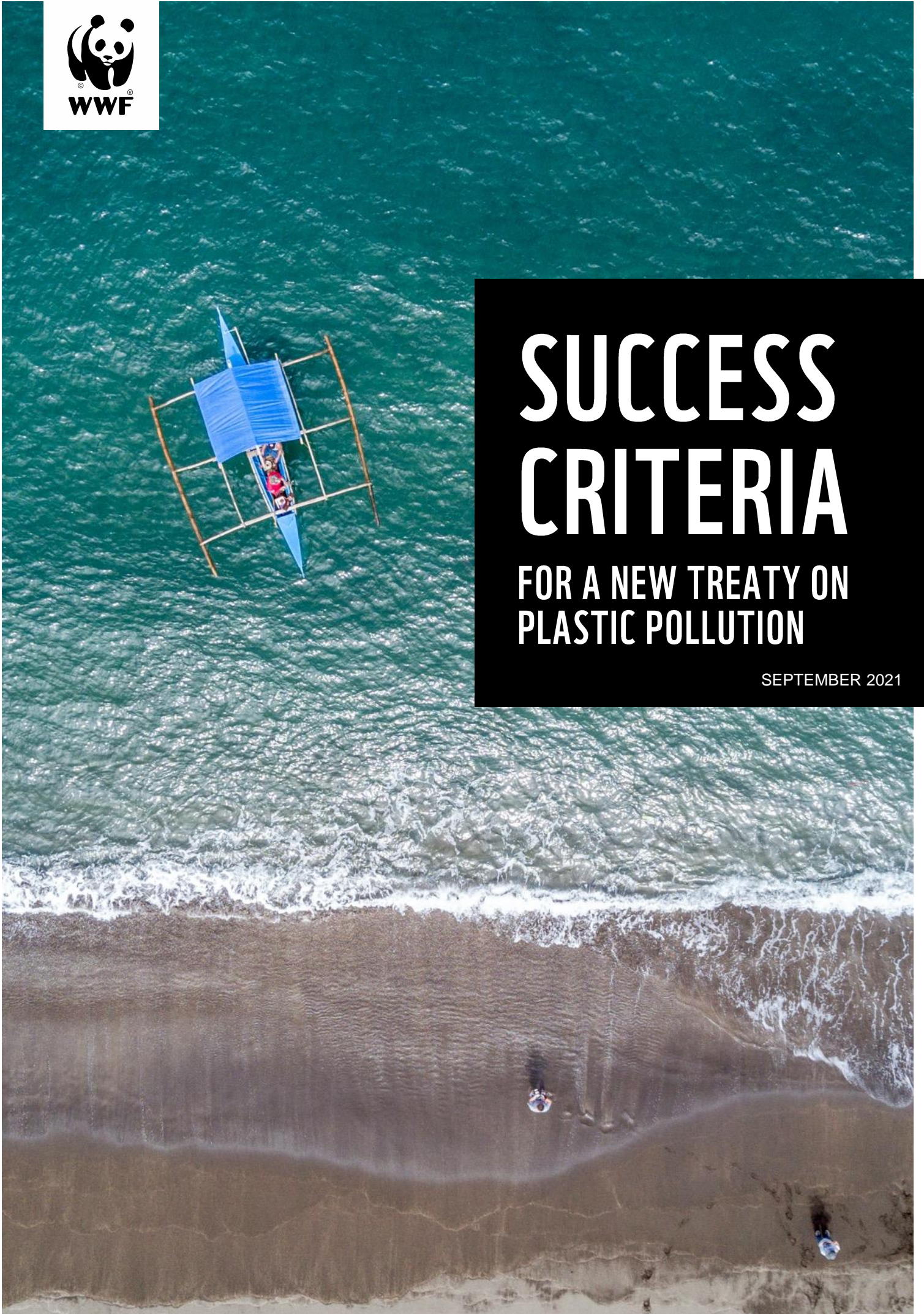




SUCCESS CRITERIA

FOR A NEW TREATY ON
PLASTIC POLLUTION

SEPTEMBER 2021



World Wide Fund for Nature (WWF)

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SUCCESS CRITERIA FOR A NEW TREATY ON PLASTIC POLLUTION

To protect nature and people from the harmful impacts of plastic pollution, we need an ambitious new legally binding international agreement that can hold States to a common standard of action. The new agreement must specify, through clear and universally applicable rules, what each State party will be required to do to tackle the problem, and it must include provisions to ensure that those rules can be evaluated and gradually strengthened over time. To have an impact, the new agreement must also be shaped in a way that promotes equity and incentivizes participation and compliance. An effective global response to plastic pollution will require significant changes to the policies and practices of all States. A new treaty should provide a credible roadmap towards the long-term goal of plastic free oceans.

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MOMENTUM IS BUILDING

A majority of UN Member States now supports the development of a new treaty on marine plastic pollution. This is a significant threshold, as it constitutes the number required for the United Nations Environment Assembly (UNEA) to take decisions. It is therefore increasingly likely that a decision to start formal negotiations will be taken at the resumed session of UNEA 5, in February 2022.

The case for a new treaty on plastic pollution is clear. Plastic pollution in the world's oceans is at record levels and rising by the day. Unless urgent action is taken, the problem will get progressively worse over the coming decades. Plastic litter is already harming many marine species and is likely to have an impact on human health in ways we do not yet fully understand. The absence of a dedicated global governance structure has left an accountability gap in the global management of plastics. A new international legal instrument is required to overcome the “commons dilemma” of plastic pollution.

With the prospects for adopting a negotiation mandate improving, the focus of the discussions has begun to shift, from *rationale* to *content*. Over the past year, several reports on the possible elements of a new treaty have been published, and more are in the pipeline. Multistakeholder dialogues have been initiated, and in September 2021, the first ministerial conference on marine litter and plastic pollution will be hosted by Ecuador, Germany, Ghana, and Viet Nam. A key purpose of that conference is to take further steps towards a new global agreement.

The start of formal intergovernmental negotiations will be a key milestone in the process towards a new treaty. It will signal that governments have accepted the need for a treaty and agreed to start discussions on what it should look like. The key question will no longer be why a treaty is needed, but what the treaty should contain. This will mark the start of a new and critical phase in the development of the new regime. The eventual outcome of the negotiations, a legally binding treaty text, will lay the foundations for actions and activities on all levels for decades to come and may to a large extent determine whether the international community will succeed in its efforts to effectively address the harmful impacts of plastic pollution.

The growing support for a new treaty is a very positive sign. It indicates that the international community recognizes the urgency of the problem and is ready to commit at the highest level, in a legally binding format, to tackle the problem of plastic pollution. This said, there are many stumbling blocks on the road to an effective global governance framework.

Too often, States have allowed consensus to trump ambition in multilateral environmental diplomacy. This tendency, combined with the

“There is a real risk that the negotiations will produce a paper tiger: a weak policy framework with a host of lofty visions and appealing principles, but few specific obligations to match them”

regulatory complexity of plastic pollution, means there is a real risk that the negotiations will produce a paper tiger: a weak policy framework with a host of lofty visions and appealing principles, but few specific obligations to match them.

Developing an effective treaty on plastic pollution will likely be more difficult than it was to put in place the legal frameworks on mercury or persistent organic pollutants. The ubiquity of plastics in the modern economy, the scale of the problem, and the uncertainty surrounding causes, effects, and response options puts the issue in a different category. To the extent that its solution will require transformative systemic change and cross-sectoral regulatory interventions, plastic pollution appears more akin to the problems of climate change or loss of biodiversity. On both those accounts, the international community has struggled to find effective international legal responses. Three decades after the adoption of the Convention on Biological Diversity (CBD), humanity finds itself in a biodiversity crisis, with at least ten thousand species going extinct every year. Similarly, thirty years after the adoption of the United Nations Framework Convention on Climate Change (UNFCCC), human activity continues to threaten the stability of Earth's climate.

The examples of CBD and UNFCCC underscore the importance of getting things right from the start in the negotiations on a new plastic pollution treaty. If done right, a new treaty can help States and other stakeholders overcome the urgent collective action problem posed by plastic pollution. By setting a common standard of action, a new treaty would create a level playing field across the plastic value chain, thereby accelerating industry transformation and existing voluntary initiatives.

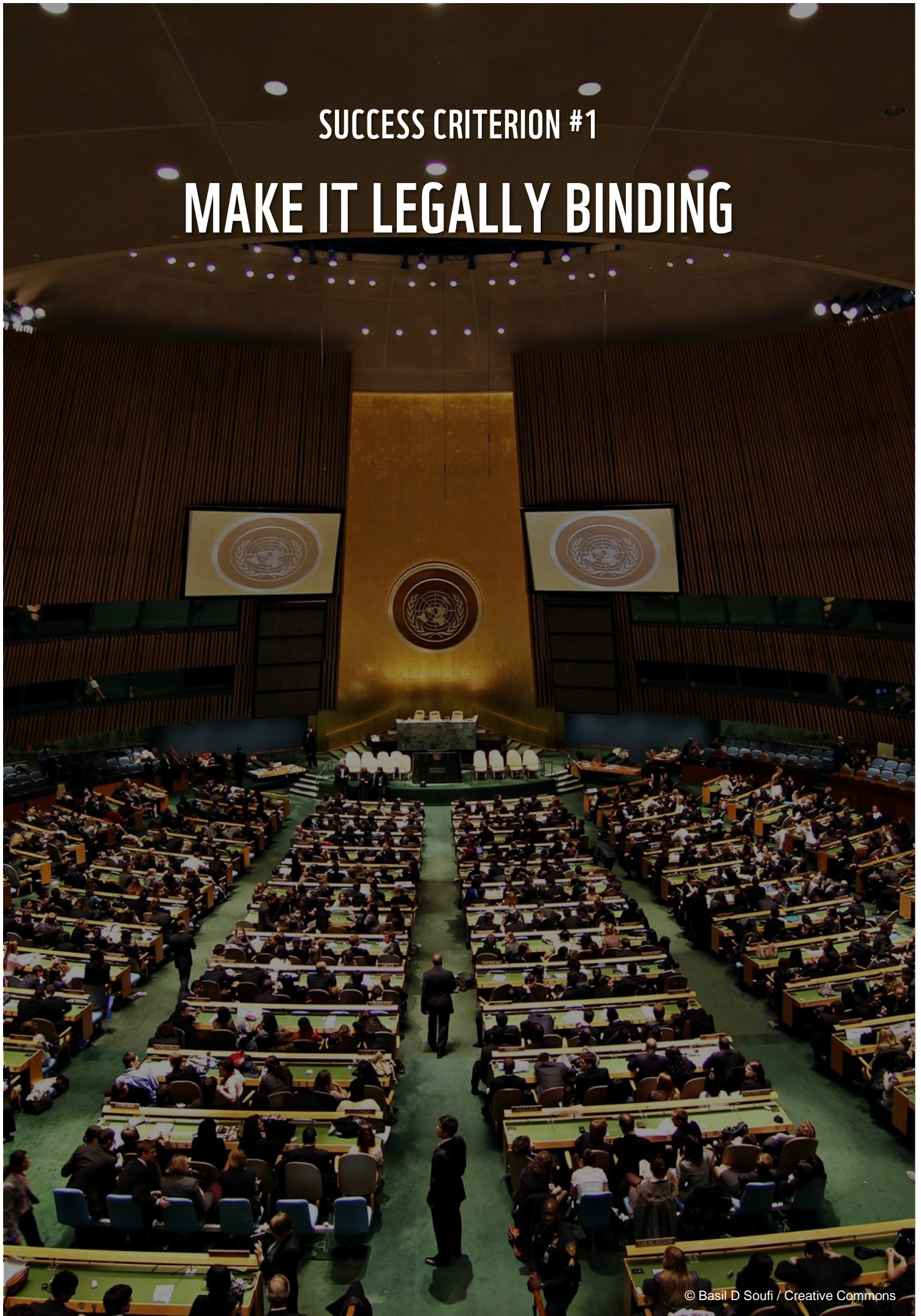
Every global issue is unique and requires a tailor-made response. But that does not mean that the wheel must be continuously reinvented. To ensure that the new plastic pollution regime gets off to the best possible start, negotiators should adopt an evidence-based approach, meaning that the development of the new treaty should be guided by extensive mapping and solid analysis of existing treaties and regimes, with a view to better understanding how past success might be replicated and past mistakes avoided.

The purpose of this brief is to highlight some of these lessons, and to translate them into a set of recommendations, or success criteria, for the design of the new agreement.

“If done right, a new treaty can help States and other stakeholders overcome the urgent collective action problem posed by plastic pollution”

SUCCESS CRITERION #1

MAKE IT LEGALLY BINDING



SUCCESS CRITERION #1: MAKE IT LEGALLY BINDING

To make sure States' commitments to tackle the problem are anchored at the highest possible political level, the new global agreement on plastic pollution should be legally binding.

KEYWORDS: legally binding, predictable, robust, reliable, highest level of commitment.

Agreements between States come in two main forms: legally binding and non-legally binding. Legally binding agreements are akin to *contracts* in domestic law. Non-legally binding agreements, or political agreements, can be thought of as pledges or promises between States to do or refrain from doing something. The key difference between legally binding agreements and non-legally binding international agreements is that the former is governed by international law, while the latter is not.

If an adequate response to a given issue requires a long-term commitment, it is better to spend some extra time to develop a legally binding agreement than to rush through a political declaration or a voluntary framework. By negotiating and concluding a legally binding instrument, States signal their intentions with special intensity and gravity. The commitments made in a legally binding instrument are generally viewed as less easily reversed and therefore more credible than non-legal pledges. Treaties can take time to negotiate, but, as with national laws, they are more predictable, robust, and reliable than strategies, political declarations, or voluntary frameworks.

For international *cooperation* problems, especially where negative externalities are involved, a high level of commitment from States is usually needed, which calls for the development of a legally binding instrument. For most States, the fact that an agreement is legally binding means it must be approved by the legislative branch of government (parliaments). This not only makes the process more public, more democratic, and less vulnerable to changes in the political leadership (executive branch), it is also an advantage during the treaty's implementation phase, which is likely to require new national laws to be developed. In most countries, this process will involve the same parliaments.

States must make credible, durable, and robust commitments to tackle the transboundary problem of plastic pollution. This can only realistically be achieved through a legally binding instrument.

“Treaties can take time to negotiate, but, as with national laws, they are more predictable, robust, and reliable than strategies, political declarations, or voluntary frameworks”

Good examples:
UNCLOS,
VGPOL/Montreal,
Basel, Stockholm,
Minamata,
CLRTAP,
MAREPOL, etc.

Bad examples:
GPA, NYDE.

A white plastic bag is shown floating in the middle of a clear blue ocean. Above the bag, a large, dense school of small fish swims in a circular pattern. The background shows a dark, rocky seabed with some coral or algae. The overall scene is underwater, with sunlight filtering through the water.

SUCCESS CRITERION #2

**BE SPECIFIC
ABOUT WHAT STATES
MUST DO**

SUCCESS CRITERION #2: BE SPECIFIC ABOUT WHAT STATES MUST DO

The rules, standards and requirements included in the new treaty should be specific and unambiguous, and they should be applicable to all States parties. The treaty should set a high common standard of action.

KEYWORDS: specific, clear, unambiguous, binding, feasible, common, time-bound, proportional.

A key purpose of any multilateral treaty is to set a common standard of action that, if faithfully implemented by a critical mass of States, will effectively address the issue in question. This way, successful treaties produce shared expectations about principles, norms, rules, and decision-making procedures, and about the change in human behaviour needed to resolve the issue of concern. The identification of these rules—this common standard of action—will be one of the key challenges in the negotiations on a new treaty on plastic pollution. Precisely what should the treaty require States to do—or refrain from doing?

In their efforts to identify clear and effective global rules, States should consider the full range of possible regulatory measures, throughout the plastic life cycle—from prohibitions on the production, use and/or sale of plastic products to technical requirements for recycling and waste management—and they should prioritize those regulatory measures with the highest expected effect on reducing the negative impact of transboundary plastic pollution. With a view to minimizing regulatory complexity, States should also consider structuring the policy measures into subcategories based on information about use patterns, leakage risk or other relevant parameters. This could mean, for instance, developing detailed requirements aimed at reducing the discharge of products such as single-use plastics and fishing gear, as these are known to have a high risk of leakage and a significant negative impact on biodiversity.

“States should consider the full range of possible regulatory measures, throughout the plastic life cycle, and they should prioritize those regulatory measures with the highest expected effect on reducing the negative impact of transboundary plastic pollution”

The rules, standards and policy measures included in the treaty should be applicable to all States parties, as a common standard of action. They should be unqualified, measurable, enforceable and, where relevant, have clear deadlines. And they should be designed using the best available techniques and best environmental practices. The actions required by each State party should be ambitious, but also achievable, and they should not go beyond what is required to reach the treaty’s objective.

Good examples:
VCPOL/Montreal,
Basel, MARPOL
Annex J, RWQ.

“It is better to adopt a treaty with a narrow thematic scope and realistic objectives than a broad-ranging aspirational treaty with lofty visions that are poorly defined”

In general, it is better to adopt a treaty with a narrow thematic scope and realistic objectives than a broad-ranging aspirational treaty with lofty visions that are poorly defined. Treaties are meant to codify norms and rules, not to serve as platforms for expression of vague political commitments. For States parties, there should be no doubt as to what is required of them.

The use of deliberate ambiguity, non-binding provisions and qualified formulations should be avoided. If the treaty text does not commit the States parties to a clear common standard of action, the gap between the actions taken (or declared) and the actions needed to solve the problem will most likely continue to grow. It is better to adopt a limited number of strict and enforceable global standards and rules than to agree on a broad range of loose and unverifiable commitments and voluntary national contributions.

Bad examples:
UNFCCC/Paris Agreement, CBD, UNCED, ECOC.

The new treaty's core provisions should legally commit States to comply with a common set of specific and proportional rules. Common, to avoid perceptions of unfairness and provide a basis for mutual accountability. Specific and proportional, to avoid ambiguity, ease implementation, promote efficiency, and facilitate reporting, monitoring, verification and enforcement. In sum, the core provisions should, if faithfully implemented, provide a credible solution to the problem of plastic pollution.

SUCCESS CRITERION #3

PREPARE FOR GRADUAL STRENGTHENING



SUCCESS CRITERION #3: PREPARE FOR GRADUAL STRENGTHENING

The new treaty should set up a mechanism for monitoring progress and evaluating efforts. It should also specify procedures that allow the regime to be gradually strengthened over time.

KEYWORDS: adaptable, flexible, scientific body, monitoring, reporting, majority decision-making.

Some global problems have relatively simple solutions. Plastic pollution, however, is a complex issue to regulate, which is illustrated by the fact that no single country on the planet has managed to eliminate it entirely. For complex problems, where there is scientific uncertainty about causes and effects, a lack of viable alternatives, and limited knowledge about the long-term effectiveness and cost-efficiency of policy measures, a start-then-strengthen approach might be required. Concretely, this may, for instance, lead to the creation of a framework convention with protocols.

There are many examples of treaties that have started off with a relatively modest framework, and then gradually strengthened the common standard of action. For some regimes, this has taken time (e.g., MARPOL), while other regimes (e.g., VCPOL/Montreal) have managed to do so with impressive speed. There are three keys to making this approach a success:

Good examples:
VCPOL/Montreal,
MARPOL, CLRTAP.

Bad examples:
UNFCCC, CBD,
UNCCD, FCTC.

First, the treaty should set up a system for monitoring progress and evaluating efforts. This typically means national reporting requirements, some sort of international monitoring system, and conferences to review the implementation of the treaty. More comprehensive stocktaking exercises could also be considered, such as the 5-yearly “global stocktake” process established by the parties to the Paris Agreement.

Good examples:
CBD, CITES, CMS,
Ramsar, UNCCD,
ICRW, UNFCCC
(IPCC)

Second, the regime should enable parties to proactively develop new knowledge about the causes and effects of plastic pollution, and to use this to inform policy development. This could be achieved by establishing one or more dedicated scientific bodies. A mechanism for promoting technical innovation and the development of new and more cost-efficient response options could also be considered.

Third, the new treaty should have provisions that specify how the original agreement can be amended (tightening control measures, shortening timetables, adding new substances in annexes) and how additional instruments can be adopted (protocols, annexes, appendices). The key to preventing gridlock and allowing the regime to be gradually strengthened over time is to avoid a formal consensus requirement.

Good example:
VCPOL/Montreal,
MARPOL, Basel,
Stockholm,
Minamata.

Bad example:
CCW.

The decision-making threshold for strengthening the treaty should reflect the initial entry-into-force requirement of the agreement and would ideally be structured as a ratchet mechanism, whereby strengthening is easier than weakening. If attempts at expanding and strengthening the regime in the future can be blocked by a handful of disinclined States, the treaty risks ending up as an obstacle to—rather than a vehicle for—change.

SUCCESS CRITERION #4

INCENTIVIZE PARTICIPATION AND COMPLIANCE



SUCCESS CRITERION #4: INCENTIVIZE PARTICIPATION AND COMPLIANCE

The new treaty should provide a robust structure for promoting participation and compliance, and for supporting States in their implementation of the treaty's core provisions.

KEYWORDS: verifiable and enforceable core provisions; transparency, fairness, accountability, legitimacy, and responsibility; financial and technical implementation support.

A high common standard of action will only produce environmental benefits if it is faithfully implemented. International obligations must be incorporated into domestic legislation and translated into the required behavioural change (be it as individuals or as representatives of a company or an organization). For multilateral treaties, this is a two-step process.

First, States must agree to be bound by the new treaty, which is done through a process of signature and ratification or accession. When a certain number of States consent to being bound by the treaty, it enters into force as an instrument of international law. It will then be binding for the parties to the agreement. If well designed, the entry-into-force threshold will serve as a tipping point: once a certain number of States have joined, it will be increasingly disadvantageous to remain outside the regime. This would push the treaty steadily towards universal participation.

The second step is implementation and compliance. Even if a high number of States decides to participate, there is no guarantee that the common standard of action will be implemented in practice. For various reasons, and despite the principle of *pacta sunt servanda* (agreements must be kept), States are often unwilling and/or unable to comply with the legal obligations they have undertaken. That is why treaties, to be effective, must contain a strong structure for promoting, supporting, and incentivizing implementation and compliance. Since the international system does not have a global executive branch with law enforcement powers, the compliance system must be embedded into the treaty itself, for instance in the form of trade restrictions or certification procedures.

Several factors determine the prospects for participation and compliance in treaties. Most importantly, States must be provided with strong incentives to join. The cost of not participating ('free riding') should, over time, be higher than the cost of participating and complying with the treaty. In short, the treaty should deliver net long-term benefits to its parties, making participation the rational course of action. This does not mean that a treaty must be profitable for all parties—for international environmental agreements that is rarely the case—but it means that the cost of joining the regime and complying with the common standard of action must be a lower than the cost of *not* doing so. To achieve this, it will be important to make sure that compliance can be verified, and, if necessary, enforced. This in turn underscores the importance of making the core provisions specific, unambiguous and, where relevant, measurable. It also helps if the impact

Good examples:
YCPO/Montreal,
Basel, MARPOL,
Annex I, Minamata.

Bad examples:
UNFCCC/Paris
Agreement, CBD,
UNCCD, ECTC.

“The extent to which States parties prioritize implementation of the treaty’s obligations is likely to improve if each party can be confident that the others carry their fair share of the burden”

of the treaty can be monitored, for instance in the form of reduced leakage rates of plastic into the ocean.

The prospects for faithful implementation will also improve if the regulatory scope of the agreement is perceived as legitimate by the States parties. Self-determination and national sovereignty remain key principles of the international community. A treaty aiming to tackle issues that States believe are more appropriately dealt with on a national level, may be perceived to infringe on those principles. It is easier to generate broad support for a treaty if the issue the treaty seeks to address has clear transboundary causes or effects, or if the treaty generates benefits that would not have been possible to obtain without international cooperation. For plastic pollution, this suggests that a primary focus should be placed on the transboundary properties of the problem.

A focus on transboundary plastic pollution does not mean that a new treaty's core provisions will be implemented exclusively through interactions between States. The plastic in the world's oceans has, at one point, found itself within the jurisdiction of a State. A key purpose of a new treaty would be to prevent this plastic from becoming transboundary plastic pollution. And, of course, any piece of plastic litter could potentially end up in the ocean, or in another country. It could therefore be argued that the risk of leakage makes all plastic pollution a transboundary concern.

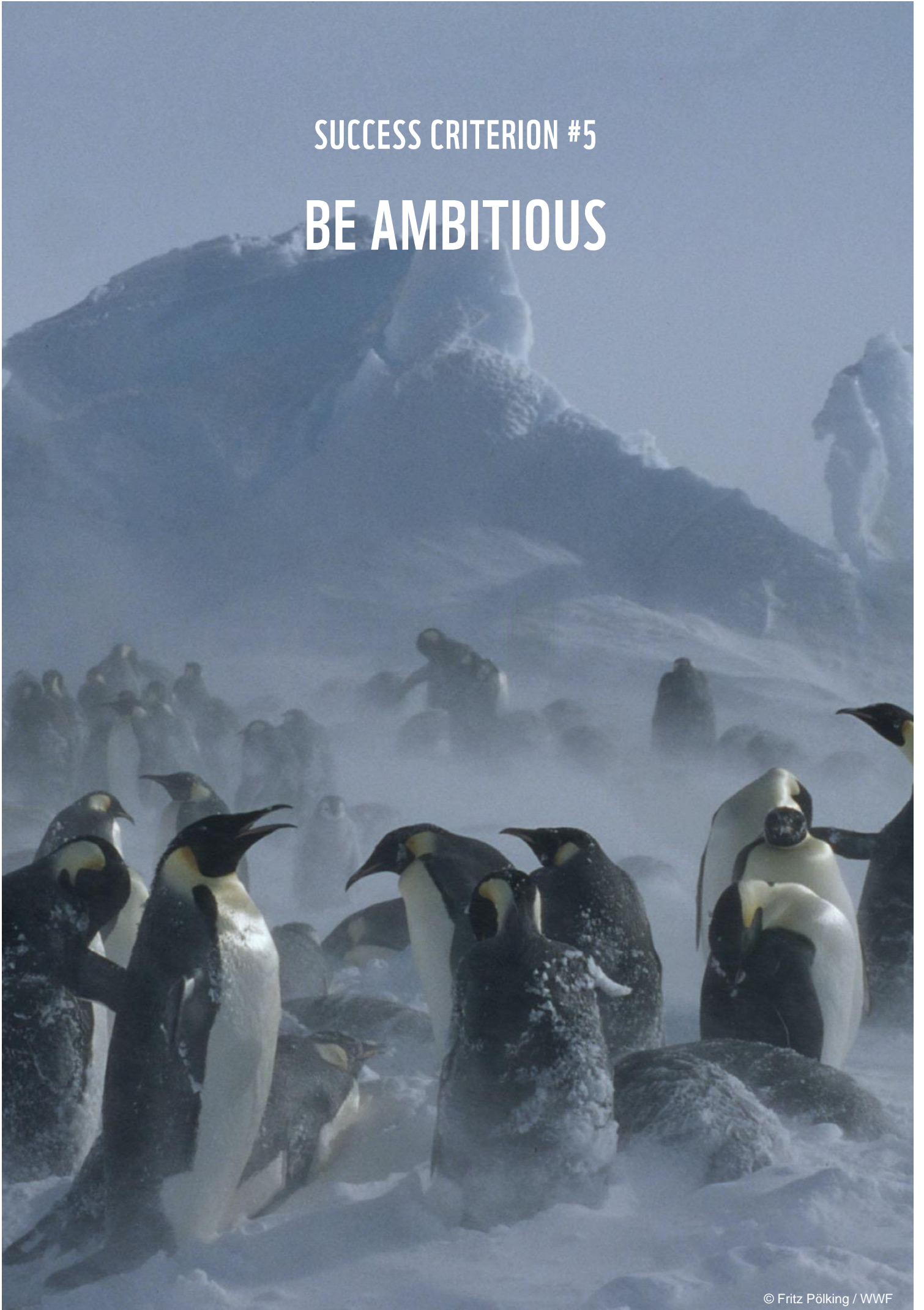
The extent to which States parties prioritize implementation of the treaty's obligations is likely to improve if each party can be confident that the others carry their fair share of the burden. This calls for transparency, reporting and information sharing. Combined with specific, measurable, and time-bound national obligations, this should produce a sense of accountability, which is key to the success of the treaty.

A sense of fairness is also central to the long-term viability of the regime. In general, it is therefore better to adopt a treaty that is balanced, just and equitable than to adopt a treaty pushed through by the most powerful States. If an international order or framework is perceived as unjust, it will eventually be challenged. Ideally, the treaty should contain a mix of measures that, over time, provide positive incentives for all States to participate, and that minimizes long-term grievances.

Finally, accountability must also be coupled with implementation support. On aggregate, the international community will be able to do more to tackle the problem if resources are distributed in a way that maximizes cost-efficiency and supports low-income States parties in their efforts to implement their obligations. For most environmental treaties, this means setting up a dedicated and well-resourced financial mechanism, possibly combined with a system for transfer of technology and knowledge. Similarly, a policy toolkit or clearing-house mechanism to promote sharing of best-practices could also serve to catalyse overall implementation of the treaty's obligations.

SUCCESS CRITERION #5

BE AMBITIOUS



SUCCESS CRITERION #5: BE AMBITIOUS

The new treaty should provide a credible roadmap to the long-term goal of plastic free oceans. Negotiators should not allow the overall level of ambition to be determined by the least interested States.

KEYWORDS: ambitious, meaningful, high common standard of action, critical mass, majority voting, consensus, rules of procedure.

An effective response to plastic pollution will require significant changes in the policies and practices of all States. If no action is taken, the amount of plastic ending up in the ocean each year ~~could triple by 2060~~, with devastating consequences for nature and people. Already today, plastic waste is choking our planet—polluting the air, water, and soil that people and nature need to survive. The task ahead is considerable, and the level of ambition contained in a new treaty must reflect that.

A treaty's overall ambition level is not easily defined: it is a function of all its constituent elements, and how these interact. A treaty can have a highly ambitious long-term goal but ~~lack the tools and mechanisms to achieve it~~. It can contain specific and proportional core provisions but ~~lack the means to promote participation~~ and compliance. Or it can have all the right elements but get ~~stuck in limbo~~ because of unrealistic entry-into-force requirements. In sum, the overall ambition level is an indication of how far States are willing to go—of how much political and financial capital they are willing to invest—to achieve a collective goal.

It might seem a waste of words to point out that a new treaty on plastic pollution should be ambitious. But sadly, the history of environmental treaty making suggests that ambition is something that must be fought for and protected throughout the negotiation process. Too often, the aspirations and aims of the most progressive States end up being sacrificed in the name of compromise. This points to one of the key risks when it comes to ensuring that the new treaty is ambitious: consensus decision-making.

“When any participating State can veto any proposal, the best you can hope for is a consolidation of status quo”

In multilateral treaty making processes, consensus is something to strive for, but it must not be seen as a formal procedural requirement. When any participating State can veto any proposal, the best you can hope for is a consolidation of status quo. This is also why the standard decision-making rule for the adoption of treaties at international conferences is by a two-thirds majority vote (VCLT, Article 9(2)). It is also why global treaties do

“The overall ambition level is an indication of how far States are willing to go—of how much political and financial capital they are willing to invest—to achieve a collective goal”

not require ratification or accession by *all* UN Member States to enter into force.

The standard practice when negotiating new international environmental agreements is to allow for the option of voting. The rules of procedure for the negotiations on the Rotterdam Convention, the Stockholm Convention and the Minamata Convention all specify that every effort should be made to reach consensus, but that decisions on substance could, if consensus could not be reached, be taken by two-thirds majority vote. The reason for this is clear: majority decision-making usually produces better results than consensus or unanimity. In the long run, moreover, it is usually easier to increase participation than to change the text of the treaty. It is therefore better to adopt an ambitious treaty with a critical mass of States on board than to accept a weak treaty by consensus.

Good examples:

Rotterdam,
Stockholm,
Minamata.

Bad examples:

ATT

AN UNPRECEDENTED OPPORTUNITY

The broad and growing support for the start of negotiations on a new treaty on marine plastic pollution is a beacon of hope for marine wildlife and coastal communities around the world. It provides an unprecedented opportunity for the international community to turn the tide on plastic pollution. The call for a new treaty is backed by a large number of civil society organisations, academic experts, businesses and concerned individuals.

We have no time to waste. The complexity of the issue of plastic pollution, combined with a culture of consensus decision-making in multilateral governance, entails a risk that the negotiations will fail to deliver an effective global response to plastic pollution. This risk needs to be addressed from the very beginning. As the process towards a new plastic pollution treaty is about to enter its most crucial phase, prospective negotiators should do what they can to avoid repeating past mistakes, and to draw the most relevant lessons from past successes.

If done right, the new treaty can become a vehicle for positive global change, as the Montreal Protocol was for the protection of the ozone layer. The new treaty can be the tool that turns the vision of a plastic free ocean into a realistic and achievable objective—the kernel in the international community’s efforts to combat this urgent environmental problem. By acting with courage, conviction and determination, negotiators of the new treaty can set a new standard for multilateral environmental governance—a standard attuned to the pressing threats to the sustainability and diversity of life on earth.

WWF has five key recommendations:

- 1. To make sure States’ commitments to tackle the problem are anchored at the highest possible political level, the new global agreement on plastic pollution should be legally binding.**
- 2. The rules, standards and requirements included in the new treaty should be specific and proportional, and they should be applicable to all States parties. The treaty should set a high common standard of action.**
- 3. The new treaty should set up a mechanism for monitoring progress and evaluating efforts. It should also specify procedures that allow the regime to be gradually strengthened over time.**
- 4. The new treaty should provide a robust structure for promoting participation and compliance, and for supporting States in their implementation of the treaty’s core provisions.**
- 5. The new treaty should provide a credible roadmap to the long-term goal of plastic free oceans. Negotiators should not allow the overall level of ambition to be determined by the least interested States.**

GLOSSARY OF TERMS

Basel	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
BWC	Biological Weapons Convention
CBD	Convention on Biological Diversity
CCW	Convention on Certain Conventional Weapons
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLRTAP	Convention on Long-range Transboundary Air Pollution
FCTC	WHO Framework Convention on Tobacco Control
GPA	Global Programme of Action for the Protection of the Marine Environment from Land-based Activities
ICRW	International Convention for the Regulation of Whaling
IPCC	Intergovernmental Panel on Climate Change
MARPOL	International Convention for the Prevention of Pollution from Ships
Minamata	Minamata Convention on Mercury
Montreal	The Montreal Protocol on Substances that Deplete the Ozone Layer (supplementary to VCPOL)
NYDF	New York Declaration on Forests
Paris Agreement	Supplementary agreement to the UNFCCC
Rotterdam	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
Stockholm	Stockholm Convention on Persistent Organic Pollutants
UNCCD	United Nations Convention to Combat Desertification
UNCLOS	United Nations Convention on the Law of the Sea
UNEA	United Nations Environment Assembly
UNFCCC	United Nations Framework Convention on Climate Change
VCPOL	Vienna Convention for the Protection of the Ozone Layer

A FUTURE IN WHICH HUMANS LIVE IN HARMONY WITH NATURE



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