

Running From Basel:

How the Convention is Deliberately Undermined

The Basel Convention was originally intended as a beacon of preventative policy and legal restraint against hazardous waste trafficking – the externalization of harm and costs along the pathways of globalization. It was born out of a notion that economically motivated waste exports particularly from developed to developing countries is both an affront to human rights and to the environment. Above all, the Convention was intended as a legally binding instrument; it is an international law, with a clear aim to promote the minimization of transboundary movement of hazardous wastes (particularly to developing countries) and to minimize their generation.

Increasingly, however, we are witnessing an unfortunate and deliberate effort on the part of powerful industrial interests and the countries that support them, to “run” from and even reverse the Basel Convention’s principles and obligations. We are witnessing a concerted effort to chip away at the bulwark that was erected in 1989 and again in 1995 with the landmark adoption of the Basel Ban Amendment. We are seeing new efforts to revise, or escape from, the original intent of the Convention – to either make it irrelevant or to twist it into an instrument that would actually facilitate transboundary movements (TBM) of waste to developing countries using the convenient and green term “recycling” and using that word to justify all manner of waste generation and TBM. However, this *is not* what the Basel Convention envisaged nor is it what is embodied in its legal text.

Running from Human Rights

One of the most disturbing trends in this regard is the latter day denial of the Basel Convention’s human rights birthright. The Convention was born out of an outrage by developing countries that their soil and lives were to be used as a dumping ground for hazardous wastes generated far from their shores in rich, developed countries – the toxic effluent of the affluent. This outrage sprang as much from the violation of human rights, the injustice the dumping represented, as from its environmental impacts. The Human Rights Council installed a Special Rapporteur on the subject in 1995, and has just last year

renewed the mandate under the new title: Special Rapporteur on the impact on human rights of mismanagement of toxic substances and waste

The underlying human rights concept inherent in the Convention of not allowing a disproportionate burden of the world’s pollution placed on any peoples simply due to their economic status (Environmental Justice Principle). Ironically while the US government embraced this principle domestically, to this day the US ignores the principle once waste passes their borders. The US, Japan, Canada and a handful of other Parties have fought Environmental Justice in the Basel context and have opposed the Human Rights Council Special Rapporteur mandate. Yet, the principle is a sound moral one and no amount of technical guidelines for environmentally sound management can assuage the affront of developing countries receiving a majority of the world’s toxic wastes simply because they are poor.

Running from Legal Obligations

Likewise, of late we have witnessed further revisionism being consciously promoted by key governments, fronting for their powerful industry lobbies (e.g. **the electronics and shipping industries**), that pretend a new Basel Convention exists or should exist – one that in fact seems to have lost some of its fundamental legal obligations. Instead, the notion is advanced that as long as ESM is employed then waste trade and waste generation is acceptable. This *revisionist* Basel Convention:

- ***Ignores the obligation to minimize the generation of hazardous waste (Article 4,2,a)***
- ***Ignores the obligation to minimize transboundary movements of hazardous wastes, (Article 4,2,d)***
- ***Ignores the obligation for national self-sufficiency in waste management (Article 4,2,b)***

While ESM is certainly *part* of the Basel Convention to be employed *for wastes that cannot be prevented from being generated* it is not merely a function of technical criteria, nor is it meant to be used to justify TBM.

Yet the revisionist notion of ESM implies that it is defined only in terms of technical capacity and only at the facility level, and does not embody the fundamental Basel policies, such as the fact that waste generation should be minimized and that it is not ESM to

externalize costs of pollution via export to poorer countries rather than deal with them at source through national self-sufficiency.

Too often we are noticing that in discussions such as on the transboundary movement of e-waste, that the Basel Convention's legal obligations are found to be "impractical" or running counter to the "circular economy".

Seemingly a "practical" and "circular" approach is one that allows developing countries to assume their "rightful" place as waste colonies for the rich and justifies this with terminology such as "recycling", "reuse", "ESM", "capacity building", "partnerships" and "free trade". Even the former Basel Convention Executive Secretary recently shocked many by stating that recycling trumped the fundamental obligation of minimizing TBM in a paper entitled *Shifting Paradigms: From Waste to Resources*. In her brave new world, in exchange for taking waste, developed countries will sell developing countries end-of-pipe pollution controls. This "new ESM" is a far cry from what the Convention's framers sought. Yet this is what is being proposed more frequently, and most recently in the call for exemptions in the Guideline in the Transboundary Movement of e-Waste.

Running from the Convention Itself

Perhaps the most damaging method of undermining the Convention has been the deliberate run to new institutions or programs offering a different context, and constituency allowing where the Basel obligations, principles and history are not well understood or respected. In such venues new laws or norms can be established that clash with those of the Basel Convention, thereby muddying the waters of which laws should reign.

The worst example of that has been the charge by the **EU**, **Japan**, **Norway** and the **United States** to seek to pass competency for ships-as-waste, to the shipping industry friendly **International Maritime Organization (IMO)** where a far weaker treaty than the Basel Convention was created to suit the profit margins of the powerful shipping industry.

Japan also created an entirely new waste program under the auspices of the **G8** known as the **3R Initiative** with its *goal of lifting trade barriers to waste*. They have also adroitly moved to press their Asian neighbors such as **Singapore**, **Malaysia** and the **Philippines** to liberalize trade in hazardous waste in bilateral free trade agreements known as JEPAs.

Running From Waste Definitions

When things have come to a confrontation and Basel Parties have asserted the clear text of the Convention, we have seen attempts at thwarting the will of the Convention by exodus from the scope of the Basel Convention. This is either done by trying hard to re-define waste or hazardous waste so that their particular wastes from which they derive great profit by externalizing its liabilities to others, is de-listed from the scope of the Convention, or, perhaps most effectively, by escaping entirely to another, more favorable institution ("venue shopping").

We saw the definitional attack most blatantly in the **shipping industry's** effort to avoid the Basel Convention for the management of end-of-life ships. The industry first insisted in asserting the legal nonsense that a ship could not be a waste. Despite the opposite being affirmed by the Parties in Decision VII/26, they eventually succeeded to convince even European nations which had long been champions of the Basel Convention and Basel Ban in agreeing. In a complete about face, in 2013 the European adopted **legislation removing ships from the Waste Shipment Regulation**, showing the power of a large unaccountable industry. This legislation is completely illegal with respect to Europe's treaty obligations, as Basel has not removed ships from their scope and all EU countries are individually and collectively bound by Basel.

Likewise we have seen efforts at the Mobile Phone Partnership Initiative (MPPI) and Partnership for Action on Computing Equipment (PACE), *and now most recently in the final negotiations over the Technical Guideline on the Transboundary Movement of e-Waste, to de-list types of non-functional electronic waste from falling under the Basel Convention simply because it might be deemed repairable.*

This is extremely dangerous as everything can be deemed repairable and once something falls out of the Basel Convention, Parties give up their ability to control their own border against toxic waste. It must be further noted that virtually all repair involves the discarding and replacement of a hazardous part. Thus, allowing exports for repair to low wage countries is yet another sneaky way to undermine the Ban Amendment.

The Basel Convention with its Ban Amendment stands as a landmark of international law, addressing both human rights and environmental issues in a manner that remains intensely relevant in an age of increased globalization. It is vital that the custodians of the Basel Convention – its Parties, steadfastly refuse to allow the original intent of the Basel Convention to be undermined, reinvented, sidestepped or watered down by special interests that desire to turn back the clock and allow profitable exploitation and cost externalization to prevail. For the sake of all of our children and their children, it is vital that we hold fast to the original intent of the Basel Convention!

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