

Why Framework Convention Design is the Ideal Design for the New Instrument for Torture-Free Trade?

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Submission to the Stake Holders' Consultations of the Group of Governmental Experts created under United Nations General Assembly resolution 73/304

17 December 2022

Designing international legal instruments involves a series of choices which largely determines their credibility and effectiveness. These include, for example, the choice between a binding treaty or a soft law instrument, the inclusion of a provision about a dispute resolution body or a monitoring, reporting, and verification mechanism. While there are different design options available, when treaties are binding and when they include a strong enforcement mechanism, they tend to be more credible.¹ In addition, different legal problems require different treaty designs.² In this short intervention, I would like to make a case for designing the new instrument in the shape of a binding framework convention. As my intervention will argue, the framework convention model can offer solutions to several of the questions discussed today.

Let me begin by emphasizing that the framework convention model offers a flexible approach to treaty-making.³ In essence, the framework conventions have two parts: the main treaty text ensures a general commitment from the State parties, and the protocols/annexes provide details, specific regulations, and technical standards.⁴ This enables treaty makers to define a clear problem in general terms and to identify negotiation parties when drafting the convention. The conventions, therefore, establish the basic principles, institutions, and decision-making mechanisms. Then, the protocols or annexes set the standards in a more concise manner.⁵

This model has been successfully used in several international environmental law treaties and a few other treaties not related to the environment. For example, the UN Environmental

¹ Andrew T. Guzman, "The Design of International Agreements," *European Journal of International Law* 16, no. 4 (September 1, 2005): 579–612.

² Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge: Cambridge University Press, 2016).

³ For more on the application of framework conventions, see Daniel Bodansky and WHO Tobacco Free Initiative, "The Framework Convention/Protocol Approach," 1999, <https://apps.who.int/iris/handle/10665/65355>.

⁴ For more, see Nele Matz-Lück, "Framework Conventions as a Regulatory Tool," *Goettingen Journal of International Law* 1, no. 3 (2009): 439-458.

⁵ See for example, Lawrence O. Gostin, "A Proposal for a Framework Convention on Global Health," *Journal of International Economic Law* 10, no. 4 (December 1, 2007): 989–1008, <https://doi.org/10.1093/jiel/jgm039>.

Program (UNEP) has promoted the creation of various treaties as framework conventions (e.g. the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer). The UNGA also initiated the UN Framework Convention on Climate Change (UNFCCC) negotiations, and the International Maritime Organization (IMO) provided the institutional framework for several conventions on marine pollution from ships (e.g. International Convention for the Prevention of Pollution from Ships – MARPOL).

The framework convention model has several advantages. First, it allows incremental progress. States can commit to addressing an issue without waiting for a consensus around appropriate measures.⁶ Second, different from the traditional forms of treaty-making, framework conventions embody a more inclusive amendment procedure. What makes this different and innovative is that it allows flexible amendment processes and more input from the scientific community. New information or lessons learned from scientific or technological discoveries can be fed into existing legal structures. As a result, the treaty at issue can be more adaptive to the emerging challenges with the input from epistemic communities and experts.⁷

Third, the amendment process is also swifter. Amendments to the protocols or annexes take an effect without involving a long negotiation process. For example, the regulations concerning the 1946 International Convention for the Regulation of Whaling (the Whaling Convention) could be amended by a qualified majority vote on a scheduled basis.⁸ MARPOL operates on the tacit acceptance amendment procedure. This is to say, the changes to the annexes can come into force unless an objection is lodged within a certain period of time. The swiftness of the amendment process does not necessarily mean that the outcomes of amendment procedures are trivial. Rather, they may have wider implications. For example, the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has regularly re-adjusted its trade-restricting measures to include newly identified endangered species of flora and fauna. It has also developed new regulatory measures (e.g. establishment of a quota system)—different from what was envisaged in the treaty itself through amendment of appendices.

The flexibility and adaptability of framework convention model can help the members of this Group to address several of the issues on the agenda:

- (i) *Scope of the goods to be included:* Following the framework convention model, several goods of different natures can be added in different protocols or annexes. There could be a separate annex banning goods whose sole purpose is to torture individuals and subject them to inhuman or degrading treatment and a separate annex banning products

⁶ Daniel Bodansky, “The United Nations Framework Convention on Climate Change: A Commentary,” *Yale Journal of International Law* 18, no. 2 (1993): 494.

⁷ Thomas Gehring, “Treaty-Making and Treaty Evolution,” *The Oxford Handbook of International Environmental Law*, August 7, 2008, <https://doi.org/10.1093/oxfordhb/9780199552153.013.0020>.

⁸ The regulations are covered under the Schedule, which also “sets out catch limits for commercial and aboriginal subsistence whaling.” For more, info <https://iwc.int/convention>.

that are for capital punishment. Two separate annexes can regulate dual use items that have a legitimate purpose—one for torture, and another one for capital punishment.

- (ii) These design features can help with tackling the question around *whether to address the death penalty on an equal footing with torture or other cruel, inhuman or degrading treatment or punishment*. Since each category could be banned or regulated under a separate annex, when signing onto or ratifying the instrument, States can choose which annexes they accept and easily opt out of the one they do not wish to be bound by.

Annex:

Examples of Framework Conventions

- The Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer
- The UN Framework Convention on Climate Change (UNFCCC)
- The International Convention for the Regulation of Whaling (the Whaling Convention)
- The 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL)
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (and its Appendices I, II, and III)
- The Convention on Biological Diversity and its Cartagena Protocol on Biosafety
- The WHO Framework Convention on Tobacco Control (FCTC) and its Protocol to Eliminate Illicit Trade in Tobacco Products
- The European Framework Convention for the Protection of National Minorities
- The UN Convention to Combat Desertification (UNCCD) (and its Annexes I-IV)
- The UNECE Long-Range Transboundary Air Pollution Convention (LRTAP) (and its Protocols)