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ENVIRONMENTAL LAW

Structure and Elements of International Legal Instruments

Key Considerations for the Future Plastics Treaty

This document provides a brief legal analysis of the different options for treaty design and the risks associated with each. It also identifies key elements needed to ensure the treaty is implementable, enforceable, and functional over the long term to fulfill the objectives set out in UNEA (United Nations Environment Assembly) resolution 5/14. Examples from previous treaties can inform an understanding of key elements that should be included in the initial treaty, taking note of the balance of general and specific provisions and what can effectively be included in subsequent agreements,¹ protocols, or annexes.

While different types of treaties have advantages and disadvantages,² the structure does not determine whether an agreement is effective. Still, the structure of the treaty must be well thought out to ensure the success of its implementation and ensure it responds to the challenges of plastic pollution. The treaty, or a decision on its structure, should not be adopted as a result of the INC running out of its currently scheduled negotiating time.

Key Recommendations for the Plastics Treaty

The objective of UNEA resolution 5/14 and the recommended legally binding instrument is to end plastic pollution, which is clear from the resolution's title: "End plastic pollution: towards an international legally binding instrument." Now is a pivotal moment in the negotiations for a treaty to end plastic pollution. While many options have been presented, there is little agreement on what the treaty should ultimately contain. With one scheduled negotiating session remaining, the months

1. In some instances, Parties to a framework convention may decide to negotiate a new agreement, rather than a protocol, such as the Paris Agreement. Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015, 3156 UNTS 79. The Paris Agreement does, however, still have a direct relationship with the UN Framework Convention on Climate Change, which continues to have annual Conferences of the Parties during which the provisions of the Paris Agreement are on the agenda. See, e.g., UNFCCC, Provisional Agenda and Annotations, FCCC/CP/2023/1 (September 29, 2023), undocs.org/FCCC/CP/2023/1.

2. CIEL, *Toward a New Instrument Addressing the Full Life Cycle of Plastics: Overview of the Typology of International Legal Instruments* (CIEL, 2022), <https://www.ciel.org/wp-content/uploads/2022/01/Toward-a-New-Instrument-Addressing-the-Full-Life-Cycle-of-Plastics.pdf>.

leading up to the start of the session at the end of November 2024 should be used to chart a path toward a treaty to end plastic pollution.

While some States may be considering a framework convention with high-level general provisions or an agreement with only voluntary provisions, premised on the idea that concluding a treaty with all INC members in December of 2024 is the most important objective, they would do well to recall the negotiations are for a legally binding instrument to end plastic pollution. A hastily agreed treaty with only basic high-level principles will result in a much greater delay in the long term than taking additional time now to conclude a treaty that is fit for purpose. A number of previous treaty negotiations have continued beyond the timeline initially set, while other INCs work on documents for consideration of the first COP after the adoption of the treaty at the Diplomatic Conference of Plenipotentiaries.³

A framework convention is not recommended for the plastics treaty, as this would significantly delay urgently needed concrete action toward ending plastics pollution. Annexes, which are generally included in substantive treaties and also sometimes hybrid treaties, are key for implementing mandatory obligations and, as outlined below, are more easily adaptable than treaty text. Treaty provisions then need to be implemented through national plans, where each State articulates its priorities, policies, and plans for action, taking into account national circumstances.

Instead, Parties should work together to develop a treaty with key binding obligations to work toward ending plastic pollution, which could take the form of a substantive treaty with annexes or a hybrid treaty with substantive obligations, annexes, and provisions for developing future protocols. A substantive treaty could then be implemented over time and strengthened with COP decisions and amendments to annexes, while a hybrid treaty could be similarly strengthened, along with the addition of protocols that could be negotiated in the future.

If States are hesitant to agree to a substantive convention, it is important to recall that Parties are not expected to be in full compliance with all provisions from the moment that the treaty enters into force. While some obligations require States to stop or start something from the moment of entry into force, the INC generally undertakes additional work to lay the groundwork for initial implementation in the interim period between the adoption of the treaty and the first COP. During this time, guidance, procedures, and decisions are developed for both Parties and the COP to clarify expectations and obligations. The first COP then decides priorities for work over the next intersessional period, including for obligations that can be implemented over time, and States assess the

3. For additional details, see CIEL, *Negotiation Timelines of International Legal Instruments: Key Considerations for the Future Plastics Treaty* (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/07/Treaty-Negotiation-Timelines.pdf>.

current status of treaty obligations at the national level, as well as technical and financial support needed for implementation.

The problem of plastic pollution is both highly complex and extremely urgent. The fact that it may take some time to get to the ratification threshold for a substantive treaty to enter into force does not mean that a general framework convention with potentially more signatories is preferable, particularly if it does not include concrete obligations for the Parties, or if it does not meet the mandate and objectives outlined under UNEA resolution 5/14. Importantly, while many substantive conventions have taken years to enter into force and gradually gain more Parties over time, so, too, have framework conventions. In addition, it is not infrequent for framework or hybrid conventions to have key amendments or protocols that only enter into force decades after the treaty's adoption, if ever. It is also common for more State delegations to participate in negotiations for a new treaty than initially become signatories and ratify. Therefore, INC members should not weaken a treaty to the least ambitious position in an attempt to reach universal ratification.

The current dynamics, including obstructionist and delay tactics applied by some INC members, demonstrate that their goal is to create either a weak agreement with no binding obligations or no agreement at all. By pursuing a treaty acceptable to even the most reluctant to act, INC members risk wasting time and resources and may ultimately finalize an agreement that is not fit for purpose. Such a result would fail to implement the necessary actions and measures to end plastic pollution, fall short of the mandate in UNEA resolution 5/14, and require significantly more resources and time from States in the future to adopt new measures or remediate additional and avoidable pollution. It would also provide the false impression of global action to end plastic pollution while allowing companies and States to continue increasing plastics production, leading to more plastic pollution and further exacerbating the problem the treaty aims to address.

Background

In March 2022, UNEA resolution 5/14 was adopted to develop an international legally binding instrument on plastic pollution, including in the marine environment (plastics treaty). The resolution requested the United Nations Environment Programme (UNEP) to convene an Intergovernmental Negotiating Committee (INC) to begin its work during the second half of 2022 “with the ambition of completing its work by the end of 2024.”⁴

4. UNEA, Resolution 5/14, End Plastic Pollution: Towards an International Legally Binding Instrument, UNEP/EA.5/Res.14 (March 2, 2022).

The first preparatory meeting of the Open-Ended Working Group (OEWG) proposed five INC sessions between November 2022 and December 2024,⁵ with offers from host countries for the subsequent four meetings discussed at INC-1 in Punta del Este, Uruguay.⁶ The final scheduled INC will be held in Busan, Korea, from November 25 to December 1, 2024.

Before INC-3, UNEP released a “zero draft” of the treaty text, followed by a “revised zero draft” at INC-4. The drafts have served as the basis for each session. Rather than streamline text or remove options, the text has continued to expand. The “compiled revised zero draft” (hereafter the “Compilation Draft”) released before INC-5 has more than 3,700 brackets, countless options and sub-options, and almost no agreed-upon text.⁷ As a result, and while plans are currently in development under the guidance of the Chair to identify a path forward, there is concern about the prospects for completing a treaty⁸ that addresses the full lifecycle of plastics in Busan.

Although the UNEA resolution does not specify the type of instrument to be completed, the zero draft and subsequent Compilation Draft that INC members have been working on for two meetings appear to be most similar to a substantive convention with annexes. However, States have yet to decide on the structure of the future instrument, and all States are not aligned.

At this stage of the negotiations, there appear to be differing views on the treaty structure. Many States are still committed to a substantive treaty with concrete mandatory obligations. However, some appear to be considering a shift from a substantive convention to a framework convention,⁹ perhaps on the premise that it may be more feasible to agree on general principles — leaving specific obligations to be developed later, either with all parties through a treaty amendment or a new protocol with a subset of Parties. Similarly, some States may also be considering a treaty with voluntary approaches rather than binding obligations, with the idea that the voluntary provisions could somehow be converted into mandatory provisions in the future. Nevertheless, transforming voluntary provisions to mandatory obligations would require amendments to the treaty text, meaning new negotiations, adoption, and ratification, or it would require negotiating an additional instrument, such as a protocol.

5. UNEP, Report of the Ad hoc Open-ended Working Group to Prepare for the Work of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment, UNEP/PP/INC.1/INF/2 (September 8, 2022), Annex I, undocs.org/UNEP/PP/INC.1/INF/2.

6. UNEP, Report of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment, on the Work of Its First Session, UNEP/PP/INC.1/14* (March 2, 2022), undocs.org/UNEP/PP/INC.1/14. Note that the date on the document is incorrect, as the meeting occurred November 28–December 2, 2022.

7. UNEP, Compilation of Draft Text of the International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment, UNEP/PP/INC.5/4 (July 1, 2024).

8. Terminology for international legal instruments can vary widely and includes but is not limited to treaty, agreement, accord, and convention. For the purposes of this document, we are using “treaty” as it is the most widely used term.

9. Reuters, “Very Difficult to Agree to Global Plastics Treaty this Year, EU Says,” *Deccan Herald* (Bengaluru, India), last updated June 19, 2024, <https://www.deccanherald.com/world/very-difficult-to-agree-global-plastics-treaty-this-year-eu-says-3072394>.

Types of Treaties

Substantive (or Specific) Convention

Substantive conventions are specific and unambiguous in their obligations and can often produce a substantial impact shortly upon entering into force.¹⁰ The defining feature of a substantive convention is that the core obligations and regulatory measures to meet the convention’s goals are contained in the original instrument and its annexes.¹¹

Some substantive conventions may not have as many States initially ratify as framework conventions and, therefore, take longer to enter into force. However, they generally have high accession over time. For example, the Stockholm Convention was adopted in May 2001 by 127 States,¹² but it took nearly three years to be accepted or ratified by fifty States, and, as of the time of writing, it currently has 186 Parties.¹³ The Rotterdam Convention was adopted in September 1998 by eighty-six States.¹⁴ Still, it took more than five years to enter into force with acceptance or ratification by fifty States, and as of September 2024, it currently has 166 Parties.¹⁵ The Minamata Convention was adopted in 2013 and entered into force nearly four years later, after ratification by fifty States, and currently has 148 Parties.¹⁶

Another common feature of substantive conventions is the inclusion of substantive and/or technical annexes that list the specific items to which binding obligations apply or that provide detailed technical information, guidelines, and procedures that support the treaty’s implementation.

For example, under the Stockholm Convention, regulated persistent organic pollutants (POPs) are listed in annexes,¹⁷ the Minamata Convention’s annexes include product lists and phaseout schedules,¹⁸ and the Convention on International Trade in Endangered

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10. For example, ratification of the Rotterdam Convention has resulted in a reduction of hazardous chemical imports by an average of seven percent for each State, and ratification of the Stockholm Convention has resulted in an average of a sixteen percent reduction in persistent organic pollutant trade for each State; see Thais Núñez-Rocha and Inmaculada Martínez-Zarzoso, “Are International Environmental Policies Effective? The Case of the Rotterdam and Stockholm Conventions,” *Economic Modelling* 81 (2019): 480, <https://doi.org/10.1016/j.econmod.2018.04.013>.
 11. UNEP, Broad Options for the Structure of the International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment, Taking into Account Paras. 3 and 4 of UNEA Resolution 5/14, UNEP/PP/INC.1/4 (September 8, 2022), undocs.org/UNEP/PP/INC.1/4.
 12. UNEP, Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants, List of Participants, UNEP/POPS/CONF/INF/4/Rev.1 (June 26, 2001), https://chm.pops.int/Portals/0/docs/from_old_website/documents/meetings/dipcon/en/DIPCONLPFINAL.pdf.
 13. “Stockholm Convention on Persistent Organic Pollutants,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-15&chapter=27&clang=en.
 14. UNEP, FAO, Final Act of the Conference of Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, UNEP/FAO/PIC/CONF/5 (September 17, 1998), para. 3, <https://www.pic.int/Portals/5/incs/dipcon/eb/English/FINALE.PDF>.
 15. UN Treaty Collection, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-14&chapter=27.
 16. “Minamata Convention on Mercury,” UN Treaty Collection, accessed July 17, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17&chapter=27&clang=en.
 17. Stockholm Convention on Persistent Organic Pollutants, Annexes A, B, and C, May 22, 2001, 2256 UNTS 119.
 18. Minamata Convention on Mercury, Annex A, October 10, 2013, CN560.2014.TREATIES-XXVII.17.

Species of Wild Fauna and Flora (CITES) lists which species have to comply with the trade procedures mandated by the treaty text.¹⁹

A benefit of annexes is that the procedures for amendment are generally easier than those for the amendment of treaty text. The former more often enters into force a set time after the Conference of the Parties (COP) decision,²⁰ with possible opt-out procedures for Parties that do not want to be bound by the amendment,²¹ while the latter generally requires ratification to enter into force.

The process for creating new annexes is generally the same as the process for amending them, allowing Parties to address emerging issues. New annexes, however, are generally limited to procedural, administrative, technical, or scientific issues²² and must relate to an obligation in the treaty.

Framework Convention

A framework convention is usually a general and broad instrument that sets goals, principles, and a framework for Parties to make decisions but leaves regulatory measures and specific obligations to future instruments, such as protocols.²³ In practice, “[b]y labeling a treaty ‘a framework convention,’ the contracting parties indicate their intent to create a larger regulatory regime by following a two-step procedure,”²⁴ but even if a treaty is not initially categorized as a framework convention, it may become clear over time if the treaty contains primarily high-level goals and Parties negotiate new protocols with concrete obligations.²⁵

Framework conventions are relatively flexible in that a protocol can be negotiated and entered into force but then be abandoned or replaced when Parties decide it is no longer necessary. Such is the case with many of the Kyoto Protocol’s substantive provisions, which have been supplanted by procedures elaborated under the United Nations Framework Convention on Climate Change (UNFCCC) for reporting²⁶ and the Paris

19. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Appendix I, Appendix II, and Appendix III, March 3, 1973, 993 UNTS 243.

20. The Convention on the Prevention of Pollution from Ships (MARPOL 73/78), arts. 16(2)(f)(iii) and 16(2)(g)(ii), November 2, 1973, 1340 UNTS 61 and 1341 UNTS 3 is the exception to the rule that treaty annex amendments do not require ratification. The processes for amendments under MARPOL in general are quite complex, as amendments may be adopted or enter into force in multiple different ways depending on circumstances.

21. See, e.g., Stockholm Convention, art. 22; Minamata Convention, art. 27; CITES, art. XV.

22. See, e.g., Stockholm Convention, art. 22; Minamata Convention, art. 27.

23. UNEP, Broad Options for the Structure of the International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment, UNEP/PP/INC.1/4 (September 8, 2022), undocs.org/UNEP/PP/INC.1/4.

24. Importantly, “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.” Nele Matz-Lück, “Framework Conventions as Regulatory Tools,” *Goettingen Journal of International Law* 1 no.3 (2009): 44, <https://ssrn.com/abstract=1535892>.

25. Matz-Lück, 441

26. “Preparing for the Enhanced Transparency Framework,” UNFCCC, accessed September 24, 2024, <https://unfccc.int/process-and-meetings/transparency-and-reporting/preparing-for-the-ETF>; “FAQ— Moving Towards the Enhanced Transparency Framework,” UNFCCC, accessed September 24, 2024, https://unfccc.int/FAQ-moving-towards-the-ETF#_Transitioning-from-Reporting-of-Biennial-Reports-and-Biennial-Update-Reports-to-Biennial-Transparency-Reports.

Agreement for emissions reductions within Nationally Determined Contributions (NDCs). Although new protocols or agreements add flexibility, they often require many years of negotiations and more years for ratification and eventual entry into force. This process involves significant costs, time, and capacity.

Framework conventions may also have high initial participation rates²⁷ because it is relatively easy for States to “commit” to an agreement that includes few to no substantive obligations and requires very little of Parties. For example, the 1992 UNFCCC set an objective and established principles with only minor substantive obligations, with 156 States participating in its adoption in May 1992, essentially agreeing to continue to work on the issue of climate change.²⁸ The Convention entered into force in March of 1994, less than two years after the treaty’s adoption. Today, all UN Member States are Parties to the Convention.²⁹ The Kyoto Protocol was negotiated under the UNFCCC and adopted in 1997 but did not enter into force until 2005.³⁰ Although the Kyoto Protocol technically met its emissions reduction goals by the Parties to the Protocol, major emitting Parties to the UNFCCC either did not join the Protocol or were not required to reduce emissions, and global emissions continued to increase.³¹ As a result, the Protocol is generally seen as a failure.

The Paris Agreement, which was adopted in 2015 and entered into force in 2016,³² is not technically a protocol. Still, it operates like one and, in effect, supersedes the Kyoto Protocol. Unlike its predecessor, the Paris Agreement sets a collective target for all Parties³³ but does not prescribe specific measures to reach the global target. Instead, the Agreement allows Parties to determine their own NDCs toward achieving the Agreement’s objective.³⁴ The theory was that each Party would set sufficiently ambitious NDCs, and collectively, these would achieve the global target, but even the pledged NDCs have fallen far short of what is needed.³⁵

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27. “United Nations Framework Convention on Climate Change,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en. The UNFCCC has 198 Parties, with “near-universal” participation. “Vienna Convention for the Protection of the Ozone Layer,” UN Treaty Collection, accessed July 17, 2024, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&clang=en. The Vienna Convention and Montreal Protocol have 198 Parties as well. “Montreal Protocol on Substances that Deplete the Ozone Layer,” UN Treaty Collection, accessed July 17, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-a&chapter=27&clang=en.
 28. UN, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of its Fifth Session (New York, April 30–May 9, 1992), A/AC.237/18 (Part II)/Add.1 (October 16, 1992), <https://unfccc.int/resource/docs/a/18p2.pdf>.
 29. “United Nations Framework Convention on Climate Change,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en.
 30. “Kyoto Protocol to the United Nations Framework Convention on Climate Change,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=en.
 31. Igor Shishlov et al., “Compliance of the Parties to the Kyoto Protocol in the First Commitment Period,” *Climate Policy* 16, no. 6 (2016): 768–82, <https://doi.org/10.1080/14693062.2016.1164658>; Data for Annual Greenhouse Gas Emissions,” Matthew W. Jones et al., last modified April 8, 2024, https://ourworldindata.org/grapher/total-ghg-emissions?tab=chart&country=-OWID_WRL.
 32. “Paris Agreement,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en.
 33. Paris Agreement, art. 2, para. 1(a).
 34. Paris Agreement, art. 4.
 35. See, e.g., United Nations, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on its Fifth Session (UAE, November 30–December 13, 2023), Part Two, FCCC/PA/CMA/2023/16/Add.1 (March 15, 2024), 1/CMA.5, undocs.org/FCCC/PA/CMA/2023/16/Add.1. Despite

The Montreal Protocol to the Vienna Convention has been the exception to the frequent pattern of framework conventions, resulting in many meetings but little action. This is due to a variety of factors, but not in small part to the combination of scientific evidence and commercial innovation,³⁶ which allowed Parties to phase out Ozone Depleting Substances (ODS) even more rapidly than initially contemplated through a series of amendments and adjustments to the Montreal Protocol.³⁷ The inclusion of legally binding schedules that each Party must implement at the national level has been key to the effectiveness of the Montreal Protocol,³⁸ which makes the Protocol itself more similar to a substantive convention.³⁹ Also dissimilar to most framework conventions and their protocols, the Montreal Protocol was adopted⁴⁰ before the Vienna Convention for the Protection of the Ozone Layer entered into force in 1988.⁴¹ The Montreal Protocol entered into force in 1989; today, it has universal ratification.⁴² Despite the small number of States supporting the Vienna Convention initially,⁴³ in 2009, it became the first-ever treaty to reach universal ratification.⁴⁴

The success of framework instruments varies. The Vienna Convention, alongside the Montreal Protocol, is largely regarded as one of the most successful multilateral environmental agreements (MEAs) ever developed,⁴⁵ primarily because the Montreal Protocol includes binding obligations, making it similar to a stand-alone substantive treaty. However, many consider the UNFCCC a failure⁴⁶ because it has not met its ultimate objective, established in 1992: “[the] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁴⁷ There are many differences between the UNFCCC with its Paris

broad participation, the stocktake indicates that existing NDCs are insufficient to meet the goals of the Paris Agreement and they are not being implemented effectively.

36. Greg Whitesides, “Learning from Success: Lessons in Science and Diplomacy from the Montreal Protocol,” *Science & Diplomacy*, August 10, 2020, <https://www.sciencediplomacy.org/article/2020/learning-success-lessons-in-science-and-diplomacy-montreal-protocol>.
37. “Adjustments to the Montreal Protocol,” Ozone Secretariat, UNEP, accessed September 24, 2024, <https://ozone.unep.org/treaties/montreal-protocol/adjustments-montreal-protocol>.
38. Montreal Protocol on Substances that Deplete the Ozone Layer, art. 3, September 16, 1987, 1522 UNTS 3.
39. The Montreal Protocol also includes key provisions on finance, non-compliance, and trade with non-Parties. Montreal Protocol, Arts. 13, 8, and 4.
40. “Montreal Protocol on Substances that Deplete the Ozone Layer,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-a&chapter=27&clang=en.
41. Vienna Convention, art. 17(l). The Convention specified entry into force 90 days after deposit of the twentieth document of acceptance, ratification, approval, or accession; “Vienna Convention for the Protection of the Ozone Layer,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&clang=en.
42. “Montreal Protocol on Substances that Deplete the Ozone Layer,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-a&chapter=27&clang=en.
43. The Vienna Convention was adopted in 1985 with only thirty-six states participating in the Conference. UNEP, Final Act of the Conference of Plenipotentiaries on the Protection of the Ozone Layer (March 22, 1985), paras. 3–4, <https://ozone.unep.org/meetings/conference-plenipotentiaries-protection-ozone-layer>.
44. “The Vienna Convention for the Protection of the Ozone Layer,” Ozone Secretariat, UNEP, accessed July 19, 2024 <https://ozone.unep.org/treaties/vienna-convention>; “Vienna Convention for the Protection of the Ozone Layer,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&clang=en.
45. See “About the Montreal Protocol,” Ozone Secretariat, UNEP, accessed September 24, 2024, <https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol#>; “Montreal Protocol Emerges as a Powerful Climate Treaty,” National Oceanic and atmospheric administration, January 11, 2023, <https://www.noaa.gov/news-release/montreal-protocol-emerges-as-powerful-climate-treaty#:~:text=%E2%80%9CThe%20Montreal%20Protocol%20is%20one,Panel%20of%20the%20Montreal%20Protocol>; Wolfgang Steinbrecht et al., “Is Global Ozone Recovering?,” *Comptes Rendus Geoscience* 350, no. 7 (2018): 368–375, <https://doi.org/10.1016/j.crte.2018.07.012>.
46. See Chandra Bhushan, “After 25 Years of Failure, We Should Abandon the UNFCCC,” *Climate Home News*, March 27, 2019, <https://www.climatechangenews.com/2019/03/27/25-years-failure-abandon-unfccc/>.
47. UNFCCC, art. 2, May 9, 1992, 1771 UNTS 107.

Agreement and the Vienna Convention with its Montreal Protocol. Among the most important are that the Paris Agreement sets a global target but has no concrete national-level targets to help reach the global goal. In contrast, the Montreal Protocol contains national targets, with enforcement mechanisms (including an effective financial mechanism) to ensure Parties meet their national targets.

Hybrid Convention

Generally, a “hybrid approach” leads to either framework conventions with specific provisions or substantive conventions with general provisions, supported and complemented in many cases by protocols and annexes. Hybrid instruments often contain at least some substantive provisions. However, they can be specifically open-ended to allow for future instruments that fill in gaps and allow for more flexibility in implementation, such as through protocols that not all Parties ratify. For example, the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution provides several nonspecific obligations that are expanded upon in Protocols (for example, the so-called “Dumping Protocol” expands on Article 5 of the Convention).⁴⁸

Hybrid instruments may be structured primarily as a substantive agreement, such as the Basel Convention, or as a framework with significant room for future implementing instruments, such as the Barcelona Convention,⁴⁹ or as a blend of the two. A hybrid instrument establishing meaningful and broadly agreed principles and obligations may promote cooperation among States but can also result in the slower creation of additional, necessary obligations and implementation than substantive conventions.⁵⁰

For example, the 1989 Basel Convention negotiations involved ninety-six States⁵¹ but did not reach the twenty ratifications for entry into force until 1992.⁵² The text of the Basel Convention called for the development of a protocol on liability and compensation,⁵³ which was adopted in 1999, ten years after the adoption of the Basel Convention, but has

48. See Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Dumping Protocol) (February 16, 1976); Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention), art. 5 February 16, 1976, 1102 UNTS 27 (“The Contracting Parties shall take all appropriate measures to prevent and abate pollution of the Mediterranean Sea Area caused by dumping from ships and aircraft”). The Dumping Protocol was one of the initial Protocols to the Convention developed concurrently to the Convention.

49. The Barcelona Convention is a hybrid instrument more like a framework convention, with some substantive parts. The Parties to the Convention are required to take appropriate measures to meet the goals of the Convention and the Protocols in force to which they are a Party to prevent, abate, and combat pollution in the Mediterranean Sea. Several provisions explicitly allow and call for the Parties to work with each other in forming Protocols and separate instruments in pursuit of the goals of the Convention, and any Party seeking to become a Party to the Convention must also become a Party to at least one of the Protocols. Barcelona Convention, Arts. 3(1), 4(1), 4(2), 23.

50. Oran R. Young, “Effectiveness of International Environmental Regimes: Existing Knowledge, Cutting-edge Themes, and Research Strategies,” 108 PNAS, December 13, 2011, <https://www.pnas.org/doi/epdf/10.1073/pnas.1111690108>. Young describes the effectiveness of the Antarctic treaty regime in bringing together disparate Parties, but also how its implementation and development have existed in a state of “punctuated equilibrium.”

51. UNEP, Final Report of the Ad Hoc Working Group of Legal & Technical Experts with a Mandate to Prepare a Global Convention on the Control of Transboundary Movements of Hazardous Wastes, UNEP/IG.80/4 (March 22, 1989), para. 6.

52. “Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-3&chapter=27&clang=en.

53. Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (Basel Convention), art. 12, March 22, 1989, 1637 UNTS 57.

yet to reach the twenty ratifications required for entry into force.⁵⁴ Furthermore, the second COP decided to ban the export of hazardous waste from Organisation for Economic Co-operation and Development (OECD) Member countries to non-OECD Member countries. Still, countries' concerns that such a decision was not legally binding⁵⁵ and growing political pressure⁵⁶ led to the Ban Amendment, which was adopted by consensus at the third COP in 1995⁵⁷ but not ratified⁵⁸ until 2019⁵⁹— more than thirty years after the adoption of the Basel Convention itself, and twenty-four years after the adoption of the Amendment. There is near universal ratification today, with 191 Parties to the Convention.⁶⁰

Key Risks and Benefits of Different Approaches and Provisions

Generally, for a treaty to succeed, it needs to include concrete obligations that directly address the problem it seeks to solve. **For the plastics treaty negotiations, this would entail ending plastic pollution (as framed under UNEA resolution 5/14), with clear provisions for implementation, enforcement, and decision-making, as well as corresponding support for States to meet their treaty obligations.**

Voluntary Provisions

When designing MEAs, different approaches and the inclusion or exclusion of certain types of provisions carry distinct risks. Treaties based on voluntary commitments have been shown to lack the rigor and accountability necessary to drive meaningful action, leading to inadequate responses to environmental challenges, unsuccessful outcomes, and a loss of resources and time. For example, NDCs under the Paris Agreement have proven ineffective at reducing emissions, demonstrating the need for more robust treaty provisions to achieve a treaty's goal.

54. "Basel Protocol on Liability and Compensation," Basel Convention, accessed September 24, 2024, <https://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>.

55. UNEP, Report of the Second Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.2/30, paras. 44 and 47 (March 25, 1995).

56. CAN, "COP Decisions: Binding or Not?," June 8, 2009, 2, https://climatenetwork.org/wp-content/uploads/2021/02/COP_Decisions_CAN_legal_group_June_8_09.pdf.

57. UNEP, Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/CHW.3/34, (October 17, 1995), para. 51; UNEP, Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.3/35, Decision III/1, Amendment to the Basel Convention, undocs.org/UNEP/CHW.3/35.

58. "Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal," Basel Convention, accessed September 24, 2024, <https://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>.

59. UNEP, Decision BC-10/3 'Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention,' UNEP/CHW.10/28, (November 1, 2011), section A, para. 2, undocs.org/UNEP/CHW.10/28. COP10 decided that Article 17(5) of the Convention requires "acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment" for the amendment to enter force.

60. "Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal," UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3&chapter=27&clang=en.

Importantly, while NDCs are the most well-known flexible approach to treaty obligations, any form of implementing concrete goals and measures on a voluntary basis can lead to similar outcomes.

While, in theory, a “start-and-strengthen” approach can be effective in improving treaty provisions over time, initial provisions need to provide sufficient instruction to the Parties and mandate to the COP to build upon the initial treaty text. If there are provisions that rely only on voluntary approaches or no obligations at all, it is very difficult to make them mandatory, as this can only occur through an amendment to the treaty text or the creation of a new protocol or agreement. Importantly, amendments to treaties or protocols generally have similar procedures,⁶¹ take many years to negotiate, and require ratification by a certain number or percentage of Parties before they enter into force.

Flexibility

In treaties, provisions can be designed to be flexible without undermining the overall effectiveness by incorporating mechanisms that account for the diverse capabilities and circumstances of the Parties involved. For instance, treaties can include conditional implementation clauses, where the execution of certain obligations by developing countries depends on receiving financial support, technical assistance, technology transfer, or capacity-building. Flexibility can also be introduced through phased implementation schedules, allowing States to meet their obligations over different timelines based on their development status.⁶² Additionally, treaties might include provisions that permit modifications (amendments and/or adjustments), exclusions,⁶³ or relief from certain obligations under specific conditions, thereby accommodating unforeseen economic or environmental challenges without compromising long-term objectives.⁶⁴

Omission of Key Provisions in the Initial Treaty

Many treaties limit additional annexes to procedural, scientific, technical, or administrative matters, as is also proposed in the compilation draft final provisions.⁶⁵ Therefore, unless there is a provision in a treaty requiring a key substantive obligation along with an accompanying annex, any new obligations have to be created either through

61. See Vienna Convention on the Law of Treaties (VCLT), May 23, 1969, 1155 UNTS 331, art. 30; see also, Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Bloomsbury Publishing, 2011), 274.

62. See, e.g., Montreal Protocol, arts. 3, 5 and Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, October 15, 2016, UNEP/OzL.Pro.28/CRP.9 (October 14, 2016).

63. See, e.g., Minamata Convention, art. 6.

64. See, e.g., General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XX, April 15, 1994, 1867 UNTS 187, (GATT 1994).

65. UNEP, *Compilation of Draft Text of the International Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment**, UNEP/PP/INC.5/4 (July 1, 2024).

a future treaty amendment or protocol, the latter of which is not even included as a possibility in the compilation draft. Even in cases where a treaty explicitly instructs Parties to develop a protocol on a particular subject, it may not enter into force, as is the case with the Compensation and Liability Protocol of the Basel Convention.

The Option to Vote on Amendments and Decisions

For the COP to make decisions effectively, it must have the ability to vote.⁶⁶ Even if this possibility is seldom used, it often provides the needed incentive for Parties to find a compromise. Most MEAs — and the Compilation Draft of the plastics treaty — outline the proportion of Parties needed to approve a treaty amendment, as well as for annex amendment and the adoption of new annexes. One notable exception is the amendment of the Annex of the Rotterdam Convention for substances that require the prior informed consent (PIC) procedure. This Annex requires consensus for amendment, and, as a result, a small number of States have been able to block the addition of recommended substances over many years, contrary to the recommendations of the Convention’s own scientific body.⁶⁷

Additionally, MEAs often specify that the rules of procedure for the COP should be adopted by consensus, which has led to some States adding brackets to the rule that would enable the COP to vote. If a COP does not include a possibility to vote, each of the decisions it needs to take can lead to deadlock, and a handful of States that wish to do nothing can block the majority of Parties that want to take action.⁶⁸ To address this issue, provisions for the COP to vote on decisions can be included in the treaty text, as recently done in the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ).⁶⁹

Treaty and Annex Amendments

Treaty text is not commonly amended, but as noted in the section above on substantive conventions, amendments to annexes happen more frequently. There are several reasons for this. First, annexes often contain lists of items subject to treaty obligations. As new studies and information become available, additional items meet the listing criteria and

66. For details on the hazards of a COP unable to take decisions by vote, see CIEL, *Obstructionist Tactics in Decision-Making: Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution* (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/03/Obstructionist-Tactics-in-Decision-Making.pdf>.

67. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 22, para. 5, Annex III, September 10, 1998, 2244 UNTS 337. Chrysotile Asbestos,” Rotterdam Convention, accessed September 24, 2024, <https://www.pic.int/TheConvention/Chemicals/RecommendedtoCOP/Chrysotileasbestos/tabid/1186/language/en-US/Default.aspx>.

68. CIEL, *Obstructionist Tactics in Decision-Making: Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution* (CIEL, 2024), <https://www.ciel.org/wp-content/uploads/2024/03/Obstructionist-Tactics-in-Decision-Making.pdf>.

69. See, e.g., Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, June 19, 2023, art. 47, para. 5.

are included in the annex. Second, amendments to annexes do not generally require ratification⁷⁰ but often include an opt-out process, along with automatic entry into force after the period specified by the convention. Third, contrary to amendments of a treaty or protocol, treaty annexes can be modified with legal effect in a simplified procedure, namely, by a decision taken by the COP at the secondary level of treaty-making.⁷¹

As an example, under the Stockholm Convention, at least one of the three annexes — Annex A listing POPs for elimination, Annex B for restriction, and Annex C for unintentional production — has been amended at every COP since the fourth meeting in 2009, with some meetings adding multiple chemicals,⁷² while the text of the treaty itself has never been amended. In contrast, as noted previously, the treaty text of the Basel Convention was amended once, with the adoption of the Ban Amendment in 1995,⁷³ which did not enter into force until 2019.⁷⁴ In 2021, the Plastic Waste Amendments adopted in 2019 to Annexes II, VIII, and IX entered into force,⁷⁵ and the E-Waste Amendments to Annexes II, VIII, and IX, which were adopted in 2022, will enter into force in 2025.⁷⁶ The Liability and Compensation Protocol has only been ratified by twelve Parties, falling short of the twenty required for entry into force.⁷⁷

Another example is CITES — over the last fifty-plus years, the treaty text has only been amended twice — first to create a Secretariat⁷⁸ and second to allow regional economic integration organizations such as the European Union to become Party.⁷⁹ The Appendices where species are listed, however, are amended multiple times at each COP with the listing (or delisting in some cases) of species. What started as twelve pages listing species in the original Convention⁸⁰ has grown to include over 40,000 species today.⁸¹

70. Although treaties often do allow a Party to submit a notification that an amendment to annex will not apply to them without a national instrument of ratification; this does not change the procedure at the convention level because the Party is essentially opting out until they ratify the amendment. For example, “[i]n its instrument of ratification, acceptance, approval or accession, any Party may declare that, with regard to it, any amendment to an annex shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.” Minamata Convention, art. 30, para. 5.

71. Beyerlin and Marauhn, *International Environmental Law*, 276.

72. The new POPs under the Stockholm Convention,” Stockholm Convention, accessed September 24, 2024, <https://chm.pops.int/TheConvention/ThePOPs/TheNewPOPs/tabid/2511/Default.aspx>.

73. UNEP, Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/CHW.3/34, (October 17, 1995), para. 51; Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.3/35, Decision III/1, Amendment to the Basel Convention (November 28, 1995).

74. “Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,” UN Treaty Collection, accessed July 19, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3-a&chapter=27&clang=en.

75. “Plastic Waste Amendments,” Basel Convention, accessed September 24, 2024, <https://www.basel.int/Implementation/Plasticwaste/Amendments/Overview/tabid/8426/Default.aspx>.

76. “E-waste Amendments,” Basel Convention, accessed September 24, 2024, <https://www.basel.int/Implementation/Ewaste/EwasteAmendments/Overview/tabid/9266/Default.aspx>.

77. Basel Protocol on Liability and Compensation, Basel Convention, accessed September 24, 2024, <https://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>.

78. “Bonn Amendment to the Text of the Convention,” CITES, accessed September 24, 2024, <https://cites.org/eng/disc/bonn.php>.

79. “Gaborone Amendment to the Text of the Convention,” CITES, accessed September 24, 2024, <https://cites.org/eng/disc/gaborone.php>.

80. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Appendix I, March 3, 1973, 993 UNTS 243.

81. “The CITES Species,” CITES, accessed September 24, 2024, <https://cites.org/eng/disc/species.php> (includes species approved for inclusion at COP-19 in 2022).

Protocols

Protocols offer additional flexibility, but they may take many years to negotiate and enter into force, and often, not all convention Parties join. Protocols can also languish for many years,⁸² with significant uncertainty about whether they will ever enter into force. In some cases, sections of protocols may be modified more easily than treaty text. For example, this is the case with adjustments to Annex A of controlled substances under the Montreal Protocol. Unlike amendments to the Montreal Protocol, which must be ratified to enter into force and are only binding on the Parties that choose to ratify,⁸³ adjustments become binding on all Parties six months after formal notification, even for those Parties that did not vote in favor of the adjustment at the Meeting of the Parties.⁸⁴ Adjustments are, however, limited to further reductions in the production or consumption of controlled substances and related timing, as well as ozone-depleting potentials.⁸⁵

Role of the COP

While the COP plays an important role in implementing a treaty, it cannot, on its own, “strengthen” or modify treaty obligations. COP decisions that can create new obligations are amendments to treaty text or a new protocol, both of which require ratification by Parties to enter into force.⁸⁶ In MEAs, amendments to annexes can also modify existing obligations by adding or removing substances subject to existing control measures. They also generally allow Parties not wishing to be bound by the amendment to opt out rather than requiring each State to ratify the amendments.⁸⁷ General COP decisions usually cannot create new obligations that go beyond those in the treaty text⁸⁸ unless the treaty explicitly allows the COP to take a binding decision on an issue.⁸⁹ Resolutions, declarations, and guidelines are generally not considered legally binding but carry political weight and moral authority.⁹⁰

82. “Protocol on Liability and Compensation,” Basel Convention, accessed September 24, 2024, <https://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>.

83. Vienna Convention, art. 9, para. 4.

84. Montreal Protocol, art. 2, para. 9(c).

85. Montreal Protocol, art. 2, para. 9(a).

86. Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004), 406.

87. See, e.g., Stockholm Convention, art. 22; Minamata Convention, art. 27; CITES, art. XV.

88. Beyerlin and Maruhn, *International Environmental Law*, 273–276.

89. Daniel Bodansky et al., *International Climate Change Law* (Oxford University Press 2017), 90–91.

90. Yamin and Depledge, *The International Climate Change Regime*, 406. In limited circumstances a COP decision may be considered legally binding if it “evidences international customary law.”

Conclusion

UNEA resolution 5/14 and the recommended legally binding instrument to end plastic pollution “could include both binding and voluntary approaches, based on a comprehensive approach that addresses the full life cycle of plastic,” followed by an enumeration of sixteen different provisions that need to be included in the treaty, without prejudging what the obligations contained within those provisions will be.⁹¹ The provisions listed include objectives, sustainable production and consumption, national reporting, and compliance. As a framework or hybrid convention without obligations that are binding on Parties, however, the plastics treaty would merely be a “paper tiger” — appearing to be powerful but ineffectual and unable to withstand change.

Negotiations should not end if, by their scheduled conclusion in Busan on December 1, 2024, the draft treaty text does not contain a series of minimum mandatory obligations that ensure that the treaty goal is met through the implementation of the treaty, including but not limited to:

- Provisions on sustainable production and consumption
- Chemicals
- Product design
- Emissions and releases
- Substantive annexes

As well as provisions related to the implementation and functioning of the treaty over time, including but not limited to:

- Transparency
- National plans
- National reporting
- COP competencies
- Implementation and compliance
- Effectiveness evaluation
- Treaty amendment
- Adoption and amendment of annexes

INC Members have a significant and unique opportunity to create a new treaty that truly tackles the ubiquitous problem of global plastics pollution: they must not squander the opportunity by hastily concluding an ineffectual treaty.

⁹¹. UNEA resolution 5/14, para. 3

About CIEL

Founded in 1989, the Center for International Environmental Law (CIEL) uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL is dedicated to advocacy in the global public interest through legal counsel, policy research, analysis, education, training, and capacity building.

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