



Legal Response Initiative

TRAINING MANUAL¹

Contents

| | | |
|------|---|----|
| I. | Public International Law | 1 |
| II. | International Environmental Law | 4 |
| III. | Climate Change Regime – Convention, Kyoto Protocol and further Negotiations | 12 |
| IV. | Procedural Rules of the Climate Negotiations | 21 |
| V. | Treaty Law, Drafting and Interpretation | 30 |

I. Public International Law

1. General

Public international law is traditionally described as a system of rules and principles that govern the relations between states and other subjects of international law such as the United Nations or the European Union. It is primarily created through states and covers almost all areas of inter-state activities such as trade, diplomacy, postal services, transboundary emissions, the use of outer space and, of course, war. Public international law governs issues relating to the global environment, control and jurisdiction over territory, human rights and international crime.

The main primary sources of international law are treaties and customary law. Secondary sources that explain, interpret, and help to analyze what the law is include court judgments or general legal principles that are part of all legal orders – for example, that a contract must be kept and executed in good faith.

With regard to the sources of public international law Article 38 of the Statute of the International Court of Justice (the “World Court”) provides:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹ This manual has been compiled and edited by Pascale Bird, Caroline Dihl Prolo, Jennifer Hirsch and Christoph Schwarte at LRI on the basis of different presentations delivered at a workshop for lawyers from UNFCCC developing country negotiation teams in London from 1 to 5 April 2013.

2. Customary law

Customary international law is derived from the consistent practice of states accompanied by *opinio juris* - the conviction of states that the consistent practice is required by a legal obligation. In addition to direct evidence of state behaviour, judgments of international courts as well as the results of academic investigation have traditionally been looked to as persuasive sources of international custom.

3. Treaties

Treaties are agreements between states (and other entities under international law) and only bind the participating Parties. These treaties are often known as conventions, pacts, protocols or covenants. The Charter of the United Nations is the most important international treaty and is often referred to as the constitution of the international community. Otherwise, there is no hierarchy between different international treaties. Conflicts amongst different treaty regimes may be addressed in the treaties themselves but can be subject to often contentious questions of application and interpretation.

A number of international treaties have established entire regulatory regimes amongst their state Parties. Often institutions set up under treaty regimes monitor implementation, take further action, and facilitate the development of new legal instruments where, for example, priorities change or scientific knowledge evolves. Some treaties contain compliance and enforcement mechanisms as well as dispute settlement procedures and an increasing number of treaties allow a variety of stakeholders to put forth political, economic, and legal issues for consideration in decision making processes.

Customary and treaty law are complementary. Treaties regularly contain codifications of customary law while subsequent state practice can develop the provision of a treaty further. Treaties and the practice of states may also lead to the creation of new rules of customary law. What constitutes currently applicable international law is however often a question of interpretation dependant on political factors operating within the sphere of international relations.

There are other (secondary) sources of binding international law, for example, court judgments or decisions of treaty bodies whose authority has been accepted by a state through an international treaty process. Also important for the determination and development of international law are international policy documents such as the 1992 Declaration of the UN Conference on Environment and Development drafted at the world summit in Rio de Janeiro (Rio Declaration). They may be described as quasi-legal instruments (or soft law) because they do not have binding force but can accelerate the formation of customary law as well as provide evidence of *opinio juris*.

4. Compliance

International law has not established a general compliance and enforcement mechanism. A state's inclination to uphold norms rather comes from the pressure that states put upon one another to behave consistently and to honour their obligations. Although there are various means of dispute settlement and enforcement within existing treaty regimes, it is usually through diplomacy driven by the desire of states to preserve their international reputation

that violations of international law are addressed. Legality and power often operate on an equal footing.

5. Treaty application and interpretation

Treaties are interpreted through different means. These include the intention of the Parties at the time the treaty was concluded and the subsequent practice of the Parties in its application. The UN Charter (Article 27 paragraph 3), for example, explicitly provides that Security Council decisions shall be made “by an affirmative vote of nine members including the concurring votes of the permanent members”. Nevertheless, these days it is fully accepted that the five permanent members of the UN Security Council only enjoy a veto right. So abstention is effectively interpreted as an affirmative vote.

The application and interpretation of treaties are generally governed by the 1969 Vienna Convention on the Law of Treaties (VCLT). Some States, for instance the US, are not Parties to the VCLT. However, most of the VCLT rules are recognised as customary international law and therefore still apply to these States.

The interpretation of treaties is covered in VCLT Articles 31 and 32. Treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The relevant context of a treaty includes the text, preamble and annexes, as well as related agreements made by all the Parties, or connected instruments made by some Parties and accepted by the others. For example, the UNFCCC is part of the context for interpreting the Kyoto Protocol, and vice versa.

Article 30 VCLT applies to successive treaties relating to the same subject matter. Article 30.2 states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaty prevail. Under Article 30.3, when all the Parties to an earlier treaty are also Parties to a later one, the earlier treaty applies only to the extent that its provisions are compatible with the later one. Article 30.4 covers situations where the Parties to a later treaty do not include all the Parties to an earlier one.

6. Public international and domestic law

Public international law applies between states and other subjects of international law (see above). Although it may be concerned with the interests of groups and individuals it usually confers rights and obligations to states. Only rarely (for example, under the European Convention on Human Rights) can people directly claim rights under international law.

However, law and policy making at the international level increasingly shapes domestic law. For example, new legislation or administrative procedures are adopted in order to comply with international treaty obligations. International legal principles may be used by domestic courts or in connection with civil society campaigns. In many developing countries donor support is contingent on compliance with international standards on, for example, sustainable development, good governance or human rights.

II. International Environmental Law²

1. Nature and sources

The term international environmental law (IEL) can be used to describe the application of international law to environmental problems. It has evolved by applying the rules and principles of general public international law and its sources, but also from private international practices and national laws for the protection of the environment. Today, international treaties are the most common source for multilateral rules and regulations on the environment.

Historically, public international law is built on the notion of state independence and territorial sovereignty. A state's "Permanent Sovereignty over Natural Resources" (PSNR) is recognised under customary international law. Hence, in order to address common environmental concerns, such as the marine environment, fisheries resources or oil spills there was a need to use other sources of law. In this connection domestic law and soft-law documents, such as the 1972 Stockholm and 1992 Rio Declarations, became of particular importance.

Legal concepts, such as precaution, polluter-pays, common but differentiated responsibilities or sustainable development, were first introduced through soft-law documents such as resolutions, guidelines or declarations of principles. They lay down parameters and provide guidance on states' conduct but do not state hard-law rules and commands. States are therefore more likely to agree on aspirational goals.

However, since they are often worded in a lawmaking manner, soft law documents can be a potential stepping-stone towards the negotiation of binding legal commitments. They provide subsequent guidance on the application and interpretation of treaties, and may also be used by the courts. Accordingly, soft law principles have exerted significant influence in the development of international environmental law.

2. Institutions

International environmental treaties are governed by its member states. In general, they delegate certain powers to either existing institutions or create new ones with a specific mandate. Even though there are an estimated 500 multilateral environmental treaties in force, the UN only has a programme on the environment (UNEP) but there is no separate global governance body for the environment.

The UN's most important organs are the General Assembly (GA), the Security Council and the Economic and Social Council (ECOSOC). The General Assembly is the main deliberative and policymaking body formed by all member states. Every year it adopts important resolutions in any matter of the UN Charter. Such soft law declarations may sometimes crystallize in treaties and customary law. The Security Council is mandated to maintain international peace and security. Therefore, it may intervene in environmental issues only when necessary to maintain such peace and security. ECOSOC is the UN institution for international cooperation in economic and social development. It is supported by UNEP and the Commission on Sustainable Development (CSD).

² This section is based on a presentation by Ruth Mackenzie on 1 April 2013.

UNEP was set up in 1972, following the Stockholm Conference, and focuses on issues such as biodiversity, hazard waste, climate change, atmospheric and marine pollution. Its tasks include clustering the environmental agreements by coordinating between treaties and secretariats, and ensuring their implementation in a harmonious manner. As a result of the ever increasing number and variety of environmental agreements, their coordination is a major challenge for UNEP. To date, several attempts to strengthen global environmental governance structures have failed. The CSD was established following the Earth Summit in 1992 as a permanent forum for discussions of sustainable development policy but has not been very active.

There are also many specialised UN agencies such as the Food and Agriculture Organization (FAO) or the International Maritime Organization (IMO) that play an important role in the development of IEL. They are responsible for the negotiation and conclusion of various Multilateral Environmental Agreements (MEAs) and at times also actively monitor and facilitate their implementation.

3. Processes

IEL is characterised by multilateral treaties that establish a framework or umbrella regime with flexible implementation and enforcement mechanisms. Such framework treaties usually comprise general principles and basic commitments in the governing legal instrument (e.g. “convention”), leaving more specific rules and technical details to protocols, annexes and subsequent decisions by the meetings of the parties. This dynamic design permits rules and standards to be changed in line with evolving scientific knowledge.

As part of such as “regulatory regime” the parties need to meet at least occasionally and are usually supported by expert bodies. The continuous negotiation process under a framework (or umbrella) treaty is characterized by a consensus-based approach to ensure widespread acceptance of outcomes. Legally, the parties’ subsequent practice and decisions clarify and can at times even amend the original treaty provisions.

Many regulatory regimes to protect the environment contain formal compliance procedures to ensure parties adhere to their obligations. They usually focus on enabling and incentivising compliance rather than binding adversarial dispute resolution. But they can also provide for certain sanctions (e.g. withholding of funds or trading rights) and a system of “naming and shaming”.

4. Relationship with other subject areas

International environmental law issues overlap with other areas of public international law such as trade, foreign investments or human rights. The cross-cutting nature of environmental protection efforts is the underlying rationale of the “environmental integration principle”, that aims to ensure that environmental protection is taken into account in every non-environmental policy.

With the exception of the UN Charter, there is no hierarchy between different international agreements. Sometimes treaties address possible conflicts and determine which norms will prevail. Otherwise, if states are bound by conflicting treaty obligations, the principles of *lex posterior derogate prior* (a later rule repeals an earlier one) and *lex specialis* (a specialized rule takes precedence over a general rule) apply.³ In practice environmental protection

³ Vienna Convention on the Law of Treaties, Art.30.

concerns are usually integrated and addressed under the relevant treaty regime (and not another legal framework). This may be illustrated by the following examples:

- Since the start of 2012, emissions from international aviation are included in the EU Emissions Trading System to reduce greenhouse gas emissions and combat climate change. Operators will have to report on their annual emissions and surrender an equivalent number of allowances. This may conflict with the rules on international trade negotiated under the World Trade Organisation. However, those rules also provide that trade restricting measures are allowed if they are necessary “to protect human, animal or plant life or health” (unless they constitute a means of arbitrary or unjustifiable discrimination).
- Environmental protection measures are often deemed to have an adverse effect on foreign investments. The 1994 Energy Charter Treaty deals with inter-governmental cooperation in the energy sector from exploration to end-use and all energy products and energy-related equipment. In conjunction with the protection and promotion of foreign investment it aims to support energy efficiency and to minimise the environmental impact of energy production and use.
- In many cases, human rights treaties have been applied to address environmental concerns through, for example, the right to life or health (under the European Convention on Human Rights). There are also legal instruments that specifically refer to a human right to a satisfactory, clean or healthy environment (e.g. the 1981 African Charter on Human and Peoples Rights). The 1998 Aarhus Convention is a multilateral agreement devised to enhance rights to information, participation and justice in environmental decision making.

5. Principles of IEL

Many MEAs articulate particular principles. These principles provide a degree of authoritative guidance and an expectation that they will be adhered to if possible. They usually include the following:

a) No harm

The “no-harm principle” or “principle of prevention” is a widely recognised rule of customary international law whereby a state is duty-bound to prevent, reduce and control the risk of environmental harm to other states. The legal precedent usually cited in this connection concerns a Canadian smelter whose sulphur dioxide emissions had caused air pollution damages across the border in the US.

The arbitral tribunal in that case determined that the government of Canada had to pay the United States compensation for damage that the smelter had caused primarily to land along the Columbia River valley in the US. It found that “under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”.

Subsequently, the no-harm rule has been incorporated in various law and policy documents. Principle 2 of 1992 Rio Declaration states: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and

the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

The contemporary elaborations of the no-harm rule tend to refer to any damage to the environment (including in areas beyond the limits of national jurisdiction) and recognise that environmental protection has to be balanced against the “Permanent Sovereignty over Natural Resources”.

Some commentators argue that it is less an obligation “not to harm” than to act with due diligence – to take the due measures to prevent and minimize harm. This is relatively tangible in a bilateral transboundary setting where one state is, for example, planning to build a polluting facility at a shared river course. If there is the potential for harm to the other state the project has to be preceded by due notification, consultation and assessment (to ensure any potential harm is prevented and minimized).

b) Cooperation and Environmental Impact Assessment

The principle of international cooperation is a foundational concept for the obligation to prevent transboundary environmental harm. It has resulted in the emergence of specific procedural obligations to notify and consult neighbouring states on the environmental risks of projects, especially when shared natural resources may be affected. However, it does not imply a veto right.

Specific procedural obligations to collaborate are often part of bi- or multilateral agreements on the management of a shared watercourse. The Pulp Mills case between Argentina and Uruguay, for example, was based on an agreement between Argentina and Uruguay on the construction of a pulp mill at the riverside. The question first brought to the court was whether Uruguay had complied with the agreement and acted cooperatively.

Even though there was no specific treaty provision on the need to undertake an Environmental Impact Assessment (EIA), the International Court of Justice found that, where a transboundary environmental impact can arise, there may be an obligation to carry out an EIA. This is a remarkable example of how international courts can play a role in creating international environmental law.

c) Precaution

Precaution is usually described as a principle or approach to prevent further environmental damage against a backdrop of scientific uncertainty. It is used as a procedural tool to lower the standard of proof in situations where the complexity of scientific facts leads to a degree of uncertainty.

Principle 15 of the Rio Declaration states: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

A precautionary approach can be found in several environmental treaties. The 2000 Cartagena Biosafety Protocol is arguably a precautionary-based agreement, as there are still

uncertainties about the harms genetically modified organisms (GMOs) can cause. Where a state is about to import GMOs for the first time, it has the right to receive full information, notification and take a decision based on risk assessment. Similarly, agreements on fish stocks adopt a precautionary approach as states have to take into account various uncertainties in determining fishing quotas.

While part of various environmental agreements, it is still disputed whether the precautionary principle has become a norm of binding international customary law. The International Tribunal of the Law of the Sea (ITLOS) found that in connection with activities in seabed area it is at least in the process of attaining this status. The ICJ is expected to address the question in its forthcoming judgment in the Whaling case (Australia v Japan).

d) Common but Differentiated Responsibilities

The principle of Common but Differentiated Responsibilities (CBDR) and Respective Capabilities (CBDRRC) describes the idea that all states are responsible for the environmental protection, but their responsibilities differ according to their respective historical contributions and capabilities.

The UN Framework Convention on Climate Change (UNFCCC) provides for the different treatment of developed and developing countries in several areas. Developed countries, for example, have mitigation commitments while developing countries have to “take measures”. Developed countries should provide financial resources and transfer technology to developing countries.

While the UNFCCC distinguishes strictly between developed and developing countries, other treaties (such as the Montreal Protocol or IMO conventions) also assign differentiated obligations to developing countries. Certain commitments may apply across the board but differ in terms of expected levels of achievements and timelines for compliance by developing states.

However, the emergence and rapid growth of some developing country economies (e.g. Brazil, China or India) has led to a debate as to whether the differentiation under the UNFCCC is still adequate. Whilst developed countries emphasise the change in capabilities, developing countries underline the historic responsibility of industrialised nations. They argue that developed nations have exhausted their fair share of the available atmospheric space while developing countries still need to grow in order to eradicate poverty.

e) Polluter Pays

The Polluter Pays Principle (PPP) provides that the costs of pollution should be borne by the entity responsible for causing the pollution. It has been widely incorporated in domestic legal systems and environmental regulatory regimes. It also underpins existing civil liability instruments such as those related to transboundary GMOs, oil spills and nuclear accidents.

Principle 16 of the 1992 Rio Declaration states: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution....”

The PPP is not recognised as a rule of customary international law that would apply between states. The PPP aims to internalise costs of pollution at source – focusing primarily on industry, not states or governments.

To date, the application of the PPP in the climate change context (between states) has been strongly rejected by developed countries. During the drafting of the Convention, India supported by many G77 nations, proposed the inclusion of a reference to the responsibility of industrialised countries for existing levels of pollution in UNFCCC, Article 3. This proposal was opposed by most developed countries and not incorporated into the final text.

6. Multilateral Environmental Agreements

MEAs are autonomous arrangements, which provide a legal framework to tackle environmental issues of common concern in the international context. Since the 1970s a growing number of such agreements has been adopted, most of them during the 1990s in response to political pressure for the application of a sustainable development approach to the use of limited natural resources.

In order to streamline a fragmented system of treaties addressing different components of the global environment, UNEP has been tasked to facilitate coordination and enhance domestic participation. UNEP has, for instance, helped to harmonise reporting requirements under the different legal regimes and to organise MEAs in thematic “clusters” depending on the nature and source of pollution and environmental harm they deal with (see above). UNEP currently categorises the MEAs in three areas: climate and atmosphere related; chemical and waste; and biodiversity and land-related. Many of them are of potential relevance to climate change and its impacts.

a) Examples of biodiversity and land related MEAs

The biodiversity and land-related MEAs, for example, include the Convention of Biological Diversity (CBD), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention) and the World Heritage Convention (WHC).

A distinctive feature of the biodiversity-related conventions is the “listing approach”. In order to ensure protection of fauna and flora, a list of endangered species is drawn up and regularly updated. The 1973 **CITES** seeks to ensure the protection of different species from threats associated with trade. Species are therefore listed in three appendices of the Convention according to different levels of protection:

- Appendix I includes species threatened with extinction and forbids trade unless in exceptional cases;
- Appendix II admits trade to its species, but in a controlled manner;
- Appendix III embeds species protected in at least one country, which asked for support in controlling the trade.

Recently, a proposal to list polar bears in Appendix I was put forward by the United States as a result of threats (the melting of polar ice caps) associated with climate change. It did not succeed as it did not qualify as threat by trade. Nevertheless, this shows the increasing linkages between climate change and other international agreements.

Wetlands absorb large amounts of CO₂ and are important for climate change mitigation. The 1971 Ramsar **Convention on Wetlands** aims to ensure "the conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world".

Under the Ramsar convention its parties established a procedure that requires each member state to designate at least one wetland of outstanding importance that would be included in a list of wetlands of international importance. The enlisted sites must be managed in a "wise use" fashion, i.e. as to enhance conservation and the sustainable use of the ecosystem and its natural resources.

The 1979 Convention on the **Conservation of Migratory Species of Wild Animals** (CMS or Bonn Convention) addresses the conservation of terrestrial, aquatic and avian migratory species. It operates under the auspices of UNEP and collaborates with CITES and the CBD to coordinate actions to protect crosscutting wildlife and habitats at a global scale.

The CMS also features a listing approach, in the appendixes of the convention, to protect "threatened migratory species" and "migratory species requiring international cooperation" respectively. It has provided the framework for the conclusions of several other agreements and Memoranda of Understanding (MOUs) to protect particular regional species. Climate change can affect migration patterns and routes.

The 1972 **World Heritage Convention** seeks to protect the cultural and natural heritage in the territory of its member states. Parties can nominate potential sites to the World Heritage List, and the World Heritage Committee decides on their inclusion (and also on their delisting). The listed sites are subject to permanent protection and oversight for the benefit of future generations. Various sites are affected by climate change. The World Heritage in Danger List is for heritage sites under threat of losing their characteristics which require financial support or corrective action.

The convention operates under the authority of United Nations Educational, Scientific and Cultural Organization (UNESCO). The World Heritage Committee is the ultimate decision-making body in the convention. It is formed of 21 representatives from states parties, elected by the UNESCO General Assembly. It decides, for example, on the use and allocation of resources from the World Heritage Fund.

The 1992 **Convention of Biological Diversity** (CBD) is a comprehensive agreement on the conservation and use of biological diversity. Biodiversity is affected by climate change but through the ecosystem services it supports, also makes an important contribution to climate-change mitigation and adaptation. Subsidiary instruments to the CBD address, for example, the access to genetic resources (2000 Cartagena Protocol on Biosafety) and benefit sharing (2010 Nagoya Protocol on Access and Benefit-sharing) in more detail using programmatic approaches rather than bans or phase-outs.

The mechanisms and language of the CBD tend to be vague and flexible (e.g. "as far as possible"). On the other hand, it sets out important guidelines and criteria for project activities, such as REDD, biofuels and hydropower.

In the UK, hydropower barrages are a serious threat for migratory birds, leading to a conflict between renewable energies and natural conservation. Similarly, the use of biofuels as a source of renewable energy may threaten food security and become a driver of

deforestation. Consequently, decisions will have to be taken to resolve conflicting interests. This illustrates the urgent need for improvements in the coordination and information flow amongst MEAs.

b) Common elements of MEAs

Since the 1990s MEAs have been designed following a similar pattern. “Objectives” and “principles” reflect complex negotiation outcomes in usually rather broad and vague terms. The substantive legal obligations are established and furthered in separate subsidiary instruments – e.g. a protocol or an annex. A degree of differential treatment defines the burden-sharing rules between parties.

MEAs usually create a framework of cooperation and envisage the adoption of further legal instruments. The Conference of the Parties (COP) to the UNFCCC can adopt protocols and annexes. The Cartagena Protocol on Biosafety was adopted under the CBD and the Protocol also allows for the adoption of further instruments – e.g. the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

As a result institutional arrangements and decision-making processes are formally carried out in separate systems (e.g. the Convention and the Protocol) and legally autonomous processes. This contributes to the fragmentation of international environmental law and policy making. In practice, however, there is also a tendency to harmonise and consolidate decision making (e.g. joint meetings or “Conference of the Parties serving as the Meeting of the Parties”).

The meetings or conferences of the parties to an agreement (after its entry into force) are the main mechanism through which the regime evolves. They allow countries to meet regularly in order to address future challenges, review provisions and adopt necessary decisions. But at the same time they generate an enormous pile of decisions, whose legal status is debatable and whose implementation depends on domestic state action. Arguably MEAs have been providing more guidance than actually binding rules.

The institutional structure of MEAs usually includes a secretariat, subsidiary bodies for implementation and technological assistance, as well as financial institutions or mechanisms. The agreements include provisions on new and additional resources for their implementation and technology transfer. Because of intellectual property rights, however, provisions on technology transfer are hardly implemented in practice. In the context of the UNFCCC, for example, there is impetus for technology transfer to enhance climate change mitigation by developing countries but intellectual property concerns by developed countries often preclude such action.

Financing issues also undermine the effectiveness of many MEAs. Recurring questions in this connection are: Who decides on what resources are needed? What instruments can be used: a fund, a trust, a market mechanism? Who runs it or decides on the allocation of funds? How do states access the resources and what projects are eligible? The Global Environment Fund (GEF), for example, is an independent financing organization, which serves as a financial mechanism to many MEAs such as the CBD, the Stockholm Convention on Persistent Organic Pollutants (POPs) and UN Convention to Combat Desertification (UNCCD).

The entry-into-force requirements of many MEAs impose extra criteria to ensure the effectiveness of the agreed goals and targets. The Kyoto Protocol, for example, requires ratification by at least 55 parties to the UNFCCC which, in addition, must add up to at least 55% of the total CO₂ emissions for 1990 of parties included in Annex I to the Convention.

Under traditional treaty amendment procedures, states become bound by an amendment after depositing an official declaration accepting the amendment. Some atmospheric and marine MEAs also provide for a simplified process. The tacit amendment process integrated in the conventions of the International Maritime Organisation (IMO), for example, assumes that silence and absence of any action indicates acceptance of the amendment after a certain period of time. Under CITES, the listing and delisting of species takes place at a meeting of the parties. Decisions can be taken by a majority and bind all parties unless they object within a certain timeframe. Such techniques enhance the effectiveness of MEAs.

c) Compliance

MEAs usually do not contain enforcement mechanisms. They rather seek to facilitate and incentivise compliance through, for example, compliance committees that draw up action plans and recommendations on financial and technical assistance for the non-compliant state. National reports are used to monitor performance and enable the constant review of the effectiveness of the regime and its evolution. Reporting, however, is often poor and superficial.

Some MEAs might contain a punitive element. For example, the UNFCCC “enforcement branch” (as opposed to its “facilitative branch”) has the responsibility to determine consequences for parties that do not meet their commitments. In this case, however, sanctions result in increased targets over the ones not met while complete withdrawal from the regime (Kyoto Protocol) entails no penalty whatsoever (e.g. Canada).

CITES can respond to non-compliance with trade measures. If a designated national Management Authority fails to control the trade in endangered species on a legislative or regulatory basis in accordance with the Convention, the CITES related trade between this party and others can be effectively suspended.

In many cases, compliance with MEA provisions is also the result of peer pressure and scrutiny by civil society organisations.

III. Climate Change Regime – Convention, Kyoto Protocol and further Negotiations⁴

1. Introduction and background

Public international law is based on the notion of sovereign states. States represent the citizens of that country and in general have equal rights. No matter what size or economic power, the principle of “one state one vote” often applies.⁵ In order to be legally bound, an independent state has to consent. Consequently, public international law depends on a system of consensus in order to ensure a degree of recognition and compliance. While the concept of sovereignty of states is fundamental to international law it can also be its

⁴ This section is based on a presentation by Jacob Werksman on 2 April 2013.

⁵ Exceptions to the rule apply for example within the systems of the World Bank or the International Maritime Organisation.

Achilles' heel. The main challenge in the climate change regime is developing a consensus on meaningful solutions to what is a generally acknowledged serious problem.

The issue of climate change as such is not difficult to understand and assess. It represents the effects of industrialisation on the global climate. In this connection, science can identify who caused the problem in the past, present and future. Now the international community has to find ways in order to collectively reduce greenhouse gas (GHG) emissions and enhance the absorption of GHG. However, this is difficult to solve because of the need for joint action. Many states do not want to compromise with economic growth and development. Further, there is a lack of political will within some countries that have not yet identified climate change as a matter of national interest.

In response to the complexities of climate change and the variant degrees of political will a treaty was adopted in 1992 – the UN Framework Convention on Climate Change (UNFCCC). In the UNFCCC the parties' obligations are soft and non-specific. The Kyoto Protocol, adopted under the Convention, in comparison, contains clear legally binding commitments and has been designed to ensure a degree of compliance with these commitments. However, it largely failed because there was insufficient political will behind it. The relevant constituencies had not been built yet. The US, for example, was a major player in the negotiations but Congress rejected the Protocol. Moving on from the Kyoto Protocol is part of designing a more inclusive 2020 regime.

2. UNFCCC

The UNFCCC provides the framework for reaching further agreement on policies and measures to address climate change. It is not a detailed regulatory regime. Many of the concepts of the current international climate regime come from the Montreal Protocol on substances that deplete the ozone layer. The Montreal Protocol is seen as a success story that exemplifies how binding rules at the international level can change behaviour. Since it deals with pollutants that also affect the atmosphere and there is a natural geophysical connection between GHG and the ozone layer the Montreal Protocol was considered an obvious starting point to address climate change.

Based on the Montreal Protocol, the new international treaty was supposed to divide obligations between industrialised countries and developing countries. Financial support would be channelled from the richer to the poorer countries. However, while climate change gradually impacts on the environment the immediate effects of the depletion of the ozone layer were obvious in industrialised countries. Australia and North America were affected the most and forced to act quickly. Replacement products were already developed and new markets created to incentivise their use. Large corporations saw the emerging business opportunities and supported the phasing-out of ozone-depleting substances. The technological challenges in order to respond adequately to climate change are far more significant. It is estimated that the transition from a fuel-based to an alternative energy economy would cost trillions of dollars.

The UNFCCC has the following overall structure:

| | |
|----------|-------------|
| Preamble | |
| Art.1: | Definitions |
| Art.2: | Objective |
| Art.3: | Principles |

| | |
|-------------|---|
| Art. 4: | Commitments |
| Art. 5: | Research and systematic observation |
| Art. 6: | Education, training and public awareness |
| Arts.7-10: | Institutional arrangements (COP, subsidiary bodies, secretariat) |
| Art. 11: | Financial Mechanism |
| Art. 12: | National Communications |
| Arts.13&14: | Consultation and dispute settlement |
| Arts.15-17: | Amendments and further instruments |
| Art.18: | Right to vote |
| Arts.19-26: | Final formal provisions on signature, ratification etc. |
| Annex I: | Listing developed/industrialised countries and countries with economies in transition |
| Annex II: | Listing of developed/industrialised OECD countries |

a) Article 3 on Principles

The preamble and Article 3 (on principles) contain similar language. They tend to set out boundaries of what an acceptable climate change regime can and should do. They do not reflect obligations but rather provide general guidance. In essence they establish who should be doing what to achieve the Convention's objective to stabilise GHG emissions "at a level that would prevent dangerous anthropogenic interference with the climate system".

Art.3.1: The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) indicates who takes the lead (industrialised countries) and who should be supported. The concept acknowledges the overhanging climate debt that is owed by industrialised countries.

Art.3.3: The precautionary principle is directed at government regulators and focuses on prevention. It has been incorporated in the major multilateral environmental agreements. Where there is a risk, the lack of scientific certainty should not prevent action.

Art.3.4: The parties have a right to and should promote sustainable development. The word "right" is significant because it provides space for developing countries to develop to a certain standard. Developing countries have the right to grow and the right to demand support for that growth. The parties' right to promote sustainable development is different from a right to develop. It is assumed that it is possible for countries to grow and thrive, while de-linking themselves from carbon. Current discussions on low-carbon development, green growth and clean development mechanism are supposed to shift perceptions from 'sacrifice' to competition and opportunity.

b) Article 4 on Commitments

Art. 4.1 lays down the general commitments applicable to all parties: e.g. cooperating in climate research; observation of the global climate system and data exchange; promotion of education, training and public awareness; integration of climate change considerations into social, economic and environmental policies and actions; employ methods (such as impact assessments) for mitigation and adaptation projects or measures; communicate to the COP information on implementation. These are soft commitments. They lack a degree of specificity and mandatory character.

Art.4.2 contains specific commitments for Annex I parties to adopt policies and measures with the aim of returning to 1990 levels of anthropogenic GHG emissions. These commitments apply exclusively to Annex I parties – developed/industrialised countries and countries with economies in transition (members of the former Eastern bloc). However, the text is very convoluted and makes it difficult to extract an obligation. It envisages returning to 1990 levels “individually or jointly” and the modification of current trends by the end of the “present decade” (2000) but does not specify a date. It does not require Annex I parties to do a lot except to communicate information on implementation, national inventory of GHGs by sources and sinks or steps taken or envisaged to implement the Convention to the COP.

Under Art.4.3 developed countries shall provide new financial resources in addition to existing development aid to meet the agreed full costs incurred by developing countries in complying with their reporting obligations under Art.12.1. They shall also provide resources, including for technology transfer, needed by developing countries to meet the full agreed incremental cost of implementing measures under Art.4.1. Incremental cost describe the additional cost of implementing a mitigation project in comparison to the activity the project replaces (the “business as usual” situation). The incremental cost concept indicates what donors are willing to fund. It was not meant to be a blank cheque for development. Donors must know where their funding is going to and what the benefits are.

According to Art.4.4 developed countries shall assist developing countries that are particularly vulnerable to the impacts of climate change in meeting the costs of adaptation. This largely entails responses to weather events and may involve the insurance industry (Art.4.8). Examples of adaptation include moving airports from low to higher grounds or building seawalls.

Art.4.5 on technology transfer (for mitigation and adaptation) requires developed countries to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of or access to environmentally sound technologies.

Art.4.6 allows for a degree of flexibility in the implementation of commitments for economies in transition.

Art.4.7 links the implementation of commitments by developing countries to the financial resources and transfer of technology made available by developed countries. But while developing countries demand that there should be no further expectation other than the developed countries providing resources and technology donor countries expect concrete arrangements (above 4.3).

Art.4.8 provides that in the implementation of their commitments parties shall give special consideration to particular groups of developing countries. The provision reiterates the groups of countries referred to as particularly vulnerable in recital number 19 of the preamble, adding countries with high urban atmospheric pollution, oil producing as well as landlocked and transit countries. The nine different categories of countries shall receive special consideration not only with regard to the adverse affects of climate change but also the impact of response measures.

Art.4.9 additionally requires parties to take “full account of the special needs and situations of least developed countries” in the context of funding and technology transfer. LDCs are

designated by the UN Economic and Social Council (ECOSOC) according to a set of criteria including low income, human resource weakness and economic vulnerability.

c) Other provisions

Art.11 defines a “financial mechanism” for the provision of financing on a grant or concessional basis, including for technology transfer. It functions under the guidance of, and reports to, the COP. The Global Environment Facility (GEF) was named as the entity “entrusted” with its operation (COP 1).

Art.12 deals with the Parties’ differentiated reporting requirements on mitigation policies and measures. Only Annex I parties are required to give detailed descriptions of mitigation measures and policies - within 6 months of entry into force of the Convention. Non-Annex I Parties must submit their first national communications within three years of entry into force of the UNFCCC or when financial resources become available. LDCs can submit communications at their discretion.

Financial assistance is provided to non-Annex I Parties to prepare national communications (see above).

d) Differentiation between Parties

The Convention differentiates the commitments of Annex I, Annex II and developing country Parties (non-Annex I countries). Annex I countries are a larger set of industrialised countries and Annex II includes the wealthiest Organisation for Economic Co-operation and Development (OECD) member countries among them. Non-Annex I countries are the developing countries.

There are different reporting timeframes for different groups (see Art.12). Countries with economies in transition can choose their own base year for GHG emissions and only Annex II countries are expected to provide financial resources to meet the incremental costs of mitigation and adaptation efforts by developing countries. Annex II countries should also promote technology transfer to EITs and developing countries (non-Annex I Parties). Developing countries do not have quantitative obligations. Least Developed Countries are given special consideration.

As a result the Convention provisions have created a so called “firewall” between Annex I and non-Annex I countries. A Party that is not listed in Annex I or II is by definition a developing country. As a result states with a higher standard of living, such as Singapore or Qatar, than many Annex I countries are qualified as developing countries. Hence, there is some debate in the negotiations about the relevance of these country groupings. While some insist that the current differentiation remains valid others maintain that it has changed. Countries with economies in transition, for example, may be an outdated historical concept. While the Eastern bloc countries had heavily polluting industries and they were not particularly wealthy.

3. Kyoto Protocol

At the first meeting of the Conference to the Parties to the UNFCCC (COP 1) in Berlin, in 1995, the Parties agreed that the commitments in the Convention were "inadequate" for meeting the Convention's objective. In a decision known as the Berlin Mandate they agreed to establish a process to negotiate strengthened commitments for developed countries. This

led to the adoption of the Kyoto Protocol in 1997. The Kyoto Protocol contains specific and legally binding commitments for developed countries based on scientific knowledge. It reinforces the “firewall” between Annex I and non-Annex I countries. It contains the following elements:

| | |
|---|---|
| Preamble | |
| Art. 1 | on definitions |
| Mitigation | |
| Art. 2 | on policies and measures by Annex I Parties |
| Art. 2 par. 2 | on the exclusion of bunker and aviation fuel |
| Art. 3 | on the obligation of Annex I Parties to meet quantified emission limitation and reduction commitments |
| Art. 4 | on joint fulfilment, included because of the constitution of the EU as a ‘regional economic integration organisation’ |
| Arts. 10 and 11 | on activities and financial support to advance existing commitments (under Article 4.1 of the Convention) without introducing new commitments for non-Annex I Parties and contingent on the provision of financial resources (by developed countries) |
| Arts. 6, 12, 17 | on flexible mechanisms of the Kyoto Protocol: joint implementation (Art.6), the Clean Development Mechanism (Art.12) and emissions trading (Art.17) |
| Transparency | |
| Art. 5 | on a national system and methodologies to estimate GHG emissions and removals |
| Arts. 7 and 8 | on reporting and review |
| Compliance | |
| Arts 16, 18, 19 | on consultations, compliance and dispute resolution process |
| Institutional and operational framework | |
| Art. 9 | on periodic reviews of the Protocol |
| Art.13, 14, 15 | on the different treaty bodies and the secretariat |
| Art. 22 | on ‘one party one vote’ |
| Final formal provisions | |
| Arts. 20, 21, 23, 24, 25, 26, 27, 28 on amendments, entry into force etc. | |

a) Mitigation

Art.2 states that each Annex I Party in achieving its quantified emission limitation and reduction commitments (QELRCs) under Art.3 shall develop and implement policies and measures on, for example, the enhancement of energy efficiency, promotion of forest management, new and renewable energy, removing subsidies in relevant sectors and reducing transport emissions.

According to Art.3, Annex I Parties shall, individually or jointly, ensure that their emissions do not exceed their assigned amounts with a view to reducing overall emissions by at least 5% below 1990 levels in the period 2008-2012. Net changes in GHG emissions shall be measured by sources and removal by sinks from land-use change (limited to afforestation, reforestation and deforestation). By 2005 each Annex I Party shall have made demonstrable progress in achieving its commitments. Commitments for subsequent commitment periods should be established in amendments to Annex B.

Under Art.4, Annex I Parties have the option of meeting their targets jointly. This is known as a “bubble”. The EU has chosen this method to reduce its emissions. The EU target is the overall target of -8% for the group. It is redistributed amongst member states in the form of national targets.

Art.5 requires Annex I Parties to establish a national system for the estimation of GHG emissions by sources and removal by sinks.

Art.6 on joint implementation allows Annex I Parties to invest in emissions reducing projects in another Annex I Party and receive emission reduction units (ERUs). Eligibility criteria include the project approval by all parties involved. Emission reductions (or removal by sinks) must be additional and supplemental to domestic actions to meet commitments under Art. 3. Countries must also maintain proper inventories and comply with reporting obligations.

Under Art.7, Annex I Parties shall submit annual GHG emission inventories, additional information and national communications in regular intervals. Teams of expert review these inventories and national communications and submit reports to the Meetings of Parties to the Kyoto Protocol (Art.8).

Art.17 states that Annex I Parties can participate in international emissions trading supplemental to domestic action. Trading schemes exist in Europe and the US. Tradable units are certified emission reductions (CERs), emission reduction units (ERUs), assigned amount units (AAUs) and removal units (RMUs). Each tradable unit equals 1 metric tonne of emissions in carbon dioxide equivalents (1 AAU = 1 RMU = 1 CER = 1 ERU).

The Kyoto compliance mechanism was established in Decision 24/CP.7 of the Marrakesh Accords. The Compliance Committee has two branches. The Facilitative Branch aims to provide advice and assistance to Parties in order to promote compliance. The Enforcement Branch has the power to determine consequences for Parties not meeting their commitments. Each branch has 10 members, one from each of the five official UN regions, one from the small island developing states, two each from Annex I and non-Annex I Parties. The Committee meets in a Plenary composed of both branches. A Bureau comprising the Chairs and Vice-Chairs of each branch supports the Committee’s work.

The Kyoto Protocol repeatedly states that the Parties included in Annex I “shall” and contains very specific regulations on how to manage a global carbon budget. It reflects a top-down approach but also allows for a degree of flexibility through the international carbon markets.

b) Finance

Art.12 on the clean development mechanism (CDM) projects seeks to achieve emission reductions and involvement of the private sector. Annex I parties can implement emissions reduction projects in non-Annex I countries and receive certified emissions reduction credits (CERs). Thus they can potentially meet their targets and promote sustainable development in developing countries.

CDM eligibility criteria include voluntary participation of all parties involved; real, measurable, and long-term reduction in emissions; emissions reduction that is additional to any that would occur in the absence of the certified project activity. The host country must

sign off on the project idea first. CDMs have been operating since 1997, and there are two types of reviews: a more intensive international assessment and review for developed countries, and a (less stringent) international consultation and analysis for developing countries.

A 2% share of the proceeds from certified CDM activities goes to the Adaptation Fund to support concrete adaptation projects, particularly in vulnerable developing countries. The Adaptation Fund is governed by the Adaptation Fund Board (AFB). The Global Environment Facility (GEF) provides secretariat services to the AFB and the World Bank serves as trustee of the Adaptation Fund on an interim basis. The GEF was established in the 1990s as an innovative mechanism for global environmental issues. It has been funding climate change projects in developing countries since 1995 and put the incremental cost concept under the Convention (Art.4.3) into operation.

The climate regime provides for different types of climate finance: grant concessional financing, carbon markets and CDM tax levy from carbon markets. To date, however, this has only generated limited resources to support mitigation and adaptation. As a result developed countries made new additional financial commitments in Copenhagen in 2009: USD 20 billion per year of public finance and USD 100 billion per year of public and private financial support (from a variety of sources including markets).

4. Kyoto Protocol amendments

Although the UNFCCC envisages a progressive development of the legal framework to address climate change, Canada (in accordance with Article 27) officially withdrew from the Kyoto Protocol while Russia, Japan and New Zealand do not participate in a second commitment period.

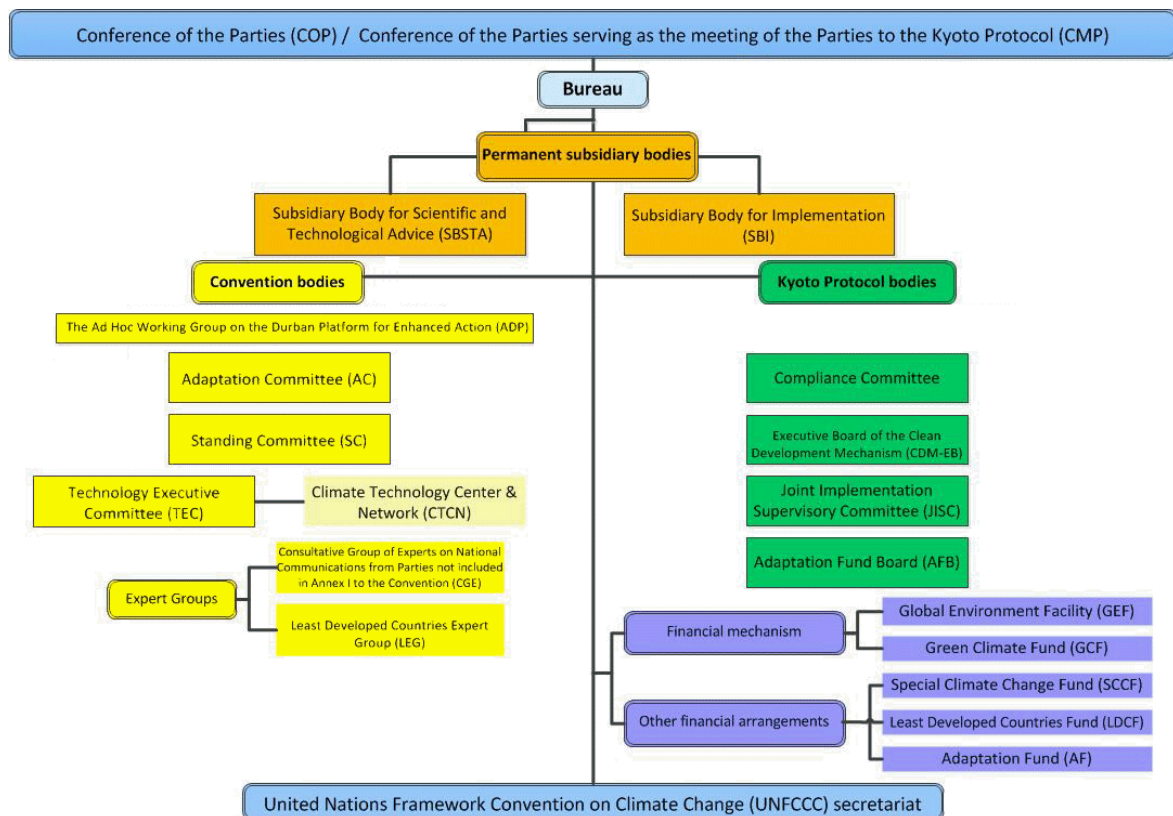
In Doha in 2012, the Parties agreed on a new 8 year commitment period (until the end of 2020). They adopted treaty amendments and decisions that preserved the Protocol's legal regime and operation. The second commitment period, however, will only cover around 15% of global greenhouse gas emissions and the commitment of some countries (e.g. Belarus, Ukraine and Kazakhstan) remains uncertain.

Notwithstanding the commitments set out in Annex B to the Kyoto Protocol (as amended), each Party's commitment during the second commitment period must be at least as ambitious as its actual annual average emissions between 2008 and 2010. To increase the level of mitigation ambitions Parties are also required to review their commitments by the end of 2014 and a new adjustment procedure (Article 3, paragraphs 1 ter and quater) has been introduced to facilitate their adoption. The Doha amendments also expand the list of greenhouse gases regulated by the Kyoto Protocol to include nitrogen trifluoride (NF3).

For the current number of ratifications of amendments to the Kyoto Protocol see http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php

5. Institutional framework

The institutional framework of the climate regime (UNFCCC and Kyoto Protocol) is available at: <http://unfccc.int/bodies/items/6241.php>



6. ADP negotiations

In Durban in 2011, the Conference of the Parties (COP) agreed to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties to be adopted no later than 2015, and to come into effect and be implemented from 2020. Subsequently, in Doha in 2012, the COP decided that the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP) will consider elements for a draft negotiating text no later than at its session in December 2014 with a view to making available a negotiating text before May 2015.

While the process has been broadly outlined, the Parties are still largely free to decide if and how to address the various issues that will be part of a new agreement. In Durban, the COP agreed on several subject areas that the workplan for the negotiations should address. On this basis the main components of a future agreement could include provisions on the following substantive issues: mitigation, adaptation, finance, technology transfer, transparency, implementation, compliance, capacity-building, and differentiation amongst Parties. In addition, a new agreement is likely to contain at least a preamble, definitions, provisions on the institutional and operational framework, and procedural rules on its adoption, amendment and entry into force.

The legal nature and form of the negotiation outcome is important. A legally binding treaty is valuable because it reflects the will of states to be held accountable for the consequences of not adhering to an agreement. If the instrument is described as non-binding or voluntary, it usually indicates a lack of political will. Legally binding instruments have final clauses which allow for states to, for example, ratify the agreement or to withdraw. They can

include provisions on transparency, compliance and enforcement mechanisms. Legally binding agreements are more likely to focus the attention and resources of governments.

The national circumstances of countries in the ADP negotiations will determine what they are prepared to do in order to address climate change. One of the main questions is whether the resulting commitments of Parties (under the new instrument) will be self-selected or negotiated. Climate finance is also central to the negotiations. While developing countries expect new and additional financial support, developed nations rather want to apply the incremental cost concept. It is also an open question from which sources the necessary money for mitigation and adaptation in developing countries will come. The question of funding under a new agreement could also be relevant to the institutional arrangements that parties agreed to establish on loss and damage.

IV. Procedural Rules of the Climate Negotiations⁶

1. Introduction

The formal rules for the conduct of the negotiations are contained in the Convention’s Rules of Procedure.⁷ Article 7.2(k), together with Article 7.3 of the Convention, commended the COP, at its first session, to agree and adopt, by consensus, rules of procedure for itself and for its subsidiary bodies (SBs). The rules were to include decision-making procedures for matters not already covered in the text of the Convention itself. However, the Draft Rules were not adopted at COP1 because the Parties were unable to agree on the voting rule (Rule 42). Since then the Draft Rules have been “applied” at each session of the COP and SBs, except for the disputed draft Rule 42.

Pursuant to Article 13.5 Kyoto Protocol, the Draft Rules apply to sessions of the Meetings of the Parties as well. By contrast, separate, specific rules of procedure apply to some Convention and Protocol bodies such as the Adaptation Fund Board, Compliance Committee or CDM Executive Board.

2. Structure and content

The Rules of Procedure⁸ cover all aspects of the negotiation process under the climate change regime. Their overall structure is as follows:

| | |
|-------------|--------------------------------|
| Rule 1 | Scope |
| Rule 2 | Definitions |
| Rule 3 | Place of sessions |
| Rules 4-5 | Dates of sessions |
| Rules 6-8 | Observers |
| Rules 9-16 | Agenda |
| Rules 17-21 | Representation and credentials |
| Rules 22-26 | Officers |
| Rule 27 | Subsidiary Bodies |

⁶ This section is based on a presentation by Linda Siegele on 3 April 2013.

⁷ Adoption of the Rules of Procedure, Note by the Secretariat, FCCC/CP/1996/2. Available at <http://unfccc.int/resource/docs/cop2/02.pdf>

⁸ Whilst technically still in draft form - as they have never been adopted - we hereafter refer to them as the “Rules of Procedure” since their application (except for the voting rule) is not contested.

| | |
|-------------|--|
| Rules 28-29 | Secretariat |
| Rules 30-40 | Conduct of business |
| Rules 41-53 | Voting |
| Rules 54-56 | Languages |
| Rule 57 | Sound records of the sessions of the COP |
| Rule 58 | Amendments to rules of procedure |
| Rule 59 | Overriding authority of the Convention |

a) Agenda (Rules 9-16)

A provisional agenda is put together by the Secretariat for each COP and SB session, with the agreement of the President of the COP.⁹ It is distributed to Parties at least six weeks before the session in all six official languages.¹⁰ Rules 10, 12 and 16 dictate what goes into the agenda. This includes items whose inclusion had been decided at a previous session, any item whose consideration was not completed at the previous session, and items proposed by Parties. In addition, Parties may propose additional items to be included in a supplementary provisional agenda, after the agenda has been circulated but before the opening of the session. When adopting the agenda, the COP can, and often does, decide to add, delete, defer or amend items, although items will only be added if considered by the COP to be urgent and important.¹¹ The practice of the COP and SBs, although this is not specifically required by the Convention or the Rules, has been to adopt the agenda on the basis of consensus.

b) Representation and Credentials (Rules 17-21)

Parties participating in a session are represented by a delegation consisting of a head of delegation and other accredited representatives. The delegation's credentials evidence its authority to act on behalf of a Party and must be submitted to the Secretariat no later than 24 hours after the opening of a session. The Bureau examines the credentials and submits a report to the COP. Parties are allowed to participate on a provisional basis pending the COP's acceptance of their credentials.

c) The Bureau (Rule 22)

The Bureau is the governing body of a session. It is made up of eleven members, including the President of the COP, seven Vice-Presidents, the Chairs of the SBs and a Rapporteur. Each of the five regional groups is represented by two Bureau members, and one Bureau member represents the small island states. Officers have a one year mandate that can be extended to a second year. The Bureau's functions are not defined in either the Convention or the Rules. Its principal task is to deal with procedural issues relating to the organisation of the COP. In practice, it has a lot of discretion as to how meetings are run. It also performs an informal advisory role, giving guidance to the President on how to conduct negotiations.

d) Duties of the COP President (Rule 23)

The position of the COP President is usually held by the environment minister of the host country. His role is to ensure an orderly conduct of business and is therefore critical. The

⁹ Rule 9.

¹⁰ Rule 11.

¹¹ Rule 13.

Rules provide that s/he "... shall have complete control of the proceedings and over the maintenance of order...".¹² The specific rights and duties include:

- Declaring the opening and closing of a session, presiding over meetings and ensuring the observance of the rules;
- According the right to speak;
- Putting questions to the vote and announcing decisions;
- Ruling on points of order;
- Proposing the closure of the list of speakers, and limiting their time; and
- Suspending and adjourning a meeting.

Whilst the President has lots of discretionary powers and plays a vital role in bringing Parties together to reach agreement, by for example putting forward compromise proposals and holding consultations, he remains under the authority of the COP.

e) Points of order, motions and proposals (Rules 34-40)

Parties may raise points of order if they consider that the President has failed to follow a rule of procedure, and the President must rule on the point of order immediately.¹³ It is possible for a representative to appeal against the ruling. In this case, the Rules provide that the appeal be put to the vote. The President's ruling will stand unless overruled by a majority of the Parties present and voting. In practice, however, whilst points of order are raised frequently, voting (almost) never happens.

Parties may also raise motions, calling for a decision on the competence of the COP to discuss any matter or adopt a proposal; the suspension or adjournment of a meeting; or the adjournment or closure of the debate on a particular question.¹⁴ Such motions must be put to the vote before discussion on the substance can proceed. Whereas points of order are procedural in nature, motions can be procedural or substantive and be made in writing.

Making proposals involves a formal process. Proposals and amendments to proposals will normally be submitted in writing by the Parties and handed to the secretariat, which will circulate copies to delegations. Proposals submitted during sessions are however often circulated as 'non-papers' to save time and paper. As a general rule, no proposal may be discussed unless copies of it have been circulated to delegations not later than the day preceding the meeting. The President may, however, waive this requirement.¹⁵

In practice, the fast moving pace of the negotiations makes a strict adherence to the Rules unpractical, and proposals (and amendments to proposals) are often made, in writing and orally, without much advance notice. By contrast, the procedure relating to proposed amendments, annex or protocol to the Convention (and any proposed amendment to an annex) require that the text be communicated to the Parties by the secretariat at least six months before the session at which it is proposed for adoption.¹⁶

f) Voting (Rules 41 – 53)

¹² Rule 23.1.

¹³ Rule 34.

¹⁴ Rules 35 & 38.

¹⁵ Rule 36.

¹⁶ UNFCCC, Articles 15(2) and 17(2); Kyoto Protocol Article 20(2); Rule 37.

To date, the Parties have been unable to agree on the first paragraph of draft Rule 42 which deals with voting on substantive matters and, as a result, the whole of draft Rule 42 has not been applied. In the absence of agreed voting rules, the practice of the Parties has been to adopt decisions and conclusions by consensus. “Consensus” is not defined in the Convention or the Rules of Procedure. Whilst there are different interpretations of what it means, it is generally agreed that it is distinct from “unanimity”. It is usually defined in the negative sense as an absence of stated objections.¹⁷ In practice, it is for the COP President or SB Chair to determine whether, in the circumstances of a particular case, Parties have reached consensus.

The first paragraph of draft Rule 42 contains two alternatives. Alternative A requires Parties to make every effort to reach agreement by consensus. If that fails, and as a last resort, decisions will be taken by a two-thirds majority vote of the Parties present and voting, with certain exceptions (such as the adoption of financial rules and the rules of procedure themselves, which require consensus). Under alternative B, decisions are taken by consensus, except for decisions on financial matters which will be taken by a two-thirds majority vote.

In addition, the Convention itself makes provision for the adoption of amendments and for the adoption of new annexes and amendments to annexes.¹⁸ Article 15(3) calls on the Parties to make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts to reach consensus have been exhausted the amendment can as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. Under Article 16(2), the same procedure applies for the adoption and amendments of annexes. Under the Kyoto Protocol, procedures for the adoption of amendments and new annexes, and amendments to these, are set out in Articles 20 and 21 respectively. The requirements are the same as for the Convention.

3. Application in practice

In the past Parties have occasionally used the Rules for strategic gain - for example, refusing to allow an item onto the agenda to avoid public criticism. Recently, at SBI38 (in Bonn in June 2013) Parties could not agree to include an additional issue (procedural and legal issues relating to decision-making by the COP and CMP) proposed by Russia on the agenda. At the end of the two week session, the SBI closed without having adopted an agenda and formally commencing its substantive work.

What happened in Bonn has been a new development in UNFCCC meetings. When there had been disagreement about potential new agenda items in the past, those items were usually rejected or held “in abeyance” which means that it is neither discussed at the session, nor struck off the agenda. The issue can be carried over to the provisional agenda of the next session. This practice has allowed the adoption of the agenda and the substantive work to go ahead. Agenda item 4(b) of the provisional SBI agenda on ‘Information contained in National Communications from non-Annex I Parties’, for example, has been repeatedly placed in abeyance (because of developing countries’ objections).

¹⁷ For a more detailed discussion on the meaning of consensus, see the LRI Briefing Paper ‘Issues on Consensus in the UNFCCC Process, 8 December 2011, available through www.legalresponseinitiative.org.

¹⁸ Articles 15 and 16, UNFCCC.

At COP15 (in Copenhagen), the Copenhagen Accord had to be “taken note of” rather than adopted as a handful of Parties expressly objected to its adoption. At COP16 (in Cancun), by contrast, only one Party (Bolivia) objected to the adoption of the Cancun Agreements. The COP President, however, found that consensus had been achieved effectively overruling Bolivia’s objection.

At COP18 (in Doha), during the last CMP plenary, Russia indicated it wanted to make an intervention as it had procedural and substantive issues with the KP Decision. The President, however, gavelled through the CMP decisions and then closed the meeting without giving Russia an opportunity to intervene. It was only in the joint meeting of the COP and CMP that Russia’s intervention was heard. But because it was the joint meeting, it was then treated as a point of order with no effect on the adoption of the KP decision. The President merely noted Russia’s objection in the report of the session.

4. Informal approaches

In addition to the formal Rules, a number of informal practices have developed over the time. For example, Parties have applied the Rules of Procedure to all inter-sessional meetings, agenda items have been added by way of COP decisions and observers have been included in non-plenary sessions.¹⁹ In relation to working groups and other informal groups, a practice has emerged of appointing two Co-Chairs – one each from an Annex I and non-Annex I Party – to ensure that the concerns of all Parties are addressed in a fair and balanced manner.

5. Other international convention processes

Like the procedural rules of the UNFCCC process, the voting provisions in the rules of procedure to the Convention on Biological Diversity (CBD)²⁰ are also contested. All other rules have been formally adopted by the Parties. The practice of the CBD COPs has therefore been to adopt decisions by consensus, too. The interpretation of consensus has also been controversial. At the CBD’s sixth COP, for example, “significant consensus” was declared despite the existence of a formal objection by Australia. Following complaints from many delegates that the COP was being “hijacked by a lone delegation”, the European Chairman declared that there was “significant consensus” and ruled the decision adopted.²¹

The UN General Assembly requires a two-third majority on important questions, such as peace and security issues, membership of the Security Council and admission of new members, but a simple majority of those present and voting on all other matters.

Consensus is not always required for the adoption of COP decisions in other multilateral environmental agreements. The Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer requires a two-thirds majority of those present and voting for matters of substance, and a simple majority for procedural matters. This majority decision-

¹⁹ The rules for the participation of observer organisations are set out in the Convention, the draft Rules of Procedure and the 2003 Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the UNFCCC. Although the latter two are not legally binding, they are followed in practice.

²⁰ See <http://www.cbd.int/convention/rules.shtml> at Rule 40, which provides for a two-thirds majority.

²¹ See note 23, at para.28.

making power was incorporated to provide a more flexible and efficient mechanism to address the urgent threat of ozone depletion.²²

6. Conference documents

In order to navigate the UNFCCC meeting process and follow the main strands of the negotiations delegates rely on the various documents issued in advance and during sessions. However, the time to review and study these documents is often limited. The most important ones include the following:

- The annotated provisional agenda: it lists all agenda items with background information on each item, identifies actions to be considered, lists documents and provides links. Each UNFCCC body that meets has its own annotated agenda.
- Note from the Chair: the Chair sets the agenda, so the note will give guidance on how the Chair sees negotiations to be conducted at the meeting. It also provides some insight into the expected debate.
- Draft negotiating text: prepared by the relevant presiding officer this is essentially a compilation of Parties' views expressed either orally during debates or through written submissions. It may first take the form of a "synthesis of proposals", i.e. a simple collation of all proposals into a single document, and then a "consolidated text" in which similar proposals have been merged and square brackets indicate areas of disagreement.
- Expert reports on specific subject areas.
- Non-papers: these are informal in-session documents, used to circulate preliminary proposals and progress issues under negotiation. The Chair's summary of the debate's alleged outcomes may, for example, first be produced as a non-paper.
- Other documents that may be useful to have to hand are decisions or drafts from earlier conferences, the texts of the Convention and KP and the (Draft) Rules of Procedure.

Conference documents are available on the UNFCCC website, at <http://unfccc.int/2860.php>.²³ The relevant meeting webpages (accessible from the website) include all documents relating to that meeting (agenda, reports, meeting papers, progress reports, submissions, technical papers etc) in chronological order, Parties' submissions and others such as workshop programmes and presentations. The Daily Programme (link from the UNFCCC website front page) lists the day's meetings, including unofficial side events and media briefings. It also contains information about the status of agenda items and documents.

7. Document symbols

Different types of documents have different symbols. For more information, please consult the Introductory guide to Documents, available in English at http://unfccc.int/documentation/introductory_guide_to_documents/items/2644.php.

For example, in "FCCC/AWGLCA/2010/MISC.2/Add.1"

- FCCC refers to the organ group;
- AWGLCA refers to the subsidiary body or working group;

²² See note 23, at para.25.

²³ Some will also be available from the Documents Desk in the conference centre.

- 2010 refers to the year or session;
- MISC refers to the nature – here miscellaneous – of the document; often contains Parties’ submissions; others include “CRP” (conference room papers) and “L” documents (draft reports and draft outcome texts);
- .2 is the number;
- Add.1 indicates modifications.

8. Drafting text and interventions

There are different tools at the Parties’ disposal for participating in the negotiations. For example, Parties may produce conference room papers - in-session documents containing new proposals or negotiating text, or outcomes of in-session work. A Party may make an oral intervention backed by a written submission for inclusion in the Chair’s text or non-paper. Alternatively, it could also focus on sharing views and building consensus with other Parties in an informal context – e.g. through bilateral meetings. Agreed outcomes are captured in COP decisions.

Drafting decision text and interventions is a demanding and technical exercise. Different decisions and interventions will command different requirements. Delegates need to take into account their governments’ and regional group’s policies and objectives on different issues, decide on how to best articulate those positions and what different options are available. What follows here are a few additional general considerations to think about.

a) Drafting decisions

Draft decisions of COP that frame the agreement of Parties on substantive issues under negotiation usually consist of:

| | |
|--|--|
| Title | |
| The Preamble (“Recalling...”, “Noting...”) | Puts the operative part in context Has no binding legal value Is used to guide interpretation of binding paragraphs, or to strategically include language |
| The Operative Part (or “Decision Text”) | Represents the actual “agreement” between Parties Prevails in direct conflict with preambular language Where ambiguous, preambular language used to interpret the Parties’ intention |

When preparing to draft some negotiation text, it may be helpful to first consult some of the following documents:

- Past decisions on similar or complementary subjects;
- Conclusions from inter-sessional meetings;
- Chair’s text ; it is a non-paper with no legal basis, but helps the Parties articulate their ideas;
- Other UN resolutions;
- Suggestions from stakeholders, such as NGOs and other stakeholder groups.

It is important to be careful with wording (and punctuation) when drafting texts. There are many phrases and words whose precise meaning can be relevant. For example:

- “May” – permissive and discretionary
- “Should” – not required but advised
- “Shall”, “Will”, “Must” – almost always binding unless combined with a weaker word, e.g. “shall endeavour”
- “And” – all connected clauses or provisions must be satisfied
- “Or” – only one of the connected clauses or provisions must be satisfied
- “As appropriate” / “If necessary” – gives Parties discretion
- “To the extent feasible/practicable” – to take action within the limits set by the Party taking action
- “Consider” – think about further without necessarily making a decision
- “Towards” – allows approximating a goal without getting there
- “To organize a workshop” – often used as a fallback when agreement cannot be reached, and usually a delaying tactic

Note also the use of similar words and expressions (underlined) in the following two extracts:

“Defines a new market-based mechanism, operating under the guidance and authority of the Conference of the Parties, to enhance the cost-effectiveness of, and to promote, mitigation actions, bearing in mind different circumstances of developed and developing countries, which is guided by decision 1/CP.16, paragraph 80, and which, subject to conditions to be elaborated, may assist developed countries to meet part of their mitigation targets or commitments under the Convention;” (Decision 2/CP.17, para 83)

“Appreciates the need to explore a range of possible approaches and potential mechanisms, including an international mechanism, to address loss and damage, with a view to making recommendations on loss and damage to the Conference of the Parties for its consideration at its eighteenth session, including elaborating the elements set out in decision 1/CP.16, paragraph 28(a–d);” (Decision 7/CP.17, para 5)

b) Oral interventions

If you believe the Chair has not followed the Rules of Procedure, you may indicate it by making a point of order stating, for example: “I would like to make a point of order”. For more details on when points of order can be raised see above.

Parties may provide input on how the Chair should deal with an issue (whether procedural or substantive) by making a motion. This can also be used as a tactical tool to deflect attention from substantive issues.

Country representatives present national positions after the negotiation blocs have taken the floor. When presenting country positions delegates often seek to follow a few basic steps:

- Raising country flag and waiting to be called
- Acknowledge President/Chair: “Thank you, Madame Chair”
- Associate with a larger group or announce their affiliation: “Madame Chair, I would like to associate myself with the remarks made by.... I present the following remarks on behalf of...”
- Remain positive and focus on positive aspects of the negotiation

- Making a clear, concise, and focused statement: “Madame Chair, my intervention will be brief. My delegation would simply like to highlight two concerns...”
- Diplomatically offer a different viewpoint to other interventions: “Madame Chairman, my colleague from Germany has eloquently raised some very important points... However, one area where her approach might prove problematic is...”
- Conclude by suggesting their view is most reasonable
- Thanking the President/Chair

9. Practical exercises

a) Words

Read the following 3 sentences:

(1) “The Parties decide to request that the secretariat organize a workshop on the provision of scaled up funding to developing country Parties...”

(2) “Scaled up predictable, new and additional, and adequate funding shall be provided to developing country Parties”

(3) “Developed country Parties shall consider taking steps, as appropriate and to the extent practicable, towards scaled up... funding for developing country Parties.”

Then (1) decide on the weakest and strongest version and (2) in the underlined version replace “and” with “or”, “should” with “shall” and delete “adequate”. Discuss the effect of the resulting revised sentence.

Sentence (2) reflects the strongest and most far reaching commitment while sentence (1) only initiates a process without a significant value statement. While ‘shall’ indicates a strong willingness and commitment “should” merely states that it is not required but advised. In the case of “and” both criteria (new and additional) must be satisfied – not just one (“or”). Without “adequate” funding is further qualified and even vaguer.

b) Text

Find decision 1/CP.17 and summarize the main content with relevance for the ongoing negotiations.

Decision 1/CP.17 on the establishment of the ADP is available at <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2> It

- launches a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention (ADP),
- establishes the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP),
- which is to complete its work no later than 2015,
- by adopting a protocol, another legal instrument or an agreed outcome with legal force to come into effect in 2020, and
- launches a workplan on enhancing mitigation ambition to identify and to explore options for a range of actions that can close the ambition gap.

How would such a new Protocol come into being?

It would be adopted under Article 17 of the UNFCCC by consensus - because there is no voting rule for a protocol in the Convention, and the Rules of Procedure (on voting) were not agreed. Rules for ratification and entry into force of the protocol would be found in the Protocol itself (e.g. 55% of the Parties accounting for a specific amount of emissions). To be agreed by 2015 it might have to be quite a simple text.

V. Treaty Law, Drafting and Interpretation²⁴

1. Introduction and background

Treaties have governed international law for centuries. As such, treaties have had a large impact on how the world works. Treaties can be bilateral (between two parties) or multilateral (between multiple parties). Multilateral treaties are usually agreements that are negotiated in technical sessions over a period of time, such as the United Nations Framework Convention on Climate Change (UNFCCC). Multilateral treaties seek to create a global approach on important international issues, such as peace and war or climate change. Multilateral treaties reflect the overall agreement of the parties involved in the negotiations – although sometimes they rather reflect what they agree to disagree about.

In the 17th century, the Dutch jurist and scholar Hugo Grotius (1583 – 1645) established general principles for treaty interpretation which still are relevant. They are similar to the principles of treaty interpretation captured in the 1969 Vienna Convention on the Law of Treaties. The Convention determines the secondary rules that apply to the development and application of treaties – e.g. adoption, reservations, amendments, interpretation, withdrawal etc. The “law of treaties” is different from “treaty law” which includes the substantial law in treaties, including the details of the obligations.

2. Treaty

A treaty is an express agreement entered into by different actors, namely states and international governmental organisations, under international law. They can be called, inter alia, international agreements, protocols, covenants, conventions, charters, declarations, memoranda of understanding, modus vivendi, pacts or exchange of letters. Regardless of the title, the agreement is only a formal treaty if it is legally binding. This is of importance in how the agreement affects the signatories. If binding, then the party in breach of the treaty might, for example, be liable for non-compliance with the treaty agreement. Treaty law is therefore often compared to contract law because parties also accept certain obligations vis-à-vis each other.

A formal definition of “treaty” and “international agreement” has been debated by academics for years. Lord McNair’s working definition describes treaties as “...a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law”. For the purpose of international relations the key question is whether the agreed instrument creates legally binding obligations under international law.

²⁴ This section is based on a presentation by Jill Barrett on 4 April 2013.

According to some scholars this depends on the intention of the parties. They are free to create non-binding or binding arrangements evidenced by, for example, concrete binding language and formal procedures. If there is no obligation that is created in the agreement, then there can be no question of being bound to it. Non-binding agreements are often referred to as a “gentlemen’s agreement” or a “declaration”.

In order for a treaty to be binding, it must be formally concluded and ratified. Ratification (acceptance, approval and accession) under international law indicates a state’s consent to be bound by a treaty following the formal adoption and signature. In most countries this is preceded by a process of domestic ratification. The process differs from country to country but usually involves parliament and the passing of domestic legislation (authorising government’s action).

In addition, Article 102 of the UN Charter states the following:

“1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

The provision requires that all treaties and international agreements entered into by any member of the United Nations must be registered with the Secretariat and be published by the Secretariat. Parties to a treaty may not invoke that treaty before the International Court of Justice or any other UN body unless it is registered.

The 1969 Vienna Convention on the Law of Treaties helps to define a treaty in Article 2 paragraph 1 (a). According to the provision, treaty means *“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”*. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, in Article 2 paragraph 1 (a), uses very similar language.

Therefore, a treaty must be (1) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with treaty-making power; (3) governed by international law and (4) in writing. The phrase *“whatever its particular designation”* emphasises that the descriptive name and form of an agreement are not necessarily decisive. The agreement qualifies as a treaty if it follows the aforementioned criteria. It must be concluded between at least two parties possessing treaty-making capacity. Their intention must have been to create a degree of formally binding obligations under international law.

There are other international instruments that are not intended to be treaties. They are usually non-binding and may be called: Memorandum of Understanding, Declaration, Arrangement, Action Plan, Guidelines, Gentlemen’s Agreement or Protocol (which, however, could also be binding instruments depending on intention and content). The name *“protocol”* is occasionally associated with a supplementary non-binding agreement added to an existing treaty. However, the London Protocol which prohibits dumping at sea, for example, is a complete replacement of the earlier treaty on the issue (and not an add-on to the London Convention). Similarly, the Montreal Protocol is a separate international treaty.

3. Practical exercise

The above text has helped explain the difference between a binding treaty and a non-binding document. In order to learn what this looks like in practice, please read the following extracts and identify if they are from a treaty or non-binding treaty-like instrument:

a) Sino-British Joint Declaration (extract)

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China have reviewed with satisfaction the friendly relations existing between the two Governments and peoples in recent years and agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis. To this end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.

3. The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

...

4. The Government of the United Kingdom and the Government of the People's Republic of China declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection.

5. *The Government of the United Kingdom and the Government of the People's Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up when this Joint Declaration enters into force; and that it will be established and will function in accordance with the provisions of Annex II to this Joint Declaration.*

6. *The Government of the United Kingdom and the Government of the People's Republic of China declare that land leases in Hong Kong and other related matters will be dealt with in accordance with the provisions of Annex III to this Joint Declaration.*

7. *The Government of the United Kingdom and the Government of the People's Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration.*

8. *This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985.*

This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 19 December 1984 in the English and Chinese languages, both texts being equally authentic.

| |
|--|
| Analysis: Despite the fact it is called a declaration, binding language such as “subject to ratification” and “shall enter into force” indicate that the Sino-British Joint Declaration is in fact a treaty. |
|--|

b) Afghanistan Compact (extract)

The Islamic Republic of Afghanistan and the international community:

Determined to strengthen their partnership to improve the lives of Afghan people, and to contribute to national, regional, and global peace and security;

Affirming their shared commitment to continue, in the spirit of the Bonn, Tokyo and Berlin conferences, to work toward a stable and prosperous Afghanistan, with good governance and human rights protection for all under the rule of law, and to maintain and strengthen that commitment over the term of this Compact and beyond;...

Have agreed to this Afghanistan Compact....

PRINCIPLES OF COOPERATION

As the Afghan Government and the international community embark on the implementation of this Compact, they will:

- 1. Respect the pluralistic culture, values and history of Afghanistan, based on Islam;*
- 2. Work on the basis of partnership between the Afghan Government, with its sovereign responsibilities, and the international community, with a central and impartial coordinating role for the United Nations;*
- 3. Engage further the deep-seated traditions of participation and aspiration to ownership of the Afghan people;*

4. Pursue fiscal, institutional and environmental sustainability;
5. Build lasting Afghan capacity and effective state and civil society institutions, with particular emphasis on building up human capacities of men and women alike;
6. Ensure balanced and fair allocation of domestic and international resources in order to offer all parts of the country tangible prospects of well-being;
7. Recognise in all policies and programmes that men and women have equal rights and responsibilities;
8. Promote regional cooperation; and
9. Combat corruption and ensure public transparency and accountability.

...

COUNTER-NARCOTICS – A CROSS-CUTTING PRIORITY

Meeting the threat that the narcotics industry poses to national, regional and international security as well as the development and governance of the country and the well-being of Afghans will be a priority for the Government and the international community. The aim will be to achieve a sustained and significant reduction in the production and trafficking of narcotics with a view to complete elimination. Essential elements include improved interdiction, law enforcement and judicial capacity building; enhanced cooperation among Afghanistan, neighbouring countries and the international community on disrupting the drugs trade; wider provision of economic alternatives for farmers and labourers in the context of comprehensive rural development; and building national and provincial counter-narcotics institutions. It will also be crucial to enforce a zero-tolerance policy towards official corruption; to pursue eradication as appropriate; to reinforce the message that producing or trading opiates is both immoral and a violation of Islamic law; and to reduce the demand for the illicit use of opiates.

COORDINATION AND MONITORING

The Afghan Government and the international community are establishing a Joint Coordination and Monitoring Board for the implementation of the political commitments that comprise this Compact. As detailed in Annex III, this Board will be co-chaired by the Afghan Government and the United Nations and will be supported by a small secretariat. It will ensure greater coherence of efforts by the Afghan Government and international community to implement the Compact and provide regular and timely public reports on its execution.

Analysis: The Afghanistan Compact is not a treaty. Much of the language is based upon “commitment”, which tends to be used for non-binding text. It is not clear who the international community is in this document and as such, it is not evident who is a party (there are participating countries mentioned, but not parties) to the Compact. The language is indicative of a policy statement rather than a treaty. Further, there is no mention of ratification, signature or enforcement.

c) Memorandum of Understandings on ASEAN Cooperation and Joint Approaches in Agriculture and Forest Products Promotion Scheme (extract)

1. *The Governments of ASEAN Member Countries hereby agree to establish the ASEAN Cooperation and Joint Approaches on Agriculture and Forest Products Promotion Scheme, hereinafter referred to as the Scheme.*

2. *In this Scheme, "Promotion" means joint efforts to improve the competitiveness of ASEAN agriculture and forest products. These include negotiation, collective bargaining, and addressing issues and problems encountered by Member Countries in the international markets.*

3. *The objectives of the Scheme are to:*

i. Strengthen the collective bargaining position of ASEAN on matters affecting agriculture and forest products trade in the world markets;

ii. Expand agriculture and forest products exports through product diversification, intensification of downstream processing and higher value added activity;

iii. Continue upgrading the quality of ASEAN Agriculture and Forest Products; and

iv. Lay down the foundation for bigger and closer economic ties between ASEAN Member Countries.

4. *The products to be covered by the Scheme shall be reviewed periodically by Member Countries and the Private Sector. The Initial Product List covered by the Scheme appears in the Schedule.*

5. *Promotional programmes of the agriculture and forest products shall be initiated by the private sector in consultation with the National Coordinator of Member Countries as referred to in paragraph 17.*

6. *The Governments of Member Countries shall assist and facilitate the private sector's initiatives.*

7. *The Scheme shall establish a mechanism for joint approaches and promotion to expand ASEAN exports of agriculture and forest products in the world market.*

II. JOINT PRODUCT PROMOTION IN WORLD MARKET

8. *The Scheme shall establish guidelines and procedures for joint ASEAN products promotions which shall include the following programmes/activities:*

i. Joint efforts to counter campaign against ASEAN products;

ii. Joint negotiations to overcome discriminatory Non-Tariff Barriers (NABs) and unfair practices imposed by importing country/countries; and

iii. Joint promotion of product through participation in promotional activities.

9. *A product to be considered for inclusion in the Scheme must satisfy any two of the following criteria:*

i. The product is being subjected to discriminatory treatment and/or non-trade related issues;

ii. The product is of major export interest to or has export potential for at least two Member Countries; and

iii. The product has economic impact in terms of income generation and employment on a large number of people in ASEAN.

...

V. COORDINATION MECHANISM

16. A Joint Committee shall be established to coordinate joint efforts and programmes under the Scheme.

17. The Joint Committee comprising the ASEAN Coordinator the National Coordinators and the Private Sectors shall oversee the implementation of the Scheme and report to SOM-AMAF. The Joint Committee shall be responsible for the overall implementation of the Scheme while the National Coordinators shall be responsible for activities organised by respective Member Countries. The ASEAN Coordinator and the National Coordinators shall be appointed by the ASEAN Secretariat and Member Countries respectively.

18. The Joint Committee shall adopt its own rules of procedures.

VI. ENTRY INTO FORCE

19. This Memorandum of Understanding shall enter into force from the date of its signature and shall initially apply for a period of five (5) years. It may be extended by the consensus of all Member Countries beyond the original five-year period.

Analysis: The 1994 Memorandum of Understandings on ASEAN Cooperation and Joint Approaches in Agriculture and Forest Products Promotion Scheme is not a treaty. The text is ambiguous and filled with aspirational language. Further, there is no voting procedure, compliance procedure or depository. The language of the text reveals that the signatories have merely signed the Memorandum of Understanding, rather than agreeing to the actual terms and conditions. Also of consideration is that the Vienna Convention establishes in Article 7 that signatories of a treaty must have full powers.

d) Memorandum of Understanding between ASEAN and China on establishing the ASEAN-China Centre (extract)

The Governments of the Member States of the Association of Southeast Asian Nations comprising Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam (hereinafter referred to collectively as "ASEAN" or "ASEAN Member States") and the Government of the People's Republic of China (hereinafter referred to as "China") (hereinafter referred to collectively as "Contracting Parties" or "Parties"; or singularly as "Contracting Party" or "Party");

RECALLING the thrust of economic cooperation between ASEAN and China which both sides can mutually benefit;

MINDFUL of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China signed in Phnom Penh on 4 November 2002 ("Framework Agreement") as well as the various agreements on trade in goods, services, dispute settlement, investment and other agreements relating to economic cooperation signed between ASEAN and China under the umbrella of the Framework and the Joint Declaration of the Heads of State/Government of Association of Southeast Asian Nations and the People's Republic of China on ASEAN-China Strategic Partnership for Peace and Prosperity signed in Bali on 8 October 2003;

REALIZING the vast potential for economic cooperation between the Contracting Parties;

RECOGNISING that cooperation is based on equity, friendship and mutual benefit;

STRESSING that the areas of cooperation under this Memorandum of Understanding shall be complementary to the activities carried out in other ASEAN-China fora;

HAVE AGREED as follows:

ARTICLE I - ESTABLISHMENT AND LOCATION

1. The Contracting Parties shall hereby establish a one-stop information and activities centre known as the ASEAN-China Centre (hereinafter referred to as "the Centre") to promote ASEAN-China cooperation in trade, investment, tourism, education and culture, with active involvement of the private sector. The Centre shall gradually expand to include a more comprehensive array of activities and participants.

2. The Centre shall be a non-profit organisation but be able to raise funds necessary for its operation.

3. The Headquarters of the Centre shall be located in Beijing. Its affiliated centres may be established in ASEAN Member States as well as other parts of China in the future.

...

ARTICLE XXIV - AMENDMENTS

1. Either Contracting Party may propose amendments to this Memorandum of Understanding. A proposed amendment shall be communicated to the Secretary-General who shall communicate it to the other Contracting Parties at least six months in advance for the consideration by the Joint Council.

2. Amendments to this Memorandum of Understanding shall be adopted by the Joint Council and shall require acceptance by the Members of the Centre. However, the amendments involving following matters shall require subsequent acceptance by all Contracting Parties before they come into force:

- a) fundamental alteration in the purpose or the functions of the Centre;
- b) change relating to the right to withdraw from this Memorandum of Understanding;
- c) introduction of new obligations for Members;
- d) change in the provisions regarding privileges and immunities of the Centre and the persons related to the activities of the Centre; and
- e) other matters determined by the Joint Council as important.

3. Amendments accepted by the Contracting Parties shall enter into force upon the date of the last deposit of the instruments of acceptance with the ASEAN Secretariat.

ARTICLE XXV ENTRY INTO FORCE AND DURATION

1. After the completion of its internal legal procedures for the entry into force of this Memorandum of Understanding, each ASEAN Member State shall give written notification to the Secretary-General of ASEAN, who shall, immediately notify China when all of the ASEAN Member States have finished the said procedures.

2. After the completion of its internal legal procedures for the entry into force of this Memorandum of Understanding, China shall give written notification to the Secretary-General of ASEAN.

3. This Memorandum of Understanding shall enter into force upon receipt of the last written notification is received. The Secretary-General of ASEAN shall notify ASEAN Member States of the entry into force of this Memorandum of Understanding.

4. This Memorandum of Understanding shall remain in force for a period of five years, and thereafter may be extended by decision of the Joint Council. This Memorandum of

Understanding shall be deposited with both the Ministry of Foreign Affairs of China and the ASEAN Secretariat. The Secretary-General of ASEAN shall promptly furnish a certified true copy to all ASEAN Member States.

Analysis: The 2009 Memorandum of Understanding between ASEAN and China is a treaty. Even though it is referred to as a Memorandum of Understanding, it is a treaty because it has a very specific provision of entry into force and duration, which is similar to a ratification procedure. Further, not every treaty has a settlement of disputes provision.

e) Memorandum of Understanding Between the Association of Southeast Asian Nations and the People's Republic of China on Strengthening Cooperation in the Field of Standards, Technical Regulations and Conformity Assessment (extract)

The Governments of the Member States of the Association of Southeast Asian Nations (hereinafter referred to as "ASEAN") and the Government of the People's Republic of China (hereinafter referred to as "China") (hereinafter singularly referred to as "Party" and collectively referred to as "the Parties");

REFERRING to the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China signed on 4 November 2002 and its amending Protocols;

RECOGNISING that further cooperation among the Parties in the field of standards, technical regulations and conformity assessment has important significance in safeguarding national security, in the protection of human, animal or plant life or health, in the protection of the environment, in the prevention of deceptive practices, in raising the quality of mutually supplied goods, in the protection of consumer's rights, and in facilitating and promoting regional trade, towards the effective and successful realisation of the ASEAN-China Free Trade Area;

DESIRING to further promote the cooperation between relevant Parties in implementation of the Agreement on Technical Barriers to Trade of the World Trade Organisation (hereinafter referred to as "TBT Agreement");

WISHING to further strengthen the strategic partnership established between ASEAN and China,

HAVE REACHED the following understandings:

Article 1 OBJECTIVE

The Parties, subject to the terms of this Memorandum of Understanding and the laws, rules, regulations and policies from time to time in force in each country, will strengthen cooperation in the field of standards, technical regulations and conformity assessment on the basis of equality, mutual benefit and mutual respect, in order to ensure that imported and exported products between ASEAN and China conform to requirements of safety, health, environment, the protection of the interests of consumers, and the promotion of regional trade in line with the principles of the TBT Agreement.

Article 2 AREAS OF COOPERATION

1. Taking into account the existing implementation system of the TBT Agreement and subject to the terms of this Memorandum of Understanding and policies on standards, technical regulations and conformity assessment of the Parties, the Parties, in order to strengthen the cooperation and consultation mechanism between them, endeavour to cooperate in the following areas:

(a) establishment of an efficient system of information exchange and communication for which the Parties will decide on the priority sectors for cooperation;

(b) conducting exchange visits of relevant management, enforcement and technical personnel of the Parties so as to exchange experience and consult and resolve relevant problems;

(c) conducting training courses, seminars and other similar activities based on the needs and capabilities of the Parties, and in consideration of narrowing the development gap within ASEAN;

(d) conducting collaborative research in areas of mutual interest within the scope of this Memorandum of Understanding; and

(e) other areas as agreed by the Parties.

...

Article 4 FINANCIAL ARRANGEMENTS

The financial arrangements to cover expenses for the cooperative activities carried out within the framework of this Memorandum of Understanding shall be mutually agreed upon by the respective Parties on a case-by-case basis subject to the availability of funds.

...

Article 9 FINAL PROVISIONS

1. This Memorandum of Understanding shall come into effect on the date of signing and will be valid for a period of five (5) years. Thereafter it shall be automatically renewed every two (2) years unless sooner terminated by written notice by either ASEAN or China, six (6) months prior to the intended date of termination.

2. The termination of this Memorandum of Understanding will not affect the implementation of on-going programmes, or programmes which have been accepted by the respective Parties prior to the date of termination of the Memorandum of Understanding.

3. A Party shall not use the name, logo and/or official emblem of any of the Parties in any publication, document and/or paper without the prior written approval of such Party.

4. For the ASEAN Member States, this Memorandum of Understanding shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised by the respective Governments of the Member States of ASEAN and the Government of the People's Republic of China, have signed this Memorandum of Understanding.

Analysis: The 2009 Memorandum of Understanding is not a treaty. The language is weak and unclear. Language such as "understanding" is not as conclusive for example of "have agreed", which is used in treaty language. Further, the document uses language such as "come into effect" rather than "come into force". The content is aspirational rather than based on legally binding measures and language.

3. Treaty Practice

Treaty practice describes the procedure for the development, handling and maintenance of treaties. It includes the drafting, the adoption of text at the end of the negotiation, how text is processed for signature, who can sign the text, how the signatories sign the text, how the

ratification instrument is drafted, how the reservations or declarations are drafted, the management of treaty records, depository function etc. The treaty practice of states differs and the relevant internal manuals and instructions are not always made public. New Zealand, for example, has its manual on the website available at:

<http://www.mfat.govt.nz/downloads/treaties-and-international-law/International-Treaty-Making-Guide-2012.pdf>

The United Nations Treaty Handbook has been prepared by the UN Office for Legal Affairs as a guide to the Secretary-General's practice as a depository of multilateral treaties and the UN Secretariat's practice in relation to the registration and publication functions. It aims to assist states in becoming party to international treaties. The handbook contains practical examples (e.g. of reservations or declarations) and is written in simple language with step-by-step instructions, and explanations that cover many aspects of international treaty law and practice. It is available at:

<http://treaties.un.org/doc/source/publications/THB/English.pdf>

4. Drafting and interpretation

The 1969 Vienna Convention on the Law of Treaties is the most important source on the law of treaties. It mainly codifies existing customary international law on treaties. To date, it has been signed and ratified by over 113 countries. Nearly all industrialised nations have become party to the Vienna Convention. Exceptions include, for example, the United States, France and Turkey. As the Vienna Convention generally reflects customary international law, there are very few reasons that countries would object to its application. The Vienna Convention (in section 3) contains rules on how to interpret a treaty:

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 – Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.