

Legal Analysis of the Implications of the Basel Convention's Decision on Plastic Waste Trade for OECD Countries

Executive Summary

This legal analysis explores the implications for the trade of waste for recovery purposes within the OECD in light of the recent adoption of the amendment to the Basel Convention, which changes the status of plastic waste under the Convention. In particular, this analysis addresses the objection and alternative proposal filed by the United States, which prevents the automatic integration of the amendment into the legal framework governing the waste trade between members of the OECD for the purpose of recovery operations. It looks at two possible scenarios:

- **No consensus** can be reached by OECD members on an alternative proposal to integrate the provision of this amendment into the OECD legal framework; and
- **A consensus** is reached to adopt the alternative proposal by the United States.

Both scenarios would carry significant consequence for the procedures applicable to waste trade within the OECD.

- **A no-consensus decision** would exclude all plastic waste trade from the scope of the OECD Decision, therefore limiting trade between OECD members parties to the Basel Convention and the US, to the categories of wastes listed under Annex IX of the Basel Convention pursuant to the Basel Plastic Amendment.
- **A consensus decision** on the alternative proposal by the US would invalidate the Article 11 status of the OECD Decision under the Basel Convention, preventing the use of OECD streamlined and simplified procedures by OECD members parties to the Basel Convention.

The present analysis concludes that a withdrawal of the US objection to the automatic incorporation of the Basel Plastic amendment by no later than December 1st, 2020 is the best way to minimize disturbances to the current intra-OECD waste trade for recovery operations.

The Duties of States Across Successive Treaties

Waste trade between the member countries of the Organisation for Economic Co-operation and Development (OECD) for the purpose of recycling is regulated by a specific OECD control system. Its provisions are contained in *Decision C (2001)107 of the OECD Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations* (OECD Decision).¹

The OECD Decision contains simplified administrative procedures compared to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel Convention). The OECD Decision is binding on OECD members pursuant to the Convention on the OECD, and thus constitutes a “multilateral agreement” pursuant to the Basel Convention Article 11.

Many, but not all, OECD member countries are also parties to the Basel Convention. The Vienna Convention on the law of treaties² codifies how the mutual rights and duties of States are determined when two successive international agreements cover the same subject matter.

If the relationship between treaties is addressed in the treaty text itself, that text governs.³ For trade between two States that are both party to the Basel Convention, the Basel Convention governs. However, Article 11 of the Basel Convention permits Basel parties to enter into other agreements with respect to hazardous waste trade, so long as the provisions of those agreements are no less environmentally sound than the requirements of Basel.⁴ Accordingly, the OECD Decision constitutes such a multilateral agreement to the extent (and only to the extent) that its provisions do not derogate from the environmentally sound management of hazardous wastes as defined by the Convention, and therefore currently governs waste trade between OECD members parties to the Basel Convention.

When two States are both party to one treaty, but only one of the States is party to the second treaty, relations between them are governed by the treaty to which both States are party. Thus, if both States involved in a shipment of waste are party to the Basel Convention, and one State is also a member of the OECD, the Basel Convention still provides the applicable rule of law.⁵

Finally, when trade involves two OECD member States, only one of which is party to the Basel Convention, the OECD Directive would govern. However, in these circumstances, the State Party to the Basel Convention would also be governed by the Basel Convention’s provisions governing trade with States not party to the Convention. The Basel Convention generally prohibits parties from trading in controlled wastes with non-parties in the absence of a multilateral agreement that meets the Article 11 standards described above.

¹ [OECD-LEGAL-0266]

² article 30, para. 4 (a) and (b) of the Vienna Convention on the law of treaties.

³ VCLT article 30, paragraph 2.

⁴ Basel Convention, Article 11.1: “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.”

⁵ VCLT, article 30, para. 4(b).

The Basel Amendments on Plastic Waste

On May 10, 2019, the Conference of the Parties to the Basel Convention adopted a series of amendments to Annexes II, VIII, and IX of the Convention⁶ (Basel Plastic Amendment) intended to better control the transboundary movements of plastic waste by changing the status of these wastes under the Convention.

When these amendments enter into force on January 1, 2021, the Basel Convention will recognize three categories of plastic waste:

- A3210, Annex VIII to the Basel Convention, which includes plastic waste presumed to be hazardous, subject to the Prior Informed Consent regime of the Basel Convention and the Basel Ban Amendment;
- Y48, Annex II to the Basel Convention, which includes mixtures of plastic wastes considered to be wastes for special consideration subject to the Prior Informed Consent regime of the Basel Convention; and
- B3011, Annex IX to the Basel Convention, of plastic waste presumed to be non-hazardous as it is destined for recycling and almost free from contamination and other types of waste, and can be traded freely, without a control procedure.

Under the Basel Convention, wastes falling within Annex IX of the Convention are freely tradable, while wastes falling under Annexes II and VIII are subject to the Prior Informed Consent (PIC) procedure and other restrictions.

OECD Incorporation of the Basel Plastic Amendments and the US Objection

To promote consistency between regimes, reduce uncertainty, and facilitate implementation for all States, the OECD Decision calls for automatically incorporating new amendments to the Basel Convention.⁷ Incorporation does not require any formal decision by the OECD, and amendments to the OECD Decision enter into effect the same day as the amendments to the Basel Convention enter into force for its parties.⁸ However, any OECD member State may delay this automatic process by entering a formal objection.⁹

A member country of the OECD may object to the normal procedure within 60 days following the vote of any amendment to the Basel Convention if it determines that a different level of control is necessary for one or more wastes covered by the Amendment.¹⁰ The notification of the objection to the OECD Secretariat suspends the automatic incorporation process.¹¹

For an objection to be valid, the OECD member must also submit an alternative proposal for inclusion in the relevant OECD Annexes.¹² The alternative proposal must then be discussed

⁶ BC-14/12: Amendments to Annexes II, VIII and IX to the Basel Convention.

⁷ Amendments made to Annex IX to the Basel Convention would be incorporated into Part I of Appendix 3 of the OECD Decision, and amendments made to Annexes II and VIII to the Basel Convention would be incorporated into Part I of Appendix 4 of the OECD Decision (Chapter II B.3 of the OECD Decision: *Procedure for Amendments to the Lists of Wastes in Appendices 3 and 4*).

⁸ Chapter II B.3 of the OECD Decision.

⁹ *Idem*, Chapter II B(3a).

¹⁰ Chapter II B.3.a) of the OECD Decision. The determination of a different level of control must be in accordance with the criteria referred to in Appendix 6.

¹¹ Chapter II B.3.b) of the OECD Decision.

¹² Chapter II B.3.a) of the OECD Decision.

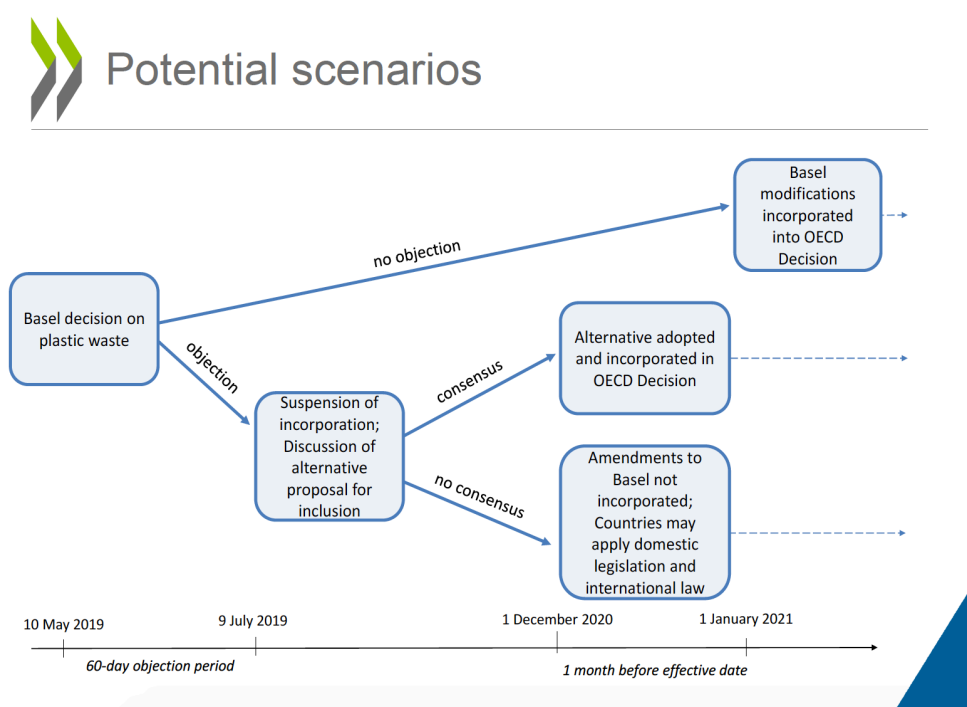
before the appropriate OECD body.¹³ If an objection is raised and a valid alternative proposal submitted, the OECD must adopt a decision by consensus at least one month before the entry into force of the amendment it is aiming to incorporate.¹⁴

On July 3, 2019, the United States (US) filed an objection to the incorporation of the Basel Plastic Amendment in the OECD Decision (alternative proposal), suspending the automatic incorporation of the Basel Plastic Amendment in the OECD Decision.

A consensus decision on incorporation of the alternative proposal in the OECD Decision must be reached by no later than December 1, 2020¹⁵. In the interim, the objection and alternative proposal suspend the incorporation of the Basel Plastic Amendment to the OECD Decision.¹⁶

Implications of Potential Scenarios

Several scenarios for the future of plastic waste trade for recovery operations within the OECD must therefore be considered. Such scenarios are outlined in the image below, taken from a presentation by the OECD Secretariat:



Source: Peter Börkey, Nathalie Cliquot, 18 June 2019.

¹³ Chapter II B.3.c) of the OECD Decision.

¹⁴ Chapter II B.3.c)-e) of the OECD Decision.

¹⁵ Following the provision of Chapter II B. 3. c. of the OECD Decision, as the amendment to the Basel convention enters into force on the 1st of January 2021.

¹⁶ Chapter II. B.3.b of the OECD Decision.

1. “No-Consensus” scenario

If no consensus is reached by December 1, 2020, “*the Amendment [to the lists of wastes in Appendices 3 and 4] will not be applied within the OECD Control System. With respect to the waste(s) concerned, the relevant appendix to [the OECD Decision] will be modified as appropriate. Each Member country retains its right to control such waste(s) in conformity with its domestic legislation and international law.*”¹⁷

The Basel Plastic Amendment covers all plastic wastes within the scope of the OECD Decision. Failure to agree on the incorporation of the alternative proposal would result in an obligation to modify the OECD Decision to exclude all plastic waste from its scope. In such case, OECD member countries would be bound by domestic legislation and international law controls to govern their plastic waste trade.

OECD members that are parties to the Basel Convention would be required to apply the provisions of the Basel Convention, including the provisions of the Basel Plastic Amendment, to their plastic waste trade, unless they adequately notified the Depository of the Basel Convention of their inability to accept it.¹⁸

Pursuant to Article 4.5 of the Basel Convention, parties cannot export hazardous waste or other waste to a non-party, or import it from a non-party.¹⁹

As a result, trade of plastic waste listed under Annex II and VIII of the Basel Convention pursuant to the Basel Plastic Amendment would become impossible between OECD members that are parties to the Basel Convention and OECD members that are not parties to the Basel Convention, unless they conclude a separate valid agreement pursuant to Article 11 of the Basel Convention.

A no-consensus scenario would therefore carry significant implications for trade of plastic waste for recovery operations within the OECD by limiting trade between OECD members parties to the Basel Convention and the US only to the categories of wastes listed under Annex IX of the Basel Convention pursuant to the Basel Plastic Amendments.

2. “Consensus” scenario

If consensus on an alternative proposal is reached by the December 1, 2020 deadline, the OECD Decision will be modified accordingly.²⁰ The OECD modifications would take effect on January 1, 2021.

In practice, the current alternative proposal by the United States would add an entry (GH012) to Part II of Appendix 3 of the OECD Decision to cover non-hazardous plastic scrap and waste, which would make it so that new entries of the Basel Convention Annexes created by the Basel Plastic Amendment would not apply to trade between OECD members. This entry would effectively maintain the current system of subjecting all plastic scrap and waste to the OECD

¹⁷ Chapter II B.3.e of the OECD Decision.

¹⁸ According to the procedure described in Article 18.2(b) of the Basel Convention.

¹⁹ Article 4.5. of the Basel Convention: “A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.”

²⁰ Chapter II B.3d) of the OECD Decision.

Green Control Procedure only. The alternative proposal would also expressly maintain the existing entry GH013 covering polymers of vinyl chloride (PVC) under under Annex 3 of the OECD Decision contrary to the new classification resulting from adoption of the Basel Plastic Amendment.

The alternative proposal would apply to all plastic waste trade between OECD members, regardless of their party or non-party status under the Basel Convention, and it would subject all plastic waste to the OECD Green Control Procedure regardless of its nature or status under the Basel Convention.

The OECD Decision is meant to constitute a “multilateral agreement” under Article 11 of the Basel Convention. As a result, OECD members parties to the Basel Convention can apply the OECD Decision rules to their intra-OECD waste trade without violating their international obligations under the Basel Convention.

However, Article 11.1 of the Basel Convention stipulates that a valid multilateral agreement under the Convention requires that “ (...) *such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention.*” It continues, “*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.*”

If an alternative proposal would derogate from the provisions of the Basel Convention, OECD members parties to the Basel Convention would not be able to apply the OECD Decision to their intra-OECD plastic waste trade without violating their international obligations. It is therefore necessary to assess whether the provisions of the alternative proposal would derogate from the environmentally sound management of hazardous wastes and other waste as required by the Convention so as to assess whether OECD members parties to the Basel Convention can apply the OECD Decision to their intra-OECD plastic waste trade without violating their international obligations.

The Basel Plastic Amendment was adopted to ensure that all categories of plastic waste traded are subject to environmentally sound management. The consensus decision to adopt the Basel Plastic Amendment provides strong evidence that the Basel Parties did not consider such environmentally sound management to be occurring in the absence of the aforementioned amendments. The *rationale* for the Basel Plastic Amendment was to control and treat plastic waste “generally as a category requiring special consideration” to enable countries to better ensure sustainable management of those waste. Accordingly, any OECD proposal that fails to address trade in all of the newly listed substances and among all relevant Parties would be incompatible with the non-derogation provisions of the Convention.

As previously noted, the current alternative proposal put forward by the United States would maintain the *status quo*, whereby all plastic waste would be considered non-hazardous, contradicting the new definition pursuant to the Basel Plastic Amendment, and trade of all plastic scrap and waste is subject to the OECD Green Control procedure. There can be no doubt that these provisions are deemed less environmentally sound by virtue of the Basel Plastic Amendment having been adopted to enable countries “to better control the quality of the waste imported and avoid the hazards presented by polluted and/or mixed plastic wastes that are

impossible to manage in an environmentally sound manner.”²¹ Furthermore, the alternative proposal would remove the newly listed plastic wastes from what constitutes “hazardous and other waste” (a strictly defined term) in the OECD Decision and would therefore ipso facto derogate from the environmentally sound management of hazardous wastes and other wastes as required by the Basel Convention.

As a result, should a consensus be reached to incorporate the current alternative proposal, the OECD Decision would not constitute a valid Article 11 agreement under the Basel Convention. Thus, OECD members that are also parties to the Basel Convention could not apply that OECD Decision to the plastic waste trade flows with other OECD members that are not parties to the Basel Convention without violating their international obligations.

A decision to adopt the alternative proposal would therefore change the status of the OECD Decision under the Basel Convention and carry significant consequences for the procedures applicable to plastic waste trade for recovery operations within the OECD, as well as for the trade in recyclables as it would mean the end of streamlined and simplified procedure for intra-OECD trade in recyclables.

Conclusion

Both a no-consensus and a consensus scenario would imply significant consequences for the procedures applicable to waste trade within the OECD.

A no-consensus decision would exclude all plastic waste trade from the scope of the OECD Decision, therefore limiting trade between OECD members that are parties to the Basel Convention and the United States to the limited categories of wastes listed under Annex IX of the Basel Convention pursuant to the Basel Plastic Amendment.

A consensus decision on the alternative proposal proposed by the United States would invalidate the Article 11 status of the OECD Decision under the Basel Convention, preventing the use of OECD streamlined and simplified procedures by OECD members that are parties to the Basel Convention entirely, as it would violate their international obligations under the Basel Convention.

Based on the foregoing legal analysis, the best solution to minimize disturbance of current intra-OECD waste trade for the benefit of recycling would require a withdrawal of the objection to the automatic incorporation of the Basel Plastic Amendment no later than December 1, 2020.

²¹ Application by Norway to amend Annex IX to the Basel Convention and addendum, 9 August 2018, UN Doc UNEP/CHW/OEWG.11/INF/36.