



United Nations Forum on Forests

**Ad hoc expert group on Consideration with a View to
Recommending the Parameters of a Mandate for Developing a
Legal Framework on All Types of Forests**

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**An Overview of International Law
Working Draft**

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I. INTRODUCTION

1. In order to understand international environmental law, it is of value to have some basic understanding of general international law. International environmental law is a sub-sector of international law, and international law has been developing over a long period of time. A significant part of international environmental law is incorporated in Multilateral Environmental Agreements (MEAs).

SOURCES OF INTERNATIONAL LAW

A: Treaties

2. Treaties are the major mechanism for international cooperation in international relations, and the main source of international law today. The starting point for determining what a treaty is, is to be found in a treaty itself, a treaty on treaty law, namely the Vienna Convention on the Law of Treaties, which was concluded in 1969, and entered into force in 1980. (Herein after referred to as the 1969 Vienna Convention). Many provisions of the 1969 Vienna Convention are considered to be binding on all States.
3. Art. 2.1(a) of the 1969 Vienna Convention defines a treaty as: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Accordingly, “whatever its particular designation”, the designation employed in a document does not determine whether it is a treaty or not. Irrespective of the designation, an international agreement falling under the above definition is considered to be a treaty. The term ‘treaty’ is the generic name, and there are very many terms used to indicate the same. The term ‘treaty’ encompasses, among others, the terms convention, agreement, pact, protocol, charter, statute, covenant, engagement, accord, exchange of notes, modus vivendi, and memorandum of understanding. As long as they fall under the above definition, they refer to international instruments that are binding under international law. International organizations are also recognized as capable of possessing the power to conclude treaties.
4. Sometimes some of these terms may be employed by drafters and negotiators to suggest other meanings; that is, they can also be used to mean something other than treaties, which, on occasion, makes the terminology confusing.
5. The various terms may be employed to indicate differing degrees of political or practical significance. For example, a simple bilateral agreement on technical or administrative cooperation will rarely be designed ‘Covenant’ or ‘Charter’, whereas an agreement establishing an international organization will usually not be given such labels as ‘Agreed Minutes’ or ‘Memorandum of Understanding’. So, the nature of the labelling used to describe an international agreement may say something about its content, although this is not always the case. The two principal categories are the

bilateral and the multilateral agreements, the former having only two parties and the latter at least two, and often up to global participation.

- **Treaty**

The term 'treaty' can be used as a common generic term or as a particular term which indicates an instrument with certain characteristics. There are no consistent rules to determine when State practice employs the terms 'treaty' as a title for an international instrument. Although in the practice of certain countries, the term treaty indicates an agreement of a more solemn nature. Usually the term 'treaty' is reserved for matters of some gravity. In the case of bilateral agreements, signatures affixed are usually sealed. Typical examples of international instruments designated as 'treaties' are Peace Treaties, Border Treaties, Delimitation Treaties, Extradition Treaties and Treaties of Friendship, Commerce and Cooperation. The designation 'convention' and 'agreement' appear to be more widely used today in the case of multilateral environmental instruments.

- **Agreement**

The term 'agreement' can also have a generic and a specific meaning. The term 'international agreement' in its generic sense consequently embraces the widest range of international instruments. In the practice of certain countries, the term 'agreement' invariably signifies a treaty. 'Agreement' as a particular term usually signifies an instrument less formal than a 'treaty' and deals with a narrower range of subject-matter. There is a general tendency to apply the term 'agreement' to bilateral or restricted multilateral treaties. It is employed especially for instruments of a technical or administrative character, which are signed by the representatives of government departments, and are not subject to ratification. Typical agreements deal with matters of economic, cultural, scientific and technical cooperation, and financial matters, such as avoidance of double taxation. Especially in international economic law, the term 'agreement' is also used to describe broad multilateral agreements (e.g. the commodity agreements). Nowadays the majority of international instruments, and international environmental instruments, are designated as agreements.

- **Convention**

The term 'convention' can also have both a generic and a specific meaning. The generic term 'convention' is synonymous with the generic term 'treaty'. With regard to 'convention' as a specific term, in the last century it was regularly employed for bilateral agreements, but now it is generally used for formal multilateral treaties with a wide range of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually the instruments negotiated under the auspices of the United Nations are entitled conventions (e.g. the 1992 Convention on Biological Diversity, the 1982 United Nations Convention on the Law of the Sea). The same holds true for instruments adopted by an organ of an international organization (e.g. the 1989 Convention on the Rights of the Child, adopted by the General Assembly of the UN). Because so many international instruments in the field of environment and sustainable development are negotiated under the auspices of the United Nations, many

instruments in those areas are called 'conventions' such as the Desertification Convention, Convention on Biological Diversity, the Convention on Persistent Organic Pollutants, among others.

- **Charter**

The term 'charter' is used for particularly formal and solemn instruments, such as the constituent treaty of an international organization. The term itself has an emotive content that goes back to the Magna Carta of 1215. Well-known more recent examples are the 1945 Charter of the United Nations, the 1963 Charter of the Organization of African Unity and the 1981 Banjul Charter on Human and Peoples' Rights. The 1982 World Charter for Nature is a resolution adopted by the General Assembly of the United Nations and not a treaty.

- **Protocol**

The term 'protocol' is used for agreements less formal than those entitled 'treaty' or 'convention'. A protocol signifies an instrument that creates legally binding obligations at international law. In most cases this term encompasses an instrument which is subsidiary to a treaty. The term is used to cover, among others, the following kinds of instruments:

(a) A Protocol of Signature is an instrument subsidiary to a treaty, and drawn up by the same parties. Such a protocol deals with additional matters such as the interpretation of particular clauses of the treaty. Ratification of the treaty will normally also involve ratification of such a protocol.

(b) An Optional Protocol to a treaty is an instrument that establishes additional rights and obligations with regard to a treaty. It is sometimes adopted on the same day, but is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a 'two-tier system'. An example is formed by the Optional Protocols to the 1966 International Covenant on Civil and Political Rights, which first Optional Protocol deals with direct access for individuals to international courts and tribunals.

(c) A Protocol can be a supplementary treaty, it is in this case an instrument which contains supplementary provisions to a previous treaty, e.g. the 1967 Protocol relating to the Status of Refugees to the 1951 Convention relating to the Status of Refugees.

(d) A Protocol can be based on and further elaborate a framework convention. This framework 'umbrella convention', which sets general objectives, contains the most fundamental rules of a more general character, both procedural as well as substantive. These objectives are subsequently elaborated and incorporated by a Protocol, with specific substantive obligations, according to rules agreed upon in the basic treaty. This structure is known as the so-called 'framework-protocol approach'. Examples are the 1985 Vienna Convention on the Ozone Layer and its 1987 Montreal Protocol with its subsequent amendments; the 1992 United Nations Framework Convention on Climate Change with its 1997 Kyoto Protocol; and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes with its 1999 Protocol on Water and Health and its 2003

Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

- **Declaration**

The term 'declaration' is used to describe various international instruments. However, in most cases declarations are not legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. Examples are the 1992 Rio Declaration on Environment and Development, the 2000 United Nations Millennium Declaration and the 2002 Johannesburg Declaration on Sustainable Development. Declarations can sometimes also be treaties in the generic sense intended to be binding at international law. An example is the 1984 Joint Declaration between the United Kingdom and China on the Question of Hong Kong, which was registered as a treaty by both parties with the UN Secretariat. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations, which can often be a difficult task. Some instruments entitled 'declarations' were not originally intended to have binding force, but their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage, as is the case with the 1948 Universal Declaration of Human Rights.

6. Once the text of a treaty is agreed upon, States indicate their *intention* to undertake measures to express their consent to be bound by the treaty. Signing the treaty usually achieves this purpose, and a State that signs a treaty is a signatory to the treaty. Signature is a voluntary act. Often major treaties are opened for signature amidst much pomp and ceremony. Once a treaty is signed, customary law, as well as the 1969 Vienna Convention, state that a State must not act contrary to the object and purpose of the particular treaty, even if it has not entered into force yet.
7. The next step is the ratification of the treaty. Bilateral treaties, often dealing with more routine and less politicized matters, do not normally require ratification, and are brought into force by definitive signature, without recourse to the procedure of ratification.
8. The signatory State will have to comply with its constitutional and other domestic legal requirements in order to ratify the treaty. This act of ratification, depending on domestic legal provisions, may have to be approved by the legislature, parliament, the head of State, or similar entity. It is important to distinguish between the act of domestic ratification and the act of international ratification. Once the domestic requirements are satisfied, in order to undertake the international act of ratification the State concerned must formally inform the other parties to the treaty of its commitment to undertake the obligations under the treaty. In the case of a multilateral treaty, this constitutes submitting a formal instrument signed by the Head of State or Government or the Foreign Minister to the depositary who then informs the other parties. With ratification a signatory State expresses its *consent to be bound* by the treaty. Instead of ratification, it can also use the mechanism of acceptance or approval, depending on its national preference. A non-signatory State,

which wishes to join the treaty at a later stage, usually does so by lodging an instrument of *accession*.

9. Accordingly, the adoption of the treaty text does not, by itself, create any international obligations. A State usually signs a treaty stipulating that it is subject to ratification, acceptance or approval. A treaty does not enter into force and create binding rights and obligations until the required number of States, as indicated by the treaty, express their consent to be bound by the treaty. The expression of such consent to be bound usually occurs with ratification, approval, acceptance or accession. Sometimes, depending on the treaty provisions, it is possible for treaty parties to agree to apply a treaty provisionally until its entry into force.
10. One of the mechanisms used in treaty law to facilitate agreement on the text is to leave the possibility open for a State to make a *reservation* on becoming party. A reservation modifies or excludes the application of a treaty provision. A reservation must be lodged at the time of signature or ratification (or acceptance, or approval, or accession). The 1969 Vienna Convention includes a section (arts. 19-23) on reservations. In general, reservations are permissible except when (a) they are prohibited by the treaty, (b) they are not included among expressly authorized reservations, and (c) they are otherwise incompatible with the object and purpose of the treaty.
11. Recently, it has become more common for treaties, including most of the recently concluded environmental treaties, to include a provision that prohibits reservation to the treaty. Examples are the 1985 Vienna Convention for the Protection of the Ozone Layer (Art. 18) and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Art. 18), the 1992 Convention on Biological Diversity (Art. 37) and its 2000 Cartagena Protocol on Biosafety (Art. 38)

B: International custom

26. The second most important source of international law, and thus of international environmental law, is international custom. International law can also be created through the customary practice of States. Before treaties became as important as they are today, customary international law was the leading source of international law: the way things have always been done becomes the way things must be done. Once a rule of customary law is recognised, it is binding on all States, because it is then assumed to be a binding rule of conduct.
27. There are two criteria for determining if a rule of international customary law exists:
 - The State practice should be consistent with the so-called 'rule of constant and uniform usage', and
 - this State practice exists because of the belief that such practice is required by law (*opinio juris*).Both elements are complementary and compulsory for the creation of customary international law. Since customary law requires this rather heavy burden of proof,

- and its existence is often surrounded by uncertainties, treaties have become increasingly important to regulate international diplomatic relations among States.
28. The provisions of the 1948 Universal Declaration on Human Rights, although not specifically intended to be a legally-binding instrument, are now generally accepted, as constituting customary international law. Customary international law is as legally binding as treaty law.
 29. On occasion, it is not possible to distinguish clearly between treaty law and customary law. For example, the UN Convention on the Law of the Sea comprises new international legal norms as well as codification of existing customary law. Between the date of its adoption in 1982, and the date it entered into force in 1994, non-parties to the treaty followed in practice many of the obligations incorporated in 1982 UNCLOS. It can therefore now be said that UNCLOS largely represents customary law, binding on all States, even if it has at this time only 145 parties.
 30. Two specific terms related to the concept of customary international law require further attention. The first one is 'soft law'. This term does not have a fixed legal meaning, but it usually refers to any international instrument other than a treaty containing principles, norms, standards or other statements of expected behaviour. Often, the term soft law is used as having the same meaning as a non-legally binding instrument, but this is *not* correct. An agreement is legally binding or is not-legally binding. A treaty that is legally binding can be considered as hard law; however, a non-legally binding instrument does not necessarily constitute soft law. The consequences of such a non-legally binding instrument are not clear. Sometimes it is said that they contain political or moral obligations, but this is not the same as soft law. Non-legally binding agreements emerge when States agree on a specific issue, but they do not, or do not yet, wish to bind themselves legally; nevertheless they wish to adopt certain non-binding rules and principles before they become law. This approach often facilitates consensus, which is more difficult to achieve on binding instruments. There could also be an expectation that a rule or principle adopted by consensus, although not legally binding, will nevertheless be complied with. Often such will often fuel civil society activism to compel compliance.
 31. The second term is 'peremptory norm' (*jus cogens*). This concept refers to norms in international law that cannot be overruled: they are of the highest order. *Jus cogens* has even precedence above treaty law. Exactly which norms can be so designated as *jus cogens* is still subject to some controversy. Examples are the ban on slavery, the prohibition of genocide or torture, or the prohibition on the use of force.

C: General principles of law

32. The third sources of international law are general principles of law. There is no agreed selection of principles that are to be considered as universally agreed upon. They usually include both principles of the international legal system as well as those common to the major national legal systems of the world. Some treaties reflect, codify or create general principles of law.

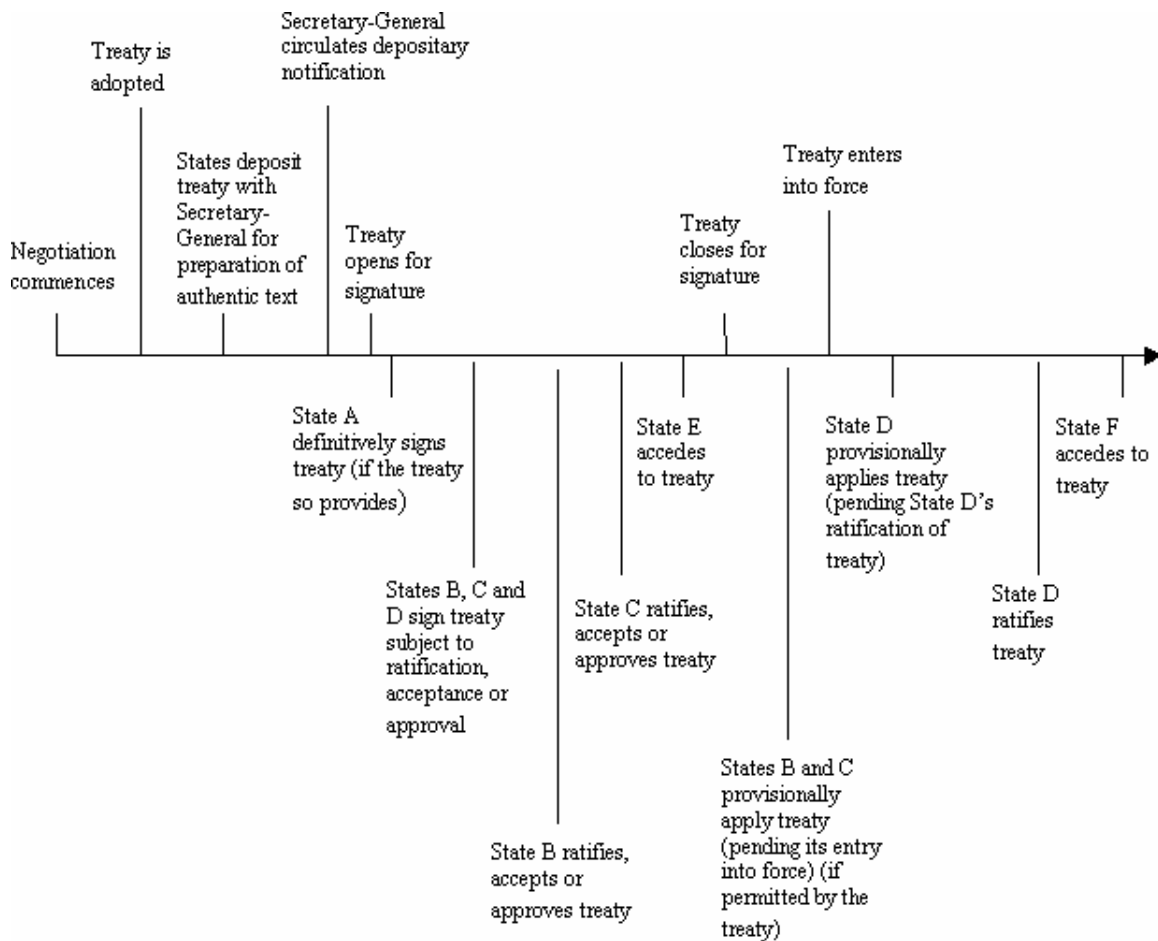
33. Also decisions of the Conference of the Parties to a MEA, and conference declarations or statements, may contribute to the development of international law.

NEGOTIATING MULTILATERAL ENVIRONMENTAL AGREEMENTS

34. There is no definite procedure established on how to negotiate a Multilateral Environmental Agreement, but from the practice of States over the last few decades some common elements may be derived.
35. The first step is for an adequate number of countries to show interest in regulating a particular issue through a multilateral mechanism. In certain cases this may be as few as two. For example, the draft Convention on Cloning was tabled in the Sixth Committee of the General Assembly by Germany and France. In other cases, a larger number of countries need to demonstrate a clear desire for a new instrument. Once this stage is overcome, States need to agree on a forum for the negotiation of the instrument. Usually an existing international organisation such as the United Nations or an entity such as UNEP will provide this forum. The United Nations has frequently established special fora for the negotiation of MEAs through General Assembly resolutions. The UN Framework Convention on Climate Change was negotiated by a specially established body. It is also possible to conduct the negotiations in a subsidiary body of the General Assembly such as the Sixth Committee, which is the Legal Committee. Treaty bodies could also provide the fora for such negotiations. For example, pursuant to Art.19(3) of the Convention on Biological Diversity, the Conference of the Parties, by its decision II/5, established an Open-ended Ad Hoc Working Group on Biosafety to develop a draft protocol on biosafety, which later resulted in an agreed text and subsequent adoption of the Cartagena Protocol on Biosafety.
36. Subsequently, the negotiating forum will start the negotiating process, by establishing a committee or convene an international conference to consider the particular issue. This could take many forms, from an informal ad hoc group of governmental experts to a formal institutional structure as in the case of the Intergovernmental Negotiating Committee (INC) for the negotiation of the Framework Convention on Climate Change. It is also possible for an international organisation to establish a subsidiary body to prepare a text for consideration and adoption by an Intergovernmental Diplomatic Conference. Certain treaties were first drafted by the International Law Commission and subsequently negotiated adopted by intergovernmental bodies. Governments also often draft negotiating texts. During the negotiations, delegates generally remain in close contact with their governments; they have (preliminary) instructions which are usually not communicated to other parties. At any stage they may consult their governments and, if necessary, obtain fresh instructions. Governments could also change their positions depending on developments. The host organization will organise preparatory committees, working groups of technical and legal experts, scientific symposia and preliminary conferences. The host body will also provide technical back-up to the negotiators.

37. In the negotiating forum, States are the most important actors, since treaties only carry direct obligations for States. However, implementation of and compliance with a treaty cannot be achieved without involving a whole range of non-State actors, including civil society groups, non-governmental organisations, scientific groups, business and industry, among others. Therefore these groups are also regularly included in the negotiating process that leads to an MEA. Some national delegations to intergovernmental negotiations now contain NGO representatives while some smaller States might even rely on NGOs to represent them at such negotiations. In such situations NGOs may have a notable influence on the outcomes.
38. The role of NGOs has been often significant in the treaty negotiating process, as well as in stimulating subsequent developments within treaty regimes. An example is the influence of the International Council for Bird Preservation and the International Waterfowl and Wetlands Research Bureau, two NGOs, in the conclusion on the implementation of the 1971 Ramsar Convention. NGO influence is achieved primarily through the mechanism of participation, as observers in international organisations, at treaty negotiations, and within treaty institutions. Some NGOs are well prepared with extensive briefs. Some national delegations rely on NGOs for background material. The inclusion of NGOs may be seen as representing a wider trend towards viewing international society in terms broader than a community of States alone.
39. In the INC process, ideally one starts with the identification of needs and goals, before the political realities get in the way. Research must have been undertaken and show the need for international legally binding instrument to counteract the perceived problem. During treaty negotiations, States will often cite scientific evidence that justifies the general policies they prefer.
40. At the time the first formal discussions take place, information has been disseminated, the preliminary positions of States are established, and the initial scope of the agreement is further defined. Therewith the process to international consensus-building starts, often lasting for years and with many lengthy drafts, negotiated over and over again.
41. Negotiations may be open-ended in time or established for a limited period. E.g., the UN Convention on the Law of the Sea negotiations took nearly ten years to complete, while the negotiations for the Convention on Biological Diversity were concluded in about fifteen months.
42. Once the draft text has been negotiated it needs to be adopted and opened for signature. The text itself is usually finalised by the negotiators and might even be initialled at that stage. Most United Nations sponsored treaties are adopted in the six official languages of the Organisation. If the negotiations had been conducted in one language (these days, usually English) the text is translated into the other languages. The mechanism of a final act might also be employed to adopt the text. For this purpose, a conference of plenipotentiaries might be convened. These are representatives of governments with the authority to approve the treaty. Subsequently, the adopted text will be 'opened' for signature. Below is a timeline

showing a possible sequence of events after adoption of a treaty, as a treaty enters into force and States become parties to it.



Source: UN Treaty Handbook, Chapter 4

43. International environmental treaty-making may involve a two-step approach, the 'Framework Convention - Protocol' style. In this event, the treaty itself does only contain general requirements, directions and obligations. Subsequently the specific measures and details will be negotiated, as it happened with the 2000 Cartagena Protocol on Biosafety with the Biodiversity Convention; or additional non-legally binding instruments can elaborate on these measures to be taken by the parties, as was the case with the 2002 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization, with the same Convention. The convention-protocol approach allows countries to 'sign on' at the outset to an agreement even if there is no understanding on the specific actions that need to be taken under it subsequently. Among the major shortcomings of the convention-protocol approach is that it encourages a process that is often long and drawn out.

ADMINISTERING TREATIES

44. Treaties do not only comprise of obligations for the State parties, but do often also create their own administrative structure to assist parties to comply with its provisions and to provide a forum for continued governance. Most environmental treaties institute 1) a Conference of the Parties (COP), 2) a Secretariat and 3) Subsidiary Bodies.
45. *Conference of the Parties.* The COP forms the primary policy-making organ of the treaty. All parties to a treaty meet, usually annually or biannually, and survey the progress achieved by the treaty regime, the status of implementation, possibilities for amendments, revisions, additional protocols, etc.
46. *Secretariat.* The Secretariat of a convention is responsible for the daily operations. In general, it provides for communication among parties, organises meetings and meeting documents in support of the COP, assists in implementation and it may assist in activities such as capacity building. The Secretariat gathers and distributes information and it increasingly coordinates with other legal environmental regimes and secretariats.
47. *Subsidiary Bodies.* Many environmental regimes provide for a scientific commission or other technical committee, comprised of experts. In most cases they include members designated by governments or by the COP, although they generally function independently. They can be included in the treaty, or by a decision of the COP. For example, the 1992 Biodiversity Convention has a Subsidiary Body on Scientific, Technical and Technological Advice, the 1998 PIC Convention provides for a Chemical Review Committee', and the Committee for Environmental Protection was established by the 1991 Protocol on Environmental Protection to the Antarctic Treaty. They can address recommendations or proposals to the COP or to other treaty bodies. They usually provide informative reports in the area of their specialisation related to the convention and its implementation.
