

The background of the top section is a dense, colorful collage of various types of plastic waste, including bottle caps, fragments of plastic, and other debris in shades of blue, red, yellow, and white.

# Toward a New Instrument Addressing the Full Life Cycle of Plastics

## *Overview of the Typology of International Legal Instruments*

### Introduction

Over the past decade, there has been a swell of voluntary initiatives and regulations designed to address the plastics crisis. More recently, the subject of a global, legal instrument designed to address plastic has emerged in various international fora. The momentum is especially evident in the discussions of the ad hoc open-ended expert group on marine litter and microplastics (AHEG), a temporary subsidiary body of the United Nations Environmental Assembly (UNEA).

Over three years between 2018 and 2020, parties, regional groups, and stakeholders submitted 10 formal propositions concerning a possible global instrument to address the plastics crisis. They included:<sup>1</sup>

- “A new dedicated global agreement” (Norway)
- “A convention on Plastic Pollution” (Center for International Environmental Law (CIEL), Environmental Investigation Agency (EIA), Global Alliance for Incinerator Alternatives (GAIA), and #breakfreefromplastic)
- “A new legally binding agreement/instrument” (the African Group)
- “A new legally binding instrument/Treaty” (World Wide Fund for Nature (WWF))
- “A global architecture that includes existing and new, voluntary or potentially legally binding elements, in a multi-layered, governance approach” (Switzerland)
- “A global treaty / An overarching legally binding global framework” (Philippines)
- “A global treaty within the UN” (Vietnam)
- “A new global framework for plastics” (European Union)
- “A new global agreement / a framework agreement” (Nordic countries)

The AHEG Chair's summary from November 2020 highlighted the need to “[d]evelop a new **global agreement, framework or other form of instrument to provide a legal framework** of global response and to facilitate national responses especially for those parties with limited resources and capacities that could contain either legally binding and/or non-binding elements (...) This option may require an intergovernmental negotiating process, such as establishing an Intergovernmental Negotiation Committee, aimed to frame and coordinate such a new global instrument.”<sup>2</sup>

Negotiations are scheduled to begin after an upcoming meeting of the United Nations Environment Assembly (UNEA), where an Intergovernmental Negotiation Committee may be established. Before they can happen, it is critical to understand the types of international legal instruments that states can pursue.

Comprehensive discussions surrounding a potential new international instrument must include preliminary

deliberations that address these questions: What type of instrument is envisaged (e.g., an agreement, treaty, convention)? And what is the potential structure of the instrument (e.g., framework, protocols, annexes/appendices)? Prior experience shows that, on some occasions, these deliberations occur during the negotiation process itself.

This legal overview will provide a non-exhaustive analysis of various international legal instruments, focusing on Multilateral Environmental Agreements (MEAs). It considers the practical distinctions, including title and the inception of the negotiation process, provides a background on the preparation and negotiation of international instruments, and presents an overview of MEAs. Furthermore, it highlights treaty-making tools to consider during current discussions and future negotiations. In doing so, it aims to inform decision-making in the context of the development and adoption of a new global instrument governing the life cycle of plastics.



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## Practical Distinctions Between Types of International Instruments

International legal instruments can vary widely. Thus, when developing a new instrument, it is essential to understand the kinds of structures that can be employed. Generally, international legal instruments can be classified in several different ways: according to laterality (e.g., bi-, tri-, pluri-, and multilateral), geography (e.g., universal and regional),<sup>3</sup> by function, and by whether they contain plural instruments (e.g., protocols, annexes, and appendices).

Furthermore, the nomenclature used to describe legal instruments in international law can vary significantly. Terms include, but are not limited to: treaty, agreement, accord, convention, covenant, charter, declaration, pact, protocol, statute, *modus vivendi*, memorandum of understanding, exchange of notes/letters, joint communiqué, and agreed minute.<sup>4</sup> Though some of these terms appear exchangeable, such interchangeability can lead to uncertainty about the nature of the instrument.<sup>5</sup>

### Understanding the Legal Differences Between Treaties, Conventions, and Agreements

The 1969 Vienna Convention on the Law of Treaties (VCLT) defined the term “treaty” as “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” (emphasis added).<sup>6</sup> Since then, “treaty” has remained the most

widely used term in international law and practice to define an international agreement.<sup>7</sup>

The VCLT establishes three criteria that an international agreement must meet to qualify as a treaty. It must: a) be an agreement concluded between states, b) appear in written form, and c) be governed by international law, whether embodied in a single instrument or in two or more related instruments<sup>8</sup> and whatever its particular designation (e.g., treaty, convention, agreement).

While the VCLT does not define terms that are often changed to “treaty,” including “international agreement,” “convention,” and “protocol,” other institutions provide insight. According to the United Nations Environment Programme (UNEP), the term “agreement” possesses two meanings: “(i) Generic terms for an international legally binding instrument. In this sense, encompasses several instruments, such as treaties, conventions, protocols or oral agreements. (ii) Specific term used to designate international instruments that are *sic* ‘less formal’, thus corresponding to soft law and deal with a narrower range of subject-matter than treaties.”<sup>9</sup>

### An Instrument’s Title Does Not Determine its Nature Under International Law

Documentation produced by the United Nations, international legal organizations, and national bodies provides conflicting guidance on whether the title of an international instrument confers purpose.

## BOX 1:

## Non-Exhaustive List of Political Declarations Calling for an Instrument on Plastics

Between 2018 and December 2021, multiple regional and global ministerial declarations and communiqués referring to or calling for global action on plastic have been adopted. They include the following designations (listed in chronological order):

Meeting/Body	Year	Document	Quote
Secretariat of the Pacific Regional Environmental Program (SPREP)	2018	Marine Litter – Pacific Regional Action Plan 2018–2025	“A <b>global legal framework</b> to address marine litter and microplastics.” <sup>20</sup>
Nordic Council of Ministers for the Environment and Climate	2019	Ministerial Declaration	“A <b>global agreement</b> to more effectively and comprehensively deal with the issue of marine plastic litter and microplastics.” <sup>21</sup>
Council of the European Union	2019	Council Conclusions on More circularity - Transition to a sustainable society	“A <b>global agreement</b> that would address the whole life-cycle of plastics.” <sup>22</sup>
Conference of Heads of Government of the Caribbean Community (CARICOM)	2019	Communiqué issued after the Fortieth Regular Meeting	“A <b>global agreement</b> to address plastics and microplastic pollution” and “a <b>global legally binding mechanism</b> .” <sup>23</sup>
African Ministerial Conference on the Environment	2019	Durban Declaration	“A new <b>global agreement</b> on plastic pollution.” <sup>24</sup>
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention)	2020	Report of the third Conference of the Parties (COP)	“A new <b>legally binding global agreement</b> to combat plastic pollution.” <sup>25</sup>
Declaration of the Ministers of Environment, Maritime Economy, Agriculture and Fisheries of Baltic Sea Member States and of the Commissioner for ‘Environment, Oceans and Fisheries’	2020	Our Baltic Conference Ministerial Declaration	“A <b>global agreement</b> to reduce and prevent plastic marine litter and micro plastics.” <sup>26</sup>
International Union for Conservation of Nature (IUCN) World Conservation Congress	2020	WCC- 2020-Resolution 019 on Stopping the global plastic pollution crisis in marine environments by 2030	“A <b>global agreement</b> to combat marine plastic pollution.” <sup>27</sup>
Council of the European Union	2020	Council Conclusions on Biodiversity - the need for urgent action	“A <b>global agreement</b> to reduce plastic marine litter.” <sup>28</sup>
Pacific Island Forum	2021	Pacific Islands Forum Leaders Ocean Statement	“Appropriate <b>global mechanisms</b> are in place to enable the transformation of the global plastics economy.” <sup>29</sup>
Council of the European Union	2021	Council Conclusions on a Sustainable Blue Economy: health, knowledge, prosperity, social equity	“A <b>legally binding global agreement</b> on marine litter and plastic pollution.” <sup>30</sup>

Meeting/Body	Year	Document	Quote
UN High-Level Debate on the Ocean	2021	Oceans Day Plastic Pollution Declaration	"A new <b>legally binding global agreement</b> on plastic pollution." <sup>31</sup>
G7	2021	Climate and Environment Ministers' Communiqué	"A potential new <b>global instrument</b> ." <sup>32</sup>
Council of the European Union	2021	Council Conclusions on EU Priorities During the 76th Session of the UN General Assembly (UNGA)	"A <b>global agreement</b> on marine plastics pollution." <sup>33</sup>
G20	2021	G20 Environment Communiqué Final	"A new <b>global agreement or instrument</b> to address marine plastic litter." <sup>34</sup>
Fifth France-Oceania Summit	2021	Final declaration	"A <b>global plastic binding agreement</b> ." <sup>35</sup>
Ministerial Conference on Marine Litter and Plastic Pollution	2021	Ministerial Statement	"A new <b>Global Agreement</b> ." <sup>36</sup>
Environment Ministers' High-Level Talanoa	2021	Pacific Regional Declaration on the Prevention of Marine Litter and Plastic Pollution and its Impacts	"A new <b>binding global agreement</b> covering the whole life cycle of plastics." <sup>37</sup>
African Ministerial Conference on the Environment	2021	Key policy messages	"A <b>global legally binding agreement</b> on marine litter and plastic pollution." <sup>38</sup>
Ministerial Meeting of the Convention for the Protection of the Marine Environment of the North-East Atlantic Commission (OSPAR)	2021	Cascais Declaration	"A <b>global agreement</b> to reduce plastic marine litter." <sup>39</sup>
African Union - European Union	2021	Joint communiqué of the second African Union – European Union Foreign Affairs Ministerial Meeting	"A new <b>global plastics agreement</b> ." <sup>40</sup>
G20	2021	G20-Rome Leaders Declaration	"A new <b>global agreement or instrument</b> (on marine plastic litter)." <sup>41</sup>
Nordic Council of Ministers for the Environment and Climate	2021	Ministerial Declaration	"A <b>legally binding global agreement</b> on plastic pollution." <sup>42</sup>
Third Clean Pacific Roundtable	2021	Outcome Statement	"A new <b>binding agreement</b> covering the whole life cycle of plastics." <sup>43</sup>
Twenty second Meeting of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention)	2021	Antalya Ministerial Declaration	"A <b>legally binding global agreement</b> to address plastic pollution." <sup>44</sup>
World Trade Organization	2021	Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade	"A new <b>global instrument</b> on plastics." <sup>45</sup>

When taken together, the declarations demonstrate political will and the potential scope of global action (i.e., marine litter, plastic pollution, the full life cycle of plastics). They also provide insight into who considers what type of instrument (i.e., legal framework, instrument, agreement, mechanisms) and its legal nature (i.e., binding, not binding, both).

According to the UN Office of Legal Affairs, a “treaty is a **generic term embracing all instruments binding under international law, regardless of their formal designation, concluded between two or more international juridical persons** (...) The application of the term treaty, in the generic sense, signifies that the parties intend to create rights and obligations enforceable under international law (...) Accordingly, conventions, agreements, protocols and exchange of letters or notes may all constitute treaties. (...) No international rules exist as to when an international instrument should be entitled a treaty. However, usually the term treaty is employed for instruments **of some gravity and solemnity**” (emphasis added).<sup>10</sup>

The UN Charter, which provides the obligation of registration and publications of international instruments with the UN Secretariat, lists treaties and international agreements separately, thus inferring a need to distinguish between the two.<sup>11</sup> Similarly, the UN Office of Legal Affairs defines the term “convention” as a term that “in the twentieth century [...] was regularly employed for bilateral agreements, it is now generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of States.”<sup>12</sup>

Moreover, the Statute of the International Court of Justice (ICJ) distinguishes between treaties and international conventions.<sup>13</sup> It is common practice for international instruments to include provisions known as jurisdictional clauses, providing that certain categories of disputes shall or may be subject to one or more methods of pacific dispute settlement (e.g., conciliation, mediation, and arbitration). Numerous clauses of this kind provide for recourse that includes more peaceful means of settlement,<sup>14</sup> while others offer avenues for recourse to the Court, either immediately or if other means of dispute settlement fail. Given that the consent is expressed in binding international instruments or declarations that vary in scope, it is fundamental for states to recognize that the international agreement binds them.

According to the International Law Commission (ILC), the title of an international agreement does not limit the scope of ICJ’s jurisdiction. For the ICJ to have jurisdiction, states must consent to submit the case to the Court for their decision. In that regard, the ILC states, “the

generic use of the term ‘treaty’ is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed ‘a. the interpretation of a treaty.’ But clearly, this cannot be intended to mean that states cannot accept the compulsory jurisdiction of the Court for purposes of the interpretation of international agreements not actually called treaties or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, ‘a. international conventions.’ But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled ‘conventions.’ On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements, the term employed is ‘treaty’, and in the other, the even more formal term ‘convention’ is used serves to confirm that the use of the term ‘treaty’ generically in the present articles to embrace all international agreements is perfectly legitimate.”<sup>15</sup>

In practice, international parties usually select a specific designation that reflects the general intent of the agreement. However, the *prima facie* suggestion communicated by the designation may not align with the provisions of the agreement, the particular circumstances under which parties drew it up, or their intention.<sup>16</sup> Some states assert this in their own systems of interpretations and practice.

For example, the Swiss federal government writes, “[t]he legal nature of an international instrument depends upon the text of the act and not its title. However, a particular usage has become established and the title of a treaty is not entirely arbitrary and may constitute a means of interpreting the intention of the parties.”<sup>17</sup> Whereas the United States federal government offers, “They [descriptive terms] may, nevertheless, be considered a factor among others in determining whether the parties intend to create an internationally legally binding agreement.”<sup>18</sup>

States may also make hierarchical distinctions based on terms to reflect the national interpretation of the importance of types of agreements.<sup>19</sup>

# Preparation and Negotiation of International Legal Instruments

## The Preliminary Process

Treaty-making formally begins with the decision to initiate negotiations. The process involves two steps: first, the choice of negotiating fora and second, a negotiation mandate.

## Choosing a Negotiating Fora

Determining where negotiations will unfold is often the product of political and jurisdictional context. The decision can, however, be consequential for the shape of negotiations. The areas that may be affected include the rules of procedure,<sup>46</sup> how the instrument is oriented, which parties may take part in the negotiations, who represents each party, how the instrument is negotiated (e.g., externally or under the aegis of international orga-

nizations), and the makeup of membership. In the present context of discussions on a future legal instrument on plastics, states are holding the proceedings under the auspices of UNEA.

## Establishing a Mandate

Before states can initiate negotiations, a mandate must be established. Such a mandate may address issues including the scope of the negotiations, the legal nature of the intended outcome, what type of provisions to include, and a target completion date. Each of these elements can shape the ultimate agreement, and as a result, establishing a mandate often requires hard-fought negotiations. A mandate should be adopted under the rules of the negotiating fora.

### BOX 2:

#### Status of a Future Legal Instrument on Plastics

As of January 2022, preparation for a global legal instrument on plastics is well underway.

In October 2021, Peru and Rwanda presented a draft resolution during the UNEP Committee of Permanent Representatives Meeting on behalf of co-sponsors. The resolution called for states to hold the initial proceedings to discuss a future legal instrument during UNEA 5.2 and aims to establish an intergovernmental negotiating committee (INC) with a mandate to negotiate a legally binding global instrument to address plastic pollution.<sup>48</sup>

Japan presented another draft resolution during the December 2021 Subcommittee of Permanent Representatives Meeting. This draft resolution aims to establish an INC with a mandate to prepare an international legally binding instrument to address marine plastic pollution.<sup>49</sup>

The Center for International Environmental Law (CIEL) and the Environmental Investigations Agency (EIA) have developed a comparison table to understand the differences between the two resolutions and support discussions on how the resolutions can potentially be merged ahead of UNEA 5.2.<sup>50</sup>

## The Negotiation Process

During a 1984 meeting of the UN General Assembly (UNGA), the Working Group on the Review of the Multilateral Treaty-Making Process outlined the core principles and processes to follow when developing a new global instrument. Any new negotiations, including those towards an international instrument on plastics, should follow the process outlined below.

(i) “[t]he State proposing the making of a multilateral treaty within the framework of the United Nations, or any other State Member of the United Nations, may submit to the organization a draft treaty (...) which could serve as a basic document for negotiating the text of the proposed treaty (...)

(ii) the practice of establishing drafting committees in negotiating bodies should be encouraged (...)

(iii) “[t]he negotiating body should undertake all possible efforts to achieve substantial agreement on the basic text so as to ensure satisfactory completion of the adop-

tion process with the view to obtaining the widest possible acceptance by participants (...)

(iv) “[i]f the General Assembly or any other competent organ of the United Nations, functioning as the negotiating body, determines that the draft of a multilateral treaty has attained the required maturity for adoption, it may proceed to adopt the treaty itself or to convene a diplomatic conference of plenipotentiaries to adopt the treaty; (...)

(v) [i]t is desirable that States consider ways and means to promote and expedite the orderly process of multilateral treaty-making in accordance with their respective constitutional requirements; (...)

(vi) [f]or each treaty-making conference convened by the United Nations it is recommended that a set of official records be kept and, subject to financial considerations, published, including the final act, the text of the treaty, and any other instruments adopted, as well as a check-list of all conference documents and records.”<sup>47</sup>

### BOX 3:

#### Non-Exhaustive List of Previous Resolutions Establishing a Mandate for Initiating Negotiations of Multilateral Environmental Agreements

Previous mandates for environmental agreements show the array of differences between the initial mandate and the resulting instrument. The following is a chart outlining just some of those differences:

Date of the adoption of the mandate	Date of the beginning of the mandate	Date of the adoption of the MEA	Date of entry into force	Legal nature of the instrument and its type, according to the mandate	Title of the resulting instrument	Months between the beginning of the mandate and the start of negotiations	Months between the adoption of the mandate and adoption of the treaty	Months between the adoption of the mandate and the treaty's entry into force
May 26, 1981	Jan. 20, 1982	Mar. 22, 1985	Sep. 22, 1988	“global framework convention” <sup>51</sup>	Vienna Convention on the Protection of the Ozone Layer (Vienna Convention)	7 months, 25 days	45 months, 25 days	87 months, 27 days
Jul. 17, 1987	Feb 1, 1988	Mar. 22, 1989	May 5, 1992	“global convention” <sup>52</sup>	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)	6 months, 15 days	20 months, 6 days	57 months, 18 days



Date of the adoption of the mandate	Date of the beginning of the mandate	Date of the adoption of the MEA	Date of entry into force	Legal nature of the instrument and its type, according to the mandate	Title of the resulting instrument	Months between the mandate and the start of negotiations	Months between the adoption of the mandate and adoption of the treaty	Months between the adoption of the mandate and the treaty's entry into force
May 24, 1985	Dec. 1, 1986	Dec. 16, 1987	Jan. 1, 1989	"to continue work on a protocol" <sup>53</sup>	Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)	18 months, 7 days	30 months, 25 days	43 months, 10 days
May 25, 1989	Feb. 19, 1990	May 22, 1992	Dec. 29, 1993	"international legal instrument" <sup>54</sup>	Convention on Biological Diversity (CBD)	8 months, 25 days	35 months, 26 days	55 months, 4 days
Dec. 21, 1990	Feb. 4, 1991	May 9, 1992	Mar. 21, 1994	"effective framework convention" <sup>55</sup>	UN Framework Convention on Climate Change (UNFCCC)	1 month, 30 days	16 months, 19 days	39 months
Dec. 22, 1992	May 4, 1993	Jun. 17, 1994	Dec. 26, 1996	"international convention" <sup>56</sup>	UN Convention to Combat Desertification (UNCCD)	5 months, 2 days	17 months, 27 days	48 months, 4 days
May 25, 1995	Mar. 11, 1996	Sep. 10, 1998	Feb. 24, 2004	"international legally binding instrument" <sup>57</sup>	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)	9 months, 15 days	39 months, 17 days	104 months, 30 days
Feb. 7, 1997	Jun. 29, 1998	May 22, 2001	May 17, 2004	"international legally binding instrument" <sup>58</sup>	Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention)	16 months, 22 days	51 months, 16 days	87 months, 10 days
Feb. 20, 2009	Jun. 7, 2010	Oct. 10, 2013	Aug. 16, 2017	"global legally binding instrument" <sup>59</sup>	Minamata Convention on Mercury (Minamata Convention)	15 months, 18 days	55 months, 21 days	103 months, 26 days
Dec. 11, 2011	May 17, 2012	Dec. 12, 2015	Nov. 4, 2016	"to develop a protocol, another legal instrument or an agreed outcome with legal force" <sup>60</sup>	Paris Agreement Under the United Nations Framework Convention on Climate Change (Paris Agreement)	5 months, 6 days	48 months, 2 days	58 months, 24 days
Dec. 24, 2017	Sep. 4, 2018	-o-	-o-	"international legally binding instrument under the United Nations Convention on the Law of the Sea" <sup>61</sup>	Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (negotiations are ongoing)	8 months, 11 days	48 months, 8 days (As of December 31, 2021, not yet adopted.)	-o-

## The Structure of Multilateral Environmental Agreements (MEAs)

Closely echoing the VCLT definition of a treaty,<sup>62</sup> UNEP defines MEA as “[a] generic term for treaties, conventions, protocols and other binding instruments related to the environment. Usually applied to instruments of a geographic scope wider than that of a bilateral agreement (i.e., between two States).”<sup>63</sup>

In practice, MEAs are legally binding instruments between states and/or international organizations that set out provisions related to the environment, concluded in writing, and governed by international law. They may be established through a single instrument (stand-alone agreement) or in two or more related instruments (often, a main instrument, followed by protocols and/or annexes/appendices).

While a mandate can clearly define the type of instrument that states will negotiate, resulting in a treaty-making approach that coincides with the resulting instrument, that is not always the case. For example, the resolutions for negotiating mandates that preceded

the United Nations Framework Convention on Climate Change (UNFCCC) and the Vienna Convention called for framework conventions. In contrast, the resolutions for the Minamata Convention on Mercury (Minamata Convention) and the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention) called for legally binding instruments (see Box 3: Non-Exhaustive List of Previous Resolutions Establishing a Mandate for Initiating Negotiations of Multilateral Environmental Agreements). Therefore, it is important to distinguish between the treaty-making approach and the type of international instrument to be adopted.

Sometimes, after discussing and exploring whether an agreement is necessary, it is necessary to determine the type of instrument parties will pursue before they establish a mandate. Such was the case in the lead-up to establishing the Convention on Biological Diversity (CBD). Here, parties created a working group to investigate whether it was desirable to create an umbrella convention to address gaps in action for conservation on



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biological diversity and what forms such an instrument might take.<sup>64</sup>

One could thus distinguish between three main approaches to MEA Negotiations:

1. **Substantive convention/targeted approach** that aims to single out particular environmental problems for isolated treatment in separate instruments. This generally leads to substantive conventions that might include annexes/appendices.
2. **Framework agreement/convention approach** that “aims to create a general system of governance for an issue area, and then developing more specific commitments and institutional arrangements in protocols”<sup>65</sup> and might lead to a framework agreement/convention.
3. **Hybrid approach** leading to either framework conventions with specific provisions or substantive conventions with general provisions, supported and complemented in many cases by protocols and annexes/appendices.

Decisions about the type of instrument and treaty-making approach are challenging under the best of circumstances and are even more so when they concern complex and urgent topics. Therefore, it is pressing to reflect on the design, legal nature, and type of a future legally binding instrument while considering the mandate of the intergovernmental negotiating committee.

## Substantive Conventions

Typically, the main body of a convention is composed of core elements that can include but are not limited to its aims and fundamental principles, parties’ obligations to act in a certain way, and the procedural and institutional setting related to implementation, compliance, monitoring, and dispute settlement. Specific dispositions, particularly scientific or technical ones, are often provided in one or more annexes/appendices.

The specialization and fragmentation of public international law can present challenges and create different legal instruments that address aspects of the same, larger issue. An overarching framework can help set out general

principles to avoid developing international treaties that contradict one another.

Parties regularly sign and ratify annexes with the treaty, and these are considered an integral part of the agreement. Taking a targeted approach can grant the convention’s main governing body the ability to start with a core text and annexes/appendices and the power to introduce amendments and adjust text at a later time.

Furthermore, negotiating parties may lose sight of the larger picture if they only focus on a specific aspect of an issue or cannot take all aspects of an issue into account. Therefore, having the flexibility to amend the treaty at a later point in time is critical (for more detail, see Box 4: Start-and-Strengthen Approach is Not Exclusive to Framework Conventions).

## Framework Agreements

Framework agreements have the same legal effect as a treaty, but the term does not have a specific technical meaning.<sup>66</sup> According to the United Nations Economic Commission for Europe (UNECE), “a framework agreement serves as an umbrella document which lays down the principles, objectives, and rules of governance of the treaty regime.”<sup>67</sup> Examples of framework agreements include the 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention) and the UNFCCC. From a historical point of view, framework agreements tend to be negotiated and adopted in the field of international environmental law (the World Health Organization (WHO), the Framework Convention on Tobacco Control (FCTC), and the European Framework Convention for the Protection of National Minorities (FCPNM) are notable exceptions).

Even if there is no fixed model for framework agreements, and experience has shown that “[i]f the title of a treaty explicitly refers to the instrument as a ‘framework convention,’ as does e.g., the UN Framework Convention on Climate Change, the intent of the drafters to create a legal framework for further action is easy to identify. By labeling a treaty ‘a framework convention,’ the contracting parties indicate their intent to create a larger regulatory regime by following a two-step procedure. However, the mentioning of the framework’s

character in the title of a treaty is not a constitutive element of creating a specific type of legal framework. Sometimes conventions that were not explicitly drafted as framework agreements have been identified as such retrospectively when the ‘framework convention and protocol approach’ was more widely used and qualified as a regulatory technique.”<sup>68</sup>

Framework agreements are often associated with a “start-and-strengthen” approach where institutional structures are created for parties to negotiate and adopt protocols and annexes that supplement the original text. Start-and-strengthen can be advantageous when states are confronted with a complex problem<sup>69</sup> that they cannot solve in a single, targeted agreement. Since universal acceptance is the goal of a multilateral agreement, states

tend to negotiate and join framework agreements with moderate ambition while setting the stage and establishing the space for further refinement.

However, the intention to create a larger regulatory regime may not fully address the issue at the core of the agreement, especially if, after negotiations, there are still gaps that subsequent action must fill. The need for additional refinement is often the scenario when a framework agreement secures wide support, focusing on principles rather than on precise obligations. Taken alone, the obligations established by a framework agreement are often not fully operational and insufficient to address the problem at hand. Such a scenario can lead to a weak framework agreement without stringent obligations and either weak or absence of protocols in force.

#### BOX 4:

#### Start-and-Strengthen Approach is Not Exclusive to Framework Conventions

Regardless of an instrument’s final form, parties must adapt to evolving needs, requirements, and research. Designing provisions that match the combined scientific consensus on the gravity and urgency of a problem and that rise to the complexity of a situation requires a focus on legal and structural features aimed at taking action and increasing commitments over time rather than on the pre-established nomenclature of MEAs.

Although the start-and-strengthen approach is often associated with framework agreements, negotiating parties have the freedom to design the institutions of the agreement however they desire.

There have already been discussions on the necessity of a start-and-strengthen approach when designing an instrument to address the plastics crisis. The 2020 report from the Nordic Council of Ministers proposed a “framework agreement that provides the legal basis for future development of more detailed implementing instruments over time.”<sup>75</sup> Along the same lines, a 2021 World Wide Fund for Nature (WWF) report suggested that because of the complexity of the problem to be solved, “a start-then-strengthen approach might be required. Concretely, this may, for instance, lead to the creation of a framework convention with protocols.”<sup>76</sup> It is important to highlight that both calls agree on the need for a start-and-strengthen approach. However, in shaping the direction of future discussions and negotiations, it should be noted that this approach is not exclusive to framework conventions and is successfully employed by other types of instruments.

## Hybrid Agreements

While framework and substantive conventions take different approaches in addressing the problems they aim to solve, it is not possible to neatly classify every instrument as one or the other — some instruments consider both general and specific provisions. In this case, the convention may set out a framework of governance or procedure for some issues while simultaneously establishing substantial and detailed rules in others. Such instruments are often referred to as “hybrid agreements,” and although there is no legal definition for the term, examining existing hybrid instruments provides insight into how they function.

The CBD is an example of an instrument that contains both general and specific provisions. The hybrid agreement resulted from the previously mentioned working group established to analyze the legal form of the agreement. In conclusion, they agreed that “with regard to the question of a framework convention, as opposed to a substantive convention, both options should be considered and possibly combined.”<sup>70</sup> Other MEAs such as the Basel Convention can also be classified as hybrid instruments.

However, it may be difficult to distinguish between a framework and hybrid agreement. “Such hybrid forms may not represent ‘typical frameworks’ but follow the same ideas for certain issues. All frameworks share the procedural possibility to address an issue in a comprehensive manner by codifying consensus on the general objectives and basic principles while allowing for parallel or later legal agreement on specific issues under or aided by the institutional roof of the parent convention.”<sup>71</sup> The International Convention for the Prevention of Pollution from Ships (MARPOL) is an example. The content and structure of MARPOL might lead to a conclusion that it is a framework agreement, even if the mandate and the title do not mention this. In that case, one might have a hybrid agreement.

## Special Considerations for an International Instrument on Plastics

The plastics crisis has wide-ranging implications for the environment, health, climate, and biodiversity. Projec-

tions suggest a tripling of the volume of plastic leakages into the ocean by 2040<sup>72</sup> and the rapid development of new chemical components on plastics and additives. The urgency of the problem, among other factors, will need rapid, comprehensive, and concrete responses.

A significant body of work, including dedicated meetings and discussions at different levels, has established that plastic pollution is not the primary objective of any existing international legal instrument, and its governance is fragmented.<sup>73</sup> Numerous stakeholders have echoed these findings. As of the time of publication, more than two-thirds of UN Member States support the option of developing a new international legal instrument, confirming that the current international and regional legal regime on plastics does not adequately address the plastics crisis, and there is the desire for an instrument to do so.<sup>74</sup>

Given the complexity and urgency of the plastics crisis, the design and implementation of a future instrument are of critical concern. Parities must reflect on the design, legal nature, and type of any future, legally binding instrument, in addition to the potential mandate of an intergovernmental negotiating committee. Experience with previous MEAs shows that to maximize flexibility, states should leave room for a combination of different provisions such as general principles, objectives, scope, definitions, and more detailed legally binding, time-targeted, and measurable provisions. These provisions can be updated, supplemented, and adjusted according to the issue’s complexity (e.g., through amendments, adjustments, annexes/appendices, and protocols).

In this particular case, states may consider combining approaches that will provide legal tools to overcome the topic’s complexity and urgency. A combination of approaches should be used during negotiations and reflected in the final text and structure of the legal instrument, noting that form should follow function and that a clear-cut decision does not require agreement before the negotiations commence in earnest. However, it is important that the mandate launching the negotiations clearly identifies the problem(s) to be addressed by the negotiated instrument.

## Additional Concerns to Consider Before and During Negotiations

Beyond the instrument's structure, parties must take additional measures into account, each of which can shape the negotiation process and the instrument's life cycle. Some of the features that should be considered include the institution's structure; the instrument's relationship with other instruments, parties, and non-parties; and how to address complementary elements such as protocols and appendices. Where possible, special considerations for the future instrument on plastics are noted.

### Institutional Structure

Since each MEA has its own governing body, special attention must be paid to the structure of the governing institution and its ongoing role. In most cases, governing bodies of MEAs have law-making powers that enable them to strengthen, update, and complement instruments, allowing for the possibility to discuss and adopt amendments, adjustments, protocols, and/or annexes/appendices.

The structure of the Montreal Protocol offers an interesting model. To allow the convention to adapt to evolving conditions and changing circumstances, parties discuss and adopt amendments or adjustments through a decision-making or governing body. For an amendment to become binding and enter into force, each party must ratify it, whereas an adjustment only requires a qualified majority of two-thirds of the votes.<sup>77</sup> Other instruments such as the Basel Convention provide similar powers to the governing body, but with slightly different rules applying to the adoption and entry into force of modifications.

**Considerations for Plastics:** Negotiators should ensure that the future governing body has the powers to adjust, amend the instrument, and consider the most appropriate rules of procedures to facilitate such a start-and-strengthen approach.

### Relationship with Other Instruments and Between Parties and Non-Parties

When designing a new international instrument, it is essential to survey and understand which existing treaties may address some aspects of the issue or other closely

related topics. If there are overlaps, the new instrument must include provisions addressing the relationships between the instruments and linking them to one another.

Another key area of concern is the relationship between parties and non-parties to the related international agreements. To address this, some existing international agreements, including the Basel and Barcelona Conventions, have adopted provisions that allow parties to enter into separate agreements on matters that fall under the scope of those conventions, provided they meet certain conditions (e.g., consistency and transparency duties).<sup>78</sup> Such agreements can ensure the instrument's efficacy.

**Considerations for Plastics:** The legal regime addressing elements of the plastic life cycle is fragmented. Currently, international instruments that address aspects of plastic pollution, including marine litter, fishing gear, waste, and chemicals, exist parallel to one another. The current structure lacks coherence and coordination between measures to address plastic pollution on land and at sea, and as such, any new instrument will need to address this. Areas of complementarity will need to be identified, including responsibility for monitoring, reporting, and enforcement; coordinating data collection; and control in the use of all additives in plastic based on the precautionary principle; among others.<sup>79</sup>



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## Protocols, Annexes, and Appendices

As discussed elsewhere, annexes, appendices, or protocols must often complement the core text of an instrument. In existing MEAs, their focus and impact range from simple tweaks to instruments that drive the associated convention. If an instrument takes a start-and-strengthen approach, there are several ways for annexes, appendices, and protocols to be introduced later. The first option is to draft and adopt complementary texts during negotiations, allowing for the governing body's decisions to further elaborate on them. The second option is for the texts to be negotiated and adopted later — this is only an option if the instrument's core text reflects this possibility. Given their importance, parties must consider how such supplements will be addressed and considered throughout an instrument's life.

### Protocols

Since protocols constitute international treaties, the rules on international treaties apply to the treaties and the protocol. Consequently, protocols are not necessarily

easier to negotiate than other treaties. The UN Treaty Collection has classified them by their functions as:

- **Protocols of Signature:** subsidiary instruments of a treaty. They are drawn up by the same parties, which usually include interpretation clauses and are ratified *ipso facto* with the treaty ratification.
- **Optional Protocols to a Treaty:** an independent instrument that establishes rights and obligations beyond the initial treaty. Optional protocols are ratified independently one from the other.
- **Protocols Based on a Framework Treaty:** an independent instrument with specific substantive obligations that concretize the general objectives of a framework convention.
- **Amendment Protocols and Supplementary Protocols:** both instruments contain provisions to amend and/or supplement former treaties.<sup>80</sup>

While there can be limitations on the parties, the general rules of the law of treaties apply. Protocols only enter into force if a certain number of parties — generally specified in the text of the protocol — join.<sup>81</sup> As a negotiation technique, some international instruments require parties to ratify and accede a minimum number of additional protocols at the moment of ratifying and accessing the main agreement. For instance, the Barcelona Convention contains conditional provisions to ensure a party cannot become a contracting party of the agreement unless it simultaneously becomes a contracting party to one or more protocols.<sup>82</sup>

## Annexes and Appendices

Frequently, treaty parties prefer to insert more specific provisions, particularly those of a scientific or technical nature, into one or more annexes. The annexes are then signed and ratified alongside the treaty and are declared an integral part of the agreement. Recent MEAs include the practice of agreeing to delegate/permit/entrust relevant Conferences of the Parties (COPs) to adopt and review additional technical annexes. The relevant COPs then become the competent body for developing the particular treaty regime further.<sup>83</sup>

The annexes may also take different forms and with different purposes. Some annexes are more scientific or

technical, while others regulate substantive issues and are more politically sensitive.

Annexes within the same agreement may have different adoption, adjustment, and amendment procedures depending on their content and purpose. Under the Kyoto Protocol, annexes of a scientific, technical, procedural, or administrative character can be adopted and amended in a simplified procedure, namely by a decision of the COPs.<sup>84</sup> In contrast, all existing annexes, especially the substantive A and B, are subject to the standard procedure of treaty-making and treaty-amendment, requiring the parties' express consent before they become binding (i.e., the deposit of instruments of acceptance by parties).<sup>85</sup>

The extent to which a convention relies upon appendices differs quite substantially. For example, conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) are considered appendix/annex-driven agreements because of how heavily they rely on those texts. MARPOL, on the other hand, uses a mixed approach with mandatory and optional annexes with appendices,<sup>86</sup> which are in substance and form more similar to protocols.

### BOX 5:

#### Challenge of Multi-Track Negotiations

When addressing a complex and urgent issue, states may be required to simultaneously negotiate parallel agreements, protocols,<sup>87</sup> annexes, and appendices. While this approach has clear advantages, parallel conversations on each element that requires precise and progressive obligations are resource-intensive. They can present challenges — especially for developing countries, which often have limited resources to cover multiple tracks simultaneously.

Promoting and funding the participation of developing countries' delegates in the negotiation rounds and the intermediary sessions can help mitigate the issue.



## Conclusion and Further Points to Consider During the Negotiation Phase

In light of the points discussed in this overview, the following considerations should be taken into account when discussing a possible future global instrument on plastics:

1. All treaties are international agreements, but not all international agreements are treaties.<sup>88</sup>
2. The title of an international instrument does not have particular legal significance (e.g., accord, act, agreement, charter, covenant, convention, declaration, exchange of notes, pact, protocol, statute, or treaty). If the discussion of an international legally binding agreement on plastics moves forward, the title “Treaty,” “Convention,” or “Framework Agreement,” will not have a particular legal significance per se from the perspective of public international law and the VCLT. The content of the document, the signatories, and ratification mechanism(s), rather than the title, will determine the political and legal implications of the agreement (even though the title may provide guidance to interpret the intention of the parties).
3. There are differences of legal nature between certain types and categories of international instruments. These differences arise from the instrument’s content and the form in which a party may express its consent to be bound, rather than from its title.
4. When approaching an international instrument, it is essential to examine its content rather than its title to determine the nature of the agreement. Accordingly, there is a need to analyze each international agreement on a case-by-case basis.
5. To some extent, the title might indicate the instrument’s relationship with previous or future concluded instruments (e.g., protocols).
6. The obligation of registration of international instruments before the UN Secretariat applies to UN Member States, whatever its form and descriptive name.<sup>89</sup>
7. The adopted resolutions aiming to establish a global instrument on plastics should follow established practice (see Box 3: Non-Exhaustive List of Previous Resolutions Establishing a Mandate for Initiating Negotiations of Multilateral Environmental Agreements) and specifically include the term “legal” or “legally binding.” Similarly, the adopted resolution should refer to the future instrument as a “legally binding instrument,” “convention,” or “treaty” without necessarily further qualifying it.
8. Whatever approach and type of legal instrument states choose to negotiate, related to the full life cycle of plastics (e.g., framework, hybrid agreement, or a substantive convention), it will be crucial to:
  - a.) Address within the main text and annexes/appendices the most urgent and pressing issues, making sure that parties have time-targeted, measurable, and binding commitments with effective enforcement mechanisms;
  - b.) Guarantee that the main governance body possesses direct law-making competence to consider and adopt amendments and adjustments to the main text, annexes/appendices, and potential protocols; and
  - c.) Put in place clear provisions for coordinating actions with other existing or future international and regional instruments and strict provisions for the relationship between parties and non-parties.

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