



LAW
ENVIRONMENT AND
DEVELOPMENT
JOURNAL

LEAD

BEYOND THE BAN – CAN THE BASEL CONVENTION ADEQUATELY SAFEGUARD
THE INTERESTS OF THE WORLD’S POOR IN THE INTERNATIONAL
TRADE OF HAZARDOUS WASTE?

Alan Andrews

ARTICLE



VOLUME
5/2

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
and the International Environmental Law Research Centre (IELRC).

LEAD is published at www.lead-journal.org
ISSN 1746-5893

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment
House II, 1F, 7 Chemin de Balexert, 1219 Châtelaine-Geneva, Switzerland, Tel/fax: + 41 (0)22 79 72 623, info@lead-journal.org*

ARTICLE

BEYOND THE BAN – CAN THE BASEL CONVENTION ADEQUATELY SAFEGUARD THE INTERESTS OF THE WORLD’S POOR IN THE INTERNATIONAL TRADE OF HAZARDOUS WASTE?

Alan Andrews

This document can be cited as

Alan Andrews, ‘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 Journal (2009), p. 167,
available at <http://www.lead-journal.org/content/09167.pdf>

TABLE OF CONTENTS

1.	Introduction	169
2.	Background	169
2.1	Origins of the Convention	169
2.2	Aims of the Convention	170
2.3	Key Provisions of the Convention	170
2.4	The Ban Amendment (the 'Ban')	171
2.5	The Bamako Convention	172
2.6	The Country Led Initiative	172
3.	Why the Convention Fails to Safeguard the Interests of the World's Poor In The International Trade in Hazardous Waste	172
3.1	The Prior Informed Consent (PIC) Procedure and the Problem of Self-verification	173
3.2	The Compliance Committee	174
3.3	Failure to Establish a Liability Mechanism	176
3.4	Lack of Funding for Technology Transfer	177
3.5	The Recycling Loophole	177
3.6	Conclusion	178
4.	Why A Complete Ban on North-South Trade in Hazardous Waste is Not the Solution	178
4.1	The Growth in Illegal Traffic	178
4.2	Lack of Universal Support for the Ban	179
4.3	The Ban as an Infringement of Sovereignty	180
4.4	The failure of the Bamako Convention	180
4.5	Conclusion	181
5.	Strengthening the Convention	181
5.1	Reforming the PIC Procedure	181
5.2	Strengthening the Compliance Committee	182
5.3	The Future of the Liability Protocol	183
5.4	Strengthening the BCRCs	183
6.	Conclusion	183

1

INTRODUCTION

When the Basel Convention¹ (the ‘Convention’) was signed in 1989, it sought to ensure that developing countries were not used as a dumping ground for the world’s toxic waste, a phenomenon described as ‘toxic colonialism’. However, as the Convention approaches its twentieth anniversary, it is clear from incidents such as the Abidjan disaster in 2006 that it is still failing to prevent industrialised country operators from exporting their hazardous waste to developing countries which lack the capacity to safely dispose of it.

Whilst environmental Non-Governmental Organisations (NGOs), the European Union (the ‘EU’) and many developing nations continue to advocate a blanket ban on trade in hazardous waste, this is a misguided response which has failed to gain acceptance by a majority of the Parties to the Convention and has resulted in political deadlock. Where a blanket ban has been implemented, it has proved difficult to enforce.

This paper argues that the Convention provides a basic legal framework within which international trade of hazardous waste can take place. However, some key institutional reforms and far greater financial resources are urgently required if it is to adequately safeguard the world’s poor in the international trade of hazardous waste. These reforms need to be based on a recognition that the Prior Informed Consent procedure is inadequate in the context of north-south trade in hazardous waste, where competition for crucial foreign revenue puts pressure on the governments of developing countries to consent to imports of waste that they do not have the capacity to manage without incurring potentially disastrous harm to human health and the environment.

The adoption of the Country Led Initiative following the ninth Conference of the Parties in June 2008 marked an attempt by the Parties to move beyond the ongoing impasse between those nations who support a complete ban on north-south trade in hazardous waste and those

who oppose the ban. This is an opportunity for the Parties to breathe new life into the Convention by addressing some of its fundamental weaknesses.

This paper begins with a brief outline of the history of the Convention in Part 2, showing how this has been shaped by the politics of north-south relations. It then outlines the key aims of the Convention and the institutions and procedural mechanisms that it established in order to achieve them.

Part 3 then analyses to what extent the Convention has achieved its aims, highlighting a number of recent high profile disasters involving international trade in hazardous waste and the recent emergence of the global market in electronic waste as evidence of the Convention’s failure as an international treaty. The paper then explains these failings by focusing on a number of key weaknesses in the Convention.

Part 4 then examines the 1995 amendment to the Convention, now known as the ‘Basel Ban’, which sought to completely prohibit trade in hazardous waste between developed and developing countries. This paper argues that the current political deadlock between those who have ratified the ban and those who have not, and evidence of growth in illegal trade in hazardous waste despite the ban, suggest that it is not the solution. Instead, strengthening the institutions and procedures under the Convention could allow international trade to take place under conditions that secured a higher degree of protection for the environment and human health.

Finally, part 5 puts forward some proposals for reforming the Convention, and assesses the likelihood of these reforms being implemented.

2

BACKGROUND

2.1 Origins of the Convention

During the 1970s and 1980s, an increasing awareness of the negative impacts of hazardous waste on human health and the environment led to a proliferation of legislation relating to waste disposal in the domestic legal

¹ The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, Basel, 22 March 1989, 28 *Int’l Leg. Mat.* 657 (1989), available at <http://www.basel.int/text/con-e-rev.pdf> (hereafter ‘Basel Convention’).

regimes of developed countries.² The resulting decrease in the availability of disposal sites and increase in disposal costs led to an upsurge in exports of hazardous waste to countries in the developing world which lacked strict controls on waste disposal.³ A number of high-profile disasters highlighted the dangers of this growing trade, leading to a public outcry and an international campaign by environmental NGOs to ban the international trade in hazardous waste.⁴

Negotiations on an international treaty aimed at regulating the trade in hazardous waste began in 1987, and concluded on 22 March 1989 with the signing of the Convention by 35 states in the city of Basel, Switzerland.⁵

From the outset, the Convention was an attempt to reconcile the opposing views of those nations which favoured a complete ban on trade in hazardous waste and those which opposed such a ban. Most developing countries, along with the EU and a coalition of Environmental NGOs argued that this was the only means by which to ensure that the industrial north dealt with its own waste rather than using the developing world as a dumping ground. Opposing a ban on trade were the majority of non-European industrialised countries, along with a small number of significant developing countries such as India and Pakistan, who were of the view that a total ban was not in the best interests of either the environment or economic development. The Convention achieved a compromise between these two positions by regulating rather than prohibiting trade in hazardous waste.⁶

2 Webster Main gives two examples from the US: The Resource Conservation and Recovery Act (RCRA) 1976 and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 1994. See A. Webster-Main, 'Keeping Africa Out Of the Global Backyard: A Comparative Study of the Basel and Bamako Conventions', 26/1 *Environ: Envtl. L. & Pol'y J.* 63, 68 (2002).

3 *Id.* at 63.

4 For example the 1988 disaster in Koko, Nigeria. For a more detailed account of this incident, see F. Adeola, 'Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System', 8/1 *Human Ecology Review* 39, 50 (2001), available at <http://www.humanecologyreview.org/pastissues/her81/81adeola.pdf>.

5 Full list of signatories available at <http://www.basel.int/ratif/convention.htm>.

6 See Webster-Main, note 2 above at 70.

2.2 Aims of the Convention

The Convention sets out three key aims, based on a recognition of the threat posed by hazardous waste to human health and the environment:⁷ First, a reduction in the amount of hazardous waste generated; second, a reduction in the amount of transboundary movements of hazardous waste; and third, the promotion of the 'environmentally sound management of hazardous waste'.⁸ Environmentally sound management ('ESM') is defined as 'taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes'.⁹

2.3 Key Provisions of the Convention

The Convention places a complete prohibition on trade in hazardous waste between Parties to the Convention and non-parties¹⁰ and reinforces the sovereign right of any Party to prohibit the import of hazardous waste.¹¹ In order to achieve the Convention's objective of minimising the transboundary movements of hazardous waste, the Convention requires that such movements only be allowed where the state of export does not have the technical capacity and suitable disposal sites, or where the wastes are required by the importing state as raw materials for recycling or recovery industries.¹²

Where international trade does take place, it must be based on the Prior Informed Consent (PIC) procedure and conducted in accordance with the principles of ESM. The PIC procedure requires that either the generator of the waste or the state of origin of the waste must give notification, in writing, to the competent authority within the state of import informing them of the nature of the waste being transported.¹³ The notification must contain 20 separate pieces of

7 See Basel Convention, note 1 above, Preamble.

8 K. Kummer, 'The Basel Convention: Ten Years On', 7/3 *Review of European Community and International Environmental Law* 227, 228 (1998).

9 See Basel Convention, note 1 above, at Article 2 (8).

10 *Id.*, Article 4 (5).

11 *Id.*, Article 4.

12 *Id.*, Article 4 (9).

13 *Id.*, Article 6.

information including a full description of the waste being transported and full details of all the parties involved in the transboundary movement.¹⁴ The importing state must then respond to the notification in writing, either giving consent to the transboundary movement (with or without conditions), refusing consent to the transboundary movement, or requesting further information.¹⁵ The exporting state must not allow the transboundary movement to take place until this information has been received.¹⁶

The Convention places an obligation on both the importing and exporting country Parties to ensure that hazardous wastes that are exported are managed in accordance with ESM.¹⁷

The Convention also establishes a procedure to deal with instances of illegal traffic of hazardous waste. Illegal traffic is defined fairly widely to include movements that take place without prior notification and consent or where consent is obtained through fraud or misrepresentation or where the waste does not conform in a material way with the documents.¹⁸

2.4 The Ban Amendment (the 'Ban')

The underlying tensions at the heart of the Convention came to a head at the second Conference of the Parties (COP) in March 1994. At the instigation of a coalition of environmental NGOs and developing countries, the Parties adopted a decision to immediately ban trade in hazardous waste destined for final disposal between developed countries and developing countries and to phase out trade in hazardous waste destined for reuse or recovery between these two groups by 31 December 2007.¹⁹

However, because this Decision was not incorporated in the text of the Convention itself, there was a dispute

as to whether it was legally binding on the Parties. Therefore, at COP-3 in 1995, following a proposal by the EU, the Parties adopted by consensus an amendment to the Convention which became known as 'the Ban Amendment', or 'the Ban'.²⁰

The Ban replicated the provisions of the 1994 decision, but defined developed countries by reference to a new Annex VII to the Convention, which was comprised of the countries of the Organisation for Economic Cooperation and Development (the 'OECD'), the EU and Lichtenstein.

However, fourteen years later, the Ban has yet to come into force, as it has not been ratified by the requisite three quarters of the Parties to the Convention.²¹ As of 20 August 2009, only 65 out of the 172 Parties to the Convention had ratified the Ban.²² The list of Parties which have not ratified the Ban includes major producers of hazardous waste such as the US and Japan as well as developing countries such as India and Pakistan who are major importers of hazardous waste.

The issue of the non-ratification of the Ban has become 'emotional and over politicised' to the extent that it is doubtful that it will ever be resolved.²³ The political deadlock is exacerbated by a legal dispute over the correct interpretation of the provision of the Convention regulating the number of ratifications required for an amendment to enter into force.²⁴

14 *Id.*, Annex VA.

15 *Id.*, Article 6 (2).

16 *Id.*, Article 6(3).

17 *Id.*, Article 4 (8).

18 *Id.*, Article 9.

19 Decision II/12, *in* Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, UN Doc. UNEP/CHW.2/30 (1994).

20 Decision III/1, *in* Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, UN Doc. UNEP/CHW.3/35 (1995).

21 *See* Basel Convention, note 1 above, Article 17(5).

22 Full list of ratifications available at <http://www.basel.int/ratif/ban-alpha.htm>.

23 E. Rachmawaty and F. Perrez, Presentation of the Context and the Concept of the CLI (Presentation given at the First Meeting of the Indonesian-Swiss Country-led Initiative on an informal process to improve the effectiveness of the Basel Convention, Bali, 15-17 June 2009). Slides from presentation available at [www.basel.int/convention/cli/bali-meeting/Bali_Presentation%201%20%20Intro%20CLI%20\(Expanded%20Bureau\)7918.ppt](http://www.basel.int/convention/cli/bali-meeting/Bali_Presentation%201%20%20Intro%20CLI%20(Expanded%20Bureau)7918.ppt).

24 *Ibid.*

2.5 The Bamako Convention

In addition to the Ban, the Convention also led to the agreement of a number of regional agreements which placed a complete prohibition on the trade in hazardous waste. The most notable of these was the Bamako Convention,²⁵ a treaty negotiated by members of the Organisation of African Unity (OAU) in 1991.

Member states of the OAU had from the outset been concerned by the Convention's failure to impose an outright ban on trade in hazardous waste. African leaders feared that the Convention would serve to legitimise the dumping of hazardous waste in Africa, and had delayed signing as a result.²⁶ In order to address these concerns, the Bamako Convention placed a complete prohibition on imports of hazardous waste into signatory nations.

2.6 The Country Led Initiative

In an attempt to move beyond the political and legal deadlock over the ratification of the Ban, the Parties adopted Decision IX/26 at the ninth Conference of the Parties in June 2008.²⁷ This Decision acknowledged an official statement by the President of the Conference on a possible way forward on the Ban. The President's statement urged Parties to expedite the ratification of the Ban, whilst acknowledging (somewhat optimistically) that there was likely to be considerable delay in achieving this. The statement therefore called upon the Parties to launch a process which would reaffirm the Ban's objectives and to explore means by which these objectives could be achieved. In particular, the statement called on the Parties to: 'Create enabling conditions, through, among other measures, country-led initiatives conducive to attainment of the objectives of the Amendment'.²⁸

²⁵ The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, Mali, 30 January 1991, available at <http://www.african-union.org/root/au/Documents/Treaties/Text/hazardouswastes.pdf>.

²⁶ See Webster-Main, note 2 above at 72.

²⁷ Annex to Decision IX/26, in Organization of the seventh session of the Open-ended Working Group and proposals by the Secretariat for the organization of work on the President's statement on the possible way forward on the Ban Amendment, UN Doc. UNEP/SBC/BUREAU/9/1/6 (2009), available at www.basel.int/meetings/bureau/bureau%201%20cop%209/docs/06e.doc.

²⁸ *Ibid.*

In response to this Decision, Switzerland and Indonesia launched the Country Led Initiative ('CLI'). The CLI established a process of informal consultations amongst key actors in the hazardous waste trade. Following these consultations, which will centre on three meetings scheduled to take place in 2009, 2010 and 2011, a set of recommendations will be made to the tenth Conference of the Parties.

By establishing a detailed procedure to regulate the transboundary movements of hazardous waste, the Convention aimed to allay the concerns of the developing world that they would bear a disproportionate burden from the trade in hazardous waste. However, the adoption of the Ban demonstrated that countries within both the developing and developed world remained unconvinced of the adequacy of the protection offered by the Convention. Part 3 will therefore attempt to explain this position by highlighting how the Convention has failed to safeguard the interests of the global south in the international trade in waste as a result of key weaknesses in its procedures and institutions.

3

WHY THE CONVENTION FAILS TO SAFEGUARD THE INTERESTS OF THE WORLD'S POOR IN THE INTERNATIONAL TRADE IN HAZARDOUS WASTE

Having outlined the aims of the Convention and the key provisions with which it seeks to achieve them, this section highlights how it has failed to protect the world's poor from the harmful effects of the international trade in hazardous waste and attributes this failure to some fundamental weaknesses in the Convention's institutions and procedures.

The most thorough method of assessing the success of the Convention would be a statistical analysis comparing global trends in the volume of international trade in hazardous waste before and after the implementation of the Convention. Such an analysis of international hazardous waste trade is however far

from simple due to the difficulty of obtaining accurate data on volumes, types and destinations of hazardous waste, and is in any event beyond the scope of this paper.²⁹ However, the 2006 Abidjan disaster is one incident which points to a general trend towards a growing trade in dangerous trade in hazardous waste between the developed and developing world.

On 19 August 2006, a Panamian registered ship chartered by a Dutch company unloaded 500 tonnes of toxic waste at the port of Abidjan in the West African country of Cote D'Ivoire. The waste was removed from the ship by tankers and dumped in sixteen sites across the city. The waste subsequently leached into groundwater supplies and contaminated the city's drinking water, soil and fisheries. More than ten people are thought to have died as a result of the incident, and over 100,000 have sought medical treatment as a result of injuries received from contact with the waste.³⁰

The facts of this case are depressingly similar to those of the Koko incident in 1988, despite the fact that nearly twenty years and a supposedly groundbreaking international treaty separate the two events. Far from being an isolated incident, the Abidjan disaster is only the most extreme example in a series of similar scandals which are indicative of a global phenomenon.³¹

3.1 The Prior Informed Consent (PIC) Procedure and the Problem of Self-verification

A crucial weakness of the Convention is that the PIC procedure fails to ensure that the exporting country properly verifies that adequate waste management

facilities are available in the importing country.³² Although the Convention places an obligation on both the importer and exporter to ensure the availability of adequate facilities in the country of disposal, it does not prescribe a particular process by which this information is to be ascertained.³³ The Parties are therefore reliant on the Convention's exchange of information provisions, which in effect means that the exporter is relying on representations made by the authorities in the importing country.

In the context of a developed country exporting to a developing country, this has a number of problems. First, 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 shipment of waste and assess whether their facilities are suitable. As a result they may give consent to the importation of a shipment of waste based on a genuine but mistaken belief that they possess adequate facilities for its disposal.³⁴

Second, by placing responsibility on the authorities within the developing country to verify the adequacy of disposal facilities, the PIC procedure is vulnerable to abuse by corrupt officials. 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.³⁵

Finally, and probably most significantly, the self-verification process ignores the economic realities that influence decision making in developing countries.³⁶ The importation of hazardous waste can provide much needed foreign currency revenue for poor countries. An extreme example of this is the case of Guinea Bissau, which in the 1980s received an offer of \$600 million from a coalition of US and European private companies

29 J. Krueger, 'The Basel Convention and the International Trade in Hazardous Wastes', in O. Stokke and Ø. Thommessen eds, *Yearbook of International Co-operation on Environment and Development* 43, 44 (London: Earthscan, 2001).

30 Reports of the numbers of casualties vary. These figures are taken from a UNEP press release 'Donor Governments Should Support On-Going Côte d'Ivoire Emergency', 14 December 2006, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=496&ArticleID=5453&l=en>.

31 For details regarding the incidents in Cambodia, Taiwan, and the Philippines, see Krueger, note 29 above at 43. Webster-Main gives details of incidents in South Africa and Somalia, see Webster-Main, note 2 above at 65.

32 L. Widawsky, 'In My Backyard: How Enabling Hazardous Waste Trade To Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice', 38/2 *Environmental Law* 577, 604 (2008).

33 See Basel Convention, note 1 above, Article 4(b).

34 See Widawsky, note 32 above at 605.

35 O. Fagbohun, 'The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote d'Ivoire', 37/3 *Hong Kong Law Journal* 831, 841 (2007).

36 See Widawsky, note 32 above at 605.

to accept toxic waste. This figure was equal to approximately five times that nation's annual Gross National Product.³⁷

This is exacerbated by the fact that developing countries are often in direct competition with each other to secure contracts for the importation of hazardous waste. The global ship breaking industry is a prime example of this phenomena, where competition with China, Pakistan and Bangladesh has been attributed as one of the factors behind the Supreme Court of India's decision to grant permission to a ship dismantling company based in Alang to dismantle the 'Blue Lady', despite an expert's report showing that the ship contained high levels of asbestos and other toxic wastes.³⁸

So whilst the sovereignty of nations to refuse imports of wastes is embodied in the Convention, in reality, governments may surrender this sovereignty where the economic incentives are sufficiently high. In these circumstances the PIC procedure is powerless to prevent government officials from knowingly overstating their capacity to cope with hazardous waste imports in order to secure vital revenue.

3.2 The Compliance Committee

The establishment of an effective compliance mechanism was identified as one of the key aims of the Strategic Implementation Plan produced at the sixth meeting of the parties in 2002.³⁹ The Conference of the Parties duly adopted a Mechanism for Promoting Implementation and Compliance in 2002. The mechanism established an Implementation and Compliance Committee (the Committee) which held its first meeting on 19 October 2003.⁴⁰

In common with similar compliance mechanisms under other international environmental agreements, the

Committee does not have a mandate to enforce the Convention or to impose punitive measures against non-compliant Parties.⁴¹ The Committee's objectives are to provide assistance to Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the Convention.⁴²

The Committee considers submissions made by Parties regarding their own non-compliance, submissions from Parties regarding other Parties' non-compliance, and submissions by the Secretariat, and then passes their recommendations and conclusions to the Conference of the Parties. However, as recently as the ninth Conference of the Parties in June 2008, neither the Secretariat nor any Party to the Convention had made a submission of non-compliance to the Committee.⁴³ This is fairly typical of the experiences of non-compliance procedures in international environmental agreements. For example, the Compliance Committee for the Aarhus Convention⁴⁴ has, since its establishment in 2002 received just one submission from a Party regarding another's non-compliance, and no submissions regarding a Party's own non-compliance.⁴⁵

A likely reason for this seeming reluctance on the part of Parties to international environmental treaties to implicate each other in non-compliance is that they fear that such actions would have undesirable repercussions either directly, in the form of retaliatory reports regarding their own non-compliance with the

37 H. Friman and P. Richard, *The Illicit Global Economy and State Power* 96 (Maryland: Rowman & Littlefield, 1999).

38 F. Pelsy, 'The Blue Lady Case and the International Issue of Ship Dismantling', 4/2 *Law, Environment and Development Journal* 137, 139 (2008).

39 Strategic Plan for the Implementation of the Basel Convention (2000-2010), Sixth Meeting of the Conference of the Parties, UN Doc. UNEP/CHW.6/3 (2002), available at <http://www.basel.int/meetings/cop/cop6/english/3e.pdf>.

40 Report of the first session of the Implementation and Compliance Committee, UN Doc. UNEP/CHW/CC/1/3 (2003).

41 The most notable exception being the compliance mechanism under the Kyoto Protocol, see J. Klabbers, 'Compliance Procedures', in D. Bodansky, J. Brunnee and E. Hey eds, *The Oxford Handbook of International Environmental Law* 996 (Oxford: Oxford University Press, 2008).

42 Terms of Reference of the Implementation and Compliance Committee, annexed to Decision VI/1 2, UN Doc. UNEP/CHW/OEWG/1/3 (2003).

43 Report of the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention and proposed work programme for the Committee for the period 2009-2010, UN Doc. UNEP/CHW.9/3 (2008), available at <http://www.basel.int/meetings/cop/cop9/docs/03e.pdf>.

44 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, available at <http://www.unece.org/env/pp/treatytext.htm>.

45 Full list of submissions available at <http://www.unece.org/env/pp/Submissions.htm#SubmissionsOther>.

Convention, or indirectly, either through other retaliatory sanctions or a general souring of diplomatic relations.⁴⁶

The Committee's powers are limited to making non-binding recommendations to the non-compliant Party as to what steps they need to take to ensure compliance⁴⁷ and making recommendations to the Conference of the Parties of additional measures it thinks the non-compliant Party needs to take.⁴⁸ This non-confrontational, collaborative approach to enforcement is in keeping with a general emphasis in multilateral environmental agreements towards negotiation and consensus.⁴⁹

For Kravchenko, this approach is more effective than traditional punitive approaches to compliance in the context of international law, mainly because it assumes that most issues of non-compliance are not a result of unwillingness, but of a lack of technical, legal or financial capacity on the part of the governments of the parties to the agreement.⁵⁰ This is a compelling argument in relation to the Convention, where a Party's technical capacity is an important factor in determining whether it is able to comply with the Convention. The Committee can therefore, by adopting this facilitative approach, play a vital role in building capacity within non-compliant Parties.

However, this approach also has its limitations. Whilst a facilitative approach is effective in dealing with cases of what can be termed 'good faith non-compliance' (that is, where a party intends to fulfil its treaty obligations but is unable to as a result of a lack of capacity) it does not address instances of intentional non-compliance.⁵¹ Fagbohun argues that it is wrong to assume that non-compliance is simply the result of a lack of capacity on the part of the government.⁵² Conversely, as the case

of the Abidjan disaster demonstrated, governments in the developing world are often reluctant to enforce the provisions of international conventions where this conflicts with their own interests.

The action taken in the aftermath of the Abidjan disaster further illustrates the shortcomings of a facilitative approach to compliance. A report into the incident, which reported back to the eighth Conference of the Parties made four recommendations: The development of a sub-regional monitoring and prevention plan; the development of a plan for the environmentally sound management of hydrocarbon wastes and of the residues from the processing of such wastes at the Port of Abidjan; the development of a national plan for the implementation of the Basel Convention; and the development of a programme to rehabilitate the lagoon system in Abidjan.⁵³ Whilst not made by the Committee itself, these recommendations are typical of the facilitative approach to compliance issues which the Committee practices.

Whilst these recommendations are clearly sensible and would go some way to preventing a reoccurrence of the disaster, they are wholly inadequate in acting as a deterrent against future transgressions. Somewhat perversely, these recommendations can be viewed as rewarding a Party for their failure to comply with the Convention by providing them with additional financial and technical resources.

In addition to its inability to impose punitive measures, the Committee's effectiveness has been limited by a seeming unwillingness on the part of the Parties to engage with it. For example, as recently as the eighth Conference of the Parties, neither the Secretariat nor any Party to the Convention had made submissions of non-compliance to the Committee.⁵⁴ At the eighth Conference of the Parties, the Committee noted that its ability to assess compliance was seriously frustrated

46 E. Louka, *Overcoming Natural Barriers to International Waste Trade* 209 (London: Graham & Trotman, 1994).

47 See Terms of Reference of the Implementation and Compliance Committee, note 42 above, Paragraph 19.

48 *Id.*, Paragraph 20.

49 See Louka, note 46 above at 209.

50 S. Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', 18/1 *Colorado Journal of International Environmental Law* 1, 28 (2007).

51 R. Mitchell, 'Compliance Theory', *in* Bodansky, Brunnee and Hey eds, note 41 above at 893.

52 See Fagbohun, note 35 above at 837.

53 Report of the mission undertaken in Côte d'Ivoire following the incident of the Probo Koala, in the context of Decision V/32, UN Doc. UNEP/SBC/BUREAU/8/1/INF/2 (2007), available at www.basel.int/meetings/bureau/bureau%201%20cop%208/docs/i02e.doc.

54 Report by the Secretariat on the Compliance Committee, Eighth meeting of the Conference of the Parties of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, UN Doc. UNEP/CHW.8/12 (2006).

by the failure of Parties to submit annual national reports to the Secretariat in accordance with Article 13 of the Convention.⁵⁵

The Committee's ability to effectively enforce compliance with the Convention is further undermined by a lack of financial resources. The Convention contains few provisions regarding how its institutions are financed; however, it does state that any funding mechanisms shall be of a voluntary nature.⁵⁶ This system is proving to be wholly inadequate in providing the Committee with adequate resources with which to fulfil its role.

However, one of the main limitations on the Compliance Committee's effectiveness is that as the Convention is an agreement between states, non-state actors are not directly bound by its provisions. The state therefore acts as an intermediary, by passing appropriate domestic laws which implement the Convention at a national level in order to regulate private actors.⁵⁷ The Compliance Committee's role is therefore limited to monitoring the extent to which Parties adopt and enforce adequate implementing legislation.

3.3 Failure to Establish a Liability Mechanism

Article 12 of the Convention required the Parties to cooperate with a view to adopting, as soon as practicable, a protocol establishing a framework for liability and compensation for damage resulting from transboundary movements of hazardous waste. The Basel Protocol on Liability and Compensation⁵⁸ was eventually adopted after six years of negotiation, at the Fifth Conference of Parties (COP-5) on 10 December 1999. However, nearly ten years later it is still not in force as only nine of the minimum of 20 Parties have ratified it.⁵⁹

The Protocol, which is the first of its kind amongst multi-lateral environmental agreements,⁶⁰ imposes strict liability against the state of export or generator for any loss of life or personal injury, loss of or damage to property, loss of income and costs of reinstatement of the impaired environment caused by the transboundary movement of hazardous waste.⁶¹ It also imposes fault based liability against any other person who causes or contributes to such damage through lack of compliance with the Convention or by 'wrongful, intentional, reckless acts or omissions'.⁶² The Protocol also imposes minimum 'floors' on liability, depending on the tonnage of the shipment.

The Protocol has yet to be ratified as it is a compromise that suits neither the developed nor the developing world. From the perspective of the developing world, it contains a number of loopholes, which would allow developed countries to escape liability for damage caused by exporting waste to developed countries. This prompted one NGO commentator to describe the Protocol as 'a text with as many holes and exclusions as Swiss cheese'.⁶³

Representatives of developing countries and NGOs focus on two main loopholes contained in the Protocol.⁶⁴ First, the Protocol does not impose liability for 'aftercare' – in other words, the liability of an exporter ceases from the point that the disposer has taken possession of the hazardous waste.⁶⁵ This means that the Protocol fails to incentivise exporting Parties to ensure that the disposal facilities are adequate in accordance with Article 4. 2(b) of the Convention. This is particularly problematic because pollution of soil and groundwater caused by the leaching of hazardous waste

⁵⁵ *Ibid.*

⁵⁶ See Basel Convention, note 1 above, Article 14.

⁵⁷ D. Wirth, 'Hazardous Substances and Activities', in Bodansky, Brunnee and Hey eds, note 41 above at 394.

⁵⁸ Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999 (hereafter 'Liability Protocol'), available at <http://www.basel.int/pub/protocol.html>.

⁵⁹ *Id.*, Article 29. List of ratifications of the protocol available at <http://www.basel.int/ratif/protocol.htm>.

⁶⁰ See Krueger, note 29 above at 46.

⁶¹ See Liability Protocol, note 58 above, Article 4.

⁶² *Id.*, Article 5.

⁶³ D. Pruzin, 'Hazardous Waste Agreement on Liability Protocol Reached at Basel Conference of Parties', Press release, Basel Action Network, 10 December 1999, available at http://www.ban.org/ban_news/hazardous3.html.

⁶⁴ See, e.g., the Basel Action Network Report on the 8th Session of the Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 19-23 April 1999, available at http://www.ban.org/subsidiary/liability_report.html.

⁶⁵ See Liability Protocol, note 58 above, Article 3(b).

from unsuitable containers is a common problem with hazardous waste (as demonstrated by the Abidjan disaster) and one which may not come to light for many years after waste disposal. It has also been suggested that this encourages the export of hazardous waste as exporting Parties can simply pass on liability to a disposal company rather than face continued liability exposure where it deposits in its country of origin.⁶⁶ Second, the Protocol exempts from liability any Party who has made a bilateral or multilateral agreement under Article 11 of the Convention which meets or exceeds the liability provisions under Protocol.⁶⁷

From the perspective of the developed world, the Protocol is unacceptable because the minimum liability thresholds it imposes are unrealistically high and because it duplicates domestic liability regimes, which creates a risk of confusion and high administrative costs.⁶⁸ So while the Convention did provide for the establishment of a liability framework, by deferring agreement on its details it paved the way for the current political impasse, leaving a critical element of the legal framework unrealised.

3.4 Lack of Funding for Technology Transfer

The Convention obliged the Parties to establish regional centres for training and technology transfers.⁶⁹ These have become known as the Basel Convention's Regional Training Centres for the Transfer of Technology (BCRCs). Together, they form a regional network of autonomous institutions which operate under the supervision of the Conference of the Parties to the Convention.

The Strategic Development Plan identified improving the capacity of the BCRCs as one of nine key strategies for supporting the Convention's aims. However, the failure to establish a regular funding mechanism means that they are unable to properly facilitate technology transfer and thus increase the capacity of developing countries to safely manage hazardous waste. BCRCs rely

on funding from two sources, namely the host country, which, in developing countries is usually severely limited, and second, as with the Committee, through voluntary donations from Parties.⁷⁰

This financial model fails to provide the BCRCs with the resources they require to build capacity in developing countries. For example, the BCRC for the Arab States, BCRC Egypt, relied exclusively on a voluntary donation of \$1 million from Finland.⁷¹ This is a paltry sum given the enormity of the task faced by the BCRCs in bringing facilities in the developing world up to a standard which allows ESM of hazardous waste. The Conference of the Parties has acknowledged the inadequacy of this system, stating in a 2007 report on the operation of the BCRCs that 'Centres' operation has not met expectations (sic). A combination of reasons explains such a modest performance over the years. Centres have never been properly funded. Insufficient guidance was provided to centres in terms of governance, institutional structure, management and programming'.⁷²

3.5 The Recycling Loophole

A critical weakness of the Convention is that the definition of waste is limited to 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.⁷³ The Basel Action Network, a vociferous critic of what it describes as the 'recycling loophole', argues that most waste trade to developing countries that is claimed to be destined for reuse or recycling is either 'sham' recycling, where it is not really for recycling at all, but will be dumped or burned by the importer, or 'dirty' recycling, where the recycling process itself will involve pollution of the environment and risk to the health of workers.⁷⁴ This has been increasingly exposed by the growth in the exports of so called 'e-

66 See Widawsky, note 32 above at 609.

67 See Liability Protocol, note 58 above, Article 3, Para 7(a).

68 See, e.g., statement by Australia, available at http://www.ban.org/about_basel_conv/cop5reportfinal.pdf.

69 See Basel Convention, note 1 above, Article 14.

70 Decision VIII/4 of the eighth meeting of the Conference of the Parties to the Basel Convention, UN Doc. UNEP/CHW.9/7 (2008), available at <http://www.basel.int/meetings/cop/cop9/docs/07e.pdf>.

71 See Widawsky, note 32 above at 598.

72 Draft Report on the Operation of the Basel Convention Regional and Coordinating Centres, 2007, available at <http://www.basel.int/centers/draft-report-bcrcs.pdf>.

73 See Basel Convention, note 1 above, Article 12.

74 Basel Action Network (BAN), Hazardous Waste Recycling: No Justification for Toxic Trade (Seattle: Basel Action Network, Briefing Paper 7, 2007).

waste': used electronic equipment such as computers and mobile telephones.⁷⁵

3.6 Conclusion

It is impossible to quantify the success of the Convention due to the absence of accurate figures on the volume of legal and illegal international trade in hazardous waste. However, incidents such as the Abidjan disaster and the Blue Lady controversy, together with the burgeoning e-waste industry in developing world cities such as Lagos, clearly indicate that the Convention is failing to prevent the growth in exports in hazardous waste to the developing world.

This failure can be attributed to a number of key weaknesses in the Convention. The Convention's fundamental failure is that it does not recognise the unique pressures that the drive for economic development, lack of institutional capacity and endemic corruption place on developing countries. Self-verification is highly vulnerable to abuse and incompetence and therefore frequently makes a mockery of the concept of 'Prior Informed Consent'.

These procedural weaknesses are exacerbated by the Convention's weak institutions. Constitutionally impotent and financially under-resourced, the Compliance Committee lacks both the mandate to enforce implementation of the Convention and the capacity to adequately facilitate compliance by Parties. Similarly, the BCRCs are unable to ensure the transfer of technology to developing countries to build their capacity to manage hazardous waste.

Finally, the fact that the liability protocol has not yet entered into force means that there is no mechanism for ensuring that the exporting state pays compensation for damage caused by exports of hazardous waste.

The events in Abidjan and Alang are both attributable to one or more of these weaknesses, and will be repeated across the developing world with increasing frequency if they are not addressed. This is a view expressed by Achim Steiner, the Executive Director of UNEP, who

⁷⁵ Basel Action Network (BAN), *The Digital Dump: Exporting Re-use and Abuse to Africa* (Seattle: Basel Action Network, Photo-documentary Report, 2005), available at <http://www.ban.org/Library/TheDigitalDump.pdf>.

warned, following the Abidjan incident, 'As global trade flows expand and tough domestic controls raise the costs of hazardous wastes disposal in developed countries, the opportunities and incentives for illegal trafficking of wastes will continue to grow'.⁷⁶

4

WHY A COMPLETE BAN ON NORTH-SOUTH TRADE IN HAZARDOUS WASTE IS NOT THE SOLUTION

The seeming inability of the Convention to prevent the growth in harmful exports of hazardous waste to the developing world would seem to support the case for the complete prohibition on trade in hazardous waste between developed and developing countries, as advocated by the Ban and regional instruments such as the Bamako Convention. However, this section will argue that a complete prohibition is difficult to enforce, and that it is not supported by a number of countries who are significant actors in the field of hazardous waste.

4.1 The Growth in Illegal Traffic

Although the Ban has not been ratified by enough Parties to become legally binding, some Parties have nonetheless decided to reflect its content within their national legislation. In particular, the EU has ratified the Ban and crucially, has implemented it within EU law through the adoption of the Waste Shipment Regulation 2006.⁷⁷ Experience gained from the EU's attempts to enforce the Waste Shipment Regulations suggests that a total prohibition on trade in hazardous waste between Annex VII and non-Annex VII countries is difficult to enforce and merely exacerbates the problem of illegal trafficking of hazardous waste.

⁷⁶ UNEP, 'UNEP Responds to Abidjan Hazardous Wastes Crisis', UNEP press release, 8 September 2006, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=487&ArticleID=5347&l=en>.

⁷⁷ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste. Regulation No. OJ L190/1 (2006), available at http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130521.pdf.

A number of recent reports suggest that the volume of both legal and illegal transboundary movements of hazardous waste between the EU and developing countries has continued to increase despite the EU's ratification of the Ban. For example, a 2009 report by the European Environment Agency found that in the period from 1997 to 2005, 1-3 per cent of exports of hazardous or problematic waste from EU countries went to countries outside the EU or OECD.⁷⁸ Although this seems like a small percentage, when viewed in the context of the overall volume of transboundary movements of waste from the EU (over 10 million tonnes in 2004), it represents a very large volume of waste. Further, the report recognised that because of the difficulty in obtaining accurate figures on the illegal trade in waste, the actual volume of hazardous waste being transported was likely to be much higher.⁷⁹

The significance of illegal traffic is highlighted in a report by the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), which found that of 140 waste shipments inspected, 48 per cent breached EU rules, many of which were hazardous wastes bound for developing countries.⁸⁰

Although it is difficult to determine whether there has actually been an increase in illegal exports or whether these figures are simply the result of increased monitoring, they clearly show that the Ban has failed to prevent significant levels of illegal exports of hazardous waste to the developing world from Europe.

Under the Convention, transboundary movement of hazardous waste is illegal if it takes place without the prior notification and consent of all concerned states, where the consent is obtained through falsification, misrepresentation or fraud, where it does not conform with the documents or where it results in the deliberate disposal of waste in contravention of the Convention

or general principles of law.⁸¹ Illegal waste traffic therefore encompasses a range of situations, including trafficking that takes place without any regard to the Basel process, which could be classed as smuggling, and situations where there is an attempt to follow the process but it is invalidated either through an unintentional mistake or a deliberate misrepresentation.

For Louka, this apparent growth in the illegal trafficking of waste is an inevitable consequence of more stringent waste management controls because of the 'static dimension of wastes'.⁸² Waste, he explains, is not a valuable commodity like other illegally traded materials such as narcotics, or, (to take an example closer to the environmental sphere), elephant ivory. Conversely, waste usually has little or even negative value, as generators of waste will often pay importers in developing countries to accept their waste. This means that for the hazardous waste trafficker, with no incentive to ensure the waste reaches its final destination, it is more advantageous to simply dump the waste.⁸³ Conventional compliance and enforcement mechanisms are therefore inadequate, as proper enforcement requires almost continuous surveillance.⁸⁴ Louka argues that illegal waste traffic (in other words, waste 'smuggling', where the PIC process is completely avoided) is far worse than other hazardous waste transfers as illegal traffickers are not under any pressure to apply any waste management standards.⁸⁵

4.2 Lack of Universal Support for the Ban

As discussed in Part 2, the Ban has yet to be ratified by most non-European developed countries including Japan, US, Canada, Australia and New Zealand (together known as the 'JUSCANZ group'), who are responsible for a significant proportion of global hazardous wastes. This is largely because the Ban is not based on a consensus between the Parties to the Convention,⁸⁶ and disrupts the 'delicate balance between industrialised and

78 European Environment Agency, *Waste without Borders in the EU – Transboundary Shipments of Waste* (Copenhagen: European Environment Agency, Report No. 1/2009, 2009).
79 *Id.* at 13.

80 European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), *IMPEL-TFS Seaport Project II: International Cooperation in Enforcement Hitting Illegal Waste Shipments* (Bruxelles: European Union Network for the Implementation and Enforcement of Environmental Law, 2006).

81 *See* Basel Convention, note 1 above, Article 9 (1).

82 *See* Louka, note 46 above at 212.

83 *Ibid.*

84 *Id.* at 2.

85 *Ibid.*

86 D. Wirth, 'Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes', 17 / 3 *Review of European Community and International Environmental Law* 237, 239 (1998).

developing nations' interests that enabled the initial passage of the Convention'.⁸⁷ Any measure that does not bind such an important group of countries is of limited value.

Furthermore, the Ban is regarded as the main reason for the US's failure to ratify the Convention. Although the US signed the Convention in 1990, it has yet to deposit its ratification documents with the Secretariat because it has yet to pass legislation which implements the requirements of the Convention.⁸⁸ The provisions of the Convention are more stringent than US legislation in a number of areas; for example, US legislation does not require the repatriation of waste that has been exported without prior notification and consent as is required by the Convention.⁸⁹ The fact that the Ban acts as an impediment to the world's leading generator and exporter of hazardous waste from ratifying the Convention is in itself a compelling reason to look at alternative solutions to a total prohibition on north-south trade in hazardous waste.⁹⁰

4.3 The Ban as an Infringement of Sovereignty

One aspect of the political deadlock over the ratification of the Ban that is often glossed over, particularly by its proponents, is that it has not been ratified by a number of developing countries such as India, Pakistan and Brazil, which are major actors in the field of international hazardous waste trade.⁹¹ This is largely because for these countries, trade in hazardous waste is an important source of both revenue and, where waste is imported for recovery and reuse, raw materials. As the Convention already recognises the sovereignty of nations to decide whether to allow imports of hazardous waste, the Ban would seem to be an unjustifiable restriction on this sovereignty.

87 See Widawksy, note 32 above at 612.

88 V. Nanda and G. Pring, *International Environmental Law and Policy for the 21st Century* 333 (New York: Transnational Publishers, 2003).

89 See Basel Convention, note 1 above, Article 8.

90 T. Waugh, 'Where Do We Go from Here? Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders', 11 *Fordham Environmental Law Journal* 477, 502 (2001).

91 Full list of ratifications available at <http://www.basel.int/ratif/ban-alpha.htm>.

However, as discussed in Part 3, supporters of the Ban would argue that cases such as the Blue Lady, where a developing country consented to the import of hazardous waste despite knowing that they lacked the capacity to manage it safely show that the notion of sovereignty in the context of north-south relations is something of an illusion. This is a compelling argument, but one that could be addressed through less restrictive measures than a total ban on transboundary movements between Annex VII and non-Annex VII countries.

Another criticism of the Ban is that membership of the OECD or EU is a very crude distinction for inclusion within Annex VII. This fails to recognise that within non-OECD countries there exists a very broad spectrum of capacity to manage hazardous waste, and indeed some non-OECD countries have greater institutional capacity to manage hazardous waste than some OECD countries.⁹² This criticism has gained credence with the enlargement of the EU in recent years to include Eastern European countries.⁹³ This crude distinction also acts as a disincentive for developing countries to improve their waste management facilities.⁹⁴

4.4 The failure of the Bamako Convention

Whilst this chapter has focused largely on the shortcomings of the Ban to highlight the futility of a complete prohibition on trade in hazardous waste, most of these arguments are also applicable to the Bamako Convention.

Like the Ban, it has largely failed to stem the trade in illegal hazardous waste, leading some commentators to describe it as a symbolic treaty, rather than one with any real legal force.⁹⁵ Indeed, due to problems of endemic corruption and weak government, signatories to the Bamako convention are particularly ill-equipped to tackle the problem of illegal traffic. While there is an absence of sufficient data to allow a quantitative assessment of

92 See Kummer, note 8 above at 230.

93 By the 2003 EU Treaty of Accession, ten countries, seven of which were members of the former Eastern Bloc, joined the EU with effect from 1 May 2004. Full text of the Treaty available at <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/12003T.html>.

94 See Kummer, note 8 above at 230.

95 See Webster-Main, note 2 above at 65-66.

Bamako's impact, the fact that the Abidjan disaster occurred in a country that had signed and ratified the Bamako Convention supports this view.

Whilst the adoption of the Bamako Convention does demonstrate that some developing nations are unconvinced by the protection provided by the Convention, the slow progress in ratifying the Convention since then points to an absence of universal support among African nations. The Bamako Convention did not receive the minimum ten ratifications to come into force until 1998, and as of 31 January 2009, had still only been ratified by 23 countries.⁹⁶ One possible explanation for this could be that these nations have been forced to direct their limited law-making resources to issues of higher priority. However, the growing importance of recycling as a source of raw material and revenue among African nations is also likely to be significant.

4.5 Conclusion

The Ban represents the views of only one side of a hotly contested issue, and therefore the prospects of it being universally ratified are very slim. Whilst its implementation by the EU is significant, the fact remains that it has proven difficult to enforce and is not accepted by the majority of non-European industrialised countries, and a number of important developing countries.

The adoption of Decision IX/26 (President's way forward on the Ban Amendment) is an effort to move past the existing deadlock which is a function of the Ban's lack of universal support among developed and developing countries alike. Although the Decision calls upon the Parties to expedite the ratification of the Ban, the adoption of the Country Led Initiative suggests a tacit acceptance by the Parties that ratification of the Ban in the near future is unlikely. It is hoped that by adopting an informal, pragmatic process which focuses on practical measures rather than ideology, the Country Led Initiative can find a compromise solution which will ensure the Convention's aims are furthered alongside continued trade in hazardous waste between the developed and developing world.

⁹⁶ Details of signature and ratification of the Bamako Convention are available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Bamako%20Convention.pdf>.

Part 5 puts forward some key reforms to the Convention which could underpin such a compromise. By allocating the vast resources that would otherwise be required to properly enforce the Ban to reforming the institutional and procedural weaknesses that were identified in Part 3, trade in hazardous waste between north and south could occur whilst protecting the interests of the people and environment of the developing world.

5 STRENGTHENING THE CONVENTION

5.1 Reforming the PIC Procedure

Reforming the Convention needs to be based on an understanding that Prior Informed Consent is an inadequate procedure in the context of north-south trade in hazardous waste. Widawsky proposes that the solution to this problem would be the establishment of an independent body, which would be responsible for inspecting disposal or recovery facilities prior to any transboundary movement and having power to grant or deny permits for international trade based on the adequacy of these facilities to comply with ESM requirements.⁹⁷

At first glance this would appear to be a simple solution to the problem. By ensuring inspection by an independent body, the relevant authorities in developing countries would be prevented from misrepresenting the capacity of their facilities to provide ESM.

However, this alone would not adequately safeguard the interests of the poor, as it only tackles one end of the self-verification process. It does not deal with the problem of exporters misleading importers as to the nature of the waste. This is particularly pertinent in the context of the growth in the trade of e-waste, where, as discussed in Part 3, exporters of e-waste falsely designate it as being for reuse or recovery when in reality a significant proportion of it is of little economic value and will simply be disposed of. The solution to this problem is inspection and certification of e-waste prior

⁹⁷ See Widawsky, note 32 above at 606.

to export, based on an assumption that all e-waste is in fact hazardous waste. This solution, which has been advocated by the Basel Action Network⁹⁸ and implemented in Australian law,⁹⁹ would go a considerable way to closing the recycling loophole, allowing developing countries to pursue their comparative advantage in the recycling industry and access vital natural resources whilst increasing the proportion of waste that is recycled rather than disposed.

Widawsky does not elaborate on the size or shape that an inspection body might take. However, given the sheer volume of international trade in the era of globalisation, it would need to be a large and well-resourced organisation if it was to fulfil its role effectively. At the very least it would require teams of experts stationed near all the world's major ports, airports and road and rail terminals.

We have already seen in Part 3 how the effectiveness of the Compliance Committee has been critically undermined by a lack of funds. It is therefore difficult to envisage the Parties to the Convention agreeing to put adequate finance in place to support the establishment of an inspection body. The Conference to the Parties would therefore need to consider alternative financing models. For example, the inspectorate could be self-financing to a degree if it were able to charge for issuing permits for hazardous waste transfers and impose fines for non-compliance with the Basel procedures. The compliance mechanism under the Convention on International Trade in Endangered Species could serve as a useful precedent in this regard.¹⁰⁰

5.2 Strengthening the Compliance Committee

As discussed in Part 3, the Committee is at present hopelessly ill-equipped to perform its role in facilitating

compliance with the Convention, so strengthening it is a prerequisite to safeguarding developing countries in international trade in hazardous waste.

First, the Committee needs to be given adequate financial resources for it to carry out its facilitative and consultative approach. This demands that the current financial model based on voluntary contributions is replaced by a compulsory system whereby Parties contribute fixed amounts based on a number of factors such as their ability to pay and the proportion of the international trade in hazardous waste attributable to them. This will allow the Committee to properly assist non-compliant Parties to properly implement the Convention.

Regardless of how well financed the Committee is, it will not be able to enforce compliance with the Convention using a purely facilitative approach. Recognising that non-compliance is often the result of a lack of political will as well as a lack of capacity, the Committee's facilitative function needs to be backed up with the threat of punitive measures. The Parties to the Convention must therefore amend the Committee's terms of reference to allow it to penalise non-compliant Parties where facilitative approaches have failed.

Widawsky proposes that the Committee's revised powers be modelled on the compliance mechanism under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, by dividing the Committee into two arms, a facilitative branch and an enforcement branch.¹⁰¹ This would certainly improve the ability of the Compliance Committee to better enforce compliance with the Convention. Declarations of non-compliance would be useful for 'naming and shaming' non-compliant Parties. Fines against states for non-implementation of the Convention and for allowing trades which breach the Convention would also be useful for punishing Parties and other actors who breach their obligations under the Convention. Fines would have the added advantage of providing a useful revenue stream to finance the Committee's expanded responsibilities.¹⁰²

98 See Basel Action Network, note 75 above.

99 The Hazardous Waste (Regulation of Exports and Imports) Act 1989. Full text of the Act is available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D645B1F37C27FD60CA2575C90006CB74/\\$file/HazWasteRegExImp89.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D645B1F37C27FD60CA2575C90006CB74/$file/HazWasteRegExImp89.pdf).

100 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington DC, 3 March 1973, 993 UNTS 243, available at <http://www.cites.org/eng/disc/text.shtml#texttop>.

101 The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 37 *Int'l Leg. Mat.* 22 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.html>.

102 See Widawsky, note 32 above at 621.

Perhaps the most potent measure that could be copied from the Kyoto regime would be an ability to suspend a non-compliant Party from trading in international waste for a certain period. This would be analogous with the power that the Kyoto Compliance Committee has to suspend Parties from utilising the flexibility mechanisms under the Kyoto Protocol such as emissions trading. Denying Parties the ability to access revenues from international trade and/or denying them the possibility of exporting their waste would act as a serious deterrent against non-compliance.

However, Widawsky's proposal ignores the fact that the Kyoto Protocol has a fairly unique status for a multi-lateral environmental agreement. It is based on global perceptions and a scientific consensus that global warming is one of the most serious threats to the environment. No such consensus or political will is evident in relation to the trade in hazardous waste. For this reason, it is unlikely that Parties would consent to the conferring of punitive powers to the Compliance Committee.

The first meeting of the Country Led Initiative in June 2009 focused on identifying the reasons for transboundary movements of hazardous waste in contravention of ESM.¹⁰³ Lack of capacity in developing countries was identified as one of the main causes.¹⁰⁴ However, the meeting did not acknowledge the role of intentional non-compliance. Although it is too early to anticipate what recommendations might emerge from this process (possible recommendations to the Conference of the Parties are not due for discussion until the third meeting of the Country Led Initiative in 2011), this emphasis on capacity issues would suggest that a departure from the facilitative approach to compliance towards a more punitive measures is unlikely.

Furthermore, the financial costs involved in both improving the PIC procedure in the manner suggested above, and reinforcing the Compliance Committee should not be underestimated. At a time when global

financial resources are stretched by a global recession, there is little prospect of much progress being made on this front in the next five years. This supports Louka's assertion that any compliance procedure under Basel 'will be ineffective in the long-run because it will become politically or financially unaffordable'.¹⁰⁵

5.3 The Future of the Liability Protocol

Whilst the ratification of the Liability Protocol would greatly improve the effectiveness of the Convention, there seems to be little prospect of this happening in the foreseeable future given that in its current form it is unacceptable to both developed and developing countries. In view of this it is all the more important that the Compliance Committee is given punitive powers so that it can act as a financial deterrent against non-compliance in the absence of a system of state liability.

5.4 Strengthening the BCRCs

Building the capacity of developing nations through the BCRCs must be a crucial objective for future Conference of the Parties. This needs to be based on compulsory rather than voluntary contributions by Parties. However, this will encounter the same problems as strengthening the PIC procedure and the Compliance Committee. It will be difficult to persuade parties to contribute additional funds, and it will be even more difficult to devise a mutually agreeable basis for deciding what each Party should contribute.

6 CONCLUSION

The Convention is currently failing to prevent the developing world from being used as a dumping ground for the industrialised nation's hazardous waste. However, a complete prohibition on hazardous waste trade between north and south is misguided and, from a practical point of view, futile. The Ban does not enjoy the support of a group of developed countries who are

¹⁰³ List of possible reasons discussed by the 1st meeting of the Country Led Initiative – summary by Co-Chairs, 17 September 2009, Doc. No. CLI/2009/8, available at <http://www.basel.int/convention/cli/bali-meeting/List%20of%20possible%20Reasons%20-%20draft%2009.17%20-%20DEF7663.doc>.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Louka, note 46 above at 212.

responsible for generating a large proportion of the world's hazardous waste, nor of a number of significant countries in the developing world. Further, by alienating the US, it has impeded the Convention's ratification by the world's largest generator of hazardous waste. The continued export of hazardous waste from the EU, which has implemented the Ban, to developing countries demonstrates how difficult it is to enforce a complete prohibition. Properly enforcing the ban would require the allocation of vast resources towards national enforcement bodies. These resources would be better allocated to reinforcing the Convention's institutions and procedures.

In adopting the Country Led Initiative, the Parties have acknowledged the need to move beyond the deadlock created by the Ban and work towards practical and pragmatic solutions to ensuring that the objectives of the Convention and the Ban are achieved whilst north-south trade in hazardous waste continues. This is a welcome development, which presents a real opportunity to instigate some of the essential reforms to the Convention's institutions and procedures.

The cornerstone of these reforms should be a strengthening of the PIC procedure to ensure that transboundary movements of hazardous waste only take place with the genuine consent of the importing nation. In order to ensure that this process is not abused by incompetent, corrupt or desperate operators on both sides of the north/south divide, any shipment of hazardous waste must be approved by an independent and objective body following physical inspection of both the proposed shipment of waste and the proposed disposal or recycling facilities. This is particularly important given the widespread abuse of the recycling loophole seen in the burgeoning e-waste and ship-breaking industries.

Further, the Compliance Committee urgently requires greater powers and financial resources to monitor implementation and enforcement of the Convention.

Further resources must also be committed to the process of technology transfer so that countries in the developing world can build the technological capacity needed to reap the economic benefits from managing hazardous waste whilst minimising the risks to human health and the environment. The failure to adopt the Liability Protocol, and the unlikelihood that it ever will

be adopted makes it all the more important that the Compliance Committee can enforce the Convention's obligations and impose financial penalties against non-compliant Parties.

These reforms would go some way to ensuring the Convention better realises its objectives. They would allow developing countries to benefit from hazardous waste disposal and recycling where, with the assistance of technology transfer they had gained competitive advantage because of expertise and capacity, not because of a 'race to the bottom' approach to environmental protection and worker's rights.

Devising a compulsory system of financial contributions in which countries' contributions to the Basel secretariat are based on their responsibility for hazardous waste generation would internalise external costs, ensure the polluter pays and send a price signal that more accurately reflects the true cost of disposal in developing countries. This may undermine the economic logic which currently drives the exportation of hazardous waste, thereby furthering two of the Convention's key aims: minimising the amount of hazardous waste that is generated and the amount of transboundary movements of hazardous waste.

However, the cost of these reforms, particularly in providing for prior inspection of both hazardous waste shipments and disposal facilities, should not be underestimated. It is doubtful whether the political will exists to bring about these reforms, particularly in the midst of a global economic crisis.

Without these essential reforms, the Convention will remain 'a compromise treaty that is long on rhetoric and short on substance and effectiveness'¹⁰⁶ and will continue to fail to prevent the world's poor paying the price for the disposal of the world's hazardous waste with their environment, health and lives.

106 P. Obstler, 'Towards a Working Solution to Global Pollution', 16 *Yale Journal of International Law* 73, 94 (1991).

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the
School of Law, School of Oriental and African Studies (SOAS) - University of London
<http://www.soas.ac.uk/law>
and the International Environmental Law Research Centre (IELRC)
<http://www.ielrc.org>*

