

A photograph of several wind turbines in a field, overlaid with a teal geometric shape that frames the text. The background is a light blue sky with soft clouds.

ENVIRONMENTAL LAW ALERT

21 APRIL 2022



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INCORPORATING
KIETI LAW LLP, KENYA

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Towards an international legally binding instrument: Africa and the global commitment to end plastic waste

During the fifth session of the United Nations Environment Assembly (UNEA) held in Nairobi between 28 February and 2 March 2022, world leaders made a landmark decision concerning the management of plastic pollution and its impact on marine life in particular. The 175 UN member states present adopted a draft resolution to develop an internationally binding legal instrument on plastic pollution (International Plastic Instrument) that was jointly developed by Rwanda and Peru and proposed at the UNEA conference held in Geneva last year (Resolution).



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Towards an international legally binding instrument: Africa and the global commitment to end plastic waste

During the fifth session of the United Nations Environment Assembly (UNEP) held in Nairobi between 28 February and 2 March 2022, world leaders made a landmark decision concerning the management of plastic pollution and its impact on marine life in particular. The 175 UN member states present adopted a draft resolution to develop an internationally binding legal instrument on plastic pollution (International Plastic Instrument) that was jointly developed by Rwanda and Peru and proposed at the UNEP conference held in Geneva last year (Resolution).

The Resolution seeks to redress the impact of an estimated 300 million tons of plastic waste that the world produces annually, 14 million tons of which is released into oceans. The International Plastic Instrument, once developed, will operate as a binding agreement in addition to the national laws, regulations, and policies regulating the use of single-use plastics that alone have not been successful in reducing the amount of plastic waste released into the environment.

The Resolution establishes an Intergovernmental Negotiating Committee to develop the International Plastic Instrument by 2024, which is envisioned to include both binding and voluntary approaches, based on a comprehensive approach that addresses the full lifecycle of plastic and takes account of national circumstances and capabilities. To this end, the Resolution outlines several proposed provisions for the International Plastic Instrument providing for key objectives and

considerations (Proposed Provisions). Amongst other things, the Proposed Provisions highlight the:

- promotion of sustainable production and consumption of plastics, including product design, and environmentally sound waste management through resource efficiency and circular economy approaches;
- development, implementation and updating of national action plans reflecting country-driven approaches to contribute to the objectives of the International Plastic Instrument;
- specification of national reporting, as appropriate, and the provision of scientific and socio-economic assessments related to plastic pollution;
- specification of arrangements for capacity building and technical assistance, technology transfer on mutually agreed terms, and financial assistance;

- consideration of the need for a financial mechanism to support the implementation of the International Plastic Instrument, including the option of a dedicated multilateral fund; and
- consideration of the flexibility that some Proposed Provisions could allow countries discretion in implementing their commitments, cognizant of their national circumstances.

This alert considers the history of and ongoing efforts to manage plastic waste in South Africa and Kenya, and analyses, from a continental perspective, the likely impact that the International Plastic Instrument's Proposed Provisions and content would have on these two jurisdictions' efforts to manage plastic pollution.

SOUTH AFRICA

Prior to the Resolution's adoption, South Africa made its negotiating position clear in affirming its support of addressing the issue of marine litter and plastic pollution through the establishment of an internationally

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legally binding instrument. In addition to the adoption of the draft Proposed Provisions, South Africa requested the recognition of Africa's special needs and circumstances and that the International Plastic Instrument include the principles of equity and common but differentiated responsibilities and respective capabilities in light of national circumstances. It also stressed the need for new, additional and predictable finance, including technology transfer as well as capacity building to support developing countries, particularly in Africa, for the International Plastic Instrument's implementation. These priorities are reflected in the final Resolution that was adopted.

Whether South Africa is able to integrate the Proposed Provisions' obligations with existing regulatory measures imposed by the National Environmental Management Act 107 of 1998 (NEMA) and the National Environmental Management: Waste Act 59 of 2008 (NEMWA) will depend on the overall integration and

possible expansion of legislation and regulations. The proposed obligation to develop, implement and update national action plans that reflect how states' approaches contribute to the International Plastic Instrument's objectives appears to contemplate an additional and nuanced plan that goes beyond South Africa's generalised National Waste Management Strategy that was only recently revised. Further, the specification of arrangements for capacity building and technical assistance, technology transfer and financial assistance are very particular requirements, that might be challenging to meet and place a possible additional financial burden on the Department of Forestry, Fisheries and the Environment and the public. On the other hand, the circular economy approaches, together with the specification of national reporting, seem very much aligned with South Africa's novel extended producer responsibility (EPR) legislation, as discussed below. Additionally, the envisioned financial mechanisms may be able to be integrated with existing fiscal obligations such as the payment of plastic bag levies.

PLASTIC CARRIER BAGS

In respect of existing legislative provisions in South Africa that deal with plastic pollution, the use and regulation of plastic carrier bags has developed in response to the extensive and continued use of plastic bags that resulted in a significant waste problem in South Africa. It was recognised that plastic bags were being directed to open waste disposal sites and, in virtue of their light weight, were being upswept by winds, resulting in significant unmanaged plastic bag waste volumes. Legislative efforts to regulate plastic bags were implemented in May 2003 through the Plastic Bag Regulations published under the precursor to NEMA, the Environmental Conservation Act 73 of 1989, which has been repealed but the regulations remain in force (Plastic Bag Regulations). This brought change to the required thickness of plastic bags to encourage re-use.

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Further to this we saw the introduction of the environmental levy on plastic bags introduced under the Customs and Excise Act 91 of 1964 in 2004 (Plastic Bag Levy). The Plastic Bag Levy will increase by 3 cents to 28 cents per bag from 1 April 2022 following National Treasury's 2022 budget review. The amendments to the Plastic Bag Regulations, which came into effect on 7 April 2021, saw the introduction of post-consumer recycle requirements to be adopted in the manufacturing of plastic bags. The post-consumer recycle minimum content will come into effect from 1 January 2023 and will increase by 25% every two years, and further require that plastic bags manufactured or imported to South Africa must contain 100% post-consumer recycle by 1 January 2027.

EPR REGULATIONS

In addition to the Plastic Bag Regulations, the final EPR regulations were published on 5 November 2020 (EPR Regulations). Along the same vein as the Resolution, which calls

upon all member states to continue and step-up circular economy measures and includes this objective as a Proposed Provision, the EPR Regulations were introduced with the purpose of extending a company's financial or physical responsibility for products throughout their lifecycle up to the post-consumer stage. The applicability of EPR obligations, which stem from section 18 of NEMWA, is a two-fold assessment that first requires determining whether an entity's goods amount to what are termed "*identified products*", which are listed in three published notices.

One of these notices caters for the paper, packaging, and some single use products sector (Packaging Notice) and specifically identifies a number of plastics linked to failed recycling systems and marine pollution. Second, one must determine whether the entity amounts to a "*producer*" of these identified products (which is defined in both the EPR Regulations and in the Packaging Notice) and include in their scope a brand owner, manufacturer, converter, seller or importer of identified products.

Producers are required to comply with a number of obligations, including either the establishment and implementation of an EPR scheme for the management of identified products, or joining a producer responsibility organisation (PRO) that manages an EPR scheme on the producer's behalf.

Given the above, it is evident that the consequences of these regulatory requirements is that manufacturers of plastic bags are required to pay a plastic bag levy as well as an EPR compliance fee. In addition, as the International Plastics Agreement contemplates including financial mechanisms to support its implementation, these may be in the form of an additional levy or fee paid to the multilateral fund that may also have to be borne by plastic producers. These costs are indicative of growing financial obligations on the plastics industry which will likely encourage businesses to adapt their operations to become more sustainable, a move which can no longer be avoided.

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KENYA

Just as in the case of South Africa, Kenya is one of the countries that supported the adoption of the Resolution. This support for the Resolution is congruent with Kenya's long-standing efforts in the management of plastic waste, and is reflective of a deep-seated belief in environmental multilateralism. Kenya was particularly explicit in calling for the international community to tackle plastic pollution as a triple planetary crisis through a legally binding international instrument, and also stressed the need for the recognition of the transboundary nature of plastic pollution in the International Plastic Instrument. These proposals were among those included in the final Resolution that was adopted.

In parallel with the negotiations towards a binding instrument that are now ongoing, Kenya will need to continue with national efforts in place to manage plastics. Previously, Kenya attempted to manage plastic waste through a 120% excise duty on plastic

bags below 30 microns thickness imposed in the year 2007, as well as attempted to ban plastics below 30 microns (in 2005) and 60 microns (in 2011). However, these different initiatives were unsuccessful.

Current efforts that are proving more successful than previous attempts include a national ban on plastic bags through a Gazette Notice published in February 2017, in which the Cabinet Secretary responsible for the environment introduced a ban on the use, manufacturing, and importation of all plastic bags used for commercial and household packaging. Only plastic bags used in primary industrial packaging (in so far as they are used to package products at source) disposal plastic bags used to handle biomedical and hazardous wastes and garbage bin liners, and duty-free shop plastic bags at airports, are exempt from the ban.

SAFEGUARDING PUBLIC INTEREST

Following the ban, the Kenya Association of Manufacturers applied to the Environment and Land Court seeking conservatory orders against the implementation of the ban in *Kenya Association of Manufacturers and Two Others v Cabinet Secretary – Ministry of Environment and Natural Resources and Three Others* [2017] eKLR. In its decision, the court stated that the ban on plastic bags was to safeguard the larger public interest and promoted the constitutional right to a clean and healthy environment for over 40 million Kenyans. According to the court, it would be unfair to sacrifice the greater public good to safeguard the commercial interest of a few plastic bag traders.

As such, the ban remains in place and to ensure compliance with it, all manufacturers, users, and importers of plastic bags intending to use plastic bags in the primary industrial packaging of their products are required to obtain clearance letters from the National Environment

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Management Authority (NEMA Kenya), upon payment of a requisite fee. Anyone found with banned plastic bags without authorisation from NEMA Kenya is liable to a penalty of a fine of not less than KES 2 million and not more than KES 4 million, imprisonment for a term not less than one year but not more than four years, or to both the fine and imprisonment. In addition to the ban on plastic bags, in 2019 Kenya banned the use of plastic bottles, straws and related products in protected areas such as national parks, beaches, forests and conservation areas, effective from 4 June 2020.

Kenya's plastics ban approach requires that producers urgently shift to innovative non-plastic options for packaging. In the case of producers exempt from the ban, more robust efforts are necessary to deal with the waste at the post-consumer stage. The coming into force of the International Plastic Instrument as envisioned will therefore present an opportunity for enhanced capacity-building,

technical assistance, and technology transfer in the country, to enable a swifter transition to a less single-use plastic dependent economy as well as one that addresses the full lifecycle of plastic. As an alternative to plastic bags, for example, NEMA Kenya recommends bags made from non-plastic materials for secondary packaging, such as sisal and papyrus, woven polypropylene plastic bags (gunny bags), non-woven polypropylene plastic bags (cloth-like bags), laminated polypropylene bags, polyolefin fibre bags, and 100% biodegradable bags (starch and cassava bags). With financial and technological support, there is scope for the growth of thriving industries around these options, not only protecting the environment but also improving the economy.

REGIONAL AND INDUSTRY ROLES

The multilateral approach to the management of plastic waste offered by the proposed International Plastic Instrument also presents an opportunity to solve a challenge that is currently plaguing the country.

Despite the ban on single use plastic bags, these bags are still being smuggled into the country from neighbouring countries that have not instituted similar measures on plastic waste. A legally binding instrument on plastic pollution placing obligations on all state parties to the agreement and including within it a reporting mechanism as envisioned in the proposed instrument will be ground-breaking. It will minimise incidences of plastics entering Kenya from neighbouring countries through the black market as more countries take action against single use plastics. It is also likely to enhance regional collaboration and aid in fast tracking initiatives within the East African region such as the passing into law of the East African Community (EAC) Polythene Materials Control Bill, 2016, which sets out restrictions and controls on the introduction of polythene material into the EAC region.

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As in South Africa, post-consumer plastic in Kenya is also managed through EPR schemes. However, unlike South Africa, specific EPR Regulations are currently under development and are not yet law. Nonetheless, the private sector already has PROs for plastic waste in place, with the Kenya Extended Producer Responsible Organisation focusing on plastic bags and the Kenya PET Recycling Company focusing on polyethylene terephthalate (PET) bottles. Both initiatives are industry driven and adopt a model that requires producers to voluntarily register and pay an EPR fee to the PRO. Depending on the final provisions of the instrument, producers may face additional obligations, as highlighted in our analysis on the South African context above, and these will need to be monitored closely. Overall, successful implementation of the International

Plastic Instrument will depend on national willingness to meet obligations under the instrument and amend the existing institutional, legal and policy framework to reflect any new binding requirements.

CONCLUSION

From proposing the Resolution to adopting it, different African countries have continued to signal their commitment to end plastic pollution in line with the African Ministerial Conference on Environment in November 2019, where African countries committed to speed up the transition to a circular economy as part of Agenda 2063. As highlighted in our analysis, Kenya and South Africa have been no exception.

It is further evident from the development of the Resolution, as well as the jubilant response to its adoption, that there was an urgent need to develop an international

legally binding instrument in response to the global recognition that plastic pollution significantly impacts the environment, human life, and particularly marine life. Given the number of obligations that the Resolution proposes, as well as the existing legislative requirements in place, operators in the countries' respective plastics industries may need to resort to operational changes to adapt to growing pressure to be more sustainable.

It is therefore necessary that all players in the plastics value chain remain cognizant of legislative and policy developments in waste regulation frameworks which impact their business both financially and administratively, areas our environmental team is well-placed to advise on.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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