

IUCN BRIEFING FOR NEGOTIATORS

Plastic Treaty INC-1 Session Structure of Plastic Pollution Treaty

Key Messages:

Given the ever-evolving nature of science and the complex, varied nature of plastic pollution, it is clear that the instrument to be adopted will need to be sufficiently flexible to allow for further adjustments and additions to the obligations. The different structural approaches found in environmental treaties to date provide a good guide and starting point. It is pivotal, however, that the treaty should include binding core obligations to fill existing regulatory gaps in relation to plastic pollution, including international trade restrictions (bearing in mind the Basel Convention regime), production caps, and financial and technical assistance. The treaty should also include mechanisms to ensure its effectiveness, such as a non-adversarial non-compliance mechanism (in line with recent MEAs).

1. Specific convention use for structure

What? As noted in the UNEP briefing note 5, the use of a specific convention structure involves a more thoroughly defined set of provisions in the body of the main treaty regime text and can be accompanied by an annex or series of annexes that contain more concentrated scientific and technical knowledge. In this context, the States wishing to become bound to the treaty sign onto the holistic combination of the main treaty terms and the annexes and become legally bound to that text provided they ratify it as required under their domestic legal requirements.

Why is this an issue? There are several concerns with the use of the specific convention system for the Plastic Pollution Treaty. First, this type of treaty represents the extent of known and foreseen scientific, technical and industrial knowledge as of the time it is negotiated and adopted. However, past practice from various multilateral environmental agreements has shown that the nature of scientific and technical knowledge expansion is such that it is easy for it to become outdated quite quickly. Should that be the case, there is a risk of the Plastic Pollution Treaty becoming dated before it can achieve its terms and targets. Thus, potentially allowing States and the private sector to use lower benchmarks and standards than those that subsequently develop. This then could pose a challenge in terms of undermining the purpose of the Plastic Pollution Treaty.

Second, the standard method of updating a specific convention is through the use of amendments to the treaty text or new annexes provided the original text allows for these actions. Amendments to the treaty text can be problematic because they will typically require very high levels of State Party ratification and can create an issue where not all State Parties agree to be bound to the terms of the amendment itself. Similarly, annexes have the same issue in terms of questions of binding legal requirements when not all State Parties agree to them.

Third, it is conceivable that, based on the extensive scope of plastic pollution, which extends far beyond international environmental law, a number of annexes would be needed for the Plastic Pollution Treaty. These would potentially include scientific and technical annexes, industrial commitment and state of knowledge annexes, pollution assessment annexes, and the ability to generate multiple annexes as needed to respond to changing realities and challenges.

2. Framework convention use for structure

What? As noted in the UNEP briefing note 5, the use of a framework convention structure involves a less thoroughly defined set of provisions in the body of the main treaty regime text. Thus, the framework convention system functions to allow States the opportunity to commit to core principles and essential terms in the main text while relying on the use of protocols and subsequent agreements to codify scientific, technical and other issues. In this context, the States wishing to become bound to the treaty sign onto the framework convention from the outset. Subsequent protocols or agreements are negotiated separately, though within the parameters established by the framework convention, and must be ratified by each State. Should a State fail to ratify a protocol or agreement, it remains legal bound to the terms of the framework convention alone.

Why is this an issue? There are several concerns with the use of the framework convention system for the Plastic Pollution Treaty. First, should a framework convention be used for the structural model of the Plastic Pollution Treaty, there is significant latitude in the control term placement. For this reason, the control terms would be further interlinked with the main elements of the treaty while allowing the State Parties to determine the parameters of the full implementation over time in subsequent protocols and agreements.

Second, as highlighted in UNEP briefing note 10, the use of framework agreements can be speculative in that the terms and commitments undertaken in subsequent protocols and agreements will necessarily vary with time. This can be seen as a potential for undermining a framework convention in the sense that the full weight of commitments could potentially be undermined in the future by weak protocols or agreements. And the potential for the subsequent negotiations within the framework convention not to yield results does exist, making it possible for State Parties to commit to the framework convention and nothing else.

However, it must be remembered that good faith in the treaty implementation process is among the foundational principles of international law. This has been codified by the Vienna Convention on the Law of Treaties and is also reflective of customary international law practices. At this early stage of the negotiations process for the Plastic Pollution Treaty, questioning the good faith principle in application has not yet been proven necessary.

Third, the nature of plastic pollution, the plastics industry, damage caused by terrestrial and marine plastics, regime interactions, along with many other issues in the realm of regulating plastics at the global level is an evolving practice. Knowledge and technological capacities have and will continue to grow and become nuanced in ways that are unforeseeable at the present

moment. Additionally, the need for details regarding financing and governance systems may change over time as well, as has been seen with the Global Environment Facility in the UNFCCC context. This suggests that, if properly tailored, a framework convention offers the possibility of rapid legal and technical responses to current and emerging issues.

Additionally, it should be noted that there is precedent for allowing States to sign onto the terms of protocols or amendments even if they are not State Parties to the underlying framework agreement. Core examples of this include many human rights treaties, such as the Convention on the Rights of the Child, which has not been ratified by the United States although it is a State Party to the subsequent Optional Protocol on the Rights of the Child on the involvement of children in armed conflict.

3. Other considerations for structure

What? Every treaty regime, including MEAs, is reflecting of differing legal and technical issues facing the global community. As a result, their terms and structure are often related and share overlapping areas of convergence, yet they are still expressions of the particularized needs of the topic. Given the depth and breadth of plastic pollution and the scope of legal, regulatory, technical and financial issues involved in its regulation, the possibility of a hybrid specific and framework convention structural model could offer a potential solution.

How? It is crucial that a robust set of definitions in the key terms section of the Plastic Pollution Treaty from the outset and ensuring that legal and scientific needs are communicated to negotiators and members of civil society. With this background, it would possible for the Treaty to be crafted in a way that contains significant control measures in the main text (specific convention model) while allowing for the development of subsequent protocols and agreements to address emerging issues (framework convention model).

Regardless the form of convention used for the Plastic Pollution Treaty, 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.

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