

Why the US Must Ratify the Basel Convention together with the Ban Amendment (or not at all)

The Original Basel Convention: An Anachronism

Treaties are living and growing instruments. Since its adoption in 1989, the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal has evolved and moved a long way from its original minimalist approach to controlling trade in wastes. The Basel Convention has now adopted hundreds of decisions, a protocol, an amendment and it has amended its annexes.

Of these agreements, the decisions to ban the export of all hazardous wastes from developed to developing countries, for any reason have dramatically altered the treaty. By far, the Basel Ban has been the most significant product of the Convention since it came into force in 1992.

While the original text of the Convention was condemned by environmentalists and many developing countries as doing more to legitimize international toxic waste trade and dumping rather than criminalize it, as soon as the treaty entered into force, the Parties progressively moved at each of the Conference of Parties (COPs) to rectify that shortcoming by the following *consensus* agreements:

COP1 (December 1992): Decision I/22 requested developing countries to prohibit the import of hazardous wastes from industrialized countries.

COP2 (March 1994): Decision II/12 banned export of all hazardous wastes from OECD to non-OECD countries including for recycling as of 1 January 1998.

COP3 (September 1995): Decision III/1 adopted the OECD (and Liechtenstein) export ban as an amendment to the Convention.

The Basel Ban has been hailed as a landmark precedent for global environmental justice. It aims to end the practice of global cost externalization – the dumping of hazardous wastes on poorer countries in avoidance of paying the high costs of more appropriate waste management or prevention within wealthier industrialized nations. It has, without question, transformed the

Basel Convention from an easily corrupted paperwork regime to an environmentally-justified trade barrier to prevent economically distorting, unsustainable and immoral cost externalization made possible by globalization, free trade and intermodal transport.

The Basel Convention now has 180 Parties but the United States is the only developed country that has failed to become a Party. Countries like the United States that might wish to enter the treaty late in the game cannot now pretend that they can turn back the clock and ignore the highly significant decisions made by a consensus of the Parties, now more than 15 years ago -- decisions which dramatically and forever altered the treaty during the period they were not Parties to it.

Yet this is precisely what the United States intends to do. Every administration since 1995 has considered ratifying the original Basel Convention alone but has not considered simultaneously ratifying the most significant alteration to that agreement the Parties have adopted. The Obama Administration claimed just this year they intend to do this as well.

Regardless of the legality of doing so, such an action is tantamount to a new 51st state joining the United States by ratifying the original 1787 US Constitution without accepting the subsequent first 10 amendments (the Bill of Rights) or the amendment banning slavery. It is simply not acceptable.

Motivations Revealed

Since the beginning of the Basel negotiations, the United States, in both Republican and Democrat administrations, has adopted the viewpoint of its industry lobby and not of its public, as it continues to strongly oppose the concept of a no-exceptions waste trade ban. The US, even as a non-Party, fought hard against passage of all of the above noted Basel decisions and they continue to do so.

As the Basel Ban and its implementation has been a *dominant goal and activity* of the treaty since 1989, and because the Ban is also absolutely consistent with the Basel Convention's obligation for countries to become self-sufficient in hazardous waste management (Article 4.2.b), the underlying motivation by the US to accede to the original treaty and ignore the Basel Ban Amendment must be seen as suspect.

A closer look at the stated US reasons for *selectively* ratifying the Basel Convention reveals that the strongest motivation is likely to be an unstated one -- an enhanced ability for the United States to work within the Convention to weaken the obligations imposed by the

Basel Ban and the treaty generally. We examine below the alleged reasons we have heard from US officials for "selective" ratification:

"In the current political climate the ban will not be accepted by Congress, so we should just move forward with what will pass." -- While it's true the Senate has already granted "advice and consent" on the original treaty and not the Ban Amendment, there is no reason, other than a lack of administration support, why an effort to promote the Ban and receive the consent from the Senate is not feasible if the Administration believed in the ban.

"The US needs legal authority to better control hazardous wastes exports and imports and the Convention alone is better than nothing" -- If indeed the United States wants better authority over waste exports and imports they can propose amending their laws at any time. The claim is seen as especially odd given the fact that the Basel Convention *with* the Ban Amendment supplies far more control over environmentally destructive shipments of hazardous waste than the original treaty.

The United States already has the internationally imposed legal authority and obligation to apply most of the obligations of the original 1989 Basel Convention by virtue of a legally binding OECD decision passed in 1986. But they have failed to do so!

The US claim becomes even more dubious once it is realized that the United States *already* has not only the authority, but the obligation to apply most of the obligations of the Basel Convention by virtue of a legally binding OECD decision passed in 1986. But they have failed to do so and have never made any effort to do so.

This legally binding OECD decision (C(86)64(Final)), which requires Prior Informed Consent (PIC) for all hazardous wastes, and prohibits exports if there is reason to believe that the wastes will not be handled in an environmentally sound manner, has *never* been properly implemented into US national law. Thus, current US law allows highly dangerous and unscrupulous exports of asbestos and lead acid batteries, lead/cadmium contaminated sludges, electronic wastes, etc. to developing countries -- with few controls. If the US really had the will to better control hazardous waste exports why did they not implement the 1986 OECD agreement?

In light of the fact that the original treaty *without* the ban was denounced by environmentalists and developing countries alike and dramatic moves were made immediately by the Parties to reform the original treaty by adding the ban, the notion that the Convention without the ban is "*better than nothing*", begs the question, *better for whom?*

The Real Reason

To date, as a non-Party, the United States has been forced to argue their extreme minority view (always in opposition to the Basel Ban) from an increasingly weak position. There is no doubt that *if* the world's last superpower were allowed to join the

Convention without accepting the decisions made by that body, the US' ability to project their current policy to weaken the Basel Ban on behalf of some of their domestic industries would be improved. Rights and obligations of Parties include the ability to block consensus, call special votes, propose amendments, etc. Additionally, the relatively large amount of money the US as a Party would be required to contribute to the Convention would allow it considerable more clout than other Parties.

As long as the US remains a non-Party they will remain ineffectual in their objective of dismantling the Basel Ban and by doing so -- the will of the global community. Meanwhile, the day of entry into force of the Ban gets closer and closer. Once it is in force, it becomes integral to the convention and the US will be forced to accede to it should they wish to ratify the Convention itself.

Would US Ratification of the Basel Convention *without* the Basel Ban Amendment be a step in the right direction for the global environment?

No. Currently the massive exports of hazardous electronic waste from the United States is illegal traffic once it leaves its shores. This is only due to the fact that under the Convention, no country can trade in hazardous waste with a non-Party without a special Article 11 agreement. These agreements are not in place for countries outside of the OECD group. Therefore almost all of this e-waste traffic going to developing countries from the US is illegal and a criminal act. Were the US to ratify the Convention it would possibly become legal and countries could be pressured into receiving US waste, as we have seen already in the case of exports from Japan. This is not a desired outcome from the world's greatest waste generator nation.

Two years ago the US Administration had the opportunity to bar the export of hazardous electronic waste generated by federal government agencies with an executive order. The fact that Obama refused to sign such an agreement after he was begged to do so by environmental organizations, shows the true colors of the US -- they wish to use developing countries as convenient dumping grounds.

It is our conclusion that US ratification of the original 1989 treaty *without simultaneous ratification of its Ban Amendment* will equate to a net loss for the global environment and the protection of developing countries. Until the United States changes its position within the Basel Convention and decides to join the rest of the global community in prohibiting the unscrupulous and environmentally damaging export of hazardous wastes to developing countries, it would be much better for all concerned to keep the US out of Basel.

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