Basel amendments create uncertainty in global plastics and e-waste markets

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After what seemed like a distant obligation in May of 2019, and overshadowed by an increase in plastic usage while managing the virus in 2020, the plastics amendments decision to the Basel Convention will take effect in **January 2021** (the Plastic Amendments).

Unfortunately, it seems that the Plastic Amendments provide more questions than answers in how global markets will adjust to these profound changes surrounding end-of-life plastics and products containing plastic – including electronics and other consumer goods.

What do the plastics amendments do?

Under the Plastics Amendments, end-of-life plastic waste, both homogenous and mixed streams, will now be regulated under the Basel Convention (subject to some exemptions) and their transboundary transfer will either be:

- Prohibited as “hazardous”; or
- Controlled by domestic regulators through disclosure/Prior Informed Consent (PIC) requirements as “other wastes”.

Gone are the days of unregulated transfers of mixed (often municipal) plastic wastes which became the subject of minor international incidents in the months leading up to the Plastics Amendments. But how do exporters of end-of-life plastics know whether their material is banned, controlled, potentially exempt under the convention, or otherwise not considered a waste at all?

Convention “wastes” include resource recovery materials

As a transboundary waste transfer agreement recognizing “the need as far as possible to reduce such movement to a minimum”, material is deemed a “waste” under the convention when subject to a broad spectrum of treatments – including both various

disposal-related activities, as well "operations, which may lead to resource recovery, recycling, reclamation, direct re-use or alternative uses".

Unlike some domestic enabling legislation, the Basel Convention does not have a companion agreement on recyclables so all end-of-life processes are grouped together. Further, the Plastics Amendments have meant that there are now multiple avenues for many post-consumer products containing plastic to fall under the convention.

Reverse onus to prove not hazardous

Where the material is a waste, the Basel Convention may deem it "hazardous" under broad, inclusive categories by:

- Direct listing of many conventional waste streams; or
- Combination of waste:
    - from defined activity or containing (any level) of listed substances; and
    - capture within certain United Nations Dangerous Goods Classes.

There is an ability to rebut the effective presumption that a waste is hazardous but it may be more trouble than it's worth for exporters managing waste streams of varying composition, including mixed plastics now subject to PIC requirements. Until recently, a hazardous designation was not fatal to the possible export of such materials to developing world markets for circular economy activities, but this has since changed.

Basel Ban Amendment on hazardous waste recycling in developing world

In September of 2019, Croatia became the 97th signatory to the "Basel Ban Amendment", thereby entrenching a prohibition against the transfer of hazardous wastes, for whatever purpose, from the Organisation for Economic Co-operation and Development (OECD)/ European Union (EU) Parties to developing world nations.

In respect of products containing plastic (such as electronics), this may mean very few Basel Convention non-OECD countries will be willing to receive such wastes in potential violation of the convention and transits to such countries through a non-convention country such as the United States are also prohibited.

Other wastes and the exemption test

The majority of post-consumer plastic wastes will likely either fall into the convention's "other wastes" category – which are subject to controlled mechanisms such as shipment-specific PIC requirements or be exempt from these mechanisms. The exemption test is whether the plastic waste is:

> *Destined for recycling in an environmentally sound manner and* ***almost free from contamination and other types of wastes***

As to the meaning of "almost free of contamination and other types of wastes", the Plastics Amendments only note cryptically "international and national specifications may

offer a point of reference. Unfortunately, the Secretariat has yet to issue relevant guidance, but it would seem that plastics mixed with paper, metals or glass, as well as products containing both plastics and other "waste" materials such as some electronics, would likely be "other wastes" where they are not otherwise hazardous.

Further, only certain specified plastics streams which meet the exemption test will be free from the Basel Convention control mechanisms.

Due diligence required on the importer

Convention compliance is not assured even when an exporter has managed to meet the requirements to establish that the transferring materials are merely "other wastes" and has obtained PIC. Specifically, the Basel Convention further prohibits the transfer of non-hazardous wastes where the exporter has reason to believe that the wastes will not give "environmentally sound management" (ESM), which is generally:

> Taking all **practicable steps** to ensure that hazardous wastes or other wastes are managed in a manner, which will **protect human health and the environment** against the **adverse effects, which** may result from such wastes;

But how is an exporter to recognize ESM or its absence from distant shores? For example, the Agbogbloshie e-waste recycling site in Accra, Ghana is praised by some as model of local opportunity in resource recovery, but has also been plagued by soil contamination issues.

A rise in illegal traffic of international waste

The result of any attempts to skirt the full requirements of the convention as it relates to plastics may draw a determination of "illegal traffic", which will have both domestic and international implications for the exporter.

Of particular concern are shipped wastes deemed to have been:

- misrepresented;
- don't "conform in a material way" with the manifest documents; or
- result in deliberate disposal (i.e. dumping) in contravention of:
    - the Basel Convention; or
    - "general principles of international law".

In other words, the contents of the shipments must get a fully description and all material must fully conform to such description. The host country regulator, now a direct participant in waste transfers, will ensure this takes place.

With the Plastics Amendments, exporters of end-of-life plastics should be aware that the Basel Convention includes a "Protocol on Liability and Compensation", which exposes export nations (and indirectly domestic recycling industries) to potentially significant damage claims for improper exports under the Basel Convention. The stakes in the trade of global plastics and e-waste have risen considerably.

By

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