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BIOLOGICAL DIVERSITY

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THE FURTHER DEVELOPMENT OF LEGAL REGIMES  
UNDER MULTILATERAL TREATIES

*Note by the Secretariat*

I. INTRODUCTION

1. The purpose of the present note is to provide guidance to the Committee on the possible options available to the Conference of the Parties in considering further development of the legal regimes under the Convention. It describes general methods by which legal regimes can be developed under multilateral treaties, including the legal effect, advantages and disadvantages of the methods, and examples of their use.

II. METHODS FOR THE DEVELOPMENT OF LEGAL REGIMES  
UNDER INTERNATIONAL TREATIES

A. *Amendment*

1. *Procedure*

2. The common amendment procedure provided for under recently concluded treaties requires the party or parties seeking to amend a treaty to submit the proposed text to all other Parties within a specified time period prior

to the meeting of the parties that will consider it.<sup>1</sup> The amendment is adopted by consensus, or majority vote if necessary,<sup>2</sup> and enters into force following the ratification requirements within that particular treaty.<sup>3</sup>

## 2. *Legal effect*

3. Amendments are legally binding, but only upon the parties which ratify, accept, or approve them.<sup>4</sup> Also, as with all legal instruments, the effectiveness of amendments will be limited by Parties' ability to ensure compliance.

## 3. *Advantages/disadvantages*

4. One disadvantage is that the time necessary to develop, adopt, and ratify an amendment can be lengthy. Attempts to shorten the amendment procedure have not been successful.<sup>5</sup>

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<sup>1</sup> The proposing party or parties usually provides the text to other parties through the Secretariat. See Convention on Biological Diversity, Art. 29; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Art. 17; and the 1985 Vienna Convention for the Protection of the Ozone Layer, Art. 9 (requiring the text of amendments to be provided to the Parties at least six months prior to the meeting of the Conference of the Parties); see also the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington D.C. 1973, Art. XVII (requiring only 90 days prior notification to the Parties).

<sup>2</sup> See Convention on Biological Diversity, Art. 29 (3) (stating every effort shall be made to reach agreement by consensus, and in the alternative, by a two-thirds majority vote); CITES, Art. XVII (1) (requiring a two-thirds majority vote); Basel Convention, Art. 17 (3) and Vienna Convention, Art. 9 (3) (encouraging consensus and in the alternative, requiring three-fourths majority vote).

<sup>3</sup> See Convention on Biological Diversity, Art. 29 (5) (entry into force 90 days after ratification by three-fourths of the Parties); CITES, Art. XVII (3) (entry into force 60 days after ratification by two-thirds of the Parties); Basel Convention, Art. 17 (5) (entry into force 90 days after ratification by three-fourths of the Parties); Vienna Convention, Art. 9 (5) (entry into force 90 days after ratification by three-fourths of the Parties).

<sup>4</sup> For example, see Convention on Biological Diversity, Art. 29 (4) (stating amendments "shall enter into force among Parties having accepted them ..." or for any other Party "... that deposits its instrument of ratification, acceptance or approval of the amendments."

<sup>5</sup> For example, an option to expedite the amendment procedure for the Montreal Protocol was rejected at the Third Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance with the Montreal Protocol. The report stated "[R]educing the period for tabling an amendment [is] not feasible in the current state of communications." (UNEP/OzL.Pro/WG.3/3/3, para. 47). The experts were analysing the amendment process of the Vienna Convention for the Protection of the Ozone Layer. In addition, two recently concluded environmental treaties -- those on climate change and biological diversity -- did not diverge from the usual and contain amendment procedures substantially similar to the Vienna Convention.

5. Another disadvantage of amendment is the potential to develop different regimes among parties to the same treaty because most treaties provide that only those parties which ratify an amendment are bound by it.<sup>6</sup> Those that do not are bound only by the original text. This may create operational difficulties in implementation.

6. An advantage of an amendment is that it is a legally binding change to the text of the treaty. The new understanding or obligation is reflected in the treaty's operational provisions.

#### B. *Adoption of protocols*

##### 1. *Procedure*

7. The term protocol in this context usually denotes a treaty amending, or supplemental to, another treaty. The common procedure requires that the text of a proposed protocol be submitted a set period prior to the meeting of the parties where it is to be discussed. The protocol must then proceed through a process very similar to that of the adoption and ratification of the treaty itself.<sup>7</sup>

##### 2. *Legal effect*

8. A protocol is legally binding, yet only upon the parties which ratify, accept, or approve it.

##### 3. *Advantages/disadvantages*

9. An advantage of a protocol is that it allows parties to elaborate on important issues in the treaty and has the same legal effect on parties to the protocol as the treaty itself. Another advantage is, being itself a treaty, a protocol can be used to deal comprehensively with a specific matter to be elaborated upon. For example, the Montreal Protocol has the latitude to address short- and long-term strategies to control global production, emissions, and the use of chlorofluorocarbons (CFCs) and other substances that deplete the ozone layer, and to evaluate scientific and economic research and the situation of developing countries.<sup>8</sup>

10. Negotiation of a protocol, however, suffers from the same drawbacks as treaty negotiations. Chief among these is the long time often required. The text of a protocol, as with a treaty, must be drafted, negotiated, and adopted. The resulting protocol is then subject to what is often a lengthy ratification process. Furthermore, although a protocol is legally binding, it only binds those parties which ratify, accept, or approve it.<sup>9</sup> Therefore, the treaty is not actually changed for those who are not a Party to the protocol.

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<sup>6</sup> It should, however, be noted that the development of different regimes under a treaty is commonplace in international law.

<sup>7</sup> See Convention on Biological Diversity, Art. 29; Basel Convention, Art. 17; Vienna Convention, Art. 9.

<sup>8</sup> Vienna Convention, Resolution 2 (1).

<sup>9</sup> Under the Convention on Biological Diversity Art. 32, although a State may not become a Party to a protocol unless it is a Party to the Convention at issue, a party to the Convention is not required to become a party to a subsequent protocol.

### C. Annexes

#### 1. Procedure

11. An annex is an instrument attached to a Convention or Protocol and forms an "integral part" of the document.<sup>10</sup>

#### 2. Legal effect

12. Typically, annexes legally bind all parties to the treaty except those that deposit an objection within a specified time after receipt of notification of the annex's adoption.<sup>11</sup>

#### 3. Advantages/disadvantages

13. Annexes are a useful yet limited method for the development of a legal regime under a treaty. Annexes are used as a means of updating the information in a treaty and are typically restricted to procedural, scientific, technical, and administrative matters.<sup>12</sup> The procedures for adopting or amending annexes thus avoid the lengthy process of ratification. An annex is typically amended by the same procedure as amending a treaty or its protocols,<sup>13</sup> but because ratification is not required the process takes less time.

14. A further advantage of annexes is that entry into force usually takes place automatically for all Parties after notification of their adoption, except for those States which deposit an objection within a prescribed period of time.<sup>14</sup>

15. The generally restricted scope of annexes limits their potential ability to make substantive changes and thus in this regard they may not be as useful as other methods of development of legal regimes.

### D. Resolutions

#### 1. Procedure

16. Resolutions are expressions of the resolve, will or opinion of the parties to a treaty, often adopted by consensus at their meetings.

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<sup>10</sup> See Convention on Biological Diversity, Art. 30; Basel Convention, Art. 18; Vienna Convention for the protection of the Ozone Layer, Art. 10.

<sup>11</sup> *Idem.*

<sup>12</sup> *Idem.*

<sup>13</sup> See Convention on Biological Diversity, Art. 29.

<sup>14</sup> See Convention on Biological Diversity, Art. 30, para. 2 (c); Basel Convention, Art. 18 (3); Vienna Convention, Art. 10 (2 c).

## 2. *Legal effect*

17. Resolutions are technically not legally binding. Yet, when adopted by consensus of the parties, they operate to a large extent with the same effect.<sup>15</sup>

## 3. *Advantages/disadvantages*

18. The advantage of resolutions is that they can serve as a flexible and expeditious means for progress in improving the implementation of a treaty. An amendment or annex is not required, nor is ratification necessary. Additionally, the procedure can be less contentious than other methods because with resolutions parties are not being asked to consent to a formally legally binding statement.

19. Conversely, because a resolution is not legally binding, it is only as effective as the consensus that created it is strong and long-lived.

20. Resolutions have been an important tool in the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Recognizing the potential effect of the use of resolutions, the Conference of Parties to CITES has used language within the Convention to create procedures for resolutions which, while not legally binding, operate with that effect.<sup>16</sup> As of March 1992, the Conference of Parties has met nine times and adopted over 165 resolutions.<sup>17</sup>

## E. *Declarations/Interpretive statements*

### 1. *Procedure*

21. At the time of signature or upon submission of a document of ratification, a State may attach a statement through which it declares its position on a specific issue or explains its interpretation of a specific portion of the text.

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<sup>15</sup> United Nations General Assembly resolutions have an analogous effect. By virtue of their adoption by consensus, General Assembly resolutions can in most cases be considered as binding decisions.

<sup>16</sup> Art. XI (3) of CITES gives the Conference of Parties the power to "where appropriate, make recommendations for improving the effectiveness of the present Convention." Based on this language, the Conference of Parties adopted Resolution 4.6, which provides that the text of any draft resolution be submitted to the Secretariat 150 days prior to the meeting of the Conference of Parties (unless exceptional circumstances exist). The Conference of Parties also adopted new rules of procedure which allow the adoption of resolutions to take place upon a simple majority vote. See Willem Wijnstekers, *The Evolution of CITES*, Third Edition, 1992, 155-6.

<sup>17</sup> See Wijnstekers, *supra* note 16, 155, discussing the decisions of the Conference of Parties of CITES regarding resolutions concerning the Convention.

## 2. *Legal effect*

22. Declarations and interpretive statements are not legally binding on other Parties. Article 31 of the Vienna Convention on the Law of Treaties<sup>18</sup> states that a treaty is 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 light of its object and purpose. Article 32 of the Convention states that recourse may be had to supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, only if the interpretation resulting from article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

## 3. *Advantages/disadvantages*

23. Being unilateral, declarations and interpretative statements are easily added to the Convention and are not subject to adoption or ratification processes. Their major advantage may be the national signals sent in order to smooth the reception of the treaty. However, because declarations and interpretive states are not legally binding and are generally unilateral, they may not be the instrument of choice to improve implementation of the treaty at the international level.

### F. *Reservations*<sup>19</sup>

#### 1. *Procedure*

24. As defined in the Vienna Convention on the Law of Treaties, a reservation is a unilateral statement whereby a State "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (article 2, para. 1 (d)).

#### 2. *Legal effect*

25. The reservation is capable of modifying the legal effect of identified provisions in their application to the reserving State, as long as it does not contravene the object or purpose of the Convention.

#### 3. *Advantages/disadvantages*

26. An advantage of the reservation is it can allow for greater participation in the treaty regime. A disadvantage is the creation of different legal obligations among Parties, which may impede implementation.

### III. TREATIES PRIOR TO ENTRY INTO FORCE

27. Under article 18 of the Vienna Convention on the Law of Treaties, prior to entry into force, signatory States are obliged to refrain from acts which would defeat the object and purpose of the treaty.

28. But Governments are not limited to passivity. When adopting a treaty, Governments may put in place resolutions to guide them and relevant

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<sup>18</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

<sup>19</sup> Recent environmental treaties tend not to allow reservations.

organizations prior to the treaty's entry into force. Often, the signatory Governments adopt resolutions for action during the interim period after signature and prior to the treaty's entry into force.

29. Resolutions passed at the time of a treaty's adoption may provide for the establishment of ad hoc working groups, expert panels, or intergovernmental bodies to keep momentum going and prepare for the first meeting of the parties. While not able to take legally binding decisions, these bodies may be powerful forums for making proposals and recommendations to the first meeting of the parties, the governing body with the legal authority to take binding decisions.

30. Furthermore, through this type of resolution, Governments may call for action prior to the Convention's entry into force. For example, resolution 2 of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity provides for action on a number of issues identified as particularly important. It was also the mechanism which initiated the establishment of the Intergovernmental Committee on the Convention (ICCBD).<sup>20</sup> Although the ICCBD is not empowered to make legally binding decisions, the resolution requests that it consider a wide variety of issues.<sup>21</sup>

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<sup>20</sup> By paragraph 2 of the resolution, the Conference invited the Governing Council of UNEP to request the Executive Director to convene meetings of the ICCBD starting in 1993.

<sup>21</sup> The ICCBD is to consider, inter alia, "other preparations for the first meeting of the Conference of the Parties to the Convention." (Resolution 2 of the Nairobi Final Act, para. 2 (i)).