

## **INTERNATIONAL LAW AS THE FOUNDATION FOR THE SOLUTION TO CLIMATE CHANGE: AN APPLICATION TO PLASTIC WASTE**

This panel was convened at 10:30 a.m. on Thursday, March 30, 2023 by its chair, Peter Rankin of Charles River Associates, who introduced the speakers: Eva R. van der Marel of UiT The Arctic University of Norway, Faculty of Law, Norwegian Centre for the Law of the Sea; Benoit Mayer of the Chinese University of Hong Kong, Faculty of Law; Patricia Crifo of Ecole Polytechnique, Department of Economics - CREST, and Energy4Climate (E4C); and Laurel Besco of the University of Toronto Mississauga, Department of Geography, Geomatics and Environment and the Institute for Management and Innovation.

### **I. INTRODUCTION**

#### **REMARKS BY PETER RANKIN\***

The plastic sector contributes to around 3.5 percent of global greenhouse gas (GHG) emissions and is a key contributor to climate change. It is also a sector set to grow significantly in the coming years. As we look toward addressing climate change broadly, addressing the sustainable production and consumption of plastics, including sustainable end-of-life solutions, presents a critical step. Today's session investigates the promise of international law as the foundation for addressing climate change-related issues, with a focus on the plastic sector. Our speakers will provide their expertise on how international law may help solve this key issue, as well as how a new treaty on plastics pollution (currently under negotiation) might be informed by developments in the climate regime, and what climate regulation might be able to learn from regulating plastics.

We will proceed by way of what are hopefully provocative questions that I will ask one of the panelists to take the lead in providing a quick response. I expect others on the panel may chime in, but we also want to hear from the audience on each one of these questions. I will ask attendees to just raise their hands and I will try to make sure that we call on them for participation. My job is to ask those provocative questions to start each part of the discussion and then make sure we stay on time so that we get to each of the four questions and also have some time at the end for general questions from the audience.

### **II. CAN INTERNATIONAL LAW OR MULTILATERAL ENVIRONMENTAL AGREEMENTS, IN PARTICULAR THOSE ON CLIMATE CHANGE, ACTUALLY OFFER A VIABLE SOLUTION TO A GLOBAL PROBLEM LIKE PLASTICS POLLUTION?**

#### **REMARKS BY BENOIT MAYER\*\***

We can approach the relationship between plastic pollution and climate change in two ways. On the one hand, we can approach plastics as a contributor to climate change—that is, a source of GHG emissions. On the other hand, we can see climate treaties as a model for addressing plastic pollution. I will say a few words about each approach.

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First, plastics as a contributor to climate change. As plastics are usually made from fossil fuels, burning them causes anthropogenic GHG emissions. But their climate impact also results from the process of producing them: the extraction of petroleum, the energy used to refine petroleum into plastics, and the emissions from transportation at various stages of the production and consumption cycles—including recycling.

There are ways to reduce GHG emissions from plastic, but not to prevent them entirely. Biodegradable plastics are not really a solution, as far as climate change is concerned: as they degrade, plastics release GHGs. Plastics from plants are also not a real solution, since they also involve similar, energy-intensive production processes. While incineration is generally a way to reduce methane emissions from the landfilling of organic waste, incinerating plastics is a source of GHG emissions. Recycling, likewise, is energy intensive. Reducing the use of plastic may be the most obvious way forward, though of course it all depends on what plastics are replaced with.

Climate treaties do not directly address plastics, or any other sector, as a source of GHG emissions. These treaties mainly leave it for states to decide in which sector to implement measures aimed at achieving national mitigation objectives. Nonetheless, many states have taken measures to reduce their GHG emissions with implications for emissions from plastics. For instance, cleaner energy means less emissions from energy consumption during the production and recycling of plastics. Some countries are taking more specific measures aimed at reducing consumption of plastics, in particular single-use plastics, though the political rationale for these measures may have more to do with reducing plastic pollution as harm to the local and marine environment than with reducing GHG emissions associated with the production and use of plastics.

Second, let me say a few words about plastics as an international issue that could be addressed by building on the experience of responses to climate change. Climate change has been addressed progressively in the last three decades, since the adoption of the United Nations Framework Convention on Climate Change in 1992, and with two additional treaties: the Kyoto Protocol of 1997 and the Paris Agreement of 2015. These treaties have been somewhat effective, in the sense that they have limited the increase in global GHG emissions, though they have arguably not done so fast enough.

By contrast, the plastic regime is, for now, merely a work in progress. There have been a number of non-binding resolutions over the years. In 2022, the UN Environment Assembly adopted Resolution 5/14, which decided to convene international negotiations to draft a treaty on plastic pollution by the end of 2024. The Intergovernmental Negotiating Committee has convened its first meeting in 2022, and four more meetings are yet to come.

By comparison with climate change, the rationale for a plastics treaty is more ambivalent. Climate change mitigation is a collective action problem by excellence: one state is harmed not directly as a result of its own GHG emissions, but as a result of global emissions. Every state is better off if others decrease their emissions, but it is even better off if it does not reduce its own emissions while others do. Plastic pollution can be viewed, similarly, as a tragedy of the commons unfolding at the global scale, in particular if one is concerned with the impacts of microplastics on the marine environment and biological diversity. But plastic pollution can also be approached as a more local environmental issue, or to some extent as a transboundary environmental issue unfolding on a regional scale, for instance along the course of a transboundary watercourse or a regional sea. States are more directly impacted by their own plastic pollution than they are by their own GHG emissions. That is good news for a plastic treaty if it means that states have a stronger incentive to reduce sources of plastic pollution, but it may also be bad news if this means that states are less interested in binding themselves to an international agreement.

Mitigating climate change requires immense efforts aimed at altering some of the foundations of modern economy. It requires not only devising new ways to produce electricity and heat, but also

rethinking transportation, industrial processes, waste management, land use, or food production. By contrast, plastics are a more contained sector, despite their omnipresent use. On the other hand, there are different ways of justifying action on plastics, with possibly different implications. One would promote different types of measures depending on whether one is interested in addressing plastic pollution as a public health issue, a local environmental issue, or a marine pollution issue. It is not clear whether the aim of a plastic treaty is to reduce the use of plastic entirely or rather to reduce the harm they cause during their production or consumption. Are plastics a chemical issue, a waste issue, an energy issue, a biodiversity issue, a land pollution issue, or a climate issue?

The experience of addressing climate change through treaties points to two different approaches. The Kyoto Protocol sought to apply a highly coordinated, “top-down” approach, whereby every state would implement a target agreed upon by other states. In reality, this top-down approach was never really followed: states volunteered their Kyoto targets, and those were never negotiated. By contrast, the Copenhagen Agreement and later the Paris Agreement follow clearly a “bottom-up” approach: each party is required to communicate the nationally determined contribution (NDC) that it intends to achieve, thus leaving it in effect for each country to determine how much it wants to contribute to global efforts. A top-down approach is supposed to ensure environmental integrity, as every state is required to play by the same rules, but ultimately it all depends on what the rules actually are, and on which state ratifies them. A bottom-up approach is more conducive to broad participation, but it does not necessarily lead to ambitious national commitments.

Likewise, in plastic negotiations, states have been divided between the two approaches. Some states have advocated for a single set of obligations applicable to all parties, with some predetermined adjustments to reflect national circumstances. Some others (including the United States) have proposed something more akin to the Paris Agreement, relying on the communication of “national action plans” that parties would volunteer for themselves. The premise of a bottom-up approach is, since each state is interested in reducing its own sources of plastic pollution, it would likely communicate ambitious national action plans. The counterargument, however, is that the informal pressure that states impose on one another under the Paris Agreement is less likely to exist under a plastic treaty. European countries, for instance, may only be mildly interested in pressuring Asian countries to reduce plastic pollution, as plastic pollution from Asian countries is unlikely to cause much direct harm to European states.

In addition, the experience of climate treaties suggests other approaches to international cooperation that could be relevant in relation to plastic pollution. A plastic treaty would likely need some provisions on financial support, transfer of technologies, and capacity building, that could build on the experience with international cooperation on climate change mitigation. Climate treaties have also developed rules on national reporting and multilateral review of the reported information, and mechanisms to monitor implementation and promote compliance.

#### **REMARKS BY EVA R. VAN DER MAREL\***

In addition, there is growing research that reflects on plastics as a fundamental element of the carbon cycle, mapping how carbon moves through the plastics life cycle, including in the form of carbon “locked up” into plastic polymers, and CO<sub>2</sub> released at various stages of production and end-of-life treatment. The carbon thus released may be transformed back into plastics, through carbon capture and usage technologies, which have already been developed to this end. It is therefore highly topical to consider how existing climate mechanisms are being (and can be) used to steer the

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plastic sector toward greater sustainability, for instance, by including carbon capture and usage into an emissions trading scheme.

### III. IN INSTANCES WHERE INTERNATIONAL LAW PREVIOUSLY ADDRESSED GLOBAL ISSUES, WAS IT NOT REALLY THE ENGAGEMENT OF PRIVATE ENTERPRISE THAT ENABLED SUCCESS?

#### REMARKS BY PATRICIA CRIFO\*

The engagement of private enterprise can play a major role in fact. Generally framed under their corporate social responsibility (CSR) programs, such engagement means that companies take the commitment to go behind legal compliance to voluntarily integrate environmental concerns into their core strategy and production processes, privately providing public goods or voluntarily internalizing externalities. By 2021, 96 percent of the 250 largest multinational companies on the Fortune500 list (up from 64 percent in 2005) have disclosed their CSR policies, and nearly 4,400 investors and 500 service providers representing over \$120 trillion in assets have signed a commitment to integrate Environmental, Social and Governance (ESG) information into their investment decisions.<sup>1</sup>

There are various drivers of CSR decisions in economics, from private response to social pressure and regulation pre-emption; strategic differentiation from competitors, entry barriers and innovation, to employee motivation, investor pressure, discipline and good governance promotion. But as social responsibility tends to go mainstream, the threat of greenwashing is becoming larger, not lower.<sup>2</sup>

For private self-regulation (voluntary) programs (such as CSR) to be considered as an effective complement to hard regulation (at the national, regional or international level) tools, several conditions must be met.

Let us make a parallel with the example of socially responsible investment (SRI), to illustrate this complementarity more precisely. In France and Europe, socially responsible investment category and practices have successfully moved from the margins of the industry in the late 1990s to become mainstream over two decades. In this evolution, three complementary factors caused corporations to transition toward more sustainable businesses: the role of investors, and in particular, institutional investors; the development of data and evaluations, with private actors providing ratings, scores, and other measurement devices; and the role of governments and regulators passing several laws on CSR reporting, notably at the national but also at the international level, especially in Europe.

This can be interesting for the plastic industry as in general the literature focuses on one of two main means by which firms transition toward sustainability: corporate voluntary programs to reduce emissions and other negative externalities, or regulation at the country, regional, or even global level to constrain firms in their behaviors and helps protect areas and populations against negative externalities, as well as promoting alternative production modes. But beyond these two classic and imperfect approaches, the case of SRI highlights a third one, transition as the result of institutional investors' investment policies.<sup>3</sup>

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<sup>1</sup> KPMG, *The ESG Journey to Assurance: 2022 ESG Survey Results and Analysis (2022); Principles for Responsible Investment, 2021–22 Annual Report (2022)*.

<sup>2</sup> Patricia Crifo & Bernard Sinclair-Desgagné, *The Economics of Corporate Environmental Responsibility*, 7 INT'L REV. ENVTL. RES. ECON. 279 (2014).

<sup>3</sup> Patricia Crifo et al., *Encouraging Investors to Enable Corporate Sustainability Transitions: The Case of Responsible Investment in France*, 32 O&E 125 (2019).

**PETER RANKIN**

How would you, within the framework of success, address the trade-offs between advancing climate goals and providing the industry with a mechanism by which to coordinate issues like pricing and hiring policies?

**PATRICIA CRIFO**

The cooperation between civil society and all stakeholders, as well as their commitment and involvement, is important. Of course, companies behave strategically, and they may make use of this goodwill to advance their own agenda. This is why the third factor of success, the role of the state and the government, is critical. The issue here is related to local national governments and international cooperation and international law.

**EVA R. VAN DER MAREL**

Talking about the desire to involve all stakeholders, particularly now in the discussion about the new treaty negotiations, it is important to critically consider not only how to involve stakeholders during the treaty negotiations, but also, what mechanisms can be created at an international level to allow for continued cooperation at different stages of the implementation of any new treaty. However, does this also raise the question of the potentially harmful impacts of industry lobbying?

**PATRICIA CRIFO**

It is important to have industry around the table because the first dimension is information: we need the information that industry stakeholders command. However, it is important to avoid lobbying practices that can deny, defer, or reduce the burden for the industry.

**IV. THERE IS NO MECHANISM IN INTERNATIONAL LAW TO COMPEL OR ENTICE PRIVATE ENTERPRISE TO STRIVE TO REDUCE PLASTIC POLLUTION, BUT COULD INTERNATIONAL LAW PROVIDE A NEEDED COMMITMENT DEVICE FOR PRIVATE ENTERPRISE AND NATIONAL POLICY?**

**REMARKS BY LAUREL BESCO\***

Despite the fact that there is no mechanism in international law to compel private enterprise into certain actions, I would argue that international law could, and hopefully will, provide an effective avenue to align private enterprise and national policy in a way which would allow for more success in reducing plastic pollution.

Around the world there have been varied approaches to dealing with plastics. National and subnational governments have sought to ban specific plastic products, such as single-use plastic bags<sup>4</sup> and plastic microbeads.<sup>5</sup> Several countries have also initiated broader economy-wide

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<sup>4</sup> Jennifer Clapp & Linda Swanston, *Doing Away with Plastic Shopping Bags: International Patterns of Norm Emergence and Policy Implementation*, 18 ENVTL. POL. 315 (2009).

<sup>5</sup> Peter Dauvergne, *The Power of Environmental Norms: Marine Plastic Pollution and the Politics of Microbeads*, 27 ENVTL. POL. 579 (2018); Leah Shipton & Peter Dauvergne, *Health Concerns of Plastics: Energizing the Global Diffusion of Anti-plastic Norms*, 65 J. ENVTL. PLAN. 2124 (2021).

transitions to circular economy approaches to dealing with plastic production, consumption and waste.<sup>6</sup> In particular, the EU and China have been at the forefront of the transition away from the linear economic model of “take-make-use-waste,” and toward a circular economy in which post-consumer products become material for another product.<sup>7</sup> For plastic this has involved actions such as the EU Eco-Design Directive, which centrally aims to reduce unnecessary or “problematic” plastic, meaning plastic that cannot easily be remanufactured or recycled.<sup>8</sup>

However, while these are certainly steps in the right direction, actions adopted to address plastic vary drastically between regions, countries, and even at different jurisdictional scales within the same country.<sup>9</sup> This variation makes it difficult for private enterprise, which may operate in more than one jurisdiction, to comply with (or even understand) the regulatory requirements and policy guidance they are faced with. For example, private enterprise may be tasked with labeling whether a plastic good should be recycled. However, technical infrastructure for the recovery of plastic waste differs significantly between countries, and even between jurisdictions of the same country,<sup>10</sup> prompting larger questions of how products should be labeled to indicate recyclability.<sup>11</sup>

There are also challenges to meet plastic reductions and utilize alternative materials if there is incoherence with other regulatory standards, such as health and safety standards for packaging in the international trade of agricultural goods.<sup>12</sup> This aspect of implementation aligns with recent research by Kirk and Besco which speaks to the critical importance of regulatory frameworks aligning with Fuller’s Inner Morality of Law criteria (one of which is coherence).<sup>13</sup>

Despite the seeming consensus toward a circular economy, literature has also noted the differences in circular economy transitions within countries.<sup>14</sup> This has prompted further research to examine the ambiguity in meaning of the circular economy,<sup>15</sup> and what the circular economy entails for plastic in practice.<sup>16</sup> Scholars have also noted the conceptual dichotomy in transitions toward a circular economy, with plastic waste simultaneously being targeted for reductions, while also being valued as “resource” to reduce initial production and reliance on virgin resins.<sup>17</sup>

<sup>6</sup> Patrizia Ghisellini et al., *A Review on Circular Economy: The Expected Transition to a Balanced Interplay of Environmental and Economic Systems*, 114 J. CLEANER PROD. 11 (2016).

<sup>7</sup> Jouni Korhonen et al., *Circular Economy: The Concept and its Limitations*, 143 ECOLOGICAL ECON. 37 (2018).

<sup>8</sup> Anne-Marie Benoy & Johanna Lehne, *Circular Economy Policy*, in *DESIGNING FOR THE CIRCULAR ECONOMY* (Martin Charter ed., 2018).

<sup>9</sup> Bastian Loges & Anja P. Jakobi, *Not More than the Sum of its Parts: De-centered Norm Dynamics and the Governance of Plastics*, 29 ENVTL. POL. 1004 (2020).

<sup>10</sup> Christian Zurbrügg, *Managing Waste at the National and Local Levels*, in *THE ROUTLEDGE HANDBOOK OF WASTE, RESOURCES AND THE CIRCULAR ECONOMY* (Terry Tudor & Cleber J.C. Dutra eds., 2020).

<sup>11</sup> David G. Bucknall, *Plastics as a Materials System in a Circular Economy: Plastics in the Circular Economy*, 378 R. SOC’Y OPEN SCI. 1 (2020).

<sup>12</sup> Ayan Dey et al., *Challenges and Possible Solutions to Mitigate the Problems of Single-use Plastics Used for Packaging Food Items: A Review*, 58 JFST 3251 (2021).

<sup>13</sup> Elizabeth Kirk & Laurel Besco, *Improving Energy Efficiency: The Significance of Normativity*, 33 J. ENVTL. L. 669 (2021).

<sup>14</sup> Vanessa Prieto-Sandoval et al., *Towards a Consensus on the Circular Economy*, 179 J. CLEANER PROD. 605 (2018); Benoy & Lehne, *supra* note 8.

<sup>15</sup> Julian Kirchherr et al., *Conceptualizing the Circular Economy: An Analysis of 114 Definitions*, 127 RCR 221 (2017); Gustavo C. Nobre & Elaine Tavares, *The Quest for a Circular Economy Final Definition: A Scientific Perspective*, 314 J. CLEANER PROD. 1 (2021).

<sup>16</sup> Bucknall, *supra* note 11; Kristian Syberg et al., *Regulation of Plastic from a Circular Economy Perspective*, 29 CURRENT OP. GREEN SUSTAINABLE CHEM. 1 (2021).

<sup>17</sup> Eva Romée van der Marel, *Trading Plastic Waste in a Global Economy: Soundly Regulated by the Basel Convention?*, 34 J. ENVTL. L. 477 (2022).

Scholars draw attention to the implications of this dichotomy for global plastic waste trade, assessing whether the transition to a circular economy involves restricting or expanding the international trade of plastic waste to support recovery processes and reduce plastic pollution.<sup>18</sup>

With the current state of different, and even contradictory approaches to addressing plastic, aligning efforts through international law has the potential to be transformational in terms of national policy and private enterprise action. While undeniably challenging to negotiate, an international law mechanism could, at the very least, standardize basic things such as how we define “plastic waste” internationally or other important terms such as “circular economy.” Importantly, harmonizing definitions could address the current conceptual tension in how post-consumer plastic is defined either as waste or as a “resource.”

It is also important to understand that private enterprise is not all the same and should not be lumped together as one actor. For example, research has found that the packaging sector is the largest contributor to both plastic consumption and waste generation globally.<sup>19</sup> However, in contrast, while the construction sector was the second largest contributor to plastic consumption globally in 2017, the sector only contributed to 4 percent of overall plastic waste generated.<sup>20</sup> This contrast relates to the sector specific uses of plastic and the product lifespan. Most plastic packaging is used once and then discarded, whereas uses for plastic in construction may last upward of thirty years.<sup>21</sup>

In addition to differences in private enterprise based on sector-specific uses of plastic, private enterprise also differs along the supply chain. For example, private enterprise within the hospitality industry has a wide breadth of choice in how to meet plastic reductions, through assessing alternative products, and different service models. Alternatively, private enterprise involved in the resource extraction or manufacture of virgin resins for plastic products may be faced with different questions of capacity in a transition to reduce plastic. The differences in ability, perspective, and intentions are evident in the varied responses of private enterprise to government actions seeking to address plastic waste generation and pollution. In Canada, the group of private enterprises taking the Canadian federal government to court over the new single-use plastics ban includes three large plastics producers.<sup>22</sup> Yet, other private enterprise in Canada has chosen not to challenge the new legislation and has moved forward with implementation—perhaps not happily, but with acceptance. The same issue—single use plastics—in the UK saw some private enterprise (namely several very large fast-food retailers) proactively remove single-use plastics from their stores even before government bans were implemented.<sup>23</sup> So, you can see that even as it relates to one small piece of the plastics pollution challenge, different parts of the private enterprise group have reacted in very different ways. Treating this group of actors as homogeneous belies many important factors which will be necessary to consider in the transition to reduce plastic pollution.

Ultimately, with different and, at times, conflicting approaches to address plastic pollution across different legal jurisdictions, international law could harmonize national policy and ensure regulatory coherence for private enterprise to adequately transition.

<sup>18</sup> Zhe Liu et al., *Are Exports of Recyclables from Developed to Developing Countries Waste Pollution Transfer or Part of the Global Circular Economy?*, 136 RCR 22 (2018); Paul Cox, *Environmental Justice, Waste Management, and the Circular Economy: Global Perspectives*, in THE ROUTLEDGE HANDBOOK OF WASTE, RESOURCES AND THE CIRCULAR ECONOMY, *supra* note 10.

<sup>19</sup> Roland Geyer, *Production, Use, and Fate of Synthetic Polymer*, in PLASTIC WASTE AND RECYCLING: ENVIRONMENTAL IMPACT, SOCIETAL ISSUES, PREVENTION, AND SOLUTIONS (Trevor M. Letcher ed., 2020).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Responsible Plastic Use Coalition v. Canada (Environment and Climate Change), [2022] FC 377 (Can.).

<sup>23</sup> The UK Plastic Pact, *On the Journey to a Circular System for Plastics: Annual Report 2020–21* (2021).

**PATRICIA CRIFO**

If we keep the parallel with the socially responsible industry that I have mentioned earlier, at the international level, one of the ways being promoted to support investments in this energy transition is to label green and/or responsible funds, in order to guarantee practitioners and investors the ecological and/or socially responsible quality of their investments.

Since their creation in 1997, more than ten green labels have been introduced on the financial markets of European Union member states (Finansol in France), and have been awarded to over 2,600 products, testifying to a real quantitative success.

Labels play a fundamental role in reducing the asymmetry of information between consumers and certifiers (who produce the label). There has been a recent proliferation of green finance labels in Europe, with for instance more than seven new labels appearing, including two only in France, over the past decade. But instead of simplifying the choice of agents, the multiplication of labels increases the noise provided by each of the quality signals.

The usefulness of labels is to simplify a prolific offer and to establish or restore confidence in the quality of a good that cannot be directly tested or for which the available information is scarce. But as the number of labels increases, trust is unraveling. Economic actors are each less interested in benefiting from a generic label but are looking for a less demanding label at a lower cost. It is, therefore, the whole system that plays in a counterproductive way, with each actor minimizing the intrinsic effort provided. Information asymmetry increases as the number of labels grows. End investors may therefore ultimately turn away from labelled products.

Only one actor seems to hold the keys to improving the situation: the regulator, and at the international level. In fact, no other private agent seems to be able to go against its function of producing information (rating agencies, specialized NGOs) or products (banks and investors). It is in this sense that one can read the recent interventions in this market by the European Commission (taxonomy of green activities, directives on ESG disclosure).<sup>24</sup>

**EVA R. VAN DER MAREL**

There are examples of where international law has allowed itself to be substantiated by industry standards, which raises the question of fragmented implementation. For example, the recently amended list of plastic wastes that continue to be excluded from the Basel Convention includes certain listed plastics provided they are “almost free from contamination and other types of waste.” A footnote reference implies that a range of possible international and national specifications may provide appropriate points of reference for determining whether this is the case, and the updated Technical Guidelines on the Environmentally Sound Management of Plastic Wastes (adopted at COP16) refer to a list of various such specifications both by private sector entities and standardization bodies. Therefore, if you want to see what is included or excluded from the Basel Convention, you will inevitably find yourself looking at varying standards, including from industry. What can we do to ensure that the Convention is nevertheless consistently interpreted and implemented?

*Question from the Audience – Tseming Yang*

What are the implications of the failure to engage in the existing fora, in particular, the Basel Convention, which is considered the logical place to address the issue of plastics? How does this

<sup>24</sup> Patricia Crifo et al., *The Role of Labels in Green Finance: Construction and Regulation of a Label Market in France*, 138 REF 209 (2020).



relate to the broader question of utilizing existing commitments versus creating new treaties, taking into account the challenges associated with treaty implementation, such as resource allocation, time, staff, and the limited experience and resources of those involved in treaty negotiations?

*Question from the Audience*

Given the multifaceted problems around plastics, is there a tension between the focus on climate change and other serious issues like marine pollution and microplastics? Is a bottom-up approach appropriate for the new treaty, or could this create inconsistency between different governments' approaches to regulating plastics?

**EVA R. VAN DER MAREL**

The audience raises the valid questions of the relevance of the Basel Convention for international plastics regulation, the dangers of fragmented national approaches in the case of a bottom-up approach, and the role of a potential new instrument. I want to discuss this in the context of the fourth "provocative question" that our chair Peter Rankin wanted to discuss, namely, could the non-participation of a one or a few key countries compromise an effective international solution?

First, is there a need for a new international "solution" to plastics pollution in the form of a new treaty, or are existing instruments and mechanisms sufficient to regulate the plastics problem? The Basel Convention is currently the only international instrument that comprehensively regulates plastics. The Convention was most recently amended at COP14 (May 2019) whereby additional plastic wastes were clearly brought within its regulatory scope. These changes became effective on January 1, 2021. On the one hand, the Basel Convention now regulates the plastics life cycle to a significant degree, in so far that plastic wastes included within its scope are subject to the Convention's mechanisms and principles, including the aim of their environmentally sound management (ESM). ESM is defined as "taking all practicable steps to ensure that [wastes included in the Convention] are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes," which is achieved for instance through obligations of waste minimization, self-sufficiency, and minimizing and controlling transboundary movement of such plastic wastes. The need to reduce waste and to apply the principle of the waste hierarchy (frequently referred to in guidance on ESM developed under the Convention, including the updated Technical Guidelines on the Environmentally Sound Management of Plastic Wastes, adopted at COP16) also has implications upstream, for instance with regard to design for recycling, bans on single-used plastics, and consumption reduction targets. So, the Basel Convention does more or less comprehensively regulate a great deal of the plastics life cycle. On the other hand, plastic wastes that are presumed non-hazardous (Annex IX, entry B3011) continue to fall outside the scope of the Basel Convention. Though this is a narrower category than before the COP14 amendments, and the exclusions are predicated on several conditions (such as not being contaminated, and being subject to environmentally sound recycling), this effectively excludes from the Convention many "easier to recycle" plastic wastes that form the building blocks of a global circular economy. Their exclusion from international regulation is problematic, as these "useful" wastes may still be prone to mismanagement, in particular when shipped abroad. Their exclusion also misses an opportunity to influence upstream decisions. This incomplete coverage is one reason why relying on the Basel Convention alone is insufficient to regulate plastics, as per the question of the audience, and why a new treaty is important. It can of course be envisaged that more plastic wastes may be included within the scope of the Basel Convention in the future. However, this leads me to the next point, which is that there are inherent limitations in influencing upstream

decisions through broad guiding principles such as the waste hierarchy, and end-of-pipe related obligations such as the obligation to prevent, reduce, and control marine pollution including from land-based sources under the UN Convention on the Law of the Sea. These inherently fall short of regulating the “root” of the problem, which are design decisions made at the very early stages of (plastics) production. Though a new plastics treaty should build on these existing principles and ensure synergies with other relevant instruments (for example, the Basel Convention; the Stockholm Convention, under which some harmful plastics additives are listed; and Regional Seas Conventions, some of which have protocols on land-based pollution and action plans on marine litter in particular), key gaps remain that justify a new, additional, plastics-specific treaty. A new plastics treaty can provide normative clarity on key concepts (for instance, plastics, circular economy, sound recycling, etc.); it can set global targets, as also discussed by Benoit in his remarks on top-down versus bottom-up approaches; and it can trigger new institutional developments, like a clearing-house mechanism.

Secondly, what if one or several countries do not participate in such a new international “solution”? Here, I would observe that the plastic sector is highly globalized, with international trade occurring at every stage of the life cycle (feedstocks, additives, primary materials, intermediates, goods, wastes), though not all countries participate equally in these different stages of plastics production and trade (notably, very few African and South American countries do). This means that in order to avoid trade (law) implications, it is imperative that we develop internationally agreed definitions and standards in relation to plastics production, usage, and end-of-life, whether through a new treaty or in the context of the International Organization for Standardization, which continues to actively develop standards in relation to plastics. We can already observe that some differences in national plastics-related measures have been raised as Specific Trade Concerns (STCs) at the World Trade Organization’s Committee on Technical Barriers to Trade. At the same time, we can see from the divergent views at the ongoing negotiations of a new plastics treaty, both in relation to procedural matters (in particular, voting) and in relation to elements to be included, show that it is important to consider the implications of possible non-participation. Here, another parallel with the Basel Convention can be envisaged. As also suggested by members of the High Ambition Coalition (though with several caveats), a new treaty could include non-party trade measures, which could be similar to those found in the Basel Convention. Under the Basel Convention, (plastic) wastes that are included within its scope may not be exported to, or imported from, a non-party, with the notable exception if parties have an agreement to that effect which requires at least the same level of ESM. Taking the question of how to encourage non-party participation further, I argue that we might consider capitalizing on the power of exporters. Given the global trade dynamics across the plastics production life cycle, there is scope for critically reflecting on exporter obligations. Again, this could build on, but go beyond, the obligation on the country of export found in the Basel Convention to take the appropriate measures not to allow exports of wastes “if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.”

## **BENOIT MAYER**

To add further to Eva’s comments, we can partly rely on what Europeans call the Brussels effect—a jurisdiction takes some measures and others must follow because the industry is doing the same for everyone else. For the composition of plastics, if a critical number of countries accept a standard, that could potentially mean that other countries will follow automatically, in the sense that they will be under the same global production chain.

**PATRICIA CRIFO**

From an economic perspective, it is legitimate to call on companies to do their part. The justification is that we face a double failure: a market failure and a governmental/legal failure.

Europe is witnessing another trend in terms of ESG: impacts. This translates to three points. First, intentionality; to have an impact a company must have the intention to generate a positive social and environmental impact. Second, additionality; proving that a company has changed things. Third, measurement; measuring impacts. This transforms the debate into impacts.

*Question from the Audience – Richard Tarasofsky*

What suggestions does the panel have regarding the possible treaty architecture that would facilitate positive outcomes? How can existing models like the Paris Agreement or the chemicals and waste treaties, with their frequent additions to annexes, be leveraged to encourage countries to enhance their ambitions progressively in this context, while addressing the challenges that can hinder progress?

**EVA R. VAN DER MAREL**

In preparation of the second round of negotiations of the plastics treaty, the Secretariat prepared an “elements paper” that summarized the various submissions they received on possible options for elements to be included. Of note are the options of “phasing out and/or reducing the supply of, demand for and use of primary plastic polymers,” “banning, phasing out and/or reducing the use of problematic and avoidable plastic products,” and “banning, phasing out and/or reducing the production, consumption and use of chemicals and polymers of concern.” (Some of) these elements could be achieved through an Annex to the new treaty with substances or products to phase out, and criteria for how to identify them. However, experience from the Rotterdam and Stockholm Conventions demonstrate the difficulty of reaching agreement on additional listings down the line, which can be very lengthy processes. Moreover, one of the issues with focusing on “listing” substances or products for phasing them out of production is that it shifts the discussion away from overall levels of consumption, and generally achieving more sustainable production and consumption patterns, and instead focuses on taking “easy to replace” elements out of the chain of production. I would therefore argue that, though a useful regulatory tool, listing products and substances of concern should not be the main focus of a new treaty. Rather, and again looking at Basel, mechanisms can be set up for the continuing development of “soft” guidance and further frameworks for implementation, to help ensure any new treaty becomes a living and dynamic instrument.

**BENOIT MAYER**

An important development in the Intergovernmental Negotiating Committee would be the rules of procedure and whether the Conference of the Parties (COP) can take decisions by a 3/4 majority. The COP under the climate change rules has no rules, which means that there must be consensus on every single decision made. This has hindered negotiations.

**LAUREL BESCO**

Mechanisms like Basel and the Convention on Biological Diversity have plastics included in them, but they have different approaches and focuses, and the same goes for national and subnational approaches. Therefore, without a standard top-down, consistent approach there will not be the potential for norms to develop within industry or private enterprise, or in consumer behavior.