

NGO Position paper on the ongoing negotiation process to integrate the Plastic amendment of the Basel Convention into the OECD regulatory Framework.

Background:

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 Convention (Basel Plastic Amendment) intended to better control the transboundary movements of certain problematic plastic waste by changing the control status of these wastes under the Convention so that they are subject to the prior informed consent (PIC) procedure.

To promote consistency between regimes, reduce uncertainty, and facilitate implementation for all States, the Decision C (2001)107 of the OECD Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations (“OECD Decision”)¹ which regulates the trade of waste destined for recovery operations between members of the OECD calls for the automatic incorporation of new amendments to the Basel Convention into the OECD Decision Annexes.

As provided in Chapter II, Section B.3 of the OECD Decision, such automatic incorporation does not require a formal decision by the OECD, and amendments to the OECD Decision enter into force on the same day as the amendments to the Basel Convention enter into force for its parties. However, in “*exceptional cases*” an objection can be filed by a member state which places the automatic incorporation in suspension pending the consideration of an alternative proposal.

Pursuant to the United States objection of July 9th 2019, the incorporation of the Plastic Amendment was suspended and the OECD initiated a negotiation process to identify possible ways forward. Any decision to amend the OECD Decision must be reached by a consensus of all OECD members. If no consensus can be reached, the amendment shall not be incorporated and all members must act in conformity with applicable domestic and international law.

Legal principles and obligations of the Parties

Members of the OECD who are also parties to the Basel Convention (i.e. all OECD members except for the United States), have specific obligations under the Convention.

In particular, Basel Parties have an obligation to implement the controls on waste trade provided for by the Convention, including, as of January 1st 2020, the Prior Informed

¹ [OECD-LEGAL-0266]

Consent procedure for the transboundary trade of all plastic waste not listed in Annex IX of the Basel Convention.² Basel Parties also have an obligation to uphold the Party to non-Party trade prohibition and comply with all articles of the Convention. In that regard, Article 11 of the Convention is particularly relevant to the ongoing OECD discussions.

Article 11 of the Basel Convention was introduced into the Convention to provide an opportunity for those countries which for whatever reason did not wish to or were unable to become Parties to the Convention, to trade with Parties in accordance with the requirements of the Convention. It was also created in order to recognize existing or future regional or bilateral arrangements between Basel parties, or between Basel Parties and non-parties, which held requirements more rigorous than those of the Convention. This article was intended as a safeguard to avoid that Parties to the Convention derogate from or weaken the requirements of the Convention via other instruments.

Article 11.2 allows separate bilateral or multilateral agreements concluded before the entry into force of the Convention, to remain valid alongside the Basel obligations as long as the agreements "*are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention*".

The OECD Council Decision was concluded prior to the entry into force of the Convention. Its continued validity as an acceptable agreement under Article 11 of the Basel Convention must therefore be assessed in light of the provisions of Article 11.2.

Therefore, one must closely analyze the wording of Article 11.2 to better understand which agreements OECD members that are also parties to the Basel Convention can accept, without violating their obligations under the Convention. One must first look at the exact meaning of the phrase "*environmentally sound management of hazardous and other waste as required by this Convention*".

Environmentally sound management" (ESM) is clearly defined in the Convention 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*" (Article 2.8 of the Basel Convention). This is strong language indicating that one must exhaust *all* likely and achievable means to achieve the goal of protecting human health and the environment. If there is more than one possible measure, Parties must pursue them all. Parties can for instance amend the Convention to assure greater environmental controls. The Plastic Amendment shows a consensus amongst the 187 countries party to the Convention of what represents "*a practical step*" to ensure that plastic wastes are "*managed in a manner which will protect human health and the environment against the adverse effects which may result from such waste.*" The

² Unless it has opted out of the Plastic Amendment and has notified the secretariat of the Basel Convention.

implementation of the Prior Informed Consent Procedure to the selected classes of plastic waste therefore defines what is considered as ESM of plastic waste.

Similarly to ESM, the term: "*hazardous and other wastes*" is also a defined term under the Convention. The definition is given in the first article of the Convention, indicating the key importance of this particular term to the Parties' obligations.

The combined use of these terms in Article 11.2 makes it undisputable that Article 11 agreements must ensure that all practical steps are taken to ensure that wastes falling under "*hazardous and other wastes*" as defined under the Convention are subject to all practical steps for ESM set out in the Convention. Hence, Parties must ensure that **all plastic waste identified as hazardous and other wastes by the Convention** (and not a subset of these wastes) are subject to the Prior Informed Consent procedure.

While, an Article 11 agreement may provide some flexibility concerning the "*compatibility with ESM*", it cannot exclude or limit the scope of the definition of "*hazardous and other wastes*" controlled by the Basel Convention. This is confirmed by a combined analysis with Article 26.1 of the convention that allows no reservation from parties. Allowing Parties to conclude agreement with a more limited scope than that of the Convention would result in a de facto reservation between two or more Parties and is therefore unacceptable under the Convention.

In conclusion, any amendment to the OECD Decision that limits the categories of plastic waste subject to control procedures beyond the provisions of what is required under the Basel Convention and its new Plastic Amendment does not meet the requirement of Article 11 to be "*compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention.*" As such, it would constitute a violation of the Convention for all OECD members that are also Parties to the Basel Convention.³

Assessment of current options to address the Basel Plastic Amendment

Among the remaining options currently being considered by the WPRPW and task team, none meets the bar of Article 11.2 of the Basel Convention.

The first option proposes to introduce Article 11-like language into the OECD Decision and to allow the establishment of a lighter administrative approach between some OECD countries. This proposal creates the possibility of derogation to the control procedure of

³ For a more detailed legal analysis, please see Legal Analysis of the Implications of the Basel Convention's Decision on Plastic Waste Trade for OECD Countries (available at <https://community.oecd.org/docs/DOC-159293>) and Norwegian position paper provided in support of discussions at the last WPRP available at <https://community.oecd.org/docs/DOC-167870>

the OECD decision, itself an Article 11 agreement under the Basel Convention, and thus the possibility of derogation from the provisions of the Basel Convention itself. Such derogation would surely fail the test of being "*compatible with the environmentally sound management of hazardous wastes and other wastes as required*" by the Basel Convention. Such an option should therefore be deemed incompatible with the requirements of Article 11 of the Basel Convention.

Options 2 and 3, under consideration propose to depart even further from the requirements of the Convention. These options wish to include all plastic waste on the OECD green list, and thus exempt plastic waste from control procedures provided that they are 'prepared to a specification'. However, this is not "*compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention*", as the defined terms of the Plastics Amendments are ignored in several ways. The text of the Plastic Amendment includes specific provisions to ensure that only those plastic waste that are known to be recyclable and safe can be freely traded without the use of PIC procedures. Such carefully negotiated safeguards include requirements that plastic waste batches:

- do not include halogenated plastics;
- are uncontaminated;
- are sorted by polymer type (with very specific exemption for those of mixed plastics that are known to be easily separable); and
- are specifically destined for mechanical recycling (as opposed to other types of recovery recognized by the Basel Convention).

Option 2 and 3 propose to ignore this carefully negotiated text and substitute it with extra-legal and unknown, vague terminology of "Specifications". It is important to note the following in that regard:

- a) It is erroneous to suggest that an extra-legal 'specification' is a relevant or adequate safeguard to prevent harm to health or the environment, in particular in light of the carefully crafted safeguards that precisely identify how to prevent such harms. Indeed, this particular terminology and proposal was discussed during the negotiations leading to the adoption of the Plastic Amendment, and was rejected as being unfit to provide an adequate level of protection against the negative health and environmental impacts of plastic wastes and their trade.

Many of the specifications that currently exist bear little relation to the ability to perform environmentally sound recycling. Specifications mostly exist for commercial reasons. Even wastes that are very difficult or impossible to recycle are given a specification to facilitate their trade. The reference to commercial specifications in options 2 and 3 therefore cannot be considered as "*compatible with the environmentally sound management of hazardous wastes and other*

wastes as required" by the Basel Convention, and should be deemed incompatible with the requirements of Article 11 of the Basel Convention.

- b) Further, options 2 and 3 are based on the presumption that OECD membership guarantees environmentally sound management of all waste treated on the collective territory of OECD Member States. This presumption is contradicted by numerous reports and available data we have, and continue to supply to the WPRPW.⁴

To briefly summarize some of the findings (also discussed during the meetings of the task team): There are wide differences in national recycling and recovery standards, in particular in relation to permitting and inspection regimes (which is the first recommendation of the OECD guidance document on ESM). Furthermore, the recycling operations are limited to only the fraction of traded waste that is economically viable to recycle. Finally, the ESM obligation applies not only to the actual recycling operation but also to the final treatment of the recycling wastes (such as landfilling of non-recycled residues, final treatment of toxic incineration fumes, etc.). Without the scrutiny required by the legal regime of the Basel Convention or the OECD Council Decision, there is no legal requirement for ESM or for authorities to be aware of problematic waste shipment. In effect, the capacity to ensure ESM of such shipment via the PIC notification procedure is lost.

The OECD Council Decision already provides for a simplified PIC procedure, for example allowing for pre-consent of facilities and a tacit consent mechanism, in order to accelerate the notification and consent procedure. Any claim that the simplified procedure creates an unmanageable burden belies the fact that the other Basel Parties, most of which have far fewer resources at their disposal than the US, have agreed to make use of the un-simplified procedure for the betterment of the global environment and the protection of their territories.

No Consensus Scenario

Because any decision on this matter needs to be reached by consensus, and because consensus proposals so far are legally unwarranted and unlikely, it is important to consider the consequences of an absence of a consensus decision.

While there exists contested interpretation of the exact meaning and consequences of a non-consensus decision, extensive legal analysis of the provisions of the OECD decision conducted by CIEL, and supported by the Norwegian Government (as presented in its comments to WPRPW agenda point 6,5), provide a clear answer. A non-consensus

⁴ See for example, submissions from GAIA, CIEL and EEB to the WPRPW, of February 2020, available at: <https://community.oecd.org/docs/DOC-169694>

⁵ Available at <https://community.oecd.org/docs/DOC-167870> .

decision would result in the exclusion of all plastic waste trade from the scope of the OECD Decision.

As a result, all OECD Members that are Parties to the Basel Convention (i.e. all OECD members except the United States) would be subject to the provisions of the Plastic Amendments of the Basel Convention, including for intra-OECD trade. Plastic waste trade between all OECD members would remain uncontrolled for waste listed under Annex IX of the Convention (non-halogenated plastic wastes that are clean, sorted and destined for recycling). Trade of all other plastic wastes would be subject at a minimum to the Basel PIC procedure between OECD Member States and Parties to the Basel Convention. The legal trade of plastic waste between the United States and other Basel Parties, including all OECD Member States, would be limited to the categories of wastes listed under Annex IX of the Basel Convention.

A non-consensus scenario would therefore carry significant, additional commercial burden for the trade of plastic waste for recovery operations within the OECD. It would further legally prevent the US from engaging in any such trade with Basel Parties, even with those that are OECD members.

Conclusion

Based on this analysis, it is clear that the least disruptive option for the global plastic waste trade would be for the US to withdraw its objection to allow the full integration of the provisions of the Plastic Amendment into the OECD Decision.

In the event that such withdrawal is not forthcoming, signatories to this analysis strongly maintain that all of the current options fail to meet the basic criteria for a valid Article 11 agreement under the Basel Convention and would thus be illegal. Agreement to any such compromise would put OECD Members Parties to the Basel Convention in a position of non-compliance with their international legal obligations. The only legally viable alternative to the withdrawal of the objection and full integration of the Plastic Amendment is therefore a non-consensus decision and removal of all plastics waste from the scope of the OECD Decision.

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