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ENVIRONMENTAL LAW

Scope and Limits of Decisions by the Conference of the Parties

Key Considerations for the Future Plastics Treaty

Governing bodies of multilateral environmental agreements (MEAs), most often called the Conference of the Parties (COP), are frequently given a mandate to “review, evaluate and adopt decisions related to the implementation of the treaty; consider and take any action necessary to achieve the objectives of the treaty.”¹ **While this text may make it seem that the COP can take any action, the question of what the COP can and cannot decide is more complex. Clarity on what can be accomplished through COP decisions and which actions might instead require amendments or even new agreements is essential when determining the obligations to be included in the initial treaty text.**

The COP can take some actions through decisions, but others are taken under distinct and defined procedures.² The COP’s adoption of treaty amendments occurs infrequently and requires ratification to apply to each Party and reach a certain number for entry into force. The COP’s adoption of annex amendments is usually followed by entry into force on a set time frame and allows Parties who do not want to be bound by them to opt out. The creation of new annexes usually follows the same procedure as annex amendments. Even if a treaty includes a specific mandate for the COP to undertake a certain task, the COP may have to adopt an amendment instead of taking the action through a decision. The precise boundaries of when a COP may take an action through a decision versus an amendment or new annex are not fixed and depend on a range of factors, such as the treaty text, the amount of time the treaty has been in force, geopolitical dynamics, and whether the resulting action would fundamentally alter the rights and obligations of the Parties.

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1. UNEP, *Compilation of Draft Text of the International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment*, UNEP/PP/INC.5/4 (July 1, 2024), Part V(1)(5)(e) [Compilation Draft]; similarly, the Minamata Convention states, “Consider and undertake any additional action that may be required for the achievement of the objectives of this Convention.” Minamata Convention on Mercury (Minamata Convention), art. 23(5)(e), October 10, 2013, 3202 UNTS.
 2. For additional details on treaty amendments and amendment and adoptions of new annexes, see both CIEL, *Structure and Elements of International Legal Instruments: Key Considerations for the Future Plastics Treaty*, (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/10/Structure-and-Elements-of-International-Legal-Instruments-Key-Considerations-for-the-Future-Plastics-Treaty.pdf> and CIEL, *Final Provisions of International Legal Instruments: Key Considerations for the Future Plastics Treaty*, (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/10/Final-Provisions-of-International-Legal-Instruments-Key-Considerations-for-the-Future-Plastics-Treaty.pdf>.

Additionally, and critically, if the COP may only take decisions by explicit consensus³ or consensus resulting from bracketed voting rules, the ability of the COP to take actions will be limited even further.⁴

This brief aims to provide examples of actions typically taken by the COP through decisions and to contrast them with actions that generally require the adoption of amendments to the treaty or its annexes or the adoption of new annexes, which have procedures distinct from those of a COP decision. It also provides examples of when Parties or COPs have attempted to undertake actions through decisions but have had difficulty doing so because these actions exceed the power of the COP and/or require an amendment to be legally binding.

Examples of COP Decisions

- The development and adoption of **guidance** on issues relevant to the implementation of the treaty⁵
- **Directing the Secretariat to undertake or commission studies or noting the results of studies** conducted at the direction of the COP, often with recommendations on the next steps for the COP to take⁶
- **Cooperation and coordination**, frequently with other MEAs and/or their secretariats⁷
- **Relating to implementation of the overall treaty or specific articles**, which often take note of progress and recommend that Parties implement specific articles or parts thereof⁸
- **The program of work and budget**, typically for a set time period⁹

3. See, e.g., the Rotterdam Convention Annex III listing requires consensus: "[t]he Conference of the Parties shall take its decisions on adoption by consensus." Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), art. 22(5)(b), September 10, 1998, 2244 UNTS 337.

4. As many MEAs adopt COP Rules of Procedure by consensus, the way to ensure decisions can be voted on is to include text within the COP mandate in the treaty, as was done in the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ). Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, June 19, 2023, art. 47(5). For details on the hazards of a COP unable to take decisions by vote, see CIEL, *Obstructionist Tactics in Decision-Making: Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution* (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/03/Obstructionist-Tactics-in-Decision-Making.pdf>.

5. Stockholm Convention, SC-11/5: Guidelines and Guidance on Best Available Techniques and Best Environmental Practices; Minamata Convention, MC-5/9: Guidance on the Best Available Techniques and Best Environmental Practices to Control Releases from Relevant Sources, UNEP/MC/COP.5/Dec.9 (November 24, 2023).

6. Minamata Convention, MC-5/3: Study of the Global Supply, Production, Trade and Use of Mercury Compounds, UNEP/MC/COP.5/Dec.3 (November 24, 2023).

7. See, e.g., Minamata Convention, MC-5/18: Enhanced International Cooperation and Coordination, UNEP/MC/COP.5/Dec.18, (November 24, 2023); Minamata Convention, MC-5/19: Cooperation and Coordination Between the Secretariats of the Minamata Convention and of the Basel, Rotterdam and Stockholm Conventions, UNEP/MC/COP.5/Dec.19 (November 24, 2023).

8. Rotterdam Convention, RC-11/1: Status of Implementation.

9. Rotterdam Convention, RC-11/15: Programme of Work and Budget for the Rotterdam Convention for the Biennium 2024–2025.

- **Financial mechanisms and technical assistance:** if not already established in the treaty, the COP may be directed to establish a financial mechanism and procedures for technical assistance, as well as operation and review.¹⁰
- **Adjustments** to elements in annexes, permitted by some agreements under certain circumstances, without annex amendments¹¹
- **The establishment and operation of subsidiary bodies,** if specified within the COP’s functions in the treaty text.¹²
- **Enforcement reports and actions:** when MEAs have Compliance Committees, they can recommend actions for the COP to take based on the procedures adopted by the COP, usually so directed by the treaty text.¹³

Decisions of the COP That Have Been Questioned, Contested, or Not Allowed

The COP usually cannot take decisions that would fundamentally alter the rights and obligations of Parties under the treaty without following prescribed processes for amendments or new agreements. The following examples from the Basel Convention and the Kyoto Protocol of the United Nations Framework Convention on Climate Change (UNFCCC) demonstrate what can happen when Parties push the boundaries of what a COP may do through a decision.

Basel Convention

The Basel Convention’s specific mandate to the COP **“to consider the adoption of a complete or partial ban of transboundary movements of hazardous wastes and other**

10. Minamata Convention, MC-5/11: Review of the Financial Mechanism of the Minamata Convention on Mercury, UNEP/MC/COP.5/Dec.11 (November 24, 2023); MC-5/12: Capacity-Building, Technical Assistance and Technology Transfer, UNEP/MC/COP.5/Dec.12 (November 24, 2023). If, however, the financial mechanism requires individual Parties to make specific financial contributions, then an amendment rather than a COP decision may be necessary. The Montreal Protocol adopted a contested decision to establish an interim multilateral fund, but at the same meeting also adopted an amendment, which entered into force after the ratification threshold was met. Montreal Protocol, Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.2/3, (June 29, 1990), Decision II/2, Annex II, art. 2(1), Decision II/8: Financial Mechanism, <https://undocs.org/UNEP/OzL.Pro.2/3>.

11. The Montreal Protocol adjustments enable further reductions in production or consumption of controlled substances and related timing. Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), art. 2(9), September 16, 1987, 1522 UNTS 3. The Convention on Long-Range Transboundary Air Pollution (LRTAP) includes Protocols, some of which also allow adjustments to annexes, such as the addition by a Party of its name and emissions reductions that can be adopted by consensus.” Protocol to the 1979 Convention on the Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, art. 13. November 30, 1999, 2319 UNTS 81.

12. See, e.g., Minamata Convention, art. 23(5)(a).

13. For additional details, see CIEL, *Implementation, Compliance, and Reporting: Key Elements to Consider in the Context of a Treaty to End Plastic Pollution*, (CIEL, 2023), https://www.ciel.org/wp-content/uploads/2023/11/Implementation-Compliance-and-Reporting-Key-Elements-to-Consider-in-the-Context-of-a-Treaty-to-End-Plastic-Pollution_FINAL.pdf. The CITES COP has decided on procedures, guidelines and circumstances in which they may authorize a trade suspension if listed species are being detrimentally affected by trade, based on treaty text that states if listed species are being adversely affected by trade or the Convention is not being complied with, “the next Conference of the Parties . . . may make whatever recommendations it deems appropriate.” Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), art. XIII(3), July 1, 1975, 993 UNTS 243.

wastes”¹⁴ might appear to enable the COP to adopt such a ban through a decision. However, this was contested by several Parties. At COP1, seventy-seven Parties requested the total ban of exports of hazardous wastes from OECD Member countries to non-OECD Member countries.¹⁵ At COP2, Decision II/12 was adopted by consensus to ban exports from OECD to non-OECD Member countries,¹⁶ but some Parties argued that the COP did not have the authority to adopt a ban.¹⁷ As a result of and due to political pressure,¹⁸ at COP3, the Parties adopted an amendment to the Convention with the same objective as the COP2 decision.¹⁹ It took another twenty-four years for enough Parties to ratify the amendment for it to enter into force.²⁰

Kyoto Protocol

The month before the first Meeting of the Parties of the Kyoto Protocol, Belarus requested an emissions target and to be included in the Kyoto Protocol’s Annex B.²¹ Parties discussed this request but agreed that Belarus could not be assigned an emissions reduction target or added to Annex B without an amendment.²² The decision of the Parties ultimately was to acknowledge the intention of Belarus to be bound by an emissions target and invite Belarus to submit an amendment proposal for its inclusion in Annex B at a future meeting.²³ Belarus did submit its amendment to be included in Annex B to the second Meeting of the Parties, which was adopted.²⁴ The addition of Parties and items to annexes almost always needs to occur through an amendment to the annex rather than through a decision.

Actions the COP Cannot Take Through Decisions²⁵

14. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), art. 15(7), March 22, 1989, 1673 UNTS 57.
15. Basel Convention, Report of the First Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.1/24 (December 5, 1992).
16. Basel Convention, Decision II/12.
17. Basel Convention, Report of the Second Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.2/30, (March 25, 1995), paras. 44, 47.
18. CAN, “COP Decisions: Binding or Not?,” June 8, 2009, 2, https://climatenetwork.org/wp-content/uploads/2021/02/COP_Decisions_CAN_legal_group_June_8_09.pdf.
19. Basel Convention, Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/CHW.3/34, (October 17, 1995), para. 51; Basel Convention, Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.3/35, Decision III/1, Amendment to the Basel Convention (November 28, 1995).
20. “Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,” Basel Convention, accessed October 1, 2024, <https://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>.
21. UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, Held at Montreal from 28 November to 10 December 2005, Part One: Proceedings, FCCC/KP/CMP/2005/8, (March 30, 2006), para. 108, <https://undocs.org/FCCC/KP/CMP/2005/8>.
22. “Summary report, 28 November–10 December 2005: UNFCCC COP11,” IISD, accessed October 1, 2024, <https://enb.iisd.org/events/unfccc-cop-11/summary-report-28-november-10-december-2005>.
23. UNFCCC, Determination of a Quantified Emission Reduction Commitment for Belarus FCCC/KP/CMP/2005/L.10 (December 9, 2005), <https://undocs.org/FCCC/KP/CMP/2005/L.10>.
24. UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Second Session, Held at Nairobi from 6 to 17 November 2006, Addendum, Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Second Session, FCCC/KP/CMP/2006/10/Add.1 (March 2, 2007), Decision 10/CMP.2, <https://undocs.org/FCCC/KP/CMP/2006/10/Add.1>.
25. Unless treaty text explicitly mandates the COP to take these actions through a decision, which is uncommon, they must follow separate procedures. For additional details on treaty amendments, amendment and adoptions of new annexes, and protocols, see both CIEL, *Structure and Elements of International*

- Modifying existing Party obligations.**

Such action must occur via a treaty amendment, which generally requires a minimum two-thirds or three-fourths majority of Party support at a COP unless the treaty has given the COP a mandate to modify Party obligations through a decision rather than an amendment. This amendment does not apply to Parties that do not ratify, and it usually takes many years, if not decades, for the required number of Parties to ratify for entry into force.
- Creating new Party obligations.**

Such action can occur via a treaty amendment, which is the same process outlined above for modifying Party obligations. The creation of Party obligations after entry into force of a treaty can also be done through a new agreement or protocol, generally under a framework or hybrid convention with specific procedures for the creation, adoption, and ratification of this new instrument, which also often takes many years and includes only the subset of treaty Parties that affirmatively join.
- Adding or removing States or items from an annex.**

Such action must occur via an annex amendment, which generally requires a minimum two-thirds or three-fourths majority of Party support at a COP, with a set timeframe for entry into force after adoption. Parties not wanting to be bound by the annex amendment may opt out.
- Creating a new annex that is either related to an existing obligation or a new obligation adopted through a treaty amendment.**

New annexes are generally limited to procedural, administrative, technical, or scientific issues. They require a minimum of two-thirds or three-fourths majority Party support at a COP, with a set timeframe for entry into force after adoption. Parties not wanting to be bound by the new annex may opt out.

Conclusion

While the idea that the COP can easily strengthen a weak treaty is appealing, international law is more complex. Parties must consent to be bound by international law via treaty ratification, and the obligations therein cannot be quickly or easily modified. The concept that it is possible to adopt a general framework first, followed by more detailed obligations specified at a later stage, is rarely effective for global agreements because, after the framework is set, public pressure and opportunities for compromise diminish. Stronger provisions are secured early on due to heightened

Legal Instruments: Key Considerations for the Future Plastics Treaty, (CIEL, 2024) <https://www.ciel.org/wp-content/uploads/2024/10/Structure-and-Elements-of-International-Legal-Instruments-Key-Considerations-for-the-Future-Plastics-Treaty.pdf> and CIEL, Final Provisions of International Legal Instruments: Key Considerations for the Future Plastics Treaty, (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/10/Final-Provisions-of-International-Legal-Instruments-Key-Considerations-for-the-Future-Plastics-Treaty.pdf>.

public scrutiny and the ability of States to negotiate benefits. COP decisions may be further restricted by requirements for decisions to be made by consensus, whether by design or as a result of bracketed voting procedures in the Rules of Procedure. Furthermore, countless proposed amendments or new annexes have either been abandoned during a COP when the lack of the majority support required under the treaty for adoption became apparent²⁶ or failed to be adopted through a vote.²⁷ Even when Parties adopt a treaty amendment to modify obligations or create new ones with broad support, reaching ratification by the number of Parties required for entry into force often takes many years.

Although treaty negotiations are challenging and time-consuming, they often present the best opportunity for the creation of a strong treaty.²⁸ If key provisions are not included by the time of treaty adoption, it will likely require many more years of negotiations to amend the treaty and additional years to reach the ratification threshold for entry into force.

26. Montreal Protocol, Report of the Twenty-Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.22/9 (November 27, 2010), paras. 48–61, <https://undocs.org/UNEP/OzL.Pro.22/9>; CITES, Summary Record of the Thirteenth Session for Committee I, CoP19 Com. I Rec. 13 (December 16, 2022), p. 2, <https://cites.org/sites/default/files/documents/E-CoP19-Com-I-Rec-13.pdf>.

27. UNEP, FAO, Report of the COP to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the Work of its Eleventh Meeting, UNEP/FAO/RC/COP.11/25 (August 28, 2023), para. 152, <https://undocs.org/UNEP/FAO/RC/COP.11/25>; CITES, Summary Record of the Fifteenth Session for Committee I, CoP18 Com. I Rec. 15 (Rev. 1), p. 5–6, https://cites.org/sites/default/files/eng/cop/18/Com_I/SR/E-CoP18-Com-I-Rec-15-R1.pdf.

28. This may not always be the case, however, depending on political dynamics or negotiations among fewer states towards a plurilateral agreement rather than a multilateral treaty under the UN framework.

About CIEL

Founded in 1989, the Center for International Environmental Law (CIEL) uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL is dedicated to advocacy in the global public interest through legal counsel, policy research, analysis, education, training, and capacity building.

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