



## CONVENTION ON BIOLOGICAL DIVERSITY

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### Note from the Secretariat

#### Development of a Legally Binding Instrument

1. From a legal perspective there are five basic stages in the development of an instrument: negotiation, adoption, signature, ratification and entry into force. Each stage marks an important development in the normative strength of the commitment of the states involved in the process.
2. To begin a negotiation there needs to be a decision to establish a negotiation process, which in recent times has often been known as an Inter-governmental Negotiation Committee or INC. The INC is usually housed within an existing process or organisation. The decision to establish a negotiation process also establishes the mandate or scope of the negotiations. The rules of procedure which govern the negotiations are either the rules of the host institution applied on a *mutatis mutandis* basis or specific rules for the INC process, which are adopted at the first meeting of the INC. Credentials are often not required to participate in initial meetings of the negotiation process.
3. The negotiation of an instrument is concluded by the adoption of the text of the instrument. Adoption of the instrument is normally the responsibility of the process or body which has negotiated the instrument. This need not always be the case, however. For example, adoption of a protocol is normally carried out by the governing body of the founding instrument of the relevant regime. In any event, the authority to adopt an instrument is not a power which can be assumed or implied: it must be specifically mandated.
4. The applicable rules of procedure normally outline how adoption will take place. Unanimity in adoption of a treaty is not always required. The applicable rules of procedure normally outline how adoption will take place. Generally the rules of procedure only require a two-thirds majority of negotiating states to consent to the draft text.

5. There are no generally prescribed procedures on how an instrument may be adopted and, consequently, the act of adoption is outlined in the rules of procedure governing the meeting. A practice which has arisen in some fora, particularly those associated with UNEP, is that the final session of a negotiation process records its conclusions and the minutes of the meeting as a "Final Act", rather than as a normal report of the meeting. The Final Act includes the text of the instrument drafted, texts of resolutions adopted, organisational details of the meeting and briefly recalls the negotiation process. Occasionally, it may also include statements made specifically for inclusion in the Final Act.

6. The principal reason for recording the minutes of the last meeting as a Final Act is ceremonial, in that the adoption of a legally binding instrument means the results of the meeting are obviously of more significance than those of previous meetings of the negotiation process. There has also often been a procedural difference, which arises from the fact that the rules of procedure governing the negotiation process do not require credentials for states to participate, whilst for adopting a legal instrument it is critical to ensure the participants have the necessary authority.

7. The act of adopting an instrument is followed by the instrument being open for signature. Signing an instrument represents a significant legal commitment of the state. The Vienna Convention obliges states which have signed an instrument not to do anything that undermines its objectives or purposes. In some cases, signature can actually bind a state. The specific nature of the legal obligation which arise from signature is an internal/domestic matter, although those countries which are a Party to the Vienna Convention are at the very least bound by its provisions.

8. Accordingly, the accreditation required by the representative of a country is often more demanding than simply being able to attend an international meeting. The actual form which the government uses to invest the necessary authority, which are commonly known as "full powers", depends on the relevant laws of the particular state of the representative. The formal powers to sign an instrument are different to normal credentials usually required of representatives at international meetings. For example, most states only provide such powers when the full text of the instrument is known to the government, in other words, when negotiations have been concluded. Another important difference is that full powers are not only considered by the credentials committee of the meeting they also need to be acceptable to the depositary of the instrument as well. In practise, this means that the Secretary-General, through the Treaty Section in the Office of Legal Affairs, needs to examine the credentials as well.

9. In many cases, there is a separate ceremony to mark the signing of an instrument. This was the case for the CBD and FCCC at UNCED, and the Kyoto Protocol in New York three months after the COP at which the instrument was adopted. In some processes, adoption and signature takes place at the same meeting. Most recently, this happened in September 1998 for the PIC Convention but was also the case with the Montreal Protocol and the Basel Convention.

10. Ratification refers to the legislative and executive measures that a

country is required by its constitution to undertake to be legally bound by a treaty. Another common way that a state can become a party to a treaty is by accession, which is a term used to refer to countries who join a treaty after it entry into force. Accession is, however, only possible if it is provided for in the treaty or with the agreement of all the parties to the treaty.

11. The provisions of an international instrument do not technically become legally binding until the instrument "enters in force". Traditionally, this occurred when all the negotiating states expressed their consent. This may be altered by agreement and it is now more usual to find that the treaty or protocol enters into force when a specified number of states consent to it. In such cases, however, the instrument is binding only among those states which have consented.

#### Adoption of the Protocol on Biosafety

12. This situation is similar to the negotiation of the Kyoto Protocol, the most recent and only example of one of our sister conventions negotiating a protocol.

13. Article 28 contains the relevant provisions of the Convention with respect to adopting protocols to the Convention. Paragraph 2 of Article 28 provides that "Protocols shall be adopted at a meeting of the Conference of the Parties."

14. Decision II/5 of the COP established the BSWG to seek a solution to concerns related to the transboundary movement of LMOs through a negotiation process to develop a protocol. The mandate and scope of the negotiations are laid out in the Annex to the decision. The Working Group was established "under the Conference of the Parties". This means that the negotiation of the Biosafety Protocol is one of those instances where the negotiation process does not have authority to adopt the instrument as such. As with other subsidiary bodies of the Convention, the BSWG, as a result of being under the COP, has the authority to develop a recommendation for the consideration of the COP.

15. Article 28 and decision II/5 mean that only the COP has the authority to adopt this Protocol. Adopting a protocol requires a decision of the COP. The manner in which the COP can take a decision is outlined in the rules of procedure. The rules of procedure are silent as to how a COP decision is recorded. The practice that is followed in this Convention, as with others, is that decisions of the COP are recorded in the report of the meeting, or more precisely in the annex to the report of the meeting. As a sovereign body the COP is, however, free to express its decisions in any manner it chooses, as long as the way in which this decision was taken complies with the other aspects of the rules of procedure, most importantly the voting procedures. The extraordinary meeting of the COP therefore has the authority to record its decisions to adopt the Protocol in a Final Act or simply in the report of the meeting.

16. Credentials to attend a meeting of the COP will be adequate to sign a Final Act.

17. The procedures regarding the signing of the Protocol has already been taken care of by the COP decision IV/3 paragraph 6 where it was stated that the Protocol shall be opened for signature no later than three

months from the date of its adoption. This will also be indicated by the Protocol itself (see draft Article 38).

18. The Depository of the instrument will be the Secretary-General of the United Nations (see Article 41 of the Convention).

19. The authority to sign, ratify or accede to the Protocol resides with the Parties.

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