



Misuse of Article 11 to Escape the Basel Convention's Plastics Amendments

May 10, 2023 | 18:15-19:45 | Room 3



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ENVIRONMENTAL LAW



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Agenda

- **Welcome – Salomé Stähli**
- **Legal Background of Article 11 / Plastic Amendments – David Azoulay**
- **Article 11 Misuse to Avoid Plastics Amendments – Jim Puckett**
 - **Case 1: EA Waste Shipment Regulation**
 - **Case 2: The Canada / US Arrangement**
 - **Case 3: Mexico Invoking OECD Council Decision**
- **On the Ground / Mexico – Marisa Jacott**
- **On the Ground / Eastern Europe – Jindřich Petrлік**
- **The Danger of Using Article 11 to Ignore Basel Obligations – David**
- **NGO Recommendations – Jim**
- **Questions / Discussion – Salomé**

SPEAKERS



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SPEAKERS



MARISA JACOTT

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JINDRICH PETRLÍK

Arnika

REPORT and ALERT on INTRANET



turn back the toxic tide

delegate alert

May 2, 2023

**Beware Improper Article 11 Agreements
Contradicting the Basel Convention**



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Legal Background

David Azoulay, CIEL



The History and Purpose of Article 11



BASEL CONVENTION

- No reservations allowed in Convention (see Article 26) / Ensure level playing field
- Only trade between Parties to ensure level playing field / Encourage ratifications
- Few Parties in the beginning / Could cause trade disruptions
- Free trade considerations / Non-discrimination
- Decided to allow an exception to trade between Parties rule
- Article 11 Agreements but only if they provide an “equivalent level of control” as Convention itself

What Article 11 Allows and Does not Allow



- Article 11:
 - Paragraph 1: after Basel entry into force
 - Paragraph 2: before Basel entry into force
- Because we are looking today at agreements or obligations formed after Basel entry into force, we turn to Para 1...

Article 11 / Paragraph 1



1. Notwithstanding the provisions of Article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes 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.

Definition of Environmentally Sound Management (ESM)



“Environmentally sound management of hazardous wastes or other wastes” means taking all practicable steps to ensure that hazardous wastes or 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;

Previous Basel Debate on whether IMO Hong Kong Convention complies with Article 11

- During the Debate on Ship recycling from COP7 to COP10...
- A useful paraphrasing of Article 11 Requirements was called for in the ship recycling debate and it became:

“Equivalent Level of Control”

Core requirements of Basel Convention regarding ESM of hazardous and other wastes

- Measures giving exporting and importing country assurances of the environmentally sound management of the waste
- A strict control system based on prior notification and consent before any transboundary movements
- Application to the full scope of *all waste listings* defined as "hazardous and other wastes"
- A duty to consider movements that fail to adhere to the obligations above, as illegal trafficking in waste (criminal offense), and the responsibility to re-import such wastes

The Basel Plastic Amendments (2019)



- At COP14 the Basel Convention decided to control problematic plastic waste for the first time
- The Basel Plastic Amendments were passed by consensus, meaning all Parties agreed to accept them
- And they are meant to be binding for all Parties now

The OECD Council Decision



- The OECD (now 38 countries) has a Council Decision for trade in recyclable waste (best known Article 11 Agreement)
- The OECD Decision by default adopts new Basel listings with Basel controlled wastes (hazardous or other) becoming OECD "amber" listed wastes, unless an OECD member objects
- The US objected to the automatic adoption of the new Plastic Amendments except for hazardous plastic (A3210), and no consensus for alternative text could be reached at OECD

The OECD Council Decision



- According to the OECD agreement: If no consensus is reached, OECD appendices “*will be modified as appropriate*” and all OECD Members retain the right to control such waste “*according to domestic and international laws*”
- For Basel party OECD member states: they must apply Basel as amended for trade in Y48 including for intra-OECD trade
- For the US, the only OECD member state not a Party to Basel: they cannot trade in the new Basel entry Y48 with OECD or Basel Parties unless they create a new valid Art. 11 agreement

An Alarming Development: OECD Countries Misuse Article 11 to Avoid Implementation of Plastics Amendments

- European Union and other EEA Member States Norway, Liechtenstein, Iceland fail to accept strict definition of Y48
- Canada and US, sign an “arrangement” to allow free trade in “non-hazardous wastes”
- Mexico is using unusable OECD Council decision to Trade with US.

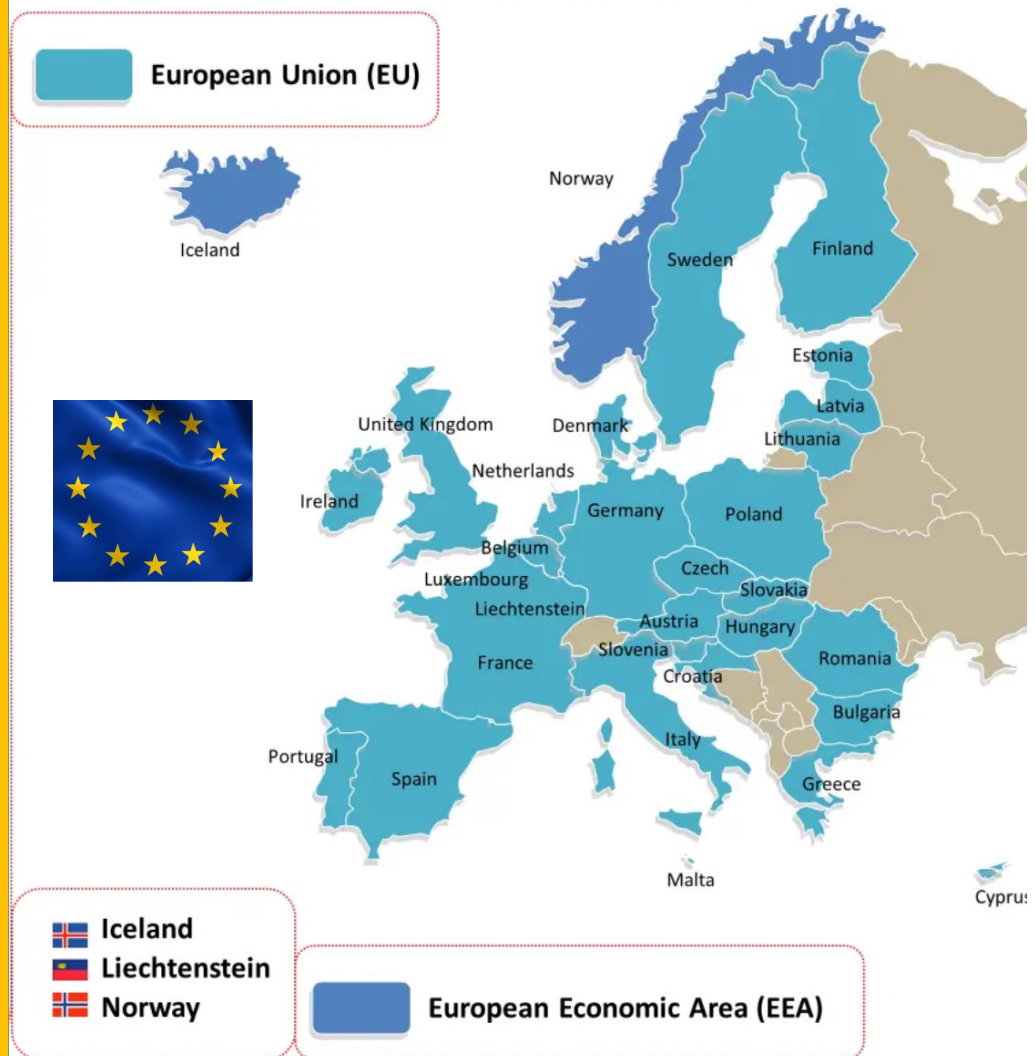
3 Cases of Misuse of Article 11 to Avoid Plastic Amendments

Jim Puckett, BAN



The European Union, Norway, Iceland, Liechtenstein Derogation

Jim Puckett, BAN



European Union / EEA Create Double Standard



- EEA will not within the EEA area respect new Y48 controls for:
 - mixed plastic wastes
 - PVC and PFTE
 - all plastic wastes exported to incinerators, landfills, or waste-to-energy plants (non R3)
- NOT controlling these Y48 wastes is LESS environmentally sound than controlling them: Thus, the Waste Shipment Regulation seeks an illegal use of Article 11

European Union / EEA Create Double Standard



- *Despite* agreeing in full to the Plastic Waste Amendments at COP14...
- *Despite* arguing against the US when they wished to use the OECD Council Decision, (Article 11 agreement) as a means to escape the Plastics Amendments within OECD...
- ... the EU, with Iceland, Norway, and Liechtenstein (EEA), refuses to apply the Amendments in full in their Waste Shipment Regulation

Even if legal, there is no rationale for ignoring Basel in Europe



- Europe has a very well documented internal plastic waste crisis
- The impacts of waste trade within EEA disproportionately impacts poorer EU countries (e.g., Eastern Europe)
- Much of this waste has been dumped and burned in farmer's fields or subject to substandard recycling
- Recycling mixed polymer streams, or PVC/PFTE, is just as difficult in Europe as globally. Incineration and landfill is opposed by communities throughout Europe
- Europe is not too good for Basel!

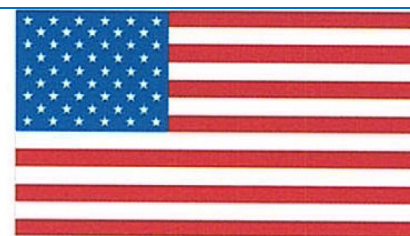
The US / Canada "Arrangement" to Ignore the Basel Plastic Amendments

Jim Puckett, BAN



The US / Canada "Arrangement" to Ignore the Basel Plastic Amendments

Jim Puckett, BAN

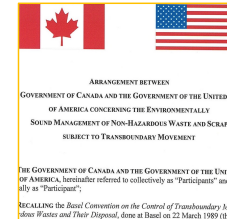


**ARRANGEMENT BETWEEN
GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES
OF AMERICA CONCERNING THE ENVIRONMENTALLY
SOUND MANAGEMENT OF NON-HAZARDOUS WASTE AND SCRAP
SUBJECT TO TRANSBOUNDARY MOVEMENT**

THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA, hereinafter referred to collectively as "Participants" and individually as "Participant";

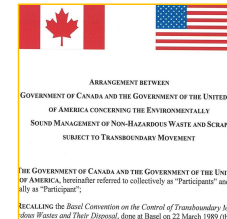
RECALLING the *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal*, done at Basel on 22 March 1989 (the "Convention");

Canada and US create Invalid Article 11 “Arrangement”



- *Weeks before* the Plastic Amendments came into force, Canada and the United States signed an “Arrangement” which they asserted is a valid Basel Article 11 agreement
- Not a legally binding accord
- Agreement: waste management on both sides of the border is “environmentally sound management”
- Thus, they would not need to apply Basel Convention for trade between the two countries in any plastic wastes other than hazardous waste (A3210 but not Y48)

Canada and US create invalid Article 11 “Arrangement”



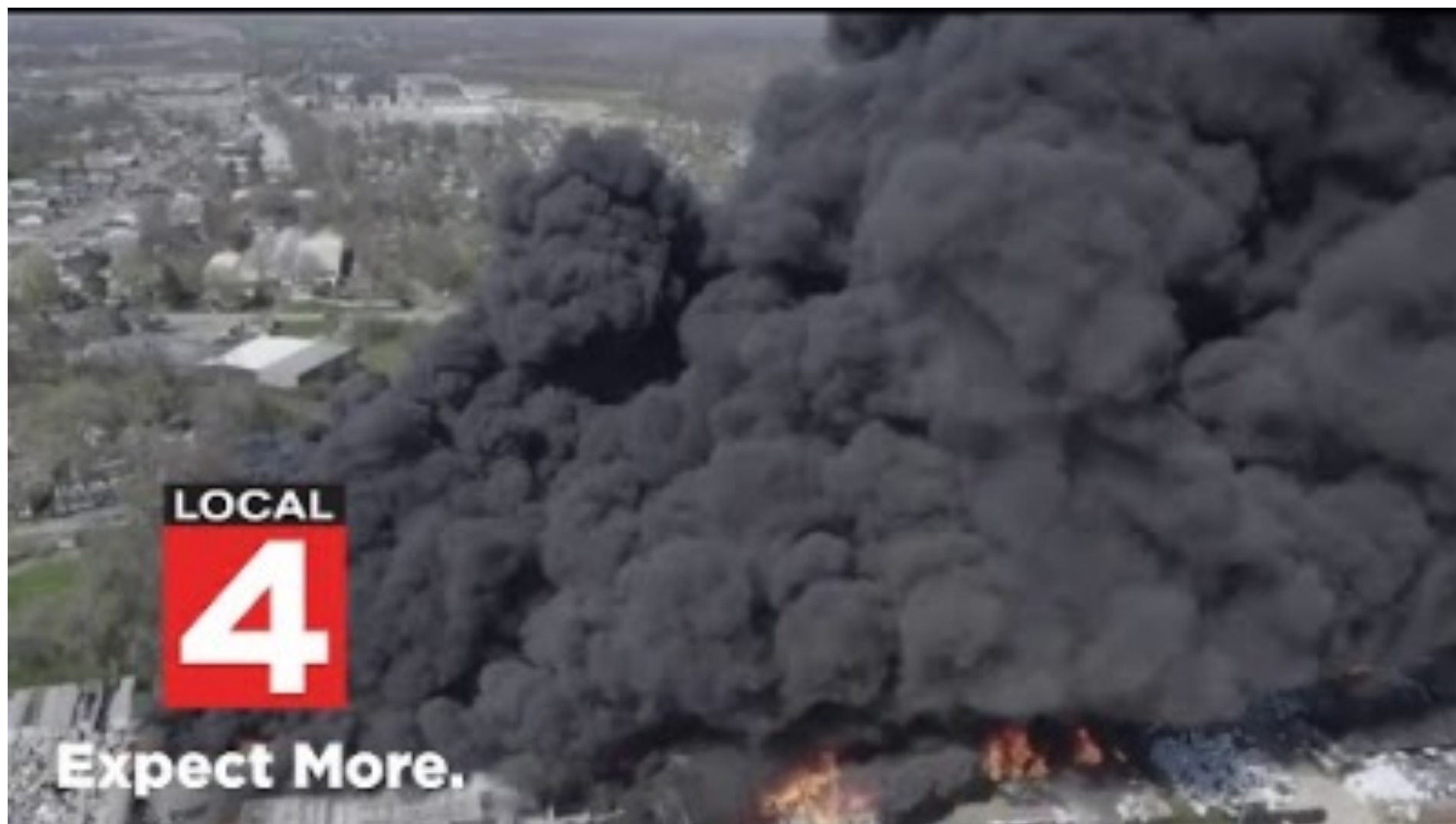
- Article 11 Agreements are part of the legally binding Basel Treaty and are thus by necessity “Legally Binding” or else they cannot legally binding obligation of Article 11
- Asserting ESM on both sides of Canada-US border is doubtful.
- In fact, in our report we cite numerous news articles describing very serious waste management problems
- Just days ago, a major plastics recycler that sources plastic waste from both sides of the border and seeks to export it from the US...

Fire With Toxic Fumes Could Burn for Days in Indiana, Officials Warn

Residents within a half-mile radius of a plastics recycling plant in Richmond, Ind., were ordered to evacuate after the fire broke out on the 14-acre property on Tuesday.

The New York Times



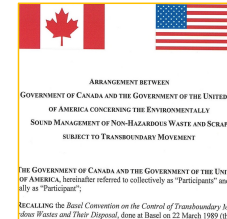


LOCAL

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Expect More.

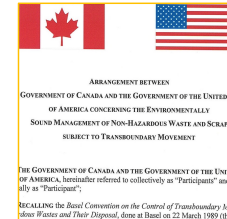
Meanwhile Plastic Waste Trade in Canada and US is out of control



Based on commercially available data we have learned:

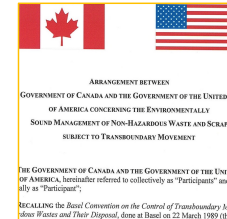
- 708 shipments of plastic waste (between 1 January 2021 and now) went from Canada to countries other than the US
- According to the Canadian government only 76 notifications for exports (less than 11%) were issued. Of these only 13 of these notifications were consented to by importing countries
- It is very unlikely that only 11% of the 708 were (B3011) because North American MRFs do not make clean streams

Meanwhile Plastic Waste Trade in Canada and US is out of control



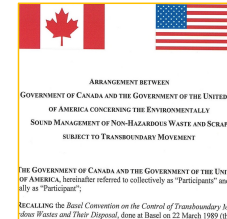
- In fact, BAN has evidence that at least 31 of these 708 Canadian exports to countries other than the US were PVC wastes (HS39153).
- As PVC is clearly Y48, all 31 exports require the PIC procedure (notifications and consents) and yet only 13 export permits were given
- This is proof of incoherent TBM control by Canada even for exports to non-OECD

Meanwhile Plastic Waste Trade in Canada and US is out of control



- BAN also has evidence of 920 non-US plastic waste imports into Canada since the Basel Plastic Amendments entered into force
- For none of these import permits were given and it is hard to believe none of these shipments were Y48 requiring import permits
- In fact, 18 of the imports were PVC (Y48) (HS code 39153)
- The fact that these arrived without permits indicates a lack of compliance on the part of Canada

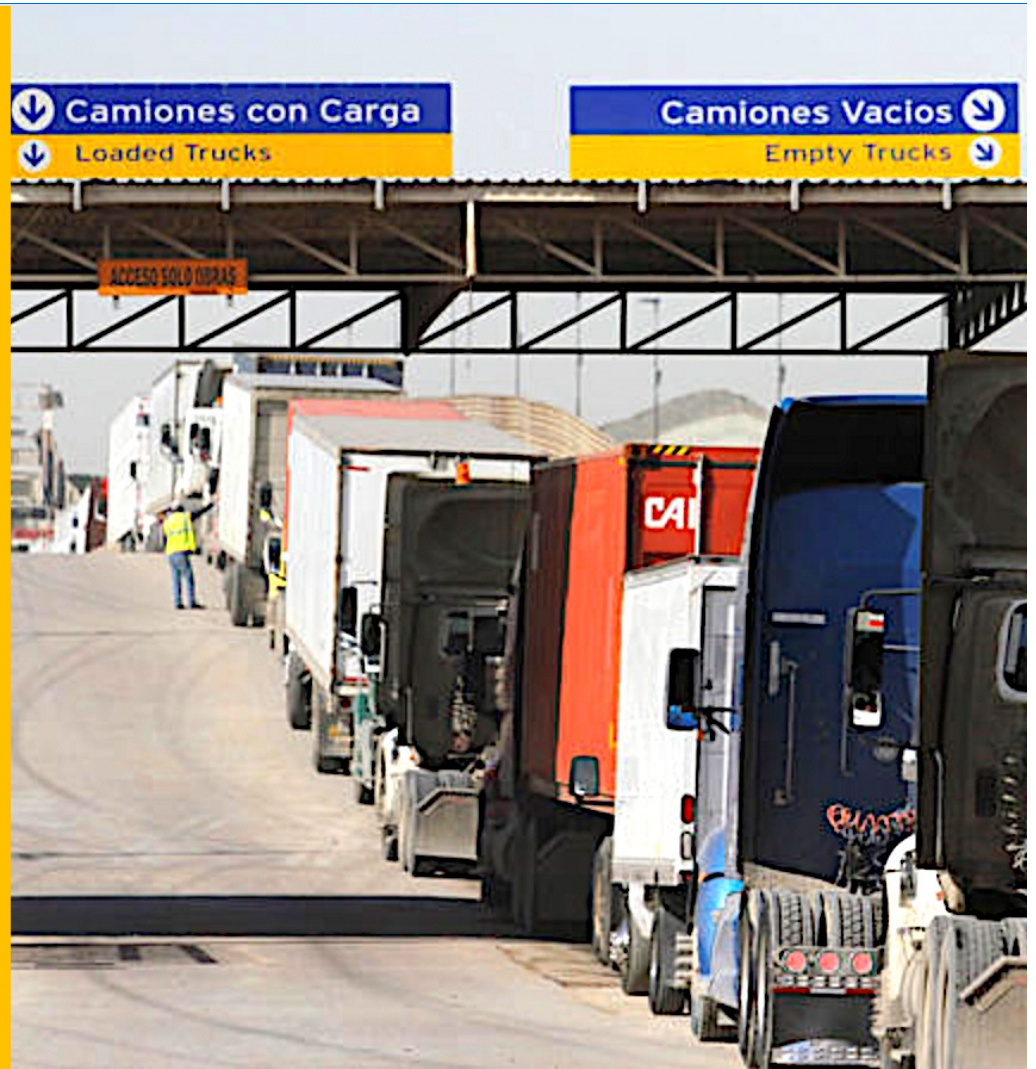
Invalid “arrangement between Canada and US



- Describing the Arrangement as being non-legally binding, is not an option for an Article 11 Agreement
- Further, having no controls cannot be seen as having an equivalent level of control to Basel’s PIC controls for Y48 plastic wastes
- The US-Canada Arrangement is clearly an invalid use of Article 11

Mexican / US Plastic Waste Trade – Not a Valid Article 11 Agreement

Jim Puckett, BAN



Mexico Continues to trade in Y48 Plastic Waste with the US



- While Mexico and US have an old bilateral agreement to trade in *hazardous waste* (La Paz Agreement, 1984), they do not currently have agreement in place to trade in Y48
- *Yet*, Mexico asserts they can use the OECD Council Decision to trade Y48 plastic wastes with the US, but the OECD Council Decision does not include Y48 in its Amber (controlled) list
- As a Basel Party, Mexico must control the export of Y48 in accordance with Basel and cannot trade it with non-Parties without a valid Article 11 Agreement

Mexico trades Y48 Plastic Waste with the US without Article 11 Agreement



- According to the US EPA website, Mexico is requiring notifications from the US on a national basis
- However, this is not compliant with Basel without a valid Article 11 agreement between the countries involved in trade
- The US lacks any authority to prosecute exporters that violate the national policy of Mexico. This creates incoherence
- Imports and exports across the US/Mexican border of Y48 lack a binding PIC process and any obligation on the US to assure ESM management, facility transparency etc.

Mexico trades Y48 Plastic Waste with the US without Article 11 Agreement



- US exporters can easily exploit this situation and seem to be doing so on a massive scale
- As of 22 Dec 2022, by admission of the Mexican government, there has been no Mexican consents given to US imports
- Yet COMTRADE data shows that in 2021 84,414 metric tons of plastic waste moved from US to Mexico, and 85,515 metric in 2022
- We know that at least some of these shipments were PVC (and thus Y48 - PIC would be required)

On the Ground: Plastic Waste Exports from US to Mexico



Marisa Jacott,
Comunes Fronteras



PLASTIC WASTE COLONIALISM IN MÉXICO



Colonialismo de la Basura Plástica en México

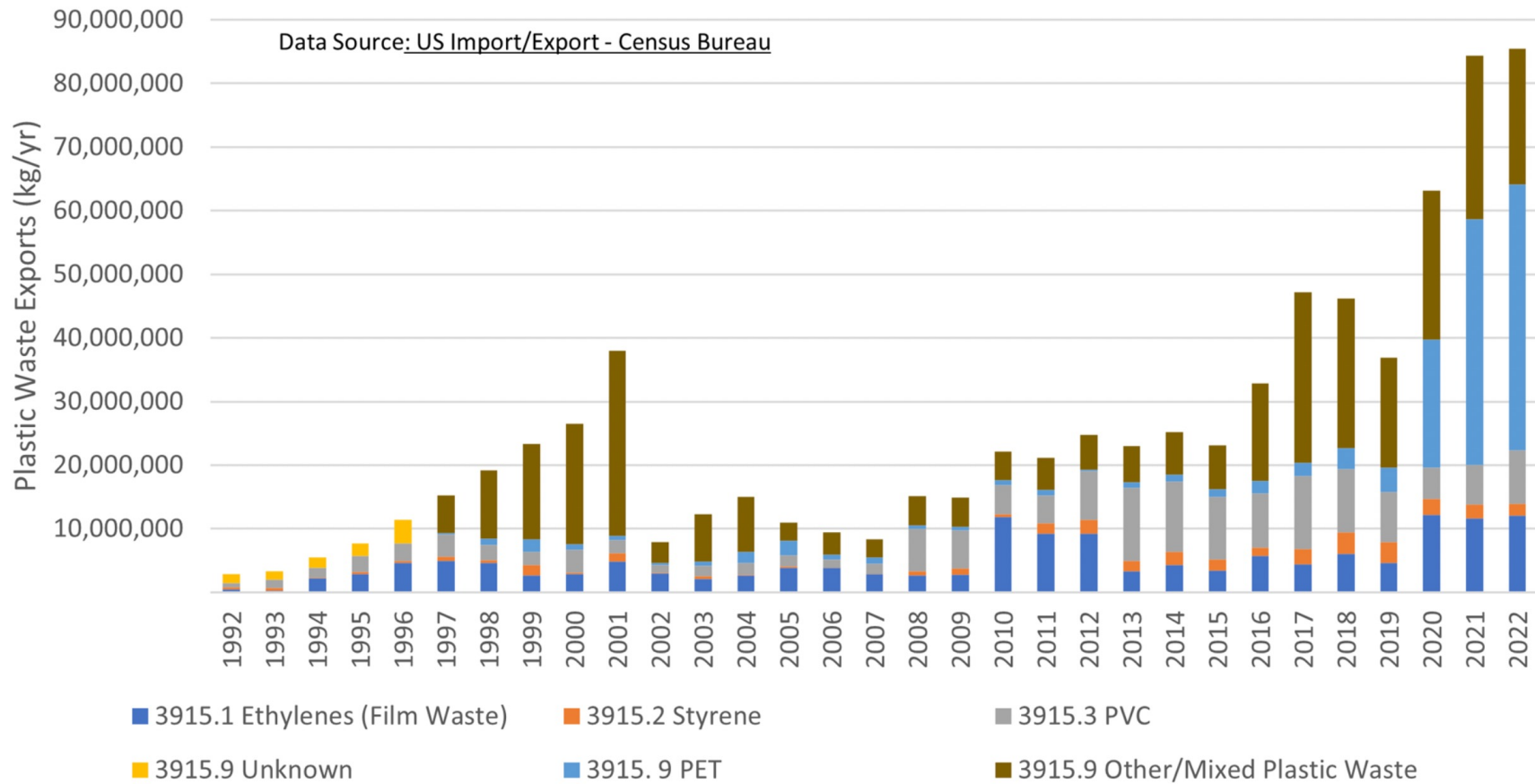


Colectiva Malditos Plásticos
presents

GEOVISUALIZER AND STORYMAP PLATFORM

US Plastic Waste Exports to Mexico (HS 3915)

Data Source: [US Import/Export - Census Bureau](#)



Plastic Waste Exports from US to Mexico

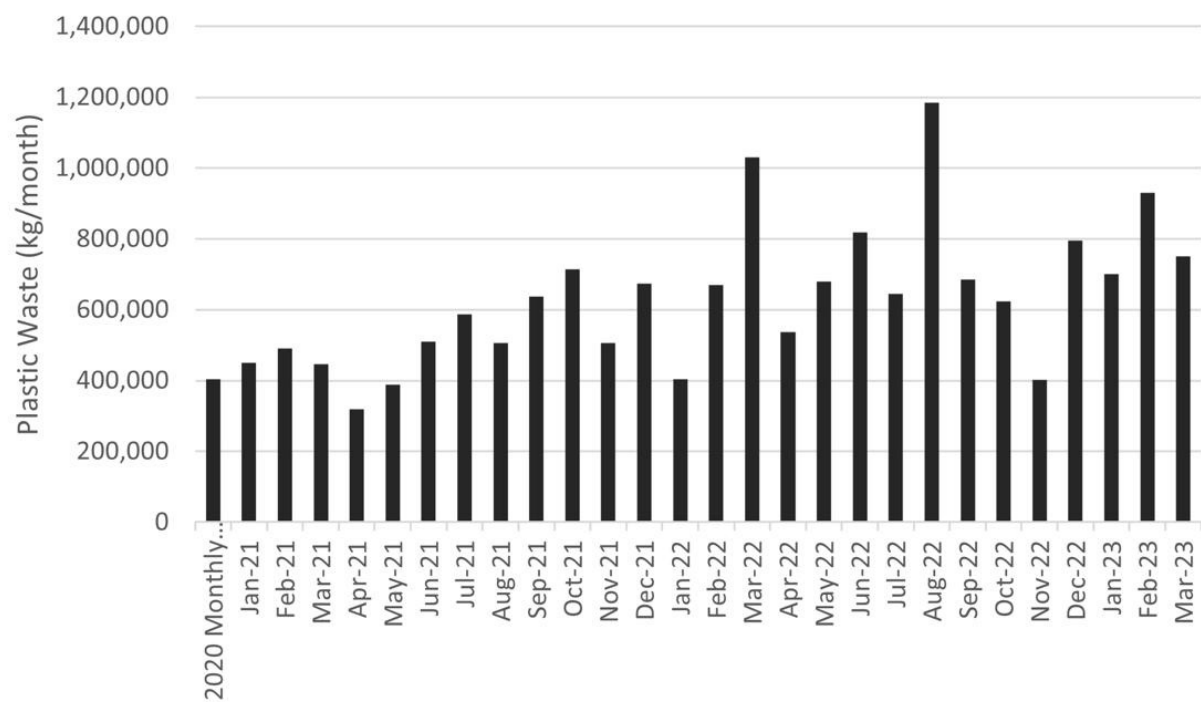
- US Plastic waste exports to Mexico went up 272% between 2013 and 2022
- The United States accounts for more than 90% (SIAVI 94%) and (DATASUR 98%) of all plastic waste imports to Mexico
- from 2015-2021, 623,329,308 kg of plastic waste was imported from the United States to Mexico, with a value of \$151,866,995 USD (SIAVI)
- Italy, Germany, the Netherlands and China, the next largest importers, together account for only 3% of the total volume

PVC = Y48 and cannot be Traded with a Non-Party (US) without valid Art. 11 Agreement

- PVC is probably the most hazardous plastic used today. It is difficult to recycle and if burned creates dioxins and furans, two of the most dangerous compounds known
- PVC exports from US to Mexico are increasing since the entry into force of the Plastic Amendments, even though this should have decreased as it became illegal at that time
- PVC Exports continue to this day without a legal basis for their trade
- They must be banned

2020-2023 PVC Exports from US to Mexico

2020-23 U.S. PVC Plastic Waste Exports to Mexico (HS 3915.3) - OECD Country



Champions of
environmental
health & justice

Data Source: US Import/Export -
Census Bureau

43,115
metric tons
of PVC waste
imported to
Mexico from
US –
1 Jan 2021 to
1 March
2023

PVC = Y48

Source:
Materials
Research, LLC.

Date	Country of Origin	Customs	Transport Method	HS Code	Quantity	Unit	FOB Value (USD)	HS Description
2/1/23	UNITED STATES	TIJUANA, B.C.	ROAD	3915300100	430,170.87	KILOGRAMS	69,464.84	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF
2/1/23	UNITED STATES	NUEVO LAREDO,	ROAD	3915300100	347,085.13	KILOGRAMS	69,552.99	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF
2/1/23	UNITED STATES	CD. REYNOSA, TAMPS.	ROAD	3915300100	474,749.00	KILOGRAMS	41,039.48	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
2/1/23	UNITED STATES	MATAMOROS,TA	ROAD	3915300100	2,001.00	KILOGRAMS	104.03	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF
2/1/23	UNITED STATES	CD. JUAREZ, CHIH.	ROAD	3915300100	39,333.92	KILOGRAMS	2,192.61	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
1/1/23							23,120.33	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
1/1/23	UNITED STATES	CD. REYNOSA, TAMPS.	ROAD	3915300100	307,746.28	KILOGRAMS	26,105.11	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
1/1/23	UNITED STATES	CD. JUAREZ, CHIH.	ROAD	3915300100	44,948.97	KILOGRAMS	2,583.47	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
1/1/23	UNITED STATES	NUEVO LAREDO, TAMPS.	ROAD	3915300100	549,758.67	KILOGRAMS	103,580.41	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
1/1/23	UNITED STATES	TIJUANA, B.C.	ROAD	3915300100	248,600.80	KILOGRAMS	40,352.48	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE
12/1/22	UNITED STATES	CD. JUAREZ, CHIH.	ROAD	3915300100	53,944.21	KILOGRAMS	3,126.52	WASTE, PARINGS AND SCRAP, OF PLASTICS. OF POLYMERS OF VINYL CHLORIDE OF POLYMERS OF VINYL CHLORIDE

PVC imports from US to Mexico

Overall Recommendations for Mexican Government

- > Cease imports of all plastic waste into Mexico from the United States**
- > We have enough of our own plastic waste! And its recycling is polluting, creates microplastics, and uses vast quantities of fresh water**
- > Inform the public of what they have allowed into the country since the new amendments went into force on 1 January 2021**
- > Cease using incineration, waste-to-energy, cement kilns and chemical recycling for wastes of any kind**

On the Ground: Exports to Eastern Europe from Western Europe Without Basel Controls



Jindřich Petrlík, Arnika





Source: Shutterstock/Varga Jozsef Zoltan

Slovakia

- June 2021: 5 illegal exports to Slovakia from Italy and Poland; waste dropped off at industrial and agricultural buildings
- Slovenian, Austrian, Croatian, Italian and Hungarian garbage trucks seen crossing the border and dropping off waste at collective farms in small villages
- Source: Euractive - Slovak police investigates cases of illegal waste imports from Italy and Poland



Poland

- When China closed its borders, waste from France, Germany and the UK needed a new home: Poland revoked all permits to import, but the now illegal trade still continued
- Beginning of 2020: over 2000 illegal dumps and over 100 sites set deliberately on fire, usually during weekends, to deal with large amounts of waste for which there is no capacity
- Source: France 24 – Poland's waste secret: Europe play with fire

Czech Republic

- Czech Republic is one of the main destination for illegally exported mixed household waste from Germany, Italy, and Austria
- The waste is frequently declared as plastic waste for recycling (even though these are mixed household wastes) for the transport across the border
- Sources: EUWID - Poland and the Czech Republic pledge joint action against illegal waste imports; Radio Prague International: Czechia becoming target of illegal waste imports



Source: Radio Prague International



Bulgaria

- Many illegal shipping of waste from Italy for “recycling”, but illegally dumped in fields or burned in communist era coal plants to meet surge in demand for heating
- Plastic burned is unsorted mixed household waste and coal plants are not equipped to burn it
- Protests because of bad air quality
- Sources: Jacobin - How Europe’s “Trash Market” Offloads Pollution on Its Poorest Countries; Worldcrunch - How Europe’s “Trash Market” Offloads Pollution on Its Poorest Countries

Romania

- April 2021: despite having the second-lowest recycling rate in Europe, large amounts of waste illegally exported to Romania from the EU, mainly from Germany, Italy, UK, Belgium, and Greece
- Source: *euobserver* - After China ban, Romania hit by illegal waste imports; RFERL: How Romania Turned Into An Illegal Dumping Ground For EU Waste



Mihai Barbu (Reuters)

What is the Danger of Claiming Article 11 as a way of Ignoring Basel Obligations?

David Azoulay, CIEL



NGO Recommendations

- We call on Mexico to cease using the OECD Council Decision to trade in Y48 wastes that are not listed in that agreement
- We call on the US to fully Ratify the Basel Convention without seeking exceptions to Amendments agreed, or otherwise immediately Control their Plastic Waste Exports nationally
- We call on Canada to withdraw and annul their "arrangement" with the United States as it is illegal to agree a non-binding accord to ignore Basel obligations. Consider instead amending their existing bilateral agreement with the United States to include Annex II wastes

NGO Recommendations

- We call on the European Union and the EFTA countries within the EEA to rectify their illegal double standard for wastes traded under the revised Waste Shipment Regulation, slated for adoption later in 2023
- Basel Parties should consider remedies similar to those that were created at the CITES Convention to give the Secretariat the authority to evaluate and police Party to non-Party agreements to ensure they are valid

Questions / Discussion





Thank You!



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