

## **Exercising or Evading International Public Authority? The Many Faces of Environmental Post-Treaty Rules**

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### Table of Contents

A. Introducing Environmental Post-Treaty Instruments .....	10
B. Exercising or Evading International Public Authority – Sketching an Approach .....	17
I. The Challenge of Identifying Diversified Exercises of International Public Authority .....	17
II. Two Parameters for Identifying Reductions in the Authority of International Rules: Substance and Legal Status.....	19
C. A Closer Look at the Substance of Environmental PTRs.....	22
I. Evading Authority Through Ambiguous Wording.....	25
II. Evading Authority by not Adopting PTRs .....	26
III. Exercising Authority While Alleviating Obligations .....	27
D. A Closer Look at the Legal Status of Environmental PTRs .....	30
I. Legal Status of PTRs in the Internal Legal Order of the Treaty Regime.....	30
II. Legal Status of PTRs in International Legal Doctrine and Court Practice .....	32
III. Legal Status of PTRs in Domestic Legal Doctrine and Court Practice .....	35
E. The Role of Consensual Decision-Making.....	40
F. Conclusion .....	46

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## Abstract

Post-treaty instruments (PTIs) are informal instruments adopted by consensus of the treaty parties as follow-up decision to a particular provision in a treaty. PTIs are potentially significant instruments for advancing environmental global governance, as the treaty parties may use them to transform indeterminate treaty provisions into more specific environmental rules and decisions. While a number of PTIs are rightly characterized as exercises of authority, this article seeks to demonstrate how certain environmental PTIs with rule-setting character ('PTRs') amount to evasions of authority by reducing international authority over States' environmental policies, or alleviate rather than tighten the treaty parties' obligations, through their content or legal status. First, some PTRs avoid authoritative language, requiring little or no concrete action by the treaty parties. Some treaty-based assignments to adopt PTRs are never even acted upon. Other PTRs simply water down the obligations of the treaty parties compared to the underlying treaty provisions. Second, PTRs possess an ambiguous legal status both in legal doctrine and in the practice of domestic and EU courts. The article further argues that consensual decision-making may well be at the root of this ambivalent practice. As a broader contribution to the debate about International Public Authority (IPA), the proposition is advanced that we need to scrutinize more carefully what kind and degree of authority an instrument exercises exactly – or not. Evasions of authority and alleviations of obligations – which can be conceived as a special type of exercising authority through inaction – have important implications for what future legal frameworks of international public law must deliver in terms of effective and legitimate procedural design.

## A. Introducing Environmental Post-Treaty Instruments

In international environmental governance, it has become common practice over the past decades to adopt multilateral treaties (formally binding international agreements) that constitute 'incomplete contracts',<sup>1</sup> or more precisely, *incomplete regulation*. Well known examples of such Multilateral Environmental Agreements (MEAs) are the *Montreal Protocol on Substances that Deplete the Ozone Layer*, the *Kyoto Protocol to the UN Framework Convention on Climate Change*, the *Cartagena Protocol on Biosafety to the Convention on*

<sup>1</sup> Cf. T. Gehring, *How to Circumvent Parochial Interests without Excluding Stake-holders: The Rationalizing Power of Functionally Differentiated Decision-making*, BACES Discussion Paper (2004) 22, citing O.E. Williamson, *The Economic Institutions of Capitalism. Firms, Markets, Relational Contracts* (1987).

*Biological Diversity*, the *Convention on International Trade in Endangered Species* and the *Ramsar Convention on Wetlands*.<sup>2</sup> As they do not contain much in terms of substantive obligations requiring specific conduct,<sup>3</sup> these MEAs become the basis for the adoption of what may appropriately be labeled environmental ‘post-treaty instruments’ (PTIs).<sup>4</sup>

Post-treaty instruments can be roughly defined as instruments adopted as a follow-up decision to a particular provision in a formal international agreement (a treaty or protocol), while themselves not meeting the threshold of formal agreements.<sup>5</sup> They are usually adopted by consensus or occasionally by large majority among all treaty parties in quasi-institutionalized treaty bodies called Conferences or Meetings of the Parties (COPs, COP/MOPs or MOPs).<sup>6</sup> Hence, they are descriptively known as ‘COP Resolutions’, ‘COP/MOP decisions’, etc.<sup>7</sup> Because PTIs are not adopted by bodies of international organizations with

<sup>2</sup> There are however more than a thousand less well known MEAs. See R. B. Mitchell’s *International environmental agreements database project*, available at <http://iea.uoregon.edu/page.php?query=home-contents.php> (last visited 19 May 2016).

<sup>3</sup> Cf. S. J. Toope, ‘Formality and Informality’ in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of Environmental Law* (2008), 107, 121 (“[...] a treaty [...] may contain [...] imprecise norms not designed to condition specific conduct.”); B. Simma, ‘Consent: Strains in the Treaty System’ in R. St.J. MacDonald & D.M. Johnston (eds), *The Structure and Process of International Law* (1983), 485 (already noting this increasing tendency in the 1980s generally for multilateral treaties on cooperative issues).

<sup>4</sup> Cf. e.g. *Natural Resources Defense Council v. Environmental Protection Agency*, (2006) United States Court of Appeals For the District of Columbia Circuit, Judgement after rehearing, Case No. 04-1438, 464 F3d 1 (DC Cir 2006), 29 August 2006 [*NRDC v. EPA*], (‘post-ratification side agreements’). Other authors have used ‘consensual COP activity’, ‘COP decisions’ or ‘decisions of treaty bodies’.

<sup>5</sup> An annex is part of a treaty, and a protocol is itself a treaty. Both thus fall outside the concept of post-treaty instrument.

<sup>6</sup> G. Handl, ‘International “Lawmaking” by Conferences of the Parties and Other Politically Mandated Bodies’ in R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005), 128 [Handl, International “Lawmaking”] defines the object of research as: “law-making settings in which individual State consent is either non-existent or extremely attenuated and where notwithstanding this fact the measures or decisions adopted are nevertheless “effective” in the sense of producing “legal effects”, i.e. affecting rights and obligations of States parties.”

<sup>7</sup> The practice of COP decisions under two MEAs previously received attention from the project on international public authority in the form of contributions by C. Fuchs, ‘Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine The Legality Principle’, 31 *German Law Journal* (2008) 9, 1565; P. L. Láncoš, ‘Flexibility and Legitimacy – The Emissions Trading System under the Kyoto Protocol’, 9 *German Law Journal* (2008) 11, 1625.

some degree of institutional autonomy, but by States acting within a loosely institutionalized forum,<sup>8</sup> the treaty-resembling terminology of ‘post-treaty instrument’ is preferable to a concept such as treaty ‘body decision’. The PTI concept assists in examining general characteristics of this broad category of instruments, as well as variations, with regard to their regulatory role, their authority, and the legitimacy of processes of adoption. This article critically observes and discusses some of these general patterns.

Although PTIs could be divided in accordance with various criteria into multiple sub-categories, there is one main separation relevant to this article at the outset. This is the distinction of general versus specific instruments that some proponents of the concept of international public authority also apply.<sup>9</sup> COPs occasionally take specific decisions or resolutions relating to one particular country, or a substance or species originating from it<sup>10</sup> – and this is much more so, of course, in the case of (non-) compliance decisions, which are by their very nature specific to the country under review. This article, however, concentrates exclusively on decisions of a general nature, that is, decisions of a rule-setting, rule-changing or rule-specifying character.<sup>11</sup> This type of PTIs is usefully described as ‘post-treaty *rules*’ (i.e. PTRs).

The *potential* significance of these PTRs for advancing international environmental governance can be swiftly noted by pointing at: 1) their higher specificity compared to the ‘overt’ indeterminacy<sup>12</sup> of their underlying treaty provisions; 2) their capacity for taking the regime into a new regulatory

<sup>8</sup> Cf. P. H. Sand, ‘The Evolution of International Environmental Law’ in Bodansky, Brunnée & Hey, *supra* note 3, 29, 35 (calling Conferences of the Parties at most ‘quasi-autonomous’).

<sup>9</sup> M. Goldmann, ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’ in A. von Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions* (2010), 688 [Bogdandy *et al*, *The Exercise of Public Authority by International Institutions*], [Goldmann, *Inside Relative Normativity*].

<sup>10</sup> See for instance CITES COP Decisions with regard to a suspension/ban of all imports from certain treaty parties due to a lack of adequate legislation or ineffective implementation of that legislation. M. Bowman, P. Davies & C. Redgwell, *Lyster’s International Wildlife Law*, 2nd ed. (2010), 518-525, provide various examples.

<sup>11</sup> These three descriptions all come down to some form of rule-making.

<sup>12</sup> M. Koskeniemi, ‘The Mystery of Legal Obligation’, 3 *International Theory* (2011) 2, 319, 323.

direction; and 3) their sheer abundance. The phenomenon has attracted quite a bit of scholarly attention in the last decade or so.<sup>13</sup>

First, PTRs usually contain considerably more ‘regulatory detail’<sup>14</sup> than their underlying treaty or protocol provisions. For example, Article 7 of the *Kyoto Protocol*<sup>15</sup> merely stipulates that industrialized parties<sup>16</sup> have an obligation to incorporate in its annual inventory “necessary supplemental information for the purposes of ensuring compliance.”<sup>17</sup> The article delegated to the Conference of the Parties Meeting as the Parties to the *Kyoto Protocol* (COP/MOP) the significant task to “decide upon modalities for the accounting of assigned

<sup>13</sup> T. Gehring, ‘International Environmental Regimes: Dynamic Sectoral Legal Regimes’, 1 *Yearbook of International Environmental Law* (1990) 1, 35; T. Gehring, ‘Treaty-Making and Treaty-Evolution’ in Bodansky, Brunnée & Hey, *supra* note 3, 467 [Gehring, Treaty-Making and Treaty-Evolution]; P. H. Sand, ‘Institution-Building Compliance with International Environmental Law: Perspectives’, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996), 774 [Sand, Institution-Building]; J. Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* (2002) 1, 1 [Brunnée, COPing with Consent]; J. Brunnée, ‘Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements’ in Wolfrum & Röben, *supra* note 6, 101 [Brunnée, Reweaving the Fabric of International Law?]; G. Ulfstein, ‘Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements, Comment by Geir Ulfstein’, in *ibid.*, 145 [Ulfstein, Reweaving the Fabric of International law?]; Handl, ‘International ‘Lawmaking’, *supra* note 6, 127; R. Churchill & G. Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little- Noticed Phenomenon in International Law’, 94 *American Journal of International Law* (2000) 4, 623; A. Wiersema, ‘The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements’, 31 *Michigan Journal of International Law* (2009) 1, 231; G. Loibl, ‘Conferences of Parties and the Modification of Obligations’ in M. Craven & M. Fitzmaurice (eds), *Interrogating the Treaty* (2005), 103. This still leaves unmentioned the literature on various specific environmental regimes where PTIs and PTRs, while not discussed as the primary issue, emerge as important tools for shaping, developing and transforming international environmental rules in these respective fields.

<sup>14</sup> Gehring, ‘Treaty-Making and Treaty-Evolution’, *supra* note 13, 481. Gehring speaks of the “tendency of government representatives” to collectively choose not a treaty but “later stages in the governance process” for much of the precise rules of international environmental governance.

<sup>15</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2302 UNTS 162, Article 7(1) [Kyoto Protocol].

<sup>16</sup> More precisely, those State Parties to the *Kyoto Protocol* that are assigned an emissions reduction target in Annex I to the *Kyoto Protocol*, *List of Annex I Parties to the Convention* available at [http://unfccc.int/parties\\_and\\_observers/parties/annex\\_i/items/2774.php](http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php) (last visited 19 May 2016).

<sup>17</sup> Article 7(1) *Kyoto Protocol*.

amounts.”<sup>18</sup> The COP/MOP did so by way of the lengthy and detailed *Decision 13/CMP.1: The Accounting Modalities*<sup>19</sup> which provided definitions, calculation methods, additions and subtractions, carry-over to later commitment periods, and many other accounting issues. Its accounting methods made a considerable difference in how various mitigation efforts could be used to subtract from country targets. The *Accounting Modalities* and related decisions that formed part of the package adopted in a series of meetings in Bonn, The Hague and Marrakech, determined the fate of the *Kyoto Protocol*. These were not mere details, but central aspects of international climate regulation, such that they enabled the ratification of the *Kyoto Protocol*.<sup>20</sup>

Second, PTRs have the potential to be used for taking international environmental regulation into new directions. Early environmental treaties that lacked mechanisms for adopting post-treaty instruments were doomed to become obsolete. With the MEAs adopted during the last four decades, whenever the existing rules become unacceptable for the treaty parties, or when new political or scientific breakthroughs take place, PTRs can be used to adapt to these changing circumstances. For instance, Resolutions of the COP of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*<sup>21</sup> introduced quota systems for ivory so that ruffled African countries would continue to cooperate within the regime. Under the *Ramsar Convention on Wetlands of International Importance*<sup>22</sup>, PTRs were used to perform a rapid shift from conservation of wetlands as such, to the ‘wise use’ of wetlands in

<sup>18</sup> Article 7(4) *Kyoto Protocol*.

<sup>19</sup> *Framework Convention on Climate Change: Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol*, 30 March 2006, FCCC/KP/CMP/2005/8/Add.2 [the Accounting Modalities].

<sup>20</sup> H. E. Ott, ‘The Bonn Agreement to the *Kyoto Protocol* – Paving the Way for Ratification’ 1 *International Environmental Agreements: Politics, Law and Economics* (2001), 469; M. Bothe, ‘The United Nations Framework Convention on Climate Change – an Unprecedented Multilevel Regulatory Challenge’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 239, 246.

<sup>21</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 7 September 1973, 993 UNTS 243 [CITES]; P. H. Sand, ‘Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment’, 8 *European Journal of International Law* (1997) 1, 29, 41-42 (“So in a matter of two decades, the CITES regime retrofitted itself with new institutions, incentives and disincentives (‘carrots’ and ‘sticks’), none of which were articulated in the original treaty text.”).

<sup>22</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245 [*Ramsar Convention*], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=15398&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15398&URL_DO=DO_TOPIC&URL_SECTION=201.html) (as amended in 1982 and 1987) (last visited 19 May 2016).

light of their benefits to human beings.<sup>23</sup> As formal treaty amendments or new protocols are often out of political reach, and because their entry into force is uncertain and may take years, the only realistically available tool for efficiently shaping, developing and transforming international environmental rules over time, is through repetitively filling and refilling MEA provisions with content.

Third, as a result, in the regimes formed around MEAs, PTRs are an *abundant* form of rule-making. This is not only true for the *Kyoto Protocol*. For example, the criteria for listing species that transform Article II of CITES<sup>24</sup> into more specific rules, were first adopted at the First Conference of the Parties in 1976,<sup>25</sup> replaced at the Ninth Conference of the Parties, and further revised on various details at most Conferences afterwards.<sup>26</sup> Similarly, Conferences and Meetings of the Parties of the *Ramsar Convention* and the *Montreal Protocol* held every few years adopt dozens of decisions of a general character on such issues as ‘critical use’ of methyl bromide, ‘wise use’ of wetlands, and what constitutes the ‘ecological character’ of wetlands.<sup>27</sup>

In light of these three observations, it is no exaggeration that environmental post-treaty rules potentially constitute a significant type of exercise of international public authority (IPA) in the development of international environmental treaty-based governance. This pivotal role for PTRs is in principle a good thing, as it leaves the treaty parties with the possibility of solving political disagreement and responding to new scientific and environmental developments by adopting and re-adopting more specific rules over time. It is important to realize, however, that as a consequence of this central regulatory role of PTRs, ultimately the environmental or ‘problem-solving’ effectiveness<sup>28</sup> at large

<sup>23</sup> M. Bowman, P. Davies & C. Redgwell, *Lyster's International Wildlife Law* (2010), 414-415.

<sup>24</sup> Article 2 CITES merely requires that Appendix I “shall include all species threatened with extinction which are or may be affected by trade.”; see also Fuchs, *supra* note 7.

<sup>25</sup> *The Bern Criteria*, 1976, Res. Conf. 1.1; for text and discussion see W. Wijnstekers, *The Evolution of CITES*, 9th ed. (2011), 101-103.

<sup>26</sup> *Ninth Conference of the Part - is Criteria for amendment of Appendices I and II*, 1994, Res. Conf. 9.24 (Rev. CoP16) [CITES COP].

<sup>27</sup> For instance, at one particular COP to the *Ramsar Convention* about 45 substantive Resolutions and Recommendations were adopted, see *Report of the 8th Meeting of the Conference of the Contracting Parties*, Valencia (Spain) 18-26 November 2002, available at [http://ramsar.rgis.ch/cda/en/ramsar-documents-cops-cop8-report-of-8th/main/ramsar/1-31-58-128%5E17797\\_4000\\_0\\_\\_](http://ramsar.rgis.ch/cda/en/ramsar-documents-cops-cop8-report-of-8th/main/ramsar/1-31-58-128%5E17797_4000_0__) (last visited 19 May 2016).

<sup>28</sup> See D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 253 (“*problem-solving effectiveness* focuses on the degree to which a treaty achieves its objectives or, more generally, solves the environmental problem it addresses”).

of MEAs greatly depends on the *content* and *authority* of PTRs. Whereas authoritative international regulation is no guarantee for effective environmental protection, it is certainly one necessary condition. If the authoritative character of international regulation declines, effective environmental protection depends on voluntary implementation.<sup>29</sup> This makes the authority of PTRs crucial.<sup>30</sup> Indeed, the fact that PTRs are very significant for completing the bridge between indeterminate treaties and effective environmental protection does not mean that in practice they have always fulfilled this expectation. On the contrary, sometimes it seems that PTRs contribute little to increasing the authority of international environmental law over the domestic environmental policies of the treaty parties but may actually undermine it or simply maintain the *status quo*. Likewise, even before studying compliance and effectiveness *ex post*, already at first glance a number of important PTRs alleviate the obligations of the treaty parties in changing domestic policies rather than tightening them.

This article takes a dual focus in assessing the practice of shaping, developing and transforming international environmental rules through PTRs as exercises of international public authority. The bulk of the article concentrates on understanding the paradoxical regulatory role of the *instrumental outcomes* (the PTRs): Are they an *exercise* in international public authority or an *evasion* of public authority? Notwithstanding the potential and actual significance of PTRs set out in the previous paragraphs, the article singles out two parameters according to which the actual authority exercised through PTRs over States and their impact on international environmental law in a broader sense may not be as clear as it seems from their widespread presence. These parameters are the *substance* (or wording) and the legal status of PTRs. This poses particular challenges to the thinking about international public authority and its legitimacy (Part B.). First, the substance (or wording) of PTRs is not always of a nature that it contributes to an exercise of international public authority over States or a tightening of their obligations (Part C). Second, while there is good reason to argue that PTRs are binding upon the treaty parties within the regime's bodies as if they were law, the multi-interpretable *legal status* of PTRs renders

<sup>29</sup> This article is faithful to the IPA project's analytical move of separating legitimacy from authority. This is an important distinguishing characteristic in comparison to competing conceptualizations of authority, such as Raz's, Lake's or Hurd's see B. Peters & J. Karlsson Schaffer, 'Introduction: The Turn to Authority Beyond States', 4 *Transnational Legal Theory* (2013) 3, 315, 321.

<sup>30</sup> My forthcoming dissertation at the University of Amsterdam, working title: 'Environmental Post-Treaty Rules: Authority and Legitimacy', contains a more extensive analysis of the authority and legitimacy of environmental PTRs.

their authority outside the environmental regime of origin uncertain (Part D). This ‘fluctuating’ authority on two levels – substance and status – shows that Conferences of the Parties have a long way to go in fulfilling the potential of developing the open-textured provisions of international environmental treaties through PTRs. Moreover, particularly the ambiguity of legal status reduces legal certainty for individual and corporate actors.

The other side of the dual focus is the role of the *process* of consensual decision-making in the adoption of environmental PTRs. Part E. briefly discusses the possibility that deficits in legitimacy and effectiveness of the consensual process, might be a significant cause of the findings in Part C. and D. Part F. concludes with the consequences which the findings of this case study might have for the study of international public authority at large.

## B. Exercising or Evading International Public Authority – Sketching an Approach

### I. The Challenge of Identifying Diversified Exercises of International Public Authority

One vexing problem that was identified in the early stages of the project on International Public Authority (IPA) is particularly present in attempting to gauge the exact impact and regulatory role of environmental post-treaty instruments. Von Bogdandy, Dann and Goldmann describe the problem as follows: The first thing to establish when trying to devise a legal framework applicable to exercises of international public authority, is to identify “those acts which are critical because they constitute a unilateral exercise of authority.”<sup>31</sup> This is the case, they argue, “*if* it determines individuals, associations, enterprises, States, or other public institutions.”<sup>32</sup> In the case of PTRs, this question is not so easily answered, at least no single answer can be provided for PTRs as a group.

Goldmann emphasizes the importance of distinguishing different types of instruments, implying that exercises of IPA might come in different types of authority.<sup>33</sup> The present contribution goes one step further and suggests that

<sup>31</sup> A. von Bogdandy, P. Dann & M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions*, *supra* note 9, 3, 10.

<sup>32</sup> *Ibid.*, 4-5.

<sup>33</sup> Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 661, 679-691.

we should also be conscious of differing *degrees* of authority. Particularly, one should be aware of international acts that upon closer scrutiny do not exercise IPA at all, or very little. In some cases, they might even give back authority to States – in the sense of freedom of action – and loosen the constraints previously imposed by a treaty. Are they *exercises* of authority, or do they merely look at first glance like they are, while in fact some of them attempt, or end up, being *evasions* of authority? And in those instances where they do exercise authority, is that authority meaningful if it alleviates the obligations of treaty parties? Is the choice of for example an instrument with unclear legal application a strategy, particularly of powerful States, for evading previous, undesirable exercises of international public authority?<sup>34</sup>

While the IPA-project is rightfully concerned with the legitimacy of exercises of international authority, a prior step should be to investigate more scrupulously the exact scope of international public authority in particular fields. The evasion of authority or alleviation of obligations in fact requires legitimating as much as their opposite (i.e. exercises of authority, tightening of obligations). It may equally have an impact on actors and societies,<sup>35</sup> by leaving authority with those who possessed it previously: The treaty parties' governments. Through such shifts in the authority holder, a *status quo* may be maintained which is harmful to large parts of the world population, either now or in the long term.<sup>36</sup> Not taking a decision may have just as much impact as taking a decision. Both may have distributive effects. The observations in this article thus connect to a trend recently noted evocatively by Caroline Foster that, paradoxically, "as we move forward through a new century of increased transnationalism, ambition for employing public international legal authority as a means for the protection of human health and the environment appears to be diminishing."<sup>37</sup>

<sup>34</sup> Recently, N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *American Journal of International Law* (2014) 1, 1 (noting that rather than changes to the consent-based structure of international law, a flight from international law towards less consent-based instruments can be witnessed, particularly with regard to global public goods).

<sup>35</sup> D. W. Rae, 'The Limits of Consensual Decision', 69 *The American Political Science Review* (1975) 4, 1270, 1279.

<sup>36</sup> Cf. the principle of inter-generational equity (Article 3(1) *Kyoto Protocol*) and the precautionary principle (e.g. in Article 3(3) *Kyoto Protocol*).

<sup>37</sup> C. E. Foster, 'Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era', 17 *Journal of International Economic Law* (2014) 2, 355, 355.

Weak exercises of authority pose a greater problem in some areas of global governance than others. On the one hand, international rules on terrorist financing, development aid, IMF conditionality or financial markets regulation will often have an authoritative wording and a legal status conducive to its effectiveness because a sufficient number of powerful States sees the need for international action.<sup>38</sup> On the other hand, environmental governance – despite regular calls of warning – often fails to reach the top of the list of global concerns, and is as such a likely place for finding rules that evade or alleviate pre-existing authority.

## II. Two Parameters for Identifying Reductions in the Authority of International Rules: Substance and Legal Status

Frederick Schauer suggests that there are two ingredients of general rules that play a prominent role for functioning as *authoritative* rules. This matters to our discussion, because if a rule is quite authoritative, it is the rule-maker (in our case the COP, COP/MOP or MOP) who primarily exercises authority; if less so, it is the rule-applier or rule-addressee (in our case the treaty parties) who primarily (continues to) exercise authority, remaining free from the authority of the rule-maker.

As a first ingredient for an authoritative rule, it helps if an instrument contains a rule formulation which – in a reasonably clear and determinate manner – *requires a certain behavior* from its addressee or applier.<sup>39</sup> Otherwise,

<sup>38</sup> However, even for these areas of global governance the story may not always be straightforward. A recent study by Chey on international financial regulation finds that the Basel Accords might have much less influence on harmonization of national financial laws than is often assumed. H. Chey, *International Harmonization of Financial Regulation? The Politics of Global Diffusion of the Basel Capital Accord* (2013), 218 (noting that “the past trend of international harmonization of financial regulation may be illusory, to at least some extent, in terms of its actual effectiveness”).

<sup>39</sup> F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991), 62. Of course, what ultimately matters is whether there exists a common understanding among the appliers or addressees, even if this is not clear from the canonical inscription of the rule, i.e. written rule formulation. *Ibid.*, 68; see also J. Brunnée & S. J. Toope, ‘Interactional International Law: An Introduction’, 3 *International Theory* (2011) 2, 307; J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law* (2010), (emphasizing the importance of shared understandings for international rules gaining legitimacy and authority); also T. M. Franck, *The Power of Legitimacy Among Nations* (1990), who however counts determinacy as a factor in the legitimacy, rather than in the authority of a rule.

due to its non-normative substance the instrument is unlikely to exercise much authority over its addressees. This concerns both the mandatory quality<sup>40</sup> of the wording (from recommendatory to mandatory) and the specificity of the wording (from vague to specific).

Second, for a set of international rules to possess authoritative force in the international legal order, or in a particular domestic or supranational legal order it helps tremendously if it can claim to be somehow applicable and valid in that order in accordance with predetermined criteria.<sup>41</sup> One would usually call this the legal status of the instrument. Absent occasional implementation within the regime's plenary or non-compliance bodies, the room for the addressed governments to decide whether or not to (self-)apply those rules increases. It becomes for instance up to each international or domestic court to decide what weight it will give to the rule, in light of many subjective considerations. Thus, if the applicability of PTRs is contingent upon the opinion of the rule applier, such as national courts, or national governments, then it is questionable if PTRs really amount to strong exercises of authority, or are merely *instructions* that rule-appliers may or may not choose to apply at their best judgment.

The legal status of a rule might vary with the legal order in which application of the rule is sought. It is therefore a pluralist notion.<sup>42</sup> For instance, a PTR has usually a higher legal status within the legal order in which it was adopted (the environmental regime in question) than in other legal orders. The legal status of a PTR may accordingly be greater before an intra-regime non-compliance mechanism than before a domestic court. As this testifies, legal status should also be understood as a relative notion. An instrument may have no status at all, may merely have to be 'taken into account', may be of equal relevance to other sources of law, or may be preemptory of everything else.<sup>43</sup>

Note that wording and legal status are not exclusive parameters influencing the exercise of authority through international rules such as PTRs. A significant deal of international public authority is exercised without a firmly and specifically worded substance and without legal status. For instance, *mere* guidelines or instructions without authoritatively worded substance or legal status can also

<sup>40</sup> D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 103-106.

<sup>41</sup> Schauer, *supra* note 39, 118.

<sup>42</sup> B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law', 20 *European Journal of International Law* (2009) 1, 23, 29-30; L. Casini & B. Kingsbury, 'Global Administrative Law Dimensions of International Organizations Law', 6 *International Organizations Law Review* (2009) 2, 319, 352-354.

<sup>43</sup> The primary example of the last category in international law is *jus cogens*, whereas in national law it would be constitutional law.

affect others in myriad ways. This depends on factors extraneous to the rule's content, or its status, causing that effect.<sup>44</sup> An example is public pressure, or peer pressure, through for instance the PISA system of university rankings.<sup>45</sup> It is not denied that other factors in the make-up of authority may persevere regardless of low substantive authority and low legal status, and thus still may determine domestic government policies in various ways. Nor is the point of this article to delineate exactly which factors form part of the concept of authority and which should be counted as (pure) persuasion or power.<sup>46</sup> The exact impact of such factors in relation to PTRs is however not further discussed here, if only because it is hard to measure.

The focus on the two parameters of substance and legal status is rather informed by the observation that their absence can greatly *reduce* the exercise of authority through PTRs, while their presence *strengthens* that authority. Weaknesses in these two parameters most clearly impact on the degree of authority in the context of international and domestic court proceedings, reducing the possibility of channeling the exercise of authority through dispute settlement procedures. This is not unimportant, because if PTRs fail to claim authority before international and national courts, their authority will have to rely on some form of pressure from the other treaty parties represented in the treaty bodies. When it comes to most areas of international environmental cooperation, peer pressure is a rather vulnerable and volatile source of authority. And in governments' own perceptions of being under an obligation, as Geir Ulfstein remarks, even in this era of soft law they "consider it to be a fundamental difference between binding and non-binding international law."<sup>47</sup>

Also, domestic court proceedings are the most accessible venue for companies, individuals and NGOs to test and argue the authority of PTRs over governments. By keeping legal status ambiguous or substance vague and non-committal, governments thus keep environmental matters among themselves and prevent intervention by others through the courts.<sup>48</sup>

<sup>44</sup> See various contributions in Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions, Advancing International Institutional Law*, *supra* note 9.

<sup>45</sup> See for instance A. von Bogdandy & M. Goldmann, 'The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument', *5 International Organizations Law Review* (2008) 2, 241, 262-263.

<sup>46</sup> I. Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', *4 Transnational Legal Theory* (2013) 3, 354, 355 .

<sup>47</sup> Ulfstein, 'Reweaving the Fabric of International Law?', *supra* note 13, 145, 151.

<sup>48</sup> This includes the non-compliance bodies, which are composed of government experts.

The following sections (C. and D.) apply these two parameters to environmental post-treaty rules. The common image of PTRs in a number of existing scholarly accounts is that they are binding in some way<sup>49</sup> and that they further the implementation of international environmental law – i.e. increase its impact on States and indirectly on individuals.<sup>50</sup> The account proposed here attaches some question marks to that common image, without tearing it down in its entirety.

### C. A Closer Look at the Substance of Environmental PTRs

In one sense PTRs are indeed flexibly adoptable instruments that States to progress from the vague and general objectives they can arrive at initially in treaty form, towards more specific, precise, elaborate and – over time – innovative prescriptions on how to define and meet those objectives. For instance, the criteria adopted by the CITES COP are widely believed to have made the process of listing species on three appendices<sup>51</sup> more scientifically sound and based on information rather than on parochial interests.<sup>52</sup> At the very least the dynamics of listing and down-listing species have undergone significant changes through the adoption of PTRs. Today, on paper only biological information is relevant for the listing or down-listing of a species.<sup>53</sup> The criteria are formulated such as to leave little doubt that they are mandatory.

Likewise, under the *Montreal Protocol*, the Meeting of the Parties adopted decisions that accelerate the phase out of controlled ozone depleting substances,<sup>54</sup>

<sup>49</sup> Brunnée, ‘Reweaving the Fabric of International Law?’, *supra* note 3, 101; Gehring, ‘Treaty-Making and Treaty Evolution’, *supra* note 13, 491-495.

<sup>50</sup> Wiersema, *supra* note 13, 231, 233, 245 (stating that COP activities ‘deepen’ and ‘thicken’ treaty obligations); G. Ulfstein, ‘The Conference of the Parties to Environmental Treaties’, in J. Werksman (ed.), *Greening International Institutions* (1996).

<sup>51</sup> Trade in Appendix I species is prohibited with very limited exceptions; trade in Appendix II species must meet strict conditions; Appendix III species are voluntarily listed by particular treaty parties and concern only the specimens on the territory of that treaty party. See Articles II-V CITES and W. Wijnstekers, *The Evolution of CITES, International Council for Game and Wildlife Conservation*, 9th ed. (2011).

<sup>52</sup> T. Gehring & E. Ruffing, ‘When Arguments Prevail Over Power: The CITES Procedure for the Listing of Endangered Species’, 8 *Global Environmental Politics* (2008) 2, 123; more skeptical is S. A. Goho, ‘The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking’, 114 *Harvard Law Review* (2001) 6, 1769.

<sup>53</sup> Gehring & Ruffing, *ibid.*, 145.

<sup>54</sup> See the procedure of Article 2(9) *Montreal Protocol*. The unequivocally binding nature and unprecedented possibility of majority voting for the phase-out decisions put those

while other decisions scale down gradually the ‘critical use’ that was temporarily allowed for methyl bromide.<sup>55</sup> Article 2H.5 on Methyl Bromide leaves open the possibility that the parties will allow some continued critical use of methyl bromide.<sup>56</sup> At the Ninth Meeting of the Parties (MOP), the treaty parties decided in rather specific and mandatory terms that use of methyl bromide should qualify as ‘critical’ only if “the lack of availability of methyl bromide for that use would result in a significant market disruption” and “[t]here are no technically and economically feasible alternatives or substitutes.”<sup>57</sup> Further, production or consumption of methyl bromide would be permitted only if, crucially, it was “not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide.”<sup>58</sup> The MOP subsequently applied these criteria to yearly nominations by parties, to determine yearly exemptions.<sup>59</sup>

However, these successes are only part of the story. In opposition to the image of PTRs as the key to progress in international environmental law due to their flexible method of adoption, the *content* of PTRs has not necessarily always deepened inroads into domestic environmental policies. Many MEA provisions can be considered to be more or less open regarding the international obligations of States they might actually give rise to. Their extent is left to PTRs to be adopted by the respective COP or MOP. Just like any instrument, PTRs are neutral

*sui generis* PTRs outside the scope of this article. See for the discussion of their *sui generis* character D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, 93 *American Journal of International Law* (1999) 3, 596, 604, 608-609; Churchill & Ulfstein, *supra* note 13, 639-641.

<sup>55</sup> *Montreal Protocol MOP Decision - Ninth Meeting of the Parties*, 15-17 September 1997. – several docs from this meeting.

<sup>56</sup> “This paragraph will apply save to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.”

<sup>57</sup> Article 1(a)(i)(ii) *Montreal Decision* (MOP) IX/6.

<sup>58</sup> Article 1(1.b.ii) *Montreal Decision* (MOP) XV/54 added later that exemptions “are intended to be limited, temporary derogations from the phase-out of methyl bromide.” XV/54 *Categories of assessment to be used by the Technology and Economic Assessment Panel when assessing critical uses of methyl bromide*, Fifteenth Meeting of the Parties and *Montreal MOP Decision Ex.1/3 Critical-use exemptions for methyl bromide for 2005*, First Extraordinary Meeting of the Parties.

<sup>59</sup> Beginning with *Montreal Decision* (MOP) Ex.I/3, March 1994 and *Annexes to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol*, available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/26700> (last visited 19 May 2016), the most recent methyl bromide exemptions show that the assigned amounts are rapidly going down.

‘containers’,<sup>60</sup> and given the low specificity of MEA provisions, ‘retrogressive’ PTRs are normally no ‘breach’ of the underlying treaty in a legality sense.<sup>61</sup>

There are many ways in which the *wording* or *substance* of environmental PTRs – what Goldmann calls its ‘textual parameters’<sup>62</sup> – may point us to an evasion of exercising international authority, or to an alleviation of international obligations. First, the wording of PTRs may be such that it is clear that they contain mere optional instructions, hortatory advice to States how to conduct environmental policy in a certain issue area most effectively, if willing to do so. In this scenario, the *status quo* is simply maintained, or just slightly affected, unless individual States decide for themselves to follow these rules. Many examples of this type of ‘very limited exercise of authority-PTRs’<sup>63</sup> are found under the *Ramsar Convention* and CITES. Second, when MEAs delegate rules on a certain unresolved issue to the COP or MOP for future rule-making, this is sometimes simply a way of postponing decision-making indelibly. Such ‘non-exercise of authority’ can be witnessed in two examples from the *Cartagena Protocol on Biosafety* where the COP/MOP simply did not adopt any PTRs at all on the subjects in question. A third type of PTR, while phrased in mandatory and specific terms, retracts on steps previously taken in the underlying treaty. This type does not amount to an evasion of authority, but rather to an *alleviation of treaty obligations*. It basically gives back freedom to States compared to the underlying treaty, or alleviates their obligations compared to what seemed to be required on the basis of the – albeit open-ended – treaty text. Primary examples are the numerous decisions taken within the COP/MOP in the aftermath of the negotiation of the *Kyoto Protocol*, and some Resolutions of the *Ramsar COP* on the ‘wise use’ of wetlands.

A happy chorus about the role of PTRs is thus misguided. PTRs have not only been used to set authoritative or increasingly tightening international environmental rules. They have also been used to merely create the image of authority or tightening of obligations. In this respect, skepticism leveled at

<sup>60</sup> J. d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’, 19 *European Journal of International Law* (2008) 5, 1075, 1081.

<sup>61</sup> Krisch, *supra* note 34, 28 (“where institutions exercise broader formal powers they seem for the most part to remain within the bounds of delegation, especially if one accepts that these bounds are subject to relatively flexible interpretation”).

<sup>62</sup> Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 661, 686-689.

<sup>63</sup> F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991), 4, 104, would call these ‘instructions’, or ‘rules of thumb’.

various aspects of international environmental treaty law and institutions<sup>64</sup> also applies to a significant part of PTRs.

## I. Evading Authority Through Ambiguous Wording

Many PTRs adopted in the Conference of the Parties of the *Ramsar Convention on Wetlands* are phrased as hortatory guidelines. Such hortatory guidelines hardly constrain the freedom of action of the parties. For example, *Recommendation 4.10* (1990) contains the phrase that “the following actions *should* be taken to promote wise use of the wetland”; *Recommendation 6.2* (1996) states that “(EIA) is a recognized field which *should* be applied ... EIA *should* be undertaken”; *Resolution VII.16* (1999) “CALLS UPON ...” and “ENCOURAGES” while *Resolution VIII.9* (2002) “URGES appropriate use ...”.<sup>65</sup> These PTRs contain guidance that evades exercising more than marginal international public authority.

The limited authority of *Ramsar* guidelines as a consequence of a lack of mandatory wording can be illustrated by an important Australian federal court case. The Federal Court of Australia had to engage with the question of whether the designation of an Australian wetland to the *Ramsar* List<sup>66</sup> had been properly performed.<sup>67</sup> If the listing had not been successful, the special obligations that *Ramsar* parties have with regard to Listed wetlands<sup>68</sup> would not apply. *Ramsar* COP *Resolution VI.16* states that “the boundaries of each listed wetland shall be precisely described and also delimited on a map by States.” The Court decided, however, that this PTR was not authoritative for the validity of the designation:

<sup>64</sup> Recently, C. Foster, *supra* note 37; also R. S. Dimitrov, ‘Hostage to Norms: States, Institutions and Global Forest Politics’, 5 *Global Environmental Politics* (2005) 4, 1.

<sup>65</sup> This list of *Ramsar* COP *Resolutions* and *Recommendations* relied on by the Dutch Crown Court in the case *Lac Sorobon* discussed below; Annex to *Recommendation 4.10, Guidelines for the Implementation of the wise use concept* (1990); *Recommendation 6.2, Environmental Impact Assessment* (1996); *Resolution VII.16*, paragraphs 10 and 11 on EIA; *Resolution VIII.9, Guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment* adopted by the *Convention on Biological Diversity* (CBD), and their relevance to the *Ramsar Convention* (2002).

<sup>66</sup> *The List of Wetlands of International Importance*, last updated 3 May 2016, available at <http://www.ramsar.org/sites/default/files/documents/library/sitelist.pdf> (last visited 19 May 2016).

<sup>67</sup> *Ramsar Convention*, Art. 2(1).

<sup>68</sup> *Ramsar Convention*, Art. 2(6)(3) and 4(2).

“The history of the meetings of the Contracting Parties discloses a concern to have the information required by Article 2(1), and more, provided. At no point however has it ever been suggested that if it were not done at the time of designation, that designation is taken not to have occurred or that a listing would be regarded as invalid.”<sup>69</sup>

Although it is not excluded that COP *Resolution* VI.16 may influence domestic policies and practices regardless of its limited mandatory quality – for instance through political pressure in the Conference of the Parties or because of a preference by the Australian government to act in accordance with PTRs – the Resolution does not constrain Australian government agencies through the Australian federal courts. This is a clear instance where limited mandatory quality helps a government to evade international public authority.

## II. Evading Authority by not Adopting PTRs

Some MEA provisions that explicitly enable the adoption of PTRs on a certain issue have never led to the actual adoption of PTRs. In such – admittedly rare – cases, any authority of PTRs on the issue is smothered in its early stages. The most striking examples are found in the *Cartagena Protocol on Biosafety* and relate to very significant issues.<sup>70</sup> Article 18.2(a) *Cartagena Protocol* provides that the required documentation accompanying ‘intentional transboundary movements’ of Living Modified Organisms (LMOs) “clearly identifies that they “may contain” living modified organisms and are not intended for international introduction into the environment.” However, the negotiators could not agree on “the detailed requirements for this purpose, including specification of their identity and any unique identification”, which was postponed to a decision by the COP/MOP no later than two years after the entry into force of the

<sup>69</sup> *Greentree v. Minister for the Environment and Heritage*, Federal Court of Australia Full Court, 13 July 2005, 128. In the meantime, the *Ramsar* COP has accorded a greater role to the *Ramsar* Secretariat in deciding upon the listing of wetlands designated by the treaty parties. See *Resolution* XI.8 Annex 2 *Strategic Framework and guidelines for the future development of the List of Wetlands of International Importance of the Convention on Wetlands* 1971, 2012 Revision, available at <http://www.ramsar.org/sites/default/files/documents/pdf/cop11/res/cop11-res08-e-anx2.pdf> (last visited 19 May 2016), para. 418-420.

<sup>70</sup> In fact, another comparable example from the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted on 29 January 2000 and entered into force on 11 September 2003, is the non-adoption of PTRs under Article 7(4) of the *Cartagena Protocol* on the scope of application of the advance informed agreement procedure.

protocol. Engaging with the assignment of Article 18.2(a), the COP/MOP to the *Cartagena Protocol* established an ‘open-ended technical expert-group’ (ICCP) that would assist the COP/MOP in reaching such criteria.<sup>71</sup> Four meetings later the COP/MOP “decided to postpone until its seventh meeting further decision-taking on detailed information to be included in documentation accompanying LMOs-FFP” (*Decision BS-V/8*). This confirmed Lefeber’s early prediction that Article 18.2(a) is “an obligation of conduct and absolutely no guarantee that such a decision will be taken, even though there will be strong political pressure to do so.”<sup>72</sup>

### III. Exercising Authority While Alleviating Obligations

Just like any instrument, PTRs are neutral ‘containers’,<sup>73</sup> and given the low specificity of MEA provisions, *retrogressive* PTRs are normally no real *breach* of the underlying treaty to the point where they can be considered *ultra vires*.<sup>74</sup> In other words, as much as they can be used for effective and authoritative regulation, they can also be used for *weakening* or *mitigating* existing or potential obligations. Pollack and Shaffer have called such global governance instruments ‘antagonists’, because they reverse the direction or spirit of an earlier instrument.<sup>75</sup> It is striking that a fairly large number of PTRs primarily serves this purpose.

The most eye-catching example of alleviating obligations through PTRs are the *Marrakesh Accords* that were adopted to elaborate the Protocol’s requirements, but also to facilitate the ratification of the *Kyoto Protocol*.<sup>76</sup> The *Kyoto Protocol* sets potentially serious emissions reduction targets for a number of industrialized States, and indicated in Article 17 that the so-called ‘flexibility mechanisms’ should not be more than ‘supplemental’ to domestic mitigation of

<sup>71</sup> *Cartagena COP/MOP Decision BS-I/6*, Article 18: Handling, transport, packaging and identification of living modified organisms, *First meeting of the Conference of the Parties serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety*, 23-27 February 2004, Malaysia.

<sup>72</sup> R. Lefeber, ‘Creative Legal Engineering’, 13 *Leiden Journal of International Law* (2000) 1, 1, 8.

<sup>73</sup> d’Aspremont, *supra* note 60.

<sup>74</sup> Krisch, *supra* note 34, 28 (“where institutions exercise broader formal powers they seem for the most part to remain within the bounds of delegation, especially if one accepts that these bounds are subject to relatively flexible interpretation”).

<sup>75</sup> G. Shaffer & M. A. Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’, 94 *Minnesota Law Review* (2010) 3, 706.

<sup>76</sup> Ott, *supra* note 20.

CO<sub>2</sub> emissions. As Michael Bothe characterized this approach, “Kyoto was still characterized by a wait-and-see-approach. The real meaning of Kyoto could only become clear when a number of relevant details were established.”<sup>77</sup> When the dust of repeated negotiations in The Hague, Bonn and Marrakesh had settled, reaching the same targets had become considerably easier for some of the parties, leading many scientists to calculate that total mitigation estimates had fallen from 5% to 2,5% overall reduction of greenhouse gas emissions.<sup>78</sup>

*Decision 15/CP.7* now reads that “the use of the [flexibility] mechanisms shall be supplemental to domestic action and domestic action shall thus constitute a significant element”<sup>79</sup>: no quantitative cap was placed on the use of emissions trading, the Clean Development Mechanism or Joint Implementation. Moreover, a number of decisions of the COP/MOP considerably increased the extent to which parties could rely on land use, land use change and forestry activities in meeting their targets.<sup>80</sup> Thus, most importantly for present purposes, the impact of international climate law on the domestic policies of the industrialized treaty parties decreased notably due to the series of PTRs adopted in the aftermath of *Kyoto*. According to a participant in the negotiations, the PTR process presented powerful States, such as Australia, Canada, Japan, the U.S., and Russia with “a journey through the jungle” that “provided an opportunity to minimize ... obligations to reduce emissions of greenhouse gases.”<sup>81</sup>

One could of course argue that these decisions were no breach of legality, were not *ultra vires*, as they stayed within the broad, open-textured boundaries of the text of the *Kyoto Protocol*. However, the point here is that, rather than tightening those boundaries, as one might have expected, the relevant PTRs loosened them further, by providing treaty parties with a wide array of tools to implement the *Kyoto Protocol* in a manner that interrupted domestic policies as little as possible.

<sup>77</sup> Bothe, *supra* note 20, 240-243.

<sup>78</sup> See B. Brouns & T. Santarius, ‘Die Kyoto-Reduktionsziele nach den Bonner Beschlüssen’, 51 *Energiewirtschaftliche Tagesfragen* (2001) 9, 590, 591; M. G. den Elzen and A. P. de Moor, ‘Analyzing the Kyoto Protocol under the Marrakesh Accords: Economic Efficiency and Environmental Effectiveness’, 43 *Ecological Economics* (2002) 2, 141, 156-157; C. Böhringer, *Climate Politics From Kyoto to Bonn: From Little to Nothing?!?* (2001), Centre for European Economic Research Discussion Paper No. 01-49, 1-38, 21; I. Fry, ‘Twists and Turns in the Jungle: Exploring the Evolution of Land Use, Land-Use Change and Forestry Decisions within the Kyoto Protocol’, 11 *RECIEL* (2002) 2, 159.

<sup>79</sup> UNFCCC COP Decision 15/CP 7, Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, 21 January 2002.

<sup>80</sup> *The Accounting Modalities*, Article 7(4) of the *Kyoto Protocol*.

<sup>81</sup> Fry, *supra* note 78, 159.

In another example of this kind, as follow-up to the *Ramsar Convention*, the *Ramsar COP* provided definitions and guidelines for the practical application of indeterminate treaty concepts such as ‘conservation’, ‘wise use’ and ‘ecological character’.<sup>82</sup> Through these decisions, the Parties have gradually conflated conservation with wise use,<sup>83</sup> notifying a shift from wetlands as ecosystems for waterfowl intrinsically requiring protection, towards “the practical benefits of wetlands conservation”<sup>84</sup> to human health, resources and culture. Some commentators submit that the parties in doing so have turned the barebones foundation of Article 3.1 into “an extremely comprehensive and sophisticated policy framework for the management of wetlands areas.”<sup>85</sup> However, important parts of this framework basically merely require the parties to manage wetlands according to their best insights. The choice to appoint pride of place to for instance environmental impact assessments (EIA)<sup>86</sup> means that a lot is left to balancing competing considerations, rather than excluding certain specific activities.<sup>87</sup> By shifting the balance from conservation to wise use, PTRs alleviated the potential burden of Article 3.1 of the *Ramsar Convention* upon domestic wetlands policies.

Further, the *Montreal Protocol Critical Use Exemptions* mentioned above as an example of authoritative wording can also be looked at in this light. While authoritatively phrased, the MOP *Decisions* on this topic alleviate the obligations of some treaty parties – predominantly the U.S. – by according them temporary exemptions from the phase-out of Methyl Bromide year after year.<sup>88</sup> By way of conclusion, Sand put it quite right when he stated:

<sup>82</sup> *Ramsar Convention*, Art. 3.1 and 3.2.

<sup>83</sup> *Ramsar Resolution (COP) VIII.14 New Guidelines for management planning for Ramsar sites and other wetlands*, November 2002, *Resolution VII.11*, May 1999, Annex.

<sup>84</sup> M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law*, 2nd ed. (2011), 415.

<sup>85</sup> *Ibid.*, 419.

<sup>86</sup> E.g. *Ramsar Resolution (COP) X.17*, ‘Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance’, 28 October-4 November 2008.

<sup>87</sup> D. Farrier & L. Tucker, ‘Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law’, 12 *Journal of Environmental Law* (2000) 1, 21, 40.

<sup>88</sup> See the analysis in B. J. Gareau, ‘Dangerous Holes in Global Environmental Governance: The Roles of Neoliberal Discourse, Science, and California Agriculture in the Montreal Protocol’, 40 *Antipode* (2008) 1, 102, 123 (“US protectionism of its strawberry production complex appears to be undermining the environmental objectives of the Montreal Protocol.”).

“Consensual ascertainment of treaty standards limits the sphere of potentially divergent auto-interpretation by states, and thus contributes to regime stabilization. But well-meaning peer interpretation may also soften “hard” treaty rules (thereby weakening their effectiveness, while ostensibly easing compliance) to accommodate offenders, albeit for the sake of stability Sicilian style: *la legge applicata a nemico, ma interpretata all'amico...* [“law is applied to the enemy, but interpreted to a friend”].”<sup>89</sup>

PTRs may do so either by enlarging the freedom of action of treaty parties, or by more or less maintaining the same freedom of action that they previously had, thus limiting or stabilizing the impact of the international exercise of authority on States and other actors.

## D. A Closer Look at the Legal Status of Environmental PTRs

Besides the wording or substance of a PTR, its legal status also influences what authority it is likely to have over the treaty parties. Even if the wording or substance of PTRs contributes to their exercise of authority or tightens obligations, their limited legal status might compromise that capacity. Legal status is a pluralist and a relative notion. Each legal order defines legal status separately. The legal status of a particular PTR often differs between the normative order in which it was first adopted, the international legal order in general, and the various domestic legal orders. The following sections investigate the multiple legal status of PTRs in these three orders. Both doctrine and practice show that the choice for the PTR-form leaves open the door to evading authority in another legal order at the application stage.

### I. Legal Status of PTRs in the Internal Legal Order of the Treaty Regime

Legal status<sup>90</sup> is not likely to be questioned much *within* the treaty regime, since treaty bodies will normally operate in accordance with the regime's rules,

<sup>89</sup> Sand, 'Institution-Building', *supra* note 13, 780.

<sup>90</sup> When this article speaks of 'legal status', it always does so in relation to a particular legal order: The internal legal order of the treaty regime; the international legal order; or the domestic legal orders. Although it is controversial whether one may call the semi-

be they formally binding or not.<sup>91</sup> Thus, within the Conference of the Parties or its sub-organs, PTRs aimed at the operation of these bodies will normally be treated as valid and applicable in a similar manner as the provisions of the underlying MEA.<sup>92</sup> Examples are the CITES listing criteria or the *Montreal Protocol* criteria for critical use, both of which govern further individualized decision-making within the bodies of the respective regimes, such as listing of species or substances. By contrast, they govern the environmental behavior of States outside the regime only indirectly.<sup>93</sup>

Legal status is more relevant for those PTRs that purport to set or transform rules for the environmental behavior of States directly, compliance with which is checked in non-compliance bodies. Examples are the *Montreal Protocol Decisions* on critical use exemptions of methyl bromide,<sup>94</sup> and the *Kyoto Protocol Rules* on how to account for Land Use, Land Use Change and Forestry<sup>95</sup> discussed above. Although status plays a role on the international and domestic levels, it should not be questioned by or before those treaty bodies.

In the internal legal order of the treaty bodies, it is not so much legal status that threatens to undermine the authority exercised through PTRs, but the on-going political conflicts over listing- and non-compliance processes. The intergovernmental nature of the COPs, COP/MOPs and MOPs may often lead to the making of exceptions, for instance through the adoption of new PTRs

autonomous order composed of environmental treaty bodies a ‘legal’ order, and therefore whether can speak of ‘legal status’ in that order, is not the main point. If one takes issues with the use of term ‘legal’ in that order of the treaty bodies, one can choose to call it a ‘normative order’, and to speak simply of ‘status’, without changing the argument.

<sup>91</sup> Gehring, ‘Treaty-Making and Treaty-Evolution’, *supra* note 13, 467, 476-479; Ulfstein, ‘Reweaving the Fabric of International Law?’, *supra* note 13, 149 (“... decisions by the supreme organ of the organization will usually be considered binding at the internal level ... This means that the COP, the subsidiary bodies and the secretariat established by the MEAs are bound by these decisions. But also States, when acting in these treaty bodies, must respect the decisions.”).

<sup>92</sup> See Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 661, 689 (pointing at ‘Direct Implementation’ as a factor in determining the normativity of an instrument).

<sup>93</sup> Cf. Goldmann’s distinction between first level and second level addressees, *ibid.*, 687-688.

<sup>94</sup> E.g. *Montreal Decision* (MOP) XXIV/5, ‘Critical-use exemptions for methyl bromide for 2014’, 16 November 2012, Annex, recently adopted decisions allocating maximum quantities of methyl bromide for critical uses.

<sup>95</sup> *Kyoto Decision* (COP/MOP), 30 March 2006, 16/CMP.1, ‘Land Use, Land-Use Change and Forestry’.

that override older, undesirable ones, or through certain favorable interpretations of existing PTRs.<sup>96</sup>

The question of legal status attains the greatest relevance for PTRs whose implementation is only partially assessed in the regime's bodies. Examples are the *Ramsar Resolutions* on the application of 'wise use' of wetlands,<sup>97</sup> and several *CITES Resolutions* on what constitutes a 'hunting trophy',<sup>98</sup> what is a 'specimen taken from the wild',<sup>99</sup> or how 'confiscated specimens' should be disposed of by national authorities.<sup>100</sup> Implementation of such PTRs is primarily left to national institutions, not to the regime bodies. The following two sections discuss PTRs' legal status in the international and domestic legal orders, respectively.

## II. Legal Status of PTRs in International Legal Doctrine and Court Practice

Wiersema rightly points out that asking whether PTRs can be categorized somewhere within the formal sources of international law as self-standing instruments is asking the wrong question.<sup>101</sup> PTRs are not treaties, and do only very sparingly contribute to the formation of customary law. They also are not legally binding decisions of international organizations, for several reasons. First of all, COPs, COP/MOPs and MOPs are not international organizations. Second, with the exception of adjustment decisions adopted under Article 2.9 *Montreal Protocol*, no MEA provision indicates that decisions adopted on its basis are legally binding. Neither is the soft law concept useful,<sup>102</sup> as the statement that an instrument is 'soft law' tells us very little about an instrument's actual

<sup>96</sup> Sand, 'Institution-Building', *supra* note 13, 787-788; J. Klabbers, 'Compliance Procedures', in Bodansky, Brunnée & Hey, *supra* note 3, 995.

<sup>97</sup> *Ibid.*

<sup>98</sup> CITES COP *Resolution Conf.* 12.3 (Rev. CoP 16).

<sup>99</sup> CITES COP *Resolution Conf.* 12.3 (Rev. CoP 16), 'Permits and Certificates'.

<sup>100</sup> CITES COP *Resolution Conf.* 9.10 (Rev. CoP 15), 'Disposal of confiscated and accumulated specimens', November 1994 and CITES COP *Resolution Conf.* 10.7 (Rev. CoP 15), 'Disposal of confiscated live specimens of species included in the Appendices', June 1997.

<sup>101</sup> As they are neither treaties, nor customary law, nor binding decisions of international organisations see Brunnée, 'COPing with Consent', *supra* note 13, 21-33; Wiersema, *supra* note 13, 258, 264 (noting that "attempts to analyze COP activity according to conventional standards for finding legal obligation are fraught with difficulty", that "a one-size-fits-all determination of their legal status or relationship to underlying treaty obligations is impossible", and that therefore we need to rephrase the question).

<sup>102</sup> Cf. *ibid.*, 259-264.

legal significance.<sup>103</sup> Considered as self-standing instruments, PTRs are neither explicitly legally binding nor explicitly non-binding,<sup>104</sup> but at least the former position is difficult to maintain. This ambiguous position can be witnessed every time the question of the legal relevance of environmental PTRs arises, be it among academics, government officials, or before a national or international court.<sup>105</sup>

Some commentators argue, however, that the status of PTRs should be inferred from their *interpretive relationship* with the underlying treaty provision, and the legal qualification of this relationship as ‘subsequent agreements’.<sup>106</sup> They point to Articles 31.2, 31.3. (a) and (b) of the VCLT, which respectively recognize as means of treaty interpretation: “any agreements [adopted] in connection with the conclusion of the treaty”, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>107</sup> If the interpreters of MEAs – e.g. governments and courts – would be legally obliged on the basis of Article 31 VCLT to interpret treaty articles in accordance with the content of PTRs, the legal status and authority of the latter would indeed be firmly established.

Yet, even though PTRs *qualify* as interpretive agreements in the sense of Article 31, it is not at all clear that this would unambiguously establish their legal status, upon a closer look at how Article 31 as a whole is constructed. The mere existence of an interpretive agreement does not necessarily make it a

<sup>103</sup> Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 661, 667-668.

<sup>104</sup> Cf. Wiersema, *supra* note 13, 248-250.

<sup>105</sup> Governments, for instance, tend to vehemently deny that they are legally bound by PTRs, disputing their legal status. Note the stance of the U.S. government filed in the proceedings of *Natural Resources Defense Council v. Environmental Protection Agency*, United States Court of Appeals For the District of Columbia Circuit, Judgment after rehearing, Case No 04-1438, 464 F3d 1 (DC Cir 2006), 29 August 2006, *Supplemental Brief for the Respondent and Final Rule 69* Fed. Reg. at 76.989; The EPA repeats this stance in its yearly Final Rules on the use of methyl bromide, e.g. for the year 2013 see *Proposed Rule 77* Fed. Reg. 74435, by pointing back at the Supplemental Brief and the ruling in *NRDC v. EPA*.

<sup>106</sup> Wiersema, *supra* note 13, 276-278; G. Ulfstein, ‘Treaty Bodies’ in Bodansky, Brunnée & Hey, *supra* note 3, 884; On subsequent agreements generally see International Law Commission, *Report on the work of its sixtieth session*, UN Doc. Supplement No. 10 (A/63/10), para. 365-389 (5 May-6 June and 7 July-8 August 2008); Georg Nolte (ed.), *Treaties and Subsequent Practice* (2013).

<sup>107</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

mandatory and hierarchically primary means of interpretation.<sup>108</sup> First, Article 31.3 VCLT merely states that subsequent agreements and practice “[...] shall be taken into account [...]”. They do not become the only means of interpretation to the exclusion of all others. Quite the contrary, if there were any hierarchy, the place where interpretive agreements are mentioned in Article 31.3 VCLT would indicate that they only gain weight “in the absence of a clear solution based on the means of interpretation enunciated in the previous paragraphs.”<sup>109</sup> At the very least, it remains for the interpreter, be it a State, a treaty body or a dispute resolution body, to decide the weight that should be accorded to the different means of interpretation of Article 31. Besides subsequent agreements, they are good faith, object and purpose of the treaty, the wording of the treaty, and the intentions of the drafters – in other words, basically any consideration the applier deems relevant. If the rule-applier relies solely on the relevant PTRs, that is a choice not *mandated* by Article 31 VCLT, nor by the language of the PTRs themselves.<sup>110</sup>

As a result, even if PTRs qualify as ‘subsequent agreements on interpretation’ – which traditional approaches in the literature dispute in case of very substantial modifications<sup>111</sup> – the limited, or at least ambiguous legal status that this confers is not enough to be the sole factor for the actor<sup>112</sup> that decides whether or not to give precedence to PTRs in interpreting an MEA provision. Doctrine renders the interpretive effect of PTRs on international environmental treaty rules, to which PTRs are potentially so important, arbitrary and uncertain. Viewed in this light, PTRs are mere policy instruments among States, whose application and implementation depends on how courts and governments decide to interpret the doctrinal rules on interpretation. Of

<sup>108</sup> Cf. Wiersema, *supra* note 13, 278 (carefully concluding that Article 31(3a) “[...] when placed alongside the question of what the relationship of COP activity is to the original parties’ obligations, allows for a more careful exploration of the current legal obligations of those parties.”).

<sup>109</sup> J. Sorel & V. Boré Eveno, ‘Article 31’, in O. Corten & P. Klein (ed), *The Vienna Convention on the Law of Treaties, A Commentary*, Vol. I (2011), 804, 826.

<sup>110</sup> Of course, the question can be asked whether national courts and governments are the legitimate actors to decide the relative weight of different interpretive means in concrete cases, thereby assuming part of the authority over the applicability of PTRs.

<sup>111</sup> Some traditional accounts of Article 31 argue that informal agreements such as PTRs only qualify as ‘subsequent agreements on interpretation’ if they amount to slight changes to, or confirmations of pre-existing meanings. Such account would disqualify a significant number of PTRs. See e.g. Sorel & Boré Eveno, *supra* note 109.

<sup>112</sup> The relevant actors here are in first instance courts, because their decisions to give or not give precedence to PTRs is likely to affect the authority of PTRs over governments.

course, such decisions are influenced by soft and hard enforcement measures,<sup>113</sup> all sorts of other prudential reasons, legitimacy considerations and experience of coercion. These factors are however much more volatile and subjective than legal status. Especially appreciation of legitimacy depends on fresh consideration by each court confronted with an issue involving PTRs. That situation will remain until consistent treatment of PTRs over time might stabilize and elevate their status in comparison to the underlying treaty and to other interpretive devices.

International court practice is too sparse and cautious to conclude that it has substantially elevated the legal status of PTRs. The judgment in the recent ICJ case *Whaling in the Antarctic* puts special emphasis on the requirement that PTRs be adopted by consensus (i.e. the great majority of PTRs) to have any – even limited – relevance in the international legal order. After noting that the PTR in question – *Resolution 1986-2* of the International Whaling Commission merely required the parties ‘to take into account’ the feasibility of non-lethal methods of whale research,<sup>114</sup> the Court suggests that the ‘duty of cooperation’ – a general duty of unclear depth that exists both in the law of international organizations and in international environmental law – requires the parties to ‘give due consideration to’ the Resolution (i.e. *show* that they have taken it into account).<sup>115</sup> It is difficult to see how a repeated obligation ‘to take into account’ rises above a single obligation to ‘take into account’. Until an international court is confronted with a PTR with a more authoritative wording, it cannot be concluded that *Whaling in the Antarctic* has elevated the status of PTRs in the international legal order.

### III. Legal Status of PTRs in Domestic Legal Doctrine and Court Practice

Another possible source of solidifying the authority of PTRs is the consistency of courts in considering themselves bound to apply PTRs, regardless of their ambiguous international legal status. Repeated applications based on legitimacy or persuasion *can* transform the legal status of PTRs upwards or downwards. Doctrinal uncertainties pervading international law reverberate in the domestic legal status of PTRs. Domestic and regional courts present

<sup>113</sup> Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 689-691.

<sup>114</sup> *Resolution on Special Permits for Scientific Research*, IWC *Resolution 1986-2*, 38th Annual Meeting, 1986 (Rep. Int. Whal. Commn 37), available at [https://iwc.int/private/downloads/nBoylGUS\\_4nCBOSEBlwAhw/IWCRES38\\_1986.pdf](https://iwc.int/private/downloads/nBoylGUS_4nCBOSEBlwAhw/IWCRES38_1986.pdf) (last visited 19 May 2016).

<sup>115</sup> *Ibid.*

an insightful battleground for examining whether there is, regardless of those similar uncertainties, any consistency in the treatment of PTRs in practice. Such practice may serve as an influence on the development of a less ambiguous doctrine or even a strengthening of the legal status of PTRs in the long term.

Domestic courts are important players in deciding whether PTRs constrain actors on the local level. Mainly, they are invoked by individuals or NGOs to consider the legality of government action concerning environmental issues. Of course, not only courts influence the existence of the domestic legal status of PTRs, but it is one of the few fora where indications of that authoritative nature can be found.<sup>116</sup> An alternative source of information would be the extent to which national and regional legislators and administrators consider themselves bound to incorporate PTRs into national legislation or administrative acts.<sup>117</sup> Another *caveat* is that national constitutional rules on the applicability of international law within the municipal legal order differ, as well as domestic attitudes towards international law. However, as the following examples will illustrate, none of the observed domestic legal systems has an easy answer to the legal status of PTRs, so that dismissing the findings by pointing at such differences seems unfounded. A number of domestic and EU court cases suffice to clarify that the treatment of PTRs' domestic legal status is not consistent. The position taken in United States courts contrasts with the position generally taken in the Netherlands and in the EU courts. The limited and ambiguous legal status of PTRs in the domestic legal orders remains. Most consistency exists as far as it concerns hortatorily phrased PTRs, which courts from both sides of the divide often dismiss as relevant for the legal obligations of States: Legal status is then a redundant point.

In the Netherlands Antilles' *Lac/Sorobon* case,<sup>118</sup> the highest administrative court of the Kingdom of the Netherlands considered a series of PTRs adopted

<sup>116</sup> Wiersema, *supra* note 13, 263, (arguing that a focus on dispute resolution bodies fails to capture obligations that exist without ever passing through dispute resolution bodies, such as is the case with many COP decisions).

<sup>117</sup> See for that type of examination J. Friedrich & E. J. Lohse, 'Revisiting the Junctures of International and Domestic Administration in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and Their Legitimacy Challenges', 2 *European Journal of Legal Studies* (2008) 1, 49, 50 ("looking at the various modes of how the norms of these instruments determine and thus internationalise domestic administration.") (emphasis added).

<sup>118</sup> *Lac/Sorobon (Bestuurscollege van het Eilandgebied Bonaire tegen de Gouverneur van de Nederlandse Antillen)*, Kroonberoep Raad van State van het Koninkrijk der Nederlanden, 11 September 2007; For an extensive case summary and note in English see J. Verschuuren, 'Ramsar soft law is not soft at all – Discussion of the 2007 decision by the

by the *Ramsar* COP to be determinative for the legality of domestic government conduct with regard to prohibiting a construction project near or on a listed wetland, because of their interpretive connection with the treaty.<sup>119</sup> This court took the position that a decision taken by the *Ramsar* COP constitutes an interpretive agreement in the sense of Article 31.3(a) VCLT. In its view, the existence of this decision was sufficient for it to prevail over any other possible interpretation of Article 3.1 *Ramsar Convention*, particularly because that article “contains too little to allow determination of the content of the obligations flowing from it”.<sup>120</sup> The court furthermore pointed at the ‘unanimous’ adoption of the relevant instruments, bypassing the fact that consensus is not the same as unanimity.<sup>121</sup>

Likewise, in *Nilsson*,<sup>122</sup> the CJEU consulted CITES *Resolution* 5.1.1 to arrive at what they deemed the authoritative definition of specimens acquired with a view to personal possession.<sup>123</sup> The CJEU did not justify why they relied on PTRs to reach judgment.

By contrast, the U.S. federal District Court (D.C. Circuit) in the *NRDC v. EPA*<sup>124</sup> case considered PTRs<sup>125</sup> to be mere international political commitments, irrelevant for the legality of domestic government conduct,<sup>126</sup> regardless of their connection with the treaty. At issue were *Decisions* IX/6, Ex.I/3 and Ex. I/4 of the *Montreal Protocol* Meeting of the Parties on critical use for consumption and production of methyl bromide by certain parties. According to the district court, it is up to the treaty contracting parties of the U.S. government to negotiate amongst each other whether the U.S. had breached what the court called its ‘political commitments’; not up to a domestic court of law.<sup>127</sup>

In *U.S. v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*,<sup>128</sup> another U.S. District Court was even blunter in ignoring explicitly

Netherlands Crown on the Lac Ramsar site on the island of Bonaire [translation of a case law annotation in Dutch], 35 *Milieu en Recht* (2008) 4, 28.

<sup>119</sup> *Ibid.*, para. 1.

<sup>120</sup> *Ibid.*, para. 2.2.3.5.

<sup>121</sup> *Ibid.*, para. 2.2.3.5.

<sup>122</sup> *Nilsson*, Case No. C-154/02, Judgment of 23 October 2003, ECR 2003 I-12733.

<sup>123</sup> *Ibid.*, para. 40.

<sup>124</sup> *NRDC v. EPA*.

<sup>125</sup> The Court of Appeals called them ‘post-ratification side agreements’, *ibid.*, 8-10.

<sup>126</sup> Cf. the reading of the judgment in B. Kingsbury, ‘Weighing Global Regulatory Rules and Decisions in National Courts’, 9 *Acta Juridica* (2009), 90, 101-103.

<sup>127</sup> *NRDC v. EPA*, *supra* note 124, 9-10.

<sup>128</sup> *U.S. v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*, United States District Court, E.D. New York, No 10-CV-308, 871 F.Supp.2d 128, 17 May 2012.

a CITES *Resolution* that gave a more lenient definition of a ‘hunting trophy’ than guidelines on the same subject issued by the U.S. Fish and Wildlife Service:

“Claimant does not provide authority to support the proposition that resolutions of parties to a treaty are binding on the parties even as a matter of international law (when those resolutions are not styled as amendments to the treaty and adopted through the treaty amendment procedure).”<sup>129</sup>

At other occasions, U.S. district courts however are more open to accepting PTRs as authoritative interpretive agreements, but this does not mean that they always consider them to be decisive. In *Castlewood Products v. Norton I and II*, on first instance the District Court<sup>130</sup> cited the Supreme Court’s holding that it has “traditionally considered as aids to [a treaty’s] interpretation [...] the post-ratification understanding of the contracting parties.”<sup>131</sup> The Court of Appeals<sup>132</sup> argued that:

[W]hile “the CITES resolutions are merely recommendations to the Parties and, therefore, they are not binding on the United States[, ... t]his does not render the resolutions meaningless, however. There would be no point in the contracting states agreeing on resolutions only to then completely ignore them. Therefore, while not binding, it was surely reasonable for [the Fish and Wildlife Service] and [the Animal and Plant Health Inspection Service] to look to the CITES resolutions for guidance in interpreting the regulations implementing CITES.”<sup>133</sup>

These cases viewed together showcase the contradictory views currently held in domestic court practice – both within and across jurisdictions – with regard to PTRs’ domestic legal status. They further underline the nature of PTRs’ as evasions of authority in demonstrating that governments acting in

<sup>129</sup> *Ibid.*, 136-137.

<sup>130</sup> *Castlewood Products v. Norton*, United States District Court For the District of Columbia Circuit, 264 F.Supp.2d 9, D.D.C., 16 April 2003.

<sup>131</sup> *Zicherman v. Korean Air Lines Co.*, United States Supreme Court 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), 226.

<sup>132</sup> *Castlewood Products Llc v. A. Norton*, United States Court of Appeals For the District of Columbia Circuit, Case No. 03-5161, 365 F3d 1076 (DC Cir 2004), 30 April 2004.

<sup>133</sup> *Ibid.*, para. 44.

accordance with a non-binding instrument against private actors are safe from being held to have acted unlawfully (*Lac Sorobon, Nilsson*), governments acting in contravention of PTRs need not fear to be held to have acted unlawfully either (*One Tusk, NRDC v. EPA*).<sup>134</sup>

Where the language of PTRs is hortatory, courts are particularly quick to dismiss them as sources of obligation or legal effect, thus the two ways of evasion of authority are reinforcing each other. In addition to the Australian *Greentree* case, discussed in Part C.I. above, this can also be observed in the Dutch case of *Face the Future v. Staat der Nederlanden*.<sup>135</sup> The court in this case decided that the language of Paragraph 33 of the *Accounting Modalities* was such that it allowed the State final authority in deciding whether or not it would annul certain emissions units derived from afforestation by a private party.<sup>136</sup> The Court therefore deemed it unnecessary to reach a conclusion on the legal status of the *Accounting Modalities* in the Netherlands legal order or the extent to which Face the Future could rely on it.

The court cases discussed here support the general observation that the final say over the domestic authority of PTRs lies almost entirely with national governments. Even on the few occasions that courts are invoked, they generally defer to the understanding of authority defended by the government side. If the government relied on the PTRs in its decision, the court usually agrees; if a government has defied the relevance of a PTR in its decision, the court usually follows, too. The arbitrariness of the authority of exactly those rules that specify how States should comply with their international environmental obligations not only questions the extent to which these rules are really exercises of authority. It also creates uncertainty for private actors and the public about whether or not they can hold their governments to their international promises.

<sup>134</sup> G. Ulfstein, 'Treaty Bodies and Regimes', in D. B. Hollis (ed), *The Oxford Guide to Treaties* (2012), 438.

<sup>135</sup> *Face the Future tegen de Staat der Nederlanden*, Rechtbank 's Gravenhage, ECLI:NL:RBSGR:2012:BX1737, para. 4.2.1.

<sup>136</sup> Para. 33 of the *Accounting Modalities* reads: "Each party included in Annex I may cancel ERUs, CERs, AAUs and/or RMUs so they cannot be used in fulfilment of commitments under Article 3(1), in accordance with paragraph 12 (f) above, by transferring ERUs, CERs, AAUs and/or RMUs to a cancellation account in its national registry. Legal entities, where authorized by the Party, may also transfer ERUs, CERS, AAUs and RMUs into a cancellation account."

## E. The Role of Consensual Decision-Making

This section explores some of the reasons for the evasion of authority and alleviating of obligations through PTRs. Explanations for the directions into which global governance develops are always multi-faceted. At least part of the explanation for the multiple ways in which PTRs evade authority, however, may be found in the consensual decision-making process through which the treaty parties adopt them. Consensual decision-making generally means the taking of decisions without a formal vote: A consensual decision is successfully adopted if no objections are made known to the chairperson.<sup>137</sup> First, consensual decision-making, which is the regular mode for adopting PTRs, may be a significant reason behind the hortatory or even retrogressive content identified in Part C. and the choice of instruments of ambiguous legal status identified in Part D. Second, consensual decision-making may have negative effects on sovereign equality compared to individual State consent and may upset the domestic balance between legislative and executive branches, thus diminishing PTRs' legitimacy in the view of the addressees and appliers of MEAs, which is essential for PTRs to gain authority in practice over time. In short, consensual *processes* of PTR-adoption suffer from problems of procedural legitimacy and (in)effective decision-making. Those problems are likely to have direct results for the authority of the decisions that come out of those processes. This may be exactly what certain executive branches want, because it maintains domestic policy discretion.

The relationship between authority and legitimacy can be approached in multiple ways. On the one hand, legitimacy can be considered as a further *parameter* for gauging the authority of an instrument: The more legitimate it is considered to be by its addressees, the more authority it is likely to gain over time. This is usually called 'social' or 'sociological' legitimacy.<sup>138</sup> On the other hand, one can argue, as do the proponents of the IPA project, that first it must be established whether a certain instrument is an exercise of IPA, and then *independently* ask the question of its legitimacy. The present article combines these propositions. While it identifies deficits in the process of PTR-adoption in terms of legitimacy and effective decision-making from a normative viewpoint,

<sup>137</sup> This sets consensual decision-making apart from decision-making by consent, or decision-making by unanimity.

<sup>138</sup> S. Bernstein, 'Legitimacy in Global Environmental Governance', 1 *Journal of International Law & International Relations* (2005) 1, 139, 156-162; D. Bodansky, 'The Concept of Legitimacy in International Law', in Wolfrum & Röben, *supra* note 6, 308, 313-315.

it understands these findings also as a cause for why PTRs often end up as evasions of IPA more than as exercises of IPA.

The central characteristic of PTR-adoption is its consensual character. The COP/MOP of the *Kyoto Protocol* is formally under an obligation to decide by consensus.<sup>139</sup> Under other MEAs, the *Rules of Procedure* formally allow recourse to voting with qualified,<sup>140</sup> or in some cases even simple majorities.<sup>141</sup> However, the *Rules of Procedure of the Ramsar Convention* for instance state that “[t]he Parties shall make every effort to reach agreement on all matters of substance by consensus”.<sup>142</sup> Similarly Rule 21.1 *CITES Rules of Procedure* provides that “[t]he Conference shall as far as possible decide on draft resolutions and other documents by consensus.”<sup>143</sup> In other words, for most<sup>144</sup> treaty bodies the norm is consensus,<sup>145</sup> while all except the UNFCCC/*Kyoto Protocol* theoretically have the shadow of a vote hanging over that consensus. In practice, however, the formal possibility of voting is hardly ever invoked. Discussions continue both inside and outside the plenary until consensus or *acclaim* is reached, or until a few reservations or interpretive declarations are sufficient to satisfy opposing parties.

<sup>139</sup> The *Rules of Procedure of the COP to the UNFCCC*, which also apply to the *Kyoto COP/MOP* (see Article 13(5) *Kyoto Protocol*), were never adopted in so far as it concerns the section the provision on voting rules, because the parties were unable to agree on including the ‘specified majorities’ mentioned in Article 7(3) UNFCCC for certain types of decisions.

<sup>140</sup> Rule 40 of the *Rules of Procedure for Meetings of the Conference of the Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol*; Rule 26 of the *CITES Rules of Procedure of the Conference of the Parties* requires a two-thirds majority; Rule 40 of the *Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity*, require a two-thirds majority (however, this last Rule is still bracketed).

<sup>141</sup> Article 7(2) *Ramsar Convention*.

<sup>142</sup> Rule 40(1) *Rules of Procedure for Meetings of the Conference of the Contracting Parties to the Ramsar Convention* (Rev. COP 11, 2012).

<sup>143</sup> Rule 21(1) *CITES Rules of Procedure*.

<sup>144</sup> With the exception of the *Rules of Procedure* under the *Montreal Protocol*, which do not state a preference for consensus.

<sup>145</sup> Also Rule 40(1) CBD and *Cartagena Protocol Rules of Procedure*: “The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the decision [except a decision under Article 21(1) or 21(2) of the Convention] shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting [...]”

For instance, at *Ramsar* COP VIII about 45 *Resolutions* and *Recommendations* on substantive issues were adopted by consensus and none by voting.<sup>146</sup>

The merits as well as the problems of consensual decision-making have received their share of attention in international relations, with a notable focus on the GATT/WTO<sup>147</sup> and the EU.<sup>148</sup> With the arrival of the *active* consensual method of treaty-text adoption in the UNCLOS-negotiations with a large role for the chairperson,<sup>149</sup> international legal scholars paid it some attention, seeing it mostly in a positive light as they gave it a chance at more *effective* decision-making.<sup>150</sup> The several ways in which PTIs lack authority, however, should lead us to examine some of the more negative aspects of consensual decision-making: A tendency towards maintaining the *status quo*, and the “invisible weighting”<sup>151</sup> of underlying power configurations, which in turn may act as a further catalyst of the *status quo*, depending on the issue.

First, consensual decision-making is problematic from the perspective of effective decision-making, whereby ‘effective’ should be understood as producing

<sup>146</sup> See Report of the 8th Meeting of the Conference of the Contracting Parties, *Ramsar Convention*, *supra* note 27.

<sup>147</sup> R. H. Steinberg, ‘In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO’, 56 *International Organization* (2002) 2, 339; C. D. Ehlermann & L. Ehring, ‘Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?’, 8 *Journal of International Economic Law* (2005) 1, 51; M. E. Footer, ‘The Role of Consensus in GATT/WTO Decision-Making’, 17 *Northwestern Journal of International Law & Business* (1997) 1, 653; R. Kissack, ‘Crisis Situations and Consensus Seeking: Adaptive Decision-Making in the FAO and Applying Its Lessons to the Reform of the WTO’, in T. Cottier & M. Elsig (eds), *Governing the World Trade Organization: Past, Present and Beyond Doha* (2011), 241; A. Lang & J. Scott, ‘The Hidden World of WTO Governance’, 20 *European Journal of International Law* (2009) 3, 575.

<sup>148</sup> D. Heisenberg, ‘The Institution of ‘Consensus’ in the European Union: Formal versus Informal Decision-Making in the Council’, 44 *European Journal of Political Research* (2005) 1, 65.

<sup>149</sup> ‘Active consensus’, as opposed to ‘passive consensus’, meant that the Chairmen assumed an active role in producing negotiating texts, which would then gradually evolve into negotiated texts. B. Buzan, ‘Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea’, 75 *American Journal of International Law* (1981) 2, 324, 334-335.

<sup>150</sup> O. Schachter, ‘The Nature and Process of Legal Development in International Society’, in R. St. J. MacDonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 745; K. Zemanek, ‘Majority Rule and Consensus Technique in Law-Making Diplomacy’, in *ibid.*, 857; Buzan, *ibid.*, 329.

<sup>151</sup> Steinberg, *supra* note 147, 346-350.

authoritatively formulated rules with the aim of achieving behavioral change. Consensual decision-making has a tendency to lead to the *status quo* or the lowest common denominator, thus producing PTRs that ask little concrete action from their addressees. Of course, in both these scenarios consensus decision-making need not be the only reason for disappointing outcomes – there may simply be a great deal of disagreement among the treaty parties. But that does not eliminate the fact that, at least with the current consensual system, the freedom of action of States' environmental policies is not reduced.

Examples of the ineffectiveness of consensual decision-making – both as regards stalling the process and delivering lowest common denominator outcomes – abound. A prominent example of stalling are two crucial sets of PTR adoption processes under the *Cartagena Protocol on Biosafety*, on advance informed agreement and documentation accompanying transboundary shipments of LMOs intended for direct use. These decisions are simply not taken,<sup>152</sup> despite the underlying treaty explicitly containing the mandate to take them.<sup>153</sup> In most cases, however, as was seen in the discussion of evasion of authority through substance (Part C.), the parties do take decisions, but these simply require minimal action. The need to seek consensus and the ability to stall that forms part of this mode of decision-making contributes to PTRs becoming vehicles for hollow words that allow much and oblige little. Qualified majority voting as a serious fallback option if consensus fails, would be more effective.<sup>154</sup> At least a real shadow of a vote would hang over the States' representatives that could be used as a catalyst.<sup>155</sup>

Second, the consensual decision-making process suffers from input and procedural legitimacy deficits that weaken the legitimate claim to authority of PTRs. In the absence of undisputed legal validity, such as is the case with PTRs, the perception of a legitimate process of adoption may tilt the balance in

<sup>152</sup> See *Cartagena COP/MOP Decisions* BS-III/9, BS-IV/10, BS-V/9 and BS-VI/8 for the decisions to postpone rules on documentation accompanying transboundary shipments of LMOs; see *Cartagena COP/MOP Decisions* BS-I/12 and BS-V/16, Annex I, para. 5 for the advance informed agreement procedure available at [http://bch.cbd.int/protocol/cpb\\_mopmeetings.shtml](http://bch.cbd.int/protocol/cpb_mopmeetings.shtml) (last visited 19 May 2016).

<sup>153</sup> Articles 7(4) & 18(2) *Cartagena Protocol*.

<sup>154</sup> A famous plea for qualified majority voting in the context of international environmental law is G. Palmer, 'New Ways to Make International Environmental Law', 86 *American Journal of International Law* (1992) 2, 259, 281.

<sup>155</sup> Ehlermann & Ehring, *supra* note 147, 65 ("The practical impossibility of a vote means that the negotiations in search of a consensus do not even take place in the shadow of a threatening vote.").

favor of applying an instrument in practice, which may render the instrument more authoritative over time.<sup>156</sup> Yet consensus decision-making in the context of adopting PTRs is vulnerable to a legitimacy deficit from several perspectives. Consensus tends to neither respect sovereign equality of weaker States,<sup>157</sup> nor *global* interests, given its tit-for-tat negotiating nature and package deals.<sup>158</sup> Consensus decision-making is an invitation to what Steinberg calls ‘invisible weighting’, i.e. it “assures that legislative outcomes reflect underlying power”.<sup>159</sup> From less powerful individual States’ perspectives, what remains is to play along or ask for small favors in exchange for leaving the consensus undisturbed. If ‘unimportant’ States do not play along, such as Bolivia in case of the Cancun Agreements adopted at the end of the climate change summit in Cancun, Mexico, they are simply ignored.<sup>160</sup> This goes contrary to the often-made assumption that, in comparison to majority decision-making, consensualism would be more inclusive. In fact, under consensual decision-making, “it is hypothetically possible to have a proposal pass with less support than a simple majority.”<sup>161</sup> Qualified majority decision-making would give more voice to most States.

<sup>156</sup> Several contributions in Wolfrum & Röben, *supra* note 6, take issue with the notion that legitimacy can replace legal validity. E.g. G. Abi-Saab, ‘The Security Council as Legislator and as Executive in Its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy’, in *ibid.*, 109, 115-116 (“I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get round the law; as a *passé-droit*, a licence trumping legality or a “justification” of its violation (cause d’exonération, “circumstance excluding wrongfulness”).”)

<sup>157</sup> See B. Kingsbury, ‘Sovereignty and Inequality’, 9 *European Journal of International Law* (1998) 4, 599 (underlining the continuing importance of sovereignty for equality).

<sup>158</sup> J. Evensen, ‘Three Procedural Cornerstones of the Law of the Sea Conference: The Consensus Principle, The Package Deal and The Gentleman’s Agreement’, in J. Kaufmann (ed.), *Effective Negotiation* (1989), 75, 78 (“Consensus is a state of the art emerging from the negotiations.”).

<sup>159</sup> Steinberg, *supra* note 147, 342.

<sup>160</sup> A similar episode in the recent adoption of the Arms Trade Treaty (ignoring objection by Syria, Iran and North-Korea) caused Akande to query ‘What is the Meaning of “Consensus” in International Decision Making?’, D. Akande, EJIL Talk (8 April 2013), available at <http://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/> (last visited 25 May 2016) (“On this scenario, one wonders whether an objection by the United States, Russia or China would be treated the same as that from a smaller country [...] Indeed, it should be remembered that it was the larger, more influential States that had originally favoured the consensus procedure at UNCLOS as a means of counteracting the collective voting power of developing countries.”).

<sup>161</sup> Heisenberg, *supra* note 148, 70.

Moreover, consensual decision-making, by being entirely the domain of national executive branches, may upset the national balance of power. Even within (democratic) powerful States, there foreign executive branches make rules that mostly bypass its national legislative institutions.<sup>162</sup> This executive dominance renders weaker the legitimacy of PTRs even in domestic jurisdictions whose governments have a relatively large say in the COP process.

Going back to two of the domestic court cases discussed earlier, they show that two very different views on the legitimacy of the consensual process are possible, and can be sought by participants in the law-applying process to fit with the preferred outcome. The Kingdom of the Netherlands' administrative court in *Lac/Sorobon* interpreted the consensual adoption of the relevant *Ramsar Resolutions* and *Recommendations* – which it understood to be ‘unanimity’ – as a boost to the legitimacy of letting those PTRs determine the outcome of the dispute.<sup>163</sup> The United States federal court in *NRDC v. EPA* simply saw the procedure by which the relevant PTRs were adopted as a different method than the one prescribed for creating binding international legal agreements, suggesting that if PTRs were allowed to govern the court decision it might upset the constitutional separation of power and the nondelegation doctrine.<sup>164</sup>

The often-used argument that the individual consent given to a general system of governance by ratifying an environmental treaty and establishing a Conference of Parties with decision-making powers would also be sufficient for subsequent PTIs loses its strength in light of the fact that the underlying MEA provisions hardly predispose the range of substantive outcomes laid down in PTRs.<sup>165</sup>

Lastly, an even less legitimate picture emerges when ineffective decision-making and procedural legitimacy deficits are combined. It must not be forgotten that taking no decision or one that clearly does not authoritatively require change, is also a decision affecting States and individuals.<sup>166</sup> For instance, *not* adopting authoritative rules on climate change affects low-lying countries vulnerable to floods from rising sea-levels. Not adopting authoritative rules on

<sup>162</sup> See generally, R. D. Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’, 42 *International Organization* (1988) 3, 427.

<sup>163</sup> *Lac/Sorobon*, *supra* note 118, para. 2.2.3.5.

<sup>164</sup> *NRDC v. EPA*, 14, 8-9.

<sup>165</sup> D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *supra* note 54, 604, 608-609; R. O. Keohane & A. Buchanan, ‘The Legitimacy of Global Governance Institutions’, in Wolfrum & Röben, *supra* note 6, 25, 62.

<sup>166</sup> Rae, *supra* note 35, 1273, 1274.

wetland protection may threaten wetlands that local communities depend on for their livelihoods. Under consensus decision-making, these can be decisions forced by a single or a handful of powerful actors upon a large majority.

In summary, the PTR-adoption process is hardly a supportive factor in strengthening the authority of PTRs or the extent to which they tighten obligations. This is so in terms of effective decision-making as well as in terms of legitimate decision-making boosting authority in the long term.

## F. Conclusion

This article may leave a gloomy impression with the reader, because it argues that potentially significant parts of environmental global governance are not very authoritative or are even used to evade international authority or obligations. State representatives in the Conference of the Parties were shown to avoid authoritative language, requiring little concrete action by the treaty parties; or to adopt rules that are authoritatively formulated, but which give back to the treaty parties more freedom of action than the terms of the treaty indicate. In a second type of evasion, PTRs were shown to (purposefully?) possess an ambiguous legal status outside the regime, making the decision whether or not to consider them authoritative dependent on their assessment by local authorities or, in rare cases, courts.

The article further argued that consensual decision-making may well be at the root of this ambivalent practice. Consensus decision-making as it is practiced in international plenary bodies is in reality neither supportive of genuine sovereign equality that can boost the legitimacy of PTRs, nor of effective decision-making that produces outcomes that make substantial inroads into national environmental policies. The former effect also supports the latter in that powerful States will more often prefer the *status quo* than less powerful States, because this leaves them more room for continuing to shape their own policies. Exceptionally, there are issues where powerful States find each other, such as the depletion of the ozone layer in the 1980s. These exceptions prove the point that powerful holdup States are often the problem in other cases.

These findings suggest that international environmental law and cooperation has a long way to go in directly affecting national policies from above, and that merely reverting to more flexible, informal instruments than treaties is no guarantee of more international public authority. It also points to the need for giving non-treaty instruments such as post-treaty rules – as they

become used as functional equivalents to treaties<sup>167</sup> – a less ambiguous place in international legal doctrine,<sup>168</sup> if they are to gain a predictable and stable legal status.

In addition, there is a broader point to be gathered, an attempt at a contribution to research such as the IPA project into global governance. When international legal scholars set out to introduce changes to the legal framework that might improve the legitimacy of exercises of international public authority, they should closely investigate also the manner in which and the extent to which international instruments really do amount to exercises of authority, or to restrictions of freedom in a broader sense. Too often it is taken for granted that international instruments will have an action-requiring impact on addressees, where they might not. Too little attention is given to the diversity of impact that such instruments may have. PTIs differ greatly in the impact they have within or outside regimes, on other norms, on States, and indirectly on corporations and individuals in different places.

This variety of impacts – including the impact resulting from *not* exercising international public authority and not tightening obligations – does not facilitate the question of how to integrate legitimating into a prospective legality framework for standard instruments as envisaged by Goldmann.<sup>169</sup> The particular form of *exercising* authority that consists of consciously leaving certain policy domains to national discretion, or even re-enlarging that space, poses different but significant challenges, also from a legitimacy standpoint. Preventing inaction, or at least making sure that inaction is the result of a legitimate process, is one of the most important challenges for a future ‘international public law’ of global governance – on climate change, biodiversity, or financial and tax regulation. Yet, incorporating incentives against weakly legitimated inaction – such as more effective and equal decision-making methods – into new legal

<sup>167</sup> Gehring, ‘Treaty-Making and Treaty-Evolution’, *supra* note 13, 481 (“Hence, the two levels of law-making become – to some degree – functional equivalents – that is, actors can increasingly choose the level at which they will deal with a given problem.”); M. Goldmann, ‘We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law’, 25 *Leiden Journal of International Law* (2012) 2, 335, 336-337 (“why should soft law be excluded from the definition of international law if it looks like international law and basically functions like international law?”).

<sup>168</sup> One strategy to reduce doctrinal uncertainty could be to categorize PTIs and PTRs as one or more types of standard instruments, as suggested in Goldmann, ‘Inside Relative Normativity’, *supra* note 9, 666-669.

<sup>169</sup> *Ibid.*, 679 (“A standard instrument is a combination of a rule of identification for authoritative instruments of a specific type and a specific legal regime that is applicable to all instruments coming under the rule of identification.”).

frameworks may well prove to be even more daunting than incorporating rules for legitimizing action.