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The Basel convention on the control of transboundary movements of hazardous wastes and their disposal: Critical analysis

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Abstract

The Basel Convention is an international treaty between nations on the control of transboundary movements of harmful wastes and their disposal (hereinafter referred to as "the Basel Convention's") that was approved on 1989 when the news media highlights many incidences of unsuitable waste dumping in Eastern Europe and Africa. This paper explains that this Basel convention does not justify its promise of shielding a developing nation and how diminish the transboundary actions of harmful wastes with increasing the issue of environment and human health. It is argued that the rules of this convention are mostly focused on hazardous

activities under the national jurisdiction of the state and affecting other states, but they do not provide enough guidance because of reminding some limitations of this Basel convention. Nevertheless, if above issues are continued it will be affected on health of human being and environment tremendously. This paper will show the way for controlling hazardous wastes and secure the environment including human health and then protect the source of generation with sustainable use of possessions by developing the administration of dangerous wastelands and other wastes.

Keywords: Convention, jurisdiction, Hazardous, Transboundary

1. Introduction

By an Italian firm, one horror story is focused on the illicit dumping of 2,100 tons of toxic waste in Nigeria ^[1]. Empirical data shows that the total annual global production of hazardous wastes had skyrocketed by the year of 1990 from 5 million metric tons to 3000 million metric tons. Generating the most waste, the USA exports waste further than 250 million tons of waste which more than 40.7 million were identified as hazardous. The factors leading are lessening of waste disposal sites, stricter national legislation in, higher domestic disposal costs and increased liability concerns. For the past 30 years, hazardous wastes have expanded exponentially.

The aim of this convention includes diminishing the transboundary actions of harmful wastes and protects the source of generation ^[2], and then sustainable use of possessions by developing the administration of dangerous wastelands and other wastes. The vital goal of this agreement is for controlling international trade in hazardous wastes in order to it secures the environment and human health ^[3]. But, most of the time, these goals are not achieved conferring on this convention. For example, many countries are not being able to build hazardous waste management infrastructure because of lacking economies of scale and efficiency. However, According to Katharina Kummer ^[4].

"Seven years after the entry into force of the Basel Convention, its institutional framework is well established."

In this paper, I will try to focus on the main problems of Basel convention and will finally stretch some ideas on how that issue can be determined by postponing hazardous waste of improper dumping using this convention.

¹ Sheehan, J. M. (n.d.). Trashing Free Trade: The Basel Convention's Impact on International Commerce. Retrieved 03 26, 2018, from <<https://cei.org/pdf/3660.pdf>>

² Sheehan, J. M. (1996). Trashing free trade: The Basel Convention's impact on international commerce. COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC 20036(USA). 1996.

³ Cox, G. (2010). The Trafugura Case and the System of Prior Informed Consent under the Basel Convention-A Broken System. Law Env't & Dev. J., 6, 263. at 265.

⁴ Kummer, K. (1999). International management of hazardous wastes: the Basel Convention and related legal rules. Oxford University Press on Demand.

2.1 History the basel convention with negotiations

2.1.1 Primary History

The Basel Convention was implemented in 1989 and enforced on 5 May 1992. From the early 1980s, the international environmental agenda is focused on the supervision of hazardous wastes and chief Montevideo program settled in 1981 on environmental law. The convention is signed by the following 13 Parties at the closing date for signature: France, Denmark, Finland, Costa Rica Luxembourg, Colombia, Sweden, Switzerland, Chile, Monaco, the United Kingdom of Great Britain, Hungary, the Former Yugoslav Republic of Macedonia, and Northern Ireland ^[5].

2.1.2 Negotiation Process of the Basel Convention (1987-1989)

By the year of 1997, through the Cairo guidelines, the governing council of UNEP provided a non-binding legal instrument that is premeditated for supporting the implementation of the governments and development of their national management policies ^[6]. It is then proposed for a joint proposal by the Hungary and Switzerland and that joint proposal is directed by the Governing Council of UNEP and Hungary, Switzerland to the Executive Director for expounding a worldwide agreement on the control of transboundary movements of hazardous wastes.

The decision by resulting negotiations is later endorsed by the United Nations General Assembly. Within a short time of fewer than two years, a schedule is fixed by the governing council for negotiating and drafting of this resolution. The Ad Hoc Working Group of Legal and Technical Experts initiated its discussions on the control of transboundary movements of Hazardous Wastes at a structural conference in 1987 and detained approximately five negotiation meetings between 1987 and 1989.

2.1.3 Assembly of Plenipotentiaries

In Basel, the assembly of Plenipotentiaries is organized at the invitation of the Swiss Government in 1989 on the international convention on the control of transboundary Movements of Hazardous Wastes where 116 States

are represented. It is also implemented eight resolutions involved with additional progress and the evolution of the Basel Convention. The final act is signed in Basel conference by the European Economic Community (EEC) and One hundred five States. This convention was signed in 1990 by the EEC and Fifty-three states and enforced in 1992 upon the credit of the twentieth apparatus of the agreement.

3.1 Formation of the basel convention for controlling of transboundary movements of hazardous

In this Basel convention, there are 29 articles and 6 annexes. According to article 1 ^[7], hazardous wastes belong to any category unless they do not hold any of the characteristics in annex 3. In article 3, ^[8], each party will inform the secretariat of this agreement for harsh environment other than enumerated in annexes 1 and 11. Article 5 ^[9], says about term of competent authorities and principal points.

On the other hand, the transboundary movement will be between the parties and States are not contracting Parties or from a Party over a State transboundary movement through non-member states on articles 6 ^[10], and 7 respectively. Illegal tariffs, international cooperation, bilateral agreement, regional agreement, the function of secretariat, settlement of dispute have also been discussed in this Basel convention.

Besides it, this convention has a conversed conference party, Reservations, and Declarations, Ratification, Acceptance, Formal Confirmation or Approval, Amendment of the Convention, Consultations on Liability, etc. On the other part, it discusses annexes where annex 1 confers categories of wastes, categories waste requiring special consideration and then characteristics of the list of hazardous. In annex 4, it is focused that how operators are disposal and finally, this convention debates about arbitration according to annex 6.

4. The obligation of the basel convention

Parties do not take a step for hazardous wastes where two groups are therefore theoretically dissimilar in position of the countries ^[11]. Each

⁵ Annex, I., Annex, I. I., Annex, I. V., Annex, V. A., Annex, V. B., Annex, V. I. & Annex, I. X. (1989). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. at 6.

⁶ Basel Convention Controlling of Transboundary Movement of Hazardous Wastes and their Disposal (2011). History of the negotiations of the Basel Convention. Retrieved 03 27, 2018, from <www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx>

⁷ Article 1 of the Basel convention.

⁸ Article 3 of the Basel convention.

⁹ Article 5 of the Basel convention.

¹⁰ Article 6 of the Basel convention.

¹¹ Katharina Kummer, D. I. (2001, 09 17). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. (C. S. (UNON), Ed.) 5-44. Retrieved 04 10, 2018, from http://www.ecoconsult.ch/uploads/1144-Annex_VII_study.pdf

party shall take proper steps for ensuring the group of hazardous wastes to minimize social, technological and economic aspects and protect the pollution and illegal traffic when these are endangered for human fitness and atmosphere [12].

According to article 4(5), a party shall not give license for hazardous waste to be transferred to a non- member party and smuggled also by a non- member party, but I think that this section has been limited in article 5(6) because this article is not permitted to the parties within Antarctica area with 60° South latitude for non- hazardous waste. Transporting hazardous waste to national jurisdiction by other states has been harshly prohibited. Parties shall take appropriate measures if the exporter state does not have any technical capacity or required facility [13]. This convention also limits the navigational rights and freedom of the ships and aircraft in territorial sea and mainland shelves bestowing to international law [14]. The exceptional regulation is that the waste issue in additional agreement does not take away from the Basel Convention. Article 4 of Basel convention is said for reducing waste generation.

Despite that materials, the rigorous requirement for authorization of notice and pursuing measuring of wastes

across state borders are observed when this Convention seats a universal prohibition on the exportation or importation of wastes between Parties and non-Parties according to section 4(a) and 4(b). But in the case of Canada vs. Philippines, [15] Canada rejects to oust 50 containers of household waste which is unlawfully transferred in Philippine without consenting of the concerned country. This is criminal act under Basel convention which goes against the convention procedures according to article 4(2), 4(b), 9, and annex 11. By the virtue of article 9, no one is permitted by illegal traffic without notification to another state.

In this point, my view is that Canada violates the Basel convention as a member party. So, on next-generation, what will be done by member party or non- member party, the question remains here? In this step, Basel convention should make proper law and suitable punishment for violating obligations of the Basel procedures although there is no domestic law in Canada in this position to authorize the dispute.

However, if this process continues like Canada, the boundary movement of hazardous wastes will be held in the future like following chart when it is increased from 1993 to 2001 unless this convention receives appropriate steps against parties for infringing requirements of this convention.

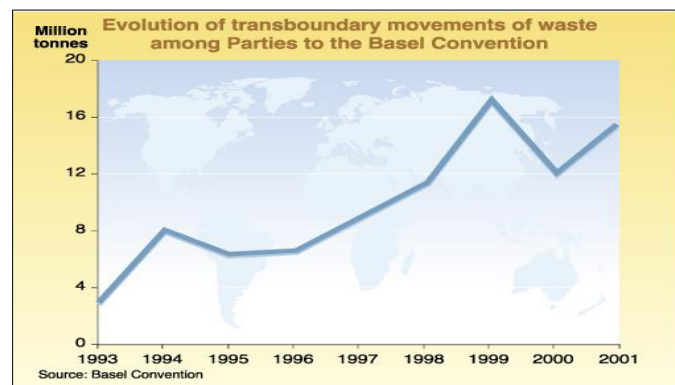


Fig 1

5.1 The problem of ratification

The number of parties to the convention is 186 however; signatories' countries are only 53 [16]. Most of the countries are ratified this convention except USA and Haiti [17]. Although the United Kingdom, Germany, and Japan postpone their decision for a signature because of a remaining ineffective declaration of intentions but they recognize this convention subsequently. A policy priority is noticed in ratification of Basel treaty under leaders from both parties with Barack Obama administration and George W Bush [18].

Nevertheless, the USA fails to ratify this convention as a non-member state. The convention is being questioned since 1992 about its obligation relating to domestic legal authority to implement. Such ratification is usually noticed as embodying the political choice of linking a treaty [19]. Stickley, this convention enforces on the packaging and wants take-back of illegal shipments [20]. Haiti thinks also same issue alike United States. With 123-member nations, it is one of the most comprehensive of the international agreements which is involved with numerous regional agreements with similar mandates that legalize the transport of hazardous wastes.

¹² Article 4 sub- section 2(a) of the Basel convention

¹³ Article 4(9), a, of the Basel convention.

¹⁴ Article 4(12) of the Basel convention.

¹⁵Canada in breach of its Basel Obligations, Canada in Breach of its Basel obligations Refusing to Take Back 50 Containers of Household Garbage Illegally Exported to the Philippines. (2015). Retrieved 04 16, 2018, from Basel Action Network (BAN): <http://archive.ban.org/wp-content/uploads/2015/04/Delegate_Alert_2_Letter_A4.pdf>

¹⁶ Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. (2011).

Retrieved 18 04, 2018, from <<http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>>

¹⁷ Ibid.

¹⁸ Fulton, T. Y. (2015). Breach Avoidance or Treaty Avoidance?: The Problem of Over-compliance and U.S. Ratification of the Basel Convention on Hazardous Wastes. Santa Clara Law Digital Commons, 1-43. Retrieved 04 11, 2018 at 3.

¹⁹ Id 04.

²⁰ Schmidt, C. W. (1999). Trading trash: why the US won't sign on to the Basel convention. Environmental health perspectives, 107(8), A410. at 412.

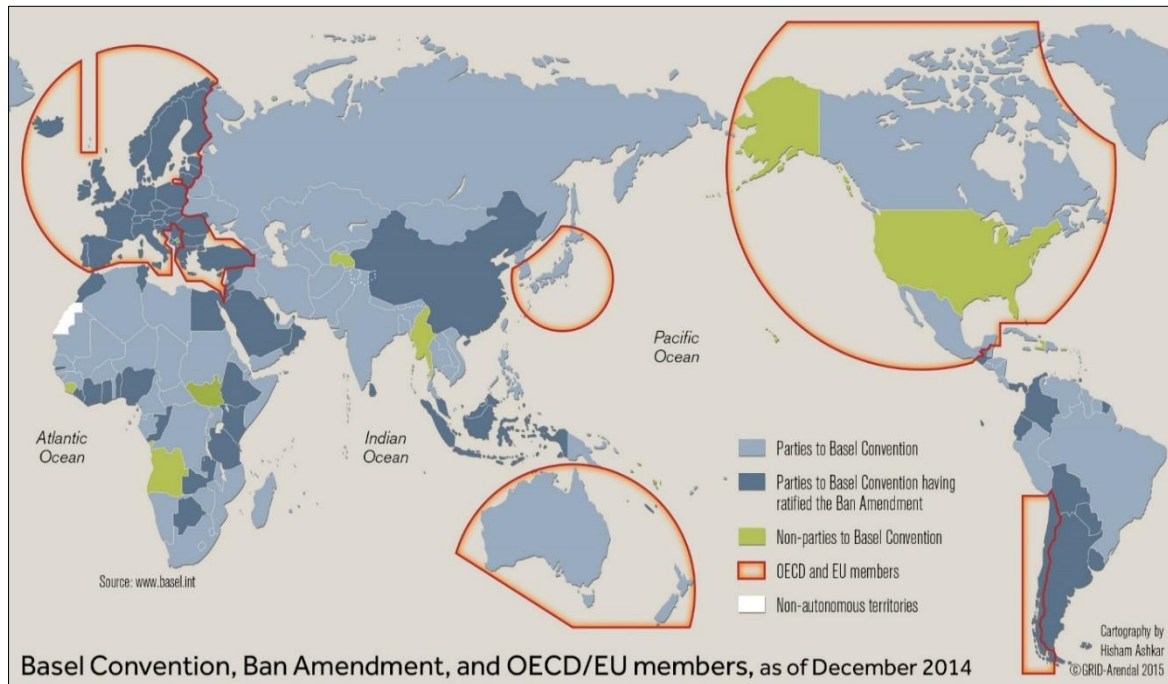


Fig 2

6.1 Weakness of the Basel convention

In recent tragedy in cote d Ivoire, 500 tons of toxic slop initiating in industrialized countries are inclined inadequately where 100000 people are killed or injured [21]. From environmental catastrophes, it is clearly understood that this convention does not justify its promise of shielding a developing nation [22]. However, Basel ban amendment assessed in 1995 when barred all importance of hazardous wastes to states and was not itemized in annex VII of this convention. It may have banned the cote d, Ivoire and supplementary catastrophes. This ban still has been become unsuccessful to save the support obligatory to be entered into force.



Fig 3

creates hazardous waste. against article 4. (a) of the Basle Convention but no step is properly taken by this convention More importantly, the rules of this convention are mainly concentrated on hazardous activities under the national jurisdiction of the state and affecting other states, but they do not provide sufficient guidance. In this position, such a toxic

substance is transferred by a probable source of pollution from a state of generation into the region of another nation-state [23]. The sovereignty right of the state is forbidden for importing hazardous which is referred in this convention [24]. According to article 4(g), is said that a party does not permit the dangerous harsh environment or another harsh environment to be transferred to a non-member party or to be imported from a non- member Party [25]. It is clearly observed in article 11 that the concept of a ban has been limited by the multilateral, bilateral and regional agreement. In my opinion, if this convention is maintained by above multilateral agreements, the provisions of Basel convention cannot be affected on transboundary movements. However, in the case of Greenpeace USA v. Stone [26] it is said that

“The Basel Convention has no implementing legislation and is not self-executing. This court has no standards or procedures to judicially enforce the treaty and therefore, plaintiffs’ claim under the Basel Convention must fail”

Although Basel fails, implementing legislation of Basel convention is ratified next in London dumping, Research, and Sanctuaries Act and the Marine Protection. Lamentably, this convention preserves the hazards but it does not legally binding destruction obligation rather it only makes offer weakly as non- binding disposal guidelines [27]. Most of those disposal rules and guiding principles only apply in the context of hazardous waste and have moved across a national border [28]. This Convention does not recommend how POPs wastes should be demolished, beyond the most general and

21 Widawsky, L. (2008). In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention’s Ability to Achieve Environmental Justice. Environmental Law, 577-625.at 577

22 Ibid.

23 Kummer, K. (1992). The international regulation of transboundary traffic in hazardous wastes: The 1989 Basel Convention. The International and Comparative Law Quarterly, 41(3), 530-562.at 531

24 Article 4 of the Basel convention.

25 Article 4(5) of the Basel convention.

26 Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990).

27 Basel Action Network A Global Alliance Against Toxic Trade (2000, 12 05). Warning: The Basel Convention Is Poorly Equipped to Deal with POPs Destruction. Retrieved 0 16, 2018, from <https://www.iatp.org/files/Warning_The_Basel_Convention_Is_Poorly_E quippe.htm>

28 Ibid.

legally non-binding terms ^[29]. Furthermore, no clear definition is defined hazardous waste because the definition of hazardous waste is unsettled which is administered by the personal determination of each individual country and sampling methodologies are not demarcated in this convention ^[30].

I think that this law is not independent because it is also involved with many laws like a stock home declaration. In my view, The Convention holds illegal hazardous waste traffic which is a criminal issue and does not support any enforcement provisions.

7.1 Other agreements of this convention

In the Basel convention, there are other local and global joint ecological agreements involving to the potentially hazardous elements as following:

7.1.1 The Bamako Convention on the Ban of the Import into Africa

The Bamako ban was almost a replica of the Basel Convention with the inclusion of radioactive wastes and a rule for the organization of hazardous wastes in Africa. More precisely, it bans the importation of all risky wastes into Africa from non- contracting parties and it is then into force in 1998 and 23 countries have ratified the Bamako ban.

7.1.2 The Basel Ban Amendment

In 1995, the Basel ban amendment is wanted for amending termed by several European countries, LDCs, Greenpeace and the amendment are recognized by 86 countries even exports of hazardous banned from a slope of industrialized (mostly OECD) states to developing states. The ban amendment, however, is not yet enforced ^[31]. The Basel Ban Industry's ideas are not shared by ecological assemblies like the Basel Action Network. In recent times, it is so far and ratified by 7 of the 15 countries within the European Union, as well as Slovakia, Uruguay, and Panama Ecuador, Sri Lanka, Paraguay ^[32].

7.1.3 The Lomé IV Convention

Lome iv convention is considered as a supplemental to the Basel Convention and enforced in April 1976 for providing a new framework of collaboration between, Caribbean, African, Pacific States and European Economic Community (EEC). Mostly, this convention also holds the Basel Protocol on Liability and Compensation ("the Basel Protocol")

8. Recommendations

In recommendations, I represent some suggestions for solving problems of the Basel convention relating to hazardous wastes as following:

1. State parties should take appropriate measures to achieve aims because they do not contain absolute obligation.³³

2. That state parties must adopt and implement legislative measures to ensure compliance with the restrictions on the hazardous waste traffic according to Basel convention.
3. This convention goes for regulating the duties of states in the event that illegal traffic occurs from the article (9(2)- (4)).
4. Multilateral treaties and jurisdictional issues should be removed.
5. The present analysis is limited to those legal instruments which are denoted by the term agreements.³⁴ In this convention, Procedural obstacles, length, complexity, and diplomatic reason, the expense of the procedure and shock of generating a percent should be avoided frequently for submission of privilege by the victim states through the convention.
6. Technology can succeed to save hazardous waste and it moves toward cleaners production methods. Nevertheless, hazardous waste management provides a particular channel in developing countries.³⁵
7. The Basel should be developed waste anticipation and diminish its generation using cleaner production methods.³⁶
8. This convention should take proper steps to minimize the hazard which is harmful to human health and environment and contrary the article 11 of the Basel Convention.
9. In this convention, it is supposed that contracting parties are encountered to develop a protocol using rules when liability and damages questions are raised but questions answer is not provided here that who should pay compensation for any damages? So, by making precise laws with negotiation, this issue can be resolved in countries.

9. Conclusions

in nut a shell, the Basel convention should pursue to minimize the movement of wastes crossing the international borders through a decided regime of rules and measures that protects people from hazardous wastes and disposal pollution. Some issues are noticed here because this convention does not achieve uniformity. There is an urgent need for the authorities to attend to the correct ways to promote apt implementation in word- wide. Some scholar's recommendation is that proper enforcement should be developed by developing countries of the execution provisions constructed upon a republic's administrative capacities. This could enable developing countries to protect themselves from toxic waste colonialism, but many countries do not answer those problems. For that issue, countries should look solution for regional approach and will try for reducing the movement of wastes across international borders through rule and procedure. In addition, every country will choose "the prevention is better than cure" theory and follow

²⁹ Ibid.

³⁰ Hackett, D. P. (1989). Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. *Am. UJ Int'l L. & Pol'y*, 5, 291. at 315.

³¹ Widmer, R., Oswald-Krapf, H., Sinha-Khetriwal, D., Schnellmann, M., & Böni, H. (2005). Global perspectives on e-waste. *Environmental impact assessment review*, 25(5), 436-458. Footnote prothom page e

³² Schmidt, op. cit., 412.

³³ Kummer, K. (1995). International Manazardous of Hazardous Wastes, The Basel Convention and Related Legal Rules with an Updated Introduction. In

I. Brownlie, *The Basel Convention: an Analysis and Assessment* (pp. 38-83). New York: Oxford University Press Inc., at 60.

³⁴ Id 88.

³⁵ Krueger, J. (1999). *Developing Countries and Basel Convention*. In *International Trade and the Basel Convention* (pp. 82- 97). UK: The Royal Institute of International Affairs. at 84.

³⁶ *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal* (1989), Framework Document on the Preparation of Technical Guidelines for the Environmentally Sound Management for Waste Subject to the Basel Convention. (n.d.). Geneva Secretariat of the Basel Convention, UNEP 1997. at 10.

this convention appropriately according finding rules in Basel convention.

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