

Technical Information by FAO
on the procedural options for a follow-up of the
Madrid Extraordinary Ministerial Decision as
requested by the Roundtable Meeting on a Legally
Binding Agreement on Forests in Europe

Q1: What procedures need to be followed for the further negotiations to be conducted under the aegis of UNECE or FAO or a joint body under UNECE and FAO (see Option « C ») – what procedural steps are needed/can be applied regarding the request, its approval and negotiations (please elaborate information for (i) using an existing body and (ii) a specific body established for this purpose)?

As explained in previous communications and papers, the FAO Conference or Council may approve global or regional multilateral conventions or agreements, pursuant to Article XIV of the FAO Constitution. Regional agreements concerning issues falling under the Organization's mandate, including forestry, may be adopted or approved by the FAO Council. Being established under the framework of FAO, the bodies established under Article XIV (hereinafter, "Article XIV Bodies") are in all respects Statutory Bodies of the Organization. They rely upon FAO's legal personality – and its privileges, immunities and exemptions – and act through FAO to discharge their mandates and implement their programmes of work. In this context, while Article XIV Bodies enjoy a measure of functional autonomy in implementing their programmes of work, administratively they are integrated with and in FAO, operate under the framework of FAO, and commit FAO and all of its Members in all their activities, whether or not their programmes of work are funded entirely by their membership.

Prior to consideration by the Council of an agreement under Article XIV, the Director-General of FAO ensures that proper consultation with governments and adequate technical preparations take place. This is usually done by convening a technical meeting or conference comprising Member Nations of the region concerned. To date 12 regional agreements were adopted under Article XIV of the FAO Constitution. The negotiation and adoption of an international legally binding instrument is an intergovernmental process and requires at a certain point in time one or more diplomatic or ministerial conference or conferences.

In the case of FAO, negotiations could start under the auspices of an Advisory Body, such as the European Forestry Commission (EFC) or of a Governing Body, such as the Regional Conferences for Europe (ERC), that reports to the Council on programme and budgetary matters and to the Conference on policy and regulatory matters. At the request of one Member State, the EFC and ERC would just be the trigger to launch the process and be involved again towards the end of the process, upon completion of the technical negotiations. In the practice of the Organization, negotiations have never been conducted exclusively in the framework of a Governing or an Advisory Body. The functions of the Regional Conferences being far broader than those of EFC, the ERC could be considered a more appropriate to start and finalise the process.

Once the technical consultations, through dedicated diplomatic or ministerial conferences, are completed and a finalized negotiating text is available, the proposed agreement could be considered by the EFC or the ERC. Soon after, the Director-General would refer the matter to the Committee on Constitutional and Legal Matters (CCLM) (for review of compatibility with FAO's Basic Texts) and the Finance Committee (for review of financial implications for FAO).

The draft agreement is then transmitted to the Council for approval by at least two-thirds of its 49 Members. Once approved, the agreement is submitted to FAO Members for signature and for their eventual ratification, acceptance or accession, following their

respective national procedures and as may be provided for in the Final Clauses of the draft legally binding agreement.

In the practice of the Organization, by the time of the review by the Council, all institutional matters have been addressed so that the Council intervention is a purely formal one. The Council usually defers to the wishes of the region proposing the agreement and has never rejected the approval of a regional agreement. On the contrary, records of past votes indicate consistently an approval majority well above two-thirds.

As concerns the possibility of the negotiations to be jointly conducted by FAO and UNECE, FAO considers that the possibility to set up a new Intergovernmental Negotiating Committee is feasible subject to an arrangement between FAO and UNECE and to guidance and endorsement of the Organization's respective Governing Bodies. Relevant Governing Bodies (e.g. for FAO, the ERC and the Council) should authorize their respective executive heads to prepare for and convene together an intergovernmental negotiating committee with a mandate to prepare a regional legally-binding instrument on forests in Europe (INC/FE). Governing Bodies could invite the executive heads to provide secretariat services during the negotiation process and before the final text of an agreement would be adopted. In line with the guidance provided, both FAO and UNECE could convene the first negotiating session of the INC/FE, possibly at the invitation of a government. The institutional set up would be guided by basic principles of international law and prevailing procedures in the UN context. Respective Governing Bodies could be updated on progress made of the INC/FE negotiations, as may have been requested and as appropriate.

In order to avoid possible misunderstandings, it should be recalled that the term "adoption" by an organization implies that a treaty comes fully under the auspices of the organization in question. In the case of FAO, this would require that the treaty provisions are compatible with the rules of the Organization. Moreover, while Article XIV Bodies may enjoy some programmatic autonomy, they operate under the framework of FAO, applying its rules and deriving their legal personality from the Organization. It follows that treaties would not normally be "adopted" simultaneously by several organizations.

Q2: How would adoption be organized (under which body and what procedural steps are needed/can be applied regarding the adoption)?

Please refer to the answer to Q1 as regards FAO procedures for the approval of an Agreement by the Council. In this regard, we wish to recall that the Council as well as the CCLM and Finance Committee meet twice a year on a regular basis. The ERC sessions are normally held once every biennium, with the next meeting planned for 2020. The EFC meets at such periodic intervals as requested by a majority of its Members or considered necessary by the Director-General, but in principle every two years.

Q3: How can the secretariat arrangement be organized?

If the LBA is approved as an Article XIV agreement in the framework of FAO, the secretariat acts through FAO, drawing on its legal personality. Accordingly, it would benefit from the international status of the Organization, its privileges and immunities, the established relations with its host countries, and its ability to establish legal relations of all kind (employment, procurement, contracting of services, communications, etc.)

with other entities. As said, administratively it would be integrated with and in FAO and operate under the framework of FAO.

These agreements may be financed by the Organization from regular or extra-budgetary funds or by the contracting parties to the agreement on the basis of voluntary or assessed contribution. However, the use of FAO funds would need to be approved by the Governing Bodies of the Organization. The latter is unlikely. Whichever the source, all contributions to the budgets would be managed by the Organization according to its rules and regulations and subject to the internal and external oversight mechanisms of FAO.

Treaties adopted outside the FAO framework may receive secretariat services from FAO. In this case, the FAO Governing Bodies are not requested to adopt the treaty but they must be consulted throughout the negotiation process and the Organization might eventually be invited to provide secretariat services before the final text of the treaty is adopted. Appropriate arrangements on the funding of such secretariat would need to be established, were FAO asked to carry out these duties.

It may be recalled that FAO and UNEP provide joint secretariat services for an agreement of a worldwide scope, the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides in International Trade. The Convention was adopted by a Conference of Plenipotentiaries in Rotterdam on 10 September 1998. The governing bodies of FAO and UNEP were consulted throughout the process and the Organizations were invited to provide secretariat services before the final text of the agreement was adopted. The arrangements to jointly perform the Secretariat Functions are laid down in a specific Memorandum of Understanding entered into by the two Organizations.

In the case of FAO, one year before the 1998 Conference of Plenipotentiaries, the FAO Conference "authorized the participation of the FAO Secretariat in an Interim Secretariat and in a Secretariat to the Convention if so desired during the negotiations and adopted by the Diplomatic Conference, provided that such arrangements were satisfactory to the Director- General and that costs additional to the implementation of the present voluntary procedure be met through extra-budgetary resources."

Q4: On the first three questions, please note that the priority of information provided should be on Option C, as this option was most preferred one at the RTM. However, regarding options « A » and « B » please recapture briefly from existing INC information (i) how adoption would be organized if the UN would be invited to adopt the agreement's text negotiated outside the UN, how the secretariat arrangement can be organized in such cases, and (ii) how the secretariat can be serviced either individually or jointly by the specified UN entities in case if the agreement is adopted outside of UN (non-UN treaty)?

Matters such as a) the use of the existing Draft Negotiating Text (DNT) as the basis on which to initiate the negotiations, b) the timeline for completion of the negotiations or c) which body of Forest Europe should be involved in the process, are for the delegates to agree upon. Equally, the decision whether there should be a joint secretariat to service the LBA is a matter for the delegates to negotiate subject to concurrence of the relevant Governing Bodies. A number of combinations are possible as have already been outlined in this and previous documents that were submitted by FAO. However, should the decision to cooperate in any form with the UN, FAO or both been taken, the approval by

the concerned Governing Bodies should be sought at the earliest possible stage, as to assure consistency with the relevant juridical framework and, in principle, agreement to the proposed arrangements.

Q5: What would be the financial implications of outlined alternative pathways – specially considering Option C)?

Any cost estimate would be highly provisional due to the lack of knowledge of major parameters influencing costs. These include the costs of meeting(s) of parties and other subsidiary bodies or committees that may be established. Costs would depend heavily on the frequency of the meetings and the needed services. Another cost category may be the support to participation of delegates from eligible parties. Would there be a work programme established, its implementation would also require some form of funding. While the cost implications of meetings and support to participation is relatively easy to assess when the main parameters are known, budgeting a work programme would be more challenging as estimates could not be built on standard costs but rather be calculated on the basis of the technical parameters.

Another cost element is that of the secretariat which is composed of two main elements, the post and non-post costs. These are relatively easy to estimate in case the number and grade of staff in the professional and general service categories are known. Organizations in the UN system have the so-called standard post costs which define the cost of any given post in the organization and therefore could be used as norms for calculation. It is worth mentioning the organizations in the UN system are applying the United Nations Common System of Salaries, Allowances and Benefits, comprising elements applied uniformly and worldwide, and elements which are organization or duty-station specific. The conditions of service of the United Nations common system is regulated and coordinated by the International Civil Service Commission (ICSC). Non-post costs are less standard and depend more on the expected functions, but for the purpose of estimation examples from existing practices could also be taken once the role of the secretariat is broadly defined.

Q6: What rules would govern the use of the existing draft negotiating text (DNT) and could conditions be applied to avoid renegotiation of already agreed (ad ref) paragraphs?

There are no specific rules which govern the use of the existing DNT. It will be for the negotiating members to agree on how to resume the negotiations: using the present DNT as approved so far and transmitting it to the ERC or the EFC for consideration at the request of one Member State or opening new negotiations. These matters should be discussed upon and decided by the negotiating parties. Once the decisions are taken whether to have FAO or UNCECE adopt the LBA or to have it serviced by one of the two organizations or both, the compatibility of the existing text with the respective internal rules and regulation could be assessed.

Q7: Which rules would apply to establish a regional pan-European convention that is of different scope than the hosting organization? What rules would govern the participation of countries (in negotiations or accession when the agreement is adopted) who are not signatories to FOREST EUROPE (outside of the region) but are

members of the FAO or UNECE and/or did not take part in previous LBA negotiations? What rules would govern the participation of those FOREST EUROPE signatories which are not members of the organizations, especially what rules would govern the participation of the EU and its Member States?

Membership of a regional agreement concluded under Article XIV of the Constitution is open to all FAO Member Nations and Associate Members whose territories are situated wholly or partly in the region. If the negotiating parties wish, membership can also be open to member nations and Associate Members whose territories are not situated partly or wholly in a region, to such non-member States that are members of the United Nations, any of its specialized agencies or the International Atomic Energy Agency and to regional economic integration organizations, such as the European Union (EU). In this last case, membership is exercised in the same manner as in FAO where the EU is a Member. Accordingly, membership is based on the fundamental principle of the alternative exercise of membership rights of a Member Organization and its Members in areas of their respective competence. This is strictly in accordance with Article II, paragraph 5 of the FAO Constitution and established practice.

Q8: What rules would govern the participation of observers (current FOREST EUROPE observers and potential new observers) in negotiating the treaty text as well as their role in future conferences of parties?

The rules of procedure applicable to the negotiation process will depend on the body ultimately tasked to serve as the negotiating body and the rules of procedure applicable to it. In the case of FAO, the approach to be followed as regards the membership would apply *mutatis mutandis* during the negotiation process. Depending on the circumstances, the States whose territories are not situated wholly or partly in the region, which may have a definite interest in forests in the region, subject to a determination by the negotiating parties of the region (and subject to an expression of this interest with the DG) could be invited at the negotiations, as other IGOs and NGOs and would have an observer status. Observer status in respect of Nations, IGOs and INGOs is governed by the Basic Texts of FAO, Volume II, Part. from i) to n).