U.S. Authorities and Considerations for the Global Plastics Agreement

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INTRODUCTION

The plastic pollution crisis is yet another defining environmental problem of our time. Not only is plastic pollution prevalent in our environment, a growing body of scientific research is linking plastic production, use, waste management, and pollution to various human health and environmental impacts, environmental justice concerns, climate change, and more. Recognizing that a global effort is necessary to effectively address the scope, scale, and complexity of plastic pollution, the UN Environment Assembly (UNEA) adopted a resolution in March 2022 to develop an international legally binding instrument on plastic pollution, including in the marine environment ("Global Plastics Agreement").[1] The resolution "requested the Executive Director of the UN Environment Programme (UNEP) to convene an Intergovernmental Negotiating Committee (INC) to develop 'the instrument,' which is to be based on a comprehensive approach that addresses the full life cycle of plastic, including its production, design, and disposal."[2]

The first four rounds of negotiations for the Global Plastics Agreement occurred between November 2022 and April 2024. The fifth, and potentially final, round of negotiations (INC-5) is scheduled to take place on November 25 through December 1, 2024, in Busan, Republic of Korea. The accelerated negotiations schedule and the lack of consensus among INC Member States on most provisions of the proposed instrument text makes it difficult to opine on whether an international legally binding instrument will be achieved by the end of the year, or if a continuation of the negotiations will be required. In an effort to support the negotiations, at the end of INC-4, two ad hoc intersessional expert groups were established to help inform and advance the work of the INC ahead of INC-5.[3] Though progress was made at the intersessional meetings, much remains to be negotiated at INC-5, including key provisions of the instrument.

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[1] *Intergovernmental Negotiating Committee on Plastic Pollution*, United Nations Environment Programme, https://www.unep.org/inc-plastic-pollution (last visited Oct. 11, 2024).

[2] *Id.*

[3] *Intersessional Open-ended Expert Groups*, United Nations Environment Programme, https://www.unep.org/inc-plastic-pollution/ioeeg (last visited Oct. 23, 2024) (INC-5 is intended to be the final round of negotiations. Whether additional rounds of negotiations may be needed is unclear as of this report. The two ad hoc intersessional expert groups—through which all INC members can participate—selected technical resource persons to help inform and advance the work of the INC. The meetings took place in Bangkok, Thailand from August 24-28, 2024, and were not negotiating or decision-making meetings. Expert Group 1 was established to develop an analysis of potential sources and means that could be mobilized for implementation of the objectives of the instrument, including options for establishing a financial mechanism, aligning financial flows, and catalyzing finances for the consideration by the Committee at INC-5. Expert Group 2 was established to identify and analyze criteria and non-criteria-based approaches regarding plastic products and chemicals of concern in plastic products. Expert Group 2 was also direct to analyze plastic product design, with a focus on recyclability, reusability, use, and application, for the Committee's consideration at INC-5.).

As the largest generator of plastic solid waste by mass and per capita, the United States has a global responsibility to decrease rates of its current plastic production and waste generation[4] and has an important leadership role to play in the Global Plastics Agreement negotiations. As a supplement to our March 2024 report, *Existing U.S. Federal Authorities to Address Plastic Pollution: A Synopsis for Decision Makers*,[5] this report offers a concise review of the instruments through which the United States can negotiate and conclude international agreements. The report then describes how existing U.S. domestic law and international obligations/precedent may align with and support three key provisions under negotiation for the Global Plastics Agreement.[6] Only when the text of the Global Plastics Agreement is finalized can it be determined whether existing U.S. law authorizes the instrument's provisions or whether new legislation would be required to authorize and implement the provisions of the agreement. However, the purpose of this analysis is to offer insight into existing U.S. domestic and international obligations ahead of the fifth round of negotiations for the Global Plastics Agreement.

U.S. APPROACH TO INTERNATIONAL AGREEMENTS

Instruments of International Lawmaking

Of the several instruments through which the United States can commit to international obligations, treaties and executive orders are frequently used to bind the United States to international commitments. The Treaty Clause of the U.S. Constitution vests the executive branch with the power to make treaties with other foreign entities provided it receives the advice and consent of a supermajority of the Senate (i.e., Article II, Section 2 treaties).[7] Scholars of international law have estimated, however, that Article II, Section 2 treaties comprise only a fraction of all international agreements to which the United States is a party.[8] Other forms of international agreements include executive agreements, which can be broadly (and imperfectly) categorized into: (1) sole executive agreements; and (2) congressional-executive agreements.[9]

Regardless of form, all instruments of U.S. international lawmaking must be consistent with the U.S. Constitution and legislation enacted by Congress.[10] The U.S. Department of State has published criteria

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[4] NAT'L ACADS. SCIS., ENG'G, & MED., RECKONING WITH THE U.S. ROLE IN GLOBAL OCEAN PLASTIC WASTE 52 (The National Academies Press, 2022), https://nap.nationalacademies.org/catalog/26132/reckoning-with-the-us-role-in-global-ocean-plastic-waste.

[5] Margaret Spring, et al., *Existing U.S. Federal Authorities to Address Plastic Pollution: A Synopsis for Decision Makers*, ENVTL. L. INST. (updated Oct. 2024), [hereinafter *Existing U.S. Federal Authorities to Address Plastic Pollution*], https://www.eli.org/research-report/existing-us-federal-authorities-address-plastic-pollution-synopsis-decision-makers.

[6] *See infra*, note 12 (describing the U.S. State Departments Circular 175 Procedure).

[7] U.S. CONST., art. II, § 2, cl. 2.

[8] Ryan Harrington, *Understanding the "Other" International Agreements*, 108 LAW LIBR. J. 343, 344 (2016) (*citing generally* Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive*, 83 MICH. L. REV. 969 (1985) (studying international agreements "concluded between 1946 and 1973," of which nearly 87 percent were executive agreements entered into by the executive with a grant of authority from Congress)).

[9] Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236, 1239 (2008) (explaining that many U.S. international lawmaking instruments "uncomfortably straddl[e]" both the Treaty Clause route and congressional-executive agreement route).

[10] David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. OF TRANSNAT'L L. 741, 744 (2017) (citing Restatement (Third) of the Foreign Relations Law, § 302 cmt. b.).

for, among other items, the negotiation and conclusion of international agreements.[11] These criteria, listed below and referred to as the "Circular 175 Procedure," help direct the inquiry in determining the procedure that should be followed "for any particular international agreement."[12]

Considerations for Selecting Among Constitutionally Authorized Procedures	
i.	The extent to which the agreement involves commitments or risks affecting the nation as a whole;
ii.	Whether the agreement is intended to affect state laws;
iii.	Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
iv.	Past U.S. practice as to similar agreements;
v.	The preference of the Congress as to a particular type of agreement;
vi.	The degree of formality desired for an agreement;
vii.	The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
viii.	The general intentional practice as to similar agreements.

Sole Executive Agreements

Generally understood to rely on the executive's inherent constitutional powers, sole executive agreements do not find "support in either prior treaty or [federal] statute."[13] Instead, the President can enter into executive agreements based only on their authority under Article II of the Constitution.[14] The Circular 175 Procedure states the executive can conclude sole executive agreements provided the agreement is consistent with legislation enacted by Congress.[15] It is generally accepted that, because the President can independently enter a sole executive agreement, the President "may also unilaterally terminate those agreements."[16]

While the Supreme Court has long upheld the executive's authority to conclude these types of agreements,[17] this method of concluding international agreements has "attracted a great deal of attention because of the potentially unrestricted reach of the power and questions concerning Congress's authority to regulate it."[18]

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[11] 11 U.S. Dep't of State, Foreign Affairs Manual § 720 (2006).
[12] *Id*. at § 723.3; *See also* STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 11 (July 13, 2023) (explaining that "Circular 175 initially referred to a 1955 Department of State circular that establish a process for the coordination and approval of international agreements").
[13] David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. OF TRANSNAT'L L. 741, 748 (2017).
[14] CONG. RESEARCH SERV., 106TH CONG., REP. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATE SENATE 5 (2001) (providing that the executive can use: the "general executive authority in Article II, Section 1; power as Commander in Chief of the Army and Navy in Article II, Section 2, Clause 1; Treaty Clause itself for agreements, which might be part of the process of negotiating a treaty in Article II, Section 2, Clause 2; authority to receive Ambassadors and other public Ministers in Article II, Section 3; and duty 'to take care that the laws be faithfully executed' in Article II, Section 3").
[15] Wirth, *supra* note 10 (citing Foreign Affairs Manual § 723.2-2)
[16] INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, *supra* note 6, at 28.
[17] American Ins. Ass'n v. Garamendi, 593 U.S. 396, 415 (2003).
[18] *See* Wirth, *supra* note 7, at 749 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, § 303 cmts. h–j, n 11–12) (AM. L. INST. 1987)).

Congressional-Executive Agreements

Congressional-executive agreements refer to international instruments that the executive can conclude with congressional authorization. Head of Foreign and International Law at Yale Law Library, Ryan Harrington, succinctly describes two forms of congressional-executive agreements (ex ante and ex post congressional-executive agreements) in his article, *Understanding the "Other" International Agreements*, summarized in the table below.

	Ex ante Congressional-Executive Agreement	Ex post Congressional-Executive Agreement
Executive's Role	President has existing authority to enter into an international agreement via authorizing statute	President initiates negotiation of international agreement *without* either Article II authorization or Congressional authorization; then submits negotiated agreement to both branches of Congress, ex post, for its approval
Congress's Role	Enacted statutory authorization for executive to enter into international agreements	Approves (or disapproves) negotiated international instrument
Negotiation	Executive	Executive
Conclusion	Executive	If Congress approves the negotiated instrument, the instrument will progress through a joint resolution or the regular legislative process. Then the Executive signs the instrument under Presentment Clause.
Termination	Likely depends on underlying, authorizing statute[19]	Likely depends on implementing statute[20]
Examples	Mutual Education and Cultural Exchange Act of 1961; Foreign Assistance Act of 1961	Actions leading to the New Deal

Professor and scholar of public international law, David Wirth, has explained that a sub-type of congressional executive agreements can be (and has been) "concluded under or in accordance with the president's constitutional power and consistent with, but not expressly authorized by, existing legislative

[19] INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, *supra* note 6, at 28 (but also explaining that "Presidents have also asserted authority to withdraw unilaterally from congressional-executive agreements," such as former President Trump's 2018 withdrawal from NAFTA. In this instance, the Department of Justice's Office of Legal Counsel "reasoned that Presidents may unilaterally withdraw from congressional-executive agreements unless the statute authorizing entry into the agreement restricted withdrawal authority").
[20] *Id*. at 28–29.

authority."[21] An example of this type of agreement is the Paris Agreement, which contains several binding and non-binding provisions.[22] This sub-category of agreements, and its constitutional bounds, is the subject of debate among scholars.

Nonbinding/Political Commitments

The Executive can also negotiate and conclude nonbinding international agreements—sometimes referred to as "political commitments" or "'soft law' pacts"—without seeking Congress's approval.[23] Nonbinding commitments do not confer "legally enforceable rights or obligations," but instead can provide "moral and political" guidance on the given topic of agreement.[24] An example of a nonbinding commitment that the United States signed was the 1975 Helsinki Accords, which discusses, among other provisions, "territorial integrity, human rights, and peaceful settlement of disputes."[25]

The instruments through which the United States can commit to international obligations described above are relevant for the U.S. Delegation as it enters into INC-5. The following section will discuss whether and how existing U.S. domestic and international authorities can support the implementation of three Global Plastics Treaty provisions as they exist as of the date of this report.

IN THE CONTEXT OF THE GLOBAL PLASTICS AGREEMENT

The factors that determine what Global Plastics Agreement the United States can negotiate and conclude include the final text of the agreements' provisions, existing U.S. law (e.g., federal statutory authorities and international obligations) related to those final provisions, and executive and legislative political will. This report provides a noncomprehensive review of such existing authorities; however, future gap analyses will be necessary to determine whether any of the authorities described herein confer the support necessary for domestic implementation.

Though there are opportunities to regulate plastics under existing federal authorities in the United States (see *Existing U.S. Federal Authorities to Address Plastic Pollution: A Synopsis for Decision Makers*), there are few laws and policies that directly regulate plastics at any stage of the life cycle. Amendments to existing authorities are necessary to regulate plastic production and pollution, but new laws and regulations are also necessary to tackle this problem. Executive and interagency action through the Interagency Policy Committee on Plastic Pollution and a Circular Economy report, *Mobilizing Federal Action on Plastic Pollution: Progress, Principles, and Priorities*,[26] agency action such as EPA's Draft

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[21] Wirth, *supra* note 10, at 750–53 (citing Japan Whaling Ass'n v. Cetacean Soc'y, 478 U.S. 221 (1996) for support that the president can conclude these types of agreements).
[22] *Id*.
[23] Harrington, *supra* note 8. at 346; INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, *supra* note 12, at 12.
[24] INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, *supra* note 12, at 12.
[25] *What Are the Helsinki Accords?*, NAT'L MUSEUM OF AM. DIPLOMACY, https://diplomacy.state.gov/stories/what-are-the-helsinki-accords/#:~:text=On%20August%201%2C%201975%2C%20the,to%20the%20forefront%20of%20diplomacy (last visited Oct. 29, 2024); INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, *supra* note 12, at 12.
[26] INTERAGENCY POLICY COMMITTEE ON PLASTIC POLLUTION AND A CIRCULAR ECONOMY, MOBILIZING FEDERAL ACTION ON PLASTIC POLLUTION: PROGRESS, PRINCIPLES, AND PRIORITIES (July 2024), https://www.whitehouse.gov/wp-content/uploads/2024/07/Mobilizing-Federal-Action-on-Plastic-Pollution-Progress-Principles-and-Priorities-July-2024.pdf.

National Strategy to Prevent Plastic Pollution,[27] and proposed legislation[28] serve as important first steps, but more is needed, including updates to existing regulations and new legislation. The relationships between plastic pollution regulation and issues concerning human rights, trade, customs, health, and financing will also need to be studied and reflected across a variety of legal and regulatory fields.

LEGAL SUPPORT FOR KEY PROVISIONS

The following analysis considers existing U.S. federal authorities and international precedent relevant to three provisions in the Global Plastics Agreement (Part II, Provisions 1, 2, and 3) through the lens of the third and fourth factors of the Circular 175 Procedure (i.e., whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; and past U.S. practices as to similar agreements). This analysis is based on the text of the post-INC-4 compilation text for the Global Plastics Agreement ("Compilation Draft")[29] and the general objectives underpinning Part II, Provisions 1, 2, and 3.

Provision II.1 addresses primary (and secondary) plastic polymers; Provision II.2 addresses chemicals (and polymers) of concern; and Provision II.3 addresses problematic and avoidable plastic products. These three provisions of Part II of the draft instrument, like other provisions, have become a significant point of divide among the negotiating parties, including the United States.

Legal Support for Part II, Provision 1 – Plastic Polymers (i.e., Plastic Production)

Part II, Provision 1 of the Compilation Draft concerns plastic polymers, specifically the production of primary plastic polymers (i.e., virgin plastics) and secondary plastic polymers (i.e., recycled plastics or resins). The UNEA resolution called for an instrument that is "[b]ased on a comprehensive approach that addresses the full life cycle of plastic."[30] Despite this objective, some parties have been reluctant or opposed to include production control measures in the instrument. Given that plastic production doubled between 2000 and 2019 (with 460 million tonnes produced in 2019 alone) and is anticipated to triple by 2060, an effective treaty instrument should include production controls and cannot attempt to address the problem through recycling and waste management alone.

The U.S. Delegation has proposed to reduce the demand for primary plastic polymers and establish government procurement policies, and has also indicated an openness to voluntary production reduction

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[27] U.S. Envtl. Prot. Agency, Draft National Strategy to Prevent Plastic Pollution, Part of a Series on Building a Circular Economy for All 5 (Apr. 2023), https://www.epa.gov/system/files/documents/2023-04/Draft_National_Strategy_to_Prevent_Plastic_Pollution.pdf.

28 Efforts to enact legislation to directly address plastic pollution include iterations of the Break Free From Plastic Pollution Act, Protecting Communities From Plastics Act, REDUCE Act, and Plastic Pellet Free Waters Act.

[29] Compilation of draft text of the international legally binding instrument on plastic pollution, including in the marine environment, UNEP/pp/INC.5/4 (July 9, 2024) [hereinafter Compilation Draft], https://wedocs.unep.org/bitstream/handle/20.500.11822/45858/Compilation_Text.pdf. Note, the Chair of the INC is also expected to issue a final version of a "non-paper" to the delegations detailing points of focus for the next round of negotiations. *See* Ambassador Luis Vayas Valdiviesco, INC Chair, Communication to the Heads of Delegation and INC Focal Points, Second Iteration of Non-Paper (last updated Sept. 24, 2024).

[30] *Intergovernmental Negotiating Committee on Plastic Pollution, supra* note 2.

targets and phasedowns (noting a global goal and/or cap could serve as a north star).[31] Demand-side reduction measures (i.e., reducing consumption or demand for plastics) are part of the solution, but supply-side measures (i.e., limiting production, controlling pollution, or otherwise regulating producers in a way that affects supply) are critical tools that align with the U.S. Delegation's priorities for the Global Plastics Agreement. The following U.S. federal legal authorities and international precedents provide support for these objectives and priorities.

Executive Action Relevant to Plastic Production

IPC Report

In July 2024, the Interagency Policy Committee on Plastic Pollution and a Circular Economy, launched by the Biden-Harris Administration, published the report *Mobilizing Federal Action on Plastic Pollution: Progress, Principles, and Priorities* ("IPC Report").[32] Though the IPC Report is nonbinding, and not an authority itself, it formally acknowledged the severity of the plastic pollution crisis and the scale of the response required to effectively confront it.[33] The IPC Report reached two key conclusions: "(1) successfully combatting plastic pollution requires the United States to take a comprehensive approach that addresses the impacts of plastics throughout the entire life cycle—from *production* to end of life; and (2) the scope, scale, and complexity of plastic pollution require coordinated action from all levels of government."[34] The report also takes stock of federal agencies' current efforts to reduce single-use plastics in government operations, drive down toxic emissions and chemicals of concern in plastic *production*, and fund investments to improve solid waste management while cleaning up existing pollution.[35]

In addition, the report "complements and supports other key domestic and international efforts to combat plastic pollution, including developing an international agreement that is commensurate to the scale and breadth of the plastics problem,"[36] acknowledging that "[r]eaching a strong global agreement can help turn the tide against the sea of plastic pollution that is rising around the world."[37]Notably, the IPC Report recognizes that plastic production and the associated pollution is a major problem, contributing to climate change, impacts to frontline communities, toxics exposure and human health effects, and other environmental justice concerns. Efforts to reduce production are critical to addressing plastic pollution, though the report largely focuses on assessing and reducing pollution from plastic production as a first step.[38]

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[31] Of note, "over two dozen member states (such as France, Netherlands, United Kingdom, Peru, Nigeria, Australia) signed the 'Bridge to Busan Declaration on Primary Plastic Polymers', calling for including the production of plastic polymers to the agreement. This could include production ceilings, reduction targets or other constraints." Michaela Motowidlo, *UN Global Plastics Treaty: Agreement on intersessional work and advancement of draft,* RECYCLE ME (June 17, 2024), https://recycleme.eco/de/en/blog/un-global-plastics-treaty-agreement/. The United States has not signed this declaration. *See Bridge to Busan: Declaration on Primary Plastic Polymers*, BRIDGE TO BUSAN, https://www.bridgetobusan.com/ (last visited Oct. 28, 2024).

[32] INTERAGENCY POLICY COMMITTEE ON PLASTIC POLLUTION AND A CIRCULAR ECONOMY, MOBILIZING FEDERAL ACTION ON PLASTIC POLLUTION: PROGRESS, PRINCIPLES, AND PRIORITIES (July 2024).

[33] *Id*.

[34] *Id.* at 1–2 (emphasis added).

[35] *Id.* at 1.

[36] *Id.* at 3.

[37] *Id.*

[38] *Id.* at 11.

Several federal authorities, discussed below, can be mobilized to address plastic production and pollution from production, in line with the proposed parameters of the Global Plastics Agreement.[39]

Federal Procurement

The U.S. federal government spends between $650 and $700 billion on products and services each year.[40] Given this level of purchasing power, government procurement decisions can influence market trends through their direct market impact by supporting emerging supply chains for innovative products and helping innovative products achieve economies of scale. As identified by the National Academies of Sciences, Engineering, and Medicine's 2022 Report on the United States' role in global ocean plastic waste, government procurement rules that favor reusable products is a strategy for decreasing plastic waste generation.[41] Such procurement rules can reduce the domestic demand for certain plastic products (e.g., a demand-side measure).

Through the Federal Acquisition Regulation (FAR) and in furtherance of section 207 of Executive Order 14057 on federal sustainability,[42] the Office of Management and Budget (OMB) has directed agencies to take actions to reduce and phase out procurement of single-use plastic products. Many agencies have taken steps to implement EO 14057, including the Department of the Interior, Department of Energy, the Department of Justice, the Department of Transportation, the Fish and Wildlife Service, the Food and Drug Administration, the Forest Service, the National Oceanic and Atmospheric Administration, and the State Department.[43] EO 14057 empowers all federal agencies to take steps to reduce the procurement, sale, and distribution of single-use plastic products.

On April 22, 2024, the Biden-Harris Administration took a significant step in implementing EO 14057 by finalizing the Sustainable Products and Services Rule. The new rule amends the FAR, directing federal procurement agencies (namely the General Services Administration (GSA), Department of Defense (DOD), and National Aeronautics and Space Administration (NASA)) to prioritize sustainable products and services "to the maximum extent practicable."[44]

Finally, in compliance with EO 14057, the GSA is considering a new regulation to reduce single-use plastics in the packaging and shipping of products. GSA could work with EPA throughout the ongoing

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[39] *See, e.g., id.* at 18 ("'Upstream' measures, such as more effective regulations on the methods, feedstocks, and chemicals used in plastic production, can lessen associated pollution from key sources at the beginning of the plastic lifecycle. . . . Pairing these measures with improved data collection is necessary to understand the full extent of the environmental and human health risks of plastic production.").

[40] Nichola Groom, *U.S. Will Consider Limiting Plastics in Federal Purchasing,* REUTERS (Jul. 7, 2022), https://www.reuters.com/world/us/us-will-consider-limiting-plastics-federal-purchasing-2022-07-06/; Fact Sheet, The White House, Biden-Harris Administration Announces New Better Contracting Initiative to Save Billions Annually (Nov. 8, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/11/08/fact-sheet-biden-harris-administration-announces-new-better-contracting-initiative-to-save-billions-annually/.

[41] NAT'L ACADS. SCIS., ENG'G, & MED., RECKONING WITH THE U.S. ROLE IN GLOBAL OCEAN PLASTIC WASTE (The National Academies Press, 2022), https://nap.nationalacademies.org/catalog/26132/reckoning-with-the-us-role-in-global-ocean-plastic-waste.

[42] Executive Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability (Dec. 8, 2021).

[43] *See generally*, INTERAGENCY POLICY COMMITTEE ON PLASTIC POLLUTION AND A CIRCULAR ECONOMY, MOBILIZING FEDERAL ACTION ON PLASTIC POLLUTION: PROGRESS, PRINCIPLES, AND PRIORITIES (July 2024).

[44] Federal Acquisition Regulation, 88 Fed. Reg. 51,672 (Aug. 4, 2023) (to be codified at 48 C.F.R. pts. 1, 52).

rulemaking process "to support a [] plan to phase out single-use plastic and packaging . . . consistent with the May 2023 recommendations of the GSA Acquisition Policy Federal Advisory Committee."[45] The other principal federal procurement agencies, DOD and NASA, could consider regulations similar to the GSA's to reduce single-use plastics in packaging and shipping.

Considering the purchasing power of the federal government, such procurement orders, rules, and regulations serve as significant demand-side measures to reduce production of certain plastic polymers.

U.S. Federal Law Relevant to Plastic Production

Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) was enacted in 1976 to prevent unreasonable risks of injury to human health or the environment associated with the manufacture, processing, distribution, use, or disposal of chemical substances.[46] TSCA, in addition to regulating disposal and management, regulates chemical substances "upstream," or at the point of production and entering commerce.[47] By regulating the chemical substances in plastics upstream, TSCA provides a path for the United States to act early in the plastics life cycle, such as through regulating production, enforcing product standards, and decreasing waste generation.

Under sections 5 of 6 of TSCA, EPA has the authority to regulate toxic chemicals and could regulate the manufacturing of plastics and their chemical constituents (such as individual additives and plasticizers). EPA could also regulate significant new uses of plastic products and products manufactured from plastic waste under section 5.

Notably, there are some limitations on TSCA's applicability to plastics. For example, some substances used in plastics are already listed in the Chemical Substance Inventory, rendering them "existing substances," and under the purview of section 6 rather than section 5.[48] Further, in 1995, the EPA issued a regulation explicitly exempting new types of polymers—the central ingredient in plastics—from the premanufacture notification requirement (Polymer Exemption Rule).[49] The regulation's rationale is based on the premise that polymers are relatively stable, nontoxic in their manufactured product condition, and do not typically bioaccumulate.[50] The exception also allows for new types of plastic to avoid appearing on the Chemical Substance Inventory and being subject to TSCA's Chemical Data

[45] Ocean Conservancy, Comment on National Draft Strategy to Prevent Plastic Pollution, EPA-HQ-OLEM-2023-0228, at 6 (July 31, 2023), https://www.regulations.gov/comment/EPA-HQ-OLEM-2023-0228-0239 (citing *GSA Acquisition Policy Federal Advisory Committee (GAP FAC)*, GEN. SERVS. ADMIN. 26 (Spring 2023)).
[46] STEVEN FERREY, ENVIRONMENTAL LAW 674 (8th ed. 2019).
[47] *Id*. at 673–674.
[48] *See generally*, *TSCA Chemical Substance Inventory*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/tsca-inventory (last visited Oct. 29, 2024).
[49] 40 C.F.R. § 723.250.
[50] Thomas Berger, Rhys Daniels, Matthew Harney, *A Practical Understanding of the Polymer Exemption*, KELLER & HECKMAN (2016), https://www.khlaw.com/insights/practical-understanding-polymer-exemption?language_content_entity=en.

Reporting rules (explained below).[51] According to some academic observers, the EPA's Polymer Exemption Rule has "effectively exempted most plastics from TSCA scrutiny."[52]

The EPA has made some exceptions to the Polymer Exemption Rule. For example, in 2010, the EPA issued another rule that excluded polymers containing perfluoroalkyl sulfonates (PFAS) and perfluoroalkyl carboxylates (PFAC) as an integral part of their composition from the polymer exemption.[53] In comments to the EPA Draft National Strategy to Prevent Plastic Pollution, some environmental groups called for the elimination of the polymer exemption altogether (which would require EPA to issue revised regulations, consistent with the Administrative Procedure Act's notice and comment requirements).[54]

Third, section 5's language only extends to "new chemical substances" rather than "mixtures." This framing—sometimes referred to as the "mixture exemption"—allows plastic manufacturers to develop new plastic compounds and plastic additive formulations without premarket approval.[55] TSCA defines "mixture" as any combination of chemical substances so long as they do not produce a chemical reaction.[56] Plastic manufacturers often create new products by mixing in plastic additives without causing a chemical reaction, preventing the new product from being considered a separately regulated "new chemical substance."[57] Furthermore, this type of plastic compounding is not typically considered "manufacturing" under TSCA.[58] The result is the creation of products that have different chemical properties (such as greater resistance to degradation) without undergoing TSCA premarket approval.

These three barriers to regulating new chemical substances under TSCA section 5 have not prevented the EPA from regulating significant new *uses* of plastics under the same authority. For example, the EPA recently relied on its TSCA section 5 authority to regulate "Significant New Uses" of plastic waste used as feedstock for transportation fuels.[59] Specifically, in June 2023, the EPA proposed Significant New Use Rules (SNURS) that would require companies to obtain EPA approval before manufacturing or processing eighteen chemicals derived from plastic-waste feedstocks.[60] The purpose of the rule is to

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[51] Earthjustice, Comments on U.S. Environmental Protection Agency's Draft National Strategy to Prevent Plastic Pollution, EPA-HQ-OLEM-2023-0228 35–36 (2023) [hereinafter Earthjustice Plastic Pollution Comments], https://earthjustice.org/wp-content/uploads/2023/11/2023.07.31-comments-on-draft-national-strategy-to-prevent-plastic-pollution.pdf.

[52] Robert Adler & Carina Wells, *Plastics and the Limits of U.S. Environmental Law*, 47 HAR. ENV'T. L. REV. 1, 45, (forthcoming 2024).

[53] 40 C.F.R. § 723.250 (d)(6).

[54] Earthjustice Plastic Pollution Comments, *supra* note 51, at 35–36.

[55] Mary Ellen Ternes, Compilation Memorandum regarding the GSCE Plastics Reports: France and the United States: Comparative Law Analysis and Recommendations Regarding Plastic Waste (Jan. 1, 2022) [hereinafter *Compilation Memorandum regarding the GSCE Plastics*], https://www.gcseglobal.org/sites/default/files/inline-files/GCSE%20French%20American%20Comparative%20Law%20of%20Plastic%20Pollution%20March%2015%202022.pdf.

[56] 15 U.S.C. § 2602(10).

[57] *Compilation Memorandum regarding the GSCE Plastics Reports*, *supra* note 55.

[58] *Id*.

[59] *Rules for Chemicals Made from Plastic Waste-Based Feedstocks under the Toxic Substances Control Act: Rule Summary,* ENVTL. PROT. AGENCY (Jul. 19, 2023), https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/rules-chemicals-made-plastic-waste.

[60] Significant New Use Rules: Certain Chemical Substances (23-2.5e), 88 Fed. Reg. 39,804 (June 20, 2023).

ensure the plastic-waste feedstocks do not contain potentially harmful impurities like PFAS, heavy metals, dioxins, bisphenols, and flame retardants..[61]

Still, the Polymer Exemption Rule—paired with the mixture exemption and the fact that many chemical substances used in plastics are already in the Chemical Substance Inventory—pushes many hypothetical plastic regulations under TSCA to section 6, which governs the regulation of existing substances.[62]

Further, although some plastics materials are currently exempt from the requirement by the "polymer exemption" under section 5, manufacturers must demonstrate that a new substance's processing, distribution, use, and disposal—or a significant new use of a previously listed chemical—will not present unreasonable risks of injury to health or the environment. This requirement can amount to an enforceable product standard in the plastics industry. For example, the EPA has recently used its section 5 authority to mandate pre-market approval before companies use plastic waste-derived feedstock to manufacture certain chemicals used in transportation fuels.[63]

In addition, if the EPA finds that a chemical ingredient in plastics manufacturing—such as plasticizers and plastic additives—presents an unreasonable risk of injury to human health or the environment, it must regulate the substance under the TSCA section 6(a). These regulations can include bans or restrictions on the chemical's production, processing, distribution, and specific uses. The EPA has already regulated several substances involved in plastics under TSCA section 6(a), including vinyl chloride.

The EPA has also regulated several substances involved in plastics production under its special authority to regulate persistent and bioaccumulative substances (see TSCA section 6(h)). The substances include:

- Decabromodiphenyl ether (a flame retardant used plastic electronics such as televisions, computers, audio and video equipment, textiles and upholstered articles, wire and cables for communication and electronic equipment, and other applications); and
- Phenol, isopropylated phosphate (3:1) (a plasticizer, a flame retardant, an anti-wear additive, or an anti-compressibility additive in hydraulic fluid, lubricating oils, lubricants and greases, various industrial coatings, adhesives, sealants, and plastic articles).

Additionally, under section 6, EPA may be able to regulate microplastics particles in a similar way as it regulates airborne asbestos particles. Microplastics may share many of the same toxic properties as asbestos particles, including being persistent and bioaccumulative.[64]

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[61] Lynn L. Bergeson and Carla N. Hutton, *EPA Will Propose SNURs for 18 Chemicals Made from Plastic Waste-Derived Feedstocks*, NAT'L L. REV. (Jun. 16, 2023), https://www.natlawreview.com/article/epa-will-propose-snurs-18-chemicals-made-plastic-waste-derived-feedstocks.

[62] By repealing the regulatorily imposed "polymer exemption" from TSCA section 5's premarket approval requirement, EPA could ensure that no new types of polymers could be manufactured without the agency's affirmation that they do not pose unreasonable risks to human health and the environment.

[63] *Rules for Chemicals Made from Plastic Waste-Based Feedstocks under the Toxic Substances Control Act: Rule Summary,* U.S. ENVTL. PROT. AGENCY (Jul. 19, 2023), https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/rules-chemicals-made-plastic-waste.

[64] Mary Ellen Ternes et al., Comment on Draft National Strategy to Prevent Plastic Pollution, EPA 330-R-23-006 (July 31, 2023), https://www.regulations.gov/comment/EPA-HQ-OLEM-2023-0228-0189.

TSCA offers some levers for the regulation of plastic production for both primary and secondary plastic polymers that the United States may use to potentially implement some provisions of the Global Plastics Agreement.

Microbead Free Waters Act

The Microbead Free Waters Act (MFWA)[65] amends the Food, Drug, and Cosmetic Act[66] and directs the Food and Drug Administration (FDA) to prohibit the manufacture and distribution of rinse-off cosmetics that contain plastic microbeads. The MFWA defines "plastic microbead" as "any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof." [67] Such particles are considered primary microplastics that are made for a specific purpose.[68] The MFWA applies to rinse-off cosmetics, such as facial cleansers, scrubs, or other bath products, and includes non-prescription or over-the-counter drugs, such as toothpastes.[69] The law does not include microbeads found in deodorants, lotions, or other cosmetic products that are not "rinsed off," nor does it include non-cosmetic microbeads.[70]

The MFWA is a narrowly defined statute that does not apply to industrial microbeads, secondary microplastics that are broken down from larger pieces of plastic, or preproduction plastic pellets. Though the Act does not prohibit the production of plastic microbeads, it is an example of Congress limiting production (indirectly) to reduce pollution of certain plastics.[71] While limited in scope, these elements are applicable to objectives articulated in the Compilation Draft. Further, the MFWA is a supply-side regulation that limits the presence of specific plastic pollutants in the marketplace.

Pollution Control Authorities

Authorities that control or may be applied to pollution from production of plastic polymers may also be implemented as supply-side measures to reduce plastic production and pollution from production. An important step is to define "plastics" as a pollutant—identify more precisely how various plastics are covered by existing regulatory definitions of pollutants, toxic substances, hazardous substances, waste, among others. This will require scientific and regulatory expertise to determine how plastics, micro and nanoplastics and/or chemicals intrinsically involved in plastic production and pollution may fit into the regulatory parameters of the major federal environmental statutes (e.g., Clean Air Act, Clean Water Act, Safe Drinking Water Act, Toxic Substances Control Act, Superfund, etc.). Arguably, some plastics are already covered by these definitions, though monitoring mechanisms need to be developed and improved. Should domestic law and implementing regulations further govern the manufacture of

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[65] Microbead Free Waters Act, Pub. L. No. 114-114, 129 Stat. 3129 (2015) (amending 21 U.S.C. § 331).
[66] *Id*.
[67] Pub. L. No. 114-114, at §§ 2(a), ddd(2)(A).
[68] *Microplastics*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://marinedebris.noaa.gov/what-marine-debris/microplastics (last visited Oct. 8, 2024).
[69] *Id*.; Sarah Kettenmann, *Nationwide Ban on Plastic Microbeads in Cosmetics*, 31 NAT. RES. & ENV'T 1 (Summer 2016).
[70] Kettenmann, *supra* note 69**Error! Bookmark not defined.**, at 1 (explaining that non-cosmetic microbeads are used in a wide range of applications, from cleaning products and medical applications to oil and gas exploration).
[71] While the Microbead Free Waters Act has a narrow application, it may be broadened to apply to other products covered under the Food, Drug, and Cosmetic Act; and may serve as a roadmap for other prohibitions on the use of certain plastics, which indirectly limits production.

plastics, however, producers will likely have to incorporate pollution control and cleanup costs into their business plans, making production more costly and likely reducing the amount of overall production.

Further, under the National Environmental Policy Act (NEPA), U.S. federal agencies can consider how plastic and petrochemical manufacturing facilities implicate human health and environmental justice concerns in their cumulative impacts analyses for actions that trigger NEPA reviews.[72] This may arise during the siting processes for plastic production or manufacturing facilities. Similarly, under its organic act, the Occupational Safety and Health Agency has authority to regulate the plastics manufacturing process to ensure no toxic or hazardous pollution threatens workers' safety.[73] These checks on the plastic production process (and related pollution) serve as supply-side measures to regulate production and its impacts on human health and the environment.

Product Design Authorities

Product design authorities that create enforceable product standards for manufacturers, as well as voluntary commitments or standards, serve as supply-side measures to regulate plastic production.[74] TSCA and the MFWA, for example, impose enforceable product standards on plastic products by restricting the use of certain harmful chemical additives (under TSCA) and certain plastics (e.g., microbeads).

The Consumer Product Safety Improvement Act authorizes the Consumer Product Safety Commission (CPSC) to "protect the public against unreasonable risks of injuries and deaths associated with consumer products."[75] The Commission has used this authority to ban specified phthalates in plastic children's toys, among other substances.[76]

The Food, Drug, and Cosmetic Act, authorizes FDA to establish enforceable product standards for plastic manufacturers. Examples include food additive regulations,[77] which govern the use of polymers in substances used in food-contact products.

In the context of the Global Plastics Agreement, enforceable product standards are important supply-side mechanisms that the federal government may use to regulate and reduce production of certain plastic polymers.

Federal Tax Subsidies

Repealing certain federal tax subsidies (e.g., 26 U.S.C. §§ 613A, 263(c), 7704) for the fossil fuel industry may make primary plastic production less profitable. Making the production of plastic more cost-prohibitive may allow the United States to mitigate the potential for adverse impacts on human health and the environment by indirectly limiting market entrance. Economic instruments such as fees, tax

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[72] *Existing U.S. Federal Authorities to Address Plastic Pollution*, *supra* note 5, at 105-106.
[73] *Id.* at 181–184.
[74] Notably, product design is also specifically covered under Part II, Provision 5 of the draft Global Plastics Agreement and has been a point of contention in the negotiations, warranting intersessional work.
[75] 15 U.S.C. § 2051(a)(3).
[76] Consumer Product Safety Improvement Act, Pub. L. No. 110–314, tit. I, § 108, 122 Stat. 3036 (2008) (codified at 15 U.S.C. § 2057c).
[77] *See* 21 U.S.C. §§ 321(s), 348.

incentives, subsidies, and subsidy reform are listed as potential measures and reporting elements to address various stages of the plastic life cycle in the Compilation Draft, including production of plastic polymers.[78]

International Obligations and Precedent Applicable to Part II, Provision 1

Minamata Convention on Mercury

The United States signed the Minamata Convention on Mercury and deposited its Instrument of Acceptance to become a party to the Convention on November 16, 2013.[79] The Minamata Convention "aims to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds."[80] Control obligations incorporated into the Convention include a ban on new mercury mines, the phase-out of existing mercury mines, controls on mercury supply sources and trade, the phase-out and phase-down of mercury use in a number of products and industrial processes, control measures on emissions to air and on releases to land and water, and the regulation of the informal sector of artisanal and small-scale gold mining.[81] Such obligations serve as examples of production and supply control mechanisms that could be applied in the Global Plastics Agreement context.

Montreal Protocol

The United States signed Montreal Protocol in 1987 and ratified the protocol in 1988.[82] The Protocol is signed by 197 countries and is "the first treaty in the United Nation's history achieve universal ratification."[83] The Montreal Protocol "regulates the production and consumption of man-made chemicals, phasing out the consumption and production of the different ozone-depleting substances (ODS) and phasing down the production and consumption of hydrofluorocarbons (HFCs) . . . , with different timetables for developed and developing countries."[84] All countries have "*binding, time-targeted, and measurable commitments"* with respect to phase out and phase down obligations, with developing countries generally having a latter time-target and the opportunity for support from the Multilateral Fund for the Implementation of the Protocol.[85] In addition to phase outs of ODS and phase downs of HFCs, there are control obligations for trade of these substances, a national licensing system to control imports and exports, annual reporting of data requirements, and more.[86] The Montreal Protocol serves as a direct example of production phase out and phase down mechanisms, as well as other

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[78] *See, e.g.*, Compilation Draft, *supra* note 29, at 13.
[79] *Minamata Convention on Mercury*, EPA, https://www.epa.gov/international-cooperation/minamata-convention-mercury (last visited Oct. 27, 2024).
[80] Co-Chairs' Synthesis Document/rev.1 23-24 (Aug. 21, 2024) [hereinafter Co-Chairs' Synthesis Document], https://www.produccion.gob.ec/wp-content/uploads/2024/09/2.-Synthesis_Report_EG2-Agosto-2024.pdf.
[81] *Id.*
[82] *The Montreal Protocol on Substances That Deplete the Ozone Layer*, OFF. OF ENVTL. QUAL., https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/the-montreal-protocol-on-substances-that-deplete-the-ozone-layer/ (last visited Oct. 28, 2024).
[83] *International Actions – The Montreal Protocol on Substances that Deplete the Ozone Layer,* EPA, https://www.epa.gov/ozone-layer-protection/international-actions-montreal-protocol-substances-deplete-ozone-layer (last visited Oct. 27, 2024).
[84] Co-Chairs' Synthesis Document, *supra* note 80.
[85] *Id*. (emphasis added).
[86] *Id*.

mechanisms, of specific chemicals and harmful substances that could guide similar objectives concerning production of certain plastic polymer or chemicals of concern (see discussion of Part II, Provision 2 below) under the Global Plastics Agreement.

Paris Agreement

The United States initially became a party to the Paris Agreement in 2016, withdrew in 2020, and rejoined on January 20, 2021.[87] The Paris Agreement is a treaty to combat climate change, and incorporates mitigation, adaptation, and finance mechanisms to achieve the overarching goal of holding "'the increase in the global average temperature to well below 2°C above pre-industrial levels' and pursue efforts 'to limit the temperature increase to 1.5°C above pre-industrial levels.'"[88]Nationally determined contributions (NDCs) are central to the Agreement. Article 4, paragraph 2 "requires each Party to prepare, communicate and maintain successive NDCs that it intends to achieve" through domestic mitigation measures.[89] The United States, for example, aimed to reduce emissions by about 25% by 2025, compared with 2005 levels.[90] The NDCs serve as an example of pollution-oriented reduction goals that can guide and impact domestic production-reduction and/or mitigation measures in the Global Plastics Agreement.

Legal Support for Part II, Provision 2 – Chemicals (and Polymers) of Concern

Part II, Provision 2 of the Compilation Draft aims to establish agreement among states to address chemicals and polymers of concern in coordination with other multilateral environmental agreements (MEAs) on chemical pollutants. The objective is to have parties commit to controlling plastic materials that contain additives or constituents of concern, including those listed under the Basel, Rotterdam, and Stockholm Conventions (BRS Conventions).[91]

The United States has shown support to identify, prioritize, and evaluate chemicals at the national level to safeguard human health. As of this report, negotiating parties are considering both criteria and non-criteria-based approaches in the negotiations. The United States has indicated an openness to both approaches, acknowledging that common global criteria supported by science-driven processes would promote harmonization among parties and industry actors.[92] The following U.S. federal authorities and international precedent support these objectives and considerations.

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[87] *The United States Officially Rejoins the Paris Agreement, Press Statement*, U.S. Dep't of State (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/.
[88] *The Paris Agreement*, UN Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement (last visited Oct. 29, 2024).
[89] *Nationally Determined Contributions (NDCs),* UN Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs (last visited Oct. 27, 2024).
[90] Rebecca Hersher, *U.S. Officially Leaving Paris Climate Agreement*, NPR (Nov. 3, 2020), https://www.npr.org/2020/11/03/930312701/u-s-officially-leaving-paris-climate-agreement.
[91] Notably, plastic polymers are not holistically covered by these existing conventions—Basel deals with hazardous wastes, which, following 2019 amendments, includes certain types of plastic wastes; Rotterdam deals with hazardous chemical and pesticides in international trade; and Stockholm deals with persistent organic pollutants.
[92] *See* IUCN WCEL, *INC – Plastic Pollution Treaty, Intersessional Work, Legal Aspects of Criteria Approaches and Noncriteria Approaches (Expert Group 2)* 2 (Aug. 2024), https://iucn.org/sites/default/files/2024-08/iucn-wcel-legal-brief-inc-intersessional-eg-2-criteria-and-non-criteria-approach-aug-2024-final-en.pdf ("The phrasing of criteria approaches and noncriteria approaches for pollution has its legal basis in the US Clean Air Act, ..."); *id.* at

U.S. Federal Law Relevant to Chemicals and Polymers of Concern

While the United States has various authorities that regulate and/or control chemicals of concern (used in plastic polymers), legislative or regulatory updates are also necessary to improve plastic pollution control measures.

Toxic Substances Control Act

TSCA is the primary U.S. federal authority to regulate chemicals and polymers of concern. As discussed above, under TSCA sections 5 and 6, EPA has authority to regulate toxic chemicals and could regulate the manufacturing of plastics and their chemical constituents (such as individual additives and plasticizers). EPA could also regulate significant new uses of plastic products and products manufactured from plastic waste under section 5. TSCA serves as an effective tool to implement obligations under consideration in Part II, Provision 2 of the Compilation Draft addressing chemicals and polymers of concern in plastics, though the polymers and mixtures exemptions may need to be revisited or exempted.

The Resource Conservation and Recovery Act (RCRA)—the first amendment to the Solid Waste Disposal Act[93]—establishes the statutory framework for the regulation of the generation, storage, and disposal of solid waste, including solid waste that is hazardous. As a threshold matter, and as the United States moves to address and remedy its contributions to the global plastic crisis, EPA can affirm that discarded plastic waste is, minimally, solid waste under RCRA.

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3 ("The use of forms of criteria approaches can be seen reflected in a number of existing international and national laws and rules that use either 'positive' or 'negative' list approaches for regulatory classification of many forms of pollutants. Examples of this include designations of ozone depleting substances under the Vienna Convention and Montreal Protocol, designations of persistent organic pollutants internationally and nationally, connected to the Stockholm Convention and the prior informed consent and classification review trigger requirements contained in the Rotterdam Convention. Efforts to generate indicators as another form of criteria approach for chemicals regulation can be seen in the text of the 2023 Global Framework on Chemicals (GFC) and its authorization of an Open-Ended Ad Hoc Group on Measurability and Indicators that will be critical for establishing the functional application of the GCF moving forward. [] Additionally, the concept of criteria for designation of categories of impacts or harms requiring regulation has been used in the Basel, Rotterdam and Stockholm Conventions context. Indeed, as the INC process began, the Secretariat of the Basel, Rotterdam and Stockholm Conventions issued the [] report, *Global Governance of Plastics and Associated Chemicals*, in which it suggested the generation and use of sustainability criteria for international regulation of plastics and associated chemicals. These criteria would address elements of the plastic value chain, ensuring that the private sector and the public sector are involved in the generation of evaluation and regulatory measures for the full range of sectors involved. This would include chemical design and product design. In developing potential factors to be used in these sustainability criteria, the BRS Convention Secretariat further expanded the understanding of criteria approaches but still retained many aspects of the choices which have historically been made between pollutants that will be subject to differing regulatory status developed by the Clean Air Act's use of criteria and noncriteria pollutant designations. The suggested forms of criteria would focus on the generation of performance criteria, 'to minimise harm to the environment and human health by influencing product and material design, such as toxicity, composition, chemical and polymer/stability integrity, size, longevity and (bio)degradability' and transparency criteria, 'to ensure the flow of information in the supply chain of plastics, including for workers, retailers, consumers and recyclers.' To ensure that these criteria are crafted flexibly and able to adapt to new and emerging information, this suggestion includes the creation of dedicated governance bodies within the ILBI system." (internal citations omitted)).

[93] *EPA History: Resource and Conservation Recovery Act*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/history/epa-history-resource-conservation-and-recovery-act (last visited Mar. 14, 2024).

Further, under RCRA, EPA is authorized to regulate hazardous waste[94] from "cradle to grave," meaning from generation to disposal. Currently, despite the hazardous chemicals contained in plastic, EPA does not consider plastic as falling within either listed or characteristic hazardous waste categories. However, given its broad RCRA mandate read in the context of more recent understanding about the hazards of plastic waste, EPA could consider plastic and/or microplastic for listing as hazardous waste or consider its potential to exhibit hazardous characteristics.[95]

More thoroughly regulating the disposal of certain toxic polymers under RCRA would directly improve plastic disposal, collection, and recycling. EPA has the authority to immediately consider listing as hazardous waste any plastics and plastic additives *created* with toxic classes of chemicals, such as "ortho-phthalates, bisphenols, halogenated flame retardants, PFAS, heavy metals and compounds (including lead, hexavalent chromium, cadmium and mercury), perchlorate, formaldehyde, toluene, antimony and compounds, UV 328, and all other additives that are persistent, bioaccumulative, and toxic."[96] Congress may also consider working to address the regulatory gaps between the definitions of "hazardous waste" under RCRA and the Basel Convention (should the U.S. desire to pursue ratification of the Basel Convention).

Control measures under RCRA, support elements of the obligations under consideration in the Compilation Draft, including "controlling plastic materials that contain additives or constituents of concern listed under the BRS conventions."[97] RCRA serves as an important mechanism to address hazardous chemicals in plastics of concern.

Food, Drug, and Cosmetic Act

Through the Food, Drug, and Cosmetic Act (FD&C), the FDA has the authority to regulate plastic materials that contain additives or constituents of concern. The FDA is authorized under the FD&C to s ensure that no packaging material adulterates foods and to conduct pre-market reviews of new food-contact substances.[98] In addition to ensuring the safety of packaging material with regard to food-contact use, FDA also reviews and regulates packaging materials to ensure compliance with NEPA, frequently focusing on the packaging material's impact on recycling.[99]

FDA also has the authority to conduct post-market reviews on "its own initiative . . . at the staff's discretion and as resources are available."[100] The subject of the FDA-initiated post-market review may be based on "petitions or notifications submitted by industry and other stakeholders that necessitate

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[94] 42 U.S.C. § 6903(5) (defining "hazardous waste"); 40 C.F.R. § 261.3; *see also* 40 C.F.R. §§ 261.21–24 (defining the four RCRA hazardous waste characteristics; ignitability; corrosivity; reactivity; toxicity) and 40 C.F.R § 261.30 (defining the listed RCRA hazardous wastes).

[95] *See Existing U.S. Federal Authorities to Address Plastic Pollution*, *supra* note 5, at 94–107.

[96] *See* Earthjustice Plastic Pollution Comments, *supra* note 51.

[97] *See* Compilation Draft, *supra* note 29, at 14.

[98] *See Existing U.S. Federal Authorities to Address Plastic Pollution*, *supra* note 5, at 174-177.

[99] Keller & Heckman LLP's Packaging Practice Group, *Packing and Environmental Legislation in the United States: An Overview* (2002), https://www.packaginglaw.com/special-focus/packaging-and-environmental-legislation-united-states-overview.

[100] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-104434, FDA OVERSIGHT OF SUBSTANCES USED IN MANUFACTURING, PACKAGING, AND TRANSPORTING FOOD COULD BE STRENGTHENED 14 (2022).

assessing a previously authorized use."[101] Post-market review process could be applied to several plastic polymers (e.g., polyethylene and polypropylene) and the use of PFAS as processing aids in plastic manufacturing and in plastic articles manufacturing that are FCS and already on the market to ensure that post-market reviews account for any updated safety information.

The authority to regulate plastic food contact substances that contain chemical additives or constituents of concern may be relevant to proposed obligations in the Compilation Draft, such as "controlling plastic materials that contain additives or constituents of concern listed under the BRS conventions."[102] Such obligations may be supported by multiple authorities, with different applications that address various plastics and stages of the plastics life cycle.

International Obligations and Precedent Relevant to Part II, Provision 2

Basel Convention

The Basel Convention (Basel) controls the international trade in hazardous wastes and certain other wastes, and establishes a "notice and consent" regime (prior informed consent (PIC)) for the export of hazardous and certain other waste to importing countries.[103] The United States signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in 1990. While the Senate gave its advice and consent to ratification in 1992, the executive has not signed the treaty because there is insufficient domestic statutory authority to implement all of its provisions.[104]

As of this report, a "majority of exports and plastic waste and scrap" are subject to Basel's PIC requirements as a result of 2019 amendments to Annexes II, VII, and IX.[105] Under Basel, Parties can only "trad[e] in covered waste and scrap subject to [the] PIC [requirements]" with non-parties if authorized under an agreement that is compliant with Article II of the Convention.[106] For example, the United

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[101] *Id.*; FDA *Works to Enhance the Assessment of Ingredients in Foods and Food Contact Substances on the Market*, FOOD & DRUG ADMIN., https://www.fda.gov/food/conversations-experts-food-topics/fda-works-enhance-assessment-ingredients-foods-and-food-contact-substances-market (last visited Oct. 23, 2024); *see, e.g.,* FDA removes Approval for the Use of PFCs in Food Packaging Based on the Abandonment, FOOD & DRUG ADMIN. (Nov. 21, 2016), https://www.fda.gov/food/hfp-constituent-updates/fda-removes-approval-use-pfcs-food-packaging-based-abandonment#:~:text=In%20response%20to%20a%20petition,grease%2Dproof%E2%80%9D%20food%20packaging. (a 2016 post-market review that removed FDA authorization for the use of two long-chain perfluorinated compounds used in "grease-proof" food packaging as a result of a petition filed on behalf of the 3M Corporation).

[102] *See* Compilation Draft, *supra* note 29, at 14.

[103] *Basel Convention on Hazardous Wastes,* U.S. DEP'T OF STATE, https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/basel-convention-on-hazardous-wastes/ (last visited Oct. 27, 2024).

[104] *Frequent Questions on International Agreements of Transboundary Shipments of Waste,* EPA, https://www.epa.gov/hwgenerators/frequent-questions-international-agreements-transboundary-shipments-waste - basel (last visited Oct. 27, 2024). As identified by authors Yang and Fulton in their article, *The Case for U.S. Ratification of the Basel Convention on Hazardous Wastes*, the United States has substantive authority under section 3017 of RCRA to implement the purpose of the Convention. These authors posit that EPA's RCRA authority already addresses the Convention's core principles: (1) environmentally sound management and; (2) PIC regime. RCRA section 3017 establishes RCRA's "Export of Hazardous Wastes" provision, which "prescribes a set of procedural requirements mandating prior notice and consent for the export of hazardous waste, similar to the requirements of the Convention." *See generally*, Yang & Fulton, *supra* note 390, at 77; 42 U.S.C. § 6938(a)–(d).

[105] *See Basel Convention*, *supra* note 103.

[106] *Id.* (describing, in part, Article II Agreements).

States (a non-party) and Canada (a party to Basel) established a bilateral arrangement in late 2020 that addresses the transboundary movement of non-hazardous scrap and waste between the two countries, meaning such materials are not subject to PIC requirements for the transboundary movement between the United States and Canada and are destined for environmentally sound management in either country.[107]

Further, "although some chemicals are regulated by the Basel Convention, the regulation of relevant chemicals under the [internationally legally binding instrument] will fill a critical void, highlighted by the Secretariat of the Basel/Stockholm/Rotterdam Conventions 'that 128 chemicals of concern are regulated under MEAs, namely the Stockholm Convention, the Minamata Convention or the Montreal Protocol', which 'represents around 4% of all identified chemicals of potential concern and 1% of all chemicals used in plastics.'"[108]

While the United States has not ratified the Basel Convention, and in some instances has made other bilateral agreements for importing and exporting hazardous waste with other countries, aspects of the Basel Convention incorporate important PIC requirements and criteria for designation of categories of impacts or harms that may be informative for the Global Plastics Treaty, particularly non-hazardous and hazardous plastic waste that must be managed due to the chemicals and/or constituents of concern in the plastic waste.

Rotterdam Convention

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade covers pesticides and industrial chemicals that have been banned or severely restricted for health or environmental reasons by two or more Parties, and which the Conference of the Parties has decided to make subject to a Prior Informed Consent (PIC) procedure.[109] Despite signing the Rotterdam Convention in 1998, the United States has not ratified the convention because it does not have the authority to implement its provisions.[110] As explained by the State Department, "the United States participates as an observer in the conferences of the parties and in technical working groups."[111] EPA regulates all Rotterdam-listed pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act and, "in many cases the substances are no longer registered for pesticidal use in the United States."[112]

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[107] *Id.*

[108] IUCN WCEL, *supra* note 92, at 1-2 (citing Secretariat of the Basel, Rotterdam and Stockholm Conventions, *Global Governance of Plastics and Associated Chemicals* 29 (2023), UNEP-FAO-CHW-RC-POPS-PUB-GlobalGovernancePlastics-2023.pdf).

[109] Co-Chairs' Synthesis Document, *supra* note 80.

[110] *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,* U.S. DEP'T OF STATE, https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/rotterdam-convention-on-the-prior-informed-consent-procedure-for-certain-hazardous-chemicals-and-pesticides-in-international-trade/ (last visited Oct. 27, 2024).

[111] *Id.*

[112] EPA, *EPA's Engagement in the Stockholm and Rotterdam Conventions, Fact Sheet Prepared for the Pesticide Program Dialogue Committee* (2023), https://www.epa.gov/system/files/documents/2023-05/update-ppdc-stockholm-rotterdam-conventions-may2023.pdf.

Annex II contains criteria for listing banned or severely restricted chemicals.[113] When a chemical not listed in Annex III is prohibited or severely restricted by a Party and exported, that Party has an obligation to notify the importing Party before the first export following adoption of the final regulatory action to prohibit or severely restrict, and thereafter before the first export in any calendar year.[114] Once a chemical is included in Annex III, a "decision guidance document" (DGD) containing information concerning the chemical and the regulatory decisions to ban or severely restrict it for health or environmental reasons, is circulated to all Parties.[115] The listing criteria in the Rotterdam Convention, and the decision guidance document, could serve as a roadmap to incorporating listing criteria into the Global Plastics Agreement.

Stockholm Convention

Guided by the objective to "protect human health and the environment from chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of humans and wildlife, and have harmful impacts on human health or on the environment," the Stockholm Convention provides relevant insight for the global plastics treaty negotiations.[116] The Convention currently applies to "34 persistent organic pollutants (POPs), which are pesticides, industrial chemicals and/or byproducts, and include some that are used in plastic products."[117] The United States signed the Stockholm Convention on Persistent Organic Pollutants in 2001, but has yet to ratify due to the lack of authority to implement all of its provisions.[118] Like the Rotterdam, the United States does, however, "participate as an observer in the meetings of the parties and in technical working groups."[119]

Under the Stockholm Convention, regulated POPs are listed in annexes. Criteria was not developed initially, but later on. Not only can parallels can be drawn between the transboundary movement of POPs and plastics, including chemicals and polymers of concern in plastics, but the criteria for adding new chemicals[120] could be emulated to develop a criteria-based approach under the Global Plastics Agreement.

Notably, though the United States has not ratified the Convention, significant domestic regulatory action has been taken to reduce emissions of POPs.[121] Today, "none of the original POPs listed in the Stockholm Convention [are] registered for sale or distribution" domestically.[122] Regulations that preceded the Convention prohibited the manufacture and restricted the use of PCBs, and "effectively reduced environmental releases of dioxins and furans to land, air, and water from U.S. sources."[123] As the EPA

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[113] Co-Chairs' Synthesis Document, *supra* note 80.
[114] *Id.*
[115] *Id.*
[116] *Id*.
[117] *Id.* (citing http://chm.pops.int/TheConvention/ThePOPs/AllPOPs/tabid/2509/Default.aspx).
[118] *Stockholm Convention on Persistent Organic Pollutants*, U.S. DEP'T OF STATE, https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/stockholm-convention-on-persistent-organic-pollutants/#:~:text=The%20United%20States%20signed%20the%20Stockholm%20Convention%20in,the%20authority%20to%20implement%20all%20of%20its%20provisions. (last visited Oct. 27, 2024).
[119] *Id.*
[120] *Id.*
[121] *Persistent Organic Pollutants: A Global Issue, A Global Response*, EPA, https://www.epa.gov/international-cooperation/persistent-organic-pollutants-global-issue-global-response (last visited Oct. 25, 2024).
[122] *Id.*
[123] *Id.*

explains, "these regulatory actions, along with voluntary efforts by U.S. industry, resulted in a more than 85 percent decline in total dioxin and furan releases after 1987 from known industrial sources."[124] EPA continues to conduct reassessments of dioxin science to better understand the risks associated with dioxin releases, and "will be evaluating additional actions that might further protect human health and the environment."[125]

Minamata Convention

As discussed above, the objective of the Minamata Convention is to protect human health and the environment from emissions and releases of mercury and mercury compounds. Provisions of the Minamata Convention address phase outs of both mercury-added products and industrial chemicals.[126] As such, "Annex A of the Convention phases out mercury use in a wide range of products."[127] Related to industrial chemicals, "Annex B of the Convention phases out mercury-based chlor-alkali and polyurethane production by 2025, and requires Parties to reduce the use of mercury in VCM production by 50% by 2020, using 2010 as a baseline."[128]

The Convention required that the Annexes be reviewed no later than five years after the Convention entered into force.[129] The review considered "Annex listing proposals, information on mercury-added products and their alternatives, and availability to the Parties of mercury-free alternatives that are technically and economically feasible, taking into account the environmental and human health risks and benefits."[130] This review was completed at COP-4, and amendments to the Annexes were finalized at COP-4 and COP-5.[131] Similar criteria provisions in the Annexes could be applied in the Global Plastics Agreement context.

Legal Support for Part II, Provision 3 – Problematic and Avoidable Plastic Products

Part II, Provision 3 of the Compilation Draft concerns problematic and avoidable plastic products, including short-lived and single-use plastic products and intentionally added microplastics. Several options for the final text are included within the Compilation Draft. The Compilation Draft also proposes the development of an annex list of problematic and avoidable plastic products and attendant criteria that would need to be satisfied for a given product's inclusion on the list.

Ahead of INC-5, the United States has recognized value in establishing global lists of problematic and avoidable plastic products and criteria to harmonize actions across states; however, as of INC-4, the United States supported the development of lists and criteria on a state-by-state basis. The United States similarly expressed it was in favor of all parties taking ambitious actions to phase out problematic and avoidable plastic products.

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[124] *Id.*
[125] *Id.*
[126] Co-Chairs' Synthesis Document, *supra* note 80, at 24.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*

U.S. Federal Law Relevant to Problematic and Avoidable Plastic Products

Save Our Seas 2.0

Section 201 of the Save Our Seas 2.0 Act (SOS 2.0) sets forth the U.S. policy "to partner, consult, and coordinate with foreign governments (at the national and subnational levels)" to, among other objectives, strengthen systems for plastic waste reduction with an emphasis on "decreas[ing] plastic waste at its source."[132] This policy provision of SOS 2.0 arguably affords support for U.S. negotiators to consider how stricter regulation of the production of "short-lived" and "single-use" plastic products may reduce the usage, and therefore source of waste, of such products. That is, upstream interventions to decrease plastic waste may help achieve the purpose of Part II, Provision 3 to phase out or restrict the use of avoidable plastic products.

In implementing the policy described above, the President must

> direct [U.S.] representatives to appropriate bodies . . . to use the voice, vote, and influence of the [U.S.], consistent with the broad foreign policy goals of the [U.S.], to advocate that each such body . . . enhance coordination with the private sector . . . to utilize safe and affordable alternatives to disposable plastic products, to the extent practicable.[133]

The Act's directive for U.S. representatives to coordinate with the private sector aligns with Part II, Provision 3 of the Draft Global Plastics Treaty. Supporting the development of "alternatives to disposable plastic products" could conceivably reduce the "upstream" use of problematic and avoidable plastic products (e.g., single-use plastic products) in the United States. Through this section of SOS 2.0, Congress has given express approval for Executive action to support the use of "safe and affordable alternatives to disposable plastic products" in international forums.

Microbead Free Waters Act

As described above, the MFWA is a narrowly defined law that prohibits the manufacture and distribution of rinse-off cosmetics that contain plastic microbeads. Plastic microbeads are "any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof." [134] While this definition does not apply to industrial microbeads, secondary microplastics that are broken down from larger pieces of plastic, or preproduction plastic pellets, it nevertheless illustrates how the United States has targeted a specific type and use of problematic plastics in domestic law. The MFWA serves as an example—albeit limited—of how the U.S. currently regulates the manufacturing and use of a narrow category of potentially avoidable plastics. Despite this example, thorough gap analyses would be required to determine whether how the United States could implement this provision of the Global Plastics Treaty.

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[132] 33 U.S.C. § 4261(2)(A).
[133] *Id*. at § 4263(3)(B).
[134] Pub. L. No. 114-114, at §§ 2(a), ddd(2)(A).

Related U.S. Federal Authorities Relevant to Problematic and Avoidable Plastic Products

The following authorities help demonstrate current domestic efforts the United States is taking toward: (1) reducing the use of problematic plastic products; and (2) supporting the development of technology to better understand how plastic exists in the natural environment, a necessary step towards stricter governance.

Federal Acquisition Regulations & Executive Order 14057

As described above, the Biden-Harris Administration issued EO 14057 in 2021 on catalyzing American clean energy industries and jobs through federal sustainability. The EO's accompanying Federal Sustainability Plan sets out a range of ambitious goals to deliver domestic emissions reductions.[135] The strategy will be accomplished, in part, through increasing government purchases of sustainable products and services, including plastic alternatives.[136] The EO also directs federal agencies to minimize waste and support recycled products and a circular economy.[137] In furtherance of section 207 of EO 14057, the White House's Office of Management and Budget has directed agencies "to take actions to reduce and phase out procurement of single-use plastic products."[138]

EO 14057 is a useful steppingstone for federal agencies to align their actions with the general objectives of Part II, Provision 3 of the Compilation Draft and demonstrates that the United States is taking measured steps to reduce its use problematic and avoidable plastic products.

Small Business Development Act of 1982

Through the Small Business Development Act of 1982, Congress authorized the Small Business Innovation Research (SBIR) Program.[139] The goal of the SBIR Program is to "provide federal research and development funding to stimulate the small business sector and to address national needs while strengthening the national base for technological innovation."[140] All federal agencies with an "extramural budget for [research/research and development] in excess of $100,000,000 must participate in the SBIR program and obligate, at a minimum, 3.2% of such budget" for SBIR awards.[141] EPA, for example, participates in the SBIR program and has recently requested proposals for the

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[135] Fact Sheet, The White House, President Biden Signs Executive Order Catalyzing America's Clean Energy Economy Through Federal Sustainability (Dec. 8, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/**Error! Bookmark not defined.**.

[136] Mark Segal, *Biden Administration Announces New Sustainable Procurement Rules for Federal Government*, ESGTODAY (Aug. 2, 2023), https://www.esgtoday.com/biden-administration-announces-new-sustainable-procurement-rules-for-federal-government/.

[137] Executive Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,935 (Dec. 13, 2021).

[138] Ocean Conservancy, Comment on National Draft Strategy to Prevent Plastic Pollution, EPA-HQ-OLEM-2023-0228 (July 31, 2023) [hereinafter Ocean Conservancy Plastic Pollution Comments], https://www.regulations.gov/comment/EPA-HQ-OLEM-2023-0228-0239.

[139] Small Business Innovation Development Act of 1982, Pub. L. No. 97–219, 96 Stat. 217 (1982).

[140] *Small Business Innovation Research Program (SBIR) Legislation, Regulation, and Guidance*, U.S. DEP'T OF EDUC., https://www2.ed.gov/programs/sbir/legislation.html (last visited Mar. 14, 2024); 15 U.S.C. § 638.

[141] OFF. OF INVESTMENT & INNOVATION, U.S. SMALL BUS. ADMIN., SMALL BUSINESS INNOVATION RESEARCH (SBIR) AND SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM, POLICY DIRECTIVE 2(B) (Oct. 2020).

development of technologies "to better characterize environmental samples of microplastics (5mm-1 nm or any defined subset) in environmental matrices such as water, wastewater or soil."[142]

While this authority does not address the ability of the United States to enter into or implement a future plastics treaty, EPA's research and development activities to better characterize microplastics in the environment may lend support to the general objectives of the Compilation Draft by helping to develop the body of research on how microplastics exist in natural environment.

International Obligations and Precedent Applicable to Part II, Provision 3

United States-Mexico-Canada Free Trade Agreement

The United States-Mexico-Canada Free Trade Agreement (USMCA)—an example where "Congress enacted legislation that simultaneously gave *ex post* approval to a [Free Trade Agreement] and implemented that agreement into federal law"[143]—has limited applicability to the Compilation Draft negotiations. While Free Trade Agreements' frameworks of negotiation, approval, and implementation are distinct from other types of U.S. international law-making, the USMCA nonetheless offers some insight into existing U.S. international obligations related to plastic products and byproducts (e.g., microplastics).

Through the UMSCA, the United States has "recognized the importance of taking action to prevent and reduce marine litter, including *plastic litter and microplastics*, in order to[, among other objectives,] preserve human health and marine and coastal ecosystems."[144] Further, the United States is obligated under this Agreement to "take measures to prevent and reduce marine litter" and "cooperate [with the other Parties] to address matters of mutual interest with respect to combatting marine litter, such as addressing land and sea-based pollution, [and] promoting waste management infrastructure, and advancing efforts related to abandoned, lost, or otherwise discarded fishing gear."[145]

Though not a wholesale match, the options articulated in Part II, Provision 3—generally proposing the regulation of the use of problematic and avoidable plastic products—could find a nonnegligible measure of support through the United States' existing UMSCA obligations to prevent plastic litter and microplastics. The theory supporting this assertion is that reducing litter from plastic products can, and arguably should, encompass the regulation of the use of such products. At a minimum, the UMSCA is a helpful framework through which the United States can examine how it is meeting its existing obligations to prevent and reduce plastic litter and microplastics: an objective imbued throughout the Compilation Draft.

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[142] *Technologies to process, sort and identify microplastics*, U.S. SMALL BUS. ASS'N, https://www.sbir.gov/node/2228851 (last visited Mar. 14, 2024).
[143] CHRISTOPHER T. ZIRPOLI, CONG. RESEARCH SERV., R47679, CONGRESSIONAL EXECUTIVE AUTHORITY OVER FOREIGN TRADE AGREEMENTS N.58 (2024) (citing United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116–113, 134 Stat. 11 (2020) (codified in 19 U.S.C. §§ 4501–47320).
[144] Agreement between the United States of America, the United Mexican States, and Canada, OFF. U.S. TRADE REPRESENTATIVE: FREE TRADE AGREEMENTS (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (emphasis added).
[145] *Id*. at Article 24.12.

Land-Based Sources Protocol to the Cartagena Convention

The Cartagena Convention is a "regional framework agreement that was negotiated under the auspices of the Regional Seas Program of the United Nations Environment Program (UNEP) and sets out general legal obligations to protect the marine environment of the Gulf of Mexico, the Caribbean Sea, and the adjacent areas of the Atlantic Ocean" that entered into force in 1986.[146] By 2008, several states ratified or acceded to the Convention, including the United States.[147] This convention serves as an umbrella agreement through parties can negotiate more detailed protocols.[148] As of this report, three protocols have been negotiated under the Cartagena Convention.

Notably, the United States has ratified the Land-Based Source (LBS) Protocol, which implements Article 7 of the Cartagena Convention. Article 7 requires parties to "take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by coastal disposal or by discharges emanating from rivers, estuaries, coastal establishments, outfall structures, or any other sources on their territories."[149] The United States' influence in the development of the LBS Protocol has resulted in a "regime largely patterned after and fully consistent with existing U.S. environmental law."[150] As a result, the LBS Protocol is implemented in the United States through the Clean Water Act, Coastal Zone Management Act, Outer Continental Shelf Lands Act, Clean Air Act, Solid Waste Disposal Act, National Environmental Policy Act, and Comprehensive Environmental Response, Compensation, and Liability Act.[151]

There are four operative Annexes to the LBS Protocol that "describe the work that each Contracting Party must do and gives [sic] guidance for the development of regional actions."[152] For example, Annex I "establishes a list of land-based sources and activities and their associated contaminants of greatest concern to the marine environment."[153] Additionally, as of this report, the UN Environment Programme indicates on its website that "the development of future *source-specific* annexes will be determined by the Contracting Parties with assistance from a Scientific, Technical and Advisory Committee."[154]

At the micro-level, U.S. negotiators may compare the "associated contaminants of greatest concern to the marine environment" to help determine whether there is any existing treaty obligation that supports—if not expressly or impliedly authorizes[155]—the United States' position in supporting the regulation of problematic and avoidable plastics through the Compilation Draft.

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[146] SENATE FOREIGN REL. COMM., 110TH CONG., EXEC. REP. 110-200 – LAND-BASED SOURCES PROTOCOL TO THE CARTAGENA CONVENTION 2 (Comm. Print 2008) [hereinafter LBS EXECUTIVE REPORT], https://www.congress.gov/congressional-report/110th-congress/executive-report/20/1.
[147] *Id*. at n.1.
[148] *Id*. at 2; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Land-Based Sources Protocol, June 4, 1974, 1546 U.N.T.S. 119.
[149] Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Land-Based Sources Protocol, art. VII, June 4, 1974, 1546 U.N.T.S. 119.
[150] LBS EXECUTIVE REPORT, *supra* note 146, at 6–7.
[151] *Id*.
[152] *What is our Pollution or LBS Protocol?*, UN ENVT. PROG., https://www.unep.org/cep/what-our-pollution-or-lbs-protocol (last visited Oct. 10, 2024).
[153] *Id*.
[154] *Id*.
[155] Wirth, *supra* note 10, at 750.

At the macro-level, the LBS's annexes are a common signature of the implementation of international environmental agreements (e.g., the Stockholm Convention on Persistent Organic Pollutants; Minamata Convention, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora). As identified by Center of International Environmental Law, the benefit of annexes is that the procedures for amendment are generally easier than those for the amendment of treaty text.[156] U.S. negotiators can examine the aforementioned examples of ways in which it might develop an annex list of problematic and avoidable plastic products and attendant criteria, as currently proposed in the Compilation Draft.

CONCLUSION

As identified in this report, some U.S. authorities as well as international obligations and precedents may support U.S. domestic implementation of three key provisions of the Global Plastics Agreement. This report is non-exhaustive and instead is intended to provide considerations for the U.S. Delegation and stakeholders in advance of INC-5, and discuss how a future Global Plastics Agreement might find support in existing U.S. law, while meeting the underlying objective of addressing plastic pollution across its life cycle. In particular, many of the multilateral environmental agreements and policy instruments are not directly applicable to the Global Plastics Agreement, but may serve as guides for negotiating provisions and establishing approaches (such as criteria or non-criteria) and help promote regime convergence.

Then United States has shown keen motivation to address the problem of plastic pollution, through administration and agency-led initiatives such as the IPC Report and EPA's Draft National Strategy. It is apparent, however, that Congress will play a pivotal role in addressing this problem at the domestic and international level. The pervasiveness of plastic pollution and related human health effects may trigger nonpartisan efforts, such as those seen for asbestos and similar environmental concerns, to take robust action and directly address the problem.

[156] CENT. FOR INT'L ENVTL. L., STRUCTURE AND ELEMENTS OF INTERNATIONAL LEGAL INSTRUMENTS, KEY CONSIDERATIONS FOR THE FUTURE PLASTICS TREATY 5–4 (Oct. 2024), https://www.ciel.org/wp-content/uploads/2024/10/Structure-and-Elements-of-International-Legal-Instruments-Key-Considerations-for-the-Future-Plastics-Treaty.pdf.

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As the report is a non-exhaustive review of domestic authorities and international obligations and precedents, we welcome expert feedback for an anticipated update. Please submit relevant information here.