade Organisation demonstrates, evolution is not always smooth.[54] This was the case even amidst a widespread realization among Parties that the GATT was 'no longer as relevant to the realities of world trade as it had been in the 1940s.'[55] Yet, clearly change can and does occur. Within the context of this discussion, however, it is instructive to examine the modernization of the regime for environmental regulation. While it would be unwise to attempt to draw direct parallels between the two, a specific focus on the enabling mechanisms within some of its MEAs reveals the dynamic nature of a truly modern regime.

Regime Change and Modernization in the Environmental Regime

In contrast to the GDPR and its poor alignment with international human rights law, the regime for environmental regulation has been exemplified by a robust evolution of Multilateral Environmental Agreements the structures of which allows for taking into account the development of International Environmental Law (IEL); defined as 'substantive, procedural and institutional rules of international law that have their primary objective the protection of the environment'.[56] As Schiele has pointed out, 'While MEAs are multilateral treaties concluded under international law and may therefore be mistaken for static legal

http://www.swansea.ac.uk/media/Cannabis%20Regulation%20and%20the%20UN%20Drug%20Treaties_June%202016_web%20(1).pdf

[51] International Narcotics Control Board, *Report of the International Narcotics Control Board for 2016,* (New York: United Nations, 2017), p. iii

[52] See International Drug Policy Consortium, CND proceedings, 2016 & 2017 (& UNGASS?)

[53] W. Gilmore, 'Money Laundering' in in N. Boister and R.J. Currie (Eds), *Routledge Handbook of Transnational Criminal Law,* (Routledge, 2014), pp. 332-337 and P. Reuter and E. M. Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Washington, DC: Pearson Institute, 2004), p. 89

[54] D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured,* (Cambridge University Press, Cambridge, 2012), pp. 282-283

[55] WTO, *Understanding the WTO* (Geneva: World Trade Organization, 2010), p. 17 cited in D. R. Bewley-Taylor, *International Drug Control: Consensus Fractured,* (Cambridge University Press, Cambridge, 2012), p. 283

[56] P. Sands et al, *Principles of International Environmental Law* (CUP, 2012, 3rd edition), p. 13.

instruments, they frequently provide for the establishment of an institutional apparatus and specific processes which allow for their constant dynamic evolution'.[57]

With the UN Environmental Programme (UNEP) a 'particularly important organization in the evolution of conventions and instruments in the field of environmental protection'[58] the environmental regime and the instruments of which it is comprised are unique in the way that they incorporate fast changing IEL and its principles. For example, even older MEAs such as the Convention on the Prohibition of Trade of Endangered Species of Fauna and Flora (CITES), which at its inception was essentially a trade convention, has over time acquired an ecological dimension. This brought it into line with purely ecological MEAs such as the 1992 Convention on Biological Diversity. Such an evolutionary process was possible through the adoption by CITES' governing body of a decision to incorporate into the Convention the precautionary principle; a new principle underlying IEL that aims to provide guidance in the development and application of International Environmental Law where there is scientific uncertainty.[59] Indeed, there are several characteristics of MEAs that allow for such flexibility and the possibility of adjusting treaties to consider changing scientific knowledge and development of IEL.

First, and key among these, is the form of the governance structure of MEAs. Rather than a functional commission of ECOSOC, or officially the Council itself, as is the case with the GDPR, the highest decision-making body of MEAs is the Conference of the Parties (COPs), in some instances called the Meeting of the Parties (MOPs). The first MEA which established a form of COP was the 1971 Ramsar Convention on Wetlands of International Importance. Another example from the same era is the London Convention on the Prevention of Marine Pollution in 1972. Although the COP within both instruments possessed limited power, Schielle points out that the first MEA to establish a 'modern' COP with more comprehensive powers was CITES. Indeed, 'all three conventions were negotiated under the auspices of the UNEP, which implies that a learning process with the gradual evolution of the modern concept of a COP took place.'[60] Treaties subsequently negotiated under UNEP also establish a modern COP with far-reaching competences.[61] There remains some debate surrounding the precise power of COPs. Nonetheless, there is general agreement that the organs are 'responsible for the dynamic evolution of MEAs, providing permanent fora for their further development and revision'.[62] Following the steps set out in the MEA and the rules of procedure, a COP adopts legally binding or non-binding decisions containing further commitments of parties. 'This function', it has been noted, 'establishes a more effective alternative to ad hoc diplomatic conferences negotiating specific issues'. It is also

[57] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), p. 1. Also see Daniel Bodansky and Elliot Diringer, *The Evolution of Multilateral Regimes: Implications for Climate Change*, Pew Center on Global Climate Change, December 2010

[58] M. N. Shaw, *International Law*, (CUP, 2008), p. 846

[59] P. Sands et al, *Principles of International Environmental Law*, Cambridge University Press, 2012, p. 218

[60] Churchill and Ulfstein 'Autonomous Institutional Arrangements' (2000), p. 630 cited in S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), p. 40.

[61] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), p. 40.

[62] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), p. 42, citing Röben, *Institutional Developments* (1999), p. 375 and

important to note that COPs are cheaper in terms of cost.[63] Discussion also exists concerning precisely how COPs differ to diplomatic conferences. On this point Jutta Brunnée sees COPs as 'hybrids between issue-specific diplomatic conferences and the permanent plenary bodies of international organizations,' pointing out that '…there has been considerable interest in shifting patterns in MEA-based law-making processes, prompted in large measure by the sense that conventional processes are too sluggish to produce timely responses to global environmental decline.' [64]

Second, and of considerable importance, is the integration within the structure of MEAs of formalized and permanent technical and expert bodies that act in an advisory capacity to the COPs and are especially well equipped to deal with various aspects of the agreements' areas of concern. This contrasts with the GDPR where there is limited opportunity for discussion of scientific advances and improvements in understanding, particularly with the ongoing marginalization of the WHO within the drug control regime. Within the realm of MEAs, the centrality of expertise is not a particularly recent innovation. Even the 70-year-old International Whaling Commission (IWC), consisting of Commissioners representing all State parties to the 1946 International Convention of the Regulation of Whaling (ICRW) has a very well-developed structure consisting of three main committees, prominent among those the Scientific Committee. This has a very important role on advising on the quotas to be taken in scientific whaling. The IWC also contains several sub-committees such as those dealing with Aboriginal Subsistence Whaling, Infractions and the Methods of Whaling.

Third, the legal structure of some MEAs allows for the incorporation of far-reaching changes. These include provisions, called 'enabling clauses', which defer to future decisions of the COPs certain developments or a clarification of a treaty regime. These have been described as 'in general giving a specific mandate to the Conference of the Parties (or another organ or institution established under international environmental agreement) to elaborate (more detailed) rules in a particular area without providing for specific amendment procedure.'[65] Within this context, as will be discussed, compliance procedures play an important role. As Jan Klabbers notes, they 'may well be considered as integral parts of the institutionalization of international environmental law.' Further, he points out, 'the procedures tend to be non-adversarial in nature, tend to not focus on "breach" but on "non-compliance" and tend to result in making recommendations to the parties as to how to assist the state in non-compliance.'[66] In the following sections we offer a brief examination of specific MEAs to highlight some of these features, as well as other relevant mechanisms pertaining to dynamic evolution.

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

[63] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, (Cambridge University press, 2014), p. 42 and Ulfstein, *Treaty Bodies* (2007), p. 881

[64] Brunnée, J., 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements,' *Leiden Journal of International Law*, 2002, 15, p. 15-16.

[65] M. Fitzmaurice, 'Consent to be Bound – Anything New under the Sun?,' *Nordic Journal of International Law*, 74, 2005, pp. 487-8

[66] J. Klabbers, *International Law*, (Cambridge University Press, 2013, p. 264.

Annually, international wildlife trade is estimated to be worth billions of dollars and to include hundreds of millions of plant and animal specimens. The trade is diverse, ranging from live animals and plants to a vast array of wildlife products derived from them, including food products, exotic leather goods, wooden musical instruments, timber, tourist curios and medicines.[67] One of the oldest and most expansive MEAs currently in existence, CITES accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs. The species covered by the Convention are listed in three Appendices, according to the degree of protection they need.[68] According to Article 7, the Convention allows or requires in certain cases Parties to make certain exceptions to the general principles described above.

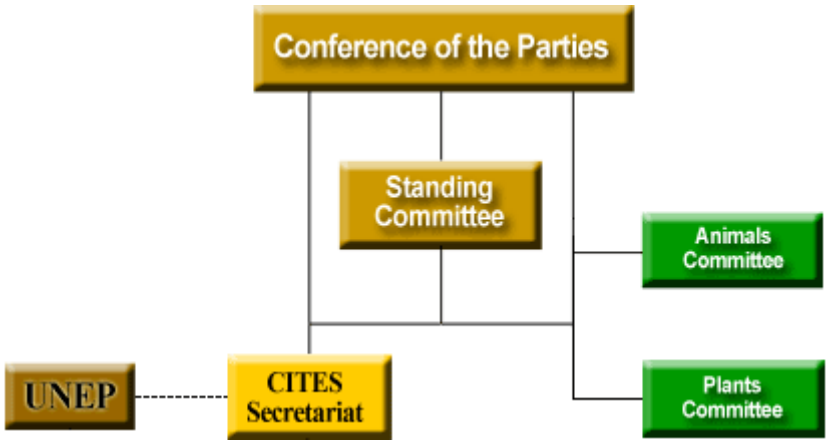

Figure 1: The Structure of CITES

The decision-making body for CITES is the COP (See Figure 1), which is established in Article 11 of the Convention. The Convention's Secretariat is administered by the UNEP, as laid down in Article 11 (1). Between the regular meetings of the COP the Standing Committee oversees implementation. For scientific issues the Conference of the Parties established an Animals Committee and a Plants Committee, also with Resolution Conf. 11.1 that set up the Standing Committee, a decision taken at COP 15 in 2010.

Indeed, CITES is one of the MEAs which has evolved the most through the resolutions of the COP. As noted above, as a trade convention signed in early 1970s, it was not originally based on any ecological principles. However, it evolved on the basis of COP resolutions such as Conf. 9.24 (COP15) which adopted the precautionary principle. CITES is also very flexible as parties are allowed to take out a 'reservation' on species listings, in which case they are treated as a non-Party to the Convention with respect to that species until their reservation is withdrawn. In relation to listings in Appendix I or Appendix II, a reservation must be taken out within 90 days of the species being listed. With respect to listings in Appendix III, a Party

[67] https://www.cites.org/eng/disc/what.php and P-M Dupuy and J.E. Vinuales, *International Environmental Law*, Cambridge University Press, 2015, pp. 167-173
[68] https://www.cites.org/eng/app/index.php

may take out a reservation at any time and in respect to any part or derivative of the species specified in the listing.

Like other MEAs, CITES has also developed a strict non-compliance procedure (NCP). As an example of the Convention's ability to change substantively over time, the establishment of the NCP followed developments in the Montreal Protocol (discussed below).[69] The main organ in charge of non-compliance is the Standing Committee which advises on measures to the COP. There are several measures that can be adopted in cases of non-compliance, with national reports that are subject to in-depth review by the special organs at the heart of the process.

CITES also cooperates closely with other MEAs. For example, in relation to trade in whales and whale products, it concluded a Memorandum of Understanding with IWC that it has a leading role in relation to whales. Consequently, the attempts of Japan and Norway to 'downlist' whales from Appendix I to II were not successful due to the commercial moratorium on whaling introduced by the IWC in 1985/86.

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer

The Montreal Protocol on Substances that Deplete the Ozone Layer (MP), a Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer, was designed to reduce the production and consumption of ozone depleting substances in order to diminish their abundance in the atmosphere, and thereby protect the earth's fragile ozone layer. The original Montreal Protocol was signed on 16 September 1987 and entered into force on 1 January 1989. The instrument is considered a success story. It is predicted by UNEP that the ozone layer should be back to its pre-1980 levels and condition by between 2050 and 2075.

[69] P. Sands et al, *Principles of International Environmental Law*, Cambridge University Press, 2012, p. 164

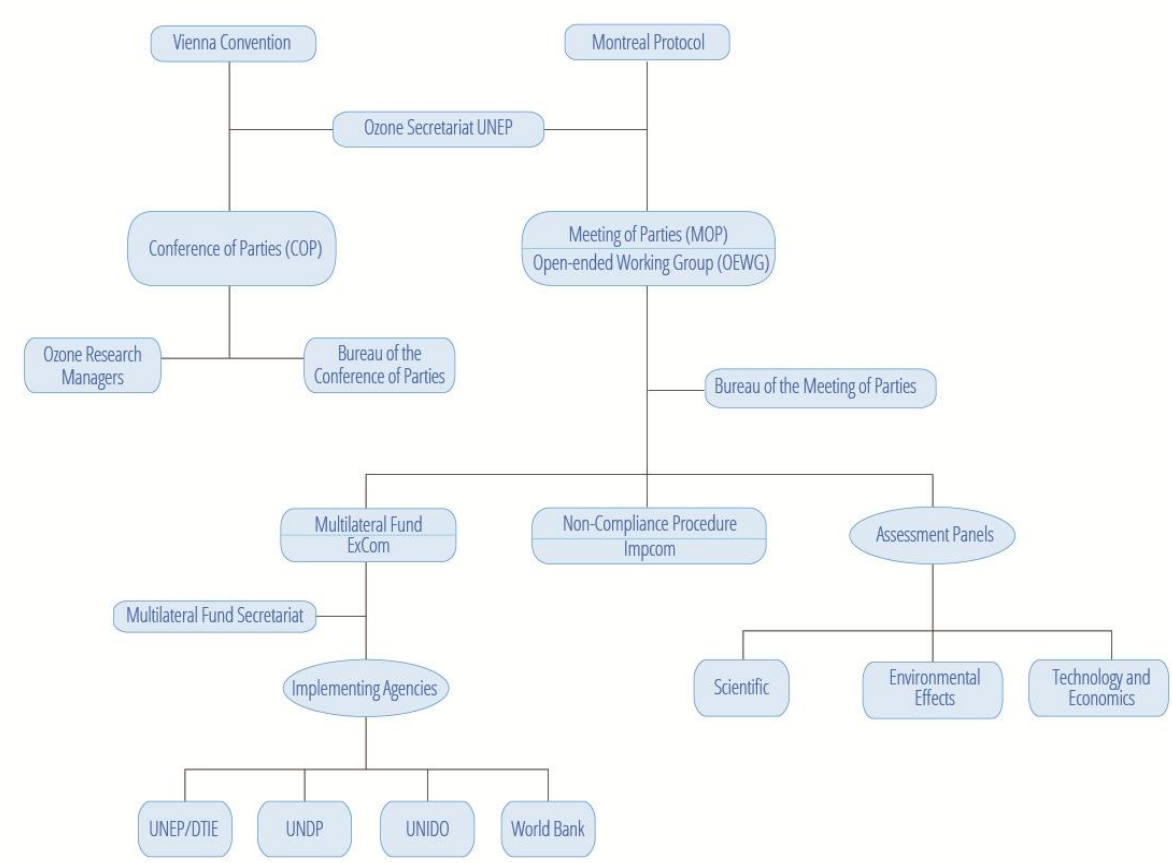

Figure 2: The structure of the Montreal Protocol

Crucially, the legal and organisational structure of the MP (See Figure 2) is designed to respond to new scientific discoveries and consequently act in a rapid manner. It has a classical amendment procedure, which means ratification by the parties of the Protocol as laid out in the Vienna Convention on the Law of Treaties (VCLT). The MP was amended four times to enable, among other things, the control of new chemicals and the creation of a financial mechanism to enable developing countries to comply. Specifically, the Second, Fourth, Ninth and Eleventh MOPs to the Montreal Protocol adopted, in accordance with the procedure laid down in paragraph 4 of Article 9 of the VCLT, four Amendments to the Protocol; the London Amendment (1990), the Copenhagen Amendment (1992), the Montreal Amendment (1997) and the Beijing Amendment (1999). Through amendment the Montreal Protocol also included explicitly the precautionary principle in its provisions, thus keeping abreast with the developments in environmental law.[70]

[70] Principle 15 of the 1992 Rio Declaration on Environment and Development: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. The 1990 London amendment to the MP

However, far less important (but nevertheless crucial for the regime) changes in the MP, under Article 2(9), introduced a new procedure of adjustments, which may concern a tightening up of the elimination procedure. This provision thus enables the Parties to the MP to adopt decisions which, in the event of not reaching consensus, are taken on the basis of a majority vote that then bind all parties. This is a revolutionary provision, which develops the original Protocol.

In addition to adjustments and amendments to the MP, the MOP to the Protocol meet annually and take a variety of decisions aimed at enabling effective implementation of this important legal instrument. As of the 22nd MOP, the Parties have taken over 720 decisions.

Other elements that make the MP successful are the special provisions for developing countries. Since the protection of the ozone layer is a common concern of humankind and the MP is a global instrument, participation of all States is a necessary requirement. This is achieved through the principle of so-called 'common but differentiated responsibilities'.[71]

One of the most important achievements of the MP, however, is the establishment of the Non-Compliance Procedure. It is worth noting that the NCP was adopted by the Decision of the MOP on the basis of the so-called 'enabling clause of the MP in Article 8: 'The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.' As such, it was not adopted on the basis of the MP itself. Rather, a permanent NCP was adopted at MOP-4 (1992). It has the Implementation Committee as the body to receive and consider reports of non-compliance. Non-compliant Parties are given notice of the allegations and an opportunity to respond. The Committee must report any recommendations to the MOP. The permanent non-compliance mechanism was reviewed and amended at MOP-10. The amendments, *inter alia*, required the Implementation Committee to report persistent patterns of non-compliance to the MOP and make appropriate recommendations to maintain the integrity of the Protocol. The MP is the first MEA to incorporate multilaterally determined penalties into its range of non-compliance responses. However, it is vital to stress that although containing provisions for sanctioning non-compliant states, the central aim of the NCP is to provide assistance. The punishment component can be considered as little more than a sideshow. As O. Yoshida notes, 'Compared with traditional judicial settlements that usually require time-consuming processes, the NCP regime seems more flexible, simple and rapid.' Moreover, 'In light of the step-by-step negotiation process of the NCP regime, which seeks feasible and amicable solutions, the international mechanism shows a scrupulous respect for the sovereignty of ozone regime member states.'[72]

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[71] Principle 7 of the 1992 Rio Declaration on Environment and Development: Principle of Common but Differentiated Responsibilities 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

[72] O. Yoshida, 'Soft Enforcement of treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions,' 10, *Colorado Journal of International Environmental Law*, 95, 142 (1999), p. 99

The 1998 UN European Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)

The Aarhus Convention is a new kind of environmental agreement. It 'establishes a number of rights of the public (individuals and their associations) with regard to the environment.' Moreover, Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute to these rights to become effective. The Convention provides for the 'right of everyone to receive environmental information that is held by public authorities, 'the right to participate in environmental decision-making' and the 'right to review procedures to challenge public decisions' that have been made without respecting these two rights or 'environmental rights in general.'[73] As such, the subject of the Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, with for example its implementation of Principle 10 of the Rio Declaration (the procedure for environmental rights),[74] it is also a Convention about government accountability, transparency and responsiveness. Speaking as the instrument came into force in 2001, the UN Secretary-General, Kofi-Annan, stated that 'The Aarhus Convention is the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations.'[75] For Mary Robinson, United Nations High Commissioner for Human Rights, it represented a 'remarkable achievement not only in terms of protection of the environment, but also in terms of the promotion and protection of human rights.' '[I]t is truly a trailblazer', she said[76]

Beyond these 'trailblazing' high-order principles, however, the Convention also contains many important general features. Namely, it adopts a rights based approach, it is a 'floor' not a 'ceiling' in terms of minimum standards, it prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention and it has a wide definition of public authorities. Further, like the MP, the MOP is the Convention's main governing body. In its meetings, other Signatories and other States as well as intergovernmental and non-governmental organizations participate as observers.[77] The mandate of the MOP is to keep under continuous review the implementation of the Convention and take the necessary measures required to achieve the purposes of the Convention.

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[73] http://ec.europa.eu/environment/aarhus/

[74] 'Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.

[75] http://www.unece.org/press/pr2001/01env15e.html

[76] https://www.unece.org/env/pp/statements.05.11.html

[77] For a discussion of the role of NGOs, see M. Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in International Environmental Law,' 23, *Colorado Journal of International Environmental Law & Policy* (2012), pp. 361-3

Similarly, as with the MP's assessment panels that were established and approved at its first MOP in 1989, several other organs of the Convention have been established by the Aarhus Convention MOP since the instrument came into force. For example, a 'Working Group of Parties' has been set up to oversee the implementation of the work programme for the Convention between meetings of the parties. This is 'the same composition' as the MOP itself, but meets more regularly.[78] Other Convention bodies include the Bureau of the Meeting (elected at the MOP in 2014), the Task Force on Access to Justice (established at the first MOP in 2002), the Task Force on Public Participation (adopted at the 2010 MOP) and the Task Force on Access to Information (established by the MOP in 2011).

Arguably the greatest success of the Aarhus Convention, however, is its Compliance Committee. Article 15 of the Convention on review of compliance, required the Meeting of the Parties to establish 'optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention', that is to say through the 'enabling clause'. Following this obligation, the Meeting of the Signatories established a Working Group to prepare such a mechanism. At its first session (October 2002), the MOP adopted Decision I/7 on review of compliance and elected the first Compliance Committee.

The Parties consequently now regularly address issues of compliance on the basis of the Committee's reports. The Compliance mechanism can be triggered in a number of ways including by a party making a submission about its own compliance.[79] At the Committee's recommendation, it adopts decisions on general issues of compliance and also decisions on compliance by individual Parties.[80] The Compliance Committee is a crucial interface between the public and the Parties and underpins the openness and transparency of the Convention. Writing in 2007, Veit Koester noted that experience with the mechanism 'so far demonstrates that it is possible to deal with compliance issues in an open and transparent manner.'[81] It is a unique mechanism built into the Convention, ensuring that it is continuously under review and that the Convention's Parties are in compliance with its provisions.

Concluding Discussions

As we hope to have demonstrated in the preceding pages, not all regimes have the same capacity to evolve and modernise. Indeed, relative to the MEAs discussed here, and the environmental regime of which they are a part more generally, the treaties underpinning the GDPR display a pronounced inability to adapt to not only the changing requirements of some Parties, but also advances in scientific knowledge and international human rights law that often underpin policy shifts at the national level. Although normative adjustments taking place within the extant framework via 'soft defection' have permitted a degree of modernization, structural impediments to go beyond this have left the regime in an awkward

[78] https://www.unece.org/env/pp/mop.html
[79] https://www.unece.org/env/pp/ccbackground.html
[80] http://www.unece.org/env/pp/ccbackground.html
[81] V. Koester, 'The Compliance Committee of the Arhus Convention – An Overview of procedures and Jurisprudence', *Environmental policy and Law,* 37/2-3 (2007), p. 92

state of limbo. A combination of factors, prominent among them governance structures and monitoring and non-compliance mechanisms, has led to a remarkably homeostatic system and a situation that arguably puts the integrity and credibility of the GDPR at risk. This state of affairs will no doubt provoke different reactions depending upon one's view of the regime's current prohibitive-orientation. Nonetheless, it is important not to ignore the important role it plays - although not always efficiently - in ensuring access to drugs for medical and scientific purposes.

In contrast, as useful examples of dynamic MEAs, the three treaties discussed here clearly indicate that successful regimes must possess the capacity to evolve. Unlike the three drug control treaties that in many respects appear designed to stifle substantive change, CITES, the MP and the Aarhus Convention all have evolutionary capacity built into their very DNA. It is important to stress that within the realm of environmental regulation the mechanisms for change are predicated on a tightening of the regime in line with advances in scientific knowledge and IEL. Nonetheless, it is instructive to move beyond the Vienna silo and draw lessons from other parts of the UN system where dynamism characterizes regime operation.

As discussed, a key mechanism for evolution of MEAs is via resolutions and decisions of the COPs/MOPs which are guided and assisted by the specialist bodies of the Agreements. In fact, the provisions of environmental conventions have evolved so greatly through such decisions that the original text only provides a very general framework. These conventions have the original legal tool of decision-making to update the text without recourse to a cumbersome procedure of amendment. Lack within the GDPR of both COPs to the treaties and specialist scientific bodies with a genuine capacity to review implementation in line with the 'health and welfare' of humankind arguably exemplifies its Jurassic character. Unlike MEA's there is no forum where all the parties can easily discuss and move to resolve challenges to the regime deriving from diverging approaches among Parties. It is telling that discussion of the tensions thrown up by regulated cannabis markets was studiously ignored at the 2016 UN General Assembly Special Session on the World Drug Problem. Among other factors, recourse by ECOSOC to a plenary conference to discuss amendment of a drug control treaty is likely to be avoided due to the additional financial costs involved.[82]

It is plausible to suggest that the form of the current GDPR structures can be explained as a legacy issue. The Single Convention after all inherited much of its internal apparatus from conventions dating to the pre-UN era. It is interesting to note, however, that despite the incorporation of COPs within instruments in other parts of the UN system in the early 1970s, for example CITES, the mechanism for review does not seem to have been considered during discussion for the 1972 Amending Protocol. Instead, the power of the INCB was bolstered. The legacy argument might also be applied in relation to the systemic disconnect between drug control and human rights; a situation that led Paul Hunt, the former Special Rapporteur on the right to the highest attainable standard of health to conclude that '[i]t is imperative that the international drug control system . . . and the complex international human rights

[82] C. S. J. Fazey, 'The Commission on Narcotic Drugs and the United Nations International Drug Control Programme; politics, policies and prospects for change', *International Journal of Drug Policy*, 14 (2003), p. 167

system that has evolved since 1948, cease to behave as though they exist in parallel universes.'[83]

Regarding the operation of the INCB, there are clearly some similarities between its role within the GDPR to monitor and encourage compliance and that of NCPs within MEAs. For example, they both rely heavily on 'naming and shaming' in public fora and have limited realistic options concerning powers of sanction. That said, despite some mandated guidance on the Board's cooperation and constant dialogue with Parties, NCPs within MEAs appear to be constructed more in terms of problem resolution and discussion among all Parties; a process that takes place through the COP.

At an operating system level, a genuine de-Jurassifcation of the GDPR clearly requires considerable effort. Nonetheless, such endeavour seems necessary in the context of the changing national level drug policy landscape. There cannot be an effective treaty regime that is static. This is not feasible in the contemporary multinational environment. Although the issue of cannabis regulation is the current imperative for systemic change, it is unlikely to be the last challenge to the existing prohibition-oriented UN drug control architecture.[84] Extraordinary options such as denunciation with re-accession and reservation or variations of treaty modification may allow individual or groups of states to realign national policy with international obligations under the drug control treaties. Yet, while perhaps necessitating a reconsideration of the term GDPR, they will do little to modernize the regime to the point where it will allow for continuous changes in approach across a range of currently prohibited substances and, to borrow Boister's phrase, 'a multispeed drug control system'.[85] Moreover, such processes are unlikely to act as catalysts for necessary systemic shifts to bring international drug control into line with international human rights law,[86] or, within an era where international law is increasingly fragmented, other regime obligations. Amongst other suggestions for structural change,[87] for the long-term operation of the regime it is certainly worth considering the integration of COPs.[88] This could be the first stage in an incremental process whereby the drug control treaties could begin to discuss structural evolution that allowed for differentiated engagement by different Parties according to their own circumstances, contingent of course on adherence to certain human rights standards.

The suggestion of integrating COPs is not as farfetched as it might at first appear. This is particularly so since closely related UN conventions already contain this mechanism for regular treaty review. Both the 2000 UNTOC and the 2003 UNCAC contain inbuilt provisions

[83] P. Hunt, 'Human Rights, Health and Harm Reduction: States' Amnesia and Parallel Universes' (International Harm Reduction Association 2008), p. 9

[84] W. Hall, 'The future of the international drug control system and national drug prohibitions', *Addiction* (2017) 112

[85] N. Boister, 'Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs,' *Leiden Journal of International Law,* Vol. 29, Issue 2, (2016), p. 409

[86] N. Boister, 'Human Rights Protections in the Suppression Conventions', *Human Rights Law Review,* Volume 2, Number 2, 2002, p. 227

[87] See for example, B. Riedel, Note, 'I'd Like to make a Reservation: Bolivian Coca Control and why the United Nations Should Amend the Single Convention on Narcotic Drugs,'49, *George Washington International Law Review,* 711, 2016-2017

[88] See International Law and Drug Policy Reform. *Report of a GDPO/ICHRDP/TNI/WOLA Expert Seminar,* Washington DC, 17-18 October 2014, p. 35

for a 'Conference of the Parties to the Convention'; Articles 32 and 62 respectively. Moreover, the former includes provision for the addition of new instruments to create 'a system that can easily be supplemented by additional protocols in the future which may then focus on other specific, maybe new, upcoming areas of transnational organised crime.' [89] The UNTOC, which like all the drug treaties not only falls under the remit of the UNODC but is also conceptually linked to the drug control treaties – and built upon the 1988 Convention specifically - [90] was seen to break new ground in this regard. Writing in 2004, Clark noted 'Article 32 of the Transnational Crime Convention is innovative procedurally in the international criminal law area.'[91] COPs, as experience in international crime control and elsewhere including MEAs reveals, should not be considered a silver bullet. Problems abound. Nonetheless, they, and related scientific and other committees and advisory bodies that come with them, appear worthy of exploration and further study. As the late Harvard Law Professor and International Court of Justice Judge Richard R. Baxter wrote in 1980, 'The lawyer is indeed a social engineer and in that role, he must be able to invent or produce machinery that will assist in the resolution of disputes and differences between states. He must be prepared to fine-tune the law, to exploit its capacity for adaption to the needs of the parties and to promote movement and change'.[92] Within the complex and cross cutting field of international drug policy, the same could be said for IR scholars, diplomats and international civil servants.

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[89] For an overview see A. Schloenhardt, 'Transnational organise crime' in N. Boister and R.J. Currie (Eds), *Routledge Handbook of Transnational Criminal Law*, (Routledge, 2014), pp. 409-33

[90] M. Woodiwss and D. Bewley-Taylor, *The Global Fix: The Construction of a Global Enforcement Regime*, Transnational Institute Briefing Series, Crime and Globalisation Programme, Amsterdam, October 2005 https://www.tni.org/files/download/crime2.pdf

[91] Roger S. Clark, 'The United Nations Convention against Transnational Organized Crime', 50 *Wayne Law Review*, 161, (2004), p. 183

[92] R.R. Baxter, 'International law in "her infinite variety"' (1980), 29, *International and Comparative Law Quarterly*, 549-66