



Legal Analysis of the Consequences of the OECD Non-Consensus Determination on the Basel Plastic Amendment

Legal Opinion of the Center for International Environmental Law (CIEL)



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Table of Contents

<i>Introduction</i>	3
<i>The Basel Convention</i>	3
The OECD Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations	5
<i>The Basel Plastic Amendments</i>	5
<i>OECD Procedures for Incorporating Amendments to the Basel Convention</i>	6
<i>Outcome at the OECD: No Consensus</i>	6
<i>The Implications for OECD Members</i>	7
Default: Apply Basel Controls	7
Countries that Have Notified the Secretariat that they are Unable to Accept the Plastic Amendments	8
Trade Pursuant to a [Separate] Article 11 Agreement	8
US-Canada Arrangement (2020)	9
EU Waste Shipment Regulation	10
<i>Conclusion</i>	11

Introduction

This legal opinion is an analysis of the legal obligations for Organisation for Economic Co-operation and Development (OECD) members trading in plastic wastes, following the OECD's inability to reach consensus on the incorporation of most of the Basel Plastic Amendments into the OECD Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations ("The OECD Wastes Trade Decision"). The OECD Wastes Trade Decision is a multilateral agreement governing the trade of certain hazardous and other wastes for recovery purposes among OECD members. Since the agreement covers trade in hazardous waste between both parties to the Basel Convention and non-parties, it must contain provisions governing the environmentally sound management of waste equal to or stronger than those in the Basel Convention in order for OECD members to continue to engage in trade without breaching their obligations.

The analysis concludes that the OECD's failure to reach consensus removes the plastic wastes deemed "other wastes" under the Basel Convention from the OECD Wastes Trade Decision's scope. OECD members who are Basel parties and have not objected to the Basel Plastic Amendments must therefore apply the relevant Basel control and ban mechanisms to trade in those wastes with Basel parties and non-parties.

This legal opinion also analyses two agreements or arrangements concluded among OECD members since the adoption of the Plastic Amendments –between the US and Canada and among member states of the European Union. It concludes that these agreements do not ensure equivalent levels of control to Basel and are therefore invalid as Article 11 agreements. Parties to these agreements must instead apply Basel control procedures or risk breaching their binding legal obligations.

The Basel Convention

The Basel Convention is the principal international legal instrument regulating the transboundary movement and disposal of hazardous wastes. The Basel Convention's adoption was primarily motivated by practices of dumping hazardous waste generated in developed countries in developing countries. Its main goals are to "reduc[e]...hazardous waste generation and... promot[e] environmentally sound management of hazardous wastes, wherever the place of disposal," to "restrict[]...transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management;" and to "[apply] a regulatory system...to cases where transboundary movements are permissible."¹ The Basel Convention accomplishes these goals by requiring parties to minimize the generation of wastes that are potentially harmful to humans or the environment and maximize their environmentally sound disposal within their own borders.² It also imposes several trade controls, including (1) a requirement for exporters of covered wastes to notify and seek prior informed consent ("PIC") for international shipments of such wastes from both their own government and the government of the country of import,³ (2) a ban on trade in covered wastes with non-parties,⁴ and (3) a ban on exports of hazardous wastes from OECD to non-OECD countries.⁵

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

¹ See United Nations Environment Programme, *Basel Convention: Overview*, <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>

² Basel Convention ("BC") arts. 4.2(a)-(b) & 4.9.

³ BC arts. 6.1-6.4.

⁴ BC Art. 4.5.

⁵ BC Art. 4A.

- Annex I provides a list of hazardous constituents. Annex III provides a list of hazardous characteristics. If a waste contains an Annex I constituent while possessing an Annex III characteristic, it is considered hazardous waste.
- 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.
- Finally, 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, “covered wastes”) requires the PIC procedure mentioned earlier, if their transboundary movement is not banned entirely.

The ban on trade with non-parties has one exception, found in Article 11 of the Basel Convention, which allows parties to enter into separate agreements with parties or non-parties governing transboundary shipments of wastes between themselves (or to continue applying such agreements where entered into before the Basel Convention) under certain conditions. Those agreements must “not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention” and “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.”⁶ The Basel Convention clearly 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.”⁷ This strong language indicates that a party 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. Thus, to be valid, Article 11 agreements must ensure that parties take all such practicable steps to protect human health and the environment from covered wastes, and they must guarantee an equivalent level of protection and control to that of the Basel Convention for such wastes.⁸

Article 11 agreements are also limited in their content by Article 26.1 of the Basel Convention, which disallows reservations or exceptions to the main text of the Basel Convention. While Article 11 agreements may have some flexibility in how they achieve the goal of ensuring the sound management of covered waste equivalently, and they can require more rigorous controls and protection, they cannot completely exempt a party from any one of its core obligations under the Basel Convention, for example by redefining the categories of covered waste identified in the Basel annexes, or by allowing free trade of any such waste.⁹

⁶ This is the standard contained in Basel Article 11 paragraph 1, applied to agreements entered into after the Basel Convention came into force for the relevant parties; agreements entered into before the entry into force of the Basel Convention still must be “compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention,” *see* Article 11 paragraph 2.

⁷ BC Art. 2.8

⁸ One notable and widely agreed on set of “practicable steps” to protect human health and the environment are the very notification and prior informed consent procedures mandated by the Convention for covered wastes and the requirement to reimport hazardous wastes where it appears that the contractual obligation to safely dispose of them will not be met.

⁹ *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.

The OECD Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations

As it became apparent that an international agreement on hazardous and other wastes was going to be signed, the OECD reached an agreement on its own system of controls for hazardous wastes specifically destined for recovery operations, which was notified as an Article 11 agreement once the Basel Convention entered into force. The OECD adopted major revisions to the Wastes Trade Decision in 2001 to align itself more closely with the Basel Convention concerning wastes covered.¹⁰ The US is the sole OECD member that is not a party to the Basel Convention (having signed but never ratified it). Thus, one effect of the OECD decision has been to enable other OECD members to continue trading in hazardous and other wastes, where ostensibly destined for recovery operations, with the United States.

The OECD Decision largely follows the Basel Convention in using appendices to define which wastes are subject to control procedures (known as “amber controls”) and which wastes are presumed safe and not subject to controls unless proven hazardous.¹¹ These appendices largely mirror the Basel annexes and frequently cross-reference Basel annexes as a way to identify waste under the scope of the decision. The OECD Decision differs in scope from the Basel Convention in that it only applies to wastes destined for “recovery,” which is a list of 13 operations where some productive use is made of the wastes (including, but much broader than, “recycling”).

The OECD Decision’s control procedures also differ from the Basel Convention in several ways regarding how they ensure PIC to transboundary shipments. Most notably, the OECD Decision allows governments to pre-approve certain recovery facilities for all waste shipments and creates a presumption of tacit consent when a government is notified and does not object to the individual shipments within a certain timeframe. The process outlined streamlines, but does not derogate, from the principle of prior informed consent.

The Basel Plastic Amendments

Before the Basel Convention Plastic Amendments, plastic wastes were only very rarely subject to Basel Convention controls. The category for non-hazardous plastics listed in B3010 of Annex IX was so open-ended and broad that the vast majority of plastic wastes could be traded among parties without PIC procedures or other Basel controls, and parties could freely trade (at least under the Basel Convention) in 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.

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. This amendment had no strong effect on the law because it was always possible to identify hazardous waste by using these Annexes I and III, without a listing on Annex VIII. But the new listing makes it far more obvious that there are indeed certain plastic wastes that contain or are contaminated by an Annex I constituent that exhibits hazardous characteristics.

¹⁰ 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, but we do not attempt to resolve the argument here.

¹¹ Though the OECD says the latter wastes are subject to “Green Controls,” in fact those controls are no controls, other than “existing controls normally applied in commercial transactions.” *See infra* n. 29 .

Second, the Amendments re-evaluated the listing of non-hazardous plastic waste B3010 to narrow its scope significantly. This new listing requires non-hazardous plastic shipments to meet several criteria. They must be almost free from contamination of any kind, to be destined only for an R3 disposal operation and not to incineration, landfill, or waste-to-energy operations, and, with just one exception, to be unmixed (single polymers only).¹² This new listing was renumbered as B3011.

Finally, the parties amended the Basel Convention so that any plastic wastes not classified as hazardous or non-hazardous are designated as wastes requiring special consideration, through a new listing in Annex II (Y48).

Thus, as of January 1st, 2021, only plastic wastes listed in B3011 (unmixed 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.¹³ Further, only those wastes listed under B3011 can be traded with non-parties, absent a valid Article 11 agreement. As Annex II wastes are subject to prior informed consent procedures—and parties have a responsibility to minimize their generation and ensure their environmentally sound management—this is expected to have a significant, positive impact on the global plastic pollution crisis.

OECD Procedures for Incorporating Amendments to the Basel Convention

As described above, the 2001 OECD Wastes Trade Decision largely replicates the Basel Convention’s categories of wastes in its own appendices (including by cross-referencing the Basel annexes). The Decision also expressly provides for a procedure to follow when the Basel annexes are amended. The Decision indicates that in these situations, the Basel amendments will automatically be incorporated into the relevant OECD appendices unless an OECD member objects.¹⁴ Thus, by and large, wastes that are newly categorized under Basel as hazardous or other wastes requiring special consideration, would by default become subject to the “amber control” procedures of the OECD Decision. If a member objects, however, the automatic incorporation is suspended, subject to a review procedure. The objecting member must present an alternative proposal for how to treat the wastes newly listed under Basel within the OECD Decision, and the parties must then seek 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 their domestic and international laws. As explained below, 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.

Outcome at the OECD: No Consensus

Under the procedures described above, if no OECD member had objected, the OECD Secretariat would have added the new plastic wastes listings in Annexes IX, VIII, and II of the Basel Convention to the “green list” (in the case of Annex IX) and “amber list” (in the case of Annexes VIII and II) of the OECD Appendices, the latter being subject to control procedures under the OECD Decision. However, the United States filed an objection with the OECD Secretariat on July 3, 2019, suspending the listings’ automatic incorporation and triggering discussion of the amendments and the US’s alternative proposal.

¹² Three discrete categories of plastic (polyethylene (PE), polypropylene (PP) and polyethylene terephthalate (PET)) may be mixed together and still not subject to control, provided all the other criteria are met.

¹³ 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).

¹⁴ OECD Decision II.B(3).

The US's proposal would have effectively maintained the existing status quo and allowed free trade of all plastic scrap for recovery purposes within the OECD.¹⁵ Ultimately, however, the OECD Members could not reach an agreement on the full incorporation of the amendment provisions. They only agreed to integrate the provisions of the amendment to Annex VIII of Basel¹⁶—thereby making plastic wastes containing hazardous substances subject to the OECD control procedures when traded among its members for recovery. Conversely, they could not reach a consensus on how other plastic waste should be treated in the context of trade between OECD members—vowing to try again before 2024.

The Implications for OECD Members

Under the OECD Decision, when there is no consensus to incorporate Basel Amendments into the OECD Decision, each country retains its right to control the wastes covered by those amendments in conformity with domestic legislation and international law.¹⁷ The OECD affirmed this general rule in its summary of the outcomes of the amendment incorporation process.¹⁸ While the Decision and this summary mention the OECD members' "right" to control the waste in conformity with domestic legislation and international law, it must be noted that the relevant international agreements create a legal obligation for parties to abide by their provisions. In this regard, the Basel Convention creates clear obligations for its parties to regulate transboundary movements of covered waste according to its provisions. While the United States has argued for continuing the status quo of allowing largely unregulated trade in such wastes for recovery purposes under the OECD Decision, it failed to persuade any other countries of this interpretation. The US proposal would have served as a significant departure from the Basel Convention, calling into question the validity of the entire OECD Decision as an Article 11 agreement.

The clear legal implication of the inability to reach a consensus on how to treat the new Annex II plastic wastes is that such wastes have "fallen out of" the OECD Decision's scope. Now, OECD members that are Basel parties must apply Basel controls to their transboundary movement, where it is not banned altogether.

Default: Apply Basel Controls

Therefore, OECD members who are Basel parties (all OECD members except the US) now have two basic obligations with regards to trade in covered plastic wastes with other OECD members going forward. First, they must only allow trade in Annex II plastic wastes, including for recovery operations, in compliance with procedures outlined in the Basel Convention. These include (a) establishing either a lack of domestic facilities or the need for the wastes as a raw material in the country of import;¹⁹ (b) obtaining or providing assurances that the wastes will be handled in an environmentally sound manner; and (c) ensuring that all competent authorities in the importing, exporting and transit countries consent to the movement and that the wastes are properly labeled.²⁰ Basel parties have an obligation to implement the Basel provisions fully—they cannot selectively choose aspects of the amendment for transposition in national legislation (e.g., parties cannot exempt certain types of Y48 waste from Basel control).

¹⁵ For more discussion of the U.S. alternative proposal, see CIEL, "Legal Analysis of the Implications of the Basel Convention's Decision on Plastic Wastes Trade for OECD Countries" available at <https://www.ciel.org/wp-content/uploads/2020/07/Analysis-Basel-Plastic-Wastes-Trade-OECD-Countries.pdf>

¹⁶ "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, and appendix with modifications, <https://www.oecd.org/environment/wastes/appendix-modifications.pdf>.

¹⁷ OECD Decision II.B(3)(e)

¹⁸ "Full summary of the amendments to the OECD Council Decision",

¹⁹ BC Art. 4.2(e), 4.8, 4.9

²⁰ BC Art. 4.2(a), 4.7, and 6.1-6.2

Second, they must not trade in these same Annex II plastic wastes with countries that are not Basel parties, whether or not they are OECD members (i.e., including the United States).

There are a few possible or purported exceptions to this general rule to consider. They are: (a) those OECD members that, even though they are Basel parties, informed the Secretariat that they were unable to accept the new amendment to the annexes within six months of the date of communication of the adoption; (b) those OECD members who have a separate bilateral or multilateral agreement covering trade in wastes. These two situations are addressed below.

Countries that Have Notified the Secretariat that they are Unable to Accept the Plastic Amendments

Initially, only three parties to the Basel Convention, including two OECD countries, Turkey and Canada, notified the Secretariat of the Basel Convention that they were unable to accept the Plastic Amendments. Since that time, Canada has accepted the Amendments.²¹

Turkey and the countries that trade with it may argue that they can legally continue trading plastic wastes without controls as they would have under the Basel Convention before the Plastic Amendments. However, there are de facto limits on this freedom. This is because countries that have ratified the Plastic Amendments are bound by their obligations under the Basel Convention, including the new listings. Articles 4.1.c and 4.8, 6.1, and 6.2 of the Basel Convention, for example, establish the basic requirements for exporting countries to ensure notification and prior informed consent from, and environmentally sound management of waste in, countries of import. The Articles clearly apply to states exporting hazardous and other waste (as defined by the Basel Convention), regardless of the legislation in place in the country of import. Therefore, even those Basel parties who are members of the OECD and who have not accepted the Plastic Amendments will, in practice, be bound by their trading partners' needs to implement their own Basel obligations concerning shipments of plastic waste.

Trade Pursuant to a [Separate] Article 11 Agreement

Since the passage of the new Basel Plastics Amendments, there have been multiple OECD members who have indicated their plans to continue trading in the new Y48 (Annex II) wastes amongst themselves, without implementing Basel controls, pursuant to an Article 11 bilateral or multilateral agreement distinct from the OECD decision. So far, these include an "arrangement" announced between Canada and the United States²² and an agreement among the EU member states to continue freely trading Y48 waste amongst themselves.²³ The legal analysis of these agreements demonstrates a failure to meet the requirements of Article 11. Uncontrolled trade of Y48 waste pursuant to either of them would therefore violate countries' binding international legal obligations.

Article 11 of the Basel Convention is the only mechanism by which parties to the Convention may enter into other international agreements with parties or non-parties that regulate the transboundary movement of hazardous waste. Again, an Article 11 agreement must establish an equivalent level of protection and control as that required by the Basel Convention, to be valid.²⁴

²¹ See UNEP, "Amendments to Annexes II, VIII and IX to the Basel Convention," <http://www.basel.int/Countries/StatusofRatifications/PlasticWasteamendments/tabid/8377/Default.aspx>.

²² Evan Dyer, *CBC Canada*, "Government quietly made 'back door' agreement with U.S. that could undermine treaty on plastic waste," Dec. 2, 2020, <https://www.cbc.ca/news/politics/canada-us-plastic-wastes-basel-1.5827340>.

²³ European Commission, "Plastic waste shipments: new EU rules on importing and exporting plastic waste" (Dec. 22, 2020), https://ec.europa.eu/environment/news/plastic-waste-shipments-new-eu-rules-importing-and-exporting-plastic-waste-2020-12-22_en

²⁴ See *supra* Part I.

For the Article 11 agreement to possess an equivalent level of control as the Basel Convention, the parties must legally be bound by it. Basel is a legally binding convention: it creates obligations for all parties to enact and enforce its provisions through domestic law. In addition to the Basel Convention's specific provisions on dispute settlement that include the possibility of recourse to the ICJ,²⁵ this status as a legally binding convention affects a number of issues of treaty interpretation, conflict-of-laws rules, and enforceability, collectively providing a higher level of certainty that states will enact the control systems envisioned in Basel than a non-binding agreement could.

Additionally, an Article 11 agreement must contain key Basel obligations including i) measures by which the exporting country obtains assurances of the environmentally sound management of the waste; ii) a strict control system based on notification and consent before any transboundary movements; iii) subjection of all "hazardous and other wastes" as defined by the Basel Convention, and falling within the scope of the Article 11 agreement, to this control system; iv) a duty to consider movements that fail to adhere to the obligations above, as a criminal offense of illegal trafficking in waste, and the responsibility to re-import such wastes should there be no mutually agreeable environmentally sound disposal alternative; and v) labeling, transparency and reporting requirements for generators and disposers of waste and the State parties.²⁶ Any purported Article 11 agreement that allows for trade in wastes that are deemed hazardous or other wastes under Basel without such requirements, does not meet the requirements of the Basel Convention and must therefore be considered invalid.

Below is an analysis of the two currently known examples of purported Article 11 agreements notified to the Secretariat of the Basel Convention, which deal specifically with waste covered by the Plastic Amendments, against the Convention's provisions.

US-Canada Arrangement (2020)

In late 2020, the U.S. and Canada concluded an "arrangement" to continue trading plastic wastes, principally those falling under the new listing Y48 of the Basel Convention, between themselves.²⁷ This arrangement, which contains 11 operative paragraphs, does not meet Article 11 of the Basel Convention requirements and must therefore be considered invalid.

First, the arrangement states that it is not legally binding,²⁸ which is a key feature in providing equivalent control, as discussed earlier.

Second, its control procedures entirely fail to guarantee environmentally sound management. Instead, the arrangement subjects waste in its scope to "all existing controls normally applied in commercial transactions." This phrase is not defined in the arrangement. However, the same phrase is used in the OECD Wastes Trade Decision to describe the controls for waste on the OECD green list—and the OECD itself has admitted that this effectively amounts to no controls.²⁹ Assuming a similar meaning here, the arrangement does not subject plastic waste trade to any controls specifically designed to ensure

²⁵ BC Art. 20

²⁶ *See, e.g.* Basel Dec. 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).

²⁷ "Arrangement Between the Government of The United States of America and the Government of Canada Concerning the Environmentally Sound Management of Non-Hazardous Waste and Scrap Subject to Transboundary Movement," available at <https://www.state.gov/wp-content/uploads/2020/12/US-Canada-Arrangement-Management-of-Non-Hazardous-Waste-and-Scrap.pdf>

²⁸ *Id.*, § 3.

²⁹ *See* OECD Guidance Manual for the Control of Transboundary Movements of Waste 19 (2009) ("Since the wastes subject to the Green control procedure are deemed to pose negligible risks for human health and the environment during their transboundary movement within the OECD area, they are not controlled under the OECD Decision.")

that wastes are managed in an environmentally sound manner. There is no system for notification and prior informed consent and no tracking or reporting requirements (for either private parties or the two governments). The remaining paragraphs largely consist of declarations (against all evidence)³⁰ that the countries already manage the covered waste in an environmentally sound manner or intend to do so.

The US and Canada had a pre-existing (1986, amended 1992) bilateral agreement covering trade in some hazardous and other waste 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. For purposes of clarity, the pre-existing agreement is also insufficient as an Article 11 agreement: it requires the exporter to provide less information that is important for ensuring safe disposal than Basel does; contains provisions to keep some of this information confidential, which Basel does not; and does not contain a requirement to minimize the generation of hazardous wastes or to treat it domestically wherever possible. 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 make an effort to amend that agreement to add the new plastics listing of Y48 but instead chose to create a new arrangement without this basic principle.

EU Waste Shipment Regulation

The EU, as a "political or economic integration organization" party to the Basel Convention³¹ and its member states have also declared they will rely on an Article 11 agreement—the sections of the EU Waste Shipment Regulation (WSR) governing trade among member states³²—to depart from the requirements of the Plastic Amendments for intra-EU-and-European Economic Area (EEA) trade.³³ The EU amended these sections to respond to the Plastic Amendments' passage but did not wholly incorporate those amendments.³⁴ While the WSR creates, like Basel and the OECD Decision, a system of notification and consent for shipments among covered wastes among EU members (as well as separate provisions on trade with countries outside the EU/EEA), the amended WSR departs from the Basel Plastic Amendments in two key ways: First, it allows for the free trade of the same categories of uncontaminated plastic waste as the new Basel B3011 listing, but does so where the waste is destined for any of a number of "recovery" operations rather than the more stringent Basel stipulation that such uncontaminated waste is destined for "[r]ecycling/reclamation of organic substances which are not used as solvents."³⁵ The list of recovery operations in the amended WSR is much broader than recycling, and includes such harmful practices as the burning of plastic waste for fuel, which is highly dangerous to human health and the environment.³⁶

³⁰ See K. Law et al., "The United States' contribution of plastic waste to land and ocean" *Science Advances* (2020); 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."); "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."); see also Stiv Wilson, "Here is Away," *Resource-Recycling* (documenting widespread contamination *with plastic* of bales of *paper* waste exported from the United States).

³¹ See BC arts. 21 and 2.

³² See Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1), Title II.

³³ This was established by EU Council decision Brussels, 23.1.2019 COM(2019) 11 final 2019/0008 (NLE), [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2019/0011/COM_COM\(2019\)0011_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2019/0011/COM_COM(2019)0011_EN.pdf)

³⁴ See Commission Delegated Regulation (EU) 2020/2174 of 19 October 2020 amending Annexes IC, III, IIIA, IV, V, VII and VIII to Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste

³⁵ See BC Annex IX B3011 and Annex IV R3.

³⁶ See WSR arts 2.6 & 3.2 (a) (establishing that wastes in Annex III, IIIA (subject to some conditions) or IIIB of the WSR and destined for "recovery" will be subject only to general information requirements and defining "recovery" by reference to Directive 2006/12/EC; see also Directive 2006/12/EC of the European Parliament and of the Council of 5

Second, the WSR provisions also allow for the free trade of some categories of plastic wastes that are subject to PIC requirements under the Basel Convention, including polyvinyl chloride (PVC) and Polytetrafluoroethylene (PTFE), as well as a greater number of mixtures of plastic wastes (again, where destined for any of a broad list of recovery operations).³⁷ These wastes and mixtures thereof were subjected to controls by the Basel Plastic Amendments, whether or not destined for recycling. These controls are in place because these wastes are very difficult to recycle and can be highly hazardous to human health when disposed of improperly. The two above exemptions from PIC procedures will almost inevitably lead to untracked shipments of dangerous plastic waste within the EU, undermining government efforts to ensure such waste is managed in an environmentally sound manner.

The EU acknowledges and justifies such derogations through the preambular text to the new rules: “In view of the fact that the Union has submitted a notification, covering shipment of waste within the Union, to the Secretariat of the Basel Convention under Article 11 of that Convention, there is no requirement for the Union to implement the changes to the Annexes to the Basel Convention relating to non-hazardous plastic waste (entries B3011 and Y48) in Union law, for shipments between Member States.”

However, a notified Article 11 agreement has no validity if it fails to ensure equivalently environmentally sound management and control of all wastes covered under the Basel Convention within its scope. Through the above deficiencies, the EU WSR clearly does not meet this bar, and the updated WSR should therefore not be considered a valid Article 11 agreement.

Conclusion

This legal analysis clearly shows that for all OECD members, except the US, who are not party to the Basel Convention, and Turkey, who has notified its inability to accept the Plastic Amendment, the applicable law now governing all of their international trade in plastic wastes listed in Annex II of the Basel Convention is the Basel Convention itself.

While those Basel parties who have notified the Secretariat of their inability to accept the Plastic Amendments may de jure be able to continue trading in such wastes without controls, they are de facto limited by the fact that most of their trading partners will still be subject to such controls.

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

April 2006 Art. 1.1(f) and Annex IIB (defining recovery through a list of recovery operations); *and* Commission Delegated Regulation (EU) 2020/2174 Annex I, par. 2(c) (changing the listing in Annex III of the WSR so that B3011, which requires recycling, does not apply, but instead listing under header EU3011 in this Annex the B3011 categories of single streams of plastic waste plus some additional ones, see *infra* n. 37). Collectively, these texts make trade in the categories of plastic waste in EU3011 subject only to general information requirements when destined for recovery.

³⁷ See Commission Delegated Regulation (EU) 2020/2174 Annex I, par. 2(c) (listing under EU3011 the categories of PVC and PTFE which do not appear in the closed list of fluorinated polymers in B3011) and par. 3(b) (creating a new listing in Annex IIIA for mixtures of plastic wastes falling under any of the three sub-headings within EU3011. In contrast, B3011 only includes mixtures of polyethylene, polypropylene or polyethylene terephthalate).