

LAW & ENVIRONMENT

Toxic waste and hazardous products: Unfair legacy for Africa's environment (2)

Dr Lanre Fagbohun, associate professor, Faculty of Law, Lagos State University (LASU), Ojo, examines the imperatives for the control of trans-boundary movement of hazardous wastes and substances in Africa. He undertakes a critical appraisal of the Basel and Bamako Conventions which are the international instruments on the control of this monster.

Criticisms of Basel Convention

COMPREHENSIVE as the Basel Convention provisions would appear to be, it has been criticized as unlikely to achieve its objective of environmentally sound hazardous waste management and disposal because it fails to address the legal and political deficiencies in the developing countries. Take the reporting, consent and tracking provisions of the Convention, it presumes that participating nations have an effective legal system, a functioning administrative structure and regulatory scheme, and a reasonably open political system based on the rule of law. These are elements that are absent in most developing countries. Many of them do not have functioning administrative structures capable of sound policymaking or sophisticated regulation of serious problems such as hazardous waste disposal.

The Basel Convention recognizes this deficiency, but it merely urges the developing countries to establish appropriate regulatory agencies. In the face of high level of corruption and endemic poverty which has greatly disempowered a large majority of people in less developed countries, the proper political and legal infrastructure that are the sine qua non to establishment of appropriate regulatory agencies are absent.

To be effective, regulatory agencies need some measure of political autonomy so that they may utilize their expertise to formulate and implement policies with minimal interruption from other branches of government. Such autonomy is not commonplace in developing countries where regulatory agencies are frequently subject to political caprice. To make matters worse, national procedure rules on *locus standi* are often aimed at preventing *actio popularis*, thereby diminishing any possibility of checks and balance on actions of government that are not protective of the rights of citizens.

Furthermore, and as identified by Wani, the law in most developing countries is either unpublished or poorly organized. Agency regulations in particular are virtually inaccessible to the public. Without access to the text of regulations, it is a daunting task to seek to challenge agency action. Agencies are provided a protective shield that breeds arbitrariness, hampers policy enforcement, impedes institutional accountability, and encourages secrecy, which in turn breed corruption and abuse of authority.

It was in realization of some of the above problems as perennially affecting majority of developing countries that the Basel Ban amendment came into being.

The Basel ban amendment
In March 1994, 65 parties to the Basel Convention led by the G-77 Group of developing countries and China voted by consensus for a full ban on all exports of hazardous wastes from the Organisation for Economic Cooperation and Development (OECD) countries to non-OECD countries. Thereafter, it was contended that the 1994 decision was not legally binding unless it became a part of the Basel Convention through amendment.

In 1995, a second decision to amend the Convention was also passed by a consensus of the Basel Convention parties. Annex VII

described the parties and other states that are members of OECD, the European Commission (EC) and Liechtenstein and incorporated this description as an integral part of the amendment. The amendment was adopted on 22nd September, 1995. As of now, the 62 nations required to ratify the Basel Ban for it to enter into force have so ratified. There is however a controversy over how amendments enter into force under the Convention and this is what is holding its global implementation. Notwithstanding, the Ban has been implemented in the European Union Waste Shipment Regulation (EWSR), thus, making it legally binding in all EU member states.

The objective of the Basel Ban amendment is to prohibit immediately exports from countries listed in Annex VII (Parties and other States, which are members of OECD, EC, Liechtenstein) to all other countries of hazardous wastes intended for final disposal, and to prohibit transboundary movements from Annex VII to non-Annex VII countries of hazardous wastes intended for recycling or reuse as end 1997. Annex VII is not yet in force, pending the entry into force of the amendment.

Background to the Bamako Convention
The realization that African countries do not have the technological capability to dispose of hazardous wastes coupled with the fact that the industrialized nations were all too willing to clean up their environment by moving their toxic wastes and unsafe residues to the developing world were some of the factors that gave impetus to the development of the Bamako Convention. Though a regional agreement it endeavors to redress the shortcomings observed by the Organisation of African Unity (OAU), now African Union (AU), in the Basel Convention.

The Convention which was adopted in Bamako, Mali on 30th January, 1991 entered into force on 10th March, 1999. The objectives of the Convention are to protect human health and the environment from dangers posed by hazardous wastes by reducing their generation to a minimum in terms of quantity and/or hazard potential.

Approach to regulation
Bamako Convention echoes substantially the language of the Basel Convention. In addition, and in a way similar to the Basel Ban, all Parties are obliged to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. For the purposes of the Convention, the categories of wastes listed in Annex I to the Bamako Convention, waste possessing any of the characteristics listed in Annex II, as well as any waste considered to be hazardous by the domestic laws of either the state of import, export, or transit are considered hazardous wastes.

The Convention includes as part of its definition of hazardous wastes, "hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reason". The Convention defines environmentally sound management of hazardous wastes as "taking all practicable steps to ensure that hazardous wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes. This is similar to the provision of the Basel Convention.

Parties to the Bamako Convention are required to impose strict, unlimited liability as well as joint and several liability on hazardous wastes generators. This is in contrast with the usual approach of most international treaties which either impose an obligation of due diligence or a standard of negligence (element of fault) as opposed to strict liability (notion of *risque étatif*) for the prevention of harm. The rationale for imposition of strict liability is that the African Courts are relieved of the obligation to set standards of reasonable care. In the same vein, plaintiffs are relieved of the burden of proving the breach of these standards. Joint and several liability as imposed also makes it easier for the plaintiffs to have somebody take responsibility for resultant liabilities.

Parties are enjoined to promote clean production methods. In this respect, incineration is specifically excluded from the definition of clean production methods. By Article 4 (3) (f), the Convention adopts the precautionary approach to pollution. Parties are to strive to prevent the release into the environment of substance which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. They are enjoined to cooperate with each other in implementing the precautionary principle.

Framework of Implementation and Enforcement

As is the case with Basel Convention, there is a Secretariat to oversee the implementation of the Convention. The Secretariat facilitates the flow of information while enforcement is the responsibility of individual parties and a Conference of Parties (COP). A notable criticism of the Convention in this regard is that neither the Secretariat, nor the COP, nor individual Parties have the power to undertake independent inspections.

In the event of disputes, the Convention directs the parties to seek settlement through negotiation, or any other peaceful means of their choice. Where this fails, the parties are required to submit their dispute to an Ad-Hoc arbitration organ set-up by the COP or to the International Court of Justice (ICJ). This

is a major departure from the provisions of the Basel Convention where the parties must first accept the jurisdiction of the ICJ or the arbitration organ before such bodies can intervene.

Relevant general principles of international environmental law

General principles of international environmental law are an independent source of law. As general proposition underlying the various rules of law which express the essential qualities of juridical truth itself, the rich repository of general principles assist in the resolution of cases where neither treaty law nor customary law provides an answer. As noted by Professor Cherif Bassiouni, in the face of increasing global interdependence, customary and conventional law are not always adequate to respond to major contemporary issues such as human rights, the environment, economic development and international criminality. Thereupon, he contends that general principles may take up the slack, indeed that they may become the most important and influential source of international law in this decade.

With respect to protection of human health and the environment from dangers posed by hazardous wastes and the promotion of environmentally sound management of export and imported waste, a number of general principles have evolved over the years that can effectively supplement the provisions of such Conventions as Basel and Bamako. Some of the applicable principles can be identified as follows:

Principle of transboundary harm prevention

The core of this principle is that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Polluter pays principle

The core of this principle is that the generator of pollution or waste or the producer of products which will become waste, take economic and environmental responsibility for the wastes or products along their entire life cycle and not to pass these burdens onto taxpayers and consumers. As has been noted, it encompasses the requirement that the polluter must pay the cost of pollution abatement, cost of environmental rehabilitation, and damages for victims of the pollution.

Right-to-Know (Environmental Democracy)

The core of this principle is that a fundamental pre-requisite for the achievement of sustainable development is broad public (stakeholder) participation in decision-making, particularly those which potentially affect the communities in which they live and work. It encompasses access to information relevant to environment and development and held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment.

Precautionary principle

The core of this principle is that prevention is better than remediation. It requires governments and the international community to be forward looking and take preventive actions to prevent damage to the environment. Where there is a reasonable foreseeability of environmental harm, cost effective measures must be taken to tackle it rather than relying on scientific proof or allowing the harm to occur before taking actions.

'The Convention includes as part of its definition of hazardous wastes, "hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reason'