insights

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The Architecture of a Global Plastics Treaty: Deconstructing the Zero Draft

Introduction

Over 460 million tons of plastic is produced annually. The Organization for Economic Co-operation and Development (OECD) projects that the amount of plastic waste will almost triple by 2060, with around half entering landfills. At present, only nine percent of plastic waste is successfully recycled.[1] Over 14 million tons escape into the world's oceans every year.[2] On September 4, 2023, the chair of the Intergovernmental Negotiating Committee (INC) on Plastic Pollution published a "Zero Draft"[3] version of a treaty to address global plastic pollution. UN delegates will use the 31-page text as a basis for concluding negotiations on a global plastics treaty.

The Executive Director of the UN Environment Programme (UNEP) convened the INC at the request of the 175 participant countries of the UN Environment Assembly (UNEA). More specifically, UNEA Resolution 5/14 mandates the INC to develop and adopt the world's first legally binding international instrument addressing the entire plastic lifecycle (which encompasses raw material extraction, design and production, in addition to use, disposal, and waste management).[4] Governments intend to agree on the final treaty text—which many commentators consider could be the most important multilateral environmental agreement since the Paris Climate Agreement—by the end of 2024.[5]

The INC's participants aim to ensure that the treaty retains coherence and complementarity with existing treaties regulating plastic pollution: including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[6] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides,[7] Stockholm Convention on Persistent Organic

Pollutants,[8] UN Convention on the Law of the Sea,[9] Convention on Long-Range Transboundary Air Pollution,[10] London Convention and London Protocol,[11] and the Convention on Biological Diversity.[12] Several UNEA resolutions also specifically promote eliminating plastic pollution to avoid harming ecosystems and human health.[13] The INC negotiations intend to promote cooperation and coordination with existing international legal instruments—including by sharing best practices and avoiding duplicating actions.

Key Legal Elements and Architecture of the Zero Draft

While existing legal instruments target different problems associated with plastics in the environment, no instrument covers the entire plastics lifecycle across all jurisdictions. With this, the INC's participants offer differing global plastic management proposals. However, content that all participants agree upon includes creating a comprehensive legal instrument to facilitate scientific collaboration, technology transfers, and capacity building to eliminate plastic pollution in the long-term.[14]

Based on views expressed by participants at the INC's first and second sessions, the Zero Draft will support the INC's next negotiating round from November 13-19, 2023 in Nairobi, Kenya. The Zero Draft's structure includes substantive sections on:

- Chemicals and polymers of concern;
- Problematic and avoidable plastic products (including short-lived and single-use plastic products and intentionally added microplastics);
- Product design, composition, and performance;
- Innovation and promotion of non-plastic substitutes;
- Extended producer responsibility;[15]
- Emissions and releases of plastic polymers throughout their lifecycles;
- Waste management;
- Trade in listed chemicals, polymers and products, and plastic waste;
- Existing plastic pollution (including in the marine environment);
- Just transition measures for affected populations;
- Transparency, tracking, monitoring and labelling;
- Financing, capacity building, technical assistance, and technology transfer.

Its text reflects convergence in countries' views on policy options, noting that negotiators may wish to select individual options or combine them. The Zero Draft's spectrum of options contain various permutations of prescriptive (or concrete) and voluntary (or normative) approaches.[16] For example, Part II.1—which aims to mitigate the adverse

impacts of primary plastic polymers—proposes three discrete options. Option 1 requires common reduction targets compared to global baselines. It obligates each country to "not allow" production and supply levels of primary plastic polymers to exceed specified targets, which remain under negotiation. Option 2 provides more individual discretion. Reminiscent of the Paris Climate Agreement's implementation of "nationally determined targets" through a compliance committee procedure,[17] each country must develop and implement a national action plan (NAPs)—which includes their intended levels of domestic plastic supply—to achieve global plastic reduction targets. Countries must also monitor and periodically report measures implemented and progress achieved against the global targets. Finally, Option 3 offers the most flexibility. It requires countries to regulate plastic polymers individually, which they communicate through NAPs.

An informal group of 60 countries, called the "High Ambition Coalition to End Plastic Pollution"—which includes many small island states, Chile, Rwanda, the United Arab Emirates, Azerbaijan, Japan, the United Kingdom, and the European Union—favors Option 1's approach to global targets and restrictions on certain hazardous chemicals. However, several countries—including the United States and Saudi Arabia—prefer the more flexible policy approaches of Options 2 and 3. For example, a United States Department of State representative, speaking at a plastics industry conference in June 2023, opined that a flexible, nationally-determined approach could attract greater participation and domestic innovation than prescriptive, "one-size-fits-all" obligations.[18] Nevertheless, some analysts raise concerns about the potential efficacy of following the Paris Climate Agreement's approach to relying on NAPs.[19] They claim such approaches lack adequate enforcement and consistent monitoring methodologies for plastics.

The draft text is replete with potential supply-side measures. Nevertheless, its references to demand-side interventions remain limited to two provisions: Part II.1 and Part II.2 (addressing "[c]hemicals and polymers of concern"), respectively. More specifically, the Zero Draft provides that each country "should take appropriate measures" aligned with those countries' national circumstances. The draft text further notes that such measures may include "market- and price-based mechanisms," removing subsidies and fiscal incentives for producing primary plastic polymers or other regulatory interventions. The text implies each national government's discretion to determine the appropriateness of such measures, given factors such as development priorities, economic circumstances, and national security considerations.

The draft text's implementation and compliance provisions offer additional interest. Countries must periodically submit to a governing body NAPs and reports evaluating the effectiveness of their measures to implement the treaty. The Zero Draft establishes a

compliance mechanism with a committee to consider written submissions by countries regarding compliance with the treaty's obligations. The nature of this mechanism is intended to be facilitative. Under the draft text, the committee is empowered to examine "individual and systemic implementation and compliance issues" before making appropriate recommendations to the governing body. These provisions, and the committee's powers, replicate elements of the Minamata Convention on Mercury's[20] and Paris Climate Agreement's implementation and compliance mechanisms.

Towards an Endgame

The global plastics treaty negotiations aim to confront escalating challenges caused by transboundary plastic pollution. Evidently, the plastic lifecycle traverses jurisdictional boundaries. End products containing plastics, as well as raw and intermediate materials used for plastic production, are pervasive and widely traded across borders. Raw materials for manufacturing plastics—including hydrocarbons—are sourced from many jurisdictions. Waste plastics are also commonly exported for recycling and disposal purposes. Yet, specific obligations for regulating plastics are predominantly jurisdiction-specific. Within this regulatory patchwork, public, and private actors acknowledge that a global plastics treaty could cultivate common standards to reduce compliance, transaction, and operational costs associated with highly fragmented measures. Such a common framework of rules could also prevent leakage, where entities attempt to relocate their operations to jurisdictions with less stringent regulatory regimes.

Yet, in many ways, the Zero Draft exhibits similar properties—of malleability, durability, and replicability—characteristic of plastic polymers. The draft text already reproduces many legal patterns, structures, and techniques common in other environmental treaties, such as the Paris Climate Agreement's flexible approach to NAPs and targets, and the Minamata Convention's approach to implementation and compliance. Yet, the treaty's content remains infinitely open and malleable: its actors will continue to mold and shape its substantive obligations into a desired form. Ultimately, however, the treaty's durability will depend on the INC's ability to balance several key factors: attracting widespread participation by major stakeholders, maximizing environmental ambition, and ensuring a just transition toward a more circular economy.

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[1] OECD, *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options* (Paris: OECD, 2022), p. 22.
[2] *Marine plastic pollution*, *IUCN Issues Brief* (Nov. 2021), https://www.iucn.org/resources/issues-brief/marine-plastic-pollution.
[3] *Zero draft text of the international legally binding instrument on plastic pollution, including in the marine environment: Note by the secretariat* ("Zero Draft"), U.N. Doc. UNEP/PP/INC.3/4 (Sept. 4, 2023).
[4] *End plastic pollution: towards an internationally legally binding instrument*, UNEA Res. 5/14, U.N. Doc. UNEA/EA.5/Res.14 (Mar. 7, 2022).
[5] *Id.* ¶ 3.
[6] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989 (entered into force May 5, 1992), 1673 U.N.T.S. 57. Following amendments in 2019, the Basel Convention's scope now includes most types of plastic waste. For a list of plastic-related amendments to the Basel Convention, see Decision BC-14/12, http://www.basel.int/Implementation/Plasticwaste/Decisions/tabid/6069/ctl/Download/mid/17953/Default.aspx?id=17&ObjID=22064.
[7] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides, opened for signature Sept. 10, 1998 (entered into force Feb. 24, 2004), 2244 U.N.T.S. 337.
[8] Stockholm Convention on Persistent Organic Pollutants, opened for signature May 22, 2001 (entered into force May 17, 2004), 2256 U.N.T.S. 119.
[9] United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982 (entered into force Nov. 16, 1994), 1833 U.N.T.S. 3.
[10] Convention on Long-Range Transboundary Air Pollution, opened for signature Nov. 13, 1979 (entered into force Mar. 16, 1983), 1302 U.N.T.S. 217.
[11] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (opened for signature Nov. 29, 1972), entered into force Aug. 30, 1975) 36 I.L.M. 7; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (opened for signature Nov. 7, 1996, entered into force Mar. 24, 2006) 36 I.L.M. 7.
[12] Convention on Biological Diversity, opened for signature June 5, 1992 (entered into force Dec. 29, 1993), 1760 U.N.T.S. 79.
[13] *See, e.g.*, *Marine plastic debris and microplastics: Report of the Executive Director*, UNEA Res 1/6, U.N. Doc. UNEA/EA.2/5 (Mar. 8, 2016); *Marine plastic litter and microplastics*, UNEA Res 2/11, U.N. Doc UNEA/EA.2/Res.11 (Aug. 4, 2016); *Marine litter and microplastics*, UNEA Res 3/7, U.N. Doc. UNEA/EA.3/Res.7 (Jan. 30, 2018); *Marine litter and microplastics*, UNEA Res 4/6, U.N. Doc. UNEP/EA.4/Res.6 (Mar. 28, 2019); *Environmentally sound management of waste*, UNEA Res 4/7, U.N. Doc. UNEP/EA.4/Res.7 (Mar. 28, 2019); *Addressing single-use plastic products pollution*, UNEA Res 4/9, U.N. Doc. UNEA/EA.4/Res.9 (Mar. 28, 2019); *Transforming our world: the 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, UN GAOR, 70th sess., 4th Plenary Meeting, U.N. Doc. A/Res/70/1 (Oct. 21, 2015), Goal 12.
[14] *See* UNEA Res 5/14, *supra* note 4, Preamble.
[15] Extended product responsibility is commonly understood as requiring: "plastic producers and importers to take responsibility for their products throughout their life cycle, from production to disposal, to incentivize collection and sorting, including by informal waste pickers, to initiate investment in recycling facilities, and to fund studies of advanced recycling and material recovery methodologies. The system would include fees paid by plastic producers, which would be used to fund initiatives aimed at reducing plastic waste, such as product design, material substitution and end-of-life management." *See, e.g.*, *Potential options for elements towards an international legally binding instrument*, U.N. Doc. UNEP/PP/INC.2/4, ¶ 24(e)(ii).

[16] This framing of the oscillation between "concreteness" and "normativity" is derived from MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).
[17] Paris Climate Agreement art. 15, opened for signature Apr. 22, 2016 (entered into force Nov. 4, 2016), 3156 U.N.T.S. 79.
[18] Steve Toloken, *US seeks middle ground in deeply divided plastics treaty talks*, PLASTICS NEWS, Aug. 9, 2023, https://www.plasticsnews.com/news/us-seeks-middle-ground-plastics-treaty-talks.
[19] Antaya March et al., *Effectiveness of national action plans*, GLOBAL PLASTICS TREATY POLICY BRIEF (2023), Global Plastics Policy Centre and Dalhousie University, https://plasticspolicy.port.ac.uk/research/national-action-plans.
[20] Minamata Convention on Mercury, opened for signature on Oct. 10, 2013 (entered into force on Aug. 16, 2017), 3202 U.N.T.S. 1.