



MISUSE OF THE  
BASEL CONVENTION  
ARTICLE 11 TO AVOID  
COMPLIANCE WITH NEW  
PLASTIC WASTE  
CONTROLS

# Misuse of the Basel Convention Article 11 to Avoid Compliance with New Plastic Waste Controls

--An Analysis--

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## Introduction

In 2019 the Basel Convention added plastics as new waste listings to begin to better control plastic wastes.[1] The Basel Parties concluded that while some plastic wastes are not necessarily hazardous wastes, they nevertheless have a high likelihood of not being properly and safely recycled following transboundary movements. The amendments adopted in 2019 entered into force on January 1, 2021. Unfortunately, not all Basel Parties obliged to do so, have implemented, and enforced these new listings.

This legal opinion analyzes the recent efforts by certain OECD countries to avoid application of Basel plastics amendments. Such efforts to avoid the new international trade controls for plastic wastes, often by the same countries that voted to adopt the amendments, mark a sad chapter for the Basel Convention and in international environmental law in general.

Each of these examples seek justification through Article 11 of the Basel Convention to circumvent the Basel Convention and its new Basel plastics amendments. However, as we shall see, Article 11 was never intended to allow agreements ratified after the adoption of the Basel Convention that are weaker than the Basel Convention itself. Rather, Article 11 agreements were allowed to admit trade between Parties and non-Parties with controls equal to or stronger than the Basel Convention or to allow stronger agreements between Parties. In this analysis we examine three of these very problematic efforts to circumvent the new Basel plastics amendments.

The European Union and EEA Double Standard: The current legislation of the European Union on waste trade, the Waste Shipment Regulation, deliberately refuses to add in full, the new plastic waste amendments for trade within the EEA (European Economic Area) thus creating a double standard for Europe. A proposal for a new, revised Waste Shipment Regulation as presented by the European Commission, also fails to do so, and continues to allow Y48 plastics controlled under the Basel Plastics Amendments to ignore key aspects of the new amendments. Recent proposed amendments by the European Parliament call for reversing the EEA member state exclusion from Basel controls (supposedly justified by Article 11), correctly citing that it is neither legally correct nor environmentally sound.

[1] Decision 14/12 of the Basel Convention's COP14 meeting found here.

<http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

Canadian Waste “Arrangement” with the United States: Shortly before the entry into force of the Basel Plastics Amendments in late 2020, the United States and Canada, declared a "non-legally binding arrangement" as an acceptable Article 11 Agreement, allowing Canada, to not only trade with a non-Party (United States) but to do so completely ignoring the 2019 Basel Amendments.

Mexico Invoking the OECD Council Decision to Trade in Plastic Waste with the United States: Finally, Mexico has recently declared that they consider that their concurrent membership in the OECD with the United States allows them to trade in Basel controlled plastic wastes with the United States without following Basel control procedures. This violates Article 11 because the OECD Council has not adopted two of the three plastic waste listings (Y48 and B3011) due to an objection to the listings by the United States. Mexico admits that they have no other Article 11 agreement in place to justify trade in Basel controlled waste with a non-Party (US). Their assertion that they can use the OECD Council Decision is analyzed herein and is found to be legally incorrect.

This analysis concludes that each of these bold declarations reserving application of the new Basel plastics amendments by claiming valid Article 11 Agreements allow this, are legally faulty, and if unchallenged, will lead to a dangerous unravelling of the intent and purpose of the Basel Convention, and its ability to obligate Parties to control and minimize transboundary movements in certain wastes, and indeed international law in general. If such exceptions are allowed between any consenting Parties, anywhere at any time, the Basel Convention, becomes meaningless.

## Background

### The Basel Convention

The Basel Convention<sup>[2]</sup> is the principal international legal instrument regulating the transboundary movement and disposal of hazardous and other wastes. The main objective of the Basel Convention is to prevent and regulate the harmful practice of exploiting weaker economies with the export and disposal of hazardous, or "other wastes" for special consideration (Annex II) generated in richer economies. One of its primary goals is to “reduc[e]...hazardous and other waste generation to a minimum; and for wastes that are nevertheless generated, ensure the availability of adequate disposal facilities which are designed to prevent pollution through environmentally sound management.” The Convention also provides that the transboundary movement of hazardous waste is reduced to a minimum and never allowed to proceed to countries that have prohibited its import or where environmentally sound management is not guaranteed.<sup>[3]</sup>

[2] The text of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989 and entered into force on 5 May 1992. The text has been subject to various amendments since its adoption.

<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>

[3] Basel Convention, Article 4.

For any trade that taking place between Parties "prior informed consent" (PIC) is necessary, ensuring that all trade is first notified to the importing country, and must await their consent before it can proceed.[4]

In 2019, the Basel Ban Amendment, adopted in 1995, entered into force. This amendment, now incorporated into the Convention as Article 4a, forbids the export of hazardous wastes from developed countries (Annex VII countries: OECD, EU and Liechtenstein) to non-Annex VII countries for any reason. The Convention also forbids waste trade between Parties and non-Parties except where a special Article 11 Agreement is ratified.[5] Notably, the Convention in its Article 26 allows for no exception to its obligations.

The Basel Convention primarily relies on its annexes to define controlled wastes, which fall into one of two categories: "hazardous wastes" and "wastes requiring special consideration" also referred to as "other wastes."

- Annex I provides a list of hazardous constituents. Annex III provides a list of hazardous characteristics. All wastes on Annex I are considered hazardous unless they do not possess a hazardous characteristic listed on Annex III.
- Annex VIII lists common wastes streams that are presumed to be hazardous based on the above, although they can still be proven not to be so using Annexes I and III.
- Annex II lists wastes requiring special consideration.
- Annex IX lists categories of wastes that will be presumed not to be hazardous, unless they are proven to be so using Annexes I and III.
- Annex IV is a list of waste management destinations for recycling and final disposal which forms the basis for determining whether a material is a waste.

By default, the transboundary movement of hazardous wastes and other wastes (collectively "controlled wastes") require the aforementioned PIC procedure unless their transboundary movement is not banned entirely -- e.g. hazardous waste trade from developed to developing countries, or trade with non-Parties. Wastes that move in contravention of PIC or the bans is considered illegal traffic and a criminal act.[6]

## The Basel Plastic Amendments

Before the Basel Convention Plastic Amendments were adopted in 2019, plastic wastes were only very rarely subject to Basel Convention controls. The former category for non-hazardous plastics listed in B3010 of Annex IX was so broad that most plastic wastes could be traded among parties without being subject to the PIC procedure or to trade prohibitions, and parties could freely

[4] Basel Convention, Article 6.

[5] Basel Convention Article 4,5; Article 11.

[6] Basel Convention Article 4 para. 3.]

trade (under the Basel Convention) plastic wastes with non-parties, such as the United States. However, the Basel Plastic Amendments, adopted by a consensus of the parties in May 2019 and effective on January 1, 2021, changed that situation with three new listings.

First, the Amendments created a new listing in Annex VIII (A3210) for plastic wastes, including mixtures of such wastes, having as constituents or contaminated by an Annex I substance, unless it could be demonstrated not to possess a hazardous characteristic (listed in Annex III). This amendment had no strong legal effect because it had always been possible previously to identify hazardous waste by using these Annexes I and III, without a specific listing on Annex VIII. But the new listing makes it far more obvious that there are indeed certain plastic wastes that will exhibit a hazardous characteristic.

Second, the Convention re-evaluated the old listing of non-hazardous plastic waste B3010 to narrow its scope significantly. This new listing, now numbered B3011, requires non-hazardous plastic shipments to meet the following important criteria:

Plastic wastes not subject to controls (B3011) must be "almost free from contamination" of any kind and be destined only for a R3 (Annex IV) recycling operations. R3 recycling operations do not include incineration, landfill, or waste-to-energy operations, and, except for a few exceptions, for some listed fluorinated compounds, cannot include halogenated compounds. Finally, they must be unmixed single polymers, cured resins, condensation products, or listed fluorinated polymers, except for one exception[7].

Third, and most importantly, any plastic wastes not classified as hazardous or non-hazardous will be designated as an Annex II "waste requiring special consideration" (new listing Y48). Annex II wastes are, like hazardous wastes, subject to PIC procedures and some Parties (e.g., the European Union) have made them subject to bans with respect to exports to developing countries.

[7] Three categories of plastic (polyethylene (PE), polypropylene (PP) and polyethylene terephthalate (PET)) may be mixed and still not subject to control, provided all the other criteria are met and they are recycled separately at the destination.



Thus, as of January 1, 2021, only plastic wastes listed in B3011 (i.e., unmixed, non-halogenated and not contaminated and destined for recycling) are not subject to Basel's prior-informed-consent procedure and other controls, including, in some cases, full prohibitions on trade.[8] Further, only those wastes listed under B3011 can be traded with non-parties, absent a valid Article 11 agreement.

These amendments were expected to have a significant, positive impact on the global plastic pollution crisis. However, as we shall see, certain OECD Parties have sought to use Article 11 in a way that contradicts the Basel Convention to circumvent the new Basel plastic wastes listings and perpetuate business-as-usual for their country.

## The Basel Convention Article 11

In Article 4.5 of the Basel Convention the trade between Parties and non-Parties is prohibited with but one exception. This exception is found in Article 11. This exception was created to provide for a pathway of non-discrimination in trade generally (e.g., to provide consistency with the General Agreement on Trade and Tariffs (GATT)) while maintaining the rigor prescribed by the Basel Convention. It allows non-Parties to trade with Parties if the Article 11 agreement under certain conditions. Article 11 is divided into two paragraphs: the first for agreements formed after entry into force of the Convention, and the second for agreements formed prior to the entry into force of the Convention.

First, for an Article 11 agreement to be a valid agreement according to the Basel Convention, the parties to it must be legally bound by it. Additionally, for an Article 11 Agreement to be valid, it must meet the requirements found in Article 11 paragraph 1 (subsequent agreements) or 2 (prior agreements).

In paragraph 2, Article 11 recognizes and allows continuance of pre-existing agreements passed prior to the Basel Convention's entry into force as long as they "are compatible with the environmentally sound management obligations of the Convention."

In paragraph 1, Article 11 describes valid agreements passed subsequent to the entry into force of the Basel Convention with even stronger language. Paragraph 1 states that Parties may enter into Article 11 agreements "provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries."

[8] For example, the EU does not allow the export of any Annex II waste to non-Annex VII (basically non-OECD) countries as part of their implementation through the EU Waste Shipment Regulation of the Basel Ban (Article 4a).

The Basel Convention defines environmentally sound management (ESM) as “taking all practicable steps to ensure that hazardous and other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.”[9]

This strict language indicates that a Party must exhaust all likely and achievable means to attain the overarching goal of protecting human health and the environment. If there is more than one practicable measure, Parties must pursue them all. Thus, to be valid, Article 11 paragraph 1 agreements created after entry into force of the Convention must ensure that Parties take all practicable steps to protect human health and the environment from covered wastes, and must guarantee an equivalent level of protection and control to that of the Basel Convention for the covered wastes. Further, the language that prescribes “provisions which are not less environmentally sound than those provided for by this Convention,” without the word “management”, indicates a common understanding of the terms “environmentally sound” as requiring language as protective of human health and the environment as the language of the Convention.

Indeed, in the debate conducted around whether or not the Hong Kong Convention established a valid Article 11 agreement for the management of obsolete ships destined for dismantling, the parties used the phrase: “Equivalent Level of Control” for shorthand language that would satisfy the language found in Basel Article 11, paragraph 1.[10]

Article 11 agreements must also be understood within the context of Article 26.1 of the Basel Convention, which disallows reservations or exceptions to the main text of the Basel Convention. As the Parties were intent on prohibiting reservations generally to the Convention and its obligations, it is not possible to imagine they would allow such reservations with non-Parties or through side agreements.

While Article 11 agreements, formed subsequent to the adoption of the Basel Convention, may have some flexibility in how they achieve the goal of ensuring the sound management of covered waste equivalently, and they can certainly require more rigorous controls and protection, they cannot exempt a Party or non-Party from any one of its core obligations under the Basel Convention -- for example by redefining or ignoring the categories of covered wastes identified in the Basel annexes, or by allowing free trade of any such waste which Parties are so clearly obliged to control for example with the PIC procedure.

[9] See, Basel Decision VII/26 where the first reference is made with respect to the Environmentally sound dismantling of ships, requiring that the Hong Kong Convention provide and “equivalent level of control”.

[10] See, Basel Decision OEWG-VII/12: Environmentally sound dismantling of ships (elaborating these and other criteria for judging whether the Hong Kong Convention provided an equivalent level of control to the Basel Convention).



These core obligations include inter alia: i) measures by which the exporting country obtains assurances of the environmentally sound management of the waste by the importing country; ii) a strict control system based on notification and consent before any transboundary movements; iii) application to the full scope of all waste listings defined as "hazardous and other wastes" by the Basel Convention, unless covered by other instruments; iv) a duty by the Parties to consider movements that fail to adhere to the as a criminal offense, and the responsibility to re-import such wastes should there be no mutually agreeable environmentally sound disposal alternative.[11]

Any purported Article 11 agreement that allows for trade in wastes that are deemed hazardous or other wastes under the Convention without including such core obligations, cannot be deemed to stipulate provisions which are not less environmentally sound than those provided for by this Convention and will not provide "an equivalent level of control" as that of the Basel Convention and must therefore be considered invalid.

## The OECD Council Decision on the Control of TBM destined for Recovery Operations

The most well-known example of an Article 11 agreement, and in this case one made prior to entry into force of the Basel Convention, is the OECD Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations[12] which has been in force since 1992 and applies to the 38 member States of the OECD.

In the early 1990s, as it became apparent that an international agreement on hazardous and other wastes was going to be signed (Basel Convention), the OECD reached an agreement on their own system of controls for hazardous wastes specifically destined for recovery operations. This was notified to the Basel Secretariat as an Article 11 agreement once the Basel Convention entered into force.

One clear effect and purpose of the OECD decision was to enable other OECD members that are Basel Parties to continue trading in hazardous and other wastes with non-Parties for the purposes of recycling. Today the United States is the only OECD member state that is a non-Party to the Basel Convention. In addition to adopting the basic principles of notification and consent, the OECD streamlined the implementation of the notification and consent regime by allowing pre-consented facilities and imposing tacit (assumed) consent for shipments where no consent is forthcoming within a given time period.

[11] See CIEL, "Shipbreaking and the Basel Convention: Analysis of the Level of Control Established Under the Hong Kong Convention" at 29-39 (2011) for an analysis of sources providing greater detail of what equivalent protection and control demands.

[12] <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0266>

In 2001, the OECD adopted major revisions to their Council Decision to align itself more closely with the Basel Convention concerning the lists of wastes to be controlled.[13] Today the OECD Council Decision and its controlled wastes -- the controlled (amber listed) and not controlled (green listed) wastes continue to largely replicate the Basel Convention's listings of wastes controlled (hazardous and other wastes) and those that are not controlled (Annex IX).

The amended OECD Council Decision also expressly provides for a procedure to follow when the Basel annexes are amended. The Council Decision indicates that Basel amendments will automatically be incorporated into the relevant OECD appendices unless an OECD member objects. Thus, wastes that are newly categorized under Basel as "hazardous" or "other wastes" (requiring special consideration), by default become subject to the "amber control" procedures of the OECD Decision requiring trade controls even for the non-Party United States and Basel Annex IX (non-hazardous wastes) are incorporated into the OECD "green list".

However, if a member objects, the automatic incorporation is suspended, subject to a review. The objecting member must present an alternative proposal for how to treat the wastes newly listed under Basel within the OECD Decision which can only be adopted by consensus. If no consensus is reached, parties will not incorporate the Basel Convention amendments into the OECD Decision. Instead, the OECD Decision dictates that its appendices "will be modified as appropriate" and that the OECD Members retain the right to control such waste "according to domestic and international laws." [14] For OECD members who are Basel parties, the practical outcome is that they must apply the Basel Convention as amended for trade in these substances. [15]

## US Objection Blocks OECD Adoption of New Plastics Amendments

This procedure is important for this analysis because this is precisely what happened on July 3rd, 2019 [16] when the US objected to the new Basel Plastics listings being adopted in the OECD Council Decision and proposed that the status quo be maintained -- a free trade in all plastic wastes destined for recovery purposes within the OECD be retained with the exception of hazardous plastic waste (A3210). A3210 is currently seen as a very small slice of actual plastic waste trade. Rather, it is the new listing Y48 and its mirror entry B3011 which are at the core of the new Basel plastic waste amendments.

[13] The OECD argues that the revised Decision must still be judged against the looser standard of "compatibility" in Article 11(2) given that the original agreement predates the Basel Convention; that seems at least debatable given the substantial revisions made in 2001 and afterwards, including many new listings, but we shall not attempt to resolve the argument here.

[14] "Full summary of the amendments to the OECD Council Decision", [https://www.oecd.org/environment/wastes/Full\\_summary\\_of\\_the\\_amendments\\_to\\_the\\_OECD\\_Council\\_Decision.pdf](https://www.oecd.org/environment/wastes/Full_summary_of_the_amendments_to_the_OECD_Council_Decision.pdf) and appendix with modifications, <https://www.oecd.org/environment/wastes/appendix-modifications.pdf>.

[15] OECD Council Decision, Chapter 2, Section B,3.

[16] Objection Letter, [http://wiki.ban.org/images/4/4f/US\\_EPA\\_Plastics\\_Objection\\_Letter.pdf](http://wiki.ban.org/images/4/4f/US_EPA_Plastics_Objection_Letter.pdf)

While the United States argued at the OECD for continuing the status quo of allowing largely unregulated trade in Y48 plastic wastes for recovery purposes under the OECD Decision, it failed to persuade any other OECD member states of this interpretation. The US proposal would have served as largely a denial of the new Basel Amendments.

However, as most of the OECD member states are Basel Parties, they knew their Basel obligations could not be legally ignored and that an Article 11 agreement does not allow for such a major derogation of simply not controlling a new Basel waste. Thus, without a consensus to accept the Basel Amendments, the OECD Decision currently does not include the new listings B3011 (non-hazardous plastic waste), nor Y48 (Plastic Waste for Special Consideration).

This leaves only hazardous plastic waste (A3210) as a legally traded plastic wastes between OECD countries. All OECD countries must otherwise control such waste "according to their domestic and international laws," meaning that OECD members that are Basel parties (all except the US) must apply Basel controls to their transboundary movement. Further, all Basel Parties, including all OECD members, except for the United States, cannot trade in any plastic wastes with the United States unless they pass a valid Article 11 Agreement with them.

## Cases of Illegal Use of Article 11

### A. European Union: Circumvention of the Basel Convention Plastic Amendments Through Invalid Use of Article 11

In January, 2019, just prior to the adoption of the Basel Plastic Amendments, the European Council decided, that while they would support the Norwegian proposal which resulted in the plastic waste Amendments, they would, simultaneously agree to unilaterally largely ignore the new obligations for trade in newly listed plastic wastes if it occurred between EU Member States and within the European Economic Area (EEA).[17] They justified this departure from the Basel Convention by declaring to the Basel Secretariat that the Treaty on European Union (TFEU); as well as the Agreement on the European Economic Area (EEA) were regional agreements in accordance with Article 11 of the Basel Convention and further declared that under these agreements, rules have been adopted, among other matters, to ensure the environmental sound management of hazardous and other wastes as required by the Basel Convention. They stated: "these agreements and the related rules stipulate provisions which are not less environmentally sound than those provided for by the Basel Convention, in accordance with Article 11 of this Convention." [18]

[17] This was established by COUNCIL DECISION (EU) 2019/638 of 15 April 2019. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0638&from=EN>

[18] <http://www.basel.int/Countries/AgreementsorArrangements/tabid/8690/Default.aspx>, see PDF of letter here.

The EU declaration to create an Article 11 exception would have been acceptable except for the fact that what was adopted by the European Commission was less environmentally sound as that which the European Commission and Council agreed to at the Basel meeting in 2019. Rather the Waste Shipment Regulation (WSR)[19] was intentionally altered to provide far less controls than that of the Basel Convention in three important ways.

Mixtures of Wastes Allowed without Controls: First, the WSR fails to provide an equivalent level of control by ignoring the decision of Basel to require prior informed consent for all but one mixture of single stream polymers, condensation products, cured resins and fluorinated polymers. The only exception allowed in Basel is a mixture of PET, PP and PE plastics. The new WSR flipped that decision by first defining a new EU3011 listing (Annex III WSR), which appeared to repeat the call for single stream listings as in Basel, but then reversed that limitation in the subsequent Annex IIIA.[20] As a result, mixed plastic types can now within the EEA area be shipped as EU "green listed" wastes and only require general notification and not prior-informed-consent procedure as is required between all other Basel Parties. Mixed plastic wastes are always more difficult to manage and many of the polymers are not recyclable at all meaning that there is an incentive to get rid of them by the cheapest method possible no matter how harmful for the environment.

Non-Recycling Destinations Allowed without Controls: Second, the new EU3011 listing created by the European Union fails to provide an equivalent level of control to that of the Basel B3011 by failing to limit exports of EU3011 plastics to Basel R3 destinations. R3 destinations under Basel Annex IV recovery operations are defined as "[r]ecycling/reclamation of organic substances which are not used as solvents." The EU chose to remove this R3 qualifying language found in the chapeau of B3011 when they drafted EU3011.[21] This EEA-only derogation thus allows the export of these single stream plastics as well as mixed stream plastics to move to landfills, incinerators, and waste-to-energy operations, without the prior-informed-consent control mechanism required by the Basel Convention. This will include such harmful practices as the burning of plastic waste for fuel, which creates harmful emissions and ashes while exacerbating the climate crisis.

PVC and PTFE Exemptions: Third, the new EU3011 listing inserts two new exemptions that were not present in the Basel Convention's B3011. These two harmful listings were added at the bottom of EU3011 as wastes of polyvinyl chloride (PVC) and of polytetrafluoroethylene (PTFE) which otherwise would have to be controlled by the PIC procedure.

[19] Consolidated text: Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste <https://eur-lex.europa.eu/eli/reg/2006/1013/2021-01-11>

[20] See WSR Annex III, and Annex IIIA, 4.

[21] Compare the language found in Basel B3011 chapeau: "Plastic waste listed below, provided it is destined for recycling<sup>5</sup> in an environmentally sound manner and almost free from contamination and other types of wastes," with the chapeau of EU3011: "Plastic waste listed below, provided it is almost free from contamination and other types of waste." Footnote 5 states: "Recycling/reclamation of organic substances that are not used as solvents (R3 in Annex IV, sect. B) or, if needed, temporary storage limited to one instance, provided that it is followed by operation R3 and evidenced by contractual or relevant official documentation."

Indeed, both PVC and PTFE are halogenated compounds which are called out by the language found in Basel's B3011 that describes a list of polymers exempted from control procedures: "Plastic waste almost exclusively consisting of one non-halogenated polymer, including but not limited to the following polymers." PVC is a halogenated polymer. And PTFE is also a halogenated polymer that was not listed in the exhaustive list of exempted fluorinated polymers in B3011. These wastes and mixtures thereof are meant to be subject to controls under the new Basel Plastic Amendments, whether destined for recycling or not. These controls are in place because these wastes are difficult to recycle and can be hazardous to human health when not managed properly.

The exemptions from PIC procedures indicated in the three instances above will almost inevitably lead to unmonitored shipments of dangerous plastic waste within the EU, undermining the global effort to ensure such waste is managed in an environmentally sound manner.

While the EU has notified the Basel Convention Secretariat of their claim of using Article 11, this hardly makes such a claim legally valid. The Basel Convention Secretariat has very little authority or capacity to police its Parties for legal compliance. As in most international treaties, compliance is the duty of the Parties. It is left to their honor and legal expertise to conduct themselves in accordance with the letter of the law.

In this case, the letter of the law is a plain reading of Article 11, paragraph 1, which must apply to any update of the WSR if it becomes criteria for an Article 11 agreement. Whether notified to the Secretariat or not, such an Article 11 agreement can only be valid if it can stipulate provisions that are not less environmentally sound than those in the Convention, or, as has characterized in the ship recycling debate -- requires an "equivalent level of control".

Not controlling wastes that are meant to be controlled under Basel for the clear purpose of protecting the environment and human health can never be seen as environmentally sound as controlling said wastes. Prima facie, the WSR does not meet the bar of a valid Article 11 Agreement and therefore must be seen as a unilateral Reservation forbidden by Article 26.1 of the Convention. Our analysis concludes that the EU's failure to adopt the Basel Convention's new Plastics Amendments is a clear violation of the Basel Convention and should be rectified in the new recast WSR now before the European Council.

Additionally, while the EU has signaled their intent for the WSR to be a key set of requirements establishing an Article 11 agreement to the Basel Secretariat, the EFTA countries Iceland, Norway and Liechtenstein have not similarly declared to the Basel Secretariat that they are using the EEA to derogate from Basel. Since these countries are not EU members, the EU cannot speak for these countries and thus it is difficult to understand how the EU's communication to the Basel Secretariat of their use of the EEA Agreement extends to Iceland, Norway and Liechtenstein.



## Waste Trade Within the EEA is in Need of More ESM, Controls and Transparency, not Less

It is not just third countries outside of the Union that are falling victim to increased levels of waste trafficking and substandard management. The need for stricter control measures within the EEA is acute and thus it makes little sense to exempt EEA countries from the Basel Convention's Plastic listings even if such a move were legal. The European Commission recently published a report highlighting the fact that the amounts of illegal shipments detected by Member States' inspections is increasing. Continuing a trend seen over previous reporting periods, almost all the hazardous and other notified waste shipped into EU Member States in 2016–2019 came from within the EU or from EFTA countries. Together, these two sources accounted for 99% of all such notified waste shipments.

Of the total shipped into Member States and EFTA countries, there were 5,502 illegal shipments of notifiable waste reported in 2016–2019, with an increase in the number of illegal shipments compared with the previous reporting period. From 2013–2015 there were 933 illegal shipments reported on average per year, and for 2016–2019 1,376 illegal shipments were reported on average per year --- a 47% increase.[22]

Many media reports in the last few years attest that EU member states are in not in a position to boast superior waste management or trafficking controls. Slovakia,[23] Romania,[24] Poland, the Czech Republic,[25] Bulgaria,[26] and others have all suffered from increased illegal waste imports (including plastic waste).

[22] Report on the Implementation of the Waste Shipment Regulation for 2016-2019, <https://eur-lex.europa.eu/legal-content/AUTO/?uri=COM:2023:142:FIN&qid=1679064816881&rid=4>

[23] EURACTIV, June 14, 2021 "Slovak police investigates cases of illegal waste imports from Italy and Poland" [https://www.euractiv.com/section/politics/short\\_news/slovak-police-investigates-cases-of-illegal-waste-imports-from-italy-and-poland/](https://www.euractiv.com/section/politics/short_news/slovak-police-investigates-cases-of-illegal-waste-imports-from-italy-and-poland/)

[24] EU Observer, 22 April 2021, "After China ban, Romania hit by illegal waste imports", <https://euobserver.com/news/151622>

[25] EUWID, Recycling and Waste Management, 14 March 2019, "Poland and the Czech Republic pledge joint action against illegal waste imports," <https://www.euwid-recycling.com/news/policy/poland-and-the-czech-republic-pledge-joint-action-against-illegal-waste-imports/> also Down to Earth, 24 September 2021, "Poland's waste secret: Europe plays with fire", <https://www.france24.com/en/tv-shows/down-to-earth/20210924-poland-s-waste-secret-europe-plays-with-fire>

[26] Jacobin, 13 June 2020, "How Europe's "Trash Market" Offloads Pollution on Its Poorest Countries", <https://jacobin.com/2020/06/european-union-green-new-deal-garbage-wast>

Following the 2017 China National Sword ban on the import of foreign waste, Poland quickly became a new dumping ground for European trash. At the beginning of 2020, that there were almost 2,000 illegal dumps across the country. In the same year, 111 waste fires took place, sometimes several times at the same location. Without enough facilities to treat the huge quantities of trash, the sites are often deliberately set aflame, typically on weekends, when no one is present. It is a cheap way to make the waste disappear and yet a catastrophe for air quality and soil pollution.[27]

In a close look at Bulgaria,[28] it was reported that the Waste Shipment Regulation has had a "paradoxical effect: with a rise of illegal trash markets that transfer waste to Eastern Europe." Cross-border movement of trash within the EU does not really qualify as an "export" due to the EU agreeing to avoid Basel controls. Indeed, such exports do not require special state authorization, only a general informational notification. The market-based mechanism for waste disposal relies on and amplifies existing economic differentials within the EU. For example, burning waste in Bulgaria is estimated to be at least 50 percent cheaper than in Italy, since Bulgarian power plants underbid their Western European counterparts. Meanwhile, low taxes levied on deposition, combined with lax regulations on what waste gets buried, make Bulgaria a lucrative destination for disposal. This unequal situation is further enabled by the European Commission's 2017 Landfill Directive. Though it aims to virtually phase out landfills by 2035, it provides derogation for countries that rely predominantly on landfills, thus turning poorer member states' primitive waste disposal methods into a competitive "advantage".

Further, a Europol report[29] has linked the illicit trafficking of waste within Europe to organized crime. The report noted that organized crime groups are now heavily entrenched in this trade and are able to make substantial profit from it. The most likely victims are the poorer economies in central and eastern Member States.

Based on the sampling of information above from government agencies, media and academics, it is clear that the EU's "use" of Article 11 of the Basel Convention, cannot be justified on the basis that the European Union's waste management capacities and abilities are superior to other Basel Parties. Rather, we are seeing the same typical waste trade dynamics of blatant cost externalization and exploitation from the trafficking in waste play out within the EEA.

[27] Down to Earth, 24 September 2021, "Poland's waste secret: Europe plays with fire", <https://www.france24.com/en/tv-shows/down-to-earth/20210924-poland-s-waste-secret-europe-plays-with-fire>

[28] Jacobin, 13 June 2020, "How Europe's "Trash Market" Offloads Pollution on Its Poorest Countries", <https://jacobin.com/2020/06/european-union-green-new-deal-garbage-waste>

[29] Threat Assessment 2013 Environmental Crime in the EU, [https://www.europol.europa.eu/cms/sites/default/files/documents/4aenvironmental\\_crime\\_threatassessment\\_2013\\_-\\_public\\_version.pdf](https://www.europol.europa.eu/cms/sites/default/files/documents/4aenvironmental_crime_threatassessment_2013_-_public_version.pdf)

## B. Canada-US Arrangement (2020)

In late 2020, the US and Canada concluded an "arrangement"[30] to continue freely trading "non-hazardous waste and scrap" of all kinds. It did not stipulate plastic waste per se, but clearly was an agreement timed to create what Canada, a Basel Party, believed would be an exemption from the new controls created by the Basel Amendments to control Y48, mixed and contaminated plastics. This arrangement has been summarized by Canada on the Basel Secretariat website as follows:

"The Canada-US Arrangement on non-hazardous waste and scrap applies to waste and scrap that are not captured under Decision OECD/LEGAL/0266 of the Organization for Economic Cooperation and Development (OECD) or the Canada-US Agreement on the Transboundary Movement of Hazardous Waste. The Arrangement sets out that the transboundary movement of non-hazardous waste and scrap under the scope of the Arrangement are subject to all existing controls normally applied in commercial transactions. The Arrangement affirms the environmentally sound management of non-hazardous waste and scrap under its scope and confirms measures are in place in order to protect human health and the environment."

As worded above and in the actual arrangement, it does not purport to derogate from the Basel Convention as it never says that Canada will not fulfill all obligations provided for by the Convention. It does not say it is going to ignore controls of Basel listings subject to control. Stating that such trade is subject to all existing controls normally applied in commercial transactions does not mean that the wastes will only be subject to commercial controls and that the Basel Convention controls cannot be required at the same time. Clearly however the exercise would not have taken place unless that were the intent. But it is significant that the Arrangement text does not indicate a deviation, derogation, or departure from Basel of any kind.

It is only on the US EPA website[31] do we see this spelled out as follows:

"Under this bilateral arrangement, transboundary movements of non-hazardous scrap and waste, including the non-hazardous plastic scrap and waste covered by Basel listing Y48 are not subject to prior notice and consent requirements when subject to transboundary movement between the two countries and destined for environmentally sound management in either country."

[30] Arrangement Between the Government of Canada and the Government of the United States of America Concerning the Environmentally Sound Management of Non-Hazardous Waste and Scrap Subject to Transboundary Movement <https://www.canada.ca/en/environment-climate-change/services/managing-reducing-waste/international-commitments/canada-us-arrangement/arrangement-non-hazardous-waste-and-scrap.html>

[31] <https://www.epa.gov/hwgenerators/international-agreements-transboundary-shipments-hazardous-waste#Canada>



The arrangement defines non-hazardous waste and scrap in a manner that departs from the Basel definitions,[32] stating that for the purposes of this new arrangement those wastes which are non-hazardous are defined as wastes which are neither part of the 1986 bilateral Article 11 Agreement between the US and Canada, nor are part of Appendix 4 of the OECD Council Decision.

We may recall that the only reason mixed and contaminated plastics defined as Annex II wastes are not on Appendix 4 is that the US objected to them being adopted by the OECD. Canada now appears to have joined in this deviation sought by the US, as it is clear that if the OECD would normally have placed Y48 plastics and all other Annex II wastes on Appendix 4 (amber list) if not for the US objection.

If the Arrangement is achieving what the US EPA website indicates, this arrangement is not a valid bilateral Article 11 Agreement because does it not begin to meet the requirements set forth in Article 11. However, Canada, a Basel Party, uses the Arrangement as a tool to ignore Basel obligations even though it is not legally valid.

First, the arrangement states that it is not legally binding.[33] However, any valid Article 11 agreement or arrangement must be legally binding. As Basel is a legally binding convention, its entire text, including Article 11, is always legally binding on its Parties, which makes Article 11 legally active and possible as an option only if its criteria for validity are met as stipulated in the legal document -- the Convention. As the arrangement at the outset claims to not be legally binding, as a purported Article 11 agreement it is dead on arrival.

Second, even if the arrangement claimed to be legally binding, the arrangement's "control procedures" fails to meet Article 11 paragraph 1 requirements. Much like the EU derogation, it replaces a clear intention by the Basel Convention to control a large category of plastic waste (Y48) with intentions to both have no controls and replace it with an empty assertion that they will manage wastes in an environmentally sound manner. This hardly meets the bar of ensuring that "[t]hese agreements or arrangements...stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries."

[32] Basel never claimed that Annex II was non-hazardous but rather is "waste for special consideration" which was a designation and Annex created to avoid the debate between those that considered the solid household waste not hazardous (the US) and those that considered it to be hazardous. The compromise was Annex II.

[33] *Id.*, § 3 of the arrangement.

Instead, of applying the basic Basel PIC control procedure as stipulated under the Basel Convention, the arrangement subjects waste in its scope only to “all existing controls normally applied in commercial transactions,” which is required in any event. This phrase is not defined in the arrangement. However, the same phrase is used in the OECD Council Decision to describe the controls for waste on the OECD green list, which the OECD itself has stated that this effectively amounts to no specific waste related controls.[34] Assuming a similar meaning here, the arrangement does not subject plastic waste trade to any controls specifically designed to ensure that wastes are managed in an environmentally sound manner. The last paragraphs of the arrangement contain numerous declarations and assertions (against all evidence) that waste trade between the two countries is accomplished in an environmentally sound manner.

Today, there is in fact no system for notification, no tracking or reporting requirements (for either private parties or the two governments) for Y48 plastic wastes traded between the US and Canada. There is no possibility of consent or denial. Since the signing of the arrangement, the Canadian and American press have highlighted significant problems due to the lack of controls by the United States and Canada on their plastic waste. The following information highlights why controls are necessary:

1. K. Law et al., “The United States’ contribution of plastic waste to land and ocean” Science Advances (2020);
2. Greenpeace, “Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability” (2020). (“most [Material Recovery Facilities in the U.S.] produce a mixed plastic, ‘#3-7’ or ‘pre-picked’ bale that requires further sorting prior to recycling. However, the economics to do that have proven to be insurmountable.”);
3. Heinrich Boell Stiftung, “Plastic Waste Atlas” 39 (2d ed. 2019) (“Britain and the USA are among the world’s top exporters of plastic waste. Most of what arrives in Asia is almost impossible to recycle.”);
4. Stiv Wilson, “Here is Away,” Resource-Recycling (documenting widespread contamination with plastic of bales of paper waste exported from the United States).
5. K. Oanh Ha, Amazon Packages Burn in India, Final Stop in Broken Recycling System, Bloomberg News
6. Evan Dyer, “Government quietly made ‘back door’ agreement with U.S. that could undermine treaty on plastic waste,” (Dec. 2, 2020) CBC Canada.
7. Marc Fawcett-Atkinson, Canada is Drowning in Plastic Waste--and Recycling Won't Save Us, (March 9, 2021) National Observer
8. Gil Shochat, Chantal Lavigne, How Canadian Recycling can be Fueling Pollution in India. (February 10, 2022) CBC Canada.

[34] Council Decision, Chapter 2,C.xlsx

In fact, the Basel Action Network (BAN) has evidence that the exports of plastic waste leaving Canada for the US are not tracked or monitored and are not assured to be going to ESM operations. BAN collected more than 3,590 records of exports of HS code 3915[35] plastic scrap leaving Canada in the period from January 1, 2021 to March 1, 2023.[36] 708 of these went to countries other than the US which normally require Canadian export permits if they were in fact A3210 or Y48 Basel listed plastic wastes.[37]

The likelihood of mixed plastics and contamination qualifying these wastes as Y48 is very high for collected plastic in North America for the following reasons:

- It is likely to be shipments of mixed polymers, cured resins, condensation products, of the indicated fluoropolymers. Only one mixture of polymers is exempt (PET, PP and PE mix). Most US and Canadian MRFs (materials recovery facility) cannot adequately and thoroughly separate mixed plastic wastes containing many different polymers into the individual polymers. Thus, exported bales are often mixed polymers.
- The waste shipments are likely to be contaminated with polymer material including other plastics or non-plastic contaminants exceeding the accepted contamination level. Most countries are applying a contamination level of 2-5% to meet the standard stipulated in the Amendments of "almost exclusively consisting of". Separated PET plastic studied in California contains more than 14% contamination.[38] Common sources such as MRFs, agricultural waste, and electronic/appliance plastics are not normally separated and cleaned and therefore also exceed the accepted contamination levels.
- It is possible that the exports are destined for cement kilns, waste-to-energy operations or other non-R3 Basel Annex IV destinations and therefore fall under Y48 according to the definition of B3011 of the Basel Convention.
- It is very possible that the exports are destined for facilities that are not environmentally sound as required under B3011.
- It is likely that the shipments contain halogenated polymers which are not allowed under Y48 other than the indicated fluoropolymers (e.g., PVC is Y48).

[35] The Harmonized Tariff Schedule's overarching designation for plastic waste/scrap is HS 3915.

[36] Datamyne data from Materials Research LLC. <http://wiki.ban.org/images/3/3f/CanadaExporttoAllCountries.xlsx>

[37] Datamyne data from Materials Research LLC. [http://wiki.ban.org/images/6/66/ExportsfromCanada\\_notUSA.xlsx](http://wiki.ban.org/images/6/66/ExportsfromCanada_notUSA.xlsx)

[38] California Bale Study

And yet, according to Environment and Climate Change Canada, only 76 notifications for export under the PIC regime have been sent by the government of Canada and of these only 13 consents have been received by the importing country, resulting in just 13 export permits during this period.[39]

In total there were 708 shipments, for which only 76 notifications for exports were issued. 76 of 708 shipments is less than 11%. It is not likely that 89% of the exports from Canada were clean single-polymer streams (B3011). In fact, BAN has evidence that at least 31 Canadian exports to countries other than the US were PVC wastes and were therefore assuredly Y48 listings (halogenated polymer), requiring prior informed consent and an export permit and yet only 13 were given.[40] With this information, it can be said with certainty that a significant amount of Y48 is leaving Canada without the proper notifications and consent.

BAN also has evidence of 6,978 shipments of plastic waste imported into Canada since the Basel Plastic Amendments were in force.[41] All but 920 of these shipments are from the United States.[42] We have likewise learned that none of these 920 were given permits for importation.[43] It is very hard to imagine none of these 920 shipments were Y48 or A3210 requiring notification and consent and permits. Indeed, we also have learned that 18 imports of PVC (HS code 39153) have entered into Canada. Canada must consider PVC to be Y48 as it is a halogenated plastic.[44] Clearly, we have thus easily identified 18 examples of illegal traffic on the part of Canada they never received consent/permits. And if we had HS codes for Y48 more generally it is clear many more of these illegal imports would be revealed. What is also certain is that the assertions of Canada being able to ably control the trade and management of plastic waste is false.

Further, of the 5,865 shipments of plastic waste that entered Canada from the US during the period since entry into force, it is not known where these shipments ended up, whether they were properly managed in Canada, or re-exported to another country. There is no mechanism to monitor these shipments without PIC as required by the Convention.

[39] Notes from an email exchange between Ms. Karen Wirsig, of Environmental Defence Canada and the Director of Waste Reduction and Management Division, Environment and Climate Change Canada, March 27, 2023.

[40] Datamyne data from Materials Research LLC.

[http://wiki.ban.org/images/f/ff/PVCExportsfromCanada\\_notUSA.xlsx](http://wiki.ban.org/images/f/ff/PVCExportsfromCanada_notUSA.xlsx)

[41] Datamyne data from Materials Research LLC.

[http://wiki.ban.org/images/c/c9/Canada\\_Import\\_from\\_notUSA.pdf](http://wiki.ban.org/images/c/c9/Canada_Import_from_notUSA.pdf)[http://wiki.ban.org/images/9/95/Canada\\_Import\\_from\\_USA.pdf](http://wiki.ban.org/images/9/95/Canada_Import_from_USA.pdf)

[42] Datamyne data from Materials Research LLC. [http://wiki.ban.org/images/9/95/Canada\\_Import\\_from\\_USA.pdf](http://wiki.ban.org/images/9/95/Canada_Import_from_USA.pdf)

[43] An email exchange between Ms. Karen Wirsig, of Environmental Defence Canada and the Director of Waste Reduction and Management Division, Environment and Climate Change Canada, April 4, 2023

[44] Datamyne data from Materials Research LLC

<http://wiki.ban.org/images/1/19/PVCImportsintoCanadaNOTUSA.xlsx>

Turkey.[46] It is highly likely that many of these were sent to non-ESM facilities as there was no tracking of these shipments, nor requirements that only ESM facilities be utilized as is required under the Basel Convention. Meanwhile Canada has no records of sending any exports via the US to non-OECD countries.[47] This again shows an inability on Canada's part to assure ESM as is asserted in the "Arrangement."

Until Canada and the US can track where the wastes that cross their border end up, it is impossible for either of these countries to live up to the assertions found in the "Arrangement."

Finally, the US and Canada have a pre-existing (1986, amended 1992) bilateral agreement covering trade in some hazardous and other waste, which was notified to the Basel Secretariat as an Article 11 agreement that the new arrangement purports to "supplement" through application to wastes not covered by the original. While the agreement is weak, it only had to live up to Paragraph 2 of the Basel Convention, which has less strict language for compatibility with Basel. However, while weak, that agreement does at least contain the basic principle of "prior-informed consent." Therefore, it is illuminating that the two governments did not try to amend that agreement to add the new plastics listing of Y48 but instead chose to create a new arrangement without this fundamental Basel principle. Through this lens, it becomes very clear that Canada and the US did not choose to monitor and control this plastic waste traffic in any way, which for Canada at least is a clear departure from their obligations as a Basel Party. For the United States, it does not bode well for any future good-faith measure to ratify and implement the Convention later.[48]

## C. Mexico's Illegal Trade in Plastic Waste with the United States

In correspondence over the last two years between the Mexican authorities and the Basel Action Network, it has become clear that despite the adoption of the new Plastics Amendments Mexico, a Basel Party, has failed to implement these rules. There is a substantial flow of plastic waste moving each day on trucks from the US to Mexico.

The Mexican government initially asserted to BAN that there was no need to do anything differently following the adoption of the Amendments, as the La Paz agreement of 1986 covered the trade as a bilateral Article 11, paragraph 2 agreement. When challenged, they retracted that assertion as that agreement only regulates hazardous waste and the most important of the new listings, Y48, is not a hazardous waste listing.

[46] Datamyne data from Materials Research LLC. [http://wiki.ban.org/images/c/c6/CanadianExportsviaUS\\_to\\_non-OECD.xlsx](http://wiki.ban.org/images/c/c6/CanadianExportsviaUS_to_non-OECD.xlsx)

[47] [An email exchange between Ms. Karen Wirsig, of Environmental Defence Canada and the Director of Waste Reduction and Management Division, Environment and Climate Change Canada, March 27, 2023.](#)

[48] Under Article 18 of the Vienna Convention on the Law of Treaties, Parties are obliged not to defeat the object and purpose of a treaty prior to its entry into force for them. The United States has signed the Basel Convention and has never indicated an intent not to ratify it. Working against the object and purpose of the Basel Convention is a violation of the Vienna Convention -- another treaty which the US has signed but not ratified.

In his letter<sup>[49]</sup> of December 22, 2022, Jesus Ignacio Lopez Olvera, Director de Materiales y Residuos Peligrosas of the Mexican Agency SEMARNAT (Subsecretaría de Regulación Ambiental Dirección General de Gestión Integral de Materiales y Actividades Riesgosas), stated that while the La Paz agreement of 1986 is not applicable, the OECD Council Decision could still be used as a legal basis for the trade between the two countries, despite the OECD having refused to adopt the new amendments as described above after the US objected. He stated:

*"It is also important to recognize that although the United States has not ratified the Basel Convention, it is an OECD country and Decision C(2001)107, updated on the OECD/LEGAL/0266 portal, respects that each Member Country retains its right to control the waste from the Basel Convention Amendments in accordance with its domestic law and international law, as this Decision qualifies as an Article 11 multilateral agreement under the Basel Convention and is considered to provide an environmentally sound management level equivalent to that of the requirements of said Convention..."*

*"...Derived from the foregoing, Mexico and the United States may move non-hazardous plastic waste in compliance with the mutatis mutandis procedures established in Article 4(d) of the OECD Council Decision whereby prior-informed-consent procedures are carried out by the importer and the State of import that controls the cross-border movement subject to amber, or dangerous procedures, respecting the internal legislation of each country."*

Chapter II, B, Section 4 (d) of the OECD Agreement referred to by Mexico is part of a suite of statements in the OECD Council Decision that lays out actions that can be taken on a national basis:

#### *4. Provision for Specific National Control*

*a. This Decision does not prejudice the right of a Member country to control, on an exceptional basis, certain wastes differently, in conformity with domestic legislation and the rules of international law, in order to protect human health and the environment.*

*b. Thus, a Member country may control wastes subject to the Green control procedure as if those wastes had been subject to the Amber control procedure.*

*c. A Member country may, in conformity with domestic legislation, legally define or consider a waste subject to the Amber control procedure as subject to the Green control procedure because it does not exhibit any of the hazardous characteristics listed in Appendix 2 of this Decision, as determined using national procedures.*

<sup>[49]</sup>[http://wiki.ban.org/images/9/99/Fwd\\_Fwd\\_BAN\\_Counter\\_response\\_ATT\\_N\\_Mexico\\_USA\\_Transboundary\\_Movements\\_of\\_Plastic\\_Waste\\_Y48.pdf](http://wiki.ban.org/images/9/99/Fwd_Fwd_BAN_Counter_response_ATT_N_Mexico_USA_Transboundary_Movements_of_Plastic_Waste_Y48.pdf)

*d. In the case of a transboundary movement of wastes where the wastes are legally defined as, or considered to be, wastes subject to the Amber control procedure only by the country of import, the requirements of section D that apply to the exporter and the country of export, shall apply mutatis mutandis to the importer and the country of import, respectively.*

The reality on the ground is that Mexican authorities have not implemented any control procedures until very recently, despite both being a Basel Party and believing that they can control the import and export of A3210 (hazardous) and Y48 (special consideration) plastics via the OECD Council Decision. As of the date of their letter to BAN and by the Mexican government's own admission, [50] there have been no Mexican consents given to any US import notifications. Meanwhile, COMTRADE data indicates that in 2021, 84,414 metric tons of plastic waste transited the border from the US to Mexico, with the number increasing to 85,515 metric tons in 2022.

How much of this waste was meant to be controlled under Basel as A3210 or Y48 is not known, as HS codes describing the "commodity" in the COMTRADE data do not correspond directly to the definitions of Basel waste listings Y48 or A3210. However, it is important to note that much of what is traded today as bales in trucks crossing the US-Mexican border will in fact likely be Y48 for the following reasons:[51]

- They are contaminated with non-target recycled polymer material including other plastics or non-plastic contaminants. Most countries are applying a contamination level of 2-5%. PET bales studied in California exceed 14% contamination.[52] Common sources such as MRFs, agricultural waste, and electronic/appliance plastics are not normally separated.
- They are mixed polymers, cured resins or condensation products, and indicated fluoropolymers. Only one mixture is exempt from controls (PET, PP and PE mix). Most US MRFs cannot adequately separate polymers to single polymers. Thus, exported bales are often mixed polymers.
- They are destined for cement kilns or non-R3 destinations.
- They are destined for facilities that are not environmentally sound.
- They are halogenated polymers other than the indicated exempt fluoropolymers (e.g., PVC is Y48).

[50]Page 12,

[http://wiki.ban.org/images/9/99/Fwd\\_Fwd\\_BAN\\_Counter\\_response\\_ATTN\\_Mexico\\_USA\\_Transboundary\\_Movements\\_of\\_Plastic\\_Waste\\_Y48.pdf](http://wiki.ban.org/images/9/99/Fwd_Fwd_BAN_Counter_response_ATTN_Mexico_USA_Transboundary_Movements_of_Plastic_Waste_Y48.pdf)

[51] The reasons are a summation of the key points of the Annex II, Y48 entry, Basel Convention.

[52] California Bale Study

Indeed, we have seen that in the time period between entry into force of the Basel Plastic Waste Amendments and today, 149 PVC shipments moved across the border from the US to Mexico[53] and 228 PVC shipments moving across the border from Mexico to the US.[54] Additionally, a report released on 17 April 2023, by the International Pollutants Elimination Network (IPEN)[55] revealed that large amounts of plastic wastes enter the country to be burned in cement kilns throughout Mexico. There are 33 such sites suspected of importing plastics and other wastes for "co-processing" fuel which contribute to climate change and pollution. Most of this material is Y48 listed plastic waste as it is not an R3 destination but rather R1 (use as a fuel) and forbidden to export between Mexico, a Basel Party, and the US, a Basel Non-Party.

Regarding these concerns Mexico previously stated:

*"The DGGIMAR[56] recognizes that there could have been movements of non-hazardous plastic waste without the consent of Mexico, which is due to a delay in updating the Mexican regulatory framework, which was already resolved with the publication of the AGREEMENT that modifies the diverse one that establishes the merchandise whose import and export is subject to regulation by the Ministry of Environment and Natural Resources in the Official Gazette of the Federation on October 7, 2022, which can be consulted at the following link:*

[https://dof.gob.mx/nota\\_detalle.php?codigo=5667507&fecha=07/10/2022#gsc.tab=0](https://dof.gob.mx/nota_detalle.php?codigo=5667507&fecha=07/10/2022#gsc.tab=0)"

*"The publication of said AGREEMENTS depended on multiple meetings, analysis and discussion between SEMARNAT, the Ministry of Health and the Ministry of Economy, not only on the issue of waste, but also on CITES, regulation of forest species and pesticides, fertilizers and substances toxic."*

From this we can conclude that the Mexican Government admits non-compliance with new Basel listings from 1 January 2021 to October 2022 (22 months). Further, it is our analysis that they are still out of compliance, as the OECD agreement does not serve as a valid Article 11 agreement to trade in controlled wastes with a non-Party.

[53] Datamyne data from Materials Research LLC,  
<http://wiki.ban.org/images/6/62/MexicanImportsofPVCwastefromUSA.xlsx>

[54] Datamyne data from Materials Research LLC,  
<http://wiki.ban.org/images/f/f4/MexicanExportsofPVCwastetoUSA.xlsx>

[55] [Basura Plástica, Combustibles Derivados de Residuos y Cementeras en México. Executive Summary](#). (English)

[56] General Directorate for the Integral Management of Hazardous Materials and Activities



## Conclusion

This legal analysis shows that several OECD member countries which fought hard for the adoption of the new Basel Plastic Amendments at the 14th Conference of Parties to the Basel Convention have later fabricated ways to ignore their new obligations to control these wastes. As the Basel Convention allows for no reservations to its obligations, these countries are invoking Article 11 of the Convention as a means to circumvent Basel compliance. While allowing for regional agreements that provide a stronger or equivalent level of control between two or more Parties or between Parties and non-Parties, the text of Article 11 explicitly does not allow for lesser levels of control.

The Parties never intended to allow any groupings of Parties/non-Parties to collude to trade among themselves with less rigor than that of the Convention. Such an outcome makes a mockery of the international law that is Basel. The pretense that Article 11 allows such derogations, deviations or departures is reliant on the fact that there is no international policing body that can blow the whistle on this illegal and inappropriate interpretation. Most Multilateral Environmental Agreements (MEAs) rely on a national honor system. However there is one important exception which Basel may wish to emulate. In its paper entitled *Non-Party Trade Provisions in Multilateral Environmental Agreements*[57] the Center for International Environmental Law (CIEL) notes that the Convention on International Trade in Endangered Species (CITES) faced with a similar situation of unpoliced non-compliance on Party to non-Party trade violations, took corrective action to ensure that the Secretariat could rule on the validity of Party to non-Party trade. Without such measures taken, little can be done other than third Parties such as non-governmental organizations (NGOs) shining a spotlight on these violations with the hope that norms of good faith and diplomacy prevail. With this in mind we recommend the following:

- Parties consider amending the Convention to allow for Secretariat authority to rule on the validity of Article 11 agreements.
- Mexico and the United States cease using the OECD Council Decision to trade in Y48 wastes that are not listed in that agreement.
- Canada withdraw their "arrangement" with the United States as it is illegal to agree a non-binding accord to ignore Basel obligations. Canada and the United States instead to consider amending their existing bilateral agreement to include Annex II wastes.
- The European Union and the EFTA countries within the EEA rectify their illegal double standard for wastes traded under the revised Waste Shipment Regulation, slated for adoption later in 2023.

[57] *Non-Party Trade Provisions in Multilateral Environmental Agreements*, [https://www.ciel.org/wp-content/uploads/2023/04/CIEL\\_brief\\_Non-Party-Trade-Provisions-in-meas\\_April-2023.pdf](https://www.ciel.org/wp-content/uploads/2023/04/CIEL_brief_Non-Party-Trade-Provisions-in-meas_April-2023.pdf)

These actions are necessary as none of the Article 11 agreements currently notified to the Basel Secretariat governing the new Plastic Amendments meet the requirements of ensuring an equivalent level of control and environmentally sound management for hazardous and other wastes as defined by the Basel Convention and its Article 11. Therefore, they cannot legally enable OECD members to continue trading in Basel covered plastic waste freely or subject only to limited controls.

END





