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This document summarizes the roundtable discussion on the nature of the regional instrument that took place virtually at the sixth meeting of the working group on access rights and the regional instrument of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean on 1 August 2014.

The roundtable discussion was organized by the Policies for Sustainable Development Unit of the Sustainable Development and Human Settlements Division of the Economic Commission for Latin America and the Caribbean (ECLAC), in its capacity as technical secretariat of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean.

Valeria Torres, Economic Affairs Officer, and David Barrio, Associate Political Affairs Officer, of the Sustainable Development and Human Settlements Division were responsible for the summary, compilation and integration of the contents. The work was supervised by Carlos de Miguel, Chief of the Policies for Sustainable Development Unit of the Sustainable Development and Human Settlements Division.

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The opinions expressed in this document, which has not undergone formal editorial review, are the sole responsibility of the panellists and may not reflect the opinions of the Organization.

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Summary

In the Plan of Action to 2014 for the implementation of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean established two working groups for the advancement towards the formulation of a regional instrument:

i) Working group on capacity-building and cooperation; and,

ii) Working group on access rights and the regional instrument.

The Plan of Action states that all signatory countries may participate in the working groups, in which they may be represented by the focal points or by a representative appointed by them. Non-signatory countries of the region may participate as observers in these meetings. Each group will elect at least a coordinator and an alternate coordinator from among the government representatives and the stakeholders will participate according to modalities set forth at the modalities of participation of stakeholders.

This document summarizes the development and conclusions of the sixth meeting of the working group on access rights and the regional instrument held virtually on Friday, 1 August 2014. The meeting, which was for information purposes only, had the aim of advancing in the discussions on the nature of the regional instrument by holding a round table discussion with the renowned experts in Public International Law: Marcos A. Orellana, Professor at the American University and Concepción Escobar, Chair in Public International Law of the National University of Distance Education of Spain and member of the United Nations International Law Commission. The document follows a question and answer format and is divided into three parts: (i) questions answered by Marcos A. Orellana; (ii) questions answered by Concepción Escobar; and (iii) questions answered by both experts.

Introduction

In the second meeting of the focal points of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean[1], held in Guadalajara, in April 2013, Costa Rica and Brazil were designated as coordinators of the group on access rights and the regional instrument.

The objective of the working group is to deepen knowledge on access rights with the outlook of proposing the nature and contents of a regional instrument. For this:

(i) the importance, benefits, values, principles, common vision and objectives of a regional instrument on access rights were discussed;

(ii) the reports of consultations carried out on the basis of the Plan of Action and the progress achieved were reviewed and analysed with the support of recognized experts in the field;

(iii) the report prepared by ECLAC on the status of Principle 10 access rights in the signatory countries, and its updates, using information provided by the countries and in consultation with them, as well as the contributions of civil society organizations was analysed;

(iv) national and international practices regarding Principle 10 access rights, including a review of the different forms that citizen participation can take and experiences in this regard were examined;

(v) A proposal on the nature and content of the regional instrument for consideration by the focal points was prepared. In addition, the group worked closely with the working group on capacity-building and cooperation, considering the reports and products that it presented.

[1] A/CONF.216.13.

The working group concluded its mandate in November 2014 with the presentation of the report on the activities carried out during the Plan of Action. Furthermore, it also presented the proposal on the nature and content of the regional instrument for consideration at the fourth meeting of the focal points ("San José Content").

At the fourth meeting of the focal points held in Santiago, the countries adopted the San José Content for the regional instrument and agreed to initiate the negotiation of the future regional instrument, deciding to define the nature during the negotiation process.

I. Questions answered by Marcos A. Orellana, professor at the American University, United States

A. Can a legally binding instrument contain binding and voluntary approaches?

A legally binding instrument can, indeed, contain both binding and non-binding provisions. For example, in a treaty one can distinguish the preamble, which establishes aspirations, the vision, the intentions of the parties and the problems that it pretends to tackle, among others, from the rest of the provisions. The preamble does not establish international obligations as such and therefore contemplates a non-binding approach. However, it is framed within a whole which is binding. The legal value of preambles is explained in further detail in another question.

Certain voluntary approaches are reflected in the provisions of some treaties. A clear example of this is the Minamata Convention on Mercury[2] which in article 16, relative to health, encourages the parties but does not oblige them. This structure offers the advantage of flexibility which is relevant both in the negotiations and in the implementation phase. Binding provisions would, therefore, be a standard minimum whereas non-binding provisions would allow guiding the action of States.

B. What international instrument would prove to be more effective to fully apply access rights?

A binding instrument would be more effective for several reasons but mainly due to the very nature of the matters which will be included in the instrument: access rights. Rights-related matters need an adequate internal legislation to be fully applied. Without a binding approach the content of the instrument which regulates these matters can hardly be operational. Accordingly, the binding nature increases effectiveness and strengthens democracy.

[2] Minamata Convention on Mercury, adopted on 10 October 2013.

Furthermore, the full application of access rights requires the strengthening of institutional competencies. Considering these basic provisions in public law, a normative platform that allows the establishment of such institutional competencies is required. In addition, it is important to recall that this process does not have a sanctioning approach but rather a preventive and capacity-building one, reinforcing the channels of citizen participation which deepen democratic structures, foster social dialogue, prevent conflict and allow for the adoption of sustainable development policies that reflect the interests of society.

On the other hand, the region is facing serious and unprecedented environmental challenges which require new and effective legal tools. Voluntary approaches are useful but have their limitations. Given the existence of conflicting interests in our societies and considering the environmental crisis the region is experiencing, legally binding tools that regulate the activities of stakeholders which would prefer not to be regulated are necessary.

C. In what way can a binding instrument facilitate compliance of obligations assumed in other international environmental treaties?

It is important to underline that there are several international environmental treaties which crystallize the will of the international community by addressing certain environmental issues of global or regional nature which are of global public interest. Even if each treaty deals with specific matters, access rights are a common thread in all environmental treaties.

Therefore, several multilateral environmental agreements (MEA) refer specifically to access rights and include specific provisions thereof. For example, the Stockholm Convention on Persistent Organic Pollutants[3] (Stockholm Convention) contains a specific article on access to information. Likewise, the United Nations Framework Convention on Climate Change[4] (UNFCCC) contains specific provisions on the participation of the public in climate change-related programmes. At the same time, the Protocol on Liability and Compensation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[5] (Basel Convention) contains provisions on access to justice. These provisions create synergies with access rights. As a result, a binding instrument on access rights strengthens the capacities of the parties of MEA to implement international obligations contained therein.

In addition, it is worth mentioning that the first United Nations Environment Assembly held in July of this year examined the role that "environmental rule of law" has in the achievement of environmental objectives. In this debate, the centrality of access rights contained in Principle 10 is reaffirmed inasmuch as they are a fundamental tool in the attainment of sustainable development and the effective implementation of MEA. Access rights represent, as a result, a platform to create synergies between different international environmental treaties so that the capacities of governments and their societies are strengthened.

D. What is the legal value of the preamble and the annexes in a treaty?

The preamble and the annexes are integral parts of the treaty and play a crucial role. The preamble reflects the vision of the parties, its aims, objectives and common platforms. Pursuant to articles 31 and 32 of the Vienna Convention on the Law of Treaties[6] (VCLT), the preamble allows for the correct interpretation of a treaty since it establishes its context and reflects its object and purpose.

[3] Stockholm Convention on Persistent Organic Pollutants, adopted on 22 May 2001.
[4] United Nations Framework Convention on Climate Change, adopted on 9 May 1992.
[5] Protocol on Liability and Compensation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted on 10 December 1999.
[6] Vienna Convention on the Law of Treaties, adopted on 23 May 1969.

For their part, the annexes are extremely important to materialize the binding elements of a treaty. This technique has been particularly used in international environmental treaties, several of which establish international obligations in their provisions, leaving the scope and details of activities, species or substances (depending on the case) to the annexes. Moreover, these treaties foresee expeditious amendment mechanisms for the annexes so as to update them without having to renegotiate basic obligations. In this sense, the flexibility that the use of annexes provides allows the treaty to evolve over time.

Some examples are useful to illustrate the importance and role of annexes. For example, they would normally include maps in a boundary agreement. In other treaties, annexes can include provisions for settlement of disputes such as the United Nations Convention on the Law of the Sea[7] (UNCLOS) that in its Annex VII regulates international arbitration on certain matters related to the Convention.

As indicated, in environmental agreements, the annexes can specify obligations set out in the articles. The Stockholm Convention establishes a list of certain covered chemicals that are the object of an obligation established in the treaty. A similar approach can be found in the Basel Convention where the annex offers details on the dangerous nature of wastes. In the UNFCCC and its Kyoto Protocol[8] the annexes identify certain parties which assume certain obligations are identified as opposed to other parties, in accordance with the principles of common but differentiated responsibilities.

E. What is the legal value of the adopted documents to date in the Process (Roadmap[9], Plan of Action[10] and Lima Vision[11])?

The legal value is dependent upon two aspects. In the first place, the adopted documents reflect certain commitments of States with regard to sustainable development, with environmental democracy, access rights and a process of open dialogue with the public. These documents also reflect the capacity of States to reach agreements. In addition, they lay the groundwork for a second phase of the process in which the contents and nature of the instrument would be defined. The ambition and degree of consensus that they reflect make one think that during the second phase of the process, countries will reach important agreements.

Secondly, the legal value can also be dealt with on the basis of article 32 of the VCLT. This article foresees supplementary means of interpretation, including the preparatory work of a treaty. The Lima Vision and its contents such as the rights-based approach, the relationship between the right to the environment and sustainable development, the link between access rights and democracy as well as the interrelation between access rights (that is, the three pillars of Principle 10) are elements that inspire a future regional instrument. The principles established in these documents also reflect values of transcendental content that inspire the actions of States.

F. How can international obligations assumed by countries be incorporated and influence national legislation?

The question illustrates one of the differences between voluntary and binding instruments. Generally speaking, voluntary instruments have not had a real incidence in national law precisely because of their voluntary nature. The examples of binding international agreements that have not had an incidence in domestic systems are those that fall into a model that is outdated nowadays.

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7 United Nations Convention on the Law of the Sea, adopted on 10 December 1982.

8 Kyoto Protocol of the United Nations Framework Convention on Climate Change, adopted on 11 December 1997.

9 Roadmap adopted at the first meeting of the focal points appointed by the governments of the signatory countries of the Declaration on 6 and 7 November 2012 (LC/L.3565).

10 Plan of Action to 2014 for the implementation of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its roadmap adopted at the second meeting of the focal points appointed by the governments of the signatory countries of the Declaration on 16 and 17 April 2013 (LC/L.3677).

11 Lima Vision adopted at the third meeting of the focal points appointed by the governments of the signatory countries of the Declaration on 30 and 31 October 2013 (LC/L.3780).

Contemporary instruments contemplate implementation and compliance mechanisms allowing for the effective incorporation through adequate national legislation of international obligations. For example, the use of a Compliance Committee may help States identify aspects to improve in their normative frameworks.

G. How can the future regional instrument incorporate the participation of youth and teens?

Access rights are not restricted to adults and the work of the Committee on the Rights of the Child[12] should be highlighted with regard to the importance of incorporating the vision and interests of children that could be affected by programmes and public policies. In this sense, public participation is inclusive and shall be mainstreamed.

H. What examples are there of successful international environmental conventions that have fully achieved their objectives? What are the limitations of binding conventions? To what extent do all countries of the region have the capacity to comply with the obligations of the future instrument?

International law offers examples of effective instruments at the regional and global level. It is only one tool and is, in some way, limited as it does not cover all the dimensions that are necessary to effectively address the environmental crisis. Therefore, it is necessary to resort to other tools such as the changes of paradigm initiated by the United Nations General Assembly in the context of Harmony with Nature, development indicators to measure the impacts of the environment in the economy and the achievement of sustainable development, among others. In this sense, to be effective, a legal instrument must focus on a specific matter such as access rights and the strengthening of normative frameworks as well as institutional and social capacities.

With regard to the capacities to comply with the obligations of a future instrument, international law allows incorporating certain flexibility in the design of instruments. For example, it is possible to set minimum standards while other objectives can be fulfilled progressively over time.

I. Can the legal value of the documents adopted in the process up to now take effect before a binding instrument is adopted or is it necessary to wait until it is adopted?

The documents adopted in the process express the *opinion iuris*, the conviction that States could have with regard to Principle 10. They are elements that express values that establish major guidelines. Depending on the matter, they could be used to interpret other conventions such as the American Convention on Human Rights[13] and its Protocol of San Salvador.[14]

[12] See http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx.
[13] American Convention on Human Rights, adopted on 22 November 1969.
[14] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), adopted on 17 November 1988.

II. Questions answered by Concepción Escobar, Chair at the National University of Distance Education, Spain, and member of the United Nations International Law Commission

A. Why a binding instrument?

Based on her professional and academic experience and as a former governmental legal adviser, the expert was of the opinion that to achieve the main objectives of the Principle 10 process it would be preferable to opt for a binding instrument.

In her view, the instruments that had been adopted to date (Declaration on the application of Principle 10, Road Map, Plan of Action and Lima Vision) had provided progressively new elements which are of great interest for the process. They also reflect the political commitment of States with this process and with the establishment of a framework to recognize and guarantee access rights. According to Dr. Escobar, in light of the above it would not be necessary to adopt another instrument of soft law, especially because the pillars of the process, its principles and main elements had been well established. Therefore, any attempt of returning to another declaration would face the risk of being repetitive and duplicating efforts unnecessarily. In her opinion, the instruments adopted up to now by the process provide a sufficient basis to develop a binding instrument or treaty.

A binding instrument is preferred for four reasons. Firstly, she indicated, as did Dr. Orellana, that the subject matter of the process required a legally binding treatment. The rights-based approach contained in the Lima Vision and, in general, the nature of the three pillars of Principle 10 (access to information, participation and justice) required the adoption of national measures in each of the participating countries. As a result, the instrument which is adopted needs to have the capacity of projecting itself in each State, should produce effects in their national systems, administrative practice and national public policies which, in her opinion, could only be guaranteed by means of a binding instrument. The declarations of principles could guide government policies and operational actions of civil society but would be insufficient to guarantee access rights. On the other hand, if countries are looking for the establishment of national measures in a coordinated manner in all countries, favouring

regional cooperation and national capacity-building, then a soft law instrument would neither be sufficient nor useful to achieve this.

Secondly, she stressed that the establishment of a permanent, solid and sufficient institutional base to ensure the fulfillment of the expected objectives could only be achieved through a binding instrument. With regard to this argument, she highlighted that no treaty, even the one that should be adopted could effectively achieve its objectives without a permanent institutional structure that supports States in the application of the treaty. She also emphasized that the institutional structure can be more or less advanced and may take various forms. According to her, it would be useful to have at least three different bodies: (i) a Conference or Meeting of the parties; (ii) a secretariat; and, (iii) a follow-up body. A permanent structure creates permanent and formal spaces for the exchange of information, administrative cooperation, the exchange of good practices and other elements which would require an operational base. In addition, it would serve as a permanent forum for intergovernmental communication, strengthening bilateral and multilateral cooperation. On the other hand, a follow-up body could notably contribute to the building of national capacities, responding to requests from States, and providing them with technical assistance when needed, whether it be directly or through a secretariat.

Thirdly, she underscored that a binding instrument could also serve as a basis for future institutional developments or future actions of administrative cooperation which could be articulated in an easier and more flexible way. This is because, under a binding instrument, future decisions would not need to be negotiated individually in each case, thus facilitating the adoption of agreements and the fulfillment of the proposed objectives.

Lastly, she said that another feature of the binding instrument is that it could contribute to reducing the litigation and social conflict within States. A treaty can assist them in adapting their national systems. The treaty could establish that States shall recognize access rights and adopt legislative measures to render them effective. It is proven, she continued, that when formal channels are established to facilitate participation and access, litigation becomes more formalized: every claim or petition must be made through the pre-established channels and this reduces social conflict. She also stated that an international treaty could alleviate conflicts between States in environmental matters. This is interesting because these matters have been the object of several disputes between countries in the region. Some examples worth mentioning are those of the International Court of Justice: Uruguay-Argentina[15] (pulp mills case); Ecuador-Colombia[16] (fumigation case) and Costa Rica-Nicaragua[17] (draining of San Juan River case). If the treaty establishes as permanent structure for exchange, this will undoubtedly improve communication between States and reduce tensions between them, even if this is not the main objective of the new treaty.

B. Which model of binding instrument?

Based on the aforementioned, according to Dr. Escobar the debate would not focus on whether or not a treaty is needed, but rather on what type of treaty would be more appropriate to achieve the expected objectives of the process.

Regarding this, she stated that the model of a binding instrument would depend solely and exclusively on the will of the States. She stated that, as in all international treaties, States are the "owners" of the instrument, even though they will have to consider other elements already agreed upon in an informal manner during the Process, especially the Lima Vision.

In her presentation, she called into question the extent to which it would be useful to adopt an absolutely uniform regime in the future instrument. On this, she stated that if one were to consider the diversity of the legal, economic and social systems of the participating countries in the Process, choosing the model of treaty which rigidly regulates all matters related to access rights from the start would not be best option. On the contrary, it would be preferable to opt for a more flexible model which would

[15] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, International Court of Justice, 20 April 2010.
[16] See *Aerial Herbicide Spraying (Ecuador v. Colombia)*, International Court of Justice, filed on 31 March 2008.
[17] See *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, International Court of Justice, filed on 22 December 2011.

consider the principles of progressive realization and non-regression, and would favour setting up capacity-building and cooperation mechanisms. Taking this into account, she compared two models of treaties: (i) closed, and (ii) open.

The closed treaty model could contain all legal elements to regulate and define all obligations for States, thus shaping a full legal regime. This model has the advantage of having the obligations assumed by States clearly outlined from the beginning. However, it has the disadvantage of having little flexibility in its application, not allowing an easy application of the principle of progressive realization. Moreover, each time States would like to amend or modify the treaty (however small the modification may be) new negotiations between States, and the ratifications processes in each State, would need to take place.

On the contrary, an open treaty model would allow for the introduction of the principle of progressive realization as well as the necessary flexibility so that the States treaty application process is successful. An open treaty model would guarantee a common minimum content that would apply immediately and would not be modifiable under any circumstance, would facilitate the progressive incorporation of States to the new system (which could progressively adapt their national laws) and would ensure that, in the end, all States are bound by the same obligations. There would be three options of open model treaties as established in Box 1.

The expert stressed that the election of the model depends solely and exclusively on the will of the States but that it should also consider technical criteria. In this sense, it would depend on what the countries would like to specifically achieve and how fast they would like to advance in the establishment of a regional system that guarantees access rights.

Even when States would have opted for a closed treaty, having considered it safer given that countries would know their undertakings from the beginning, it is important to note that the treaty could be successively modified by means of an amendment, optional or additional protocols, among others. However, in her experience, negotiating a closed treaty in the matters such as those dealt with in the process could be more difficult for States and could create uncertainty and reticence between them as not all countries could be sure to comply with the obligations foreseen in the treaty. States can also have doubts as to the degree which the treaty would have an influence on their respective legislations and national practices. On top of this, there is another aspect that can determine the ratification of a closed treaty by each State: in these types of treaties, obtaining national political balance for ratification is more difficult and the process of its entry into force is usually slower. Therefore, if countries were to opt for this model of treaty, it would be useful to establish a very low number of ratifications for its entry into force. Otherwise, if a high number of ratifications is required, its entry into force could take considerable time and this could damage the credibility of the instrument.

BOX 1
OPTIONS OF OPEN MODEL TREATIES

1. Framework convention that only sets principles and refers to complementary treaties that could be concluded subsequently to develop it progressively;
2. General convention that includes principles, rights and operational provisions and establishes an institutional structure, even if it is minimal, but which foresees the possibility of concluding additional protocols which could complement the system progressively as greater consensuses are reached; and,
3. General convention that includes principles, rights and obligations, establishes a permanent structure and foresees that within that permanent structure new legal instruments are adopted to complement the original treaty. In this third model there would also be the possibility of including administrative or execution arrangements, attributing certain national authorities of State parties (normally those which are competent in access rights and environmental matters) with the capacity to conclude complementary agreements. The latter would be binding but would not need to be negotiated or ratified like a treaty, given that their binding legal force is derived directly from the General Convention. In both cases, the treaty would be very flexible and the decision-making process to adapt the original treaty to the new circumstances would follow a simplified and less rigid model.

Source: Economic Commission for Latin America and the Caribbean on the basis of Concepción Escobar's presentation.

C. Does participation in the negotiation of a text of a binding instrument generate any type of obligation and/or international liability?

It is important to differentiate negotiation from ratification. The treaty is only binding for those States which have previously ratified it. Participating in the negotiation does not generate any type of obligation for the State. Even if the treaty is signed by the States, such signature does not generate legal obligations if it is not followed by ratification. In practice, there are some examples of States that have negotiated a treaty and then not ratified it, and as such, are not obliged by it. These include the Rome Statute of the International Criminal Court[18] which has not been ratified by the United States even though it was one of the countries that most actively participated in the negotiations. Much of the same occurred with the UNCLOS. In addition, ratification always takes place in accordance with the national legal systems. As a result, States always have the last say before being bound by a treaty.

In a process such as that of Principle 10, the States should be interested in participating in the negotiation given that they could raise their interests and needs and have an influence in the final text. In the end, they would reserve the right to ratify or not. Moreover, participating in the negotiation would facilitate ratification since the State would have participated in the development of the treaty and would be aware of the degree to which it can have an impact on its national system.

D. What type of legal liabilities can a country incur if it does not comply with the obligations of a binding instrument?

The content of the obligations that the State must comply with will be established in the treaty. Consequently, a State will only have to comply with those obligations which specifically and voluntarily have been included in the treaty during the negotiation. Once again, political decisions are key here.

It is important to note that non-compliance of the treaty gives rise to international liability. However, she highlighted that international liability does not necessarily mean the imposition of sanctions at the international level, unless the treaty establishes that the bodies it creates can impose sanctions. Therefore, it is important to clarify that lack of compliance by the State does not necessarily translate into imposition of enforceable sanctions. On the contrary, to her understanding, the approach of the Principle 10 process is more related to building mutual trust, offering technical assistance, strengthening regional cooperation and national capacities and establishing national mechanisms. To her knowledge, in the Principle 10 process countries were not looking to establish a system for attributing liabilities in case of non-compliance or to adopt a sanctions-approach in the instrument. In addition, she indicated that in a system such as the one foreseen, liability can ultimately translate into the setting up of technical assistance mechanisms to strengthen national capacities and prevent a new situation of non-compliance.

All in all, international liability only emerges for those States that are obliged by the treaty and additionally do not comply with it. And even in the case of non-compliance, the situation does not automatically translate into the imposition of sanctions to the State concerned.

[18] Rome Statute of the International Criminal Court, adopted on 17 July 1998.

E. In the event of a binding framework convention which establishes that provisions on specific matters be developed in the future, does the treaty have to be ratified again once these provisions have been determined? Can a convention authorize executive governments or bodies created by the instrument (delegation of competencies) to adopt such provisions without a new ratification?

F. Can the modality of protocols "solve" the conflict of having a binding agreement now regulating general matters and leave other matters and/or details (such as compliance and monitoring mechanisms) for a second stage of the negotiation/agreements?

Questions E and F were answered jointly.

Every international treaty is a living instrument which can be modified, amended or complemented in several ways, as is deemed necessary and as the process develops. Therefore, it is essential to leave open the possibility of adopting these modifications and supplements.

There are many mechanisms to modify or complement a treaty in force. These can basically be grouped into three: i) amendment, additional and optional protocols (which are treaties); ii) execution agreements, which are obligatory but do not necessarily need to be treaties given that their binding force is derived from the treaty which authorizes such execution agreements (these can be adopted directly by governments on the basis of the original convention); and, iii) institutional agreements adopted by the Conference or Meeting of the State Parties, the follow-up body, etc. which are also binding but do not take the form of a treaty.

However, not all of these instruments serve for the same purpose. For example, in the event that a follow-up body is created with 15 members and in the future parties would like it to be composed of 6 or 25 members, such modification would be a minor issue which could be solved by means of an execution or institutional agreement. But if parties would like to modify its competencies substantially these simplified methods for modification of the treaty would not be valid. For example, this would be the case when parties want the follow-up body, in addition to receiving reports from governments or exchanging information, also to examine complaints from individuals or other governments. This would represent a radical change with respect to the obligations undertaken by the States in the original treaty and would thus require a more formal mechanism, such as an optional or amendment protocol. In these cases of substantive changes of the treaty, another treaty is needed to modify it.

Any of the aforementioned instruments can be included in the binding instrument that could be adopted in the framework of the Principle 10 process. Including more or less flexibility depends upon the political will of States. But in any case, regardless of the model chosen, foreseeing this flexibility in the treaty is what is most important. As a result, the treaty should stipulate how amendments are to be adopted, whether administrative or execution agreements are permitted, for which matters or objectives, and who the national authorities which can conclude these agreements are (whether it be directly, or requesting that States notify who the authorities are in their country). Lastly, it should indicate whether the Conference or Meeting of the Parties (or other bodies created by the treaty) has the power, or not, to adopt instruments that complement the main treaty through the adoption of institutional instruments.

G. Taking into account the slow pace of ratification processes and the seriousness of environmental issues, can any type of sanction be imposed on infringing States during the negotiation process?

The point of departure is that if a treaty is chosen it only obliges those that have ratified it. Therefore, if a State does not ratify the treaty there would be no way to oblige it. She indicated, however, that it would be different if negotiating States include a clause on provisional application to facilitate that the treaty produce effects before it enters into force (between signature and entry into force). This notwithstanding, she underlined that it was a political decision and indicated that it could be useful for some matters to be dealt with such as institutional structure or the application of general principles. The expert insisted that the production of effects of a treaty prior to its entry into force must be separated from the imposition of sanctions which, to her understanding, was not the approach agreed by the countries in this process.

H. What role does political will play in the achievement of the objectives of multilateral environmental agreements and how can the latter's effectiveness be measured?

Political will was decisive. In addition, it is not unusual to find countries in practice that ratify treaties, assume obligations and then do not develop them internally or fully comply with what was agreed. There is no sense in developing an international instrument of any type (binding or non-binding) if there is not a clear political will of complying with it. Otherwise, tremendous frustrations are created and conflict increases.

With regard to the difficulties of a treaty's compliance, these were not in themselves a flaw of the binding instrument but a consequence of the lack of political will by States to put in place something which they had previously consented.

As for multilateral environmental agreements, such as the UNFCCC and the United Nations Convention to Combat Desertification[19], it is hard to value their effectiveness abstractly. In any case, an international treaty can serve to tackle previously identified difficulties by establishing specific reaction measures, something which would not be possible in the case of a declaration of principles which is not followed by concrete measures. A treaty can, in this sense, strengthen regional cooperation and national capacities.

I. What examples are there of successful open treaties?

There is a long list of them such as the European Convention on Human Rights[20] (an open convention with additional protocols), the Convention of Palermo against transnational organized crime[21] or the conventions of the International Maritime Organization on navigation and pollution of the seas. The latter would belong to the third category of open treaty mentioned earlier in which it is the same institution that adopts norms. In the three cases, principles and a minimum content had been provided for and then specific procedures had been established to complement them.

[19] United Nations Convention to Combat Desertification in Countries experiencing Serious Drought and/or Desertification, Particularly in Africa, adopted on 14 October 1994.
[20] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950.
[21] United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000.

J. What is the link between form and content of the instrument? Should the form be chosen on the basis of the content or vice versa?

Both elements were related. Accordingly, adopting an international treaty only to set principles would be senseless much like adopting a memorandum of understanding (non-binding instrument) containing clearly normative components. The stance in favour of adopting a binding instrument was based on the logic of the instruments already adopted in the process, the experience of the Aarhus Convention[22] and other related experiences. The very nature of the matters that would be included in the new instrument would hardly be effectively regulated by a non-binding instrument since it would not succeed in ensuring that States adopt legal measures to comply with access rights.

There are doubts about the order in which both aspects should be determined. On this, the decision on the form can be left, indeed, to the end on the basis of the negotiation of the content. However, in her experience, negotiators will not commit themselves easily if they do not know the nature of their commitment. A true negotiation of the content without knowing the nature of the instrument is not common practice in international negotiations. Nonetheless, it would be possible to establish a process in successive phases whereby basic contents are agreed upon (without specific provisions or legal specifications) and, on the basis of such basic contents, a decision is made on whether a treaty or a non-binding instrument is wanted, opening thereafter the negotiating process.

With regard to the Nagoya Protocol[23], where the debate on the form was present from the very beginning, it is worth noting that its final closing was very much conditioned upon the permanent tension between the adoption of a treaty or another type of instrument. If there had been an agreement on the form progress would have been faster with respect to contents and vice versa.

K. What are the economic implications of a binding instrument?

Any cooperation process —whether it is binding or non-binding— which also foresees the building of national capacities would need budgetary forecasting. The establishment of permanent institutional structures also generates costs. However, though one tends to think of significant costs in these cases, costs can be reduced and they can be assessed progressively according to the needs and the specific budget availability. In addition, earmarking a certain project in a budget is, essentially, a manifestation of commitment and political will of the State.

L. How can the reduction to a common minimum denominator that is limited to establishing standard minimums be avoided in the convention?

The European Social Charter[24] is a model of flexibility that established minimum principles for all, minimum obligations for all complementing those principles and the commitment of opting for the rest of the obligations progressively. An open treaty would be the best way to prevent the common minimum denominator that would be included as the sole content of a closed treaty. With an open treaty that includes elements of flexibility, the States could progressively come closer to the end result they expect; a result which some countries could not reach automatically and immediately due to justified reasons. In addition, to guarantee progressive realization, the application of the treaty could foresee the obligation of submitting periodic reports on how each country is complying with the general obligations and those obligations progressively undertaken. This would favour that in a given horizon, the treaty is applied in its entirety by all State Parties.

[22] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998.

[23] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted on 29 October 2010.

[24] European Social Charter, adopted on 18 October 1961.

III. Questions answered by both experts

A. Can a treaty foresee different application phases? Can some of the obligations in a treaty be deferred in time or can some of the obligations be subject to a certain condition (legislative and institutional development, etc.)?

1. Answer by Concepción Escobar

A treaty can, indeed, foresee that the obligations contained within it be applied progressively or even in different time periods. The idea of progressive realization in the compliance of a treaty and its progressive application are found in treaties of a different nature. This formula is frequent in treaties which oblige to adopt measures in national systems. As such, it is present in almost all human rights treaties. Therefore, for example, in treaties which govern economic and social rights, the State usually undertakes to comply with it progressively and to the extent possible according to its capabilities. Likewise, it is possible that a treaty establishes obligations at various levels (for example, some principles that are mandatory for all, a minimum of rights that are obligatory for all, and another group of rights or obligations that they can assume progressively).

On the other hand, any treaty can establish that it will enter into force when certain conditions established expressly therein are met. This way, the production of effects of the treaty is differed in time. Such conditions can be of different kinds. For example, the treaty could foresee that a certain period should elapse or that the treaty is ratified by a certain number of States that have a specific condition or fall into a specific category.

Furthermore, a treaty can establish that the obligations of the instrument will be complied with gradually. There are many possible formulas such as establishing a grace period for the compliance of certain obligations, distinguishing between different types of obligations that shall be fulfilled in different moments or phases and so on.

All these possibilities can be considered when negotiating the binding instrument if negotiators want to modulate or make its application conditional.

However, and replying to the second part of the question, in her opinion, it is more complicated to tie some obligations to the general condition of having legislative or institutional developments. This would refer to a matter of domestic law and it is important to recall that a basic principle of the law of the treaties is that no State can justify the failure to perform an international obligation it has voluntarily undertaken on the grounds that it is contrary to its internal law, unless the treaty sets some specific parameters. As a result, if the treaty, for example, establishes a system for the exchange of information, a condition could be established by which that provision will only be applicable when the States have an institution that is responsible for managing environmental information, but always undertaking to develop it within a specified framework of time. What could not be established in the treaty is that States must put in place a system that guarantees access rights and, at the same time, contemplate that such obligation would only apply from the moment that the State adopts national legislation to guarantee access rights. That would be an empty, senseless norm.

In practice, a great number of treaties include formulas for their successive application in time. An interesting model that could be explored by this process would be a treaty that contains different categories of provisions which would become applicable successively, such as institutional provisions, intergovernmental cooperation mechanisms and specific obligations that shall be applied in domestic law. First, the institutions would be established. Then, the cooperation mechanisms and finally, the obligations would be incorporated into national law. As a result, the establishment of the first (basic institutional structure) would contribute to articulating the second (intergovernmental cooperation mechanisms) and this would, in turn, contribute to fulfilling the last (adaptation of national law and adoption of the internal measures which are required to strengthen national capacities).

A simple example worth noting in this sense is the European Social Charter. The Charter contains a series of principles which must be accepted as legally binding by all State parties, a set of common obligations for all States and, thirdly, a series of obligations which States can accept or not. This model incorporates the necessary flexibility so that States in a different economic and social situation can participate in the general system and accept common general obligations for all. One should bear in mind that the final objective is that all States end up fully participating in the treaty.

2. Answer by Marcos A. Orellana

There are several forms of making flexibility operational such as the establishment of grace periods or the differentiation of commitments. International law foresees several examples of open treaties that allow strengthening regimes over time. There are successful experiences such as the use of negative consensus by the International Maritime Organizations regarding the environmental protection of the seas as well as the use of protocols and amendments in the regime for the protection of the ozone layer. In the case of the Basel Convention, he indicated that the application of flexibility was hindered due to the lack of legal clarity in the drafting of certain provisions. Against this background, a future treaty should foresee the necessary clarity to make flexibility schemes such as amendments operational. As for the so-called “conditions”, he highlighted that these need to be objective, measurable and verifiable.

B. How can the regional instrument have an influence on environmental conflicts within and between countries?

1. Answer by Concepción Escobar

It is evident that the instrument is essentially aimed at strengthening access rights at the national level. However, in relation with conflicts between States, an instrument that includes mechanisms for permanent communication between States (Conference of the Parties, Secretariat, Council and/or follow-up body) could reduce regional conflict. In the pulp mill case between Argentina and Uruguay, for example, the degree of conflict could have been reduced had there been a permanent forum for consultation on access rights, at least from the perspective of the confrontation between local communities. Given that environmental issues have a strong transboundary dimension, tension and conflict can be significantly reduced if there is a binding instrument on Principle 10 in place which foresees access rights from a transboundary dimension.

2. Answer by Marcos A. Orellana

It is worth noting the importance of the extraterritorial application of the obligations on access rights. An aspect that could illustrate how an instrument on access rights can reduce conflict is how affected populations could have access to environmental information, participate in decision-making processes and have access to justice. With regard to the pulp mill case between Argentina and Uruguay, he said that, for the most part, the controversy had to do with the threat the Argentine population felt as a result of the constructions of pulp mills in the Uruguayan side of the border. He mentioned that if these people had been able to exercise access rights extraterritorially, there would have been an institutional channel for debate. This leads one to think that, if that were the case, those potentially affected would not have blocked the bridges between Uruguay and Argentina, triggering the conflict between both countries.

Extraterritoriality is a matter expressly provided for in the Aarhus Convention and has been reaffirmed by the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights. Consequently, the application of access rights in favour of individuals outside the territory of a State is a matter that should be considered in the Latin American and Caribbean process. A possible formula to explore could be to start off applying the access rights internally and, after a certain period of time, establish the conditions to apply these rights extraterritorially considering that the environment knows no political borders that States trace.

C. Can a treaty be linked to development or budgetary issues?

1. Answer by Concepción Escobar

Political decisions are fundamental. It will all depend on the actual content of the treaty and if, in this framework, development or budgetary issues can be considered. She underlined that a binding instrument would favour and facilitate cooperation and technical assistance and this would go along the lines of considering development and budgetary issues.

2. Answer by Marcos A. Orellana

The debate on the levels of development and compliance of obligations had already taken place in past decades. The idea that the respect of rights is possible once certain levels of development have been achieved has been surpassed with the conceptualization of the right to development. This notion of development as a process is then taken up by the 1992 Earth Summit, which coins the term sustainable development based on the application of access rights.

D. In what category would the Aarhus Convention fall into? Is it considered a successful treaty?

1. Answer by Concepción Escobar

The Aarhus Convention is, undoubtedly, a successful convention (with the limits of every international treaty), especially considering that it had been able to influence national legislations. It is difficult to assess the success of this treaty abstractly. As for the category in which it would fall into, it would probably be between categories two and three of open treaties.

2. Answer by Marcos A. Orellana

It is a successful treaty indeed given the normative development that the State Parties as well as the European Union bodies had experienced. Moreover, the Aarhus Convention has influenced and strengthened the progressive development of the jurisprudence of the European Court of Human Rights, especially with respect to the link between the State obligations on the prevention of environmental risks and the access right to environmental information. In short, there is strong evidence on how the Aarhus Convention has succeeded in helping countries and the European Union strengthen their normative frameworks.

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Annexes

Annex 1
Outline of Concepción Escobar's presentation[25]

I. Why a binding instrument?

- A new instrument of "soft law" would be an unnecessary duplication.
- Incidence of the instrument in national legal systems: the need to adopt legislative and other measures.
- National access mechanisms and reduce social conflict.
- Creation of an institutional framework: models and functions. Contribution to settlement of disputes.
- Increase presence and influence of the region at the international level.

II. Which model of binding instrument?

- A political decision: will of the State prevails.
- Preservation of the principles of progressive realization and non-regression.
- Closed or open treaty?
- Models of open treaties: possible formulas.
- Difficulties of a closed treaty.
- Progressive realization as a specific content of the binding instrument.

III. What effects would a binding instrument produce?

- Only those States that have ratified it are bound by the instrument.
- Scope and content of obligations: political decision.
- Non compliance of the treaty generates international liability.
- Liability is not equal to imposition of sanctions.
- Cooperation and settlement of disputes.

[25] For the sole purposes of the round-table discussion of 1 August 2014.

Annex 2
Curriculum vitae of the experts

I. Marcos A. Orellana

Marcos A. Orellana (LL.M, S.J.D.) is Adjunct Professor at the American University Washington College of Law in Washington DC and Director of the Center for International Environmental Law (CIEL)'s Human Rights and Environment Program. Dr. Orellana has been a visiting scholar with several American universities including Harvard, Princeton, Vermont and Yale, as well as in other Colleges of Law in Asia, Europe and Latin America. Previously, Dr. Orellana was Fellow to the Research Centre for International Law of the University of Cambridge, UK. He also was a visiting scholar with the Environmental Law Institute in Washington DC and Instructor Professor of international law at the Universidad de Talca, Chile. Dr. Orellana was also an intern at the World Bank's Inspection Panel. Dr. Orellana has provided legal counsel to the Chilean Ministry of Foreign Affairs on international environmental issues. In that capacity he has joined official delegations to meetings of select MEAs as well as at the Rio+20 Conference on Sustainable Development. Dr. Orellana has also been legal consultant to various international governmental, including the United Nations Environment Programme and the Office of the High Commissioner for Human Rights.

II. Concepción Escobar

She holds a Degree and a PhD in Law by the Complutense University of Madrid.

Chair in Public International Law of the National Distance Education University (UNED) and "Jean Monnet" Chair in Law of the European Union. She was Dean of the Faculty of Law of UNED between 2001 and 2004. She is currently the Director of the Department of Public International Law of UNED.

She is professor of the Diplomatic School of the Ministry of Foreign Affairs, where she is responsible for the course "Public International Law." She is professor of the University Institute "General Gutiérrez Mellado" (UNED/Ministry of Defense) and of the Center for Studies on International Humanitarian Law of the Spanish Red Cross. In addition to teaching Public International Law and Law of the European Union, she has delivered courses and conferences at different Spanish and foreign universities as well as in other post-secondary education centers.

Since 2011, she is member of the United Nations International Law Commission and since May 2012 she is Special Rapporteur on "Immunity of State officials from foreign criminal jurisdiction."

She was Chief of the Legal Affairs Division of the Ministry of Foreign Affairs and Cooperation between June 2004 and March 2012.

Between 2008 and 2014 she has been member of the Permanent Court of Arbitration. She is arbitrator and conciliator under the United Nations Convention on the Law of the Sea since 2012.

She has been the delegate of Spain before the International Court of Justice in the advisory opinion on the unilateral declaration of independence of Kosovo and Agent of the Kingdom of Spain before the International Tribunal for the Law of the Sea in case nº 18, "M/V. Louisa."

She has been part of and head of several Spanish delegations before international organizations and conferences, of which the Rome Conference on the Statute of the International Criminal Court and the Kampala Conference on the amendment of the Rome Statute – of which she was President of the Drafting Committee- are worth mentioning.

In the realm of research, she has focused her activities in the following matters: Immunities in International Law, International Human Rights Law, International Criminal Law, International Tribunals and Settlement of Disputes, Maintenance of Peace, Law of the European Union (institutions, legal system, human rights, asylum, and judicial proceedings). She is author of several

publications in the aforementioned areas and, since 2010, is responsible for the edition of the prestigious manual on International Law "Institutions of Public International Law" of professor Díez de Velasco.

She is member of the Scientific Council of the Elcano Royal Institute on International and Strategic Studies. She is also member of different scientific institutions, among which are the Spanish Association of Professors of International Law and International Relations and the Spanish Association for the Study of European Law, of which is a member of the Board of Directors. She is member of the Spanish Royal Academy on Jurisprudence and Legislation.

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