

NON-PARTY PROVISIONS



PLASTICS TREATY LEGAL ADVISORY SERVICE NOTE

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Summary

The inclusion of ‘Non-party provisions’ in a Plastics Treaty could have an important influence on plastic production within nations that do not become a party to the Treaty.

This would be particularly so if there was a critical mass of State Parties representing a large plastic consumer market to create an incentive for plastic producers in Non-party States to change their overall production practices to meet the requirements of selling into those markets (i.e., to produce less environmentally harmful plastic products, whether for consumption in State Parties or Non-party States).

Non-party provisions could also influence downstream activities within Non-party nations.

This note summarises a range of precedents in multilateral treaties for Non-party provisions, along with advantages and disadvantages of Non-party provisions.



Questions/Issues

What 'Non-party provisions' would be most effective in facilitating the objectives of the Plastics Treaty?

One potential objective formulation under consideration by the Intergovernmental Negotiating Committee (INC) is 'end plastic pollution [and] protect human health and the environment from its adverse effects throughout the life cycle of plastic'.¹ This objective formulation appears to have more substantial support compared with other formulations set out in the Options Paper.² Non-party provisions likely to best facilitate such an objective are those that:

1. Encourage Non-parties to contribute to achieving the objectives, or
2. Prohibit Party conduct that enables or encourages activities by non-parties that undermines these objectives, for instance, banning or limiting the import by State Parties of harmful plastics from non-party states may promote these objectives.

Sub-questions:

(A) What are the key types of 'non-party provisions' that have used in other multilateral treaties, particularly environment conventions?

According to research by Lawyers Responding to Climate Change (attached), the most common types of Non-party provisions in international agreements take the following forms:³

- Provisions requiring parties to *encourage Non-parties to adhere to or join the agreement* (e.g., 2009 Port State Agreement, 2000 Cartagena Protocol, Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR));
- Provisions requiring Parties to take measures to *deter or discourage Non-parties from activities that undermine the agreement's effective implementation* (e.g., UN Fish Stocks Agreement, 1993 FAO Compliance Agreement, 2009 Port State Agreement, 2010 Cluster Munitions Convention);
- Provisions *restricting Parties from trading with Non-parties unless those Non-parties conform to the requirements of the agreement* (e.g., CITES, Montreal Protocol (Article 4), ICCAT, Minamata Convention (Article 3));
- Provisions *encouraging Parties to enter into bilateral and other agreements with Non-parties to ensure compliance with the relevant agreement* (e.g., 2000 Cartagena Protocol);
- Provisions *prohibiting Parties from giving more favorable treatment in applying the relevant agreement to non-parties than to Parties* (e.g., 2001 Control of Harmful Anti-Fouling Systems on Ships, 1982 Paris MOU on Port State Control, 1995 Convention on Standards of Training etc. for Seafarers)

¹ See UNEP/PP/INC.2/4 Potential options for elements towards an international legally binding instrument, based on a comprehensive approach that addresses the full life cycle of plastics as called for by United Nations Environment Assembly resolution 5/14

² See UNEP/PP/INC.2/5 Report of the intergovernmental negotiating committee to develop an international legally binding instrument on plastic pollution, including in the marine environment, on the work of its second session

³ See *Lawyers Responding to Climate Change*, Non-party Provisions in International Agreements (5 February 2013), available at <https://legalresponse.org/legaladvice/non-party/#:~:text=Non%2Dparty%20provisions%20can%20only,the%20agreement%20by%20non%2Dparties>

(B) What form of ‘non-party provisions’ would be most suited to a Plastics Treaty?

A Plastics Treaty most closely resembles international environmental agreements that target specific substances for restriction. Provisions that have generally been deemed useful in those contexts are therefore likely to be most suited to a Plastics Treaty. Some potentially useful examples are:

‘Upstream/midstream’ non-party provisions

- 1) Banning or restricting the import of polymers, plastic chemicals or plastic products into treaty parties that are produced in non-party nations and that do not conform to ‘upstream/midstream’ measures in the Plastics Treaty.⁴
- 2) Prohibiting financing/investment/subsidies/aid/credits/guarantees/insurance from treaty parties (and entities under their jurisdiction) in plastic production in non-party nations that does not conform to the ‘upstream/midstream’ measures in the Plastics Treaty.⁵

Some of examples of ‘upstream/midstream’ measures in a Plastics Treaty that these non-party provisions could apply to may include:

- Criteria/standards for plastic product design that promotes circularity (recyclability, reuse, repair) or improved waste management e.g., minimum recycled content, product colour/shape /composition, chemical simplification, avoiding release of microplastics;
- Ban or phase down of particularly harmful polymers/ chemicals/ additives used in plastic products, e.g., chemicals that are particularly problematic for the environment or harmful to human health;
- Ban or phase down use of particularly harmful/ unnecessary types of plastic products, e.g., single use plastics, microplastics, certain types of fishing gear; and
- Standards for labelling/certification of plastic products e.g., chemical composition, recyclability.

‘Downstream’ Non-Party provisions:

- 3) Prohibiting the export from treaty parties of plastic products to non-parties unless the non-parties provide written consent and certification demonstrating their compliance with the Plastics Treaty provisions relating to the downstream requirements of the Plastics Treaty.⁶
- 4) Prohibiting the export of plastic products from treaty parties to non-parties, where the risk of non-conformance with midstream and/or downstream requirements of the Plastics Treaty is high.

Some of examples of ‘downstream’ measures in a Plastics Treaty that these non-party provisions could apply to may include reuse/recycling targets or adequate waste disposal systems.

⁴ See Montreal Protocol on Ozone Layer, art. 4 ¶ 4, Sep. 16, 1987.

⁵ See Montreal Protocol on Ozone Layer, art. 4 ¶ 6, Sep. 16, 1987.

⁶ See Minamata Convention on Mercury, art. 3, § 6, Oct. 10, 2013.



(C) What are the main advantages and disadvantages of the provisions in (B) in terms of facilitating the objectives of the Plastics Treaty?

Advantages

- May promote behaviour of non-party nations in line with the objectives of the Plastics Treaty.
- May influence plastic producers in non-party nations to produce plastics products that conform to the Plastics Treaty's objectives and 'upstream/midstream' provisions. This is important as the world's largest producers may end up being in nations that do not become a party to the Plastics Treaty.
- May encourage recyclers and processors of plastic waste in non-party states to recycle or process such waste in a way that conforms to the Plastic Treaty's 'upstream/midstream' provisions.
- Will work well in an agreement that sets specific, binding 'upstream/midstream/downstream' measures (as opposed to a "bottom-up" agreement of voluntary commitments).

Disadvantages

- May encourage states that are unlikely to join the Plastics Treaty to negotiate more aggressively for a weaker or unacceptable outcome (this may play into procedural issues around adoption of the Plastics Treaty by consensus).
- Compliance of non-party provisions by party states may be challenging or costly to monitor and enforce.
- May only be effective if there was a critical mass of States Parties representing a large plastic consumer market to create an incentive for plastic producers in non-party States to change their overall production practices to meet the requirements of selling into those markets (i.e., to produce less environmentally harmful plastic products, whether for consumption in Party States or non-Party States).
- Will be less effective if negotiations move toward a Plastics Treaty that is, like the Paris Agreement, a "bottom-up" agreement of voluntary commitments.





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