



## BASEL BAN AMENDMENT: A PROTOCOL TO SAFEGUARD THE WORLD

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### ABSTRACT

With passing time it has clearly become evident that the developed countries are trading their hazardous waste to the developing countries and many by illegal means under the objective to either recycle it or to properly dispose it off. This all happening because with all the upcoming regulation it has become difficult for any business to survive moreover the process to dumping the waste in correct manner have become expensive hence the developed countries find a cheap way to get rid of the waste. This process of getting rid of hazardous waste does have negative effect on many of the developing nations moreover it is morally wrong to do so. This was the reason why the basel convention in first place came up but with coming time it is concluded that it is becoming weak in its implementation. Hence the main objective of this study is to examine that whether the Basel convention is even capable to taking care of countries that are being affected by the illegal dumping of the hazardous waste. The study would help in strengthening the awareness of the topic moreover it would try to point out the points which could help the convention to become successful in its implementation.

Keywords: Hazardous waste, International environmental agreements, International trade, recycling

### INTRODUCTION

With all the innovation and development taking place, with new technology and production of goods and services, there has been an increase in hazardous waste which is the threat to the environment as well as the population of the world.<sup>1</sup> The waste produced is expensive and difficult to dispose for the industries and hence the burden significantly lies on the government to dispose of all the waste produced.<sup>2</sup> This is usually carelessly handled which in turn lead to environmental degradation. To cut down the expense and to get rid to this waste developed countries used to send the waste to the developing country. So as to prevent such exports and prohibit all such activities a convention was adopted in 1989, "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal". The treaty came into effect in 1992 with the major goal of "restriction of transboundary movements of hazardous waste except where it is perceived to be in accordance with the principles of environmentally sound management".<sup>3</sup>

<sup>1</sup> Fikru, M. G. *Trans-boundary Movement of Hazardous Waste: Evidence from a New Micro Data in the European Union*. Review of European Studies , 2012, page no 3-15

<sup>2</sup> O'Neill, K. *The Changing Nature of Global Waste Management for the 21st Century: A Mixed Blessing? Global Environmental Politics*, 2001, page no.77-98

<sup>3</sup> . The Basel Convention available at <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>, accessed on 13<sup>th</sup> January, 2017.



The major objective of this study is to see whether the basel convention is able to achieve its objective in preventing the world to become the dumping ground.

The outcome of this paper would strengthen the cause of this topic and would try to give the suggestions or change in strategies which could lead to effective implementation of this convention.

The first part of the research paper deals with the legal framework within which this convention works with the history of the convention.

The second chapter tries to analyse the amendment which took place in 1995 and was popularly known as “Basel Ban” and how it changed the positioning and applicability of the treaty.

The third chapter will focus on the existing literature that is relevant to the research that proposes the question as to whether the Basel Convention can adequately protect the developing world from the rich nations' hazardous waste.

The fourth chapter tries to find the question whether the treaty was able to establish a liability mechanism.

The fifth chapter deals with proposing some suggestions which can help its better implementation.

## **CHAPTER I: THE LEGAL FRAMEWORK WITHIN WHICH THIS CONVENTION WORKS WITH THE HISTORY OF THE CONVENTION**

This treaty was framed because of the incidents happened on 31<sup>st</sup> August, 1986

known as khian sea waste disposal incident where the ship was carrying incinerator ash from Philadelphia in the United States and was alleged to dump half of its load on a beach in Haiti before being forced away.

Another such incident happened in 1988 which was known as the koko incident wherein five ships were carrying 8000 tonnes of hazardous waste were transported to Nigeria in exchange of \$100 rent to use a Nigerian farm land.

After all the negotiation the treaty was concluded in 1989 on 22<sup>nd</sup> March where 32 states became the signatory.<sup>4</sup>

But during second conference in March, 1994 because of the disagreements between the parties an amendment in the provision of treaty was discussed which is known as the basel ban amendment.<sup>5</sup>

## **CHAPTER II: THE BAN AMENDMENT**

The convention without the ban amendment is just a regulatory body which regulates the import and export of hazardous waste but with the amendment it prohibited the export and import of hazardous waste.<sup>6</sup>

<sup>4</sup> Full list of signatories of the Basel convention available at <http://www.basel.int/ratif/convention.htm> Accessed on 14<sup>th</sup> January, 2017

<sup>5</sup> Decision II/12, in *Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, UN Doc. UNEP/CHW.2/30 (1994).

<sup>6</sup> The Basel Ban Amendment available at <http://www.basel.int/Implementation/LegalMatters/B>



But the complete ban was incorporated as amendment but could not be put in force because it could not gain the required majority.

During the negotiations and meeting it was seen that African countries and industrialized countries were not at par.<sup>7</sup> It was debated and with time it was made clear that both the countries would be bringing the political and economical viewpoints.<sup>8</sup> This gradually took turns into north south debates where the developed countries were using developing countries to excel.

During the meeting the African countries made they very clear that they were looking for a complete ban on export of hazardous goods with that they also needed a liability clause which would penalize the country who tried to illegally export the hazardous waste.

African countries were seeking this kind of help from the external sources because they have realized the fact that there are many countries which do not have the technical, economical and administrative means to enforce the complete ban.<sup>9</sup>

It is believed by many scholars that the complete ban would lead to better implementation of the convention. Jim Vallette said, "*Banning the international waste trade is one very important step in*

*stopping the contamination of our water, ground and air. Providing waste makers with escape valves, such as export, is moving us in the wrong direction. The only real solution, if these countries decide against becoming party to the toxic crisis, is to reduce waste at the source to stop it before it's ever produced".*<sup>10</sup>

#### **A. Reason why it is not yet incorporated**

It is said and concluded by several scholars that the north south debate is one of the reason why the ban is not yet into force. The negotiations are happening for numb roof years and will continue to take place because there is no mutual consensus till yet. The economic interest of the members is the one which always overrides the goal and objective of the convention.<sup>11</sup>

Moreover there were many industrialized countries which argued that the ban should not affect the ongoing or pending bilateral or multilateral projects and the developed countries directly stated a NO to this amendment because they claimed all their projects were of economic significance.<sup>12</sup>

There were some countries which were neither supporting African countries and nor supporting the industrialized countries because they believed that the import and export actually helped them to grow

anAmendment/Overview/tabid/1484/Default.aspx accessed on 25/02/2018 at 23:27

<sup>7</sup> Chasek P.S., Downie D.L. and Brown J.W. *Global Environmental Politics*. Westview Press, 2014

<sup>8</sup> Patricia Nemeth. *Why has the Basel Convention not adequately addressed the transboundary movements of hazardous waste to the developing world?*, Report on UN Sabbatical Leave 2014

<sup>9</sup> Ibid.

<sup>10</sup> Supra note9.

<sup>11</sup> Supra note 9.

<sup>12</sup> Supra note 9.



economically and bring more opportunities to develop themselves.<sup>13</sup>

There was theory of POLYTHINK given by Redd and Mintz, in which they defined polythink as many or different ways to seeing a problem or a goal. And it is because of this polythink there are so many conflict on the enforceability of the ban.<sup>14</sup>

There are many interpretations of how this amendment could be useful example many developed countries want that convention should allow trade of waste through the process of consent and there are many developing countries which says that there should be no ban when trade of technology or opportunity takes place where there is any scope of development for the countries who are importing. And it is because of this the endless debate is still going and not reaching a conclusion<sup>15</sup>.

### **CHAPTER III: WHETHER THE BASEL CONVENTION CAN ADEQUATELY PROTECT THE DEVELOPING WORLD FROM THE RICH NATIONS' HAZARDOUS WASTE.**

The most sincere technique for evaluating the achievement of the Convention would be a measurable investigation looking at worldwide patterns in the volume of global

<sup>13</sup> Selin, H. *Global Governance of Hazardous Chemicals: Challenges of Multilevel Management*. Cambridge: MIT Press.2010

<sup>14</sup> Mintz, A. & Wayne, C. *Group Decision Making in Conflict: From Groupthink to Polythink in the War in Iraq*, In *The Handbook of Conflict resolution: Theory and Practice*.2014

<sup>15</sup> Supra note 9.

exchange risky waste when the usage of the Convention. Such an analysis of global hazardous waste exchange is however a long way from straightforward because of the trouble of acquiring precise information on volumes, sorts and goals of perilous squander, and is in any occasion past the extent of this paper. But the 2006 Abidjan disaster is one of the occurrences which state the failure of the convention.

#### **B. REASONS FOR FAILURE**

##### **1. PRIOR INFORMED CONSENT (PIC)**

There are various issues involved when we talk about exporting the waste from the developed countries to the developing countries through the procedure of PIC. The procedure establishes verification of adequate waste management facilities by the importing countries.<sup>16</sup> All though this obligation to verify is on both the countries but it does not describe the procedure in which this has to be done.<sup>17</sup>

In the first place, developing countries regularly do not have the specialized and authoritative ability to lead an exact evaluation of the level of hazard to human living and the condition postured by a specific shipment of waste. Furthermore, survey whether their offices are reasonable. Subsequently they may agree to the importation of a shipment of waste in view of a real however mixed up conviction that they have satisfactory facilities for it's disposal.<sup>18</sup>

<sup>16</sup> Basel convention article 4

<sup>17</sup> Basel convention article 4(b)

<sup>18</sup> Alan Andrews, 'Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the



Second, by putting duty on the experts inside the developing countries to confirm the sufficiency of transfer facilities makes the PIC strategy is powerless against manhandle by degenerate officials. In these conditions the PIC strategy is frail to forestall government authorities from intentionally exaggerating their ability to adapt to dangerous waste imports is just a method to secure fundamental income.

The Committee's powers are restricted to making nonbinding proposals to the non compliant Party with reference to what steps they have to take to guarantee consistence what's more, making suggestions to the Conference of the parties of extra measures it supposes the non compliant needs to take.<sup>20</sup> This is peaceable and community way to deal with requirement is with regards to a general accentuation in multilateral ecological understandings towards arrangement and accord.

**2. THE COMPLIANCE COMMITTEE:**

**3. THE RECYCLING LOOPHOLES:**

The foundation of an effective compliance committee was seen as one of the key points of the Vital Implementation Plan decided at the 6th meeting in 2002. The Conference of the Parties appropriately embraced a Mechanism for Promoting usage and Compliance in 2002. The convention built up an effective compliance Committee which came into force on 19 October 2003.

A basic failure of the Convention is that the meaning of waste is restricted to 'substances or items which are discarded or are proposed to be arranged of or are required to be discarded by the arrangements of national law'. The Basel Action Network, is a critic of what it portrays as the 'recycling loophole', contends that most waste exchange to developing nations that is guaranteed to be bound for reuse or recycling is either 'sham' reusing, where it isn't generally for reusing by any means, however will be dumped or consumed by the importer, or 'dirty' reusing, where the recycling procedure itself will include contamination of nature and hazard to the well being of workers.<sup>21</sup> This has been progressively uncovered by the development

The reason for failure of this committee is same that of any international convention which is the Committee does not have a command to force corrective measures against defaulting party. The Committee's destinations are to furnish help to Parties to agree to their commitments under the Convention and to encourage, advance, screen and plan to secure the execution of and consistence with the Convention.<sup>19</sup>

World's Poor in the International Trade of Hazardous Waste?', 5/2 Law, Environment and Development Journal (2009), p. 167, available at <http://www.lead-journal.org/content/09167.pdf>

<sup>19</sup> Terms of Reference of the Implementation and Compliance Committee, annexed to Decision VI/1 2, UN Doc.UNEP/CHW/OEWG/1/3 (2003).

<sup>20</sup> Alan Andrews, 'Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?', 5/2 Law, Environment and Development Journal (2009), p. 167, available at <http://www.lead-journal.org/content/09167.pdf>

<sup>21</sup> Supra note 9.



in the export of 'e-waste': utilized electronic gear, for example, PCs also, cell phones.<sup>22</sup>

#### 4. THE DEFINITION CLAUSE:

The Basel Convention defines "waste" as substances or articles that are required to be discarded and in addition the methods for their disposal.

The refinement is expressed on the grounds that there was no genuine distinction between the two classifications of waste in the arrangements of the Convention.<sup>23</sup> The author argued that the class of "different wastes" was included as a trade off between the contradicting parties amid the arrangements. some of the Member States kept up that household waste should not be considered equivalent to the hazardous waste while, others contended that these waste ought not be viewed as dangerous as they were not distinguished as such. It is ought to be noticed that the Convention prohibited the radioactive waste and "waste which get from the scrap of a ship" in view of the way that they are secured by other universal instruments.<sup>24</sup>

<sup>22</sup> Basel Action Network (BAN), *The Digital Dump: Exporting Re-use and Abuse to Africa* (Seattle: Basel Action Network, Photo-documentary Report, 2005), available at <http://www.ban.org/Library/TheDigitalDump.pdf>.

<sup>23</sup> Basel Convention. (2006). Basel Convention, Country Fact Sheet, Japan. Accessed at 18/02/2018, from <http://www.basel.int>

<sup>24</sup> Basel Convention (Texts and Annexes). (1989). Accessed at 20/02/2018 at 20:54 from <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>

#### CHAPTER IV: FAILURE TO ENFORCE THE LIABILITY MECHANISM

The article 12 of the convention requires the parties to adopt a framework which provides liability and compensation for the damages which arises from the trading of the hazardous waste. The basel convention did came up with the Basel protocol on liability and compensation at the fifth conference of parties on December, 1999 but till date it is not being enforced.<sup>25</sup>

The Protocol still can't seem to be confirmed as it is a trade off that suits neither the developed nor the developing world. From the point of view of the creating scene, it contains various provisions, which would permit developed nations to escape risk for harm caused by sending out waste to developing countries.<sup>26</sup>

From the point of view of the developed world, the Convention is unsuitable in light of the fact that the base obligation limits it forces are unreasonably high and on the grounds that it copies residential risk administrations, which makes a danger of disarray and high regulatory costs. So while the Convention provided for the foundation of a risk structure, by conceding concurrence on its points of interest it made ready for the current political impasse,

<sup>25</sup> Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999 (hereafter 'Liability Protocol'), available at <http://www.basel.int/pub/protocol.html>

<sup>26</sup> Supra note 21



leaving a basic component of the lawful structure unrealised.<sup>27</sup>

## **CHAPTER V: MEASURES TO IMPROVE THE IMPLEMENTAION OF THE CONVENTION**

### **1. Reforming the PIC Procedure**

Reforming the Convention should be founded on an understanding that Prior Informed Consent is an deficient strategy with regards to north-south exchange hazardous waste. the answer for this issue would be the foundation of an independent body, which would be in charge of reviewing trade or checking the facilities preceding any transboundary development and having energy to concede or deny grants for universal exchange in view of the sufficiency of these offices to agree to ESM requirements.

By ensuring an independent inspecting body seems to be a fair and just way to secure implementation but this method is not enough to safeguard the interest of the developing countries because it does not deals with the problems where in the exporters mislead the importers about the nature of waste which they are trading. The answer for this issue is assessment and accreditation of e-waste before send out, in view of a presumption that all e-waste is in actuality hazardous waste.<sup>28</sup>

<sup>27</sup> See Basel Convention, Article 14.

<sup>28</sup> Basel Action Network (BAN), The Digital Dump: Exporting Re-use and Abuse to Africa (Seattle: Basel Action Network, Photo-documentary Report, 2005), available at <http://www.ban.org/Library/TheDigitalDump.pdf>.

### **2. Strengthening the compliance committee:**

At present the committee is not at all successful in achieving the sole objective of facilitation the compliance with the convention hence it is required to be strengthened.

First of all the committee needs adequate funding to carry out its sole objective. The present financial model is based on voluntary contribution which should be replaced by the compulsory contribution. The effectiveness of the compliance committees is not able be achieved because of lack of funds and through this process it could be achieved.

### **3. The liability protocol**

The effectiveness of the basel convention would highly depend on the enforceability of the liability protocol because after such there could be certain enforceability of the convention at present it is just a regulatory provisions which cannot reach any conclusion but can only give guidelines and cannot impose fines and penalties.

### **CONCLUSION:**

At present the convention is completely failing in achieving its objective. Moreover the world is being used as a dumping ground by many countries to get rid of their hazardous waste by giving some money. An amendment which implemented the complete Ban was a good idea but it was not able to achieve its enforceability. It did not enjoy the majority support even by the developing countries which are getting affected but do not understand it because of



the opportunity which they think they are getting to develop. The how can we expect the support from the countries that are causing this trade of waste. Further the proposition provided in the paper would provide better implementation of the Basel convention the change in PIC procedure would help to ensure that the genuine import and export takes place moreover the independent body would make sure that nobody is fooling about the nature of the waste so that proper disposing facilities can be looked into. The liability protocol would give convention the some weight as no rules can be properly implemented unless there is no penalty clause behind them.

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