

IUCN WCEL BRIEFING FOR NEGOTIATORS

Plastic Treaty INC-1 Session

Key Concepts from Multilateral Environmental Agreements for Plastic Pollution Treaty

Key Messages:

The Plastic Pollution Treaty could benefit from many key concepts developed throughout treaty practice, especially that of multilateral environmental agreements (MEAs). At the same time, the issues raised by plastic pollution and potential State responses are highly complex, often quite technical, and may require nuanced responses that are not necessary in other treaty regimes. Examining standard concepts from treaty regimes and MEAs allows for negotiations to focus on the ways in which these distinctions can be accommodated and benefit from the strengths of international law and established practice.

1. Preamble

What? The use of a preamble is a standard and accepted practice across international treaty law and regimes including but not limited to multilateral environmental agreements. As noted in UNEP briefing note 5, the preamble includes historical and contemporary understandings that informed the creation of a treaty, along with potential nexuses with other treaty regimes, and serves as an interpretive tool for the future. In this context, the drafting of the preamble will be critical to the Plastic Pollution Treaty.

How? The preamble may include historical references, treaty regime references, as well as emphasizing the core interpretive principles of international law that form the underlying terms of the Plastic Pollution Treaty. In this context, principles such as the polluter pays principle, the precautionary approach, and national capabilities and circumstances could play a significant role in the framing of the Treaty in the preamble content.

2. Introductory elements including definitions, robust objectives, scope and principles

What? Definitions are essential to the functioning of any treaty regime. This will also be the case for the Plastic Pollution Treaty in particular because of the highly nuanced and technical nature of the issues raised by the cycles of plastic pollution.

How? As discussed in the IUCN Briefing for Negotiators addressing the glossary of key terms, one way for the Plastic Pollution Treaty to maximize its legal and technical impact is through a strong and extensive set of definitions. These definitions could reflect the science of the plastics life-cycle.

What? The objective is a foundational element of treaties. While some multilateral environmental agreements do not contain these provisions, objectives can play an important framing role for a treaty regime in a way that have legal significance for the interpretation of the terms of the treaty and for its effective implementation. Caution is needed, however, when using a narrow objective or set of objectives since that could later result in questions of whether a treaty regime or the governance system for it is exceeding the scope of the underlying treaty.

How? A carefully worded set of objectives reflecting the needs of the international community, the plastics pollution questions and issues of future growth could play a valuable role in crafting a meaningful treaty. This includes the use of objectives that are clear and can be reviewed for implementation and effectiveness. With this in mind, the objectives could include quantified or quantifiable terms that provide methods to assess the effectiveness of the treaty's implementation of these objectives. At the same time, the Plastic Pollution Treaty could benefit from objectives that are flexible and dynamic so that they will remain relevant to and reflective of new and emerging scientific knowledge. To reflect the complex interconnections between plastic pollution and international law, the objectives could include links to sustainable development, sustainable finance, efforts to address climate change, and the protection of biological diversity.

What? As highlighted in UNEP briefing note 5, the scope of a treaty regime has taken on several classifications of format under multilateral environmental agreements depending on the underlying objectives of the treaty. There is no requirement that a treaty regime use only one form of parameter for scope, especially in the context of the complex legal, regulatory and technical issues raised by plastic pollution.

How? The use of a combination of legal, regulatory and scientific parameters that can be measured and reviewed could allow the Plastic Pollution Treaty to contain a holistic scope. This could be used for the generation of information on the treaty's effectiveness.

What? The inclusion of fundamental principles for the implementation of a treaty regime can serve a vital role at the time of adoption as well as in future negotiations for amendments, annexes, protocols, agreements, or other interpretive actions. These principles should reflect the underlying assumptions and shared knowledge through which a treaty regime was negotiated. Given the many sub-sections of international law involved in efforts to address plastic pollution, a clear articulation of these principles would be valuable.

How? The principles designed could include principles of international law addressed from the outset of the negotiations for the Plastic Pollution Treaty, including the precautionary approach as well as national capabilities and circumstances, non-regression, progressive realization or progression, circularity, circular economy, and just transitions.

3. Core obligations, control measures and voluntary approaches, accompanied by annexes

What? Obligations represent the core of any treaty, including multilateral environmental agreements. They are the methods through which State Parties entrench their collective understanding of what international law is and will be under the treaty regime, including those that are binding and those that can be viewed as persuasive. Binding obligations are typically subject to treaty terms and may be subject to treaty-based compliance systems. Persuasive commitments are voluntary State Party commitments in terms of much of their implementation and enforcement. The negotiations for the Plastic Pollution Treaty will need to include discussions on the type of commitments under the treaty, their classification as binding or voluntary, procedural or substantive, and the methods used to define control measures. Moreover, states will have to agree on the nature of the commitments are being substantive or procedural in nature, and whether the treaty should have a “top-down” character or whether the content of commitments should be defined by the parties themselves through, for example, the formulation of national plans (“bottom-up”).

How? In defining the core obligations of the Plastic Pollution Treaty, care should be taken to ensure that choices regarding binding and voluntary classification reflect the theoretical and practical implications of control and voluntary measures.

4. Implementation measures including national action plans, mechanisms for scientific and technical cooperation and coordination, effectiveness evaluation and national reporting, and compliance measures

What? National action plans have been used across various multilateral environmental agreements. They are typically used as a tool through which State Parties articulate their legal, regulatory and policy plans to address certain issues for a dedicated time period. These national action plans are then made available to the public, civil society, other State Parties to a treaty, and to the governance mechanisms for the treaty regime. In many cases, the governance mechanisms then have the opportunity to provide comments and the State Parties are required to file subsequent national action plans that address steps taken to implement previous commitments as well as new commitments for the future.

How? National action plans in the plastic pollution context should be centred on the fundamental issues posed by the problem at the national level and could also include provisions regarding sub-national entities. In designing the requirements for national action plans, the bridge between law and science offers a strong option to ensure that the terms reflect the objectives, principles, scope and core obligations of the treaty regime. The plans would benefit from being cumulative in nature, allowing for an understanding of how past practices have/have not caused changes that can be further advanced into future laws and policies. National action plans can be valuable tools for government planning and implementation if they are carefully designed and if State Parties have assistance, such as technical and financial assistance, to alleviate the potential for excess burdens being placed on governmental entities.

National action plans should be designed to increase ambition over time (“progression”) and contain a safeguard against regression (“non-regression”). It would be preferable that the national action plans be communicated on the same time, iterative for all State Parties rather than on staggered

timelines. The content of national action plans should be informed by the objectives of the Plastic Pollution Treaty and designed to fulfil these objectives.

Starting from the bottom-up approach through national action plans, the Plastic Pollution Treaty should include a strong system of international oversight. This would apply to robust binding guidance for national plans, binding requirements for reporting on implementation and achievement of these plans (possibly by using indicators), independent review and a mechanism for facilitating implementation and compliance. It might also be helpful to graphically illustrate how these elements fit together. To address increasing ambition over time, inclusion of the requirement for iterative processes for all State Parties, the need for progression of ambition in national action plans, global stocktakes which inform the level of ambition in the next round of national plans, and common timeframes for reporting and next round of national actions plans should be considered as critical elements.

What? The nature of plastic pollution, the plastics lifecycle, the circular economy, and environmental impacts of plastic pollution make the inclusion of scientific and technical coordination and cooperation essential. In the plastic pollution context, there is a strong likelihood that this will require coordination and cooperation between State Parties as well as State Parties and the private sector, national and sub-national actors, and academic institutions works in relevant areas of innovation.

How? The Plastic Pollution Treaty could consider the use of control measures and voluntary measures that facilitate scientific and technical cooperation and coordination between public sector actors and public-private actors.

What? National action plans constitute one form of oversight for the implementation of a treaty, however they are rarely used alone when creating procedures to oversee the effectiveness and accomplishment of a treaty regime. Instead, treaties – including multilateral environmental agreements – often use reporting requirements, stocktakes and similar benchmarking requirements to measure and assess the success of a treaty in application. These methods of assessment can be used to determine the need for amendments, annexes, protocols, agreements or other similar instruments in the future, giving them connections to both the specific convention structure and the framework convention structure discussed in the IUCN Briefing for Negotiators on the Structure of Plastic Pollution Treaty.

How? Effectiveness and accomplishment oversight for the Plastic Pollution Treaty could be a valuable tool if crafted in a way that thoroughly evaluates the legal and technical aspects of plastic pollution. This type of oversight could be entrenched through a recurring stocktake system similar to that adopted for the Paris Agreement or could be triggered by another measure, although a sense of predictability of assessment would be valuable. These stocktakes could be used to assess progress regarding plastic pollution at the national level and international level, adoption and implementation of laws and rules relating to plastic pollution, economic transitions away from plastics intensive industries, reductions in biodiversity loss connected with plastic pollution, and reductions in carbon emissions attributable to the plastics industry, to name a few potential options.

This could be used to generate a reliable assessment process that could increase the legitimacy of the Plastics Pollution Treaty. Care would need to be taken so that the assessment system designed is sufficiently rigorous to allow for in-depth measures while also accommodating unforeseen situations that could have an impact on implementation. The Covid-19 pandemic highlighted this need across multilateral environmental agreements with reporting requirements as well as in the context of the Sustainable Development Goals.

What? Compliance in any treaty regime is essential to ensuring the viability of the treaty and the protections it contains. As UNEP briefing note 5 highlights, recent trends in multilateral environmental agreements have been toward designing compliance mechanisms that are focused on using committees or similar bodies to provide non-punitive mechanisms of remedying failures of State Parties to comply. A primary example of this is the Paris Agreement Implementation and Compliance Committee. The design of compliance mechanisms is a necessary element of any treaty regime, and given the complex issues presented by plastic pollution and the different capacities of States to respond to these issues, the balance between finding non-compliance and designing a practical response can be critical.

How? The Plastic Pollution Treaty could include a compliance mechanism that is forward looking and seeks to ensure that compliance is a lynchpin of the treaty regime that is used for corrective guidance rather than punishment. This could be accomplished through the careful drafting of rules of procedure for a compliance mechanism as well as the use of an oversight assessment mechanism for the compliance system. The latter could be modelled on the system used by the World Trade Organization, in which permission for a State Party to take a retributive action against another State Party requires permission from the plenary governing body, during which the decisions of the Dispute Settlement Body are necessarily reviewed.

5. Means of implementation including capacity-building, technical assistance, technology transfer on mutually agreed terms, and financial assistance

What? As highlighted in UNEP briefing note 5, capacity building has become an important element of many multilateral environmental agreements. To entrench the use of capacity building as integral in achieving the objectives of the Plastic Pollution Treaty, the design and adoption of a governance mechanism, such as the Paris Committee on Capacity-Building could prove useful.

How? Capacity-building in the plastic pollution context differs from that in the context of multilateral environmental agreements, and inclusion of a nuanced understanding of capacity-building needs in responding to plastic pollution could be valuable. When designing the governance mechanisms to be used in the Plastic Pollution Treaty, the inclusion of a dedicated mechanism for capacity-building could offer an important opportunity.

Similarly, the inclusion of technical assistance and technology transfer elements in the Plastic Pollution Treaty could be used to entrench these aspects of equity within the objectives, scope and principles of the Treaty.

What? UNEA resolution 5/14 includes specific reference to a financial mechanism to assist in implementing the Plastic Pollution Treaty. Thus, the financing issue has been placed on the overall negotiation agenda.

How? Given the complex nature of plastic pollution and associated responses to it, the financial mechanism could be designed in a way that assists States in need of financial support across a variety of activities.

6. Institutional arrangements, including governing bodies arrangements and subsidiary bodies

What? The governance mechanism for the Plastic Pollution Treaty will be crucial to addressing the oversight and implementation of the Treaty, providing guidance, support and capacity-building to State Parties, and facilitating the adoption of either new amendment and annexes or new protocols and agreements. As UNEP briefing note 5 highlights, the standard multilateral environmental agreement provides for a Conference of the Parties system for a treaty regime and a Meeting of the Parties system for other associated agreements. There is a variation in conference frequency across these treaty regimes. These conferences are typically the decision-making bodies for subsequent measures under the treaty. Increasingly, the Conference of the Parties system in multilateral environmental agreements has been used to facilitate the incorporation of civil society and the private sector in information sharing efforts.

How? The Plastic Pollution Treaty could adopt the Conference of the Parties system as a governance mechanism. If this decision is made, critical questions will include the frequency of conferences, the use of inter-sessional meetings, the location of conferences, the duration of conferences, and the extent of civil society and private sector engagement during the conferences.

What? Subsidiary bodies are common within treaty regimes. They can facilitate dialogue and information-gathering, serve as consultative entities, or serve other functions as provided for in the text of a treaty or in subsequently adopted measures. Treaty regimes can be designed to create permanent subsidiary bodies or subsidiary bodies with a limited portfolio and lifespan.

How? The complexities of issues involved in plastic pollution could make the use of subsidiary bodies within the Plastic Pollution Treaty integral to achieving its objectives and purposes. Based on the changing nature of law and technology in the realm of plastics, treaty terms creating specific subsidiary bodies as well as allowing for the creation of unspecified subsidiary bodies in the future could be quite useful to the implementation and responsiveness of the Plastic Pollution Treaty.

7. Final provisions, including settlement of disputes

What? As noted in UNEP briefing note 5, decisions regarding the use of reservations is central to the legitimacy of State intent to be bound by a treaty's terms. The idea of reservations has been discussed as an effort to balance sovereignty and international law, however in relation to topics such as environmental harms they are rarely used.

How? The decision regarding the use of reservations in the Plastic Pollution Treaty is a critical one in that it has the potential to shape the ways in which State Parties view their obligations and commitments. In the negotiations, the discussion surrounding reservations could be a pivotal one for assessing the level of State commitment to the terms of the proposed Treaty.

What? In UNEP briefing note 5, there is a discussion of the effective date of a treaty as potentially being linked to critical thresholds or State constituencies for the ability to meet the objectives of the treaty. The methods used can include a required number of State Parties, State Parties constituting a combined required percentage of the activity or industry addressed in the treaty, and State Parties representing the largest sector of an industry or activity. These types of measures can be valuable for the legitimacy of a treaty in practice, since it will be difficult to attain the objectives and commitments of a treaty when the State most heavily involved in the targeted activities are not State Parties.

How? In recent examples, such as the Paris Agreement, a calculation was used to determine the necessary State Parties for entry into force. The complex nature of plastic pollution will make the use of a similar calculation difficult, however there are other potential factors to be considered for establishing the benchmark for entry into force. These could include: a majority of the plastic producing States, a majority of the plastic polluting States, a majority of the plastic consuming States, a majority of the States experiencing plastic pollution, or a combination of two or more of these factors.

What? Dispute settlement provisions are essential to provide certainty regarding issues that arise in the context of any treaty regime. Often, treaty regimes will attempt to settle disputes between State Parties through less onerous dispute settlement systems, including the use of good offices by international actors and the use of mediation by neutral third parties. Beyond that, treaty regimes will often designate the International Court of Justice as having jurisdiction to hear claims arising under their terms. This is possible because the International Court of Justice is empowered to hear these types of issues under the terms of its foundational text.

How? Dispute settlement will be important to framing the oversight of the Plastic Pollution Treaty. In this context, a phased approach starting with good offices and mediation and escalating to the International Court of Justice where necessary could offer a path that allows the States involved and the Treaty to benefit from the experience of an increasingly environmentally aware international court that is also versed in intricate issues of sovereignty and international law. The inclusion of dispute settlement provisions within the main text of the treaty structure decided upon for the Plastic Pollution Treaty could be considered as an important element that should not be left for the conclusion of a subsequent instrument.

Contact:

Minna M. Epps, Head, IUCN Head of Delegation, IUCN Centre for Conservation Action,
Minna.EPPS@iucn.org

Alexandra R. Harrington, Lancaster University Law School and Chair, IUCN WCEL Agreement
on Plastic Pollution Task Force, a.harrington1@lancaster.ac.uk