

Transboundary movements of hazardous wastes and their disposal

Транскордонний рух небезпечних відходів та їх видалення

Marzena Furtak-Niczyporuk, Paweł Nowicki

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The problem of transboundary trade of hazardous wastes is common nowadays as it eliminates severe control which determines requirements for their management in the country of producer. As a matter of fact, hazardous wastes should be liquidated in given country in so far it follows the regulations of safe and effective management. It is the duty of a given country to ensure performing duties connected with storage, transport and disposal of hazardous wastes by their producers. Therefore there is a need for introducing a ban on transboundary movements of hazardous wastes and their disposal to the territory of other countries particularly the developing ones. This is consistent with the commonly accepted right to ban delivery and disposal of hazardous wastes onto its territory from another country. However as follows from the practice the expectations are not easy to realize as there are countries which would do it to achieve apparent advantages. On the whole developed countries are exporters but developing ones are importers. As a consequence, there is the waste route "North-South" as this direction is quantitatively dominant taking into account the statistical data of transboundary movements of hazardous wastes¹. Then the developed countries are believed to be ("bad guys"), but the developing ones ("good guys")².

Transboundary movement of hazardous wastes creates risk of damaging human health and the environment. First of all, nowadays it results from excessive production and complexity of hazardous wastes dumping which finally leads to their transboundary movements. Indeed, the most effective way of human, health and environment protection against dangers connected with hazardous wastes is the reduction of their production to the minimum as far as quantitative and potential threats are concerned. However it proves to be difficult in the present stage of civilization development, particularly keeping in mind accessibility of safe wastes management technology. In any case, there is the need for protection of both human health and the environment. They should be considered in the aspect of human rights that is the subjective rights of particular kind due to each man. Consent for transboundary movements of hazardous wastes must take into consideration human rights that is: the right to live and the right to the highest possible health standard; the right to safe and healthy work conditions; the right to the suitable standard of living³. Additionally, it should be stated that the transboundary movements of hazardous wastes can not be considered in the light of man's right to the environment which has not been formed yet⁴.

The Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal is the only international agreement concerning the transboundary trade of hazardous wastes⁵. First of all, it assumes a separate system of transboundary movements of hazardous wastes based on the requirement for obtaining the prior agreement for their each legal translocation which is appropriate for

¹ K. Kummer Peiry. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal // American Society of International Law Proceedings. – 2013. – 434 p.

² K. Kummer Peiry, The Basel Convention..., 434.

³ Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Calin Georgescu, United Nations General Assembly, Human Rights Council, Eighteenth session, A/HRC/18/31, July 2011.

⁴ M.M. Kenig-Witkowska, International law of the environment. Chosen systemic issues. – Wolters Kluwer, Warsaw, 2011, 47.

⁵ Comprehensive discussion is included in: K. Kummer, International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules, Oxford 1999, 38–86.

the importing country the transit country and the exporting country⁶. This possessing illegal qualifications it leads to negative consequences for transboundary movements of hazardous wastes. Whereby such movements from the country the country they were produced in to another one should be legally allowed when it does not impose threat to human health and the environment and is consistent with a suitable procedure. Moreover, hazardous wastes should be transported according to international conventions and recommendations. The control of transboundary movements of hazardous wastes should stimulate their management in a safer way and lead to their amount reduction. Generally, this includes the activities resulting in the decrease of environmental pollution on the global scale.

The Basel Convention assumes that the transboundary trade of hazardous materials consists in the movements of hazardous wastes and their disposal. According to the legal definition wastes are substances or objects which are disposed of or are going to be disposal of or their disposal is required by virtue of the national law regulations. Though there is no further legal definition of hazardous wastes, one can make their full catalogue: the wastes belonging to the category included in annex I (unless they possess one of the characteristics mentioned in annex III); the wastes not belonging to the above mentioned category but admitted to be hazardous by the regulations of national legislation of exporting, importing or transit countries; directly quoted "other wastes" that is those belonging to the category mentioned in annex II (household wastes and remains from their incineration); radioactive wastes which are not the objects of other international control systems along with the instruments used particularly for radioactive materials; wastes from ships whose removal is not included in other international legal instruments⁷. Therefore it should be added that the Basel Convention deals not only with hazardous wastes though marginally.

In such a context the Basel Convention accepts at once legal definitions of transboundary movements and disposal. The transboundary movements mean here any movements of hazardous wastes or other wastes from the territories comprised by the national jurisdiction of one country to the territories or across the territories under the jurisdiction of another country or the territories or across territories not comprised by any national jurisdiction of any country provided that at least two countries are involved in such movements. In turn, disposal means any activity specified in annex IV (actions which do not result in recovery of resources recycling, regeneration direct secondary use or alternative applications and those which can lead to recovery of resources, recycling; regeneration, direct secondary use or alternative applications). Generally movements and disposal of hazardous wastes or other wastes take place in the framework of the legal management. Thus one should refer to the legal definition of management which means accumulation, transport and disposal of hazardous or other wastes including further actions connected with the dumping sites. On the other hand, one should remember about frequent situations when movements and disposal of hazardous and other wastes take place beyond the legal management.

The Basel Convention includes the legal definitions of the exporting country, importing, country, transit country as well as concerned one. The exporting country is a party from which beginning is planned or beginning takes place as for as transboundary movements of hazardous or other wastes are concerned. The importing country identifies the party to which it plans or realizes transboundary movements of hazardous or other wastes in order to dump them or to load them before disposal on the territory not being under the national jurisdiction of any country. The territory under the national jurisdiction means here land territory, sea region as well as air space within which the state performs administration and legislation competences according to the international law on protection of human health and the environment. However the transit country can be any country but not an exporting or importing one across which transport of hazardous or other wastes is planned or takes place. Finally, there are also concerned countries whose parties are exporting, importing or transit countries no matter if these countries are parties in the established interpretation or not.

Moreover, the Basel Convention defines general responsibilities of the countries participating in movements of hazardous materials and their disposal. Particularly the parties commit themselves to cooperation: informing other parties about the decision of not taking an opportunity of using the law to ban import of hazardous or other wastes for disposal: ban on their export or not allowing the export of hazardous or other wastes to the parties that banned their import, after receiving notification from them about prohibition of or no giving permission for export of hazardous or other wastes if the importing country does not give a written consent for the import in the case the importing country did not ban measures in management, transboundary movements of hazardous each party

⁶ K. Kummer Peiry, *The Basel Convention...*, 434.

⁷ M.M. Kenig-Witkowska, *International...* 252; more about radioactive wastes: E. Nathanson, *International Management of Radioactive Wastes*, *Boston College Environmental Affairs Law Review*, vol. 5, 1976, 363; J.W. Kindt, *Radioactive Wastes // Natural Resources Journal*. – 1984. – Vol. 24, 967–1014.

to use domineering measures in enforcement of duties in management transboundary movements of hazardous and other wastes and their disposal. Moreover, the parties will apply suitable measures to ensure permission for transboundary movements of hazardous and other wastes only under specified conditions. They are not deprived of the possibility of applying additional requirements satisfying the systemic conditions.

Next the Basel Convention establishes detailed conditions of transboundary movements of hazardous and other wastes between the parties. It should be mentioned that: the exporting state notifies in writing the concerned states about any proposed transboundary movements; the notified receives the written consent of the state of import such movement or refuses it; the state of export will not give permission to their producer or exporter for transboundary movements without a written confirmation of possessing a consent of the state of import and that there is a contract between the exporter and the disposer; the state of export will not allow to commence the transboundary movement until it has received a written consent of the transit state, however, with specified exceptions. In the case of transboundary movements of hazardous wastes, which were legally or actually specified only by the state of export, the state of import or the state of transit then a suitable interpretation is used. Moreover general notifications are allowed when hazardous or other wastes are supplied regularly. All transboundary movements of hazardous or other wastes must be insured or possess other guarantees which may be demanded by the state of import or the state of transit.

As for the pathological actions in transboundary movements of hazardous or other wastes and their disposal, the Basel Convention refers to the duty of reimporting and illegal movement. When the transboundary movement in accordance with the contract conditions is impossible, the state of export must ensure that they are taken back by the exporter to the state of export or provide another disposal safe for the environment. In turn, the illegal movement according to the legal definition means each transboundary movement of hazardous or other wastes. Hence it includes the transboundary movement: without notification of all concerned states; without consent of the concerned state; due to the consent received from the concerned states as a result of falsification; erroneous information fraud; inconsistency of the material state and documentation; intentional disposal violating the Basel Convention or general rules of international law⁸. If the illegal movements take place due to the exporter or producer's behaviour, the state of export will provide that they will be taken back or disposed of in another way consistent with the Basel Convention. On the other hand the illegal movement due to the action of the importer or disposer compels the state of import to dispose them in the way safe for the environment.

The parties of the Basel Convention committed themselves to cooperate to achieve its goals if they transboundary movements of hazardous wastes and their disposal. For the transboundary movements of hazardous and other wastes based on the Basel Convention by the state or states not being its parties, the requirement of consent suitable for the state of state of import is used. It should be also mentioned that the parties of the Basel Convention are to cooperate to improve and achieve environmentally sound management of hazardous and other wastes. Considering the above, special needs of developing countries should be highlighted. In principle the parties of the Basel Convention may enter into bilateral multilateral or regional agreements with other parties or states which are not parties of the Basel Convention. Moreover, the parties of the Basel Convention will cooperate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for the damages⁹. The parties will, whenever it comes to their knowledge ensure that in the case of an accident during the transboundary movements of hazardous or other wastes which are likely to present risks to human health and the environment in other states, those states will be immediately informed. Of course, this is connected with financial mechanisms agreed by the parties of the Basel Convention.

The mechanism of Basel Convention functioning is based on a conference of the parties and the secretariat. The conference of parties should be recognized as the decision making organ but the secretariat as the subsidiary one. The tasks of the conference of the parties include: continuous review and evaluation of the effective implementation of the Convention; promotion of harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous and other wastes; consideration and adoption of amendments annexes to the Basel Convention; consideration and adoption of any additional

⁸ As an example it concerns the dispute between the USA and China on illegal transboundary movements of wastes (illegal movement) M. Bradford, *The United States, China & The Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*, *Fordham Environmental Law Review* 8, 2011, 308.

⁹ As an example the official record about responsibility and compensations for damages due to the transboundary movements of hazardous and other wastes and their disposal G.F.S. Soares, E.V. Vargas, *The Basel Liability Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* (in: *Yearbook of International Environmental Law*, vol. 12–2001, ed. G. Ulfstein, J. Werksman, Oxford 2003, 69–104.

actions that may be required for the achievement of Convention aims; consideration and acceptance of required protocols; establishment of subsidiary bodies. It is worth taking into consideration a particular role of amendments and annexes to the Basel Convention which constitute its integral part¹⁰. At present the secretariat tasks include: organization and attendance of meetings of the conference parties; preparation and transmittance of reports; assurance of necessary coordination with relevant international bodies; communication with focal points and competent authorities compiling; receiving and conveying information to the parties of the Basel Convention; help with finding illegal movements; cooperation with international organizations.

Another problem is the transboundary trade of hazardous wastes with participation of the European Union¹¹. The Basel Convention entered the European Union law based on the decision of the Council 93/98/EWG about accession to it and at the same time to national orders of numerous European Union countries as the ratified international agreement, for example to the Polish legal order in the ratification made by the President of the Polish Republic of 10 January 1992¹². Later the regulation of the transboundary movements of hazardous wastes and their disposal was developed in the European Union law. First of all this includes the decree (WE) No 1013/2006 of the European Parliament and Council of 14 June 2006 as regards movements of wastes¹³. However there appears also the order 2008/98/WE of the European Parliament and Council of 19 November 2008 concerning wastes and repealing same orders. However it has a general character¹⁴. The regulations of the decree are used directly as opposed to the above mentioned order which requires transposition to the natural mentioned order which requires transposition to the natural regulations of legal orders of European Union countries. In the Polish legal order of basic importance is the law of 29 June 2007 about international movements of wastes¹⁵.

Moreover it should be noted that the transboundary trade of hazardous wastes, regulated for the first time by the Basel Convention has also its further connotations in other regions of the world. Entrance of the Basel Convention for more effective control and restrictions of transboundary movements of hazardous wastes into the Latin American countries and Caribe was discussed during the meeting in Santiago (Chile) on 15–19 November 1993 when eight recommendations concerning management of hazardous wastes were accepted¹⁶. However the African countries which generally were not satisfied with the regulations of the Basel Convention because they wanted complete ban on hazardous wastes import to Africa under the auspices of the African Unity Organization, accepted the Convention of 29 January 1991 about the ban on import to Africa and control of transboundary movements and management of hazardous wastes (Bamako Convention)¹⁷. Among the examples of other regional agreements about transboundary trade of hazardous wastes one should mention: the Panama regional agreement of 11 December 1992 about transboundary movements of hazardous wastes and the Convention of 16 September 1995 about the ban on import of hazardous and radioactive wastes into the territory of insular countries as well as about the control of their transboundary movements and management of wastes (the Waigani Convention)¹⁸.

Summary

The Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal is the only international agreement concerning the transboundary trade of hazardous wastes. First of all, it assumes a separate system of transboundary movements of hazardous wastes based on the requirement for obtaining the prior agreement for their each legal translocation which is appropriate for the importing country the transit country and the exporting country. This possessing illegal

¹⁰ More broadly D. Hunter, J. Salzman, D. Zaelke, *International Environmental Law and Policy*, 2nd ed., New York Foundation Press, 2002, 849–850.

¹¹ P. Zacharczuk, *Public administration in relation to the international problem of movement of wastes* (in:) *Public administration in relation to the globalization process*, edited by M. Rudnickiego, M. Jabłońskiego, Beck Warsaw 2011, 83–96; M. Furtak-Niczyporuk, *Regulation of international movements of wastes*, Portfolio of the Legal Committee - OL PAN, 2016, 73–82; Z. Bukowski, *International trade of waste, Chemical industry and the environment protection*, *Eascicle 12*, Wrocław-Bydgoszcz 2005, 31–54.

¹² Dz. U. 1995, Nr 109, poz. 88.

¹³ Dz. Urz. UE L Nr. 190, str. 1 z późn. zm.

¹⁴ Dz. Urz. UE I 312, str. 3 z późn. zm.

¹⁵ Dz. U. 2015, poz. 1048 z późn. zm.

¹⁶ G. Biggs, *Latin America and the Basel Convention on Hazardous Wastes*, *Colorado Journal of International Environmental Law and Policy*, Vol. 5(2), 333.

¹⁷ M.M. Kenig-Witkowska, *International ...*, 258.

¹⁸ *Ibidem*.

qualifications it leads to negative consequences for transboundary movements of hazardous wastes. The Basel Convention assumes that the transboundary trade of hazardous materials consists in the movements of hazardous wastes and their disposal. Consent for transboundary movements of hazardous wastes must take into consideration human rights that is: the right to live and the right to the highest possible health standard; the right to safe and healthy work conditions; the right to the suitable standard of living.

Анотація

Базельська конвенція від 22 березня 1989 року про контроль за транскордонними перевезеннями небезпечних відходів та їх видалення є єдиною міжнародною угодою про транскордонну торгівлю небезпечними відходами. Насамперед вона передбачає окрему систему транскордонних переміщень небезпечних відходів на підставі вимоги для отримання попередньої домовленості щодо їх кожної юридичної транслокації, яка підходить для країни-імпортера, країни транзиту та країни-експортера. Те, що володіє нелегальною кваліфікацією, веде до негативних наслідків для транскордонного переміщення небезпечних відходів. Базельська конвенція передбачає, що транскордонна торгівля небезпечними матеріалами полягає в переміщенні небезпечних відходів та їх утилізації. Згода на здійснення транскордонних перевезень небезпечних відходів повинна враховувати права людини, тобто право на життя та право на найвищий можливий стан здоров'я, право на безпечні й здорові умови праці, право на відповідний рівень життя.

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Dr. Marzena Furtak-Niczyporuk,
Chair and Department of Public Health,
Medical University of Lublin

Dr. Paweł Nowicki,
Department of European Law,
Nicolaus Copernicus University in Torun