

BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

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Background

The management of hazardous wastes has been on the international environmental agenda from the early 1980s, when it was included as one of three priority areas in the United Nations Environment Programme's (UNEP) first Montevideo Programme on Environmental Law in 1981. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter referred to as "the Basel Convention") was adopted in 1989, in response to a public outcry following the discovery, in the 1980s, in Africa and other parts of the developing world of deposits of toxic wastes imported from abroad. Awakening environmental awareness and corresponding tightening of environmental regulations in the industrialized world in the 1970s and 1980s had led to increasing public resistance to the disposal of hazardous wastes – in accordance with what became known as the NIMBY (Not In My Back Yard) syndrome – and to an escalation of disposal costs. This in turn led some operators to seek cheap disposal options for hazardous wastes in Eastern Europe and the developing world, where environmental awareness was much less developed and regulations and enforcement mechanisms were lacking. It was against this background that the Basel Convention was negotiated in the late 1980s, and its thrust at the time of its adoption was to combat the "toxic trade", as it was termed. The Convention entered into force in 1992.

The Basel Negotiation Process (1987-1989)

In June 1987, based on a joint proposal by Switzerland and Hungary, the Governing Council of UNEP mandated the Executive Director to convene a working group with the task of elaborating a global convention on the control of transboundary movements of hazardous wastes, drawing on the previous work undertaken by UNEP and other national, regional and international bodies. The Council also authorized the Executive Director to convene, in early 1989, a diplomatic conference to adopt and sign the convention. This decision and the resulting negotiations were subsequently endorsed by the United Nations General Assembly.

The schedule determined by the Governing Council allowed for a period of less than two years for the drafting and negotiation of the convention. The Ad Hoc Working Group of Legal and Technical Experts with a Mandate to Prepare a Global Convention on the Control of Transboundary Movements of Hazardous Wastes (hereinafter referred to as "the Working Group") began its deliberations at an organizational meeting in October 1987 and held a total of five negotiation sessions between February 1988 and March 1989.

The Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, convened at the invitation of the Swiss Government from 20 to 22 March 1989 in Basel (hereinafter referred to as "the Basel Conference"), and in which 116 States were represented, considered the final draft of the Convention submitted to it by the Working Group. The Basel Convention was adopted unanimously by the Conference on 22 March 1989. The Conference also adopted eight

resolutions related to the further development and the implementation of the Basel Convention. One hundred and five States and the European Economic Community (EEC) signed the Final Act of the Basel Conference. On 22 March 1990, when the Basel Convention was closed for signature in accordance with its article 21, fifty-three States and the EEC had signed it. It entered into force on 5 May 1992 upon deposit of the twentieth instrument of accession (article 25). As of September 2010, there are 174 parties to the Basel Convention (173 States parties and the European Union¹).

An account of the negotiation process leading to the adoption of the Basel Convention and the discussions of the Conference of the Parties to the Convention would be incomplete without an outline of the background and the general difficulties, which emerged during the deliberations of the Working Group and continued to some extent after the adoption of the Convention. The Basel negotiations proved to be extremely difficult and contentious. This was mainly due to the great political sensitivity of the issue, which intensified the difficulty of accommodating the aims of States with widely diverging situations and interests. The negotiations accordingly provoked considerable interest, which in turn resulted in numerous academic writings, analyzing the negotiations themselves as well as the provisions of the Convention.

During the mid-1980s, the political discussion of the issue of international transport of hazardous wastes in general, and that of illegal transboundary traffic in such wastes in particular, had gathered momentum, reaching its culmination in 1988 in widely publicized media reports on incidents involving the illegal dumping of toxic wastes from industrialized nations in Third World countries. The problem was taken up by governments and intergovernmental agencies, as well as non-governmental environmental groups, at the national and international levels. The growing interest in the issue is reflected in the number of States represented at the sessions of the Working Group, which increased from twenty-four at the organizational meeting to almost eighty at the last session, and in a similar increase in the number of organizations participating in the proceedings as observers.

Due to these developments, the focus of public opinion during the negotiation process on the Basel Convention was almost exclusively on the “North-South” aspect of the problem: the threat posed to the environment of ill-equipped developing countries by the illegal import of hazardous wastes from industrialized nations. The fact that, even at the time, the vast majority of international waste transport took place between industrialized nations was widely ignored. This added a political dimension to the negotiation process, which had considerable influence on the direction of the discussions. The elaboration of the Basel Convention was seen by many primarily as an opportunity to put a stop to illegal international waste traffic from North to South. A substantial number of developing countries, led by member States of the Organization of African Unity (hereinafter referred to as “OAU”), the predecessor of the African Union, regarded the deliberations as an opportunity to demonstrate their solidarity in refusing to tolerate the use of their territories as dumping grounds for toxic wastes from the rich States of the industrialized world. Their demand for a complete ban of all transboundary movements of hazardous wastes world-wide was strongly supported by environmental non-governmental organizations (NGOs). On the other hand, many developed countries, focusing on the option of controlled waste traffic, were not prepared to agree with any proposed measures

¹ Since the entry into force on 1 December 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, the European Union replaced and succeeded the European Community, in accordance with article 1 of the Treaty on European Union as amended.

that would put too many restrictions on the trade in wastes – especially recyclable materials with an economic value – amongst industrialized States. UNEP adopted the position that a complete ban of international hazardous waste transport was not the best solution from an environmental viewpoint, since it would preclude such transport even in cases where waste disposal in a country other than the country of origin was more environmentally sound. This position attracted harsh criticism from developing countries as well as environmental NGOs, who saw it as a betrayal of their struggle against illegal traffic and as an active support of the interests of the industrialized world. Disagreement between developed and developing countries also arose on other key issues.

As the negotiations progressed, the rift between industrialized and developing countries deepened. Following the adoption by the Council of Ministers of the OAU in May 1988 of a resolution on the dumping of nuclear and industrial wastes in Africa, which condemned the import of such wastes into the African continent as “a crime against Africa and the African people”, the OAU member States consolidated their position in the negotiations, demanding the incorporation of strong safeguards against waste traffic from developed to developing countries into the draft Convention, as well as far-reaching provisions for financial and technical assistance to developing countries in the field of waste management. An African Ministerial Conference, convened in Dakar in January 1989 by the Government of Senegal in cooperation with UNEP as a forum for discussion of the contentious issues by representatives of African States and a small number of Western States, led to open disagreement between the two sides. The only result of the conference was a very broadly worded appeal for active participation by African States in the Basel negotiations. At the fourth session of the Working Group, held shortly afterwards, disagreement was so strong that the Working Group failed to produce a further amended version of the draft Convention, as had been planned originally: instead agreement was only reached on a limited number of provisions. At this point, doubts emerged concerning the feasibility of elaborating an agreed draft for submission to the Basel Conference and, therefore, concerning the success of the Conference itself. In an attempt to redeem the situation, the Executive Director of UNEP convened, at short notice, a round of informal negotiations of the Working Group where the most contentious issues were discussed. Based on the results of these talks, which took place in early March 1989, the Working Group was able to resume work at its fifth session, which immediately preceded the Conference of Plenipotentiaries.

At the opening of the adoption ceremony, a statement was made on behalf of the President of Mali, then Chairman of the OAU, to the effect that the African States were not prepared to sign the Convention as they considered it too weak and that they had agreed to decide on their final position after further discussion within the framework of the OAU. This came as a considerable surprise to the other delegations. A number of other States, including important industrialized States such as the Federal Republic of Germany, the United States of America, the United Kingdom and Japan, also deferred their decision on signature, for exactly the opposite reason. This meant in effect that there was considerable danger of the Basel Convention remaining an ineffective declaration of intentions, should all these States ultimately decide against becoming parties to it. It also shows how precarious the agreed compromise was. On the key issue of a complete ban on international hazardous wastes transport, the outcome was considered mainly by developing countries and environmental NGOs (as well as a number of academic writers) to be less than satisfactory: a prohibition of transboundary movements of hazardous wastes in general, or to developing countries in particular, was rejected due to the opposition voiced by industrialized States. At the suggestion of Greenpeace International, a provision was introduced by way of compromise which mandated the Conference of the Parties (COP) to reconsider the issue at regular intervals.

Aims and Provisions of the Basel Convention

The overarching 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 (article 1 and annexes I, III, VIII and IX), as well as two types of wastes defined as “other wastes” (household waste and incinerator ash; article 1 and annex II). The provisions of the Convention center around the following principal aims: (i) the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal; (ii) the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and (iii) a regulatory system applying to cases where transboundary movements are permissible.

The first aim is addressed through a number of general provisions requiring States to observe the fundamental principles of environmentally sound waste management (article 4). A number of prohibitions are designed to attain the second aim: hazardous wastes may not be exported to Antarctica, to a State not party to the Basel Convention, or to a party having banned the import of hazardous wastes (article 4). Parties may, however, enter into bilateral or multilateral agreements on hazardous waste management with other parties or with non-parties, provided that such agreements are “no less environmentally sound” than the Basel Convention (article 11). In all cases where transboundary movement is not, in principle, prohibited, it may take place only if it represents an environmentally sound solution, if the principles of environmentally sound management and non-discrimination are observed and if it is carried out in accordance with the Convention’s regulatory system.

The regulatory system is the cornerstone of the Basel Convention as originally adopted. Based on the concept of prior informed consent, it requires that, before an export may take place, the authorities of the State of export notify the authorities of the prospective States of import and transit, providing them with detailed information on the intended movement. The movement may only proceed if and when all States concerned have given their written consent (articles 6 and 7). The Basel Convention also provides for cooperation between parties, ranging from exchange of information on issues relevant to the implementation of the Convention to technical assistance, particularly to developing countries (articles 10 and 13). The Secretariat is required to facilitate and support this cooperation, acting as a clearing-house (article 16). In the event of a transboundary movement of hazardous wastes having been carried out illegally, i.e. in contravention of the provisions of articles 6 and 7, or cannot be completed as foreseen, the Convention attributes responsibility to one or more of the States involved, and imposes the duty to ensure safe disposal, either by re-import into the State of generation or otherwise (articles 8 and 9).

Similar to most modern multilateral environmental agreements, the Basel Convention features its own institutional framework. The COP is the supreme decision-making body of the Convention. The Basel Convention Secretariat, provided by UNEP, prepares, organizes and services meetings under the Convention, facilitates exchange of information and provides guidance and assistance to parties on legal and technical issues. The Secretariat also has a limited mandate to facilitate implementation of the Convention by parties. The Subsidiary Bodies of the Conference of the Parties are the Expanded

Bureau, the Open-ended Working Group and the Implementation and Compliance Committee.

The Convention also provides for the establishment of regional or sub-regional centres for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation to cater to the specific needs of different regions and subregions (article 14). Fourteen such centres have been established. They carry out training and capacity building activities in the regions.

Subsequent Developments (1992-2010)

1. Ban Amendment and Basel Protocol

Following the adoption of the Basel Convention, the negotiations on the introduction of a total or partial ban on transboundary movements of hazardous wastes continued in the framework of the COP. They resulted in the adoption by COP 3 in 1995 of the Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter referred to as “the Ban Amendment”). 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 (Parties and other States which are members of the OECD, EC, Liechtenstein) to all other countries. The strong underlying controversies remained, however, and the Ban Amendment has not yet entered into force. The evolution of the membership of the Organisation for Economic Co-operation and Development (OECD), the emergence of new waste streams and techniques for recycling and resource recovery, and the increasing availability of state-of-the-art recycling facilities in non-OECD countries has added new dimensions to the problem. The challenge of protecting vulnerable countries from unwanted hazardous waste imports, while not precluding the import of wastes considered valuable secondary raw materials to countries in a position to manage them in an environmentally sound manner has therefore gained importance. Informal discussions were initiated at COP 9 in 2008 to identify a way to enable the entry into force of the Ban Amendment while addressing the concerns and needs of all countries in this context.

The Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter referred to as “the Basel Protocol”) was adopted by COP 5 in 1999. As is the case of the majority of treaties on civil liability for environmental damage adopted over the past two decades, it has not yet entered into force. The Basel Protocol regulates civil liability for damage resulting from the transboundary movement of hazardous wastes and other wastes, including incidents occurring as a result of illegal traffic. Each phase of a transboundary movement, from the point at which the wastes are loaded to their export, international transit, import and final disposal, is covered. Delegates at COP 5 also agreed on an interim arrangement to cover emergency situations until the Protocol enters into force. COP 6 approved the Interim Guidelines for the Implementation of decision V/32 on the Enlargement of the scope of the Technical Cooperation Trust Fund.

2. Implementation and Compliance Committee

A Committee for Administering the Mechanism for Promoting Implementation and Compliance (hereinafter referred to as “the Implementation and Compliance Committee”) was established at COP 6 in Geneva in 2002. The objective of this mechanism is to assist

parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of, and compliance with, the obligations under the Convention. The mechanism is non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all parties. The mechanism should complement work performed by other Convention bodies and by the Basel Convention Regional Centres. The Implementation and Compliance Committee is mandated to review specific submissions as well as general issues of compliance and implementation.

3. Policy development and soft law

One of the most significant contributions of the Basel Convention over the past 20 years is the elaboration of a significant number of policy instruments with non-binding character. Within the framework of the Convention, a large body of technical guidelines on the management of specific waste streams has been developed by technical government expert groups and approved by the COP. These non-binding instruments have been designed for the use of Governments at all levels, as well as other stakeholders, to provide practical guidance and thus facilitate the management of the relevant waste streams.

In 2002, COP 6 adopted the Strategic Plan for the implementation of the Basel Convention for the period 2002 to 2010, to assist developing countries and countries with economies in transition in implementing the provisions of the Convention. Numerous national and regional capacity building and training projects have since been implemented under the umbrella of the Strategic Plan, with the assistance of the Secretariat and the Basel Convention Regional Centres. COP 10 in 2011 is expected to adopt a new strategic framework for the period 2011 to 2021, defining the fundamental aims and priorities of the Convention for the relevant decade while taking into account changes that have occurred since its adoption.

COP 6 also established a partnership programme with business and industry. Under this programme, two public-private partnerships have thus far been successfully launched, both with the objective of developing specific technical guidelines – to be used by the relevant industry and authorities for the management of end-of-life electronic devices and electronic waste – and initiating relevant pilot projects at country level, including in companies. Between 2003 and 2008, the Mobile Phone Partnership Initiative (MPPI) developed guidelines for every stage of the management of end-of-life mobile phones, which are being used in relevant facilities. 2008 saw the inception of the Partnership for Action on Computing Equipment (PACE) by COP 9. Building on experience gained with the MPPI, PACE is working to increase the environmentally sound management of used and end-of-life computing equipment. Among other things, concrete projects are planned to be developed and implemented within its framework. Both partnerships have the benefit of participation of key actors of the relevant industries, sharing their experience and knowledge.

Contribution to development of international law and practice

1. General

The Basel Convention is the sole global legal instrument addressing transboundary movements and environmentally sound management of hazardous and other wastes. In the 20 years since its adoption, it has become the centrepiece of an international legal regime on the issue. Some of its fundamental principles, such as the principles of proximity of disposal of wastes, environmentally sound management and prior informed consent to import of potentially hazardous substances, have arguably contributed to the development of customary international law in the relevant field. A number of regional treaties incorporating these principles have since been adopted by groups of countries in different parts of the world to complement the global regime of the Basel Convention and address specific regional needs. Recent years have seen efforts to cooperate with organizations working in areas that complement and strengthen the Basel Convention regime, notably with the World Customs Organization and Interpol in the area of enforcement and with the International Maritime Organization in the area of marine pollution by substances subject to transboundary movement, as well as of dismantling of obsolete ships.

2. Synergies among the Basel, Rotterdam and Stockholm Conventions

The Basel Convention, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants share the common aim of protecting human health and the environment from hazardous chemicals and wastes. The scopes of application of the three conventions overlap in part, in that they cover different stages of the life cycle of certain chemicals, such as persistent organic pollutants. COP 9 of the Basel Convention (June 2008) and COPs 4 of the Rotterdam (October 2008) and Stockholm Conventions (May 2009), respectively, adopted the so-called “synergies decisions” providing for greater cooperation and coordination among the three conventions. The synergies decisions set out five areas for enhancing cooperation and coordination among the chemicals and waste conventions: organizational issues in the field, technical issues, information management and public awareness issues, administrative issues and decision-making. The first simultaneous extraordinary meetings of the Conferences of the Parties to the Basel, Rotterdam and Stockholm conventions (ExCOPs) took place in Bali from 22 to 24 February 2010 in coordination with the eleventh special session of the Governing Council/Global Ministerial Environmental Forum of UNEP to take the necessary steps to further strengthen the synergies process. The ExCOPs reviewed the implementation of the synergies decisions. Through the adoption of substantially identical omnibus decisions on joint activities, joint managerial functions, joint services, synchronization of budget cycles, joint audits and review arrangements, the ExCOPs provided the mandate for the further development of the synergies process. The most visible outcomes of the ExCOPs are the establishment of a new post of Joint Head to lead the work of the UNEP part of the three secretariats and of a Joint Convention Services section to provide support to all three secretariats in areas that are not convention specific, notably administration and finance, conference servicing and administrative support; public awareness and outreach; resource mobilization; and legal and information and communication technology (ICT) support.

This so-called “synergies” process, which ensures closer cooperation at all levels between three treaties with partly overlapping mandates while fully maintaining the legal autonomy of each, is widely seen as a ground-breaking development and can be considered

a first concrete result of international efforts to promote and enhance international environmental governance. As such, it is likely to play a significant part in the overarching United Nations-wide International Environmental Governance process and is often perceived as a possible model for other areas of international cooperation. In legal terms, the convening of simultaneous extraordinary meetings of the supreme governing bodies of three independent treaties – and the adoption by these meetings of substantially identical decisions – is likewise an unprecedented and innovative step.

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Note: All documents related to the Basel Convention are available on the Convention’s Website at www.basel.int. Information and documentation on the Rotterdam and Stockholm Conventions can be found at the respective websites, www.pic.int and www.pops.int.