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CONTENTS

ARTICLES

- The Basel Convention: Re-Visiting Some Socio-Legal Issues Pertaining to Transboundary Movement of Hazardous and Other Wastes . . . *Abdul Haseeb Ansari* 295
Parveen Jamal
Muhamad Hassan Bin Ahmad
- A Critical Analysis of the Developing Countries Participation in the WTO Dispute Settlement Mechanism . . . *Amit Singh* 323
Prerna Tara
- Rethinking 'Insanity' Defence in the Light of *Kumari Chandra* versus *State of Rajasthan*: Are Female Murderers 'Abnormal'? . . . *Aishwarya Deb* 350

NOTES AND COMMENTS

- Should De-Localised Arbitrations be Subject to another Domestic Legal System? . . . *Charles Chatterjee* 364
- Confirmation Bias- The Pitfalls . . . *Jyoti Dogra Sood* 376
- Transfer of Criminal Matters: Is it Ensuring Fair Trial? . . . *G. S. Bajpai* 391

BOOK REVIEW

- Partha Pratim Mitra*, *Birds, Wetlands and the Law: Indian and International Perspectives* (2019) . . . *Prakash Sharma* 401

BOOKS RECEIVED FOR REVIEW 405

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THE BASEL CONVENTION: RE-VISTING SOME SOCIO-LEGAL ISSUES PERTAINING TO TRANSBOUNDARY MOVEMENT OF HAZARDOUS AND OTHER WASTES

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Abstract

The Basel Convention with the Rotterdam Convention and the Stockholm Convention provides an international legal regime for prevention and control of transboundary movement of hazardous wastes for whatever reasons. This legal regime is supplemented with the Bamako Convention prohibiting import of hazardous wastes in African countries. They have large number of memberships and are successful in achieving the underlined objectives with the application of PIC mechanism. But for certain obvious reasons, smuggling of hazardous wastes and their transboundary movement in disguise of recycling them or using them as raw materials are on the rise, especially to African, Central Asian and South Asian countries. There are a number of cases proving this. Among them, the Trafigura case of Ivory Coast is the most notable one. The paper sheds light on topical issues pertaining to the legal regime. It also looks into the probable reasons for which poor countries succumb to be used as dumping grounds. The authors suggest that the provisions of the conventions should be strictly followed and for that all countries, developing, least developed and developed, should have enough political will to properly enforce the law based on the PIC principles. They also suggest that the membership of the Basel Convention should further be increased so that the menace of transboundary movement of hazardous wastes, which infringes the sovereignty of poor states, and violates rights of their citizens, could be alleviated.

I Introduction

IN RESPONSE to the outcry in developing and least developed countries against dumping of hazardous wastes in their territories, especially from the Organization of Economic Cooperation and Development (OECD) countries, which were leaving deleterious effects on the environment of these countries, with predominant objective

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to protect human health and the environment against the adverse effects of hazardous wastes, as a matter of rule the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal 1989¹ (hereinafter Basel Convention) controls the trans-boundary movement of hazardous materials without prior informed consent; and against the background of the free trade of the World Trade Organisation (WTO), the convention, in effect, restricts trade in hazardous wastes.² The movement of wastes are strictly under the prior informed consent (PIC) procedure enshrined in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998,³ which is ratified by more than 150 countries, and which applies to banned or restricted pesticides and industrial chemicals enlisted in the annex III of the convention. This convention supplements with the Basel Convention by protecting the sovereignty of the member states, health of their people and their environments. The Stockholm Convention on Persistent Organic Pollutants (POPs), 2001 which has 182 member states, attempts to control of POPs from being released into water, soil or air, as they are harmful to human and the environment. They can stay longer and travel through any medium. The three conventions work together, as there is one secretariat for them, the Basel, Rotterdam and Stockholm (BRS Secretariat). The Basel Convention particularly sought to ensure that developing countries are not used as dumping ground for toxic wastes. For that it has three-pronged approach, which are known as the three 'Rs' of the convention, reduce, reuse and recycle. The convention also believes that movement of wastes for reuse or recycle of hazardous wastes should be closest to the place of generation; that is why it controls the trans-boundary movement of wastes. The convention claimed to be one of the most successful international legal instruments for protection of the environment. However, instances of some developed countries smuggling or exporting in disguise of hazardous wastes to some developing countries in particular, African and Central Asian countries are still being reported. A phenomenon described as 'toxic colonialism' is truly exists even now.⁴ Moreover, it may be argued that as the Basel Convention approaches its 13th anniversary, it is clear from incidents such as the *Abidjan* case in 2006 and *Trafigura* case 2009 that it is failing in successfully

1 It was adopted on Mar. 22, 1989 and entered into force on May 5, 1992.

2 Hazardous wastes are determined on the basis of toxic, corrosive, ignitability, reactivity and eco-toxicity of wastes. They may generally be: clinical wastes, mining wastes, industrial wastes, agricultural wastes, end of life equipment and commodities, asbestos, PCB equipment, batteries, e-wastes, ship, etc. The convention currently addresses 27 specific categories of wastes and 18 waste streams.

3 The convention entered into force on Feb. 24, 2004.

4 Andrews A, "Beyond the Ban – Can the Basel Convention Adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?" 5(2) *Law, Environment and Development (LEAD) Journal* 265 (2009). Available at: <http://www.lead-journal.org/content/09167.pdf>. (last visited on July 15, 2019).

implementing its objectives of preventing industrialized country operators from exporting their hazardous wastes to developing and least developed countries.⁵ The situation is no better even after the addition of the Bamako Convention, 1998 triggered after the ineffectiveness of the Basel Convention in poor African countries, which out rightly prohibits the trade and dumping of hazardous substances.

The paper discusses the pertinent issues of topical nature emanating from the Basel Convention and Bamako Convention, 1998 that provide the basic legal framework on controlling dumping and international trade in hazardous wastes at the global level in general and African and Asian level in specific. As the Basel and Bamako Conventions have both fallen short in attaining their objectives, the paper looked into the general aim of controlling the trans-boundary movement of hazardous wastes and some articles of these conventions prohibiting international trade in toxic waste. The legal and political commitment put forward in enforcing the aims of these conventions has also been examined. Facts and decision of the *Trafigura* case of the Ivory Coast will be discussed in context. The paper finally discusses the factors that are responsible for the continued trade and dumping of hazardous wastes in African and some Asian countries and offers viable suggestions on how this practice can be diminished and ultimately eliminate.

II Protection of the environment and trans-boundary movement of hazardous substances

Since the Second World War, a number of United Nation's (UN) agencies became interested in protection of the global environment and became keen in framing pertinent environmental regulation.⁶ This is because the post-war situation as demanded was *laissez-faire* industrial revolution, which ultimately started posing blatant serious deleterious impact on the environment, and which was conspicuously noticed as a blatant mistake of errant human activities at the United Nations Conference on Human Environment, 1972 (UNCHE). In this scenario, the United Nations Environmental Program (UNEP) played particularly important role, along with its other notable functions, in diffusing environmental regulatory technologies to developing countries, sponsoring negotiations on new treaties and supporting a growing band of regional environmental organizations.⁷

5 *Ibid.*

6 Such as the World Health Organization (WHO) where human health overlaps with environmental regulation, International Labor Organization (ILO) gets involved where worker health and safety and environmental concerns overlap, etc.

7 Objectives of UNEP include:

- To promote international cooperation in the field of the environment and recommending appropriate policies.
- To monitor the status of the global environment and gathering and disseminating environmental information.

The UNEP is a primary driving force in the UN system for international activities related to the sound management of environmental processes and developing policies, especially in developing countries, for sustainable management of the environment for the benefit of all. Its primary aim is: “to promote chemical safety and provide countries with access to information on toxic chemicals. It also promotes chemical safety by giving expert opinion on policy advice, technical matters and capacity building to seeking developing countries and least developed countries, especially on activities on chemicals related to the implementation of the Strategic Approach to International Chemicals Management (SAICM) 2006.”⁸ Over the years, the world generally witnessed development of legal regimes from time to time via global and regional conventions promoting and according protection to the environmental, safety to the human, animal and plant life and health and prohibiting irresponsible dumping of toxic and hazardous wastes and their movement for the sake of disposal, especially in developing and least developed countries, distinctly or in disguise. Below will be a discussion on the relevant conventions pertaining to management and transboundary movement of wastes.

-
- To catalyze environmental awareness and action to address major environmental threats among governments, the private sector and civil society.
 - To facilitate the coordination of UN activities on matters concerned with the environment, and ensuring, through cooperation, liaison and participation, that their activities take environmental considerations into account.
 - To develop regional programmes for environmental sustainability.
 - To help, upon request, environment ministries and other environmental authorities, in particular in developing countries and countries with economies in transition, to formulate and implement environmental policies.
 - To provide country-level environmental capacity building and technology support.
 - To help develop international environmental law, and providing expert advice on the development and use of environmental concepts and instruments.

The role of UNEP includes:

- Assessing global, regional and national environmental conditions and trends.
 - Developing international and national environmental agreements and legal instruments.
 - Strengthening institutions for the wise management of the environment.
 - Integrating economic development and environmental protection.
 - Facilitating the transfer of knowledge and technology for sustainable development.
 - Encouraging new partnerships and approaches within civil society and the private sector
- See, Braithwaite John and Drahos Peter, *Global Business Regulation 259* (Cambridge University Press, United Kingdom, 2000).

8 *Available at:* https://sustainabledevelopment.un.org/content/documents/SAICM_publication_ENG.pdf (last visited on Aug. 2, 2019); Also see, United Nations Environmental Programme. Chemicals and Waste, *Available at:* <http://unep.org/chemicalsandwaste/>. A clear nexus exists between environmental quality and human health. This was affirmed by the UNEP 2016 report on ‘Healthy Environment, Healthy People.’

The Basel Convention⁹ is of particular relevance when it comes to the question of movement and disposal of hazardous wastes. Relevant provisions of the convention *vis-a-vis* transboundary movement of wastes are discussed below.

III The Basel Convention on the prohibition of trans boundary movement of hazardous wastes

The Basel Convention was negotiated and signed in the wake of the, 1972 UNCED, which prompted increased environmental awareness resulting in public awareness, tightening of environmental regulations in industrialized countries resulting in tremendous increase in waste generation and costly waste management, especially the OECD countries, strengthening of the “Not in my backyard Syndrome” (NIMBY), and escalation of disposal cost. This resulted in disposal of wastes in African and East Asian states, where regulations were either lacking or were of very low standards, and people were relatively not enough environmental conscious. Many states considered it as environmental injustice. The convention, as stated above has three pillars: to reduce ‘hazardous wastes’ *via* promotion of environmentally sound technology (article 4); to have environmentally sound management of wastes (article 4); to restrict transboundary movement of hazardous wastes, except on environmentally sound management under an amicable regulatory mechanism, which will respect the sovereignty of states (articles 6,7 and 11); to increase cooperation among states and technical assistance to developing states (articles 10 and 13), and it be facilitated by the secretariat of the convention (article 16); to take back wastes illegally exported or to ensure safe disposal of that (articles 8 and 9); and to establish regional or sub-regional centers for training and transfer of technology.

The Basel Convention defines ‘Waste’ as: “substances or objects that are disposed of or are intended to be disposed off or are required to be disposed of by the provisions of national law.”¹⁰ These cover toxic, poisonous, explosive, corrosive, flammable, Eco toxic and infectious wastes. While trans-boundary movement is defined as: “...any movement of hazardous waste(s) or household wastes or incineration ash from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement”.¹¹ Thus, movement of hazardous wastes means the movement of harmful substances both environmentally and health wise from one state or group of states to another state or group of states. Often this is a practice of some developed countries, especially OECD countries, exporting for dumping of harmful and hazardous substances to developing and least developed least developed countries (LDCs).

9 *Supra* note 1.

10 *Id.*, art. 2(1).

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1989 and it came into force in 1992. The convention operates at international level and puts an onus on exporting countries to ensure that hazardous wastes are managed in an environmentally sound manner in the country of import.¹² As can be shown below, the countries of export often violate the safety conditions for a healthy disposal of waste(s). As a principal international legal instrument regulating the trans-boundary movement and disposal of hazardous wastes, the main goal of the convention, as stated above, is: “to protect by strict control, human health and the environment against the adverse effects, which may result from the generation and management of hazardous wastes and other wastes.”¹³ It will be appropriate to say that the extended meaning of ‘human health and protection of the environment would be “protection of human, animal and plant life and health in specific and protection of the environment in specific’.

The preamble of the Basel Convention recognizes the sovereign rights of states where hazardous wastes are dumped or intended to be dumped in these words: “Fully recognizing that any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory; ... recognizing also the increasing desire for the prohibition of trans-boundary movements of hazardous wastes and their disposal in other States, especially developing countries.”¹⁴ The spirit of the convention can easily be elicited from the preamble as protecting developing and least developed nations from the ill effects of hazardous waste(s) disposal in their territories. Similarly, in light of that spirit and the salient objectives stated above, the obligations of the convention are to:

- Minimise generation of hazardous waste;
- Ensure adequate disposal facilities are available;
- Control and reduce international movements of hazardous waste;
- Ensure environmentally sound management of wastes; and
- Prevent and punish illegal traffic.

Furthermore, the Basel Convention places obligations on countries that are party to the convention and insists that, “the Parties concerned or other Parties, as appropriate,

11 *Id.*, art.3.

12 *Supra* note 1. Available at: <https://www.environment.gov.au/protection/hazardous-waste/conventions>. The Basel Convention has a total of 29 art., 9 annexes, 1 protocol and 2 annexure.

13 Orellana M.A and Azoulay D, *The Centre for International Environmental Law (CIEL), Shipbreaking and the Basel Convention: Analysis of the Level of Control Established under the Hong Kong Convention*, 11 (2011, Geneva).

14 Preamble to the Basel Convention.

shall ensure through co-operation that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the state of import or elsewhere as appropriate.” To ensure that is strongly executed, the convention called on each Party to introduce “appropriate national/domestic legislation to prevent and punish illegal traffic.”¹⁵ Parties are under duty bound to lessen to the best of their capacity the amounts of wastes that are exported to treat and dispose as close as possible to the places of generations and to prevent or minimize their generations at their source.

The convention is one of the most comprehensive global environmental agreements on hazardous wastes and other wastes, with 186 parties (as of August 6 2018). In fact, it has nearly universal membership. The convention generally aims: “to protect human health and the environment against the adverse effects resulting from the generation, trans-boundary movements and management of hazardous and noxious wastes and other wastes by banning their trans-boundary movement for dumping directly or in disguise of recycling or re-use or as ‘dirty trade’. Under the Basel Waste Solution Circle, it lays extra emphasis on environmentally sound management (ESM) of hazardous wastes, preferably at or near the place of generation. It provides a forum for developed countries to demonstrate and train developing and least developed countries to some successful ESM activities. It also aims to establish partnership among them to this effect. It has got support of several NGOs and professional organizations because minimization of waste generation and the environmentally sound waste management is the solution to the problem posed by ever increasing generation of hazardous wastes.

To assist in the implementation of the provisions of the convention and ensure hazardous waste are technically managed, the convention established Regional and Coordinating Centers on 18 July 2014. The centers are located in Argentina, China, Egypt, El Salvador, Indonesia, Islamic Republic of Iran, Nigeria, Russian Federation, Senegal, Slovak Republic, South Pacific Regional Environment Programme (Samoa), South Africa, Trinidad and Tobago, and Uruguay. They deliver training and technology transfer regarding management of hazardous wastes and other wastes and the minimisation of their generation, so as to assist and support parties in their implementation of the convention.¹⁶ The convention provides for: “the establishment of Regional Centers for Training and Technology Transfer (BCRCs) regarding the management of hazardous and other wastes, and the minimization of their generation.”

15 Gwam, C.U., “Human Rights Implications of Illicit Toxic Waste Dumping from Developing Countries, Including the U.S.A., Especially Texas To Africa, in particular, Nigeria” 38 *T. Marshall L. Rev.* 241 (2012).

16 Peiry, K.M, Basel Convention Regional Coordinating Centres. Available at:<http://www.basel.int/Partners/RegionalCentres/Overview/tabid/2334/Default.aspx> (Last Accessed 29/11/2016).

The centers were established, and operate, pursuant to relevant provisions of the Basel Convention and decisions of the Conference of Parties.¹⁷ Accordingly, the convention made it criminal the illegal trafficking of hazardous waste. It provides that, “that illegal traffic in hazardous wastes or other wastes is criminal¹⁸ and each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention”.¹⁹ The punitive measures are important in wake of the Ban Amendment, which banned *firstly*, Movement of wastes for disposal from annex VII countries (OECD countries, EC and Liechtenstein) to non-annex VII. *Secondly*, Movement of wastes for recovery and recycle from Annex VII countries to non-Annex VII countries.

The Basel Protocol on Liability and Compensation, which has unfortunately not come into force, is actually a good step in right direction. It aims to protect the rights of developing and least developed countries that are targeted for illegal dumping and illegal trafficking of wastes. It provides a mechanism for prompt payment of compensation in case of damage suffered by these acts. The authors are of the opinion that the developing Members countries of the Basel Convention should ratify the Protocol because it aims to protect their interests.

The World Custom organization (WCO), which has 182 members and which is operating around the globe, is coordination in enforcement of the treaty norms of the Basel Convention, especially norms pertaining to illegal trafficking of hazardous wastes. In view of the increasing challenges of illegal trafficking, e.g. generation of 400 million tonnes of hazardous wastes, and illegal shipping and dumping of a big portion of it at vulnerable places. To control it, the WCO is working with Regional Intelligence Liaison Offices (RILOs).²⁰

There is a reporting system in the Basel Convention so that the secretariat could keep the track of generation, management and movement of wastes. The generating states are required to maintain waste inventory covering: waste streams, geographical area, specific exclusions, level of classification of waste generating facilities, and the system and the level of classification of hazardous wastes and other wastes, and harmonization between the national and Basel codes.²¹

17 *Ibid.* See also, Basel Convention art. 14.

18 *Id.*, art. 4 (3).

19 *Id.*, art 4 (4).

20 See, WCO: “On World Environment Day, WCO for a ‘World Without Plastic’”, *Available at:* <http://www.wcoomd.org/en/media/newsroom/2018/june/on-world-environment-day-wco-strives-for-a-world-without-plastic.aspx> (last visited July 12, 2019).

21 See, UNEP: Basel Convention, the world environmental agreement on wastes, *Available at:* <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> (last visited on July 20, 2019).

The Bamako Convention, 1998 as noted above, seems to be more preemptive in comparison to the Basel Convention as it bans import of hazardous and other wastes in African countries. It is a different story that to what extent the convention narrates the success story, when a country like Nigeria and some others have signed the convention but have not yet ratified. Moreover, the authors feel that there is no need to have total ban in order to show total solidarity among the African countries when the Basel Convention itself authorizes member countries to ban entry of wastes in their territory. Also, in wake of the increase of the use of waste to wealth technology, a variety of wastes can be used for producing value-added products, *e.g.*, biofuels and lots of other products via bioconversion are already in practice. This technology seems to have no limits, and for that wastes will have to be moved from one country to another country. However, there is a need to effectively implement the treaty norms of the Bamako and Basel Conventions.²²

The Basel Convention is suffering from some inherent weaknesses. It appropriately respects the sovereignty of the member states by prescribing that wastes can enter into the territory of a state only on permission of that states on basis of the 'prior informed consent' (PIC) mechanism for which is provided in the Rotterdam Convention 1998, provided that "if the exporting countries do not have sufficient disposal capacity or if exporting countries do not have disposal sites that can dispose of the waste in an environmentally sound manner or if the wastes are required as a raw material for recycling or recovery industries in the importing countries". But there are plenty of scopes of avoiding or evading this requirement. Wastes can be smuggled without the knowledge of state authorities. They can be imported or exported under the PIC mechanism in disguise of recycling or re-use and which can easily be supported by false statement or evidence. In fact, it is common for economic reasons or some other vested interests or under threat even after the treaty rules of this convention and Bamako Convention, local laws enacted to enforce them. If political will on the part of the importing countries lack, laws can easily be flouted. Some containers of hazardous wastes, including nuclear wastes were discovered dumped along the Somali coast causing health hazards to a number of people.²³ Was it deliberate or accidental? It could not be ascertained. However, in 2014, the British court sentenced a scientist for

22 See, Faga, E. "The Transboundary Movement of Hazardous Wastes: A Comparison between Basel and Bamako Conventions", Ph.D. Thesis submitted to Tilburg University, 2016. The thesis can be, *Available at:* <http://arno.uvt.nl/show.cgi?fid=141334> (last visited on June 30, 2019). Also see, UNEP: "Twenty Years of the Bamako Convention: A Time for More Effective Implementation", *Available at:* https://wedocs.unep.org/bitstream/handle/20.500.11822/22556/Twenty%20Years%20of%20the%20Bamako%20Convention_A%20Time%20for%20More%20Effective%20Implementation.pdf?sequence=1&isAllowed=y (last visited on June 30, 2019).

23 See, ISS, "Stop dumping hazardous waste on African shores", *Available at:* <https://issafrica.org/iss-today/stop-dumping-hazardous-waste-on-africas-shores> (last visited on June 30, 2019).

16 months jail in connection of exporting 46 tonnes of hazardous electrical waste illegally to Africa, mainly to Nigeria and Ghana. One of the blatant examples of illegal trafficking of highly toxic chemical wastes is the *Trafigura* case of Ivory Coast, where in 2006 toxic and seriously dangerous wastes were shipped by Probo Koala ship from Amsterdam to Abidjan, Ivory Coast. The consequences of this act revealed that over 1000 people had suffered serious health-related harms and sought medical helps. A similar incident took place in 1987 when toxic wastes were dumped in Koko village, Delta State Nigeria. The *Trafigura* case in particular is one of the most illustrious cases in relation to dumping of hazardous wastes from developed to developing countries. Below is the highlight of the *Trafigura* case.

The *trafigura* case

On 19 August 2006, the ship Probo Koala unloaded 500 tonnes of hazardous waste at Abidjan, Côte d'Ivoire (Ivory Coast). This waste was disposed of at open-air sites around Abidjan. The London office of Trafigura, a Dutch international petroleum trader, chartered the ship. The Probo Koala had made an attempt to release this waste at the port of Amsterdam; but the port service did not accept the waste without extra handling charge because of the waste's alleged toxicity. The ship left the port of Amsterdam without discharging its waste. After the waste from the ship was discharged in Abidjan, people living near the discharge sites suffered from a variety of health hazards. From August 21, 2006, residents started to complain of a terrible smell and from September 5, while at the same time free admission to hospitals was announced by a government official, tens of thousands visited local hospitals. It was soon alleged that the slops had caused serious injuries as the waste was caustic soda and petroleum residue. Sixteen people died, allegedly from exposure to this waste, and more than 100,000 had sought medical attention.²⁴

It is important to relate that before the incident, and precisely on July 2, 2006, Trafigura attempted to have the waste treated in Amsterdam but eventually disagreed on the revised price proposed by the contracted company, APS. After a failed attempt in Lagos (Nigeria), Trafigura called for an experienced port agent in Abidjan (Ivory Coast), WAIBS, to select an authorized company there. WAIBS recommended Compagnie Tommy, a recently licensed local operator. The discharge of slops to Compagnie Tommy was conducted with the approval of the port authorities and in the presence of both the police and customs officials.²⁵

24 Trafigura Lawsuits (Re Cote d'ivoire) Business and Human Rights Resource Centre, *Available at*: <https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire> (last visited on July 10, 2019).

25 The Probo Kuala Case in ten questions. What happened?, *Available at*: <http://www.trafigura.com/resource-centre/probo-koala/>. (last visited on June 25, 2019).

Trafigura sent two of its executives to Abidjan in August 2006 to investigate what happened. These executives and a representative from a Trafigura subsidiary, Puma Energy, were arrested by Ivorian authorities and imprisoned. On February 12, 2007 the Government of Côte d'Ivoire signed a settlement agreement with Trafigura in which the company agreed to pay 198 million dollars to the Ivorian government for a compensation fund, the construction of a waste treatment plant and to assist in the recovery operations. However, the company stressed this payment was not “damages” and that it did not admit liability. Côte d'Ivoire agreed to drop any prosecutions or claims, now or in the future, against Trafigura. After this settlement agreement was reached, the Trafigura executives and the Puma Energy representative were released from prison. Subsequently, several claims were sustained as against this background. These claims cut across the courts in the United Kingdom, the Netherlands and in France:

In the High Court of Justice in London, a group action was sustained by 30,000 claimants from Ivory Coast, alleging that the waste had high level of caustic soda, as well as a sulphur compound and hydrogen sulphide making it hazardous waste as defined by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. In the Netherlands, the prosecutors instituted a criminal action accusing Trafigura of disposing illegally, hazardous wastes too. Alleging further that Trafigura caused “bodily, moral and economic injury...to the plaintiffs,” and requests that Trafigura pay each claimant 2,500 Euros in compensation, as well as cleaning up the waste. The claim from France was from three French victims of the Probo Koala incident. They, in turn, filed a complaint against Trafigura before an examining magistrate in Paris alleging corruption, involuntary homicide and physical harm leading to death.²⁶

Summarily, the Probo Koala toxic waste dumping incident resulted not only in criminal prosecution of the international oil trading company Trafigura in the Netherlands but also civil claims against Trafigura before the High Court of London by a large group of Ivorian citizens. This had gone a long way in showcasing the extent of damage sustained by the victims of Trafigura's action.

Some interested parties continue to claim that the events and their consequences were not fully investigated and that Trafigura's role remains unclear. On February 16, 2015 and January 11, 2016 respectively, two Dutch claim vehicles (“Stichtings”) allegedly representing more than 100,000 Ivorian claimants each, have introduced new liability claims in the Amsterdam District Court.²⁷

26 Trafigura Lawsuits (Re Cote d'ivoire) Business and Human Rights Resource Centre, *Available at:* <https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire>. (last visited on July 10, 2019).

27 The Probo Kuala Case in ten questions. What happened? *Available at:* <http://www.trafigura.com/resource-centre/probo-koala/> (last visited may 30, 2019).

Lessons to learn from the Trofigura episode is that illegal dumping of wastes along any coast in any country can be a matter of public outrage nationally and internationally; and courts can take cognizance of such illegal dumping and can award exemplary compensations. The culprit can also be prosecuted in the local court under national laws or in the court where the ship is registered for flouting international law. Both Holland and Trafigura flouted the EU law, which prohibits illegal dumping of wastes to Africa, Caribbean and Pacific States. They had to be held responsible for it. It may be noted here that still there are a number of claims yet to be settled. The authors solicit from the States not to engage in such illegal dumping activities. They should have political will not to harm people in other countries. International NGOs has to be watchful and if any such illegal acts occur they should help bringing cases against culprits, because according to the according to the Greenpeace and Amnesty Report published on September 12, 2012, the irony is nothing to stop similar disaster.²⁸

IV Trade in hazardous wastes from developed to developing countries

The safe disposal of hazardous wastes still remains a challenge for many industrialized countries. It was observed that an enduring feature of international trade in hazardous wastes is lack of reliable information on their quantities, composition and trans-boundary movement.²⁹ The existing data is characteristically inappropriate and inconsistent. As noted above, due to the difficulties, shortage of man power and cost associated with proper disposal of hazardous wastes, it is simply shipped to developing countries - mostly in disguise of trade for re-use or re-cycle - which lack the capacity or proper facilities to handle the wastes, as used products.³⁰ This is commonly in Africa and some of the Asian-Pacific countries where there is substantial and persistent under-reporting, lack of preventive laws, and lack of political will for some vested interests. Some countries that are known importers, such as Bangladesh, India and Nigeria had sporadic reporting records over the period of 1999-2007.³¹ The position in India and Nigeria has tremendously improved; yet there are some developing and least developed

28 The Guardian, "Trafigura Lessons have not been learned, report warns", *Available at:* <https://www.theguardian.com/environment/2012/sep/25/trafigura-lessons-toxic-waste-dumping> (last visited on June 30, 2019).

29 See, for instance the data compiled by the Secretariat of Basel Convention, which was compiled from reports from parties to the Convention 2004-2006 (Geneva: secretariat of the Basel Convention and UNEP, 2009) Cox, G. The Trafigura Case and the System of Prior Informed Consent under The Basel Convention – A Broken System? *Law, Environment and Development (LEAD) Journal* Vol. 6/3 2010 P.266 *Available at:* <http://www.lead-journal.org/content/10263.pdf> (last visited on July 30, 2019).

30 20 Countries that are Used as Dumping Grounds for your Waste. *Available at:* <http://whenonearth.net/20-countries-that-are-used-as-dumping-grounds-for-your-waste/> (last visited on June 20, 2019).

31 *Ibid.*

courtiers in Africa and Asia are being successfully targeted. Unfortunately, some of the exportation is done in disguise and in violation of the informed consent principle. Poverty is the main reason for that illicit practice in disguise of fair trade.

In the African continent, member states of African countries under the auspices OAU³² felt that they for economic reasons were not properly protect themselves under the Basel Convention because of its failure to impose an outright ban on trade in hazardous wastes. Consequently the Bamako Convention came into being which placed a complete prohibition on imports of hazardous wastes, not even due to trade, into Member States.³³ However, even the Bamako Convention does not seem to address the challenge. Instances of waste dumping in in disguise of trade in Africa still abound.

It is for this reason that the WTO and multilateral environmental agreements (MEAs) had also underscored by trade ministers at the 2001 Doha Ministerial Conference, reflecting the need to have an amicable coexistence between international trade (WTO) and protection of human health and the environment (MEAs), including the Basel Convention under these mandates, first, Clarifying the relationship between WTO rules and trade measures in MEAs. Second, Developing procedures for exchange of information between MEAs secretariats and the WTO committees, *e.g.*, Committee on Trade and Environment (CTE) and CTE Special Session (CTESS). Third Trade in environmental goods and services, in particular the extent of which it may be liberalized taking into account protection of the environment. Fourth, Adoption and practice of preventive measures, *e.g.* sustainable generation and management of wastes and labelling. Fifth, Cooperation and coordination among the generating states and international organizations, including the WTO; and to take range of actions in that regard. This has been stressed from time to time at the meetings of the Conference of Parties (COPs). The authors are of the opinion that member states of the Basel, Rotterdam and Stockholm Conventions, especially developed countries, should develop enough political will to adopt certain restrictive measures to protect human health and environment in other countries. The WTO dispute settlement body (DSB) should always try to work on co-existence of trade law and environmental law while deciding deposes under article XX of the GATT.³⁴

V Exportations of wastes to African and Asian countries in disguises

It has been the trend for a long time now that some developed States for some or the other reasons choose developing States, mainly in Africa and Central Asia, as their

32 Organization of African Union now AU (African Union).

33 *Supra* note 4 at 172.

34 *Available at:* <http://www.basel.int/Implementation/LegalMatters/TradeandEnvironment/CaseLaw/tabid/3511/Default.aspx> (Last visited on June 20, 2019); and <http://www.basel.int/Implementation/LegalMatters/TradeandEnvironment/CaseLaw/tabid/3511/Default.aspx> (last visited on June 20, 2019).

dumping grounds. Sometimes, the dumping is carried out without the approval of the developing States, and in other times with the approval of developing states in disguise irrespective of the harm involved in the disposal of the hazardous waste.

The 1987 industrial wastes, which had dioxin hazardous chemical, were exported to Guinea from Philadelphia. Likewise, the exportation of toxic elements including more than 10,000 tonnes of radioactive wastes and other toxic wastes from Italia to Koko, a village in Nigeria, and the shipment of mercury waste products incinerator from Great Britain to South Africa, which resulted in severe poisoning of the workers and nearby communities, including adversely endangering their survival, are some major example of toxic dumping in Africa.³⁵

Asian countries had a share of their negative experiences. Developed countries have taken them as dumping grounds for hazardous wastes. The port of Manila, in the Philippines, found itself the unwilling dumping place for the 50 shipping containers, each about the size of a school bus, full of trash from Canada. In china, many devices are shipped back as e-wastes to the country despite the bans that are in place. In India, a lot of European wastes including metals, textiles and tires end up in there. Pakistan too is not left out, according to Basel Action Network, more than 500,000 used computers are still sent to Pakistan each year from developed countries. Dangerous e-wastes are finding its way to Pakistan from countries such as Singapore, the US and also from some European countries despite the fact that it is in clear violation of the international laws.³⁶

In the Philippines, containers supposed to contain plastic for recycling but when opened contained garbage, used diapers along with other hazardous wastes. In Indonesia, containers, although labelled as scrap metals, custom officials found out that the materials were mixed with sand, plastics, and asphalt, which are hazardous wastes. In Guinea too, the waste dumped by a Norwegian company arrived labelled as raw material for building bricks. The noxious smell prompted officials to take action and realize it was not what it was labelled.³⁷ These are some examples of hazardous wastes being disposed in developing countries in disguise.

The late 1980's saw a series of incidents in Africa, which highlighted the poor treatment and management of hazardous waste shipments originating from the OECD countries. The most prominent example was the 1988 incident of Koko, Nigeria. A native farmer

35 MegnitusAdugna "Environmental Injustice, Human Right Violation and Development in Africa" (A thesis submitted to department of philosophy, Addis Ababa University, June, 2015)

36 Krunk K., Top 20 Countries That Are Used as Dumping Grounds of the World's Trash. *Available at:* [http://whenonearth. Net/20 countries- that- are used- as- dumping- grounds- for- your- waste/](http://whenonearth.Net/20 countries- that- are used- as- dumping- grounds- for- your- waste/)(Last visited on June 20, 2019).

37 *Ibid.*

lent his land for 100 US dollars per month to an Italian company ostensibly for the storage of fertilizer only to discover the barrels contained polychlorinated bisphenols (PCBs) and asbestos fibers.³⁸ It was also discovered that the 8,000 drums of the PCBs were the world's most hazardous wastes. Many Nigerians in Koko, including Chief Nana, stated that they used empty drums for storing and drinking water from them, which resulted in their ailment. The Gwam states that: "dumping of toxic wastes in Nigeria, like other places, is a violation of the right to good health and life as attested to by the sickness and subsequent death of Chief Nana of Koko and members of his household following the toxic waste dumped in his compound."³⁹

Similarly, the dumping of computer wastes and other electronic wastes has been a growing problem for countries in West Africa, particularly Nigeria, with attendant ecological and human health risks.⁴⁰ A recent Report (2016) shows that Nigeria is becoming a thriving electronic graveyard as tonnes of discarded appliances from all over the world find their way there with estimates of 66,000 weight tons of used electronic wastes full of toxics in 2015 and 2016. According to the UN e-wastes are illegally dumped in poor nations. It may be noted that exports for re-use or re-furbish are legal, but they are falsely classified as 'used goods' although they are non functional. The European Environment Agency says that around 1.3 million tonnes of used electronic products are shipped out of EU every year, mostly to West Africa and Central Asia. They can be processed in dangerous and inefficient conditions causing serious harm to people and the environment in and around that area.⁴¹ This has adverse environmental and health effects, especially to these developing nations that are not

38 Cox, G. "The Trafigura Case and the System of Prior Informed Consent under The Basel Convention – A Broken System?" 6(3) *Law, Environment and Development (LEAD) Journal* 266(2010) Available at: <http://www.lead-journal.org/content/10263.pdf>. (last visited on July 20, 2019). A similar incident occurred in 1986 in Guinea-Bissau where highly toxic incinerator ash from Philadelphia was dumped on an open-air site. This was after a number of unsuccessful attempts to unload the consignment in Caribbean states. The Guinean- Norwegian firm who imported the waste claimed it was raw material for bricks. This pattern of deliberate mislabelling was a recurring feature of the trade in hazardous waste at the time, particularly to less developed countries.

39 *Supra* note 15 at 57.

40 *Supra* note 38 at 266-269.

41 *The Guardian*, "Toxic 'e-waste' dumped in poor nations, says United Nations", Dec.14, 2013, Available at: <https://www.theguardian.com/global-development/2013/dec/14/toxic-ewaste-illegal-dumping-developing-countries> (last visited on June 30, 2019). According to a study, as of Sep.8, 2016, top 20 countries used as dumping grounds are: Ghana, the Philippines, Nigeria, Somalia, China, India, Vietnam, Pakistan, Bangladesh, Ivory Coast, Indonesia, Kenya, Guinea, Haiti, Mexico, Zimbabwe, Lebanon, South Africa and Sweden. Krunk, Kid, "Top 20 Countries That Are Used As Dumping Grounds Of The World's Trash", Available at: <http://www.atchuup.com/countries-used-as-dumping-grounds-of-worlds-trash/> (last visited on June 20, 2019).

only poor but also lacking in medical capacity to treat the consequential ailments from these toxic and hazardous substances.⁴²

There has been increasing concern over cases of sub-standard quality counterfeiting and the dumping of near-end-of-life and end-of-life electrical and electronic appliances in Nigeria, mainly at the Alaba International Market in Lagos. Used Electrical Electronic Equipment (UEEE) from developed countries have become highly sought-after commodities in Nigeria in recent years in an attempt to bridge the so called “digital divide” and make information communication technology (ICT) equipment easily available at affordable prices. However, this has led to a massive flow of obsolete Waste Electrical and Electronic Equipment (WEEE), electronic waste, e-waste or end-of-life electrical/electronics to the country. Most times imported UEEE is mixed with end-of-life (e-wastes) or near-end-of life electrical and electronic equipment. Some of this equipment contains hazardous substances (heavy metals, like lead, mercury, cadmium, and organics, such as polychlorinated biphenyls and brominated flame retardants) that can have adverse consequences on the environment and human health, especially when they end up as waste and/or are improperly managed using crude methods such as dumping on refuse sites or open burning to recover copper metals.⁴³

Prior to the dumping of toxic waste in Koko village as highlighted above, due to feeble, untrained and insufficient enforcement personnel, the environmental management was poor and enforcement of laws was inefficient. Emanating from the Koko toxic waste incident, the Federal Government issued the Harmful Waste Decree 42 of 1988, which enabled the creation of the Federal Environmental Protection Agency (FEPA) through Decree 58 of 1988 and 59 (amended) of 1992.⁴⁴ The FEPA was entrusted the total charge of management and protection of the environment. It is on record that by the establishment of FEPA, that Nigeria became the first African country to establish a national institutional mechanism for environmental protection. In 1999, under the Federal Ministry of Environment, in order to consolidate the institutional framework, several departments were merged, but in the lack of any enabling law to take preventive and punitive actions, it remained defunct for long. This turned that existing law as dead letters, as they could not properly be enforced.

Because of lapse in the Decree, the Federal Government in line with section 20 of the 1999 Constitution of the Federal Republic of Nigeria⁴⁵ established the National

42 *Environment Health News*, “The world is sending tons of illegal, electronic waste to Nigeria: Report”, April 19, 2018, at: <https://www.ehn.org/how-much-e-waste-is-shipped-to-nigeria-2561214315.html> (last visited on June 20, 2019).

43 *Supra* note 15 at 270.

44 *Available at*: <http://www.nesrea.gov.ng/about/index.html> (last visited on June 20, 2019).

45 Constitution of the Federal Republic of Nigeria, 1999 (As amended).

Environmental Standards and Regulations Enforcement Agency (NESREA), the statutory body currently charged with the responsibility of environmental management throughout Nigeria.⁴⁶The Bill for an Act establishing NESREA⁴⁷ The vision and mission of the agency is: “to ensure a cleaner and healthier environment for Nigerians. Mission: To inspire personal and collective responsibility in building an environmentally conscious society for the achievement of sustainable development in Nigeria”.⁴⁸

It is stated that: “The agency (NESREA) has responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria’s natural resources in general and environmental technology including coordination, and liaison with, relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines. The NESREA Act also empowers the Agency to be responsible for enforcing all environmental laws, guidelines, policies, standards and regulations in Nigeria, as well as enforcing compliance with provisions of international agreements, protocols, conventions and treaties on the environment to which Nigeria is a signatory”.⁴⁹

It has been further stated that: “Following a three-year undercover investigation by Greenpeace Movement, it was discovered that electronic waste, like old television sets, computers and mobile phones were not properly and responsibly recycled in the US and Europe. Instead, e-waste is being disguised as second-hand goods and shipped off to Nigeria, where it is sold, scrapped or illegally dumped”.⁵⁰ The Probo Koala incident, more recently known as Trafigura case and discussed above, where a toxic and dangerous waste were shipped from Amsterdam to Abidjan is another instance where developed countries use developing nations as dumping ground for hazardous waste. The key question to ask is what gives the leeway to developed countries to disposed waste in developing countries in disguise?

46 Available at: <http://www.nesrea.gov.ng/about/index.html> (last visited on June 20, 2019).

47 NESREA was passed by the National Assembly, signed into law by President Umaru Musa Yar’Adua and published in the Federal Republic of Nigeria Official Gazette No. 92. Vol. 94 of July 31, 2016.

48 Lambrechts, Derica and Michael Hecter, “Environmental Organized Crime: The Dirty Buisness of Hazardous Waste Disposal and Limited State Capacity in Africa” 43(2) *South African Journal of Political Studies* 251-268 (2016).

49 *Ibid.*

50 Greenpeace International, Undercover operation exposes illegal dumping of e-waste in Nigeria. Available at: <http://www.greenpeace.org/international/en/news/features/e-waste-nigeria180209/>. (last visited on June 20, 2019).

It has been proffered that the Basel Convention was not affording sufficient protection for developing countries.⁵¹ If the principle of prior informed consent will be enhanced, the enforcement to the Basel convention be ensured and a total ban of hazardous waste be implemented, developing countries will be saved from the hands of developed countries that have chosen them as dumping grounds. This is one way through which environmental justice be achieved and developed countries will be hindered from such act.

VI Factors responsible for dumping of hazardous wastes into developing countries

The reason why developing countries allow developed countries to dump hazardous wastes in their territories is principally economic.⁵² The economic incentives for exports of hazardous wastes to developing countries are generally remain indubitable. The illegal trade in hazardous wastes is primarily driven by profit, with a multimillion-dollar turnover.

Industrialized nations have become aware of the dangers of unsound disposal of hazardous wastes. So, developed countries have introduced more stringent environmental and safety measures. As a result, disposal has become extremely costly. Developing countries provide a disposal option at prices that are often a mere fraction of the disposal or recycling cost in the state of origin.⁵³ In developing countries, lower costs generally reflect the lack of environmental standards, less stringent laws and absence of public opposition due to lack of information concerning the dangers involved.⁵⁴ Some identified factors are responsible for the continuous trade and dumping of hazardous waste in African and Asian countries, which among others include:

Economic factor

Trade in hazardous waste claimed to be destined for recycling, reclamation or energy recovery that may be composed of listed hazardous wastes. These have the economic potential for developing countries. The traded recyclable waste materials are paper, plastics, iron, copper, aluminium and lead which are in most cases from OECD countries to African and major Asian economies. Evidence reveals frequent cases of improper labelling of recyclable consignments to disguise hazardous wastes which include mercury, lead-acid batteries and clinical wastes and the prevalent cases of ship breaking in India and Bangladesh and the West African countries and particularly, the Nigerian

51 Lipman Z., "Trade in Hazardous Waste: Environmental Justice versus Economic Growth" Macquarie University, Australia, *Capacity Building for Environmental Law in Asian and Pacific Region*, 464-476, Available at: <https://researchers.mq.edu.au/en/publications/trade-in-hazardous-waste-environmental-justice-versus-economic-gr> (last visited on June 20, 2019).

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

case of export of waste electrical and electronic equipment containing hazardous substance, such as lead mercury, cadmium and hexavalent chromium.⁵⁵

Unfortunately, the Basel Convention does not strictly prohibit the export of waste. For instance developing countries export their waste to developed nations when they do not have the technical know how to dispose the same. Equally, developing countries also benefit from trade in waste where it provides as a source of raw materials and getting second hand products as well as providing employment opportunities for the local population.⁵⁶ Economic realities most often influence decision-making and defeat self-verification process in developing countries. This is because the importation of hazardous wastes can provide much needed foreign currency revenue for poor countries.⁵⁷ The economic debate tilts towards hazardous waste treatment than recycling, as may not be lucrative industrial sector for most developing countries. The perceptions of quick financial gains and interests have colored the debate and negotiations surrounding the various ban amendments.

Unfair practice

International trade in hazardous wastes in developing countries despite international statutory prohibition can as well be associated to corruption. For instance, the *Trafigura* case of illegal dumping of hazardous waste in Abidjan, Côte d'Ivoire, in August 2006 by the tanker Probo Koala is its best example.⁵⁸ Most often, shipping of toxic waste in African and Central Asian countries is facilitated by indigenous companies or individuals. The shipping of wastes to developing countries is often vulnerable to abuse by corrupt officials when the procedure placed responsibility on the authorities of those developing countries to verify and follow the normal procedure.

The law for instance provides that a party shall not permit hazardous wastes or other wastes to be exported to a non-party or to be imported from a non-party.⁵⁹ Article 6 of the Basel Convention provides that, "the State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the state of export, the competent authority of the States concerned of any proposed trans-boundary movement of hazardous wastes or other wastes."⁶⁰ To further protect the health of the citizens of the state of export article 6 (11) provides that any trans-boundary movement of hazardous wastes or other wastes have to be

55 *Ibid.*

56 *Supra* note 13 at 15.

57 *Ibid.*

58 *Supra* note 38 at 273.

59 *Supra* note 1, art. 4 (5).

60 *Id.*, art. 6.

covered by appropriate insurance, bond or other guarantee required by the import or any state of transit, which is a party.

Equally, the state of import has to: “respond to the notifying country in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information”. Often these procedures are not complied with and corrupt officials of the countries involved will oversee the same.

Another serious problem of the Basel Convention that may facilitate corruption is its failure in imposing a duty on the exporting country to verify that the importing country has adequate waste management facilities through a particular process by which the information is to be ascertained. Therefore, both parties rely on the convention’s exchange of information provisions, which is usually based on the information supplied by the importing country.⁶¹ Concerned officials are likely to negligently exchange documents without actually ascertaining the true position of the technical expertise of the country of import.

The report of the Commission of Inquiry into the Abidjan disaster set up by the government of Cote d’Ivoire for instance, found that the incident was at least partly attributable to the actions of corrupt officials.⁶² In the same vein, this incident which was brought before numerous civil and criminal courts, mainly in the Ivory Coast, in the United Kingdom and the Netherlands. Judgements have been rendered and settlements have been made. Trafigura notably paid USD 198 million to the government of the Ivory Coast to fund complete remediation and compensate the Ivorian government and any victim; paid EUR 1.3 million in the Netherlands; and GBP 30 million to settle claims by 29,614 claimants represented by Leigh Day and Co law firm in the UK.⁶³ However, part of the money paid to Leigh Day and Co to distribute never reached its intended beneficiaries and/or was misappropriated or embezzled. This is categorically owing to corruption.

The case of Koko in Nigeria supports the argument. The Federal Government of Nigeria through its security agencies detained fifty four indigenous persons, which include immigration and customs officials at Murtala Mohammed International Airport, allegedly having partake in disposal of toxic waste in Koko. Therefore, apart from economic conviction corruption also facilitates international trade in hazardous waste in developing countries.⁶⁴

61 *Supra* note 4.

62 *Ibid.*

63 The Probo Kuala Case in ten questions. What happened? *Available at:* <http://www.trafigura.com/resource-centre/probo-koala/>. Last visited on June 20, 2019).

64 Koko Toxic Waste: Indigenes Still Live With Nightmare 27 Years After.

VII Violation of the principle of prior informed consent (PIC)

The principle of prior informed consent was first established in United States legislation regulating toxic waste, specifically the Toxic Substances Control Act of 1976.⁶⁵ This principle forms the keystone of the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and a number of other highly significant multilateral environmental agreements.⁶⁶ It is also the primary regulatory mechanism encapsulated in the Basel Convention to regulate the international trade in hazardous waste in order to protect human health and the environment.

It is interesting to state that the text of the Basel Convention, as adopted in 1989, reflects a compromise between advocates of a complete ban on trans-boundary movements of wastes and those who wished to define the legal framework and conditions for the international transfer of wastes. Hence, the parties to the Basel Convention are under an obligation to “ensure that the trans-boundary movement of hazardous wastes and other wastes only takes place, if the State of export does not have the technical capacity and the necessary facilities” to dispose of the wastes in a proper manner.” Prior written approval of the importing country is necessary before export can be initiated. Furthermore, the Basel Convention prevents parties to the convention from exporting hazardous wastes to non-parties, to other states that have prohibited the import of such wastes, and to states that do not have proper treatment and disposal facilities.⁶⁷

As mentioned above, the Basel Convention places an obligation on both the importer and the exporter to ensure the availability of adequate waste management facilities in the country of disposal. Rarely is the consent fully obtained as provided by the convention. The detailed procedures of this system are set out in article 6 the Basel Convention. The state of export or export generator must notify the states of import and transit of the trans-boundary movement.⁶⁸ This is to be undertaken via the ‘competent authorities’ of the countries concerned. The designated notification information is stipulated in annex V A and includes physical description, quantity, composition and methods of disposal. There is an additional requirement to include the information provided by the disposer of the waste in the country of import upon which the assessment was made that the wastes will be handled and treated or recycled

65 Nakagawa, M. ‘Overview of Prior Informed Consent from an International Perspective’, 4 *Sustainable Development Law and Policy* 4 (2004).

66 *Supra* note 38 at 263.

67 Gwam, C.U., “Adverse Effects Of The Illicit Movement And Dumping Of Hazardous, Toxic, And Dangerous Wastes And Products On The Enjoyment Of Human Rights” 14 *Fla. J. Int’l L.* 427-437 (2001-2002).

68 *Supra* note 1, art. 6(1).

in an environmentally sound manner in accordance with the laws and regulations of the country of import.⁶⁹ The importing state responds in writing by consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information.⁷⁰

The state of export is not permitted to allow the export unless it has both received the written consent of the state of import and has received evidence of a contract between the exporter and the disposer 'specifying environmentally sound management of the wastes in question'.⁷¹ Transit states can prohibit the passage of the waste and the state of export must have received written consent from the transit state before the export can proceed.⁷² A movement document is required to accompany the consignment and must be signed by each person who takes charge of the trans-boundary movement throughout its passage.⁷³ Article 8 provides for a duty to re-import on the part of the state of export in the situation where disposal cannot be carried out under the terms of the contract or where environmentally sound alternative arrangements cannot be made within a period of 90 days. Under article 9, similar re-importation provisions apply to the state of export for illegal traffic of hazardous waste. These are measures aimed at protecting countries of import (African and Central Asian countries) from the dangerous effects of both environmental and health hazards from exported waste. However, it is unfortunate that these yardsticks are abused by the exporting countries.

The Basel Convention's PIC procedure was replicated in subsequent regional and international multilateral environmental agreements relating to potentially hazardous substances. The major ones are: the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the 2001 Stockholm Convention on Persistent Organic Pollutants; and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity.⁷⁴

Certain problems exist in the application of PIC principle where a developed country exporting to a developing country; developing countries often lack the technical and administrative capacity to conduct an accurate assessment of the level of risk to human health and the environment posed by a particular waste. Thus, the country may give

69 *Id.* annex V A (20).

70 *Id.*, art. 6(2).

71 *Id.*, art. 6 (3) (a) and (b)

72 *Id.*, art. 6 (4)

73 *Id.*, art. 6(9) Annex V B

74 Gary Cox, "The Trafigura case and the system of Prior Informed Consent under the Basel Convention- A Broken System?" 6(3) *Law, Environment and Development Journal*, 263-283(2010), at 272.

consent to the importation based on genuine but mistaken belief that it possesses adequate facilities for its disposal.⁷⁵ Again, the Basel convention fails in imposing a duty on the exporting country to verify that the importing country have adequate waste management facilities through a particular process by which the information is to be ascertained. Therefore, both parties rely on the convention's exchange of information provisions, which is usually based on the information supplied by the importing country.⁷⁶ This among other reasons makes the PIC procedure vulnerable to abuse by corrupt officials when the procedure placed responsibility on the authorities of developing countries to verify. The report of the commission of inquiry into the Abidjan disaster set up by the government of Cote d'Ivoire found that the incident was at least partly attributable to the actions of corrupt officials.⁷⁷ Also, by placing responsibility on the authorities within the developing country to verify the adequacy of the disposal facilities, the PIC procedure is vulnerable to abuse by corrupt officials.⁷⁸

It is interesting to note that even though developed countries as the US took lead on many global environmental initiatives during the 1970's and the 1980's on the issue of waste disposal, the US resistance to the Basel Convention on the control of hazardous waste is an example of the fact that it acted as a leader of a veto coalition.⁷⁹ The US effectively led rejection of a total ban, arguing instead of the principle of informed consent (PIC) a rich country should be able to pay a poor government to dump hazardous waste on its citizens as long as that government was fully informed of the hazardous nature of the waste. The US-led veto coalition won, with a position of either a PIC convention or no convention at all.⁸⁰ This could be seen as an intention and support for the violation and abuse of the PIC principle by the developed exporting nations. In fact most developing countries often lack the technical and administrative capacity to conduct an accurate assessment of the level of risk to human health and the environment posted by a particular shipment of waste and assess whether their facilities are suitable. As a result, they may give consent to be the importation of a shipment of waste based on a genuine but mistaken belief that they possess adequate facilities for its disposal with severe adverse consequences.

One-way of addressing the challenges of violation of the prior informed consent is to have a tighter procedure. For example, as provided in the Bamako Convention, the states of import should use a 'shipment specified notification' instead of general notification to cover numerous shipments.⁸¹ Also, obligation parties to limit their ports

75 *Ibid.*

76 *Supra* note 4 at 173.

77 *Ibid.*

78 *Id.* at 263.

79 *Ibid.*

80 *Supra* note 74 at 278.

81 *Ibid.*

or points of entry for the purposes of trans-boundary shipments and notify the Secretariat to this effect for distribution to all contracting parties.⁸² These adjustments would greatly assist institutionally and financially stretched developing country parties enforce the procedures.⁸³

VIII Factors adversely affecting the enforcement of the Basel Convention

The Basel Convention has outlined the basic general obligations on each state that is a party.⁸⁴ These obligations are outlined to ensure the legal disposal of hazardous wastes by states. Although illegal traffic in hazardous wastes or other wastes is criminal,⁸⁵ no provision of the Basel Convention stated how its enforcement would be realized. The only provision in relation to means of enforcement in the convention was to the extent that: “the Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention”.⁸⁶

This has been identified to be a major weakness of the convention, thus a factor affecting the enforcement/ effectiveness of the Basel Convention. The effectiveness of the convention has been limited by extrinsic and intrinsic factors.

(i) Extrinsic factors

Although the Basel Convention has been ratified by most industrialized countries, the United States has not yet become a party to the Convention. The United States is the world’s largest generator of hazardous wastes, accounting for almost three quarters of the world’s annual production.⁸⁷ Consequently, to ensure environmental justice for developing countries, the participation and co-operation of the United States is essential.

The United States did sign the Basel Convention in 1988 and Senate consented to its ratification in 1992. However, the instruments of accession have not been deposited with the Basel Secretariat, as the US Congress has not yet passed domestic legislation to implement the Convention. Domestic legislation is essential to enable the United States to meet its obligations under the Convention. For example, without such legislation Federal Agencies would be unable to prevent exports to a non-party or to

82 *Ibid.*

83 *Supra* note 1, art. 4.

84 *Id.*, art. 4 (3).

85 *Id.*, art. 4(4)

86 Greenpeace, *Lead Astray: the Poisonous Lead Battery Waste Trade*, A Greenpeace Report, 6 (1994).

87 Kitt, J “Waste Exports to the Developing World: A Global Response, (1995) 7 *Georgetown International Environmental Law Review*, 485 at 512. For reason of not ratifying see, Available at: <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> (Last visited on June 20, 2019).

re-import waste, which has been exported in violation of the principles of environmentally sound management.⁸⁸

(ii) Intrinsic factors

There are a number of major weaknesses in the Basel Convention which impact on its potential to achieve environmental justice for developing countries. For example, the convention lacks an enforcement mechanism to ensure that hazardous waste traders are fully accountable for all damage, which occurs. Additionally, on the enforcement of the ban, parties to the convention are required to be up and doing in the enforcement of the ban on transboundary movement of hazardous waste. Article 9 (5) provides that: "Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article". Article 14 (2) provides that: "The Parties shall consider the establishment of a revolving fund to assist on an interim basis in case of emergency situations to minimize damage from accidents arising from transboundary movements of hazardous wastes and other wastes or during the disposal of those wastes".

Having identified the loophole/weakness of the Basel convention, the parties requested the Secretariat, subject to availability of funding, to organize implementation and enforcement training activities, in collaboration with the Basel Convention Regional Centres, the secretariats of other multilateral environmental agreements, in particular the Rotterdam and Stockholm Conventions and other international organizations, agencies or programmes, to assist Parties, particularly developing countries and countries with economies in transition, to develop national legislation and other measures to implement and enforce the conventions and to prevent illegal traffic.

In line with the provision of the convention,⁸⁹ and in the discharge of its functions, the secretariat in response to the demand made by the parties, has facilitated the development of an implementation and enforcement programme, to be implemented by the Basel Convention Regional Centres. This is to enhance the capacity of countries to monitor and control trans-boundary movements of hazardous wastes and chemicals.

In Africa, the enforcement activities were initially undertaken in the context of the programme of activities developed to assist Côte d'Ivoire in the aftermath of the dumping of hazardous waste from the Probo Koala vessel in Abidjan in 2006. The maiden project in Cote d'Ivoire aimed at strengthening capacity of Côte d'Ivoire to monitor and control trans-boundary movements of hazardous chemicals and wastes and to enhance the implementation and enforcement of the Basel Convention.

⁸⁸ *Supra* note 1, art. 16.

⁸⁹ In Decision IV/19 (1998), at Kuching, the Fourth Meeting of the Conference of the Parties acknowledged the progress made towards developing a Draft Protocol and requested the Ad Hoc Working Group to finalize it for consideration and adoption by the Fifth Meeting of the Conference of the Parties.

This maiden project is being replicated in three French-speaking countries, Gabon, Madagascar and Morocco, funded through the UNEP Trust fund for Côte d'Ivoire, which was established by the UNEP Executive Director following decision VIII/1 of the Conference of the Parties to the Basel Convention. Currently the programme is also being implemented in Djibouti, Ethiopia and Mozambique with funding from the SAICM Quick Start Programme Trust Fund and in Kenya and Tanzania with funding received from the Government of Norway, the Swedish Chemicals Agency (KEMI) as well as the German Technical Cooperation Agency (GTZ). The Basel Convention Regional Centre based in Dakar, Senegal is the implementing agency in French-speaking countries while the Africa Institute, based in Pretoria, South Africa, implements the programme in English-speaking countries.

This implementation of the project is in three (3) phases. In the first phase, legal and technical experts were retained to undertake on the “gaps and needs” analysis to assess the implementation and enforcement of the Basel Convention. In the second phase, on the basis of the analysis and its associated recommendations, norms and regulations for the coordinated implementation of the three chemicals and waste conventions were developed and validated in a national consultation workshop in July 2010. During the third and final phase of the project which was completed in October 2011, a series of training and seminars for enforcement agencies such as customs and port authorities, environmental authorities (convention focal points) and the judiciary took place in Abidjan. The training focused on enhancing the implementation of Basel Convention, prevention of illegal traffic of hazardous wastes and chemicals and the environmentally sound management of wastes.

Furthermore, to ensure the enforcement of the convention, a *Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal* came into force.⁹⁰ This protocol was made pursuant to the relevant provisions of Principle 13 of the 1992 Rio Declaration on Environment and Development, which allows States to develop international and national legal instruments regarding liability and compensation for the victims of pollution and other environmental damage.⁹¹ The basic objective of the protocol is provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the trans-boundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.⁹² The protocol went

90 Preamble to the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal came into force

91 Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, art. 1.

92 *Id.*, art. 4(1).

further to allow for Claim for damages,⁹³ claim for compensation⁹⁴ and the right of recourse⁹⁵ before competent courts.⁹⁶

Globally, efforts have been made to ensure the enforcement of the Basel convention. Many nations are cooperating with international efforts to stop illegal trafficking of hazardous waste.⁹⁷ The International Network for Environmental Compliance and Enforcement (“INECE”)⁹⁸ represents such global efforts, which has developed a multinational strategy and database, but needs funding.

IX Conclusion

The paper explored and discussed the socio-legal issue trans-boundary movement of hazardous substances with a view of revealing the inadequacies and lack of implementation of the extant laws by state parties. It is found by the authors that developing countries in Africa and Asia are being used as dumping grounds for hazardous and other wastes. This unvaryingly affects both the human health and environment in those states. The US and EU generate more most of hazardous wastes in the world. Hence, developed countries like the US and EU countries should be selfless and proactively supporting the enforcement of both the international and States legislations, but the irony is that the US in not yet a party to the convention and EU counties are invariably flouting the laws. More than 10 years after the dumping of large quantities of toxic waste in the Ivory Coast, there is still nothing to stop a similar disaster in developing countries because politicians and courts have failed to learn from the lessons. The victims and indeed people of Abidjan and the African Continent were failed not just by their own government but also by governments in Europe who did not enforce their own laws. Some victims are still waiting for justice and there are no guarantees that this kind of corporate crime will not happen again. Greenpeace and Amnesty are calling for freedom from toxic waste dumping to be a human right.

93 *Id.*, art. 4 (6).

94 *Id.*, art. 8.

95 *Id.*, art. 17.

96 Sarah Westervelt & Whitney Beckham, “Externalizing The Costs Of Hazardous Waste From The United States” 16 *Vermont Journal of Environmental Law* 636 (2014-2015).

97 International Network for Environmental Compliance and Enforcement (INECE) is a partnership of government and non-government enforcement and compliance practitioners from more than 150 countries. INECE’s goals are: raising awareness to compliance and enforcement, developing networks for enforcement cooperation, and strengthening capacity to implement and enforce environmental requirements.

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Hence, the authors suggest that state parties should fully comply with the procedure for trans-boundary movement of hazardous wastes and other wastes, especially as it relates to consent, notification and reply in accordance with the provisions of the Basel Convention. State parties, the authority should diligently prosecute organizations and individuals that are in flagrant violation of anti-dumping legislations and adequate monetary compensation be speedily paid to affected individuals. Strict enforcement mechanism needs to be implemented and supervised. The following other suggestions may also be considered: (i) The ability of member states of the Basel Convention, especially the developing countries, should enhance their capacity in order to keep the three Rs, and jointly and severally work for sound and sustainable management of hazardous wastes. (ii) Illegal traffic in hazardous wastes should be alleviated and minimized by all possible means. (iii) Even the lawful export of wastes should be further reduces. (iv) Regional partnership for enforcing the treaty norms of the Convention should be encouraged. (v) Awareness among the people should be inculcated. (vi) Efforts should be made to increase the membership of the convention.