

The Eighth Session of the Working Group
on Future Development of EANET
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EXPLANATORY NOTE FOR OBTAINING THE SIGNATURES FOR THE INSTRUMENT

I. Background

1. The Tenth Session of the Intergovernmental Meeting (IG10) of Acid Deposition Monitoring Network in East Asia (EANET) held in November 2008, decided to task the Working Group for Future Development of the Acid Deposition Monitoring Network for East Asia (WGFD) to further develop the Instrument to Provide a Sound Basis for Contribution to EANET and to consider and suggest any procedures necessary to obtain the signature for the Instrument.
2. The purposes of this document are: 1) to provide a broad view and common practices regarding the signature and other related procedures for concluding international treaties including regional treaties; and 2) to recommend necessary procedures to obtain the signature for the said Instrument.
3. The IG10 reaffirmed that one of the objectives of an Instrument is to enable the participating countries to contribute financially.
4. The view was expressed at the IG10 that there are three options for concluding the said Instrument: the first is an Instrument without signature; the second is an Instrument with signature but without ratification; and the third is an Instrument with both signature and ratification procedures. The first option is essentially no different from the current status (with EANET's status based on documents titled "Joint Announcement on the Implementation of the Acid Deposition Monitoring Network in East Asia (EANET) (JA)" and "Tentative Design of the Acid Deposition Monitoring Network in East Asia (EANET) (TD)"). Some countries indicated that the third option would be difficult to achieve; while other countries expressed the preference of an Instrument with signature, which could be easier for them to secure financial contributions from their governments for EANET. Thus, it was suggested that the second option, an Instrument with signature, may be a realistic option for the EANET Instrument.
5. To facilitate an informed decision-making by the participating countries for the next steps to conclude the Instrument, the Secretariat prepared this Note with a view to provide information on common practices and necessary procedures for concluding multilateral instruments, including legally binding treaties and non-legally binding instruments.

6. In Section III of this Note, some recommendations are made for necessary procedures for concluding the said EANET Instrument.

II. General Practices and Procedures for Concluding International and Regional Instruments/Treaties

7. International instruments (including regional instruments) are broadly classified as legally binding (often referred to as *hard law*) and non-legally binding (often referred to as *soft law*). Legally binding instruments include treaties, agreements, conventions, charters, protocols, memoranda of understanding, and exchange of notes, etc; while non-legally binding instruments include declarations, action plans, and codes of conducts, etc.

8. For a legally binding multilateral agreement to enter into force, a series of procedures will be followed after negotiations and a draft text is agreed:

- **Adoption:** Upon finalizing the negotiation of text, a treaty will be first “adopted” before it will be “signed”. This is usually a proclamation that normally takes place upon the finalization of a conference specially convened to negotiate the treaty. The adoption of the treaty signals the ending of text negotiation and the beginning of the process that an international treaty passes through before its enforceability.
- **Signature:** A country begins a process of endorsing a treaty by “signing” it. A State that signs a treaty is a signatory to the treaty. However, for multilateral agreements, signature is necessary, but not sufficient step, for the State to be legally bound to the treaty. Signing a treaty usually only indicates the State’s readiness to proceed with the steps needed to fulfill entering into force procedure. Signature also authenticates the text and is a voluntary act. This action is at times called “Signature Subject to Ratification, Acceptance or Approval.”

Oftenly, major treaties are opened for signature for a certain period until a specified date, after which signature will no longer be possible. Once a treaty is closed for signature, a State may still become a party to it by means of accession. In some cases, multilateral treaties are open for signature indefinitely.

Once a government has decided to sign a treaty, it shall formally authorize a duly designated representative of that government (full name and title) to sign the treaty on behalf of the government. The document giving full power to the designated person to sign shall be a formal, headed governmental letter, signed by the Head of State, Head of Government or Minister of Foreign Affairs, and shall carry the seal of the Government. The document shall contain name and title of the person authorized to sign, name of treaty and date of signature.

Documents authorizing representatives of governments to sign the treaty on behalf of a government, as specified above, shall be presented in advance to a legal representative of the treaty organization, who shall formally accept the document as a basis for signature.

An instrument may provide for a signatory to submit, in connection with the signing of the treaty, a declaration of certain conditions and exceptions related to the implementation of the commitments of the treaty.

A treaty to be signed must appear in an original, bound and sealed version, printed on approved treaty paper and contain signature pages with space allocated for all named States expected to sign the instrument. Signatures should be applied with an approved pen (ink).

- ***Depository:*** A duly signed agreement, together with the authorizations for signature, shall be safely submitted to the Depository, where it shall be recorded and filed.

In practice, the negotiating countries to a multilateral treaty may designate the depository for that treaty either in the treaty itself or in some other manner, e.g., through a separate decision, adopted by the negotiating parties. When a treaty is adopted within the framework of the United Nations or at a conference convened by the United Nations, the treaty normally includes a provision designating the Secretary-General as the depository for that treaty. If a multilateral treaty has not been adopted within the framework of an international organization or at a conference convened by such an organization, it is customary for the treaty to be deposited with the State that hosted the negotiating conference.

- ***Ratification, Acceptance or Approval:*** The next step after “*Signature*” is “*Ratification*”, which is an action that a State specifies its assent to being bound by the treaty, after completion of required national constitutional procedures for ratification, depending on the country’s legal system.

Each State has its own internal procedure but in international law, for ratification or accession to take effect, the instrument of ratification or accession must be forwarded to the depository of the treaty. Once this is done and a period of time specified in the treaty has elapsed, the multilateral agreement becomes binding on the ratifying State (if at the time of ratification by that State the multilateral agreement has already entered into force).

Many countries have specific and often technical legal processes in place to manage ratification. In Canada for example, ratification is exercised by the Executive, expressed by means of an Order in Council issued by the Governor General in Council, which authorizes the Minister of Foreign Affairs to sign an instrument of ratification.

Ratification is then effected in the case of a global Multilateral Environmental Agreement (MEA), by deposit of the instrument of ratification with the Depository for the treaty, usually the UN Secretary-General.

When a State wishes to ratify, accept, approve or accede to a treaty, it must execute an instrument of ratification, acceptance, approval or accession, signed by one of three specified authorities, namely the Head of State, Head of Government or Minister for Foreign Affairs. There is no mandated form for the instrument, but it must include the following:

- Title, date and place of conclusion of the treaty at issue;
- Full name and title of the person signing the instrument, e.g., the Head of State, Head of Government or Minister for Foreign Affairs or a person acting in such a position temporarily or with full powers for that purpose issued by one of the above authorities;
- 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;
- Date and place where the instrument was issued; and
- 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.

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

“*Acceptance*” or “*approval*” of a treaty following signature has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise. In the practice of certain countries, acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state.

- **Accession:** This is the act by which a state accepts to become a party to an agreement whose text has been negotiated, adopted and signed by other countries within the specified signature period. Basically, this act has the same denotation as ratification, the only difference being that accession occurs after negotiations have taken place, and the State has missed the specified signature period.
9. For non-legally binding multilateral instrument, also referred to as “soft law”, it usually means multilateral instrument, other than a treaty, that contain principles, norms, standards or other statements of expected behaviors. Non-legally binding instruments emerge when

states agree on a specific issue, but they do not, or do not yet, wish to bind themselves legally; nevertheless they wish to adopt certain non-binding rules and principles before they become law. This approach often facilitates consensus, which is more difficult to achieve on binding instruments. There could also be an expectation that a rule or principle adopted by consensus, although not legally binding, will nevertheless be complied with.

10. Non-legally binding instrument remains as such, and will not become binding. For a country, when adopting legislation to nationally implement such instrument, the relevant elements of the instrument could become binding due to that legislation.
11. Given the non-binding effect, the only procedure for concluding a non-legally binding instrument is one the first step of a legally binding multilateral agreement described above in Paragraph 8, that is, “*Adoption*”.
12. As mentioned above, “*Adoption*” is the formal act by which the form and content of a proposed instrument text are established. As a general rule, the adoption of the text of an instrument takes place through the expression of the consent of the states participating in the negotiations. An instrument that is negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization according to the Rule of Procedures of that organization. In the case of EANET, the Instrument can be adopted by its Intergovernmental Meeting (IG) according to its Rule of Procedure (by consensus).
13. With respect to a non-legally binding instrument with signature, it is not a commonly seen practice for a non-legally binding instrument to require the signature. However, as a general rule of international law of treaties, the participating countries of a multilateral instrument have free consent to reach whatever terms they wish for a multilateral instrument. Should those countries wish to establish that an Instrument need the signatures of the representatives of the participating countries; they shall agree in forms and terms to do so.
14. In this case, the procedures for such a non-legally binding instrument should only be “*Adoption*” and a simplified “*Signature*”. There is no need for going through the full “*Signature*” process described above (Paragraph 8) for a legally binding agreement. The form and the terms for signing the Instrument shall be agreed through negotiations/discussion among the participating governments.

III. **Suggested Procedures for the EANET Participating Countries on Signature on the Instrument**

15. EANET participating countries have yet to reach on whether the EANET Instrument should be legally binding, non-legally binding with signature or non-legally binding without signature.

16. Should the IG decide the EANET Instrument be legally binding, the procedures described in Section II above for a legally binding agreement should be followed, including:
 - adoption
 - signature
 - ratification
 - accession

17. Should the IG decide the Instrument be non legally binding but with signature, it is suggested that:
 - The final negotiated Instrument shall contain signature pages with space allocated for all the representatives of the participating countries duly authorize by the competent authority.
 - Before the signing procedure takes place, the Instrument shall be formally adopted by the participating countries, e.g., through the IG decision according to the Rule of Procedure of EANET. If well prepared, the adoption session may be held at the same meeting immediately before the signing ceremony.
 - Recognizing that national procedures required to obtain signature for the Instrument could be different from country to country, participating countries shall closely consult with relevant competent authority on obtaining the signature.
 - In case that the representative of a country authorized to sign is not present at the meeting, the participating countries should agree at a certain period for such representative to sign the Instrument.

18. Should the IG decide the Instrument be non-legally binding Instrument without signature, the final negotiated text does not need the signing pages but only will need the adoption procedure described above.