

United State's Plastic Waste Trade and International Law

Impact, the Basel Convention, and Future Prospects

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Abstract

The global proliferation of plastic waste has reached alarming quantities, yet there are no universally acknowledged solutions in sight. This article examines how the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes has addressed the issue of plastic waste import and exports, especially in relation to the United States as a non-state party, due to its significant role in plastic waste generation. Furthermore, this article analyses regional responses to the shortcomings of the Basel Convention, as well as investigating the legal pathways currently used by the United States, including an examination into potential future trade agreements. The article emphasises on the United States as a State prone to non-engagement, and how it uses legal and political manoeuvring to avoid treaty obligations; shedding a light on the critical need for international cooperation in relation to plastic waste management.

Keywords: plastic waste trade; United States of America; Basel Convention; Bamako Convention; marine plastic pollution

1. Introduction

The world generates approximately 350 million metric tons of plastic waste on a yearly basis. Today's society bears a stamp of a 'throw away culture', where only a fraction (probably less than 20%) of plastic waste is recycled, whereas the rest is incinerated or disposed of.¹ Plastic waste management currently follows a linear structure, where single-use plastics are dominating the market, and are almost always discarded

after its initial use.² When hazardous wastes are improperly disposed of in landfills, leakages of plastics, and other toxic chemicals leaches into the ground- and water sources, or are released into the atmosphere through incineration.³ There are well documented negative effects arising from the huge amounts of generated plastic waste, including contributions to resource depletion and the release of greenhouse gas emissions causing harm to the ecosystems.⁴

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¹ Roland Geyer, 'Production, use, and fate of synthetic polymers' in Trevor M Letcher (ed), *Plastic Waste and Recycling: Environmental Impact, Societal Issues, Prevention and Solutions* (Elsevier 2020) 21; Eva Romée van der Marel, 'Trading Plastic Waste in a Global Economy: Soundly Regulated by the Basel Convention?' (2022) 34 *Journal of Environmental Law* 477.

² Alessio Miatto, Barbara K Reck, Jinghan Di, Thomas E Graedel 'United States plastics: Large flows, short lifetimes, and negligible recycling' (2021) 167 *Resources, Conservation and Recycling* 1.

³ Zada Lipman, 'Trade in Hazardous Waste' in Carmen G Gonzalez, Jona Razzaque, Shawkat Alam and Sumudu Atapattu (eds.), *International Environmental Law and the Global South* (Cambridge University Press 2015).

⁴ Geyer, *supra* n. (1) 24; Romée van der Marel, *supra* n. (1).

Evidently, the enormous effects the massive volumes of plastic waste have on the environment, and on human health is too broad to tackle in this article. Accordingly, this article will focus on the United States of America (U.S.), and its plastic waste trade under international law, as well as some aspects of the environmental impacts arising from plastic waste.

In a 2016 study, it was found that the U.S. generated 42 million metric tons of plastic waste – the highest number of produced plastic waste in the entire world. Furthermore, the amount of U.S. generated plastic waste ending up in the environment, especially in marine environments, was estimated to be up to five times larger than estimates made for 2010, making the U.S.'s contribution to marine plastic pollution among the highest worldwide.⁵ When plastic waste is washed out to sea, wave- and wind forces, as well as solar radiation, break down the chemical bonds in plastic structures. This causes large plastics to break off into smaller components, known as micro- and nanoplastics. Fragmentation of such plastics increases the particle surface area, allowing for leakages of toxic chemicals into the environment.⁶ Besides the environmental impacts, plastic pollution poses a threat to human health. The chemical additives deriving from plastic products are associated with health issues such as cancer, infertility, and neurodevelopmental disorders.⁷ Accumulated micro- and nanoplastics in the environment inevitably

travel up the food chain through human ingestion of food, and aquatic species.⁸ Stagnant plastic waste also attracts harmful pathogens, which may be detrimental to human health.

Undoubtedly, plastic pollution is an imminent danger to the environment, as well as to human health. However, despite this, there are still neither any sound, uniformly defined goals around sustainability, in relation to plastic waste, nor any universally agreed upon approaches to tackle the issue under international law.⁹ Hence, due to the growing threats of plastic pollution, this article will closely examine how the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and its Plastic Waste Amendments, adopted in 2019 to include the import and export of plastic waste, can efficiently tackle this issue. As the U.S., as aforementioned, was found to be one of the top worldwide polluters in 2016, along with the fact that the U.S. is a non-State Party to the Basel Convention, the main focal point will be the U.S.'s stance on plastic waste contribution.

In section two, key events from the 1970s and 1980s will firstly be introduced, as these lead to public outcries on the need of a uniform convention to tackle the issues of cross-border movements of hazardous wastes. Furthermore, the scope and functioning of the Basel Convention will be described, followed by the Plastic Waste Amendments, and an explanation of the Import Ban imposed by States in the Global South. Section two continues with an analysis of the current shortcomings of the Convention, and concludes with the regional, African Ba-

⁵ George G Leonard, Jenna R Jambeck, Natalie Starr, Nicholas J Mallos, Theodore R Siegler, 'The United States' contribution of plastic waste to land and ocean' (2020) 6 *Science Advances* 1.

⁶ National Academies of Sciences, Engineering, and Medicine (U.S.). Committee on the United States Contributions to Global Ocean Plastic Waste, *Reckoning with the U.S. role in global ocean plastic waste* (National Academies Press 2022) 110.

⁷ 'Plastic Pollution Is a Human Health Issue' (*Plastic Health Coalition*) <<https://www.plastichealthcoalition.org/>> accessed 3 April 2023.

⁸ Anastasia Telesetsky and Rebecca Bratspies, 'Global Plastic Pollution: Curbing single-use plastic production' in Erika Techera, Jade Lindley, Karen N. Scott and Anastasia Telesetsky (eds.), *Routledge Handbook of International Environmental Law* (2nd edn., Routledge 2021) 458.

⁹ Romée van der Marel, *supra* n. (1).

mako Convention – created in light of the Basel Convention not imposing sufficiently strict rules on the transboundary movement of hazardous waste. In view of the Bamako Convention, the Malabo Protocol will also be introduced in this section.

In section three, the U.S.'s plastic waste generation, including the amount it seeks to export will be introduced, as well as the effects the U.S. is facing as a non-party to the Basel Convention. As an example, despite the U.S.'s contributions to the transboundary movements of hazardous wastes, it is not bound by the substantive legal obligations set out in the Basel Convention.¹⁰ Moreover, the section includes an overview of the U.S.'s previous history as a leading player in the drafting of environmental treaties, and how it now essentially engages in active treaty avoidance; also at play in relation to the Basel Convention. Finally, the section finishes off with how the U.S. has tackled the Import Ban of plastic waste imposed by China, the U.S.'s largest plastic waste importer, pre-Plastic Waste Amendments.

In section four, explorations of the U.S.'s continuing legal possibilities to export plastic waste are analysed, where current bilateral agreements in conformity with Article 11 of the Basel Convention are highlighted, including the pending trade deal with Kenya, as well as opportunities for plastic waste export with Member States of the Organization for Economic Co-operation and Development (OECD). The section concludes with some examples of ways in which the U.S. could adopt domestic infrastructure to handle its plastic waste, and what domestic measures regarding the issue that have

been proposed by the U.S.'s Environmental Protection Agency (EPA).

What this article seeks to address is what the regulatory space is for the U.S., including the legal possibilities under the Basel Convention, in view of the Plastic Waste Amendments, and the Ban Amendment, to export its plastic waste. What is more, addressing what the current legal situation is, following the Global South Import Ban, for the U.S. to legally export its plastic waste. This article will take the U.S.'s position as a non-State Party to the Basel Convention into account, and investigate legal possibilities of plastic waste export going forward. The article contributes to the existing literature as an analysis of the impact of U.S. generated plastic waste, and its regulation under international law in light of, and in relation to the Basel Convention and its recognized bilateral agreements.

2. Basel Convention

In this section, the historical background leading up to the drafting of the Basel Convention will firstly be described, followed by its scope, and objectives. Furthermore, the Plastic Waste Amendments from 2019, introduced and adopted at the 14th meeting of the Conference of State Parties to the Convention (COP14) will be discussed, including the impact of the Amendments on the relationship between Parties and non-State Parties. Additionally, the Import Ban on plastic waste, implemented by key importing States in the Global South, will be explained in connection with the U.S.'s exports of plastic waste to the area. Finally, this section concludes with current shortcomings of the Basel Convention, which will bring about the relevance of the regional, African Bamako Convention, and the Malabo Protocol.

¹⁰ C Scott Fulton, Tseming Yang, 'The Case for U.S. Ratification of the Basel Convention on Hazardous Waste (2015) Santa Clara University Legal Studies Research Paper No. 1-15, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2688173> accessed 24 April 2023.

2.1 Historic Background

During the 1970s and the 1980s, the wealthy Global North began acknowledging the detriments of hazardous wastes, and thus, started imposing stricter disposal regulations for such wastes.¹¹ Consequently, the results were high cost increases, due to labour costs and environmental restrictions on the disposal of hazardous waste. According to a study conducted in the late 1980's, the costs of disposing one ton of hazardous waste in an industrialised country ranged between USD \$100–\$2000. Meanwhile, the cost for the same procedure in Africa was merely a fraction of that price, ranging between USD \$2.50–\$50.¹² The study highlights the economic incentive for waste brokers to look for low-cost options abroad to transfer their disposals. However, this transfer of responsibility from the Global North to the Global South is a forthcoming issue, which will be further elaborated on in this section.

The *Khian Sea* incident of 1986 involved a cargo ship, leaving docks from Philadelphia, U.S., loaded with 14,000 tons of toxic incinerator ash. The company handling the waste had intended to dump it in the Bahamas, after having been refused to send it to New Jersey. However, the shipment was turned away, following the Bahamian authorities learning about the true character of the cargo. *Khian Sea* spent the next 18 months at sea in search of a location to dispose of the remainder of the toxic cargo. The ship eventually ended up in Haiti, where some of the load was sold as 'fertiliser'. Once the Haitian government detected the transaction, it ordered the *Khian Sea* to remove the waste, though the ship left without a recovery operation. The

¹¹ Center For Progressive Reform, *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties* (White Paper, No. 1201, 2012).

¹² Lipman, *supra* n. (3).

rest of the cargo carried on the *Khian Sea* 'disappeared' on a route between Singapore and Sri Lanka. The cargo crew later admitted the waste had been dumped somewhere in the Indian- and Atlantic Ocean.¹³

Another notable case involving the illegal disposal of hazardous waste occurred during the *Koko* incident in Nigeria. A Nigerian businessman negotiated with an Italian contractor to store 8,000 barrels of toxic waste in the Nigerian farmland. The waste caused significant impacts on public health and caused tremendous harm until it was removed.¹⁴ The *Khian Sea*, and the *Koko* incident sparked public debate regarding the transboundary movements of hazardous wastes, leading up to the drafting and signing of the Basel Convention in 1989.¹⁵

2.2 Scope of the Basel Convention

The Basel Convention has three objectives: (1) to reduce transboundary movement of hazardous wastes to a minimum, and in conformity with environmentally sound management; meaning the waste must be disposed of efficiently, in appropriate facilities, and in a safe manner; (2) to dispose of such wastes as close to the source of generation as possible; (3) to minimise hazardous waste generation as a whole.¹⁶ The scope is extensive, and the Convention distinguishes be-

¹³ Hao-Nhien Q Vu, 'The Law of Treaties and Export of Hazardous Waste' (1993) 12 *UCLA Journal of Environmental Law and Policy* 389; Center for Progressive Reform, *supra* n. (11).

¹⁴ Ifeoma M Onyerikam, 'Achieving Compliance With the Basel Convention on Transboundary Movement of Hazardous Wastes' (LLM thesis, University of Alberta 2007).

¹⁵ 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.

¹⁶ Tony George Puthucherril, 'Regulating Toxic Chemicals, Pesticides, and Hazardous Wastes: A TWAIL approach to the BRS legal regime for a detoxified future' in Erika Techera, Jade Lindley, Karen N Scott and Anasta-

tween different types of waste streams in a series of Annexes. 'Hazardous wastes', under Annex I, provides for a broad definition of wastes considered to be of a hazardous nature. 'Other wastes' requiring special circumstance, including household garbage and ashes from such wastes are covered in Annex II. Wastes presumed non-hazardous, thereby falling outside the scope of the Convention, are covered in Annex IX, and include various amounts of metals, glass, and ceramic waste.¹⁷ Annex III expands hazardous characteristics, such as poisonous and ecotoxic, and Annex VIII list wastes presumed hazardous.¹⁸ The intent of the Convention is neither to prohibit, nor restrict trade. Rather, it seeks to offer flexible regulatory principles to guide the operation in favour of the promotion of environmental protection, justice and sound management, as well as sustainable development and promotion of public safety, health and international cooperation.¹⁹ Furthermore, the Convention affirms the sovereign rights of States, given the ability to unilaterally prohibit imports of hazardous wastes, and offers the opportunity to redefine non-hazardous wastes as hazardous.²⁰

The Basel Convention's key provisions can be summarised in Articles 4, 6, 8, 9 and 11. Consecutively, stemming from the Plastic Waste Amendments, (further elaborated upon in the succeeding subsection) the new 'prior informed

consent' (PIC) procedure is found in Article 4 and 6. Article 4(1) contains the PIC-procedure governing the waste trade between State Parties, and prohibits hazardous waste trade where explicit consent has not been obtained for the import of the waste in question. Additionally, Article 4(2)(b) emphasises the obligation of exporting States to ensure the availability of adequate disposal facilities for the environmentally sound management of the hazardous waste in the importing State, and Article 4(5) prohibits State parties from engaging in export of hazardous wastes with non-Parties to the Convention.²¹ Moreover, Article 6 encompasses the specific requirement for the PIC-procedure, such as the requirement of a written confirmation from the importing State, which provides the affirmative consent, or the denial of the shipment. On top of that, Article 6 imposes a prohibition of export, prior to confirmation and finalisation of the specifications of the State's consent, and the environmentally sound waste disposal management.²² Articles 8 and 9 incorporate the consequences provoked when the exported waste is improperly disposed of. Article 8 contains a duty of the exporting State to re-import the hazardous waste in cases where the shipment cannot be concluded in accordance with the terms of the contract, unless alternative arrangements can be made to dispose of the waste in an environmentally sound manner.²³ Meanwhile, Article 9 elaborates on what constitutes illegal traffic. These include shipments conducted without meeting the PIC-requirement, consent obtained through falsified documents, misrepresentation or fraud, or shipments performed with the intent of illegal disposal of hazardous wastes;

sia Telesetsky (eds.), *'Routledge Handbook of International Environmental Law'* (2nd edn., Routledge 2021) 191.

¹⁷ Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (adopted 10 December 1999, not yet in force) UN Doc UNEP/CHW.1/WG/1/9/2.

¹⁸ Romée van der Marel, *supra* n. (1).

¹⁹ Puthucherril, *supra* n. (16) 191.

²⁰ Tony George Puthucherril 'Two Decades of the Basel Convention' in Erika Techera, Jahid Hossain Bhuiyan, Shawkat Alam, and Tareq ME Chowdhury (eds.), *'Routledge Handbook of International Environmental Law'* (1st edn, Routledge 2013) 295.

²¹ Basel Convention, *supra* n. (15) article 4(1), article 4(5); Fulton and Yang, *supra* n. (10).

²² Basel Convention, *supra* n. (15) article 6; Fulton and Yang, *supra* n. (10).

²³ Basel Convention, *supra* n. (15) article 8.

contradicting the aim of the Basel Convention.²⁴ Another noteworthy provision to mention is Article 20 on the settlement of disputes. In the case of an arising dispute between State Parties as to the interpretation, application, or compliance with the Basel Convention, the Parties shall seek to settle the dispute through negotiation, or other peaceful means. Furthermore, if settlement is not possible, the parties shall submit the case to the International Court of Justice (ICJ) or to arbitration. Upon ratification of the Basel Convention, States accept the jurisdiction of these dispute settlement alternatives *ipso facto*.²⁵

Finally, and importantly, the general obligation under Article 4(5) of the Convention declares that a Party shall not permit import or export of hazardous wastes to non-State Parties.²⁶ Nonetheless, Article 11 provides State Parties with the option of entering into bilateral, multilateral, regional agreements, and arrangements of transboundary movement of hazardous wastes with State Parties or non-State Parties, provided such agreements do not derogate from the required environmentally sound management of hazardous wastes set out in the Convention.²⁷

2.3 Plastic Waste Amendments

By virtue of the growing awareness surrounding the negative impacts of plastic waste on sustainable development, and the pressing global issue plastic debris management has become; amendments were made to the Convention in 2019 in order to rectify plastic previously not being included in the Annexes defining what constitutes hazardous wastes. These were adopted at the COP14, with the objective to enhance control of the transboundary movements of plastic waste, in conjunction with an overarching aim to pro-

tect human health and the environment.²⁸ The Plastic Waste Amendments were inserted into Annex II, falling within the category of 'other wastes'. Therefore, plastic waste, including mixtures of it, was clarified as included within the scope of the Basel Convention, hence becoming subject to the obligations set out in Article 4.²⁹

Furthermore, the Plastic Waste Amendments included new rules on the aforementioned PIC-procedure, where the exporting State needs explicit consent from the importing State when conducting shipments involving plastic waste.³⁰ The rules were introduced in order to protect developing States in the Global South from unfair exploitation from industrialised countries in the Global North, due to the historical trend of unfair export of hazardous wastes. Moreover, the meeting launched an updated version of the Technical Guidelines, first adopted in 2002, on the environmentally sound management of plastic waste. In order to endorse the prevention, or minimization of plastic generation, as well as enhancement, improvement, and promotion of environmentally sound management, the 'Plastic Waste Partnership' was established. The Plastic Waste Amendments serve a crucial part of the global plastic economy, as the Basel Convention currently has 190 State Parties, many of which rely on the trade of plastic waste.³¹ Moreover, the Plastic Waste Amendments provide an important step towards addressing the 'throw away

²⁸ 'Basel Convention Plastic Waste Amendments' (*UN Environment Programme: Basel Convention: Controlling transboundary movements of hazardous wastes and their disposal*) <<http://www.basel.int/Implementation/Plasticwaste/Amendments/Overview/tabid/8426/Default.aspx>> accessed 23 February 2023.

²⁹ Romée van der Marel, *supra* n. (1).

³⁰ Miho Ligare 'Industry's Federal Government Ties Lead to Unjust Plastic Waste Export to Kenya' (*Surfrider Foundation*) <<https://www.surfrider.org/coastal-blog/entry/industrys-federal-government-ties-lead-to-unjust-plastic-waste-export-to-kenya>> accessed 6 April 2023.

³¹ Romée van der Marel, *supra* n. (1).

²⁴ Basel Convention, *supra* n. (15) article 9.

²⁵ Basel Convention, *supra* n. (15) article 20.

²⁶ Basel Convention, *supra* n. (15) article 4(5).

²⁷ Basel Convention, *supra* n. (15) article 11.

culture' of the Global North, and highlights the consequences consumerism culture has, given the widespread use of single-use plastics.³²

Additionally, another drastic change concluded in the Plastic Waste Amendments is the restriction on State Parties to engage in plastic waste transactions with non-State Parties. Hence, the biggest impact would, in practice, fall on non-State Parties.³³ However, despite the prohibition, opportunities still remain for the U.S. to conclude valid agreements under Article 11 of the Basel Convention, as long as the PIC-procedure is included. Notwithstanding the remaining contractual opportunities for the U.S., the State remained the only Member State within the OECD opposing the Plastic Waste Amendments; ostracising itself from the rest of the international community with regards to plastic waste.³⁴

2.4 Restrictions of Plastic Waste Imports from the Global South

In 2017, China forbade the import of 24 solid waste materials, including all forms of unprocessed plastic, under an Import Ban regulation by means of a campaign against foreign garbage. Moreover, China tightened their regulations on the levels of impurities permissible in recyclable wastes.³⁵ These plans were finalised in 2018 when China ceased all imports of the

banned waste materials, officially declaring a global 'plastic waste crisis'. Exporting countries were left with gigantic volumes of (plastic) waste at their own borders, with China having closed its doors on plastic waste imports. The Global North quickly began looking for new export markets, where countries in Southeast Asia seemed attractive. However, these countries also acknowledged the negative impacts arising from importing low-quality, chemically contaminated plastic waste, that would have nowhere to go but the environment.³⁶ Therefore, Thailand first followed China's footsteps in 2018, banning imports of e-waste and plastic waste; followed by India in 2019, amending its rules on hazardous waste import to prohibit solid plastic waste.³⁷ Furthermore, Vietnam, the Philippines and Malaysia took measures in the same year to restrict the import of wastes.³⁸ These decisions have come to panic the industrialised part of the world, including the U.S., heavily relying on the exportation of, in particular, plastic waste, to the Global South.³⁹ These restrictions on plastic waste imports are relevant given the high records held by the U.S. in terms of plastic waste exports, especially to China. This will further be elaborated upon in the next chapter.

2.5 Shortcomings of the Legal Regime of the Basel Convention

The creation of the Basel Convention was certainly a landmark Treaty to officially recognize the harmful effect arising from the transboundary movements of hazardous wastes from the developed Global North to the developing Global South. However, it must be noted that compli-

³² Telesetsky & Bratspies, *supra* n. (8) 461.

³³ Emily Benson and Sarah Mortensen 'The Basel Convention: From Hazardous Waste to Plastic Pollution' (*The Center for Strategic and International Studies (CSIS)*, 7 October 2021) <<https://www.csis.org/analysis/basel-convention-hazardous-waste-plastic-pollution>> accessed 8 April 2023.

³⁴ Rina Li 'Scrap Collector: US stands as lone OECD opponent of Basel plastic amendment' (*WasteDive*, 19 July 2019) <<https://www.wastedive.com/news/scrap-collector-us-opposes-basel-plastic-amendment-oecd/559106/>> accessed 8 April 2023.

³⁵ Shiming Yang, 'Trade for the Environment: Transboundary Hazardous Waste Movements After the Basel Convention' (2020) 37 *Review of Policy Research* 713.

³⁶ Doug Woodring and Trish Hyde, 'Prepare for Round Three of the Plastic Waste Trade War' (2019) 75 *Plastic Engineering* Volume 32.

³⁷ Yang, *supra* n. (35).

³⁸ Yang, *supra* n. (35).

³⁹ Yang, *supra* n. (35).

ance with the Basel Convention is generally quite low, due to the failure of establishing reliable mechanisms for liability and compensation.⁴⁰ As there is no international structure in place to compel waste traders to pay compensation for causing damage, there is also no (economic) incentive to comply with the Basel Convention.

Two examples of deliberate non-compliance of the Basel Convention are two events of 2006, where the French ship *Clemenceau*, and *SS Norway*, transported asbestos to India, a toxic waste harmful to human health, under falsified information regarding the content of the cargo. As the shipments were refused, further attempts were made to move the waste to other developing countries.⁴¹ Conclusively, these cases explicitly highlight how developed nations have attempted to export toxic waste to the Global South, where environmental regulations, and enforcement procedures are much lower than in the Global North. It sheds light on the vast issues of non-enforcement to the Basel Convention.

Illegal trade of hazardous wastes to the Global South abounds due to several factors. Firstly, for a long time the Basel Convention fell short by providing for a so-called 'recycling loophole'. In short, this loophole allowed traders to claim hazardous wastes as repairable, or recyclable to remain outside the scope of the Convention. The loophole was first removed with the introduction of the Ban Amendment, further elaborated on in section four. As the Basel Convention requires prior informed consent, the removal of this obligation – by remaining outside of the scope of the Convention – puts an extremely hard burden on the importing State to detect illegal hazardous waste trade, and analyse shipment paperwork at the border. It also removes the obligation of the exporting State to ensure adequate handling of

the hazardous waste.⁴² This is of major concern as many Southern countries lack the appropriate facilities to sufficiently dispose of the waste in a safe manner. Secondly, the import of hazardous wastes to the Global South remains due to both ignorance of the risks posed to human health, and the environment, in addition to the often economic necessity of these shipments to support a failing economy. This has specifically been an issue related to plastic waste given the fact that commercial, private actors established in countries in the Global North have disguised exported plastic waste (to the Global South) as being recyclable waste in the past.⁴³ This engenders a problem as much of exported plastic waste originates from single-use plastics; mainly produced with the intention to immediately be discarded i.e., it is not recyclable. Examples of such plastics include plastic bags, pallet wraps, plastic bottle caps and packaging containers.⁴⁴

2.6 Bamako Convention

The Bamako Convention is a Treaty among African nations on the prohibition of the import of hazardous wastes into Africa. The African Union (AU) found the Basel Convention inadequate in the sense that it did not provide for a total prohibition on the transboundary movement of hazardous wastes. In the wake of several illegal dumping events on African soil, conducted by countries in the Global North, such as the aforementioned *Koko* incident, the AU demanded a total import ban on hazardous wastes from the Global North to the Global South, in order to

⁴⁰ Onyerikam, *supra* n. (14).

⁴¹ Onyerikam, *supra* n. (14).

⁴² 'Repairing the 'Repairables Loophole' in the e-Waste Technical Guideline' (*Basel Action Network*, 2017) <<https://www.ban.org/2017/10/23/repairing-the-repairables-loophole-in-the-e-waste-technical-guideline/>> accessed 4 April 2023.

⁴³ Lipman, *supra* n. (3).

⁴⁴ Telesetsky and Bratspies, *supra* n. (8) 459.

protect the continent.⁴⁵ Furthermore, the position of the AU was dictated by the feeling that African countries would be deficient in the effective control of transboundary movements of hazardous wastes, due to the lack of appropriate institutional, and technological means.⁴⁶ As the Basel Convention failed to impose such obligations at the time, the Bamako Convention was adopted in 1991 in line with Article 11 of the Basel Convention, encouraging State Parties to enter into bilateral, multilateral, or regional agreements to help achieve the overarching objectives of the Basel Convention.⁴⁷

The formatting and language of the Bamako Convention mimics that of the Basel Convention. Like the Basel Convention, both instruments are based on the PIC-requirement. Consent must be given prior to shipments of hazardous wastes, in a written format, delivered to the relevant authority in the receiving State.⁴⁸ In the instance of an invalid consent procedure, the shipment is

deemed as illegal traffic under Article 9. Moreover, Article 8 contains a duty to re-import hazardous waste shipments not concluded with the correct terms of the contract.⁴⁹ However, key differences are set out in the general obligations of the Bamako Convention. Firstly, the Bamako Convention is *de facto* prohibiting all imports of hazardous wastes into the African continent by imposing a complete import ban, including limitations on the regional transboundary movements of hazardous wastes through rigid, strict controls. Secondly, the Bamako Convention imposes significantly harsher obligations than those set out in the Basel Convention, such as strict and unlimited liability on violations. Thirdly, the Bamako Convention prohibits dumping of hazardous wastes in the ocean and inland waters, as well as prohibits incineration of hazardous wastes. Finally, the disposal of hazardous wastes must be conducted in an environmentally sound manner.⁵⁰ The outcome goal of the Bamako Convention is to promote a cleaner production of industrial waste, and to impose punitive measures on acts deemed illegal under the Convention.⁵¹

The Bamako Convention regards imports of hazardous wastes into Africa as illegal, criminal acts. Article 9(2) hence provides that each State Party introduces the appropriate national legislation for imposing criminal sanctions on all persons involved with illegal imports.⁵² Besides, penalties are expected to be sufficiently high to punish, and deter trafficking of hazardous wastes – indicating that the Bamako Convention is regulated through domestic penal law. Moreover, State Parties are urged to cooperate

⁴⁵ Matiangai VS Sirleaf, 'Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Wastes in Africa' (2018) University of Pittsburgh School of Law Working Paper No. 2018-10, 35/2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3161739> accessed 19 May 2023.

⁴⁶ UNEP 'Conference of the Parties to the Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Report by the Secretariat on the Implementation of the Bamako Convention' (16 Jan. 2018) UNEP/BC/COP.2/.

⁴⁷ 'The Bamako convention' (*UN Environment Programme*) <<https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/meeting-international-environmental>> accessed 19 May 2023; Basel Convention, *supra* n. (15) article 11.

⁴⁸ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177 article 6; Damilola S Olawuyi, 'The Emergence of International Environmental Law on Chemicals- An Appraisal of the Role of Soft Law' (2007) Hamad Bin Khalifa University College of Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996430> accessed 19 May 2023.

⁴⁹ Bamako Convention, *supra* n. (48) article 8, article 9.

⁵⁰ Bamako Convention, *supra* n. (48) article 4; UN Environment Programme, *supra* n. (47).

⁵¹ Sirleaf, *supra* n. (45); UN Environment Programme, *supra* n. (47).

⁵² Bamako Convention, *supra* n. (48) article 9(2).

to ensure no imports of hazardous wastes from a non-State Party enters the territory of a State Party, and the Bamako Convention urges the use of other enforcement mechanisms to ensure these goals.⁵³ Nonetheless, the bare reliance of domestic enforcement for the prosecution of hazardous waste trafficking was likely viewed by State Parties as insufficient. Thus, the AU sought to create a regional forum for better, efficient prosecution of crimes related to hazardous wastes.⁵⁴ This led in 2014 to the adoption of the Malabo Protocol, which is further discussed in the next section.

Evidently, the adoption of the Bamako Convention was a distinct demonstration of the dissatisfaction of African states with the Basel Convention. However, the Bamako Convention has proven to have its limitations. One of them is the failure to attract support from the vast majority of African states, despite most of them having ratified the Basel Convention. The lack of political will for implementation stems from the economic realities faced by many African states. Illegal trade and importation of hazardous wastes are rewarded by substantial financial gain, and boosts national economies. Furthermore, the Convention lacks specific provisions on the development of adequate waste management technologies, resulting in an inability of many African states to meet the strict requirements. Another limitation is the inflexibility of international cooperation between the Secretariat of the Bamako Convention and the Basel Convention, which potentially would allow for a more successful implementation of the legal instruments.⁵⁵

⁵³ Bamako Convention, *supra* n. (48) article 4(1)(b).

⁵⁴ Sirleaf, *supra* n. (45).

⁵⁵ Avitus A Agbor, 'The Ineffectiveness and Inadequacies of International Instruments in Combatting and Ending the Transboundary Movement of Hazardous Wastes and Environmental Degradation in Africa' (2016) 9 African Journal of Legal Studies 235.

2.6.1 Malabo Protocol

In 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Protocol seeks to extend the jurisdiction of the yet-to-be formed African Court of Justice and Human Rights (ACJHR) to include crimes of an international, and transnational character.⁵⁶ The establishment of the Court would create an African regional criminal tribunal, and requires 15 ratifications to enter into force. At the time of writing, it currently only has 15 signatures.⁵⁷

The relevance of the Malabo Protocol is that it criminalises the trafficking of hazardous wastes. The offence is constituted by any import, export, or failure to re-import transboundary movements of hazardous wastes, as prescribed in the Bamako Convention.⁵⁸ Furthermore, the Protocol seeks to address, and improve the current limitations to the Basel Convention on efficient regulation, including a stringent enforcement regime in the event of illegal movements of hazardous wastes.⁵⁹ Hence, the Malabo Protocol will be implemented by the nascent ACJHR as a complement to the domestic enforcement mechanisms State Parties are obliged to ensure under the Bamako Convention. Alternatively, as

⁵⁶ Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) 17 Journal of International Criminal Justice 1005.

⁵⁷ African Union 'List of Countries Which Have Signed, Ratified/Accessed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (20 May 2019) <<https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf>> accessed 20 May 2023.

⁵⁸ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (adopted 27 June 2014, not yet in force) article 28L.

⁵⁹ Sirleaf, *supra* n. (45).

an 'other enforcement mechanism' under Article 4(1)(b), serving as a regional forum of efficient prosecution of hazardous waste trafficking.

However, implementation challenges may arise consequent to the entry into force of the Malabo Protocol. This can be explained by the exceptionally broad nature of Article 28L, criminalising the trafficking of hazardous wastes. The article presumes all violations of any rule in the Bamako Convention constitutes a criminal offence. Furthermore, as the Convention contains detailed, and technical rules in relation to the transport of hazardous wastes, it may be deemed as unreasonable to enforce criminal liability on every act that does not conform with every provision. Hence, the framework would need to be further clarified before its entry into force.

The ACJHR will only have jurisdiction with respect to crimes committed after the entry into force of the Malabo Protocol.⁶⁰ Furthermore, the Court may only exercise its jurisdiction for States having ratified the Protocol, and when one, or more of the following conditions apply: a) the conduct has occurred on State territory; b) the accused is a national of a State Party; c) the victim is a national of a State Party; or d) extraterritorial acts committed by non-nationals threaten vital interests of a State Party. A State may also accept the jurisdiction of the Court via declaration lodged with the Registrar.⁶¹ Finally, State Parties, the Office of the Prosecutor, The Assembly of Heads of States and Government of the AU, and the Peace and Security Council of the AU are able to submit cases to the Court, allowing it to exercise its jurisdiction.⁶²

Conclusively, the Malabo Protocol has the potential to provide for an alternative avenue of enforcement of hazardous waste trafficking for

African States unable to domestically fulfil the objectives set out in the Bamako Convention. The prospective prosecution of hazardous waste trafficking may, furthermore, possibly establish the goals of condemnation of hazardous waste dumping, leading to better protection of the environment, and human health.⁶³

3. The United States, the Non-Compliant Mega Polluter

This section will firstly introduce the amount of plastic waste generated in the U.S., including how plastic waste is typically disposed of, as well as how much U.S. generated plastic waste that typically ends up in marine environments. Furthermore, the U.S.'s plastic waste export relationship with China will be analysed. In the second subsection, the U.S.'s historical involvement in the drafting of environmental treaties will be touched upon, together with the shift into what can be considered 'treaty avoidance' in the post-modern era. The unintended effects of the U.S.'s failure to ratify the Basel Convention will also be analysed, where emphasis will be placed on the U.S.'s national interests, along with the impact that U.S. non-ratification has on, not only the Basel Convention, but to the treaty system as a whole. Finally, this chapter concludes with how the Import Ban imposed by China and other key import States in the Global South has affected U.S.'s plastic waste exports and how the U.S. has tackled this barricade.

3.1 Plastic Waste Generation and Exportation

As touched upon in the introduction, the U.S. was determined to be the largest plastic waste generator on the globe in 2016. In fact, the largest market demand for single-use plastics is

⁶⁰ Malabo Protocol, *supra* n. (58) article 46E.

⁶¹ Malabo Protocol, *supra* n. (58) article 46E bis.

⁶² Malabo Protocol, *supra* n. (58) article 46F, article 46G.

⁶³ Sirleaf, *supra* n. (45).

found in the U.S. at 35%,⁶⁴ where only a shy 9% of plastic waste is *de facto* recycled – a small margin showing no increasing trend in the last ten years.⁶⁵ Rather, much of the U.S. produced plastic waste is either illegally disposed of, dumped in coastal waters, or inadequately disposed of in countries having imported plastic waste from the U.S.⁶⁶ Furthermore, the U.S. falls in the top 20, out of the majority of coastal States contributing to marine debris yearly.⁶⁷ Much plastic waste entering the ocean is caused solely by littering, originating from the large coastal populations. Hence, despite the U.S. being a high-income State with robust waste management possibilities, it still manages to generate the highest collections of plastic waste in the world.⁶⁸ Additionally, owing to the status held by the U.S. as the second largest plastic waste exporter worldwide, the international impacts of U.S. generated plastic waste are extensive. Between 1988–2016, the U.S. exported 88% of its plastic waste to Hong Kong, and China.⁶⁹ In particular, China is identified as a state whose waste management system falls significantly below the adequate standards by more than 20%.⁷⁰ This implies that exported U.S. plastic waste may not have been disposed of in an environmentally sound manner, a requirement set out in the Basel Convention for State Parties. In fact, China's imported U.S. plastic waste oftentimes tends to get dumped, or other-

wise ends up in ocean environments. As a result, much plastic waste finding its way to the ocean has originated from the U.S., making the State the third largest contributor to the issue on a global scale.⁷¹

However, on account of China's Import Ban on plastic waste, U.S. exports to China, and Hong Kong dropped by 94%.⁷² Meanwhile, a single substitute market to tackle the U.S.'s heavy reliance on plastic waste exports has proved to be largely unavailable. Instead, the U.S. has expanded to various new markets, in order to make up for the consequences of the Import Ban. Furthermore, investments into a domestic adequate waste management system are still absent, where the issue seemingly is the same as in the 1970s/80s; namely, the costs for a vigorous infrastructure are considered too high in order to attract investors.⁷³

3.2 Effects of being a Non-State Party to the Basel Convention

The U.S. has long been a pioneering State in the organisation of the international response to global environmental issues.⁷⁴ This is evident by the fact that virtually all successful international environmental initiatives originate from U.S. domestic legislation, where many of its national environmental policies are observable. This leading position was established following the 'environmental awakening' in the 1960s, where the U.S. took upon itself to internationalise its domestic environmental goals. Examples of successful multilateral agreements exemplifying the American leadership position include the Stockholm Declaration from 1972, and the 'Earth Summit' on Environmental Development con-

⁶⁴ Klara Lavender Law, 'Plastics in the Marine Environment' (2017) 9 Annual Review of Marine Science 205.

⁶⁵ Roland Geyer, Jenna R Jambeck, Klara Lavender Law, 'Production, use, and fate of all plastics ever made' (2017) 3 Science Advances 1.

⁶⁶ Leonard, Jambeck, Starr, Mallos, Siegler, *supra* n. (5).

⁶⁷ Autumn R Iverson, 'United States requires effective federal policy to reduce marine plastic pollution' (2019) 1 Conservation Science and Practice 1.

⁶⁸ Geyer, Jambeck, Lavender Law, *supra* n. (65).

⁶⁹ Amy L Brooks, Jenna R Jambeck, Shunli Wang, 'The Chinese import ban and its impact on global plastic waste trade' (2018) 4 Science Advances 1; Iverson, *supra* n. (67).

⁷⁰ Leonard, Jambeck, Starr, Mallos, Siegler, *supra* n. (5).

⁷¹ Leonard, Jambeck, Starr, Mallos, Siegler, *supra* n. (5).

⁷² Leonard, Jambeck, Starr, Mallos, Siegler, *supra* n. (5).

⁷³ Miatto, Reck, Di, Graedel, *supra* n. (2).

⁷⁴ Center for Progressive Reform, *supra* n. (11).

ducted in Rio de Janeiro, Brazil, in 1992.⁷⁵ However, post the 'Earth Summit', a steady decline in the U.S.'s involvement with environmental treaties has been detectable. In the postmodern era, the U.S. has resisted not only the development of international mega-diplomacy, but also the development of customary international law, and larger multilateral environmental treaties. The latter is of particular note, due to the U.S.'s failure to ratify the Kyoto Protocol on combating climate change, and committing State Parties to reduce greenhouse gas emissions; coupled with the temporary withdrawal from the Paris Agreement. It appears the U.S. is particularly prudent to ratify treaties where binding obligations arise, and where there may come to be economic consequences in the event of a violation.⁷⁶ Moreover, the State is conscious of treaties governed by international bodies, in fear it may threaten U.S. sovereignty. Thus, the U.S. discards international cooperation in favour of national interests. However, the scarcity of political will in the U.S. to ratify environmental treaties subsequently undermines the U.S.'s national interests, such as the ability to influence future negotiations, and taints its reputation as a State capable of delivering on its promises. Furthermore, the U.S.'s failure to commit to global issues, such as plastic pollution, has larger international repercussions in view of their position as a global leader. When refusing treaties ratified by practically the entire international community it erects barriers to reach a consensus with respect to critical issues; along with giving other countries an incentive to free ride, in the sense they may also adopt the position of purely ratifying treaties serving

national interests. Additionally, the failure of a formal ratification may erode the credibility of the Basel Convention as a whole, as well as raise concerns regarding the U.S.'s own commitments to environmental matters.⁷⁷

It may be debatable whether the Basel Convention can reach its full potential without the formal participation of such an influential State as the U.S. At worst, the U.S.'s failure to ratify the Basel Convention risks undermining the entirety of the treaty system; evident by the U.S. ability to efficiently engage in transboundary movement of hazardous wastes, regardless of its Party status.⁷⁸ The most protruding consequence of the failure of ratification is the exclusion of the U.S.'s possibilities to engage in export and import of hazardous wastes with State Parties. Although such possibilities still remain under Article 11, these *ad hoc* bilateral agreements are subject to a strenuous process, not always successful. However, the U.S. has fruitfully utilised Article 11 to avoid disruptions of their waste trade, thus circumventing the trading prohibition under Article 4(5) with non-Parties.⁷⁹ The influential nature of the U.S. is reflected in its bilateral relationships, resulting in a dynamic often characterised by a large power asymmetry. The less influential State becomes dependent on the actions taken by the U.S., which dominates decisions on compromise, and cooperation. Furthermore, bilateral agreements do not change the fact that the U.S. remains isolated from any decision-making power under the Basel Convention, despite remaining a subject to its substantive re-

⁷⁵ Sharon Mascher, 'Canada, The US and International Environmental Law' in Erika Techera, Jade Lindley, Karen N Scott and Anastasia Telesetsky (eds.), *Routledge Handbook of International Environmental Law* (2nd edn., Routledge 2021) 249.

⁷⁶ Mascher, *supra* n. (75) 250.

⁷⁷ Anya Wahal 'On International treaties, the United States Refuses to Play Ball' (*Council on Foreign Relations* 7 January 2022) <<https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball>> accessed 16 April 2023.

⁷⁸ Fulton and Yang, *supra* n. (10).

⁷⁹ Fulton and Yang, *supra* n. (10); Center For Progressive Reform, *supra* n. (11).

quirements.⁸⁰ The substantive requirements include the environmentally sound management of the hazardous wastes, and the PIC-procedure. Arguably, it appears advantageous for the U.S. to continue as merely an observer State, as it is still able to protect its national interests, even when State Parties may negotiate important amendments on international waste policies. Even though such policies are likely to impact both the U.S.'s environmental policies, as well as its foreign policy interests.⁸¹

Additionally, the failure of ratification undermines the U.S.'s credibility of cooperation regarding environmental matters. Consequently, this does not only affect future treaty negotiations, but it may also diminish accommodation of U.S. interests by treaty negotiating partners. In preference of opting for breach avoidance, which is widely used by the U.S. as a mechanism for treaty avoidance, a ratification of the Basel Convention would be consistent with the U.S.'s good faith commitments, as a signature to the Basel Convention, and promote a positive reputation of the U.S. abiding by its international legal obligations – something valuable to the U.S. if it seeks to hold other States accountable for international law violations.⁸²

Conclusively, the U.S. is not exempted from the effects arising from plastic pollution. Hence, the U.S. does not only have self-preserving reasons to ratify the Basel Convention in order to protect state interests, but also out of concern for the environmental impact arising from the Basel Convention's inability to fully serve its purpose.

3.3 The Effects of the Import Ban on U.S.'s Plastic Waste Export

Against the backdrop of the Import Ban imposed by China, the U.S.'s exports of plastic waste decreased tremendously in 2018. Furthermore, the Import Ban fractured both China's and the U.S.'s positions as dominant players in the plastic waste import-export industry, with the U.S. being the most notable State impacted by the Import Ban. This is owing to the fact that the U.S. have exported a vast majority of its plastic waste in the past, in comparison to the domestic cut-backs of plastic waste exports following the introduction of the restrictions on plastic waste trade.⁸³ Arguably, the Import Ban should have sparked a national debate in the U.S. regarding the domestic abilities to adequately dispose of its plastic waste. Potential possibilities for legal reforms are firstly, the development of adequate infrastructure for waste management; secondly, investments into plastic waste recycling; and thirdly, reduced consumption of plastics.

It is vital for the U.S. to further develop its domestic solutions to deal with the growing plastic waste problem, considering the current inadequacy to recycle all of its generated plastic waste. In 2021, a study estimated that roughly 85 percent of all plastic waste (that was not exported) ends up in landfills, ten percent is incinerated, and merely five percent is recycled.⁸⁴ Nevertheless, worthy of attention is the estimated 1.13 million to 2.24 million tons of plastic waste not accounted for in these studies, due to its direct

⁸⁰ Fulton and Yang, *supra* n. (10); Mascher, *supra* n. (75) 249.

⁸¹ Fulton and Yang, *supra* n. (10).

⁸² Fulton and Yang, *supra* n. (10).

⁸³ Abdoulaye Boré, Bary Abdouraman, Tingzhou Lei, Wenchao Ma, Xuewei Liu, Ziyang Lou 'Evolution of global plastic waste trade flows from 2000 to 2023 and its predicted trade sinks in 2030' (2022) 376 *Journal of Cleaner Production* 1.

⁸⁴ Margaret Osborne, 'At Least 85 Percent of U.S. Plastic Waste Went to Landfills in 2021' (2022) *Smithsonian Magazine* <<https://www.smithsonianmag.com/smart-news/the-us-recycled-just-5-percent-of-its-plastic-in-2021-180980052/>> accessed 17 May 2023.

leakage into the environment each year, including the ocean.⁸⁵

Europe provides an example of an area efficiently handling its plastic waste. In Europe, where all States are Parties to the Basel Convention, implementation of the Plastic Waste Amendments, and the Import Ban by China and others, has resulted in a decrease of cross-continental trade, in relation to plastic waste, whereas intra-continental trade has increased. Hence, trade within the EU has grown independent of policy formation in developing States, due to its abilities to handle its own plastic waste. This ability is most likely due to the rapid technological development of plastic waste infrastructure in Europe, showcasing the efficiency an adequate management system has on plastic waste handling.⁸⁶

However, the U.S.'s export trade flow of plastic waste already began returning to pre-Import Ban volumes in 2019, and had almost fully recovered in 2020, due to the emergence of new channels of importing plastic waste States. The emerging importing States are developing nations in Africa, Latin America and Southeast Asia, where sufficient waste management facilities are absent.⁸⁷ As State Parties to the Basel Convention have the obligation under Article 4(2)(b)

to ensure the disposal of hazardous wastes in an environmentally sound manner, in adequate waste management facilities in importing States; the emergence of new importing States lacking this vital capacity is an issue to be addressed.⁸⁸ Especially, as the handling of plastic waste in States lacking the proper infrastructure poses an increased risk to the environment, as well as to human health.

Trade relationships of plastic waste have largely become determined by geographical factors post-Import Ban, leading to trade blocs between neighbouring regions. This is also true for the U.S.; aside from disposing of its plastic waste in domestic landfills, the State has gradually formed an independent trading region in North America. The U.S. is predominantly exporting its plastic waste to Canada, and Mexico, relying on its previous existing bilateral agreements in conformity with Article 11 of the Basel Convention. Furthermore, it may be expected that the U.S. will further develop its trade relationships by 2025, with export markets in Latin America, South America, and Africa.⁸⁹ See figure 1. Additionally, the U.S. continues to export plastic waste to OECD States. This will further be elaborated on in section four.

⁸⁵ Tik Root, 'U.S. is top contributor to plastic waste, report shows' *The Washington Post* (Washington D.C., 1 December 2021) <<https://www.washingtonpost.com/climate-environment/2021/12/01/plastic-waste-ocean-us/>> accessed 21 May 2023.

⁸⁶ Boré, Abdouraman, Lei, Ma, Liu, Lou, *supra* n. (83).

⁸⁷ Boré, Abdouraman, Lei, Ma, Liu, Lou, *supra* n. (83).

⁸⁸ Basel Convention, *supra* n. (15) article 4(2)(b).

⁸⁹ Boré, Abdouraman, Lei, Ma, Liu, Lou, *supra* n. (83).

Figure 1. Potential plastic waste trading relationships between the U.S. and other countries by 2025.



Based on data from: Boré, Abdouraman, Lei, Ma, Liu, Lou, *supra n.* (83).

The U.S. is noticeably looking for new markets to expand its plastic waste export, given its recent attempts to strike a trade deal with Kenya to reverse the State's strict legislation on the import of plastic waste. Such a deal could potentially come to undermine the Basel Convention, as the U.S. is still bound to conform with the obligations established when trading with State Parties. A successful trade deal with Kenya would facilitate the U.S.'s plastic waste exports to other markets in Africa, where adequate waste management facilities tend to be flawed, or absent.⁹⁰ This pending U.S.-Kenya Waste Agreement will also be expounded upon in the next section. The

U.S.'s attempts at this trade deal negotiation is further shining a light on the forceful precedence set by the U.S. in its attempt at treaty avoidance, and working against the objectives of the Basel Convention. The effects are already witnessable with perhaps the most obvious example being Canada's withdrawal from the Kyoto Protocol on Climate Change. Canada accentuated the power asymmetry existing between the U.S. – one of the largest global polluters, seemingly always remaining a non-State Party to crucial environmental treaties – in relation to other States with lower carbon footprints than the U.S.⁹¹ Consequently, the inefficiencies of such treaties become most evident when the largest global

⁹⁰ Emma Howard 'Oil-backed trade group is lobbying the Trump administration to push plastics across Africa' (*Unearthed*, 30 August 2020) <<https://unearthed.greenpeace.org/2020/08/30/plastic-waste-africa-oil-kenya-us-trade-deal-trump/>> accessed 1 May 2023; Carlos Muireithi, Hiroko Tabuchi, Michael Corkery, 'Big Oil Is in Trouble. Its Plan: Flood Africa With Plastic' *The New York Times* (New York, 30 August 2020) <<https://www.nytimes.com/2020/08/30/climate/oil-kenya-africa-plastics-trade.html>> accessed 1 May 2023.

⁹¹ Compliance Committee of the Kyoto Protocol 'Canada's withdrawal from the Kyoto Protocol and its effects on Canada's reporting obligations under the Protocol' (20 August 2014) UN Doc CC/EB/25/2014/2; 'Canada pulls out of Kyoto Protocol' *The Guardian* (London, 13 December 2011) <<https://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol>> accessed 1 May 2023.

player may avoid conformity to otherwise universally applicable rules.

4. Continuing Legal Possibilities For U.S. Export of Plastic Waste

Throughout this article, the obstacles the U.S. has faced with regards to its plastic waste export has been emphasised and analysed. This section seeks to address the legal possibilities and options the U.S. currently has to export plastic waste, and what possibilities there are to further develop a sufficient system in the surge of the Plastic Waste Amendments. The section firstly explores the bilateral relationships the U.S. has with Canada, and Mexico, including the status of the Agreements under U.S. domestic law. Furthermore, this section seeks to address the U.S.'s attempts to strike a trade deal with Kenya, in order to facilitate trade with other African nations, and explores the legal consequences arising from such an agreement. The section continues with the U.S.'s trading possibilities with OECD Member States, followed by an elaboration of prospective options for the U.S.'s expansion of its domestic waste management infrastructure, including information on draft proposals already in place.

4.1 Bilateral & Multilateral Agreements in Conformity with Article 11 of the Basel Convention

The U.S. currently has interchangeable bilateral agreements in force with both Canada, and Mexico on the transboundary movement of hazardous wastes. Both Agreements are, like the Basel Convention, based on a system of notification and consent, and create a system allowing for transboundary shipments of wastes considered hazardous in the Agreements.⁹² Hazardous

waste is defined as any waste characterised as such under the national laws and regulations, which may result in damage to the environment, or to human health, if it is improperly disposed of.⁹³ The purposes of the Agreements are to encourage economically efficient disposal, thereby removing the Basel Convention's criteria of waste handling in an environmentally sound manner. However, Mexico, and Canada are always bound by the provisions, and obligations set out in the Basel Convention as State Parties, although trade occurs with a non-State Party. Thus, the requirement of ensuring that the handling of hazardous wastes is conducted in an environmentally sound manner still applies to Mexico, and Canada.⁹⁴ Nonetheless, the U.S. is not legally bound by the provisions; it is merely encouraged to respect the principles. The U.S. is solely subject to its own national laws, and the regulations of established Agreements with states it engages in hazardous waste trade with. Consequently, a system set out to enhance an economically efficient disposal system seems to only hold benefits for the U.S., as its trading partners must still comply with harsher requirements as State Parties to the Basel Convention.

Furthermore, an important note in relation to the Canadian, and the Mexican Agreements is the lack of treaty status, as neither Agreement has been ratified in the U.S. Senate. Consequently, both Agreements are considered to only hold the status of an international executive agreement, raising questions as to the direct enforceability of the Agreements under U.S. domestic law. The phenomenon arises due to the U.S.'s

(2012) 36 William & Mary Environmental Law and Policy Review 405.

⁹³ Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipment of Hazardous Wastes and Hazardous Substances (United States–Mexico) (14 August 1986) TIAS 99-2, article I.

⁹⁴ Basel Convention, *supra* n. (15) article 4.

⁹² Jeffrey M Gaba 'Exporting Waste: Regulations of the Export of Hazardous Wastes from the United States'

constitutional laws, which only allow Agreements with a treaty status to confer domestic obligations in the country.⁹⁵ Therefore, the legal certainty whether the U.S. framework governing the proper management of hazardous wastes, the RCRA,⁹⁶ is applicable or not, may be considered low. In practice, the U.S. may essentially unrestrictedly continue its exports of plastic waste, with a low risk of potential breaches of its international obligations. Meanwhile, its trading partners are at risk of breaching the obligation to ensure that imported hazardous waste is handled in an environmentally sound manner, under the Basel Convention. The issue is seemingly coming down to the uncertainties of whether the proper domestic U.S. law applies; in the case it does not, the U.S. may disregard appropriate disposal practices, exposing its trading partners to breaches of the Basel Convention. Evidently, the power asymmetry existing between the U.S. and its less influential trading partners grows tangible in such disproportionate Agreements.

In addition to the bilateral agreements with Canada and Mexico, the U.S. has bilateral arrangements in force with Costa Rica, Malaysia and the Philippines; albeit these arrangements only concern exports from the mentioned States to the U.S.⁹⁷

4.1.1 Pending U.S.–Kenya Waste Agreement

The U.S.'s attempts at striking a trade deal with Kenya highlights the motivation of the U.S. to branch out and reach new plastic waste export markets. A successfully negotiated trade deal

with the country would open doors for U.S. trade of plastic waste on the African continent, where Kenya could serve as a central hub for its exports, against the backdrop of becoming one of the largest economies in Africa.⁹⁸ Moreover, the efforts taken by the U.S. to hamper Kenya's efforts to eventually stop importing plastic waste into the country further accentuates the issue of the U.S.'s lack of global engagement to reduce the transboundary movements of plastic waste.⁹⁹

How a trade deal between the U.S. and Kenya would look like is an interesting aspect to consider, since Kenya ratified the Basel Convention in the 2000s.¹⁰⁰ As a State Party, the general obligation under Article 4(5) applies; prohibiting import or export of hazardous wastes to a non-State Party. Hence, Kenya cannot legally trade with the U.S. under the U.S.'s current status as a non-State Party to the Basel Convention.¹⁰¹ Furthermore, Kenya ratified the Ban Amendment in 2009, prohibiting trade between OECD States and non-OECD States.¹⁰² This provides for another element erecting barriers for successful, legal trade.

⁹⁵ Gaba, *supra* n. (92).

⁹⁶ Resource Conservation and Recovery Act (RCRA) 1976 (USA).

⁹⁷ 'Text of the Bilateral Agreements or Arrangements in Force as Transmitted to the Secretariat' (*UN Environment Programme: Basel Convention: Controlling transboundary movements of hazardous wastes and their disposal*) <<http://www.basel.int/Countries/Agreements/BilateralAgreements/tabid/1517/Default.aspx>> accessed 1 May 2023.

⁹⁸ Hiroko Tabuchi, Michael Corkery, 'Countries Tried to Curb Trade in Plastic Waste. The U.S. Is Shipping More' *The New York Times* (New York, 12 March 2021) <<https://www.nytimes.com/2021/03/12/climate/plastics-waste-export-ban.html>> accessed 4 May 2023; Howard, *supra* n. (90).

⁹⁹ Mureithi, Tabuchi, Corkery, *supra* n. (90).

¹⁰⁰ 'Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*UN Environment Programme: Basel Convention: Controlling transboundary movements of hazardous wastes and their disposal*)' <<http://www.basel.int/?tabid=4499>> accessed 22 May 2023.

¹⁰¹ Basel Convention, *supra* n. (15) article 4(5).

¹⁰² 'Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*UN Environment Programme: Basel Convention: Controlling transboundary movements of hazardous wastes and their disposal*)' <<http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>> accessed 22 May 2023.

Kenya's relationship with the Bamako Convention is another component to take into consideration. At the time of writing, Kenya is not a State Party to the Bamako Convention. Thus, the country is not bound by the prohibition on imports of hazardous wastes into Africa; the Bamako Convention does not constitute a hindrance for hazardous waste trade between Kenya and the U.S.¹⁰³ However, the Bamako Convention would become an obstacle for Kenya's intra-African trade of hazardous wastes, given the prohibition for State Parties to accept imports of hazardous wastes from non-State Parties.¹⁰⁴ However, this prohibition is unlikely to constitute an issue for Kenya, due to Africa's largest economies remaining outside the scope of the Bamako Convention. These include Algeria, Ghana, Morocco, Nigeria, and South Africa.¹⁰⁵

Perhaps a bilateral agreement between the two parties, in line with Article 11 of the Basel Convention, could provide for a potential legal framework. The question arising is whether such an agreement would allow for Kenya to derogate from its obligations under the Ban Amendment. Supposedly, this could be presumed to be the case, given the current bilateral agreements in force between the U.S. – Costa Rica, and the U.S. – Malaysia; both States ratifying parties to the Ban Amendment.¹⁰⁶ On the other hand, if such an agreement would violate Kenya's obligations outlined in the Ban Amendment, it is

worth pondering over why Kenya would be willing to engage in negotiations of such an agreement. Moreover, if the agreement would contravene the legal principles established in the Ban Amendment, it prompts inquiries of how the international community would respond to the violation. Article 20 of the Basel Convention provides for the settlement of disputes between State Parties for altercations regarding the compliance with the Convention. Parties shall first try to resolve the dispute through peaceful means, such as negotiation. If unsuccessful, the Parties shall submit the case to the ICJ, or to arbitration. Other Basel Convention State Parties hence have some alternatives in the event of the completion of a trade deal contrary to the Ban Amendment. However, it also provokes considerations regarding the diplomatic consequences, and tensions allegedly arising from other State Parties possibly bringing a case against Kenya. Nevertheless, worth noting is that the ICJ has never addressed such a dispute, suggesting that presenting a case before the Court could prove unrealistic.

One final aspect to take into consideration is the jurisdiction of the ACJHR. Kenya has signed the Malabo Protocol, but is yet to ratify it.¹⁰⁷ In the case of Kenya not becoming a State Party to the Protocol, the Court could potentially exercise its jurisdiction based on the conditions set out in Article 46F.¹⁰⁸ However, the ACJHR would only have jurisdiction in relation to crimes taking place after the Malabo Protocol's entry into force. Therefore, it remains to be determined whether the Court would have jurisdiction on this hypothetical matter, depending on the timing of the completion of the Waste Agreement, and the entry into force of the Malabo Protocol.

¹⁰³ 'Bamako Convention' (*InforMEA*) <<https://www.infornea.org/en/treaties/bamako-convention/treaty-parties>> accessed 22 May 2023.

¹⁰⁴ Bamako Convention, *supra* n. (48) article 4(1)(b).

¹⁰⁵ Chinedu Okafor, 'Ethiopia and Kenya to become Sub-Saharan's 3rd and 4th largest economies after Nigeria and South Africa – IMF' *Business Insider Africa* (14 April 2023) <<https://africa.businessinsider.com/local/markets/ethiopia-and-kenya-to-become-sub-saharas-3rd-and-4th-largest-economies-after-nigeria/hvrc4ck>> accessed 22 May 2023.

¹⁰⁶ UN Environment Programme, *supra* n. (97); UN Environment Programme, *supra* n. (100).

¹⁰⁷ African Union, *supra* n. (57).

¹⁰⁸ Malabo Protocol, *supra* n. (58) article 46F.

4.2 Trade with OECD States

The OECD is an intergovernmental organisation, whose Member States consist of largely high-income countries in Europe, North America (including the U.S.), and the Pacific. The organisation was established in the 1960s, and serves as a platform for Member States to address policy issues, promote international cooperation and trade, as well as finding solutions to economic and environmental challenges.¹⁰⁹

In 1992, the OECD adopted a Decision establishing rules for trade between its Member States with regards to the transboundary movement of hazardous wastes.¹¹⁰ The Decision was amended in 2001 to harmonise the established requirements with those set out in the Basel Convention. Like the Basel Convention, the OECD Decision contains detailed rules on a notice and consent regime for trade of hazardous wastes, and requires specific contract documentation between the exporting and importing State.¹¹¹ Furthermore, the Decision differentiates between hazardous wastes in accordance with their toxicity levels, where plastic waste falls under the 'green list'. Wastes allocated on this level are considered comparatively harmless and non-hazardous. Thus, transactions of such wastes are merely subjected to light controls normally applied in cases of international commercial transactions. However, Member States retain the

right to adopt stricter requirements under their domestic laws.¹¹²

A significant legal development of the Decision occurred in 1994, with the introduction of a ban prohibiting OECD States from exporting hazardous wastes to non-OECD States. The Ban was introduced due to a notion that the consent procedure under the Basel Convention was insufficient at the time, in regards to preventing States in the Global North from dumping hazardous wastes in developing countries.¹¹³ That being said, the Ban Amendment is also recognized under the Basel Convention, and became operative during two phases.¹¹⁴ In the first phase, the ban was immediately placed on transboundary movements of hazardous wastes from OECD States, to non-OECD States. The second phase prohibited export for repairable, or recycling purposes, hence removing the aforementioned 'recycling loophole'; having allowed waste traders to mask hazardous waste as such in order to fall outside the scope of the Basel Convention. The introduction of the Ban Amendment recognized the inability of the Global South to adequately handle hazardous wastes in conformity with the Basel Convention, meanwhile remaining at the receiving end with reference to hazardous waste shipments. Furthermore, the Ban Amendment shed light upon the widespread misinformation given to developing countries regarding the severity of toxicity levels of the received wastes, and how the import-export pro-

¹⁰⁹ 'Together, we create better policies for better lives – Who we are' (*Organization for Economic Co-operation and Development*) <<https://www.oecd.org/about/>> accessed 3 May 2023.

¹¹⁰ Organisation for Economic Co-operation and Development 'Decision of the Council Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations' (30 March 1992) OECD Doc. C(92)39/FINAL.

¹¹¹ Gaba, *supra* n. (92).

¹¹² Katharina Kummer, *International Management of Hazardous wastes: The Basel Convention and Related Legal Rules* (OUP 2000).

¹¹³ Fulton and Yang, *supra* n. (10); Gaba, *supra* n. (92).

¹¹⁴ 'The Basel Convention Ban Amendment' (*UN Environment Programme: Basel Convention: Controlling transboundary movements of hazardous wastes and their disposal*) <<http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx>> accessed 3 May 2023.

cedure was prone to abuse.¹¹⁵ However, with the introduction of the Ban Amendment developing countries in the Global South felt unjustly deprived of the economic benefits arising from the recycling industry. Additionally, other nations, including the U.S., expressed their opposition to the introduction of the ban. Nonetheless, the Ban Amendment entered into force in 2019, 25 years after its adoption.¹¹⁶ The factual legal impact of the Ban Amendment may, however, remain limited on trade between the Global North and South considering the U.S.'s remaining position as a non-State Party to the Basel Convention, and with the European Union having adopted the Ban Amendment.¹¹⁷

Accordingly, the adoption of the OECD Decision has facilitated U.S. trade of hazardous wastes among the Member States, in view of the U.S. identifying the Decision as being in conformity with the requirements set out in Article 11 of the Basel Convention. Hence, the Decision is recognized as a multilateral agreement, and the control processes of the hazardous waste trade are subjected to the national U.S. RCRA framework on adequate waste disposal facilities.¹¹⁸ Furthermore, the Decision falling within Article 11 provides the U.S. with a broad market of 38 possible trade partners in the transboundary trade of hazardous wastes. However, given the Ban Amendment, it seemingly becomes evident a U.S. ratification to the Basel Convention would be disadvantageous for U.S. trade. As a non-Party to the Convention, the U.S. is not bound by its legal obligations, and may therefore export hazardous wastes to non-OECD States without vio-

lating any international obligations. Rather, it is presumably the importing State which violates its obligations under the Basel Convention to not accept exports of hazardous wastes from the U.S., as a Member State of the OECD. Moreover, there are no breaches of U.S. domestic laws, as the applicable RCRA regulation only requires a notion of consent for exports between the U.S., and non-OECD States. Clearly, it best serves U.S. interests to remain outside the scope of the Basel Convention in connection with the international control of its exports of hazardous wastes.¹¹⁹

4.3 Domestic Plastic Waste Infrastructure

As previously suggested, an efficient way for the U.S. to handle its immense amount of plastic waste would be through appropriate development of a domestic waste management system. A good way to go about tackling the plastic waste issue is through a recycling system where plastic waste processing may allow for the conversion of plastics into new products. By creating a market demand for recycled plastics, this would provide businesses with an incentive to invest, and turn recycled plastics into new developed products. Furthermore, the U.S., being the pivot of technological innovation, a market demand for recycled plastics would boost both research, and technical development. Another measure the U.S. could implement is a national policy encouraging companies to reduce the use of single-use plastics. Similarly, to the EU Directive on the reduction of certain plastic products, the U.S. could introduce a comparable ban for single-use plastics, in order to minimise plastic waste generation.¹²⁰

The rapid development of plastic waste treatment technology in Europe is a good exam-

¹¹⁵ Neha Joshi, 'Keep Your Waste! – Relevance of the Basel Ban Amendment to the Global South' (2020) Jindal Global Law School <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635474> accessed 15 May 2023.

¹¹⁶ Puthucherril, *supra* n. (16).

¹¹⁷ Yang, *supra* n. (35).

¹¹⁸ Fulton and Yang, *supra* n. (10).

¹¹⁹ Gaba, *supra* n. (92).

¹²⁰ Council Directive (EU) 2019/904 of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L155/1.

ple of how to effectively shrink cross-continental trade of such wastes.¹²¹ However, the fact that Europe consists of many small countries provides the continent with a unique opportunity to become its own trade region; the U.S. is limited in this regard by having fewer neighbouring countries. Hence, from a U.S. perspective export of plastic wastes possibly provides for better economic outcomes, rather than domestic waste disposal. It may be presumed given the U.S.'s strong drive for economic and capitalistic efficiency; the high costs involved in an adequate infrastructure is likely to result in low incentives for investments.

However, given the size of the U.S., along with its influence, and economic development, it is only fitting that the country is able to handle its generated plastic waste, rather than exporting it to the Global South, where adequate waste management is absent. Furthermore, it is irresponsible for such a strong, global player as the U.S. to have such an ignorant attitude as to where its plastic waste ends up. Moreover, as previously noted, the U.S. is not immune to the inevitable consequences of plastic pollution if no uniform legal action can be reached, with a global consensus, as to the appropriate waste disposal of global plastic waste. The U.S., in particular, has a high moral responsibility, due to the substantive volumes of plastic waste originating on U.S. soil. Especially so, when large quantities frequently end up in the environment, or face inadequate disposal as a result of irresponsible U.S. plastic waste export practices.¹²²

In conclusion, the U.S.'s course of action, with regards to pressing plastic waste issues, seems to be a political question, rather than a legal one. The U.S. is faced with different sides of national interest hampering the development

of successful treaty ratifications; however, there must come a point where the international community will hold the U.S. accountable for its 'slippery eel' policies, as virtually the largest global plastic polluter, refusing to acknowledge the global effects of its actions.

4.3.1 *Prospective Domestic Measures*

In 2021, the U.S. EPA took one step in the right direction through the finalisation of the country's first 'National Recycling Strategy'. The goal of the Strategy is increasing U.S. recycling rates to 50 percent by 2030 – a hefty goal, given the current recycling rate of five percent.¹²³ Furthermore, the Strategy responds to the U.S.'s recycling challenges through five post-consumer waste management objectives. These include improvements of the market for recycled materials; increased waste collection, and improvements to the waste management infrastructure; reduction of waste contamination; enhancement of programs, and policies supporting a circular economy; standardising measurements, and increased data collection. Many of the suggested measures tend to focus on the promotion of public awareness, and education with reference to the value of recycling. Notably, the EPA's National Environmental Justice Advisory Council pointed out during a consultation on the Strategy in June 2021 that the public view of recycling is adverse, along with the reasoning that inefficient plastic waste recycling is caused by public confusion.¹²⁴ Albeit, the individual consumer does have an impact on how waste is disposed of, it appears as if the EPA is partially shifting the culpableness of the U.S.'s insufficient waste management in-

¹²¹ Boré, Abdouraman, Lei, Ma, Liu, Lou, *supra* n. (83).

¹²² Leonard, Jambeck, Starr, Mallos, Siegler, *supra* n. (5).

¹²³ U.S. Environmental Protection Agency, *National Recycling Strategy: Part One of a Series on Building a Circular Economy for All* (November 15 2021) 2; Osborne, *supra* n. (84).

¹²⁴ U.S. Environmental Protection Agency, *supra* n. (123) 10.

frastructure from Governmental Agencies onto local communities. Further criticism against the Strategy is the inclusion of chemical recycling in its scope despite opposition from various environmental, and public health groups.¹²⁵ Chemical recycling breaks down plastics into molecular components, and the technology is largely unproven. However, a conducted study has resulted in the suggestion that the method has a higher environmental impact, in comparison to the traditional mechanical recycling method. Moreover, chemical recycling has a higher impact on the formation of ozone, acidification, and other substances caused by the high energy demand, and purification of the process.¹²⁶ It is an interesting perspective to consider the U.S.'s eagerness to implement potentially more hazardous infrastructure to combat the plastic waste predicament, rather than to further develop, and technologically advance the existing infrastructure. Finally, it remains uncertain how the EPA will efficiently implement its suggested measures.

On top of this, in April 2023, the EPA launched its Draft National Strategy to Prevent Plastic Pollution as part of its established Series on Building a Circular Economy for All.¹²⁷ The Draft consists of three main objectives: to reduce pollution caused during the production process of new plastics, further improvements of post-use management of materials, prevent micro-

and nanoplastics from entering waterways, as well as manage environmental waste cleanups. Furthermore, like the 2021 Strategy the Draft contains policy conundrums raising questions on how the U.S. successfully could implement virtually idealistic measures. Especially, with regards to the ostensibly intractable dilemma of micro- and nanoplastics in the environment. Although the Draft contains potentially promising interventions, such as the suggestion to use trash-capturing technologies in waterways to capture small plastic sediments, the EPA seem to miss the overarching issue concerning micro- and nano plastics. Namely, a feasible solution to the global plastic waste pandemic could be through efficient implementation of measures aiming to reduce the generation of plastic waste. However, the Draft emphasises on the estimated increase of plastic consumption in the U.S., and seeks to address the need of U.S. policy-makers to prioritise and implement measures of intervention, in order to prevent littering rather than promoting plastic waste reductions.

5. Conclusion

Throughout this article, an analysis has been conducted into the Basel Convention on the Transboundary Movement of Hazardous Wastes, in relation to the U.S. as a non-State Party. Furthermore, the U.S.'s relationship, and contribution to global plastic pollution has been explored, along with the U.S.'s extensive plastic waste generation. Additionally, the article has sought to establish what legal opportunities have remained for the U.S. to export plastic waste, following the applied restrictions to the current legal framework, in combination with extensive import bans by Global South nations. The remaining options analysed were agreements in conformity with Article 11 of the Basel Convention, the pending trade agreement between the U.S. and Kenya, trade within the OECD community, as

¹²⁵ 'Part one of EPA's 'National Recycling Strategy' underwhelms' (*PIRG*, 17 November 2021) <<https://pirg.org/media-center/part-one-of-epas-national-recycling-strategy-underwhelms/>> accessed 21 May 2023.

¹²⁶ Adisa Azapagic, Christian Krüger, Florian Antony, Harish Jeswani, Maike Horlacher, Manfred Russ, Simon Hann 'Life cycle environmental impacts of chemical recycling via pyrolysis of mixed plastic waste in comparison with mechanical recycling and energy recovery' (2021) 769 *Science of the Total Environment* 1.

¹²⁷ U.S. Environmental Protection Agency, *Draft National Strategy to Prevent Plastic Pollution: Part of a Series on Building a Circular Economy for All* (April 2023) 1, 31.

well as suggestions to improve the U.S.'s domestic abilities to handle its plastic waste.

A conclusion which may be drawn is that it is safe to presume that despite efforts by the international community to impose harsher restrictions on non-State Parties to the Basel Convention, the U.S. tends to find loopholes to continue its practices – often through the avoidance of undertaking international obligations. The U.S. uses a system where it 'picks and chooses' which international treaties to engage itself with, often resulting in treaty avoidance, in order to avoid risking being held accountable in cases of a violation. Furthermore, the U.S. takes advantage of the fact that the Basel Convention lacks adequate enforcement mechanisms. The phenomenon makes it unlikely for a State Party violating its international obligations to not import plastic waste from the U.S. to stop engaging in

the practice, as there are no foreseeable consequences. Additionally, the U.S. engagement with plastic waste exports without acknowledging its responsibility to make sure the waste is properly disposed of in an environmentally sound manner is another issue in direct conflict with the Basel Convention. It is safe to conclude that the U.S. has no intentions on changing its current path, unless the international community manages to pressure the U.S. to change its current policies, with regards to its negative impact on plastic waste pollution. It is no longer feasible that the U.S. may bend, and undermine the waste treaty system at its own convenience, somehow managing to get around virtually universally applicable rules. Especially so, when the U.S. so often seeks to hold other States to high standards, and hold them liable for potential violations of their legal commitments under international law.