August 2024
Legal Brief

INC - Plastic Pollution Treaty
Intersessional Work
Legal aspects of Criteria Approaches and Noncriteria Approaches (Expert Group 2)

At the end of INC-4 in April 2024, the Intergovernmental Negotiating Committee (INC) for the adoption of an international legally binding instrument on plastic pollution, including in the marine environment (ILBI) mandated the creation of two ad hoc open-ended intersessional expert groups. The purpose of these intersessional expert groups is to facilitate discussion and, potentially, options for paths forward on critical areas for the ILBI, to be taken up during INC-5 in Busan at the end of 2024. One of the two intersessional expert groups created – EG 2 –was expressly mandated to "to identify and analyse criteria and noncriteria based approaches regarding plastic products and chemicals of concern in plastic products, and product design focusing on recyclability and reusability of plastic products, considering their uses and applications, for the consideration by the Committee at INC-5.

This is reflective of core areas of discussion and debate before and during INC-4, including Conference Room Papers and proposals made by Norway, the Cook Island and Rwanda on chemicals of concern in plastics, Switzerland, the EU and others relating to plastic products and chemicals of concern and conceptual approaches to address them, and the United Kingdom and Thailand on problematic and avoidable plastic products. These proposals and others are reflected in Part II. 2, 3 and 5 of the Compilation Document, released by the INC Secretariat for use as the basis for negotiations in Busan during INC-5.

To facilitate the framing of the discussions for EG 2, the Group Co-Chairs and the INC Secretariat requested that States and their national experts complete a questionnaire regarding their thoughts on these issues. The Compilation of EG2 questionnaire responses used to set the discussions during the on-line meeting of IEG 2 and it is expected that the information generated will also play a role in shaping the agenda for the subsequent in-person meeting of the intersessional expert groups, scheduled for 24 – 28 August 2024 in Bangkok.

Subsequent to the INC-4 outcomes and especially in the phases of the on-line meetings (Agenda EG2; Co-Chairs Synthesis Report EG2: Synthesis Report) **queries have arisen as to the exact legal, regulatory and scientific constructs of criteria and noncriteria approaches, in particular in the context of chemicals in products.**

This brief provides an overview of these concepts and several examples of how such approaches have been implemented, as well as how these approaches might be used to provide a scientific basis for regulation under the ILBI that protects the environment, biodiversity and human health. The brief and the entire process of determining criteria and non-criteria approaches should be understood as attempting to further the regulation of chemicals involved in the plastics process as well as plastic products themselves. Although some chemicals are regulated by the Basel Convention, the regulation of relevant chemicals under the ILBI 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

For more information, please contact:

Karine Siegwart
Senior Policy Advisor
Centre for Policy and Law
karine.siegwart@iucn.org

Alexandra R. Harrington,
Lancaster University Law School and Chair, IUCN WCEL Agreement on Plastic Pollution Task Force,
a.harrington1@lancaster.ac.uk

IUCN World Headquarters
Rue Mauverney 28
1196 Gland
Switzerland
Tel: +41 22 999 0000
Fax: +41 22 999 0002
www.iucn.org

around 4% of all identified chemicals of potential concern and 1% of all chemicals used in plastics".[1]

Criteria and Noncriteria Approaches

The phrasing of criteria approaches and noncriteria approaches for pollution has its legal basis in the US Clean Air Act, under which 6 forms of air pollutants – Ozone, particulate matter, carbon monoxide, lead, sulfur dioxide and nitrogen dioxide – were designated as "criteria pollutants."[2] Considered to be the most damaging to the environment and human health from the perspective of national law and regulation, these pollutants were also identified as being transboundary in their transmission and effects, and as a result the system for identifying and regulating these pollutants became tailored to meet these circumstances.[3] With the exception of lead, criteria pollutants have generally been connected to climate change although it must be stressed that greenhouse gases (GHGs) are not included as criteria pollutants *per se*.[4] In various iterations of regulatory standards adopted by the US Environmental Protection Agency, known as National Ambient Air Quality Standards, acceptable and unacceptable levels of criteria pollutants have been established.[5] Under the terms of the Clean Air Act, all other forms of air pollutants are classified as "noncriteria pollutants."[6] This classification does not mean that noncriteria pollutants are exempted from regulation but rather that they are subject to different levels of scrutiny and regulatory standards than criteria pollutants.[7]

From their origins in the Clean Air Act, criteria pollutants and noncriteria pollutants have become an accepted terminology throughout the air pollution legal, regulatory and scientific sector. Indeed, scientific and legal sources define criteria pollutants and noncriteria pollutants with specific reference to their existence as a result of the Clean Air Act.[8]

It should be noted, however, that similar processes of approaching pollutants, especially substances linked with air pollution, have been adopted in other jurisdictions albeit through the use of differing terminology. For example, the European Union (EU) has developed measures for multiple forms of pollution that are based on a similar legal and scientific concept of designating certain pollutants for heightened regulation due to their environmental and human health impacts while also maintaining a differing regulatory system for other substances deemed to be pollutants. These efforts began over a decade ago, notably through the creation of the EU Registration, Evaluation, Authorisation and Restriction of Chemicals

[1] Secretariat of the Basel, Rotterdam and Stockholm Conventions, Global Governance of Plastics and Associated Chemicals (2023): UNEP-FAO-CHW-RC-POPS-PUB-GlobalGovernancePlastics-2023.pdf., p 29. This was also reflected in the scientific findings and discussions at the webinar "Road to Busan | Potential Approaches to Plastic Products and Chemicals of Concern in the Plastics Treaty" organized by the International Pollutants Elimination Network (IPEN) with the support of the Geneva Environment Network as part of the Road to Busan series and within the framework of the Geneva Beat Plastic Pollution Dialogues, 7 August 2024, with a focus on health and environmental protective criteria and non-criteria-based approaches for products and chemicals through various examples that could be reflected in the International Legally Binding Instrument.
[2] See United States Clean Air Act (1970); US Environmental Protection Agency, https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air; Environmental Encyclopedia (2011) 400, 1165; Chris Park & Michael Allaby, A Dictionary of Environment and Conservation, 3d (OUP 2017).
[3] Ibid.
[4] Ibid.; Environmental Encyclopedia (2011) 400.
[5] Ibid.
[6] Ibid.; Chris Park & Michael Allaby, A Dictionary of Environment and Conservation, 3d (OUP 2017).
[7] Ibid.
[8] See Marta Schuhmacher, Jose L Domingo & Josepa Garreta, 'Pollutants emitted by a cement plant: health risks for the population living in the neighborhood,' Environmental Research 95 (2004) 198 – 206; Duarte Caldeira Dinis, Jose Rui Figueira & Angelo Palos Teixerira, 'A multiple criteria approach for ship risk classification: An alternative to the Paris MoU Ship Risk Profile,' Socio-Economic Planning 90 (2023) 1; E Tupz, I Talinli & E Aydin, 'Integration of environmental and human health risk assessment for industries using hazardous materials: A quantitative multi criteria approach for environmental decision makers,' Environment International 37 (2011) 393 – 403; Richard A. Toro et al., 'Long-term assessment and acute air pollution events in a mega-industrial area in Central Chile,' Urban Climate 55 (2024).

(REACH) system,[9] have expanded since the adoption of the European Green Deal in 2019 and now extend to product design principles, as evidenced by the EU Safe and Sustainable by Design Policy and the EU Ecodesign Directive.[10]

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.[11] Examples of this include designations of ozone depleting substances under the Vienna Convention and Montreal Protocol,[12] designations of persistent organic pollutants internationally and nationally, connected to the Stockholm Convention[13] and the prior informed consent and classification review trigger requirements contained in the Rotterdam Convention.[14] 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.[15]

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 above mentioned 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.[16] 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.[17] 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"[18] and transparency criteria, "to ensure the flow of information in the supply chain of plastics, including for workers, retailers, consumers and recyclers."[19] 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.[20]

[9] https://echa.europa.eu/regulations/reach/understanding-reach; E Tupz, I Talinli & E Aydin, 'Integration of environmental and human health risk assessment for industries using hazardous materials: A quantitative multi criteria approach for environmental decision makers,' Environment International 37 (2011) 393 – 403.
[10] https://research-and-innovation.ec.europa.eu/research-area/industrial-research-and-innovation/chemicals-and-advanced-materials/safe-and-sustainable-design_en .
[11] https://commission.europa.eu/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products-regulation_en .
[12] https://ozone.unep.org/treaties/vienna-convention; https://ozone.unep.org/treaties/montreal-protocol .
[13] https://www.pops.int/ .
[14] https://www.pic.int/ .
[15] See Global Framework on Chemicals – for a planet free of harm from chemicals and waste (2023); https://www.chemicalsframework.org/; https://www.chemicalsframework.org/page/open-ended-ad-hoc-group-measurability-and-indicators
[16] Secretariat of the Basel, Rotterdam and Stockholm Conventions, Global Governance of Plastics and Associated Chemicals (2023): UNEP-FAO-CHW-RC-POPS-PUB-GlobalGovernancePlastics-2023.pdf (basel.int)
[17] Ibid.
[18] Ibid. at p 105.
[19] Ibid.
[20] p 106

Recommendations

Existing uses of criteria approaches and noncriteria approaches to pollutants have been successful in regulating aspects of critical forms of pollution, notably air pollution. As scientific knowledge and legal efforts to address pollution and pollutants has increased internationally and nationally it is possible to see this concept of criteria and noncriteria approaches expanding into other sectors than air pollution.

The potential inclusion of criteria approaches and noncriteria approaches for the designation and regulation of plastics, chemicals and product design under the ILBI is an example of this growing awareness regarding the need for criteria-centred evaluation methods. However, this must be balanced against the fundamental question of the types of criteria and/or noncriteria approaches will be used and whether the annexes or other lists envisioned in the ILBI will be positive or negative lists.

It will be important to consider the incorporation of science-based criteria approaches and/or science-based noncriteria approaches. The suggestion of sustainability criteria as a broader method for framing and understanding the impacts of chemicals and product design throughout the plastics value chain is important. Beyond this, it will be essential that, regardless whether the criteria approach, noncriteria approach, or a hybrid thereof is recommended for use in the ILBI, the contents of the criteria selected include not only science-based elements and socio-economic elements but also directly include evaluative elements connecting to short, medium and long-term impacts of substances and designs on biodiversity, ecosystems and the environment at the international, regional and local levels. The inclusion of these elements within the approach(es) selected would bridge the interlinkages between pollution, biodiversity and climate change and would ensure that there is greater convergence and coherence between treaties regulating pollution and international treaty regimes more broadly. This would advance transparency and information-sharing as well as providing States and stakeholders with an option to connect knowledge from other, related sectors, helping to ensure that reporting requirements are less onerous for States and that stakeholders can have their perspectives included across a wide range of related international treaty regimes.