



WCEL
WORLD COMMISSION ON ENVIRONMENTAL LAW
COMMISSION MONDIALE DE DROIT DE L'ENVIRONNEMENT
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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 is one of a series of ten targeted legal briefs that 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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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 7 of 10: Legal Process of Treaty Negotiations

**IUCN WCEL BRIEFING FOR NEGOTIATORS
International Legally Binding Instrument INC-3 Session
Legal Process of Treaty Negotiations**

As part of the triple planetary crisis, pollution is one of the major drivers of biodiversity loss and ecosystem degradation, on land, in the air, in water and in the marine environment. At the same time, the human right to a healthy environment has been recognised by the UN and associated bodies.¹ Additionally, science increasingly has supported the many connections between the impacts of plastic pollution and damage to environmental and human health. While many multilateral environmental agreements (MEAs) address aspects of pollution, especially plastic pollution, none directly govern the full lifecycle of plastic production and pollution, including the many related areas such as trade law and human rights law. In 2022, the UNEA adopted Resolution 5/14, opening the process of negotiating an International Legally Binding Instrument on plastic pollution, including in the marine environment (ILBI).² The Resolution establishes parameters for the process of negotiating the ILBI and functions against the backdrop of international law as well as the established process for negotiating, drafting and creating benchmarks for the treaty creation in existing MEA practice.

There are many steps in the process of advancing from opening negotiations to concluding a final treaty and, for this reason, the IUCN World Commission on Environmental Law has issued the following brief outline for the legal process of treaty negotiations. This outline is framed within the context of the negotiations for an ILBI although this is meant to serve as an

¹ See UNGA, The human right to a clean, healthy and sustainable environment, A/76/L.75 (26 July 2022).

² UNEA, "End plastic pollution: Towards an international legally binding instrument," UNEP/PP/OEWG/1/INF/1 (10 May 2022).
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illustration of the general international law norms and practices. Thus, it is widely tailored to explain the common practices of treaty negotiation practice, using standardised terminology although this terminology may differ in practice across the various treaty negotiating systems.

1. Authorization of Treaty Negotiations

In order to begin a formal treaty negotiation process under the auspices of an international organization, it is necessary that there be an authorization of these negotiations by the appropriate governance body within the organization.³ The governance body authorized to make this decision is typically designated in the terms of the organization's foundational text or charter. For instance, UNEA Resolution 5/14 authorized the organization of the process of negotiations with the aim of creating a Plastics Treaty. Consequently, the Intergovernmental Negotiating Committee (INC) on Plastic Pollution was created.

The parameters of the treaty negotiations will be dictated by the terms of the authorizing instrument. For this reason, it is critical to fully understand the contents, intent and scope of the authorizing instrument as well as the procedural requirements it may set out for the negotiation process. These may be subsequently amended by the INC sessions.

2. Conduct and Timing of Negotiations

Much of the timing for the negotiations process is determined by the terms of the authorizing instrument. The questions raised by the timing of negotiations will focus on whether there is a timeframe for the final date of the treaty's conclusion. For example, UNEA Resolution 5/14 established the target ambition date of late 2024 for the conclusion of a draft treaty, with the hope that this would subsequently be adopted in 2025.

There is no limit to the number of sessions that may be held in a standard treaty negotiation, however considerations such as the viability of frequent meetings, the costs and burdens of frequent meetings, and the likelihood of benefits from frequent meetings may influence this decision. For instance, in the ILBI context, it was decided that there would be five INC negotiating sessions between late 2022 and late 2024 in order to generate the draft treaty. The decision was made to hold the events approximately every 5 – 6 months (November 2022, May 2023, November 2023, April 2024 and November 2024).

The question of location is also important for the treaty negotiation process. In some instances, there will be a decision to hold all negotiation sessions in one central location. For instance, over the course of the multiyear negotiations for the High Seas Treaty these sessions were consistently convened under the auspices of the United Nations Convention on the Law of the Sea (UNCLOS) and held in New York, where it is headquartered. In other instances, there may be a decision to hold each negotiation session in a different geographic region. Again, in the Plastics Treaty negotiation context, the decision was made to hold the opening INC – INC-1 – in Punta del Este, Uruguay, with subsequent INCs in France, Kenya, Canada and South Korea, respectively.

3. Role of Stakeholders and Observers

Depending on the scope of the authorization and mandate, stakeholders – whether intergovernmental organizations (IGOs), international organizations (IOs) or non-governmental organizations (NGOs) or scientific experts – have been invited to join the treaty negotiation process as observers. This is critical to ensuring that the expertise levels needed to address

³ For more background on treaty negotiation processes see Alexandra R Harrington, *International Organizations and the Law*, 1st ed (Routledge, 2018); Malcolm N Shaw, *International Law*, 9th ed (CUP, 2021).

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the triple planetary crisis are included throughout the treaty process, including scientific knowledge and vulnerable communities. The place of stakeholders is similar to their roles as observers in a number of international organizations. In this capacity, once accredited by the relevant organizing entity, stakeholders have the ability to attend negotiation sessions and, often, to make statements following the debates of States.

4. Intersessional Meetings

In addition to the main negotiating sessions, there is the possibility for intersessional meetings to be held where there are issues that would benefit from specific discussion prior to the next negotiating session. These are entirely optional, and their use will depend on assessments of factors such as potential utility, the viability of convening the States and stakeholders for them, and the feasibility of holding them if there is a short duration between the main negotiating sessions themselves. The ILBI is an example of a negotiation process where, thus far, the decision has been made not to hold intersessional meetings because of the tight timeframe for the overall negotiations. However, the INC and other partners have engaged in many webinars and events addressing critical topics to allow the discussion process to continue.

Additionally, it should be noted that in some treaty negotiations the States and stakeholders have the ability to submit comments in general or on specific questions raised by the organizing body during the intersessional period. These comments allow States to provide their own views on the issues being addressed in the treaty negotiation process, giving all States the opportunity to make themselves heard in advance of the negotiations and to help guide them. This has been the process in the ILBI negotiations to date.

5. Plenary Meetings and Contact Groups

During the negotiation rounds, meetings of States involved in the negotiations are referred to as plenary meetings. These meetings are places where all States can express their views and where formal, binding votes take place at the appropriate time. Depending on the boundaries established by the organizing body, accredited stakeholders will be seated as observers for the plenary meetings. This means that stakeholders have the ability to listen and, often, may offer interventions in the form of comments made following comments from States. Stakeholders typically do not have the opportunity to make comments during the voting discussions.

In standard procedure, contact groups – issue-focused meetings of smaller groups of States that take place outside the plenary meetings – may be established. The use of contact groups, which are headed by chairs approved by vote of the plenary session, is to clarify certain questions that have arisen and to report back to the plenary. There is no limit on the number of contact groups that can be created during any negotiation round, and they are open to all States that express an interest. Additionally, it is common for accredited stakeholders to be able to attend contact group meetings as observers although they are unable to participate in the discussions.

6. Decision-Making Mode

In the early rounds of treaty negotiations, the intent is to foster discussion and start to build consensus around issue areas and potential terms of the final treaty. When there is agreement by the States, the negotiations will switch from discussions to “decision-making mode,” during which proposals and votes on terms for inclusion in the draft of the treaty will be made. It should be noted that many negotiation rounds will feature both discussions and decision-making modes and that the shift between these phases will often focus on the readiness of the States to come to an agreement on a particular topic (for example, the structure of the treaty).

7. Zero Drafts

When significant progress has been made in the discussion portions of the treaty negotiations process, it is not uncommon for a “zero draft” of the treaty to be offered. This is not a binding document and does not mean that debates or discussions have concluded. Instead, the zero draft is used as a starting point for formal suggestions and proposals from States officially – or for stakeholders making suggestions – to advance toward the proposal of terms during treaty-making mode. In the context of the ILBI, INC-2 mandated that the Secretariat issue a zero draft in advance of INC-3.

8. Treaty Format

Generally, there are two options for the format of a treaty – a specific convention or a framework convention – although a hybrid option is always possible if approved by the States. The use of a specific convention structure involves a more thoroughly defined set of provisions in the body of the main treaty regime text and can be accompanied by an annex or series of annexes that contain more concentrated scientific and technical knowledge. In this context, the States wishing to become bound to the treaty sign onto the holistic combination of the main treaty terms and the annexes and become legally bound to that text provided they ratify it as required under their domestic legal requirements. Examples include the Montreal Protocol and the Basel, Rotterdam and Stockholm Conventions in the environmental law context, as well as the majority of human rights and trade law treaties.⁴

The use of a framework convention structure involves a less thoroughly defined set of provisions in the body of the main treaty regime text. Thus, the framework convention system functions to allow States the opportunity to commit to core principles and essential terms in the main text while relying on the use of protocols and subsequent agreements to codify scientific, technical and other issues. In this context, the States wishing to become bound to the treaty sign onto the framework convention from the outset. Subsequent protocols or agreements are negotiated separately, though within the parameters established by the framework convention, and must be ratified by each State. Should a State fail to ratify a protocol or agreement, it remains legal bound to the terms of the framework convention alone. Perhaps the most prominent example of this is the United Nations Framework Convention on Climate Change (UNFCCC).

In any treaty format, the use of a preamble is an important aspect for framing the definition and understanding of the issues to be addressed, the core foundational objectives of the treaty, and the interlinkage between the treaty and other existing treaties. For example, in the ILBI context it will be essential that the preamble reference core MEAs as well other human rights treaties and trade agreements.

9. Regime Convergence

There are many MEAs that have intersecting focus areas, and this is particularly true in the case of plastic pollution. For example, the UNFCCC, the Convention on Biological Diversity, and the Basel, Rotterdam and Stockholm Convention have direct connections. At the same time, it should be remembered that a treaty will have impacts in many other fields as well, such as human rights law and trade law. Therefore, a clear need for effective mechanisms of interaction between any new plastics treaty and other pertinent international regimes exists. This reflects recent efforts of Conferences of the Parties for various multilateral environmental

⁴ For a further discussion of these interrelationships, see IUCN WCEL Briefing for Negotiators, Treaty Regime Interaction (2023), available at <https://www.iucn.org/resources/information-brief/iucn-briefings-negotiators-plastics-treaty-inc-2-session-compilation>. IUCN WCEL Briefings for Negotiators for INC-3 (Intergovernmental Negotiating Committee to develop an international legally binding instrument on plastic pollution)



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agreements to create synergies and mechanisms of coordination between treaty regimes with overlapping terms and areas of regulation.

10. Voting Procedures

Voting procedures are crucial in any setting, and particularly in the context of a treaty negotiation. Typically, these are relatively standardized and agreed upon as a formality in the first round of treaty negotiations. The common practice in treaty negotiations is that each State has one vote and that regional entities may vote together as a block.

11. Approval and Adoption of Treaty Text

When the terms of the treaty have been agreed to by the States through the designated voting procedure, the entirety of the draft treaty text will be voted on by the States. Should this vote for the entirety of the treaty text be positive, the work of the negotiations will be complete but the treaty itself will not be legally binding. Instead, it will be forwarded to the body that requested the negotiations for review and for a vote on adoption. Assuming this body approves the text of the treaty, it will then adopt it and the treaty will be open for signatures. Following the national procedures for ratification, States will provide official notice when this is accomplished and at that point they will be bound by the terms of the treaty.

12. Date of Effectiveness of Treaty

It should be noted that one of the essential terms in any treaty is the designation of the date on which it goes into effect at the global level for those States that have become Parties to it. The choice of this date will reflect the priorities and concerns of those drafting the treaty in terms of ensuring that it has sufficient support to be meaningfully put into place. There are many options, including those that are more general – such as a designated date – or specific – such as when a certain number of States have ratified it or when a certain percentage of producing or consuming States have ratified it.