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SETTING THE TABLE FOR AN INTERNATIONAL ENVIRONMENTAL AGREEMENT: A BEGINNER'S GUIDE TO NEGOTIATING MANDATES

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The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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INTRODUCTION

You may be an experienced negotiator of international environmental agreements. Or you may be new to the field and excited to negotiate your very first one. In both cases, you know your precedents, helped craft your government's positions, and are anxious to get started. But wait…before you negotiate the agreement, you will need to navigate the mandate.

A mandate launches the negotiation of an international environmental instrument and sets forth its terms of reference, both procedural (such as where and when it will take place) and substantive (such as what the instrument should address). It is generally issued by the UN General Assembly (e.g., in the case of a new global instrument), a treaty body (e.g., in the case of an amendment to an existing agreement), or another institution (e.g., in the case of an instrument covering a particular region).

There is far more commentary on international agreements than on the negotiating mandates that precede them. However, such mandates can be highly significant. They are often the place where key issues are pre-negotiated and, even when they do not go so far, what a mandate says – or does not say -- can affect the ultimate design and content of an agreement, as well as its attractiveness to potential Parties.

This guide looks at the issues commonly addressed by negotiating mandates[1] for international environmental agreements, options for addressing them, and examples of mandate provisions that have been particularly significant in relation to agreements' outcomes.

[1] A mandate may also be called a "modalities resolution."

1. IN WHICH FORUM WILL THE NEGOTIATION TAKE PLACE?

The forum for a negotiation will usually depend upon two main factors:

- whether there is an existing agreement pursuant to which the new instrument is being negotiated; and
- the extent to which the subject matter of the new instrument extends beyond environment issues and/or raises questions of a more political nature.

If the instrument to be negotiated is an amendment, protocol, or annex to an existing multilateral environmental agreement, the forum for the negotiation is generally non-controversial. An existing or newly established body under that agreement (such as an Ad Hoc Working Group) will generally undertake the negotiation.[2]

If, however, States are creating a multilateral agreement from scratch, the "where" may pose more of a question.

- Many agreements have been developed under the auspices of the UN Environment Programme (UNEP), including, for example, the Vienna Convention for the Protection of the Ozone Layer, the Convention on Biodiversity, and the Minamata Convention on Mercury.[3]
- However, in other cases, it has been important to some States that an agreement be negotiated in the UN General Assembly, rather than a more technical or specialized

[2] See, e.g., the decision of the Parties to the Convention on Biological Diversity to negotiate a biosafety protocol, Decision II/5, https://www.cbd.int/decision/cop/default.shtml?id=7078. For a regional agreement example, see the decision of Parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context to negotiate a protocol on strategic environmental assessment, Decision II/9, http://www.unece.org/fileadmin/DAM/env/documents/2001/eia/mp.eia.2001.9.e.pdf. An exception is the 2017 UNGA mandate to develop a legally binding instrument on biodiversity beyond national jurisdiction under the Law of the Sea Convention; the negotiation is to take place under UN auspices, rather than be conducted by the States Parties to the Convention, http://undocs.org/en/a/res/72/249.

[3] See, e.g., Section III of UNEP Governing Council Decision 25/5, http://www.iia.cnr.it/wp-content/uploads/2016/02/16_20-02-09_gc25_decision25_5.pdf.

body. For example, the Convention to Combat Desertification was developed under UN auspices, given the view advanced by many States that the relevant issues (including development) extended beyond environmental ones.[4] The UN was also the host for the negotiation of the UN Framework Convention on Climate Change (UNFCCC), rather than UNEP and the World Meteorological Organization (WMO)(the "parents" of the Intergovernmental Panel on Climate Change);[5] many States, especially developing countries, considered that the climate issue had political dimensions better addressed at the UN than in more technical bodies.

In the case of some subjects, it may be appropriate for two fora to host a negotiation jointly. For example, the process for developing what became the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was carried out under the auspices of both the Food and Agriculture Organization (FAO) and UNEP.[6] In that case, both organizations had earlier promulgated voluntary information exchange programs (FAO for pesticides and UNEP for chemicals), later augmented through prior informed consent procedures.

You will want to consider which forum is the most appropriate one, in light of both your country's interests and the interests of the future instrument more generally.

You may also want to consider whether negotiations should take place in a particular city or cities. Factors may include convenience, cost, whether experts from capitals (as opposed to permanent representatives) will need to attend, where the secretariat is located (if one already exists), and/or the political atmosphere. It is often decided that the rounds will rotate between cities X and Y. The mandate for the process that led to the UN

[4] See paragraph 2 of UNGA Resolution 47/188, http://www.un.org/documents/ga/res/47/a47r188.htm.

[5] See paragraph 1 of UNGA Resolution 45/212, Protection of global climate for present and future generations of mankind, http://www.un.org/documents/ga/res/45/a45r212.htm.

[6] See paragraph 1 of UNEP Governing Council Decision 18/12, https://old.saicm.org/images/saicm_documents/gc18-pic.pdf.

Convention to Combat Desertification went so far as to call for rotation among Geneva, Nairobi, New York, and Paris.[7]

2. WHAT TYPE OF INSTRUMENT WILL BE NEGOTIATED?

You may or may not want the mandate to specify the nature of the future instrument. There are essentially three options: a mandate may decide on, identify the options for, or leave open, the type of instrument to be negotiated.

The mandates for the four key instruments in the climate change regime illustrate a range of possibilities:

- A 1990 UNGA Resolution called for the negotiation of a "**framework convention**" on climate change, suggesting not only that a legal instrument was to be negotiated, but also a particular kind.[8] This negotiation resulted in the 1992 UNFCCC.
- The "Berlin Mandate," agreed at the first meeting of the Parties to the UNFCCC, launched the negotiation of a "**protocol or other legal instrument**" (thereby limiting the outcome to a protocol, amendment, or agreement).[9] This negotiation resulted in the 1997 Kyoto Protocol.
- The "Bali Plan of Action" left wide open the ultimate result of the next negotiation, calling only for "**an agreed outcome**."[10] The resulting Copenhagen Accord was a non-legally binding instrument (later adopted by the UNFCCC Parties, with elaboration, as the "Cancun agreements").

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[7] See paragraph 4 of UNGA Resolution 44/188, http://www.un.org/documents/ga/res/47/a47r188.htm.

[8] See paragraph 1 of UNGA Resolution 44/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

[9] See preambular paragraph 4 of the Berlin Mandate, http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf.

[10] See paragraph 1 of the Bali Action Plan, p. 3, https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf.

- The "Durban Platform," by calling for a **protocol, another legal instrument, or "an agreed outcome with legal force,"** required an end product with some type of legal content (i.e., it did not seem to leave room for a completely non-binding outcome) but also provided some flexibility.[11] This negotiation led to the 2015 Paris Agreement.

A mandate might call for the negotiation of an international "legally binding instrument," without specifying which kind (e.g., convention, protocol); the FAO and UNEP decisions preceding the Rotterdam PIC Convention followed this approach.[12]

The "legally binding" aspect of an outcome might even be so significant to the mandate creators that it appears in the title, such as the 2011 "Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe"[13] and the 2017 UNGA Resolution entitled "International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."[14]

Although less common, a mandate might expressly indicate that the future instrument is to be non-legally binding. For example, a 2006 UN resolution (of the Economic and Social Council) requested the UN Forum on Forests to conclude and adopt "a non-legally binding instrument on all types of forests."[15]

You are already aware, but this is a reminder, that a decision to negotiate a legal instrument (such as a convention, protocol, or even a "legally binding instrument") does not require that all provisions of the instrument must be legally binding. Regarding the

[11] See paragraph 2 of the Durban Platform, p. 2, http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2.

[12] See paragraph 1 of UNEP Governing Council decision 18/12, https://old.saicm.org/images/saicm_documents/gc18-pic.pdf.

[13] See http://www.foresteurope.org/docs/MC/MC_oslo_lba_mandate.pdf.

[14] See UNGA Resolution 72/249, http://undocs.org/en/a/res/72/249.

[15] See paragraph 26 of ECOSOC Resolution 2006/49, http://www.un.org/en/ecosoc/docs/2006/resolution%202006-49.pdf.

above examples, for instance, the UNFCCC's key emissions provision was non-binding,[16] and the Paris Agreement includes a combination of binding and non-binding provisions.[17] In fact, the UNEP mandate to develop a mercury convention explicitly noted that the "legally binding instrument…could include both binding and voluntary approaches."[18]

3. WHAT WILL BE THE INSTRUMENT'S CONTENT?

You will want to consider to what extent the mandate needs to address the content of the future instrument.

At a minimum, a mandate is expected to address the negotiation's most basic topic or purpose.[19] The topic/purpose may be self-evident and non-controversial; alternatively, it may involve a painstaking negotiation over every word.

Beyond that, how far a mandate gets into the content of an instrument will depend. It is always possible to leave content issues to the actual negotiation. This may be the case where, for example, the subject is not likely to be especially controversial, or, on the contrary, so controversial that pre-agreement is not readily achievable.

- The mandate for what became the Convention to Combat Desertification specified only that the convention was "to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa."[20]

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[16] See the emissions "aim" in Articles 4.2(a) and (b) of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[17] See the Paris Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

[18] See paragraph 25 of UNEP Governing Council decision 25/5, http://www.iia.cnr.it/wp-content/uploads/2016/02/16_20-02-09_gc25_decision25_5.pdf.

[19] See, e.g., the ECE Committee on Environmental Policy's decision to develop an instrument under the Aarhus Convention "on pollutant release and transfer registers," paragraph 30(b), http://www.unece.org/fileadmin//DAM////env/documents/2000/cep/ece.cep.74.e.pdf.

[20] See paragraph 2 of UNGA Resolution 47/188, http://www.un.org/documents/ga/res/47/a47r188.htm.

- The mandate for the negotiation of the UNFCCC said only that the framework convention should be "on climate change," that it should be "effective," and that the commitments should be "appropriate."[21]

At the same time, there are several possible reasons to get particular issues decided upfront.

- Most obviously, getting an issue decided your way in the mandate eliminates the need to spend negotiating capital on it later on.
- The inclusion or exclusion of a particular point may make it politically easier for your country – or another key country -- to engage in the negotiation. Indeed, it may not even be possible to secure a mandate without *ex ante* agreement on a particular issue.
- If there is general interest in a speedy negotiation, it can be helpful to dispense at the outset with a potentially controversial issue.

A mandate might address the instrument's content directly, such as by stating expressly that the instrument will include provisions on X or exclude provisions on Y. For example, the UNEP decision setting out the mandate for the negotiation of what became the Minamata Convention on Mercury contained an extensive list of to-be-included provisions, such as on reducing the supply of mercury, on reducing international trade in mercury, and on addressing mercury-containing waste.[22] The Berlin Mandate, in contrast, famously provided that the future agreement under the UNFCCC would *not* include any new commitments for the Parties not included in Annex I of the Convention (essentially developing countries).[23]

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[21] See paragraph 1 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

[22] See paragraph 27 of UNEP Governing Council Decision 25/5, http://www.iia.cnr.it/wp-content/uploads/2016/02/16_20-02-09_gc25_decision25_5.pdf.

[23] See paragraph 2(b) of the Berlin Mandate, https://unfccc.int/resource/docs/cop1/07a01.pdf.

A mandate might also call for a particular style of provision, such as the direction to the working group that prepared what became the Aarhus Convention to draft provisions aimed at providing "practical, concise and action-oriented procedures and tools..."[24]

There are also many indirect ways to shape the content of an instrument:

- The mandate may call for certain types of commitments or other provisions to be considered. For example, the mandate for what became the Cartagena Protocol to the Convention on Biological Diversity called for the Working Group to "consider the inclusion of the elements" set forth in a report prepared by an expert group on biosafety.[25]
- The mandate may provide that the negotiations are to "take into account" particular documents, such as ministerial declarations, UNGA resolutions, or one or more Rio Declaration principles. The mandate for the UNFCCC called for the negotiations to take into account, *inter alia*, the Second World Climate Conference Ministerial Declaration and the IPCC's first assessment report (which included a legal report on the possible elements of a future framework convention on climate change).[26]
- Mandates generally require negotiators to take into account proposals made by States participating in the process. The Berlin Mandate called for the consideration of proposals and, unusually, singled out a particular proposal (a draft protocol submitted by the Alliance of Small Island States).[27]

[24] See paragraph 3 of Annex I of ECE/CEP/18, http://www.unece.org/fileadmin//DAM////env/documents/1996/cep/ece.cep.18.e.pdf.

[25] See, e.g., the Convention on Biological Diversity's mandate to develop a biosafety protocol, paragraph 2(b) of the Annex to Decision II/5, https://www.cbd.int/decision/cop/?id=7078.

[26] See paragraph 1 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

[27] See paragraph 5 of the Berlin Mandate, https://unfccc.int/resource/docs/cop1/07a01.pdf.

- There may be a requirement to take account of science. The Durban Platform contained a requirement that the process be informed by the latest IPCC report,[28] the Berlin Mandate's directive required that the process be carried out in light of, *inter alia*, "the best available scientific information and assessment on climate change and its impacts…,"[29] and the development of a biosafety protocol proceeded "on the basis of the best available scientific knowledge and experience…"[30]
- The mandate may address the relationship between the instrument to be negotiated and existing instruments. The instrument that became the Aarhus Convention was to avoid "overlap with existing international legal instruments."[31] The biosafety protocol was not to "override or duplicate any other international legal instrument in this area."[32] The to-be-negotiated instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction is not only to be fully consistent with the Law of the Sea Convention (understandably, given that the instrument is to be under that Convention) but "should not undermine existing relevant legal instruments and frameworks and relevant…bodies."[33]
- The mandate may set out a list (exhaustive, non-exhaustive, or illustrative) of issues or subjects to be considered. While not dictating the content/provisions of the instrument, such a list may become a *de facto* list of the instrument's

[28] See paragraph 6 of the Durban Platform, http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2.

[29] See paragraph 3 of the Berlin Mandate, https://unfccc.int/resource/docs/cop1/07a01.pdf.

[30] See paragraph 9 of the Annex to the Biodiversity Convention's COP Decision II/5, https://www.cbd.int/decision/cop/?id=7078.

[31] See paragraph 3 of Annex I, ECE/CEP/18, http://www.unece.org/fileadmin//DAM////env/documents/1996/cep/ece.cep.18.e.pdf.

[32] See paragraph 5(b) of the Annex to Decision II/5, https://www.cbd.int/decision/cop/?id=7078.

[33] See paragraphs 6 and 7 of UNGA Resolution 72/249, http://undocs.org/en/a/res/72/249.

elements. This is, in effect, what happened with the Durban Platform's list of topics with respect to which the negotiators were to plan their work.[34]

- Relevant considerations may be indicated in a mandate. The UNEP Governing Council Decision that led to the Stockholm Convention on Persistent Organic Pollutants called for the future instrument to recognize "differing regional and national conditions" and to take into account "the special concerns of developing countries and countries with economies in transition."[35] The Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe noted, among other considerations, the "importance of flexibility."[36] The mandate for what became the Cartagena Protocol to the Biodiversity Convention specified that the process was to be guided by "the need for all Parties to cooperate in good faith and to participate fully, with a view to the largest possible number of Parties to the Convention ratifying the protocol."[37]
- Statements in the mandate, even in the preamble, may inform the content without saying so explicitly. For example, the UNGA Resolution calling for a framework convention on climate change stated, in its preamble, that "the largest part of the current emission of pollutants into the environment originates in developed countries…"[38] A variant of this statement ended up in the preamble to the UNFCCC.

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[34] See paragraph 5 of the Durban Platform, http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2.

[35] See paragraph 6(a) of UNEP Governing Council Decision 19/34, p. 75, https://wedocs.unep.org/bitstream/handle/20.500.11822/17274/97_GC19_proceedings.pdf?sequence=23&isAllowed=y.

[36] See paragraph 24(a), http://www.foresteurope.org/docs/MC/MC_oslo_lba_mandate.pdf.

[37] See paragraph 8 of the Annex to Decision II/5 of the Biodiversity Convention Conference of the Parties, https://www.cbd.int/decision/cop/?id=7078.

[38] See preambular paragraph 8 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

The "Dubai pathway on hydrofluorocarbons," which paved the way for the negotiation of the "Kigali Amendment" to the Montreal Protocol, is one of the most content-full mandates. It contained extensive lists of "challenges" to be "addressed," as well as "issues" to be "further discussed." It left somewhat unclear whether such challenges/issues, once resolved, were to be reflected in the amendment's provisions *per se*; it was also not clear as to whether resolving the challenges/issues was a precondition to negotiating the amendment or was to be done in the course of the negotiations.[39]

A mandate may even address the future evolution of the instrument to be negotiated. In the case of what became the Stockholm Convention, the UNEP Governing Council Decision called for the initial inclusion of twelve specified persistent organic pollutants, noting the need to develop "science-based criteria and a procedure for identifying additional" POPs.[40]

You will want to carefully consider content-related options. Before agreeing to any kind of exhaustive list (whether of topics or actual provisions), you will want to be sure that your country will not want to raise other issues in the course of the negotiation. To be safe, and unless you decide it is more important to preclude others from raising other topics/provisions, it is usually best to include in any list language such as "inter alia" or "including but not limited to…."[41]

[39] See the Dubai pathway on hydrofluorocarbons, Decision XXVII/1, https://www.informea.org/en/decision/decision-xxvii1-dubai-pathway-hydrofluorocarbons.

[40] See paragraph 9 of UNEP Governing Council Decision 19/34, p.76, https://wedocs.unep.org/bitstream/handle/20.500.11822/17274/97_GC19_proceedings.pdf?sequence=23&isAllowed=y.

[41] See, e.g., paragraph 1 of the Bali Action Plan, https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf.

4. WHAT ABOUT TIMING?

A mandate raises several "when" issues, including when the process will begin and end, and sometimes the frequency/duration of meetings.

Regarding the start date:

- There is generally an indicative near-term timeframe for the first session (such as that it should take place "without delay," "in March/April," "in the second half" of year X, or "no later than" X date), with the details left to the secretariat.[42]
- There may be an initial "organizational session" of the negotiating body that determines the schedule of the subsequent, more substantive sessions.[43]

End dates may be definite (negotiations "to be completed by" X, possibly coinciding with a particular related event)[44] or enjoy some flexibility (such as where a process is directed to negotiate, "with a view to" finalization by a certain date or event).[45]

A mandate may generally indicate that sessions should take place "as often as necessary." Alternatively, it may more specifically dictate how many negotiating sessions there will be and even how long such sessions will be (such as no longer than two weeks).[46]

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[42] See, e.g., paragraph 11 of UNEP Governing Council Decision 19/34, which requests the Intergovernmental Negotiating Committee developing an instrument on persistent organic pollutants to "commence its work by early 1998," p. 76, https://wedocs.unep.org/bitstream/handle/20.500.11822/17274/97_GC19_proceedings.pdf?sequence=23&isAllowed=y.

[43] See, e.g., paragraph 4 of UNGA Resolution 47/188 (establishing an intergovernmental negotiating committee for the elaboration of a convention to combat desertification), http://hrlibrary.umn.edu/resolutions/47/188GA1992.html.

[44] See, e.g., paragraph 2 of the Bali Action Plan, which calls for the Ad Hoc Working Group to complete its work in 2009 and present the outcome to the UNFCCC Conference of the Parties for adoption at its fifteenth session, http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf.

[45] For example, the Aarhus Convention was to be finalized "as far as possible" before the 1998 Conference "Environment for Europe."

[46] For example, the Committee negotiating the future Convention to Combat Desertification was to hold five substantive sessions, each lasting for two weeks.

For the sake of efficiency and convenience, and particularly where the negotiation concerns an instrument under an existing agreement, it may indicate that negotiating sessions should take place in conjunction with sessions of other bodies.[47]

Recognizing that it is difficult to predict the course of a negotiation at the outset, a mandate might expressly call for the process to review the timetable at the end of each negotiating session.[48]

If your country strongly supports a negotiation, timing issues present an opportunity to accelerate and intensify the process; contrariwise, you may have an interest in delaying the start and end dates and providing for less negotiating time.

5. WHO WILL PARTICIPATE?

Mandates usually specify who can participate: States, regional economic integration organizations, and/or observers.

Generally speaking, mandates provide for negotiations to take place among States. For global agreements, the process is normally open to "all States Members of the United Nations or members of the specialized agencies."[49] (This formulation captures, for example, the Holy See and the Cook Islands, which are members of various UN specialized agencies but not Members of the United Nations.) In many cases, it also includes regional economic integration organizations, such as the EU.[50] Many mandates establish voluntary trust funds

[47] See, e.g., paragraph 3 of the Bali Action Plan, http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf.

[48] See, e.g., paragraph 4 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

[49] See, e.g., paragraph 3 of UNGA Resolution 47/188, which launched negotiations on what became the Convention to Combat Desertification, http://hrlibrary.umn.edu/resolutions/47/188GA1992.html.

[50] See, e.g., paragraph 31 of Section III of UNEP Governing Council Resolution 25/5, which launched negotiations on what became the Minamata Convention on Mercury, http://www.iia.cnr.it/wp-content/uploads/2016/02/16_20-02-09_gc25_decision25_5.pdf.

to enable the full and effective participation of developing countries, particularly the least developed countries.[51]

Mandates generally provide for observers. In the case of negotiations under UN auspices, their participation will be "in accordance with the established practice of the General Assembly."[52] Observers typically include relevant intergovernmental and non-governmental organizations.[53] The UNGA Resolution that called for a new instrument on marine biological diversity beyond national jurisdiction made specific reference to organizations and entities that were invited/accredited to past conferences related to the subject matter in question.[54]

It is less common, but also possible, for a mandate to comment on national preparation for the negotiations. For example, the 1990 UNGA Resolution on the development of a climate change framework convention welcomed a "broad-based preparatory process at the national level involving, as appropriate, the scientific community, industry, trade unions, non-governmental organizations and other interested groups."[55]

6. WHAT ABOUT THE PROCESS?

Several issues arise in connection with the establishment of a negotiating process.

[51] See, e.g., paragraph 10 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

[52] See, e.g., paragraph 3 of UNGA Resolution 47/188, http://hrlibrary.umn.edu/resolutions/47/188GA1992.html.

[53] See, e.g., paragraph 31 of Section III of UNEP Governing Council Decision 25/5, http://www.iia.cnr.it/wp-content/uploads/2016/02/16_20-02-09_gc25_decision25_5.pdf.

[54] See paragraphs 12 and 13 of UNGA Resolution 72/249, http://undocs.org/en/a/res/72/249.

[55] See paragraph 3 of UNGA Resolution 45/212, http://www.un.org/documents/ga/res/45/a45r212.htm.

First, a mandate may build in a **session or phase before actual negotiations** begin. Such a session/phase is distinct from an initial organizational session, because it addresses the substance of the negotiation to follow. Reasons may vary.

- States that are less than enthusiastic about a negotiation may seek to include such a phase in order to slow things down. The process laid out in the Berlin Mandate, for example, includes, in its "early stages," an "analysis and assessment" of, *inter alia*, possible "policies and measures" and "environmental and economic impacts."[56]
- There may be a genuine interest in further analysis or discussion before reaching the negotiations stage. The first session of the Intergovernmental Negotiating Committee charged with negotiating the convention to combat desertification was "devoted to the sharing of technical information and assessments, with the involvement of experts, on drought and desertification."

Second, there is the question of the **rules of procedure** that will apply to the process. Rules of procedure address many important aspects of the process, including with respect to the "conduct of business" and, more specifically, the decision-making rule by which the instrument will be adopted. The decision-making rule may already be established, such as when a negotiation involves an amendment or protocol to an existing instrument. Agreements (or their subsequently agreed rules of procedure) will generally dictate the rule (e.g., consensus, two-thirds majority) for the adoption of an amendment or protocol thereto.

However, where there is no applicable rule, it may be important to your country to set down a rule (or even all the rules of procedure)[57] in the mandate. If you are concerned about not having the instrument adopted over your objection, you will want it adopted by consensus (i.e., the absence of a stated objection). Consensus may also be useful if you seek

[56] See paragraph 4 of the Berlin Mandate, https://unfccc.int/resource/docs/cop1/07a01.pdf.

[57] See, e.g., Annex 1 to the Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe, http://www.foresteurope.org/docs/MC/MC_oslo_lba_mandate.pdf.

to promote participation by as many States as possible in the ultimate agreement. If, however, you are concerned about the risk of having one or more States block the adoption of the instrument, you may want to seek a less-than-consensus requirement, such as two-thirds or three-quarters of those present and voting.[58]

Alternatively, the voting rule can be left to the rules of procedure for the negotiation, which are often left to the secretariat to develop, for subsequent adoption by the intergovernmental negotiating group.

Third, there may be an issue concerning the **nature of the negotiating group**. Even where it is clear that it will be negotiated by the Parties to the underlying agreement (e.g., in the case of an amendment), there is often a question whether to ask an existing subsidiary body or set up an "ad hoc" group. The latter may have the virtue of being able to spend more time on the negotiation; at the same time, an additional group, on top of existing bodies, may make for a very busy calendar.

Particularly where the future instrument is *not* an amendment or protocol to an existing agreement, a mandate may, in addition to setting up an intergovernmental negotiating committee or an open-ended working group, call for the convening of a diplomatic conference at the end of the process for the purpose of adopting the final text. The UNEP Governing Council Decision that launched the negotiation of what became the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal called for its adoption and signature at such a conference.[59]

[58] See paragraph 17 of the UNGA mandate on biodiversity beyond national jurisdiction, which calls for exhausting every effort in good faith to reach agreement on substantive matters to by consensus, but also provides a decision-making rule in case consensus cannot be reached, http://undocs.org/en/a/res/72/249.

[59] See paragraph 12 of UNEP Governing Council Decision 14/30, p. 84, file:///C:/Users/Owner/Downloads/87_06_GC14_report_N8723250.pdf.

You have now read about the many ways in which a mandate can determine, or at least influence, the ultimate instrument. It might affect the instrument's legal form, design, commitments, and other features. It may even affect its ultimate acceptability to your country and others. Your country may reasonably decide to focus its negotiating energies only on the instrument itself. However, it is hoped that, with the benefit of your advice, it will do so only after considering the issues a mandate presents, along with the options and reasons for addressing them.