TRANS-BOUNDARY MOVEMENT OF HAZARDOUS WASTE IN AFRICA: INTERROGATING THE BASEL AND BAMAKO CONVENTION

By

ERIC OMO ENAKIRERU*
&
U. D. EKOTT**

Abstract

The article critically examined trans-boundary movement of hazardous waste in Africa: interrogating the Basel and Bamako Conventions and posit that trans-boundary movement and disposal of hazardous waste is a global phenomenon which poses serious threat to both man and the environment including all the competing elements in the ecosystem. Hazardous waste is toxic in nature with the capacity to alter ecological balance to the detriment of man. The article examines the concept of hazardous waste, its incidence in the sub-sahara African countries and the international instruments regulating its trans-boundary movement. It argues that environmental damaged by hazardous waste could be permanent and irreversible. It is truism that most of the sub-Saharan African Countries, like Nigeria had ratified several international treaties and conventions aimed at challenging extra-territorial disposal of hazardous waste material. Against this background, this article seeks to critically appraise the Basel and the Bamako convention on the ban of the import into Africa and the control of trans-boundary movement and management of hazardous wastes within Africa. This is with a view to proffering suggestion for reform and recommendation on the challenges and constraint of the enforcement of the infraction of territorial, regional legislations and convention in tackling the menace of hazardous waste in Africa.

Keywords: **Trans-boundary waste, environment, hazardous waste, conventions and legislations**

1.0 INTRODUCTION

Trans-boundary movement of hazardous waste is an emerging global phenomenon with serious environmental consequences. It poses serious threat to the environment including all the competing elements in the eco-system. Hazardous waste is toxic in nature with the capacity to alter ecological balance to the detriment of man. In some cases, the environmental damage occasioned by

the hazardous waste could be permanent and irreversible. Hazardous wastes which are generated mostly by the developing countries including Nigeria are most of the time a byproduct or produce shipped and imported into Nigeria. This emerging global phenomenon with dire environmental implication which is affecting both developed and developing nations. It has been argued that developing nations are greater victims because their ignorance and economic vulnerability is being preyed on by some developed countries to make them hazardous waste dumpsites. The realisation informed the need to both the production and disposal of hazardous waste in Nigeria.

Trans-boundary movement of hazardous waste for the purpose of disposal between two or more countries can be classified into two categories namely:

(a) Legal transfer of hazardous waste as sanctioned by an importing country

(b) The transfer to and dumping of hazardous waste in a country that has not sanctioned such disposal within its jurisdiction.

Developing countries including Nigeria are often susceptible to this second type of transfer[1]. According to Koffa[2], out of the total volume of hazardous waste generated annually, worldwide, 90% originates in the industrialized nations. As generation of their wastes escalated especially as a result of human population and technological evolution, it became obvious that an urgent need to find a place to dispose such massive and life threatening hazardous was imminent. This era witnessed in the industrialized nations, organized demonstration among citizen

* PhD, Senior Lecturer, Department of Public Law, Faculty of Law, University of Delta, Agbor, Delta State, Nigeria. E-mail: eric.onakireru@unidel.edu.ng, ericomo61@yahoo.com, 08050617977, 07062041722

** Department of Jurisprudence and International Law, College of Law, Western Delta University, Ogharra, Delta State, Nigeria Tel: 08038180070, Email; ekott4sute@yahoo.com

[1] A.O. Akinusi., The Bamako and Basel Conventions on Trans-boundary Movement of Hazardous Waste", retrieved from, http://heinoline.org(2024)

[2] M.T. Koffa., Africa Remains a Dumping Site for Hazardous Waste: Weaknesses of the Basel and Bamako Conventions", retrieved from, http://theliberiandialogue.org/articles/c(2024)
Proper management of hazardous wastes requires the establishment of treatment and disposal facilities such as waste incinerators and landfills. While these facilities may public desirable and after required by law, public opposition, more than physical, technological, environmental and economic factors tend to stifle the sighting of new facilities and the expansion of existing ones. This phenomenon which is highly prevalent especially in industrialized countries is not unexpected because these hazardous waste facilities are locally-unwanted-land-uses which nobody wants in his or her backyard. The success rate of citing these facilities especially in the US is so dismal that it seems impossible to site them 'in anybody's backyard". See Ibitayo O., "Trans-boundary Dumping of Hazardous-waste, retrieved from, 22/11/11, (Hereafter, referred to as Ibitayo, "Trans-boundary Dumping of Hazardous Waste", see also, Langone, "A Stinking Mess" TIME, January 2, 1989, at Easter book, "Cleaning up", NEWSWEEK, July 24, 2022 at 27-28

groups and environmentalists against dumping backyards. The *'not in my backyard syndrome*[3]*'* has prevented construction of many new hazardous waste facilities. Consequently, United States and Western European waste producers have looked elsewhere to dispose of their wastes. Naturally developing countries like Nigeria and other African countries are the preferred destinations for the following reasons:

Firstly, most of these countries have relatively high levels of poverty, low Gross National Product (GNP) and high foreign debt profiles, hence importing hazardous wastes as a source of foreign exchange can be highly tempting. For example, Guinea Bissau, one of the poorest countries in the world was to be paid $600 million for storage and disposal of imported hazardous waste. At the time of the offer, the amount was, twice the country's foreign debt and about four times its Gross National Product.[4] Although Guinea Bissau subsequently cancelled the contract due to pressure from its neighbours, the situation reflects the dilemma confronted by many developing nations facing financial offers in exchange for hazardous waste.

Secondly, lack of stringent environmental regulations such as requirement for high performance and health - based standards for the design, siting, and closure of toxic waste disposal facilities and the low level of implementation of existing policies are the norms in most of these countries. Toxic waste treatment and disposal facilities can therefore be built cheaply and without consideration for adverse human health and environmental effects. For example in Dakar, Senegal, the hazardous waste landfill is built very close to the water table thus posing a threat to the drinking water supply.[5]

Lack of stringent environmental regulations in these developing nations exposes these nations to the indiscriminate dumping of hazardous wastes in their territories. This is so because as earlier stated, there exist, in the industrialized nation stringent environmental regulations, standards and control with effective monitoring mechanism which require polluter to pay for pollution and engage in extensive clean-up operations.[6] To avoid high cost of disposal or violation of

---

4 Ibitayo O.,"Trans-boundary Dumping of Hazardous Waste" supra note 3, see also, Anderson et al, "The Global Poison Trade", NEWSWEEK November 7, (2022)

5 Supra note 3

6 The polluter pays principle is one of the general principles of EC policy on the environment. The principle is set out in Art. 174 (2) of the EU Treaty. It embodies the idea that the polluter, rather than society at large, should pay for polluting activities. In a waste context, the polluter is taken to mean the producer of a product that eventually becomes waste.

these regulations. In their countries, waste generators turn to the Developing countries with lax environmental enforcement mechanism, for disposal of their poisonous waste.

Thirdly, there is a high level of corruption particularly in the sub-Sahara African countries hence government officials can easily be influenced. Thus, allowing import of toxic waste into their countries. The unregulated dumping of toxic waste on Kassa Island in Guinea, involved the collaboration of a Guinean company and complicity, of some officials of the country's ministry of trade.[7] In fact, in the Ivory Coast toxic waste disaster, investigation showed that some corrupt government officials were involved.

Fourthly, most African countries lack the technical capacity and expertise necessary for proper identification of both the elements of the imported hazardous waste and its human health and environmental impacts. The exporting companies are aware of this lack of technical expertise on the part of these destination countries. Thus they often disguise the hazardous waste as useful commodities that are relatively harmless. Within this context, the wastes are often shipped or labeled as "recyclable, liquid fertilizers road construction or brick - making materials[8].

For example the Koko toxic waste was improperly and deceitfully marked,[9] United States exporters falsely labeled hazardous military wastes and disposed of them in Zimbabwe,[10] Radioactive wastes, from European countries, and Soviet Union have been dumped in Republic of Benin;[11] Kassa Island in Guinea received 15,000 tons of materials improperly labeled as a raw materials for bricks. After environmental disaster, the wastes were analysed and discovered to be incinerator ash.[12]

Fifthly, political crises in the developing countries could make such countries vulnerable to illegal trade/dumping of toxic wastes. A good example in this regard is Somalia. The entire coast of Somalia is saturated with toxic wastes because of it prolong civil war. The wastes merchants exploit this situation to

---

[7] Supra note 6

[8] Supra note 6

[9] Hackett D. P.,"Assessment of the Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal", (2015)

[10] Supra note 9

[11] Supra note 9

[12] Supra note 3

dump their toxic wastes along the Somali Coast. This is so because there is no functional government in place, which implies that there is non-existence of environmental regulations and even if they exist, there is no enforcement mechanism as the attention is focused mainly on the political crises. Some rebels even accept toxic wastes in exchange for arms and ammunition. It follows that the toxic wastes dumping in Somalia has been one of the main drivers of the armed conflict that has ruined the country.[13]

Another factor that encourages the industrialized nations to ship their toxic wastes to Africa is high level of awareness and literacy in those countries about the adverse effect of hazardous waste both on human health and an environment. Thus their stiff resistance to disposal of such wastes near their residence- otherwise dubbed "not in my backyard" philosophy. Unfortunately, most of the developing countries including Nigeria do not have this level of awareness and literacy. Federal Government of Nigeria Stated that:

> Over the past decade, unscrupulous foreign businessmen acting in collaboration with local links have found a new way of making money through illegal trade, thriving on these cargoes of death from developed countries to the poor, helpless and largely illiterate developing countries. 94% of all hazardous waste trade originated from the OECD countries. The sole aim is to avoid the strict environmental and health safety regulatory requirements and public opposition of the host developed countries, which is deeply rooted in economic calculations. For example, the treatment and disposal of polychlorinated biphenyl, (PCB, a highly toxic chemical), cost 3000 US Dollars per ton in the U.S. Compared to a mere 2 U.S. Dollars 50 cents including shipment cost and disposal in a developing countries, where

[13] Hussein B. M., "The Evidence of Toxic Wastes Dumping in Somalia and its Impact on the Enjoyment of Human Rights: A Case Study, (2010)

> it is simply buried in dug pits in the backyard or farms or helpless citizens.[14]

Perhaps it was this practices by the so-called civilized and industrialized nation that prompted Nigerian Foreign Affairs Minister in the late 1980s to described the dumping hazardous wastes in sub-Sahara African countries particularly in Nigeria as "a moral equivalent of war".[15]

Despite the global and municipal efforts in taming the rising tide of dumping of hazardous waste in developing countries, Nigeria remains vulnerable. According to Benebo, within the past two years, the National Environmental Standards and Regulations Enforcement Agency (NESREA) has received several alert on the influx of hazardous chemicals and wastes including non-serviceable second-hand goods also within the same period Nigeria has intercepted and arrested five ships in connection with toxic wastes.[16]

These realities underscore the need for effective hazardous waste regulatory mechanisms in Nigeria

2.0 INTERNATIONAL INSTRUMENTS REGULATING TRANS-BOUNDARY MOVEMENT OF HAZARDOUS WASTES:

The Basel Convention: The resulting decrease in the availability of disposal sites and increase in disposal cost led to an upsurge in exports of hazardous waste to countries in the developing world which lacked strict controls on waste disposal. A number of high – profile disasters highlighted the dangers in growing trade, leading to a public outcry and an international campaign by environmental Non-Governmental Organizations (NGO) to ban the international trade in hazardous waste. In June 1987, based on a joint proposal by Switzerland and Hungary, the Governing Council of United Nations Environmental Programme (UNEP) mandated the Executive Director to convene a working group with the task of elaborating a global convention on the control of trans-boundary movements of hazardous wastes,[17] drawing on the previous work undertaken by

---

[14] Information provided by the Government of Nigeria to the United Nations Commission on Sustainable Development, New York, 5th Session, April 7-25, 1992, retrieved from, http://www.un.org/dpcsd/earthsummit,

[15] Ibitayo O. "Trans-boundary Dumping of Hazardous Waste, Supra Note 3, The Comment was made by Major General, Ike Nwanchukwu was the Nigerian Foreign Affairs Minister at the time

[16] Beneb N., (2019) "Using Enforcement Cooperation to Promote Environmental Governance: The Case of National Environmental Standards and Regulations Enforcement Agency of Nigeria", retrieved from, http://iniece.org/conference/g/papers/benenonig

[17] See Ibitayo, O. "Trans-boundary Dumping, of Hazardous Waste" supra, note 3.

UNEP and other national, regional and international bodies.[18] The Council also authorized the Executive Director to convene in early 1989, a diplomatic conference to adopt and sign the convention. This decision and the resulting negotiations were subsequently endorsed by the United Nations General Assembly. The Conference of Plenipotentiaries on the Global Convention on the Control of Trans-Boundary Movements of Hazardous Wastes, convened from 20th – 22nd March 1989 in Basel in which 116 nations were represented, considered the final draft of the convention submitted to it by the working group. The Basel Convention was unanimously adopted by the Conference in 22 March 1989. The Conference also adopted eight resolutions related to the further development and the implementation of the Basel Convention. 105 nations and the European Economic Community (EEC) signed the final Act of the Basel Conference. On 22 March 1990, when the Basel Convention was closed for signature in accordance with its provisions,[19] fifty-three states and EEC had signed it. It entered into force on May 5, 1992 upon deposit of the twentieth instrument of accession.[20] As at September 2010, there were 174 parties to the Basel Convention including European Union.[21]

The overarching objectives of the Basel Convention are to protect human health and the environment against adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as "hazardous wastes" based on their origin and/or composition and their characteristics,[22] as well as two types of wastes defined as "other wastes" (household waste and incinerator ash).[23] The provisions of the convention center around the following principal aims, namely:

i) The reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal;
ii) The restriction of trans-boundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management and
iii) A regulatory system applying to cases where trans-boundary movements are permissible.

---

[18] Kummer, K.P. "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal". Available at http://untreaty.un.org/cod/avl/ha/bectmhwd.html (Accessed on 4 November 2011)

[19] Art 21of the Basel Convention, supra note 20

[20] Art 21

[21] Kummer, K.P. "Basel Convention" supra, note, 76

[22] Art 1 and annexes I, III, VIII & IX of the Basel Convention.

[23] Ibid, art 1 and annex II

The first aim is addressed through a number of general provisions requiring states to observe the fundamental principles of environmentally sound waste management.[24] A number of prohibitions are designed to attain the second aim –hazardous wastes may not be exported to Antarctica, to a state not party to the Basel Convention, or to a party having banned the import of hazardous wastes.[25] or multilateral agreements on hazardous waste management with other parties or with non-parties, provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this convention.[26] In all cases where trans-boundary movement is not in principle, prohibited, it may take place only if it presents an environmentally sound management and non-discrimination are observed and if it is carried out in accordance with the convention's regulatory system.

The Regulatory Mechanism of the Basel Convention: The regulatory system is the cornerstone of the Basel convention as originally adopted. Based on the concept of prior informed consent, it requires that, before an export may take place, the authorities of the state of export notify the authorities of the prospective states of import and transit, providing them with detailed information on the intended movement. The movement may only proceed if and when all states concerned have given their written consent.[27] The state of import is required to respond to the notifier in writing, consenting to the movement with or without conditions or requesting for additional information.[28] The state of export shall not be allowed the generator or exporter to commence the trans-boundary movement until it has received a written confirmation that:

i. the notifier has received the written consent of the state of import; and
ii. the notifier has received from the existence of a contract between the exporter and the disposer specifying environmentally sound management of wastes in question. Each State of transit which is a party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in

[24] Ibid Art 4

[25] Ibid

[26] Ibid, art. 11

[27] Ibid, art. 6 and 7

[28] 155. Ibid, art 6(2)

> writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The State of export shall not allow the transboundary movement to commence until it has received the written consent of the state of transit.[29]

The provisions such as this, is for all intent and purpose, to curbed illegal, and unauthorized trade in hazardous wastes. The state of import has a legal right to deny the permission for the movement with or without conditions and the State of export has a legal obligation to ensure that such movement does not proceed until it has received the written consent from the State of import. Similarly, the State of transit, can deny permission for such movement and the State of export would be bound to ensure that it does allow the movement until it has received a written consent from the State of transit.

Nigeria can make effective use of these provisions to safeguard its territory from becoming a dumping ground, for hazardous waste. Thus according to Dr. Benebo Ngeri, the Director – General of National Environmental Standards and Regulations Enforcement Agency of Nigeria stated that;

> Nigeria is cooperating with international community for effect networking and timely exchange of information experience on environmental compliance and enforcement issues…. Within the last two years the Agency has received several alerts on the influx of hazardous chemicals and wastes including non-serviceable second hand-goods like electrical and electronics equipment. The awareness created by the alert system has led on several occasions, to the diversion of such shipments to other countries instead of Nigeria. Within the past two years also Nigeria has intercepted and arrested five ships.[30]

Basel Convention made provision for duty to re-import hazardous wastes or other wastes to which the consent of the state concerned has been given but due to

[29] Ibid, art 6(4)

[30] See Ngeri, B "Using Enforcement Cooperation" supra note 16.

some factors the contract could not be completed in accordance with the terms of the contract:[31]

> When a trans-boundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given, subject to the provisions of this convention, cannot be completed in accordance with the terms of the contract, the wastes in question are taken back into the State of export by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner, within 90 days from the time that the importing state informed the state of export and the secretariat or such other period of time as the State concerned agree.

It is important to note that the provision above contemplate a situation of authorized transaction but for certain circumstances the contract cannot be completed and there is no alternative arrangement for the disposal of such wastes, then the exporter of the wastes is under a legal obligation to re-import the waste to his country. This does not cover a situation of illegal dumping or unauthorized waste trader like the Koko incident.

The convention classified the following as illegal traffic:[32] Any trans-boundary movement of hazardous wastes or other wastes:

> i. without notification pursuant to the provision of this convention to all states concerned; or
> ii. without the consent pursuant to the provisions of this convention of a state concerned; or
> iii. with consent obtained from a states concerned through falsification misrepresentation or fraud; or that does not conform in a material way with the documents; or
> iv. that results in deliberate disposal (e.g. dumping) of hazardous wastes or other

[31] Art 8, The Basel Convention.

[32] Ibid, art 9(1)

> wastes in contravention of this, convention, and of general principles of international law, shall be deemed to be illegal traffic.

*. The provisions above were made to deal with illegal dumping of hazardous and other wastes that characterized the period before the convention. A number of toxic wastes shipped to the developing countries are usually done through false declaration. In Nigeria today, it is a serious concern to environmentalist, the unabated influx of obsolete electrical and electronics equipment. Most of these items, which in actual terms are e-wastes, are dumped in the country through misrepresentation or falsification. They are exported to Nigeria under various disguise such as aids, donation, assistance etc. but their real intention is to dispose of their toxic wastes. It is hoped that the relevant authorities in Nigeria will avail themselves of these provision to safeguard our public health and the environment.

Where such contraventions occur as a result of the conduct of the exporter, the wastes are taken back by the exporter within 30 days from the time the State of exporter has been inform of the illegal traffic or other period of time agreed by the States concerned.[33] Where the illegal traffic is as a result of the conduct of the importer, the State of import shall ensure that the wastes in question are disposed of in environmentally sound manner by the State of import within 30 days from the time the illegal traffic has come to the attention of the State of import or such period as the States concerned may agree.[34]

In a situation where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer then all the parties concerned shall ensure that the wastes are disposed of as soon as possible in either the export State or importer State or any other place agreed amongst them.[35]

The convention also provided for the introduction of national legislation to both prevent and punish illegal traffic.[36]

---

[33] Ibid art 9(2)

[34] Ibid art 9(3)

[35] Ibid art 9(4)

[36] Ibid art 9(5

The Basel convention also provides for cooperation between parties ranging from exchange of information on the issues relevant to the implementation of the convention to technical assistance, particularly to the developing countries.[37] Nigeria, through it Dump-watch, NESREA utilized the provisions and this yielded positive results. Intelligence gathering and information exchange with other countries / and international institutions has led to effective monitoring of trans-boundary movements of hazardous wastes and dumping of same in our territory.[38] The secretariat is required to facilitate and support this cooperation acting as a clearing – house[39]

Like most modern multilateral environmental agreements, the Basel Convention has its own institutional framework. The Conference of parties (COP) is the supreme decision – making body of the convention. The Basel Convention secretariats, by the United Nations Environmental Programme prepares, organizes and services provided meetings under the convention, facilitates exchange of information and provides guidance and assistance to parties on legal and technical issues. The secretariat also has a limited mandate to facilitate implementation of the convention by the parties. The subsidiary bodies of the conference of the parties are expanded Bureau, the open-ended Working Group and the Implementation and compliance committee.

The convention also provides for the establishment of regional or sub-regional centres for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation to cater for the specific needs of different regions and sub-region.[40]

The Ban Amendment and Basel Protocol: Following the adoption of the Basel Convention, the negotiations on the introduction of a total or partial ban on trans-boundary movements of hazardous wastes continued in the framework of conference of parties. They resulted in the adoption by the COP3 in 1995 of the Amendment to the convention on the control of Trans-Boundary Movement of Hazardous Wastes and their Disposal. The Ban Amendment provides for the prohibition of exports of all hazardous waste covered by the Convention that are intended for final disposal, reuse, recycling and recovery from countries listed in Annex VII to the convention (parties and other states which are members of the

---

[37] Ibid art 10 and 13

[38] See Benebo N. "NESREA" supra note 16.

[39] Art 16, The Basel Convention, supra note 20.

[40] Ibid art 167

OECD, EC, Liechtenstein), to all other countries. The strong underlying controversies remained, however, and the Ban Amendment has not yet entered into force. The evolution of the membership of the organisation for Economic Cooperation and Development (OECD), the emergence of new waste streams and techniques for recycling and resource recovery and the increasing availability of state – of – the art recycling facilities in the non-OECD countries has added new dimensions to the problem. The challenge of protecting vulnerable countries from unwanted hazardous wastes imports while not precluding import of wastes considered valuable secondary raw materials to the countries in a position to manage them in an environmental sound manner has therefore gained prominence. Informal discussions were initiated at the conference of parties 9 in 2008 to identify a new way to enable the entry into force of the Ban Amendment while addressing the concerns of and needs of all countries in this context.

The Ban protocol on liability and compensation for damage resulting from trans-boundary movement of hazardous wastes and their disposal, was adopted by the COP5 in 1999.[41] As usually the case with majority of treaties on civil liability for environmental damage adopted over the past two decades, it has not yet entered into force. The Basel Protocol regulates civil liability for damage resulting from the trans-boundary movements of hazardous wastes and other wastes, including incidents occurring as a result of illegal traffic. Each phase of a trans-boundary movement, from the point at which the wastes are loaded to their export, international transit imports and final disposal, is covered. COP5 also agreed on an interim arrangement to cover emergency situations until the protocol enters into force.[42] COP6 approved the interim guidelines for the implementation of decision on enlargement of the scope of the Technical Cooperation Trust Fund.[43]

A committee for administering the mechanism for promoting implementation and compliance was established at COP6 in Geneva in 2006. The objective of this mechanism is to assist the parties to comply with their obligations under the convention and to facilitate, promote, monitor and aim to secure the implementation of and the convention.[44] The mechanism is non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of Basel Convention. It will pay particular attention to the special

[41] Kummer, "The Basel Convention" supra, note 76 at 5

[42] Ibid

[43] Ibid

[44] Ibid

needs of the developing countries and countries with economies in transit, and is intended to promote cooperation among parties. The mechanism should complement work performed by other convention bodies and by the Basel Convention Regional Centres. The Implementation and Compliance Committee is mandated to review specific submissions as well as general issues of compliance and implementation.

3.0 BAMAKO CONVENTION ON THE BAN OF THE IMPORT INTO AFRICA AND THE CONTROL OF TRANS-BOUNDARY MOVEMENT AND MANAGEMENT OF HAZARDOUS WASTES WITHIN AFRICA

The impetus for the Bamako Convention arose from the failure of the Basel Convention to prohibit trade of hazardous waste to developing countries and from the realization that many developed nations, were exporting toxic wastes to Africa. This impression was strengthened by several prominent cases such as Koko and Abidjan incidents.

The provisions of Bamako Convention are *in pari materia* with the Basel Convention. The major distinction between the two conventions is that Bamako convention applies to African countries and it places total ban on the trans-boundary movements of hazardous wastes from other countries outside Africa while allowing such movements among the contracting parties within Africa in accordance with the provisions of the convention.

Bamako Convention was adopted on 30 January 1991 in Bamako, Mali as a treaty of African Nations prohibiting the import of any hazardous waste. The convention was negotiated by twelve members of the Organization of African Unity including Nigeria (now African Union) and came into force in 1998.

The Scope of the Bamako Convention: The Convention gives detail description of the scope of the Convention including the types of waste that are subject to the Convention.[45] The details of the wastes are described in a series of Annexes. The Convention considers any of the listed constituents as hazardous waste regardless of hazardous characteristics unlike the Basel Convention, where certain constituents are not considered hazardous waste unless they possess one of a series of listed hazardous characteristics.

Specific categories of waste constituents described in Annex 1 includes radioactive wastes, while hazardous characteristics are described in Annex II

[45] Art 2, Bamako Convention, supra note 10

including toxic, poisonous, explosives, corrosive, inflammable, ecotoxic (i.e. poisonous to plants and animals) and infectious waste.

Notably the Convention covers hazardous substances which have been banned, cancelled or refuse registration by Government regulatory action, or voluntarily withdrawn from registration in the country of manufacture for human health or environmental reasons.[46] This provision recognizes a history of attempt to dump unwanted, banned or dangerous products such as deregistered pharmaceuticals in African countries often under the guise of humanitarian aids or assistance.[47]

The convention does not affect the sovereignty of countries, over their territorial sea or economic exclusive zone as defined within the Law of the sea and it also has no effect on the right of countries with respect to other international agreements.[48]

General Obligations of the Parties to the Convention: Article 4 of the convention spells out the obligations of the parties to the Convention to cooperate with each other member states to stop the import and trade of hazardous or radioactive waste in Africa. African nations must apply legal or other means to prevent import of hazardous or radioactive wastes into Africa from non-contracting countries. It imposes a duty on all members to inform the secretariat concerning any illegal waste trade;

> All parties shall take legal, administrative and other means within the area under their jurisdiction to prohibit the import of all hazardous waste for any reason into Africa from non-contracting parties. Such import shall be deemed illegal and criminal act.[49]

Parties are required to prevent any vessel or carrier from non-party countries from dumping hazardous and / or radioactive waste at sea including incineration of waste as well as banning such activities by parties to the convention. All information relating to any dumping of the type is also required to be forwarded to the secretariat for distribution to all parties.

---

[46] Ibid, art 2(1) (d)

[47] National Toxics Network" available at http://www.ntn.a.u/cchandbook/bamao/art_scb.html. "National Toxic Network") (Accessed on 29 November 2011)

[48] Art 4(2), Bamako Convention supra note 11

[49] Ibid, art 4(1)

For the waste already located in the convention area, each party shall:[50]

i. Ensure that hazardous waste generators submit to the secretariat reports regarding the wastes that they generate in order to enable the secretariat of the Convention to produce a complete hazardous waste audit;
ii. Impose strict unlimited liability as well as joint and several liabilities on hazardous waste generators;
iii. Ensure that the generation of hazardous wastes within the area under its jurisdiction is reduced to a minimum taking into account social, technological and economic aspects;
iv. Ensure the availability of adequate treatment and / or disposal facilities, for the environmentally sound management of hazardous wastes which shall be located, to the extent possible, within its jurisdiction;
v. Ensure that persons involved in the management of hazardous wastes within its jurisdiction take such steps as are necessary to prevent pollution arising from such wastes and, if such pollution occurs, to minimize the consequence thereof for human health and environment;

Bamako Convention incorporates important and progressive principles that are crucial to ecologically sustainable development of countries in economic transition. In order to avoid the pollution problems that have historically been common in developed countries, it is important that developing countries avoid older polluting technology paths and where possible adopt, clean, non-polluting technologies and measures to support, encourages and promote cleaner production technologies. It adopts clean production technology in accordance with the precautionary principle approach to waste avoidance rather than continue with the current permissible emission approach based on assimilative capacity assumptions[51.]

The import of Art 4(3)(1) is that contracting parties should carefully select industrial processes and technologies which have the lowest possible potential to cause pollution rather than establishing technologies that requires a license to pollute and then try to calculate how much pollution the local environment and population can tolerate.

The convention makes it clear that "pollution control" devices such as filters and scrubbers do not constitute clean production. It also states that dilution of pollutants, transfer from one environmental media to another e.g. dumping in a river instead of landfill or volume reduction through incineration are not clean production.[52]

[50] Ibid, art 4(3)

[51] Ibid, art 4(3)(g)

[52] Ibid, art 4(3)(g)

Another principle incorporated in the convention is the principle of state cooperation. The convention recognizes the fact that serious issues such as hazardous waste need not be left for individual state alone but rather requires a concerted efforts of the contracting party in taking appropriate measures to prevent pollution.[53]

Competent Authorities Focal Point and Dump watch: To facilitate the implementation of the Convention, the parties shall establish a Competent Authority (most likely an environmental agency) and a person within the competent authority who can fulfill the role of a focal point for receiving and distributing documentation related to the obligations of Convention.[54] Given the scarce resources in countries with economies in transition it is not deemed necessary to establish a new department to carry out these obligations but it is preferable that they are managed within existing institutions or agencies. Parties are also to nominate a national agency in the role of dump watch.

The competent authority is required to receive notification if waste is to transit through its jurisdiction. The competent authority of a waste exporting country is to notify other states and parties of the export. Proposal and the competent authority of a waste importing country must notify all affected parties of its decision allow or reject the import.[55]

Trans-boundary Movement and Notification Procedure: Details of notification procedures concerning trans-boundary movements of hazardous waste are clearly set out in article 6 and 7 of the convention. The notification procedures are very similar to that of Basel Convention with very minor variations. It is therefore of no moment to dissipate energy on this.

However, it is import to point out that Bamako convention appears to be more forceful in terms of the provisions relating to enforcement of the obligations of the convention. It states that:[56]

i. Parties shall undertake to enforce the obligations of this convention against offenders and infringements according to relevant national laws and/or international law;
ii. Nothing in this convention shall prevent a party from

[53] Ibid, art 4(1) (b)

[54] Ibid

[55] Ibid

[56] Ibid art 4(4) (a) & (b)

> imposing additional requirements that are consistent with the provisions of this convention, and are in accordance with the rules of international law, in other to better protect human health and the environment.

The above provision is preferable to a rather general provision in Basel Convention.[57] Based on this provision, a country whose environment has been contaminated by hazardous waste from another country, can even after the toxic waste has been re-imported by the generator of the waste, impose additional requirement to decontaminate and reinstate the affected soil.

Another important point to note is that Bamako Convention has strong sanctions against illegal waste movements including development of national legislation. The combined effect of Articles 4 and 9 makes illegal waste movements a criminal rather than civil offence.[58]

Bamako Convention is, as it were a vital legal tool in the hands of the contracting parties, which, if properly used could rid our land of all kinds of toxic waste. As already stated elsewhere in this work, tons of toxic wastes are dumped in our country under the guise of "fairly – used – electronic equipment". Many incidents of ships loaded with such toxic wastes have been recorded in Nigeria in recent times. This raises serious question on the effectiveness of the Bamako Convention.

According to erudite author, I. O. Omoruyi the Bamako Convention is unrealistic.[59] Particularly, he criticized Art (4)(3) which provides that African countries should cooperate with regards to trans-boundary movements of hazardous wastes where state of import has the technical capacity and necessary facilities or suitable disposal sites to dispose of the waste in question in an environmentally sound and efficient manner, opined that "it is a dangerous provision" According to him:

> There is no guarantee that some unscrupulous African leaders will not secretly allow the importation of hazardous wastes in exchange for some foreign exchange and then try to export it to some other unsuspecting African country. Again it

[57] Art 4(4), Basel Convention, supra, note 18.

[58] Art 4(1) & 9(1), Bamako Convention supra note 11

[59] I .O. Omoruyi,*The Legal Process and Environmental Protection in Nigeria* (Ambik Press 2002) 84

> is difficult to see any African country for the time being that meet the requirement for importation of hazardous waste in Africa. The convention is, therefore, unrealistic.[60]

With due respect, we disagree with this opinion. With rigorous notification and documentation procedures set out in Article 6 couple with detailed information requirement as set out in Annex IV A and Annex IV B, it would be difficult if not impossible to import hazardous waste from outside and then export it to the convention member country.

Again we dispute the conclusion reached by the learned author that the "Bamako Convention is unrealistic" perhaps, a safe conclusion should have been that there is, in practical terms, a general weakness in implementation of the provisions of the convention by the member nations due to some reasons already discussed in chapter 3 of this work. It is our opinion that it is the poor implementation of the provisions of the convention that makes it ineffective and not the provisions of the Convention that is unrealistic.

Apart from poor implementation, Bamako Convention towers above all other hazardous waste control conventions in terms of its provisions regarding environmentally sound management and disposal of wastes. By adopting progressive environmental concepts like "precautionary principle" and "strict liability", it underscores is determination to protect the African environment from damage caused by hazardous waste. Over all, the Convention not only prescribes environmental protection oriented provisions, it also sends a message to the world that African nations are not dumping grounds for hazardous wastes generated in other continents. As well, it has provided the impetus for similar regional instruments and the Basel Ban. In this way, the Bamako, Convention has made a significant contribution to the development of the substantive and procedural regulating regime on this subject of global concern. Indeed, Nigeria has benefited immensely from Bamako Convention in the battle against dumping of hazardous waste in its territory.

Though international treaties[61] are not strictly binding on Nigeria until they are enacted into our national law, they greatly influenced most of the policy decisions on environment. The Constitution of Federal Republic of Nigeria

---

[60] Ibid

[61] See S. 12 (1) of the 1999 Constitution of Federal Republic of Nigeria.

states that:

> No treaty between the Federation and any other country shall have the force of law except to the extent to which any of such treaty has been enacted into law by National Assembly.[62]

Nigeria is a party to many international treaties and conventions on environmental protection. In May 28, 1971 Nigeria became a party to the Convention on the Continental shelf of 1958 which recognizes, defined and places certain limitation on the rights to explore and exploit natural resources of the sea.[63] Nigeria was among the 114 governments represented at the UN Conference on the Human Environment in Stockholm in 1972 and also a party to the 1979 Rabat Conference of Ministers and Assembly of Heads of State of defunct Organization of African Unity which gave due consideration to the Environmental Protection in the African Region.[64] In April 1982, Nigeria hosted the 6th Inter- Parliamentary Union meeting at which an ad hoc committee, that is Committee on Education, Culture and Environment adopted a draft resolution on the State of the World Environment ten years after the United Nations Conference on Human Environmental Stockholm; and in May 1982, she was represented at the Nairobi celebration of 10th anniversary of the Stockholm Conference which reaffirmed the participating nations' commitment to the protection and enhancement of the quality of the Human Environment.[65]

In 1994, Nigeria signed the Convention on Biological Diversity and in 1995, the National Biological Diversity Unit was set up by the defunct Federal Environmental Protection Agency which was then the apex institution on Environmental Matters in the country. It should be noted that Federal Environmental Protection Agency (FEPA) was established as a body corporate in 1988 by Agency Decree.[66] The functions of the Agency were set out under section 4 of the Decree as:

> responsibility for the protection and development of the environment in general and environmental technology, including initiation of policy in relation to environmental research and technology.

---

[62] Ibid

[63] M.T. Okorodudu - Fubara,*Laws of Environmental Protection, Materials and Text*, (Lagos, Caltop Publications, 1998) 47.

[64] Ibid at 6

[65] Ibid

[66] No. 58 of 1988 later Cap 131 LFN 1990 now replaced by National Environmental Standards and Regulations Enforcement Agency Act (NESREA) Act

The National Biological Unit is to implement the provisions of the Biological Diversity Convention of 1992 which has as the main objective, the provision for a broad global framework for development of measures to conserve the earth's biodiversity, within which state parties will themselves develop the measures necessary to achieve the objective which it sets out.

There are a number of international agreements, declarations action plans, international treaties and conventions on the environment have been negotiated covering such shared concerns as acid rain, contamination, ocean pollution, endangered species protection, hazardous waste trade etc.[67]

Environmental treaties alone number more than 1780, two – third of them were reached since the Stockholm Conference in 1972. Although some of these agreement have led to immeasurable action, proving that when necessary international collaboration can work, yet some of these agreements have amounted to mere word.

From investigation, it appears that out of 82 international environmental conventions that are applicable to Nigeria, only 30 were signed while 52 are not signed. This means that 35% of the conventions have been signed while 64% have not been signed. It is hoped that with appropriate application and utilization couple with proper and effective enforcement of these treaties, they will no doubt serve as regulatory mechanism in the control of toxic wastes in Nigeria.

4.0 RECOMMENDATIONS

In spite of existing domestic legislations and international conventions rectified by Nigeria to combat trans-boundary movement of hazardous waste, the practice continues to thrive due to poor enforcement mechanism, poor implementation and poor attitude of courts towards environmental related cases. It is therefore recommended as follows:

a. that relevant constitutional provisions relating to environmental protection, particularly section 20 of the constitution should be elevated to fundamental human rights to make it more effective, and therefore making the status of environmental infraction as same with fundamental human right binding on Nigeria.
b. All the tiers of government should be given constitutional power to legislate and enforce effectively on environmental issues within the area of their jurisdiction without the interference of the federal government.

[67] Ndukwe, O.U, "International Dimension of Environmental Law: A Review" in Atsegbua L., (ed) *Selected Essays on Petroleum and Environmental Laws*, (Benin, Era Computer Services, 2000), 95-107

c. that the National Environmental Standards and Regulations Enforcement Agency Act should be reviewed to introduce the common law principle enunciated in *Donoghue v. Stevenson*[68] as done in United Kingdom.[69]
d. National Environmental Standards and Regulation Enforcement Agency Act should be amended to bring oil and gas industry under its jurisdiction for effective protection of our environment.
e. It is recommended that section 9 of Harmful Waste (Special Criminal Provision) Act[70] which waives diplomatic immunities be reviewed to include all persons including government and its agencies so as to make all polluters accountable for their pollution.
f. Nigeria should initiate a special program similar to that of United States superfund[71] program with the purpose of protecting public health and the environment by cleaning up hazardous waste sites and responding to environmental emergencies. In this regard, National Oil Spill Detection and Response Agency (Establishment) Act[72] should be amended to cover all aspects of pollution and not only oil related disaster
g. Enforcement agencies should be provided with adequate testing and monitoring facilities. These include laboratories for testing suspected hazardous substances, communication equipment for effective monitoring of the environment.
h. Manpower development is crucial to effective implementation of environmental legislations. It is recommended that personnel involve in enforcement of environmental legislations should be trained and retrained to make them more effective.

5.0 CONCLUSION

The conclusion was reached after a careful analysis of existing environmental laws and regulatory mechanism in the United States and Nigeria. The recommendations made in this article will improve the Nigerian environment. It is evident that poverty and corruption is at the root of environmental law violations in Nigeria unlike the United States. Other factors accountable for this phenomenon include poor implementation of the existing environmental laws and weak enforcement mechanism. Nigerian government, apart from paying

---

[68] (1932) AC 562

[69] See s. 34 of Environmental Protection Act, 1990 (United Kingdom).

[70] Cap 165, LFN 1990

[71] Comprehensive Environmental Response, compensation, and Liability Act of 1980 commonly referred to as "SUPERFUND".

[72] Act, No. 15, 2006.

attention to legislative regulatory mechanism should equally, focus on the eradication of poverty and tackle corruption which is endemic to the country.

It is hoped that if the above recommendations are rigorously implemented together with appropriate poverty eradication program and enforcement of existing anti-corruption laws it will go a long way in protecting our environment from hazardous waste.