

UN Treaty Handbook adapted for the FCTC

I. DEPOSITING MULTILATERAL TREATIES

The Secretary-General of the United Nations shall be the Depositary of this Convention and amendments thereto and of protocols and annexes adopted in accordance with Articles 28, 29 and 33. (FCTC, Article 37)

Treaties are the primary source of international law, and the Secretary-General is the main depositary of multilateral treaties in the world. At present, the Secretary-General of the United Nations is the depositary for over 500 multilateral treaties, including the FCTC. As with Article 37 of the FCTC, above, the negotiating parties to a multilateral treaty may designate the Secretary-General as the depositary in the treaty itself.

The depositary of a treaty is responsible for ensuring the proper execution of all treaty actions relating to that treaty. The depositary's duties are international in character, and the depositary is under an obligation to act impartially in the performance of those duties. Functions of the depositary listed in Article 77(1) of the Vienna Convention on the Law of Treaties¹ include (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary; (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty; (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it; (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question; (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty; (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited; (g) registering the treaty with the Secretariat of the United Nations; and (h) performing the functions specified in other provisions of the present Convention.

The Secretary-General is guided in the performance of depositary functions by provisions of the relevant treaty; resolutions of the General Assembly and other United Nations organs; customary international law; and Article 77 of the Vienna Convention 1969. In practice, it is the Treaty Section of the United Nations Office of Legal Affairs which carries out depositary functions on behalf of the Secretary-General.

II. PARTICIPATING IN MULTILATERAL TREATIES

A. *Signature*

This Convention shall be open for signature by all Members of the World Health Organization and by any States that are not Members of the World Health Organization but are members of the United

¹ VIENNA CONVENTION ON THE LAW OF TREATIES SIGNED AT VIENNA (23 May 1969) and VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS (21 March 1986)

Nations and by regional economic integration organizations at the World Health Organization Headquarters in Geneva from 16 June 2003 to 22 June 2003, and thereafter at United Nations Headquarters in New York, from 30 June 2003 to 29 June 2004. (FCTC, Article 34)

One of the most commonly used steps in the process of becoming party to a treaty is signing that treaty. Article 34 of the FCTC indicates the place of signature, date of opening for signature, period of signature, and specifies which States and organizations may sign the treaty. In particular, as also explained below, the FCTC is open to signature by regional economic integration organizations (REIOs).

Multilateral treaties often provide that they will be open for signature only until a specified date, after which signature will no longer be possible. For example, the FCTC is open for signature at UN Headquarters in New York only from 30 June 2003 to 29 June 2004. Once the FCTC is closed for signature, a State may become a party to it by means of accession.

The FCTC, like many multilateral treaties, provides for signature subject to ratification, acceptance or approval - also called simple signature. In such cases, a signing State does not undertake positive legal obligations under the treaty upon signature. However, signature indicates the State's intention to take steps to express its consent to be bound by the treaty at a later date. Signature also creates an obligation, in the period between signature and ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty (see Article 18 of the Vienna Convention 1969).

B. Full powers

Only the Head of State, Head of Government or Minister for Foreign Affairs of a State, or the corresponding authority of a REIO according to its constitutive instrument and rules, may sign the FCTC on behalf of the State or the organization without an instrument of full powers. Any other authority may sign the FCTC only if that person possesses a valid instrument of full powers. "Full powers" is defined in Article 2 of the 1969 Vienna Convention as follows: "a document emanating from the competent authority of a State or from the competent organ of an international organization designating a person or persons to represent the State or organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty". This instrument empowers the specified representative to undertake given treaty actions. This is a legal requirement reflected in Article 7 of the 1969 and 1986 Vienna Conventions, designed to protect the interests of all parties to a treaty as well as the integrity of the depositary. Typically, full powers are issued for the signature of a specified treaty. Full powers are legally distinct from credentials, which authorise representatives of a State to participate in a conference and sign the Final Act of the conference.

As depositary, the Secretary-General insists on proper full powers for the person (other than a Head of State, Head of Government or Minister for Foreign Affairs) seeking to sign a treaty. Documents not containing a legible signature from one of the above-mentioned authorities are not acceptable (e.g., a telexed message). Signature of a treaty without proper full powers is not acceptable.

While there is no specific form for an instrument of full powers, it must include the following information. Examples can be found in ANNEX ONE.
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| <ol style="list-style-type: none">1. The instrument of full powers must be signed by one of the three above-mentioned authorities and must unambiguously empower a specified person to sign the treaty. Full |
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- powers may also be issued by a person exercising the power of one of the above-mentioned three authorities of State ad interim. This should be stated clearly on the instrument.
2. Full powers are usually limited to one specific treaty and must indicate the **title of the treaty** (the WHO Framework Convention on Tobacco Control).
 3. Full powers must state the **full name and title of the representative** authorised to sign. They are individual and cannot be issued to the "permanent representative ...". Due to the individual character of the full powers, it is prudent to name at least two representatives, in case one is hindered by some unforeseen circumstance from performing the designated act.
 4. **Date and place of signature** must be indicated.
 5. **Official seal.** This is optional and it cannot replace the signature of one of the three authorities of State.

As custodian of the original version of the treaty, the depositary verifies all full powers prior to signature. A State or REIO wishing to sign the FCTC should make an appointment for signature with the Treaty Section and submit to the Treaty Section for verification a copy of the instrument of full powers well in advance of signature (facsimiles are acceptable for this purpose). The State or REIO should present the original instrument of full powers at the time of signature. Full powers may be submitted by hand or mail to the Treaty Section.

C. Consent to be bound

This Convention shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations. It shall be open for accession from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary (FCTC Article 35(1))

In order to become a party to a multilateral treaty such as the FCTC, a State or REIO must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty - its consent to be bound by the treaty. A State can express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. Those included in the FCTC are ratification; acceptance or approval; and accession.

A “regional economic integration organization” is defined in Article 1 of the FCTC as “an organization that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters”.

A REIO may express its consent to be bound either in instruments relating to formal confirmation or in instruments of accession. Formal confirmation is the equivalent of ratification for international organizations. This terminology was codified by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). Article 35(2) of the FCTC provides that any REIO which becomes a Party to the Convention without any of its Member States being a Party will be bound by all FCTC provisions, and also that for those organizations where one or more Member States is a Party to the FCTC, the organization and its Member States shall decide on their respective responsibilities for the performance of their

obligations under the Convention but will not be entitled to exercise rights concurrently under the Convention. Article 35(3) provides that REIOs shall declare in these instruments the extent of their competence with respect to matters governed by the Convention and inform the Depositary of any substantial modification in the extent of their competence.

The expression by a State or REIO of its consent to be bound by a treaty is not the same as the treaty's entry into force. Consent to be bound is the act whereby a State or REIO demonstrates its willingness to undertake the legal rights and obligations under the FCTC through the deposit of an instrument of ratification, acceptance, approval, formal confirmation or accession. Entry into force of a treaty is the moment the treaty becomes legally binding for the State or REIO that has expressed its consent to be bound. The FCTC contains provisions dealing with both aspects.

1. *Ratification*

Most multilateral treaties, including the FCTC, expressly provide for States to express their consent to be bound by signature subject to ratification, acceptance or approval. Providing for signature subject to ratification allows States time to seek approval for the treaty at the domestic level and to enact any legislation necessary to implement the treaty domestically, prior to undertaking the legal obligations under the treaty at the international level. *Once a State has ratified a treaty at the international level, it must give effect to the treaty domestically.* This is the responsibility of the State. Generally, there is no time limit within which a State is requested to ratify a treaty which it has signed.

Ratification at the international level, which indicates to the international community a State's commitment to undertake the obligations under a treaty, should not be confused with procedures or requirements at the national level, which a State may be required to undertake in accordance with its own constitutional provisions before it may express its consent to be bound internationally. Such procedures or requirements (e.g. approval by the parliament) are sometimes referred to as "ratification", which may raise confusion with ratification at the international level as a treaty action. "Ratification" at the national level is inadequate to establish a State's intention to be legally bound at the international level. The required actions at the international level must also be undertaken.

2. *Acceptance or approval*

Acceptance or approval of the FCTC following signature has the same legal effect as ratification (see Article 15 of the Vienna Convention 1969). Signature subject to acceptance or approval was introduced relatively recently into treaty practice, principally in order to provide a government a further opportunity to examine a treaty when it is not necessarily obliged to submit it to a particular constitutional procedure for obtaining ratification.

3. *Accession*

A State or REIO may express its consent to be bound by a treaty by depositing an instrument of accession with the depositary (see Article 15 of the Vienna Convention 1969). Accession has the same legal effect as ratification. However, unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession. The Secretary-General, as depositary, has tended to treat instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned have been advised accordingly.

When a State or REIO wishes to ratify, accept, approve, formally confirm or accede to the FCTC, it must execute an instrument of ratification, acceptance, approval, formal confirmation or accession, signed by one of three specified authorities, namely the Head of State, Head of Government or Minister for Foreign Affairs, or the competent authority of a REIO. There is no mandated form for the instrument, but it must include the information below. A model instrument of ratification, acceptance or approval is provided in ANNEX TWO and a model instrument of accession in ANNEX THREE:

1. Title, date and place of conclusion of the treaty concerned;
2. Full name and title of the person signing the instrument, i.e., the Head of State, Head of Government or Minister for Foreign Affairs or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities;
3. An unambiguous expression of the intent of the Government, on behalf of the State, to consider itself bound by the treaty and to undertake faithfully to observe and implement its provisions;
4. Date and place where the instrument was issued; and
5. Signature of the Head of State, Head of Government or Minister for Foreign Affairs (the official seal is not adequate) or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities.
6. Similar requirements apply, mutatis mutandis, to an instrument issued by a REIO

4. *Other practical considerations*

An instrument of ratification, acceptance, approval, formal confirmation or accession becomes effective only when it is deposited with the Secretary-General of the United Nations at United Nations Headquarters in New York. The date of deposit is normally recorded as that on which the instrument is received at Headquarters. States and REIOs are advised to deliver such instruments to the Treaty Section of the United Nations directly to ensure the action is promptly processed. The individual who delivers the instrument of ratification does not require full powers. In addition to delivery by hand, instruments may also be mailed or faxed to the Treaty Section. If a State initially faxes an instrument, it must also provide the original as soon as possible thereafter to the Treaty Section.

Additionally, it is recommended that, where feasible, States provide courtesy translations in English and/or French of instruments in other languages submitted for deposit with the Secretary-General. This facilitates the prompt processing of the relevant actions.

5. *Reservations*

No reservations may be made to this Convention (FCTC Article 30)

In certain cases, States make statements upon signature, ratification, acceptance, approval of or accession to a treaty. Such statements may be entitled "reservation", "declaration", "understanding", "interpretative declaration" or "interpretative statement". However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to the declarant is, in fact, a reservation (see Article 2(1)(d) of the Vienna Convention 1969). Article 30 of the FCTC prohibits reservations to the Convention.

6. *Interpretive Declarations*

A State may make a declaration about its understanding of a matter contained in or the interpretation of a particular provision in a treaty. Interpretative declarations of this kind, unlike reservations, do not purport to exclude or modify the legal effects of a treaty. The purpose of an interpretative declaration is to clarify the meaning for the declaring State or REIO of certain provisions or of the entire treaty.

For example, the European Community submitted an interpretative declaration when it signed the Framework Convention on Tobacco Control, reading “The Community and its Member States declare that a Member State of the European Community whose national constitution or constitutional principles do not permit the introduction of a comprehensive ban on tobacco advertising, promotion and sponsorship may make use of the provision enshrined in 13(3) of the Framework Convention on Tobacco Control to accommodate regulations so as to respect national constitutional constraints”.

Declarations are usually deposited at the time of signature or at the time of deposit of the instrument of ratification, acceptance, approval, formal confirmation or accession. Since an interpretative declaration does not have a legal effect similar to that of a reservation, it need not be signed by the Head of State, Head of Government or Minister for Foreign Affairs as long as it clearly emanates from the State concerned. Nevertheless, such a declaration should preferably be signed by one of the aforementioned authorities or a person having full powers for that purpose issued by one of the above authorities. This practice avoids complications in the event of a doubt whether the declaration in fact constitutes a reservation.

The Secretary-General, as depositary, reviews all declarations to treaties that prohibit reservations to ensure that they are *prima facie* not reservations.

III. KEY EVENTS IN A MULTILATERAL TREATY

A. *Entry into force*

This Convention shall enter into force on the ninetieth day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary. (FCTC, Article 36(1))

The provisions of the FCTC determine the date upon which the treaty enters into force. The FCTC will enter into force 90 days after 40 States or regional economic integration organizations have deposited instruments of ratification, approval, acceptance, formal confirmation or accession with the depositary. At that moment, the treaty is in force for those 40 States and regional economic integration organizations. Once a treaty has entered into force, if the number of parties subsequently falls below the minimum number specified for entry into force, the treaty remains in force unless the treaty itself provides otherwise (see Article 55 of the Vienna Convention 1969).

B. Entry into force for States and Regional Economic Integration Organizations that become Parties after the entry into force of the FCTC

For each State that ratifies, accepts or approves the Convention or accedes thereto after the conditions set out in paragraph 1 of these Articles for entry into force have been fulfilled, the Convention shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession. (FCTC, Article 36(2))

Where a State ratifies, accepts, approves or accedes to a treaty that has already entered into force, the treaty enters into force for that State according to the relevant provisions of the treaty. With entry into force for it, that State also becomes a party. The FCTC provides for entry into force for a State at a specific time (90 days) after the date the State deposits its instrument of ratification, acceptance, approval or accession.

Article 36(3) and (4) of the FCTC address entry into force for regional economic integration organizations. Paragraph 3 provides that when a regional economic integration organization deposits an instrument of formal confirmation or an instrument of accession after the FCTC has entered into force, the treaty will enter into force for that regional economic integration organization 90 days later. Paragraph 4 stipulates that any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of the organization.

Dispute resolution and compliance mechanisms

Many treaties contain detailed dispute resolution provisions, but some contain only elementary provisions. Where a dispute, controversy or claim arises out of a treaty (for example, due to breach, error, performance issues, etc.) these provisions become extremely important. Treaties may provide various dispute resolution mechanisms, such as negotiation, consultation, conciliation, use of good offices, arbitration, judicial settlement, reference to the International Court of Justice, etc.

Moreover, detailed compliance mechanisms are included in some recently concluded treaties. Many disarmament treaties and some environmental treaties provide compliance mechanisms, for example, by imposing monitoring and reporting requirements.

Article 27 of the FCTC provides that in the event of a dispute with respect to interpretation or application of the Convention, “the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation.” If these modes of dispute settlement should fail, parties to the dispute are not absolved of the responsibility of continuing to seek to resolve it.

Amendments

After entry into force, the FCTC text may be amended in accordance with the amendment provisions in the treaty itself, contained in Article 28.

Where a State or organization becomes party to a treaty after an amendment to it has entered into force, it becomes party to the treaty as amended, unless otherwise indicated (see Article 40(5)(a) of the Vienna Convention 1969). The provisions of the treaty determine which State are bound by the amendment.

The FCTC provisions on amendments provide that any Party may propose amendments to the Convention, which will be considered by the Conference of the Parties. It is the Conference of the Parties which will adopt amendments to the FCTC by consensus or as a last resort by a three-quarters majority vote of the Parties present and voting (those Parties present and casting an affirmative or negative vote) at the session. Instruments of acceptance will be deposited with the Depositary; information about entry into force of amendments to the FCTC is contained in the following paragraphs.

Determining the date on which an amendment enters into force

...an amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least two-thirds of the Parties to the Convention. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment. (FCTC, Article 28(4) and (5))

For an amendment to the FCTC to enter into force, parties must express their consent to be bound by it through the deposit of an instrument of acceptance with the Depositary. A treaty normally provides that a minimum number of parties must have expressed their consent to be bound to allow it to enter into force. As with the treaty itself, the amendment enters into force only for those parties that have expressed their consent to be bound by it. The Secretary-General, as depositary, is guided by the amendment provisions of a treaty in determining when an amendment to the treaty enters into force. The FCTC (Article 28(4)), requires that two-thirds of the Parties to the Convention deposit an instrument of acceptance for entry into force of an amendment. In determining what constitutes two-thirds of the Parties for the purposes of entry into force of an amendment, the Secretary-General applies what is sometimes called the current time approach: the Secretary-General as depositary counts all parties at any given time in determining the time an amendment enters into force. Accordingly, States that become parties to a treaty after the adoption of an amendment but before its entry into force are also counted.

As stated above, an amendment will enter into force for those Parties which have accepted it on 90 days after the Depositary has received instruments of acceptance from at least two-thirds of the Parties to the Convention. For any other Party, the amendment will enter into force 90 days after that Party deposits its instrument of acceptance with the Depositary.

Withdrawal and denunciation

In general terms, a party may withdraw from or denounce a treaty in accordance with any provisions of the treaty enabling withdrawal or denunciation (see Article 54(a) of the Vienna Convention 1969) or with the consent of all parties after consultation with all contracting States (see Article 54(b) of the Vienna Convention 1969).

Where a treaty contains provisions on withdrawal, the Secretary-General is guided by those provisions. The FCTC provisions addressing withdrawal (Article 31) are as follows:

1. At any time after two years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

2. *Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.*
3. *Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party.*

Termination

The FCTC does not include a provision regarding its termination. Article 42(2) of the Vienna Convention 1969 states that a treaty may only be terminated as a result of the application of the provisions of the treaty itself or of the Vienna Convention 1969 (e.g., Articles 54, 56, 59-62 and 64). In accordance with these provisions, a treaty may also be terminated by a subsequent treaty to which all the parties of the former treaty are also party.

References:

Much of the language in this document is taken from the Treaty Handbook prepared by the UN Office of Legal Affairs, which is available online at:

<http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm>.

That Handbook was prepared as a guide to the Secretary-General's practice as a depositary of multilateral treaties, and to treaty law and practice in relation to the registration function and was mainly designed for the use of Member States, secretariats of international organizations, and others involved in assisting governments on the technical aspects of participation in the multilateral treaties deposited with the Secretary-General, and the registration of treaties with the Secretariat under Article 102. It is intended to promote wider State participation in the multilateral treaty framework.

Readers may also wish to consult WHA document A56/InfDoc 2 titled "WHO Framework Convention on Tobacco Control: procedural matters"; this is available online at: http://www.who.int/gb/EB_WHA/PDF/WHA56/ea56id2.pdf.

ANNEX ONE: Example of Instruments of Full Powers

Example 1:

I, [name], [title], do hereby certify that [name] and/or [name] is/are vested with Full Powers and Authority to sign, on behalf of the Government of [country], the Framework Convention on Tobacco Control.

In witness whereof,

I have signed and sealed these presents at [name of the place/city], this [day] day of [month], [year].

Example 2:

WHEREAS the Framework Convention on Tobacco Control will be opened for signature on 16th June 2003 at headquarters of the World Health Organization in Geneva, Switzerland;

NOW THEREFORE I have authorised [name], [title], or in case of his/her absence, [name], [title], to sign, subject to acceptance, the said Convention on behalf of [country];

IN WITNESS WHEREOF I have hereunto set my own hand and caused my seal to be affixed to these presents.

GIVEN at [place], this [date].

ANNEX 2 - MODEL INSTRUMENT OF RATIFICATION, ACCEPTANCE OR APPROVAL

(To be signed by the Head of State, Head of Government or Minister for Foreign Affairs)

[RATIFICATION / ACCEPTANCE / APPROVAL]

WHEREAS the Framework Convention on Tobacco Control was adopted on 21 May 2003 and opened for signature on 16th June 2003 at headquarters of the World Health Organization in Geneva, Switzerland;

AND WHEREAS the said Convention has been signed on behalf of the Government of [name of State] on [date],

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above mentioned Convention, [ratifies, accepts, approves] the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of [ratification, acceptance, approval] at [place] on [date].

[Signature]

ANNEX 3 - MODEL INSTRUMENT OF ACCESSION

(To be signed by the Head of State, Head of Government or Minister for Foreign Affairs)

ACCESSION

WHEREAS the Framework Convention on Tobacco Control was adopted on 21 May 2003 and opened for signature on 16th June 2003 at headquarters of the World Health Organization in Geneva, Switzerland;

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above mentioned Convention, accedes to the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of accession at [place] on [date].

[Signature]