

**Submission to the Plastics Treaty Process**  
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Ahead of the second session of the Intergovernmental Negotiating Committee (INC2), this short submission raises a set of issues of interest or concern at this early stage of the negotiations. It draws on the experience – both academic and professional – of CILG faculty and fellows of other treaties, thematic regimes in various domains and the broad processes of international law and organization. Constrained by time, it does not attempt to address the full range of plastics issues under consideration. Its primary aim is to frame questions on key issues for the consideration of the negotiators and other stakeholders at this early stage. It draws on the preparatory documents UNEP/PP/INC.1/4 (Broad options for the structure), 1/5 (Potential elements), and 1/7 (Plastics science).

**A. Structure and Effectiveness of the Instrument**

**Question 1: Should the instrument be based on voluntary pledges, binding obligations, or both?** (see UNEP/PP/INC.1/5 sect. C). This is an early and important issue for consideration: will the structure of the proposed instrument be ‘bottom-up’ based on voluntary country pledges, similar to the 2015 Paris Agreement, or more traditionally ‘top-down’ in that it establishes clear obligations and responsibilities for states. The mandating UNEA resolution specifies only that the instrument “could include both binding and voluntary approaches” but significantly adds “based on a comprehensive approach that addresses the full life cycle of plastic” [Art. 3 of UNEA Res 5/14 of 2 March 2022].

It is important to recall that the ‘new’ Paris formula grew out of the failure of the 2009 Copenhagen effort to enshrine more traditional state climate responsibility in a treaty and the difficulties of the Kyoto Protocol. The model was innovative (the Nationally Determined Contribution (NDC) system; the ratcheting ‘ambition’ logic at its core) and marked by intense follow-up activity (the succeeding COPs). But to date, unfortunately, the treaty has yet to be effective at its fundamental goal, the actual reduction of global emissions.

While it is hoped that the Paris Agreement will ultimately succeed in the decades ahead, the goals and national commitments of the treaty have been too easily blown off course by other developments at the global level (pandemics, global economic woes, geopolitical tensions, the withdrawal of specific states). This remains a worrying weakness of the voluntary approaches. Critics may reasonably say that there are other metrics by which to judge the effectiveness of the Paris treaty, i.e., levels of international cooperation, the development and sharing of new technologies, global awareness, efforts on specific greenhouse gases like methane, or achievements in renewable energy. Yet all have mixed records to date, and none can substitute for emissions reductions.

With respect to a plastics instrument, a “mainly” voluntary NDC-like model should be considered by negotiators only if they are prepared to accept that the instrument will likely not deliver a global reduction in plastics pollution, which is its main purpose. There are other purposes the instrument could serve -- for example to change the political dynamics, mobilize constituencies, or lay the foundation for future binding treaties -- but a “comprehensive approach that addresses the full life cycle of plastic” would seem to require core obligations.

A hybrid or blended model in which the instrument has both ‘voluntary’ and ‘compulsory’ provisions or chapters is potentially useful here. Given the breadth of issues arising under a full-life cycle approach, this would enable different issues and sub-issues to be distributed across a spectrum or matrix of obligation. As one of the preparatory document notes, “voluntary approaches can be used to supplement core obligations and control measures ... Such approaches may be taken on by both parties and non-party stakeholders in order to encourage broader participation in achieving the objectives of the instrument.” [Para 17, ‘Potential Elements,’ UNEP/PP/INC.1/5]

**Question 2: Should the instrument be a single, stand-alone Convention or a Framework Convention with Protocols?** (see UNEP/PP/INC.1/4 Section II, A and B). Similarly, two broad options for the overall structure of the instrument are available. The core obligations and control measures (the provisions intended specifically to prevent, minimize or redress the problems that give rise to the treaty) can be structured either in a comprehensive single convention where they are part of the main text with supporting annexes, or a framework convention where some or all of the control measures are placed in one (usually) or more separate protocols that are related but distinct legal instruments requiring separate adoption.

A convention/protocol structure is typically used when it is possible to reach agreement on broad principles (the framework convention) but not the control measures, which are left for later negotiations on protocols. This is the case notably for the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol (phasing out ozone depleting substances). The staggered negotiations, and extra time, can allow for an effective protocol to emerge.

**Question 3: Is the instrument’s proposed structure broad enough to accommodate its scope?** The full life-cycle of plastics presents a broad array of inter-related but different subjects, from upstream issues like raw materials and trade, to mid-stream issues like manufacture and distribution, to downstream issues like collection, recycling, and final disposal. Some issues may be industry related, others may require market incentives, national action plans or inclusion of specific communities like waste pickers, monitoring or enforcement, or emerging technologies.

The structure of a future instrument must reflect this breadth appropriately. Both a stand-alone single convention, if carefully structured with annexes, or a framework convention and its protocol(s), could potentially cover the breadth of issues, though recent examples are mostly narrow. Both the 2013 Minamata Convention on Mercury and the Vienna Convention on the Ozone and its Montreal Protocol dealt with issues less broad and less complex than the full life-cycle of plastics. In that context, one of the early conceptual challenges to be tackled here is that plastics-as-pollution is not a sufficiently wide umbrella concept on which to structure an instrument.

One approach could conceptually separate out plastics-as-materials from plastics-as-pollution, and structure an instrument – whether a stand-alone convention or framework convention and protocol –

on that dual basis. Another approach could take the four strategic goals identified in para 9 of the Plastics Science document (UNEP/PP/INC.1.7) as broad conceptual categories:

- (i) eliminating and substituting problematic and unnecessary plastic items, including hazardous additives;
- (ii) ensuring that plastic products are designed to be circular (reusable as a first priority, and recyclable or compostable after multiple uses at the end of their useful life);
- (iii) ensuring that plastic products are circulated in practice (reused, recycled, or composted); and
- (iv) managing plastics that cannot be reused or recycled (including existing pollution) in an environmentally responsible manner.

**Question 4: If a framework convention is used, should it set out broad principles only or also include specific obligations? Separately, what process should be put in place for the negotiation of follow-on protocols?** While framework conventions can offer a more incremental negotiating process, they can simultaneously defer specific difficult issues from being tackled and carry the possibility that member states may ratify a framework convention but not its protocol. Though this happens in other areas of international law (see the International Covenant on Civil and Political Rights), it is rare in environmental treaties: all states that have acceded to the Vienna Ozone Convention have also acceded to the Montreal Protocol. But caution is warranted nonetheless if the instrument is to take up divisive issues. The net effect in such cases is a dilution of the effectiveness and ultimate success of the instrument.

On balance, it would seem important for the core obligations to be placed in a single instrument but for that instrument to have the breadth and flexibility necessary to address a broad range of issues. Can one conceive in that sense of a treaty-within-a-treaty, just as one thinks of a protocol-from-a-convention? Hypothetically, would it be possible to structure a (mainly) top-down core of obligations and control measures around plastics-as-pollution within a (mainly) wider bottom-up treaty, which strengthens over time (through stock-take reviews and other measures) on both plastics-as-pollution and plastics-as-materials?

#### **B. Implementation Mechanisms: Compliance, Dispute Settlement, Institutional Arrangements**

There is wide variation in whether and in what form treaties include implementation mechanisms – measures designed to enable, induce, or compel implementation of the substantive obligations of the treaty. In the realm of weapons of mass destruction, some treaties, such as the Nuclear Non-Proliferation Treaty and Chemical Weapons Convention have extensive monitoring, compliance, and dispute settlement mechanisms. Others, such as the Biological Weapons Convention and Treaty on the Prohibition of Nuclear Weapons have virtually none. Several questions need to be considered for the plastics treaty.

**Question 5: Should the treaty rely on assistance measures, penalties, and/or rewards to secure compliance?**

The Potential Elements document distinguishes a “facilitative approach” (essentially, assistance measures) from an “enforcement approach” (penalties). To that we would add another tool: rewards. Rewards, unlike financial and technical assistance, have value over and above the terms of the treaty. They are not designed to make it easier for parties to implement the treaty but rather provide positive incentives for them to join and remain a party. Thus, for example, parties to a plastics treaty could be

provided with technical and financial *assistance* to transition away from fossil fuel plastics and/or they could be provided with more official development assistance or debt relief as a *reward* for joining the treaty. All three – assistance, rewards, and penalties – could play a role in the plastics treaty although there is a shift away from the enforcement approach in multilateral environmental agreements. [Para 22, ‘Potential Elements,’ UNEP/PP/INC.1/5]

**Question 6: What institutional arrangements should be created to oversee implementation of the treaty?**

Whether assistance, penalties or rewards is the main approach, the treaty will likely require implementation machinery. Given that national reporting is likely to be a feature, at a minimum an institution will be needed to receive the reports and keep track of their content. It also could be charged with assessing progress towards fulfilling the objectives of the treaty. Beyond that, institutional arrangements could include:

- expert bodies to provide technical and other forms of capacity-building assistance
- inter-governmental committees to channel financial resources and to facilitate scientific and technical cooperation
- committees for information-sharing, dialogue, and the dissemination of best practices
- monitoring bodies and mechanisms to assess compliance, and
- enforcement mechanisms to impose sanctions.

**Question 7: What dispute settlement mechanisms should be used?**

Peaceful dispute settlement mechanisms range from dialogue and consultation, to third party good offices and mediation, to arbitration and adjudication. Most of these are contemplated by Article 33 the United Nations Charter which applies to all international disputes. Beyond that, many treaties include specific dispute settlement methods, such as mediation or arbitration. In principle a “plastics” dispute could be submitted to the International Court of Justice or some other court of general jurisdiction. Alternatively, a new specialized tribunal could be created, but that seems unlikely. More realistically, UNEP or the treaty secretariat (if one is created) could be tasked with providing authoritative interpretations of the treaty, as the International Labor Office does for labor conventions. It could also offer good offices to help settle disputes, as the executive heads of many international organizations do, such as the UN Secretary-General.

**C. Emerging Technologies, Financial Assistance, and Technical Capacity-Building**

In several areas of the life-cycle of plastics, emerging technologies hold promise but are not yet fully vetted scientifically, scaled to a significant level, or price competitive to their alternative. This issue also characterized the Minamata (Mercury), Vienna/Montreal (Ozone), and Paris (climate change) experiences. Two illustrations are offered here.

**Question 8: Should the instrument include provisions to facilitate the transition away from fossil fuel plastics to alternatives? If so, what sort of provisions?** Separate from pollution concerns, plastics contribute to climate change. Plastics, chiefly their production, accounted for 3.4% of global emissions in 2019. Today, 99% of plastics are made from fossil fuels. At the same time, there is growing demand for plastics as an essential material used widely in human society, and in increasingly sophisticated fields like aviation. Yet plastics are not necessarily fossil fuel derived. The relationship is historically driven (related to the oil industry) rather than chemistry-determined. There is emerging research and private

sector innovation around plastics from non-fossil-fuel feedstocks, including agricultural waste (biomass). The instrument will need to take up the plastics-carbon connection across the life-cycle of plastics, but primarily at the up-stream stage.

Of course, these emerging technologies require careful scientific assessment of secondary and potentially negative effects on land use, food sources, or the continued use of harmful chemicals. But the fundamental question for the instrument therefore is not just how to curb harmful fossil-fuel based plastics, but how to encourage and accelerate the emergence and scaling of more sustainable and circular bioplastics. How to create a market for alternatives to fossil-fuel plastics? How to create industry targets for non-fossil fuel plastics? Since there is generally a green premium (given that fossil fuel plastics are so cheap), how to incentivize markets to move in the right direction?

**Question 9: Should the instrument include provisions to facilitate the transition from mechanical to chemical recycling? If so, what sort of provisions?** Similarly, chemical recycling is another emerging technology that the instrument may need to address. Mechanical recycling involves physically grinding down plastic materials and melting them down to be remolded into new products. Chemical recycling breaks down plastic polymers into their chemical building blocks that can then be used to create new plastic products or other chemicals.

Mechanical recycling is generally considered to be less expensive, reduces the need for virgin materials, and can be used to create new products with a lower carbon footprint. But it is not always effective at removing contaminants from plastic waste. Chemical recycling is a more complex and expensive option involving technologies like pyrolysis and depolymerization. It could reduce the amount of plastic in landfills and the consequent release of harmful chemicals into the environment though the recycling process itself might release harmful chemicals. Again, careful scientific assessment is needed but in the context of the instrument, complementary approaches may well be required. The recycling issue raises financial questions and possible industry responsibilities under the “polluter pays” principle.

In both examples, early or emerging technologies could change the domain of the instrument as a whole, raising the question of whether the instrument should address them or stay silent. Interesting comparisons can be drawn from the experience with curbing mercury (Minamata) and ozone depleting substances (Vienna/Montreal), but also with the emergence, scaling, and price-competitiveness of renewable energy technologies (Paris).

**Question 10: across the range of issues this instrument will address (in the context of the full life cycle of plastics), which ones will require financial or technical assistance?** In addition to incentivizing markets, the treaty negotiators must be attentive to the need for a just transition away from fossil fuel plastics. Some countries are better able to bear the costs than others, and within some countries, entire industries – both in the formal and informal economies – depend on plastics. It may be necessary to establish a new multilateral funding mechanism. For example, to the extent that the reduction in fossil fuel plastics reduces greenhouse gas emissions, it may be possible to utilize existing climate finance mechanisms. The same questions arise around technical assistance.

In conclusion, we hope that the above questions and consideration will assist the negotiators, secretariat, and other stakeholders at this early stage of the negotiations. Thank you.