

TRANS-BOUNDARY MOVEMENT OF HAZARDOUS WASTES AND INDIAN EXPERIENCE

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I. BACKGROUND

The movement of hazardous wastes for disposal in the developing countries created a problem that evolved with the advent of industrialization and increasing globalization. Established stringent domestic environmental laws have forced the world's leading industrialized countries which produce hazardous waste in West to ship the same primarily to developing countries. In the developed world an informed public often oppose the generation and disposal of domestic hazardous waste unlike in the developing world where the ill-informed public is unable to strongly oppose these movements. Developed countries are encouraged to dispatch wastes to underdeveloped nations where, the costs are low, as it makes more economic sense. On the other hand developing countries need such wastes for development purposes, for example, for producing steel. But disposal of such wastes not only damages environment but also is a security threat as in some cases even explosives and armaments have been shipped, may be intentionally or inadvertently, as waste. Problem thus is complex as a complete ban on movement of hazardous wastes may result in an adverse impact on trade, commerce and industry of the developing countries as well.

Disposal costs in the developing world are considerably cheaper and, thus, the decision to export the hazardous wastes is considered logical. However, the problem of management of hazardous wastes raises environmental and health issues needing an economical solution in a planned and transparent manner. Export of hazardous wastes takes place in the name of re-cycling, which is termed as dumping in developing countries. In India the problem is more acute, as the workers handling such products being uneducated do not observe safety standards. The hazardous activity of breaking down the old ships is a case in point. This activity has relocated from the Northern to Southern World and to Asia, which lack environmental and workers safety regulatory infrastructure, particularly in the Asian nations.

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China and India are the most popular destinations for live ships for breaking. The export of hazardous ships for scrap is, however, a clear case of toxic waste trade in recyclable steel. Shipment of hazardous wastes has caused several accidents resulting in loss of life and property. It is still economical to allow wastes to be disposed of safely outside the national boundaries of developed countries. After Sept. 11 disaster several thousand tonnes of metal scrap, possibly contaminated with asbestos, PVCs, cadmium, mercury and dioxins, has been exported to India and other parts of Asia. China, Malaysia and South Korea have also received shipments. Eventually, such scrap landed in Asian countries dirtying the Asian ports and threatening the Asian workers.¹

Several cases of illegal shipments of hazardous wastes have resulted in hue and cry across the world. Existing legal framework has failed to control the movement of such wastes across the national borders causing pollution related problems, particularly, in developing countries which lack well developed handling and disposal arrangements. More so, the victims of ill affects of such shipments are deprived of any compensatory mechanism. The issue has drawn attention across the world for fixing proper accountability in respect of polluting industries handling hazardous wastes and their ill affects. Indian judiciary has taken several important decisions thereby creating a great amount of awareness in the country. It would not be an exaggeration to say that the development of environmental laws in India has taken place mainly due to the awareness generated and concerns expressed by Indian Supreme Court. It has prescribed absolute liability standards in accordance with the "Polluter Pays principle"² and laid down guidelines for the industries to follow in the form of "Precautionary principles"³. A proper legal regime of determining the nature and extent of compensation payable to the victims of pollution as a result of handling, transportation and disposal of hazardous wastes, is thus, necessary.

Due to lack of awareness not many precautions were taken in India for internal movements. Earlier, accidental deaths occurred due to hazardous wastes shipped from Australia through Hong Kong and Singapore in respect of dry cell batteries and gas lighters stuffed in ISO containers catching fire. In case of WTC scrap shipments the U.S. Govt. was under obligation to

¹ Nityanand Jayaraman and Kenny Bruno, *Trading in Disaster- World Trade Center Scrap lands in India*, SPECIAL TO CORPWATCH, February 6, 2002, see www.corpwatch.org/pid.jsp?articleid=1608.

² *Shriram Gas Leak case, M.C.Mehta v. Union of India*, AIR 1987 SC 1086, 1099.

³ Precautionary approach set forth in Principle 15 of the Rio Declaration on Environment and Development. 1992.

indicate the true nature of the consignments of their shipments and to compensate if the same were found containing poisonous contaminants. As per the Basel Convention⁴, the Indian Govt. is supposed to prevent the import of material if it is found to be hazardous. But U.S. refused to sign the Basel Convention and, therefore, not bound by the treaty. An action plan⁵ was supposed to be devised for environmentally sound management for hazardous products. Govt. of India has passed legislation⁶ and made Rules and Regulations under the same as a signatory to the Basel Convention⁷ which lay an obligation for provision of complete information on the exporter, importer, source of generation, type of waste and its constituents, method of disposal, safety data sheet etc., which are required to be furnished by both the exporter and importer. However, the movement of hazardous wastes still takes place unabated. Problem of management of hazardous wastes and other wastes is likely to be compounded by the fact that in Delhi alone 31 registered industries are likely to produce 50000 tones of wastes annually.⁸

II. REGIONAL AGREEMENTS PRECEDING BASEL CONVENTION

A. OECD Decisions

Before the Basel Convention was adopted, OECD took two separate decisions, viz., the "Movement decision"⁹ for regulating transport from OECD countries, and the "Exports decision"¹⁰ between the members and non-members. The "movement decision" contains only one binding provision, viz., "Countries shall control the trans- frontier movements of hazardous wastes and ...shall ensure that the competent authorities of the countries concerned are provided with adequate and timely information concerning such movements." OECD decisions were binding on the signatories but not the recommendations. As the Decision also sets forth a recommendation asking the member nations to manage the wastes in such a way so as to

⁴ Article 4, Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989.

⁵ Agenda 21, Chapter 19, Environmentally Sound Management of Toxic Chemicals, including Prevention of Illegal International Traffic in Toxic and Dangerous Products.

⁶ The Environment Protection Act, 1986.

⁷ Hazardous Wastes (Management and Handling) Rules, 1989 as amended in 2000 and 2003.

⁸ TIMES OF INDIA, New Delhi, October 08, 2005.

⁹ OECD Decision and Recommendation on Trans-frontier Movements of Hazardous Wastes, 1984.

¹⁰ OECD Decision and Recommendation on Exports of Hazardous Wastes from the OECD Area, 1986.

protect the man and environment it did not bind the members and could not control the movements of toxic waste materials. The "exports decision" intended to regulate the movement of wastes from OECD member countries to non-members and contained stricter standards: to monitor the export of hazardous wastes it set up authorities with the power to prohibit such export; to use no less strict standards on control of exports on members than to non-members; to prohibit any export to importing country if the intended disposal facility is not adequate. However, Exports Decision also made a non-binding recommendation that the exporting country prohibit the export of the hazardous wastes if an objection is made by any country of transit and no appropriate alternative route can be found by the exporter. Thus, both these decisions suffered from the lack of specific requirements of notification and of a liability regime for waste dumping. The 'prior consent requirement' was considered to have resulted in blockade of the export. However, a provision for the liability of an exporter to pay would have provided an incentive to the exporting country to monitor and control the waste exports.

B. European Community Directives

The European Community faced a very controversial situation due to export of hazardous wastes to Africa. But the events leading to adoption of the EC hazardous exports directives occurred in Europe only. One of the incidents was referred to as "Saga of the Saveo Drums", which began in 1976¹¹. As a result, the EC countries realized that the proper monitoring and regulation machinery could have avoided this waste scandal. It then passed a resolution, in 1984, regulating the trans-boundary transport of hazardous waste. The directives later modified in 1986¹² required that the exporter should not only receive the consent from the importing country but also demonstrate the intended disposal capability to handle the waste safely. These directives also suffered from the weakness as the Member States could implement the same only after the enactment of domestic laws and it also

¹¹ The incident began in 1976 with the explosion of a fertilizer factory in Saveo in Italy, releasing a cloud of dioxin. In 1982 the Italian government ordered the Swiss company, the owner of the factory, to move the dioxin waste out of the country. The company a West German firm who hired a French sub-contractor and drums carrying the waste were transported to France and disappeared. As a result of frantic search for ten months the waste barrels were found in an abandoned slaughterhouse in France.

¹² Directives on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 amended as Directives on the Supervision and Control within the European Community of the Trans-frontier Shipment of Hazardous Waste, 1986.

did not apportion liability for any proper disposal and accidents in transportation. Moreover, the directives did not allow EC members to ban all imports of hazardous wastes. The lack of liability regime, in particular, did not provide enough incentive for countries to control their waste exports.

C. Organization of African Unity and Central American Countries Regulations

The developed countries were interested only in finding a way to monitor and control toxic waste exports. But the African countries were very agitated over the waste dumping incidents. Strong international reactions were noticed to the dumping of toxic material incidents like Seveso Drums, Khian Sea¹³, Koko¹⁴, and Somalia¹⁵ cases. After the Koko incident the Nigerian government declared the import of hazardous waste a capital crime. Subsequently, the Organization of the African Unity (the OAU) through its Council of Ministers passed a resolution in 1988 calling for a ban on dumping and declared that dumping of toxic waste in Africa was a crime against Africa and African people. It condemned such dumping by multinational Corporations and urged members to stop arranging for waste dumping. The resolution, however, was only a non-binding political statement and did not distinguish between waste imports and local waste disposal and thereby multi-national Corporations located in one of the OAU countries could not dispose all the wastes it generated, even locally. Fearing that the Central American nations may become a dumping ground, they created the Central American Commission for the Environment and Development for

¹³ This was a very notorious case in which the ship Khian Sea carrying twenty-eight million pounds of toxic incinerator ash left Philadelphia in 1986. It informed Haiti that the ship was carrying 'fertilizer ash' and dumped 3000 tones of hazardous waste at Gonaives beach before the Haitian government could rescind the permission. The ship appeared in Singapore after wandering in the ocean for 18 months with the changed name of 'Pelicano'. During this period it changed its name twice and its country of registration many times. During an investigation by US federal grand jury it informed that it disposed of the ash legally. However, they were finally indicted for perjury when it was revealed that the ash has been illegally dumped in the Indian Ocean.

¹⁴ On discovering in 1988 that an Italian company was dumping waste in the port city of Koko, the Nigerian government asked Italy to take back the waste. But when the Italian ships went to take back the waste they were denied permission to dock at many European ports and the ships returned empty after several months.

¹⁵ Due to a confused political situation in war-torn and famine-stricken Somalia, in 1992 the Italian and Swiss companies took advantage and entered into an \$80 million contract for dumping waste in Somalia.

developing guidelines and legislation. Ultimately it banned the hazardous waste imports.

D. Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes

These guidelines¹⁶ were finalized in 1985 but adopted in 1987 by the United Nations Environment Program (UNEP). For ensuring safe disposal facilities for the transported wastes the guidelines required a prior notification of and consent by the importing and transit nations. The Governing Council of the UNEP set up a working group to incorporate these guidelines into international law by means of a convention through negotiations which could not be completed due to differences over the consent requirement and the definition of the hazardous wastes. However, the guidelines resulted into culmination of the Basel convention due to hue and cry raised on account of above mentioned incidents.

III. BASEL CONVENTION AND BASEL BAN

The Basel Convention¹⁷ made several suggestions towards containing the problem and clearly brought the issues to the attention of the Basel committee outlining a process in which States must "Not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing into specific imports"¹⁸. It also required the States to ensure that proper measures should be taken, so that, "Generation of Hazardous wastes and other wastes is reduced to minimum" and that, "Movement of hazardous and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes"¹⁹. An agreement based upon "prior informed consent"²⁰ for trans-boundary movement of hazardous wastes was drawn declaring the wastes to be illegal if undertaken without prior written notice. Such movements would be considered illegal even if the exporting country had prior knowledge that the waste would not be managed in an environmentally sound manner. Since several countries including the U.S. have not ratified the Convention so far, the Basel Convention did not adequately deal with the problem of export of hazardous material as it was a document without any enforcement

¹⁶ Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes.

¹⁷ Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989.

¹⁸ Article 4, *id.*

¹⁹ *Ibid.*

²⁰ Article 9 Basel Convention.

mechanism. The Convention was aimed at minimizing the generation and trans-boundary movement of hazardous wastes and other wastes by treatment and disposal at the source of generation consistent with their environmentally sound management. The generation should be reduced to the minimum in terms of quantity and potential hazards²¹.

Some of the key elements of the regulatory system of the Convention were 'prior informed consent' 'the prohibition to export to a country not Party to the Convention' and 'the legal provisions for duty to re-import and the responsibility of States involved in the trans-boundary movements.'²² The concept of 'prior informed consent' puts obligations on the State of export, the generator or exporter to notify the other party in writing about the proposed trans-boundary movement and obtain a written consent for the movement with or without conditions. The exporting state shall not permit export without written confirmation not only of the importing but also of the transit state or states. All trans-boundary movements shall be covered by 'insurance, bond or other guarantee as may be required by the state of import or any other state of transit which is Party'. Such a permission can, however, be denied within a period of 60 days failing which the movement can take place²³. The state of export is also obliged to notify the state or states which are non parties²⁴. The exporting State is obliged to take back the wastes in question if the movement has taken place in violation of the terms of the contract on which the consent was given and the 'alternative arrangements cannot be made for their disposal in an environmentally sound manner'. This has to be done within 90 days of the information given by the importing state to the exporting state or the Secretariat of the Convention. No hindrance can be created either by the exporting state or the state(s) of transit in such movement²⁵.

Any movement without notification or consent or with consent obtained with falsification, misrepresentation or fraud or such movement resulting in dumping, contravenes the Convention or the general principles of international law 'shall be deemed to be illegal traffic'. The exporting state, in such case(s), shall be liable to take back or otherwise dispose of such wastes within 30 days of information received. If no responsibility can be fixed the wastes are to be disposed of in an environmentally sound manner

²¹ Para 1.2, Manual of Implementation of the Basel Convention, 1989.

²² Para 1.3, *id.*

²³ Article 6, Basel Convention.

²⁴ Article 7, *id.*

²⁵ Article 8, *id.*

and all the state shall make national legislation for dealing with such traffic²⁶. The Basel Convention calls for countries to become self-sufficient in hazardous waste management as an incentive for minimizing waste production. Thus, regardless of what kind of promises Indian ship-breakers might give for improving conditions there, the ban on the export of ships that have not been pre-cleaned of toxic substances will still be in effect. As per the Indian guidelines all the ships must be controlled under the Hazardous Waste Rules which include the obligations placed on India under the Basel convention. The Basel BAN was adopted as an amendment to the Basel Convention in 1995 to prevent precisely the type of activity from which the ships meant for scrap in other countries than OECD countries are shipped. By prohibiting the export of toxic wastes from the richest to the poor Countries, the global community tried to counter the brute economic imperative that allows the export of hazards to avoid the costs of proper and responsible treatment and prevention at home.

The subsequent meetings of the Conference of parties held in Piriápolis, Uruguay in December, 1992 and in Geneva, Switzerland in March, 1994 produced a more concise document in the form of Basel Action Network, i.e. BAN which called for the minimum prohibition of "All trans-boundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States." It also decided to phase out by 31st Dec. 1997 "All trans-boundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States."²⁷ This document was considered a non-ambiguous and complete vision for the future of the hazardous waste trade. However, gradually the Basel BAN became a subject of discussion in every forum and it could not become a document of consensus as only a few countries ratified the BAN. The meeting in Geneva divided the world into two groups i.e. the Developed and Developing World and specifically prohibited the trans-boundary movement from any country in the OECD, European Community (EC) and Liechtenstein to any other country.

Trade and environment are major components of the problem of trans-boundary disposal of hazardous wastes. There has been a heavy emphasis on the movement aspect and the trade aspect has been overlooked and the same has formed the basis for the developed world's opposition to the BAN.

²⁶ Article 9, *id.*

²⁷ Article 4A, *id.*, inserted vide Decision III/1 (Amendment to the Basel Convention).

²⁸ Basel Protocol on Liability and Compensation for Damage Resulting from Trans-boundary Movement of Hazardous Wastes and Their Disposal, 1999.

The BAN seems to ignore the fact that the trade of recyclable and hazardous wastes is very lucrative and the demand of such material is inelastic. As a result, ways and means are being found circumventing thereby any legal responsibility for the shipments and ultimately defeating the very purpose of the convention. For example, Australia shipped lead, for re-cycling, through Hong Kong and Singapore, which were not included in the Annexure. Some of the countries indulge in the trade of supply of recyclable waste to those who are not a party to the convention. WTO has emphasized the free flow of goods across boundaries. The international trade law, therefore, prohibits the BAN imposed by the Basel processes. The Basel BAN has, therefore, been treated discriminatory as it creates a clash between the free trade and the environment.

IV. PROTOCOL ON LIABILITY AND COMPENSATION, 1999

In 1999, a "Liability Protocol"²⁸ was defined to provide the States with an avenue to voice complaints and seek arbitration. States parties to the Convention are under an obligation to 'develop international and legal instruments regarding liability and compensation for the victims of pollution and other environmental damage'²⁹. Basel Convention did not provide for an enforcement mechanism. Instead of providing rules on liability and compensation the Convention left the matter to be addressed by the parties to the convention through a protocol at a future date³⁰. The 'Protocol' was expected to address this issue. It was in the form of legislative guidelines in accordance with principles laid down in the Rio Declaration and promise made by the Basel Convention³¹. The Protocol was aimed at providing adequate and prompt compensation for the damage caused due to movement of hazardous wastes even to a third party or for environmental damage. Compensation could be for the loss of life or injury to life or property in the form of reinstatement or the cost of preventive measures for possible environmental damage³². The protocol is applicable to the damage caused due to an incident on account of movement or disposal of such wastes and also includes the illegal traffic³³ and when the incident occurred in the national jurisdiction of either of the parties to the Convention be it exporter or importer. Liability starts after loading on a means of transport and extends up to the time it is taken over by the disposer. However either of the

²⁹ Principle 13, Rio Declaration, 1992.

³⁰ Article 12, Basel Convention, 1989.

³¹ *Supra* notes 29, 30.

³² Article 1, Protocol, *supra* n. 28.

³³ Article 3, *id.*

contracting parties can exclude liability for an incident occurring in its national jurisdiction by notifying the parties and the secretariat of the Convention. If one of the contracting parties is a party to the Convention the liability will start only after the wastes are loaded or possession is taken over, as the case may be. A transit state is also liable under bilateral or multilateral agreements even if it is not a party to the convention and in case of re-import the liability will last till the wastes reach the original exporting party. No liability arose before the Protocol came into force and the same is applicable only to the wastes which have been notified. Protocol is also not applicable to the movements which take place under bilateral agreements not covered by the Convention.

The Protocol has divided the liability into 'Strict Liability' and 'Fault based Liability'. In case of 'Strict Liability' the exporter or the importer who notifies the goods is liable till such time the possession is taken by the disposer after which the disposer is liable. The person who re-imports shall be liable till such time the possession is taken over by the exporter or the alternate possessor³⁴. Liability is excluded in case of a force majeure clause including an incident on account of a war or armed conflict or civil war or natural calamity of an exceptional nature or an act of public authority or an act of state or an incident on account of fault of a third party or the party suffering the damage. A claimant can file a claim against any one or all the parties to a contract, if there are more than one parties involved.

In case of 'Fault based Liability'³⁵ a party guilty for non-compliance or non implementation of the provisions of the Convention is liable for the damage caused by an incident on account of the movement of the wastes. Such a party is liable for any intentional wrong or negligence or omission or any reckless act. Domestic laws would, however, not be affected by this provision. All parties to the contract are under a duty to take due care to prevent the damage and a party which has taken reasonable steps to prevent such damage, as per its domestic law, shall not be liable³⁶. Liability will, thus, also be determined on account of contributory negligence of the person who suffers the damage³⁷. In case of goods mixed with wastes the liability will arise only in respect of wastes covered by the Protocol³⁸. The claims arising out of the damages due to the incidents covered by the Protocol can

³⁴ Article 4, *id.*

³⁵ Article 5, *id.*

³⁶ Article 8, *id.*

³⁷ Article 9, *id.*

³⁸ Article 7, *id.*

be filed within 5 years of the date on which the party came to know or perceived to have known but not later than a period of ten years from the date of incident³⁹.

With a view to establish a comprehensive liability regime, the protocol tried to fix responsibility on the generator of waste or the exporter in the event of an accident. However, it left many escape routes for the defaulting parties. The main flaw in the protocol remained in the provision relating to the applicability to the parties as it was applicable only when the damage occurred within the national jurisdiction of either of the contracting parties if either or both the parties are signatories to the convention and is not applicable to contracting parties if they are not parties to the convention⁴⁰. If only the importing party is a signatory the Protocol will apply only after the possession of the wastes has been taken by the importer. If the exporter is a party the same will apply only before the disposer takes the possession.

The Basel Convention imposes a duty on the exporting state to take back the wastes legally exported⁴¹ but does not lay down as to who should bear the cost. Once the importing state has given the consent it appears illogical for it not to bear the cost. By this analogy no state will allow import till such time it has developed the requisite disposal facilities. Similarly in case of illegal traffic the exporting state may plead that it is not practicable to take back the wastes and wants to dispose of the same on the spot. If the importing state does not term the import as illegal it may have to bear the clean-up and shipping back costs. It would, perhaps, be logical if the exporting state is made responsible till the wastes are finally disposed of.

V. UN CONFERENCE ON HUMAN ENVIRONMENT, 1992 (EARTH SUMMIT) AND AGENDA 21

Brundtland Report (1987), also known as “Our Common Future”⁴², alerted the world to the urgency of making progress towards economic development that could be sustained without depleting natural resources or harming the environment. It defined Sustainable Development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” and thus introduced the concept of ‘inter-generational equity’. And also “development which improves people’s quality of life, within the carrying capacity of the earth’s

³⁹ Article 13, *id.* -

⁴⁰ Article 3, *id.*

⁴¹ Article 8, Basel Convention, 1987.

⁴² *OUR COMMON FUTURE*, World Commission on Environment and Development, 1987 headed by former Prime Minister of Norway, Ms G.H.Brundtland

life support system.⁴³ While reviewing the progress of the action on the report in 1999, Ms Brundtland said that 'the spread of chemicals, such as dioxins and PCB's, impairs the intellectual development of children, reducing their level of IQ'. 'Business will have an important role and responsibility in helping to curb the use of non-renewable fuels; in promoting a reduction of generation of wastes and in reducing trans-boundary pollution, and helping to minimize environmental change' and 'we need public private interaction'⁴⁴.

Stockholm Declaration⁴⁵ called upon the States to halt 'the discharge of toxic substances or of other substances' in excess of the quantity and concentration to avoid 'serious or irreversible damage' upon ecosystems⁴⁶. States should take 'all possible steps to prevent pollution of the seas by substances that are likely to create hazards to human health, to harm living resources and marine life'⁴⁷ Rio Declaration⁴⁸, affirming the Stockholm principles, emphasized the need of sustainable development of which environmental protection was an integral part of the development process.⁴⁹ They share 'common but differentiated responsibilities' 'in view of the different contributions to global environmental degradation.'⁵⁰ It emphasized the need for cooperation 'to strengthen capacity building for sustainable development by improving scientific understanding through scientific and technological knowledge.'⁵¹ It declared that 'environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus'⁵². 'States should effectively cooperate to discharge or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'⁵³.

⁴³ 2nd World Conservation Strategy, UNEP see www.earthsummit2002.org

⁴⁴ See http://www.provincia.fe.it/agenda21/document/brundtland_report.htm

⁴⁵ UN Conference on Human Environment, 1972 held at Stockholm, also known as Stockholm Declaration.

⁴⁶ Principle 6, Stockholm Declaration.

⁴⁷ Principle 7, *id.*

⁴⁸ UN Conference on Environment and Development, 1992 also known as the Rio Declaration and the Earth Summit.

⁴⁹ Principle 4, Rio declaration, 1992.

⁵⁰ Principle 7, *id.*

⁵¹ Principle 9, *id.*

⁵² Principle 12, *id.*

⁵³ Principle 14, *id.*

Agenda 21⁵⁴ called upon the states to minimize the 'wood waste'⁵⁵ 'use economic incentives to reduce polluting the seas' and 'control and reduce toxic-waste discharges' besides 'stopping ocean dumping and incineration of hazardous wastes at sea'⁵⁶. It gave due importance to hazardous waste management by seeking international support on restraining the trade in hazardous wastes. It required the industry to adopt cleaner production methods and phase out the processes that produce high risks because of hazardous waste management and the producers should be held responsible for environmentally sound management of the hazardous wastes they generate. Apart from asking the states to launch public awareness programs for the hazardous waste management it wanted them to ban the export of hazardous wastes to countries that are not equipped to deal with those wastes. Industry should treat, recycle, reuse and dispose of wastes at or close to the site where they are created⁵⁷. For furthering the concept of sustainable development it cautioned the states that 'In the face of threats of environmental damage, lack of full scientific understanding should not be an excuse for postponing actions which are justified in their own right' and thus gave a thrust to the 'precautionary principle'⁵⁸. For this purpose 'economic assistance would move from the developed to the developing countries principally in the form of technology'⁵⁹.

VI. AFTERMATH OF THE BASEL CONVENTION, 1987

African States did not sign the convention because they wanted a complete ban on hazardous wastes and passed a resolution at Bamako, the capital of Mali, which became the Bamako Convention⁶⁰ aimed at imposing a complete ban on imports into OAU from anywhere else. It also regulated movement of wastes within the OAU. In a way the convention adopted the

⁵⁴ Agenda 21, a special product of the Earth Summit was a vast work program for the 21st century, approved by consensus among the world leaders in Rio. This historic document is 700 pages long and embraces all areas of sustainable development. It strives to reconcile the twin requirements of a high quality environment and a healthy economy for all peoples of the world, while identifying key areas of responsibility as well as offering preliminary cost estimates for success.

⁵⁵ Agenda 21: Chapter 11, Section two: Conservation and management of Resources.

⁵⁶ Agenda 21: Chapter 18, Section two: Conservation and management of Resources.

⁵⁷ Agenda 21: Chapter 20, Section two: Conservation and management of Resources.

⁵⁸ Agenda 21: Chapter 37, Section Four: Means of implementation.

⁵⁹ Agenda 21: Chapter 34, Section four: Means of Implementation.

⁶⁰ Bamako Convention on the Ban of Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa, 1991.

principle of Basel Convention for movements within OAU and stricter standards for imports into African countries. In 1992, OECD⁶¹ adopted a system of grading the wastes into green, amber and red. Green goods do not have the characteristics of the goods covered by Basel Convention and can have free movement. Other category of wastes is strictly controlled and requires permission from the importing country and the recycling facilities should be as per the domestic laws of that country. But even the so-called green also included lead and thallium waste and scrap. Even EC members, except France, did not ratify the Convention and developed their own measures for control of movement of hazardous wastes. Lome' convention⁶² decided to 'prohibit all direct or indirect export of hazardous wastes into ACP States while at the same time these States shall prohibit the direct or indirect import into their territory of such waste from the Community or from any other country'. Thus most of the African States got what they did not get from the Basel Convention which only regulated and not banned the movement of hazardous wastes.

Global community banned all exports of hazardous wastes from the rich countries of the OECD to non-OECD countries. This has been transcribed into the European law and into the laws of each EU member states. Asbestos and PCBs are clearly listed as some of the hazardous wastes which are forbidden from export and a ship destined to be scrapped would be considered as a 'substance or object intended for disposal' under the law. "Under the Basel convention and EU law, there is simply no way that a ship laden with asbestos, PCBs, contaminated oils etc. that is headed for scrap yards can be considered anything other than a hazardous waste", said Jim Packet of BAN who has been following the Basel Convention and EU law on the subject since 1989. "Yes, India is poor, yes we need jobs", said Ravi Agarwal of the Basel Action Network in India. "But we find it disgusting that we are offered the world's worst hazards, the world's worst jobs, all to better the North's environment and health at the expense of our own"⁶³. This report speaks volumes about the concern about shipments in violation of the Basel Convention and its ineffectiveness in controlling such movement of hazardous wastes.

"For most of the country, governments have concentrated on developing a set of international trade rules that allow for the free flow of goods

⁶¹ OECD Decisions of 1992.

⁶² Article 39, Fourth Lome' Convention, 1989 signed by 69 African, Caribbean & Pacific countries.

⁶³ See www.ban.org/ban_news/ferries.html

(including hazardous wastes). Even while world trade bodies such as UNCTAD and WTO are busy lobbying for changes to government trade policy and practice e.g. through the reduction of tariffs, removal of quotas, or seeking exceptions to hazardous waste trade bans, they have consistently ignored market failures- such as those that allow concentration of extremely hazardous activities and wastes in places that are least able to handle them safely.⁶⁴ It is argued that 'the Basel convention was never necessary as the Basel Ban promotes discriminatory rules among members which allow wealthy countries to trade the waste with each other but not with the developing countries.'⁶⁵ Indeed the Basel Ban proponents forget that the poor countries do not need 'green' mandates to encourage recycling and it would slow down development in poor countries. In fact it is necessary to promote labor and environment standards. The ban will have adverse effect on people and the environment and would prolong poverty of those who desperately need development. It was suggested that the Basel Ban be dumped. This view is taken perhaps due to the tendency of some of the rich countries to dump their wastes in developing countries which is supported by others as 'The public generally sees toxic wastes exports as wrong, not a legitimate activity. This perception is due in part, to reports indicating a pattern in which a rich country dumps its hazardous wastes in third world countries, often in an unsafe manner and without properly informing the local community, accounts of such misdeeds abound.'⁶⁶

However, the Basel Convention should be considered as a meeting ground for drastically opposite views on supporting a total ban and the other wanting a free movement of hazardous wastes. The Basel Convention rather than completely putting a ban has tried to regulate the movement of such wastes. The Basel convention tried to adopt a safer path as some of the agreements imposed a complete and the others tried to regulate the movement. It also tried to fill the gaps left by the earlier agreements. For example, the 'movement's decision' and the 'exports decision' of the OECD did not have specific consent and notification requirements and a liability regime for waste dumping. The requirement of prior consent and notification may probably have resulted in complete stoppage of movement by the importing party but a liability regime would have encouraged both the exporter and the importer to better monitor movement of wastes. Even the

⁶⁴ See <http://archive.greenpeace.org/toxics/toxfreeasia/unctad.html>

⁶⁵ Prasanna Srinivasan, *Let the Trade Continue*, WALL STREET JOURNAL ASIA, December 16, 2002; see www.libertyindia.org/publication/baselconvention/htm

⁶⁶ Hao-nhien Q. Vu, *The Law of Treaties and Export of Hazardous Wastes*, 12 UCLA JOURNAL OF ENVIRONMENTAL LAW & POLICY at 389.

EC directives did not provide for a liability regime and the same were enforceable at will of the States when they make domestic laws. Besides, the OAU directives imposed a ban on dumping without a binding force of the agreement. The Basel Convention was a compromise at regulation rather than ban on export of hazardous wastes giving proper definition to 'hazardous waste' making provisions for 'prior consent requirement' and taking back by the exporter of the illegal traffic. That is another matter that due to certain weaknesses in the consent requirement and 'liability regime' and lack of enforcement mechanism it was not successful in regulating the movement of wastes and in controlling illegal shipments. But despite some shortcomings of the Convention it should be considered a step in the right direction for developing international law.

'The movement of wastes across frontiers raises political and social problems.'⁶⁷ The international Conventions try to tackle a problem by developing guidelines and regulations but it fails to solve the same as the developing countries do not ratify the same. As a result, the developing countries are not able to enforce the provisions of the convention against such countries which do not ratify the convention. Similarly, in absence of a strong Liability Protocol the contracting parties are not compelled to abide by the Conventions. Developed countries use their muscle power by not providing proper funding to the international agencies. UNEP being underfunded is not able to develop a proper legal framework to deal with the problems of environment. The Basel Convention and the Liability Protocol are steps in this direction and international community can make use of the same for regulating the movement of wastes.

The definition of the 'hazardous wastes' was considered difficult as the same depended on different levels of concentration, quantity and their association with other substances. The exporter or importer or the disposer could try to avoid liability by pleading ignorance about the composition of a particular substance to be termed as hazardous waste. Moreover, the procedures for the management are unduly cumbersome. Then the 'special wastes' is also to be defined specially which has its own special problems needing solutions⁶⁸. Generally, the waste is considered hazardous if it is harmful to health and environment. The Convention has indicated wastes in two lists, one based on the processes from which the end products are made

⁶⁷ T.R.Subramanya, *Legal Control of Trans-boundary Movement of Hazardous Substances: North South Issues and a Model for Reform*, 34 INDIAN JOURNAL OF INTERNATIONAL LAW, 1994 at 40.

⁶⁸ John D Leeson, ENVIRONMENTAL LAW (1995), Chapter 16 at 434.

and the other based on the disposal processes. But the lists can't be exhaustive. One country may add more wastes to a list and the other may, in view of environmental protection, discourage the same in view of industrial development. An importing country may also do some interpolation for jealously discouraging the imports. However, the Convention being the environmental protection strategy should be read in the right perspective.

'The hazardous wastes pose actual and potential danger to human health and the environment.'⁶⁹ It is definitely a challenge. Since the Stockholm, Rio and Agenda 21 the international community has a mandate and is trying to solve the problem of environmental degradation. The States can solve the problem through domestic legislation but not across the boundaries. Industrialized countries including USA and UK which produce most of the hazardous waste, encounter heavy cost of waste disposal and stringent domestic legislation, dump the same in the developing countries. With the Basel convention the developing countries may become dumping ground for waste, it being less costly in terms of labor and environmental standards. Developing countries are more prone to health and environmental hazards as the Convention does not prohibit movement of wastes between non-parties to the Convention. But after the Liability Protocol the contracting parties are under an obligation to abide by the provisions of the Convention as it is an incentive for them to follow the regulations.

'As estimated in 1990, 400 million metric tons of hazardous waste was generated world wide and over 90% of the same was generated in OECD countries. As disposal is costlier in industrialized countries the same gets dumped in the developing countries which lack the capacity to deal with the same. This practice of such exports is termed as environmental injustice or environmental racism on a global scale. Problem of transport of hazardous goods to developing countries is primarily economic'⁷⁰. The export of hazardous wastes to the disadvantaged countries puts a burden of industrialization on them without having received any of its advantages. The concept of intergenerational responsibility and inter-generational justice was emphasized by the Brundtland Report⁷¹ as a step towards sustainable

⁶⁹ Bharat Desai, *Regulating Trans-boundary Movement of Hazardous Wastes*, 37 INDIAN JOURNAL OF INTERNATIONAL LAW, 1997 at 43.

⁷⁰ Dr. Zada Lipman of Macquarie University, Australia, *Trade in Hazardous Waste: Environmental Justice Versus Economic Growth*, see www.arbld.unimelb.edu.au/envjust/papers/allpapers/lipman/home.htm

⁷¹ OUR COMMON FUTURE, the Brundtland Report, 1987, the Report of the UN Commission on Environment and Development.

development. Agenda 21 also emphasized the concept of sustainable development. The Basel Convention is a step towards ensuring environmental justice to developing countries and the regulations are expected to be an incentive to minimize waste and a check on the developed countries to export waste to developing countries. Even the developing countries will be encouraged to adopt cleaner technologies in waste disposal. 'Environmental measures addressing Trans-boundary or global environmental problems, should, as far as possible, be based on an international consensus'⁷². In order to further discourage the developed countries to dump wastes there is a need to impose anti-dumping duties. However, the States have started opposing any effort to dump wastes but have not been very successful in imposing duties as the same are considered hampering trade.

'The trans-boundary movements of hazardous wastes from industrialized countries to developing countries constitute transfer of pollution. Several instruments have been adopted with the avowed objective of protecting the environment and human health from the dangers posed by the increased generation and complexity of hazardous wastes. Several environmental NGO's claimed that India has become the prime target for international hazardous waste traders and demanded a complete ban on any import of hazardous wastes'⁷³ Environmentalists propagate the idea of a complete ban on imports of hazardous wastes into India. But the trade and industry term this as hindrance in industrial development as the wastes are a raw material and also because the reprocessing and recycling provides employment and provide certain low cost products extracted from the wastes. For this purpose stringent enforcement of domestic labor laws and the provision for re-export of imported material which does not conform to the domestic laws for regulation of hazardous wastes is needed. Hazardous Wastes generate many harmful gases and other substances on disposal through burning which creates air pollution. For this 'no emission standards existed' even in USA 'and directly applied to the sources of air comprising of hot gas and dust cloud on account of burning of bodies combined with asbestos, fiberglass and concrete dusts as this was a new type of air pollution

⁷² Abdul Haseeb Ansari, *Free Trade Law and Environmental Law: Congruity or Conflict*, 41 INDIAN JOURNAL OF INTERNATIONAL LAW, 2001 at 1.

⁷³ Shikhar Ranjan, *Legal Control of the Trans-boundary Movements of Hazardous Wastes into India -An Evaluation*, 41 INDIAN JOURNAL OF INTERNATIONAL LAW, 2001 at 45.

source.⁷⁴ India should develop such standards and apply the same to the instances of air pollution caused due to disposal of hazardous wastes.

‘Developing a comprehensive and effective global regulatory framework for trans-national waste trade is complex and difficult task in view of the conflicting interests of the industrialized and developing countries⁷⁵.’ The Basel Convention did not completely prohibit or ban the movement of the hazardous wastes and only tried to regulate the same on the basis of prior informed consent. It is not an easy task to arrive at a consensus among the States particularly when the economic issues are concerned. Since the movement of the wastes also affects the economic activities it was not possible to ask the states to agree to a complete ban on their movement. Hence many aspects of the law on these wastes have been left to the discretion of the states party to the Convention. The Basel Convention was thus an achievement in itself keeping in view of the global state of affairs and it is on the states to devise some mechanism to regulate the movement of these wastes which is acceptable to the parties. Regional conventions like the Bamako Convention⁷⁶ and the Lome’ Convention⁷⁷ that address the problem more effectively than the Basel Convention can render a useful guidance in developing the law on this subject. Since most of the matters have been left to the discretion of the parties the Basel convention can only serve a purpose of guiding the state in developing the domestic legislation taking into account the decisions of the OECD to prohibit the export of hazardous wastes from OECD to non OECD countries.

The Convention and the decisions although are significant in developing international law but it requires a strong political will of the parties to turn this into a reality. It was hoped that the 1999 liability Protocol⁷⁸ will strengthen the Basel regime. The Protocol tried to fill the gap for regulating the liability of the contracting parties and but it did not provide for the

⁷⁴ Marjorie J Clarke, a Department of Sanitation Specialist in her statement before the US Senate Environment Committee hearing on the Air Quality surrounding the World Trade Center, Feb. 2002; see www.everest.hunter.cuny.edu/mclarke/resume.htm, www.corpwatch.org

⁷⁵ B.C.Nirmal, *Regulating Trans-boundary Movements of Hazardous Wastes* in S. Bhat & Akhtar Majeed (ed.) *Environment Management and Federalism, Indian Experience* (Uppal Publishing House, New Delhi) Chapter 9, 135-179 at 163.

⁷⁶ *Supra* n. 60.

⁷⁷ Lome Convention, 1989 signed by 69 African, Caribbean and Pacific (ACP) States.

⁷⁸ Basel Protocol on Liability and Compensation for Damage resulting from Trans-boundary Movements of Hazardous Wastes and their Disposal, 1999.

responsibility for disposal of hazardous wastes. It depends upon the states to pay adequate attention to the creation of disposal facilities and agree upon a common framework for a properly defined liability regime for the same. A comprehensive global Convention is needed on the regulation of land based disposal also as has been done in case of disposal of the same on the sea and air. The 1996 Marine Protocol⁷⁹ for prevention of dumping of radio-active materials and other hazardous materials is a step in the right direction. Similarly, there is an urgent need to develop a legally binding instrument on the radio-active wastes, which at present are beyond the scope of the Basel Convention, and are governed by a non-binding IAEA Code of Conduct on Radio-active wastes. The Lome' and Bamako Conventions and EC directives⁸⁰ can provide the required guidelines for developing such an instrument. An effective legal mechanism for dealing with state liability for trans-boundary nuclear pollution is also urgently needed which can regulate the liability of the states in a Chernobyl like situation.

VII. INDIAN LAW ON HAZARDOUS WASTES AND THE JUDICIAL RESPONSE

The dumping of hazardous wastes and other wastes has posed a grave situation in India causing serious ecological problems. There is no scarcity of laws in India but the necessary willingness to implement the same is lacking. The Environment Act⁸¹ is an umbrella law on environment under which rules have been framed for handling and management of hazardous wastes. Indian judiciary has developed a comprehensive environmental jurisprudence for regulating the entry of hazardous wastes and other wastes into the country. Despite existence of laws and regulations for hazardous wastes, instances of imports of hazardous wastes into the country have occurred. This was mainly due to indifference of the government agencies, resistance of the people for fear of losing jobs and illegal activities of unscrupulous operators which has encouraged the industrialized countries to dump wastes in India. It is, therefore, incumbent upon the government agencies, particularly the Pollution Control Boards to enforce the laws more forcefully, of course, also taking into account the genuine concerns of the Indian industry. A complete ban may perhaps not be feasible in the interest of the industry and the international trade.

⁷⁹ The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.

⁸⁰ Lome and Bamako Conventions and EC directives 92/3.

⁸¹ Environment (Protection) Act, 1986.

'Hazardous substances pervade modern industrialized societies. Indian industry generates, uses and discards toxic substances.⁸²' Hazardous wastes including the Toxic substances are regulated in India by the provisions of the Environment Act which has defined 'hazardous substance' in section 2(e). The Hazardous Wastes (Management and Handling) Rules, 1989 (subsequently amended in 2000 and 2003)⁸³ have been framed under the Act. Radioactive Wastes which were not covered by the definition of 'Hazardous Wastes' under the Convention have been covered earlier in India by the Atomic Energy Act, 1962. The Merchant Shipping Act, 1958 already governed the discharge from the ships. Pollution created by the waste water and exhaust gases was covered by Water Act, 1974 and Air Act, 1981 respectively. A person generating hazardous wastes and the operator of a facility are responsible for proper handling, storage and disposal of wastes. No person, without proper authorization, may collect, receive, treat, transport, store, or dispose of hazardous wastes. Hospital waste is governed by the Bio-Medical Waste (Management and handling) Act, 1998.

Indian government issued Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 applicable to the industries that use or store specified hazardous chemicals. Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996, to supplement the Hazardous Chemicals, 1989, were made to strengthen the administrative response to hazardous substance accidents. Provisions relating to certain aspects of storage, transportation and regulation of hazardous substances are contained in Motor Vehicles Act, 1989; the Insecticides Act, 1968; the Atomic Energy Act, 1962; the Inflammable Substances Act, 1952; and the Explosive Substances Act, 1908. The Factories Act, 1948 has been amended in 1987 to include a section on hazardous industrial activities for plant safety. The 2000 amendment to the Hazardous Wastes Rules, 1989 was to restrict the export and import of hazardous wastes for recycling and reuse.

'More than 30000 tons of steel scrap, possibly contaminated with asbestos has been exported to India.'⁸⁴ This referred to shipments of WTC scrap into India. Though the risks from the scrap were probably not of the order of the health threats at Ground zero, the US nevertheless have the obligation to ensure that toxic contamination from the World Trade Center

⁸² Shyam Divan and Armin Rosencranz, ENVIRONMENT LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES, (Oxford University Press, 2001) at 514.

⁸³ Hazardous Wastes (Management and Handling) Rules, 1989 subsequently amended in 2000 and 2003.

⁸⁴ *Supra* n. 1.

is not exported to other nations. Contamination of steel scrap is a common concern in the steel industry. Under the Basel Convention it falls on the Indian Govt. to prevent import of wastes if they are found hazardous because US refuses to sign the Convention and is not bound by the treaty. Despite an order of the Indian Supreme Court, US consignments of hazardous wastes continue to come routinely through the unscrupulous importers. This reflected the record of implementation of the rules and regulations on environment in India which has not been very satisfactory. The Indian regulatory agencies, notably the Port and customs authorities and the Ministry of Environment and Forests, have not been very proactive on matters such as management of hazardous wastes which affect human health and environment. Following many instances of unregulated import of hazardous wastes into India for dumping and disposal an interim prohibition was imposed by the Indian Supreme Court in 1997⁸⁵ on the imports to India and a committee was appointed to examine matters relating to hazardous wastes thoroughly. The committee found containers holding wastes at Delhi and Bombay. Customs authorities were later allowed to release these goods as per recommendations of the committee only.

In *Shriram Gas Leak* case⁸⁶ the Supreme Court articulated a new standard of absolute liability in 1984. In *Bichhuri* case⁸⁷ the 'polluter pays principle' has been held to be a sound principle and 'absolute liability standard' has been applied on the polluting industries. Parliament enacted the PLIA⁸⁸ and recognized the principle of 'no fault liability'. In case of an accident due to hazardous substance/s the owner of the substance is liable to compensate as per the Schedule to the Act. This 'no fault liability' regime received further endorsement in the setting up of National Environmental Tribunals.⁸⁹ Since PLIA was a social welfare statute even the electricity has been held to be hazardous substance for the purposes of the statute. However, the apex court indicated that 'We can not have a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries, even if hazardous, have to be set up since they are essential for economical development and

⁸⁵ *Research Foundation for Science and Natural Resources Policy v Union of India*, 1997 (5) SCALE 495 and 1999 (1) SCC 223, 224, 345 and 495.

⁸⁶ *M.C. Mehta v Union of India*, AIR 1987 SC 1086, 1099.

⁸⁷ *Indian Council for Enviro-Legal Action v Union of India (Bichhuri Case)*, AIR 1996 SC 1446.

⁸⁸ Public Liability Insurance Act, 1991, (PLIA).

⁸⁹ National Environment Tribunal Act, 1995.

advancement of the people. We can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner which would pose least risk of danger to the community and maximizing safety requirement in such industries.⁹⁰

Indian judiciary has been particularly active in the area of environmental justice and has gone to the extent of suggesting that environmental courts should be set up for dealing with environment cases. Absolute liability standard laid down by the Supreme Court was, however, diluted in the *Bhopal Gas* case⁹¹ and laid down that the quantum of damages payable should be on the basis of the monetary capacity of the delinquent. It was stated that 'it is premature to say whether this yardstick has been, or will be, accepted in this country, not to speak of international acceptance which may be necessary should occasion arise for executing a decree based on such a yardstick in another country.'⁹²

The Supreme Court has applied the same to domestic polluters as well and the 'Precautionary Principle' and 'EIA regulations' have been adopted in environmental laws. However, the apex court recognized the distinction between the principle of 'absolute liability' applicable only to hazardous industries, and the wider 'polluter pays principle' which applies whenever an industry pollutes the air, water or land, irrespective whether it is hazardous unit or not. The apex court in the *Vellore* case⁹³ appears to have mixed up these two principles and rolled them into one. It appears that in India a polluter is no longer entitled to the defenses that are available to him under the law of torts. This appears to be the outcome of adoption of the 'no fault rule'.

VIII. CONCLUSION AND SUGGESTIONS

UN Conference on Human Environment, 1972⁹⁴ only called for a halt to the discharge of toxic substances and did not significantly deal with the issue of wastes. The World Charter for Nature, 1982⁹⁵ also didn't deal with the matter but emphasized the need to take special precautions to prevent the discharge of radio-active or toxic wastes. Cairo guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes called upon the states to develop policies for the environmentally sound

⁹⁰ *Supra* n. 86.

⁹¹ *M.C. Mehta v Union of India*, AIR 1987 SC 965.

⁹² *Supra* n. 87.

⁹³ *Vellore Citizens' Welfare Forum v Union of India*, AIR 1996 SC 2715.

⁹⁴ *Supra* n. 45.

⁹⁵ Principle 12, World Charter on Nature by the United Nations in 1982.

management of hazardous wastes from their generation to final disposal. Basel Convention developed the 'prior informed consent' principle but is silent on the effect of subsequent withdrawal of consent by the importing state. It, however, laid down that any such movement with consent, obtained from the state of import through falsification, misrepresentation or fraud is an illegal traffic: The movement is to take place with the prior consent of the transit state as well which should be given within 60 days failing which the movement can take place by informing the other parties of the decision of export through the state of transit. But it may create a situation where a state of transit decides to take action against the movement taking place without its consent. Although the Convention insists on an environmentally sound management of hazardous wastes and other wastes, it does not lay down any clear cut criteria for its determination. Cairo guidelines contained certain parameters to be followed which the Convention did not prescribe. However, it called for the parties to develop appropriate technical guidelines for environmentally sound management of hazardous wastes. Stockholm and Rio Declarations emphasized the need for development of liability and compensation rules at national levels. But the Convention instead of providing rules on liability and compensation left the matter to be addressed by the parties to the Convention through a Protocol. The Basel Protocol on Liability and Compensation, 1989 tried to fill the gap left by the Basel convention in this regard. But the Protocol also was not applicable to the damage caused by the movement of wastes before the commencement of the Protocol but covers even the 'illegal traffic'. Even after the Protocol comes into force any damage that will result from an incident occurring during trans-boundary movement pursuant to bilateral, multilateral or regional or other arrangements will be outside the purview of the protocol. The person in control of such wastes for the purpose of taking preventive measures is only obliged to act reasonably and in accordance with any domestic law regarding preventive measures and is not subject to any liability under the Protocol. The area of international law relating to reparation for environmental damage is under-developed. Apart from requirement of huge finances for making such reparation there is problem of determining of how to assess the measures for environmental damages. Regulatory framework of the Convention is very weak as the Secretariat has very little powers for monitoring trans-boundary movement and prevention of illegal traffic unlike Bamako Convention who's Secretariat can verify the allegations and submit a report to the parties. The Convention has left enough room to the parties to circumvent some of the provisions on one pretext or the other. For example, the prohibition of export to a non-party can easily be evaded by means of bilateral and multilateral agreements by even the non-contracting

parties. African and other countries have not signed the convention and are not bound by the Convention. Rather, the Bamako and Lome' regional conventions have imposed the ban on the movement of these wastes. Radioactive wastes have been excluded from the scope of Basel Convention as the same were covered by other conventions. Even Rio Declaration and the Agenda 21 are a 'soft law,' as these do not create binding obligations and represent an authentic statement of international norms applicable to 'sustainable development'. Indian law on environment in general and on hazardous wastes is in conformity with the Basel Convention and suffers from the similar weaknesses.

Since the implementation of laws in India has been very tardy it may be worthwhile to consider induction of technology in the procedures for imports and exports. Fully developed ports like Singapore do not permit any ship or any other means of transport to enter unless it's documentation is electronically compatible which ensures better scrutiny of documents and compliance of laws and regulations. Similarly, no container can enter the US territory unless it has passed through the strict security check mechanism where the Shipping lines owning ships and containers have been asked by the security agencies to ensure strict compliance of security regulations. Though the maritime industry is well regulated yet adoption of the security centric steps, including online container tracking, would ensure proper shipment documentation to avoid illegal movement of hazardous wastes across national boundaries.

Somalia incident highlighted the untenable argument that the international law was applicable to the states and not the individuals. Strict security procedures laid down by the US government and their compliance, particularly after the WTC disaster, also takes care of the issue that the international conventions are applicable to the States and not to the individuals as the ship-owners, the exporters and the importers are directly held responsible, for any violations of the international laws in general and domestic laws in particular. Somalia like situation was, though an exception rather than the rule should not be allowed to happen and not only the States but also the individuals and the institutions should be held accountable. It is, however, surprising that no efforts were made by the international community to modify the provisions of the Basel Convention to avoid the incidents like Somalia. Procedure laid down by the Rotterdam Convention,⁹⁶ adopted in consonance with the Basel Convention, for prior consent requirement can be effective only if there is a proper enforcement mechanism

⁹⁶ Rotterdam Convention on the Prior Informed Consent Procedure for Certain

in place for which the strengthening of the Convention Secretariat is necessary which is possible only if the powerful States like USA ratify the Convention and provide the requisite financial and political backup.

Hazardous Chemicals and Pesticides in International Trade, 1998. The Convention is intended to protect human health and the environment by prohibiting international trade in certain hazardous chemicals unless the importing State first gives its informed consent, and by facilitating information exchange to promote the safe handling and use of such chemicals.