

Working paper

# Tackling Plastic Waste Pollution through Trade: The Interplay between WTO Law and the Basel Convention after the Plastic Waste Amendments

By

Dr. Ilaria Espa (Senior Associate Professor, Università della Svizzera italiana) and  
Brigitta Imeli (PhD Candidate, World Trade Institute, University of Bern)

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## 1. Introduction

The issue of plastic waste has recently gained centre stage in international fora due to the increased awareness of the environmental and health hazards entailed by plastic pollution. An important aspect around which concerns have revolved is how to make the existing international regime on transboundary movement of waste suitable to tackle the immense challenge of managing the exponentially growing volume of annually produced plastic waste sustainably.<sup>1</sup> Trade in plastic waste has in fact reportedly contributed to plastic waste mismanagement to the extent that transboundary transfers have long followed a North-to-South pattern, whereby developed countries have been ‘exporting the problem’<sup>2</sup> to middle- and low-income countries with limited recycling capacity and less stringent or effective environmental standards.<sup>3</sup>

Against this backdrop, the international community has identified the *Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal*<sup>4</sup> as the ideal setting to tackle the issue of plastic waste pollution at a global level. As a multilateral environmental agreement (MEA) set to protect human health and the environment from the adverse effects of ‘hazardous wastes’ and ‘other wastes’, the Convention indeed restricts transboundary movements of hazardous wastes, except where they are perceived to be in accordance with the principles of environmentally sound management. Furthermore, for an otherwise permissible covered export to take place, it requires the prior consent of all states concerned.<sup>5</sup> In keeping with the spirit of the Convention, the *Plastic Waste Amendments* (hereinafter, the Amendments)<sup>6</sup> were adopted in May 2019 by the Basel Convention’s nearly universal membership and recently entered into force on 1 January 2021 with the aim of promoting sustainable trade in plastic waste.<sup>7</sup> The Amendments clarify the Convention’s coverage, setting clear that plastic wastes – except uncontaminated, pre-sorted plastic materials prepared and suitable for immediate

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<sup>1</sup> For instance, in November 2020 a group of World Trade Organization (WTO) Members launched the Informal Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade (IDP), with the goal of addressing the rising environmental, health and economic cost of plastics pollution. See: <[https://www.wto.org/english/news\\_e/archive\\_e/ppesp\\_arc\\_e.htm](https://www.wto.org/english/news_e/archive_e/ppesp_arc_e.htm)>. The Organisation for Economic Co-Operation and Development (OECD) undertakes considerable efforts to find solutions for achieving a sustainable plastics economy. See: <<https://www.oecd.org/env/waste/global-forum-on-environment-plastics-in-a-circular-economy.htm>>.

<sup>2</sup> United Nations Environment Programme, *Marine plastic debris and microplastics. Global lessons and research to inspire action and guide policy change* (UNEP 2016), p. 53.

<sup>3</sup> Mirina Grosz, *Sustainable Waste Trade under WTO Law: Chances and Risks of the Legal Frameworks’ Regulation of Transboundary Movements of Wastes* (Nijhoff 2011) p. 3-4.

<sup>4</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (hereinafter *Basel Convention*).

<sup>5</sup> For a more detailed analysis of the basic architecture of the Basel Convention, see Section 3.

<sup>6</sup> Proposal to Amend Annexes II, VIII and IX to the Basel Convention from 17 December 2018, U.N. Doc. UNEP/CHW.14/27.

<sup>7</sup> Decisions BC-14/12, Amendments to Annexes II, VIII and IX to the Basel Convention, from 24 September 2019.

recycling – are subject to the Convention’s strict rules. These clarifications will support Parties in identifying the types of wastes subject to transboundary movements and in their determination of whether they wish to agree to such movements, including to assess whether they have capacity to manage imports.

Perhaps not surprisingly, the centrality acquired by the issue of plastic waste, as epitomized by the negotiation of the Amendments, has coincided with an upsurge in the use of import restrictions on low-grade plastic scrap by a number of large plastic-receivers –*in primis* China, by far the greatest importer of plastic waste in the world, but also Vietnam, Thailand, Malaysia and India.<sup>8</sup> And yet, the introduction of such measures may pose challenges to the extent that they constitute trade restrictions subject to the World Trade Organization (WTO) rules. The number and nature of claims submitted by traditional plastic waste exporters to the WTO Committee on Technical Barriers to Trade (hereinafter, the TBT Committee) illustrate how the use of such measures has already sparked much controversy.<sup>9</sup> With the entry into force of the Amendments, and the plastic waste emergency ever more crucial, the issue is furthermore set to remain highly contentious.

This article aims at exploring the implications of the Basel Conventions’ Plastic Amendments under WTO law. In particular, it attempts at illustrating whether and, if so, to which extent the WTO regime could/should accommodate for policy space for Members to introduce and/or maintain (at least certain typologies of) import restrictions with a view to foster, rather than frustrate, sustainable trade in plastic waste in line with the Amendments. This complex issue cannot be separated from the broader question of how the WTO regime should interact with MEAs to enhance environmentally friendly outcomes endorsed multilaterally – notoriously a *vexata quaestio*, which has not yet received a formalized, systematic answer despite its crucial importance to make the WTO a modern institution that can effectively contribute, in a proactive rather than reactive fashion, to the most pressing challenges of the 21st century.

Accordingly, this article first gives an account of the magnitude and scale of plastic waste pollution in Section. Particular attention is dedicated to environmental and health implications caused by plastic pollution as well as to how such implications have been amplified by the consolidation of North-to-South trade patterns. Section 3 will then illustrate the basic architecture of the Basel Convention while focusing on the innovations

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<sup>8</sup> Amy L. Brooks, Shunli Wang and Jenna R. Jambeck, ‘The Chinese import ban and its impact on global plastic waste trade’, *Science Advances* vol. 4 no. 6, 20 June 2018, p. 2. The authors reveal that since 1988 approximately 50% of global plastic waste destined for recycling has been sent to China and another 25% to other East Asian and Pacific (EAP) countries. The data refers to plastic waste flows, regardless whether they fall under the Basel Convention’s scope of application. Further, it does not differentiate between several operations covered by Annex IV B Basel Convention, such as resource recovery, recycling reclamation, direct re-use or alternative uses.

<sup>9</sup> The measures were also claimed to grant less favourable treatment to foreign products, and to affect public health and the environment to the detriment as they redirect reusable plastics from productive purposes to the waste stream. In particular the United States submitted that “a ban with such a broad scope was more trade-restrictive than necessary to fulfil its objectives”. See: Committee on Technical Barriers to Trade (TBT Committee), Minutes of the meeting from 21-22 March 2018, G/TBT/M/74, para. 2.234 See also: Statement by the United States to the Committee on Technical Barriers to Trade 21-22 March 2018, G/TBT/W/468, para. 6f.

introduced by the Plastic Waste Amendments to cope with the plastic pollution emergency. Section 4 is built around a case study on the import restriction on plastic waste introduced by China in 2018. The Section analyzes the merits of complaints put forward by other WTO Members, with a view to shed light on the main legal hurdles under WTO law that import restrictions on plastic waste may face. Section 5 elaborates on whether WTO law has the potential to foster, rather than frustrate, sustainable trade in plastic waste by means of accommodating for measures covered under the Basel Convention's Plastic Amendments – bearing in mind the uncertainties that still remain as to the relationship between WTO and MEAs rules. Finally, Section 6 concludes.

## 2. Plastic wastes as a global concern

### 2.1 Health and environmental hazards associated with the accumulation of plastic waste

There has been an exponential growth in the production and use of plastics since the 1950s. It is estimated that 6 300 million tonnes of plastics waste have been generated between 1950 and 2015, and production is still expanding.<sup>10</sup> This trend, in combination with poor end-of-life waste management, has resulted in widespread, persistent plastics pollution. Of all plastic wastes generated only 9% were recycled and 12% incinerated, leaving nearly 80% to accumulate in landfills or the natural environment.<sup>11</sup>

Marine plastic debris is of particular concern for the global community. The ocean may already contain over 150 million tonnes of plastic, and the amount of plastic debris is estimated to reach 250 million tonnes by 2025 as additional 5 to 13 million tonnes are introduced every year.<sup>12</sup> Plastics are extremely durable (degradation in marine conditions may take hundreds of years), but can break up into micro- and nanoplastics over shorter timescales, which facilitates their uptake by marine species. Further, plastics may contain chemical additives and contaminants harmful for marine wildlife at extremely low concentrations.<sup>13</sup> Ingestion of plastics or entanglement harms marine species, which has negative implications for ecosystem health and the overall sustainability of fisheries. In sum, plastics pollution endangers food safety and availability, and implies considerable economic costs.<sup>14</sup>

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<sup>10</sup> United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability* (UNEP 2018), p. vi.

<sup>11</sup> OECD Environment Policy Paper No. 12, *Improving Plastics Management: Trends, policy responses, and the role of international co-operation and trade*, September 2018 (OECD 2018), p.4.

<sup>12</sup> United Nations Environment Programme, *Marine plastic debris and microplastics. Global lessons and research to inspire action and guide policy change* (UNEP 2016), p. 42.

<sup>13</sup> Frederic Gallo, Cristina Fossi and Roland Weber, 'Marine litter plastics and microplastics and their toxic chemicals components: the need for urgent preventive measures', *Environmental Sciences Europe* (2018) vol. 30 no. 13 (Gallo et al. 2018), pp. 2-4.

<sup>14</sup> OECD 2018, p.5.

Plastics pollution also puts human health at risk. Beyond seafood, contaminations are found in sea salt and both bottled and tap water. Scientific evidence on the health effects of plastics (including knowledge on the role and hazards of nanoplastics, potentially the most hazardous area of marine plastics) is limited. Nevertheless, given the nature and scale of possible health effects, the precautionary principle shall be applied.<sup>15</sup>

Plastic pollution in oceans has been a growing concern since the rise of the plastic industry in the mid-1950s. But the scale and importance of the problem has not received due attention until the past decade.<sup>16</sup> In 2015, the United Nations General Assembly has expressed concern about the negative effects of marine debris and microplastics, and urged the global community to take action.<sup>17</sup> Upon this call, the United Nations Environment Assembly (UNEA) initiated a study on marine plastic pollution and an assessment on available governance approaches.<sup>18</sup> These works emphasized that the problem of plastic pollution must be tackled at source (cleaning measures such as ‘fishing for—floating macro—plastic’ are not efficient and economically viable in an oceanic scale)<sup>19</sup> and identified initiatives that could be undertaken in the context of the Basel Convention.

## 2.2 North-to-South patterns in plastic waste trade

As already mentioned, waste mismanagement occurs predominantly in middle- and low-income countries<sup>20</sup>, while improved waste management in developed countries, to a certain extent, has been achieved by ‘exporting the problem’.<sup>21</sup> Developed countries have been the primary exporters of plastic waste during the last two decades, contributing to 87% of all exports. If taken together, the EU-28 ranks first among plastic exporters (accounting for 31% of all exports), followed by the US and Japan. An analysis of 28 years of import and export data suggests that plastic waste trade largely occurred between OECD and East Asia and Pacific countries. In result, wealthier nations (with relatively high

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<sup>15</sup> Gallo et. al 2018, p. 7. *See also*: OECD 2018, p.5; UNEP 2016, p. 101f.

<sup>16</sup> UNEP 2016, p. xvii.

<sup>17</sup> Resolution 70/235 on oceans and the law of the sea adopted by the General Assembly from 23 December 2015, A/RES/70/235.

<sup>18</sup> United Nations Environment Assembly of the UNEP, Combating Marine Plastic Litter and Microplastics: An Assessment of the Effectiveness of Relevant International, Regional and Subregional Governance Strategies and Approaches, from 15 February 2018, UNEP/AHEG/2018/INF/3.

<sup>19</sup> Patrick ten Brink, Jean-Pierre Schweitzer, Emma Watkins, Michiel De Smet, Heather Leslie and Francois Galgani, ‘T20 Task Force Circular Economy: circular economy measures to keep plastics and their value in the economy, avoid waste and reduce marine litter’ (G20 Insights 2017) <[https://science.vu.nl/en/Images/G20\\_2017\\_The-circular-economy-plastic-and-marine-litter\\_tcm296-847678.pdf](https://science.vu.nl/en/Images/G20_2017_The-circular-economy-plastic-and-marine-litter_tcm296-847678.pdf)>.

<sup>20</sup> OECD 2018, p. 4; Jenna R. Jambeck, Roland Geyer, Chris Wilcox, Theodore R. Siegler, Miriam Perryman, Anthony Andrady, Ramani Narayan and Kara L. Law, ‘Plastic waste inputs from land into the ocean’, *Science*, vol. 347 no. 6223 (February 13 2015), p. 769.

<sup>21</sup> UNEP 2016, p. 53.



domestic management costs) have been sending plastic waste towards developing countries (with less developed waste management infrastructure) throughout the last three decades; importantly, 45% of the world's plastics waste has been imported by China between 1992 and 2016.<sup>22</sup>

## 2.3 The North end: causes and consequences

While it has consolidated over time, the traditional North-to-South pattern in plastic waste trade developed out of both practical and economic arguments. On the one hand, it is often contended that allowing the export of waste plastics to countries with a comparative cost advantage in sorting or recycling can help boost global recycling rates, while also generating increased shared economic benefits and improving environmental outcomes. This line of reasoning especially holds true if waste collection in the destination country is, absent appropriate incentives, insufficient, and relies on often less stringent environmental standards. Therefore it may be seen as a casuistry that “invoke[s] ‘the circular economy’ as a justification for dispensing with controls on transboundary movements of wastes”.<sup>23</sup>

Further, the “circular economy argument” must be seen in the context of insufficient disposal capacities for plastic waste in developed countries. This phenomenon is, in part, a result of the so-called ‘not in my backyard’ (NIMBY) syndrome.<sup>24</sup> Especially in the US, due to the population’s resistance faced with the potentially deleterious effects of hazardous wastes, plans for disposal sites could not be realized. As a result, waste treatment capacities decreased, while volumes of wastes generation continued to rise.

Finally, recycling plastic is at present not economically competitive. Recycled plastic’s greenhouse gas footprint of is a fraction of virgin plastic’s, and recycling has the potential to divert material from landfill and reduce the use of virgin material. But the external costs of virgin plastic production are not sufficiently internalized, which holds back potential suppliers of recycled plastics from investing in sorting and recycling capacity.<sup>25</sup>

In light of the foregoing, exporting wastes to third countries, often with less stringent environmental requirements, was regarded as a much easier solution than improving domestic markets for recycled plastic and increasing local disposal capacities - despite their potential contribution to an environmentally sound management of plastic wastes.

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<sup>22</sup> 23 of 36 EAP countries are low- or middle-income countries; 33 of 35 OECD countries are considered high income countries. Amy L. Brooks, Shunli Wang and Jenna R. Jambeck, ‘The Chinese import ban and its impact on global plastic waste trade’, *Science Advances* vol. 4 no. 6, 20 June 2018, p. 2. The study refers to plastic waste flows, regardless whether they fall under the Basel Convention’s scope of application. Further, it does not differentiate between several operations covered by Annex IV B Basel Convention, such as resource recovery, recycling reclamation, direct re-use or alternative uses.

<sup>23</sup> Joint letter of the European Environmental Bureau, the Basel Action Network, the International Pollutant Elimination Network and CIEL to the European Commission Director General Environment from 8 July 2019 <<https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2019/07/NGO-Letter-OECD-Basel-Plastics.pdf>>.

<sup>24</sup> See: <<http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>>.

<sup>25</sup> OECD 2018, p. 13f.



## 2.4 The South end: a boomerang solution?

Exports of plastics waste towards destinations with limited recycling capacity and less stringent treatment standards have however not only exposed affected receiver countries to negative environmental impacts on both the national and regional levels; the challenges posed to developing countries by rapidly growing export volumes has also ultimately led to detrimental effects on the global level.<sup>26</sup> For example, from the coastlines of China an estimated 1.3 million to 3.5 million of metric tonnes of plastic may enter the oceans annually<sup>27</sup>, as the country is still developing domestic waste management infrastructure. The contribution of imports is estimated to count for 10-13% additional mass to the plastic waste generated domestically, which is already difficult to manage.<sup>28</sup>

## 3. The Basel Convention and its Plastic Waste Amendments

### 3.1 The Basel Convention's basic architecture

#### 3.1.1 Aim and coverage

The Basel Convention, adopted in 1989 and entered into force in 1992, is today's central international legal framework addressing international waste trade.<sup>29</sup> It has nearly universal coverage, encompassing 188 Parties as of September 2021.<sup>30</sup> The overall objective of the Convention is "to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes".<sup>31</sup> Accordingly, it covers two categories of wastes: 'hazardous wastes' and 'other wastes'. Hazardous wastes are those that belong to any category contained in Annex I unless they do not possess any of the characteristics in Annex III; as well as wastes defined as or considered to be hazardous by domestic legislation and notified as such. 'Other wastes' are those in any category contained in Annex II subject to transboundary movement. Until 1 January 2021 'other

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<sup>26</sup> United Nations Environment Assembly of the UNEP, Possible Options under the Basel Convention to Further Address Marine Plastic Litter and Microplastics, from 29-31 May 2018, UNEP/AHEG/2018/1/INF/5, p. 3.

<sup>27</sup> Jambeck et al. 2015, p. 769.

<sup>28</sup> Brooks et al. 2018, p. 3.

<sup>29</sup> The convention entered into force in 1992, Grosz 2011, p.136f.

<sup>30</sup> The US and Haiti have signed, but not ratified the Convention. The list of the Parties is available at <<http://www.basel.int/?tabid=4499>>.

<sup>31</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), U.N.T.S. vol. 1673, p. 57, Preambular para. 24.

wastes' encompass household waste and residues from the incineration thereof, which is likely a significant source of marine plastic litter.<sup>32</sup>

### 3.1.2 Control procedure

The Convention is built upon three fundamental regulatory pillars: i) reduction of the generation of hazardous waste and the promotion of environmentally sound management of hazardous wastes wherever the place of disposal, ii) the reduction of transboundary movements of hazardous wastes except where it is in accordance with the principles of environmentally sound management, and iii) a control system applying to cases where transboundary movements are permissible.<sup>33</sup>

### 3.1.3 Environmentally Sound Waste Management

The first pillar includes general provisions requiring Parties to observe the fundamental principles of environmentally sound management (ESM) of hazardous and other wastes.<sup>34</sup> The Convention defines ESM as “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”.<sup>35</sup>

However, critics argue that this definition is overly vague, for example it is not clear whether the criteria for environmentally sound is to be determined by the importing or the exporting country.<sup>36</sup>

### 3.1.4 Prior informed consent procedure

The second pillar consists of a regulatory system on the transboundary movements of wastes. In all cases where export is not, in principle, prohibited, it may take place only if it represents environmentally sound management and is carried out in accordance with the Convention's control procedure, which is based on the concept of prior informed consent

(PIC). The PIC allows for the transboundary movement of covered wastes provided that the authorities of the exporting Party notify the authorities of the prospective states of import and transit, providing them with the information set out in the Convention on the

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<sup>32</sup> United Nations Environmental Programme (UNEP), Possible options under the Basel Convention to further address marine plastic litter and microplastics, from 22 May 2018, UNEP/AHEG/2018/1/INF/5, p. 5.

<sup>33</sup> Grosz 2011, p. 141; Jonathan Krueger, International Trade and the Basel Convention (Earthscan 1999), pp 53ff.

<sup>34</sup> Article 4 Basel Convention.

<sup>35</sup> Article 2.8 Basel Convention.

<sup>36</sup> Krueger 2011, p. 29, referring to David J. Abrams, 'Regulating the International Hazardous Waste Trade: A Proposed Global Solution' Columbia Journal of Transnational Law, vol. 28 nr. 3 at p. 801. Parties have been undertaking considerable efforts to address these shortcomings. For instance, both general and waste stream specific technical guidelines have been adopted and an expert working group has been mandated. See: Framework for the environmentally sound management of hazardous wastes and other wastes, adopted by the eleventh meeting of the Conference of the Parties in decision BC-11/1 on follow-up to the Indonesian-Swiss country-led initiative, UNEP/CHW.11/3/Add.1/Rev.1.

intended movement. The movement may only proceed if and when all states concerned have given their written consent.<sup>37</sup> To facilitate this procedure, the Parties have adopted notification and movement documents, which are to be used and follow each movement of covered wastes.

### 3.1.5 Reduction of transboundary movement of hazardous wastes

The third pillar contains a number of prohibitions: hazardous wastes may not be exported to Antarctica, to a Party having banned the import of hazardous wastes, or to a non-Party.<sup>38</sup> Parties may, however, enter into bilateral, multilateral or regional arrangements or agreements regarding transboundary movement of hazardous wastes or other wastes (also with non-parties), provided that such agreements are “no less environmentally sound” than the Basel Convention.<sup>39</sup>

Further, the Convention has evolved to include a version of the north-south trade ban sought by some parties since 1989.<sup>40</sup> The Ban Amendment<sup>41</sup> (adopted in 1995, entered into force in 2019) provides for the prohibition of exports of hazardous wastes that are destined for disposal in any of the operations listed in Annex IV<sup>42</sup> from countries listed in Annex VII to the Convention (i.e. Parties that are members of the OECD, EU and Liechtenstein) to all other Parties.<sup>43</sup>

The most controversial aspect of the Ban Amendment is the ban on exports of wastes intended for operations in Annex IV B to the Convention, as it might negatively impact an economically beneficial trade in wastes.<sup>44</sup> Further, market limitations for recyclables could lead to price increases for second-hand materials, particularly in non-Annex VII

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<sup>37</sup> See: Articles 6 and 7 Basel Convention. The Basel Convention also provides for cooperation between parties, ranging from exchange of information on issues relevant to the implementation of the Convention to technical assistance, particularly to developing countries (Articles 10 and 13 Basel Convention). The Secretariat is required to facilitate and support this cooperation, acting as a clearing-house (Article 16). In the event of a transboundary movement of hazardous wastes having been carried out illegally, *i.e.* in contravention of the provisions of Articles 6 and 7, or cannot be completed as foreseen, the Convention attributes responsibility to one or more of the States involved, and imposes the duty to ensure safe disposal, either by re-import into the State of generation or otherwise (Articles 8 and 9 Basel Convention) <<http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>>.

<sup>38</sup> Article 4 Basel Convention.

<sup>39</sup> Article 11 Basel Convention.

<sup>40</sup> Krueger 2011, p. 43.

<sup>41</sup> Decisions III/1, Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, from 22 September 1995, UNEP/CHW.3/35.

<sup>42</sup> Annex IV lists operations which do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses.

<sup>43</sup> Article 4A Basel Convention. See also: Katharina Kummer Peiry, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (United Nations Audiovisual Library of International Law, 2010), p. 5. <[https://legal.un.org/avl/pdf/ha/bcctmhwd/bcctmhwd\\_e.pdf](https://legal.un.org/avl/pdf/ha/bcctmhwd/bcctmhwd_e.pdf)>.

<sup>44</sup> Krueger 1999, p. 32.

countries, while growing demand for primary materials can result in an adverse impact on the environment.<sup>45</sup> For example, a study investigating the 1996 Chinese import ban on waste plastics points to the fact that the measure resulted in a significant shortage of raw materials used for the production of ‘secondary resin’, which was substituted by imports of ‘primary resin’.<sup>46</sup> However, such negative environmental impact may be reversed by increasing the efficiency in the collection of domestic waste.<sup>47</sup>

## 3.2 The Plastic Waste Amendments

### 3.2.1 Aim and coverage

Prior to its recent amendments, the Basel Convention did not cover a large part of plastic wastes that could enter the sea, such as plastics from industrial or commercial packaging, unless they were classified or defined as either hazardous or other wastes, e.g. household wastes. For this reason, it was noted that there was scope to consider extending the definition of ‘hazardous’ under the Convention.<sup>48</sup>

Based on UNEA’s work, in 2018 Norway proposed to amend the annexes to the Basel Convention; a revised version of the proposal was adopted by consensus during the 14<sup>th</sup> meeting of the Conference of the Parties (COP-14) on 10 May 2019. The decision amends Annexes II, VIII and IX to the Convention by clarifying, extending and replacing certain existing entries on plastic wastes or inserting new ones.<sup>49</sup>

The amendments acknowledge various parts of plastic wastes require special consideration. After the revision, only certain one-polymer plastics and certain mixed waste fractions thereof fall outside the Convention’s scope of application, and only if destined for recycling and almost free from contamination and other types of wastes.<sup>50</sup>

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<sup>45</sup> Grosz 2011, p. 171.

<sup>46</sup> Anantha K. Duraiappah, Zhou Xin and Pieter J. Van Beukering, ‘Issues in production, recycling and international trade: Analysing the Chinese plastic sector using an optimal life cycle (OLC) model’ *Environment and Development Economics*, vol. 7 no. 1, February 2002, pp. 47-74, at p. 60.

Plastic resin is produced by the cracking of hydrocarbons. For the production of primary resin virgin materials (often products of crude oil refinement) are used, while secondary resin is made of reprocessed plastic. Secondary resin is mostly used in combination with primary resin to manufacture final products; thus, it has the potential to divert material from landfill and to decrease the use of virgin material. Further, the greenhouse gas footprint of recycled plastic is a fraction of that of virgin plastic (OECD Environment Policy Paper No. 12, Improving Plastics Management: Trends, policy responses, and the role of international co-operation and trade, September 2018, p.13).

<sup>47</sup> Pieter J. Van Beukering, Yongjoiang Li, Zhaou Yumin and Zhou Xin, ‘Trends and Issues in Plastic Recycling in China, with Special Emphasis on Trade and Recycling, CREED Working Paper Series no. 16, 1997. Further, Article 11 Basel Convention might allow the export of hazardous wastes even between two parties to the Ban Amendment (Grosz 2011, p. 169).

<sup>48</sup> UNEP/AHEG/2018/1/INF/5, p. 5.

<sup>49</sup> UNEP/CHW.14/27.

<sup>50</sup> One-polymer plastics that may fall outside the Convention’s scope of application are polyethylene, polypropylene and polyethylene-terephthalate. In the case of mixed plastics, these must be destined for separate recycling.

The new entry in Annex II adopted as part of the Amendments establishes a presumption of plastic wastes to be covered by Annex II with certain exceptions only, thereby subjecting them to the PIC procedure<sup>51</sup> and the prohibition of international trade with non-Parties absent an ‘Article 11 Agreement’.<sup>52</sup>

In particular, the Amendments consist of:

- i. a new entry ‘Y48’ in Annex II, which expands the category of ‘other wastes’ subject to the PIC procedure by including solid plastic waste that falls outside the scope of Annex IX;
- ii. a new entry ‘A3210’ in Annex VIII that clarifies which plastic wastes are considered or defined as ‘hazardous’;
- iii. a revised entry ‘B3011’ in Annex IX that clarifies the criteria when solid plastic wastes are not considered hazardous wastes and would not be subject to the PIC procedure,<sup>53</sup>

The new entry in Annex VIII clarifies when plastic wastes are hazardous; making them subject to the PIC procedure, as well as to the Ban Amendment in relevant movements involving Parties that have consented to be bound by that amendment. As regards Annex IX, the amendment relates to plastic waste listed in that entry destined for *recycling* in an environmentally sound manner and almost free from contamination and other types of wastes. It also sets out requirements on the extent to which the waste must be prepared for recycling: Only pre-sorted, single polymer plastic waste almost free from contamination and other types of wastes and suitable for recycling may continue to be traded subject to the Basel Convention’s regulatory system after the new entries adopted in the Amendment become effective.

### 3.2.2 Open questions

The new entries in the Amendments have become effective on 1 January 2021.<sup>54</sup> However, at this stage there still remain questions in relation to how Parties will interpret and implement these Amendments.

For example, it is uncertain what treatment they imply for waste plastics containing additives. Additives such as colorants, plasticizers and flame-retardants are present in nearly all plastics. At the end of a product’s lifecycle their negative impact predominates, as they can reduce the materials’ recyclability and pose risks to human and ecological health.<sup>55</sup> Hagen *et al.* suggest that “[t]he reference in the text [of Annex IX] to wastes

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<sup>51</sup> Article 4.1 Basel Convention.

<sup>52</sup> Meaning a bilateral or regional agreement with provisions that require not less environmentally sound waste management than foreseen by the Basel Convention (Articles 4.5 and 11 Basel Convention). Given the Basel Convention’s nearly universal Membership, this obligation concerns transboundary movement of wastes only with a few Parties, including the US. A significant example is the OECD Control System on Waste Recovery. *See: infra* at Section 3.2.3.

<sup>53</sup> Explanatory note from the Government of Norway on its proposals to amend Annexes II, VIII and IX to the Basel Convention from 31 January 2019, UNEP/CHW.14/INF/18, p. 6.

<sup>54</sup> Possible options under the Basel Convention to further address marine litter and microplastics, from 11 May 2019, UNEP/CHW.14/28, p. 56 ff.

<sup>55</sup> OECD 2018, p 14.

containing “one polymer” seems to be used as shorthand for the idea of single-stream, presorted & cleaned plastic fractions (as opposed to bales of mixed plastics), rather than an effort to truly limit the scope of B3011 to “single polymer” materials.”<sup>56</sup> However, deleting the phrase ‘copolymers’ from the current entry’s chapeau, listing presumptively nonhazardous plastics, arguably suggests an interpretation to the opposite.

Furthermore, guidance has yet to be developed as to the coverage of B3011 and in particular what Parties understand to be the meaning of ‘almost free of contamination and other types of wastes’. At the time of writing it is uncertain what weight percentage and kind of contamination is tolerated under B3011, although the Amendment provides that international and national specifications may offer a point of reference. Also, some Parties feel that it may not be necessary to include cured resins and fluorinated polymers under B3011. Discussions on the exact coverage of the entries and technical guidelines for the Amendments’ implementation are ongoing.<sup>57</sup>

As the European Recycling Industries’ Confederation noted, clarifications at the appropriate level are instrumental to ensure a harmonized implementation and avoid distortions in waste shipment approvals and inspections resulting from different national interpretations” increasing legal uncertainty.<sup>58</sup> The Conference of the Parties adopted a number of actions to clarify the Amendments’ meaning, which will hopefully reflect the ambitious goals of the amended Norwegian Proposal, as adopted by the Parties in May 2019.<sup>59</sup>

### 3.3 The OECD Control System for Waste Recovery

The OECD Council was the first actor to address waste management on the supranational level. Fueled by media reports of waste generated in industrialized countries being dumped in developing countries, the 1976 OECD Council’s Recommendation outlined a comprehensive supranational waste management policy.<sup>60</sup> The framework has been continuously developed; later conclusions and recommendations on the transfer of hazardous wastes to third countries included the

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<sup>56</sup> Paul E. Hagen, K. Russell LaMotte and Dacia T. Meng, ‘Basel Convention Recasts the Circular Economy for Plastics’, The National Law Review, May 17 2019 <<https://www.bdlaw.com/publications/basel-convention-recasts-the-circular-economy-for-plastics/>>.

<sup>57</sup> See: Further consideration on Plastic Waste. Note by the Secretariat, UNEP/CHW.15/10 from 9. February 2021.

<sup>58</sup> Statement of the European Recycling Industries’ Confederation: EU position for implementation of Basel decisions into the OECD <<https://www.euric-aisbl.eu/position-papers/item/299-euric-statement-eu-position-for-implementation-of-basel-decisions-into-the-oecd>>.

<sup>59</sup> The actions include, for instance, the update of the existing technical guidelines for the Identification and Environmentally Sound Management of Plastic Wastes and for their Disposal See: Decision BC-14/13: Further actions to address plastic waste under the Basel Convention, available at <<http://www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP14/tabid/7520/Default.aspx>>.

<sup>60</sup> Recommendation of the Council of on a Comprehensive Waste Management Policy from 28 September 1976 [C(76)155(Final)]. The 1976 Recommendation was a first step to further environmental protection and the rational use of energy and resources, followed by eight Council Acts between 1984 and 1992 on the transboundary movement of wastes.



principle that OECD Member Countries will not apply any less strict controls, nor will they allow exports to occur without the consent of the importing and the transit countries.<sup>61</sup> Still, the OECD rules apply only to those movements of wastes where i) both the country of export and the country of import are OECD Member Countries and ii) the wastes are destined for recovery.<sup>62</sup>

In 2001, the OECD control system was amended with the goal to harmonize its procedures and requirements with those of the Basel Convention. Today, two control procedures exist. The OECD Green control procedure is applied to Basel Annex IX wastes, while the Amber control procedure is applied to Basel Annexes II and VIII wastes.<sup>63</sup> With similar lists of waste operations and hazardous waste criteria in place, the control systems are congruent to a large extent.<sup>64</sup>

In contrast to the Basel Convention, the OECD's approach does not intend to reduce the volume of trade, but merely aims to promote waste recovery alongside with an environmentally sound and economically efficient waste management. This is not least because trade in recyclables has become a substantive market within the OECD area. This difference is reflected in the regulatory framework's stringency: the OECD Green list includes additional materials that members countries agreed to subject to the Green Control Procedure, while the Amber Control Procedure involves considerably shorter notification periods for the country of import, and an assumption of tacit consent in case no objection has been lodged.<sup>65</sup>

OECD Council Decisions are international agreements that create binding commitments on member countries. While most OECD member countries are also parties to the Basel Convention, the US has signed, but not ratified the Convention. Therefore, its consent to the 'Amended 2001 OECD Decision' is of key importance as it subjects it to obligations comparable to those of the Basel Convention – at least with regard to the transboundary movement of hazardous and other wastes towards OECD member countries, *i.e.* Mexico.

The Basel Convention's later amendments are largely incorporated into the 'Amended 2001 OECD Decision'. Incorporation happens automatically 60 days following the

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<sup>61</sup> Resolution of the Council on International Co-operation concerning Transfrontier Movements of Hazardous Wastes from 20 June 1985 [C(85)100], Recommendation V. Council Decision C(92)39/FINAL on the Control of Transfrontier Movements of Wastes Destined for Recovery Operations established a three-tier system, known as the "red, amber, green" control system; the number of lists was reduced to two in 2002, by Council Decision C(2001)107/FINAL.

<sup>62</sup> Council Decision C(2001)107/FINAL defines transboundary movement as "any movement of wastes from an area under the national jurisdiction of a member country to an area under the national jurisdiction of another member country".

<sup>63</sup> OECD, Guidance Manual for the Implementation of Council Decision C(2001)107/FINAL, as amended, on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, 2009. <<https://www.oecd.org/env/waste/guidance-manual-control-transboundary-movements-recoverable-wastes.pdf>> p. 9.

<sup>64</sup> Grosz 2011, p. 173.

<sup>65</sup> Grosz 2011, 173-174.



adoption of the Basel Convention's amendment, unless objections are lodged before that date.<sup>66</sup>

On July 3 2019, the US has invoked the objection provision to incorporating the Basel Convention's three plastic amendments to the 'Amended 2001 OECD Decision'. In its opposition letter, the United States Environmental Protection Agency (US EPA) argues that "subjecting plastic scrap to the Amber Control Procedure would impede trade for recycling and could reduce the level of recycling among OECD countries."<sup>67</sup> Further, it warns that "[a]s a result [of adopting the amendment], in OECD countries, plastic recycling could decrease and landfilling of plastic scrap could increase, reducing the environmental and economic benefits that are achieved through recycling".<sup>68</sup> Therefore, the US suggested that transboundary movements of plastic scrap shipped between OECD countries should be subject to the Green Control Procedure.<sup>69</sup> The US's proposal would have effectively maintained the *status quo* allowing for free trade of all plastic scrap for recovery purposes within the OECD.<sup>70</sup> Ultimately, however, OECD Members agreed to integrate the provisions of the amendment to Annex VIII of the Basel Convention, thereby making plastic wastes containing hazardous substances subject to the OECD control procedures when traded among its members for recovery.<sup>71</sup> Conversely, they could not reach a consensus on how other plastic wastes should be treated in the context of trade between OECD Members. It will be reviewed in 2024 whether consensus can be achieved.<sup>72</sup>

#### 4. Import restrictions on plastic waste and WTO law

As explained above, in the latest years an increasing number of developing countries have started and/or continued to halt or reduce imports of plastic waste.<sup>73</sup> The restrictions

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<sup>66</sup> Article 3.b OECD Council Decision C(92)39/FINAL.

<sup>67</sup> The US EPA's objection letter to the Secretary-General is available at: [http://wiki.ban.org/images/4/4f/US\\_EPA\\_Plastics\\_Objection\\_Letter.pdf](http://wiki.ban.org/images/4/4f/US_EPA_Plastics_Objection_Letter.pdf).

<sup>68</sup> See: *Ibid.*

<sup>69</sup> See: *Ibid.* The letter asserts that "[l]ess than one percent of plastic waste is mismanaged in OECD countries". However, nine of the 36 OECD countries have waste mismanagement rates higher than 1%. Turkey, for instance, has a 16% mismanagement rate and a 1% domestic recycling rate (Jambeck et al. 2015, p. 769).

<sup>70</sup> See: CIEL, "Legal Analysis of the Consequences of the OECD Non-Consensus Determination on the Basel Plastic Amendment", available at: <https://www.ciel.org/reports/legal-analysis-of-the-consequences-of-the-oecd-non-consensus-determination-on-the-basel-plastic-amendment/>; For more information on the US 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/wpcontent/uploads/2020/07/Analysis-Basel-Plastic-Wastes-Trade-OECD-Countries.pdf>.

<sup>71</sup> Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of transboundary movements of wastes destined for recovery operations.

<sup>72</sup> See: Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, OECD/LEGAL/0266.

<sup>73</sup> See: *supra* Section 2.2.

maintained by China since 2018 have undoubtedly sparked the most controversy due to Beijing's unmatched centrality as a plastic waste receiver at the global level, but they also triggered a domino effect. For instance, in response to exporters' search for alternative destinations, Vietnam, Thailand and Malaysia announced their own import restrictions the same year, while India's import ban came into effect in September 2019.<sup>74</sup>

While an analysis of the minutiae of the various measures currently implemented is beyond the scope of this paper, this Section will focus on the measures introduced by China as a relevant case study to assess how import restrictions on plastic waste of the types that are covered under the Basel Convention (and specifically under the Plastic Waste Amendments) may fare under the WTO rules. In particular, the question of whether and, if so, to which extent, trade measures under the Basel Convention regime may be held compatible with the WTO Agreement will allow to make some more general inferences about the relationship between WTO and MEAs rules.

#### 4.1 Case study on Chinese import restrictions

Almost half of the world's plastic waste exports allegedly destined for recycling was taken up by China between 1992 and 2016; other East Asian and Pacific (EAP) countries imported further 25%.<sup>75</sup> Main exporters have been the EU and the US, with approximately 87% and 78% of their plastic waste directed to China.<sup>76</sup>

Owing to its alleged difficulties in coping with growing volumes of plastic waste, China has started introducing restrictive waste import policies since the late 2000s. As a first measure, it restricted physical contamination in imports of waste plastics to a maximum of 1.5 weight percent in 2009.<sup>77</sup> Faced with difficulties in implementing the applicable contamination limits, it launched the Green Fence Operation in 2013 with the aim to enforce the import legislation. The operation highlighted the global dependence on a single importer: "Inspections slow[ed] down port operations, shippers [saw] rising demurrage costs as they pay[ed] ports to hold containers until they [were] inspected".<sup>78</sup>

While the Green Fence operation was temporary, in 2017-2018 China announced permanent import restrictions on solid waste. With effect from January 2018, it

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<sup>74</sup> CIEL 2019, p. 62, referring to Colin Staub, Thailand Bans Scrap Plastic Imports, Plastics Recycling Update from 27 June 2018 <<https://resource-recycling.com/plastics/2018/06/27/thailand-bans-scrapplastic-imports>>.

<sup>75</sup> Brooks et al. 2018, p.2.

<sup>76</sup> The data stems from 2012 and thus applies to the EU-27. Costas A. Velis, Global recycling markets - plastic waste: A story for one player – China. Report prepared by FUELogy and formatted by D-waste on behalf of International Solid Waste Association - Globalisation and Waste Management Task Force, September 2014, pp. 27 and 30.

<sup>77</sup> Velis 2014, pp 42 and 46; Chinese Ministry of Environmental Protection 'Announcement on Amending Catalogues of Imported Wastes Management (Extract)' no.36 from 3 July 2009 <<http://english.mee.gov.cn/Resources/Policies/policies/Solidwastes/200909/P020090911322248259263.pdf>>.

<sup>78</sup> Jerry Powell, 'Operation Green Fence is deeply affecting export markets', Post on Resource Recycling from 12 April 2013 <<https://resource-recycling.com/recycling/2013/04/12/operation-green-fence-is-deeply-affecting-export-markets/>>.

prohibited the importation of 24 kinds of solid waste, including post-consumer plastic wastes (“plastic wastes from living sources”).<sup>79</sup> As of March 2018 the import ban was complemented by a set of technical specifications that allow for the importation of waste materials if they comply with ambitious maximum acceptable levels of contamination set out in the legislation.<sup>80</sup> With regard to post-consumer plastic waste and scrap a 0.5 percent maximum level of contamination by non-recyclable materials was introduced, which is a much higher bar than the previous level of 1.5 percent. The new standard might be seen as “almost impossible to meet”, given that plastic material entering recycling facilities in the US may contain up to 15 – 25 weight percent contamination.<sup>81</sup>

Lastly, China prohibited the importation of further 16 types of solid wastes, including industrial waste and scrap of plastic, effective from December 2018.<sup>82</sup> The measures’ stated rationale is the protection of human, animal and plant life and health, and the protection of the environment, and more specifically, to tackle environment pollution emerging from imports of polluted and hazardous wastes.<sup>83</sup>

#### 4.1.1 The measures scope and the Plastic Amendments

Significantly, the measures at issue have been recognized by the OECD as acts consistent with China’s rights and obligations as a party to the Basel Convention.<sup>84</sup>

Indeed, the wastes covered by Measures 1 and 3 arguably fall under Annex II to the Basel Convention.<sup>85</sup> Thus, Article 4.1 Basel Convention allows China to exercise a right to prohibit the import of these wastes and needs to inform the other Parties of such a decision.<sup>86</sup> Such a notification leads to an obligation on the State of export to prohibit or not permit the export of hazardous wastes and other wastes to Parties which have prohibited imports.

A different conclusion can only be drawn if the plastic wastes i) almost exclusively consist of a single polymer/mixed waste fractions of clean polyethylene, polypropylene, and polyethylene terephthalate ii) are destined for (separate) recycling and ii) are “almost free from contamination and other types of wastes”. Measure 2 embodies the domestic implementation of these criteria, staying within the limits of a reasonable interpretation.

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<sup>79</sup> G/TBT/N/CHN/1211 and G/TBT/N/CHN/1212 notified on 18 July 2017.

<sup>80</sup> G/TBT/N/CHN/1233 notified on 15 November 2017; *see also*: G/TBT/N/CHN/1234 notified on 15 November 2017 concerning environmental protection requirements on imported compressed piece of scrap automobile.

<sup>81</sup> Plastic Atlas 2019, Heinrich Böll Foundation and Break Free From Plastic, 2<sup>nd</sup> edn, December 2019, p. 38.

<sup>82</sup> Chinese Ministry of Environmental Protection, Announcement on Adjustment to the Catalogue for the Administration of Import Solid Waste, Announcement no. 6 from 13 April 2018. The importation of further 16 types of solid wastes, not affecting plastic, is prohibited with effect from December 2019.

<sup>83</sup> *See*: The notifications by China to the TBT Committee at *supra* fn. 79 and 80.

<sup>84</sup> OECD 2018, p.10.

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<sup>86</sup> This conclusion also holds true if the wastes are to be qualified as ‘hazardous’.

*Table 1: Overview of the Chinese import restrictions on plastic waste*

Overview of the Chinese import restrictions on plastic introduced since 2017		
<b>Products covered by the measures:</b> Waste and scrap of <ul style="list-style-type: none"> <li>Ethylene polymers and remnants (HS 3915100000);</li> <li>Vinyl benzene polymers and remnants (HS 3915200000);</li> <li>Chloroethylene polymers and remnants (HS 3915300000);</li> <li>Polyethylene terephthalate and remnants (HS 3915901000);</li> <li>Other waste and scrap plastics and remnants (HS 3915909000)</li> </ul>		<b>Not covered (by the definition of solid waste) are:</b> <ul style="list-style-type: none"> <li>any substances that may be utilized as per their original use without repairing and processing</li> <li>substances that are directly returned to the original production process or its generation process without storage or piling up</li> </ul>
<b>Measure 1</b> (G/TBT/N/CHN/1211 and G/TBT/N/CHN/1212 notified on 18 July 2017, in effect from 31 December 2017)	Covers only post-consumer plastic ("plastic waste from living sources")	Import ban
<b>Measure 2</b> (G/TBT/N/CHN/1233 notified on 15 November 2017, in effect from 1 March 2018)	Covers any waste and scrap of plastic	Import restrictions related to the contamination of plastic products, setting i.e. a maximum contamination level of <ul style="list-style-type: none"> <li>0.01 weight percentage with <ul style="list-style-type: none"> <li>i) ashes of plastic;</li> <li>ii) hazardous wastes as defined in domestic legislation;</li> <li>iii) used, intact or sealed plastic containers</li> </ul> </li> <li>0.5 weight percentage of other carried wastes</li> </ul>
<b>Measure 3</b> (Published in April 2018, no WTO notification publicly available, in effect from 31 December 2018)	Industrial waste and scrap of plastic  In particular thermoplastic remnant materials, leftover materials, and inferior products produced in the manufacture of plastics and processing of plastic products.	Import ban

#### 4.1.2 The measures' immediate implications

The three acts in combination largely stemmed the flow of plastic waste and scrap to China. The volume of imports from the EU and the US fell from 100 000 tonnes in June

2017 to less than 10 000 tonnes in January 2018, and from 75 000 tonnes in January 2017 to 6 000 tonnes in December 2018, respectively.<sup>87</sup>

Growing waste stockpiles surged, thereby obliging exporting countries to find alternative destinations, resulting in significantly higher trade inflows for countries such as Thailand, Malaysia, Vietnam, Turkey, and India during the second half of 2017.<sup>88</sup> The poorly developed plastics recycling facilities and relatively weak environmental treatment standards in the new destination countries gave cause to concerns about the health and environmental impacts in the importing states. Occurrences included illegal imports to Thailand, the establishment of almost 40 illegal recycling factories in Malaysia dumping toxic wastewater into waterways, and a Vietnamese shipping terminal that amassed more than 8,000 containers loaded with plastic and paper for recycling.<sup>89</sup> These occurrences highlight the role of the Basel Convention's Ban- and Plastic Amendments in preventing marine plastic pollution, and the necessity for their effective implementation in exporting and importing States alike.

Since 2017, the affected countries introduced or strengthened trade restrictions on waste plastic, including total import bans announced or already in place in India, Malaysia, Thailand and Vietnam. These prohibitions followed on less trade-restrictive import regulations, associated with considerable difficulties at the implementation level. Also, they failed to restrict the volume of imported waste plastics to a level possible to manage in accordance with ESM.<sup>90</sup>

Exporting countries' immediate responses include, besides their search for alternative destinations, increased landfill and incineration.<sup>91</sup> This reaction is enhanced by the fall of domestic waste plastic prices, and is associated with detrimental effects on the environment and human health. At the same time, the Chinese measures seem to have accelerated the adoption of ambitious circular economy strategies. The EU and Australia

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<sup>87</sup> OECD 2018, p.10; More recent data suggests a drop by 99.1 percent in 2018 compared with 2017 comprising all imports. Colin Staub, 'China: Plastic imports down 99 percent, paper down a third', Post on Resource Recycling from 29 January 2019 <<https://resource-recycling.com/recycling/2019/01/29/china-plastic-imports-down-99-percent-paper-down-a-third/>>.

<sup>88</sup> Qiao Huang, Guangwu Chen, Yafei Wang, Shaoqing Chen, Lixiao Xu and Rui Wang, 'Modelling the global impact of China's ban on plastic waste imports, Resources, Conservation and Recycling, vol. 154, March 2020, p. 74.

<sup>89</sup> Plastic Atlas 2019, p. 38.

<sup>90</sup> Plastic Atlas 2019, p. 38. With regard to China, Xia writes for example: "The Chinese government introduced a number of restrictions – such as the environmental license, waste import license, and overseas supplier registration – to raise the barriers for entering into the formal recycling industry with the objective of protecting the environment. However, most of these measures have suffered from ineffective implementation because of local protectionism, corrupt practices, and subordination of environmental protection to economic development goals in policy decision-making. As a consequence, state regulations have functioned as barriers for entrance into the formal economy without achieving the intended policy objectives." Ying Xia, 'China's Environmental Campaign: How China's War on Pollution is Transforming the International Trade in Waste', New York University Journal of International Law and Politics, vol. 51 no. 4 from June 2019, p. 1177.

<sup>91</sup> Brooks et al. 2018, p. 2.

adopted comprehensive legislative frameworks in 2018, including ambitious waste reduction, recovery and recycled content goals. These programs also aim to extend domestic recycling capacity and to phase out exports of recyclables. As short-term highlights, the EU strategy banned the use of certain single-use plastics, while Australia adopted strict export restrictions on plastic waste in line with the Basel Convention's Plastic Amendments – both measures effective since 2021.<sup>92</sup> Against this background, the Chinese import restrictions may trigger positive environmental and health effects in the long term, largely depending on exporting countries' responses.

In China itself, the import restrictions caused a sudden feedstock shortfall for the domestic recycling industry, which led to increased black market trading and a heavier reliance on virgin materials.<sup>93</sup> However, the measures' negative environmental and health impacts are expected to be short-term. The import restrictions may be seen as a stepping-stone towards improving domestic waste collection and sorting in China. As the volume of imports shrinks, prices for domestic plastic wastes rise, setting an economic incentive for their collection.<sup>94</sup>

Further, the Chinese measures are likely to reduce the volume of plastic dispersion into the environment.<sup>95</sup> The trade restrictions are part of a comprehensive policy action that includes the establishment of municipal waste sorting and disposal systems in major cities by 2020, and the promotion of waste-to-energy projects in rural areas, accompanied by public education. Further steps include a cradle-to-grave waste management system to monitor the generation, transport, processing, and disposal of solid wastes.<sup>96</sup> This way the import restrictions may contribute to protecting the environment, and human, animal and plant life and health – both within the country and abroad.

## 4.2. The Chinese measures under WTO scrutiny

Ever since China notified its measures to the WTO TBT Committee,<sup>97</sup> the use of import restrictions on plastic waste has triggered heated discussion among Members. Major exporters, including the US, the EU, Canada, Australia and Japan, have expressed complaints relating to both the measures' procedural and material aspects. The analysis

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<sup>92</sup> See, for instance: Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment <<https://eur-lex.europa.eu/eli/dir/2019/904/oj>>; Australian Government, Exports of Plastic Waste <<http://www.environment.gov.au/protection/waste/exports/plastic>>. Furthermore, a number of US cities and states enacted restrictions on the use of certain plastic utensils. In other regions still no restrictions are in place (Huang et al. 2020, p. 72).

<sup>93</sup> OECD 2018, p.12.

<sup>94</sup> *Ibid.*

<sup>95</sup> Xia 2019, p. 1147f.

<sup>96</sup> *Ibid.*

<sup>97</sup> Members use the TBT Committee i.e. to discuss trade concerns related to specific laws, regulations or procedures that affect their trade, usually in response to notifications.



of such complaints sheds light on the main WTO hurdles that these types of measures may face when subject to WTO scrutiny. At the same time, China's insistence on the centrality of such import restrictions for health and environmental protection protection, and its reiterated calls upon other Members to "follow the letters and spirit of the Basel Convention, and reduce, process, and recycle hazardous and other wastes produced within their own territory"<sup>98</sup> allow some reflections on whether and, if so, under which conditions may the fact that import restrictions on plastic waste are covered by the Basel Convention increase their chances to successfully justify them under available WTO flexibilities.

#### 4.2.1 Complaints raised in relation to the Chinese measures in the TBT Committee

China notified its measures to the WTO TBT Committee<sup>99</sup>, triggering heated discussion among Members. The US, the EU, Canada, Australia and Japan have expressed complaints relating to both the measures' procedural and material aspects.

In sum, China was requested to observe the normal 60-day timeframe for comments and to provide for a reasonable implementation period.<sup>100</sup> Further, it was urged to "immediately halt implementation of its ban on the import of recovered materials as well as its import control standards for recovered materials that in many cases result in a de facto ban due to the technical infeasibility of those measures".<sup>101</sup> Lastly, it was asked to "revise these measures in a manner consistent with existing international standards for trade in recycled commodities", respectively to consider alternative, less trade-restrictive measures with a focus on waste from both foreign and domestic sources.<sup>102</sup>

In response, China declared that it has granted the reasonable implementation timeframes of six months, and fulfilled the applicable transparency obligation under the WTO Agreements.<sup>103</sup> While it submitted to attach great importance to all comments received, it also explained that the import restrictions were core elements of a comprehensive policy framework which aims to protect the environment and public health. To achieve these goals, China expressed its endeavor to "continue to pro-actively practice the values of 'sustainable development' and [...] unswervingly advance the reform of the solid waste import administration regime."<sup>104</sup> At last, it called upon other Members to follow the letters and spirit of the Basel Convention, and reduce, process, and recycle hazardous and other wastes produced within their own territory".<sup>105</sup> Below, we provide an overview and legal assessment of the arguments raised.

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<sup>98</sup> G/TBT/M/74, paras 2.17-2.18.

<sup>99</sup> Members use the TBT Committee i.e. to discuss trade concerns related to specific laws, regulations or procedures that affect their trade, usually in response to notifications.

<sup>100</sup> See: G/TBT/M/74, paras 2.9-2.16; G/TBT/W/472; G/TBT/W/468.

<sup>101</sup> G/TBT/W/468; see similar: G/TBT/M/74, paras 2.9-2.16; G/TBT/W/472.

<sup>102</sup> G/TBT/W/468; see similar: G/TBT/M/74, paras 2.9-2.16; G/TBT/W/472.

<sup>103</sup> G/TBT/M/74, paras 2.17-2.18.

<sup>104</sup> G/TBT/M/74, paras 2.17-2.18.

<sup>105</sup> G/TBT/M/74, paras 2.17-2.18.



#### 4.2.2 Overview and legal assessment of the complaints: procedural aspects

The procedural submissions, in core, called upon China

- i. to observe the normal 60-day timeframe for comment from other Members. The first measure's notification provided for a two-day commenting period, while the second measure allowed 30 days for comments. In both cases, China refused to extend the timeframes for comments or to re-notify the measures with a sufficient time to submit comments in line with the TBT Agreement.
- ii. to afford reasonable implementation timeframes, customary 6 months after the timeframe for comments elapsed. The first act's proposed entry into force was set for 1 September 2017, 45 days after the notification on 18 July.<sup>106</sup> However, the measure was revised in order to clarify uncertainties relating to its scope of application and entered into force in December 2017, leaving a six-month transition period for relevant industries and enterprises to adapt to the new requirements.<sup>107</sup> The second measure, too, entered into force upon a 6 months implementation period. However, in the EU's view a "more realistic transitory period" should not be inferior to nine months.<sup>108</sup>

Article 2.9.4 TBT Agreement calls upon Members to allow, without discrimination, a reasonable time for other Members to comment on notified draft technical regulations. Recommended is a 60 days normal time limit.<sup>109</sup> Further, Article 2.12 TBT Agreement obliges importing Members to provide a 'reasonable interval' – presumably not less than six months – between the technical regulation's publication and its entry into force.<sup>110</sup>

But these obligations are not absolute. If urgent problems of safety, health, environment protection or national security surround the adoption of a technical regulation<sup>111</sup>, or in case a six-month timeframe would be ineffective to fulfil the legitimate objectives the

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<sup>106</sup> Committee on Technical Barriers to Trade, Minutes of the Meeting of 8-9 November 2017, G/TBT/M/73, paras 2.8-2.9. *See also*: Statement by the United States to the Committee on Technical Barriers to Trade from 21-22 March 2018, G/TBT/W/468.

<sup>107</sup> G/TBT/M/73, para. 2.14.

<sup>108</sup> However, according to the EU, only a period of 14 weeks elapsed between the draft measure's notification and their entry into force. Statement by the European Union to the Committee on Technical Barriers to Trade from 21-22 March 2018, G/TBT/W/472.

<sup>109</sup> Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade from 13 November 2002, G/TBT/9, Annex 3. Article 2.9 TBT Agreement is only concerns cases where the regulation may have a significant effect on trade of other Members.

<sup>110</sup> Minutes of the Meeting held on 15 March 2002, G/TBT/M/26.

<sup>111</sup> As listed in Article 2.10 TBT Agreement. *See*: Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, para. 7.502.

regulation aspires, Members may decide to omit the procedural requirements of Article 2.9 and 2.12 TBT Agreement.<sup>112</sup> Arguably, this opportunity is open to China.<sup>113</sup>

#### 4.2.3 Overview and legal assessment of the complaints: material aspects

All commenting Members welcomed the Chinese efforts to protect the environment and public health. Still, the EU, the US, Australia, Canada and Japan expressed the following concerns in relation to the measures' material aspects:

- i. The import restrictions adversely affect international trade and the circulation of resources, as they also apply to tradeable raw materials of commercial value. Examples of such materials are waste PET, associated with "extremely low" hazards, and industrial scrap and plastic that have been sorted and graded.
- ii. The measures fail to provide equal treatment to imports, given that the use and sale of domestically sourced "recovered materials" are subject to regulations that allow for higher levels of impurities.
- iii. China did not provide evidence on the import restrictions' contribution to their stated goals, i.e. by showing "why the standards previously in place are considered insufficient to reach the same goals, taking into account ability of commonly used industrial processes to handle impurities without any significant damage to the environment or public health."<sup>114</sup> Further, the implementation of the notified measures will result in a negative impact on the environment (at least on the short term). This is because alternative recycling capabilities are not available in exporting countries. Thus, scheduled exportations end up in landfills or incineration, instead of being recycled in China and recovered for intermediate materials. For these reasons, the import restrictions in place are more trade-restrictive than necessary to achieve their stated aim to protect public health and the environment.

#### 4.3 General remarks on the applicability of the WTO Agreements to import restrictions on plastic waste

As a preliminary issue, import restrictions on plastic waste are subject to WTO rules insofar as they adversely affect international trade in "goods" – implying the applicability of the relevant WTO Agreements. While the WTO Agreements do not define the notion of "goods", indications as to whether a commodity qualifies as such can be derived from Members' tariff schedules. These reflect Members' specific tariff concessions made in course of trade negotiations, and are based on the Harmonised Commodity Description and Coding System (HS).<sup>115</sup> In line with this, an item listed in the HS can generally be referred to as a good, implying the applicability of the respective WTO Agreements.

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<sup>112</sup> Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras 275 and 290.

<sup>113</sup> Further, the obligations in Article 2.9 TBT Agreement only seem to concern measure 2, while the import bans are subject to the less ambitious requirements of Article X GATT.

<sup>114</sup> G/TBT/W/472, p. 1.

<sup>115</sup> That provides a classification for goods. Grosz 2011, p. 254.

Only in certain exceptional cases, when not shipped abroad as valuable resources for recovery, but *exclusively* as part of an environmental measure, wastes may not qualify as a “good”.<sup>116</sup> This is because they are not offered for sale and do not compete on consumer markets. As a consequence, (limitations on) the transboundary movement would not trigger WTO rules – as they protect market access and the competitive opportunities of imports.

This argument was also considered in the US House of Representatives in relation to Canadian waste imports.<sup>117</sup> In the same context, a representative expressed its opinion on the current system of transnational waste trade being “one that rewards the environmentally irresponsible who don't make the expenditures to provide for disposal of the waste they generate, and punishes the environmentally responsible, those States which make the investments in landfills and then are unable to protect themselves from the import of out-of-State waste.”<sup>118</sup>

In most cases, waste trade and related technical regulations are subject to international trade law. For example, in the *Brazil – Retreaded Tyres* case the fact that waste-related products were under scrutiny did not cause general explanations on the applicability of WTO law. Based on their (separate) HS entries (distinguishing them from used and new tyres), the products were classified as commodities.<sup>119</sup> This conclusion was not questioned by the Parties to the dispute.

The Chinese import restrictions identify the covered products by reference to their HS numbers, which in itself signals the applicability of the TBT Agreement and GATT. The fact that only a small portion of all imported plastic waste has been indeed recycled in China may not alter this conclusion. At a more general level, it can be inferred that import restrictions on plastic waste may come under the purview of WTO law to the extent that they also apply to tradeable raw materials of commercial value with an assigned HS code. Examples of such materials include, but are not limited to, waste PET, associated with “extremely low” hazards, and industrial scrap and plastic that have been sorted and graded.

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<sup>116</sup> Grosz 2011, p. 256.

<sup>117</sup> “With respect to quantitative restrictions, the prohibition on export restrictions, it is my view that if you look at the context in which those provisions occur both in the GATT and in the North American Free Trade Agreement’s context, is clearly market access. In other words, it is prohibited to restrict exports or imports that are destined for a market in the other country. And this says nothing in my view about what you can or can't do with respect to material that is being transported across the boundary, not to be traded in the marketplace, but rather as a means of taking an environmental problem from one country and putting it into another.” Prepared witness testimony of Robert Howse in the US House of Representatives, Hearing before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, on Three Bills Pertaining to the Transport of Solid Waste: H.R. 382, H.R.411 and H.R. 1730, 23 July 2003, p. 77 <<https://www.govinfo.gov/content/pkg/CHRG-108hhr89003/html/CHRG-108hhr89003.htm>>.

<sup>118</sup> Opening words of Paul E. Gillmor, Chairman Subcommittee on Environment and Hazardous Materials Committee on Energy and Commerce, Hearing before the Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, on Three Bills Pertaining to the Transport of Solid Waste: H.R. 382, H.R.411 and H.R. 1730, 23 July 2003, p. 4.

<sup>119</sup> Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/, para 2.4.

### 4.3.1 The legality of import restrictions on plastic waste under basic WTO obligations

To the extent that import restrictions on plastic waste halt or reduce the volume of traded plastic goods, they may be captured by the GATT rules on quantitative restrictions. Article XI:1 GATT sets out a general prohibition on quantitative restrictions on imports and exports.<sup>120</sup> It is a comprehensive provision, covering any acts – be they *de jure* or *de facto* – to the extent that they exhibit an actual or potential limiting effect on the quantity or amount of a product being imported or exported. However, it does not apply to measures that deal with the quality, rather than the quantity of imports. The import-restrictive elements of such acts are to be considered under the TBT Agreement.<sup>121</sup> However, a set of measures “containing both prohibitive and permissive aspects, namely a ban and exceptions” may be challenged as a whole under both the GATT and TBT Agreement.<sup>122</sup>

Applying these considerations to the Chinese import restrictions, one may examine the three measures “as a whole” under Article XI:1 GATT – with the likely outcome to find an initial conflict, given the measures’ strong limiting effect on the quantity of plastic waste imported.<sup>123</sup> But this does not lead to the conclusion that the measures are in violation of WTO law. While at this stage of the inquiry the measures’ motivation is not relevant, it can justify the deviation from Article XI:1 GATT under Article XX GATT.

At the same time, Article 2.1 TBT Agreement may be applicable to the extent that the measures at issue also incorporate a qualitative element. This holds true for the Chinese restrictions at issue to the extent that the use and sale of domestically sourced “recovered materials” are subject to regulations that allow for higher levels of impurities.<sup>124</sup> Article 2.1 TBT Agreement prohibits discriminatory treatment of foreign products, unless it is a sole result of the regulating Member’s aim to achieve a legitimate policy aim. Technical regulations that impede the competitive opportunities of imports as compared to domestic goods (so-called national treatment obligation) are in principle prescribed. But discriminatory treatment against imports – like the one flowing from the Chinese import restrictions – may be justified under the TBT Agreement based on

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<sup>120</sup> Quantitative restrictions refer to any restriction other than duties, taxes or other charges on the importation (or exportation) of goods to the territory of Members. Quantitative import restrictions can take the form of explicit import bans, quotas and any other measures having an equivalent effect: i.e. restrictions on the issuance of import licenses or punitive fines affecting imports. For example, the import ban, the prohibition on the issuance of import licenses, and the fines on importing, marketing, transportation, storage, keeping or warehousing of retreaded tyres adopted by Brazil were found to be inconsistent with Article XI:1 GATT – and this was not disputed by Brazil: Panel Report, *Brazil – Retreaded Tyres*, paras 7.15, 7.34 and 7.372-7.373.

<sup>121</sup> Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1), para. 9.

<sup>122</sup> Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, paras.7.660-7.663.

<sup>123</sup> Plastic Atlas 2019, p 38.

<sup>124</sup> G/TBT/W/472, p. 1.

considerations similar to those that can justify a measure's deviation from GATT principles under Article XX GATT.<sup>125</sup>

## 5. Import restrictions on plastic waste as a legitimate policy response

### 5.1 Prospects of provisional justification under available WTO exceptions

The WTO Agreements recognize Members' right to pursue important policy objectives, including the protection of human health and the environment. The existence of relevant flexibilities is aimed at striking a balance between trade and non-trade interests, respectively Members' rights to invoke an exception and their duty to respect the treaty rights of other Members.<sup>126</sup>

Article XX GATT allows Members to deviate from any GATT provisions (including Article XI:1) to the extent that they impose measures that i) can be provisionally justified under one of the paragraphs of Article XX GATT and ii) meet the requirements of the chapeau. While the list of legitimate policy goals under Article XX GATT is exclusive, Members have great discretion to set the level of protection they deem appropriate in a given situation.

Similar considerations – namely that the measure aims at a legitimate objective and is 'necessary' to achieve it at the level designated by the regulating Member – can render a discriminating or trade-restrictive measure consistent with the TBT Agreement.<sup>127</sup> Given the close relationship of the two agreements in terms of justification, the two provisions should be read harmoniously, in principle providing for the same consistent results.<sup>128</sup>

To the extent that import restrictions on plastic waste's declared goal is, as in the case of the Chinese measures at issue, the "Protection of human health or safety; Protection of

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<sup>125</sup> See, for instance: Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para. 321.

<sup>126</sup> The Appellate Body further notes that "Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, pp. 30-31. In the context of the TBT Agreement, see: Recital six of the Agreement. See also: Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 174.

<sup>127</sup> Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 182.

<sup>128</sup> On the relevance of Article XX GATT jurisprudence in the context of Article 2.1 TBT, see: Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras 7.88 and 7.92.

animal or plant life or health; Protection of the environment”,<sup>129</sup> they may seek justification under the GATT and/or the TBT Agreement. These aims are in fact explicitly recognized as legitimate policy objectives, and may justify otherwise-inconsistent measures under both agreements.

### 5.1.1 Relevance of public health exceptions

Article XX(b) GATT allows for the justification of measures “necessary to protect human, animal or plant life or health”.<sup>130</sup> Provisional justification presupposes that the measure:

- is designed to “protect human, animal or plant life or health”, that is, it at least contributes to these goals (which have been interpreted as to include environmental policy measures aimed at protecting public health), and
- is “necessary” to achieve the goal to the level of ambition as defined by the enacting Member, meaning that there is no other measure less trade-restrictive reasonably available that would contribute to the policy aim to the same extent.

That import restrictions on plastic waste such as the Chinese measures aim to protect human, animal or plant life and health – implying that they come under paragraph b – has not been contested. Questioned is whether the measures are ‘necessary’ to achieve these goals.

The “necessity test” under Article XX(b) GATT involves “weighing and balancing a number of distinct factors”, especially related to the: (i) importance of the values protected by the measure; (ii) its effective contribution to attaining those objectives; and (iii) its trade restrictiveness, especially considering the existence of less trade-restrictive and reasonably available alternatives that would allow to achieve the regulating member’s desired level of protection.<sup>131</sup>

With regards to the first factor, only “few interests are more “vital” and “important” than protecting human beings from health risks” and that of “protecting the environment is no less important.”<sup>132</sup> In some cases, severe restrictions on international trade were considered in principle eligible to be condoned to preserve these fundamental values.

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<sup>129</sup> See, for instance the Chinese notification to the TBT Committee: G/TBT/N/CHN/1233 notified on 15 November 2017. While adjudicators are not bound by a Member's characterization of the objectives it pursues through its measure, in this case neither evidence nor other Member suggest differently.

<sup>130</sup> In line with the Panel in *Brazil – Retreaded Tyres*, reference to environment protection may be understood as a short form of animal and plant life and health. However, this does not exempt Respondents from substantiating risks specifically to animal and plant life and health. Panel Report, *Brazil – Retreaded Tyres*, para. 7.45.

<sup>131</sup> Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, paras. 251-254.

<sup>132</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 144.



With regards to the second factor, while it is true that plastic wastes pose considerable risks on human and animal health, and that their detrimental impact in China as well as in many developing countries gets aggravated by low-quality imports, the import

restrictions' effective contribution to protecting these values, at least on the short term, may be questionable. However, it is worth-noting that successful justification does not require a measure to immediately contribute to its aim, nor must its adoption rely on quantitative projections to the goals it pursues. It lies in the nature of some state actions – for example those addressing climate change – that their effect can only be evaluated over time.<sup>133</sup> Arguably, the same reasoning could hold true in the case of import restrictions addressing plastic pollution, and perhaps most likely in the case of measures that – like the Chinese measures at issue – are integral part of a comprehensive policy framework apt to induce sustainable changes in the practices of the domestic recycling industry, and to result in a better waste management and a higher domestic recycling rate. Testing this hypothesis, supported by evidence, could suffice for the imposing country to comply with its burden of proof under the necessity test.<sup>134</sup>

Finally, as regards the third factor, whether a reasonably available alternative measure exists depends on factors such as: (a) the extent to which the alternative measure contributes to the realization of the policy goal; (b) difficulties of implementation that would impede its tolerance level chosen; and, (c) the trade impact of the alternative compared to the measure at issue. In core, this last step is an evaluation of whether the alternative measure is less trade restrictive *while* preserving China's right to achieve its desired level of protection.<sup>135</sup> Accordingly, a measure justified on public health or environmental grounds cannot be rejected by pointing to a less trade restrictive alternative unless that provides at least the same level of protection.<sup>136</sup> In the case of import restrictions on plastic waste, decisive factors include whether the supposed alternative measures, including "the standards previously in place" can bring about the same contribution to the protection of human and animal health<sup>137</sup> and whether plastic receiver countries do have adequate domestic capabilities to cope with non-compliant imports rather than limiting or *de facto* banning the entry of plastic waste.

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<sup>133</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.

<sup>134</sup> Indeed, "a panel might conclude that [a measure] is necessary on the basis of a demonstration that [it] is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence". Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 251-254.

<sup>135</sup> Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 70.

<sup>136</sup> Gabrielle Marceau, 'The Interface between the Trade rules and climate Change Actions', in Deok-Young Park (ed), *Legal Issues on Climate Change and International Trade Law* (Springer 2016) p.17.

<sup>137</sup> For instance, in contesting the Chinese import restrictions, plastic exporters contended that China not provide evidence on the measures' contribution to their stated goals, i.e. by showing "why the standards previously in place are considered insufficient to reach the same goals, taking into account ability of commonly used industrial processes to handle impurities without any significant damage to the environment or public health." G/TBT/W/472, p. 1.



In this vein, the generally recognized insufficiency of developing countries' waste management capabilities<sup>138</sup> may provide with a strong argument in favour of the necessity of such measures, even where – as in the case of the Chinese restrictions – they

are designed to halt all imports covered by the Basel Convention, and to avoid the generation of further risks – to the *greatest possible extent* available under international trade law. In this perspective, furthermore, it seems unlikely that the import restrictions could be defeated on the basis of reasonably available alternatives. As already below, a comprehensive interpretation of WTO law that takes into account the Basel Convention (explicitly allowing Parties to restrict the importation of covered wastes) as a relevant context, leads to the same conclusion.

### 5.1.2 Relevance of environment protection exceptions

Article XX(g) GATT concerns measures “relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption”. In line with existing jurisprudence, this exception not only encompasses living “resources” like fisheries, but also depletable resources of human value like clean air and renewable resources like biological species. Provisional justification presupposes that the measure:

- “relates to” its stated aim, meaning that a real and close relationship between the trade-restrictive act and its objective exists.
- be “made effective in conjunction with restrictions on domestic production or consumption”, that is, there is a requirement of even-handedness in the imposition of restrictions on imported and domestic products, which however does not mandate the equal treatment of imported and domestic products.

That the Chinese measures relate to the conservation of clean water and marine resources – and thus may come under the scope of the exception – is arguably not controversial. However, the question whether they are made effective in conjunction with restrictions on domestic production or consumption merits further comment. The requirement of even-handedness in the imposition of restrictions on imported and domestic products demands that the measure relates to its stated goal in a reasonable fashion. In case all limitations are placed upon imported products alone, a measure cannot be accepted as primarily or even substantially designed for implementing its stated aim.<sup>139</sup> The Chinese measures are part of a comprehensive policy framework, which speaks in favor of the conclusion that restrictions on foreign and domestic products are imposed in an even-handed manner.

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<sup>138</sup> See above, Section 2.

<sup>139</sup> In contrast, if “[...] no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.” Appellate Body Report, *United States – Gasoline*, p. 21. See also: Marceau 2016, p. 18.

### 5.1.3 Whether import restrictions on plastic waste may be definitively justified under available WTO exceptions

A measure provisionally justified under one of the paragraphs of Article XX GATT must comply with the provision's introductory clause. This second part of the analysis, commonly referred to as the 'chapeau test', no longer deals with the objective of the

measure, but asks whether it is applied and implemented in a reasonable manner and in good faith. This concerns both substantive and procedural elements and serves to prevent the abuse or illegitimate use of the exceptions.<sup>140</sup> Comparable considerations apply under the TBT Agreement as its recital 6 meets the exact wording of the chapeau.

To exclude the misuse or abuse of the exceptions for protectionist purposes, the chapeau prohibits 'arbitrary or unjustifiable discrimination' that occurs 'between countries where the same conditions prevail' and 'disguised restrictions on international trade'. It must however be noted at the outset that no standardized test exists for the chapeau test's application. Rather it is a delicate search for the appropriate equilibrium between Members' right to adopt trade-restrictive measures in the pursuit of important societal values and the right of other Members to trade.<sup>141</sup>

The first condition has been interpreted to proscribe, on the one hand, discrimination that is not rationally connected to the pursuit of the policy objective and, on the other hand, to require Members to consider differences in conditions between countries, rather than to apply a measure in a rigid and inflexible manner. In relation to the Chinese import restrictions, paramount questions to be addressed in this context are, firstly, whether the discrimination between domestic and imported waste plastics is rationally related to the protection of public health and the environment, rather than revealing 'arbitrary' or 'unjustifiable' conduct. Elements to be factored in the analysis could include whether the measures are coherently incorporated into a comprehensive policy framework aimed at achieving clear environmental benefits or whether they may result in a negative impact on the environment (at least on the short term), for instance by deterring recycling in alternative destinations and making increased volumes of scheduled exportations end up in landfills or incineration, instead of being recycled in China and recovered for intermediate materials. At a more general level, with regard to import restrictions other than a ban, market access requirements set out in terms of performance rather than in terms of specific procedures (for instance, by mandating a certain level of recycled material content / biodegradability of plastic products, or a maximum level of impurities in plastic waste) are examples that could facilitate a measure's compliance with the chapeau requirements.<sup>142</sup>

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<sup>140</sup> Marceau 2016, pp. 15 and 19.

<sup>141</sup> Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, para. 157. Further considerations include whether the application of a measure is flexible enough to take into account the specific conditions prevailing in the exporting Member's economy (Marceau 2016, p. 19).

<sup>142</sup> Based on reasonings in X and X cases, references

As to the second condition, it has been interpreted in conjunction with the previous criteria of arbitrary or unjustifiable discrimination in a way that is aimed at overall avoiding situations of disguised protectionism. In line with this, any restrictions on the international trade in plastics, including possible exceptions, must clearly be driven by the measure's stated goal. In the past, one manner to demonstrate that a measure was not a *disguised* restriction was to refer to Members' to undertake good faith efforts to *negotiate* (with no obligation to reach) an across-the-board solution before resorting to

a unilateral measure. Thus, before enacting trade restrictions on (plastic) products, it may be useful that Members reach out in a bilateral, plurilateral or multilateral agreement to other affected (plastic exporting) Members so as to better reflect their major considerations. In the case of the Chinese restrictions, and of any other restrictive measure imposed on plastic waste covered under the Basel Convention, it could likely be argued that this condition is fulfilled.<sup>143</sup>

## 5.2. On the relevance of the Basel Convention for justifying import restrictions on plastic wastes covered by the Plastic Waste Amendments

While the analysis above shows that import restrictions on plastic waste, such as the measures recently adopted by China, may be considered admissible under WTO law, chances arguably increase to the extent that the measures are covered by the Basel Convention. It is well-known that the WTO Agreements must be clarified "in accordance with customary rules of interpretation of public international law".<sup>144</sup> Therefore "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", as well as "any relevant rules of international law applicable in the relations between the parties" must be taken into account.<sup>145</sup> The term 'any relevant rules of international law' indicates a wide mandate to examine public international law sources. These include international custom, general principles of international law and international conventions establishing rules recognized by all

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<sup>143</sup> This is unambiguously the case for import restrictions implemented after the adoption (and *a fortiori*) the entry into force of the Plastic Amendments. Regarding measures that were introduced before that, the fulfilment of this condition may depend upon whether the specific wastes subject to the restrictions could still be considered to be covered by the Basel Convention. In the case of the specific Chinese restrictions at issue, this distinction does not appear dispositive as the measures at issue were already considered to be consistent with China's rights and obligations as a party to the Basel Convention before the entry into force of the Amendments (see Section 4.1.1 above).

<sup>144</sup> Article 3.2 Dispute Settlement Understanding (DSU). We note that the same conclusion was to be drawn without the explicit confirmation in Article 3.2 DSU, given the WTO Agreements' nature as treaties under public international law. Read in this context, the provisions' last sentence "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" merely clarifies that the WTO judiciary cannot modify the Agreements, but does not limit the extent to which Members may conclude other treaties that can *influence their mutual WTO rights and obligations*. (Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits', *Journal of World Trade (Law-Economics-Public Policy)* vol. 37 no. 6, 2003, pp. 1001–1003).

<sup>145</sup> Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT).

parties.<sup>146</sup> Accordingly, MEAs like the Basel Convention play an important role in interpreting the WTO Agreements: in a trade dispute between Parties to the Basel Convention<sup>147</sup>, the treaty shall be taken into account when applying WTO provisions to restrictions on the transboundary movement of covered wastes.

In addition, a MEA with a broad membership indicates a genuine and globally recognized environmental problem, and reflects a response agreed on by the international community.<sup>148</sup> In line with this, the Plastic Waste Amendments' adoption by the Convention's nearly universal membership denotes the recognition of management of plastic wastes as a global environmental and human health<sup>149</sup> concern, and indicates trade control measures as a justifiable response. Therefore measures explicitly permitted by the Basel Convention shall arguably be found 'necessary' under Article XX(b) GATT. *Mutatis mutandis*, this line of reasoning also holds true when it comes to evaluating the measures' compatibility in line with the chapeau of Article XX GATT and/or the sixth recital of the TBT Agreement. Restrictions under the Basel Convention – that is, restrictions imposed only on the importation of covered plastic wastes – arguably qualify as a justifiable (that is, rationally connected) response to the risks posed by them on human health and the environment. Furthermore, to the extent that the Basel Convention is a MEAs with quasi-universal membership, and that the Plastic Waste Amendments were approved by consensus, it could safely be contended that adequate opportunities have been provided to all exporting Members to negotiate a common solution before resorting to trade-restrictive measures.

Furthermore, and despite the failure to provide an unambiguous answer to the matter within the WTO up until now, one may even argue that this conclusion should hold true irrespective of whether both the imposing Member/s and the affected Member/s did ratify the Convention.<sup>150</sup> Such a reasoning would be consistent with the objective to seek avenues for making WTO responsive to the challenge of promoting sustainable trade in plastic waste in line with the mandate to endorsed in the Preamble to the WTO Agreement.

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<sup>146</sup> Cf. Article 38 para. 1 Statute of the International Court of Justice.

<sup>147</sup> The determination whether a treaty is relevant for the purposes of interpretation shall be made on a case-by-case basis and take into account the subject of the dispute and the content (i.e. subject-matter) of the rules under consideration (Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties', *Journal of World Trade (Law-Economics-Public Policy)* vol. 35, no. 6, 2001, p. 1087. It may not be contested that the Basel Convention is a relevant treaty in interpreting trade-restrictions imposed on the transnational movement of covered wastes.

<sup>148</sup> Marceau 2001, p. 1097.

<sup>149</sup> Scientific evidence on the health effects of plastics is limited. However, given the nature and scale of possible human health effects, the precautionary principle shall be applied. Gallo et al. 2018, p. 7; OECD 2018, p.5; UNEP 2016, p. 101f.

<sup>150</sup> This conclusion is supported by the general principle of interpretation against conflicts (developed under Article 30 VCLT) and the obligation to interpret treaty provisions in the context of other rules of international law applicable between the parties (Article 31.3(c) VCLT). Applying the *lex specialis* rule leads to the same result. In line with this principle WTO Members that are parties to the MEA consented that the specific circumstances addressed by the MEA would be authorized pursuant to Article XX GATT. (Marceau 2001, p. 1097; *see similar*: Pauwelyn 2003, p. 1024).

Lastly, and accordingly, the existence of a MEA shall not hinder Members to take more ambitious measures as agreed by the international community. Article 4 of the Basel Convention itself states “Nothing in this Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of this Convention and are in accordance with the rules of international law, in order to better protect human health and the environment.”<sup>151</sup> As Marceau notes, “Article XX permits certain unilateral actions to be taken to promote environmental goals, even in the absence of a MEA on the subject-matter. It would be illogical if a WTO Member, acting in furtherance of the goals

of a relevant MEA as a party to such an MEA, were to be placed in a worse position than if no such MEA existed.”<sup>152</sup> Consequently, trade restrictions that go beyond the Basel Convention may be justified on a case-by-case basis.

## 6. Conclusion

Evidence on the detrimental health and environmental effects of plastic pollution, together with data on the magnitude of the problem, helped to increase public awareness and to trigger policy action. The Basel Convention embodies a unique international legal framework set to address the adverse effects of wastes, including rules on their transboundary movement. Given its material scope and nearly universal membership, this MEA has been identified as the ideal setting to tackle the issue of plastic waste pollution at a global level.

Since the 1 of January 2021, most plastic wastes – except uncontaminated, pre-sorted plastic materials prepared and suitable for immediate recycling – are subject to the Basel Convention’s rules. This will support Parties their determination of whether they wish to agree to such movements, including to assess whether they have capacity to manage and contribute to sustainable trade in plastic wastes. Important questions concerning the Amendments’ implementation, however, still remain to be answered by the Parties. In addition, the US’s absence from the Basel Convention implies some uncertainty with regard to the treatment of its plastic waste exports. They are only subject to legally binding rules within the OECD Control System for Waste Recovery, to date restricted to “hazardous” plastic waste due to the US’s objection to incorporate all three Plastic Waste Amendments to the Basel Convention.

This study evidences, however, that trade measures with a genuine design to address the adverse environmental and health impacts of plastic pollution – including import restrictions on plastic wastes – do not contrast with WTO rules. WTO rules leave ample room to accommodate for measures that strive to achieve legitimate policy goals – fostering, rather than frustrating, sustainable trade in plastic waste. Notwithstanding that the question on the relationship of MEAs and trade rules has never been addressed in WTO dispute settlement, the Basel Convention reaffirms this conclusion: as relevant context, it serves as guidance for the interpretation of trade rules. As a MEA with a broad membership, it indicates plastic pollution, that results from unregulated plastic waste

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<sup>151</sup> Paragraph 11, Article 4 Basel Convention.

<sup>152</sup> Marceau 2001, p. 1096.

trade, as a genuine and globally recognized environmental and health problem and denotes trade control measures as a justifiable response. In sum, this contribution demonstrates the WTO's potential to respond to 21<sup>st</sup> century challenges. At the same time, it underlines the challenges posed by sometimes limited political will, which holds back cooperation that could foster the fulfilment of shared environmental and climate change objectives.