

# Supreme Court Bans Hazardous Waste Trade

July 9, 2012

**Central Government will have to comply with Basel Convention, ratify Basel Ban Amendment, re-draft its Hazardous Waste Rules, 2008**

**Fate of asbestos laden dead US ships Exxon Valdez and Delaware Trader seem sealed, contempt proceedings to be heard on July 9**

ToxicsWatch Alliance (TWA) welcomes Supreme Court's judgment delivered on July 6, 2012 directed the central government to ban import of all hazardous/toxic wastes identified and declared to be so under the UN's Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal to which India is a party.

The para 35 of the judgment reads: **"The Central Government is also directed to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government is also directed to bring the Hazardous Wastes (Management & Handling) Rules, 1989, in line with the BASEL Convention and Articles 21, 47 and 48A of the Constitution."** This judgment is consistent with multilateral decisions made in October 2011, when 178 parties to the Basel Convention met in Cartagena, Colombia to not only re-endorse the Basel Ban Amendment forbidding the export of hazardous wastes from rich to poorer countries, but also resolve that the Basel Convention must continue to prohibit the dumping of end-of-life vessels on developing countries.

Now Union Ministry of Finance will have to issue notification under Section 11 of the Customs Act, 1962 to prohibit the import of hazardous wastes.

It is noteworthy that Jayanthi Natarajan, Union Minister of Environment and Forests informed the Parliament on May 21, 2012 that "Import of such (hazardous) wastes for disposal is not permitted. Import is permitted only for recycling or recovery or reuse with the permission of the Ministry of Environment and Forests and/or Directorate General of Foreign Trade", Union Commerce Ministry. In the light of the Court order, the information the Minister shared with the Lok Sabha that defined hazardous waste as recyclable material will have to be revisited.

The court reminded the central government that "A sum of Rs.10, 000/- was also imposed as costs against the Ministry of Environment and Forests."

Now Union Ministries of Finance, Commerce, Environment, Shipping and Steel besides Gujarat agencies will have to comply with the Basel Convention, ratify Basel Ban Amendment and redraft its illegal Hazardous Waste Rules, 2008 and 5 amendments. The Basel Convention was signed by India on 15th March, 1990 and ratified on 24th June, 1992.

This judgment will have implications for the bilateral free trade agreements with hazardous waste

trading nations like Japan, USA and others and trade in hazardous wastes by some Special Economic Zones. In recent years, central government has been prevailed upon by hazardous waste traders to dilute its laws and mutilate the Convention by entering into agreements in subservience of.

The following examples of departures from the Basel Convention and international law are noteworthy:

India has decided that transit states do not have to receive prior informed consent for all

- shipments of hazardous waste.

- Toxic wastes imported into the country under the garb of recycling

India has decided that dumping in rivers, oceans, and lakes, or burning waste somehow does not constitute disposal and therefore that which is dumped in aquatic environments, or burned, is not

- waste.

The international definition of “environmentally sound management” has been ignored in favor of a new definition of “safe for recycling” that states that as long as a material contains less than

- 60% contamination by a hazardous constituent, then it’s safe!

India has exempted bio-medical wastes and municipal wastes from this law although these are

- meant to be covered under Basel.

- India allows dioxin laced material imports for disposal

Waste asbestos imports are banned unless they are contaminating other substances (e.g. old

- ships) but the same is allowed.

It has failed to implement the Ban Amendment forbidding all imports of hazardous waste from

- developed countries.

It failed to recognize it is illegal to trade in waste with non-Parties of the Basel Convention such

- as the United States.

While since 1982 over 5924 dead and hazardous wastes laden ships have been dumped in Indian waters, the Hazardous Wastes Management (Handling & Transboundary Movement Rules, 2008)

provides that the Rules will not apply to “wastes arising out of the operation from ships beyond five kilometers of the relevant baseline as covered under the provisions of the Merchant Shipping Act, 1958 and rules made there under”. Subordinate legislations under Merchant Shipping Act,

- 1958 also merit attention.

Allows importers of hazardous waste oil in the garb of furnace and lubricant oil to remain

- untraceable

The judgment has pointed out that it is contrary to our constitution because the State is under obligation to protect people’s right to health and environment), instead of an environmental law being protective of human health and the environment, these subordinate hazardous waste legislations are trade centric for hazardous waste.

While the original petition was filed in 1995, the hazardous wastes case (Writ Petition Civil No. 657 of 1995) was dealt with on October 14, 2003. The case stayed and steered its course with the tireless efforts of Mr Sanjay Parikh, the lawyer, Members of the Supreme Court Monitoring Committee (SCMC) on Hazardous Wastes, Dr Claude Alvares, Dr. D.B. Boralkar and ToxicsWatch Alliance (TWA). All the subsequent and relevant applications that form the basis of the judgment were filed by them in public interest.

“I wonder how our blind and deaf system will respond. We have total turnaround from 2003 rules to 2008 rules. This must be by design and not default. SCMC members (the remaining two) were

intentionally kept out of loop by MoEF while making of 2008 Rules. In my opinion HWM regime in India is violating constitution/SC order but nobody seems to bother especially those who matter and are responsible for the same” says a SCMC member.

The judgment vindicates the position of remaining SCMC members and TWA who sought injunction to restrain Union of India from finalising of a Notification on hazardous wastes dated 28th September, 2007 and the publication of the Hazardous Wastes (Management, Handling & Transboundary Movement) Rules, 2008.

TWA had written to P Karunakaran headed Parliamentary Standing Committee on Subordinate Legislation “for an injunction to restrain Union of India” or any other possible relief through its examination of the Notification on hazardous wastes dated 28th September, 2007, which has been published as Hazardous Wastes (Management, Handling & Transboundary Movement) Rules, 2008, subsequent four amendments in the Rules, proposed fifth amendment in the Rules and the ‘Procedure for grant of approval for utilization of hazardous wastes as a supplementary resource or for energy recovery, or after processing under Rule 11 of Hazardous Wastes Management Rules, 2008’.

The current members of SCMC who were also the members of Supreme Court’s High Powered Committee on Hazardous Wastes Management headed by Prof M G K Menon have attempted to reveal the plot being set by hazardous waste traders.

Following a Supreme Court order, the Union Ministry of Labour constituted a Special Committee to examine “Impact of Hazardous Wastes on Workers’ Health” by its order of October 14, 2003 under Chairmanship of S K Saxena, Director General, Directorate of General Factory Advice Service and Labour Institute (DGFASLI) on the issue of medical benefits and compensation to workers affected by handling of hazardous waste, toxic in nature. The DGFASLI Committee’s report mentions lung cancer and mesothelioma caused by asbestos in all work involving exposure to the risk concerned among other occupational diseases caused by hazardous waste generating industries. The July 7, 2012 judgment does not provide any specific relief to the workers. So far the court has not done anything as per the recommendations of its own committee. This issue needs to be revisited.

Due to the disappearance of hazardous wastes from various ports and container depots, A.C. Wadhawan Committee was also constituted by the court to enquire into it. The waste oil trade is a part of black economy that is still flourishing. Court ought to ban it at the earliest.

It is noteworthy that all the incineration based municipal waste to energy plants have failed. In such a backdrop, the proposal of the hazardous waste to energy projects through the procedure for grant of approval for utilization of hazardous wastes as a supplementary resource or for energy recovery, or after processing under Rule 11 of Hazardous Wastes Management Rules, 2008 will have to be revisited in the light if the July 2012 judgment. This has not been examined as far as their adverse environmental health impact is concerned. This was unfolding under illegitimate acts of subordinate legislation on hazardous waste.

The intent of the Commerce and Environment Ministry stood exposed when it proposed an amendment to the Hazardous Wastes (Management & Handling) Rules; after amendment it was to read “Hazardous Materials (Management, Handling and Transboundary Movement) Rules, 2007. The proposed rules was to have the effect of exempting transit countries from obtaining prior informed consent for all shipments of hazardous waste to India. The proposal also stated that as long as a material contains less than 60 per cent contamination by a hazardous constituent, then it is safe

for our ecology. Waste asbestos embedded in the structure of the scrap material is not banned. This sleight of hand at redefinition attracted widespread criticism from environment and public health groups. Startled by the proposed Rules environment and public health researchers and activists had charged that it has been done at the behest of hazardous waste traders. Even the Confederation of Indian Industry (CII) had expressed its concerns in November 2007. The SCMC on Hazardous Wastes also objected. As a consequence the word “wastes” was not replaced with “materials” but “Transboundary Movement” remains. In effect, the original Rules were mutilated and the process of mutilation unfolded.

Through a jugglery of words in the subordinate legislations on hazardous wastes, Union Ministries of Commerce and Environment have paved the way for officially opening floodgates for the dumping of world’s hazardous waste in the name of recycling. This has unleashed unprecedented havoc on India’s environment and health of its citizens. These subordinate legislations on hazardous wastes seeks to undo established, science-based definitions of waste and consider waste that is being recycled somehow less hazardous than the waste being landfilled in order to curry favor with hazardous scrapping industries.

Through a not-so-subtle mangling of international definitions for “waste”, “disposal” and “safe recycling” both these ministries have designed a veritable global waste funnel that will ensure that the world’s waste will surge to our shores. All this is being done in the name of recycling.

It is quite clear now that Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 completely altered definitions are contrary to the international rules of the Basel Convention, which India is obliged to uphold. It is illegal for both these ministries pretend to implement the Basel Convention but utilise definitions that outwit the intent of the treaty.

Central government appears to have done its homework to justify hazardous waste trade in various disguises. Under Rule 23 of Hazardous Wastes (Management, Handling and Transboundary Movement) Third Amendment Rules, 2008 refers to the “Responsibilities of Authorities” which is specified in its Schedule VII that provides the List of Authorities and Corresponding Duties” wherein it is mentioned that Directorate-General of Foreign Trade constituted under the Foreign Trade (Development and Regulation) Act, 1992 has a duty to “Grant License for import of hazardous wastes”.

It is indeed strange that while the Environment Ministry admits that there is huge deficit of capacity to deal with hazardous wastes generated in the country, the new Hazardous Waste Rules, Amendments and Procedures permit traders to import hazardous wastes.

A SCMC member opines, “Truly, we take three steps forward and then five steps backward.” It is noteworthy that central government has ignored the recommendations of both the court appointed members of SCMC. The judgment ought to have revisited the table of assigned task with deadlines in the October 14, 2003 order because concerned agencies have not completed the task assigned to them in contempt of court so far with impunity.

It came to light from the Environment Minister’s statement in the Parliament that a co-ordination committee comprising of representatives from the Ministry of Finance, the Ministry of Commerce and Industries, the Ministry of Shipping, Central Pollution Control Board and select State Pollution Control Boards has been constituted that claims to be “working to sensitize the Customs authorities

regarding enforcement of these Rules in order to check illegal import of hazardous waste into the country.” It appears that through linguistic manipulation waste is been re-defined as non-waste. What has become evident is that Indian regulations offer least resistance to dumping of hazardous wastes. In fact it welcomes hazardous wastes trade in the name of “recycling or recovery or reuse” of hazardous wastes.

As a consequence hazardous waste importers are bringing in lakhs of tonnes of hazardous waste into India without facing any legal hurdle. Earlier, Environment Ministry’s Hazardous Waste Rules prohibited import of waste oil, ash and residues from incineration of municipal solid waste, plastic, and unsorted waste scrap. But the same was allowed under the Open General License of the export-import policy of the Commerce Ministry. This led to import of ash and residues from incineration of municipal solid waste has increased by about 130 times during 2006-2009. The import of plastic waste increased by seven times during this period. Countries such as Netherlands, Germany and the United Kingdom have realized that Indian regulations are hazardous waste friendly. There was a 48 per cent increase in hazardous waste trade import during 2006-2009.

Acknowledging such a situation, the then Union Environment and Forest Minister had written a letter to Union Commerce Minister in April 2010 urging alignment of Hazardous Waste Rules and Export-Import policy to reduce “scope of confusion” at implementation level. “I suggest that a joint group of the two ministries be set up to resolve the issue”, the minister said and had further added that some export-oriented units especially those in the Special Economic Zones (SEZ) were importing hazardous waste without seeking approval from either the Ministries. They were also operating without a mandatory “consent to operate” under environmental laws aimed at protecting the environment. The minister had said, “An impression also seems to have gained ground that such units are exempt from the provisions of environment regulations can import hazardous wastes without any permission. These impressions need to be corrected”.

What has happened since then is that instead of aligning and factoring in environmental concerns in the hazardous waste trade, blind profiteering has taken precedence over public health concerns. The Hazardous Wastes Rules do not apply to SEZ. The names of SEZs which are importing hazardous wastes must be disclosed.

As per a 54 page Report of the Committee to Evolve Road Map on Management of Wastes in India, Union Ministry of Environment & Forests there are about 36,000 hazardous waste generating industries in India which generate 6.2 million tonnes out of which land fillable hazardous waste is about 2.7 million tonnes (44%), incinerable hazardous waste is about 0.4 million tonnes (7 %) and recyclable hazardous waste is about 3.1 million tonnes (49 %). Indiscriminate and unscientific disposal of wastes in the past has resulted in several sites in the country to become environmentally degraded. Isn’t our own hazardous waste sufficient?

It is noteworthy that “141 hazardous waste dumpsites that have been primarily identified in 14 States/UTs out of which 88 critically polluted locations are currently identified” which in effect means that there no capacity to deal with these wastes. If they are unable to deal with the domestically generated waste in a scientific and environmentally sound manner and are compel them to dump them, how can Environment Ministry’s reply to the Parliament that implies that India has the capacity to deal with the imported hazardous waste for any purpose be deemed convincing.

The of bench of Justice Altmas Kabir and Justice J. Chelameswar made it clear that according to the apex court’s October 13, 1997 and October 14, 2003 orders, ship-breaking

operations could not be allowed to continue without strictly adhering to Basel Convention, precautionary principles, Central Pollution Control Board guidelines and without taking proper safeguards.

Sensing weakness in India's environmental regulatory agencies, US Maritime Administration (US MARAD) has unfolded its Ship Disposal Policy with Indian sea coasts as one of its key destinations. In the aftermath of the July 6 judgment, the fate of Sierra Leone flagged ex end-of-life US ship Exxon Valdez (currently named MV Oriental N, IMO No. 8414520) appears sealed. The matter will come up for hearing on July 9, 2012. The central and Gujarat government authorities will now have to take steps to prevent the entry of another dead and hazardous US flagged ship, "DELAWARE TRADER" (IMO No. 8008929) has been cleared by the U.S. Maritime Administration (US MARAD) for dismantling in the infamous shipbreaking yards of Alang beach, Bhavnagar, Gujarat. It is expected to arrive in Indian waters in the coming days. It was last reported at the Port of Maputo, Mozambique on 13 June, 2012. TWA demands that DELAWARE TRADER should not be allowed to enter Indian waters. These ships enter Indian waters and present fait accompli to the law enforcement agencies. The court's order will act as a deterrent.

India being a signatory to UN's Basel Convention and International Maritime Organisation (IMO)'s MARPOL (marine pollution) Convention is duty bound to work to completely eliminate pollution of the marine environment by discharge of oil and other hazardous substances from ships and to minimize such discharges in connection with accidents involving ships. The acts of omission and commission of Ministry of Shipping also merited attention in this regard.

In para 31 of the judgment, it reads: "...the question of ship breaking and distribution of hazardous wastes are being considered separately in the contempt proceedings, in these proceedings we expect and reiterate that the directions contained in the BASEL Convention have to be strictly followed by all the concerned players, before a vessel is allowed to enter Indian territorial waters and beach at any of the beaching facilities in any part of the Indian coast-line. In case of breach of the conditions, the authorities shall impose the penalties contemplated under the municipal laws of India."

The hazardous waste trade dumping situation in India further worsened during 1998 to 2012. This merits a parliamentary probe since the court has not constituted any new committee to examine the situation.

In manifest contempt of court, the non-cooperation of the Union Environment & Forests Ministry with the SCMC members is one of the key reasons for the sorry state of affairs in the hazardous ship breaking industrial operations.

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