

Plastics in the Spotlight

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Plastic marine litter has received a media spotlight in recent years. There are an estimated 150 million tonnes of plastic present in oceans, a fraction of global plastic production,¹ while photos showing mountains of plastic in developing countries have become common on social media. In 2017, China, the world's largest importer of scrap plastics, banned their import. Countries and cities across the globe are banning single use plastic items. The spotlight recently shone on Canada with the Philippines-Canada waste dust up.

On April 23, 2019, the Philippines demanded that Canada take back shipping containers that contained household waste mixed in with recyclable plastics. Canada had asserted that it is not responsible for returning the waste that was shipped from a Canadian port in 2013. As threats from the Philippines President escalated in late April 2019, Canada offered to take back 69 of the shipping containers and pay the costs to do so.

For the last six years, Canada and the Philippines have attempted to find a solution. Both countries' respective positions are complicated by obligations under international law.

This international dispute caught the attention of the Canadian public and media and serves as a reminder for Canadian recycling businesses that international obligations may give rise to regulatory requirements that are applicable to the company's operations.

Facts

In 2013, a Whitby, Ontario plastics recycler consigned 103 containers to Manila, Philippines from a port in B.C. The regulatory shipping documents stated that the containers contained plastic scrap materials. Philippine inspectors found that some of the initial containers also contained household waste.

The Philippine Department of Environment and Natural Resources ("DENR") subsequently conducted a Waste Assessment and Character Study on the waste. In November 2014, the DENR concluded that the waste was neither toxic nor hazardous.

¹ Frederic Gallo et al, "Marine litter plastics and microplastics and their toxic components: the need for urgent preventive measures", (2018) 30:1 Env Sci Europe at 13.

The Philippine government also prosecuted the importing companies for violations of Philippine law. The prosecution sought to obtain the court's permission to dispose of the containers within the Philippines. On June 30, 2016, the Regional Trial Court of Manila Branch 1 rejected the prosecution's request and ordered the containers to be shipped back to Canada.² To date, Canada has not ordered the company to return the containers. The recycling business appears to no longer operate.³

What are Canada's Legal Obligations?

Canada and the Philippines are both signatories to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* ("Basel Convention").⁴ The Basel Convention requires Canada to regulate the import and export of "hazardous wastes" and "other wastes", which are defined as follows:⁵

- ◆ Hazardous wastes are either a waste enumerated in an Annex to the Basel Convention or a waste that either the importing state or exporting state considers to be hazardous.⁶
- ◆ "other wastes" are set out in an Annex to the Basel Convention and includes household waste, incinerator ash, and as of last week, plastic waste⁷

The Basel Convention imposes obligations on Canada as the exporting state, including the following two relevant requirements:

- ◆ Article 9 requires the Philippines to give its prior informed consent as the importing state before Canada can export Hazardous wastes and other wastes. Article 9(1)(d) states that the Philippines, as the importing state, cannot consent to receiving waste that does not "conform in a material way" with shipping documents.⁸

The Basel Convention is violated if Hazardous/other wastes are imported into the Philippines without the Philippines' prior informed consent. Article 9(2) of the Basel Convention requires Canada, as the exporting state, to take back the offending waste, or if impracticable, dispose of the waste in accordance with the Basel Convention.⁹

² Decision of Judge Tita Bughao Aliguag of the Regional Trial Court of Manila Branch 1, Criminal Case No 14-311191 & 14-31192-96 (30 June 2016).

³ Randy Shore, "Philippines fiasco: Doctored paperwork obscures origin of garbage shipped to Manila", *Vancouver Sun*, (24 April 2019).

⁴ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, UNTC vol 1673, 22 March 1989, (entered into force internationally 5 May 1992) [Basel Convention].

⁵ See for example, Basel Convention, Arts 4(1)(b) and (c), which state that Parties shall prohibit or not permit the export of hazardous or other wastes to a state that does not consent in writing to the specific import.

⁶ Basel Convention, Art 1(1).

⁷ Basel Convention, Art 1(2), Annex II, see also: "Governments agree landmark decisions to protect people and the planet from hazardous chemicals and waste, including plastic waste", Synergies, <http://www.brsmeas.org/?tabid=8005>

⁸ Basel Convention, Art 9(1)(d).

⁹ Basel Convention, Art 9(2).

- ♦ Article 4(4) requires Canada, as a signatory to the Basel Convention, to implement and enforce the Basel Convention within Canada’s authority, including “measures to prevent and punish conduct in contravention of the Convention.”¹⁰

Canada is required to enforce the Basel Convention through its own laws in order to hold an exporter liable for wrongdoing. Canada implements and enforces the Basel Convention through the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* (“Federal Hazardous Waste Regulation”).¹¹ In 2016, Canada amended the Federal Hazardous Waste Regulation to make “other wastes” subject to the regulation.¹²

The Federal Hazardous Waste Regulation sets out a procedure for hazardous waste and recyclable exporters in the event that the importing facility does not accept the waste. The exporter must immediately give notice to the Federal Minister of the Environment and, within 90 days of giving notice or some other time as determined by the Minister, must either:

- ▶ make all “necessary arrangements” to dispose of the hazardous waste or recyclable in the importing country at another facility,¹³ or
- ▶ return the hazardous waste to Canada, in accordance with the procedure set out in the Federal Hazardous Waste Regulation.¹⁴

Federal environmental officers are empowered to enforce the Federal Hazardous Waste Regulation and may issue Environmental Protection Compliance Orders to compel an exporter to comply with the procedures set out above.¹⁵

Canada May Not Be Required to Return the Waste if “Impracticable”

According to the Basel Convention, if returning the waste would be impractical, then the waste must be disposed of “in accordance with the provisions of this Convention”, which means that the waste could be disposed of in the Philippines.

Canada had argued that compelling the waste exporter to return the waste to Canada or taking back the waste itself may be “impracticable”:

- ♦ The Prime Minister of Canada stated at a press conference in 2017 that it was unclear about who should pay to return the waste to Canada.¹⁶

¹⁰ Basel Convention, Art 4(4).

¹¹ *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2005-149 [Federal Hazardous Waste Regulation].

¹² *Regulations Amending the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, SOR/2016-273 [Federal Hazardous Waste Regulation].

¹³ Federal Hazardous Waste Regulation, s 9(p)(iii)(A).

¹⁴ Federal Hazardous Waste Regulation, ss 9(p)(iii)(B).

¹⁵ *Canadian Environmental Protection Act*, SC 1999, c 33, ss 235(1), (2).

¹⁶ Andy Blatchford, “Trudeau’s trash talk: Ottawa seeking way to handle garbage stranded in Philippines”, *CTV News* (14 November 2017) online: < <https://www.ctvnews.ca/politics/trudeau-s-trash-talk-ottawa-seeking-way-to-handle-garbage-stranded-in-philippines-1.3676810> >

- ◆ As the recycler appears to no longer operate its business, it would be impracticable to return the waste because it cannot compel the waste exporter to return the waste.

Significance

The issue gained international profile when the Philippines elevated it above diplomatic discussions in advance of the 14th Annual Conference of the Parties to the Basel Convention, which took place last week. Canada and the Philippines have several diplomatic options to resolve their dispute:

- ◆ Canada or the Philippines could submit an application to review the Parties' actions pursuant to the Basel Convention's Mechanism for Promoting Implementation and Compliance ("Compliance Mechanism").¹⁷ The Compliance Mechanism creates a procedure that allows disputing states to resolve disputes without recourse to the Basel Convention's formal dispute resolution mechanisms.¹⁸
- ◆ The Philippines can also attempt to initiate more formal proceedings against Canada. The Basel Convention, Article 20(2) allows a state to submit the dispute to the International Court of Justice or private arbitration.¹⁹ However, Canada would need to give its consent before either the International Court of Justice or an arbitral tribunal could hear the dispute.²⁰

While Canada's offer to take back the majority of containers may resolve the matter, it leaves questions unanswered.

How did the waste get into the shipment of recyclables? How much will it cost Canadians to take back and dispose of the waste? Who is responsible for the containers once in the port of Vancouver? What of the polluter pays principle? How will Canada deal with plastics in the face of national import bans and more restrictive international regulation?

Canada's dispute with the Philippines is significant for Canadian recyclers, and the management of plastic waste in Canada. Conducting due diligence on international partners and markets, greater attention to container content, and understanding and complying with Canadian regulations can mitigate the business risks of shipping recyclables across borders. Solving the broader issue of what to do with plastic waste will require collaboration between industry, all levels of government and consumers.

¹⁷ *The Basel Convention Mechanism for Promoting Implementation and Compliance*, UN Dec VI/12, 2002 [Basel Convention Compliance Mechanism].

¹⁸ Basel Convention Compliance Mechanism.

¹⁹ Basel Convention, Art 20(2).

²⁰ Basel Convention, Art 20(3); Canada has not previously declared that it consents to submitting disputes to the International Court of Justice or to arbitration.

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