

# The Legal Status of Subsidiary Body Rulings under the Espoo Convention



**SEMINAR ON TWENTY YEARS OF LAW AND PRACTICE UNDER THE  
CONVENTION**

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# The rise and legal significance of treaty bodies



In order to implement treaties effectively, states increasingly turn to treaty bodies, such as MoPs, and Implementation Committees, to interpret and elaborate on treaty commitments. The legal significance of these decisions are often unclear – they are intended to be authoritative, yet they do not possess the attributes of formally binding instruments.

## Purpose of Presentation

- Examine the legal nature and role of these decisions with a focus on the Implementation Committee
- Consider some of the practical implications for Parties
- What does this tell us about the normative development of Convention?

# Espoo: From Treaty to Regime



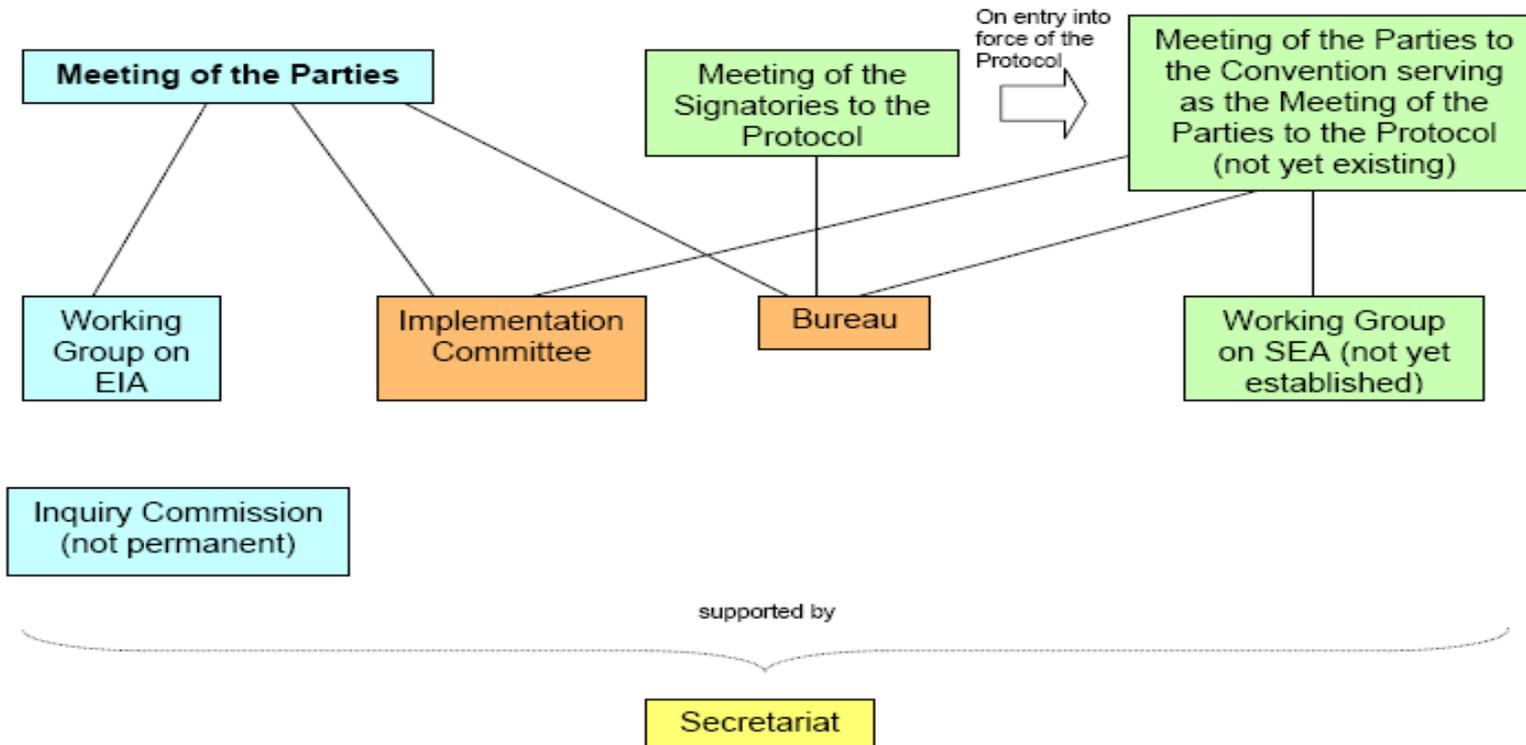
- Need for normative development driven by need for greater precision and a changing social, economic and environmental context
- Domestic EIA systems have developed sprawling governance systems, including subordinate legislation, specialized agencies, inter-governmental agreements and practitioner guidance
- Domestic EIA implementation also overseen by judicial branch – which provides further interpretive guidance
- Espoo has undergone similar development of quasi-legislative and quasi-judicial practices – which is consistent with treaty practice under other MEAs

Legislation	Agency	Regs	Ex. Orders	Guidance	Case law
NEPA	CEQ	≈70	≈ 35	≈25	100-200/an
CEAA	CEAA	9	1 + Agts with Provs.	25	100's
Espoo	MoP	MoP Decisions	IC Reports	WG on EIA Reports	Guidance Documents

# Espoo Treaty Bodies



## Bodies under the Espoo Convention & its Protocol



# Treaty Bodies as Law-makers: Interpretation and Elaboration



- In course of implementation, treaty bodies often called upon to interpret Convention and fill in gaps through elaboration of commitments
  - i.e. Legal implications of Inquiry Commission
    - ✦ Art. 3(7) allows Parties to submit question of whether likelihood of significant transboundary impact to independent body of experts
      - Inquiry Commission – provides “advise”
      - Implementation Committee held Inquiry Commission opinion:
        - “a matter of fact”
        - “takes immediate effect”
        - “cannot be challenged”
        - requires “immediate notification” and “immediate suspension of implementation”
      - Operates similar to provisional measures request
      - Determines substantive rights

# Treaty Bodies as Law-makers: Interpretation and Elaboration



- **Imposes duties on states**
  - i.e. obligation to report on compliance
    - ✦ Subject of 2<sup>nd</sup> amendment (not in force)
    - ✦ But treated as ongoing obligation that “may be considered a compliance matter”
      - But non-compliance with broader regime rules – not treaty obligation
- **Determines rights of third parties**
  - i.e. implementation committee decided not to allow compliance submission to be initiated by non-Party
- **Implementation Committee beginning to assume quasi-judicial form**
  - References general principles of international law
  - Relies on guidance documents in support of interpretations
  - Provides “reasoned” justifications for decision
  - Has collated and published previous “opinions” – which demonstrates a desire for adherence to past decisions

# From Legality to Efficacy



- **MoP decisions not formally binding – but convey high expectations of compliance**
  - “compliance pull” aided by precision and by delegation of decision making to IC
- **Legal formality secondary consideration to effectiveness concerns**
- **Authoritativeness of IC stems from institutional position**
  - It is institutionally required to interpret Convention
  - Its adherence to quasi-judicial form
  - Its oversight by MoP

# Why does this require our attention?



- Normative ambiguity requires different theory of compliance based on principles of accountability, procedural justice and the quality of justification given (from legality to legitimacy)
- Parties should take seriously supervisory role of the MoP
  - May be need to raise questions regarding interpretations
  - May want to reserve consider desired level of precision (as ambiguity provides discretion to states)
- Raises questions regarding how outside institutions may view IC/MoP decisions
  - Is there a possibility of decisions crystallizing into law?

# Conclusion



- As Espoo moves from treaty to regime – compliance shifts from treaty compliance to regime compliance
- This shift necessitates a blurring of the line between implementation and law-making
- This may be in turn result in a tension between the desire for efficacy and state consent – but this tension can be successfully mediated with careful attention to concepts of administrative legitimacy

# MOP Decisions



## MOP DECISIONS

