



The Basel Convention as an Evolving Treaty Regime: Implications of the Ban Amendment and Plastic Waste Amendment

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(Degree)

博士 (学術)

(Date of Degree)

2022-09-25

(Date of Publication)

2024-09-25

(Resource Type)

doctoral thesis

(Report Number)

甲第8475号

(URL)

<https://hdl.handle.net/20.500.14094/0100477901>

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Summary of the Doctoral Dissertation

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Title of Dissertation (In case of foreign language, translation into Japanese is required):

The Basel Convention as an Evolving Treaty Regime: Implications of the Ban Amendment and Plastic Waste Amendment

(進化する条約制度としてのバーゼル条約：輸出禁止改正とプラスチックごみ改正の影響)

Summary of Dissertation

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposals adopted in 1989 and entered into force in 1992 is currently the only international environmental regime addressing the issue of transboundary movement of hazardous and other wastes, and its environmentally sound management. The Convention initially opted for ‘restriction’ over ‘prohibition’ by establishing a regulatory scheme. This scheme allows any transboundary movement of hazardous and other wastes to proceed only when such movements adhere to the rules of the Convention under the Prior Informed Consent (PIC) mechanism and the observance of the environmentally sound management. It also provides a limited ban, prohibiting any transboundary movement between Party and non-Party to the Convention. However, Article 11 provides an exception for such prohibition if there is an agreement or arrangement between a Party and non-Party to the Convention which stipulates provisions that are “not less environmentally sound” than the standard of the Basel Convention.

The emphasis on the environmentally sound management (ESM) principle can also be found during the whole negotiation process of the Convention and in many of the core provisions of the Convention, such as in Article 4 paragraph 2(b) and 2(d), Article 4 paragraph 8, and Article 4 paragraph 10, highlighting its importance as the original aim underpinning the Basel Convention. During the negotiation process, UNEP as the convenor reiterated times and again on the initial aim of the convention was to manage the issue of hazardous waste in an environmentally sound manner, rather than only addressing the transportation of those wastes. The total ban proposal, which suggests a prohibition of transboundary movement of hazardous wastes from developed to developing countries was also argued on the ground that developing countries cannot manage those waste imports in an environmentally sound manner. Thus, the reading of environmentally sound management (ESM) as the foundational principle of the Basel Convention regime has important theoretical implications for the argument of this thesis. The foundational principle of ESM under the Basel Convention regime needs to be interpreted as comprising of two main elements: 1) the minimization of waste generation and transboundary movement; and 2) the regulatory scheme of transboundary movement based on PIC mechanism. The inclusion of ESM principle was initially intended to minimize waste generation and transboundary movement, but has since emphasized as the enabling standards for the regulatory scheme of the Basel Convention. The Ban Amendment and the Plastic Waste

Amendment has subsequently re-focused the emphasis on minimization of waste, arguably strengthening the environmentally sound management as the foundational principle.

The Convention adopted the Ban Amendment through Decision BC-III/1 in 1995 and entered into force in 5 December 2019 which essentially ban any movement from developed countries to developing countries without any exception, referred in this study as the North-South total ban. The amendment will now prohibit any transboundary movement of hazardous wastes from countries listed on Annex VII, considered as developed countries, to non-Annex VII countries, both for recycling and final disposal. Concurrently, during the Fourteenth Conference of Parties (COP) held in 2019, the Parties to the Convention also adopted decision BC-14/12 which amended Annex II of the Basel Convention to include several types of plastic waste considered as harmful and need to be controlled under its scope. This decision, commonly addressed as the “Plastic Waste Amendment”, specifies new categories of plastic waste that will be subject to the Convention’s regulatory scheme.

This study examines how and to what extent those amendments bring changes to the operationalization of the Basel Convention by employing the multidisciplinary approach of international relations and international legal studies specifically for the concept of ‘regime change’. For general international relations scholars, a regime change might continue until it disappears and another taking its place, but this study, integrating a legal analysis, corroborates a different future path of the Basel Convention regime. As such, this study proposes a *regime evolution* in explaining the Basel Convention regime, described as significant alterations in a regime’s structures of rights and rules and its operationalization leading to the changing patterns of behaviors without altering the regime’s object and purpose. By doing so, this study offers a fresh perspective in understanding the Basel Convention, an international treaty regime scarcely examined by both international relations and international legal scholars.

In essence, this study argues that the Ban Amendment changes the Basel Convention’s rules and operationalization in several aspects. First, the change in rules can be observed from the new obligation to prohibit for Annex VII countries who have ratified the Ban Amendment. Ratification of Ban amendment by Annex VII countries will not change their entitlement under the Convention to import hazardous wastes but will impose a new obligation upon them not to export those wastes to the developing, non-Annex VII Parties. For example, competent authorities in exporting states are now required to observe whether the proposed State of Import is included in Annex VII or not, which was previously not required and they may immediately

send the notification of proposed transboundary movement to the potential State of Import and in some cases to include State of Transit.

Second, changes in operation of the Basel Convention can be observed from three aspects: it establishes a North-South total ban mechanism, in which any transboundary movement from Annex VII countries to non-Annex VII is now prohibited without any exception. This modification of the Basel Convention's operationalization might have distinctly shaped the practices and behavior of states under the Convention, both for Annex VII and non-Annex VII countries. It establishes a constellation of relationship between member states: 1) between Parties to both the Basel Convention and its Ban Amendment; 2) when the proposed transboundary movement of hazardous waste is between a ratifying party to the Ban Amendment and a non-ratifying party of the Ban Amendment; and 3) between a ratifying party to Ban Amendment and a non-party to the Basel Convention. For example, Annex VII countries who have ratified the Ban Amendment will now either have to find other Annex VII Parties to send their hazardous waste or to dispose those waste in their own country. Another changes in operation relates to the fact that the entry into force of Ban Amendment established Annex VII. Consequently, there is a change in the approach to transboundary movement of hazardous waste: from a bilateral and individualized contract between an export state and an import state on the movement of a particular waste, to a 'catch-all' approach based on the country groupings based on Annex VII countries and non-Annex II countries. This modification in the operationalization of the Basel Convention might provide a mechanism less prone to error or misconduct, thus providing incentives for achieving the environmentally sound management.

Third, the Ban Amendment introduced the concept of high-risk in transboundary movement of hazardous waste from developed countries to developing countries, and by doing so, this study argues that ESM principle under the Basel Convention has indeed evolved to be interpreted having stricter standards. While Ban Amendment only applies to Parties who ratify it and consequently the applicability of this interpretation is currently limited, this thesis argues that it might become a new general norm under the Convention. It is also argued that a stricter interpretation of ESM principle after the Ban Amendment will strengthen its constitutive elements of minimization of waste generation and transboundary movement. For example, the prevention element under the ESM will now need to be interpreted in light of the recognition that there is a high risk in hazardous waste being exported to developing countries as not constituting environmentally sound management. This new recognition under the Basel

Convention regime indicates a risk of significant harm to the environment as well as to the human health potentially caused by the export of hazardous waste to developing countries.

Fourth, the stricter interpretation of the ESM principle after the Ban Amendment will also lead to a stricter interpretation of Article 11 of the Basel Convention regarding bilateral and regional agreements with non-Parties. Article 11 provides “no-less environmentally sound” standards of ESM for those bilateral and regional agreements. This stricter interpretation of ESM may arguably apply to any transboundary movement which involves at least one party of the Convention ratifying the Ban Amendment.

Those significant changes in the operationalization of the Basel Convention through the Ban Amendment have affected its foundational principle of environmentally sound management, by shifting the focus in the elements of the principle from regulatory scheme in order to maintain the practices of transboundary movement of hazardous waste to the prioritization of prevention and minimization of waste generation and transboundary movement. This shift of focus has in fact strengthened the ESM as the foundational principle of the Basel Convention regime, since observance of waste hierarchy which promotes waste minimization before any transboundary movement and disposal is crucial for ESM principle.

While the changes brought about by the Ban Amendments are particularly limited to the operationalization of the Basel Convention for hazardous wastes, the adoption and entry into force of Plastic Waste Amendment focuses more on the changes in the operationalization of the Basel Convention for other wastes. Unlike hazardous waste streams, deliberations on plastic waste have heightened their urgency not because of its discernible hazardous properties but rather of its massive volume and its mismanagement globally. The volume and mismanagement of plastic waste globally have subsequently led to the increasing awareness of the risk of generation of plastic waste. Basel Convention’s regulatory scheme does not directly applicable to this waste stream, yet addressing the issue is becoming pivotal to ascertain Basel Convention’s adaptability in facing emerging waste issues. This study refers to this situation faced by the Basel Convention as the ‘relevancy dilemma’. Annex II of the Convention which uniquely addresses ‘waste requiring special consideration’ provides the necessary means for the Basel Convention in addressing the issue, since plastic waste generally does not fall within the ‘traditional’ definition of ‘hazardous’ under the Convention.

The inclusion of plastic wastes into Annex II exhibited that Parties essentially agreed to

apply the Basel Convention's regulatory scheme for any transboundary movement of plastic wastes. It follows a 'reverse-logic' from the commonly applied approach on the inclusion of hazardous wastes under the Convention: instead of the common practice of establishing a waste as considered hazardous because it constitutes a specific hazardous waste streams or having constituent of Annex I to exhibit Annex III characteristics, plastic waste inclusion under the Convention is because its widespread mismanagement having potential risks on a global scale. The broadening scope thereby serves as an incentive for the applicability of environmentally sound management principle.

Another changes in the operationalization relates to the requirements of 'almost free from contamination' and 'almost exclusively' introduced by the Plastic Waste Amendment. The requirement stipulates an emerging obligation of waste separation, in particular for plastic wastes proposed for transboundary movement. This obligation adds a new dimension to the traditional definition of waste life cycle to include separation before any proposed transboundary movement in order for such movement to be considered as observing environmentally sound management principle. Since observance of waste life cycle is important for environmentally sound management, this stricter standard of what constitutes environmentally sound management of plastic wastes might actually provide incentives for minimization of waste generation and subsequently its transboundary movement, as evidenced by the recent drop in plastic wastes exports following China's National Sword Policy in 2017.

In conclusion, this study argues that the Ban Amendment and the Plastic Waste Amendment have significantly changed the operationalization of the Basel Convention to a point it can be considered as exhibiting evolving characteristics. The significant changes do not change the original aim of the Convention as the convergence of expectations of actors within a regime. As such, it does not correlate with the general conception of regime change which suggests that any significant change to the regime's structures of right and rules and its operationalization leads to either regime's dissolution or a new regime to emerge. Regime evolution, as an alternative, argues that the significant changes in the operationalization of the Basel Convention has strengthened the environmentally sound management instead, by re-focusing the emphasis to the minimization of waste generation and transboundary movement

from the regulatory scheme of hazardous and other wastes.

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