

SYMPOSIUM ON GLOBAL PLASTIC POLLUTION

CLEARLY HAZARDOUS, OBSCURELY REGULATED: LESSONS FROM THE BASEL CONVENTION ON WASTE TRADE

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As an internationally-traded commodity, plastic waste has long followed the profitability dynamics of the global waste and recycling market, leaving in its trace a disproportionate environmental and health burden on the world's most vulnerable populations.¹ East Asian and Pacific countries, where most globally generated plastic waste has been exported since the late 1980s,² are marked by underdeveloped, inefficient, or non-existent waste management infrastructures.³ Despite the highly visible environmental and human health impacts of plastic pollution, the global plastic waste trade has predominantly operated outside the scope of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.⁴ In 2019, however, this treaty was amended to explicitly bring all but a narrow stream of plastic waste within the category of wastes controlled as “hazardous waste,”⁵ or “waste requiring special consideration.”⁶ This essay explains the international legal implications of the amendment and discusses potential challenges related to its implementation and enforcement. It argues that in order to be effective, the new plastic waste trading rules will require further legal clarity, greater transparency in plastic waste trade that is *not* regulated under the Convention, and stronger law enforcement cooperation between customs and environmental protection authorities, both within and between countries. Since controlling all plastic waste trade at point of export is, in practice, impossible given the state of global shipping infrastructures and container traffic volume, the most effective approach to curbing plastic waste pollution and illegal trade lies outside the mandate of the Basel Convention, notably, in assigning financial and environmental responsibility for plastic waste within plastic product supply chains.

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¹ See Ctr. for Int'l Env'tl. Law et al., [Plastic & Health: The Hidden Costs of a Plastic Planet](#) (2019); GAIA, [Discarded: Communities on the Frontline of the Global Plastic Crisis](#) (2019).

² On global trade statistics, see Amy L. Brooks et al., [The Chinese Import Ban and Its Impact on Global Plastic Waste Trade](#), 4 SCI. ADVANCES 1 (2018).

³ See UN Env't Programme, [Global Waste Management Outlook](#) (2015).

⁴ [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal](#), Mar. 22, 1989, 1673 UNTS 126 [hereinafter *Basel Convention*].

⁵ Hazardous wastes are defined under Article 1(1) of the Basel Convention and listed in Annexes I and VIII.

⁶ These are wastes that do not meet the Basel Convention's definition of hazardous waste but are also environmentally problematic and thus subject to the same transboundary control mechanisms as hazardous waste. See [Basel Convention](#), *supra* note 4, art. 1(2) & Annex II.

The Origins of Basel

The Basel Convention was adopted in 1989 based on broad international consensus that the widespread business practice of exporting hazardous waste from industrialized to developing countries required stricter regulation. Accounts of the negotiation process show that beneath the general consensus that disposing toxic wastes in poor countries was unethical, there was immense disagreement over the types of substances that should be understood as “hazardous waste” not to be exported to developing countries, and over whether trade in hazardous waste for recycling and recovery purposes should be exempt from restriction.⁷ The approach taken under the treaty is to define certain waste streams as “hazardous waste,” oblige state parties to reduce the generation of these wastes within their jurisdictions, affirm the sovereign right of states to ban these types of imports, prohibit state parties from exporting hazardous waste to countries that have adopted hazardous waste import bans, and restrict trade with non-parties.⁸

The Convention stipulates that hazardous waste transfers should only take place when the material in question cannot be managed at its source in an environmentally sound manner, or where it is required for recycling or recovery purposes in the state of import.⁹ All movements of hazardous waste involving Basel parties are subject to a prior informed consent (PIC) procedure involving countries of export, import, and transit; financial insurance requirements; and documentary proof of environmentally sound management.¹⁰ In 1995, parties to the Convention adopted the Basel Ban Amendment,¹¹ which prohibits all hazardous waste flows (including for recycling or recovery) from Organisation for Economic Co-Operation and Development (OECD) and EU countries, as well as Liechtenstein, to all other Basel parties. Whether a waste commodity is legally defined as hazardous waste determines whether it can flow freely in global commerce or is instead subject to stringent geographical limitations, transparency and consent mechanisms, environmental management obligations, and financial insurance responsibilities. For these reasons, the repercussions of including plastic waste under international hazardous waste trading rules are not minor, as these rules determine the legality or illegality of all cross-border waste transactions.

Plastic Waste Under Basel

Parties to the Basel Convention adopted the 2019 plastic waste amendment with an aim to protect human and environmental health from the negative externalities of the global plastic waste trade. In consequence, notification and PIC mechanisms applicable to international transfers of hazardous waste will now apply to a vast range of plastic waste streams that were previously traded as low-risk or no-risk waste commodities, subject only to the normal transboundary controls applied to regular commercial transactions. The new international regulatory parameters of the plastic waste market are expected to significantly alter the organization and operation of the global plastic waste trade, with important implications for Basel parties as well as their non-party trading partners such as the United States.

Prior to the plastic waste amendment, the Basel Convention listed “solid plastic waste”¹² among wastes presumed to be non-hazardous and excluded from the scope of the treaty. As a result, a bill of lading or other shipping

⁷ See JENNIFER CLAPP, [TOXIC EXPORTS: THE TRANSFER OF HAZARDOUS WASTES FROM RICH TO POOR COUNTRIES](#) (2001).

⁸ [Basel Convention](#), *supra* note 4, arts. 1, 4, 6, 11.

⁹ *Id.* art. 4(9).

¹⁰ *Id.* art. 6.

¹¹ [Decision III/1 Amendment to the Basel Convention](#), UN Doc. UNEP/CHW.3/35 (Nov. 28, 1995).

¹² [Basel Convention](#), *supra* note 4, Annex IX.

documentation containing the international commodity code for plastic waste¹³ was unlikely to draw the attention of customs authorities as potentially containing hazardous waste subject to Basel Convention controls. The transboundary transfer of any shipment described as plastic waste could generally take place between private actors without the intervention of environmental protection agencies, and beyond the inspection radar of customs authorities. This framework of rules facilitated the evolution of a global plastic waste market devoid of environmental responsibility. The widespread practice of mixing contaminated, unrecyclable, and potentially hazardous waste with non-hazardous recyclable materials prompted China to ban a wide range of waste imports, including plastic waste, as of January 2018.¹⁴ In the following months, port seizures in various South Asian nations revealed that in light of China's ban, massive quantities of hazardous waste falsely labelled as plastic recyclables had been diverted to these destinations from Australia, Canada, the United States, and the European Union.¹⁵

Longstanding practices of port-hopping illegal waste cargo to jurisdictions with more lenient waste regimes and shipping hazardous plastic waste to countries without having obtained their prior informed consent will become increasingly difficult under the new plastic waste restrictions, which apply to all 186 state parties of the Basel Convention.¹⁶ By drastically increasing transparency in global plastic waste transactions and enhancing the environmental responsibilities of global plastic waste traders, the new Basel rules will bring an end to the economic practicality of externalizing one of the most prevalent and environmentally persistent forms of hazardous waste. Once the amendment takes effect on January 1, 2021, almost all plastic waste transactions involving Basel parties that do not qualify as uncontaminated single-polymer waste will be subject to treaty rules applicable to transfers of hazardous waste. Canada, China, and Turkey are the only Basel parties to have indicated they will require additional time for domestic implementation of the new rules.¹⁷

The social, economic, and environmental significance of this amendment should not be underestimated. In the process of its adoption, various industry groups expressed their opposition to the proposed amendment, arguing that the new administrative requirements for transactions of mixed plastic waste would disincentivize investment in global waste management and recycling technologies.¹⁸ Adoption of the amendment also led the United States to protest at the OECD against the automatic inclusion of the new Basel definitions into the OECD waste regime.¹⁹ According to the U.S. Environmental Protection Agency, the enhanced scrutiny over plastic waste is unnecessary in the context of OECD trade, as "OECD member countries have attained high environmental standards and have the capacity to manage waste in an environmentally sound manner."²⁰ Yet empirical evidence from

¹³ [Harmonized System](#) (HS) code 3915 applies to "waste, pairings and scrap, of plastic."

¹⁴ China's notification to the World Trade Organization refers to the "striking of 'illegal foreign garbage'" for environmental and public health reasons. *See* World Trade Org., Comm. on Technical Barriers to Trade, [Notification by China](#), WTO Doc. G/TBT/N/CHN/1211 (July 18, 2017).

¹⁵ *See, e.g.*, Malaysian Ministry of Energy, Science, Tech., Env't & Climate Change, [3000 Metric Tonnes of Plastic Waste from 60 Containers are Expected to be Shipped Back to Their Country of Origins](#) (May 28, 2019); Basel Action Network, [Report on Fate of Re-Exports of Seized Illegal Imports of Waste from the USA to Indonesia](#) (Oct. 28, 2019).

¹⁶ On illegal waste trade flows and practices, see I. Rucevska et al., *Waste Crime - Waste Risks: Gaps in Meeting the Global Waste Challenge* (2015).

¹⁷ Depository notifications in accordance with Article 18(2)(b) relating to the amendments to Annexes II, VIII and IX of the Convention have been submitted by [Canada](#), [China](#), and [Turkey](#).

¹⁸ *See, e.g.*, European Fed'n of Waste Mgmt. & Env'tl. Serv., [FEAD Position on the Norway Proposal to Amend Annexes II, VIII and IX of the Basel Convention](#) (Dec. 2018); World Plastics Council, [WPC Norway Amendment Position Statement](#) (May 6, 2019).

¹⁹ On OECD and Basel harmonization, see Org. for Econ. Co-Operation & Dev., [Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations](#) (2020).

²⁰ U.S. Env'tl. Prot. Agency, [Letter to Secretary-General of the OECD](#) (July 3, 2019).

the U.S. recycling landscape reveals a different reality, starkly highlighting the depth of U.S. reliance on non-OECD waste import markets. Trade and media publications report that recycling programs have been collapsing across hundreds of U.S. cities due to the combined effect of plastic waste import bans adopted by South Asian countries and the more recent impact of the coronavirus pandemic.²¹ With U.S. export markets for plastic waste disappearing and domestic recycling systems being abandoned, the country faces a surging waste crisis that will inevitably lead to more landfilling and incineration of plastic waste, or to an increase in illegal trade, in the absence of significant investment and restructuring of domestic recycling systems. In essence, the Basel plastic waste amendment will force all countries involved in the global plastic waste trade—Basel parties and non-parties alike—to reconceptualize their plastic waste management infrastructures.

Implementation and Enforcement Challenges: Crystal Clarity in Legal Ambiguity

While the plastic amendment is widely hailed as a historic achievement, its successful implementation will depend on how the new provisions are legally interpreted by individual Basel parties. Greater legal clarity is needed about which plastic waste shipments will be categorized by Basel parties as hazardous waste or non-hazardous commodities. According to the terms of the amendment, this differentiation will rest on whether a shipment of plastic waste is “almost free from contamination and other types of waste”²² and consists “almost exclusively”²³ of one polymer or resin. The amendment further stipulates that “international and national specifications may offer a point of reference”²⁴ in this regard. Clearly, technical guidelines adopted under the Convention will have to be updated to reflect this new terminology and provide insight to parties on acceptable contamination thresholds. It should be noted, however, that Basel parties are under no legal requirement to adopt a consensus definition of these terms. Hence, any legal ambiguity in the wording of the amendment may lead to hundreds of inconsistent domestic legal interpretations, hindering the effectiveness of the new rules. Experience gained under the Basel Convention with respect to controlling electronic waste reveals that the challenge of resolving the treaty’s linguistic ambiguities and obtaining definitive legal clarity on the distinction between hazardous waste and non-hazardous “goods” can be nearly impossible given the disjointed global regulatory landscape and the voluntary nature of technical guidance instruments developed under the Convention.²⁵

A second aspect of the plastic amendment that will require further development and clarity is the evidentiary requirement of “contractual or relevant official documentation,”²⁶ which applies to all shipments of plastic waste claimed to be non-hazardous commodities exempt from the Basel regime. The rationale behind this requirement is that successful implementation of hazardous waste controls rests on Basel parties’ ability to verify that shipments of plastic waste labelled non-hazardous are in fact non-hazardous. The nature and quality of this new evidentiary requirement will matter. If Basel parties allow plastic waste commodities to be shipped based on the simple proof of a contract between an exporter and importer that the waste will be recycled in an environmentally sound manner, or other documentation similarly based on unverifiable claims made by private entities, there may be enhanced opportunities for illegal plastic waste trading. While there clearly needs to be greater transparency and

²¹ See Cole Rosengen & E.A. Crunden, *How Coronavirus is Disrupting US Waste and Recycling*, WASTEDIVE (Apr. 29, 2020); Michael Corkery, *As Costs Skyrocket, More U.S. Cities Stop Recycling*, N.Y. TIMES (Mar. 16, 2019).

²² [Basel Convention](#), *supra* note 4, Annexes II, VIII, and IX.

²³ *Id.*

²⁴ *Id.*

²⁵ Sabaa Ahmad Khan, *E-Products, E-Waste and the Basel Convention: Regulatory Challenges and Impossibilities of International Environmental Law*, 25 RECIEL 248 (2016).

²⁶ [Basel Convention](#), *supra* note 4, Annex IX.

regulatory oversight regarding these non-hazardous plastic waste commodities, it also cannot be forgotten that these “goods” are in fact excluded from the scope of the treaty. Hence, requiring more stringent documentation in relation to these waste transactions could be legally challenging. Since controlling regular commodities is not an intrinsic objective of the Basel Convention, imposing evidentiary requirements in relation to shipments of non-hazardous waste may be perceived as an unjustified intrusion of the Basel Convention into regular international commerce.

Even when greater legal clarification is achieved, effective enforcement of the amendment will depend on whether Basel parties concomitantly strengthen their border control capacities. The global shipping infrastructures through which international waste trading takes place are set up to minimize lengthy inspections and reduce shipping delays. For example, in Canada, declarations of export for regular commodities need only be submitted to authorities forty-eight hours prior to loading a container onto a vessel. The combination of short timeframes for inspection and the immense volume of container traffic impedes effective enforcement of hazardous waste export rules and facilitates illegal trading, also known as waste crime. Europe, North America, Japan, and Australia have all been identified as main ports of origin of illegal waste shipments.²⁷ Moreover, a 2007 Canadian Senate report found all of Canada’s major seaports to be directly or indirectly infiltrated by extensive organized crime networks.²⁸

While customs authorities play a critical role in enforcing hazardous waste export prohibitions, most are too under-resourced to fulfill their obligations.²⁹ A 2015 federal audit of the Canadian Border Services Agency (CBSA) concluded that the agency “did not fully have the necessary authorities, information, practices, and controls to implement its enforcement priorities and prevent the export of goods that contravene Canada’s export laws.”³⁰ According to the CBSA, one third of shipments for export that have *already been identified as high-risk* are left unexamined as a result of administrative delays, container traffic volume, and lack of human resources.³¹ Given these circumstances, it is unsurprising that the most recent case of illegal traffic reported to the Basel Convention concerns a shipment of falsely labelled non-recyclable plastic and household waste, which was loaded at the Port of Montreal (Canada) and destined for India through the Port of Antwerp (Belgium).³² Having evaded Canadian authorities, the illegal shipment was discovered and intercepted upon random inspection in Belgium. The fact that transparency in marine shipping rests so heavily on the physical inspection capacities of ports presents a foundational limitation to monitoring and controlling the waste trade.

A final matter worth noting is that while the new plastic amendment legally binds all Basel parties, there are no hard consequences for non-compliance. Cases of non-compliance may be submitted by the Basel parties to the party-appointed Implementation and Compliance Committee, but this merely triggers a facilitative process aimed at assisting parties to meet their obligations.³³ In addition, the Basel Protocol on Liability and Compensation,³⁴ which sets out rules regarding liability and compensation for damage resulting from transboundary movements, accidental spills, and illegal traffic of hazardous waste, remains unenforced to date.

²⁷ Rucevska et al., *supra* note 16, at 55.

²⁸ Standing Senate Comm. on Nat’l Sec. & Def., Canadian Security Guide Book: [Canadian Security Guide Book: Seaports](#) (2007 ed.).

²⁹ Rucevska et al., *supra* note 16, at 8.

³⁰ Auditor Gen. of Canada, [Report 2 – Controlling Exports at the Border](#) para. 2.89 (2015).

³¹ *Id.* at para. 2.40.

³² See Secretariat of the Basel Convention, [Confirmed Cases of Illegal Traffic Reported by Parties](#).

³³ Decisions Adopted at the Sixth Meeting of the Conference of the Parties to the Basel Convention, [Mechanism for Promoting Implementation and Compliance](#) art. 9, UN Doc. UNEP/CHW/6/40 (2002).

³⁴ [Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal](#), UN Doc. UNEP-CHW.1-WG 1-9-2 (1999).

Conclusion

The Basel Convention applies to the “hazardous waste” phase of the plastics lifecycle and thus attends exclusively to the most toxic and highest-risk aspect of the much broader problem of plastic pollution. Yet solving the problem of plastic pollution also requires enhanced legal controls over non-hazardous waste (as discussed above) and, most importantly, bolder assignments of environmental responsibility in plastic product supply chains. Both these areas are beyond the mandate of the Basel Convention. The plastic amendment essentially presents a solution of last resort to a global crisis whose origin and continued reproduction are deeply embedded in the still-predominant practice of externalizing environmental costs. Eliminating plastic pollution requires, above all, moving away from toxic materials in product design and establishing extended producer responsibility over the entire plastics lifecycle, from product to waste. In this respect, the Plastic Waste Partnership established under the Basel Convention to enhance international and public-private cooperation on the sustainable management of the plastics lifecycle is just as significant as the new legal rules, as it brings to the forefront Basel parties’ most important yet historically neglected obligation, that is, to minimize the generation of hazardous waste within their jurisdictions so that transboundary transfers of toxic waste become a thing of the past.