

Triumvirate of Transboundary Movements of Hazardous Wastes and Developing Countries

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Abstract—For decades, poorer countries have been used as dumping sites for unwanted wastes, particularly those classified as 'hazardous,' by the developed industrialist countries. As a result, developing world has to tackle a myriad of issues arising out of solid waste dumping while ensuring the safety of the environment and the human lives. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal sought to address this crucial issue but the burden of wastes generated in the developed world is still, to a greater extent born by the developing world which stands in clear violation of the well-recognized principles of international environmental justice. This research therefore seeks to address the problem, how the developing world is still being a graveyard of wastes which generates negative impacts on the environment and human lives notwithstanding the legal instruments and principles that seek to regulate transboundary waste dumping and their impacts on human lives and the environment?. The objectives of the research are to analyse the role and application of 'Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal' in the movement of wastes into the poorer countries by the developed world, to determine whether it contributes towards the establishment of environmental justice and to find out the factors that hinder the effective use and implementation of the Basel Convention. The research was carried out using the black letter approach to research based on primary sources viz. legislations, judicial decisions and international treaties and secondary sources viz. books, journal articles, previous research studies and online sources. Gathered data will be interpreted in light of the theory of environmental justice. The study concludes that the proper implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is necessary to protect the environment and to meet sustainable development goals.

Keywords— Environmental Justice, Transboundary Movements, Hazardous Wastes, North South Division.

I. INTRODUCTION

During 1970's and 1980's there had been a heightened public concern in the developed world on negative impacts of hazardous wastes on human lives and the environment which forced the domestic law-making

authorities to enact legislations that deal with waste disposal and their adverse impacts. This on one hand reduced waste dumping sites and on the other hand increased the costs of waste disposal (Andrews 2009). Consequently, the developed world had to resort to alternate mechanisms to get rid of wastes and the most popular of these methods involved the export of wastes to the developing or poorer countries by way of second hand trading. Accordingly, since 1980s there has been an increase of the waste shipments from developed countries to the developing countries and according to the statistics there had been 3.6 million tons of such waste shipments between 1986 and 1988 (Moyers, 1990).

This new trend resulted in a number of crucial issues most significant being the Koko Nigeria disaster in 1988 and the case of the *Khian Sea* in 1980's (Gutierrez 2014). These incidents emphasized the importance of adopting an international instrument to deal with Transboundary Movements of Hazardous Wastes and their Disposal. As a result, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) was drafted and concluded on 22 March 1989 with 35 states as its first signatories and came into force in 1992.

The objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as "hazardous wastes" based on their origin and/or composition and their characteristics, as well as two types of wastes defined as "other wastes" - household waste and incinerator ash (Secretariat of the Basel Convention 2011).

Since the adoption, Basel Convention has gone through a number of milestone developments most significant being the Ban Amendment adopted by the third meeting of the Conference of the Parties (COP) in 1995. The Ban Amendment provides for the prohibition of exports of all hazardous wastes covered by the Convention that are intended for final disposal, reuse, recycling and recovery from countries listed in annex VII to the Convention. COP adopted Annexes VIII and IX to the Convention, which provide further elaboration as to the wastes regulated by the Convention in 1998 and the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and

their Disposal in 1999. In 2002, a Committee was established by COP to administer the Mechanism for Promoting Implementation and Compliance and further adopted a Strategic Plan for the implementation of the Basel Convention for the period 2002 to 2010 and a partnership programme with business and industry. The Bali Declaration on Waste Management for Human Health and Livelihood which affirmed that if waste is not managed in a safe and environmentally sound manner it may have serious consequences for the environment, human health and sustainable livelihood was adopted in 2008 (Secretariat of the Basel Convention 2011).

Notwithstanding all these landmark developments, developing world still provide graveyards for hazardous wastes flowing from developed countries taking on irreversible environmental and life-threatening risks. It is estimated that from 2000–2010 alone, more than 600 million metric tons of hazardous wastes were generated globally (Pratt 2010), a major portion of which was emanated from industrialist countries (Neil 1998, Lipman 2011). These wastes are exported to developing countries for number of reasons (Mason 2006) and according to some researchers many of the wastes exported to developing countries are unaccounted for (Okaru 2011). These wastes coming from the developed countries impose life threatening environmental and health hazards in the developing countries which are further heightened by the inability of these countries to deal with such wastes in an environmentally sound and sustainable manner (Dimitri 2014).

This research therefore seeks to address the problem how the developing world is still being a graveyard of wastes which generates negative impacts on the environment and human lives notwithstanding the legal instruments and principles that seeks to regulate transboundary waste dumping and their impacts on human lives and the environment?. The objectives of the research are to analyse the role and application of 'Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal' in the movement of wastes into the poorer countries by the developed world, to determine whether it contributes towards the establishment of environmental justice and to find out the factors that hinders the effective use and implementation of the Basel Convention.

II. METHODOLOGY

The research was carried out using the black letter approach of research based on primary sources viz. legislations, judicial decisions and international treaties and secondary sources viz. books, journal articles, previous research studies and online sources. Black letter approach was used since it is necessary to carry out an in-depth, critical and an objective analysis of the principles of

the Basel convention in light of the environmental justice theory in order to answer the problem sought to be addressed in the study.

III. TRIUMVIRATE OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES

A. Environmental Justice

This research seeks to analyse the issue of movement of wastes from developed countries to developing countries in light of the theory of environmental justice while analysing whether the principles recognized in the Basel convention ensure environmental justice.

According to United States Environmental Protection Agency Environmental justice mean the fair treatment and meaningful involvement of all the people without discrimination on any ground what so ever in the environmental governance. It simply argues that everyone has an equal right to the enjoyment of the environment and every person shall bear an equal burden of environmental risks. If only one person or a particular group of persons are compelled to bear the risks of environmental damage due to procedural, geographical, social, economic or any other reason it will amount to environmental injustice or environmental racism.

When the hazardous wastes emanated in the developed countries are exported into the developing countries due to economic or any other reason (except for a fair reason like recycling), such practice forces a total different community to enjoy an inferior environment and to bear all the negative consequences arising out of it including threats upon health and human lives for the sake of betterment of the developed countries. It stands in clear violation of environmental justice and all the equities connected with it. The only reason why the developing country citizens are exposed to such a hazard is merely because they are economically inferior to the developed country.

In order to address this injustice both developing countries and developed countries shall be considered in an equal footing and both sets of countries shall be given the choice of being the exporters and importers of wastes enabling the authorities that exercise sovereign power in such jurisdictions to decide whether they are allowing the access of a particular waste into its territorial limits or not.

B. North South Divide

The exercise of international environmental justice has however been hindered by the North South divide in the environmental governance. According to the existing studies the leading cause of global environmental degradation is the profligate consumption of the planet's resources by its wealthiest inhabitants, most of whom reside in the global North or in the mega-cities of the global South. The richest twenty per cent of the world's population consumes roughly 80 per cent of the planet's

economic output, and generates 90 per cent of its hazardous waste (United Nations Millennium Ecosystem Assessment 2005). For centuries, a set wealthy nations are exploiting the resources of poorer countries who are trapped in the vicious cycle of poverty paying their price for the environmental pollution caused by industrialist countries and losing opportunities for development (Gonzalez, 2015).

South is bearing a disproportionate burden of costs of activities of the North due to their geographic location, lack of laws and regulation and even due to lack of power in the international arena to stand against the acts of so-called powerful nations, more specifically since wealthy nations hold the controlling power of most of the key international decision-making bodies including World Trade Organization, World Bank, International Monetary Fund and even the United Nations.

C. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Any legal instrument that seeks to address the complicated issue of transboundary movement of hazardous waste shall be fully equipped to establish environmental justice over North South dimensions of environmental governance.

Article 4 of the convention deals with the general obligations of the parties to the convention. It recognizes the sovereign right of any party to prohibit the import of any hazardous waste and the obligation of the other party to respect such decision (Article 4 (1)). This sovereign power is further strengthened by Article 6 which mentions that the international trade of hazardous wastes shall be based on the Prior Informed Consent (PIC) procedure and conducted in accordance with the principles of Environmentally Sound Management (ESM). These principles allow every country without discrimination on the basis of economic status, political power or any other ground to take independent decisions with regard to acceptance or rejection of wastes.

Article 4 (2) (a) recognizes the obligation of the state parties to reduce the emanation of hazardous wastes and other forms of wastes to the minimum taking into account social, technological and economic aspects and Article 4 (2) (b) lays down the necessity of having adequate disposal facilities within the territorial limits of the country which generates wastes. This obligation is further supplemented by Article 4 (9) which permits transboundary waste disposal only in definite instances provided in the convention. It is either where the exporting state does not have the technical capacity and the necessary facilities or suitable disposal sites or where the wastes are required by the importing state as raw materials for recycling or recovery industries. These principles seek to ensure that the burden of disposing wastes will be born to the

maximum extent possible by the territory which generates such waste without unnecessarily passing an alien environmental burden to a separate country unless it is for the benefit of the wider community.

According to article 4 (5) a party shall not permit hazardous wastes or other wastes to be exported to a non-party or to be imported from a non-party. It ensures that the parties to the convention do not impose an environmental burden on a vulnerable state not regulated by the convention or takes on an environmental burden which cannot be regulated by the convention.

Article 4 (8) mentions that The Convention places an obligation on both the importing and exporting country Parties to ensure that hazardous wastes that are exported are managed in accordance with ESM. Further Article 9 of the Convention lays down a procedure to deal with instances of illegal traffic of hazardous waste.

These basic principles of the Basel convention ensure that the environmental justice principles are upheld and respected in transboundary movement of hazardous wastes. However, the Basel convention has a number of loop holes which when combined with the North South division of environmental governance create crucial environmental injustices.

IV. BASEL CONVENTION: THE DARK SIDE

Basic loophole in the regulation of transboundary movement of hazardous wastes is that some of the major industrialist countries including USA are not parties to the Basel convention, which means that they will follow their own rules in exporting and importing wastes. This is one major factor that hinders the effectiveness of the Basel convention in the practical scenario. This can have serious adverse impacts on the environmental justice, environment, human lives and health since in practice developing countries are at the mercy of developed countries (basically due to monetary needs and the need of financial support) and might voluntarily takes up the burden of hazardous wastes due to economic gains that derives from it even in the absence of proper regulation in contrary to the provisions of the Basel Convention.

Article 4 (9) (b) of the convention permits transboundary movement of hazardous wastes for the purposes of recycling. This principle has been a door through which different types of hazardous wastes sought entry into other countries which have not been necessarily aimed at using in recycling processes.

Further, the Prior Informed Consent fails to properly verify that the facility in the receiving state which accepts waste can manage such waste in an environmentally sound manner. Moreover, the technical guidelines of environmentally sound management provided in the convention are not mandatory but discretionary in the

domestic context. Therefore, exporting state will have to face a number of issues in getting the domestic technical standards properly verified and assessing whether they are environmentally sound.

The convention lacks provisions for liability and compensation for the violation of the obligations in the convention and pollution resulting from toxic waste. Protocol on Liability and Compensation sought to address this issue to a greater extent which recognize both strict liability and fault-based liability, however the Protocol imposes greater liabilities in cleaning up and remedying environmental damages for after-care incidences which is unfavourable to the poorer, developing countries.

Further the convention contains generally wider definitions which provides a little guidance to the parties to the convention. Most significant of these definitions is the definition given to environmentally sound management. According to Article 2 (8), Environmentally sound management of hazardous wastes or other wastes means 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. This definition is too general therefore depends upon each states discretion to decide what exactly is environmentally sound which hinders the assurance of environmental justice and sustainability.

V. RECOMMENDATIONS

Due to above loopholes, this study suggests that it would be significant to create a separate international institution to ensure that the provisions in the Basel Convention are adequately complied with by the member countries. This institution shall monitor whether the hazardous wastes exported in to the developing countries are re-usable and re-cyclable or not. Further there shall be a guideline which comprehensively defines hazardous wastes with a framework to identify waste with regard to each consumable and environmentally sound waste management mechanisms. Apart from that, the technical guidelines of environmentally sound management provided in the convention shall be made mandatory.

Moreover, irrespective of whether a particular country is a party to the convention or not, transboundary movement of hazardous wastes shall be regulated through jus cogens, peremptory norms of international law and other environment-related principles including state responsibility, polluter pays principle, precautionary principle, principle of sustainable development and most importantly the principle of environmental justice. In doing so, economic and political strengths of different states shall not be allowed to be a decisive factor and every state shall be treated equally.

Further, domestic mechanisms must be developed to recycle hazardous wastes which contain necessary allocations of human resources, novel technology and infrastructure. Apart from these social, management and technological factors domestic legal framework relating to recycling of hazardous wastes shall be developed. This can be done through upsurgeance of fines, imposing longer prison sentences, conferring more powers on the law enforcement authorities to carry out investigations and introducing spot fines. Further domestic laws shall take a proactive approach to prevent environmental damages arising out of hazardous wastes.

VI. CONCLUSION

Developing world is struggling to achieve environmental justice particularly with regard to the use of their territories as waste dumping sites by the developing world. Basel convention contributes towards ensuring environmental justice to a greater extent yet certain loopholes together with North South conflict of environmental governance can in actual practice impose critically uneven environmental burdens on the developing countries. Basel Convention shall be developed to address these loopholes while encouraging all the states in the world to be a party to the convention and to take part in addressing the crucial issue of transboundary movement of hazardous wastes. Developing countries shall strengthen their domestic laws and policies to ensure environmentally sound management systems while maintaining their independence in accepting and rejecting transboundary wastes. These mechanisms will reduce climate change issues, protect the environment and will facilitate the achievement of sustainable development goals.

References

- Moyers, B. (1990) *Global Dumping Ground: The International Traffic in Hazardous Waste*. United States: Center for Investigative Reporting.
- Andrews, A. (2009) Beyond the Ban – Can the Basel Convention adequately Safeguard the Interests of the World’s Poor in the International Trade of Hazardous Waste?. *Law, Environment and Development Journal*. [online] p. 169-183. Available from - <http://www.lead-journal.org/content/09167.pdf> [Accessed: 10th April 2017]
- Gutierrez, A. (2014). International Environmental Justice on Hold: Revisiting the Basel Ban from a Philippine Perspective. *Duke Environmental Law and Policy Forum*. [online] p. 399-426. Available from - Available at: <http://scholarship.law.duke.edu/delpf/vol24/iss2/4> [Accessed: 10th April 2017]
- Secretariat of the Basel Convention. (2011). *Basel Convention*. [Online]. Available from -

<http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> [Accessed: 5th April 2017]

Okaru, O.V. (2011) The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries. *Fordham Environmental Law Review*. 4 (2) p. 137-165

Pratt, L. (2010) Decreasing Dirty Dumping – A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste. *William & Mary Environmental Law and Policy Review*. p. 581.

Lipman, Z., (2011) Trade in Hazardous Waste: Environmental Justice Versus Economic Growth. Available from - www.ban.org/library/lipman.html (Accessed: 5th April 2017)

Neill, K., (1998) Out of Backyard: The Problems of Hazardous Waste Management at a Global Level *Journal of Environment and Development*, 7 p. 138

Mason, B., Toxic Waste Dumping in Ivory Coast (2006). Available from - www.wsws.org (Accessed: 3rd March 2017)

United Nations Millennium Ecosystem Assessment (2005) *Ecosystems and Human Well-Being: Synthesis* [online] Available from - <http://www.unep.org/maweb/documents/document.356.aspx.pdf> [Accessed: 26th February 2017]

Grear, A. and Kotzé, L (eds) (2015) *Research Handbook on Human Rights and the Environment*. Washington: University of Seattle.



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