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I. INTRODUCTION

1. In order to understand international environmental law, it is of value to have some basic understanding of general international law. International environmental law is

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

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

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

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

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

- **Protocol**
  The term 'protocol' is used for agreements less formal than those entitled 'treaty' or 'convention'. A protocol signifies an instrument that creates legally binding obligations at international law. In most cases this term encompasses an instrument which is subsidiary to a treaty. The term is used to cover, among others, the following kinds of instruments:
  (a) A Protocol of Signature is an instrument subsidiary to a treaty, and drawn up by the same parties. Such a protocol deals with additional matters such as the interpretation of particular clauses of the treaty. Ratification of the treaty will normally also involve ratification of such a protocol.
  (b) An Optional Protocol to a treaty is an instrument that establishes additional rights and obligations with regard to a treaty. It is sometimes adopted on the same day, but is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a 'two-tier system'. An example is formed by the Optional Protocols to the 1966 International Covenant on Civil and Political Rights, which first Optional Protocol deals with direct access for individuals to international courts and tribunals.
  (c) A Protocol can be a supplementary treaty, it is in this case an instrument which contains supplementary provisions to a previous treaty, e.g. the 1967 Protocol relating to the Status of Refugees to the 1951 Convention relating to the Status of Refugees.
  (d) A Protocol can be based on and further elaborate a framework convention. This framework 'umbrella convention', which sets general objectives, contains the most fundamental rules of a more general character, both procedural as well as substantive. These objectives are subsequently elaborated and incorporated by a Protocol, with specific substantive obligations, according to rules agreed upon in the basic treaty. This structure is known as the so-called 'framework-protocol approach'. Examples are the 1985 Vienna Convention on the Ozone Layer and its 1987 Montreal Protocol with its subsequent amendments; the 1992 United Nations Framework Convention on Climate Change with its 1997 Kyoto Protocol; and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes with its 1999 Protocol on Water and Health and its 2003

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

- **Declaration**

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

6. Once the text of a treaty is agreed upon, States indicate their *intention* to undertake measures to express their consent to be bound by the treaty. Signing the treaty usually achieves this purpose, and a State that signs a treaty is a signatory to the treaty. Signature is a voluntary act. Often major treaties are opened for signature amidst much pomp and ceremony. Once a treaty is signed, customary law, as well as the 1969 Vienna Convention, state that a State must not act contrary to the object and purpose of the particular treaty, even if it has not entered into force yet.

7. The next step is the ratification of the treaty. Bilateral treaties, often dealing with more routine and less politicized matters, do not normally require ratification, and are brought into force by definitive signature, without recourse to the procedure of ratification.

8. The signatory State will have to comply with its constitutional and other domestic legal requirements in order to ratify the treaty. This act of ratification, depending on domestic legal provisions, may have to be approved by the legislature, parliament, the head of State, or similar entity. It is important to distinguish between the act of domestic ratification and the act of international ratification. Once the domestic requirements are satisfied, in order to undertake the international act of ratification the State concerned must formally inform the other parties to the treaty of its commitment to undertake the obligations under the treaty. In the case of a multilateral treaty, this constitutes submitting a formal instrument signed by the Head of State or Government or the Foreign Minister to the depositary who then informs the other parties. With ratification a signatory State expresses its *consent to be bound* by the treaty. Instead of ratification, it can also use the mechanism of acceptance or approval, depending on its national preference. A non-signatory State,

which wishes to join the treaty at a later stage, usually does so by

and its existence is often surrounded by uncertainties, treaties have become increasingly important to regulate international diplomatic relations among States.

28. The provisions of the 1948 Universal Declaration on Human Rights, although not specifically intended to be a legally-binding instrument, are now generally accepted, as constituting customary international law. Customary international law is as legally binding as treaty law.

29. On occasion, it is not possible to distinguish clearly between treaty law and customary law. For example, the UN Convention on the Law of the Sea comprises new international legal norms as well as codification of existing customary law. Between the date of its adoption in 1982, and the date it entered into force in 1994, non-parties to the treaty followed in practice many of the obligations incorporated in 1982 UNCLOS. It can therefore now be said that UNCLOS largely represents customary law, binding on all States, even if it has at this time only 145 parties.

30. Two specific terms related to the concept of customary international law require further attention. The first one is 'soft law'. This term does not have a fixed legal meaning, but it usually refers to any international instrument other than a treaty containing principles, norms, standards or other statements of expected behaviour. Often, the term soft law is used as having the same meaning as a non-legally binding instrument, but this is *not* correct. An agreement is legally binding or is not-legally binding. A treaty that is legally binding can be considered as hard law; however, a non-legally binding instrument does not necessarily constitute soft law. The consequences of such a non-legally binding instrument are not clear. Sometimes it is said that they contain political or moral obligations, but this is not the same as soft law. Non-legally binding agreements emerge when States agree on a specific issue, but they do not, or do not yet, wish to bind themselves legally; nevertheless they wish to adopt certain non-binding rules and principles before they become law. This approach often facilitates consensus, which is more difficult to achieve on binding instruments. There could also be an expectation that a rule or principle adopted by consensus, although not legally binding, will nevertheless be complied with. Often such will often fuel civil society activism to compel compliance.

31. The second term is 'peremptory norm' (*jus cogens*

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

NEGOTIATING MULTILATERAL ENVIRONMENTAL AGREEMENTS

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

35. The first step is for an adequate number of countries to show interest in regulating a particular issue through a multilateral mechanism. In certain cases this may be as few as two. For example, the draft Convention on Cloning was tabled in the Sixth Committee of the General Assembly by Germany and France. In other cases, a larger number of countries need to demonstrate a clear desire for a new instrument. Once this stage is overcome, States need to agree on a forum for the negotiation of the instrument. Usually an existing international organisation such as the United Nations or an entity such as UNEP will provide this forum. The United Nations has frequently established special fora for the negotiation of MEAs through General Assembly resolutions. The UN Framework Convention on Climate Change was negotiated by a specially established body. It is also possible to conduct the negotiations in a subsidiary body of the General Assembly such as the Sixth Committee, which is the Legal Committee. Treaty bodies could also provide the fora for such negotiations. For example, pursuant to Art.19(3) of the Convention on Biological Diversity, the Conference of the Parties, by its decision II/5, established an Open-ended Ad Hoc Working Group on Biosafety to develop a draft protocol on biosafety, which later resulted in an agreed text and subsequent adoption of the Cartagena Protocol on Biosafety.ltilatein an ag be derM.25 0 .ltiProc.ocol uently establish-13.5 46 Tw ;

37. In the negotiating forum, States are the most important actors, since treaties only carry direct obligations for States. However, implementation of and compliance with

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

Source: UN Treaty Handbook, Chapter 4

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