



Revisiting Basel Convention from a South Asian Perspective: Thirty Years and Counting

Prashant Singh, Research Scholar, Faculty of Law
University of Lucknow, Uttar Pradesh, INDIA

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Author
Prashant Singh

shodhsamagam1@gmail.com

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ABSTRACT

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, aimed mainly, among many other things, to curb the menace of unregulated transboundary movement of hazardous wastes, especially from developed to the developing states, by introducing measures like notification, prior informed consent, offering capacity building programs and technical assistance for hazardous waste disposal in environmentally sound manner through regional centres in the wake of popular movements against 'toxic waste colonialism'. However, it is noticed that despite all attempts illegal trade in hazardous wastes continues and so is the increase in annual waste generation. Moreover, South Asian region particularly feels neglected given that no regional centre under Basel convention has been provided for one of the most populous regions of the world. Hence, a lot remains to be done to really achieve the objectives of the convention.

KEY WORDS

Basel, Convention, Colonialism, Dumping, Hazardous, Toxic.

INTRODUCTION

The world at present is posed with some of the most serious challenges to the very existence of human civilization or maybe all other forms of life on earth and probably the whole universe yet known to the humankind. The Covid Pandemic¹ had already spread havoc across the world and brought the booming globalisation to a standstill which for many should be a wakeup call. If a virus can cause us such harm more

complicated issues like Climate change² and Biodiversity loss³ may bring unimaginable sufferings and even extinction of human and other kinds of life on Earth. Just when we felt some respite from the pandemic the Russia-Ukraine war or Special Military Operation⁴, whatever one prefers calling it, makes us believe that nuclear apocalypse⁵ may not be an impossibility.

The 'Global Warming'⁶ phenomenon caused by so called 'Green House Gases'⁷ is resulting into climate change which in turn has led to unexpected drought in one part of the world and floods in the other. Temperature is rising so much so that people are dying from heatwave in northern parts of Europe close to Arctic.⁸ Understandably, glaciers are melting, various species of flora, fauna, fungi and other aspects of biodiversity are becoming extinct or are on the verge of extinction. Some of them are so fundamental in food chain that the effect of their extinction would be felt immediately such as vultures, butterflies and honeybees and their effect maybe even irreversible.⁹

Hazardous Waste: A Toxic Ball without any Goal Post

As if all these were not enough the surge in comparatively novel causes of environment pollution such as trans-boundary movement of hazardous waste¹⁰ resulting from various human activities, not so indirect as the above mentioned ones, are further aggravating human sufferings. To those who may object such categorisation of such harmful activities it is submitted that the author's intention is to portray a situation somewhat similar to the case where a person smoking and harming his lungs upto a period of time is still indirectly harming his lungs when compared to a more direct situation where the same person is subjected to abhorrent Nazi gas chamber. To elaborate it further, we may give the example where melting of icebergs and glaciers giving rise to sea level may affect every coast but more direct and immediate effect is upon the small island nation which are not much above the sea level. Hence toxic hazardous waste¹¹ is making environment and its components sick, very sick especially to those who are more close to it. Human, Animal, Plant all are suffering from its harmful effects.¹² People are dying either directly by coming into contact of such toxic wastes or by the disease caused by getting exposed to it. It is polluting the air, water, soil and what not?¹³

Such hazardous waste maybe local in origin or imported from somewhere else.¹⁴ Its origin maybe in normal course when seen in comparison to standard manufacturing process followed globally or it maybe a result of lack of technology and inefficiency which is quite obvious for newly independent and historically subjugated populace often termed as third world states.¹⁵ Further such hazardous waste maybe identified as such or people may simply be unaware of the harms associated with it due to lack of knowledge and education given their developmental stage.¹⁶ In case they are aware then they may try to avoid the harm by disposing it which again requires proper techniques and know how or there maybe another reason where they try to dump it in some foreign territory either with or without consent of that other state,¹⁷ which in later case is now illegal.¹⁸

Again while obtaining consent they may not properly reveal the hazardous nature of the waste as why would any sane mind accept such hazardous waste knowingly would be the obvious question.¹⁹ The answer to such question may again be grounded in the economic and developmental stage of the state accepting such hazardous waste knowingly.²⁰ A state which is aware of the harms associated with such waste may still accept it for some immediate monetary benefit or if it sees certain usage or value of the waste in question.²¹ As we know about the process of recycling recyclable waste hence many states who are not in a position to procure costly resources may try to fulfil their demand and need through recyclable waste even if its in the form of hazardous waste.²²

The other and more controversial and apparently unethical cause of such transfer of waste to alien territory would simply be the selfish reason of removing the hazardous waste from ones own vicinity and dumping it to others backyard. This phenomenon is often said to be a product of 'not in my backyard' movement.²³ And it is submitted that the developed world is using the third world countries as dumping

ground which is causing serious health hazard to the population and environment of these so called third world countries now also known as global south composed of mostly developing or transitioning economies and erstwhile colonies of major colonial powers which were mainly comprised of European and American colonial powers.²⁴

The Problem of Dirty Dumping

As explained in the previous paragraphs the hazardous waste involves various issues right from its origin to its disposal. Knowledge and technical know how coupled with financial assistance can not only drastically reduce the creation of hazardous wastes but also it can help in its efficient disposal with minimum harmful effects on people and environment.²⁵ But first it requires proper regulation of the hazardous waste and its movement as persons, whether natural or legal, responsible for handling it may have other considerations such as avoiding costs involved in its disposal and hence preying on uninformed impoverished and newly independent states with little or no legal checks and balances.²⁶ Not only this but there maybe a case where the hazardous waste in transit may leak due to various reasons and accidents and thus may harm any third party not involved in any capacity.²⁷

But unfortunately the developed states which excelled in knowledge and technology and dominate financially chose to avoid the problem by dumping it in developing and under developed states. To avoid rising costs of hazardous waste disposal domestically they simply relied on transferring their burden on others shoulder only that the new shoulders were not capable to hold that burden but ignorant enough to offer their help anyway and harming themselves in the process. But thankfully conscience came into play and questioned the unequal arrangements. Popular public outcry and efforts of United Nations and its United Nations Environment Program discussed the issue.²⁸ Ultimately the Basel Convention materialised and subsequently came into force which in some way dealt with most of the issues discussed above.

The Basel Convention

In precise terms the present article highlights the Basel Convention and its latest status by first discussing its origin and historical development. The focus would be on India²⁹ and the region it belongs to that is South Asia.³⁰ Building upon the environment consciousness of the 1980's and existing deliberations and guidelines regarding Hazardous wastes, the Basel Convention came into effect after more than two years of its adoption by the deposit of the 20th instrument of accession³¹ on the fifth of May of the year 1992 and has presently more then 190 parties to the convention.³² India became a signatory on March 15, 1990 and subsequently ratified it on June 24 1992 which eventually came into force on September 22, 1992 according to the provisions of the Convention.³³ The Basel Convention has gone through several amendments and at present is composed of several agreements and protocol attached to it out of which some are in force while some are yet waiting for the required number of ratifications and other conditions necessary for its coming into force. Inherently each of those documents try to deal specific issues mentioned above such as banning the trans-boundary movement of hazardous wastes from developed to developing or under developed states often termed as 'toxic waste colonialism',³⁴ dealing with latest and more specific kinds of hazardous wastes identified as such for example plastics³⁵, addressing the age long demand for ascertaining liability and compensation resulting from such trans-boundary movements of hazardous wastes³⁶ etc. Apart from these several framework agreements between host governments and authorised bodies under the Basel convention for the purpose of setting up 'Regional Centres' across the globe could be said to be agreements under the convention.³⁷ These regional centres work for providing technical assistance and capacity building programs through pilot projects by awarding small grants through their Small Grants Programs. Various states benefited from such small grants program including India.³⁸

So we see that a proper outline or structure has been put in place to check the issues arising from hazardous wastes and its trans-boundary movement but the same is not able to provide the result as is

required.³⁹ Reasons may be apparent as well as more complicated ones. The apparent reasons could be the inability to bring those agreements into force due to insufficient number of ratifications. Also the volume of activities and infrastructure may be insignificant when compared to the volume of hazardous wastes generating every year⁴⁰ for instance the regional centres are very few in numbers⁴¹ and the training and grants or the projects being implemented under the same are far less than actually required.⁴² The other more complicated and technical issues may be due to ambiguous terms and provisions of the convention and technical loop holes and of course enforcement and compliance issues. Further, issues like fragmentation of International Law⁴³ may arise as institutions like WTO and its related agreement establishing the same, among others, aim for free trade and the restrictions on the movement of hazardous wastes under the Basel Convention may come in conflict with such trade rules and regulations.⁴⁴

The Historical Development

Much has already been highlighted in the previous sections right from the origin and possible challenges arising therefrom. In this section attempt is to pinpoint the international law on the issue. As was made clear, in 1938 itself, through Trail Smelter case, trans-boundary harm caused by activities in one's own territory gives rise to liability under international law. Similarly the initial international laws dealing with Law of the Sea aimed at preventing dirty dumping in the sea of hazardous wastes including radioactive wastes. The Ozone layer depletion and consequent Montreal protocols targeted curbing of CFCs. The 1972 Stockholm conference further gave impetus to environmental concerns. The Cairo Guidelines and other similar soft law kind of instruments coupled with domestic legislations in several developed states tried to deal with the hazardous waste related issues. But as indicated earlier the environmental activism in developed states while proved beneficial to them and also acted as model for other nations but the same also gave rise to toxic waste colonialism as public awareness made them create proper infrastructure for waste disposal which proved to be a costly affair for them and in order to avoid the same they preferred transferring the waste outside their border. Hence a proper international mechanism to check such dirty dumping of hazardous waste through toxic colonialism was required and Basel Convention was meant to do the same. Thus through the efforts of UNEP the said convention was adopted in 1989 and came into force in 1992.

Important Aspects of the Convention

Much has already been written about important provisions of the Convention⁴⁵ so here it is better to provide the important aspects in holistic but concise form. As highlighted in previous section the identification of the waste as hazardous will be the first stage for which the Convention provides for a very broad definition with enough space for states to consider it as such, thus it balances the needs of the states especially the resource scarce states and in doing so it tries to reconcile environment vs development debate. Further the prior informed consent gives exclusive rights to the state to decide its fate and priority. Here it is to be noted that the convention not only deals with the rights and duties of state parties involved as importer and exporter but also the parties through which such wastes transit have been given due importance. The convention aims to not only reduce the generation waste but also stresses upon the environmentally sound management of wastes as well. Preferring the disposal of wastes close to its place of generation the convention ultimately desires to reduce such trans-boundary movement of the wastes to the minimum. The Convention acknowledges the limitations of the developing world and rightly calls for technology transfer for environmentally sound management of wastes.⁴⁶ Considering the fact that over exploitation of resources may be checked through recycling such provisions make sense. Further the notification requirement aims to check the issue of uninformed movement of hazardous wastes. As the Ban Agreement have already come into effect therefore a major part of developed world would cease to export their hazardous wastes into developing states so issues like toxic waste colonialism would be checked though not entirely. The Convention expressly excludes certain wastes such as radioactive wastes and ship wastes from its ambit. With the passage of time several new kinds of wastes were identified for their hazardous contents and hence COP 14 and 15 introduced several amendments

and included in its ambit many previously unknown varieties of plastic waste and especially e-waste or electronic wastes thus making it a living document. The Convention encourages to adopt certain other instruments and laws in addition to the convention if they are more environment friendly. The Convention provides for dispute settlement through negotiation as far as possible and if same fails then recourse to International Court of Justice or Arbitration maybe taken. However the Convention relies on the state parties to setup mechanism to prevent and punish the violation of the Convention under their respective jurisdiction. To sum up the Convention sets it goal quite clearly and gives enough freedom to parties to arrive at the best decision and also keeps scope for development open by holding Conference of Parties at regular interval and performing important function through its secretariat.

Challenges and Criticism: Neglected South Asia

It has been found that the hazardous wastes kept increasing despite the Convention coming into force. Several Incidents have since taken place which highlight the failure of the Convention in curbing hazardous waste trans-boundary movement. The Protocol on liability and compensation has yet not come in effect.⁴⁷ Technology transfer and funding remains a dream. E-waste has become major challenge though efforts have been made to check the same under the convention but a lot remains to be done. The training and capacity building programs are held on regular intervals but same appear to be insufficient. The Regional Centres for capacity building and technology transfer are too few in numbers.⁴⁸ The situation could be well understood by the fact that no such regional centre is there in South Asia⁴⁹ despite the fact that this region is most populous and densely populated and is literally a graveyard for ships given the ship breaking industries in the region.⁵⁰ Also the South Asian region is home to major chunk of biodiversity and sensitive ecological components. The geography of the region extends from Himalayas to Indian Oceans and from Deserts to Islands. Hence its exclusion from such benefits is surprising and concerning. Same goes for the grants and aid under the convention. Till date India has received only two such projects of few thousand dollars that too under Stockholm Convention and for Stockholm convention Regional Centre in India.⁵¹ Though several proposals have been made by South Asian states through South Asia Cooperative Environment Program⁵², an intergovernmental Organisation in the region based in Colombo Sri Lanka, but nothing has materialised yet.⁵³

CONCLUSION

The International Law has always been dominated by Developed states and same is true in the case of trans-boundary movement of hazardous wastes where the developed states turned the Global South as their dumping yard for hazardous wastes. The system so created flourished given the raw material requirements of newly independent states but at a very heavy cost on human health and environment. The same was realised soon and thus Basel Convention came into being but a lot remains to be done and the development under the Convention is happening at a very slow pace. South Asia and particularly India has received very less under the Convention and thus requires proper attention. Hopefully, a regional centre under the said convention may further increase the regions integration in the global efforts of tackling hazardous wastes through environmentally sound means of disposal.

Footnotes

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13. UNDESA Sustainable Development, 'Topics: Chemicals and Wastes' available at <<https://sdgs.un.org/topics/chemicals-and-waste>> accessed on 1 January 2023.
14. Supra 11; Lekha Sridhar and Parul Kumar, 'The New Face of Waste Colonialism: A Review of Legal Regulations Governing the Import of Waste into India' (2019) 15(2) Socio Legal Review 101.
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16. Ibid; Supra 11.
17. Supra 11 at 162;
18. Basel Supra 10, Article 4 & 9.
19. Supra 11 at 155, 167.
20. Shawkat Alam, 'Trade Restriction Pursuant to Multilateral Environmental Agreements: Developmental Implications for Developing Countries' (2007) 41(5) J World Trade 983.
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25. See Basel supra 10, Preamble.
26. Supra 11; Infra 45.
27. See for eg Basel Convention supra 10, Annex III Entry 8.
28. Supra 11.
29. Infra 32.
30. All SAARC member states have ratified the Basel Convention. Maldives was the first one (28 April 1992) and Afghanistan was the last one (25 March 2013). See Infra 32.
31. Article 25 of Basel Convention
32. Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal available at <<https://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>> last accessed on 1 January 2023.
33. Ibid.
34. The Ban Amendment came into effect on 05 December 2019 whereby export of hazardous waste from developed to developing states were banned. Sri Lanka is the only South Asian state to ratify the said amendment.
35. 'BC-14/12: Amendments to Annexes II, VIII and IX to the Basel Convention' available at <<https://www.basel.int/Implementation/Plasticwaste/PlasticWasteAmendments/FAQs/tabid/8427/Default.aspx>> accessed on 1 January 2023.
36. The Basel Protocol on Liability and Compensation was adopted at the Fifth Conference of Parties (COP-5) on 10 December 1999. It has not yet come into force as it awaits the ratification by at least 20 state parties. See <<https://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>> accessed on 1 January 2023.
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39. Supra 11;
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41. Infra 48.
42. The closest BCRC is either in Iran, Indonesia or China. The South Asian region has no actual regional centre. Supra 38 and infra 48.
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44. Supra 20, 21.
45. Laura supra; Katharina Kummer, 'The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention' (1992) 41(3) Int'l & Comp. LQ 530; Kimberly K Gregory, 'The Basel Convention and the International Trade of Hazardous Waste: The Road to the Destruction of Public Health and the Environment Is Paved with Good Intentions' (2001) 10(2) Currents: Int'l Trade LJ 80; Saurabh Bhattacharjee, 'From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back' (2009) 1(2) Trade L & Dev 193; Gary Cox, 'The Trafigura Case and the System of Prior Informed Consent under the Basel Convention - A Broken System' (2010) 6(3) Law Env't & Dev. J 263;
46. The Basel Convention, 1989, Article 10 and 13.
47. Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal Basel, 10 December 1999, Article 29.
48. As on 01 January 2023, they are 14 in number. See also <<https://www.basel.int/Partners/RegionalCentres/TheCentres/tabid/5275/Default.aspx>> accessed on 1 January 2023.
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