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In 2022, the **IUCN World Commission on Environmental Law (WCEL)** created the Plastic Pollution Task Force to provide insights and support to the Treaty negotiation process. The following briefing is a part of a set of ten targeted legal briefs are part of the present IUCN Submission for the third Intergovernmental Negotiating Committee to develop an international legally binding instrument on plastic pollution, including in the marine environment.

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**IUCN WCEL Briefings for Negotiators for INC-3**

*These are updated briefings of the INC-1 and INC-1 submissions, please note, and are considered version 3 – for submission to INC-3 as annexes for Forms A and B from IUCN. Further information can be found on <https://www.iucn.org/incplastics> - or by searching <https://www.iucn.org/search?key=plastics>.*

- **BRIEFING 1 of 10: Key Elements for Plastic Pollution Treaty**

**IUCN WCEL BRIEFING FOR NEGOTIATORS  
International Legally Binding Instrument INC-3 Session  
Key Elements for Plastic Pollution Treaty**

**Key Messages:**

In United Nations Environment Assembly (UNEA) resolution 5/14 and subsequent discussions at INC-1 and INC-2, the issue of elements of the International Legally Binding Instrument (ILBI) became quite important. Following INC-1, it was clear that the ILBI could benefit from many key elements developed throughout treaty practice, especially that of multilateral environmental agreements (MEAs). At the same time, the issues raised by plastic pollution and potential State responses are highly complex, often quite technical, and may require nuanced responses that are not necessary in other treaty regimes. These issues continued throughout INC-2, where discussions included some aspects of potential Treaty elements and it was agreed that further information would be gathered from States and stakeholders before the release of the mandated Zero Draft. Examining standard concepts from treaty regimes and MEAs allows for negotiations to focus on the ways in which these distinctions can be accommodated and benefit from the strengths of international law and established practice. In the main IUCN Submission in advance of INC-3, a number of elements for the ILBI have been proposed and the below sections are intended to complement these recommendations.

**1. Preamble**

What? The use of a preamble is a standard and accepted practice across international treaty law and regimes including but not limited to multilateral environmental agreements. As noted in UNEP briefing note 5 in advance of INC-1, the preamble includes historical and contemporary understandings that informed the creation of a treaty, along with potential nexuses with other treaty

regimes, and serves as an interpretive tool for the future. In this context, the drafting of the preamble will be critical to the ILBI.

How? The preamble may include historical references and treaty regime references, as well as emphasizing the core interpretive principles of international law that form the underlying terms of the ILBI. In this context, principles such as the polluter pays principle, the precautionary approach, national capabilities and circumstances, sustainable development, the rights of future generations and intergenerational equity could play a significant role in the framing of the ILBI in the preamble content. As was stressed by States during INC-1 and INC-2, the transboundary and interdisciplinary nature of plastic pollution is an important element for the ILBI to include. In this context, including this as a thread from the preamble onward could serve as a comprehensive tool for holistically addressing plastic pollution.

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

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

How? As discussed in the IUCN WCEL Briefing for Negotiators addressing the glossary of key terms, one way for the ILBI to maximize its legal and technical impact is through a strong and extensive set of definitions. These definitions could reflect the science of the plastics life-cycle as well as the role of science and scientific knowledge in plastic pollution and associated impacts. At the same time, they will need to retain some level of flexibility, perhaps linked to elements in the anticipated annexes, to accommodate advances in scientific and technological knowledge and capacities.

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

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

What? As highlighted in UNEP briefing note 5 in advance of INC-1, the scope of a treaty regime has taken on several classifications of format under MEA depending on the underlying objectives of the treaty. There is no requirement that a treaty regime use only one form of parameter for scope, especially in the context of the complex legal, regulatory and technical issues raised by plastic pollution.

How? The use of a combination of legal, regulatory and scientific parameters that can be measured

and reviewed could allow the ILBI to contain a holistic scope. This could be used for the generation of information on the treaty's effectiveness.

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

How? The principles designed could include ILBI Pollution Treaty, including the precautionary approach as well as national capabilities and circumstances, non-regression, progressive realization or progression, circularity, circular economy, and just transitions.

### **3. Core obligations, control measures and voluntary approaches, accompanied by Annexes**

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

How? In defining the core obligations of the ILBI, care should be taken to ensure that choices regarding binding and voluntary classification reflect the theoretical and practical implications of control and voluntary measures. At the same time, binding and voluntary obligations should be designed to be reinforcing and supportive of each other and the shared objectives and scope of the ILBI.

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

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

How? National action plans in the plastic pollution context should be centred on the fundamental issues posed by the problem at the national level and could also include provisions regarding subnational entities. In designing the requirements for national action plans, the bridge between law and science offers a strong option to ensure that the terms reflect the objectives, principles, scope and core obligations of the treaty regime. The plans would benefit from being cumulative in nature, allowing for an understanding of how past practices have/have not caused changes that can be



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further advanced into future laws and policies. National action plans can be valuable tools for government planning and implementation if they are carefully designed and if State Parties have assistance, such as technical and financial assistance, to alleviate the potential for excess burdens being placed on governmental entities. National action plans should be designed to increase ambition over time (“progression”) and contain a safeguard against regression (“non-regression”). It would be preferable that the national action plans be communicated on the same time, iterative for all State Parties rather than on staggered timelines. The content of national action plans should be informed by the objectives of the ILBI and designed to fulfil these objectives. In addition, the use of national implementation plans should be considered to serve as a potential complementary system in which State Parties.

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

In designing national action plan requirements, it would be important to ensure a structure that avoids duplication of information gathering and analysis with other international treaty reporting requirements. Given the financial and technical burdens of reporting on States, particularly SIDS and developing States, alleviating the pressures of duplication in reporting could result in more robust insights from the national action plans. This could also advance an understanding of how to coordinate their implementation in conjunction with other relevant national laws and international treaties.

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

How? The ILBI could consider the use of control measures and voluntary measures that facilitate scientific and technical cooperation and coordination between public sector actors and public-private actors. Additionally, as outlined in the main IUCN Submission in advance of INC-3, a dedicated subsidiary body on science-policy should be established as a core element of the ILBI governance system. As the negotiations for the creation of a Science-policy panel to contribute further to the sound management of chemicals and waste and to prevent pollution, as mandated in UNEA Resolution 5/8, progress, there should be efforts to bridge the work of this Panel with the ILBI.

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



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How? Effectiveness and accomplishment oversight for the ILBI could be a valuable tool if crafted in a way that thoroughly evaluates the legal and technical aspects of plastic pollution. This type of oversight could be entrenched through a recurring stocktake system similar to that adopted for the Paris Agreement or could be triggered by another measure, although a sense of predictability of assessment would be valuable. These stocktakes could be used to assess progress regarding plastic pollution at the national level and international level, adoption and implementation of laws and rules relating to plastic pollution, economic transitions away from plastics intensive industries, reductions in biodiversity loss connected with plastic pollution, and reductions in carbon emissions attributable to the plastics industry, to name a few potential options. This could be used to generate a reliable assessment process that could increase the legitimacy of the ILBI. Care would need to be taken so that the assessment system designed is sufficiently rigorous to allow for in-depth measures while also accommodating unforeseen situations that could have an impact on implementation. The Covid-19 pandemic highlighted this need across multilateral environmental agreements with reporting requirements as well as in the context of the Sustainable Development Goals.

What? Compliance in any treaty regime is essential to ensuring the viability of the treaty and the protections it contains. As UNEP briefing note 5 in advance of INC-1 highlights, recent trends in MEAs have been toward designing compliance mechanisms that are focused on using committees or similar bodies to provide non-punitive mechanisms of remedying failures of State Parties to comply. A primary example of this is the Paris Agreement Implementation and Compliance Committee. The design of compliance mechanisms is a necessary element of any treaty regime, and given the complex issues presented by plastic pollution and the different capacities of States to respond to these issues, the balance between finding non-compliance and designing a practical response can be critical.

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

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

What? As highlighted in UNEP briefing note 5 in advance of INC-1, capacity building has become an important element of many multilateral environmental agreements. Capacity-building was repeatedly stressed as integral to the ILBI by States experiencing all aspects of the plastics life-cycle during INC-1 and INC-2 discussions. To entrench the use of capacity building as integral in achieving the objectives of the ILBI, the design and adoption of a governance mechanism, such as the Paris Committee on Capacity-Building could prove useful.

How? Capacity-building in the plastic pollution context differs from that in the context of MEAs because of the complexity of the issues raised across environmental law as well as trade law and many aspects of human rights law. The inclusion of a nuanced understanding of capacity building needs in responding to plastic pollution could be valuable. When designing the governance mechanisms to be used in the ILBI, the inclusion of a dedicated mechanism for capacity-building could offer an important opportunity. Similarly, the inclusion of technical assistance and technology transfer elements in the ILBI could be used to entrench these aspects of equity within the objectives, scope and principles of the Treaty.



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What? UNEA resolution 5/14 includes specific reference to a financial mechanism to assist in implementing the ILBI. Thus, the financing issue was resoundingly discussed as a critical element of the ILBI by States and stakeholders during INC-1 and INC-2. It remains an issue for future negotiations and many States and stakeholders have stressed the need for any such mechanism to be functional and responsive from the outset of the ILBI's effective date onward.

How? Given the complex nature of plastic pollution and associated responses to it, the financial mechanism could be designed in a way that assists States in need of financial support across a variety of activities. To reflect the impacts and threats of plastic pollution on Small Island Developing States and developing States, the financial mechanism should include principles of equity in lending and financial assistance and provide priority to those States most in need of support.

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

What? The governance mechanism for the ILBI will be crucial to addressing the oversight and implementation of the Treaty, providing guidance, support and capacity-building to State Parties, and facilitating the adoption of either new amendment and annexes or new protocols and agreements. As UNEP briefing note 5 in advance of INC-1 highlights, standard MEA terms provide for a Conference of the Parties system for a treaty regime and a Meeting of the Parties system for other associated agreements. There is a variation in conference frequency across these treaty regimes. These conferences are typically the decision-making bodies for subsequent measures under the treaty. Increasingly, the Conference of the Parties system in multilateral environmental agreements has been used to facilitate the incorporation of civil society and the private sector in information sharing efforts.

How? The Plastic Pollution Treaty could adopt the Conference of the Parties system as a governance mechanism. If this decision is made, critical questions will include the frequency of conferences, the use of inter-sessional meetings, the location of conferences, the duration of conferences, and the extent of civil society and private sector engagement during the conferences. Interactions with Conferences of the Parties and similar governance systems for other treaties with overlapping interests could be a critical element to avoid duplication of legal efforts and ensure synergies in knowledge relating to the holistic impacts of plastic production, consumption and pollution. As suggested in the main IUCN Submission in advance of INC-3, in light of the pressing need to address plastic pollution at the global level, the Conference of the Parties should meet annually, with intersessional meetings similar to the UNFCCC system, and a strong stakeholder presence.

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

How? The complexities of issues involved in plastic pollution could make the use of subsidiary bodies within the ILBI integral to achieving its objectives and purposes. Based on the changing nature of law and technology in the realm of plastics, treaty terms creating specific subsidiary bodies as well as allowing for the creation of unspecified subsidiary bodies in the future could be quite useful to the implementation and responsiveness of the ILBI. For these reasons, the main IUCN Submission in advance of INC-3 proposes the creation of three standing subsidiary bodies, a Subsidiary Body for Science-Policy Advice, a Subsidiary Body for Implementation, and a Subsidiary Body for Regime and Organization Convergence.

## 7. Final provisions, including settlement of disputes

What? As noted in UNEP briefing note 5 in advance of INC-1, decisions regarding the use of reservations are central to the legitimacy of State intent to be bound by a treaty's terms. The idea of reservations has been discussed as an effort to balance sovereignty and international law, however in relation to topics such as environmental harms they are rarely used.

How? The decision regarding the use of reservations in the ILBI is a critical one in that it has the potential to shape the ways in which State Parties view their obligations and commitments. For these reasons, the main IUCN Submission in advance of INC-3 proposes that reservations expressly not be allowed for the ILBI.

What? In UNEP briefing note 5 in advance of INC-1, there is a discussion of the effective date of a treaty as potentially being linked to critical thresholds or State constituencies for the ability to meet the objectives of the ILBI. The methods used can include a required number of State Parties, State Parties constituting a combined required percentage of the activity or industry addressed in the treaty, and State Parties representing the largest sector of an industry or activity. These types of measures can be valuable for the legitimacy of a treaty in practice, since it will be difficult to attain the objectives and commitments of a treaty when the State most heavily involved in the targeted activities are not State Parties.

How? In recent examples, such as the Paris Agreement, a calculation was used to determine the necessary State Parties for entry into force. The complex nature of plastic pollution will make the use of a similar calculation difficult, however there are other potential factors to be considered for establishing the benchmark for entry into force. These could include: a majority of the plastic producing States, a majority of the plastic polluting States, a majority of the plastic consuming States, a majority of the States experiencing plastic pollution, or a combination of two or more of these factors. Reflecting the most common practice across international treaty systems and the need for the ILBI to become operational on a rapid schedule, the main IUCN Submission in advance of INC-3 proposes an effective date of ninety (90) days following the ratification of the ILBI by the fiftieth (50<sup>th</sup>) State Party.

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

How? Dispute settlement will be important to framing the oversight of the ILBI. In this context, a phased approach starting with good offices and mediation and escalating to the International Court of Justice where necessary could offer a path that allows the States involved and the Treaty to benefit from the experience of an increasingly environmentally aware international court that is also versed in intricate issues of sovereignty and international law. The inclusion of dispute settlement provisions within the main text of the treaty structure decided upon for the ILBI can be considered as an important element that should not be left for the conclusion of a subsequent instrument. For these reasons, the main IUCN Submission in advance of INC-3 proposes the use of internal methods of mediation followed by the ability to seek recourse at the International Court of Justice.

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