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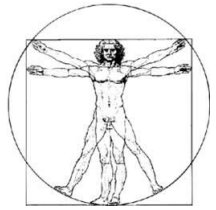
International Law and Treaty-Making Process

Sub-title

Pascale Bird
Legal Response International

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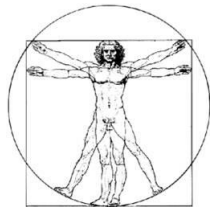
Overview



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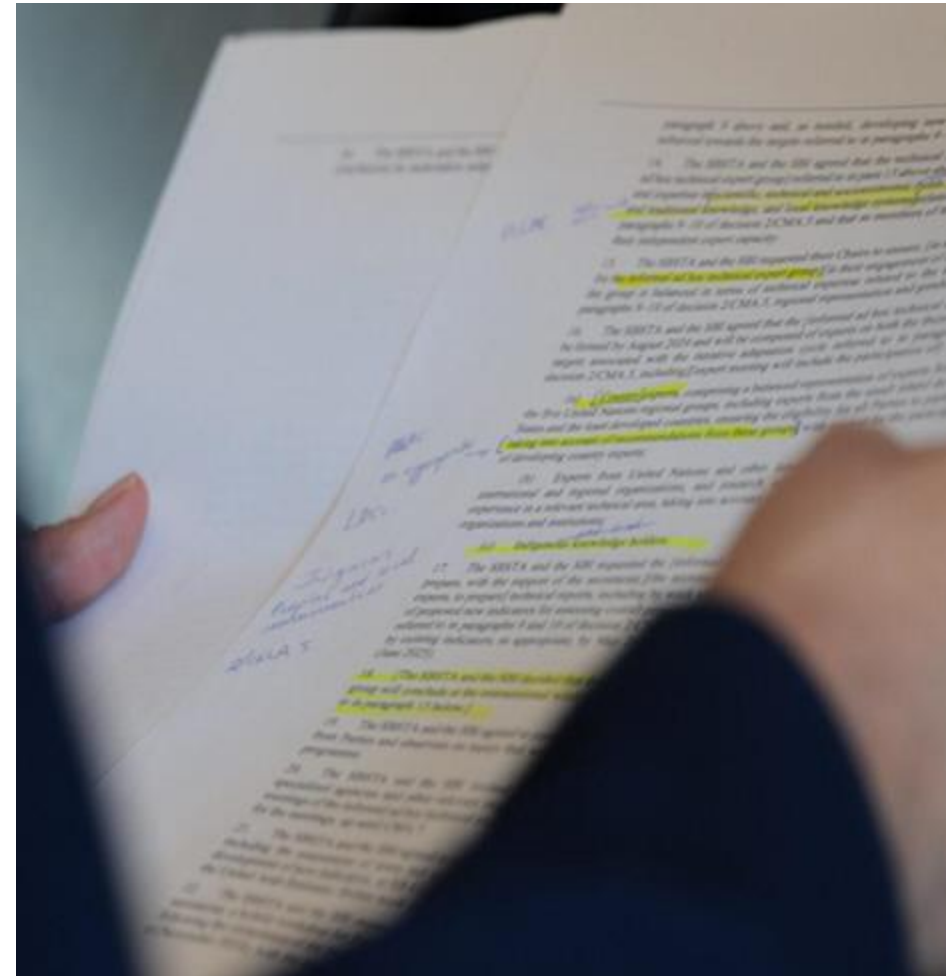
- The importance of the law in the UNFCCC process
- International climate regime – legal context
- Treaty and other sources of international law
- Characteristics of environmental treaties
- Legal nature of the climate treaties
- Compliance

The law in the negotiations

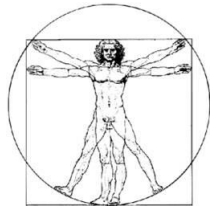


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- You are negotiating *legal texts* and using *legal language*
- Law regulates the *governance* of the regime
- Law regulates *how* negotiations are conducted.
- *Legal tools* support political arguments.

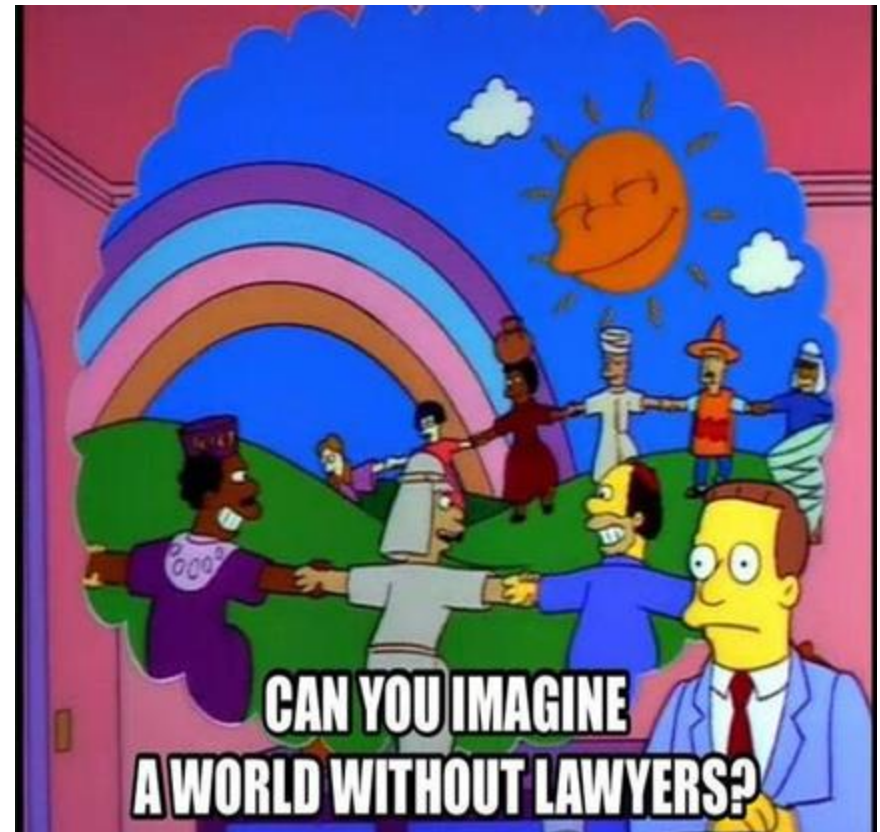


Questions for reflection



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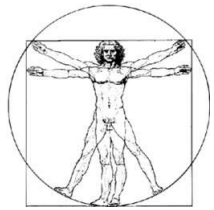
- Does it make a difference if a text says 'shall' or 'should'?
- Are COP decisions legally binding?
- Can the PAICC sanction countries if they don't submit their NDCs?



Example: Article 4, Paris Agreement

Each Party shall prepare, communicate and maintain successive NDCs that it intends to achieve (Art. 4.2, PA)

Developed countries should continue taking the lead by undertaking economy-wide absolute emission reduction targets (Art. 4.4, PA)



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International climate regime – Legal context

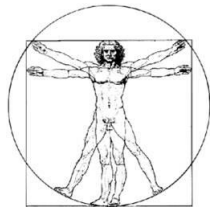
- UN Framework Convention, Kyoto Protocol and Paris Agreement are **treaties** under international law
- A **Treaty** is one source of international law
- Sources: Article 38 of the Statute of the International Court of Justice – *the Court ... shall apply:*
 - *International conventions (treaties)*
 - *International custom*
 - *the general principles of law recognized by civilised*
 - *Judicial decisions*
- Soft Law



The International Court of Justice, which has its seat in The Hague, is the principal judicial organ of the United Nations

Image source: <https://www.icj-cij.org/home>

Treaty



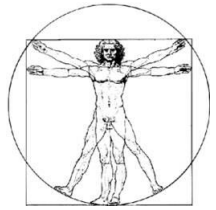
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Vienna Convention on the Law of Treaties, 1969 =
treaties':

'Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'

- Concluded between States
- In written form
- Governed by international law
- Entry into force provisions
- Ratification, acceptance or approval process
- 'Treaty' is a generic term referring to binding instruments: can also be called convention, agreement, covenant, pact, protocol, etc.

Treaty limitations



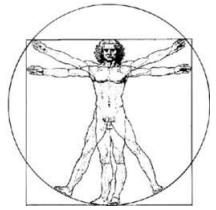
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- Treaties make state conduct mandatory and enforceable
- Signal highest expression of political will
- Prompt translation of international commitments into domestic action

BUT ...

- Countries are protective of national sovereignty
- Weak or non-existent enforcement mechanisms

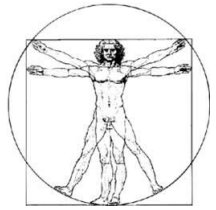
Characteristics of environmental treaties



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- 'Living instruments' evolving as a result of scientific technical developments and continuous diplomacy
- Require multidisciplinary approach
- Flexibility in form
- Require establishment of specific structure and (COP, Secretariat, etc.)
- Multilateral environmental agreements often represent the least common denominator
- Enforcement mechanisms are weak or non-existent

General principles



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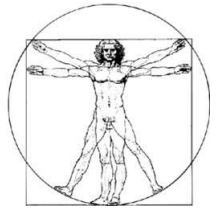
- Norms that provide guidance and inform implementation of a treaty's provisions
- Found in treaty preamble and/or operative part
- Legal status varies according to source and content: generally they do not prescribe binding actions on parties but some have achieved binding force by consolidating into customary international law

eg. Harm prevention principle:

States are under a duty to prevent or mitigate transboundary impacts arising from activities which may cause significant harm to the environment of other States or to areas beyond national jurisdiction

- Other examples: precaution, equity, common but differentiated responsibilities, sustainable development, international cooperation

Customary international law and soft law



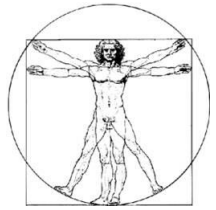
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Customary international law arises from consistent state practice AND states' belief that they have a legal obligation (or right) to act
➡ unwritten rules that are binding on all countries, even on those who did not formally agree to them

Soft law refers to non-legally binding but normatively worded instruments used in contemporary international relations by states and international organisations

- Good faith commitment: create expectations that are not binding but cannot be ignored
- Examples: Rio Declaration 1992 COP

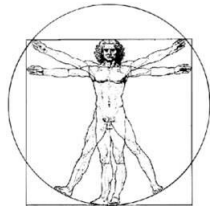
Legal nature of the climate treaties



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- Legally binding on those countries that have agreed to it
- BUT beware difference between the binding nature of the treaty and of its provisions!
- Legal character will depend on various factors incl. placement in text, precision, normative content, subject, etc.
- Some provisions create **hard obligations/legally binding commitments** v others create **non-binding commitments**
- Most legally binding commitments are obligations of conduct (ie procedural) rather than result. Example: *Each Party shall prepare, communicate and maintain successive NDCs that it intends to achieve* (Art. 4.2 PA)

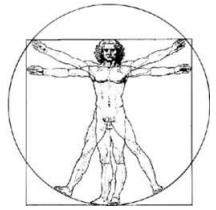
Treaty structure



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- **Preamble** (*recalling, noting, affirming, calling upon, encouraging, recognising, taking int consideration...*)
 - Not binding
 - Provides context to the operative part and guides its interpretation
- **Operative part**
 - The actual “agreement” between Parties
 - Words may be used to dilute or negate rights and obligations
 - Prevails if direct conflict with the preamble
 - Not just obligations: bodies, processes, final provisions ...

Example: Article 9, Paris Agreement



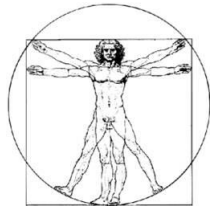
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1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention

2. Other Parties are encouraged to provide or continue to provide such support voluntarily.

3. (...) developed country Parties “should continue to take the lead in mobilizing climate finance ...” taking into account the needs and priorities of developing country Parties.

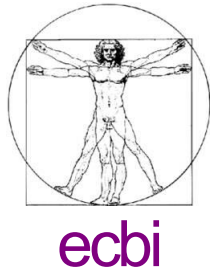
Compliance



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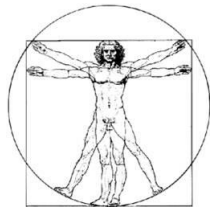
- Legal architecture of climate treaties:
UNFCCC: Framework - Kyoto: top down - Paris: bottom up
- Kyoto Protocol: compliance committee has two branches: facilitative and enforcement branches
- Paris Agreement: the **Implementation and Compliance Committee** (PAICC) is mandated to facilitate implementation and promote compliance with the provisions of the PA (Art. 15)
- PA compliance mechanism under Article 15 is complemented by the Enhanced Transparency Framework (ETF) and Facilitative Multilateral Consideration of progress (Article 13) and the Global Stocktake (GST) (Article 14)

Compliance (contd.)



Limitation of review mechanisms:

- ETF – no assessment of substantive progress towards achieving NDCs
- GST – lacks tools for holding individual Parties accountable
- PAICC:
 - limited opportunity to address non-compliance with PA substantive provisions (procedural compliance)
 - Narrow scope of initiation and tools limiting potential to promote compliance (consent of party required in some cases, measures limited to ‘findings of fact, dialogue to identify challenges, referral to capacity-building



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Thank you!

Any questions?

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