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**CRITICAL ANALYSIS OF THE BASEL CONVENTION ON THE  
CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS  
WASTES AND OTHER WASTES AND THEIR DISPOSAL**- Nadia Amin<sup>1</sup>**Abstract**

“The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Other Wastes and Their Disposal” being the first ever international convention arising out of the depressing issues of dumping of wastes, particularly hazardous wastes in third world countries in consequence to ‘Not in my backyard’ syndrome in environmentally conscious developed states during the period of environmentalism, is significant for a critical analysis paving the way for scope of improvement if needed, for achieving the aim of the convention which is to protect the human health and environment. The paper work therefore intends to carry out the research in parts facilitating the discussion for the objective of the paper. The objectives of this research paper are as follows:

- To provide an overview of the environmental factors leading to a discussion on an international platform through negotiation amongst international communities.
- To understand the gist of the convention through its various relevant provisions crucial to the working of the convention in the current scenario.
- To examine the convention in the light of the Cairo guidelines, with the intent to facilitate the convention with improvement, if needed.
- To appraise the convention and identify the challenges through critical analysis of the Convention with respect to its working mechanism.

The scope of the paper is global, because it includes within its ambit both developed and developing countries, the people associated with the activity of the transboundary movement of hazardous wastes and other wastes, and their disposal. Further the scope of the paper is

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<sup>1</sup> LL.M. Student (I.E.L) 2<sup>nd</sup> Semester at Amity Law School, Noida

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progressive because it provides a solution based on an inclusive approach of the international and national communities as a whole.

Keywords: Hazardous wastes, Other wastes, Competent Authority, Prior Informed Consent, Illegal Traffic, Conference of Parties, Meetings of COP, Open-ended working group.

## **Introduction**

The Basel Convention, the prime international legal instrument on regulation of transboundary movements of hazardous wastes and other wastes and their disposal is of paramount importance because of its aim to protect human health and environment from the adverse impact of hazardous wastes and other wastes and their disposal. However, international conventions being considered as ‘positive morality’ in jurisprudence, its effectiveness can be ascertained through implementation of the international conventions in the national legislation of state parties, because national laws are considered as ‘positive law’ in jurisprudence backed by sanction. Based on such a proposition the effectiveness of the implementation of the principles of the Basel convention can be truly ascertained through a critical analysis of the “Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Other Wastes And Their Disposal, 1989” (hereinafter referred as the “Basel Convention”).

## **Literature Review**

For the purpose of this paper, the researcher has gone through ‘Law, Environment and Development Journal’, United Nations Environment Programme articles, latest report of the Conference of Parties to the Convention sixteenth meeting, the first report of the open-ended working group adopted in the sixth meeting, along with the latest report of the thirteenth meeting, the national reports available in the official website of the Basel Convention and the official website of the Basel Convention in literature review.

## **Methodology**

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The methodology adopted for this research paper is based on quantitative methods focussing on a doctrinal approach for collecting data. The citation used is Indian Law Institute Style.

### **The Critical Analysis of the Basel Convention**

The critical analysis of the “Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Other Wastes And Their Disposal, 1989” (hereinafter referred as the “Basel Convention”), shall be discussed in parts. The parts shall comprise of discussions mainly on the following areas:

- a) Environmental factors highlighting the concerns that brought about the Basel convention to address the issues related to wastes, particularly the transport of hazardous wastes .
  - b) Historical background in the light of the negotiation process to bring about the Basel Convention, amidst diverging political situations and interests.
  - c) Brief description of the aim, objectives and relevant provisions of the Basel Convention.
  - d) A brief analysis of the Basel Convention with the Cairo guidelines.
  - e) A critical analysis of the effectiveness of the Basel Convention, through its working mechanism.
- a) **Environmental factors highlighting the concerns that brought about the Basel convention to address the issues related to wastes, particularly the transport of hazardous wastes**

The Basel Convention was adopted in the year 1989. But prior to the adoption of the convention major environmental processes occurred during the 1960s to 1970s in the form of:

- i) Environmental Awareness; and
- ii) Stringent environmental legislations in developed countries.

i) **Environmental awareness**: Environmental movements for the purpose of protecting the environment took place in the form of expression through poems,

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literature, art and publication. The most prominent publication in the form of a book on environmental concern namely 'Silent Spring' by Rachel Carson in the year 1962 had an immediate impact on the awareness of public health issues associated with the adverse consequences of environmental degradation. Based on the credibility of the publication, the United States of America in the year 1970 banned Dichlorodiphenyltrichloroethane (DDT) which is a harmful chemical insecticide<sup>2</sup>. The acknowledgement of the repercussions of industrial waste stimulated the beginning of the modern environmental movement with the observation of the first 'Earth Day'<sup>3</sup> in the year 1970 followed by the sense of enhanced need to protect human health and environment when in the year 1978 **Love Canal incident**<sup>4</sup>, took place due to dumping of chemical wastes by Hooker Chemicals and Plastic Corporation during the 1940s and 1950s in the United States.

ii) **Stringent environmental legislations in developed nation states**: The soaring awareness having led to stringent environmental regulations and standards for disposal of wastes by the generating countries, a syndrome known as "Not In My Backyard" became popular with respect to disposal of wastes. Such a condition led to toxic trade of waste to states having a more flexible environmental regime than that of developed states. Such trade resulted in toxic colonialism in developing states. The 1988 **Khian Sea incident**<sup>5</sup> is a remarkable example of illegal dumping of 4000 tons of incinerator ash hazardous wastes in the developing state of Haiti, as a result of strict environmental legislations in the developed city of Philadelphia of the United States. Furthermore, **the Koko Nigeria incident**<sup>6</sup>, in the year 1988 is yet another glaring example of toxic trade resulting in illegal dumping of hazardous wastes in the name of fertilizers, thereby imprinting the accident as "drums of death" in the minds of the people of Koko village in Nigeria, who were basically poor farmers which in the long run led to the adoption of the Bamako Convention. However, the need to combat toxic trade having been demanded by African Union as well as the Eastern European Nations, the negotiation for an international legal

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<sup>2</sup><https://environmentalhistory.org/20th-century/seventies-1970-79>

<sup>3</sup><https://environmentalhistory.org/20th-century/seventies-1970-79>

<sup>4</sup>The Editors of Encyclopedia Britannica, "Love Canal: A Toxic Tragedy", Saving Earth Encyclopedia Britannica available at <https://www.britannica.com/explore/savingearth/love-canal>

<sup>5</sup><https://www.bbc.co.uk/programmes/p06rm27x>

<sup>6</sup><https://www.unep.org/news-and-stories/press-release/bamako-convention-preventing-africa-becoming-dumping-ground-toxic-wastes>

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framework on the control of transboundary movement of hazardous wastes and their disposal began leading to the adoption of a convention on the issue prior to adoption of the Bamako Convention.

b) **Historical background in the light of the negotiation process to bring about the Basel Convention, amidst diverging political situations and interests.**

Illegal transport of hazardous wastes across frontiers being the concern of African states and Eastern European countries, the negotiation for the Basel convention on the control of transboundary movements of hazardous wastes and other wastes, and their disposal initiated in the year 1987 with a joint proposal by Switzerland and Hungary to the United Nation Environment Programme. Accordingly, the Executive Director of the UNEP Governing Council was assigned with the task to convene a working group and a diplomatic conference in 1989. For the purpose of convening the conference within the timeline of two years an Ad-hoc working of legal and technical experts was formed to carry out the drafting of the report and negotiation of the issue.<sup>7</sup> In the month of March, from day 20th to 22nd in the year 1989 the Conference of Plenipotentiaries was convened at Basel on the invitation from the Swiss Government with a view to consider and adopt the final draft submitted by the working group. 116 states were represented in the conference. The conference unanimously adopted the final draft of the convention and eight resolutions for further development and implementation of the convention on 22/03/1989<sup>8</sup>. It came into force on 05/05/1992.

The Basel negotiation process was extremely difficult due to conflicting state of affairs with respect to bringing about a balance between socio-environmental need and socio-economic necessity. The nature of problems in hazardous wastes faced by both developed and developing states differed from each other. The developed states were in general concerned with the transport of wastes and hazardous wastes because of the strict environmental compliance standards in their national legislation. On the other hand the least developed or developing states were concerned with the illegal transport of

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<sup>7</sup>Katharina Kummer Peiry, "Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Their Disposal", United Nations Audiovisual Library Of International Law, 2003

<sup>8</sup>Katharina Kummer Peiry, "Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Their Disposal", United Nations Audiovisual Library Of International Law, 2003

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hazardous wastes into their sovereign territories.<sup>9</sup> The negotiation further came across two sets of opinions from stakeholders. One group of stakeholders comprising the Organisation of the African Union, the environmental non-governmental organizations demanded for a complete ban of transboundary movement of hazardous wastes world wide.<sup>10</sup> Whereas, the other group of stakeholders comprising developed states, and economies in transition such as India, Pakistan, Bangladesh were of the opinion of controlled waste traffic, as a complete ban was supposed to put too many restrictions on trade in wastes; especially recyclable materials with an economic value. The negotiations further demanded for strong safeguard against illegal traffic in wastes particularly hazardous wastes from developed to developing countries and also financial assistance and capacity building.

In the effort to bring about an international regulatory mechanism with respect to control of trade in hazardous wastes beyond borders as well as to ensure disposal in an environmentally sound manner, keeping in mind the economic gains accruing out of recyclable trade in wastes, the UNEP did not support for a complete ban resulting in Organisation of African Union not adopting the convention. In spite of diverging opinions, the negotiation efforts having been successful in bringing most of the sovereign states together on the issue of combating transboundary toxic trade colonialism through adoption and implementation of the convention is praiseworthy.

**c) Brief description of the aim, objectives and relevant provisions of the Basel Convention.**

“The Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Other Wastes And Their Disposal” was adopted with a view to protect public health and environment from the adverse effects posed either by the transport of hazardous wastes and other wastes or by the disposal. Since transboundary movements of hazardous wastes or other wastes arises out of economic as well as day-to-

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<sup>9</sup>Katharina Kummer Peiry, “Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Their Disposal”, United Nations Audiovisual Library Of International Law, 2003

<sup>10</sup>Katharina Kummer Peiry, “Basel Convention On The Control Of Transboundary Movement Of Hazardous Wastes And Their Disposal”, United Nations Audiovisual Library Of International Law, 2003

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day activities, therefore the convention came into force with four objectives to be achieved by the state parties:

- **Reduction of generation of hazardous wastes**: According to the preamble of the convention, one of the most effective ways to achieve the aim of the conference of parties to the convention held in Basel in 1989, is by reducing the generation of wastes to minimum in terms of the quantity of the wastes or the hazard potential of such wastes.
- **Restriction of transboundary movement of hazardous wastes and other wastes, except where it is perceived to be in accordance with the principles of environmentally sound management of wastes**: The convention having recognised the increasing need for prohibition of transboundary movement of hazardous wastes, particularly in developing countries due to inadequate technological advancement, disposal sites and above all insufficient funds for aftercare disposal treatment of hazardous wastes; the parties to the convention opted for a restriction which is flexible in nature owing to the economic benefits associated with trade in wastes.
- **Promotion of environmentally sound management of hazardous wastes and other wastes wherever the place of disposal is**: The convention having acknowledged the fact of generation of waste to a minimum, recognised the absolute right of a sovereign state to ban the entry or disposal of hazardous wastes or other wastes to its territory. However, according to the convention disposal of wastes needs to be managed in an environmentally sound manner irrespective of the place of disposal. Disposal can either be in place of generation or import having suitable disposal site as well as facility to handle such disposed off wastes.
- **Regulatory system applying to cases where transboundary movements are permissible**: Since parties to the convention agreed to generate wastes and transfer that wastes in case of insufficient disposal mechanism at the place of generation or for the purpose of trade in wastes used as raw material or for recycling or recovery, relied upon the fact of having a

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regulatory mechanism of the convention as well as national regulations of the state parties for enhanced control of transboundary movement of wastes.

With a view to fulfill the aim and achieve the objectives the convention contains various provisions. However, for the purpose of this paper the relevancy of a few provisions shall be discussed in brief. The convention being a global legal instrument with different state parties concerning issues related to wastes which could either be hazardous or other wastes, instead of providing a strict definition of hazardous wastes and other wastes, provided in its Article 1<sup>11</sup> about the wastes which shall for the purpose of the convention be considered hazardous wastes. The article is a relevant one because it mentions three Annexes<sup>12</sup> namely Annex I, Annex II and Annex III, where Annex I deals with the categories of wastes that need to be controlled in the sense that these wastes are generated from various wastes streams, for instance clinical wastes from medical care in hospitals, clinics and medical centers, wastes from phytopharmaceuticals, waste chemical arising from research etc. The Annex also provides for the constituents in the wastes, the presence of which renders it as hazardous. For instance lead and cadmium which are included in the list has a relation with the Khian Sea incident<sup>13</sup> where on testing of the incinerator ash, presence of lead and cadmium was found and accordingly it was ascertained that the deposits were hazardous and illegal. Wastes with certain inherent characteristics having potential to pose risks or threat to human health and environment being generally considered as hazardous wastes, therefore, Annex III for the convenience of states in transboundary trade of wastes provides for the list of hazardous characteristics. Annex II<sup>14</sup> provides for wastes other than hazardous wastes with an emphasis special on wastes generated from households, because of the huge generation of such wastes on a day-to-day basis. The annexes assigned with various codes are significant in facilitating the prior informed transboundary movement of wastes.

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<sup>11</sup><https://www.basel.int>

<sup>12</sup><https://www.basel.int>

<sup>13</sup><https://www.bbc.co.uk/programmes/p06rm27x>

<sup>14</sup><https://www.basel.int>



Article 2<sup>15</sup> is also a relevant provision because it provides for definition of various terms which are crucial for understanding the working of the Convention. However such a provision possesses certain loopholes which shall be discussed in the critical analysis of the relevant provisions of the convention. Article 4<sup>16</sup> is yet another relevant provision because it provides for general obligations of the parties to transboundary movement of wastes. Such a provision is mandatory in nature. This provision provides for the criminality in illegal traffic of hazardous wastes or other wastes. Further supplies for strict prohibition on the export or import of hazardous wastes and other wastes to and from non-party. There are many clauses in this article which are undoubtedly pivotal for the purpose of this convention. However, in the light of the data available in the national reporting<sup>17</sup> of the official website of the Basel Convention, Article 4(2)(b); Article 4(2)(d) and Article 4(4) are relevant because they are meant to review if the state parties have taken any appropriate measures to ensure availability of adequate disposal facilities for environmentally sound management of hazardous wastes and other wastes; if there is a reduction to minimum in the transboundary movement of such wastes; if parties have undertaken any strict regulatory framework.

Article 5<sup>18</sup> is a relevant provision because according to this provision the parties need to inform the secretariat about their designated competent authorities as well as the focal point for the purpose of receiving notification of transboundary movements of hazardous wastes or other wastes. Such a provision is pivotal in the national reporting mechanism of the convention.

Article 6<sup>19</sup> is another relevant provision because it provides for the process that needs to be undertaken in the form of notification by the stakeholders who are primarily the State of export or the generator or the exporter of the state of export, the State of transit, if any; the State of import or the disposer in the State of import<sup>20</sup>. Such exchange of consent through notification is received through the channel of the designated

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<sup>15</sup><https://www.basel.int>

<sup>16</sup><https://www.basel.int>

<sup>17</sup><https://www.basel.int/Countries/NationalReporting/NationalReports>

<sup>18</sup><https://www.basel.int>

<sup>19</sup><https://www.basel.int>

<sup>20</sup><https://www.basel.int>

competent authorities. The inclusion of the movement document in this Article is significant with respect to the objective of the convention. This Article is relevant because of its application in the national reporting of the convention's working mechanism globally.<sup>21</sup>

Article 8<sup>22</sup>, of the convention is relevant because it provides for the duty of the state of export to re-import the hazardous wastes or other wastes, if the transboundary movement cannot be completed according to the terms of contract or if there is no alternative disposal ensuring environmentally sound management of wastes. This provision is relevant in cases of illegal dumpings which shall be discussed in Chapter V of this paper.

Article 9<sup>23</sup> is the most relevant provision of the convention because it deals with the instances which, if it takes place, will be considered as illegal traffic, and such a condition often leads to dumping without consent. The provision also provides for the steps to be taken by the parties if such transboundary movement takes place. Basically it is a liability as well as a shared responsibility principle for promotion of mutually supportive economic- environmental needs of the states concerned. Clauses 1, 2, 3, and 4 of this article are key to this article for the purpose of the objective of the convention. Clause 5<sup>24</sup> of the Article is also important because it provides for national legislation to include appropriate measures to prevent and punish illegal traffic. The implementation mechanism of this article has been pertinent to combat the instances of illegal traffic in the present scenario, which shall be discussed in the critical analysis part of this chapter.

For the purpose of reviewing the implementation mechanism of the Basel Convention Article 13<sup>25</sup> is relevant because it requires the state parties to provide information necessary for the purpose of transboundary movement of wastes. Clause 3 of this Article<sup>26</sup> is relevant in the national reporting process, whereby the state parties are required to submit a report of the preceding year's development on matters connected to transboundary movements of hazardous wastes and other wastes to the Secretariat of the

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<sup>21</sup><https://www.basel.int/Countries/NationalReporting/NationalReports>

<sup>22</sup><https://www.basel.int>

<sup>23</sup><https://www.basel.int>

<sup>24</sup><https://www.basel.int>

<sup>25</sup><https://www.basel.int>

<sup>26</sup><https://www.basel.int>

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Conference of Parties. Article 15<sup>27</sup> is another relevant provision with the inclusion of the Conference of Parties, which is the governing body of the convention comprising governments of the countries that have accepted, ratified or acceded to the convention. Necessity being absolutely dependent on socio-economic development, while human health being dependent on the bearing capacity of the environment, Article 17<sup>28</sup> and 18<sup>29</sup> dealing with the amendment and adoption of the annexes of the convention adopted in the conference long back in the year 1989 with a vision of further development based on necessity arising out of implementation are relevant provisions to adopt a change. Article 20<sup>30</sup> is also a relevant provision with respect to settlement of disputes.

From the point of the importance of the convention and the procedural effectiveness of the same, the above discussed articles are relevant for the purpose of this paper, else the work of this paper will produce a lengthy document.

d) **A brief analysis of the Basel Convention with the Cairo guidelines.**

“Cairo Guidelines and Principles For Environmentally Sound Management of Hazardous Waste”, approved in the year 1987 by the United Nations Environment Programme, as a non-legal binding instrument, to assist governments in the development and implementation of their national policies for hazardous wastes, is significant in the convening of the global Basel Convention, because such a convention was mandated by the Governing council of the UNEP upon the Executive Director to be drawn on the Cairo guidelines and relevant national, regional and international bodies.<sup>31</sup> However, analyzing the guidelines with the Basel convention, certain loopholes in the convention have been observed. The convention while providing for “management” in Article 2<sup>32</sup>, provides for ‘**collection, transport and disposal** of hazardous wastes or other wastes, including after-care of disposal sites’; “disposal” means any operation specified in Annex IV to the convention; “approved site or facility” means a site or facility for **disposal of** hazardous wastes. Whereas, Article 1<sup>33</sup>, of the guidelines, while defining

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<sup>27</sup><https://www.basel.int>

<sup>28</sup><https://www.basel.int>

<sup>29</sup><https://www.basel.int>

<sup>30</sup><https://www.basel.int>

<sup>31</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

<sup>32</sup><https://www.basel.int>

<sup>33</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

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‘management’, provides for the **collection, transport(including transfrontier movements), storage(including storage at transfer station), treatment and disposal** of hazardous wastes. Also ‘approved site or facility’ means a site or facility for **storage, treatment and disposal** of hazardous wastes. The loophole in the convention is visible from the non-inclusion of the words storage, and treatment in the management and approved site or facility of hazardous wastes. Such a loophole is significant because of the nature of the convention being global in nature. According to the convention the responsibility of the competent authority rests only with the receiving of the notification of transboundary movement of hazardous wastes or other wastes or information related to it. The convention does not expressly and stringently provide for an inclusive approach in the form of consultation amongst the people associated with the creation and management of wastes, be it hazardous wastes or other wastes. Whereas, according to the guidelines, the responsibility of the competent authority is the planning, organization, authorisation and supervision of the management of the hazardous wastes.<sup>34</sup> The guidelines provide for consultation with the concerned public authorities as well as inclusion of public through public participation in devising out a plan for the management of hazardous wastes describing the arrangements for implementing the plan.<sup>35</sup> The guidelines further provides for the responsibility on the part of the competent authority to ensure that the persons concerned in the management of hazardous wastes keep such wastes separate from other wastes for the purpose of the necessity arising out of environmentally sound management of hazardous wastes and other wastes.<sup>36</sup> By doing so the guidelines brought into picture the need for a responsible competent authority aware of the ground realities about disposal mechanisms as well as disposal facilities operating in various parts of a country, alongwith the capability of the operators, people engaged in the hazardous wastes disposal management. The guidelines further provide for the promotion of the establishment of a system of collection of hazardous wastes, including those generated in small quantities.<sup>37</sup> The convention has not defined pollution, whereas the guidelines have. Since, the convention is drawn upon the guidelines as well, therefore it could have adopted the relevant principles. However, to obtain the unanimous consent of the representatives present in the conference, adoption of principles best suited to the circumstances of the national trade scenario

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<sup>34</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

<sup>35</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

<sup>36</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

<sup>37</sup><https://wedocs.unep.org/bitstream/handle/20.500.11822/29578/ELGP8.pdf>

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and environmental aspect of the states was the need of the hour while the convention was negotiated and presented for adoption.

e) **A critical analysis of the effectiveness of the Basel Convention, through its working mechanism.**

The Conference of Parties of the Basel Convention is crucial for the critical analysis of the convention, because it is through the information conveyed by the representatives of the state parties in the conferences held from time to time, and the tracking of the effective implementation of the convention, the working of the convention can be ascertained. For the purpose of the paper, the report of the Conference of Parties to the Basel Convention on the work of its sixteenth meeting<sup>38</sup> shall be taken into consideration. According to the report, the Deputy Executive Director of the United Nations Environment Programme while highlighting the “Global Chemicals Outlook II: From Legacies to Innovative Solutions- Implementing the 2030 Agenda For Sustainable Development”<sup>39</sup> addressed the 16th COP, that over two thousand new chemicals are currently being released every year, most of which had not been assessed for their effect on human health, and over two billion tonnes of wastes being produced globally every year.<sup>40</sup> The improper production of chemicals and management of waste as well as pollution contributed to major threats to human health through the production of greenhouse gasses and through climate change.<sup>41</sup>

It is in the 16th COP, the issues in the current scenario with respect to the most relevant mechanism of Prior Informed Consent has been highlighted, and are as such:

- Absence of a unified and robust electronic platform for notifications;<sup>42</sup>
- Significant delays in receiving acknowledgement and decisions from parties<sup>43</sup> regarding whether they consented or not to a transboundary movement of waste;<sup>44</sup>
- Challenges in communicating with parties which had not provided updated contact information for their competent authorities;<sup>45</sup>

<sup>38</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>39</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>40</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>41</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>42</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>43</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>44</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

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- Lack of harmonization between some documents<sup>46</sup>
- Imprecise or missing definitions for some key terms;<sup>47</sup>
- Difficulty accessing database for identifying recording and tracking transboundary waste movements;<sup>48</sup>
- The absence of effective mechanisms for monitoring that allowed followup regarding the final disposal of waste exports;<sup>49</sup>
- Insufficient information and other issues when transboundary movements involved States of transit;<sup>50</sup>
- Issuance of export permits with time limits that were too short;<sup>51</sup>
- Lack of automatic alignment of transit consents with the consent dates of the states of import;<sup>52</sup>
- Insufficient cooperation and coordination among relevant stakeholders;<sup>53</sup>
- Lack of clarity regarding some issues and definitions pertinent to cross-border and transit movements;<sup>54</sup>
- Inadequate monitoring and prevention of illegal traffic situations in which one of the parties involved classified the wastes involved as non-hazardous wastes<sup>55</sup>

Because of the challenges in the mechanism of the prior informed consent, there have been instances of illegal traffic with the Convention having reported nine confirmed cases of illegal traffic. According to the Conference of Parties to the 16th meeting, the major challenges in illegal traffic are:

- Enforcement efforts;<sup>56</sup>
- Controlling transboundary movements and detecting hazardous waste at entry points;<sup>57</sup>

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<sup>45</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>46</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>47</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>48</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>49</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>50</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>51</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>52</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

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<sup>54</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

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- Lack of equipment;<sup>58</sup>
- Inadequate storage areas;<sup>59</sup>
- Holding bays and port reception facilities;<sup>60</sup>
- Limited manpower;<sup>61</sup>
- The costly nature of systematic monitoring and checks;<sup>62</sup>
- Inadequate infrastructure for disposal of hazardous wastes;<sup>63</sup>
- Need to ensure that penalties for illegal traffic were included in legislation.<sup>64</sup>

During the conference, one of the representatives, having cited recent increase in illegal traffic, informed that Basel Conference 3/1 on the amendment to the Basel Convention known as 'Ban Amendment' was not successfully implemented. In the same conference another representative spoke of cases of illegal dumping of hazardous and toxic wastes on his party's territory by another party. Such information is based on the report of the conference as available in the official website.<sup>65</sup>

Testing loopholes in the convention behind inadequate fruitfulness of the working mechanism of the convention are possibly due to reasons as follows:

- The accuracy in the implementation of the prior informed procedure during a transboundary movement of hazardous waste or other waste is dependent upon the exchange of information received through the competent authority of the importing state. The competent authority on the other hand acts on the report submitted by the delegated authorities in the hierarchy. Since, parties engaged in the trade of waste are stakeholders engaged in the trade or business associated with the earning of financial gains from the utilization of such wastes as raw material often ends up in obtaining the consent in both ethical and unethical manner. However, in doing so the parties involved in the entire consent process, based on mistaken belief of having the capability both technical and financial, to manage the waste in an environmentally sound manner, ends up in providing

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<sup>57</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

<sup>58</sup><https://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>

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information not best suited to the bearing capacity of the soil and people of the importing state. The convention does not provide for an extended responsibility to the exporting state through a detailed procedure to ascertain the capability, both technical and financial, of the importing country to deal with the aftereffects of the hazardous wastes which could not have been disposed of in the country of generation. Mere selling off wastes in the name of trade would not serve the aim of the convention, which is to protect the human health and environment.

- The Conference of Parties although hold a relevant place in determining the implementation of the convention, yet it has not been effective in the sense that the compliance committee which was adopted by the conference of parties in the year 2002 for promoting the implementation and working of the convention, has been mandated to provide assistance through recommendations on non-compliance based on the submissions made by the parties and the Secretariat.<sup>66</sup> The convention does not provide for any strict liability enforcement regime for regulation of non-compliance by the parties. Based on the working mechanism of the Compliance Committee as well as the undesirable repercussions from various state parties straining the economic relations between states in the current scenario of globalization as well as competition between countries, especially developing countries utilizing hazardous wastes or other wastes as shipments from developed countries, for years have not made submissions of non-compliance to the committee. Without update of information of non-compliance by parties, the Secretariat of the Convention is helpless.
- The Protocol on Liability and Compensation for Damage Resulting From Transboundary Movements of Hazardous Wastes and Their Disposal, which provides for strict liability against the state of export or generator for any loss of life or personal injury, loss or damage to property, loss of income and costs of reinstatement of the impaired environment caused by the transboundary movement of hazardous wastes, along with fault based liability against any person who causes or contributes to such damage through lack of compliance with the convention or by wrongful, intentional, reckless acts or

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<sup>66</sup>Alan Andrews, 'Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?', 5/2 Law, Environment and Development Journal (2009), p. 167



omissions and also for imposition of minimum ‘floors’ on liability, depending on the tonnage of the shipment, although adopted in the year 1999 on 10th of December, yet not ratified, as it is a compromise that neither suits the developed as well as developing countries.<sup>67</sup> The convention even if it comes into force, yet it won’t serve the aim of the convention to the fullest because the protocol exempts liabilities of the parties entering into multilateral agreement, as well as the protocol does not provide for the liability on the exporter with after care liability. In the context of environmental well being directly influencing human health, a bare minimum absence of liability of continuous monitoring of aftercare disposal mechanisms by a non-generating yet importing country for disposal is a major loophole in terms of suppressing environmental necessity in the pursuit of economic gains for better lives, which is ironically in stake due to contamination of the most important sources of life, i.e ground water and air.

- The convention does not have any mechanism to ensure the reuse and recycling of the wastes imported by the importing country, as well as a disposal mechanism instead of dumping.
- One of the major issues in achieving the aim of the convention is connected with the definition of wastes. The convention defined wastes based on their inherent properties, nature, source of origin. The convention having provided an overview of how wastes supposed to be leaving it to the discretion of the States for determination of wastes has posed a challenge in ascertaining a product as hazardous according to the policies of countries engaged in trade of wastes. Such a flexible provision in the convention, has encouraged countries to frame policies suitable to their economy by allowing acceptance of hazardous wastes, after knowledge of adverse effects of such wastes in the lives of people and environment. For instance, the permission granted to a ship dismantling company based in Alang to dismantle the ‘Blue Lady’, by the Supreme Court of India, despite reports showing high levels of asbestos and other toxic wastes.<sup>68</sup> The Supreme Court of India’s role being limited to the interpretation of the provision of laws enacted

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<sup>67</sup>Alan Andrews, ‘Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World’s Poor in the International Trade of Hazardous Waste?’, 5/2 Law, Environment and Development Journal (2009), p. 167

<sup>68</sup>Alan Andrews, ‘Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World’s Poor in the International Trade of Hazardous Waste?’, 5/2 Law, Environment and Development Journal (2009), p. 167

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by the legislature as well as review of policies by the executive, had no other option than to allow such shipments.

Alongwith with the COP, the open-ended working group which was adopted by the sixth<sup>69</sup>, meeting of the Conference of Parties of the Basel Convention for the purpose of reviewing the implementation of the Convention's work plan is of paramount importance. This is so because such a group has been critical in assessing the reasons for challenges in the implementation mechanism of the convention. During the first meeting of the open ended working group, then Executive Secretary, Ms. Sachiko Kuwabara Yamamoto, recognised that the technical and financial resource base was critical to the future of the convention, because developing countries as well as economies in transition, and their need for assistance, when waste grew in complexity and volume, posed a tremendous challenge, as the convention during that period did not have an adequate and substantial financial mechanism of its own and had to rely on the dwindling resources available under the trust funds.<sup>70</sup> Thereafter on the challenges regarding the present scenario of the prior informed consent and illegal traffic, the open-ended group at its 13th meeting held at Geneva International Conference in the year 2023<sup>71</sup> provided strategies for resolving the concerned issues. The way forward for challenges with respect to prior informed consent are as such:

- Conduct a mapping procedure that classified the comments received from parties and observers according to the issue observed, with a view to facilitating consideration of a solution;<sup>72</sup>
- Digitization of the procedure, which is important to take into account work on electronic approaches to notification and movement documents to ensure that there was no overlap;<sup>73</sup>

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<sup>69</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

<sup>70</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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<sup>72</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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- Sufficient and sustainable financial and technical assistance and capacity building for countries using the procedure;<sup>74</sup>
- Training and exchange of experience, that could help countries in their application of the procedure;<sup>75</sup>
- Intersessional working group to identify common challenges and problems with regard to the prior informed consent and provide recommendations.<sup>76</sup> (The 16th COP, having recognised such recommendation of the working group, provides for establishment of a small intersessional group)<sup>77</sup>

The group apart from recommending, also recognised the challenge of defining waste and the application of the PIC procedure being tricky where importing and exporting state does not apply the same definition of hazardous wastes.<sup>78</sup>

- Regarding difficulties faced in relation to plastic wastes exports, according to the group, the proper screening of wastes before consignment were released, would assist in closing loopholes.<sup>79</sup>

The way forward for illegal traffic as recommended by the open-ended working group are as follows:

- Enactment and enforcement of national legislation;<sup>80</sup>
- Definition of hazardous wastes;<sup>81</sup>
- Implementation of polluter pays principle;<sup>82</sup>
- Production of guidelines;<sup>83</sup>

<sup>74</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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- Development of a system for managing hazardous wastes and approval of inventories;<sup>84</sup>
- Development of a national plan;<sup>85</sup>
- Setting up of technical committees;<sup>86</sup>
- Introduction of a ban on single use plastics;<sup>87</sup>
- Exchange of information on best practices and enhanced cooperation with the regional centers.<sup>88</sup>

The open ended group also provides for technical guidelines on significant issues such as:

- The environmentally sound management of wastes consisting of, containing or contaminated with POP;<sup>89</sup>
- On the transboundary movements of electrical and electronic wastes, in particular regarding the distinction between waste and non-waste under the Basel Convention;<sup>90</sup>
- On the environmentally sound management of plastic waste.<sup>91</sup>

Further, alongwith the working of the open-ended working group, the national reporting mechanism is one of the effective ways to ensure the working mechanism of the convention with the state parties requiring to update the secretariat of the convention about the application of the convention and adoption of other legal mechanism best suited to national practices, in regulating the transboundary movements of wastes and their disposal. National reporting is crucial because the electronic reporting system provides lots of information making transboundary movement of

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<sup>83</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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<sup>89</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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<sup>91</sup>[https://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/ReportsandDecisions/tabid/3413/Default.aspx](https://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/ReportsandDecisions/tabid/3413/Default.aspx)

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waste mechanisms simplified to some extent. For instance, if China and India are taken as base countries for explaining the national reporting mechanism, both the countries adopted the Basel Convention. They have updated information on designated competent authority, also have their national definitions of wastes as well as hazardous wastes, also regarding cases of illegal traffic so on and so forth. However, if a country did not report major events concerning transboundary movement of wastes and disposal, such as an accident, the convention does not have any liability mechanism for such non-disclosure of fact.

### **Conclusion**

Although the Basel Convention has certain loopholes in its mechanism, such a convention has always been the base convention for recognising the various waste streams, and the Conference of Parties has been pivotal in addressing the rising waste streams through its implementation mechanism. Today the convention having addressed the issues of plastic waste, e-waste, waste arising from ship dismantling, waste from batteries, tyres and household, and having an effective regulatory mechanism that has been successful in addressing illegal traffic in various wastes exported in an illegal way, the 'Environment Protection Agency' of United States of America in its "Draft National Strategy To Prevent Plastic Pollution: Part of a series on building a circular economy for all" published in the year 2023, provides for exploring the possible ratification of the Basel Convention and encourage environmentally sound management of scrap and recyclables traded with other countries.<sup>92</sup> Thus, in spite of loopholes, the Basel Convention is one of the important conventions in the field of international environmental law having a binding force upon the state parties ratifying such a convention. And based on the history of the negotiation process the existence of the convention signifies the fact that "Something is better than nothing".

### **Suggestions**

It's high time that the aim of the Basel Convention should be taken into consideration by the States in an approach of common but differentiated responsibilities. The various efforts can be as follows:

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<sup>92</sup>EPA Office of Resource Conservation and Recovery, Environmental Protection Agency, Draft National Strategy to Prevent Plastic Pollution: Part Of A Series On Building Circular Economy for All, 2023

- The developed countries need to phase out the production of hazardous wastes with the help of scientists and policy makers forming a stringent time bound limit for phasing out such production, through continuous monitoring of progress in production of alternative products in the line of green economy.
- The exporting countries being the generating countries of wastes and hazardous wastes needs to adopt a circular economy so as to restrict the production of hazardous wastes as well as other wastes to a minimum in the current scenario, leading to the production of products and services of utmost necessity, resulting in halting of production of wastes in their soil in future, thereby discouraging the scope of spending huge amount in cleaning up process as well as export from a hazardous waste free state.
- Developed as well as developing countries can lead the world with the help of green technology in mitigating the menace of hazardous wastes through investments, keeping in mind the needs of the bearing capacity of the environment as well as the one suffering from the transboundary impact of hazardous wastes transfer.
- Exporting countries so far being the generating country can help in combating the issue of adverse effects of disposal of hazardous waste in the importing country, due to ignorance of the importing state arising out of mistaken belief of being capable of management of wastes, particularly hazardous wastes and other wastes, by continuously monitoring the disposal facilities as well as providing adequate knowledge best known to the exporting country aiding in environmentally sound management of wastes.
- There should be some mechanism ascertaining the bare minimum liability of the exporting state in the form of award of credits for assisting and monitoring the after care disposal mechanism in the importing state.
- The developing states need to incentivise the people who can come up with indigenous scientific solutions: technology based sustainable solutions to combat the problem of hazardous waste and other wastes.
- The government of developing states needs to incentivise people for community participation in restricting creation of wastes, hazardous wastes in the source of generation.
- The competent authority should engage from time-to-time, through appointed environmental committees, in consultation with people residing in the vicinity of

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disposal facilities. The government should also conduct testing of the quality of ground water during intervals, along with the health conditions of the people around the area, prior, consent to the acceptance of wastes from the exporting country. A detailed report of state of health and environment of the area where disposal site are located or intended to be used as disposal facility should be made available in the official gazette of both the State government and Central Government, inviting suggestions from experts across the country with respect to the sound disposal process until stopped by such countries. Such a mechanism should be incorporated in the national policies for obtaining consent on importing wastes.

- Along with strengthening policies for regulating transboundary movement of wastes, the developing countries need to encourage people through incentives to produce local products for the purpose of upliftment of the economy, thereby reducing the dependency on imports of wastes for raw materials. However, such a vision is far from reality because of the immense significance of the wastes used as raw materials, therefore compliance mechanisms within the country need to be stringent, in order to protect the health of people and health of the biodiversity in the environment.
- The Convention being dependent on the actions of the State Parties, change needs to be brought about through active and inclusive practices amongst people across the countries, from north to south, east to west. Without mutual support of Sovereign States with each other, efforts of a State with its people, the problem of transboundary movement of wastes as well as adverse effects of disposal of wastes will be a never ending threat with no solution for combat.
- Last but not the least the practical problems related to ground reality of any nation shall be made aware to students during their higher curriculum studies, to combat environmental issues at the grassroot level. Accordingly, students should be engaged in protecting the environment, like armed forces protecting borders.

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