



Book – Multilateral Environmental Agreements

Book – Multilateral Environmental Agreements

Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS

Course: Introductory course to International Environmental Law

Book: Book – Multilateral Environmental Agreements

Table of contents

1. Negotiating Multilateral Environmental Agreements

Forum

Time

Committee or conference

Governments

Non-state actors

First steps

Adoption, signature and deposit

Convention-Protocol Approach

2. Administering Treaties

Non-compliance mechanisms

Conference of the Parties

Secretariat

Subsidiary bodies

1. Negotiating Multilateral Environmental Agreements

There is no definite procedure established on how to negotiate a Multilateral Environmental Agreement. Some common elements, however, may be derived from the practice of states over the last few decades.

The first step in the negotiation process is for an adequate number of countries to show interest in regulating a particular issue through a multilateral mechanism. The existence of a common challenge and the need for a solution is necessary. In certain cases, the number of acutely interested parties may be as few as two.

For example, the draft Convention on Cloning was tabled in the Sixth Committee of the General Assembly by Germany and France. A counter proposal was advanced by the United States of America.

In other cases, a larger number of countries need to demonstrate a clear desire for a new instrument.

Forum

Once this stage of establishing a common interest in addressing a global problem is established, states need to agree on a forum for the negotiation of a multilateral instrument. Usually an existing international organization such as the United Nations or an entity such as the United Nations Environment Programme (“UNEP”) will provide this forum. The United Nations has frequently established special fora for the negotiation of MEA through General Assembly resolutions. The 1992 United Nations Framework Convention on Climate Change (“UNFCCC”) was negotiated by a specially established body - the Intergovernmental Negotiating Committee (“INC”).

It is also possible to conduct the negotiations in a subsidiary body of the General Assembly such as the Sixth Committee, which is the Legal Committee. Treaty bodies could also provide the fora for such negotiations. For example, pursuant to article 19(3) of the 1992 Convention on Biological Diversity, the Conference of the Parties, by its decision II/5, established an Open-Ended Ad Hoc Working Group on Biosafety to develop the draft protocol on biosafety, which later resulted in an agreed text and subsequent adoption of the 2000 Cartagena Protocol on Biosafety.

Time

Negotiations may be open-ended in time or established for a limited period. For example, the United Nations Convention on the Law of the Sea negotiations took nearly ten years to complete, while the negotiations for the 1992 Convention on Biological Diversity were concluded in about fifteen months.

Committee or conference

The negotiating forum will start the negotiating process by establishing a committee or convening an international conference to consider the particular issue. This could take many forms, from an informal ad hoc group of governmental experts to a formal institutional structure as in the case of the INC for the negotiation of the 1992 UNFCCC. It is also possible for an international organization to establish a subsidiary body to prepare a text for consideration and adoption by an Intergovernmental Diplomatic Conference.

Certain treaties were first proposed by the International Law Commission and subsequently negotiated and adopted by intergovernmental bodies.

The host organization will organize preparatory committees, working groups of technical and legal experts, scientific symposia and preliminary conferences. The host body will also provide technical back-up to the negotiators.

Governments

Governments also often draft negotiating texts. During the negotiations, delegates generally remain in close contact with their governments; they have preliminary instructions which are usually not communicated to other parties. At any stage they may consult their governments and, if necessary, obtain fresh instructions. Governments could also change their positions depending on developments. Depending on the importance of the treaty under negotiation, governments may expend considerable resources in order to safeguard and advance their own national interests in the context of arriving at a global standard.

In many cases this may require building numerous alliances and interest groups in order to advance national positions. The European Union usually operates as a block in MEA negotiations but often formed alliances with other like-minded countries

Non-state actors

In the negotiating forum, states are the most important actors, since most treaties only carry direct obligations for states. However, the proper implementation of and compliance with a treaty cannot be achieved without involving a whole range of non-state actors, including civil society groups, Non-Governmental Organizations (“NGOs”), scientific groups, and business and industry, among others. Therefore the participation of these groups in the negotiating processes that lead to an MEA is now more readily facilitated.

Some national delegations to intergovernmental negotiations now contain NGO representatives while some smaller states might even rely on NGOs to represent them at such negotiations. In such situations, NGOs may have a notable influence on the outcomes of the negotiations.

The role of NGOs has often been significant in the treaty negotiating processes, as well as in stimulating subsequent developments within treaty regimes. An example is the influence of the International Council for Bird Preservation (now BirdLife International) and the International Waterfowl and Wetlands Research Bureau, two NGOs, in the conclusion and on the implementation of the 1971 Ramsar Convention on Wetlands.

NGO influence is achieved in most cases through the mechanism of participation as observers, in international organizations, at treaty negotiations, and within treaty institutions. Some NGOs are well prepared with extensive briefs. Some national delegations rely on NGOs for background material. The inclusion of NGOs may be seen as representing a wider trend towards viewing international society in terms broader than a community of states alone and in the progressive democratization of international norm making processes. This might indicate a development in international law making and implementation with significant implications for the future.

First steps

In the Intergovernmental Negotiating Committee process, one ideally starts with the identification of needs and goals, before the political realities get in the way. Research must have been undertaken and show the need for a legally binding international instrument to address the perceived problem. This phase may sound logical, but as the negotiations surrounding climate change show, states can always invoke opinions of scientists, deviating from the majority, who argue more in line with their national interests. During treaty negotiations, states will often cite scientific evidence that justifies the general policies they prefer.

At the time the first formal discussions take place, information has been disseminated, the preliminary positions of states are established, and the initial scope of the agreement is further defined. It is also likely that interested states have made representations concerning their own interests to other states using diplomatic channels. Then the long process to international consensus- building begins, often lasting years and with many lengthy drafts, negotiated over and over again.

Adoption, signature and deposit

Once the draft text has been negotiated it needs to be adopted and “opened” for signature. The text itself is usually finalised by the negotiators and might even be initialled at a final meeting of plenipotentiaries.

Most United Nations-sponsored treaties are adopted in the six official languages of the organization. If the negotiations had been conducted in one language (now, usually English) the text is formally translated into the other official languages.

The mechanism of a final act might also be employed to adopt the text. For this purpose, a conference of plenipotentiaries might be convened. These are representatives of governments with the authority to approve the treaty. Subsequently, the adopted text will be opened for signature.

Where a treaty is to be deposited with the Secretary-General of the United Nations, it is necessary that the Treaty Section of the United Nations be consulted in advance, particularly with regard to the final clauses.

Convention-Protocol Approach

As mentioned above, international environmental treaty making may involve a two-step approach, the “Framework Convention-Protocol” style.

In this event, the treaty itself contains only general requirements, directions and obligations. Subsequently the specific measures and details will be negotiated, as happened with the 2000 Cartagena Protocol on Biosafety with the 1992 Convention on Biological Diversity.

Or, additional non-legally binding instruments can elaborate on these measures to be taken by the parties, as was the case with the 2002 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, with the same convention.

The convention-protocol approach allows countries to “sign on” at the outset to an agreement even if there is no agreement on the specific actions that need to be taken under it subsequently. Among the major shortcomings of the convention- protocol approach is that it encourages a process that is often long and drawn out.

2. Administering Treaties

Treaties do not only create rights and obligations for state parties, they often also create their own administrative structure to assist parties to comply with their provisions and to provide a forum for continued governance.

Non-compliance mechanisms

Environmental treaties usually rely on voluntary compliance with their obligations, rather than on coerced compliance. Accordingly, there is a tendency to develop non-compliance mechanisms designed to secure compliance by the parties with the terms of a treaty or decisions of the Conference of the Parties (“COP”) through voluntary means.

The emphasis in these non-compliance mechanisms is to assist parties to meet their obligations rather than identify guilt in non-compliers and impose punitive sanctions. Even in the absence of a formal procedure, non-compliance problems are likely to be handled in a similar way in many environmental regimes. Non-compliance procedures are best understood as a form of dispute avoidance or alternative dispute resolution, in the sense that resort to binding third party procedures is avoided. The treaty parties will instead seek to obtain compliance through voluntary means and in the process reinforce the stability of the regime as a whole.

Breach of an environmental treaty is unlikely to justify punitive action. Punitive action is generally avoided by states in favour of softer non-compliance procedures which rely on international supervisory institutions to bring about compliance through consultation and practical assistance. Effective supervision of the operation and implementation of treaty regimes often depends on the availability of adequate information.

An example is the non-compliance procedure adopted by the parties to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Whenever there are compliance problems, the matter is referred to an implementation committee consisting of ten parties, whose main task is to consider and examine the problem and then find an amicable solution based on the 1987 Montreal Protocol. It is possible for a party itself to draw the attention of the implementing committee to its inability to comply with the Protocol with a view to obtaining assistance with compliance measures.

Conference of the Parties

Most environmental treaties establish a Conference of the Parties, a Secretariat, and subsidiary bodies.

The COP forms the primary policy-making organ of the treaty. All parties to a treaty meet, usually annually or biannually, and survey the progress achieved by the treaty regime, the status of implementation, possibilities for amendments, revisions, and additional protocols.

For example article 18 of the 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (“PIC Convention”) held in Rotterdam, the Netherlands.

1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Article 18)

“1.A Conference of the Parties is hereby established.

2. The first meeting of the Conference of the Parties shall be convened by the Executive Director of UNEP and the Director-General of FAO, acting jointly, no later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be determined by the Conference.

(...)

4. The Conference of the Parties shall by consensus agree upon and adopt at its first meeting rules of procedure and financial rules for itself and any subsidiary bodies, as well as financial provisions governing the functioning of the Secretariat.

5. The Conference of the Parties shall keep under continuous review and evaluation the implementation of this Convention. It shall perform the functions assigned to it by the Convention and, to this end, shall:

- a) Establish, further to the requirements of paragraph 6 below, such subsidiary bodies, as it considers necessary for the implementation of the Convention;
- b) Cooperate, where appropriate, with competent international organizations and intergovernmental and non- governmental bodies; and
- c) Consider and undertake any additional action that may be required for the achievement of the objectives of the Convention.

(...)”

Secretariat

The Secretariat of a convention is responsible for the daily operations. In general, it provides for communication among parties, organizes meetings and meeting documents in support of the COP, assists in implementation and it may assist in activities such as capacity building. The Secretariat gathers and distributes information and it increasingly coordinates with other legal environmental regimes and secretariats. UNEP is administering secretariat functions to many MEAs, such as the Convention on Biological Diversity, the Convention on Migratory Species and the Convention on International Trade in Endangered Species, as well as the Basel, Stockholm and Rotterdam Conventions.

In addition, UNEP has supported the negotiations of several conventions and action plans for the protection of the various regional seas. There are also stand-alone secretariats of MEAs under the United Nations umbrella such as the Desertification Convention Secretariat, and secretariats of regional agreements with regional organizations.

Subsidiary bodies

Many environmental regimes provide for a scientific commission or other technical committee, comprised of experts. In most cases, they include members designated by governments or by the COP, although they generally function independently. They can be included in the treaty or by a decision of the COP.

For example, the 1992 Convention on Biological Diversity has a Subsidiary Body on Scientific, Technical and Technological Advice, the 1998 PIC Convention provides for a Chemical Review Committee, and the Committee for Environmental Protection was established by the 1991 Protocol on Environmental Protection to the Antarctic Treaty. They can address recommendations or proposals to the COP or to other treaty bodies. They usually provide informative reports in the area of their specialization related to the convention and its implementation.