Confluence des droits_La revue

Revue de l'UMR DICE 7318 Droits International, Comparé et Européen

12 I 2022

The application of the principles of proximity and self-sufficiency to trade and transport of plastic waste

Daria Vasilevskaia

Édition électronique
URL : https://confluencedesdroits-larevue.com/?p=2234
ISSN : 2681-8302

Éditeur
Confluence des droits_La revue
UMR Droits International, Comparé et Européen (DICE)
Espace René Cassin
3, avenue Robert Schuman
13628 Aix-en-Provence
France
contact@confluencedesdroits-larevue.com

Référence électronique
Daria Vasilevskaia, « The application of the principles of proximity and self-sufficiency to trade and transport of plastic waste », *Confluence des droits_La revue* [En ligne], 12 | 2022, mis en ligne le 16 décembre 2022. URL : https://confluencedesdroits-larevue.com/?p=2234

The application of the principles of proximity and self-sufficiency to trade and transport of plastic waste

Daria Vasilevskaia
Doctorante contractuelle, Aix Marseille Univ, Université de Toulon, CNRS, DICE, CERIC, Aix-en-Provence, France.

Summary
International trade and transport of plastic waste seems to satisfy demands for cost and labour efficient management, yet, once out of sight, it might also contribute to pollution and transboundary harm. Should international law embrace the European principles of proximity and self-sufficiency, and how would this sit alongside existing principles of trade liberalisation?

International trade and transport of plastic waste seems to satisfy demands for cost and labour efficient management, yet, once out of sight, it might also contribute to pollution and transboundary harm. Should international law embrace the European principles of proximity and self-sufficiency, and how would this sit alongside existing principles of trade liberalisation?

I. Introduction

The transport and trade in plastic waste, as pursued by higher-income countries (HIC) in recent decades, gives rise to challenges for international law. One of them is balancing economic growth and environmental protection. Freedom of trade in plastic waste under the World Trade Organisation's (WTO) regime has allowed HIC to choose cost and labour efficient[1] destinations for waste treatment, with most plastic waste exported to the countries in the East Asia and the Pacific.[2] The incapacity of importing countries to treat the waste in an environmentally sound manner has led about 80% of global plastic waste ending up in landfills or contaminating the environment.[3] The widespread plastic pollution signals the need to rebalance the ambitions of economic growth and environmental protection to prevent further damage.

Among the proposed solutions to this imbalance, there are those that support trade liberalisation as an instrument to facilitate economically and environmentally sound waste management. For instance, freedom of trade allows countries that do not have necessary or appropriate facilities for plastic waste

[1] C. Parts, "Waste Not Want Not: Chinese Recyclable Waste Restrictions, Their Global Impact, and Potential U.S. Responses", *Chicago Journal of International Law*, vol. 20(1) 2019, p. 294.

[2] A. L. Brooks *et al.*, "The Chinese import ban and its impact on global plastic waste trade", *Science Advances*, vol. 4(6) 2018, p. 10, DOI: 10.1126/sciadv.aat0131.

[3] Resulting in an estimated 4 million to 12 million MT of waste plastic entering the oceans annually. *Ibid*.

treatment to send it where this waste can be managed more sustainably. On the other hand, there are solutions that support trade limitations, based on the argument that freedom of trade contributes to plastic pollution and subsequent human and labour rights violations.[4]

It is hard to deny the necessity of the freedom of trade in the context of economic globalisation and intertwined supply chains. The question is whether there are legal opportunities to derogate from this rule or modify it because the current situation with marine plastic pollution demonstrates that free trade in plastic waste is not compatible with hoped-for environmental outcomes. In fact, the free trade rule seems to have facilitated plastic pollution despite numerous international rules related to environmental protection in the waste management sector.

Existing international rules aiming to ensure environmentally sound global management of plastic waste lack enforcement and harmonisation. For instance, Parties to the Basel Convention[5] (currently 188 parties) should not export or import plastic waste if they have a reason to believe that it would not be managed in an environmentally sound manner.[6] At the same time, they are free to export this waste under the WTO regime, unless the country of import has imposed trade restrictions on foreign wastes in order to protect "human, animal or plant life or health" or "exhaustible natural resources", and other legitimate interests listed under article XX of the General Agreement on Tariffs and Trade (GATT).[7]

The Basel Convention's provisions have not been duly respected since it was adopted in 1989. While legally exported waste is aspired to be recovered or disposed of in an environmentally sound manner, it is estimated that only 9% of plastic waste has been recycled globally.[8] In fact, East Asia and Pacific (EAP) countries have imported 75% of global plastic waste from 1988 until 2018.[9] With the Organization for Economic Cooperation (OECD) members exporting much of their plastic waste to lower-income countries in EAP, China has imported a cumulative 45% of plastic waste from 1992 until 2018.[10]

In 2017, after almost thirty years of foreign waste overload, China introduced a ban on imports of certain plastic wastes[11] and dramatically changed the global flows of plastic waste. A few high-income countries[12] raised concerns regarding the Chinese ban,[13] and the bans subsequently introduced by other countries in the Asia-Pacific region through the WTO Committee on Technical Barriers to

---

[4] United Nations Environment Programme (UNEP), *Neglected: Environmental Justice Impacts of Marine Litter and Plastic Pollution*, April 2021.

[5] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,* Opened for Signature 22 March 1989, 1673 UNTS 57 (Entered into Force on 5 May 1992) (Basel Convention).

[6] *Ibid.,* art. 4 para 2(e), (g).

[7] *Marrakesh Agreement Establishing the World Trade Organization,* Opened for Signature 15 April 1994, 1867 UNTS 3 (Entered into Force 1 January 1995) Annex 1A. (General Agreement on Tariffs and Trade), (GATT).

[8] A. L. Brooks *et al.*, "The Chinese Import Ban and Its Impact on Global Plastic Waste Trade", *Science Advances*, vol. 4(6) 2018, p. 1, DOI: 10.1126/sciadv.aat0131.

[9] *Ibid.*, p. 2.

[10] *Ibid.*, p. 1.

[11] The following categories of plastic waste were banned from import: "plastic wastes from living sources", "scraps of plastic waste". *China — Catalogue of Solid Wastes Forbidden to Import Into China, G/TBT/W/546*, 5 July 2018, (Statement by China to the Committee on Technical Barriers to Trade 20 and 21 June 2018).

[12] Such as Canada, the US, EU Member States, Japan, Australia, New Zealand.

[13] *Minutes of the Meeting of 8-9 November 2017 G/TBT/M/73*, 6 March 2018, (STC *China G/TBT/N/CHN/1211*) 2.2.3.2.

Trade. The complainants argued that the restrictions were unnecessary, discriminatory, lacking transparency, and did not give the WTO members enough time to adapt.[14] The Chinese ban has, therefore, stimulated an increasingly polarised discussion on trade and transport of plastic waste. In January 2021, China banned all imports of solid wastes.[15] However, recyclable materials "complying with China's national quality standards and presenting no hazard to human health and the environment were not regarded as solid waste and could be imported normally."[16] While China did not provide an official and timely notification for this import ban,[17] it appears from a WTO's annual report[18] that recyclable plastic waste is still considered "solid waste" and thus not allowed to be imported freely.

The new Plastic Waste Amendment[19] to the Basel Convention is a repercussion of the multiple trade restrictions and import bans recently introduced by low and middle-income countries (LMIC). It aims to expand international control over trade and transport of most common plastic wastes, emphasising the necessity to harmonise the environmental and trade regimes and rebalancing freedom of trade and environmental protection. With this new Amendment, contaminated and hazardous plastic wastes cannot be subject to transboundary movement without prior informed consent from the country of import. However, plastic waste "almost free from contamination" (i.e., clean and ready-to recycle plastic waste) is not controlled by the Amendment and thus can freely circulate between countries unless there is an import ban on this kind of waste.[20]

As part of implementing the Plastic Waste Amendment, the European Union (EU) has banned exports of hazardous and contaminated plastic wastes to non-OECD countries from January 2021.[21] This new policy is inspired by years of application of the principles of proximity and self-sufficiency at the regional level. The EU's experience now being translated at the international level may provide valuable insights for rethinking global plastic waste management. Such analysis seems especially timely with the Basel Convention Plastic Waste Amendment having come into force and the ongoing proliferation of trade restrictions and import bans imposed by non-OECD countries under the WTO law. These developments lead to the question, should international law embrace principles of proximity and self-sufficiency, and how would this sit alongside existing principles of trade liberalisation?

---

[14] *Ibid*.

[15] Ministry of Ecology and Environment, The People's Republic of China, 'China to Ban All Imports of Solid Waste from 2021' (30 November 2020).

[16] Committee on Import Licensing, Minutes of the Meeting Held on 21 April 2021, WTO Doc G/LIC/M/52 (30 July 2021) [5.3].

[17] *Ibid*.

[18] Trade Policy Review Body, Annual Report by the Director-General, 'Overview of Developments in the International Trading Environment (22 November 2021)' 39–40.

[19] Conference of the Parties, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *Amendments to Annexes II, VIII and IX to the Basel Convention, UN Doc UNEP-CHW-COP.14-BC-14-12,* April - May 2019, *Decision BC-14/12* (*Plastic Waste Amendment*).

[20] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Opened for Signature 22 March 1989, 1673 UNTS 57 (Entered into Force on 5 May 1992)*, *op. cit.*, p. 3, art. 4 para 2(e).

[21] *Commission Delegated Regulation (EU) 2020/2174 of 19 October 2020 Amending Annexes IC, III, IIIA, IV, V, VII and VIII to Regulation (EC) No 1013/2006 of the European Parliament and of the Council on Shipments of Waste (Text with EEA Relevance) 2020* (OJ L) (*Delegated Regulation (EU) 2020/2174*).

In view of the given legal and political developments in the international arena, it appears timely to examine the potential application of the principles of proximity and self-sufficiency (PPSS). After the Chinese import ban, state actors mainly focused on improving self-sufficiency regarding plastic waste treatment (for HIC) and being cautious about plastic waste imports (for LMIC). As a result, HIC have to manage their plastic waste domestically or look for alternative destinations for exports, which becomes more and more challenging with "developing" countries sending rich nations' waste back[22].

As opposed to international law, European Union law gives clear legal definitions for principles of proximity and self-sufficiency. It also draws a clear distinction between waste for recovery and waste for disposal. Recovery is "any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function."[23] Disposal means any operation which is not recovery.[24]

The principle of proximity suggests that "the network [of waste disposal and recovery] shall enable waste to be disposed of or [...] to be recovered in one of the nearest appropriate installations, by means of the most appropriate methods and technologies, in order to ensure a high level of protection for the environment and public health."[25] In its turn, the principle of self-sufficiency suggests that "the network [of waste disposal and recovery] shall be designed to enable the [European] Community as a whole to become self-sufficient in waste disposal as well as in the recovery of waste […], and to enable Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste."[26] The principles are widely implemented by the European Court of Justice, whose case law will be analysed in section III.

The principles of proximity and self-sufficiency may appear to oppose trade liberalisation and, thus, be counterproductive for economically and environmentally sound plastic waste management. In this respect, the European Union's example presents a particular interest because of its well-developed legislation and rich case law on principles of proximity and self-sufficiency. When it comes to interpreting those principles, the European Court of Justice prioritises efficiency[27] and allows a degree of flexibility for implementing the PPSS if waste cannot be treated sustainably at its place of origin.

Moreover, the EU's regional and extraterritorial application of the PPSS is a striking example of the challenging balance between economic benefits and environmental protection. Back in 2007, while already implementing the PPSS at the regional level, the European Community (EC) filed a complaint

[22] "Canada-Philippines Trash Dispute Nears End", *Waste360*, 12 May 2019.

[23] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives (Text with EEA Relevance) 2008 (312) (Waste Framework Directive), art. 3(15).

[24] *Ibid.*, art. 3(19).

[25] *Ibid.*, art. 16(3).

[26] *Ibid.*, art. 16(2).

[27] The Court underlines that even if "the Article 130 of the Treaty authorises Member States to adopt protective measures which are more stringent than those adopted pursuant to Article 130" it does not authorise them to extend the application of those principles to waste for recovery "when it is clear that those principles create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of the derogations provided for by Article 36of the Treaty." Summary of the judgement, *Chemische Afvalstoffen Dusseldorp BV case* (n 114) <https://eur-lex.europa.eu/legal-content/EN/SUM/?uri=CELEX:61996CJ0203>; see also para 33 of case.

at the WTO against Brazil's import ban on retreaded tyres.[28] With this ban, Brazil made an exception for the Mercosur countries,[29] which was the main reason for the EC to claim that the measure was discriminatory under the WTO regime.

According to Brazil, the imported retreaded tyres were less durable than the new ones and thus were becoming waste much quicker and accumulating in landfills. Brazil argued that imported retreaded tyres were causing public health concerns due to the spread of mosquito-borne diseases in areas where the tyres were stockpiled, and thus their imports had to be decreased to avoid further pollution and health risks. Despite that the EC was already applying the PPSS at the regional level, it did not perceive as valid Brazil's exception for the Mercosur countries and did not want to lose its place in the market. With the new EU's policy of banning exports of certain plastic wastes to non-OECD countries, it seems relevant to examine how its views have evolved regarding other countries making regional exceptions on trade restrictions and how the PPSS could have been applied in the Brazil Tyres case.

As for international law, it is important to highlight that even if it does not provide clear definitions of the PPSS nor explicitly recognise them, there is still scope for applying those principles through the ones already defined and acknowledged by international law. For instance, the Basel Convention's main text considers the principle of prevention of environmental damage, which is in line with the objectives of the principles of proximity and self-sufficiency. As opposed to those two, the principle of prevention is a customary principle of international environmental law and is integrated into fundamental international instruments [30] and case law. Customary principles of international environmental law could be a means of implementing the PPSS but this opportunity is very limited because the PPSS are still widely unrecognised. Moreover, very general customary principles may not have sufficient impact in practice while applied to very specific and technical issues that PPSS deal with.

Among the documents adopted under the Basel Convention, only non-binding technical ones explicitly refer to both principles,[31] and one of them provides definitions for the principles.[32] The document states that "*these principles are not absolute and are not meant to replace the principles agreed to in the Basel Convention*, nor to define 'environmentally sound management'. They are presented as principles that *merit consideration and that some countries have found useful.*"[33] This statement signifies that even though the Basel Convention considers PPSS, they are not sufficiently integrated into its legal framework.

The EU's experience appears to be worth learning from when it comes to implementing the PPSS, and it could be translated at international level. The principles may help optimise global waste management

[28] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, 3 December 2007.

[29] Mercosur is a South American trade bloc established by the Treaty of Asunción in 1991 and Protocol of Ouro Preto in 1994. Its full members are the following: Argentina, Brazil, Paraguay and Uruguay. Associate members are Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Suriname.

[30] Such as principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.

[31] See section II A (1).

[32] Basel Convention, "The Framework Document on the Preparation of Technical Guidelines for the Environmentally Sound Management of Wastes Subject to the Basel Convention 1994" para 10 <http://www.basel.int/Implementation/TechnicalMatters/DevelopmentofTechnicalGuidelines/TechnicalGuidelines/tabid/8025/Default.aspx>.

[33] *Ibid.*

and make it more equitable by choosing the closest appropriate facility to recover or dispose of waste in an environmentally sound manner. They may as well help connect and harmonise relevant international regimes because they embrace fundamental aspects of plastic waste regulation, such as environmental, public health and human rights; trade and competition law; as well as technical, economic and geopolitical components. Furthermore, the principles may serve as a decision-making tool and a framework prioritising improving local infrastructures where possible. Finally, the PPSS have the potential to add flexibility and accountability to the global trade and transport of plastic waste.

I argue that proximity and self-sufficiency principles should be integrated both in the legal framework set by the Basel Convention and international trade law. Considering the increasing importance of the principles of proximity and self-sufficiency for the EU's plastic waste policies, this paper will analyse how these principles sit alongside existing international law. I aim to build a conceptual and analytical argument rather than an evaluative one. This paper does not aim to evaluate or interpret the Basel Convention or the WTO legal framework in terms of implicit implementation of the principles of proximity and self-sufficiency. It instead attempts to highlight how existing provisions may either challenge or facilitate the pursuit of objectives promoted by the PPSS.

The analysis will first focus on the legal framework set by the Basel Convention and the WTO as the leading international instruments[34] regulating trade and transport of plastic waste (II). Then, an overview of the EU's legal framework and case law related to the principles of proximity and self-sufficiency will be made (III). It seems essential to draw on the EU's experience in adapting specific legislation and applying an extraterritorial approach to plastic waste management by banning exports of certain plastic wastes to non-OECD countries. Lastly, the conclusion will provide a comparative analysis of the application of the principles by both legal regimes and define ways for improvement at the international level (IV).

II. How do principles of proximity and self-sufficiency fit in the existing international legal framework on trade and transport of plastic waste?

The international legal framework regulating the transboundary movement of plastic waste has been actively developing in the past few years, yet the Basel Convention's Plastics Amendment and WTO's agreements, such as the GATT and the TBT Agreement, are so far the leading legally binding international instruments in the plastic waste sector. In the context of active interaction between the trade and the environmental regimes, it is worth exploring how the PPSS fit in the Basel Convention's regime (A) and how they could be applied through trade measures (B).

A) Obligations under the Basel Convention

While several non-binding documents adopted under the auspices of the Basel Convention explicitly refer to the PPSS, the Convention itself only contains provisions that could be considered as implicitly implementing the principles (1). The Plastic Waste Amendment, in its turn, provides important

[34] Other instruments include: United Nations Convention on the Law of the Sea (UNCLOS), The International Convention for the Prevention of Pollution from Ships (MARPOL), Stockholm Convention on Persistent Organic Pollutants, and regional agreements.

controls for the transboundary movement of "hazardous" and "other" plastic wastes. However, with "clean" plastic waste not being controlled by the Convention and certain terms of the Amendment remaining unclear,[35] it risks facilitating waste movement from HIC to LMIC (2) and contributing to further pollution.

1. Implicit implementation of the principles of proximity and self-sufficiency

Basel Convention seems to apply the principles of proximity and self-sufficiency implicitly. For instance, the Preamble of the Convention states that "hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated". The Preamble also underlines a need for "stringent control of transboundary movement of hazardous wastes and other wastes, and [a] need as far as possible to reduce such movement to a minimum". Moreover, the Preamble recognises that "developing countries"[36] have limited capabilities to manage hazardous wastes and other wastes.

As for the main text of the Convention, several paragraphs of article 4 seem to be particularly aligned with the PPSS. Under this article, transboundary movements of wastes are allowed only if there is no danger regarding their movement and disposal[37] and if the importing State has the necessary facilities for treatment or disposal of the waste.[38] Parties should not export or import waste if there is a reason to believe that it will not be managed in an environmentally sound manner.[39] Moreover, the transboundary movement of wastes shall only be allowed if the State of export does not have the technical capacity/facilities or disposal sites to dispose of the wastes in an environmentally sound manner; or if the waste is required as a raw material for recycling or recovery industries in the State of import.[40] Article 4 also recognises that LMIC are negatively impacted by waste flows from HIC and that such exports should be reduced (para 13). However, the Convention still seems to rely on the discretion of the exporting states while deciding on the amount and/or the pollution potential of the exported wastes.

The Basel Convention sets a necessity test for transboundary movement of waste, but only when it comes to waste disposal. Para 9 (a) of article 4 states that while it is necessary to minimise the transboundary movement of waste, it is crucial to allow this movement to make waste management more efficient and environmentally sound. The Convention encourages that the waste for disposal is sent to the Party with the technical capacity, the necessary facilities or suitable disposal sites.[41] Lastly, para 2 (b) encourages the Parties to take appropriate measures to dispose of wastes within their

[35] The following terms are left for domestic specification: "plastic waste almost exclusively consisting of…" and "almost free from contamination."

[36] The term "developing countries" is used by the Basel Convention. In this paper this term will be replaced with "low and middle-income countries" (LMICs) according to the World Bank's classification. "WDI - The World by Income and Region", *The World Bank*.

[37] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,* Opened for Signature 22 March 1989, 1673 UNTS 57 (Entered into Force on 5 May 1992), *op. cit.*, p. 3, art. 4 para 2(e), (g).

[38] *Ibid.*, art. 4 para 9(a).

[39] *Ibid.*, art. 4 para 2(e), (g).

[40] *Ibid.*, art. 4 para 9(a-b).

[41] *Ibid.*, art. 4 para 9(a).

territory. These requirements would be perfectly in line with the PPSS if they were also applicable to waste recovery.

When it comes to waste recovery and recycling, para 9 (b) allows transboundary movement of "hazardous" and "other" wastes if they are required as a raw material. It is worth noting that under the Basel Convention's Plastic Amendment, some kinds of plastic wastes are not included in the categories of "hazardous" or "other" wastes and thus are not subject to the Basel Convention control system. This issue will be reviewed in the following sub-section.

As for non-binding documents on the implementation of the Basel Convention, only five out of thirty analysed texts explicitly refer to both or one of the principles.[42] Only one document among those five mentioned above provides definitions of both principles.[43] However, its legal status is unclear. On the website of the Convention, the document is listed among the "adopted technical guidelines" and is vaguely presented as "having a special legal value". In the meantime, the document itself does not contain a UN document number or any information about the author and the date of publication.

This document defines the principle of proximity as: "the disposal of hazardous wastes must take place as close as possible to their point of generation, recognising that economically and environmentally sound management of some wastes will be achieved at specialised facilities located at greater distances from the point of generation."[44] The principle of self-sufficiency is defined as: "countries should ensure that the disposal of the waste generated within their territory is undertaken there by means which are compatible with environmentally sound management, recognising that economically sound management of some wastes outside of national territories may also be environmentally sound."[45]

Interestingly, along with the principles of proximity and self-sufficiency, the framework document mentions the principle of "least transboundary movement". The principle implies that "transboundary movements of hazardous wastes should be reduced to a minimum consistent with efficient and environmentally sound management."[46] It is also stated that the three principles "should be considered in relationship and balance"[47] and that "considerations for disposal may be different from those for recovery, which, if soundly managed, can provide environmental and economic benefits and should be encouraged."[48]

The definitions provided by the EU's legal framework and the non-binding document under Basel Convention are quite similar. For example, both differentiate between waste for disposal and recovery even if the EU does it more clearly.[49] In addition, they both underline the necessity of taking into account the geographical and technical capacity factors; the importance of economically efficient and

[42] The following types of documents were analysed: manuals, strategic frameworks and toolkits for the implementation of the Convention, technical guidelines, documents issued by the Secretariat, the Open-Ended Working Group of the Convention, and the Conference of the Parties.

[43] Basel Convention, *op. cit.*, p. 8, para 10.

[44] *Ibid.,* para 10(g).

[45] *Ibid.*, para 10(f).

[46] *Ibid*.

[47] Basel Convention, *op. cit.,* p. 8, para 10(h).

[48] *Ibid.,* para 10(h).

[49] Basel Convention does not provide a definition of "recovery" and "recycling" but does have a definition of "disposal."

environmentally sound management of waste, which can also take place outside of national territories; and refer to public health and environmental implications.

These similarities could facilitate reaching an international consensus on the definitions of these principles if eventually they are recognised by international law. For instance, they could be included in the future global treaty on plastic pollution[50] or existing international instruments. However, integrating these principles in international law does not necessarily mean signing a new treaty, amending the Convention or signing another protocol that may take years to be ratified.[51] The principles could rather be integrated through capacity building. For instance, the Convention's relevant bodies could issue specific guidelines on applying the principles, promote them as "best practices", and incentivise Parties to apply the principles voluntarily.

If the principles of proximity and self-sufficiency are implicitly considered by the Basel Convention, would an explicit recognition help prevent environmental damage from mismanaged plastic waste? While qualitative analysis of the implementation of the principles by the Convention does not seem feasible within this paper, it is important to underline that lack of clarity regarding these principles does not necessarily mean their non-application. Pursuing the objectives of the PPSS through the implementation of customary principles of environmental law (such as no harm and prevention principles) may be easier within the already complex and fragmented plastic waste regime. However, the non-recognition of the importance of these principles and the current imbalance between the freedom of trade and environmental protection could be challenging the adoption of a life-cycle approach to the transboundary movement of plastic waste. Moreover, some of the provisions do not make a clear distinction between wastes for disposal and recovery. Lastly, the existing obligations are not sufficiently enforced, especially when it comes to plastic wastes, which are not controlled by the legal framework recently established by the Basel Convention's Plastic Amendment.

2. Plastic Waste Amendment: provisions facilitating the movement of waste from HIC to LMIC

The Plastic Waste Amendment that came into force in January 2021 has taken a few categories of plastic wastes under control of the Basel Convention. By updating Annexes II, VIII, and IX of the Convention, the Amendment has divided plastic wastes into three categories: (i) "hazardous"; and (ii) "other" plastic wastes, which are subject to the control system of the Basel Convention;[52] and (iii) the "clean" plastic waste which is not subject to the control system. The last category covers recyclable plastic waste that is "suitable for immediate recycling requiring only minimal further mechanical preparatory treatment processes, if any."[53] As opposed to the hazardous plastic wastes listed under

[50] *United Nations Environment Assembly Resolution 'End Plastic Pollution: Towards an International Legally Binding Instrument',* UNEA Res 5/14, UN Doc UNEP/EA.5/Res.14 (adopted 2 March 2022).

[51] As it happened to the Protocol on Liability and Compensation. *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal Basel,* Adopted 10 December 1999 (Not yet in Force), (Protocol on Liability and Compensation).

[52] Complying with the following obligations: prior informed consent (art. 4(1)(c) and (6); duty to ensure environmentally sound management (art. 4(2) and (8)-(10)); duty to re-import (art. 8); mandatory measures to combat illegal traffic (art. 4(3)(4) and 9); prohibition on disposal in antarctica (art. 4(6)); required authorization for traders (art. 4(7)(a)); packaging and labelling requirements (art. 4(7)(b)); information reporting (art. 13).

[53] Conference of the Parties, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *op. cit.*, p. 4.

Annexes II and VIII of the Amendment, the wastes suitable for immediate recycling listed under Annex IX do not require prior informed consent from the importing country. Thus, they can freely circulate between countries unless there is a trade or transport restriction in place.[54]

The lack of control over the "clean" plastic waste leaves the environmental impact of the Amendment unclear. Annex IX contains sixteen kinds of plastic wastes, including some of the most commonly used polymers, such as polyethylene terephthalate (PET) and polypropylene (PP). According to an OECD's report, PET and PP global recycling rates are generally below 30%, even in higher-income countries.[55] In 2018 recycling rates for PET commonly exceeded 10%, while those for PP were closer to zero.[56] In the situation where even the most technologically advanced countries cannot manage the recovery of the "easy-to-recycle" plastic wastes, the Amendment gives the Parties room for manoeuvre when it comes to limiting or facilitating international trade and transport of these wastes. Allowing such decision-making to be applied on a case-by-case basis, the Amendment seems to have a quite limited potential for decreasing the movement of plastic wastes from HIC to LMIC and the subsequent plastic pollution.

Another limitation of the Amendment is the lack of legal clarity regarding some of the terms. Parties did not come to an agreement regarding the terms "plastic waste almost exclusively consisting of…" and "almost free from contamination", which were left for domestic specification.[57] A project group on transboundary movement under the Plastic Waste Partnership has conducted a survey to identify Parties who have already specified these terms domestically after the Amendment has come into force.[58] While the final results of the survey are yet to be published, the preliminary information is as follows: 27 out of 36 respondents (Parties to the Convention) were not aware of or did not use specifications to implement the Amendment; among these 27, only seven respondents stated that they were using other approaches/implementation methods or were preparing ones, 16 out of these 27 said that other approaches were not implemented, and four did not respond.[59] Thus, on top of the general lack of clarity regarding these terms, there may also be a lack of awareness and understanding regarding the expected steps for implementing the Amendment. The work of the Secretariat and the experts of the Plastic Waste Partnership may, however, help with capacity building, awareness-raising and providing relevant guidelines on the implementation of the Amendment.

Capacity building regarding the Amendment's implementation requires eliminating discrepancies between environmental and trade regimes regulating transboundary movements of plastic wastes. For instance, in order to prevent excessive waste flows from HIC to LMIC, countries of export, import or transit may use article 1(1)(b) of the Convention to define plastic wastes listed in Annex IX as

---

[54] This volume of the "Confluence des droits" Review provides a specific analysis of the amendment in the following article:

[55] Organisation for Economic Co-operation and Development, *Improving Plastics Management: Trends, Policy Responses, and the Role of International Co-Operation and Trade*, (Background Report, OECD Environment Policy Paper No. 12, September 2018), p. 8.

[56] *Ibid.*

[57] P. Whithing, Sims recycling solutions, Presentation for the webinar of the Plastic Waste Partnership: Activities on transboundary movements of plastic waste and Plastic Waste Amendments, *Call for Information on Implementation of the Plastic Waste Amendments,* February 2021, <https://unep-brs.webex.com/recordingservice/sites/unep-brs/recording/80653ea61e184fafbfaf5576a0e7bc4b/playback>.

[58] *Ibid.*

[59] *Ibid.*

"hazardous" at the domestic level, even if they are not defined as such by the Convention. In that case, exporting Parties will have to obtain a prior informed consent before transporting the waste. It is possible that such a measure could be argued by an affected exporting country to be discriminatory under WTO law. An affected exporting country might even challenge the measure at the WTO.

In the context of regime fragmentation and poor enforcement of obligations under the Basel Convention,[60] "clean" plastic wastes destined for recovery may be mismanaged, cause pollution and spread diseases. In that case, should the meaning of "hazardous" wastes be expanded in order to take into account the indirect impacts of mismanaged "clean" plastic wastes under Annex IX? Can plastic products manufactured from non-toxic components be considered "clean" and sustainable if they end up contaminating the environment and break into microplastics?[61] This logic resonates with the principles of proximity and self-sufficiency that take into account long-term effects of transboundary movements of wastes and aim to reduce global pollution by ensuring that wastes are treated as close as possible to their place of generation.

The fact that the Plastic Waste Amendment does not control the movement of "clean" plastic wastes for recovery seems to be both problematic and promising. On the one hand, the following legal insufficiencies seem to facilitate transboundary movement of wastes from HIC to LMIC, which leads to pollution and public health risks: legal uncertainty regarding some terms of the Amendment; regime fragmentation and discrepancies regarding national definitions of "hazardous" wastes; lack of due-diligence enforcement. On the other hand, the Amendment, as the only legally binding international instrument on plastic waste, is a valuable step towards greening and optimising supply chains; a more harmonised, environmentally and economically efficient regulation of plastic waste; and providing a point of reference for international organisations, such as OECD and the WTO.

Applying the principles of proximity and self-sufficiency to transboundary movements of plastic wastes under Annex IX could help realise the maximum potential of the Amendment. This could be done by relying on article 4 of the Convention and the Protocol on Liability and Compensation. Article 4 obligations could provide a legal basis for limiting movements of wastes if there is a reason to believe that they will not be managed in an environmentally sound way, and the Protocol could help with enforcement and accountability.

However, the Protocol is not yet in force. It was adopted in 1999 in response to the concerns of "developing" countries about their financial and technological challenges while coping with illegal waste dumping. Since its adoption, only twelve parties have ratified the Protocol (all of them are LMIC). For the Protocol to come into force, it must be ratified by at least twenty Parties.

In the situation where high-income countries that could be liable for plastic pollution have not ratified the Protocol for more than twenty years, could article 4 of the Basel Convention be used to consider "illegal" (retroactively and in the future) all the wastes that have been or will be transported to countries unable to manage them in an environmentally sound way? Interestingly, high-income countries were much quicker to react to import bans on plastic wastes implemented by LMIC under the WTO than to

[60] Especially article 4 introducing due diligence obligation of exporting and importing Parties: prohibition of export/import of wastes if there is a reason to believe that they will not be managed in an environmentally sound manner.

[61] OECD, *Considerations and Criteria for Sustainable Plastics from a Chemicals Perspective – Background Paper 1,* 16 March 2018, p. 5.

ratify the Protocol on Liability and Compensation. Thus, governmental actors still seem to prioritise cost and labour efficiency over environmental protection.

The next section will explore the existing trade regime in the context set by the Plastic Waste Amendment. What are the potential limitations and opportunities for the WTO members applying the principles of proximity and self-sufficiency to their plastic waste-related trade measures?

B) The application of the principles of proximity and self-sufficiency through trade measures

In a situation where the PPSS are not integrated in the international hard law, low and middle-income countries have to rely on existing rules to push back the waste coming from the "developed" world. However, the inconsistency of trade and environmental regimes while regulating global plastic waste management makes relying on the existing rules quite challenging. International law is protecting the freedom of trade in "clean" plastic wastes while emphasising that lower-income countries struggle with waste management both technically and financially. With the ongoing plastic pollution issue being more and more pressing, there is a need to visualise the limitations (1) and the opportunities (2) to act within the existing legal framework because making adjustments may take a long time. Mapping the pitfalls and opportunities would help find optimal strategies for a more sustainable global plastic waste management and preventing protectionist measures.

1. Limitations: the WTO Agreements and the WTO case law do not refer to the principles

a. The principles are still not highlighted by the WTO Agreements

With the principles of proximity and self-sufficiency not being expressly recognised by international environmental and trade law, trade regime has shown quicker reactivity to potential protectionism in environmental and public health protection measures. This paragraph will mainly focus on the exceptions for free trade under GATT article XX and how the principles of proximity and self-sufficiency fit in this context. Before getting into the details, a brief analysis of the WTO legal framework applicable to trade in plastic waste will be presented.

Under GATT art. XX, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; […] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[62]

While the WTO and EU's trade liberalisation frameworks are similar, the WTO does not allow trade restrictions on the grounds of implementing the principles of proximity and self-sufficiency. At the EU level, together with imposing trade restrictions to protect public security, health and life of humans, animals or plants,[63] Member States can refer to the principles mentioned above as a legitimate

[62] *Marrakesh Agreement Establishing the World Trade Organization,* Opened for Signature 15 April 1994, 1867 UNTS 3 (Entered into Force 1 January 1995) Annex 1A, *op. cit.,* p. 3, art. XX (a), (b), (g).

[63] *Treaty on the Functioning of the European Union*, Opened for Signature 7 February 1992, [2009] OJ C 115/199 (Entered into Force 1 November 1993), (FEU), art. 34-36.

exception to the free trade rule. The specificities of this regime will be analysed further in the section focusing on the European Union.[64]

The importance of recognising the principles of proximity and self-sufficiency at the WTO level seems to be more and more relevant. Trade measures relating to plastics have become increasingly common. For instance, in the last ten years, WTO «members notified 128 measures affecting trade in plastics for environmental reasons», mainly under the Agreement on Technical Barriers to Trade (TBT).[65] The following measures were applied: "technical requirements related to waste management, import licensing schemes to control trade flows, and bans on single-use plastic items or shopping bags. Eighty per cent of these measures were notified by developing countries and LDCs [Least Developed Countries]."[66]

China was one of the WTO members having introduced a ban on plastic waste imports[67] through the TBT Agreement. As a result of this measure, China has not only boosted global legislative action on marine plastic pollution and plastic waste issues, but it seems to have made a clear statement on the principles closely related to the proximity and self-sufficiency ones. While banning "foreign plastic waste from living sources" and "waste, parings and scrap, of plastics," China referred to "the internationally recognised" principles of "waste generator responsibility" and "disposal to the nearest" highlighting that "each member has the obligation to dispose of domestically generated solid wastes."[68]

These principles' alignment with the PPSS objectives demonstrates how timely it may be to integrate the PPSS at the international level. As opposed to the principles referred to by China, the PPSS approach waste treatment in a systemic way allowing a degree of flexibility regarding transboundary waste movement depending on the category of waste or its method of treatment (disposal and recovery). Furthermore, there is an element of circularity to the principles because they encourage relevant authorities involved in plastics' life cycle to enable self-sufficiency with waste disposal and recovery.

High-income countries such as Australia, the USA, New Zealand, Canada, some EU Member States, and Japan were the first to challenge these measures through the TBT Committee.[69] While raising specific trade concerns under the TBT Agreement, they referred to the following potential violations by countries imposing restrictions: discrimination; rationale, legitimacy of the measure; lack of transparency and time to adapt; unnecessary barrier to trade; lack of scientific basis.

The specific trade concerns (STC) mechanism[70] under the TBT Agreement allows to efficiently manage conflicting trade policies between Members on a case-by-case basis without necessarily addressing these issues to the Dispute Settlement Body (DSB). Currently, no plastic waste related STCs raised

---

[64] For more details see section III B.

[65] WTO, "DG Azevêdo: Members have the opportunity to address global plastic pollution at the WTO", *WTO News Portal*, Speech, 25 November 2019.

[66] *Ibid.*

[67] *China — Catalogue of Solid Wastes Forbidden to Import Into China,* G/TBT/W/546*, op. cit.*, p. 4.

[68] *Ibid., p.* 1.

[69] *STC China G/TBT/N/CHN/1211, op. cit.*, p. 4, 2.2.3.2.

[70] *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4* G/TBT/26, 13 November 2009, (Committee on Technical Barriers to Trade), p. 16, (*Fifth Triennial Review TBT Committee*).

before the TBT Committee have led to disputes within the WTO. However, it is worth exploring how the principles of proximity and self-sufficiency would eventually fit in the WTO case law and what can be learned from the disputed that have already taken place.

b. The principles were not referred to in the case law

To date, there was no dispute at the WTO on "plastic waste from living sources" and "waste, parings and scrap, of plastics", but one synthetic polymers-related case seems essential to demonstrate legal and factual issues relating to the application of the principles of proximity and self-sufficiency to trade and transport of plastic waste. Brazil Retreaded Tyres case involves an import restriction on retreaded tyres imposed by Brazil and challenged by the European Community (EC).[71] With this restriction, Brazil wanted to reduce the accumulation of waste tyres on its territory, but it made an exception for imports from the Mercosur countries.

Brazil imposed this ban on the grounds of the necessity to "protect human, animal or plant life or health" under GATT art. XX(b). Retreaded tyres' lifespan is shorter than the one of the new tyres. Thus, they become waste much quicker. Accumulation of retreaded tyres in the environment does not simply create pollution. Most importantly, the stockpiled tyres become a breeding ground for mosquito-borne diseases, which can significantly threaten public health, especially in the Brazilian climate.

While tyres, "plastic waste from living sources", and "waste, parings and scrap, of plastics" are different products, they all contain or are made of synthetic polymers.[72] Thus, the environmental and public health impacts of tyres' disposal in the environment are similar to other plastic wastes. Although these products can be differentiated based on their marine pollution potential, when disposed of in the natural environment, they all contribute to the spread of diseases and degrade very slowly while releasing toxins and breaking into microplastics. Thus, the Brazil Tyres dispute appears to be a helpful case study for understanding how regulating plastic waste trade fits in the WTO framework.

In January 2006, the DSB established a panel at the request of the European Communities. Regardless of the Brazilian arguments based on art. XX(b), the EC claimed that the restrictive measures were discriminatory and inconsistent with Brazil's obligations under art. I:1, art. III:4, XI:1, and XIII:1 of the GATT 1994. As a result, in June 2007, the Panel concluded that the Brazil's Import Ban was a quantitative restriction inconsistent with GATT art. XI:1. Moreover, restrictions on imported tyres and tyres made from imported casings maintained by one Brazilian State were found inconsistent with GATT art. III:4 (national treatment). Later on, the EC made an appeal to review certain legal interpretations developed by the Panel, for instance, to reassess the "necessity" of the Import Ban.

In December 2007, the Appellate Body provisionally justified the Brazilian Import Ban under GATT art. XX(b). However, Brazil did not meet the requirements of the Chapeau of art. XX because of the Mercosur exception. Thus, the measure was considered to constitute arbitrary or unjustifiable discrimination and a disguised restriction on international trade. Therefore, technically, Brazil lost the

[71] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, 3 December 2007.

[72] Modern tyres are usually made of a mix of natural and synthetic rubber.

case, but it could have brought itself into conformity with the WTO law by banning all the imports of the tyres in question.[73]

The dispute outcome could have been fundamentally different if the PPSS were raised in the argument by the respondent. Brazil could justify the Mercosur exception by intending to manage only regional waste to protect the environment and remain self-sufficient. This scenario could have worked consistently within the EC's legal framework where the principles have been actively implemented since 1989. Therein, waste can freely circulate between Member States unless it is destined for disposal.[74] Despite implementing these two principles within its single market, the EU did not seem to have applied the same vision to the Mercosur countries.

While aiming to liberalise trade between both regions via the European Union –Mercosur free trade agreement, the EC was against free trade and eased custom controls exclusively between the Mercosur countries. Despite clear environmental and public health risks of imported retreated tyres for Brazil, the EC challenged Brazil's justification of import restrictions on the basis of art. XX (d) exception.[75] Since the principles of proximity and self-sufficiency were not raised by the parties, the Panel and the Appellate Body did not expressly dismiss them. This provides ground for exploring the opportunities for the application of the principles under future WTO jurisprudence.

2. Opportunities: justifying import restrictions on plastic waste – lessons learned from the Brazil Tyres case

In the context of proximity and self-sufficiency principles and responding to claims about discriminatory treatment of imported plastic products and waste, the high-income countries and low and middle-income countries find themselves in a similar position. If they implement regulations that limit free trade or transport of these products, and if a member challenges these at the WTO, the initiator of the ban will have to provide grounded explanations based on the article XX (b), (g) of GATT or other provisions. And therefore, demonstrate the importance of the interests protected by these measures and their contribution to the end pursued, as well as provide factual and scientific data. At the same time, the DSB will have to evaluate the necessity or relevance of these measures. Respondents will have to prove that the measures in place help prevent plastic pollution or better treat plastic waste, protect public health or natural resources, and do not give less favourable treatment to imported products.

A low-income country, as a respondent in the Brazil Tyres case, makes us alert to the potential for high-income countries to enforce trade rules against "developing" countries. One of Brazil's achievements in this dispute is contributing to establishing "a dividing line between trade in new products and used (reconditioned) products under multi-lateral rules." [76] Differentiation between new and used/recovered products will help avoid rich nations transferring the burden of the final destination of

[73] CIEL, "WTO Brazil Retreaded Tires Trade Dispute", CIEL Center for International Environmental Law (Campaign Update).

[74] For more details see section III B: "Proximity and self-sufficiency: from design to implementation."

[75] Measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement […], and the prevention of deceptive practices."

[76] F. Marega, "The Retreaded Tyres Case in WTO: An Important Multilateral Achievement by Brazil" in Alberto do Amaral Júnior (eds), *The WTO Dispute Settlement Mechanism A Developing Country Perspective*, Springer, 2019, p. 337.

such goods to low and middle-income countries.[77] "The case represented the first-ever challenge against trade restrictions imposed by a developing country for health and environmental reasons."[78] The Brazil Retreaded Tyres case is a valuable lesson for the EU about rethinking how it solves the problem of being unable to provide a circular functioning of the economy. The EU was seeking to export its tyres in the same way it has sought to export plastic recyclables. The arguments used by Brazil in this case law could be applied to a potential WTO dispute related to trade restrictions on plastic waste.

While defending its restrictive measure, Brazil emphasised the necessity to protect public health. Brazil argued that "because waste tyre disposal presents health risks that cannot be eliminated, only non-generation of waste tyres allows Brazil to achieve its chosen level of protection."[79] It underlined that the ban was essential to prevent the unnecessary generation of dangerous waste and reduce the risks of its disposal.[80] Brazil appealed to the fact that European Communities also admitted that waste tyres pose a significant environmental and public health problem in Brazil and that "measures to reduce the accumulation of tyre waste are legitimate responses to these risks."[81] Moreover, plastic pollution legislation of a claimant can be good evidence of its position on this matter.

Referring to the EU's legislation on the principles of proximity and self-sufficiency could feed the argument about the necessity of their extraterritorial application. Claiming that both Parties agree that plastic waste (including retreaded tyres) poses environmental and health risks could be a strategy if a WTO dispute occurred. However, the complainant challenging the import ban may allege that the waste in question is not "immediately and directly harmful to human health" as it may be in case of hazardous substances and materials, and that plastic waste or waste in question do not constitute any "well-known and life-threatening health risks."[82]

Another challenge could be proving that there are no reasonably available alternatives to the import ban. For instance, in the Brazil Tyres case, the EU was claiming that instead of banning the import of the retreaded tyres, the Party could "improve the management of waste tyres on its territory,"[83] as well as "controlled stockpiling and landfilling; energy recovery; and material recycling."[84] Thus, the debate will be about proving that the Party banning the import did "all it could" to reduce the risks and that banning is the only reasonable and practicable option.[85] A claimant could argue that a respondent took no measures to educate the population or developed no infrastructure to reduce the health and environmental risks of the waste in question. It could also argue that the respondent did not take steps to minimise the use of products that pose risks to prevent this waste's constant and growing flow to the country.

---

[77] *Ibid.*

[78] CIEL, "WTO Brazil Retreaded Tires Trade Dispute", CIEL Center for International Environmental Law (Campaign Update).

[79] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R, 12 June 2007, [4.13].

[80] *Ibid.*

[81] *Ibid.,* [4.14].

[82] *Ibid.*, [4.16, 4.18].

[83] *Ibid.,* [4.171].

[84] *Ibid.*

[85] *Ibid.,* [7.160].

Since the principles of proximity and self-sufficiency are not explicitly recognised by international law, the customary "no-harm" principle could be used as a reference point. To justify the necessity of the Mercosur exception for import restriction, Brazil could have referred to this principle together with the proximity and self-sufficiency ones. This would have been consistent with the way the EU regionally implements proximity and self-sufficiency principles.

Insufficient consideration and enforcement of the "no-harm" principle at the international level seems to be one of the fundamental issues in the Brazil Tyres case. While the EU's foreign trade policies lacked due diligence for extraterritorial environmental risks, Brazil tried to protect its environment and public health through trade measures and faced confrontation. In the meantime, under the draft of the EU–Mercosur Free Trade Agreement, [86] both regions agreed on the importance of environmental protection and the especially fragile and globally vital Brazilian ecosystems. This demonstrates the inconsistency of certain EU positions on environmental matters in various international organisations.

Over the past three decades, global trade in plastic waste has shown that the duty of environmental protection was not sufficiently taken into account by countries, while numerous MEAs have provisions related to that. The plastic waste crisis's human rights and public health implications could be a stronger argument to balance freedom of trade and environmental protection. Along with the article XX(b) and (g) exceptions, there is scope for using the "public morals" exception[87] to justify restrictive measures on plastic waste trade. Together with the "necessity to protect human health or life" or "exhaustible natural resources", this exception could highlight the human rights dimension of applying the principles of proximity and self-sufficiency at the international level.

The WTO legal framework seems to have the capability to integrate and reinforce the principles of proximity and self-sufficiency. In particular, taking into account the rise in trade-restrictive measures under the GATT and the TBT Agreement and the numerous formal and informal discussions of the plastic pollution issue at the WTO. The principles could be reinforced by referring to the Plastic Waste Amendment and the Basel Convention, highlighting its importance as the only legally binding international instrument regulating trade and transport of plastic waste. Considering that the EU has a similar legal framework, it is worth exploring its implementation of the Plastic Waste Amendment combined with the principles of proximity and self-sufficiency.

III. Learning from EU's experience: implementation of the principles of proximity and self-sufficiency

The principles of proximity and self-sufficiency have been an integral part of the EU's internal waste policy since 1989. Considering the EU's ambitions to build a circular plastics economy,[88] it is essential to understand the legal and political context in which these principles are implemented before looking into specific legislation and case law on PPSS. The following sub-sections will analyse the EU legal framework related to trade and transport of plastic waste (A) and the evolution of the PPSS from design to implementation (B).

[86] "New EU-Mercosur Trade Agreement: The Agreement in Principle", 1 July 2019.

[87] Necessity to protect public morals - GATT article XX(a).

[88] European Environment Agency Briefing, "The Plastic Waste Trade in the Circular Economy".

A) EU legal framework related to trade and transport of plastic waste

This sub-section will take a closer look at the political context of the EU's innovative regulation of plastic waste (1) and the legal context in which the EU anticipates, transposes and enforces its international obligations (2).

1. The political context of the EU's innovative regulation of plastic waste

The EU's exports of plastic waste to Asia have significantly dropped after China introduced an import ban on plastic waste in 2017. If in 2015 and 2016 the EU exported up to 300 000 tons of plastic waste monthly, this figure was twice as low in 2019, i.e., 150 000 tonnes of exported plastic waste per month. Despite that the EU has recently committed to banning exports of hazardous and contaminated plastic waste to non-OECD countries, it is still significantly reliant on exports of its plastic waste to LMIC. The European Environmental Agency explains this tendency with the fact that there is "a demand for imports and profits can be made."[89] While the EU's circular economy ambitions are still to be realised, being transparent about exports of plastic waste already appears to be a big step towards improving plastic waste management in the region.

However, there is much less transparency about transboundary movements of plastic waste between the EU Member States. This could be explained by paper-based procedures necessary for inter-state waste shipments, which "can lead to 1,000-page files and up to a year for shipments to get clearance."[90] This lack of transparency seems to be problematic for non-state actors advocating for public access to environmental information under the Directive 2003/4/EC.[91] As long as this procedure is not digitalised, access to information about inter-state waste shipments would be minimal. This aspect is vital to understanding the regional implementation of the principles of proximity and self-sufficiency. Without this data, it would be challenging to estimate how the existing legal framework is implemented in practice and how it is affecting the environment.

The available information points out that the EU's regional implementation of the PPSS is similar to the extraterritorial one: cost and labour efficiency is prioritised over environmental protection. Rich Member States tend to send their plastic waste to Member States with least developed economies both legally and illegally.[92] For instance, Poland was reported to be the only member state to have taken up

---

[89] *Ibid.*

[90] K. Taylor, "Stop Exporting Plastic Waste out of Europe, EU Lawmakers Say", www.euractiv.com, 20 April 2021, <https://www.euractiv.com/section/circular-materials/news/stop-exporting-plastic-waste-out-of-europe-eu-lawmakers-say/>.

[91] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC 2003 (041).

[92] Germany, Italy and the UK are reported to send plastic waste to Poland both legally and illegally, where the majority of it is burned, causing CO2 and hazardous substances emissions: 36 204 tonnes of plastic scrap was sent to Poland in 2018, C. Arkin, Heinrich Boll Stiftung, "Waste Exports: The rubbish dump is closed", 4 November 2019; J. Harper, DW Akademie, "Poland won't take UK garbage any more", 25 July 2019; Poland In "Municipal waste from Germany sent to Polish landfills", 18 October 2018; Barbara Bodalska EURACTIV Poland "Commission concerned with Poland's 'waste mafia'".

importing plastic waste from higher-income EU countries after the Chinese ban, along with Malaysia, Vietnam, Thailand, Indonesia, Taiwan, South Korea, Turkey and India.[93] However, because there is a lack of transparency about transboundary movement of wastes between Member States, it is difficult to track the volumes of these downstream flows.

Another transparency-related issue is transboundary movement of "ready-to-recycle" plastic waste listed in Annex IX of the Basel Convention. Because this category of wastes is not subject to the Convention's control system, Parties do not have to submit reports to the Basel Convention Secretariat on the amount of exported plastic waste. Thus, even if the EU has banned exports of hazardous and contaminated wastes to non-OECD countries,[94] it will be difficult to track its exports of the "ready-to-recycle" wastes.

The EU's political context related to trade and transport of plastic waste demonstrates both an intention to improve the regional waste management capacity and an understanding that this capacity is still not sufficient to treat the majority of plastic waste within the region. Moreover, hoping for a ban on all exports of plastic waste does not seem to be realistic in a globalised world. The fact that the EU makes steps towards building a circular economy and demonstrates the intention to be transparent about its plastic waste trade and transport policies sets a valuable example for other major exporters of plastic waste. However, in order to have a more precise picture of the existing EU's framework, it is worth taking into account the legal context surrounding that issue.

2. The legal context: anticipating, transposing and enforcing international obligations

The European Union started promoting environmentally sound transport and disposal of wastes in 1975 with its Directive on waste.[95] Three years later, the Directive on toxic and dangerous waste[96] introduced an obligation to provide an identification form for toxic or dangerous waste for its transport or disposal. In 1982, the Council adopted the Directive on the supervision and control of the transfrontier shipment of hazardous waste.[97] The Directive obliged holders of the waste to send notifications about the waste to be transported and get consent for import or transfer of this waste before starting the transboundary movement.

After the adoption of the Basel Convention, the EU was actively implementing and integrating the Convention at the regional level with the following instruments: Regulation on shipments of waste,[98]

---

[93] Reality Check team *BBC News* "Why some countries are shipping back plastic waste", 2 June 2019.

[94] *Delegated Regulation (EU) 2020/2174*, *op. cit.*, p. 5.

[95] *Council Directive 75/442/EEC of 15 July 1975 on waste* [1975] OJ L 194/7 (no longer in force). This Directive first defined the concept of waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force" art. 1(a).

[96] *Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste* [1978] OJ L 84/43.

[97] *Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste* [1984] OJ L 326/31 (no longer in force).

[98] *Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste* [2006] OJ L 190/1 (Regulation on shipments of waste).

Resolution on waste policy,[99] Waste Framework Directive,[100] REACH Regulation,[101] Single Use Plastics Directive[102] and others. In fact, the EU has gone much further in waste regulation than the text of the Convention itself, which is in line with the Convention's objectives.[103] For instance, the principles of proximity, priority for recovery and self-sufficiency, as well as the necessity to apply best available techniques are mentioned in the Regulation on shipments of waste.[104] In contrast, Basel Convention does not explicitly mention them. Both texts emphasise the importance of the protection of human health and the environment and the necessity of waste minimisation.

In October 2020, the EU Commission adopted a delegated act that set new standards for intra and extra EU shipments of plastic waste.[105] The regulation aims to ensure that the EU implements the decision on plastic waste agreed in 2019 in the Basel Convention and an amendment to appendices of the OECD Decision relating to plastic waste. This document has prohibited the export of hazardous and contaminated plastic waste from the EU to non-OECD countries, set out control procedures for the export of such waste to OECD countries. The regulation has also clarified that intra-EU shipments of non-hazardous waste are exempt from new controls. The delegated act entered into force on 1 January 2021, at the same time as the Basel Convention Amendment.

The delegated act provides a new perspective on "ready-to-recycle» wastes listed in Annex IX of the Plastic Waste Amendment. While the Amendment refrains from identifying the wastes listed under Annex IX as "easy-to-recycle" and only mentions that the wastes should be "almost free from contamination" and "almost exclusively" consist of one polymer, the EU categorises these same wastes as "easy-to-recycle."

The EU's definition of "easy to recycle" plastic wastes entirely relies on the categories listed in Annex IX. Thus, this definition is quite technical[106] since Annex IX only lists categories of wastes that are not controlled by the Convention unless hazardous or contaminated and leaves the specification of certain terms to the Parties of the Convention. The only non-technical criteria for the "easy-to-recycle" waste is that it should be "destined for recycling in an environmentally sound manner". However, statistically, the waste that is sent to low and middle-income countries that are not members of the OECD is not recycled in that manner.[107]

---

[99] *Council Resolution of 7 May 1990 on waste policy* [1990] OJ C 122/2.

[100] "Waste Framework Directive", *op. cit.*, p. 6.

[101] *Regulation (EC) No 1907/2006 of the European Parliament and of the Council Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)* [2006] OJ L 396/1, (REACH Regulation).

[102] *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* [2019] OJ L 155/1, (SUP Directive).

[103] "Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention". *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Opened for Signature 22 March 1989, 1673 UNTS 57 (Entered into Force on 5 May 1992), op. cit.*, p. 3, art. 4 para 4.

[104] *Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste* [2006] OJ L 190/1 (Regulation on Shipments of Waste) Preamble, paras 20-21.

[105] *Delegated Regulation (EU) 2020/2174, op. cit.,* p. 5.

[106] According to Annex IX, plastic waste should be "almost free from contamination and other types of wastes" and "almost exclusively" consist of one non-halogenated polymer.

[107] J. R. Jambeck *et al.*, "Plastic Waste Inputs from Land into the Ocean", *Science,* vol. 347(6223) 2015, pp. 768-769.

As fairly noted by the OECD, "*Even non-toxic plastics derived from non-toxic constituents are not sustainable plastics if they end up as litter and form microplastics in the oceans.*"[108] The new definition introduced by the delegated act raises a number of questions that may as well arise at the international level. What criteria should be taken into account to define "easy-to-recycle" waste, not only from the technical/theoretical point of view but also from a more practical one (for instance, taking into account geopolitical aspects, cost and labour efficiency, human and labour rights implications)? What waste should be considered as "hard-to-recycle?" Can there be such a category as "sustainable" plastics, and how should it be defined? What could be the role of the principles of proximity and self-sufficiency in clarifying these definitions?

In conclusion, it is worth noting that the ban on plastic wastes export to non-OECD countries is a significant step towards common but differentiated responsibilities and cooperation. As for the legal context, the EU's innovative legal framework creates a strong and promising foundation for enforced and harmonised regional implementation of the principles of proximity and self-sufficiency. Further analysis of the application of these principles to trade and transport of plastic waste will be provided in the following sub-section.

B) Proximity and self-sufficiency: from design to implementation

The principles of proximity and self-sufficiency implement article 191(2) of the Treaty on the Functioning of the European Union. It states that Union policy on the environment "shall be based [...] on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."[109] Since 1989 the European Community was implicitly applying the PPSS by referring to the "need to develop a network of facilities for the final disposal of waste so that certain areas within the Community were not left under-equipped, and to the desirability of waste being disposed of in the nearest suitable centres (with exceptions for recyclable waste)."[110]

The principles of proximity and self-sufficiency are implemented differently, depending on the type of waste treatment.[111] The following paragraphs will provide an analysis of their implementation regarding waste for disposal (1) and recovery (2). Recovery is "any operation the principal result of

[108] OECD, *Considerations and Criteria for Sustainable Plastics from a Chemicals Perspective – Background Paper 1, 16 March 2018,* p. 5.

[109] "FEU", *op. cit.*, p. 18.

[110] "Commission Communication on Community Strategy for Waste Management Policy dated 18 September 1989, followed by a Council Resolution dated 7 May 1990": J.H. Jans, "The Status of the Self-Sufficiency and Proximity Principles with Regard to the Disposal and Recovery of Waste in the European Community", *Journal of Environmental Law,* vol. 11(1) 1999, p. 121, 128.

[111] It is important to distinguish waste "management" and waste "treatment". According to the Waste Framework Directive, "waste management" means the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or broker (WFD art. 3.9). Waste "treatment" is "recovery or disposal operations, including preparation prior to recovery or disposal" (WFD art. 3.14). The Directive requires that waste should be managed without endangering human health and harming the environment (WFD art. 13).

which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function."[112] Disposal means any operation which is not recovery.[113]

1. Waste for disposal

The principle of proximity originates from more fundamental principles of EU environmental regulation, which are incorporated in EU primary law and acknowledged by the case law.[114] One of them is the principle of rectification at source, which was mentioned by the Court of Justice of the European Union (CJEU) in the famous "Wallonia judgment."[115] The reason for the dispute was a Walloon decree prohibiting "the storage, tipping or dumping […] in Wallonia of waste originating in another Member State or in a Region of Belgium other than Wallonia."[116] By this decree, the Wallonia Executive wanted to reserve sufficient capacities for the sound management of domestic waste."[117]

At the demand of the European Commission, the judge had to decide "whether this market barrier could be justified by imperative requirements of environmental protection."[118] Conceptually this demand is similar to the ones raised at the WTO regarding the need to balance free trade with environmental protection. The Court responded that the principle that environmental damage should be remedied at source laid down by article 13Or (2) of the Treaty entails national or local authorities "to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste."[119] Thereby, back in 1992, the judge lays down the background for the principles of proximity and self-sufficiency.

This is a critical aspect to reflect on at the international level. Does international law have such a position regarding plastic waste? Considering the Basel Convention's legal framework, the answer would be "yes" for hazardous and contaminated plastic wastes. As for the ready to recycle plastic wastes, the answer would be "maybe" (majorly under article 4 of the Convention – obligations of due diligence) because there is no enforcement and accountability for these categories of wastes under the Basel Convention, while the Protocol on Liability and Compensation is still not in force.

The Wallonia case also confirms the basic vision of the entire waste sector as part of the internal European market.[120] In this sense, the CJEU decided "that waste, whether recyclable or not, is to be regarded as 'goods', the movement of which, in accordance with article 30 of the Treaty, must in principle not be prevented."[121] However, the Court underlined that the proximity principle, the principle of rectification at source and the principle of self-sufficiency could justify market

[112] "Waste Framework Directive", *op. cit.*, p. 6, art. 3(15).

[113] *Ibid.,* art. 3(19).

[114] M. Reese, "The proximity principle" in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law*, Edward Elgar Publishing, 2018, p. 224.

[115] *Commission of the European Communities v Kingdom of Belgium* (C-2/90) [1992] ECR I-04431 (Wallonia judgment).

[116] *Ibid.,* para 20.

[117] Reese, *loc. cit*.

[118] *Ibid*.

[119] *Wallonia judgment*, *op. cit.*, p. 30, para 34.

[120] Reese, *op. cit.,* p. 30, p. 227.

[121] *Wallonia judgment, op. cit.*, p. 30, para 28.

restrictions[122] in particular when it comes to waste for disposal. Originally these principles applied only to waste disposal operations and not to recovery, but in 2008 their scope was extended to municipal waste regardless of whether it is recovered or not.[123]

The question of shipments of waste and the implementation of the proximity and self-sufficiency principles arises in "Ragn-Sells case."[124] The dispute involved a waste treatment and transport company (Ragn-Sells) and an Estonian municipality. The municipality signed contracts with two facilities: mixed municipal waste was to be transported to a landfill site located 5 km from the town, while industrial and building waste was to be taken to a landfill site located 25 km away. Ragn-Sells argued that granting an exclusive right to these two facilities was contrary to "the principle of free competition and the free movement of goods, freedom of establishment and freedom to provide services."[125] Thus, Ragn-Sells questioned the lawfulness of contract documents between the municipality and the waste treatment facilities.

The national court referred the case to the CJEU, asking whether the principle of proximity can provide justification for the grant of an exclusive right to the nearest treatment facilities.[126] The Court of Justice stated that Member States might generally or partly restrict shipments of waste destined for disposal operations and mixed municipal waste collected from private households by way of implementation of the principles of proximity, priority for recovery and self-sufficiency under Directive 2008/98.[127] MS may confer on local authorities' powers to manage the waste produced on their territory, while the authorities may provide that those types of waste are treated in the nearest appropriate facility.[128] Thus, the EU gives Member States power at the national level to restrict transport of waste for disposal and municipal waste, but not the waste for recovery.

2. Waste for recovery

An interesting example of the implementation of the proximity and self-sufficiency principles regarding waste for recovery is the case C-203/96 of the Court of Justice of the European Union.[129] It arose from a dispute involving a Dutch company that sought to export industrial waste from the Netherlands to Germany for recovery and a competent Netherlands's Ministry that did not authorise the export on the basis of the principles of proximity and self-sufficiency. The national court referred the case to the CJEU in order to confirm the legitimacy of banning the export of waste for recovery. According to the judgment, the principles of self-sufficiency and proximity are not applicable to

[122] *Ibid.*, para 34, 35.

[123] Reese, *op. cit.,* p. 30, p. 232.

[124] *Ragn-Sells AS v Sillamäe Linnavalitsus* (Court of Justice of the European Union, C-292/12, ECLI:EU:C:2013:820, 12 December 2013, (Ragn-Sells case).

[125] *Ibid*., para 29.

[126] *Ibid*., para 36.

[127] *Ibid*., para 56.

[128] *Ibid*., para 63.

[129] *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-203/96) [1998] ECR I-04075, (Chemische Afvalstoffen Dusseldorp BV case).

shipments of waste for recovery, which is justified by the intention of the Community legislature[130] to encourage recovery of waste in the Community as a whole.[131] Waste of that type "should be able to move freely between Member States for processing, thus excluding the application of the principles of self-sufficiency and proximity."[132]

The Court underlines that even if "the Article 130 of the Treaty authorises Member States to adopt protective measures which are more stringent than those adopted pursuant to Article 130" it does not authorise them to extend the application of those principles to waste for recovery "when it is clear that those principles create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of the derogations provided for by Article 36 of the Treaty."[133] Thus, the Court prioritises efficiency, which is one of the keys to environmentally sound waste management. Non-hazardous waste destined for recovery can freely circulate within the European Union, and countries cannot require the delivery of such waste to a national undertaking and give it exclusive rights for treating the waste, because such requirement has "the effect of favouring the national undertaking and increasing its dominant position."[134]

In conclusion, it is worth noting that despite the extraterritorial application of the principles of proximity and self-sufficiency by the EU through imposing export bans on some categories of plastic waste, there is still scope for improvement. Keeping in mind the amount of waste exported from the EU to "developing" countries, the circular economy policy does not seem to be functioning well for now. At the same time, the EU is conscious of the problem. Applying the proximity and self-sufficiency principles predominantly within the EU system and only to particular categories of wastes and types of waste treatment seems to be quite controversial not only from the point of view of plastic pollution but also from the point of view of human and labour rights.

The principles of proximity and self-sufficiency do not apply to non-hazardous waste destined for recovery, which is the case of most recyclable plastic waste. The waste can be freely transported between Member States and can also be sent from the EU to "developing" countries for "recycling" within the framework of the Basel Convention. If a "developing" country does not have the capacity to recycle the waste, it risks being disposed of in landfills, while intentionally or unintentionally, the exporter may not know about the fate of the waste at the point of destination. Thus, if the waste is disposed of outside the EU, the principles of proximity and self-sufficiency cannot be applied and enforced in the same way as within the EU. It is in theory, rather than practice, that the EU's legal framework on both principles can allow an environmentally and economically sound balance between limiting and facilitating the transboundary movement of plastic waste.

---

[130] *Council Directive 75/442/EEC of 15 July 1975 on waste* [1975] OJ L 194/7; and *Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community* [1993] OJ L 30/1.

[131] Summary of the judgement, *Chemische Afvalstoffen Dusseldorp BV case, op. cit.*, p. 32, <https://eur-lex.europa.eu/legal-content/EN/SUM/?uri=CELEX:61996CJ0203>; see also para 33 of the case.

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

IV. Conclusion

Plastic waste highlights the dual nature of the freedom of trade, which is a significant factor contributing to plastic pollution and subsequent human rights violations and an essential instrument facilitating economically and environmentally sound waste management. The current situation with marine plastic pollution demonstrates that free trade in plastic waste is not compatible with hoped-for environmental outcomes. Applying the principles of proximity and self-sufficiency to trade and transport of plastic wastes turned out to be a natural outcome of the malfunctioning global system. While the principles are still not recognised by the international environmental and trade law, a similar quandary is arising as has occurred in EU law for some time: how to balance free trade with environmental protection when it comes to plastic waste movements?

We have shown how, in the EU context, principles of self-sufficiency and proximity have been emphasised and have led to disputes and the need to interpret the boundaries between facilitating or limiting trade and transport of plastic waste. As seen from the EU's experience, several issues and questions may arise while applying the PPSS at the international level.

Firstly, there may be an issue with applicability of the principles to different categories of waste. Should the principles be applied to justify trade restrictions on waste for disposal only, contaminated waste for recovery or all waste for recovery (even the clean one)?

Another challenge could consist in competition between various actors involved in waste management. If the PPSS are applied at the international level, there is a risk of protectionism and even monopolist behaviour of actors involved in the treatment of waste, who know they have a captive client because of the application of the principles. This may cause higher competition between recyclers. In addition, disputes may arise regarding granting exclusive rights on waste treatment and respecting the principles of free competition between importing countries and various waste treatment facilities.

Lastly, transparency along the whole life cycle of plastic products should be further improved to apply the PPSS properly. It may be challenging at the international and regional level to determine the nearest appropriate facility to send the waste to. There is a growing need for digitalisation of waste transport and treatment contracts and recycling capacity assessment from the point of view of environmentally sound waste management. The current lack of transparency regarding waste movements does not provide sufficient access to environmental information for the public. It may hinder the potential for non-state actors to participate in decision-making related to waste treatment and enjoy their right to a healthy environment.

If the aforementioned issues arise in international law, it is practical to rely on the existing legal framework. Plastic Waste Amendment may help overcome incoherence between instruments regulating transboundary movement of plastic wastes. Even if the Amendment does not control "ready to recycle plastic waste", it can still stimulate exporting countries to put more effort into improving local waste management and separate collection. Global exports of wastes for recovery may not decrease, but the quality of the exported waste would improve, and thus the potential for it to be recycled increases. While the PPSS are not yet recognised by international law, the principles of prevention, due diligence and no-harm may help guide decision-making regarding wastes not controlled by the Plastic Waste Amendment.

Uncertainties regarding the international implementation of the PPSS remain because the WTO has not yet positioned itself regarding the importance of these principles. The GATT, the TBT Agreement and the WTO case law do not contain references to the principles. As the Brazil Tyres case has shown, while the EU was already applying the principles at the regional level, it did not consider Brazil's regional exception on import restriction as a peculiar way to apply the PPSS within Mercosur. With the principles not recognised by the WTO members, it would be more challenging for countries like Brazil to justify regional exceptions on trade in waste or in lower-quality products made of recovered materials.

Another challenge to the PPSS application is that plastic waste is still perceived as a commodity under the WTO regime, and thus, its trade should, by default, not be limited. Reversing the free trade rule when it comes to plastic waste trade may significantly decrease marine pollution. As recently highlighted by Margaret Young,[135] what if environmental protection was the default rule and not the exception to the freedom of trade? What if the free trade in plastic waste was only allowed if the exporter managed to justify the necessity of outsourcing waste recovery?

Currently, several opportunities are available for the application of the PPSS at the international level. From a short-term perspective, looking at the example of the European Union, other members of the OECD may gradually introduce export bans on certain categories of plastic waste, starting with hazardous and contaminated plastic wastes for disposal and recovery, and eventually becoming self-sufficient even with treatment of "clean" plastic wastes. If not managed appropriately, "clean" plastic waste has the same marine pollution potential as contaminated waste. While the free transboundary movement of "clean" plastic waste may be practical at the regional level (for instance, in the EU or Mercosur countries), poor controls, enforcement and accountability at the international level may cause further pollution.

From a long-term perspective, two main opportunities to apply the PPSS seem relevant. Firstly, the PPSS could be integrated into the future treaty on plastic pollution, which is currently being widely discussed within multiple international fora supported by the OECD, WTO and UNEP.[136] Secondly, with the growing cooperation between the ASEAN Member States[137] to push back plastic waste flows coming from the OECD members, there is an opportunity to accelerate the entry into force of the Basel Protocol on Liability and Compensation.[138] With the Protocol coming into force, it would be easier to hold accountable the actors breaching the existing provisions of the Basel Convention, including those aligned with the objectives pursued by the PPSS.

---

[135] M. Young, "2022 And a New Path for Environmental Law in the Global Economy — Pathway to the 2022 Declaration", 2 May 2021.

[136] "A New Global Treaty to Tackle Plastic Pollution?".

[137] "ASEAN Member States Adopt Regional Action Plan to Tackle Plastic Pollution", *World Bank* (Text/HTML) <https://www.worldbank.org/en/news/press-release/2021/05/28/asean-member-states-adopt-regional-action-plan-to-tackle-plastic-pollution>.

[138] *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal Basel,* Adopted 10 December 1999 (Not yet in Force), *op. cit.*, p. 12.